

No. 50242-9-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

WELLS FARGO BANK, N.A., AS TRUSTEE FOR OPTION ONE
MORTGAGE LOAN TRUST 2006-1, ASSET-BACKED
CERTIFICATES, SERIES 2006-1, its successors in interest and/or assigns

Plaintiff-Respondent,

v.

BARRY M. GARDNER AKA BARRY M. GARDNER SR., MARY
BETH GARDNER, et al.,

Defendant-Appellant.

**ANSWERING BRIEF OF RESPONDENT WELLS FARGO AS
TRUSTEE**

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY OF THE ARGUMENT	1
II.	COUNTERSTATEMENT OF THE ISSUES.....	2
III.	COUNTERSTATEMENT OF THE FACTS AND CASE.....	3
	A. The Gardners' Loan	3
	B. Gardners Defaulted and Filed for Bankruptcy.....	3
	C. The Parties' Two Mediations and Negotiations.....	4
	D. The Lawsuit and the Gardners' Counterclaim	6
IV.	STANDARD OF REVIEW	7
V.	ARGUMENT	7
	A. The Appeal of the CR 12(f) Order is Untimely	7
	B. FFA's Text Precludes Gardners' Affirmative Defense	8
	C. Gardners' Counterclaim Failed as a Matter of Law.....	10
	i. The Gardners Failed to Plead or Introduce Any Evidence of Public Interest Impact	11
	ii. The Gardners' New Public Interest Impact Argument Should Not Be Considered on Appeal.....	14

iii.	The Gardners Cannot Prove Causation under the CPA.....	16
D.	The Trust Requests Attorneys' Fees.....	19
VI.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Badgett v. Security State Bank,</i> 116 Wn.2d 563, 807 P.2d 356 (1991).....	17
<i>Bucci v. Northwest Trustee Services, Inc.,</i> 197 Wn. App. 318, 387 P.3d 1139 (2016).....	17
<i>C.J.C. v. Corp. of the Catholic Bishop of Yakima,</i> 138 Wn.2d 699, 985 P.2d 262 (1999).....	10
<i>Castro v. Stanwood Sch. Dist. No. 401,</i> 151 Wn.2d 221, 86 P.3d 1166 (2004).....	7
<i>Duncan v. Alaska USA Fed. Credit Union, Inc.,</i> 148 Wn. App. 52, 199 P.3d 991 (2008).....	9
<i>Gragg v. Orange Cab County,</i> 942 F. Supp. 2d 1111 (W.D. Wash. 2013).....	14
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,</i> 105 Wn.2d 778, 719 P.2d 531 (1986).....	<i>passim</i>
<i>Johnson v. Camp Auto., Inc.,</i> 148 Wn. App. 181, 199 P.3d 491 (2009).....	11
<i>Klem v. Wash. Mut. Bank,</i> 176 Wn.2d 771, 295 P.3d 1179 (2013)	11, 12
<i>Lyons v. U.S. Bank Nat. Ass'n,</i> 181 Wn.2d 775, 336 P.3d 1142 (2014)...	10

<i>McFreeze Corp. v. Dep't of Revenue,</i>	
102 Wn. App. 196, 6 P.3d 1187 (2000).....	10
<i>Meyer v. U.S. Bank Nat. Ass'n,</i> 530 B.R. 767, 782 (W.D. Wash. 2015)..	18
<i>Moritz v. Daniel N. Gordon, P.C.,</i>	
895 F. Supp.2d 1097 (W.D. Wash. 2012).....	13
<i>New Meadows Holding Co. by Raugust v. Wash. Water Power Co.,</i>	
34 Wn. App. 25, 659 P.2d 1113 (1983), <i>aff'd</i> , 102 Wn.2d 495,	
687 P.2d 212 (1984).....	16
<i>Panag v. Farmers Ins. Co. of Washington,</i>	
166 Wn.2d 27 204 P.3d 885 (2009).....	13
<i>Rush v. Blackburn,</i> 190 Wn. App. 945, 361 P.3d 217 (2015).....	12
<i>Schaefco, Inc. v. Columbia River Gorge Comm'n,</i>	
121 Wn.2d 366, 849 P.2d 1225	8
<i>State v. Ashbaugh,</i> 90 Wn.2d 432, 538 P.2d 1206 (1978)	8
<i>State v. Scott,</i> 110 Wn.2d 682, 757 P.2d 492 (1988).....	16
<i>Thurman v. Wells Fargo Home Mortg. Co.,</i> No. 12-1471, 2013 WL	
3977622, at *1 (W.D. Wash. Aug. 2, 2013)	9, 18
<i>Tiffany Family Trust Corp. v. City of Kent,</i>	
155 Wn.2d 225, 119 P.3d 325 (2005).....	20
<i>Wash. State Physicians Exch. & Ass'n v. Fisons Corp.,</i> 122 Wn.2d 299,	
858 P.2d 1054 (1993).....	17

Statutes

11 U.S.C. § 727..... 4

RCW 4.84.330 19

RCW 19.118.041(4)..... 14

RCW 19.130.060 14

RCW 19.86.093 *passim*

RCW 61.24.135 *passim*

RCW 61.24.163 *passim*

RCW 80.36.400(3)..... 14

Rules

RAP 2.5(a) 15

RAP 5.2(a) 1, 7, 8

RAP 14..... 19

RAP 18.1..... 19

RAP 18.8(b)..... 8

RAP 18.9(a) 19

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Appellants Barry Gardner and Mary Beth Gardner (the “Gardners”) appeal two Orders by Kitsap County Superior Court (the “Trial Court”): (1) a March 23, 2017 Order granting summary judgment (“SJ Order”) (CP 644-646)¹ in favor of Respondent Wells Fargo Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2006-1, Asset-Backed Certificates, Series 2006-1, its successors in interest and/or assigns (the “Trust”), which dismissed the Gardners’ one-sentence counterclaim for a consumer protection act (“CPA”) violation; and (2) an October 10, 2016 Agreed to Order Striking the Affirmative Defense of the Gardners (the “CR 12(f) Order”) (Doc. 43).

The Gardners’ appeal of the 2016 CR 12(f) Order is untimely under RAP 5.2(a). Even if it were not untimely, the CR 12(f) Order should be affirmed. In 2014, the Trust filed the underlying lawsuit to judicially foreclose on the Gardners’ property after the Gardners had failed to make a payment on the loan at issue since 2009. (CP 5-13). The Gardners’ affirmative defense to stop the judicial foreclosure because of a prior 2012 bad faith mediation finding by a mediator is simply unavailable to them

¹ Citations to “CP” are to the Clerk’s Papers designated by the Gardners. Citations to “Doc.” are to the Court’s docket. Citations to “VR” are to the Verbatim Transcript of Record.

because RCW 61.24.163 provides that “[t]he mediator’s certification that the beneficiary failed to act in good faith during mediation does not constitute a defense to a *judicial foreclosure*.” RCW 61.24.163(14)(b) (emphasis added).

The Gardners’ counterclaim is based on a misunderstanding of the pleading and evidentiary requirements under the CPA. They allege that the Trust should be held liable under the CPA because it failed to mediate in good faith. (CP 40). However, the Gardners failed to set forth any allegations or evidence of two required elements of a CPA claim: (1) the public interest impact; and (2) causation. *Id.* As a result, the Trial Court dismissed the Gardners’ counterclaim. Dismissal was wholly appropriate, and this Court should affirm.

II. COUNTERSTATEMENT OF THE ISSUES

1. Is the Gardners’ appeal with respect to the 2016 CR 12(f) Order timely?
2. Is a mediator’s certification that a party failed to act in good faith a defense to judicial foreclosure under RCW 61.24.163?
3. Was the Trial Court correct in dismissing the Gardners’ one-sentence CPA counterclaim as a matter of law in the SJ Order?

4. Is the Trust entitled to an award of attorney fees as prevailing party in this appeal in light of the attorney fee provisions in the Deed of Trust which the Gardners executed?

III. COUNTERSTATEMENT OF THE FACTS AND CASE

The underlying facts and procedure pertinent to this appeal are as follows:

A. The Gardners' Loan.

In 2005, the Gardners took out a residential mortgage loan (the "Loan") from Option One Mortgage Corporation, a California Corporation ("Option One") for \$900,000 to refinance the real property commonly known as 5805 Wilson Creek Road Southeast, Port Orchard, WA 98367 (the "Property") (CP 420-426; CP 441). The Gardners signed a promissory note (the "Note"), which was secured by a deed of trust (the "Deed of Trust") encumbering the Property and recorded in the land records of Kitsap County, Washington. (CP 420-440).

In 2006, the Loan was securitized. (CP 418). The Trust is the current holder of the Note and the Deed of Trust. (*Id.*). An allonge to the Note endorsed it to the Trust. (CP 424).

B. Gardners Defaulted and Filed for Bankruptcy.

The Gardners admit they defaulted on the Loan in 2009 and have not made any mortgage or tax payments on the Property since then. (CP

481-482, 489). As a result, the Trust's prior Loan servicer commenced a non-judicial foreclosure in 2009. (Doc. 66, Ex. A, ¶ 8).

In response, the Gardners filed Chapter 7 bankruptcy in the United States Bankruptcy Court Western District of Washington (Seattle) (the "Bankruptcy Court"), Bankruptcy Petition Number 09-22057-MLB (the "Bankruptcy Case") on November 17, 2009. (*Id.*, Ex. B). In February 2010, the Bankruptcy Court granted the Gardners a Chapter 7 discharge under 11 U.S.C. § 727. (CP 357). After a second non-judicial foreclosure commenced, the Gardners requested a referral to foreclosure mediation under the Foreclosure Fairness Act, RCW 61.24.163 ("FFA"), which is a section of the Deed of Trust Act, RCW 61.24 *et seq.* ("DTA"). (Doc. 66, Ex. E).

C. The Parties' Two Mediations and Negotiations.

In November 2010, Steve McLean, the Gardners' "Reverse Mortgage Advisor," offered, on behalf of the Gardners, \$300,000 to a Wells Fargo representative in exchange for "the satisfaction/fulfillment of the existing lien...subject to FHA/HUD & lender underwriting." (CP 531). The Trust did not accept.

Thereafter, the parties mediated on October 25, 2011 and September 20, 2012. (CP 464). After the September 20, 2012 mediation, mediator Nancy A. Tarbell issued a report which checked a box that the

beneficiary failed to mediate in good faith because of a “[l]ack of timely provision of documents.” (CP 463). While the second mediation did not result in a settlement agreement, the parties negotiated before and after the session. Before the mediation, the Gardners now claim that they “obtained approval for a reverse mortgage” in February 2012 (Opening Brief at 1). That is not consistent with sworn testimony by Mr. McLean, who testified that no reverse mortgage was ever approved. (CP 516-518).

On April 19, 2012, five months before the second mediation, the Gardners offered a discounted payoff amount of \$377,727 to the Trust. (CP 538-539). On April 20, 2012, the Trust, through its prior Loan servicer, countered with \$423,000 but was unsure why the Loan servicer would be “responsible to take a loss, fix the borrowers['] property and pay [borrowers’ attorney’s] legal fees. Without these items we would be close to what....can get approved.” (CP 536). On May 31, 2012, the Gardners, rather than raise their offer to close the gap, instead lowered their offer to \$375,000. (CP 299).

After the September 20, 2012 mediation, Ms. Tarbell issued a letter to the parties, which stated, among other things, that “[t]here is every indication of good intentions, willingness to look at the property and meaningful discussions between the parties...The parties continue to

negotiate with the reverse mortgage broker (the solution offered by the borrower) now becoming more involved.” (CP 464).

On November 13, 2012, two months after the September 20, 2012 mediation and seven months after the Gardners’ \$377,727 offer, the Gardners made a nearly identical offer of \$379,321. (CP 552, 545). The Trust, through its prior Loan servicer, rejected the offer as being too low because the “investor stands to net more with foreclosure” and provided the foreclosure net of \$432,147.55, requesting that McLean rework the offer. (CP 551). The Gardners never provided another offer above \$379,321. On October 23, 2013, the Gardners offered \$300,000. (CP 300).

D. The Lawsuit and the Gardners’ Counterclaim.

In September 2014, the Trust filed the judicial foreclosure lawsuit in Trial Court. (Doc. 2). The Gardners responded with an Amended Answer, which included an affirmative defense under the FFA, and a counterclaim (the “Counterclaim”). (Doc. 18). The Trial Court orally struck the Gardners’ affirmative defense in 2015 (the Court order followed in 2016), and granted the Trust’s judicial foreclosure in 2017. (Doc. 43, 73). The full Counterclaim by the Gardners reads as follows: “Failure of the beneficiary to mediate in good faith is also an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the Consumer Protection Act. RCW 61.24.135(2)” (Doc. 18). The Trial Court

dismissed the Counterclaim at summary judgment by Court Order on March 23, 2017. (CP 644-46).

IV. STANDARD OF REVIEW

Appellate review of a trial court's decision on summary judgment is *de novo*. *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004). Additionally, interpretation of a statute is a matter of law subject to *de novo* review. *Id.* The CR 12(f) Order should not be considered on appeal because, as discussed below, its appeal is untimely.

V. ARGUMENT

A. The Appeal of the CR 12(f) Order is Untimely.

Under RAP 5.2(a), except under certain exemptions which do not apply, a "notice of appeal must be filed in the trial court...within 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed." The Trial Court entered the CR 12(f) Order on October 10, 2016. The Gardners did not appeal the CR 12(f) Order within thirty days of its entry. On March 10, 2017, the Trial Court, without opposition from the Gardners, entered a judicial foreclosure judgment in favor of the Trust. The Gardners did not appeal the judicial foreclosure judgment within 30 days of the judgment's entry. As a result, the Gardners failed to comply with RAP 5.2(a).

When an appellant fails to timely perfect an appeal, the disposition is governed by RAP 18.8(b). *State v. Ashbaugh*, 90 Wn.2d 432, 438, 538 P.2d 1206 (1978). That rule states, in relevant part, as follows:

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal...The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

RAP 18.8(b). The Gardners did not provide sufficient (or any) excuse for their failure to file a timely notice of appeal regarding the CR 12(f) Order, nor have they demonstrated sound reasons to “abandon the preference for finality.” *Schaeferco, Inc. v. Columbia River Gorge Commission*, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993). As a result, under RAP 5.2(a) and 18.8(b), the Gardners’ appeal relating to the 2016 CR 12(f) Order should be dismissed and not considered. *Id.* (dismissing appeal because of untimely notice of appeal).

B. FFA’s Text Precludes Gardners’ Affirmative Defense.

Even if this Court considers the Gardners’ untimely appeal of the dismissal of their affirmative defense, the Trial Court’s 2015 ruling, striking the affirmative defense, and 2016 CR 12(f) Order should be upheld. The Gardners’ affirmative defense, like their Counterclaim, is one sentence: “Failure of the beneficiary to mediate in good faith is an

affirmative defense to the foreclosure under RCW 61.24.163(14)(a).” (Doc. 18). The scope of RCW 61.24.163(14)(a) is limited to non-judicial foreclosures:

The mediator’s certification that the beneficiary failed to act in good faith in mediation constitutes a defense to the *nonjudicial* foreclosure action that was the basis for initiating the mediation...

RCW 61.24.163(14)(a) (emphasis added).

Case law is in accord that RCW 61.24.163(14)(a) does not constitute an affirmative defense to a *judicial* foreclosure action. *See Thurman v. Wells Fargo Home Mortg. Co.*, No. 12-1471, 2013 WL 3977622, at *1 (W.D. Wash. Aug. 2, 2013) (*quoting* RCW 61.24.163(14)).² RCW 61.24.163(14)(b) provides that the “mediator’s certification that the beneficiary failed to act in good faith during mediation does not constitute a defense to a judicial foreclosure...”

In their Opening Brief at pages 20 - 27, the Gardners resort to linguistic gymnastics and the FFA’s legislative history for the proposition that a beneficiary failing to act in good faith is an affirmative defense to a judicial foreclosure. However, the clear language of the statute states the

² GR 14.1(a) is limited to unpublished Washington Court of Appeals opinions. GR 14.1(b) allows parties to cite to unpublished Federal Court opinions if “citation to that opinion is permitted under the law of the jurisdiction of the issuing court.” Federal Rule of Appellate Procedure 32.1(a) prohibits federal courts from restricting citation to unpublished opinion issued on or after January 1, 2007. *Thurman*, issued after 2007, may be cited here. *See Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 67 n.54, 199 P.3d 991 (2008).

opposite, i.e., that it is not a defense to judicial foreclosures. “[I]f the statutory language is clear, the court may not look beyond that language or consider legislative history but should glean the legislative intent through the statutory language.” *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999). Where a statute uses plain language and defines essential terms, the statute is not ambiguous. *McFreeze Corp. v. Dep’t of Revenue*, 102 Wn. App. 196, 200, 6 P.3d 1187 (2000).

The 2012 mediation arose out of a non-judicial foreclosure which was never completed. In 2014, the Trust commenced a separate judicial foreclosure. As such, under the clear language of the FFA the mediator’s 2012 finding cannot be a bar to a subsequent 2014 judicial foreclosure action.

C. Gardners’ Counterclaim Failed as a Matter of Law.

The Gardners’ CPA Counterclaim focused on the Trust’s prior Loan servicer receiving a bad faith mediation under the FFA (a section of the DTA) for failure to provide documents in the 2012 mediation. A claim under the CPA based on violations of the DTA must meet the same requirements applicable to all CPA claims. *Lyons v. U.S. Bank Nat. Ass’n*, 181 Wn.2d 775, 786, 336 P.3d 1142 (2014). The Gardners’ CPA Counterclaim must therefore have satisfied five elements to survive

summary judgment: “(1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or business or property; (5) causation.” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013) (alteration in original) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). The “failure to prove any of the elements is fatal to a CPA claim.” *Johnson v. Camp Auto., Inc.*, 148 Wn. App. 181, 185, 199 P.3d 491 (2009) (quotations omitted). The Gardners failed to plead or introduce any evidence of two elements: public interest impact and causation.

i. The Gardners Failed to Plead or Introduce Any Evidence of Public Interest Impact.

The Gardners failed to plead or introduce any evidence of public interest impact, the third essential element of a CPA claim or counterclaim. Washington State “requir[es] a public interest showing.” *Hangman Ridge*, 105 Wn.2d at 787. “Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest.” *Id.* at 790. There are two ways to satisfy the public interest impact: (1) *per se* through a “specific legislative

declaration” or (2) through the *Hangman Ridge* test,³ the latter of which the Gardners did not attempt to satisfy in the Trial Court. *See id.* at 788-91. RCW 19.86.093(1)-(2)⁴ “reflect the Court’s view in *Hangman Ridge*” that the “public interest element can be satisfied *per se* where the plaintiff shows [a] violation of a statute that contains a specific legislative declaration of public interest impact.” *Klem*, 176 Wn.2d at 804 (Madsen, C.J., concurring). *See also Rush v. Blackburn*, 190 Wn. App. 945, 968, 361 P.3d 217 (2015) (incorporating Madsen’s *Klem* concurrence on public interest impact).

In the Trial Court, the Gardners did not attempt to satisfy prongs (2) or (3) of RCW 19.86.093, only the first prong. In response to the Trust’s summary judgment motion in Trial Court, the Gardners stated “in cases where a CPA claim is created by statute, the first three elements of the *Hangman Ridge* test are not relevant as the legislature has already

³ Because the Gardners complain of a consumer transaction, the following factors are relevant: “(1) Were the alleged acts committed in the course of [the Trust’s] business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving [the Gardners]? (4) Is there a real and substantial potential for repetition of [the Trust’s] conduct after the act involving [the Gardners]? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?” *Hangman Ridge*, 105 Wn.2d at 790. The Supreme Court of Washington in *Hangman Ridge* abandoned the three-part *Anhold* test that the Gardners rely on for the first time on appeal. *Id.* at 789-90; (Opening Brief at 8-11).

⁴ RCW 19.86.093 provides that “[i]n a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it: (1) Violates a statute that incorporates this chapter; (2) Violates a statute that contains a specific legislative declaration of public interest impact; or (3)(a)Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.”

declared them satisfied.” (CP 563). The Gardners’ argument ignores the actual language of *Hangman Ridge*, which states that a public interest impact cannot be *per se* “[u]nless there is a ‘specific legislative declaration’ of a public interest.” *Hangman Ridge*, 105 Wn.2d at 791. The FFA does not contain a specific legislative declaration of public interest impact. Therefore, the Gardners cannot satisfy RCW 19.86.093(2).

RCW 19.86.093(1) states that a claimant may establish that the act or practice is injurious to the public interest because it “[v]iolates a statute that incorporates this chapter.” RCW 61.24.135(2) does not incorporate the CPA, so the Gardners cannot satisfy RCW 19.86.093(1). *See, e.g., Moritz v. Daniel N. Gordon, P.C.*, 895 F. Supp.2d 1097, 1113 (W.D. Wash. 2012) (distinguishing between incorporating and referencing the CPA).⁵ RCW 61.24.135(2) provides, in relevant part, that

[i]t is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86 RCW, for any...entity to...[v]iolate the duty of good faith under RCW 61.24.163.

RCW 61.24.135 does not address public interest impact or a *per se* violation of the first three or all five elements of the CPA. Instead, RCW 61.24.135 and RCW 61.24.163(14)(a), combined, provide a rebuttable

⁵ Federal court decisions concerning Washington State CPA claims are “guiding” authority. *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 47 204 P.3d 885 (2009).

presumption⁶ of the first *two elements* of the CPA (“unfair or deceptive act in trade or commerce”). If the Washington State legislators intended to establish more than two CPA elements in RCW 61.24.135(2), “it could have done so expressly, as it has in other statutes.” *Gragg v. Orange Cab County*, 942 F. Supp. 2d 1111, 1117-18 (W.D. Wash. 2013) (collecting statutes).⁷ As a result, the Gardners failed to satisfy RCW 19.86.093(1) or (2) for public interest impact.

ii. The Gardners’ New Public Interest Impact Argument Should Not Be Considered on Appeal.

In Trial Court, the Gardners, in their Counterclaim, did not show that the Trust could have or did cause injury to other people. Instead, the Gardners stated that “where the legislature has declared an action to be a violation of the CPA, the consumer does not need to establish any of the first three elements of the CPA,” including the public interest impact. (CP 564). At the hearing for summary judgment on March 10, 2017, the Gardners’ counsel emphasized that the Gardners were relying on a *per se* RCW 19.86.093(1) theory of satisfying the public interest impact element of the CPA:

⁶ RCW 61.24.163(14)(a) (“the beneficiary is entitled to rebut the allegation that it failed to act in good faith”).

⁷ *See, e.g.*, RCW 80.36.400(3) (“A violation of this section is a violation of chapter 19.86 RCW”); RCW 19.118.041(4) (“A violation of...this chapter is a per se violation of chapter 19.86 RCW”); RCW 19.130.060 (“Violation of this chapter constitutes a violation of chapter 19.86 RCW”).

“MR. RICHMOND (GARDNERS’ COUNSEL): In 2009, however, the legislature adopted RCW 19.86.093...When this was adopted, it created a three-prong test essentially codifying that third element of the public interest impact. And it states that in a private action, which this is, under which an unfair or deceptive act or practice is alleged, claimant may establish that the act or practice is injurious to the public interest because it violates a statute that incorporates this chapter. *As counsel has accurately stated, that is our position. Our position is that the Deed of Trust Act incorporated this chapter.* (VR Vol. II 32:8-33:1) (emphasis added).

Now, for the first time on appeal, the Gardners explain why they purportedly satisfy a non-*per se* test under the public interest impact element of the CPA, which involves evaluating whether the Defendants’ deceptive acts “have the potential for repetition.” (Opening Brief at 8-11). The Gardners then detail how they purportedly “satisfy” the *Ahnold* method. (*Id.*). The *Ahnold* method was overruled in *Hangman Ridge*. *Hangman Ridge*, 105 Wn.2d at 789-90. In the Trial Court, the Gardners did not even try to satisfy the *Hangman Ridge* test, the five public interest impact factors, *supra* at 11, n.3, that overruled the three-part *Ahnold* method, nor do they in their Opening Brief. The Gardners cannot introduce alleged evidence of public interest impact in their appellate reply brief for the first time on appeal.

The Washington Rules of Appellate Procedure and Washington case law prohibit the Gardners from, at this late date, raising new

arguments for the first time on appeal. See RAP 2.5(a); *New Meadows Holding Co. by Raugust v. Wash. Water Power Co.*, 34 Wn. App. 25, 29, 659 P.2d 1113 (1983), *aff'd*, 102 Wn.2d 495, 687 P.2d 212 (1984) (“This court will not consider arguments raised for the first time on appeal.”). The rule exists to promote the efficient use of judicial resources, affording the Trial Court an opportunity to correctly decide the case before it, and avoid unnecessary appeals and remands for further proceedings. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The Gardners cannot repeatedly represent to the Trial Court that their basis for alleging public interest impact is *per se* and then change that argument for the first time on appeal. Accordingly, this Court should refuse to consider the Gardners’ public interest impact argument under the *Hangman Ridge* test which is the non-*per se* test for public interest impact. Those arguments go far beyond the public interest argument raised by the Gardners to the Trial Court in the proceedings below.

iii. The Gardners Cannot Prove Causation under the CPA.

Apart from the Gardners’ failure to prove or allege public interest impact, their CPA Counterclaim also fails under CR 56 because the Gardners cannot prove causation. The Gardners failed to present admissible evidence in Trial Court that the allegedly deceptive act

proximately caused their injuries. *Hangman*, 105 Wn.2d at 792; *Wash. State Physicians Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 314, 858 P.2d 1054 (1993) (a CPA claim requires a “causal link between the unfair or deceptive act and the injury suffered”). The one unfair or deceptive act pled by the Gardners in their Counterclaim was the Trust’s failure to mediate in good faith by failing to bring documents to a 2012 mediation. (Doc. 18). Other than the potential statutory violation under the FFA, the Gardners alleged no other deceptive act. (*Id.*).

Here, as Mr. McLean testified, the Gardners were never approved for a reverse mortgage, which was the Gardners’ only attempt at renegotiating their loan agreement through a heavily discounted payoff. (CP 516-518). Under Washington State law, the Trust was “under no good faith obligation” to renegotiate a loan agreement. *Badgett v. Security State Bank*, 116 Wn.2d 563, 572, 807 P.2d 356 (1991). *Badgett* is still good law, and was not overruled by the FFA. It continues to be cited after the FFA’s enactment. *Bucci v. Northwest Trustee Services, Inc.*, 197 Wn. App. 318, 387 P.3d 1139 (2016) (unpublished portion) (“Bucci’s disappointment over the denial of his desire for a loan modification is not actionable,” citing *Badgett*). The Gardners “appear to believe that a beneficiary’s breach of its duty of good faith somehow automatically entitles the

borrower to [loss mitigation]. That is not the law.” *Thurman*, 2013 WL 3977622, at *4 (W.D. Wash. Aug. 2, 2013).

The Gardners testified under oath at their depositions that they had suffered no monetary injury. (CP 317, 323). In their updated 2017 interrogatory responses, filed with their opposition to the Trust’s motion for summary judgment, the Gardners then alleged the following speculative injury, not included in their Counterclaim:

Damages are sought...in an amount equal to the appropriate percentage of statistical success in good faith mediation...multiplied by the fair market value of rental costs based upon the life expectancy of [the Gardners]. (CP 579).

This speculative injury is predicated on the Gardners losing their Property.

But the Gardners have not alleged, nor proven, that they would have *kept* their Property *but for* the Trust’s prior Loan servicer’s alleged misconduct of failing to bring documents to a 2012 mediation. On the contrary, the Gardners were foreclosed upon because they were in default. The Gardners acknowledged in their depositions failing to pay their mortgage and taxes for over eight years. (CP 481-482, 489). No matter whether the Trust provided documents or not at the mediation, foreclosure was the proper remedy and there is no link between the Trust’s allegedly wrongful conduct at the 2012 mediation and the foreclosure. *Meyer v. U.S. Bank Nat. Ass’n*, 530 B.R. 767, 782 (W.D. Wash. 2015) (dismissing CPA

claim because plaintiff's damages were "precipitated by [plaintiff's] default, not by any of the asserted technical violations of the DTA."). The Gardners failed to show proximate cause in Trial Court, and, therefore, the Trial Court's summary judgment decision should be affirmed.

D. The Trust Requests Attorneys' Fees.

The Trust respectfully requests an award of costs and attorneys' fees as the prevailing party pursuant to RAP 14. The Trust also requests an award of its reasonable attorney fees on appeal pursuant to RCW 4.84.330 and RAP 18.1. The Trust is entitled to attorney's fees under the Deed of Trust, which provides that the Lender's "reasonable attorney's fees" paid in connection with what is "necessary to protect the value of the Property and Lender's rights in the Property" "shall become additional debt of Borrower secured by this Security Instrument." (CP 23). The Deed of Trust supports an award of fees because the Trust is compelled to defend against the Gardners' appeal in order to protect their first priority lien interest in the Property and specifically, their right to move forward with selling the Property, now that it has been judicially foreclosed upon in March, 2017.

Even if the Deed of Trust did not so provide, RAP 18.9(a) allows this Court to order a party who files a frivolous appeal to pay terms to another party. An appeal is frivolous if, considering the entire record, and

resolving all doubts in favor of the appellant, the Court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005). Given the fact that the Gardners, while represented by counsel, did not timely appeal the CR 12(f) Order, and argued in Trial Court that they *per se* satisfied the public interest impact of a CPA claim, and now argue they satisfied a non-*per se* test which *Hangman Ridge* overruled, this appeal is frivolous.

VI. CONCLUSION

For the reasons set forth above, the Trust requests that the Court affirm the Trial Court's grant of its Motion for Summary Judgment to dismiss the Gardners' Counterclaim and the Trial Court's striking of the Gardners' affirmative defense. Moreover, the Trust requests that the Court award the Trust its costs on appeal pursuant to a Cost Bill to be presented after entry of this Court's order.

RESPECTFULLY SUBMITTED this 13th day of October, 2017.

HOUSER & ALLISON, APC



Ryan S. Moore, WSBA No. 50098
Robert Norman, WSBA No. 37094
Attorneys for Respondent

CERTIFICATE OF SERVICE

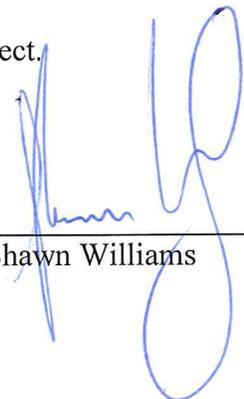
I the undersigned declare as follows: I am over the age of 18 years and am not a party to this action. On October 13, 2017, I served the foregoing document(s): ANSWERING BRIEF OF RESPONDENT WELLS FARGO AS TRUSTEE, in the manner described below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: October 13, 2017.



Shawn Williams

HOUSER & ALLISON, APC (SEATTLE)

October 13, 2017 - 1:16 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50242-9
Appellate Court Case Title: Barry M. & Mary Beth Gardner, Appellants v. Wells Fargo Bank, N.A.,
Respondent
Superior Court Case Number: 14-2-01703-2

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