

FILED
Court of Appeals
Division II
State of Washington
12/28/2017 3:45 PM

Court of Appeals No.
Trial court No. 14-2-01703-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT1

A. The Pleadings and Evidence Before the Trial Court Gave Rise to a Genuine Issue of Material Fact, Therefore, the Trial court Erred in Granting the Motion for Summary Judgment in Regard to the Gardner’s Consumer Protection Act Claim.....3

1. Wells Fargo’s bad faith involved more than the failure to bring documents to the mediation.....3

2. Wells Fargo has conceded that the first and second elements of a CPA claim have been satisfied.....4

3. The Gardners provided facts and evidence sufficient to give rise to a genuine dispute to whether Wells Fargo’s failure to mediate in good faith in violation was an unfair or deceptive act against the public interest pursuant to RCW 19.86.020.5

4. Wells Fargo has conceded that the Gardners suffered an injury as a result of the failure to mediate in good faith.....8

5. The pleadings and evidence create a genuine dispute as to the material fact that the injuries suffered by Gardners were caused by Wells Fargo’s failure to mediate in good faith and subsequent abandonment of the non-judicial foreclosure process.....9

6. Wells Fargo has not met its burden of showing there is no genuine issue of material fact and that it is entitled to prevail as a matter of law.10

B. Wells Fargo’s Failure to Mediate in Good Faith Was Contrary to the Statue and Legislative Intent and Gave Rise to an Affirmative Defense.....11

1.	The Gardners' appeal of the affirmative defense dismissal was filed in a timely manner.....	12
2.	The Foreclosure Fairness Act allows an affirmative defense under the circumstances of this case.	13
C.	This Court Should Award Attorney Fees to the Gardners and Deny Wells Fargo's Request.....	15
III.	CONCLUSION	16

TABLE OF AUTHORITIES

Cases

<i>Ameriquest Mortg. Co. v. Office of Att’y General of Washington</i> , 177 Wash.2d 467 300 P.3d 799 (2013)	8
<i>Anhold v. Daniels</i> , 94 Wash.2d 40, 614 P.2d 184 (1980).....	5
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).....	3
<i>Barkley v. GreenPoint Mortg. Funding, Inc.</i> , 190 Wash.App. 58; 358 P.3d 1204 (2015).....	8
<i>Cabage v. Northwest Trustee Svcs, Inc.</i> , 191 Wash.App. 1030 (2015).....	8
<i>Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie Fraternal Order of Eagles</i> , 148 Wash.2d 224 (2002)	15
<i>Frias v. Asset Foreclosure Services, Inc.</i> , 181 Wash.2d 412 (2014)..	10, 11
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wash.2d 778, 719 P.2d 531 (1986)	3, 10, 11
<i>Hisle v. Todd Pacific Shipyards Corp.</i> , 151 Wash.2d 853, 93 P.3d 108 (2004).....	2
<i>Hoffer v. State</i> , 110 Wn.2d 415, 755 P.2d 781 (1988).....	2
<i>Holiday Resort Community Ass’n v. Echo Lake Associates, LLC</i> , 134 Wn.App. 210, 135 P.3d 499 (Div. 1 2006).....	2
<i>Klem v. Washington Mutual Bank</i> , 176 Wash.2d 771 (2013).....	6
<i>Krusee v. Bank of America</i> , No. C13-824, 2013 WL 3973966 (W.D. Wash. 2013).....	10
<i>Meyer v. U.S. Bank Nat. Ass’n</i> , 530 B.R. 767 (2015).....	10

<i>Moritz v. Daniel N. Gordon, P.C.</i> , 895 F.Supp.2d 1097 (W.D. Wash. 2012).....	2, 6, 11
<i>New Meadows Holding Co. by Raugust v. Washington Water Power Co.</i> , 34 Wn.App. 25, 659 P.2d 1113 (Div. 3 1983)	7
<i>State v. Gore</i> , 681 P.2d 227, 101 Wn.2d 481 (Wash. 1984).....	2
<i>State v. Hovrud</i> , 60 Wn.App. 573,, 805 P.2d 250 (1991).	6
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	7
<i>Thurman v. Wells Fargo Mortg. Co.</i> , No. 12-1471, 2013 WL 3977622 (W.D. Wash. 2013)	14
<i>Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993)	15
<i>Zimmerman v. W8LESS Products, LLC</i> , 160 Wn.App. 678; 248 P.3d 601 (Div. 2 2011).....	12

Statutes

RCW 19.86.090	15
RCW 19.86.920	2
RCW 61.24.135	4, 6
RCW 61.24.135(2)(a)	4
RCW 61.24.163(14).....	1, 11, 13, 14, 15

Rules

CR 12(b)(6)..... 1

CR 12(f) 12

Fed.R.Civ.P. 56(a) 2

RAP 2.2(a) 12, 13

RAP 5.2(a) 12

I. INTRODUCTION

The Gardners filed their Brief on September 14, 2017. The Gardners argued that the trial court erred in granting Wells Fargo's Motion for Summary Judgment regarding the Gardners' counter claim and in dismissing the affirmative defense. In both instances, the Gardners had raised facts giving rise to a genuine issues of material fact making the summary disposition inappropriate.

Wells Fargo filed an Answering Brief on October 13, 2017. Wells Fargo argued (1) that the Gardners had not set forth allegations satisfying the public interest impact and causation elements of a Consumer Protection Act (CPA) claim; (2) that the Gardners' appeal of the affirmative defense dismissal was untimely; and (3) that the language of RCW 61.24.163(14) was clear and no further interpretation was warranted. Wells Fargo has conceded the other elements and arguments raised in the Gardners' Brief.

The Gardners now file this Reply addressing the issues under contention.

II. ARGUMENT

The standard of review for both the CR 12(b)(6) motion and the CR 56 summary judgment motion is *de novo*. *Hoffer v. State*, 110 Wn.2d

415, 420, 755 P.2d 781 (1988); *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wash.2d 853, 860, 93 P.3d 108 (2004).

Summary judgment is appropriate if the evidence, demonstrates “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *See Moritz v. Daniel N. Gordon, P.C.*, 895 F.Supp.2d 1097, 1103 (W.D. Wash. 2012) (*quoting* Fed.R.Civ.P. 56(a)). The moving party bears the initial burden of showing there is no genuine issue of material fact and that he or she is entitled to prevail as a matter of law. *See id.* The facts are viewed in the light most favorable to the non-moving party. *See id.*

In interpreting Washington state law, federal authority is persuasive but not controlling. *State v. Gore*, 681 P.2d 227, 101 Wn.2d 481, 487 (Wash. 1984). The Consumer Protection Act is a statute enacted for the protection of the public and thus should be liberally construed to give effect to its purposes. *Holiday Resort Community Ass'n v. Echo Lake Associates, LLC*, 134 Wn.App. 210, 135 P.3d 499 (Div. 1 2006), RCW 19.86.920.

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A. The Pleadings and Evidence Before the Trial Court Gave Rise to a Genuine Issue of Material Fact, Therefore, the Trial court Erred in Granting the Motion for Summary Judgment in Regard to the Gardner’s Consumer Protection Act Claim.

The parties agree that to make a claim under the Consumer Protection Act, an individual “must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986).

Wells Fargo argues only that the Gardners “failed to plead or introduce any evidence” regarding the public interest element or causation. Resp. Br. p. 11. Wells Fargo has, therefore, conceded that the Gardners have satisfied the first, second, and fourth elements. The question before this Court is, therefore, whether the Gardners alleged facts regarding public interest and causation that were sufficiently plausible on their face to survive a motion for summary judgment. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

1. Wells Fargo’s bad faith involved more than the failure to bring documents to the mediation.

Wells Fargo off-handedly describes the bad faith act as the failure to bring documents to the mediation. Resp. Br. p. 17, ¶1. Wells Fargo’s depiction is misleading.

As noted in Appellant's Brief (p. 11), the mediator submitted a letter describing the failures of the Wells Fargo's agents at the scheduled mediation. The failure to have documents at the mediation was only one element. The mediator noted specifically that:

- the lender was not prepared to negotiate figures;
- the lender was unaware of the nature of the appraisal and documents at hand;
- the lender did not have a representative with adequate authority to reach a resolution available; and
- the lender asserted that the numbers that had previously discussed were stale and that the borrowers would need to restart the process.

See Dckt #48, Ex. H, p. 2. The mediator's letter documents, therefore, that Wells Fargo's behavior was more egregious than a simple failure to bring documents. The mediator's letter documents that Wells Fargo's agents attended the mediation with no intent to do any more than go through the motions. When called on the failure, Wells Fargo, rather than correcting the error and participating in a good-faith mediation as required by law, abandoned the nonjudicial process and brought the underlying action.

2. Wells Fargo has conceded that the first and second elements of a CPA claim have been satisfied.

The Gardners argued that the failure to mediate in good faith satisfied the first two elements of a CPA claim under RCW 61.24.135(2)(a). App. Br. p. 7-8. Wells Fargo argues that the Gardners "failed to plead or introduce evidence of two elements: public interest

impact and causation.” Resp. Br. p. 11. Wells Fargo has conceded that the Gardners have satisfied the first two elements of a CPA claim.

3. The Gardners provided facts and evidence sufficient to give rise to a genuine dispute to whether Wells Fargo’s failure to mediate in good faith in violation was an unfair or deceptive act against the public interest pursuant to RCW 19.86.020.

The Gardners argued that they had satisfied the public interest element of a CPA claim by showing both a *per se* public interest and by meeting the criteria of the 3-prong test announced in *Anhold v. Daniels*, 94 Wash.2d 40, 614 P.2d 184 (1980). App. Br. p. 8-11. Wells Fargo argues that (1) there is no specific legislative declaration of a public interest impact; and (2) that the Gardners’ invocation of the 3-prong test should not be considered as it was not raised below. Resp. Br. p. 11-16.

a. The Gardners have shown a *per se* public interest in Wells Fargo’s failure to act in good faith at mediation as the Foreclosure Fairness Act explicitly declares a public interest and invokes the Consumer Protection Act.

Wells Fargo would have this Court believe that the Legislature did not intend to create a public interest in lenders mediating in good faith in enacting the Foreclosure Fairness Act. This argument flies in the face of common sense. Individuals will engage in the meditation process once in their lifetimes. Lenders, such as Wells Fargo, on the other hand, will routinely attend such mediations. The legislature clearly intended the

Foreclosure Fairness Act to protect the public, and demonstrated that intent by incorporating the CPA in RCW 61.24.135, stating “[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 person or entity to: (a) Violate the duty of good faith under RCW 61.24.163.”

Therefore, the Foreclosure Fairness Act has expressly incorporated that CPA in regard to the exact behaviors at issue in the present case. *See Klem v. Washington Mutual Bank*, 176 Wash.2d 771, 804 (2013) (“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.”). Respondent cites to a single federal case, *Moritz v. Daniel N. Gordon*, P.C. 895 F. Supp.2d 1097, 1113 (W.D. Wash. 2012) that draws a distinction—without explanation, in a footnote—between “referencing” and incorporating.” This distinction is without basis in Washington law, which treats “referencing” a statute and “incorporating” a statute as equivalent. *See State v. Hovrud*, 60 Wn.App. 573, 576, 805 P.2d 250 (1991).

Wells Fargo cannot credibly argue that there is no *per se* public interest where the legislature has expressly declared that the CPA is violated by violations of that statute. The Gardners have satisfied the third

element of a CPA claim sufficient for the claim to have survived summary judgment.

b. This Court may consider the Gardners' alternative public interest argument.

Wells Fargo correctly notes that The Gardners relied primarily on the *per se* showing of a public interest impact before the trial court. Resp. Br. at 14-16. As discussed in Appellants' Brief and above, the Legislature has clearly spoken on the public interest impact of the Foreclosure Fairness Act by expressly incorporating the CPA. The Gardners also contest that the public interest impact of Wells Fargo's actions can plainly be shown in their own right: a bank engages in numerous foreclosure mediations with members of the public, and its practices in doing so have a plain and obvious public interest impact.

Wells Fargo claims that such a discussion is untimely since it was not briefed extensively at the trial level. However, there is nothing in the rules of appellate procedure that prevent a party from presenting additional arguments in support of the same proposition which has been raised at prior stages of the proceedings. The cases relied upon by Wells Fargo, *New Meadows Holding Co. by Raugust v. Washington Water Power Co.*, 34 Wn.App. 25, 659 P.2d 1113 (Div. 3 1983) and *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988) refer to a party's failure to contest a

motion for summary judgment or point out an error of the trial court. Providing additional legal arguments for the same proposition which a party argued at the lower court level is not in the same category. No new facts or issues were alleged, merely an alternative way of looking at the same facts and law. No judicial resources are wasted by such a consideration nor is the respondent unfairly surprised.

Further the question of whether a public interest was impacted is a question of law, not fact. *See Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wash.App. 58, 67; 358 P.3d 1204 (2015) (“[W]hether a particular action gives rise to a Consumer Protection Act violation is reviewable as a question of law.”). Such arguments can be raised on appeal. *See Ameriquest Mortg. Co. v. Office of Att’y General of Washington*, 177 Wash.2d 467, 478, 300 P.3d 799 (2013) (“The application of a statute to a fact pattern is a question of law fully reviewable on appeal.”).

4. Wells Fargo has conceded that the Gardners suffered an injury as a result of the failure to mediate in good faith.

The Gardners argued that they have suffered injuries including:

- Violation of their statutory right to a good faith mediation;
- Incurring attorney’s fees for responding to the subsequent judicial foreclosure proceedings after Respondent abandoned the nonjudicial foreclosure process.

App. Br. p. 12-13. These injuries are sufficient to sustain a CPA claim.

See Cabage v. Northwest Trustee Svcs, Inc., 191 Wash.App. 1030 (2015)

(“the injury element [of a CPA claim] can be met even where the injury alleged is both minimal and temporary.”).

Wells Fargo’s Answering Brief does not dispute these injuries. Rather, Wells Fargo argues only that the Gardners “failed to plead or introduce evidence of two elements: public interest impact and causation.” Resp. Br. p. 11. Wells Fargo has conceded that the Gardners have satisfied the injury element of a CPA claim.

5. The pleadings and evidence create a genuine dispute as to the material fact that the injuries suffered by Gardners were caused by Wells Fargo’s failure to mediate in good faith and subsequent abandonment of the non-judicial foreclosure process.

Wells Fargo argues that the Gardners cannot prove that it has caused their injuries. Resp. Br. p.16-19. Wells Fargo’s arguments reframe the injuries alleged to give the appearance that they are merely speculative. Wells Fargo’s arguments fail.

The Gardners did not allege monetary damages at the hearing. Rather they alleged that the initial damage suffered was the opportunity to have a good faith mediation. Wells Fargo has conceded that this injury occurred. Wells Fargo cannot show that this was not the result of the failure to mediate in good faith.

The Gardners have also incurred attorney fees in responding to Wells Fargo’s invocation of the judicial foreclosure process. *See,*

generally, Krusee v. Bank of America, No. C13-824, 2013 WL 3973966 (W.D. Wash. 2013) (Finding that where an individual incurred additional expenses in mediation as a result of Defendant's failure to mediate in good faith as required by statute she has alleged a claim for damages cognizable under Washington law for a failure to mediate in good faith). Again, Wells Fargo has conceded that this injury occurred. These damages would not have occurred but for Wells Fargo's failure to mediate in good faith and subsequent abandonment of the nonjudicial foreclosure process. *See Frias v. Asset Foreclosure Services, Inc.*, 181 Wash.2d 412, 431 (2014) ("...other business or property injuries might be caused when a lender or trustee engages in an unfair or deceptive practice in the nonjudicial foreclosure context.").

6. Wells Fargo has not met its burden of showing there is no genuine issue of material fact and that it is entitled to prevail as a matter of law.

The evidence and pleadings give rise to genuine disputes as to several material facts when viewed in a light most favorable to the Gardners. Wells Fargo has conceded that the Gardners have shown that Wells Fargo committed an unfair or deceptive act or practice that occurred in trade or commerce and that resulted in injuries to them and/or their property. *See Hangman Ridge*, 105 Wash.2d at 780; *Meyer v. U.S. Bank Nat. Ass'n*, 530 B.R. 767, 776 (2015).

The Gardners have shown a *per se* public interest act as the legislature has expressly declared a public interest by incorporating the CPA. *See Hangman Ridge*, 105 Wash.2d at 790. Finally, the Gardners have shown that the injuries that Wells Fargo has conceded occurred were caused by Wells Fargo's failure to mediate in good faith. *See Frias*, 181 Wash.2d at 431. Under these circumstances, the trial court erred in granting Wells Fargo's motion for summary judgment. *See Moritz*, 895 F.Supp.2d at 1103 ("Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

B. Wells Fargo's Failure to Mediate in Good Faith Was Contrary to the Statute and Legislative Intent and Gave Rise to an Affirmative Defense.

The Gardners also argued that RCW 61.24.163(14) gave rise to an affirmative defense where Wells Fargo abandoned the nonjudicial foreclosure process after failing to mediate in good faith. App. Br. p. 19-27. Wells Fargo argues that the appeal of this issue is untimely and that the statutory language clearly precludes this defense. Resp. Br. 7-10. This argument fails.

1. The Gardners' appeal of the affirmative defense dismissal was filed in a timely manner.

Wells Fargo argues that the Gardners' appeal of the Order dismissing the affirmative defense was untimely. Resp. Br. p., 7-8 *citing* RAP 5.2(a). Wells Fargo's argument fails because appeal was brought in a timely manner from the final judgment in this case.

Rule of Appellate Procedure 5.2(a) sets out that:

Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e).

Neither of the two exceptions noted in Rule 5.2(a) applies in this instance.

So any appeal needed to be filed within 30 days after the entry of the decision to be reviewed. The Gardners could not have filed the appeal of the dismissal, however, before March 23, 2017, as set out under Rule of Appellate Procedure 2.2 which sets out the decisions that may be appealed.

Neither the CR 12(f) order dismissing the affirmative defense nor the entry of partial summary judgment on judicial foreclosure was the final judgment in this case. A grant of partial summary judgment is not a final, appealable order; they are only subject to discretionary review.

Zimmerman v. W8LESS Products, LLC, 160 Wn.App. 678, 690; 248 P.3d 601 (Div. 2 2011). Therefore, Rule 2.2(a)(1) did not start the appeal period

until entry of the final judgment dealing with all remaining issues in this case on March 23, 2017.

The only other Rule that might be applicable would be Rule 2.2(a)(3). This rule states that a decision may be appealed where it “affect[s] a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.” RAP 2.2(a)(3). The dismissal of the affirmative defense did not prevent a final judgment nor did it discontinue the action.

The dismissal of the affirmative defense was not ripe for appeal prior to the entry of the final judgment. RAP 2.2(a)(1). The appeal of this issue was filed within 30 days of the entry of judgment as required by Rule 5.2(a). Dckt #77. The appeal of the dismissal of the affirmative defense is properly before this Court.

2. The Foreclosure Fairness Act allows an affirmative defense under the circumstances of this case.

The Gardners argued that the Trial Court erred in granting Wells Fargo’s Motion to Dismiss the Gardner’s affirmative defense under the Foreclosure Fairness Act. App. Br., p. 19-27. Wells Fargo argues that the language of RCW 61.24.163(14) is clear and no further interpretation is required. Resp. Br. p. 9-10.

Wells Fargo first asserts that case law confirms that RCW 61.24.163(14)(a) is limited to non-judicial foreclosures. Resp. Br. p. 9 (citing *Thurman v. Wells Fargo Mortg. Co.*, No. 12-1471, 2013 WL 3977622 (W.D. Wash. 2013)). *Thurman* does not stand for the proposition that Respondent asserts. The Court in *The Thurman* Court did not rule on this issue. Rather, the Court simply referred to the statutory language in setting out the law applicable to the case at hand. Further, *Thurman* is a federal court case not binding on Washington courts applying Washington state law.

Wells Fargo next asserts that the language of the statute is clear and supports the proposition that the failure to mediate in good faith does not preclude judicial foreclosure where the lender subsequently abandons the process. Resp. Br. p. 10. RCW 61.24.163(14) does not clearly contemplate the situation at hand.

RCW 61.24.163(14)(a) creates a defense to nonjudicial foreclosure in the **current** action. RCW 61.24.163(14)(b) forecloses the raising of the bad faith as a defense if a modification of the loan is agreed upon and the borrower subsequently defaults on the modification. Neither of these sections expressly addresses the situation at hand where the lender fails to mediate in good faith but then switches to a judicial foreclosure in the **current** action.

The language of the statute does not directly address the situation at hand. Wells Fargo's interpretation of the statute to forestall an affirmative defense in this situation would defeat the express purpose of the Foreclosure Act and should be rejected. *See Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie Fraternal Order of Eagles*, 148 Wash.2d 224, 239 (2002) ("The spirit or purpose of an enactment should prevail over ... express but inept wording."). Banks would have no incentive to mediate in good faith if they can ignore the requirements and simply switch gears to a judicial foreclosure.

Permitting the affirmative defense created by RCW 61.24.163(14)(a) to be used if a judicial foreclosure is brought in place of the existing nonjudicial foreclosure is consistent with the spirit and purpose of the Foreclosure Fairness Act.

C. This Court Should Award Attorney Fees to the Gardners and Deny Wells Fargo's Request.

The Gardners requested recovery of their attorneys' fees to date on the CPA claim under RAP 18.1. Such damages are appropriate for a prevailing consumer bringing a CPA claim. RCW 19.86.090, *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 334, 858 P.2d 1054 (1993). The Gardners also request that they be

awarded costs for the entire case at the appellate level under RAP 14.2 and RAP 14. The Gardners respectfully request that these fees be awarded.

Wells Fargo requests attorney fees under RAP 14, RCW 4.84.330, and RAP 18.1. Wells Fargo asserts that the Gardners have made frivolous claims. Resp. Br. at 19-20. In particular, Wells Fargo asserts that the Gardners' appeal of the dismissal of the affirmative defense and raising the non-*per se* public interest claim were frivolous. As discussed above, the dismissal of the affirmative defense was not appealable under RAP 2.2 until there was a final judgment. This appeal was filed within the appropriate time period. Provision of additional supportive legal arguments for a position already asserted at the trial court level is appropriate and should not be the basis for attorneys' fees.

III. CONCLUSION

The Gardners brought forth evidence sufficient to survive Wells Fargo's motion to dismiss and the motion for summary judgment. The trial court erred in granting these motions and deciding in Wells Fargo's favor without considering the facts of the case.

The Gardners respectfully request that this Court remand this case to the trial court for consideration of their CPA claim. The trial court should also be ordered to stay the foreclosure proceedings while the parties attempt the mediation.

RESPECTFULLY SUBMITTED this 27th day of December, 2017.

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December 28, 2017 - 3:45 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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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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