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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

MARK LISSON and CATHERINE LISSON,
Plaintiffs and Appellants,
vs.
WELLS FARGO BANK, N.A.;
HSBC BANK USA, N.A.,
as Trustee for Deutsche Bank Alt-A Securities
Mortgage Loan Trust, Series 2006-AR6, Mortgage Pass-Through Certificates; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.;
NORTHWEST TRUSTEE SERVICES, INC.,
Defendants and Respondents.

RESPONDENT'S BRIEF OF WELLS FARGO BANK, N.A., HSBC BANK USA, N.A., AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

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INTRODUCTION

Plaintiff-Appellant Mark Lisson is a screenwriter and movie producer. With his spouse Catherine,[1] he asked their mortgage lender to reduce the monthly payments on their $650,000 loan in order to preserve their available money to fund their future film projects, rather than pay their mortgage. When their request for a loan modification was unremarkably denied, they sued Defendants-Respondents Wells Fargo, HSBC, and MERS.

After hearing defendants' summary judgment motion, the trial court correctly dismissed each of the three claims because (a) in the absence of a completed foreclosure sale, no viable action for an alleged violation of the Deeds of Trust Act (DTA) could lie; (b) an injunction was granted mooting their claim for injunctive relief which is not a cause of action in any event; and (c) all of Wells Fargo's acts were fully authorized by the noteholder and loan owner, HSBC, vitiating the Consumer Protection Act (CPA) claim.

The trial court's judgment should be affirmed.

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[1] As is common when related litigants share surnames, we use first names for clarity, and intend no disrespect.

RESTATEMENT OF ISSUES ON APPEAL

A. In the absence of a completed foreclosure sale, no claim under Washington's Deed of Trust Act (DTA) exists. No foreclosure sale of the Lissons' property was ever completed. Did the trial court correctly dismiss their DTA claim?

B. Three of five essential elements of a claim under Washington's Consumer Protection Act (CPA) are an unfair or deceptive act or practice, causation, and injury. Wells Fargo was servicing the loan as HSBC's authorized custodian of the promissory note, and the Lissons knew payments were due to it. The Lissons nevertheless chose to deliberately default on their $650,000 loan even though they had enough money to pay it off. Did the trial court correctly determine that they could not establish an unfair or deceptive act or practice, causation, or injury for a CPA claim?

RESTATEMENT OF THE CASE

Factual History

A. The Lissons take out a $650,000 loan in 2005 secured by their Bainbridge Island property. The loan is sold and securitized, and Wells Fargo services it

In July 2005, the Lissons purchased a Bainbridge Island property for $870,000. CP 43, 251, 280. Two months later, they borrowed $650,000 from Ohio Savings Bank. CP 44, 108, 111–115, 315, 320–324. To memorialize the loan, the Lissons executed an Adjustable Rate Note payable to Ohio Savings Bank, its "successors and assigns," dated September 21, 2005. *Id.* The note was subsequently indorsed in blank. *Id.*

To secure the loan, the Lissons also executed a deed of trust recorded against the property on September 27, 2005. CP 44, 108, 117–134, 315, 326–344. The deed of trust identified Ohio Savings Bank as the lender, and Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee for the original lender Ohio Savings Bank and Ohio Savings Bank's "successors and assigns." CP 117, 326.

The loan was subsequently sold and the securitized by HSBC Bank USA, N.A. (HSBC) in its capacity as trustee for Deutsche Alt-A Securities Inc., Mortgage Pass-Through Certificates Series 2006-AR6. CP 108, 315–316, 571–584; RP 16.

On March 1, 2006, Wells Fargo Bank, N.A., doing business as America's Servicing Company (ASC),[2] began servicing the loan for HSBC. CP 107–108.

[2] ASC was a trade name of Wells Fargo. CP 107, 601.

As custodian for HSBC, Wells Fargo maintained physical possession of the Lissons' original promissory note, indorsed in blank, at all relevant times from March 9, 2006, onward. CP 108.[3] On November 9, 2014, Wells Fargo sent the original note to its counsel for the Lissons' litigation (CP 105), and it was made available for inspection by the trial court and the parties (RP 9).

B. The Lissons decide to deliberately default on their loan, but they wait nearly a year before seeking to modify it

Mark Lisson is a screenwriter and movie producer. CP 43. In January 2012, the Lissons decided to stop making the monthly payments due on their loan. CP 261–262. They were concerned they might not have enough money in the long run to make monthly payments, and preferred to keep their money to fund movie deals. CP 155-56, 187-88. The Lissons made the decision to deliberately stop paying their loan because they wanted it modified (CP 262) so their monthly payment amount was reduced (CP 187).

Mark did not recall mentioning a loan modification to Wells Fargo before he and Catherine decided to default on purpose. CP 169, 262. He did mention a loan modification to Wells Fargo before hiring an attorney in December 2012, however. CP 44, 187.

[3] On October 2, 2016, loan servicing was transferred from Wells Fargo to a different entity during the pendency of the Lissons' lawsuit. CP 315; RP 5.

Mark called ASC in January 2012 to inform it that the Lissons would no longer be making loan payments. CP 251–252, 261–262. He was aware that ASC was affiliated with Wells Fargo. CP 169, 262. The Lissons did not fill out a loan modification application until nine months later, on September 2, 2012. CP 252, 268–269, 305–313.

It was not until they received a notice of default — nearly a year after they decided to stop paying their loan — that the Lissons finally reached out to Wells Fargo to discuss options, started assembling a loan modification package, and retained counsel. CP 44–45.

The Lissons had the funds to make the January 2012 payment, but they chose not to. CP 152, 154, 169. Their assets totaled just under $2 million at the time of the loan modification request nine months later. CP 252, 268, 272–273, 309. They had enough money to pay what they owed on the loan and then some. CP 273.[4]

It is undisputed the Lissons have not made a single loan payment since their default over six years ago. CP 264, 109, 317.

C. All appropriate assignments, declarations, and foreclosure-related documents are signed and recorded by the lender's authorized agents

[4] In July 2014 the Lissons sold a house they owned in Brentwood, California, netting around $980,000. CP 258. Those funds were enough to pay off the entire loan balance, which was $632,204.76 as of November 6, 2014. CP 109. Mark testified at his October 15, 2014 deposition that he had sufficient assets to pay the $113,000 loan reinstatement amount. CP 278.

On March 19, 2012, MERS a nominee for Ohio Savings Bank and its successors and assigns assigned its record nominee (agency) interest in the deed of trust to HSBC, which Assignment was then electronically recorded that same day. CP 56.

Several months later, on September 7, 2012, HSBC granted Wells Fargo a limited power of attorney to execute mortgage-related documents, to pursue secured debts, and to "complete any other document that arises in the normal course of servicing." CP 316, 590. The power of attorney specifically identified the trust that had purchased the Lissons' loan as one for which Wells Fargo had HSBC's authority to act. CP 591:106 / X20. HSBC's power of attorney granted to Wells Fargo was recorded on November 2, 2012. CP 589.

Three months later, a notice of default dated December 7, 2012, was issued to and received by the Lissons. CP 44, 49–51. The notice of default identified HSBC as the note owner and ASC as the loan servicer. CP 51. It was issued by Northwest Trustee Services, Inc. (NWTS)[5] as HSBC's duly authorized agent. CP 51.

Less than a week later, Wells Fargo signed a beneficiary declaration in its capacity as HSBC's attorney-in-fact on December 13, 2012. CP 316,

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[5] NWTS was formerly a defendant to the Lissons' lawsuit. It is not a party to this appeal.

601. The beneficiary declaration identified HSBC as both the owner and actual holder of the Lissons' note. CP 601.

D. The Lissons wait until FFA mediation to apply for a loan modification. No agreement is reached at mediation

Nearly a year after their default, the Lissons opted to retain counsel and enter pre-foreclosure mediation with Wells Fargo under Washington's Foreclosure Fairness Act (FFA), RCW 61.24.163, et seq. CP 45, 316, 593–597.

They waited to complete and submit a loan modification application as part of the mediation process. CP 44–45.

After two mediation sessions in May 2013 and September 2013, the FFA mediation concluded without a modification agreement. CP 45. The mediator certified that the parties had mediated in good faith, but no agreement was reached. CP 252, 288–289. He noted that "the borrowers did not qualify for a modification" at that time. CP 252, 288–289. His certification included a net present value (NPV) calculation. CP 290.

E. Foreclosure proceedings continue after FFA mediation

A second assignment of the deed of trust, executed by Wells Fargo as HSBC's "attorney-in-fact" was recorded on November 26, 2013. CP 53, 67.[6]

[6] The assignor was identified as "HSBC Bank USA, National Association, as Trustee for Deutsche Alt-A Securities Mortgage Loan Trust, Series 2006-AR-

NWTS was appointed as successor trustee of the deed of trust on January 3, 2014. CP 108, 136–138. The appointment was recorded ten days later. CP 136. Wells Fargo signed the appointment as HSBC's "servicing agent," and stated that it held the Lissons' note for HSBC CP 108, 137–138.

More than three months after that, NWTS issued a notice of trustee's sale dated March 14, 2014, and recorded three days later. CP 252, 296–300. The sale was scheduled for July 18, 2014. CP 297.

Procedural History

F. The Lissons file suit, and the trustee's sale is temporarily enjoined

Four days before the scheduled sale, the Lissons filed their summons and complaint on July 14, 2014 (CP 1–22), along with their motion for a temporary restraining order and/or preliminary injunction (CP 23–42). Mark submitted two declarations in support of the motion (CP 43–51, 186–88) along with the declaration of one of the Lissons' attorneys. (CP 52–70).

Wells Fargo, HSBC, and MERS opposed the temporary restraining order. CP 90–103. In support of their opposition, they submitted the

6," while the assignee was identified as "HSBC Bank USA, National Association as Trustee for Deutsche Alt-A Securities, Inc., Mortgage Pass-Through Certificates Series 2006-AR-6." CP 67.

declarations of Wells Fargo's Andrea Kruse (CP 104–38) and of their attorney Margaret Grega (CP 139–178).

The sale date was continued to November 14, 2014. CP 140, 190. The trial court heard the motion for a temporary restraining order on November 13, 2014. CP 189. It granted a temporary restraining order enjoining sale of the Bainbridge Island property until further order, conditioned on the Lissons making their monthly loan payments of $3,095.19 to the trial court's registry, commencing on November 17, 2014. CP 189–192.

A second hearing was held on the Lissons' motion for a preliminary injunction on February 13, 2015. CP 252, 302–303. Ten days later, the trial court entered an order granting the motion. CP 230–232. Sale of the property was restrained until further order, and the trial court ordered the Lissons to continue making their monthly loan payments to the trial court's registry. CP 231.

G. The trial court grants defendants' summary judgment motion, and the Lissons appeal

Wells Fargo, HSBC, and MERS moved for summary judgment seeking dismissal of all claims (CP 233–250), supported by the declarations of Wells Fargo's Eric Chhan (CP 314–601) and its attorney Andrew G. Yates (CP 251–313).

The Lissons filed their response (CP 602–626), supported by their attorney's declaration (CP 627–649). Wells Fargo, HSBC, and MERS replied (CP 650–656), along with a statement of supplemental authority (CP 657–659).

The trial court heard oral argument on the summary judgment motion on April 14, 2017. RP 1–38. After taking the matter under submission (RP 3:17–4:7; 35:13–37:15), the Court issued its memorandum of decision on April 20, 2017, granting defendants' summary judgment motion (CP 660–663).

The trial court determined that the Lissons had failed to raise a triable issue of material fact for each of their three causes of action for injunctive relief, and for alleged statutory violations of the Deed of Trust Act and Consumer Protection Act. CP 661–662.

The Lissons and NWTS entered into a stipulation followed by entry of an order granting dismissal of NWTS with prejudice on August 21, 2017. CP 696–97.

On September 19, 2017, the Lissons appealed from the order granting summary judgment. CP 664–673.

STANDARD OF REVIEW

Summary judgment is reviewed de novo. *Castro v. Stanwood School Dist. No. 401*, 151 Wn.2d 221, 224 (2004), citing *Ski Acres, Inc. v. Kittitas*

County, 118 Wn.2d 852, 854 (1992). The interpretation of a statute, like the statute of limitations, is "a matter of law subject to de novo review." *Castro*, 151 Wn.2d at 224; citing *State v. Karp*, 69 Wn. App. 369, 372 (1993).

When a party fails to assign error to an event and fails to argue the points in its opening briefing, those arguments are waived. *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 297 (2003); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992).

Without compliance with RAP 10.3(a)(4), the Lissons assign no error here.

SUMMARY OF ARGUMENT

The Lissons' first and second causes of action for injunctive relief and alleged violation of the Deeds of Trust Act, RCW 61.24, *et seq.,* fail as a matter of law under Washington Supreme Court precedent. Injunctive relief is a remedy, not a cause of action, and the claim is moot. The Lissons cannot maintain a DTA violation action absent a completed foreclosure sale.

Their third cause of action for alleged violation of the Consumer Protection Act, RCW 19.86, *et seq.,* fails because they cannot establish the essential elements of a CPA claim. Wells Fargo's conduct was authorized by HSBC as the loan owner, and none of the conduct identified by the Lissons is unfair or deceptive according to controlling law.

Because the Lissons chose to deliberately default on their loan and failed to cure the default even though they had sufficient funds to do so, they cannot possibly establish causation under the CPA. They always knew the loan servicer to whom payments were due. They informed it of their choice to default. Then they submitted modification applications to the servicer, engaged in pre-foreclosure mediation with it in good faith, and chose to incur attorney's fees to sue the servicer to stop foreclosure and demand a modification. Any damages were not proximately caused by any act of Wells Fargo, HSBC, or MERS, and were caused instead by the Lissons' own decisions, actions, and inaction.

The trial court correctly concluded that there were no genuine issues of material fact requiring adjudication. Dismissal of their CPA claim was merited after the Lissons proved they could not establish the five conjunctive elements of a CPA claim when the burden shifted to them to do so in response to summary judgment. The Lissons do no better on appeal.

The trial court's judgment should unassailably be affirmed.

Legal Analysis and Argument

A. Absent a completed foreclosure sale, the Lissons' attempted claim under the DTA fails as a matter of law

The Lissons' second cause of action against HSBC and Wells Fargo is for breach of duties under the DTA. CP 18–19. They contend that defendants initiated a foreclosure that did not conform with the DTA. CP 19. They are wrong.

According to the Washington Supreme Court, the DTA affords no cause of action for wrongful initiation of foreclosure. *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 429 (2014) ("there is no actionable, independent cause of action for monetary damages under the DTA based on DTA violations absent a completed foreclosure sale"). A claim for an alleged violation of the DTA may only be brought after completion of the foreclosure sale. *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 784 (2014) ("Without the sale of the property, damages are not recoverable under the DTA.").

It is undisputed that the Bainbridge Island property has not been sold. CP 317. The sale was first restrained by the temporary restraining order entered in November 2014 (CP 189–192), and was subsequently enjoined by the preliminary injunction issued in February 2015 (CP 230–232).

In the words of their own attorney, the Lissons' claim for an alleged violation of the DTA is "moot." CP 252, 303.

Yet, in their statement of issues on appeal, the Lissons perplexingly cite the DTA (AOB 4), and they claim it was violated (AOB 20). They then submit authorities for vacating a foreclosure sale. AOB 20–22. Because no foreclosure sale has occurred here, however, that discussion on appeal and its supporting authorities are irrelevant.

In the absence of a completed foreclosure sale, the trial court's order granting summary judgment and dismissing their DTA claim was unquestionably correct. *Frias*, *supra*, 181 Wn.2d at 429. The ruling should be affirmed.

B. The Lissons cannot recover on their moot claim for injunctive relief

Injunctive relief is a remedy, not a cause of action. *Kucera v. DOT*, 140 Wn.2d 200, 209 (2000) ("An injunction is distinctly an equitable remedy …. [I]njunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law."); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 53 (1987) (describing an injunction as a "remedy to protect [plaintiff's] rights[.]").

The Lissons already received that remedy by the temporary restraining order and subsequent preliminary injunction enjoining sale. The trial court did not err in dismissing their cause of action for injunctive relief.

C. The Lissons cannot prove any claims whatsoever against MERS

1. *MERS's involvement is limited in scope and time*

The Lissons' allegations against MERS are fundamentally different than those against HSBC and Wells Fargo. MERS is the subject only of their causes of action for injunctive relief and alleged violations of the CPA.

Their pleadings were bereft of factual allegations against MERS, merely alleging that it was designated as the lender's nominee in the deed of trust, and that it executed the assignment of that deed of trust to HSBC. CP 4–5, 7–8.

MERS's sole involvement was thus limited to the time up to and including the assignment's execution and recording on March 19, 2012. CP 56. The record is likewise devoid of evidence that MERS was involved in any subsequent foreclosure instruments, documents, recordings, processes, or the mediation.

2. *The Lissons offered no grounds to enjoin MERS, and no DTA action lies in the absence of a completed sale*

For the same reasons that their cause of action for injunctive relief fails against HSBC and Wells Fargo, it likewise fails against MERS. Without a completed foreclosure sale, no claim lies for an alleged violation of the DTA either. Summary judgment dismissing these two causes of action against MERS was decidedly correct.

3. *Any claims based on identifying MERS in the deed of trust are barred by the Statute of Limitations*[7]

To the extent any of the Lissons' claims depend on MERS being named in the deed of trust, they were not timely brought. The deed of trust was recorded in September 2005—nearly nine years before they filed suit in July 2014.

The longest even potentially applicable limitations period here is six years for a contract claim under RCW 4.16.040, and a CPA claim must be brought within four years as required by RCW 19.86.120. But the Lissons exceeded those time periods by nearly half and double, respectively. Any claims against MERS premised on the deed of trust are barred.

4. *Because the security follows the note, a CPA claim cannot be based on a MERS assignment that the Lissons were not even aware of*

The Lissons claim that MERS's assignment qualifies as an unfair or deceptive act or practice under the CPA because MERS was not a defined DTA "beneficiary" with any interest to assign. CP 4–5, 7–8. But the

[7] A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. RAP 2.5. The appellate court may affirm a summary judgment award on any correct ground, even though that ground was not considered by the trial court. *Nast v. Michels,* 107 Wn.2d 300, 308 (1986); *Kwiatkowski v. Drews*, 142 Wn. App. 463, 485 (2008). Further, a party is not dilatory in asserting an affirmative defense if it asserts the defense in its answer or amended answer. *Omaits v. Raber*, 56 Wn. App. 668, 671 (1990); *Harvey v. Obermeit*, 163 Wn. App. 311, 323 (2011). MERS' Answer plead the Statute of Limitations as an affirmative defense. CP 79 (¶4).

decisional law holds otherwise: execution of the assignment by MERS does not constitute an unfair or deceptive act or practice under the CPA.

It has long been established that the security instrument follows the note, and any assignment of the deed of trust is irrelevant. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104 (2012) ("Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around.").

The uncontroverted evidence showed that Wells Fargo physically possessed the blank-indorsed note as HSBC's custodian. Two unchallenged declarations by Wells Fargo confirmed those facts (CP 108, 315), as did the beneficiary declaration itself (CP 601) and the appointment (CP 137–38). After they initiated suit, the Lissons' original note was in the possession of Wells Fargo's litigation counsel (CP 105), who, in turn, made it available for inspection by the trial court and the Lissons (RP 09).

HSBC possessed the blank-indorsed note through its custodian, Wells Fargo, and it was therefore entitled to have the deed of trust assigned to it.[8]

[8] *Lynott v. Mortg. Elec. Reg. Sys., Inc.*, No. 12-cv-5572-RBL, 2012 U.S. Dist. LEXIS 170607, at *5–6 (W.D. Wash. Nov. 30, 2012) ("U.S. Bank is the beneficiary of the deed [of trust] because it holds Plaintiff's note, not because MERS assigned it[.] … [P]ossession of the note makes U.S. Bank the beneficiary; the assignment merely publicly records that fact."); *Florez v. OneWest Bank, F.S.B.*, No. C11-2088-JCC, 2012 U.S. Dist. LEXIS 56111, at *4 (W.D. Wash. Apr. 3, 2012) ("In *Bain*, the alleged authority to foreclose was based solely on MERS's assignment of the deed of trust, rather than on possession of the

There could be no deception in an assignment that merely confirmed what had already occurred by operation of law. *Bain*, *supra*, 175 Wn.2d 83, 104; *Florez v. OneWest Bank, F.S.B.*, No. C11-2088-JCC, 2012 U.S. Dist. LEXIS 56111, at *4 (W.D. Wash. Apr. 3, 2012).

Worse, the Lissons testified that they had not even seen the assignment document before this litigation. CP 265–266, 169. It hardly bears mentioning that it is impossible to be deceived by something one has never seen. The Lissons' claims of deception related to the execution of an assignment by MERS abjectly fail.

5. ***Absent resulting injury, MERS's identification as beneficiary in the deed of trust cannot be a CPA violation***

Characterizing MERS as the "beneficiary" of a deed of trust is not a *per se* deceptive act or practice. *Bain, supra,* 175 Wn.2d at 117. Because such a characterization has the capacity to deceive, it might be presumed deceptive. *Id.* But to establish a CPA violation, the Lissons must also show that they would not have suffered injuries absent MERS's allegedly deceptive practices. *Id.*, at 119.

The Lissons never connect any practice by MERS to any injury they suffered. MERS is barely mentioned in their entire complaint (CP 4–5, 7–

Note. Here … the undisputed facts establish that OneWest had authority to foreclose, independent of MERS, since OneWest held Plaintiffs' Note at the time of foreclosure.").

8), appears not all in their evidence, and is hardly referenced in their opening brief (AOB 6–7, 22, 27).

Simply put, the Lissons do not allege — and certainly failed to establish in the trial court — that MERS had any involvement whatsoever in their deliberate decision not to pay their loan and to wait nearly a year to apply for a loan modification in connection with pre-foreclosure mediation.

When a plaintiff "fails to put forth facts of any injury related to" MERS's actions, and prove that "but for MERS's involvement, she would have [not been injured]," summary judgment is appropriate, and the CPA claim is dismissed. *Bain v. Metro. Mortg. Grp.*, No. 75946-9-I, 2018 Wash. App. LEXIS 1036, at *7 (Ct. App. Apr. 30, 2018) (unpub'd)[9]; *accord, Zalac v. CTX Mortg. Corp.,* 628 Fed.Appx. 522, 2016 WL 146006, at *1 (9th Cir. 2016) ("[A]lthough MERS was named as the initial beneficiary in the deed of trust, it had no connection to the foreclosure proceedings and can thus play no role in the causation of [plaintiff's] purported damages."); *Burkart v. Mortgage Elec. Registration Sys., Inc.*, 2012 WL 4479577, at *5 (W.D. Wash. 2012) ("If the Burkarts want to plead one or more claims based on MERS' improper designation as the

[9] "[U]npublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." GR 14.1(a).

beneficiary in their deed of trust, they must provide sufficient allegations to establish that they have been injured.”).

The same holds true when the plaintiff “repeatedly acknowledge[s] that she knew [who] was the entity to whom she was required to make loan payments … [and that it] had authority to modify her loan terms.” *Bain, supra,* 2018 Wash. App. LEXIS 1036, at *8. In short, the Lissons did not prove that any action by MERS caused them any resulting damages. *See, e.g., Conner v. Everhome Mortgage Company*, No. 74050-4-I (Wash. App. Ct. Div. I, Nov. 21, 2016) (borrower failed to establish the essential CPA causation element against MERS because she first failed to show the foreclosing lender relied on MERS’ assignment for its authority to appoint the successor trustee and direct the foreclosure and how the MERS assignment caused her to default, and second she submitted no evidence to show the allegedly deceptive MERS assignment caused her to incur legal expenses because it had no effect on who owned or held her note).

“Consulting an attorney to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a CPA claim. Although the latter is insufficient to show injury to business or property, the former is not.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 62 (2009) (citations omitted).

The Lissons retained an attorney to see if they could obtain a modification and adjust their finances, not to dispel uncertainty about the identity of the note's holder. They admitted they owed the loan balance. They thus failed to establish the existence of any genuine issue of material fact as to any injury caused by MERS's conduct. Their nominal claims against MERS could not withstand summary judgment, and were correctly dismissed.

D. The Lissons cannot establish the essential elements of a CPA claim

1. *The requisite elements of a CPA claim include an unfair or deceptive act or practice, causation, and injury — the Lissons established none of these*

The Lissons' third cause of action against Wells Fargo, HSBC, and MERS is for alleged violations of the CPA. CP 19-21. The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. Any person injured in his business or property by a violation of RCW 19.86.020 may bring a civil action to recover actual damages. RCW 19.86.090; *Panag*, *supra,* 166 Wn.2d at 37.

To prevail on a CPA claim, a plaintiff must prove: *(1)* an unfair or deceptive act or practice; *(2)* occurring in trade or commerce; *(3)* affecting the public interest; *(4)* injury to a person's business or property; and *(5)* causation. *Panag, supra,* 166 Wn.2d at 37.

A litigant who cannot satisfy any one of these five conjunctive elements cannot state a CPA claim. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 793 (1986). A CPA claim must be dismissed if any one of the five elements is not established. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298 (2002); *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 114 (2001).

The Lissons did not rebut below the defendants' proof that they could not, as a matter of law, establish three of five essential elements of a CPA claim, namely an unfair or deceptive act or practice, injury, and causation. The trial court correctly dismissed their CPA claim.

2. *The Lissons did not, because they could not, establish an unfair or deceptive act or practice by Wells Fargo, HSBC, or MERS*

A plaintiff can establish an unfair or deceptive act or practice by showing "an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787 (2013). A defendant's act or practice is *per se* unfair or deceptive if the plaintiff shows it violates a statute declaring it to be such. *Mellon v. Reg'l. Tr. Servs. Corp.*, 182 Wn. App. 476, 488 (2014).

Conduct may be "deceptive" if it misleads or misrepresents something of *material* importance. *Walker v. Quality Loan Serv. Corp*., 176 Wn. App. 294, 318 (2013). An act or practice may be "unfair" if it is likely to cause substantial injury which is not reasonably avoidable by consumers and not outweighed by countervailing benefits (*Klem*, *supra*, 176 Wn.2d at 787), or if it "offends public policy as established 'by … the common law,' or is 'unethical, oppressive, or unscrupulous,' among other things" (*Klem*, at 785–786 (quoting *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57 (1983)).

The Lissons took a "kitchen sink" approach to their CPA claim, but still could not establish three of the essential elements. They made generic, conclusory assertions that the CPA had been violated by: (1) HSBC and Wells Fargo making "numerous misrepresentations" — unspecified — regarding who owned their note and the identity of the deed of trust's beneficiary; (2) Wells Fargo executing as "servicing agent" for HSBC, but without that authority, an appointment naming NWTS as successor trustee; (3) Wells Fargo executing foreclosure-related documents as HSBC's attorney-in-fact "even though no such power was ever specifically given" by HSBC to Wells Fargo; (4) HSBC and Wells Fargo refusing to modify their loan; and (5) HSBC and Wells Fargo using an improper NPV calculation and, generally, their mediation participation. CP 7–8, 13–17.

As the following discussion demonstrates, however, the evidence revealed that all of the Lissons' assertions failed as a matter of law.

(a) *Because Wells Fargo was HSBC's custodian of the note, no misrepresentations were made*

The Washington Supreme Court has confirmed that beneficiary status under the DTA is determined by whether an entity is a Uniform Commercial Code-defined "holder" of the instrument securing the deed of trust, not whether it owns the instrument. *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 525 (2015) ("The statute's definition of 'holder' does not turn on ownership. That is unsurprising, given that the statute expressly provides that '[a] person may be a person entitled to enforce the instrument ... *even though the person is not the owner* of the instrument.'") (quoting RCW 62A.3-301) (original italics).

Under long-standing Washington law, the holder of a note indorsed in blank, like the note here (CP 324), is entitled to enforce the note and the deed of trust securing it. *Bain, supra,* 175 Wn.2d at 104; *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 828, n.4 (2015). "[I]n Washington one may be a *'person in possession'* of a note either physically, or *through an agent*." *Butler v. One West Bank, FSB (In re Butler)*, 512 B.R. 643, 652–653 (Bankr. W.D. Wash. 2014) (italics added);

accord, *Thomas v. Specialized Loan Servicing, LLC*, No. 76644-9-I, 2018 Wash. App. LEXIS 1933, at *5 (Ct. App. Aug. 13, 2018) ("A custodial agreement … authorizes the bank to hold physical possession of [the noteholder's] residential mortgage loans. [Plaintiff] points to nothing in the record that contradicts this evidence and thus fails to raise a question of material fact on this point.").

HSBC is a UCC "holder" because it possessed the note indorsed in blank in the custody of its servicing agent, Wells Fargo. RCW 62A.3-301. HSBC is therefore the beneficiary of the deed of trust entitled to enforce the obligation by foreclosure. RCW 61.24.005(2); *Brown*, *supra*, 184 Wn.2d at 525.

The Lissons assert the beneficiary declaration concerning their note "did not comport with DTA requirements." AOB 13. That declaration identified HSBC as both the "owner" and the "holder" of the note. It was signed by Wells Fargo as HSBC's "attorney-in-fact."[10] CP 601. At all relevant times, Wells Fargo physically possessed the note, as HSBC's custodian. CP 108, 315. No misrepresentations were made in the

[10] The Lissons cite no authority for the proposition that an agent may not sign a Beneficiary Declaration for a principal. In an unpublished opinion, this Court's Division One specifically held the opposite. *Ortega v. Nw. Tr. Servs.,* No. 69652-1-I, 2014 Wash. App. LEXIS 382 at *3, *18, n. 6 (Ct. App. Feb. 18, 2014) (overruling borrowers' objections to Wells Fargo's execution of a beneficiary declaration as attorney-in-fact for HSBC, and ruling no DTA violations).

beneficiary declaration or about it, and legion case law contradicts the Lissons.[11]

In addition to the beneficiary declaration and appointment, Wells Fargo also introduced into evidence two uncontroverted declarations that it possessed the original note as custodian for HSBC. CP 108, 315. The Lissons' unsupported allegations to the contrary do not create a genuine issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989); *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 657 (2014).

And contrary to the Lissons' unsupported arguments, the declaration of Andrea Kruse did not create a fact issue either. Consistent with other evidence (CP 315), Kruse states: "Wells Fargo has also served as HSBC's *authorized document custodian* and servicing agent …. *In this capacity*, Wells Fargo has maintained physical custody of the original Note indorsed in blank …." CP 108 (italics added).

[11] *See*, *In re Butler, supra,* 512 B.R. at 653 (holding where beneficiary declaration identified One West as the "actual holder" of the note, "One West was also a 'holder' and 'beneficiary,' as the Note was indorsed in blank and One West … had possession of the Note through its agent, Deutsche Bank."); *Ortega v. Northwest Trustee Servs. Inc*., 2014 Wash. App. LEXIS 382, *3, *18 (Wash. Ct. App. Feb. 18, 2014) (unpub'd) (same, where HSBC was identified as "actual holder" in beneficiary declaration executed by Wells Fargo as HSBC's attorney-in-fact, while Wells Fargo's own declaration stated it was the "actual holder."); *Coble v. SunTrust Mortg., Inc.*, No. C13-1878-JCC, 2015 U.S. Dist. LEXIS 19434, at *17 (W.D. Wash. Feb. 18, 2015) ("The UCC makes no requirement of actual physical possession to be deemed a 'holder' of a note. RCW 62A.3-201, cmt. A (under the UCC a holder may possess a note 'directly or through an agent').").

The Lissons' assertion that a note may not be held by a custodian was exhaustively analyzed — and thoroughly rejected —in *In re Butler, supra*, 512 B.R. at 651. As the holder of the original, blank-indorsed note through its custodian, Wells Fargo, HSBC is the deed of trust beneficiary and entitled to enforce it. The trial court correctly confirmed that no misrepresentations giving rise to a CPA claim existed on this record.

(b) *Because HSBC authorized Wells Fargo to fore-close, its execution of the successor trustee ap-pointment was neither unfair nor deceptive*

The Lissons say that NWTS was not authorized to act as successor trustee because the appointment identified Wells Fargo "as present holder of the Note" (CP 137) and was executed by it as "servicing agent" for HSBC (CP 138). But the validity of NWTS's appointment as successor trustee is not subject to reasonable dispute.

Wells Fargo signed the appointment as the authorized attorney-in-fact for the note holder and beneficiary, HSBC, pursuant to its limited power of attorney. CP 316, 590. The recorded power of attorney specifically identified the trust which purchased the Lissons' loan as within Wells Fargo's authority to act for HSBC. CP 589, 591:106 / X20.

An agent's authority to act for its principal in executing foreclosure documents is well-established. As the Ninth Circuit has recognized: "The fact that Wells Fargo signed … where specifically authorized to do so by power of attorney agreements, does not change this result." *Meyer v. Nw.*

Tr. Servs., 712 Fed. App'x. 619, 629 (9th Cir. 2017) (unpub'd); *accord*, *Pelzel v. Nationstar Mortg., LLC*, No. 43294-3-II, 2015 Wash. App. LEXIS 638, at *15 (Ct. App. Mar. 24, 2015) (unpub'd); *US Bank Nat'l Ass'n v. Woods*, No. C11-5976-BHS, 2012 U.S. Dist. LEXIS 78676, at *16–17 (W.D. Wash. June 6, 2012); *Thomas*, *supra*, 2018 Wash. App. LEXIS 1933, at *7 ("The written power of attorney agreements are clear manifestations of the [loan owners'] consent that [the servicer] would act on their behalf in executing all required documentation to complete nonjudicial foreclosure sales.").

A challenge to execution by the beneficiary's agent of an appointment — the same as the Lissons' — was expressly rejected by this Court's Division One in *Bucci v. Nw. Tr. Servs., Inc.,* 197 Wn. App. 318 (2016). The borrowers argued that the law "does not allow an agent to appoint a successor trustee." *Id.,* at 333. The court explicitly rejected that argument: "[O]ur Supreme Court held that 'nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note,' and that 'Washington law, and the Deed of Trust Act itself, approves of the use of agents.'" *Id.* (quoting *Bain*, *supra*, 175 Wn.2d at 106); *see also*, *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 229 (2016) (holding no DTA violation occurs when an entity later appointed as trustee acts as the beneficiary's "duly authorized agent" in issuing a notice of default).

The use of an agent to appoint a successor trustee also does not violate the DTA. *McPherson v. Homeward Residential*, No. C12-5920-BHS, 2014 U.S. Dist. LEXIS 15123, at *16 (W.D. Wash. Feb. 4, 2014) (explaining "the relevant Appointment of Successor Trustee expressly states that Homeward recorded this document as the agent of the beneficiary, U.S. Bank, not on its own behalf[.] .... [A]s a matter of law, Homeward's recordings on behalf of U.S. Bank were in accordance with the DTA."); *Hummel v. Nw. Tr. Servs.*, 180 F. Supp. 3d 798, 806, n. 7 (W.D. Wash. 2016) (rejecting challenge to beneficiary's appointment of successor trustee through an agent); *Thomas*, *supra*, 2018 Wash. App. LEXIS 1933, at *6 ("Thomas asserts that the … appointment of successor trustee and the … beneficiary declarations are invalid because they were signed by [the loan servicer's] employee rather than an employee [of the loan owner]. The argument fails because [the servicer] was acting as an agent of the [loan owner] when its employees executed these documents, permissible actions under the DTA.").

Wells Fargo, as servicing agent, appointed NWTS as successor trustee, just as the servicers did in *McPherson* and *Hummel.* Undercutting their claims of purported "deception," the Lissons testified they had not even seen the appointment before their litigation. CP 161–162, 169; RP 09, 21.

On appeal, the Lissons argue that Wells Fargo "has not provided any testimony whatsoever from any person actually signing documents that any

Wells Fargo employees knew of [the] existence [of the power of attorney] and/or relied upon it to execute documents." AOB 13. Based on that, they "maintain that Wells Fargo never had the requisite authority under the DTA to instruct … NWTS to foreclosure [sic] nonjudicially." AOB 14.

But they cite no authority — and counsel's research yields none — that requires a signatory to specifically acknowledge the existence of a power of attorney to validly and effectively exercise the powers granted thereunder. Decisional law holds the opposite. *In re Butler*, *supra*, 512 B.R. at 651 ("Plaintiff alleged that [declarants] did not review or understand various documents they signed on behalf of their respective entities [or] … may not have fully understood [their] capacity to sign on behalf of [the entities]. … Their understanding of their capacities and the documents themselves is largely irrelevant.") (granting summary judgment and dismissing all claims).

Indeed, the Ninth Circuit reversed a CPA violation ruling based on the trial court's finding that the foreclosing trustee "had no notice or knowledge of any … powers of attorney or any other agreement substantiating the authority of Wells Fargo to act on behalf of [the note owner]." *Meyer, supra,* 712 F. App'x. at 629. The Ninth Circuit reiterated the oft-stated rule that "an authorized agent is empowered to make binding declarations within the scope of its agency on its principal's behalf such that the declarations of the agent are deemed to be those of the principal itself." *Id.,* at 630 (citing *Ennis v. Smith*, 171 Wash. 126, 130 (1993)). But no rule of law states that agent must specify the power or authority under which it acts at the time it signs documents. *Also see, Knecht v. Fid. Nat. Title Ins. Co.*, 2013 U.S. Dist. LEXIS 38814, 2013 WL 7326111 (W.D. Wash. 2013) (dismissing claim of lack of authority because power of attorney need not be recorded).

More is required of the Lissons than merely rebutting summary judgment evidence by "general affronts to [the declarants'] veracity" (*In re Butler, supra,* 512 B.R. at 650) by claiming "[t]he only testimony provided by Wells Fargo is from people reciting the contents of computer screens and providing copies of documents" (AOB 13). Instead, they needed to "identify material inaccuracies in the [executed] documents … [and] allege specific facts to suggest that [the declarants] did not have the requisite capacities to sign their documents." *Ortega, supra,* 2014 Wash. App. LEXIS 382, at *3, *16–17.[12] But this they could not do. When an opponent fails to show the existence of a genuine issue of material fact, summary judgment is correctly granted. *In re Butler*, *supra*, 512 B.R. at 651.

Execution of a successor trustee appointment by the beneficiary's attorney-in-fact is not an unfair or deceptive practice under the CPA.

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[12] *Accord*, *In re Butler*, *supra*, 512 B.R. at 650 (holding that the non-moving party must "set forth specific facts to suggest that the Court should not believe the testimony of the declarants [and] … submit … evidence of her own to suggest that the facts offered by [the declarants] are untrue, or to otherwise dispute their testimony.").

(c) *Because the Lissons were not entitled to a loan modification, there was no deceptive act*

The Lissons cannot establish any claims based on an alleged improper review for a loan modification. They desired such a modification because they were “afraid that the mortgage was going to adjust and it might go much higher.” CP 262. Although the Lissons wanted to obtain a modification with lower payments (CP 186–187), they had sufficient funds to make their monthly payment at the time of their default and to cure their default afterwards (CP 152, 154, 169, 273). They simply chose not to do so.

In September 2012 they had total assets of nearly $2 million (Footnote 4, *ante*), and their expenses have since decreased. CP 268–273. In 2014, their cash flow increased when they sold their second home for a net gain of nearly $1 million, enough to pay off the entirety of their loan here — but they chose not to do so. CP 46, 258, 273. They did not prove any entitlement to a loan modification, and viewed through the lens of their own decisions, actions, and inaction, their claims regarding “improper review” for a loan modification ring hollow, at best.

Washington law does not require a lender to offer or agree to any loan modification. Courts cannot “rewrite contracts the parties have deliberately made for themselves [and they] … may not interfere with the freedom of contract or substitute their judgment for that of the parties to rewrite the contract.” *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 891–892, (2007); *see, U.S. Bank Nat'l Ass'n v. Lissak,* 2015 Wash. App. LEXIS 1452, *7 (Wash. Ct. App. July 7, 2015) (unpub'd) (affirming dismissal because borrower "fail[ed] to show that his contract required U.S. Bank to modify his loan *or to even consider a loan modification*.") (italics added). "While the parties may choose to renegotiate their agreement, they are under no good faith obligation to do so." *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 572 (1991).

Because the Lissons proved no entitlement to a loan modification, Wells Fargo's and HSBC's failure to agree to one is not an unfair or deceptive act. It neither "mislead[s] or misrepresent[s] something of material importance" (*Walker, supra,* 176 Wn. App. at 318), nor is it "unethical, oppressive, or unscrupulous" (*Klem*, *supra*, 176 Wn.2d at 786). Even if Wells Fargo had mediated in bad faith — the mediator certified the opposite (CP 252, 288–289) — the result would not be a modified loan for the Lissons. *Thurman v. Wells Fargo Home Mortg.*, No. C12-1471-JCC, 2013 U.S. Dist. LEXIS 109066, at *13 (W.D. Wash. Aug. 2, 2013) ("The Thurmans appear to believe that a beneficiary's breach of its duty of good faith [in mediation] somehow automatically entitles the borrower to a loan modification. That is not the law.").

(d) *There was no deception or unfairness in mediation or in the resulting NPV calculation*

Without more to grasp on to, the Lissons attempt to rail about Wells Fargo's participation in pre-foreclosure mediation, and its calculation of the property's net present value (NPV) during mediation. The failure to engage in good faith in pre-foreclosure mediation is an unfair or deceptive act or practice. RCW 61.24.135(2); *Mellon*, *supra*, 182 Wn. App. at 488-89. But it is undisputed here that the mediator certified the parties participated in good faith. CP 252, 288–289.

Consequently, the Lissons cannot use Wells Fargo's mediation participation to establish that it committed an unfair or deceptive act or practice within the meaning of the CPA. If "proposing a forbearance agreement that is unreasonable and impossible to perform does not fall squarely within the conduct prohibited by [the DTA and] … is not *per se* unfair or deceptive" (*Mellon*, *supra*, 182 Wn. App. at 489), then certainly good faith mediation participation does not support a CPA claim.

The Lissons' assertion that Wells Fargo incorrectly calculated the property's NPV also does not translate into an actionable claim. Over the course of two mediation sessions, the mediator certified that NPV inputs were provided, the NPV analysis was completed, and that the NPV exceeded the anticipated net recovery at foreclosure in compliance with RCW 61.24.163(14)(c). CP 289–290. The Lissons argue that the mediator was wrong. But, even if that allegation is true, they can posit no basis to hold Wells Fargo and HSBC responsible for the mediator's conduct.

Wells Fargo did not owe a duty to the Lissons to use any particular NPV inputs. Under the DTA, the duty to maximize NPV under a pooling and servicing agreement is owed not to the borrower, but to "all parties in a deed of trust pool, not to any particular parties[.]" RCW 61.24.177; *see*, *Johnson v. JP Morgan Chase Bank N.A.*, No. 14-5607-RJB, 2015 U.S. Dist. LEXIS 105472, at *23 (W.D. Wash. Aug. 11, 2015) ("Plaintiffs fail to show even that if Chase had a duty under RCW 61.24.177, that that duty was owed to them and not the beneficiaries under the pooling serving [sic] agreements. Plaintiffs have failed to show that Chase owed them a duty of care.").

The Lissons also provided no evidence showing that they would have been eligible for a loan modification but for their grievance with the NPV inputs. *Thurman, supra,* 2013 U.S. Dist. LEXIS 109066, at *7–8. Nor can they claim that they were personally misled by, or relied upon the NPV inputs. It is undisputed that they do not know what a NPV calculation is as it relates to their loan, and they have never looked at the NPV inputs used in their FFA mediation. CP 274–275.

This Court has held that absent supporting expert testimony, a CPA claim cannot be based on NPV inputs. *Patrick v. Wells Fargo Bank, NA*, 196 Wn. App. 398, 410, n. 38, *rev. denied*, 187 Wn.2d 1022 (2017) ("The Patricks assert that NPV work sheets they provide in the record show that using the correct inputs, they qualified for a modification. Without a declaration from an expert, this court is not in a position to credit that assertion."). The Lissons likewise provided no such expert testimony.

Like the Patricks, the Lissons "allege that Wells Fargo gave them conflicting reasons for their [loan modification] rejection and used incorrect information to calculate the NPV of their loan, [but] they do not support these allegations with evidence. Nor do they cite authority indicating that poor communication at [an FFA] mediation, like providing conflicting information, constitutes bad faith." *Patrick*, *supra*, 196 Wn. App.at 410.

Because the Lissons did not establish the first element of their CPA claim regarding commission of an unfair or deceptive act or practice, the trial court correctly dismissed their CPA claim.

3. *The Lissons also could not establish causation under the CPA*

Proof that a defendant's violation is the actual cause of claimant's damages is an essential element to a CPA claim. *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 279-80 (2011). "[T]he CPA has a causation requirement. … A borrower must prove that but for the violation of the statute, he would not have been injured." *Blair v. Nw. Tr. Servs., Inc.*, 193 Wn. App. 18 (2016). The claimant must establish the "injury ... would not have happened" if not for the defendant's deceptive acts. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82 (2007).

The Lissons cannot prove causation. The obvious "but-for" cause of any damages here was their own failure to perform their loan contracts, on purpose, and their choice not to cure the loan default even though they were able to do so. On the same facts, this Court's opinion in *Patrick* is instructive.

In Patrick, the reviewing court affirmed the summary judgment dismissal of the borrowers' CPA claim because Wells Fargo had no obligation to provide a loan modification, and the "but-for" cause of damages was the borrowers' failure to make mortgage payments and to cure their default. *Patrick*, *supra*, 196 Wn. App. at 410.

"[T]he Patricks point to no evidence that but for unfair or deceptive acts or practices by Wells Fargo, they would have obtained a loan modification …. Instead, the record shows that Wells Fargo had no obligation to offer the Patricks a modification and that the Patricks' failure to make … payments on their loan, [and] cure their default … caused the trustee's sale. The trial court did not err in granting the defendants summary judgment on the Patricks' CPA claim." *Id.*, at 410–411.

The court also noted, "[i]f reasonable minds could not differ, th[e] court may determine the factual question of causation as a matter of law." *Id.*, at 408; *accord*, *Thomas*, *supra*, 2018 Wash. App. LEXIS 1933, *10 ("Thomas does not contest that he defaulted on the loan payments and did not cure the default. The trial court correctly concluded that Thomas's default, and not any misrepresentation …, was the ‘but for’ cause of the [damages].”).

Equally helpful is the federal district court’s opinion in *Marts v. U.S. Bank, Nat’l Ass’n*, 166 F. Supp. 3d 1204 (W.D. Wash. 2016) (*Marts*). In *Marts*, like here, the borrowers were in default. They alleged their lender committed unfair and deceptive acts in identifying the loan owner and the entity with note enforcement rights. They did not allege that “but for” their confusion over who owned their loan, however, they would have brought their loan current. “They knew whom to submit their loan payments to and whom to contact to apply for a loan modification. They just did not like the answers they were receiving.” *Id.*, at 1208–1209.

Finding their injuries to be “self-inflicted,” the *Marts* court held the borrowers failed to establish both the CPA injury and causation elements. *Marts*, 166 F. Supp. 3d at 1208–1209. Like the Lissons, the Marts also alleged they had incurred “investigation costs in an effort to forestall foreclosure.” *Id.* at 1208. The court held those investigative costs were due to their own default, however. *Id.*; *see also*, *Panag*, *supra*, 166 Wn.2d at 64 (“If the investigative expense would have been incurred regardless of whether a violation existed, causation cannot be established.”).

As in *Patrick* and *Marts*, here neither Wells Fargo nor HSBC caused the Lissons any injury. The Lissons admit their deliberate loan default. They do not assert they could reinstate the loan “but for” not knowing to whom to pay the balance due. Instead, the undisputed evidence shows that they knew at all times to pay their mortgage to Wells Fargo, informed it of their plans to default, submitted their modification application to it, engaged in pre-foreclosure mediation with it — they but simply chose not to make loan payments to it although they had the money.

To make up for this failure of causation, the Lissons assert the allegedly non-compliant beneficiary declaration, assignment, and appointment were the but-for cause of the nonjudicial foreclosure proceedings. This is simply false. First, there was nothing "defective" about any of those documents. Second, and more importantly, there would have been no need for any of those documents but for the Lissons' loan default and their failure to cure default at their own election.

Their own breach of the loan contracts and their failure to cure is the source of their causation, not anything Wells Fargo, HSBC, or MERS did. Since they cannot establish causation under the CPA, their claim fails as a matter of law and was correctly dismissed.

4. *The Lissons had no injury under the CPA*

Even if the Lissons had managed to prove an unfair and deceptive act that caused them damages (they did not), they still cannot prove any resulting injury.

The general threshold for a CPA injury is not particularly high. However, where plaintiffs claim an unfair or deceptive act or practice based on an affirmative misrepresentation — *i.e.*, here that Wells Fargo's execution of the beneficiary declaration and successor trustee appointment was misleading, as was MERS's execution of an assignment — the plaintiff must show "a causal link between the misrepresentation and the plaintiff's injury." *Indoor Billboard*, *supra*, 162 Wn.2d at 83. Causation cannot be established "merely by a showing that money was lost." *Id.*, at 81.

The Lissons purposely stopped paying and defaulted on their loan even though they had funds available. CP 261–262, 264. They then chose to not cure their default when they had funds available. CP 278.

The institution of nonjudicial foreclosure proceedings and any attendant CPA "injury" were therefore caused by the Lissons' choice to default and not to cure, not by alleged misconduct of Wells Fargo, HSBC, or MERS. *Indoor Billboard*, *supra*, 162 Wn.2d at 82 (a plaintiff must demonstrate that the "injury complained of ... would not have happened" if not for defendants' acts); *Marts*, *supra*, 166 F. Supp. 3d at 1208–1209 (rejecting CPA claim because MERS's role did not prevent borrowers from knowing whom to speak with about their loan, and did not prevent them from curing any default); *Babrauskas v. Paramount Equity Mortgage*, No. C13-0494-RSL, 2013 U.S. Dist. LEXIS 152561, at *11 (W.D. Wash. Oct. 23, 2013) (plaintiff's "failure to meet his debt obligations is the 'but for' cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title"); *McCrorey v. Fed. Nat's Mortg. Ass'n*, No. C12-1630-RSL, 2013 U.S. Dist. LEXIS 25461, at *11 (W.D. Wash. Feb. 25, 2013) (finding no injury under the CPA because "it was [plaintiffs'] failure to meet their debt obligations that led to a default, the destruction of credit, and the foreclosure").

The Lissons allege injuries in paying an attorney to investigate their claims, traveling to meet with that attorney, and paying the attorney to prepare and file the suit and related motions. CP 17, 46. But filing litigation does not constitute CPA injury.

Merely "having to prosecute" a claim under the CPA "is insufficient to show injury." *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564 (1992); *Demopolis v. Galvin*, 57 Wn. App. 47, 55 (1990) (litigation expenses are not a CPA "injury"); *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 281 (2004) (noting that "there must be some other evidence to establish injury to the claimant's property and attorney fees from prosecuting a CPA claim alone does not satisfy the injury requirement"); *Thomas*, *supra*, 2018 Wash. App. LEXIS 1933, *10 ("Attorney fees divorced from a deceptive business practices do not constitute injury under the CPA.").

Rather, injury under the CPA is strictly limited to damage "in ... [a plaintiff's] business or property[.]" RCW 19.86.090. "[T]he fees and costs incurred in litigating the CPA claim cannot satisfy the injury to business or property element: if plaintiff[s] were not injured prior to bringing suit, [they] cannot engineer a viable claim through litigation." *Babrauskas*, *supra*, 2013 U.S. Dist. LEXIS 152561, at *12 (*citing Sign-O-Lite Signs*, *supra*, 64 Wn. App. at 563–564).

The Lissons' alleged injuries of time and money spent in working with their attorney to apply for a loan modification during pre-foreclosure mediation cannot support a CPA claim. Investigation cost injuries are only available when the investigation is genuinely necessary to "dispel uncertainty regarding the nature of an alleged debt." *Panag*, *supra*, 166 Wn.2d at 62. Yet it is undisputed that the Lissons took out the loan, made payments only to Wells Fargo, decided to stop paying Wells Fargo, and then asked Wells Fargo to modify the terms of the loan. CP 262–265. There was no genuine "uncertainty" to dispel. The Lissons simply wanted to force better loan terms and hold onto their money while doing so, rather than using it to meet their contractual obligations.

Using litigation costs incurred as their CPA injuries is exactly what the Lissons attempted here. But the Lissons admit they incurred "investigation costs" in an effort to modify their loan and forestall foreclosure — not to dispel any uncertainty regarding the holder of their note because, in fact, they were always aware of the entity with whom to communicate, and did so.

They did not retain counsel, thereby incurring any costs and fees, until December 2012 — nearly one year after their intentional default. CP 45. They did so for the purpose of "seek[ing] legal advice regarding [their] options in light of the pending foreclosure" — though they had already mentioned a loan modification to Wells Fargo before then. CP 44–45. The Lissons nevertheless waited to complete and submit their modification application as part of the mediation process, which did not conclude until nearly two years after they defaulted. CP 44–45.

When a plaintiff is already aware of the information for which he ostensibly incurs "investigative costs," he does not suffer a compensable CPA injury by incurring such costs. *Marts*, *supra*, 166 F. Supp. 3d at 1208.

The trial court correctly determined that the Lissons suffered no compensable CPA injury. Their failure to establish the essential elements of a CPA unfair or deceptive practice, the but-for cause of CPA damages, or any legally cognizable CPA injuries, necessitated the trial court's dismissal of their CPA claim as a matter of law.

E. Wells Fargo and HSBC are entitled to recover their attorney's fees on appeal

As RAP 18.1 provides, Wells Fargo and HSBC are entitled to attorney's fees and costs on appeal as provided by their note and deed of trust. Paragraph 26 of the deed of trust provides: "Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument … includ[ing] without limitation attorneys' fees incurred … on appeal." CP 129.

Similarly, Paragraph 7(E) of the note states: "[T]he Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note … includ[ing] … reasonable attorneys' fees." CP 113. "Note Holder" is defined as "anyone who takes this Note by transfer and who is entitled to receive payments under th[e] Note[.]" CP 111 (¶1).

Because this appeal relates directly to HSBC's, and its agent Wells Fargo's, enforcement of its rights under the note and deed of trust, HSBC respectfully requests that the Court award their reasonable attorney's fees and costs incurred on appeal as contractually-agreed and provided by the note, deed of trust, and RAP 18.1.

CONCLUSION

The trial court properly dismissed the Lissons' complaint when it concluded that the Lissons could not maintain an action for violation of the DTA, CPA, and injunctive relief. The Lissons failed to prove any cause of action entitling them to relief under the DTA or CPA. Viewing the facts in a light most favorable to the Lissons, summary judgment was still correctly granted in favor of Wells Fargo, HSBC, and MERS. The trial court's ruling dismissing the complaint with prejudice should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of September, 2018.

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MORTGAGE ELECTRONIC
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CERTIFICATE OF SERVICE

I, Tamorah Burt, certify that on this 5th day of September, 2018, I caused the foregoing RESPONDENT'S BRIEF OF WELLS FARGO BANK, N.A., HSBC BANK USA, N.A., AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC to be delivered to the following parties in the manner indicated below:

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