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**Case No. 50954-7 -II**

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

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**MIKE and JUNE TIMMERMAN,**

**Appellants,**

**v.**

**SOUTH SOUND OUTREACH SERVICES and Doe Defendants 1  
through 20, inclusive,**

**Respondents.**

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**APPELLANTS MIKE AND JUNE TIMMERMAN'S OPENING  
BRIEF**

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**TABLE OF CONTENTS**

**PAGE(S)**

**INTRODUCTION.....1**

**STANDARD ON REVIEW.....4**

**ASSIGNMENT OF ERROR.....4**

**STATEMENT OF THE CASE.....5**

**ARGUMENT.....18**

    A.    South Sound violated the Consumer Protection Act when it engaged in unfair and deceptive practices committed by Ms. Hall, who did not make referrals to mediation for the Timmermans and other homeowners.....18

        1.    Deed of Trust Act Requirements for Referral to Mediation.....18

        2.    Applying the Consumer Protection Act to DTA Requirements.....19

            a.    Unfair and deceptive practices.....20

            b.    Occurring in trade or commerce.....22

            c.    Public Interest Element.....24

            d.    The Timmermans were damaged and injured by the actions of South Sound.....25

            e.    Causation.....25

    B.    Defendant South Sound is entirely responsible for the actions of its employee, Diane Hall, as her actions and inactions were directly related to her job responsibilities.....27

    C.    Genuine issues of material fact precluded dismissal of the intentional infliction of emotional distress claims....29

**CONCLUSION.....33**

## TABLE OF AUTHORITIES

### CASES

American Nursery Products, Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 222, 797 P.2d 477 (1990).....	4
Bratton v. Calkins, 73 Wn.App. 492, 870 P.2d 981 (1994).....	27
Crystal China and Gold Ltd. v. Factoria Center Investments, Inc., 93 Wn.App. 606, 610, 969 P.2d 1093 (1999).....	4
Dickinson v. Edwards, 105 Wn.2d 457, 716 P.2d 814 (1986) .....	27
Dicomes v. State, 113 Wash.2d 612, 782 P.2d 1002 (1989) .....	31
Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).....	29
Gilliam v. Department of Social and Health Services, Child Protective Services, 89 Wn.App. 569, 950 P.2d 20 (1998) .....	28
Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975) .....	29, 31
Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, (1986).....	19
Klem v. Washington Mut. Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013) .....	20, 21
Kloepfel v. Bokor, 149 Wn.2d 192, 196, 66 P.3d 630 (2003).....	29
Martin v. Seattle, 111 Wn.2d 727, 733, 765 P.2d 257 (1988) .....	4
Mason v. Mortgage America, 114 Wn.2d 842, 792 P.2d 142 (1990).....	20
McGrail v. Department of Labor and Industries, 190 Wash. 272, 67 P.2d 851 (1937),.....	27
Niece v. Elmview Group Home, 131 Wn.2d 39, 48, 929 P.2d 420 (1997) .....	28
Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 740, 733 P.2d 208 (1987) .....	23
Panag v. Farmers Ins. Co. of WA, 166 Wn.2d 27, 48, 204 P.3d 885 (2009) .....	21, 24
Persing, Dyckman & Toynebee, Inc. v. George Schofield Co., Inc., 25 Wn.App. 580, 582, 612 P.2d 2 (1980).....	4
Phillips v. Hardwick, 29 Wash.App. 382, 387, 628 P.2d 506 (1981).....	31
Quimby v. Fine, 45 Wn. App. 175, 724 P.2d 403 (1986).....	23
Ramos v. Arnold, 141 Wn.App. 11, 169 P.3d 482 (2007) .....	23
Reid v. Pierce County, 136 Wn.2d 195, 202, 961 P.2d 333 (1998).....	29
Rice v. Janovich, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987) .....	29
Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002).....	31

Sato v. Century 21, 101 Wn.2d 599, 681 P.2d 242 (1984).....	20
Short v. Demopolis, 103 Wn.2d 52, 66, 691 P.2d 163 (1984).....	23
Skamania County v. Columbia River Gorge Commission, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).....	4
St. Paul Ins. Co. v. Updegrave, 33 Wn.App. 653, 656 P.2d 1130 (1983)	20
State v. Schwab, 103 Wn.2d 542, 558, 693 P.2d 108 (1985) .....	21
Talmadge v. Aurora Chrysler Plymouth, Inc., 25 Wn. App. 90, 605 P.2d 1275 (1979).....	20
Thompson v. Everett Clinic, 71 Wn.App. 548, 860 P.2d 1054 (1993).....	28
Titus v. Tacoma Smeltermen's Union Local No. 25, 62 Wn.2d 461, 383 P.2d 504 (1963).....	28
Walker, 176 Wn.App. 294 .....	22
Washington Natural Gas Co. v. Public Utility District No. 1 of Snohomish County, 77 Wn.2d 94, 459 P.2d 633 (1969) .....	23
Womack v. Von Rardon, 133 Wash.App. 254, 135 P.3d 542 (2006).....	30

## **STATUTES**

RCW 19.86, et seq. ....	9, 25
RCW 19.86.010(2).....	22, 23
RCW 19.86.020 .....	23
RCW 19.86.093 .....	24
RCW 19.86.093(3)(b) & (c).....	25
RCW 61.24.005(9).....	19
RCW 61.24.163 .....	passim
RCW 61.24.163(1).....	19, 26
RCW 61.24.163(1) & (2).....	19
RCW 61.24.163(16)(b).....	15

## **OTHER AUTHORITIES**

H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914) .....	21
---	----

## **RULES**

Civil Rule 56(e).....	10
Washington Pattern Jury Instructions. WPI 50.02.....	27

## **TREATISES**

Prosser and Keaton on the Law of Torts § 8 at 37 (W. Page Keeton, et al. eds., 5th ed. 1984 .....	30
Restatement (Second) of Torts §46.....	29, 30

## INTRODUCTION

This is case fairly straight forward – South Sound is a non-profit which provides, among other services, housing counseling services. Included in those housing counseling services, South Sound made referrals to mediation under the Foreclosure Fairness Act (“FFA”) for homeowners who wanted to try to prevent foreclosure. RCW 61.24.163, *et seq.* The Timmermans were homeowners who were facing a foreclosure by their first mortgage lienholder, Chase, and they sought help from South Sound, through its employee Diane Hall, to obtain a referral to mediation. The Timmermans were aware that there was a deadline for the referral to be made and they communicate with Ms. Hall about that deadline. Ms. Hall assured them that she would make the referral in a timely fashion. When Mrs. Timmerman followed up asking about the referral, she was instructed by Ms. Hall not to be bother her because she was handling things. Mrs. Timmerman then waited for contact from Ms. Hall for months and never received responses to her attempted contacts. At one point, Mrs. Timmerman talked to “Bob” at South Sound who took a message for Ms. Hall that was never returned, but he assured Mrs. Timmerman that the matter was being handled.

The Timmermans discovered that their home had been foreclosed after it occurred. When Mrs. Timmerman contacted Ms. Hall about the situation, she assured them she would get the foreclosure sale undone. That never occurred. The Timmermans later learned, through the efforts of their attorney, that other clients of South Sound had been similarly treated by Ms. Hall, that South Sound was aware that Ms. Hall was not fulfilling her obligations as a housing counselor, and that instead of accepting responsibility for her actions and attempting to prevent more harm to its clients, South Sound attacked those who complained about Ms. Hall and made excuses for her.

South Sound was funded for the housing counselor work by the Washington State Housing Finance Commission and the mediation program was operated by the Washington Department of Commerce (“DOC”). The DOC was the entity who received complaints about Ms. Hall and South Sound and communicated with South Sound’s director about those deficiencies. South Sound did **not** take any action to prevent Ms. Hall from continuing to fail in her representation of homeowners and instead, blamed the homeowners and others for it not doing its job.

In this litigation, South Sound made the same sort of excuses for Ms. Hall not doing what she was paid to do for the Timmermans and others – make a referral to FFA mediations and assist homeowners in

participating in them, and asserted that the Timmermans were to blame for their situation. South Sound effectively distracted from its own actions, pointing out that a second mortgage lender, BECU, started its own non-judicial foreclosure months after the Chase mortgage foreclosure began, contending that this attempted foreclosure made clear that the Timmermans were injured by the loss of their home. This argument, which was effectively accepted by the trial court, ignored entirely the fact that (1) a foreclosure by a junior lienholder would **not** change the first mortgage holder's lien position; and (2) because of South Sound, the Timmermans were denied an opportunity to try to prevent foreclosure by Chase, which is what they were seeking, and resolution of that matter would have allowed them to work on resolving the second mortgage issues.

The Timmermans filed suit against South Sound alleging violations of the Consumer Protection Act and Intentional Infliction of Emotional Distress. None of the facts provided to the Court by the Timmermans was refuted by South Sound, in spite of its effort to mislead the trial court. Yet, the trial court held twice that summary judgment was appropriate and that South Sound bore no liability for its own actions and that of its employee, Diane Hall. Those rulings are not consistent with Washington law and they are an abrogation of the notion that Washington

courts are a place where its residents may receive justice for wrongs done to them.

### **STANDARD ON REVIEW**

An appellate court should independently determine whether the findings of fact support the conclusions of law. *Crystal China and Gold Ltd. v. Factoria Center Investments, Inc.*, 93 Wn.App. 606, 610, 969 P.2d 1093 (1999); *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990); *Martin v. Seattle*, 111 Wn.2d 727, 733, 765 P.2d 257 (1988); and *Persing, Dyckman & Toyne, Inc. v. George Schofield Co., Inc.*, 25 Wn.App. 580, 582, 612 P.2d 2 (1980). Here, the trial court completely ignored the genuine issues of material fact outlined by the Timmermans in their briefing which precluded entry of the two summary judgment orders.

Conclusions of law are reviewed *de novo*, as are the application of the facts to the law. *Id.*; *see also, Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

### **ASSIGNMENT OF ERROR**

(1) South Sound was not entitled to a partial summary judgment on the Timmermans' Consumer Protection Act claim because they provided uncontroverted evidence to the Court to support each element of a CPA claim. Or in the alternative, there were genuine issues of material fact, if the Court were to consider the "guessing about facts" in which South Sound engaged.

(2) South Sound was not entitled to summary judgment on their claims for intentional infliction of emotional distress because the loss of an opportunity to save their home from foreclosure and the actual loss of their home caused significant emotional distress to the Timmermans, consistent with Washington case law, and the actions of South Sound were intentional.

(3) South Sound cannot avoid liability by falsely asserting that its employee was somehow acting outside the scope of her employment when she did not do her job because her refusal to do her job – act as a housing counselor, including making referrals to FFA mediation – is precisely what caused harm to the Timmermans. Further, South Sound did not properly supervise Ms. Hall, made excuses for her refusal to act even when multiple persons made complaints about her actions and when funding was going to be withdrawn, and then admitted that it was only after Ms. Hall was terminated that anyone at South Sound looked at her files.

### **STATEMENT OF THE CASE**

The Timmermans had owned the subject property, located at 16514 71<sup>st</sup> Avenue East, Puyallup, WA (“Property”) since 1998. It was their home and where they raised their children. Mr. Timmerman is employed as a Machinist and Mrs. Timmerman is employed as an office manager. CP 131.

When they purchased the Property, the Timmermans obtained a \$140,000.00 first mortgage loan from Citybank. In connection with that loan, they signed a Deed of Trust that was recorded in Pierce County, Washington on October 7, 1998. Thereafter, they also entered into a second mortgage with Boeing Employees Credit Union and a third mortgage with Boeing Employees’ Credit Union. These loans were also

secured by Deeds of Trust signed by the Timmermans, recorded in Pierce County. The first mortgage lien was eventually assigned to JP Morgan Chase and/or its subsidiaries. CP 131-132.

Sometime in or about September 2012, Mr. Timmerman was terminated from Boeing and they fell behind in making their mortgage payments. Eventually in April 2013, they were forced to file a Chapter 7 bankruptcy and obtained a discharge of their debts on July 27, 2013. *Id.*

Once they fell behind on the mortgages, they began to receive foreclosure notice regarding the Chase mortgage and the BECU mortgages. The Chase foreclosure was the first one initiated by the foreclosing trustee company, Northwest Trustee Services, Inc. (“NWTS”). NWTS issued the Timmermans a Notice of Default and eventually served them with a Notice of Trustee’s Sale (“NOTS”) in September 2013. *Id.*

When the Timmermans received the NOTS, they reached out for help with stopping the foreclosure and being reviewed for a loan modification to South Sound. They reached out to South Sound because it was a certified housing counseling agency and was supposed to assist them in applying for a loan modification. They were supposed to be placed into mediation under the Foreclosure Fairness Act program, which would stop the non-judicial foreclosure sale. RCW 61.24.163. The nonjudicial foreclosure sale was scheduled to take place on **January 31,**

**2014.** CP 136-141.

The Timmermans emailed Diane Hall at South Sound when they made their first appointment. They talked to Ms. Hall about the fact that they needed to have a referral made to the FFA mediation program within twenty (20) days of the recording of the NOTS. The NOTS was recorded in Pierce County, Washington on September 24, 2013. Thus, the referral to mediation had to be done by **October 14, 2013**. Ms. Hall assured the Timmermans that she would make the referral in a timely fashion. CP 132-133.

When the Timmermans did not hear anything from Ms. Hall after the initial meeting, they called her and Ms. Hall told them not to call her back again because she “only deals with fires”. *Id.* She assured the Timmermans that their file was being handled and she would be back in touch as needed. The Timmermans did not get a response for months from Ms. Hall and kept wondering what was happening with the mediation. *Id.* CP 142-147.

When the Timmermans’ foreclosure sale date was fast approaching, they desperately tried to get a response from Ms. Hall, but to no avail. They were finally able to reach Bob at South Sound on the Wednesday or Thursday before the foreclosure sale. Bob reassured the Timmermans that Ms. Hall would have things under control, even though

he admitted that he did not have access to Ms. Hall's files. CP 133. Online records related to Roberta Marsh, the former South Sound Executive Director, indicate that a Bob Badgley was an employee of South Sound as an "Outreach Advocate". CP 348-353.

The Timmermans learned, after the foreclosure sale was completed on **January 31, 2014**, that Ms. Hall never made a referral for the FFA mediation. In fact, she had done nothing at all with the Timmermans' file since they met with her months prior. As a direct result of Ms. Hall's refusal to do her job and to make the referral for the Timmermans to FFA mediation, they lost their home to foreclosure and lost any chance they might have had for a loan modification. CP 118.

When the Timmermans were finally able to speak with Ms. Hall shortly after the foreclosure sale, she assured them that she would get the sale rescinded. She did not do so. The Timmermans' home was sold at auction by NWTs to BECU, the holder of their second mortgage loan. Although there were surplus funds from the auction, the monies were claimed by other mortgage lienholders. CP 179-180.

While there was no guarantee that the Timmermans would receive a loan modification through the FFA mediation process, they were denied the opportunity to even have that chance or to do anything to prevent the nonjudicial foreclosure sale as a direct result of the actions of Ms. Hall and

South Sound. CP 119. Further, this is not the first time that Ms. Hall's refusal to do her job resulted in the loss of a home through foreclosure. In fact, Ms. Hall caused at least one other person to lose her home to foreclosure and then refused thereafter to accept responsibility for her refusal to perform her job functions. CP 148. More importantly, South Sound continued to employ Ms. Hall without any safeguards for homeowners or anyone overseeing her "work" in order to prevent the loss of another home because of her refusal to adequately represent homeowners. These actions by South Sound were intentional and resulted in the loss of the Timmermans' home to foreclosure. CP 134.

South Sound asserted to the trial court in its Partial Motion for Summary Judgment on the Timmerman's Consumer Protection Act ("CPA") claims (RCW 19.86, *et seq.*) that the Timmermans were not harmed by way of its complete abrogation of its responsibilities to them because another foreclosure was started by BECU regarding their junior mortgage. CP 16, 19. This is a completely disingenuous assertion designed to relieve it from responsibility for its own actions. The BECU non-judicial foreclosure, noticed through the issuance of a NOTS document which was recorded in Pierce County, Washington on **January 10, 2014** – approximately three weeks before the foreclosure of their home by Chase, the servicer of the first mortgage loan. CP 153-157.

South Sound never provided any testimony from Ms. Hall nor from anyone else who could contradict Mrs. Timmerman's testimony and instead maintained that because there are no other email records relating to conversations with Ms. Hall or documents exchanged with her, Ms. Timmerman's assertions cannot be true. CP 16-17. Ms. Timmerman's testimony was truthful and made under penalty of perjury, and was required to be accepted as such by the Court absent contradictory evidence or testimony. Civil Rule 56(e). The fact that there were significant differences between Mrs. Timmerman's unrefuted declaration and the facts as asserted by South Sound meant there was a genuine issue of material fact which would preclude entry of summary judgment.

South Sound sought to evade responsibility for Ms. Hall's actions and its own by contending that the Timmermans could only have been referred to it through another housing counseling agency, Parkview Services and that no record was created for the Timmermans because BECU was exempt from the FFA mediation process. CP 66. But the BECU foreclosure notice was served on the Timmermans, as evidenced by Ms. Timmerman's email to Ms. Hall, in **January 2014** – three months **AFTER** they met with Ms. Hall about the pending foreclosure initiated by **Chase**. CP 132-133. Ms. Timmerman's emails to Ms. Hall also make clear that she knew about South Sound because she was present with her

sister at a foreclosure prevention event where she met with Ms. Hall and became aware of its services. Further, the Klein Declaration indicates that he does not have “personal” knowledge of any part of the foreclosure mediation process as evidenced by his uncertain language therein. All of the information provided by Mr. Klein was an effort to deflect from South Sound’s actions and to mislead the Court about its business model.<sup>1</sup>

Counsel for South Sound, Paul Correa, provided a declaration wherein he attempts to provide factual testimony about matters of which he has no personal knowledge, except for his regurgitation of the information provided by Mr. Klein. CP 31-34. The contents of both Declarations from the first MSJ filing primarily quote from the Timmermans’ Complaint and the documentation they provided in discovery. CP 31-34 and CP 65-67. South Sound produced no documents of its own. Nothing. And in fact, South Sound does not even indicate that it searched its own records for email communications exchanged between Ms. Hall and Ms. Timmerman. *Id.* Mr. Klein asserted that the Timmermans did not pay any money to South Sound as evidence of there being no relationship, ignoring the fact that South Sound is a non-profit and does not charge for housing counseling services. *Id.*

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<sup>1</sup> It is also notable that Mr. Klein says that Ms. Hall left South Sound in “Spring 2014” – shortly after the Timmermans discovered her failures. No explanation for her leaving is provided. CP 67.

After obtaining dismissal of the Timmermans' CPA claims, South Sound brought a second motion for summary judgment wherein Roberta Marsh, former executive director of South Sound while Ms. Hall was employed there, submitted a declaration asserting that it did not have any records of a file for the Timmermans. CP 577-580. As the Timmermans pointed out to the trial court, this assertion was false on its face, since the Timmermans have produced copies of email exchanges with Ms. Hall – something Mr. Klein was asserting did not exist. *Id.*; CP 143-147.

The Timmermans obtained records from the Washington Department of Commerce (“DOC”) which made clear that Mr. Klein and Ms. Marsh were intentionally vague and misleading to the trial court. 65-66; CP 499-525. South Sound had records of the Timmermans and others harmed by Ms. Hall’s actions and inaction in its files because there were exchanges between Roberta Marsh of South Sound and the DOC wherein she defended Ms. Hall’s refusal to do her job. In spite of Ms. Hall harming a great many of South Sound’s clients, Ms. Marsh made excuses - contending that there was a “witch hunt” against her. CP 499-525. Ms. Marsh too made excuses for Ms. Hall’s refusal to make the referral for the Timmermans, attempting to blame them and the BECU foreclosure started months later for Ms. Hall’s failures. Later in time, when South Sound’s funding was going to be cancelled by the DOC, Ms. Marsh admitted that

she found things that Ms. Hall had hidden from her. *Id.*

The records of the DOC make it abundantly clear that South Sound KNEW that Ms. Hall was not doing her job and instead of actually doing something about it, Ms. Marsh made excuses and attacked those complaining about Ms. Hall's refusal to do her job. CP 527-530. DOC records contain a copy of a memorandum summarizing statements provided to it by the FFA mediators identified therein about Ms. Hall and in the case of the Montoyas (other South Sound clients), her supervisor, as well. The comments from the mediators about those who were lucky enough to at least have Ms. Hall make a referral exemplifies the same sort of excuses Ms. Hall and Ms. Marsh made on behalf of South Sound. They include: Ms. Hall is busy, she's overwhelmed, she blames the borrowers and contends that she made them aware of mediation sessions when she did not, etc.<sup>2</sup> *Id.*

On April 3, 2014, while Ms. Marsh was trying to save funding for South Sound, the DOC received a call from another borrower who reported that Ms. Hall had failed to appear at a scheduled mediation. CP 535. DOC records include communications from a mediation program beginning on June 26, 2013 that reports having continuous problems with

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<sup>2</sup> The Memo is a summary of some of the responses provided to the DOC. Ms. Huelsman advised the trial court that she was in possession of copies of the emails sent by the mediators from which the summary was derived and copies of all of those documents were produced to counsel for Defendant South Sound. No such request was made.

Diane Hall. Included in those emails is one from Ms. Hall who complains about being overwhelmed and makes clear that Ms. Marsh was well aware of her failures and the problems. CP 537-543. On February 25, 2014, another complaint was made to the DOC by a different mediator about Ms. Hall and the fact that she had “disappeared off the face of the earth” in several cases. CP 545-549.

Consistent with what South Sound did to the Timmermans, Ms. Hall and South Sound also caused another family to become ineligible for FFA mediation by not scheduling an appointment in time to make the referral in **October 2013**. CP 551-552. The DOC file contains another email from this same timeframe wherein Ms. Hall makes excuses for her refusal to do her job. CP 554-555. Finally, DOC records included a timeline for another homeowner who was being harmed by South Sound not fulfilling its obligations and includes Ms. Marsh, who is certainly aware of what is happening with Ms. Hall. CP 557-560.

By the time of the second MSJ hearing, the Klein and Marsh Declarations had no credibility whatsoever, and yet the trial court continued to rely upon them and to ignore entirely the false representations that had been made on behalf of South Sound. Nowhere in either of its motions for summary judgment did South Sound dispute the truthfulness or accuracy of the email communications between Mrs.

Timmerman and Ms. Hall, nor the fact that Diane Hall did respond to Mrs. Timmerman acknowledging that she was working on their file and asking for more information. CP 133. Similarly, it admitted it is not disputing that the Timmermans met with Ms. Hall. *Id.*

The provisions of the FFA require that as soon as the referral is made, the ability to proceed with the foreclosure is stayed while the mediation is open.

(16)(a) If a borrower has been referred to mediation before a notice of trustee sale has been recorded, a trustee may not record the notice of sale until the trustee receives the mediator's certification stating that the mediation has been completed. If the trustee does not receive the mediator's certification, the trustee may record the notice of sale after ten days from the date the certification to the trustee was due. If, after a notice of sale is recorded under this subsection (16)(a), the mediator subsequently issues a certification finding that the beneficiary violated the duty of good faith, the certification constitutes a basis for the borrower to enjoin the foreclosure.

**(16)(b) If a borrower has been referred to mediation after the notice of sale was recorded, the sale may not occur until the trustee receives the mediator's certification stating that the mediation has been completed.**

RCW 61.24.163(16)(a)-(b) (emphasis added). The timeline for the scheduling of the first FFA mediation under the statute is seventy (70) days. However, FFA mediations very seldom are ever completed within 70 days and can take many months to complete. CP 494-495. During the time that the mediation would have been open, no foreclosure on the

Chase mortgage could have occurred and the Timmermans could have potentially prevented foreclosure by Chase, and even by BECU separately. RCW 61.24.163(16)(b).

South Sound constantly tried to distract the trial court with the BECU second mortgage, contending that because BECU is not required to participate in FFA mediations, the Court must assume that its foreclosure would have been completed even if the Timmermans modified the Chase mortgage. However, that is pure conjecture and in fact, if Ms. Hall had done her job, she could also have assisted the Timmermans with negotiating with BECU. Ms. Hall was a **housing counselor**. Her job as a **housing counselor** was to assist homeowners with all manner of negotiations with mortgage companies, including negotiations with a credit union that had a second mortgage on a property with a loan modification pending on a first mortgage. Because the Chase first mortgage lien would have remained in place in the event of a foreclosure by BECU, there was no reason to believe that the Timmermans could not have negotiated with BECU if they had been able to get the first mortgage situation resolved. The Timmermans were denied the opportunity to try to resolve both of these mortgages and lost their home because Ms. Hall REFUSED to do her job, and she lied to and misled the Timmermans.

South Sound continued to employ Ms. Hall without any safeguards

for homeowners or anyone overseeing her “work” in order to prevent the loss of another home because of her refusal to adequately represent homeowners. The minimal actions taken by Ms. Marsh, when she knew that Ms. Hall was not performing her job, demonstrate quite clearly that South Sound made a conscious choice not to properly staff their offices, to take new cases and to continue to fail many homeowners. These actions by South Sound were intentional and resulted in the loss of the Timmermans’ home to foreclosure.

As a direct result of the actions of South Sound as described above, the Timmermans did not have an opportunity to try to save their home from foreclosure and eventually lost it. They were denied the additional time that the mediation process would have allowed and they lost the opportunity to explore other foreclosure avoidance options. CP 134. The Timmermans were denied these opportunities because South Sound allowed Ms. Hall to act entirely independent of any supervision or oversight, and allowed her to completely abrogate all of her responsibilities as a supposed housing counselor, to the detriment of the Timmermans and others.

The Timmermans also suffered out of pocket damages because they had to retain lawyers to assist with the eviction process and ultimately to seek legal counsel in order to determine what their rights are with

regard to the actions of South Sound. CP 134. They also suffered significant emotional distress due to the loss of their home and an opportunity to try to save it from foreclosure. They suffered sleepless nights, anxiety, headaches and other physical manifestations of their stress. They are entitled to relief accordingly for their claims and to compensate them for their damages. *Id.*

It was clear that there were genuine issues of material fact which precluded summary judgment at both hearings. There were significant relevant facts which South Sound refused to address, while simultaneously making misrepresentations to the trial court about Ms. Hall and its obligations as a housing counseling agency receiving funds from the DOC to assist homeowners such as the Timmermans. The Timmermans' claims were supported by uncontroverted testimony and documentation and raised genuine issues of material fact. Summary judgment should have been denied in both instances.

## **ARGUMENT**

**A. South Sound violated the Consumer Protection Act when Ms. Hall was permitted to engage in unfair and deceptive practices by refusing to timely make a referral to mediation for the Timmermans and other Washington homeowners.**

1. Deed of Trust Act Requirements for Referral to Mediation.

The Washington Deed of Trust Act was amended in 2011 to create

a foreclosure mediation process entitled the Foreclosure Fairness Act (“FFA”). RCW 61.24.163. FFA provisions are specific and contain hard and fast deadlines for referral. These include requirements that a borrower be referred to mediation once the Notice of Default is issued through to twenty (20) days following the recording of the Notice of Trustee’s Sale. RCW 61.24.163(1). Referral to mediation may only be made by an attorney or an approved housing counselor. RCW 61.24.163(1) & (2). South Sound falls within the definition of a “housing counselor” in the statute. RCW 61.24.005(9) because it is licensed with the Washington State Housing Finance Commission. CP 65-66; 149, 159-160.

The Timmermans were doing everything possible to avoid foreclosure and this is supported by Ms. Timmerman’s testimony and the contents of her emails. Timmerman Dec. Defendant South Sound cannot escape liability and responsibility for not doing what was promised to the Timmermans simply because BECU was also foreclosing. Ms. Timmerman was asking for help with that situation too and there were plenty of foreclosure avoidance options available to them, as noted on the DOC FFA Mediation webpage provided by the Defendant. CP 70-104.

2. Applying the Consumer Protection Act to the Timmermans’ Claims.

When analyzing CPA claims, a plaintiff must prove five elements:

“(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 their business or property; (5) causation.” *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, (1986). Consistent with long standing case law, there are genuine issues of material fact that prevent summary judgment here. *Sato v. Century 21*, 101 Wn.2d 599, 681 P.2d 242 (1984); *St. Paul Ins. Co. v. Updegrave*, 33 Wn.App. 653, 656 P.2d 1130 (1983); *Talmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979). Under the CPA, specific monetary damages are not necessary but a court is nevertheless required to award a prevailing plaintiff attorneys’ fees. *Mason v. Mortgage America*, 114 Wn.2d 842, 792 P.2d 142 (1990).

The Timmermans lost title to their home and an opportunity to prevent foreclosure in any number of ways, including a loan modification, short sale, deed in lieu, etc. They also lost the time that they would have had in the house during the mediation process without a foreclosure sale, and the foreclosure of the first position lien also deprived them of communicating with BECU about foreclosure prevention options with that entity. They had to pay an attorney to consult about their rights once the foreclosure occurred and they suffered injuries for which they need to be compensated, in addition to out of pocket damages. CP 133-134.

**a. Unfair and deceptive practices.**

The Supreme Court noted in *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) that CPA claims can be brought against defendants for acts that are “unfair or deceptive”, including in the context of a non-judicial foreclosure sale. *Klem* at 11. *Klem* went on to cite extensively to and discuss its decision in *Panag v. Farmers Ins. Co. of WA*, 166 Wn.2d 27, 48, 204 P.3d 885 (2009) to expressly clarify that a violation of the CPA may be brought because of a “. . . an act or practice that has the capacity to deceive the substantial portions of the public, or an unfair or deceptive practice not regulated by statute but in violation of public interest.” *Klem* at 16. In describing the “unfair or deceptive” standard, the Supreme Court quoted from this portion of *Panag*:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would have undertaken an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of the country.

*Klem*, at 16, citing to *Panag*, 166 Wn.2d at 48 (quoting *State v. Schwab*, 103 Wn.2d 542, 558, 693 P.2d 108 (1985) (Dore, J. dissenting) (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914))). The Court further noted that “an act or practice can be unfair without being

deceptive” and that the statute clearly allows claims for “unfair acts **or** deceptive acts or practices.” *Klem*, at 16-17. Citing to *Panag*, the *Walker* Court, another foreclosure case, also noted that Walker had valid claims even without a completed foreclosure because he had suffered harm:

In *Panag v. Farmers Insurance Co. of Washington*, our Supreme Court held, “[T]he injury requirement is met upon proof the plaintiff’s property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.” Investigative expenses, taking time off from work, travel expenses, and attorney fees are sufficient to establish injury under the CPA.

....

Because Walker pleads facts that, if proved, could satisfy all five elements, we conclude that the trial court erred by dismissing his CPA claim.

*Walker*, 176 Wn.App. 294, 309-10, citing to *Panag*, 166 Wn.2d at 53.

The **facts** in this case are different from those in *Klem* and *Panag*, case cited above because South Sound was not involved in the foreclosure sale, but are nevertheless analogous for purposes of analyzing claims brought under the CPA related to a foreclosure and proving the elements of such a claim.

**b. Occurring in trade or commerce.**

South Sound was in the business of providing housing counseling services at the time in question and thereafter, although it now contends that it is not doing FFA mediations any longer. CP 64-65, 148-149, 317-319. It is still listed as a housing counseling agency with the state of

Washington. CP 159-160. The complained of actions took place in the course of its provision of services as a housing counselor. “Trade” and “commerce” are defined under the CPA to include “the sale of assets or services, and **any commerce directly or indirectly affecting the people of the state of Washington.**” RCW 19.86.010(2) (emphasis added). The “commerce” in this case would include the provision of housing counseling services and participation in the FFA mediation program on behalf of homeowners. *See, Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987). The Washington Supreme Court has held that the “entrepreneurial aspects of the practice of law . . . fall within the sphere of “trade or commerce” under RCW 19.86 (.010)(2) and 19.86.020.” *Short v. Demopolis*, 103 Wn.2d 52, 66, 691 P.2d 163 (1984). This rule was also extended to the medical profession in *Quimby v. Fine*, 45 Wn. App. 175, 724 P.2d 403 (1986). Thus, an attorney can be subject to a CPA claim for “how the price of legal services is determined, billed, and collected and the ways a law firm obtains, retains and dismisses clients” and a doctor can violate the CPA by a lack of informed consent. *Id.* South Sound’s activities as a housing counseling agency are analogous and there is no Washington case law that carves out an exemption for an corporate entity simply because it has registered as a non-profit with the IRS. Municipal corporations and political subdivisions of the state are

exempt from the Act. *Washington Natural Gas Co. v. Public Utility District No. 1 of Snohomish County*, 77 Wn.2d 94, 459 P.2d 633 (1969), but that too does not apply to South Sound.

South Sound cited to *Ramos v. Arnold*, 141 Wn.App. 11, 169 P.3d 482 (2007) in support of their claims but maintain that it stands for the proposition that the Timmermans may only bring a claim for negligence against South Sound since they were not misled by marketing materials. This assertion flies in the face of the findings embodied in *Ramos* and the Supreme Court's discussion of how to determine CPA claims in *Panag*. South Sound contends that Ms. Hall simply did nothing more than "a poor job communicating with them". MSJ, 9:7-15, ignoring entirely that Ms. Hall refused to make the referral and that her actions and inaction are substantially more than not responding to her clients. The Timmermans were denied the opportunity to **try** to prevent foreclosure of their home because of Ms. Hall. Period. This is not a "miscommunication". It was an absolute refusal to do her job, just as she did to Ms. Walker and others, which caused the Timmermans and others to lose their homes to foreclosure.

**c. Public Interest Element.**

Proof of the public interest element may be proven through evidence of actual injury to others or a finding that it "had the capacity to

injure other persons” or “has the capacity to injure other persons”. RCW 19.86.093. Proof that South Sound’s practices has injured others and that those practices had injured others in the same time period of the Timmermans were waiting for a referral. The fact that South Sound will engage in similar actions or inactions in the future is evident in its continued licensing as a housing counselor and that it may resume FFA mediation referrals in the future, is demonstrated by its licensing and refusal to accept any responsibility for its actions in this instance. CP 132-134, 159-160, 494-495. RCW 19.86.093(3)(b) & (c) allow for proof of the public interest element by demonstrating that the complained of act “has” or “had” the “capacity” to injure other persons. The fact that South Sound is no longer doing FFA mediation work because the DOC will not it with funding does not change this analysis and in fact, the changes made to the CPA public interest element in 2009 were made precisely to do away with defendants’ ability to make these sorts of assertions – “we are no longer doing the bad act” – as a means of avoiding liability. *See*, RCW 19.86, *et seq.*; Legislative History.

**d. The Timmermans were damaged and injured by the actions of the Defendants.**

The Timmermans have testified about their out of pocket damages incurred as a result of the actions of South Sound, as well as the fact that

they lost their home, their ability to avoid foreclosure through various means and were suddenly faced with action to remove them from the property. CP 134.

**e. Causation**

The actions and inactions of Ms. Hall and South Sound in relation to the Timmermans' request to be placed in an FFA mediation were the direct cause of the completed foreclosure, without them being afforded the opportunity to participate in an FFA mediation. The Timmermans' were deprived of the opportunity to try to save their home from foreclosure through a loan modification and/or to engage in one of the other foreclosure avoidance options, as expressly provided for in the FFA. The Timmermans were required to have the referral made by a housing counselor or a lawyer (RCW 61.24.163(1)). They could not do it on their own. Mrs. Timmerman reached out to Ms. Hall who represented that she would make the referral in a timely fashion, as confirmed by the emails. This never happened and Ms. Hall never responded further to the Timmermans, only promising to void the foreclosure once she learned it had occurred. CP 132-134. Thus, it is Ms. Hall and South Sound who are responsible for the loss of the Timmermans' home to non-judicial foreclosure without the benefit of opportunities to avoid it.

**B. Defendant South Sound is entirely responsible for the actions of its employee, Diane Hall, as her actions and inactions were directly related to her job responsibilities.**

The Timmermans brought suit against the actor who caused the harm which they suffered – the loss of their home to foreclosure. South Sound’s assertions that somehow the loss of one’s home to a foreclosure which they believed was stopped does not support claims for emotional distress is outrageous. More importantly, South Sound’s attempt to avoid liability by blaming its employee – the employee over which there was apparently no supervision and who caused at least two families to lose their home to foreclosure when she refused to do her job – is not supported by any statutes or case law.

The first place to look regarding the doctrine of *respondeat superior* is in the Washington Pattern Jury Instructions. WPI 50.02 outlines the application of the doctrine:

An agent is acting within the scope of authority if the agent is performing duties that were expressly or impliedly assigned to the agent by the principal or that were expressly or impliedly required by the contract of employment.  
*[Likewise, an agent is acting within the scope of authority if the agent is engaged in the furtherance of the principal's interests.]*

WPI 50.02. The Notes include:

In *McGrail v. Department of Labor and Industries*, 190 Wash. 272, 67 P.2d 851 (1937), the court stated: The test for determining whether an employee is, at a given time, in the

course of his employment, is whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment or by the specific direction of his employer, or, as sometimes stated, whether he was engaged at the time in the furtherance of the employer's interests.

**The court on numerous occasions has quoted the *McGrail* statement with approval and applied the test of furtherance of the employer's interest.** See e.g., *Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814 (1986); *Bratton v. Calkins*, 73 Wn.App. 492, 870 P.2d 981 (1994).

**It is the general rule that a principal may be held liable for the tortious acts of the agent if such acts are done within the scope of employment, although the principal may not know or approve of them.** See *Titus v. Tacoma Smeltermen's Union Local No. 25*, 62 Wn.2d 461, 383 P.2d 504 (1963). **Whether acts are committed within the scope of employment is ordinarily a question for the jury.**

*Gilliam v. Department of Social and Health Services, Child Protective Services*, 89 Wn.App. 569, 950 P.2d 20 (1998) (citing WPI 50.02).

Vicarious liability does not extend to acts committed by an employee who is pursuing his or her own personal interests rather than the employer's, even if the acts were committed during the course of employment. See, e.g., *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997); *Thompson v. Everett Clinic*, 71 Wn.App. 548, 860 P.2d 1054 (1993).

**If an employee was acting outside the scope of employment, the employer may still be liable under theories other than vicarious liability, such as negligent supervision of employees.** See, e.g., *Thompson v. Everett Clinic*, supra; *Niece v. Elmview Group Home*, supra.

WPI 50.02 (emphasis added).

Notably, South Sound does not cite to one single Washington state

case on this subject, which governs this issue. Instead its citations to orders from a federal judge in the Central District of Illinois and an Oregon judge are irrelevant to this Court's analysis.

**C. Genuine issues of material fact precluded dismissal of the intentional infliction of emotional distress claims.**

In order to prove intentional infliction of emotional distress, also known as the tort of outrage, a plaintiff must show that there was (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192, 196, 66 P.3d 630 (2003). Conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community” will constitute intentional infliction of emotional distress. *Id.* (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)), (quoting *Restatement (Second) of Torts* §46 cmt. d); *see also, Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998); *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989); *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987).

Although the factual basis for the Court's finding in *Kloepfel* differs from those alleged herein (Ms. Kloepfel was stalked by a former

roommate), the trial court's award of \$60,000.00 for emotional distress damages is illustrative. Following a careful analysis of the history of the torts of intentional and negligent infliction of emotional distress, the *Kloepfel* Court noted that,

[T]he difference in focus in these cases is based upon the intent behind the defendants' acts. "The distinction between negligence and intentional torts is related to the difference in fault. Society through its courts has a "definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm or was morally wrong." *Prosser and Keaton on the Law of Torts* § 8 at 37 (W. Page Keeton, et al. eds., 5<sup>th</sup> ed. 1984).

*Kloepfel*, 149 Wn.2d at 200. Emotional distress symptomatology is defined in the *Restatement of Torts* as including "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea." It is distress that "no reasonable man could be expected to endure." *Kloepfel* at 200. Here, the stress to the Timmermans of losing their home is objectively sufficient to support their assertions of distress.

Defendants cited to *Womack v. Von Rardon*, 133 Wash.App. 254, 135 P.3d 542 (2006) in support of their position, asserting that the killing of a cat is somehow analogous to the loss of the Timmermans' home. While the horrific circumstances of the cat killing are just that, it is NOT the same as the loss of a home and/or the opportunity to prevent the loss of their home. Further, the Timmermans lost a chance to save their home

from foreclosure because Ms. Hall did not do anything! She did not refer them to an FFA mediation to stop the Chase foreclosure, and she did not contact BECU to discuss foreclosure prevention options – something which is the job of a housing counselor. CP 318-319, 362-371. The Timmermans agreed with South Sound that other Washington case law holds that the determination as to whether the conduct is so outrageous would ordinarily be a question for a trier of fact. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002). “The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.” *Dicomes v. State*, 113 Wash.2d 612, 782 P.2d 1002 (1989), *citing*, *Phillips v. Hardwick*, 29 Wash.App. 382, 387, 628 P.2d 506 (1981). To pass this bar, the conduct must be: “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Dicomes*, at 630, *quoting*, *Grimsby*, at 59.

Ms. Hall’s conduct, which was effectively endorsed and ratified by her employer, South Sound, was sufficiently outrageous and atrocious in degree that it is beyond all possible bounds of decency. Ms. Hall was charged with helping people save their homes from foreclosure and she

did anything BUT help them and instead, caused the Timmermans and others to lose their homes and any chance at saving them from foreclosure.

South Sound's continued disingenuous attempts to deflect from its own behavior by referring to the BECU foreclosure completely ignores the fact that it was only started right before the scheduled sale on the first mortgage, the Timmermans could have resolved their situation with BECU either on their own or with assistance from Ms. Hall – the **housing counselor**. But just as with the FFA mediation, Ms. Hall did nothing. - absolutely nothing. The Timmermans relied upon her to prevent the foreclosure by asking for the mediation. She refused to do so and that inaction was the cause of the loss of the Timmermans' home to foreclosure.

The records of the DOC make clear that South Sound and Ms. Marsh KNEW that Ms. Hall was not doing her job and that homeowners were being harmed as a result. South Sound KNEW that Ms. Hall did not meet deadlines, did not attend mediations, was not making timely referrals, among other things, and still, its first concern in actions not taken until **February 2014** was to have billing done correctly, while applauding Ms. Hall's work. CP 576-578; CP 494-495. South Sound is completely responsible for the loss of the Timmermans' home and the injuries they have suffered as a result.

In light of the genuine issues of material fact permeate this case and the trial court should have denied summary judgment in both instances.

### CONCLUSION

Genuine issues of material fact remained unresolved at the time that the Orders were entered and precluded summary judgment. The Timmermans request that this matter must be remanded to the trial court for resolution of these genuine issues of material fact.

DATED this Friday, June 8, 2018.

LAW OFFICES OF MELISSA A. HUELSMAN, P.S.

A handwritten signature in black ink that reads "Melissa A. Huelsman". The signature is written in a cursive style and is positioned above a horizontal line.

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**CERTIFICATE OF SERVICE**

I, Tony Dondero, declare under penalty of perjury as follows:

1. I am over the age of eighteen years, a citizen of the United States, not a party herein, and am competent to testify to the facts set forth in this Declaration.

2. That on Friday, June 8, 2018, I caused the foregoing document attached to this Certificate of Service plus any supporting documents, declarations and exhibits to be served upon the following individuals via the methods outlined below:

Michael B. Tierney, WSBA #13662 Paul Correa, WSBA #48312 Tierney & Correa, P.C. 719 Second Ave., Suite 701 Seattle, WA 98104 Attorney for South Sound Outreach Services Tel: 206-232-3074 Fax: 206-232-3076 <a href="mailto:tierney@tierneylaw.com">tierney@tierneylaw.com</a> <a href="mailto:correa@tierneylaw.com">correa@tierneylaw.com</a>	<input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Federal Express
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is both true and correct.

Dated this Friday, June 8, 2018, at Seattle, Washington.



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Tony Dondero, Paralegal

**LAW OFFICES OF MELISSA HUELSMAN**

**June 08, 2018 - 10:49 AM**

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