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

**MICHAEL and JUNE TIMMERMAN,
Appellants,**

v.

**SOUTH SOUND OUTREACH SERVICES, a non-profit organization,
Respondents.**

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellants Michael and June Timmerman sued non-profit South Sound Outreach Services (“SSOS”) after losing their house to foreclosure. They alleged that after asking SSOS for help, the services provided by SSOS were defective, depriving them of a chance to avoid foreclosure. They asserted claims for violation of the Consumer Protection Act and for outrage. The trial court granted summary judgment against the Timmermans’ CPA claim because it was essentially a claim of ordinary negligence in the delivery of services for which the CPA provides no remedy. Moreover, their claim is of a private concern -- not a public concern -- and is thus beyond the scope of the CPA. The Timmermans’ claim for outrage was disposed of on a second summary judgment motion. The outrage claim failed because allegations of essentially negligent conduct do not satisfy the requirement of intentional or reckless conduct directed at the plaintiff, nor is the alleged conduct sufficient to shock the conscience. This Court should affirm these sound rulings.

The parties’ involvement with one another began with an email that June Timmerman sent to Diane Hall, a foreclosure counselor at SSOS, in October 2013. Timmerman’s email said that she had met Hall when she accompanied her sister, Deborah Bood, to a meeting at SSOS. Hall had helped June’s sister avoid foreclosure. Now, June said, JP Morgan Chase

had sent the Timmermans a notice of trustee sale and they needed the same type of help. Hall responded to Timmerman's email and asked for the address of the property and said she would get back in touch. However, the Timmermans never completed the intake process to formally become clients of SSOS. There is no further email between June Timmerman and Diane Hall until January 2014.

Hall did not refer the Timmerman's case into the state foreclosure mediation program, created by RCW 61.24.163. Under this law, Chase would have been required to participate in a timely-noticed mediation and this might have helped the Timmermans attempt to avoid foreclosure. Emphasis should be placed on the word "attempt" because, as the Timmermans admitted in their Complaint, there was no guarantee that a mediation would enable them to avoid foreclosure. They produced no evidence that they had income or the wherewithal to negotiate in a mediation. Moreover, after Chase issued its notice of trustee's sale, a separate trustee's sale was initiated by Boeing Credit Union ("BECU"), which held second and third-position loans secured by the Timmerman property. BECU was exempt from the statutory mediation requirement. Thus, in addition to being unable to satisfy the requirements to bring a claim under the CPA, or to show outrageous conduct intentionally or recklessly directed at them, the Timmermans could not show causation.

II. RESTATEMENT OF THE ISSUES

1. The trial court properly granted the SSOS motion for summary judgment dismissing the Timmermans' Consumer Protection Act claim as a matter of law because (1) the claims did not implicate the definition of commerce for purposes of the CPA, but instead sounded in negligence, and (2) the controversy involved a private claim that did not impact the public interest.

2. The trial court properly granted the SSOS motion for summary judgment dismissing the Timmermans' outrage claim as a matter of law because there was no evidence of outrageous conduct directed at the Timmermans.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR¹

1. Washington authority holds that the CPA does not apply to negligence claims arising from the performance of a service. The Timmermans complained that Diane Hall failed to refer their foreclosure to mediation, which was the service she was supposed to provide as a housing counselor, and that SSOS failed to supervise Hall, its employee. Did the trial court properly hold that no claim arose under the CPA?

2. A claim under the CPA requires proof of causation and damages.

¹ Appellants did not identify specific issues pertaining to their assignments of error as required by RAP 10.3, but the issues listed here are responsive to their arguments or reflect the issues related to the trial court's decision.

The Timmermans admit that even if SSOS had referred their matter to foreclosure mediation, this provided no guarantee that they could avoid the two non-judicial disclosures that had been initiated. Was summary judgment on the CPA claim appropriate because the Timmermans could not establish causation or damages?

3. A claim for outrage requires proof of intentional or reckless conduct directed at the plaintiff. Was summary judgment on the outrage claim appropriate because the Timmermans lacked evidence that SSOS or Diane Hall intentionally or recklessly directed conduct towards them?

4. A claim for outrage requires proof of extreme conduct that shocks the conscience. Was summary judgment on the outrage claim appropriate because the Timmermans complained only of the negligent failure to deliver services?

5. A claim for outrage requires evidence of damages and causation, but generally does not extend to mere economic damages. The Timmermans complained of emotional upset related to an economic injury and admit that there was never a guarantee that they could avoid the economic injury. Was summary judgment on the outrage claim appropriate because they because the Timmermans could not establish causation or damages?

6. A claim of outrage requires evidence of severe emotional upset that no person could endure. Was summary judgment against the Outrage claim appropriate where the Timmermans failed to produce evidence of such injury?

7. Claims under the CPA and for outrage require the plaintiff to prove causation. Given that the Timmermans admitted that mediation in no way guaranteed that they could keep their home and that the second-position mortgager had noticed a trustee sale not subject to mediation, is lack of causation an independent reason to affirm the trial court's rulings?

IV. RESTATEMENT OF THE CASE

A. In around 2012, SSOS adds foreclosure mediation referral and counseling to the body of services it provides to the public and employs three housing counselors who are supervised by executive director Roberta Marsh.

SSOS is a non-profit agency established in 1996, serving the greater Tacoma area and Pierce County. Each year, SSOS provides thousands of low-income individuals with access to financial counseling, employment coaching, and assistance in obtaining medical and disability benefits, utility assistance, housing, and tax preparation. CP 64, 586-591. Roberta Marsh was the Executive Director of SSOS during the relevant time of 2013-2014. CP 575.

In 2011, Washington enacted the Foreclosure Fairness Act, RCW

61.24.163 (“FFA”). The Act created a foreclosure mediation program overseen by Department of Commerce (“DOC”) and executed through partnerships with Dispute Resolution Centers, mediators, attorneys (private and legal aid), and housing professionals. CP 74. Certain small banks or credit unions are exempt from the Act and are not required to participate in the mediation program. CP 105-113. A borrower may be referred to the program by an attorney or a housing counselor. CP 79. Participation in the foreclosure mediation program does not guarantee that a participant will avoid foreclosure. CP 79-80. The Timmermans state in their pleadings:

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 . . .

CP 5.

SSOS had long provided housing counseling to its clients, and during 2012, it was a participating non-profit agency in the foreclosure mediation program, providing counselors who could refer a foreclosure to the mediation program. CP 573. Marsh supervised three counselors, including Diane Hall. *Id.* SSOS no longer participates in the state foreclosure mediation program. *Id.*

In around 2013, Marsh became aware of complaints about Diane

Hall's work, and that individuals at DOC were concerned with her performance. However, there was also praise for her work, and Marsh had observed Hall to be a knowledgeable and skilled counselor. CP 575-583. One of the people who had lauded Diane Hall was Debbie Bood, June Timmerman's sister. Bood wrote a letter of support for Hall to the DOC, that concluded:

I can undoubtedly say that without Diane's persistence and knowledge in the foreclosure laws/guidelines, I would have lost my home. I cannot thank her enough for all that she's done for me.

CP 605. In response to the complaints, Marsh met with Hall to work on improving response times to clients and managing her case load. She felt that Hall was sincere in her desire and commitment to improving in this area. CP 577. She believed that Hall was an excellent housing counselor with a deep passion for helping people through the foreclosure counseling program and was an expert in the technical aspects of the foreclosure process. CP 576. Diane Hall is no longer employed at South Sound Outreach Services. CP 67.

B. In 2013, after being discharged from bankruptcy, the Timmermans file for bankruptcy, and after final discharge, default on the first, second, and third mortgages secured by their house.

In 2013, the Timmerman's home was subject to a first mortgage held by JP Morgan Chase ("Chase"), as well as a second and third

mortgage, held by Boeing Employee's Credit Union ("BECU"). CP 1 at ¶ 2.1 – 2.2. On March 14, 2013, Chase sent a Notice of Default indicating that the Timmermans had fallen behind on their mortgage payments in an amount over \$10,000 and stating that if they did nothing, the property would be sold. CP 37. On May 20, 2013, the Timmermans filed for bankruptcy under Chapter 7. CP 30. The bankruptcy petition shows that the Timmermans were being sued by BECU with trial scheduled for March 2014. CP 39-45. They were also being sued by Midland Funding, with a summary judgment motion hearing set for April 2013. The Timmermans claimed to have suffered significant gambling losses. CP 42. The Timmermans owed Chase \$108,119.50. CP 40. They owed BECU \$38,600.99 on the second mortgage, and \$74,667.00 on the third mortgage. *Id.* The stated value of the home on the bankruptcy schedule was \$224,413. *Id.*

After the final order of bankruptcy discharge in July 2013, the Timmermans deliberately defaulted on their BECU loans, purportedly on the advice of counsel. CP 56. They also remained in default on their first mortgage, and Chase sent them a Notice of Trustee Sale dated September 24, 2013. CP 46-53. The Chase trustee sale was scheduled for January 31, 2014. The amount needed to reinstate their loan on the date of the notice was \$17,338.37. CP 52.

The Timmermans also received a notice of Trustee Sale from BECU, which they mentioned to SSOS in a January 2014 email. CP 56. BECU is exempt from the FFA and cannot be compelled to participate in a foreclosure mediation. CP 66. If BECU followed the statutory process for non-judicial foreclosure, the Timmermans would have received a notice of default much earlier than January 2014, and very likely received a notice of trustee's sale long before the January email to SSOS. See RCW 61.24.031. The exact dates remain unknown because the Timmermans refused to produce documents related to the BECU foreclosure. CP 252-261.

C. Facing foreclosure, June Timmerman accompanies her sister to a meeting at SSOS and sends an email to Diane Hall a short time before the mediation referral deadline, but never formally completes the intake process at SSOS or other necessary steps.

To become a client of SSOS in the foreclosure mediation program, there was a short list of things a prospective client needed to do. They were:

a. Apply. Clients were typically instructed to download the SSOS application from the internet, complete it, and bring it in personally to SSOS. CP 573.

b. Meet. Clients were required to make an appointment for an initial intake meeting, and then meet with a housing counselor to go over

paperwork and understand the process and schedule a group information session. *Id.*

c. Consent. Clients were required to sign consent forms that authorized South Sound Outreach Services to obtain information from their lending institutions. *Id.*

d. Pay. A small initial fee was charged to the clients when they were on-boarded and initiated the process of a foreclosure mediation. The small fee was authorized by statute. *Id.*

e. Provide Documents. One of the biggest hurdles the housing counselors faced was obtaining documents from the clients. A complete packet of documents was required to be sent to the lending institution or its representative and the mediator. The biggest source of complaints, delays, and continuations came from incomplete document packets. *Id.*

f. Attend a group informational meeting. Meetings were held once or twice a week. In that meeting, SSOS emphasized to the clients that it could not do everything for them, but could partner with them to try to get the best result. *Id.*

The Timmermans did not follow this process. CP 66. In their Opening Brief, the Timmermans inaccurately say that they “emailed Diane Hall at South Sound when they made their first appointment.” Opening Brief (“OB”) 7. There is no record that the Timmermans ever made an

appointment to meet Diane Hall. Rather, June Timmerman accompanied her sister Debbie Bood, who attended a meeting at SSOS to deal with her own foreclosure problem. Thereafter, on October 3, 2013, June Timmerman sent an email to Diane Hall stating:

Hi Diane,
My name is June Timmerman and I met you at a meeting I attended with my sister, Debbie Bood. We have received our foreclosure notice with the sale date of January 31, 2014. I am in my 20 day response period to request a mediation. I believe the 20th day will be OCTOBER 9, 2013. PLEASE call and/or email me with what you need from me. I called a couple of times (was unable to leave a message as voicemail was full) but I was able to leave a voice message on the voicemail yesterday. Please Advise Thank you so much – as we have every intention of keeping our house, if possible. I look forward to hearing from you,
June

CP 54-59. Diane Hall responded, stating:

I am sorry that you have not been able to reach me. I can make the referral but could you please provide the property address so I can look up the Notice in the public records. I will follow up with you hopefully tomorrow. Thanks.

Id. There is no email showing that the Timmermans provided the property address to Diane Hall within the short time left to refer the case to mediation. There is no record of any further email communication for the remainder of 2013.

Moreover, SSOS has no record showing that the Timmermans followed the process to enroll as clients. CP 66. Jeffrey Klein, the present

executive director for SSOS, states:

Sound Outreach does not deny that the Timmermans met with Diane Hall, but it has no records to verify any of the Timmermans' other allegations. No file was opened or created related to the two trustees sales of the Timmerman property and no contract agreement was created that Sound Outreach has record of. Also, we are required by law to keep client records for seven years, and have hard copy files of hundreds of clients that we helped through foreclosure counseling. The fact that we do not have Timmerman on file tells me that we never opened a file because BECU was exempt. That is my assumption. We searched through every file twice.

CP 66.

D. In 2014, June Timmerman sends an email to Diane Hall stating that she has not heard from her and mentioning that BECU, which is exempt from mediation, has also noticed a trustee sale. The Chase trustee sale goes forward, and BECU, the second-position lienholder, purchases the property.

In her next email, on January 15, 2014, June Timmerman noted that she had not heard back from Diane Hall during the six months that had passed from her October 2013 email. She said:

Hi Diane,
I haven't heard back from you, but my sister, Debbie Bood, said you were really efficient, so I haven't worried about it. However, my sale dates is 1/31/14 and I haven't heard or received anything regarding the mediation. Could you please let me know that everything is still ok??
Thank you,
June

CP 55. There is no response email from Diane Hall or any other means to verify that the email was sent and received. *Id.* The Timmermans claim

that between the October 2013 and January 2014 emails, they called Diane Hall and she told them she was too busy to deal with anything other than emergencies. OB 7. They also claim that they called SSOS and spoke to a different employee who did not have access to Hall's files, but assured them their matter was being handled. *Id.*

On January 31, 2014, June Timmerman sent an email stating:

Hi Diane,
I'm sorry to bother you as I know you're extremely busy but you requested a mediation for us in October and I haven't heard anything from the mediator or anybody so I'm getting a bit concerned as my sale date is scheduled for Friday. Please let me know that everything is ok and that my house will not be sold on Friday!!
Also, my 2d mortgage (BECU) has also started foreclosure and placed a sale date on our house in May 2014. We filed a bankruptcy and it was discharged in July of 2013. We hadn't made any payments on the 2d mortgage as our attorney said to wait until we find out what's going on with our 1st mortgage. So, we're in a big mess!! Could you please request a mediation for this one as well as it is our intention to keep our house.
THANK YOU!!!
June

CP 56.

The Chase foreclosure sale went forward in January 2014 and the property was purchased by the second and third position lienholder,

BECU. CP 58.

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E. The Timmermans' lawsuit against SSOS for violations of the CPA and for outrage is resolved in two summary judgment motions, primarily because their claims sound in negligence and fail as a matter of law.

The Timmermans sued SSOS under the Washington Consumer Protection Act, RCW 19.86, and for the intentional tort of outrage. The court entered summary judgment dismissing the CPA claim on April 28, 2017. CP 227-28. Explaining its ruling in open court, it said:

I do not think this meets the requirements of the Consumer Protection Act, even with every fact going the plaintiff's way. I don't believe it meets the definition of commerce, or that it impacts the public interest. It is -- in my opinion, perhaps wrong -- a private claim, and it honestly feels like a negligence claim.

RP P:10, LL:8-18.

On September 1, 2017, SSOS filed a motion for summary judgment against the Timmermans' sole remaining claim for outrage, which the court granted after oral argument. CP 625-26, 692-95. The court found that the actions alleged, which it had indicated seemed like allegations of negligence, did not rise to the level of extreme conduct that shocked the conscience.

V. ARGUMENT

A. Standard of review.

An appellate court reviews a trial court's grant of summary judgment de novo. Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030

(1982); Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998).

When reviewing a summary judgment order, the appellate court engages in the same inquiry as the trial court and only considers the evidence and issues raised below. Wash. Federation of State Employees v. Office of Financial Mgt., 121 Wn.2d 152, 157 (1993). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

B. The trial court properly granted summary judgment against the Timmermans' CPA claim because it sounded in negligence and was private in nature.

The Supreme Court of Washington has enunciated a 5-part test that a private citizen must satisfy in order to prevail in an action under the Consumer Protection Act. Under this test, a private citizen must show (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) which causes injury to the party in his business or property, and (5) which injury is causally linked to the unfair or deceptive act. The plaintiff "must make a prima facie showing of all five elements in order to survive summary judgment," and failure to satisfy one of the elements is fatal to the claim. Brown ex rel. Richards v. Brown, 157 Wn. App. 803, 815 (2010).

SSOSs asked for summary judgment against the Timmermans' CPA claim because: (1) SSOS did not market the foreclosure mediation program in "trade" or "commerce," (2) SSOS should be exempt from the CPA because it was implementing a program created by federal and state statute and overseen by the State Department of Commerce, rather than engaging in trade, (3) the Timmermans' claim was private, (4) the Timmermans admitted that the mediation program did not guarantee that they could keep their home, and they could not establish causation. CP 21-27. The trial court granted the motion because it found (1) the claims did not implicate the definition of commerce for purposes of the CPA, but sounded in negligence, and (2) the controversy involved a private claim that did not impact the public interest. RP P:10, LL:8-18.

1. Summary judgment was appropriate because the Timmermans complained only of negligence.

The Supreme Court of Washington has held that "claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act." Ramos v. Arnold, 141 Wn. App. 11, 20, 169 P.3d 482 (2007). The Timmermans claim is directed at the competence of Diane Hall and SSOS. They alleged: "Defendant South Sound did not adhere to its duties to the Timmermans and did not perform any of the services that they agreed to

perform for the Timmermans.” CP 6 at 3.2. Specifically, the Timmermans complain that Diane Hall was too busy to talk to them on the phone, gave them a false assurance that she was handling their case, and did not refer their foreclosure into the state foreclosure mediation program. OB 1, 7-8. The Timmermans did not separately allege a negligent supervision claim, but alleged that SSOS did not properly supervise Hall. OB 13-14, CP 7 at 3.3.

The trial court properly granted summary judgment because the CPA applies only to the entrepreneurial side of a professional service business, and not to the provision of services. “The term ‘trade’ as used by the Consumer Protection Act includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided.” Ramos, 141 Wn. App. at 20, citing Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 169, 744 P.2d 1032 (1987). The Supreme Court of Washington has repeatedly drawn a distinction between marketing services and the actual delivery of services. Thus, for example, in Ramos, the homebuyers sued their pre-purchase home appraiser, Arnold, alleging that he violated the CPA by failing to include major defects in his appraisal report. 141 Wn. App. at 20. Rejecting this theory, and affirming summary judgment, the Supreme Court of Washington explained:

Claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act. The Ramoses' complaint is targeted at the alleged inadequacy of the actual appraisal rather than the entrepreneurial aspect of Arnold's business. Since this claim amounts to an allegation of negligence, the trial court properly dismissed the Consumer Protection Act claim on summary judgment.

Id. at 20 - 21. Similarly, in Michael v. Mosquera-Lacey, a dental surgeon performing bone graft used an anesthetic that the patient was allergic to, and also used cow bone, which the patient had emphatically stated she did not want used for a graft. 165 Wn.2d 595, 600–01, 200 P.3d 695 (2009). The patient sued for battery, negligence and CPA violations. Reversing the Court of Appeals and dismissing the CPA claim, the Supreme Court of Washington found that:

Michael failed to show that Dr. Mosquera-Lacy's use of cow bone is entrepreneurial. It does not relate to billing or obtaining and retaining patients. It simply relates to Dr. Mosquera-Lacy's judgment and treatment of a patient.

165 Wn.2d at 604.

All of the things that the Timmermans complained about concern the performance of professional services, and none of them concern the marketing or sale of services in trade or commerce. The Timmermans never identified any misleading marketing or entrepreneurial activity undertaken by SSOS, but alleged only the negligent delivery of services.

CP 6. On appeal, the Timmermans continue to focus on a failure to competently deliver services, stating that: “The complained of actions took place in the course of its provision of services as a housing counselor.”

OB 23.

Just as in Ramos and Michael, the trial court properly found that this allegation sounds in negligence and does not implicate the CPA. The trial court did not need to decide facts against the Timmermans to properly reach this decision. It explained its reasoning this way:

I do not think this meets the requirements of the Consumer Protection Act, even with every fact going the plaintiff's way. I don't believe it meets the definition of commerce, or that it impacts the public interest. It is -- in my opinion, perhaps wrong -- a private claim, and it honestly feels like a negligence claim.

RP P:10, LL:8-18. Ample precedent supports this ruling, and this Court should affirm it.

2. Because the Timmermans' claim is a private matter, and of no public concern, it does not implicate the CPA.

Although more is not needed, the trial court's entry of summary judgment was also proper because the Timmermans sought relief for their private economic loss and could not identify any continuing public interest. “In order to prevail in a private action under the CPA, the plaintiff must show that the challenged acts or practices affect the public interest.” Dix v. Ict Group, Inc., 160 Wn.2d 826, 161 P.3d 1016 (2007).

The Supreme Court of Washington has said that “[o]rdinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest, . . . it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes the factual pattern from a private dispute to one that affects the public interest.” Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 790-91, 719 P.2d 531 (citations omitted).

In this case, the Timmermans could not establish that the public faced a threat of a recurrence of the conduct that they complained of because SSOS no longer employs Diane Hall, nor does it participate in the Foreclosure Mediation Program. CP 67, OB 25. The trial court stated that the public interest element was not satisfied “because of the fact that this is an individual person who is no longer there.” RP 12. The court added: “And it just doesn’t -- to me, it doesn’t seem like a Consumer Protection Act violation . . . as a matter of law.” *Id.*

Both in their response to the motion and at oral argument, counsel for the Timmermans correctly argued that under RCW 19.86.093(3), the public interest prong may be established in any of three ways: if the conduct (a) injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons. The language in this prong of the statute is in the disjunctive—thus, a plaintiff can satisfy

this element if they establish any of the three scenarios. The Timmermans argued that Diane Hall had harmed “at least one other person” through her handling of a foreclosure mediation in the past, thus satisfying RCW 19.86.093(3)(a). CP 128. However, the Timmermans did not offer competent evidence to support that argument. They offered only the hearsay declaration of their own counsel, Melissa Huelsman. CP 148-49. Ms. Huelsman stated that Diane Hall’s actions had “caused” a different client of hers to lose her home to foreclosure and that other witnesses and documents contained statements to that point. *Id.* SSOS moved to strike the Huelsman declaration because it was entirely hearsay and because it improperly put Ms. Hueslman into the role of a material witness in violation of RPC 3.7. CP 197 - 201. Because the Hueslman Declaration was not competent evidence, the trial court could not rely on it in deciding the motion for summary judgment. King County Fire Prot. Dist. No. 16 v. Hous. Auth., 123 Wn.2d 819, 826, 872 P.2d 516 (1994). The trial court did not rule on the motion to strike the Huelsman Declaration.

Ultimately, the information in the Huelsman Declaration did not change the trial court’s analysis. It found that, taking all facts in a light most favorable to the Timmermans, the matter was a private one, flowing from allegations of negligence in the delivery of a service. RP P:10, LL:8-18. Because a CPA plaintiff must establish all five of the elements of that

claim, and the Timmermans could not, the trial court correctly ordered summary judgment. CP 227. A plaintiff “must make a prima facie showing of all five elements in order to survive summary judgment,” Brown ex rel. Richards, 157 Wn. App. at 815. Here, even if the Timmermans had established that SSOS failed to properly deliver its free services to them—and to other individuals—this would not have saved their claim from summary judgment because “claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act.” Ramos, 141 Wn. App. at 20.

Even after the CPA claim had been dismissed, the Timmermans attempted to revive it by resubmitting their argument during the subsequent motion for summary judgment regarding the outrage claim. That motion was filed on September 1, 2017. CP 234-242; CP 301-316. There, Ms. Huelsman offered a second declaration, again containing hearsay, and again attempting to show that Diane Hall had negligently handled other matters. CP 494-496. The documents attached to the declaration showed that DOC had received a number of complaints about Hall and had sent out an email that was designed to solicit negative comments from those who had worked with her. CP 498 – 560, 575-581. SSOS moved to strike that declaration under ER 802 and 902, but the

court denied its motion. CP 623.

To rebut Huelsman's declaration, SSOS submitted the declaration of Roberta Marsh, the executive director of SSOS during the relevant time. Marsh described how she had responded to the DOC's questions and complaints about Hall and had personally undertaken efforts to supervise and support Hall, who carried a heavy load of cases. CP 573 – 605. Her declaration was supported by emails and statements from customers and other professionals expressing support for Hall and praising her skill and ability. CP 592-605. These positive reports, attached to Marsh's declaration, were consistent with her experience with Hall. *Id.* She stated:

Hall had deep strengths and expressed a willingness to work on her weaknesses. I had no reason to believe that Hall presented a risk to any of our clients. Quite to the contrary, as I stated to DOC, if my house was in foreclosure, I would have wanted Diane to be my counselor.

CP 577. One of the emails in support of Hall was from June Timmerman's sister, who wrote a testimonial praising Hall and crediting her with helping save her home. CP 581, 605.

Marsh further testified that the documents and declarations before the trial court made it clear to her that the Timmermans had never taken the steps needed to become clients of SSOS:

SSOS emphasized to any prospective client that we could partner with them, but that they bore the responsibility to

be engaged and proactive or we could not help them. The Timmermans simply did not do this. It was not enough for them to sit in on a meeting that was held for Deborah Bood—June’s sister—and then make a phone call or send one email. That did not suffice to make them our client or initiate any process. The Timmermans were never the client of South Sound Outreach Services.

CP 577 - 578. Marsh observed that “[t]he big difference between Deborah Bood and June Timmerman, is that Bood scheduled an intake meeting and became a client and provided the forms that allowed South Sound to go to work for her and keep track of her case, whereas Timmerman did not.”

CP 581.

The trial court’s ruling should be affirmed because the Timmermans did not produce competent evidence to satisfy the public interest prong. At best, they illustrated the fact that SSOS housing counselors had challenging case loads and were imperfect, but that when clients worked with them, they were able to reach successful outcomes together. Many members of the public, June Timmermans’ sister among them, benefitted from the foreclosure counseling provided by SSOS. Many professionals who worked with Diane Hall thought highly of her. Others did not. This is not the stuff of a CPA claim.

The trial court properly found that the Timmermans complaint concerned how SSOS delivered services to them and to others, as opposed to alleging that SSOS engaged in deceptive trade practices within the

realm of the CPA. The trial court was correct in stating that the Timmermans' allegations did not amount to a Consumer Protection Act violation, as a matter of law, and that ruling should be affirmed. RP 12.

C. The Timmermans cannot establish a claim for outrage because there was no outrageous conduct intentionally or recklessly directed at them or the requisite type of damages.

To prove an outrage claim, the Timmermans were required to produce evidence proving that: 1) SSOS engaged in extreme and outrageous conduct, 2) SSOS intentionally or recklessly inflicted emotional distress on them, and, (3) it actually resulted in severe emotional distress to each of them. Kloepfel v. Bokor, 149 Wn.2d 192, 195–96, 66 P.3d 630 (2003); see also Grimsby v. Samson, 85 Wn.2d 52, 60, 530 P.2d 291 (1975); Restatement (Second) of Torts § 46 (1965). The trial court properly entered summary judgment against the Timmermans' claim because they did not allege or produce evidence of anything that would show that SSOS intentionally or recklessly caused them to suffer severe emotional distress.

1. There was no evidence of intentionality or recklessness supporting an outrage claim.

The tort of intentional infliction of emotional distress differs from that of negligent infliction of emotional distress in that it may exist without evidence of physical symptoms. However, the threshold is higher

in many important ways. First, there must be evidence of intentionality. The infamous case of Womack v. Von Rardon, illustrates this concept. 133 Wn.App. 254, 135 P.3d 542 (2006). In that case, three juveniles took a cat from the plaintiff's front porch to a nearby school and, using gasoline, set the cat on fire. The cat had to be euthanized. On appeal from summary judgment against the plaintiff, Division Three of this Court held that, although the conduct was deplorable, the record did not sufficiently establish the required intent directed at the pet owner to support the intentional tort of outrage. 133 Wn.App. at 257. The court explained that "[t]he summary judgment required Ms. Womack to establish she suffered severe emotional distress and the defendants intended, rather than negligently brought about, that distress." *Id.*

Like the claim in Womack, in this case, the Timmermans' outrage claim against SSOS failed because they could not show that SSOS's conduct was directed at them. The Timmerman's citation to Kloepful is unhelpful to their argument, as the court there also emphasized the element of intent: "The difference in focus in these cases is based upon the intent behind the defendants' acts." Kloepful v. Bokor, 149 W.2d 192, 196, 66 P.3d 630 (2003). On summary judgment, the Timmermans produced no evidence showing that SSOS or Diane Hall intended to cause

them harm or recklessly engaged in conduct directed towards them.² To the contrary, the declarations of former executive director Roberta Marsh and of executive director Jeffrey Klein stood uncontroverted, negating such intentionality. Ms. Marsh stated that she met with SSOS's three housing counselors every week to review their cases and discuss processes. CP 575. However, the Timmermans did not take the steps necessary to allow SSOS to "intake" their foreclosure matter and to enable Ms. Marsh to oversee the progress of their case. CP 577 - 579. Mr. Klein, the present executive director, testified that SSOS searched through every file twice, and found no record of any file opened up for the Timmermans. CP 66. This evidence did not support a finding that SSOS had intentionally or recklessly engaged in conduct directed at the Timmermans, but showed only that the Timmermans had not taken the steps necessary to become clients of SSOS.

2. The Timmermans did not identify any outrageous conduct.

In addition to finding a lack of intentionality, the trial court properly found that the alleged conduct lacked the severity needed to rise to the level of outrage. The trial court makes a threshold determination on

² The Timmermans devote several pages to discussing *respondeat superior*. SSOS argued only that if Diane Hall acted with the intentionality required to state a claim for Outrage, she acted *ultra vires* and not in the course and scope. CP 413. However, there was no evidence supporting the conclusion that anyone at SSOS intentionally directed wrongful conduct towards the Timmermans.

whether the conduct is sufficiently extreme and outrageous to warrant a trial. Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002). “[I]t 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 Wn.2d 612, 782 P.2d 1002 (1989), citing Phillips v. Hardwick, 29 Wn. 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, 85 Wn.2d at 59.

The Timmermans alleged that “South Sound did not adhere to its duties to the Timmermans and did not perform any of the services that they agreed to perform for the Timmermans.” CP 6 at 3.2. This is essentially an allegation of negligence, but the Supreme Court of Washington has held that “mere negligence is not enough” to support a claim for the intentional tort of outrage. Grimsby, 85 Wn.2d at 59. To hold otherwise would be to adopt a rule that any sort of professional who acts negligently by failing to communicate—even in a manner that foreseeably causes financial harm to a person attempting to establish a client relationship—is liable for the tort of outrage.

In an instructive case, the Supreme Court of Washington rejected a

claim for outrage that was related to a viable claim under the CPA for violation of the Deed of Trust Act. Lyons v. U.S. Bank, N.A., 181 Wn.2d 775, 792, 336 P.3d 1142 (2014). The court wrote:

[Appellant] claims that the conduct of NWTs in not confirming the proper beneficiary and in not suspending the trustee's sale when she contacted them was so outrageous as to go beyond all bounds of decency. But these allegations are not so outrageous that they shock the conscience or go beyond all sense of decency. While perhaps the actions might have violated the DTA and could support a claim under the CPA, the acts are not sufficiently outrageous to support a claim for outrage.

181 Wn.2d at 793. If the Supreme Court of Washington has held that intentionally deceptive conduct related to a trustee's sale does not rise to the level of outrage, then the Timmerman's allegation of negligent failure to refer a case to foreclosure mediation surely falls short of that standard.

Similarly, applying Washington law, a federal trial court found in circumstances resembling those at hand that no claim was stated for Intentional Infliction of Emotional Distress (IIED) arising from a foreclosure. In Timmerman v. HSBC Bank USA Nat'l. Assoc., 2016 WL 4061813 *6 (W.D. Wash. 2016), Viktor Timmerman alleged that the lending institutions had misrepresented facts that caused his home to be foreclosed on, causing him extreme emotional distress. *Id.* Rejecting his IIED claim, the court held:

Plaintiff simply cannot assert conduct that rises to the level

necessary to sustain this claim. At best, Plaintiff alleges that the Defendants apparently misrepresented their right to foreclose on the property. That is not enough.

Id.

Numerous other courts applying Washington law have likewise disposed of outrage claims arising from foreclosure actions. Vawter v. Quality Loan Serv. Corp. of Wash., 707 F. Supp. 2d 1115, 1121 (W.D. Wash. 2010) (“Chase’s and MERS’s actions in connection with the nonjudicial foreclosure process, as alleged by the Vawters, may be problematic, troubling, or even deplorable, but these actions do not involve physical threats, emotional abuse, or other personal indignities aimed at the Vawters.”); McGinley v. Am. Home Mortg. Serv., Inc., No. 2:10–CV–01157 RJB, 2010 WL 4065826, at *11 (W.D. Wash. Oct. 15, 2010) (court order) (claim resting on alleged nondisclosures associated with loan refinance, terms of the loan, and subsequent nonjudicial foreclosure proceedings was insufficiently outrageous to survive summary judgment.)

In Lyons, Timmerman, and other similar cases, the allegations of misrepresentation were intentional and more serious than the claims of negligence that the Timmermans make here, yet they did not rise to the level required to state an outrage or IIED claim under Washington law.

“When conduct offered to establish outrage is not extreme, ‘a court must

withhold the case from a jury notwithstanding proof of intense emotional suffering.’ ” Case v. Kitsap Sheriff’s Dept., 249 F.3d 921, 932 (9th Cir. 2001) citing Brower v. Ackerley, 88 Wn. App. 87, 943 P.2d 1141, 1149 (1997). The trial court’s ruling should be affirmed.

3. The Timmerman’s claim flows from the loss of property, which cannot support a claim for outrage.

Timmerman v. HSBC Bank points up yet another obstacle to the Timmermans’ outrage claim: their damages flow from a financial loss. In this case, the Timmermans alleged:

Defendant South Sound has caused the Timmermans significant emotional distress as a direct result of its actions as described herein. The Timmermans suffered from anxiety, sleeplessness, and other physical symptoms as a result of the fact that they lost their home and any opportunity to save it from foreclosure by being reviewed for a loan modification. They have also incurred Financial Damages as identified above in the Factual Statement.

While it is human to attach emotional import to a home, courts have rejected attempts to bootstrap an outrage claim onto a case that is based on financial losses. This legal rule was discussed in Bell v. F.D.I.C., No. C09-0150RSL, 2010 WL 113996, at *1 (W.D. Wash. Jan. 7, 2010). The plaintiff in that case blamed Twin Capital Mortgage for the loss of their home to foreclosure, accusing it of making multiple misrepresentations regarding the terms and conditions of the loans and assessing “junk” fees unrelated to any actual expenditures or services

provided. The federal trial court, applying Washington law, held:

If the allegations are true, defendant's business practices may violate state and federal statutes, may constitute fraud, and are generally deplorable. Nevertheless, defendant's alleged conduct threatened only plaintiff's financial wellbeing: there were no physical threats, emotional abuse, or even embarrassment/indignities aimed at plaintiff. Defendant's practices, as alleged by plaintiff, are not "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." Birklid v. Boeing Co., 127 Wash.2d 853, 867, 904 P.2d 278 (1995) (quoting Grimsby v. Samson, 85 Wash.2d 52, 59, 530 P.2d 291 (1975)). The intentional infliction of emotional distress claim asserted against Twin Capital Mortgage must, therefore, be dismissed.

Bell, 2010 WL 113996, at *1.

The Timmermans cite no authority that would compel a different result here, and the Court should reject their attempt to argue that the economic damages that flowed from the breach of their contract with Chase supports a claim of outrage. Such a claim attempts to stretch that tort beyond recognition and runs counter to the body of law defining the tort very narrowly. Grimsby, 85 Wn.2d at 59 (quoting Restatement (Second) of Torts § 46, comment d (1965)). If it was permitted, it would add the tort of outrage to every breach of contract claim and every consumer fraud claim. Like the other courts that have considered these arguments, this Court should find that an outrage claim cannot be based on ordinary negligence in the rendering of a professional service that results

in economic damages.

4. The Timmermans lacked evidence of severe emotional distress sufficient to support an outrage claim.

An additional basis to grant summary judgment to SSOS was the fact that the Timmermans' produced no evidence that supported a finding of "severe" emotional distress, an element of the tort of outrage. "Even without the objective symptomatology requirement, outrage's third element requires evidence of severe emotional distress." Kloepful, 149 Wn.2d at 203. Their allegations of distress are indistinguishable from ordinary noneconomic damages. These are recoverable as a matter of course in any tort claim. RCW 4.56.250(1)(b). The statute defines noneconomic damages as "subjective, nonmonetary losses, including but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship." The Timmermans complained of distress caused by their financial loss and the loss of their family home. As unfortunate as that is, it does not, by itself, rise to the level of "severe" emotional distress required to support a claim for outrage. As a seminal California case discusses it:

The consequential injury resulting from economic loss in terms of emotional distress is not compensable. Recovery

for worry, distress and unhappiness as the result of damage to property, loss of a job or loss of money is not permitted when the defendant's conduct is merely negligent. As has been stated elsewhere, "emotional distress is but 'part of the human condition.'

Branch v. Homefed Bank, 6 Cal. App. 4th 793, 801, 8 Cal. Rptr. 2d 182, 187 (1992) (citations omitted).

D. The Timmermans admitted that there was no guarantee that mediation would allow them to avoid foreclosure, and as a result, they could not establish causation.

In its motions for summary judgment, SSOS argued that the Timmermans' inability to prove causation was an insurmountable hurdle to their claims under the CPA and for outrage. The trial court did not identify that as a basis for its rulings. However, it provides this Court with an independent basis to affirm the trial court's decisions upon its de novo review of them.

First, the Timmermans admitted in their complaint that referral to mediation did not guarantee that they would not lose their home to foreclosure. CP 5 at 2.11. Moreover, the Timmermans did not present evidence showing that they had the financial wherewithal to bring their account current or otherwise work with their lenders if a mediation had occurred. CP 582. SSOS moved for summary judgment and for judgment under CR 12(c) based on this admission and lack of evidence. CP 27.

In addition to this, BECU held second and third mortgages on the

property, which the Timmermans had deliberately defaulted on, causing BECU to notice a trustee sale. CP 30. Even if a mediation process had been initiated with Chase, BECU was not required to participate and was proceeding with its foreclosure based on the Timmermans' intentional breach. CP 66. There was sufficient liquidation value in the home to fully pay Chase's first-position interest, as well as BECU's second and third-position interests, making it logical for BECU to proceed with a trustee's sale. CP 40. Roberta Marsh, who has vast experience in housing counseling, stated that it was very unlikely that BECU would voluntarily subject its interests to the mediation process, and that "my experience with hundreds and hundreds of foreclosure cases is that this would have been an extraordinarily rare thing." CP 582. The only evidence to the contrary was the statement of the Timmermans' counsel, which was not competent evidence on summary judgment. As such, the allegation that SSOS "caused" them to lose their home was provably false.

Second, the Timmermans also alleged that: "The Timmermans suffered from anxiety, sleeplessness, and other physical symptoms as a result of the fact that they lost their home and any opportunity to try to save it from foreclosure by being reviewed for a loan modification." CP 7. No causal nexus could be drawn between this anxiety and SSOS because the Timmermans could not show they would not have lost the property

anyway, either because they lacked the ability to work with Chase, or because BECU was proceeding with its separate trustee sale that was exempt from mediation. The Timmermans allege: “[w]hile they were behind on the mortgages they began to receive notices of pending foreclosures of the Chase mortgage and the BECU mortgage.” *Id.* at ¶ 2.4. The record shows that these foreclosure notices were related to the Timmermans’ gambling debts, unemployment, bankruptcy, and deliberate decisions to default, and not by any conduct of SSOS. CP 38 – 45.

Third, the Timmermans argue that they lost the chance to stay in their home longer during the mediation process. OB 17, CB 124. There was no competent evidence submitted to the trial court that the Timmermans would have been able to keep living in a house they had quit paying for. This idea was based on statements from the Timmermans’ counsel. But Washington law holds that the nonmoving party may not rely on speculation, argumentative assertions, or self-serving declarations taken at face value to withstand summary judgment. Seven Gables Corp. v. MGM/UA Entm’t Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The unsupported statement of counsel would not have supported a jury verdict for damages. ESCA Corp. v. KPMG Peat Marwick, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997), affirmed, 135 Wn.2d 820, 959 P.2d 651 (1998) (a jury cannot base an award of damages on speculation). Moreover, the

Timmermans did not plead a claim for “lost opportunity,” nor is such a theory viable in this case. Washington recognizes the “loss of chance” doctrine in only two types of claims: wrongful death and medical malpractice. Volk v. DeMeerleer, 187 Wn.2d 241, 277-78, 386 P.3d 254 (2016).

Last, the Timmermans argue that they were damaged by losing their chance to “communicate” with BECU. OB 20. This was not argued below. CP 133. Nevertheless, there is no evidence that SSOS prevented the Timmermans from communicating with BECU. SSOS did not advise the Timmermans regarding the BECU foreclosure. Rather, the Timmermans claim that an unidentified attorney advised them to stop paying their second and third mortgages with BECU after the bankruptcy discharge in July 2013. CP 56. Although they had defaulted on the BECU loans in July 2013 (CP 39-45), the Timmermans did not inform Hall about that fact until the day of the Chase trustee sale on January 31, 2014. This does not support their argument that they might have arranged a multi-party work-out agreement “but for” the conduct of SSOS. CP 252-257.

A foreclosure mediation for the Chase trustee sale provided no guarantee that the Timmermans would be able to keep their house. The Timmermans admit this. Foreclosure mediation was unavailable for the BECU trustee sale. The Timmermans do not dispute this legal fact. There

is no “loss of chance” theory available in Washington law for a CPA or outrage claim. The Court may find that on the established facts, lack of a causation was a separate basis supporting the trial court’s entry of summary judgment against both claims.

VI. CONCLUSION

This Court should affirm the rulings of the trial court. Neither the facts nor the law support either a CPA claim or an outrage claim against non-profit South Sound Outreach Services. The Timmermans allege that an SSOS employee failed to do her job adequately, and that SSOS failed to supervise her. But complaints about the delivery of services do not implicate the CPA, and the trial court properly recognized that this established legal principal required summary judgment against the Timmermans.

For this same reasons, an outrage claim is not viable. The tort of outrage requires evidence that the conduct was directed at the plaintiff, and negligence does not suffice. The Timmermans complained only of negligent failure to supervise and negligent delivery of services.

Moreover, the type of conduct, arising from a trustee sale and a failure to stop it, is not outrageous. Like the Bell case, so here, “defendant’s alleged conduct threatened only plaintiff’s financial wellbeing: there were no physical threats, emotional abuse, or even embarrassment/indignities

aimed at plaintiff.” Bell, 2010 WL 113996, at *1. The trial court, as a threshold arbiter, properly found no triable issue of fact as to whether the conduct was outrageous. Finally, the Timmermans admit that there is no causation because there was no guarantee that the foreclosure could be avoided.

Respectfully submitted this 18th day of July, 2018.

TIERNEY & CORREA, P.C.

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South Sound Outreach Services

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below a copy of the foregoing document on all counsel of record in this case:

- Via U.S. Mail
- Via Hand Delivery
- Via Facsimile
- Via Electronic Mail

To:

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Dated this 18th day of July, 2018.


Barbara Fairleigh

TIERNEY & CORREA

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