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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DIANNE KLEM, as administrator of the estate of Dorothy Halstien,

Respondent/Cross Appellant,

vs.

WASHINGTON MUTUAL BANK, a Washington corporation, and

Defendant,

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a
Washington corporation, and QUALITY LOAN SERVICE
CORPORATION, a California corporation,

Appellants/Cross Respondents.

**BRIEF OF RESPONDENT/CROSS APPELLANT DIANNE KLEM,
AS ADMINISTRATOR OF THE ESTATE OF DOROTHY
HALSTIEN**

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I. INTRODUCTION

[The trustee] is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and creditor alike. ... [T]he trustee must take reasonable and appropriate steps to avoid sacrifice of the debtor's property and his interests.

Cox v. Helenius, 103 Wn.2d 383, 389, 693 P.2d 683 (1985).

This case arises from a trustee selling 75-year-old Dorothy Halstien's Whidbey Island home at a foreclosure sale, while she was in a nursing home, for only one-third of its value. The sacrifice of Ms. Halstien's equity resulted from Quality Loan Service Corporation's business practices that the jury found to be in violation of Washington's Consumer Protection Act. (CP 1491.) These unfair business practices included: (i) abrogating its duty to be impartial by only acting with the bank's approval even though Washington law requires a trustee to act independently and treat both the banks and the borrowers in good faith (RP 215-17, 357-58, 395; Ex. 12); (ii) selling Ms. Halstien's house for only \$83,087.67 even though Quality knew that a postponement of the sale for just a few weeks would have enabled Ms. Halstien's guardian to sell the house for \$235,000 (RP 103, 131, 302-04); and (iii) predating and falsely notarizing the notice of sale in order to speed up the deed of trust foreclosure process (RP 194, 198-200).

II. ASSIGNMENT OF ERROR

The Respondent/Cross Appellant, who was appointed as the representative of Ms. Halstien's estate after Ms. Halstien passed away, asserts that the jury's verdict and the corresponding judgment against Quality Loan Service Corporation are proper. However, Ms. Halstien's representative asserts that the trial court erred when it denied issuing an injunction that would prevent Quality from repeating its unfair practices.

III. ISSUES PRESENTED

The issues raised by the Appellants can be boiled down to: (i) whether the court had jurisdiction over Quality Loan Service Corporation; (ii) whether the plaintiff's claims were waived; and (iii) whether the evidence supported the jury's verdict.

The issue raised by Ms. Halstien's representative is whether – in light of the jury's conclusion that the defendants were engaged in business practices that violated the Consumer Protection Act, and in light of the fact that the defendants continue with those unfair business practices – the trial court erred by denying the plaintiff's motion for an injunction.

IV. STATEMENT OF CASE

A. Defendants sold a disabled woman's home, which was worth at least \$235,000, for \$83,087.67.

There are eight important sets of facts that are not in dispute. First,

Quality Loan Service Corporation of Washington ("QLSCW") was the trustee on the deed of trust on Ms. Halstien's home, and Ms. Halstien granted the deed of trust to secure a loan made to her by Washington Mutual Bank ("WaMu"). (RP 201-02.) QLSCW and its sister company, Quality Loan Service Corporation ("QLSC"), are together referred to as "Quality."

Second, it is undisputed that while Ms. Halstien was suffering from dementia and living in a nursing home, and at a time when Quality knew that Ms. Halstien's guardian (the "Guardian") had a signed \$235,000 sale agreement for Ms. Halstien's home, Quality caused Ms. Halstien's home to be sold at a foreclosure sale for only \$83,087.67. (RP 125-26, 263, 302-05; Ex. 18, 24.) In addition, Quality did not conduct the foreclosure sale, but rather hired a messenger to do so. (RP 263.)

Third, the parties agreed upon the jury instructions, including the one that describes the foreclosure law applicable at the time of the Halstien foreclosure. The foreclosure law instruction reads in part:

The trustee may, for any cause the trustee deems advantageous, postpone the foreclosure sale.

The trustee is a fiduciary for both the borrower and the lender, it must act impartially between them, and it is bound by its office to present the sale under every possible advantage to the borrower as well as the lender.

The trustee of a deed of trust is not required to obtain the best possible price for the trust property. Nonetheless, the

trustee must take reasonable and appropriate steps to avoid sacrifice of the homeowner's property.

(CP 1418.)¹

Fourth, it is undisputed that prior to the foreclosure sale, the Guardian asked Quality to postpone the sale so that a \$235,000 sale could close, but Quality refused. (RP 126-31, 303-06.) Quality followed, and continues to follow, a policy that it will not postpone a foreclosure sale without approval of the bank. (RP 357-58.) The policy was dictated in a confidential set of instructions given to Quality by WaMu. Quality failed to produce the instructions in response to the plaintiff's discovery requests. (CP 343-44.) However, WaMu produced them in discovery. The confidential instructions to Quality from WaMu provided in pertinent part **"Your office is not authorized to postpone a sale without authorization from ... Washington Mutual."** (RP 215-21; Ex. 12.)²

Fifth, Quality admits that it follows a policy of treating all

¹ (See Jury Instruction No. 5 on CP 1418). Instruction No. 5 uses language taken directly from this Court. See, e.g., *Cox v. Helenius*, 103 Wn.2d 383, 389, 693 P.2d 683 (1985). Quality agreed to instruction No. 5, along with all other instructions – save for No. 23 which is not at issue in this appeal. (CP 1393-1409; RP 444.)

² Mr. Seth Ott, the Quality employee who prepared the notice of sale for Ms. Halstien's home, confirmed this policy. (RP 357-58). At trial he testified as follows:

- Q Is it Quality's policy to defer to banks the decision as to whether or not to postpone a foreclosure sale?
A We need to get approval from the lender.
Q Okay. So to continue a foreclosure sale you needed to first get approval from the lender?
A Yes.

forecloses the same regardless of whether a homeowner has any equity.

Mr. David Owen, Quality's Chief Operations Officer, confirmed that equity in property is of no concern to Quality when it forecloses on Washington deeds of trust. The trial testimony of Mr. Owen includes:

Q At your deposition I asked you if you were aware of anybody that was concerned about the possibility of the loss of equity, and you said that there were none, to your knowledge. Since then have you found anybody that was concerned?

MR. CLEVERLEY: Objection, still argumentative.

THE COURT: Overruled.

Q. Go ahead and answer.

A. No.

(RP 214-15.) Quality's counsel, in his closing arguments, reiterated to the jury that Quality refuses to take steps to avoid sacrifice of the debtor's property:

[Quality's] sole purpose under a deed of trust is to enforce the lender's obligation, the debt against the property that is owed by the borrower. That's it.

.....

Their job is simply to do the process of that repossession when there is a default. And that may sound cold and heartless that Quality doesn't care whether the property gets foreclosed or not. They can't care. That's not their obligation.

(RP 474, 489.)

Sixth, it is undisputed that at the time of the foreclosure Ms. Halstien's home was worth at least \$235,000. The fact that the value was greatly in excess of the bid accepted by Quality is supported by: the

\$320,000 property evaluation (RP 76, 355-56; Ex. 14); the 2007 tax assessed value of \$256,804 (RP 75; Ex. 9); and the quick resale of the house for \$235,000 by the party who bought it at the foreclosure sale. (RP 132, Ex. 69).

Seventh, it is undisputed that after the sale was conducted by Quality's messenger, the Guardian learned that Quality predated and falsely notarized the notice of sale on Ms. Halstien's home and the homes of many other Washington residents. (RP 197-99, 353-55; Ex. 8, 70, 71.)

Eighth, the parties agreed on instructions that left it to the jury to answer the following questions: (i) Was QLSCW the agent of QLSC; (ii) Did Quality violate the Consumer Protection Act; (iii) Did Quality breach the parties' deed of trust contract; and (iv) What damages, if any, did Quality cause Ms. Halstien to suffer? The jury answered the first three questions in the affirmative and concluded that Quality was responsible for \$151,912.33 of damages caused to Ms. Halstien.³ (CP 1488-92.)

B. Defendants' motions to dismiss were properly denied.

Ms. Halstien's guardian commenced suit against QLSCW in May 2008 to recover the substantial loss of equity suffered by Ms. Halstien.

³ The Plaintiff technically prevailed on the negligence claim as well; however, the verdict amount on the negligence claim was one-half the amount of the verdict on the Consumer Protection Act or contract claims. (CP 1488-92.)

(CP 1-15.) Early in the lawsuit, in order to avoid going to trial, QLSCW moved to dismiss all of the plaintiff's claims. (CP 110-24.) QLSCW alleged that the Guardian waived the right to commence a lawsuit by failing to obtain an order enjoining the foreclosure sale. (CP 115-23.) Initially, on October 1, 2008, in a preliminary summary judgment order, the trial court granted QLSCW's request. (CP 245-46.) However, on November 21, 2008, after a careful review of the facts and the law, the court reconsidered its decision and denied QLSCW's motion to dismiss with respect to six of plaintiff's seven causes of action. (CP 270-71.)

The trial court reconsidered its preliminary decision because the plaintiff showed that the complaint raised claims related to the foreclosure process that Quality conducted, not claims related to the amount of the debt secured by the deed of trust. This distinction is important because claims related to obligations secured by the deed of trust are known prior to the foreclosure process taking place, but claims relating to how the foreclosure is conducted flow from events occurring up to the day of the foreclosure sale.

For example, Quality knew that there were third parties willing to buy the house for almost three times what WaMu was owed. Nevertheless, on the day of the sale, Quality treated the foreclosure of Ms. Halstien's home in the same manner as if she had no equity. To avoid

sacrificing of Ms. Halstien's property, the trustee should have postponed the sale when it discovered that the highest bid was only one dollar more than what she owed to WaMu. However, Quality was in no position to act as a trustee and avoid the sacrifice of equity; on the day of the sale, it delegated its sale duties to a legal messenger who could not make the important decisions that needed to be made when the bidding stopped at one dollar more than was owed to the Bank.⁴ (CP 261-64.)

Moreover, Plaintiff did not discover some of Quality's wrongdoing, such as the false notarization of documents, until deposing Quality's employees. (RP 352-53.)

C. The complaint was amended to add Quality Loan Service Corporation as a defendant because it was the party responsible for the damage.

During the course of the Superior Court action, WaMu went into a federal receivership, Ms. Halstien died, and the Guardian learned in discovery that QLSCW was the agent used by QLSC to do business in

⁴ No potential purchasers from Whidbey Island, nor any real estate agents, were at the sale because the Multiple Listing Service showed that there was a \$235,000 pending sale on the house that rendered moot the need for a foreclosure sale. (RP 308-09; Ex. 24.) As a result, the only bidder at the sale, other than Quality's messenger, was an out-of-county investor (not a party to the Superior Court case). (RP 131; Ex. 48.)

Washington.⁵ (CP 272-97.) Accordingly, the plaintiff promptly moved to amend the complaint to: (i) eliminate the one cause of action that the trial court dismissed; (ii) add QLSC as a party; and (iii) change the plaintiff from Ms. Halstien's guardian to the representative of Ms. Halstien's estate.⁶ The trial court granted the request for leave to amend the complaint on February 24, 2009. (CP 559-60.) The trial court's decision is supported by numerous facts including:

- All of the work done by QLSCW is supervised by someone at QLSC (RP 156-57, 192, 344-45);
- QLSC, not QLSCW, billed WaMu for the Halstien foreclosure (RP 192; Ex. 18);
- All phone calls about the Halstien foreclosure, including those made to the number listed in the Halstien notice of sale, were routed to QLSC's office in San Diego (CP 307, 310-11);
- All business records related to the Halstien foreclosure are kept in QLSC's San Diego office (CP 330);
- QLSC's Chief Operations Officer was unable to identify the whereabouts of the QLSCW employee who supposedly worked from within Washington on the Halstien foreclosure (CP 316);

⁵ On September 25, 2008, pursuant to 12 U.S.C. § 1821(c), the Federal Deposit Insurance Corporation was appointed as the receiver for WaMu. The Guardianship and probate proceedings were in Snohomish County Superior Court Cause Number 06-4-01381-1. Dianne Klem, who was named as the representative of Ms. Halstien's estate, is also the Executive Director of Puget Sound Guardians, the Guardian. (RP 62; CP 1608.)

⁶ The Appellants' assertion that the plaintiff was untimely in moving to add QLSC as a party is unfounded. The discovery of the necessary facts to amend the complaint was delayed because Quality refused to produce any witnesses until it was compelled to do by the trial court. (CP 1814.) Moreover, the order authorizing the amendment of the complaint was entered more than ten months prior to trial. (CP 559-60.)

- QLSC advertises that it does business in Washington (CP 399);
- QLSC and QLSCW are commonly owned and are “sister companies” (CP 306); and
- WaMu paid Quality over \$1.8 million to conduct 805 Washington foreclosures during the period from January 4, 2004 through April 30, 2008 (CP 389);

D. Quality unsuccessfully attempted to avoid service and to challenge jurisdiction.

Plaintiff served the amended complaint – which was actually the second amended complaint because some clerical amendments were made in May 2008 – on QLSC on three separate occasions, but nevertheless QLSC argued that service was not effective. (CP 602-07.)

Plaintiff first accomplished service on March 10, 2009, when the attorney of record for QLSCW and QLSC agreed (via email) to accept service of process. (CP 1816-17.) In her email she said, “**Yes, I will accept service for Quality Loan Service Corporation.**” (CP 1825.)

Plaintiff relied upon the acceptance, called off its process server, and delivered copies of the summons and complaint to opposing counsel (CP 1821-22); however, opposing counsel later attempted to retract her acceptance.⁷ (CP 1824.) The plaintiff did not accept the retraction, but tried to render moot any dispute by arranging for service a second time.

⁷ The plaintiff’s forbearance is consideration that binds QLSC to the promise made by its attorney. *See, e.g., Huberdeau v. Desmarais*, 79 Wn.2d 432, 439, 486 P.2d 1074 (1971).

On April 9, 2009, Plaintiff completed service for the second time at Quality's office in San Diego, California. (CP 1818.) QLSC acknowledged that on April 9, 2009 it received a copy of the summons and complaint, but nonetheless it alleged that service was not adequate unless the documents were personally handed to Kevin R. McCarthy, QLSC's registered agent. In addition to being a named partner in the law firm that represented both QLSC and QLSCW at trial, Mr. McCarthy owns both QLSC and QLSCW. (RP 191-192.) Moreover, Mr. McCarthy's affidavit in support of QLSC's motion to dismiss is proof that he received the summons and complaint. (CP 600-01.)

Nevertheless, because QLSC's unfounded objections to service persisted, plaintiff arranged for service to be accomplished a third time. On May 18, 2009, a process server went to QLSC's headquarters with instructions to serve Mr. McCarthy. A QLSC employee told the process server that Mr. McCarthy was not available and that the summons and complaint should be left with her, which the process server did. (CP 1822, 1827.)

Based on the acceptance of service by Quality's counsel, that Mr. McCarthy received actual notice about the superior court suit, and that Plaintiff accomplished process of service on QLSC on April 9, 2009, and again on May 18, 2009, the trial court denied Quality's challenge to the

service. (CP 647-48.) The order was entered on June 5, 2009, and in that same order, the trial court also rejected Quality's contention that the Washington courts do not have jurisdiction over QLSC.

E. Washington residents are harmed because Quality is not impartial.

Trustee companies, other than Quality, act in an impartial manner when considering requests to postpone foreclosure sales.⁸ Moreover, Quality's failure to act in accordance with the standards followed by other trustees is what caused Ms. Halstien to suffer a \$151,912.33 loss. If Quality had exercised discretion as trustee to postpone the sale before the sale started, or when it became apparent that there would be no competitive bidding, then Ms. Halstien would not have been harmed. Therefore, if the judgment against Quality were reversed, without any authorizing legislation, a new lower standard for trustees would be established.

F. Washington residents are harmed by Quality predating and falsely notarizing documents.

Quality's practice of predating and falsely notarizing notices was a systemic problem that occurred from at least 2004 through 2007. (RP 197-99, 256; Ex. 8, 70, 71.) Moreover, this practice is not benign as

⁸ Mr. David Leen, a licensed attorney and an expert on the subject of deed of trust foreclosures, testified at trial about how trustee sales are conducted. (RP 237-45.)

Appellants contend. It deprives homeowners of time needed to refinance their home loans, sell their homes, or look for a new place to live.⁹

Washington law requires 30 days to pass between the posting of the notice of default and the first day on which the notice of trustee's sale can be "recorded, transmitted or served." *See* RCW 61.24.030(8). In the Halstien case, the notice of default was posted on October 25, 2007, so Quality was required to wait until November 26, 2007 (since the 25th was a Sunday) before it could record, transmit or serve the notice of sale.¹⁰ (RP 392; Ex. 81.) However, even though the face of the Halstien notice of sale says that it was notarized and dated in Quality's San Diego, California office on November 26, 2007, it was actually out the door and on its way to Washington by November 19, 2007. (Ex. 73.) In short, Quality falsely notarized it so that it could be in Washington in time to be recorded on November 27th.

Falsely dating the notices, so that they could be recorded in Washington earlier than otherwise possible if Quality conducted business

⁹ Quality's assertion that the false notarization is inconsequential begs the following question: If it makes no difference when the notice of sale is actually signed, why would Quality feel compelled to instruct a notary to lie about the date of signing on so many occasions, a violation of Cal. Civ. Code § 1189(a)(2) and RCW 42.44.160?

¹⁰ The original hard copy notice of sale has to be filed in the records office in the county in which the real property is located. *See* RCW 61.24.040(1). Thus, there was no way that the notice of sale could be transmitted by way of an electronic intercompany transfer as alleged by Appellants' counsel. (*See* Appellants' Br. at 4, 19.)

honestly, enabled Quality to schedule earlier foreclosure sales. The Deed of Trust Act provides that foreclosures cannot occur until 90 days after the notice of sale is recorded in the county where the property is located. *See* RCW 61.24.040(1). Transmitting the notice of sale out of California just one day early can in some instances speed up the foreclosure process by a full week because foreclosure sales can only take place on Fridays. *See* RCW 61.24.040(5).

In the notice of sale for Ms. Halstien's home, Quality set the sale date for February 29, 2008. (Ex. 8.) However, when accounting for the time it actually took Quality to get the notice from San Diego into the records of Island County, had Quality waited until November 26th to honestly date the document before transmitting it, Quality would not have been able to record it until December 3, 2008, and Quality would not have been able to schedule the foreclosure sale before Friday, March 7, 2008. If the sale had been held in March instead of February, the Guardian would have had time to close the \$235,000 sale.¹¹ (RP 131, 388.)

¹¹ If Quality used employees in Washington to prepare notices, it would take it less time to get those notices recorded in Washington; however, if Quality had employees in Washington it could also be assumed that Washington homeowners would get an offsetting benefit of having a trustee that would be easier to contact and that would have a better understanding of Washington law. Unlike Quality, trustees based in Washington, will, where appropriate, postpone foreclosure sales without first obtaining approval from the banks. (RP 236-40).

G. The evidence supports the jury's verdict for the plaintiff.

Quality attempted at trial to divert attention from the wrong it did to Ms. Halstien by attacking the professionalism and honesty of the plaintiff's witnesses. However, the evidence presented at trial supported the plaintiff's case and demonstrated that Quality's finger pointing was misplaced. Moreover, Quality's witnesses damaged their credibility by making inconsistent statements.

There are at least seven examples why the jury was justified in believing the plaintiff's witnesses over the defendants' witnesses. First, as was shown to the jury, the Snohomish County Superior Court scrutinized and approved of everything the Guardian did in connection with Ms. Halstien and her house. (RP 64-65.)

Second, in response to being asked why he falsely dated the notice of sale, Mr. Ott, the Quality employee who prepared the notice, talked about what management told him to do, but when Mr. Owen from Quality's management was asked about the practice he blamed employees like Mr. Ott. (RP 194-202, 351-54.)

Third, Quality tried to make it look as if its phone records contradict the testimony of David Greenfield, one of the plaintiff's witnesses. However, on cross-examination, Mr. Owen conceded that

Quality's records are not complete and do not show how many times Quality was called and asked to postpone the sale. (RP 280-81.)

Fourth, the jury recognized the falsehood of Appellants' claim that QLSCW (the Washington corporation) was independent of QLSC (the California corporation). While the Washington corporation was named as the trustee, testimony at trial demonstrated that the California corporation received the payment for the trustee services. (RP 192; Ex. 18.) Moreover, while Mr. Ott said he worked for the Washington corporation, he admitted that he had never set foot in Washington before trial and that his bosses were at the California corporation where he worked. (RP 341, 345-46.)

Fifth, Quality argues that the Guardian's office should have called the trustee more times than it did to request that the sale be postponed. However, the jury had good reason to believe that the Guardian's contacts with Quality were sufficient and that further contact would be futile. When Dianne Klem, the Executive Director of the Guardian, was asked at trial why her office did not call Quality on more occasions, she said, "Well, Quality had told us on two occasions that they unequivocally could not assist us in that area, that only the bank could make the decision." (RP 131.) David Greenfield's testimony was similar. He testified that when he talked to the Quality representatives about getting the sale postponed

that they “were adamant” that it was the bank that he had to talk to and that Quality “couldn’t do anything about it.” (RP 321.)

Sixth, Quality unsuccessfully attempted to impeach David Greenfield’s credibility by inflating a simple misunderstanding; based on the jury’s verdict, it is apparent that Quality’s attempt failed. It is true that when David Greenfield talked to a representative of Quality on February 19, 2008, he mistakenly thought he was talking to Mr. Seth Ott, who signed the Halstien notice of sale. However, while Mr. Ott was out of the office on paternity leave when Mr. Greenfield made the February call, it was reasonable for Mr. Greenfield to assume he was talking to Mr. Ott, as is demonstrated by the following questioning:

Q Okay. And when you called on February 19th, do you remember the process that you used to make this phone call?

A I did call the 866 number. And it was the same phone tree as the January call, so I went through the same steps to dial the first three letters of his first name or last name. And it went to that extension, and a gentleman answered the phone and I started in with my introduction.

Q So when you started speaking with this individual did you assume it was Mr. Ott?

A Yes, I had no other reason to believe it wasn’t because it was on his extension. It was the same way I contacted him in January, 2009, so I believed it was him.

Q You were speaking with a male?

A Yeah, it was a male, yes.

Q And is it possible that that [sic] phone call was answered by somebody other than Mr. Ott?

A I mean, it's possible. Once again, I called the number that was his extension and a male answered it, so I had reason to believe it was the same person I talked to in January, but it could have been somebody else.

(RP 303)

Seventh, although Quality argued that the Guardian's employees were at fault because a foreclosure was possible and they did not attempt to enjoin it, the jury and the trial judge had ample reasons to conclude that the failure to get an injunction should not result in a waiver of the plaintiff's claims. As explained by Dianne Klem, it was a shock to everyone that the trustee would accept a bid of less than \$85,000 when the trustee knew there was a pending sale for \$235,000. (RP 103.) Moreover, even if it could have been assumed that Quality would go ahead with a sale of \$83,087.67, even after Quality was informed of the \$235,000 offer, it was not possible for the Guardian to obtain an injunction. As pointed out at trial, some of Quality's wrongdoing occurred on February 29th (the day of the sale) and other wrongdoing (the false dating of the notice of sale) was only discovered after the sale. Additionally, due to the administrative and legal hurdles that a guardian must clear to commence an action in court, and the notices required to file for an injunction, there was not enough time between getting the \$235,000 offer and the scheduled

sale date for the Guardian to obtain an injunction.¹² (RP 127-29.) Finally, even if there had been more time and the Guardian could somehow accurately predict in advance what Quality would do on the day of the sale, there was no money for the injunction bond required by RCW 61.24.130(1). (RP 75.)

H. The trial court appropriately entered a judgment against Quality.

On February 5, 2010, after the jury returned its verdict, the trial court heard arguments about whether it should enter a judgment consistent with the jury's verdict – or if it should enter a judgment notwithstanding the verdict – and if Quality should be enjoined from continuing to commit unfair or deceptive business practices. On March 5, 2010, the trial court rendered its decisions. The court denied Quality's motion for a judgment notwithstanding the verdict and, by doing so, again concluded that the plaintiff's right to proceed to trial was not waived. (CP 1580-81.) Thus, consistent with the jury's verdict, the trial court entered a judgment against Quality in the principal amount of \$151,912.33. (CP 1582-84.)¹³

¹² The Guardian would first have to give notice of a motion for authority to commence an injunction action in the Snohomish County guardianship proceeding. Then, assuming the Guardian obtained authority to file the injunction action, RCW 4.12.010 and RCW 61.24.130(2) require that the Guardian file an action in Island County and serve injunction pleadings on Quality at least five days prior to the injunction hearing.

¹³ The trial court also awarded prejudgment interest of \$36,633.58, attorney fees of \$41,635.00, and costs of \$1,265.88. (CP 1582.)

After the jury issued its verdict, and again at the February 5, 2010, hearing, Quality had the opportunity to inform the trial court that it would no longer engage in the practice of abrogating its duty to be impartial by only acting with the bank's approval and that it would start to make reasonable efforts to avoid the sacrifice of homeowners' property. However, it failed to do so. (*See* Verbatim Report of Proceedings on February 5, 2010.) Nevertheless, on March 5, 2010, the trial judge denied the plaintiff's motion for an injunction. (CP 1585-88.)

V. ARGUMENT

A. **Quality's central argument is based on an overly broad interpretation of a decision from Division One and is inconsistent with a decision from Division Three.**

The legal arguments made in the Brief of the Appellants buttress why this Court should accept direct review. The current rate of home foreclosures presents an urgent issue of broad public import, and on that issue the Appellants' brief demonstrates that there is a perceived conflict between the Courts of Appeals. *See* RAP 4.2 (a)(3) - (4).

With respect to the alleged waiver of claims, Division Three of the Court of Appeals makes a clear distinction between bringing a postsale challenge regarding the underlying obligation (i.e., a challenge connected to the loan itself), which was never at issue in this case, and a postsale challenge regarding the procedures used by the trustee to conduct the

foreclosure, which was at issue in this case. *See CHD, Inc., v. Boyles*, 138 Wn.App 131, 157 P.3d 415 (2007). In Division Three, the Court of Appeals found that CHD had waived its claim because its dispute related to the underlying obligations on the property in foreclosure; however, in so doing, the Court made it clear that even where no injunction is obtained prior to sale “a party can contest the procedures of a sale in a postsale action.” *Id.* at 139.

Quality argues that *Brown v. Household Realty Corporation*, from the Court of Appeals for Division One, stands for a very different proposition and that all claims – including claims relating to how the foreclosure sale was conducted – are waived if the plaintiff does not seek an order to restrain the sale. *See* 146 Wn. App. 157, 189 P.3d 233 (2008). Quality argues that “*Brown* is directly on point and controlling authority mandating dismissal here.” (*See e.g.* Brief of Appellants at 31.)

Accepting Quality’s argument would require this Court to both overrule *CHD, Inc., v. Boyles* and this Court’s decisions in which it has recognized that there are situations where postsale challenges are permitted even if the plaintiff did not seek an injunction.¹⁴

¹⁴ For example, in footnote 5 in *Plein v. Lackey*, this Court noted that in cases where there are flaws in the trustee’s sale itself “postsale challenges were permitted.” 149 Wn.2d 214, 228-229 n.5, 67 P.3d 1061 (2003).

B. The jury’s verdict against Quality is entitled to respect.

The amount of damages awarded by the jury should be given great deference. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 269, 840 P.2d 860 (1992), quoting *Bingaman v. Grays Harbor Comm’t’y Hosp.*, 103 Wn.2d 831, 835-37, 699 P.2d 1230 (1985). In the instant case, where there is no evidence that the jury was influenced by passion or prejudice, the burden on Quality is to show that the verdict “shocks the conscience, sense of justice and sound judgment of the appellate court.” *Curtiss v. YMCA*, 7 Wn. App. 98, 104, 498 P.2d 330 (1972), *aff’d*, 82 Wn.2d 455, 511 P.2d 991 (1973). This heavy burden is one that Quality cannot bear. The jury had ample reason to conclude that Quality caused Ms. Halstien to suffer damages by engaging in unfair practices that were in violation of the Consumer Protection Act and by breaching the parties’ deed of trust contract.

C. Questions of fact are reviewed only to determine if the findings are supported by “substantial evidence.”

Whether “waiver” has occurred is a question of fact. *Renfro v. Kaur*, 156 Wn. App. 655, 661, 235 P.3d 800 (2010). Questions of fact are reviewed only to determine if the findings are supported by “substantial evidence.” *See e.g., Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Procedural and other discretionary rulings

made by the trial court are reviewed for abuse of discretion. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 755 (1971).¹⁵

D. Plaintiff's claims were never waived.

Quality argues that all of the plaintiff's claims were waived because Ms. Halstien's guardian did not enjoin the foreclosure sale. This argument is not supported by the Deed of Trust Act, the facts, or any applicable case law.

1. *The Deed of Trust Act does not require a homeowner to seek an injunction in order to preserve all claims.*

The Deed of Trust Act has never provided that a homeowner must seek an injunction in order to preserve all damage claims. At the time of the Halstien foreclosure in February 2008, regarding injunctions, the Act stated that “[n]othing contained in this chapter shall prejudice the right of the borrower ... to restrain, on any proper ground, a trustee's sale.” RCW

¹⁵ In its recitation of the standards of review, Quality includes the standard of review for summary judgments. (Br. of Appellants at 26). The matter before this court is not an appeal of a summary judgment. Pursuant to CR 54(b), absent a certification from a trial court that a ruling on a motion for partial summary judgment is final, such a ruling is not final and remains open to later revision by the trial court. Because the trial court did not certify its rulings as such, its rulings on the various motions for summary judgment were not final rulings; therefore they were not independently open to review pursuant to RAP 2.2(a)(1). To the extent to which such rulings are ultimately part of the trial court's final judgment, they are reviewed under the standard applicable to the type of issue involved and not automatically reviewed under a summary judgment *de novo* standard.

61.24.130(1).¹⁶ Moreover, when the Act was amended in 2009, the legislature confirmed that a damage claim, like that of Ms. Halstien's, is not waived by the failure to enjoin a sale.¹⁷

Thus, while a borrower's right to get an injunction is a remedy recognized by the Deed of Trust Act, the Act has never provided that the failure to seek an injunction precludes a party from suing for damages caused by a trustee using an unfair or deceptive foreclosure process.

Further, this Court has held that "The [Deed of Trust] Act must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interest and the lack of judicial oversight in conducting nonjudicial foreclosure sales." *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007).

¹⁶ The only other mention of an injunction in the Act is in the prescribed form for the notice of sale, where it states that the failure to bring a lawsuit "may result in a waiver of any proper grounds for invalidating the trustee's sale." RCW 61.24.040(1)(f). It is important to note that "may" instead of "shall" is used and that the waiver is linked only to grounds "for invalidating the trustee's sale." Here, the plaintiff has never attempted to invalidate the sale and raised only damage claims.

¹⁷ Effective as of July 26, 2009, the legislature included in RCW 61.24.127 the following language:

- (1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter **may not be deemed a waiver** of a claim for damages asserting:
- (a) Common law fraud or misrepresentation;
 - (b) A violation of Title 19 RCW [which includes the Consumer Protection Act in subsection 19.86]; or
 - (c) Failure of the trustee to materially comply with the provisions of this chapter.

See Laws of 2009, ch. 292 § 6 (emphasis added).

2. A party can only waive claims that it knows about.

In *Plein*, this Court ruled that before the failure to enjoin a foreclosure sale can result in the waiver of a claim, the plaintiff has to have “actual or constructive knowledge” of the claim prior to the sale. 149 Wn.2d at 227. Such knowledge is required in order for the waiver doctrine to apply because, before a claim can be waived, there must be an “...intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.” *Birkeland v. Corbett* 51 Wn.2d 554, 565, 320 P.2d 635 (1958).¹⁸

While the waiver doctrine was applicable in *Plein* because the gravamen of Mr. Plein’s complaint was an event that occurred more than one year prior to the foreclosure sale, the waiver doctrine cannot apply in the instant case because the claims flow from what the trustee did in connection with the sale.¹⁹ Amongst other claims, on the day of the sale, Quality (through its messenger) accepted a bid that was only one dollar more than what was owed to the bank and the trustee and thus failed to “take reasonable and appropriate steps to avoid sacrifice of the debtor’s

¹⁸ As noted previously, whether “waiver” has occurred is a question of fact. *Renfro v. Kaur* 156 Wn.App. 655, 661, 235 P.3d 800 (2010). Therefore, the trial court’s decision should not be overturned because it is supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.* 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

property and his [or her] interests.” *Cox v. Helenius*, 103 Wn.2d 383, 389, 693 P.2d 683 (1985).

3. *The cases where courts have applied the waiver doctrine are unlike this case.*

It is impossible to align the undisputed facts in this case with the holdings of the cases on which Quality relies. Quality admits that Plaintiff’s claims “arose out of the foreclosure process,” but the cases it cites to support its waiver argument address claims “arising out of an obligation secured by a deed of trust.” *Compare* (CP 115), *with Brown v. Household Realty Corporation*, 146 Wn. App. 157, 189 P.3d 233 (2008). For example, the claims “arising out of an obligation secured by a deed of trust” that the Court of Appeals refers to in the *Brown* case are claims based on the terms of the loan contracts. *Brown v. Household Realty Corporation*, 146 Wn. App. 157, 160, 189 P.3d 233 (2008). The Browns alleged in their complaint that their loan contracts provided for “excessive fees and excessive interest.” *Id.* Similarly, the other cases cited by Quality are unlike this case because the plaintiffs’ claims in those cases

¹⁹ In *Plein*, the “pivotal transaction” which Mr. Plein contested in his suit occurred in December 1998, but the foreclosure sale at issue in that case did not take place until March 2000. 149 Wn.2d at 219-20.

could have been raised well before the foreclosure sale.²⁰

The instant case involves entirely different types of claims. Plaintiff did not contest the amount of the secured obligation owed to WaMu, did not attempt to set aside the sale, and only litigated claims related to the failure of the trustee to comply with Washington law when it conducted the foreclosure sale. Although the waiver doctrine may bar stale claims that are founded on challenges to the underlying debt, like the claims raised in *Brown*, it does not preclude a party from pursuing claims in a timely filed post-sale action when the claims flow from how the trustee conducted the sale. See *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 130, 157 P.3d 415 (2007); See also *Moon v. GMAC Mortgage Corp.*, No. C08-969Z, 2009 WL 3185596 (W.D. Wash. Oct. 2, 2009).

The distinction between the plaintiffs' claims in *Brown* and those in the instant case is based on common sense. On the one hand, the trustee

²⁰ See, e.g., *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003) (plaintiff alleged that the underlying debt had been paid); *Hallas v. Ameriquist Mortgage Co.*, 406 F. Supp. 2d 1176 (D. Or. 2005) (the plaintiff's claims related to the execution of the deed of trust); and *People's Nat'l Bank of Wash. v. Ostrander*, 6 Wn.App. 28, 491 P.2d 1058 (1971) (plaintiff alleged that the deed of trust was obtained by fraud). Moreover, the reasons given for the application of the waiver doctrine in four other cases cited by Quality do not apply in the instant case. See *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007) (no showing of damage to the borrower); *Country Express Stores, Inc. v. Sims*, 87 Wn.App. 741, 943 P.2d 374 (1997) (plaintiff did not present any evidence of damages); *Steward v. Good*, 51 Wn.App.509, 754 P.2d 150 (1988) (plaintiff, unlike here, was suing to set aside a sale); *Koegel v. Prudential Mutual Savings Bank*, 51 Wn.App. 108, 752 P.2d 385 (1988) (plaintiff's interests were not prejudiced by the sale).

in *Brown* had nothing to do with the terms of the obligations secured by the deed of trust that were the basis for the Brown's complaint. On the other hand, Quality, as the trustee in the Halstien foreclosure, controlled the foreclosure process and it is the foreclosure process used by Quality that is the basis for the claims raised by Ms. Halstien's representative.

The Browns knew of their claims almost two years before the foreclosure process and then waited almost two years after the foreclosure sale to file their complaint. *Brown*, 146 Wn. App. at 160. In contrast, Plaintiff did not delay in filing the instant case. Plaintiff did not know until the day of the foreclosure that Ms. Halstien would suffer any damage. Specifically, Plaintiff did not know until the conclusion of the foreclosure sale that the trustee would accept a bid that was roughly one-third of the pending offer of \$235,000, thereby sacrificing Ms. Halstien's equity. (RP 103.) Further, with respect to the defendants' involvement in the creation of the claims, the trustee controls the foreclosure process but does not control the terms of the obligations secured by the deed of trust.

Finally, Quality's argument that all claims are waived is contrary to the ruling of this Court. In *Plein*, this Court stated that "...the waiver doctrine would not be applicable under the facts in *Cox*...because of the irregularities at the sale." 149 Wn.2d 214, 228 n.5, 67 P.3d 1061 (2003). *See also Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). The types

of irregularities the Court in *Plein* was referring to are similar to the irregularities that exist in this case. The Court noted that post-sale relief was appropriate in cases like *Cox* because of the “extreme disparity between price and value and conduct of the trustee.” *Plein*, 149 Wn.2d at 228-29 n.5.

E. The jury’s verdict on the Consumer Protection Act claim is supported by substantial evidence.

At trial, the plaintiff proved all five elements of its Consumer Protection Action claim.²¹

1. *Quality engaged in unfair and deceptive acts or practices.*

Quality engaged in several unfair or deceptive acts. First, when it came to making the decision about whether or not to postpone the foreclosure sale, it was an unfair practice for Quality to only act with WaMu’s approval. A trustee has always had the duty to act in good faith

²¹ The five elements are: (1) that Quality engaged in an unfair or deceptive act or practice; (2) that the act or practice occurred in the conduct of the defendant’s trade or commerce; (3) that the act or practice affected the public interest; (4) that Ms. Halstien was injured; and (5) that Quality’s act or practice caused Ms. Halstien’s injury. See RCW 19.86; *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 787-93, 719 P.2d 531 (1986).

with respect to both the borrower and the beneficiary of the deed of trust.²² *Cox v. Helenius* is the seminal case that addresses this duty. 103 Wn.2d 383, 693 P.2d 683 (1985).²³ In *Cox*, this Court ruled that “[the trustee] ... is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and creditor alike.” *Id.* at 389 (citations omitted). Moreover, consistent with the *Cox* decision, the current version of RCW 61.24.010(4) (which was not in effect at the time of the sale) provides: “The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.” Therefore, since Quality did not act in good faith with respect to both the bank **and** the borrower as required by law, it acted in an unfair

²² It has always been the case that the trustee owes a duty to both the homeowner and the bank to take “reasonable steps to avoid sacrifice of a debtor’s property,” but the scope of the duty has been clarified by our legislature from time to time. *Cox v. Helenius*, 103 Wn.2d 383, 389, 693 P.2d 683 (1985). Because the Halstien foreclosure occurred in February of 2008, Quality was required to act as a fiduciary towards Ms. Halstien and WaMu. *Id.* Subsequent to the foreclosure sale at issue in this case, the legislature modified RCW 61.24.010 adding subsections (3) and (4). Laws of 2008, ch. 153 § 1. Effective June 12, 2008, these subsections provided that the trustee would no longer owe a fiduciary duty to any party, but nonetheless the trustee would still be required to “act impartially between the borrower, grantor and beneficiary.” *Id.* The legislature again clarified the duty in 2009 and specifically provided that the trustee owes a duty of good faith to both the bank and borrower. *See* Laws of 2009, ch. 292 § 7 (which became effective on July 26, 2009). Accordingly, at the present time the trustee must act in “good faith” to take reasonable steps to avoid the sacrifice of a homeowner’s equity.

²³ Similar to the instant case, *Cox v. Helenius* involved a home that a trustee sold at foreclosure for far less than it was worth. The trustee in *Cox* sold the home – in which the debtor had equity of at least \$100,000 – for \$11,783. The Supreme Court set aside the sale because if the trustee’s actions were left unchecked, the homeowner would have lost approximately \$90,000 of equity. Likewise, if left unchecked, the trustee’s action in this case would cause Ms. Halstien to suffer a loss of \$151,912.33.

manner.

Second, it is unfair for Quality to shirk its responsibility to take reasonable steps to avoid sacrificing the borrower's property. *Cox* articulates this responsibility. In *Cox*, this Court held that the trustee must "take reasonable and appropriate steps to avoid sacrifice of the debtor's property and his interests." 103 Wn.2d at 389 (citations omitted). Quality breached this responsibility because it treats all foreclosures the same whether or not the homeowner has equity in the property. Consequently, it is unfair for Quality to conduct foreclosures without any regard for homeowners' equity.

Third, it was unfair and deceptive of Quality to predate and falsely notarize notices of sale. By using the false date on the Halstien notice of sale, Quality's representatives made it appear as though they actually waited the full 30 days from the posting of the notice of default, as required by RCW 61.24.030(8), before transmitting the 90 day notice of sale. This deception was unfair to Ms. Halstien because if Quality had acted honestly, it would not have been able to record the notice of sale as early as it did and therefore could not have set the Halstien foreclosure sale for as early as February 29, 2008. *See* RCW 61.24.040(1)(a).

In short, it is unfair and deceptive for Quality to ignore its obligations as a trustee and act as a "repo man" for the banks. If the

legislature was willing to allow a “repo man” to handle home foreclosures in the same manner as repossessions of cars and refrigerators, the Deed of Trust Act, like the Uniform Commercial Code, would have provided the lender with self-help remedies. However, that is not the case. *Compare* RCW 61.24.020, *with* RCW 62A.9A-609(a)(1).

2. *Quality’s unfair and deceptive acts or practices occurred in trade or commerce.*

The plaintiff proved that Quality’s unfair and deceptive practices occurred in the course of trade or commerce.²⁴ Quality is a for-profit corporation, which sold its Washington trustee services to WaMu and other banks on thousands of occasions. Each time that Quality was appointed as a trustee, its fee had to be paid by a Washington homeowner when that homeowner cured his or her loan defaults or the fee became part of the obligation secured by the deed of trust.

3. *Quality’s unfair and deceptive acts or practices affect the public interest.*

The jury correctly found that Quality’s unfair and deceptive practices affected the public interest. This Court has stated that whether a defendant’s unfair and deceptive acts or practices affect the public interest

²⁴ Trade and commerce is defined as “the sale of assets or services, and any commerce directly or indirectly affecting the people of the State of Washington.” *See* RCW 19.86.010(2).

is an issue to be determined by the trier of fact: “whether the public has an interest in any given action is to be determined by the trier of fact from several factors, depending upon the context in which the alleged acts were committed.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789-90, 719 P.2d 531 (1986).

In the instant case, the jury considered a great deal of evidence that lead to the conclusion that Quality’s unfair and deceptive practices affected the public interest. For example, Quality’s practice of abrogating its responsibility as a trustee and postponing sales only when permitted to do so by the lenders is a practice that affects the public interest. The jury also considered the multiple instances over a four year period in which Quality falsely notarized documents. Thus, the jury had ample evidence to find that Quality’s unfair and deceptive practices affected the public interest.

4. *Quality’s unfair and deceptive acts or practices injured Ms. Halstien.*

The plaintiff established at trial that Ms. Halstien’s home could have been sold for at least \$235,000, even though Quality sold it for only \$83,087.67. As a result, the plaintiff proved that Ms. Halstien suffered an injury.

5. *Quality' unfair and deceptive acts or practices caused Ms. Halstien to suffer the injury.*

The plaintiff established at trial that Quality's practices were the proximate cause of Ms. Halstien's injury; without Quality's unfair and deceptive acts or practices, Ms. Halstien's home would have been sold for \$235,000, not \$83,087.17. If Quality had acted reasonably, it would have postponed the foreclosure sale and the Guardian could have consummated a \$235,000 sale. Moreover, as noted previously, if Quality had not predated the notice of sale, the Guardian would have had more time to consummate the \$235,000 sale. Quality's unwillingness to postpone the foreclosure sale once notice of the \$235,000 sale agreement was provided, and Quality's illegal acceleration of the foreclosure process, caused Ms. Halstien's damage.²⁵

F. The jury's verdict on the breach of contract claim is supported by substantial evidence.

The plaintiff and the defendants agreed upon instruction Number 21 (CP 1307-09, 1435; RP 444), which is consistent with Washington Pattern Jury Instruction number 300.02, 6A Wash. Prac., *Civ Pro.* § 31:2 (5th Ed. 2005). This instruction identifies five elements that have to be

²⁵ There can be more than one proximate cause of the injury, and the Consumer Protection Act does not require a plaintiff to prove that the practices complained of are the sole cause of the injury. See *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82, 170 P.3d 10 (2007).

proven to prevail on a breach of contract claim.²⁶ At trial, Plaintiff proved all five elements of the breach of contract claim.

Plaintiff proved the first element, the existence of a contract, by showing that Quality took the place of the trustee originally named in the deed of trust. (RP 201-02) Accordingly, the three parties to the deed of trust contract were Ms. Halstien, WaMu, and Quality.

The express terms of the deed of trust establish the second element, whether the contract provided that Quality would conduct the foreclosure in accordance with Washington law. The deed of trust (which is part of Ex. 51) states, on page 12 in section 16, that “All rights and obligations contained in this Security Instrument [including the right of the trustee to conduct a foreclosure sale pursuant to section 22 of the deed of trust] are subject to any requirements and limitations of Applicable Law.” (RP 204-05.) The deed of trust defines “Applicable Law” on page 2 as “all controlling applicable federal, state and local statutes, regulations,

²⁶ The five elements included in Instruction No. 21 are:

(1) That a defendant entered into a contract with Ms. Halstien and/or Puget Sound Guardians; (2) That the terms of the contract included that the defendant would insure that any foreclosure of Ms. Halstien’s home would be conducted in a manner defined by Washington law; (3) That the defendant breached the contract; (4) That Ms. Halstien and/or Puget Sound Guardians performed or offered to perform the obligations under the contract; and (5) That Ms. Halstien sustained damages as a result of a defendant’s breach.

ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.”

Plaintiff proved the third element, which requires a showing that the contract was breached, by showing that Quality did not comply with Washington law in conducting the foreclosure sale. At trial, Plaintiff showed that (i) Quality’s deference to WaMu was contrary to its obligation to be impartial; (ii) Quality made no effort to avoid sacrificing Ms. Halstien’s equity, and (iii) Quality falsely dated the notice of sale in order to speed up the foreclosure process.

Plaintiff demonstrated the fourth element, Ms. Halstien’s performance, or offer of performance, of the obligations under the contract, by showing that Ms. Halstien granted a security interest for WaMu’s benefit. Ms. Halstien’s obligation under the deed of trust contract required her to transfer the title of her home to a trustee for WaMu’s benefit, which she did.²⁷

Finally, the fifth element, whether Ms. Halstien suffered damages as a result of the breach, is evident from Ms. Halstien’s loss of \$151,912.33 of equity.

²⁷ Ms. Halstien’s obligation under the deed of trust is different from her obligation under the promissory note, which was to pay her loan. However, on behalf of Ms. Halstien, the guardian offered to perform that obligation by using the proceeds of the proposed \$235,000 sale.

G. The verdict on the negligence claim cannot diminish the verdict on the other claims.

The trial court appropriately included the principal amount of the jury's Consumer Protection Act award, or the jury's breach of contract award, in the judgment. Quality provides no legal support for an argument to the contrary. Moreover, as the parties agreed, the jury was instructed as follows:

You may find that the Plaintiff suffered damages based on one or more of the claims listed below. However, the damages are not cumulative. Therefore, if you find that the Plaintiff suffered damages based on more than one of the claims, the Plaintiff's final damage award will be based on the highest damage award you find, rather than by adding together multiple damage awards.

(CP 1443, 1488)

H. Quality disregards one of the goals of the Deed of Trust Act.

There are three goals of the Deed of Trust Act. One of them is that the foreclosure "...process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure." *See e.g., Plein v. Lackey, supra*. 149 Wn.2d at 225 (citing *Cox v. Helenius*, 103 Wn.2d at 387). Unfortunately, the foreclosure process used by Quality is not mindful of that goal.

I. Quality is confused about the statute in effect at the time of the foreclosure.

Quality inadvertently transposed numbers when it cited to RCW 64.21.040(6). (Br. of Appellant's at 39, 40.) It presumably meant to cite to RCW 61.24.040(6), as it is the current text of this statute that is quoted. Nevertheless, even if this assumption is true, Quality has quoted from a version of the statute that did not exist at the time of the Halstien foreclosure. In February 2008, RCW 61.24.040(6) provided:

The trustee may for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days by a public proclamation at the time and place fixed for sale in the notice of sale ...

See Laws of 2008, ch. 153 § 3 (which became effective June 12, 2008);

Laws of 2009, ch. 292 § 9 (which became effective on July 26, 2009).

This provision supports the argument that Quality could have easily done the right thing and postponed the foreclosure sale prior to February 29, 2008, or on that day when it learned that there would be no competitive bidding.

Moreover, even if the statute as subsequently amended was applicable to the Halstien foreclosure, Quality's argument would still lack merit. While the current version of the Deed of Trust Act states that the trustee may, but has no obligation, to continue the sale, the new language of RCW 61.24.127 (which permits post-sale damage claims) undermines

Quality's waiver argument. Even if a trustee may choose not to postpone a sale, the statute now expressly precludes the waiver of any Consumer Protection Act claims and of any claims arising from the trustee's failure to comply with the Deed of Trust Act.

J. Quality was properly served and does business in Washington.

As this Court noted in *Martin v. Meier*, 111 Wn.2d 471, 478, 760 P.2d 925 (1988), it is well settled that:

...[D]ue process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

In the instant case, the due process requirement was satisfied by service of process on QLSCW. There is also no legitimate basis for Appellants to argue that it was not satisfied with respect to QLSC.

Counsel for QLSC accepted service on behalf of her client and QLSC was personally served on two subsequent occasions in accordance with RCW 4.28.080(9), which authorizes the summons to be delivered to:

...the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent.

Service is thus not limited to a corporation's "registered agent."

The declarations of service in the instant case confirm that service

of process was proper because it was twice made on the “office assistant” whom the managers and the registered agent of QLSC authorized to sit at the entrance of QLSC’s corporate headquarters and accept court papers. (CP 1827, 1828.) Moreover, the declarations of service are in a standardized form and are thus presumptively correct, and should not be overturned without clear and convincing evidence to the contrary. *See, e.g.; Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918); *Miebach v. Colasurdo*, 35 Wn. App. 803, 808, 670 P.2d 276 (1983), *aff’d in relevant part*, 102 Wn.2d 170, 685 P.2d 1081 (1984).

In addition, Plaintiff completed service on a party over which the Washington courts have jurisdiction. Washington’s long arm statute, RCW 4.28.185, reflects the legislature’s “conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause.” *See, e.g., Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767, 783 P.2d 78 (1989). RCW 4.28.185 reads in pertinent part:

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

- (a) The transaction of any business within this state; [or]**
- (b) The commission of a tortious act within this state;...**

Therefore, since QLSC has transacted substantial business in Washington in its own right and through QLSCW as its agent, the Washington courts have jurisdiction over QLSC.²⁸

VI. CROSS-APPEAL

In the instant case, where it was proven that a Washington homeowner was damaged by a California-controlled trustee that refuses to follow Washington law, and where it was proven that the trustee continues to employ the same wrongful practices, an injunction is required. Quoting from the Consumer Protection Act, this Court has unequivocally declared that the purpose of the Act is “to protect the public” and to that end, the Act “shall be liberally construed that its beneficial purposes may be served.” *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973). Therefore, the trial court erred by denying Plaintiff’s motion for an injunction.

A. **The trial court’s findings of fact and conclusions of law support the entry of an injunction order.**

The trial court’s denial of Plaintiff’s motion for an injunction was not based on the rejection of Plaintiff’s factual or legal contentions. In

²⁸ The Appellants argue that the people who prepared the foreclosure notices and scheduled the foreclosure sale did so as employees of QLSCW. However, since it is also admitted that the “bosses” of these employees work for QLSC, an agency relationship exists between QLSC and QLSCW because the two parties have consented that “one shall act under the control of the other.” *Rho Co. v. Dept. of Revenue*, 113 Wn.2d 561, 570, 782 P.2d 986 (1989).

fact, the trial court's conclusions of law, and the findings of fact made by the jury and the trial court judge, match the contentions of the plaintiff. (CP 1049-52, 1488-92, 1585-88.)

The jury found that Defendants' unfair and deceptive business practices violated the Consumer Protection Act. (CP 1491.) Similarly, when the trial court was considering Plaintiff's motions for an injunction, it concluded that: (i) Quality had a contract with the lender that provided that it was "not authorized to postpone a foreclosure without the consent" of the lender (CP 1587-1588); (ii) "[a]s a general practice Quality defers to the lender when asked by a borrower to postpone a sale" (CP 1051); (iii) a "contract with a lender that prohibits QLS from exercising its discretion to postpone a sale...could be a violation of the 'good faith' requirement of the Deed of Trust Act" (CP 1588); (iv) under the Deed of Trust Act a trustee owes a duty of "good faith" to all parties including "the borrower, beneficiary and grantor" (CP1586); and (v) a trustee "must take reasonable and appropriate steps to avoid sacrifice of the debtor's property and his interest" (CP 1587).

Moreover, between the time the jury rendered its verdict and the time of the final hearing on the injunction motion, Quality had the opportunity to inform the trial court that it would no longer engage in the practice of abrogating its duty to be impartial by only acting with the

bank's approval and that it would begin to take reasonable steps to avoid the sacrifice of homeowners' equity. However, it failed to do so. This failure demonstrates the need for an injunction, as Quality's Chief Operating Officer testified that he intends for Quality to "do nothing differently" in the future.²⁹ (CP 1052.)

B. The decision to deny the motion for an injunction was based on incorrect assumptions of law.

The trial court denied Plaintiff's request for an injunction because it wrongly concluded as a matter of law that: (i) "[t]here is little case law on injunctions pursuant to the Consumer Protection Act, and the statute provides no substantive requirements" (CP 1586); and (ii) Plaintiff's request for an order requiring Defendants to do exactly what this Court and current Washington law requires trustees to do was "overly broad" (CP 1586). As noted below, the trial court erred in making these conclusions.

1. There is substantial authority to support the issuance of an injunction.

In Washington, injunctive relief to preclude future violations of the Consumer Protection Act is explicitly authorized by statute. RCW

²⁹Similarly, throughout the Appellant's Brief, Quality argues that the bank has the right "veto" any request for a continuance of a sale and Quality must follow the bank's instructions. (See, e.g., Appellants' Br. At 10, 24, 38.)

19.86.090 provides that any person who is injured by a violation of the Act “may bring a civil action in superior court to enjoin further violations...” The statute reflects the legislature’s determination that an injunction may be necessary in order to further the purposes of the Act.

In addition, as discussed above, this Court has made it clear that the legislative purpose of the Act is “to protect the public” and “shall be liberally construed that its beneficial purposes may be served.” *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973). Thus, contrary to the trial court’s assertion, there is ample law to support the issuance of an injunction.

2. *The proposed injunction is based on the express instructions of this Court and is not overly broad.*

Plaintiff requested a modest injunction that would require Quality to comply with Washington law, but would not be so broad as to force Quality out of business.³⁰ In essence, Plaintiff only asked the trial court to order Quality to comply with the applicable law and follow the same procedures as other, law-abiding, trustees. Plaintiff proposed to the trial court, and proposes now, the following injunction language:

³⁰ This case involved WaMu, which is no longer in business, but Quality’s representatives testified that their business practice of abrogating the duty to be impartial, by only acting with the bank’s approval, applies to the foreclosures Quality handles in Washington for a large number of other banks. (RP 215-17, 357-58, 395.)

In connection with acting as a trustee for deeds of trusts on Washington property, Quality Loan Service Corporation and Quality Loan Service Corporation of Washington will: (a) treat both the borrower and the lender in good faith; (b) take reasonable and appropriate steps to avoid sacrifice of the homeowner's property; and (c) refuse to follow instructions from any lender that require them to obtain lender approval prior to postponing a foreclosure sale. Subsection (c) does not preclude Quality Loan Service Corporation or Quality Loan Service Corporation of Washington from considering the interests of lenders prior to exercising discretion on when to postpone a foreclosure sale; however, they are not allowed to defer the exercise of that discretion to any lender.³¹

(CP 1573.)

Even though the scope of the proposed order is modest, and even though it allows Quality to be fair to both the lenders and borrowers, the trial court nevertheless denied the request for an injunction because it concluded that an injunction would be “overbroad and unenforceable.”

(CP 1587.) The trial court's conclusion was erroneous because the proposed language merely requires Quality to follow the concise directives of the legislature and this Court.

For example, part (a) of the proposed injunction merely provides that Quality will “*treat both the borrower and the lender in good faith*” as is required by RCW 61.24.010. Part (b) states that Quality as a trustee

³¹ The final sentence of the proposed injunction was inserted by Plaintiff to make it clear that while Quality must take into consideration the interests of the borrowers, Quality can consider the interests of the lenders as well.

must take reasonable and appropriate steps to avoid the sacrifice of the homeowner's property, as this Court required in *Cox*. *Cox*, 103 Wn.2d at 389. Part (c) provides that Quality must consider the interests of both the lender and the borrower when making decisions about the timing of the sale. This requirement is consistent with RCW 61.24.010(4), which requires a trustee to treat both the borrower and lender in good faith, and with the directive in *Cox* that trustees must "...attend equally to the interest of the debtor and creditor alike." *Cox*, 103 Wn.2d at 389.

Finally, the injunction proposed by Ms. Halstien's representative is enforceable. Faced with such an order, Quality should begin to follow the law. However, if Quality does not begin to comply with the law, other parties aggrieved by Quality's unfair practices can enforce the injunction in other lawsuits. *See R/L Associates v. Seattle*, 113 Wn.2d 402, 411, 780 P.2d 838 (1989). In Washington, parties other than the plaintiff in the lawsuit in which the injunction was issued can enforce an injunction. *See id.*

C. The trial court abused its discretion when it denied the plaintiff's motion for an injunction.

Generally, a trial court exercises considerable discretion in deciding whether to issue injunctive relief. *See, e.g., Steele v. Queen City*

Broad. Co., 54 Wn.2d 402, 341 P.2d 499 (1959).³² However, in cases where all of the statutory prerequisites are satisfied, courts have pointed out that the scope of that discretion is limited. While there is no Washington case directly on point, other federal and state courts have held that a trial court's discretion to grant or deny an injunction is limited when the injunctive relief is explicitly authorized by statute.

For example, in *United States v. Buttorff*, 761 F.2d 1056 (5th Cir 1985), the Fifth Circuit stated, "When an injunction is explicitly authorized by statute, proper discretion usually requires its issuance if the prerequisites for the remedy have been demonstrated and the injunction would fulfill the legislative purpose." (quoting *Donovan v. Brown Equipment and Service Tools, Inc.*, 666 F.2d 148, 157 (5th Cir. 1982)). See also *United States v. White*, 769 F.2d 511, 515 (8th Cir., 1985); *United States v. Cohen*, 222 F.R.D. 652 (W.D. Wash. 2004); *United States v. Venie*, 691 F.Supp. 834 (M.D. Pa. 1988); *N.H. Dept. of Envtl. Services v. Mottolo*, 155 N.H. 57, 917 A.2d 1277 (N.H. 2007). Such cases support the proposition that our legislature's decision to explicitly provide for

³² Abuse of discretion occurs if a trial court bases its decision on untenable grounds or reasons. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010). A decision is based on untenable grounds or reasons if the court relies on unsupported facts or the wrong legal standard. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006).

injunctive relief by statute significantly diminishes a trial court's ability to deny that relief to a party who has prevailed on his or her damage claim.

In addition, the trial court based its decision to deny the motion for an injunction on conclusions of law. As noted above, the trial court's decision to deny the injunction was based on the incorrect conclusions that: (i) "[t]here is little case law on injunctions pursuant to the Consumer Protection Act, and the statute specifies no substantive requirements;" and (ii) the plaintiff's request for an order requiring the defendants to follow the law was "overly broad." Neither of these conclusions was based on the evidence presented at the trial. The first conclusion is a comment about the state of Washington law and the second is a comment on the scope of the relief requested. These conclusions are therefore conclusions of law and, as such, are subject to de novo review on appeal. *State v. Williams*, 96 Wn.2d 215, 220, 634 P.2d 868 (1981); *see also Dumas v. Gagner*, 137 Wn.2d 268, 280, 971 P.2d 17 (1999).

D. An injunction is necessary to stop Quality's future violations of the law.

While Quality's employees testified that they stopped their practice of pre-dating and falsely notarizing notices of sale, Plaintiff demonstrated at trial that Quality has no intention of changing its improper practices of (i) deferring to lenders all decisions about if or when to postpone

foreclosure sales and (ii) treating all foreclosures the same whether or not the borrower has equity. If the jury's verdict was going to be enough to prompt Quality to change its wrongful practices, then between the time the jury rendered its verdict and the time of the final hearing on the injunction motion, Quality would have informed the trial court that it would no longer engage in its unfair practices. However, it failed to do so and an injunction is necessary.³³

VII. ATTORNEY FEES

The prevailing party in a Consumer Protection Act claim is entitled to attorney fees incurred at trial and on appeal. RCW 19.86.090; RAP 18.1, *see also Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 336, 858 P.2d 1054 (1993) (“Attorneys’ fees on appeal are recoverable under the Consumer Protection Act”). The trial court included attorney fees in the judgment, and Halstien’s representative requests additional attorney fees incurred in responding to Quality’s appeal of that judgment.³⁴

³³ In *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976), this Court warned that “...courts must beware of efforts to defeat injunctive relief by protestations of reform.” In this case, Quality failed to even make protestations of reform.

³⁴ The amount of attorney fees on appeal can be determined by the Clerk pursuant to RAP 18.1(c), or as determined by the trial court after remand pursuant to RAP 18.1(i).

VIII. CONCLUSION

For the reasons set forth above, Plaintiff requests that this Court: (i) affirm the trial court's entry of the Judgment Against Quality; (ii) reverse the trial court's decision to deny the injunction; and (iii) award additional attorney fees to Plaintiff. In connection with reversing the trial court's order denying the injunction, Plaintiff requests that this Court enter an injunction, or instruct the trial court to enter an injunction, in the form described above.

RESPECTFULLY SUBMITTED this 17th day of
September, 2010.

NORTHWEST JUSTICE PROJECT

By Frederick P. Corbit
Frederick P. Corbit, WSBA #10999
On behalf of Halstien's Representative,
the Respondent/Cross Appellant