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No. 67629-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BRIAN HEBERLING

Appellant,

vs.

JPMORGAN CHASE BANK,

Respondent,

WASHINGTON MUTUAL BANK, FA,
BANK OF AMERICA

Defendants.

BRIEF OF RESPONDENT
JPMORGAN CHASE BANK, N.A.

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I. STATEMENT OF THE CASE

On July 11, 2006, in consideration for a mortgage loan, Appellant Brian Heberling (“Heberling”) executed a promissory note (the “Note”) in the amount of \$1,700,000.00, payable to Washington Mutual Bank, FA (“WaMu”), and a Deed of Trust in favor of WaMu. CP 448-476. On July 13, 2006, the Deed of Trust was recorded under King County Auditor’s File No. 20060713001645, and encumbered a piece of real property located in King County, commonly known as 1660 W. Lake Sammamish Parkway N.E., Bellevue, WA 98008 (the “1660 Property”). CP 454-476.

Around the same time, Heberling executed promissory notes and deeds of trust in favor of WaMu for two additional properties. The first property is located at 1090 West Lake Sammamish Parkway NE, Bellevue, WA (the “1090 Property”). CP 477-498. The second property is located at 649 Beach Street, Manzanita Beach, Oregon (the “Manzanita Beach Property”). CP 499-524.

On or about July 24, 2008, Heberling wrote a WaMu employee requesting a “short term cash infusion” of \$500,000, so that the 1660 Property could be resold. CP 442-444.

On September 25, 2008, Respondent JPMorgan Chase Bank, N.A. (“Chase”), facilitated by the Federal Deposit Insurance Corporation (“FDIC”), acquired the assets, and assumed the qualified financial contracts of WaMu. CP 374.

Heberling subsequently failed to make the required payments for each of the three loans with WaMu on all three properties. CP 2-3. In an attempt to avoid foreclosure on these properties, Heberling asked for a “short term cash infusion,” which eventually turned into his request for a loan modification. CP 691, 718.

On or about January 31, 2009, Heberling received a letter from WaMu informing him that a loan modification was denied because of a title issue on the Property. CP 524.

On or about April 2, 2009, Heberling received another letter from WaMu stating that “we cannot guarantee that you will be approved [for a loan modification].” CP 525-526. This letter was accompanied by a Notice of Collection Activity for the 1660 Property. *Id.*

On or about April 30, 2009, Heberling was approved for a three-month loan modification trial period for the 1090 property and the Manzanita Beach property. CP 427.

On or about May 14, 2009, a Notice of Default was sent to Heberling, informing him that he was in default of the Note. CP 527-530. The Notice of Default indicated that Heberling could lose the 1660 Property at a foreclosure sale if he failed to respond. *Id.*; *see also* CP 429. Despite having sufficient funds to cure the default, Heberling declined to do so. CP 431.

On or about June 15, 2009, Heberling received a Notice of Foreclosure and Notice of Trustee’s Sale related to the 1660 Property. CP 533-535; *see also* CP 432. Although Heberling was informed that he could initiate court action to contest the default, he disregarded that information. CP 432.

On or about September 8, 2009, Heberling sent additional documents to Chase to support his request for a loan modification. CP 434. Heberling told Chase that his financial situation was “looking brighter.” CP 434. A hardship affidavit Heberling signed as part of this documentation stated that “the servicer is not obligated to offer me assistance based solely on the representations in this affidavit;” but Heberling “didn’t really pay much attention” to that statement because of his belief that Chase was obligated to modify the Note. *Id.*

On September 21, 2009, Heberling was informed that he did not qualify for a loan modification related to the 1660 Property. CP 537-538; *see also* CP 437.¹ Heberling did not qualify because his income was not sufficient to support the debt required. *Id.* At that time, Heberling was beyond the “tipping point” where he no longer believed a modification would occur. CP 439.

Prior to the Trustee’s Sale, Heberling considered borrowing money to cure the default, but ultimately chose not to proceed in that manner. CP 443. Heberling also, despite having retained counsel, did not consider restraining the Trustee’s Sale through court action. CP 441-442. Consequently, on October 23, 2009, the foreclosure was completed with a Trustee’s Sale of the 1660 Property. CP 538-539.

Between the time of Heberling’s first communication with WaMu, and the date of the Trustee’s Sale almost two years later, Heberling received no documentation that promised or granted him a loan modification. CP 419, 444.

On or about November 19, 2009, Heberling filed a Complaint asserting five causes of action. CP 1-6. Defendants moved for summary judgment primarily based on Heberling’s failure to the restrain the Trustee’s Sale. CP 7-118. On August 2, 2010, the Court granted summary judgment in Defendants’ favor only as to claims of Breach of Contract, Promissory Estoppel, and Negligence. CP 339-341.

After the Court’s decision, the parties engaged in discovery, including depositions of Heberling and, per CR 30(b)(6), a Chase representative. CP 393-447; CP 658-667.²

¹ Contrary to the Complaint, this was not the first time Heberling had been denied for a loan modification related to the 1660 Property. CP 440; *cf.* CP 4.

² Although Heberling repeatedly asserts that an individual named Michael Lemon made certain representations to him, Heberling’s final Witness List did not name Mr. Lemon as a witness in the case, nor did Heberling ever depose Mr. Lemon. See Brief of Appellant at 4,5; CP 398-447; CP 658-667.

On June 24, 2011, Defendants again moved for summary judgment on Heberling's remaining causes of action. CP 369-583. The Court then ruled that Defendants prevailed on all claims. *See* CP 876-877.³ This appeal followed.

II. RESPONSE TO ASSIGNMENT OF ERROR

1. The Superior Court did not err in granting summary judgment to Chase and in denying Heberling's motion for reconsideration, because no evidence existed to support Heberling's claims, and Chase was entitled to prevail as a matter of law.

III. RESPONSE ARGUMENT

A. Standard of Review and Basis for CR 56 Motions.

An order granting summary judgment is reviewed *de novo*, with the Court of Appeals engaging "in the same inquiry as the trial court." *Beaupre v. Pierce County*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007). However, this Court may affirm the ruling below on any ground supported in the record, "even if the trial court did not consider the argument." *King County v. Seawest Inv. Associates, LLC*, 141 Wn.App. 304, 310, 170 P.3d 53, 56 (2007), *citing LaMon v. Butler*, 112 Wn.2d 193, 770 P.2d 1027 (1989).

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show no genuine issue of material fact and thus, the moving party is entitled to judgment as a matter of law. *See* CR 56(c); *see also Knox v. Microsoft Corp.*, 92 Wn. App. 204 (1998), *rev. denied*, 137 Wn.2d 1022 (1999); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991). With the motion, the Court can consider "supporting affidavits and other admissible evidence based on personal knowledge." *Id.*

³ Defendants had also moved for summary judgment on the question of damages; however, that issue was not reached given the Court's order. CP 388-392.

If the moving party demonstrates that an issue of material fact is absent, the nonmoving party must then articulate specific facts establishing a genuine issue for trial. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *see also* CR 56(e) [“an adverse party may not rest upon the mere allegations or denials of his pleading, but... must set forth specific facts showing that there is a genuine issue for trial.”]. A genuine issue of material fact does not exist where insufficient evidence exists for a reasonable fact-finder to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

Unsupported conclusory allegations, or argumentative assertions, are insufficient to defeat summary judgment. *See Vacova Co. v. Farrell, supra, citing Blakely v. Housing Auth. of King Cy.*, 8 Wn.App. 204, 505 P.2d 151, *review denied*, 82 Wn.2d 1003 (1973), *Stringfellow v. Stringfellow*, 53 Wn.2d 639, 335 P.2d 825 (1959); *see also Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). “Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact.” *Id.*, *citing Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988); *see also Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 769 P.2d 298 (1989). Summary judgment is appropriate if, after considering the evidence, reasonable persons could reach only one conclusion. *See Hansen v. Friend*, 118 Wn.2d 476, 824 P.2d 483 (1992), *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982).

B. Chase Was Not Responsible for the Substance of Heberling’s Remaining Negligent Misrepresentation and Consumer Protection Act Claims.

1. Heberling’s Complaint Did Not Allege that Chase Made Promises to Him.

As a threshold matter, summary judgment in Chase’s favor was appropriate because Heberling’s Complaint solely named Defendant WaMu as the party liable for allegedly making certain representations prior to foreclosure. CP 339-341.

In *Hallett v. St. Paul Fire & Marine Ins. Co.*, 50 Wn.App. 567, 749 P.2d 196 (1988), this Court addressed a summary judgment ruling based on allegations presented in an amended complaint. The majority found that the plaintiff had failed “to establish a cause of action or recover damages from [a law firm named as a party].” *Id.* at 574.

Similarly, in this case, Heberling’s Complaint specifically mentions purported acts of WaMu alone.⁴ The only mention of Chase anywhere in the substance of Plaintiff’s Complaint is contained in the statement that “Chase acquired all assets and certain liabilities of WAMU.” CP 3. Only in response to the final Motion for Summary Judgment did Heberling claim, for the first time, that Chase assumed his claims against WaMu as one of those liabilities.⁵ Thus, while the Complaint’s Prayer for Relief includes all defendants, its factual allegations do not implicate either Chase or Bank of America as parties.

⁴ Those allegations include, “Heberling quickly began working with WAMU to modify each of the loans...,” “WAMU continued to advise Heberling that it would return the 1660 Property to the same work-out plan as his other two properties,” “WAMU continued to represent to Heberling that it would treat the 1660 Property in the same manner as it had his other two properties...,” “Heberling relied upon WAMU’s representations that he would be provided a work-out plan for the 1660 Property...” CP 1-6.

⁵ New legal theories are not permitted to be raised in *response* to a motion for summary judgment. See *Camp Finance, LLC v. Brazington*, 133 Wn.App. 156, 135 P.3d 946 (2006), citing *Kirby v. City of Tacoma*, 124 Wn.App. 454, 469-70, 98 P.3d 827 (2004); *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn.App. 18, 974 P.2d 847 (1999) “[a] party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along.”].

2. Chase Had No Potential Liability Based on the Purchase and Assumption Agreement with the FDIC.

Article 2.5 of the Purchase and Assumption Agreement expressly relieves Chase from liability associated with claims related to WaMu:

[n]otwithstanding anything to the contrary in this Agreement, *any liability associated with borrower claims* for payment of or liability to any borrower for monetary relief, or that provide for any other form of relief to any borrower, whether or not such liability is reduced to judgment, liquidated or unliquidated, fixed or contingent, matured or unmatured, disputed or undisputed, legal or equitable, judicial or extra-judicial, secured or unsecured, whether asserted affirmatively or defensively, *related in any way to any loan or commitment to lend made by the Failed Bank prior to failure*, or to any loan made by a third party in connection with a loan which is or was held by the Failed Bank, or otherwise arising in connection with the Failed Bank's lending or loan purchase activities *are specifically not assumed by the Assuming Bank.*⁶ [Emphasis added.]

This section unambiguously supersedes all other provisions in the Agreement by its express language and broad scope. As such, the liability for claims associated with loans made prior to the Purchase and Assumption Agreement does not lie with Chase.⁷

In *McCann v. Quality Loan Service Corp. et al.*, 729 F.Supp.2d 1238 (W.D. Wash. 2010), the United States District Court for the Western District of Washington dismissed a case where the borrower raised, *inter alia*, negligent misrepresentation. The Court found that “[a]rticle 2.5 of the P & A Agreement relieves Chase of all liability for borrowers’ claims relating to loans made by Washington Mutual prior to September 25, 2008.” *Id.* at 1242-43; see also CP 540-582. Other courts have reached the same

⁶ The Agreement defines “loans” as not only the loans themselves, but “all amendments, *modifications*, renewals, extensions, refinancings and refundings of or for any of the foregoing...” CP 621. [Emphasis added.]

⁷ FDIC receivership “facilitates the sale of a failed institution’s assets (and thus helps to minimize the government’s financial exposure) by allowing the [FDIC] to absorb liabilities itself and guarantee potential purchasers that the assets they buy are not encumbered by additional financial obligations.” *Payne v. Security Sav. & Loan Ass’n, F.A.*, 924 F.2d 109 (7th Cir. 1991). As Plaintiff himself observed, “Washington Mutual was defunct.” CP 430.

conclusion as well.⁸

Heberling's lawsuit rested solely on the assumption that he requested, and then was promised, a modification of a WaMu loan.⁹ Such allegation, however, was expressly barred under the Purchase and Assumption Agreement even after Chase assumed the loan asset. Consequently, the trial court correctly granted summary judgment to Chase.

3. Heberling's Claims Were Also Barred Under 12 U.S.C. §1821(d)(13)(D).

Heberling allegations against Chase were also governed by the provisions in the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1821(d)(13)(D) ("FIRREA"). Pursuant to FIRREA, courts lack subject matter jurisdiction regarding claims against a defunct bank that the FDIC takes into receivership, unless the plaintiff first complies with an administrative claims process. *See McCarthy v. FDIC*, 348 F.3d 1075 (9th Cir. 2003); *Intercontinental Travel Mktg. v. FDIC*, 45 F.3d 1278 (9th Cir. 1994) ("[n]o court has jurisdiction over the claim until the exhaustion of this administrative process"); *see also* 12 U.S.C. § 1821(d)(13)(D)(ii) ["except as otherwise provided in this subsection, no court shall have jurisdiction over... any claim relating to any act or omission of such institution or the Corporation as receiver."].

⁸ *Cf. Federici v. Monroy*, 2010 WL 1345276 (N.D. Cal. Apr. 6, 2010) ("all of the claims against [Chase] are based on [WaMu's] lending activities, the liability for which was explicitly *not* assumed by [Chase] in its purchase of [WaMu's] assets, the [complaint] does not state any claims upon which relief could be granted against [Chase]."); *Molina v. Washington Mutual Bank*, 2010 WL 431439 (S.D. Cal. Jan.29, 2010) ("any of Plaintiffs' claims arising out of [Chase's] alleged status as successor in interest to Plaintiffs' borrower claims against [WaMu] must fail."); *Williams v. FDIC*, 2009 WL 5199237 (E.D. Cal. Dec. 23, 2009), *citing Village of Oakwood v. State Bank & Trust Co.*, 519 F.Supp.2d 730 (N.D. Ohio 2007), *aff'd* 539 F.3d 373 (6th Cir. 2008) ["an assuming bank would rarely be inclined to enter a P & A agreement with the FDIC knowing that it could be taking on unidentified liabilities of undefined dimensions that could arise at some uncertain date in the future."]; *Grealish v. Wash. Mut. Bank*, 2009 WL 2170044 (D. Utah July 20, 2009); *Cassese v. Wash. Mut. Bank*, 2008 WL 7022845 (E.D.N.Y. Dec. 22, 2008); *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101 (11th Cir. 1991).

⁹ *See* CP 448: "Q. Had you suggested a loan modification as an option? A. That's the inference of my introductory article to them, or introductory e-mail to them. Of course."

This requirement “applies to any claim or action respecting the assets of a failed institution for which the FDIC is Receiver,” and extends to post-receivership claims related to the failed institution. *McCarthy*, 348 F.3d at 1081. If the administrative process is not followed, “the claim shall be deemed to be disallowed..., such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.” 12 U.S.C. § 1821(d)(6)(B)(ii). The provisions of FIRREA allow the FDIC “to perform its statutory function of promptly determining claims so as to quickly and efficiently resolve claims against a failed institution without resorting to litigation.” *Rosa v. Resolution Trust Corp.*, 938 F.2d 383 (3rd Cir. 1991), *cert. denied*, 502 U.S. 981, 112 S.Ct. 582, 116 L.Ed.2d 608 (1991).

Courts have routinely agreed that FIRREA prohibits actions against the third-party purchaser of a failed bank’s assets from the receiver (e.g. FDIC). *See Benson v. JPMorgan Chase Bank, N.A.*, 2010 WL 4010116 (N.D. Cal. Oct. 13, 2010) [allegations that Chase ‘continued’ WaMu’s misconduct; holding that even if the Court “were to find that the Complaints include stand-alone allegations of post-receivership misconduct by Chase, FIRREA still applies.”]; *Village of Oakwood v. State Bank & Trust Co.*, 519 F.Supp.2d 730 (N.D. Ohio 2007), *aff’d* 539 F.3d 373 (6th Cir. 2008); *Am. First Fed., Inc. v. Lake Forest Park, Inc.*, 198 F.3d 1259 (11th Cir. 1999) [“AFF, having purchased the note from the RTC, stands in the shoes of the RTC and acquires its protected status under FIRREA.... Thus, if Lake Forest is barred {by Section 1821(d)} from asserting this claim against the RTC, it is similarly barred from asserting it against AFF.”].¹⁰

¹⁰ *Benson* also holds that “Chase is “not liable to Plaintiffs as a ‘successor in interest’ to WaMu,” because “FIRREA bars claims ‘relating’ to the acts of the receiver or seeking the assets of the failed bank, even

In *American Nat'l Ins. Co. v. JPMorgan Chase & Co.*, 2010 WL 1444533 (D.D.C. Apr. 13, 2010), the United States District Court for the District of Columbia held that plaintiffs' claims against Chase for tortious contractual interference were barred under FIRREA. Despite the plaintiffs' argument "that their lawsuit [sought] damages only from JPMorgan Chase for injuries that were caused only by JPMorgan Chase," the court found that the allegations necessarily "depend on the FDIC-Receiver's sale of Washington Mutual Bank's assets to JPMorgan Chase." *Id.* at *3.

Here, Heberling failed to pursue the proper procedure for his claims – this resulted in a statutory bar under FIRREA. Heberling could not maintain claims against Chase, as purchaser of WaMu's assets, without having availed himself of the required administrative process first. As such, Chase correctly prevailed in this case as a matter of law.

C. Chase Was Entitled to Summary Judgment on Heberling's Consumer Protection Act Claim.

Heberling is incorrect that he "presented evidence to support all" elements of a Consumer Protection Act (CPA) claim. Brief of Appellant at 13.¹¹

The five elements under RCW 19.86 are: (1) an unfair or deceptive act or practice, (2) the act or practice occurred in the conduct of trade or commerce, (3) the act or practice impacted the public interest, (4) an injury to the plaintiff's business or property, and (5) a causal link between the unfair or deceptive act or practice and the

when those claims are asserted against the third-party purchaser of failed-bank assets from the receiver." *Id.*

¹¹ Heberling also erroneously asserts that "Chase has disputed only elements 1, 3, and 5." *Id.* Chase's final Motion for Summary Judgment addresses the fact that Heberling suffered no damages to either a business or the Property. CP 390-391. Chase concedes that Heberling's allegations would meet the second prong test as presented. See *Browne v. Avvo Inc.*, 525 F.Supp.2d 1249, 1254 (W.D. Wash. 2007), citing RCW 19.86.010(2). ("Trade' and 'commerce' are defined as 'the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington'.")

injury. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). Failure to meet any one of these elements is fatal and necessitates dismissal. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298 (2002). “[W]hether a particular action gives rise to a CPA violation is reviewable as a question of law.” *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 930 11 P.2d 288 (1997).

1. First Factor – Unfair or Deceptive Act or Practice.

“Implicit in the definition of ‘deceptive’ under the CPA is the understanding that the practice misleads or misrepresents something of material importance.” *Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC*, 134 Wn.App. 210, 135 P.3d 499 (2006). But “acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law.” *Leingang, supra.* at 155.

Plaintiff can meet the first CPA element in only two ways: he may show either that an act or practice (i) “has a capacity to deceive a substantial portion of the public,” or (ii) that “the alleged act constitutes a per se unfair trade practice.” *See Saunders v. Lloyd's of London*, 113 Wn.2d 330 (1989), *quoting Hangman, supra.*¹²

2. Third Factor – Act or Practice With Capacity to Impact the Public Interest.

The third factor articulated in *Hangman Ridge* also requires “a showing of impact to public interest separate and apart from showing an unfair and deceptive act.” *Holiday Resort, supra.* at 226, *citing Hangman Ridge, supra.* “Mere speculation that an alleged unfair or deceptive act had the capacity to deceive a substantial portion of the public is

¹² An unfair trade practice “requires a showing that a statute has been violated which contains a specific legislative declaration of the public interest impact.” *Hangman*, 105 Wn.2d at 791.

insufficient to survive summary judgment” on a CPA claim. *Brown ex rel. Richards v. Brown*, 157 Wn.App. 803, 816-17, 239 P.3d 602, 609 (2010), citing *Westview Invs., Ltd. v. U.S. Bank Nat’l Ass’n*, 133 Wn.App. 835, 854 n. 27, 138 P.3d 638 (2006).¹³

The test to determine the public interest requirement is based upon the context of the practice. “Where the transaction was essentially a consumer transaction... these factors are relevant to establish [a] public interest... (1) Were the alleged acts committed in the course of defendant’s business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant’s conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?” *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 170 P.3d 10 (2007).

In a private dispute, it is more difficult to show public interest. *Hangman Ridge, supra.* at 790; see also *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604-05 (2009) (dismissing CPA claim where defendant did not advertise to the general public).

3. Fourth Factor – Injury to Plaintiff’s Business or Property.

Under the fourth *Hangman Ridge* factor, the alleged acts must also result in injury to Plaintiff. See *Hangman Ridge* at 792, citing *Cooper’s Mobile Homes, Inc. v. Simmons*, 94 Wn.2d 321, 617 P.2d 415 (1980).

a. Damages Must Generally be Certain.

Damages for lost wages or personal injuries, including pain and suffering, are not compensable under the CPA. See *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons*

¹³ The *Brown* decision post-dates the enactment of RCW 19.86.093.

Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993), *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn.App. 722, 959 P.2d 1158 (1998). An award under the CPA is strictly limited to damage “in... [a plaintiff’s] business or property....” RCW 19.86.090, *see also Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009).

In *ESCA Corp. v. KPMG Peat Marwick*, this Court states:

[s]ufficiency of the evidence to prove damages must be established with enough certainty to provide a reasonable basis for estimating it. Although the precise amount of damages need not be shown, damages must be supported by competent evidence in the record. To be competent, the evidence or proof of damages must be established by a reasonable basis and it must not subject the trier of fact to mere speculation or conjecture. [Citations omitted.] 86 Wn.App. 628, 939 P.2d 1228 (1997), *aff’d*, 135 Wn.2d 820, 959 P.2d 651 (1998).

Similarly, “lost profits cannot be recovered where they are speculative, uncertain and conjectural.” *Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998).

Even where damages may exist, “the doctrine of mitigation of damages, or avoidable consequences, prevents an injured party from recovering damages that the injured party could have avoided if it had taken reasonable efforts after the wrong was committed. *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn.App. 819, 142 P.3d 209 (2006), *citing Bernsen v. Big Bend Elec. Coop.*, 68 Wn.App. 427, 842 P.2d 1047 (1993).

b. The Economic Loss Rule Also Bars Recovery.

The economic loss rule prohibits recovery for an alleged breach of tort duties where a contractual relationship exists, and the asserted losses are economic in nature. *See Alexandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007); *see also Borish v. Russell*, 155 Wn.App. 892, 230 P.3d 646 (2010), *citing Water’s Edge Homeowners Ass’n v. Water’s Edge Assocs.*, 152 Wn.App. 572, 216 P.3d 1110 (2009), *review denied*, 168

Wn.2d 1019, 228 P.3d 17 (2010). Where a complaint only requests monetary damages for “a homeowner’s disappointment in the economic benefit they failed to receive,” the issue is central to contract – not tort – law. *See Borish, supra.* at 902, *citing Alexandre, supra.*

In *Badgett v. Security State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991), the Supreme Court writes:

[b]y urging this court to find that the Bank had a good faith duty to affirmatively cooperate in their efforts to restructure the loan agreement, in effect the Badgetts ask us to expand the existing duty of good faith to create obligations on the parties in addition to those contained in the contract - a free-floating duty of good faith unattached to the underlying legal document. This we will not do. The duty to cooperate exists only in relation to performance of a specific contract term. *As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms. The Badgetts received the full benefit of their contract when they received the amount of money they bargained for at the agreed rate of interest for the agreed period of time. Id.* at 570. [Citations omitted; emphasis added.]

The Court ultimately holds, “[t]he Bank and the Badgetts entered into a written loan agreement. While the parties may choose to renegotiate their agreement, they are under no good faith obligation to do so. The duty of good faith implied in every contract does not exist apart from the terms of the agreement.” *Id.* at 572.

4. Fifth Factor – Causal Link Between Conduct and Injury.

The Court must analyze Plaintiff’s CPA allegations “under the ‘but for’ standard of proximate causation under WPI 15.01, as subsequently adopted in *Indoor Billboard*.” *Schnall v. AT & T Wireless Services, Inc.*, 171 Wn.2d 260, 259 P.3d 129 (2011).¹⁴ The *Indoor Billboard* decision clarifies that reliance on false or deceptive acts is not a element

¹⁴ *See also Carlile v. Harbour Homes, Inc.*, 147 Wn.App. 193, 194 P.2d 280 (2008) [“The injury must be expressly “by” a violation of RCW 19.86.020, meaning that “but for” a defendant’s conduct, the alleged injury would not have occurred.”]

under the CPA. The Supreme Court concluded that “where a defendant has engaged in an unfair or deceptive act or practice, and there has been an affirmative misrepresentation of fact, our case law establishes that there must be some demonstration of a causal link between misrepresentation and the plaintiff’s injury.” *Indoor Billboard*, 162 Wn.2d at 81-82.

5. The Evidence in This Case Did Not Establish the Requisite Factors for a CPA Violation.

a. There Was No Unfair or Deceptive Act or Practice.

Heberling alleges that “Chase’s standard form said that the loan modification was approved.” Brief of Appellant at 14. Putting aside the fact that no document in the record actually shows the existence of a modification “form,” Heberling’s sole basis for claiming an unfair or deceptive act is predicated on his own self-serving declaration. CP 673-848.¹⁵

There is no testimony or declaration from the individuals Heberling says he spoke with. There are no documents suggesting that Heberling was about to receive either a temporary or permanent loan modification.

These facts notwithstanding, Heberling argued that in November 2008, WaMu employee Michael Lemon allegedly “quoted [Heberling] some initial terms and conditions.” CP 414-415. Heberling interpreted this conversation to mean that he would receive – without the need for any supporting documentation – a permanent five-year loan modification. *Id.*, CP 419.¹⁶

¹⁵ Heberling actually denied any reliance on “forms,” stating: “I was relying on what Mr. Lemon was representing to me in phone conversations, not these form letters.” CP 415, 423.

¹⁶ Even accepting Heberling’s testimony, *arguendo*, a specific date for the alleged modification to begin was never stated to him. CP 421.

In January 2009, Heberling received a letter *denying* his modification request, which he also disregarded. CP 423, 524. Heberling testified that he was expecting a contract or agreement to sign, which was never sent because no modification was granted. CP 425. In April 2009, Heberling received a letter stating, “we cannot guarantee that you will be approved,” along with a Notice of Collection Activity. CP 426, 429. On or about May 14, 2009, a Notice of Default was issued. CP 429. Then, in June 2009, a Notice of Trustee’s Sale followed. CP 432-433.

In September 2009 – a month before the Trustee’s Sale – Heberling received a letters stating he was not qualified for a modification. CP 483-485; *see also* 536-537. Heberling firmly believed that he would not receive a modification agreement. CP 439.

The complete lack of evidence supporting Heberling’s version of events is also consistent with the testimony of Chase’s CR 30(b)(6) representative:

Q. [O]n the subject you’re not aware of there being any reference to Mr. Heberling having been offered some kind of modification?

A. Correct.

Q. Not even an interest-only modification?

A. Correct.

CP 913.

Moreover, every one of Chase’s letters to Heberling either denies a modification or requests more information for mere consideration to occur. CP 381-382, 444, 524-525, 536-537.

Heberling chose to focus on an internal Chase document as a “smoking gun” that validates his theory; he posits that the phrase “Offered Step-Rate IO Balloon per manager approval” equates to a loan modification promise somehow made to him. Brief of

Appellant at 7, *citing* CP 665-66, 750-52. But Chase’s representative was quite clear about the wording:

Q. So ‘Offered Step-Rate IO Balloon per manager approval’ doesn’t mean that they, in fact, offered that to Mr. Heberling?

A. No, not at all.

[...]

Q. And you don’t believe that means Mr. Heberling was, in fact, offered this?

A. No, he was not.

Q. Where do you glean that from this document?

A. ...[T]his is just a suggestion. The internal employee who created this is suggesting this but would need a manager approval. This is no way means that he [Heberling] was approved for that.

CP 665.

This single private comment - which Chase’s representative testified was not conveyed to Heberling - is simply a red herring that added no support to Heberling’s theories.

Heberling’s entire claim of an unfair or deceptive act was built on the very type of conclusory, unsupported allegations that could not cause a reasonable fact-finder to find in his favor.

b. There Was No Act or Practice With the Capacity to Impact the Public.

Heberling boldly contends that “Chase’s conduct in the loan modification process affects every single homeowner who seeks a modification.” Brief of Appellant at 15. But, much like the supposedly deceptive act, Heberling put forward no evidence under this prong of the CPA test.

In fact, Heberling admitted that the acts are not a “generalized course of conduct” and that there is not a “real and substantial potential for repetition”:

Q. Well did you have any reason to believe that other individuals besides

- yourself were under similar circumstances?
- A. The nation was under similar circumstances.
- Q. But did you speak with anybody specifically that was encountering difficulties in getting a loan modification through Washington Mutual or Chase?
- A. Ultimately, yes, of course. I read lots of blogs. I have talked to numbers of people that have had series of frustrating and whatever circumstances.
- Q. Do you recall if any of those circumstances were similar to yours?
- A. Similar in the chaotic nature of it all, yeah.
- Q. But in terms of being told one thing and then being told something different?
- A. Oh, absolutely.
- Q. And were the individuals involved in those situations the same individuals you dealt with?
- A. Oh, I have no idea.

CP 445.

Heberling's own testimony showed that neither the Defendants nor their individual employees engaged in a pattern of behavior likely to impact the general public. To the contrary, even assuming the truth of Heberling's averments for the sake of argument, no evidence exists to prove Chase's interactions with respect to the subject loan were anything more than a private dispute.

c. There Were No Damages to Heberling's Business or Property, and No Causal Link to Chase's Purported Acts.

Heberling essentially theorized that an oral promise to modify the Note led directly to sale of the Property. Yet, Heberling could not show that he suffered damages from enforcement of a valid security interest. Even if damages existed, however, Heberling's evidence did not prove they would "not have happened" but for Chase's alleged acts.

Heberling's own assessment of damages was overly vague. CP 446. ["I don't think we've reached a conclusion about [whether damages are only monetary]. This has definitely scarred me in many, many ways, so cross that bridge when we come to it."] Heberling testified that he "wasn't entirely certain what I was going to do with the 1660 property.... [a] residence was one option and developing it for resale was another." CP 414, 438. He did not intend to make the Property a vacation rental. CP 413.

Based on these uncertainties, and considering that RCW 61.24.127 prohibited Heberling from recovering the Property itself, Heberling lacked support for demonstrating necessary damages under the CPA.

Moreover, Chase provided Heberling with an opportunity to cure the default at numerous times prior to the Trustee's Sale. CP 430, 441. Heberling was told that he could restrain the sale through court action. CP 432, 442. Consequently, Heberling completely failed to accept Chase's invitations, or exercise his legal rights, to avoid foreclosure. *Id.*

Lastly, the "agreement" in question - the Deed of Trust - states in large print:

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW. CP 467.

When applied to the case at bar, the reasoning of *Badgett v. Security State Bank, supra.*, cuts against Heberling's claim that damages were owed to him because of a loan modification denial.

In sum, Heberling could not persuade the trial court of facts sufficient to meet *all* five requirements under the CPA. Consequently, judgment as a matter of law was

proper. This Court should likewise reach the same conclusion and affirm the decision below.

D. Summary Judgment was Also Correctly Granted on the Negligent Misrepresentation Cause of Action.

Although Heberling's Assignment of Error references the grant of summary judgment in Defendants' favor, he does not brief the Negligent Misrepresentation claim included in that ruling. Thus, the Court should consider argument on this point waived. *See Moore v. Harley-Davidson Motor Co. Group, Inc.*, 158 Wn.App. 407, 425, 241 P.3d 808, 817 (2010) *review denied*, 171 Wn.2d 1009, 249 P.3d 1028 (2011) ("we are not required to review arguments that are inadequately briefed and that lack any citation to authority. We may decline to reach an issue raised by inadequate briefing.") [citations omitted]. Nonetheless, given the Assignment of Error's potential scope, Chase will address the validity of a favorable decision on this claim.

To prove Negligent Misrepresentation, a plaintiff must establish by clear, cogent, and convincing evidence: "(1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages." *Ross v. Kirner*, 162 Wn. 2d 493, 172 P.3d 701 (2007), *citing Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 55 P.3d 619 (2002). "A party claiming negligent misrepresentation must prove it justifiably relied upon the information negligently

supplied [by a defendant].” *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 959 P.2d 651 (1998).

Promises of future performance “may support a contract claim (or similar claim such as promissory estoppel in an appropriate case), [but] failure to perform them cannot alone establish the requisite negligence for negligent misrepresentation.” *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 876 P.2d 435 (1994), *citing High Country Movin’, Inc. v. U.S. West Direct Co.*, 839 P.2d 469 (Colo. Ct. App. 1992); *see also Micro Enhancement Int’l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn.App. 412, 40 P.3d 1206 (2002). “This is because of the absence of any false representation as to a presently existing fact, a prerequisite to a misrepresentation claim.” *Id.*

In this case, Heberling claimed an oral representation of a future promise. In fact, Heberling testified that all written documentation indicated he was *not* granted a loan modification:

Q So specifically, though, with regards to the January 31st, 2009 letters, was there anything in those letters that indicated that a loan modification had been granted?

A. Obviously not. It’s a denial letter.

CP 423.

Q. Did you receive any written statement or response from Washington Mutual, Chase, any employee, that you had been granted a loan modification?

A. No.

Q. Did you receive any written statement from Chase, Washington Mutual, or any employee of those businesses, that you had been promised a loan modification [incorrectly transcribed as “identification”]?

A. In writing, no.

Q. And by written, we mean both e-mails or paper, right? It's still no?

A. It's still no.

CP 444.

Heberling further testified that future document preparation was necessary before he would receive final paperwork:

Q. Now, when you say that Mr. Lemon prepared to offer you something, were those the words that he used, or how is it he conveyed that preparation to you?

A. As there are notes somewhere in these piles of paper here, he gave me specific terms and conditions on all three loans, with modified interest rates and payment amounts, and said that the bank was going to work up modification paperwork to perfect that presentation, and that I should await that paperwork shortly before Thanksgiving, quote-unquote.

CP 415.

Q. Did Mr. Lemon provide specifics on what paperwork you were going to receive?

A. No. Other than just documentation for the loan modification.

Q. And you still hadn't actually seen any paperwork from Washington Mutual other than the denial letter?

A. Of course not.

CP 426.

As such, even taking these alleged conversations as true, Heberling believed some *future* performance would result in modified terms of the Note. Under case law, including *Havens*, Heberling could not establish an existing promise that constituted Negligent Misrepresentation, and Chase was entitled to summary judgment.

E. Chase Should Receive Attorneys' Fees and Costs For Defending Against This Appeal.

Under RAP 18.1(a), "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or

Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.”¹⁷

Additionally, under RAP 14.2, “A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.” Under RAP 14.3(a), certain expenses are allowed as awardable costs.

It is undisputed that Chase held the secured note during the time relevant to Heberling’s allegations. CP 3, at ¶ 3.7. Therefore, upon prevailing in this appeal, Chase respectfully requests that it be awarded attorneys’ fees based on the Deed of Trust, which permits recovery of fees, and “the term ‘attorneys’ fees’... shall include without limitation attorneys’ fees incurred by Lender in any... appeal.” CP 467. Chase should also be awarded costs for those items specified in RAP 14.3(a) upon the presentation of a cost bill pursuant to RAP 14.4.

IV. CONCLUSION

If a party could preclude summary judgment through the mere recitation of alleged facts, then CR 56 is certainly rendered meaningless in contested litigation, as nothing more than a contrarian stance, and manufactured dispute, would defeat overwhelming evidence in the moving party’s favor. That absurd result is precisely what Heberling asks this Court to endorse through his appeal. Outside of Heberling’s own self-serving version of events, the trial court was presented with absolutely no factual or legal support concerning the Complaint’s allegations.

¹⁷ RAP 18.1(b) requires that a “party must devote a section of its opening brief to the request for the fees or expenses.”

In conclusion, the trial court correctly granted summary judgment to Chase because: 1) the Complaint did not accuse Chase of making oral misrepresentations, 2) Chase was not responsible for Heberling's claims under either the Purchase and Assumption Agreement with the FDIC, or pursuant to 12 U.S.C. § 1821(d)(13)(D) (FIRREA), 3) Heberling could not advance evidence proving all five elements of a CPA claim, and 4) Heberling was unable to sustain a Negligent Misrepresentation argument.

Relying on any of these bases, Judge Spector could reach only one reasonable result in this case: Chase was entitled to judgment as a matter of law. Therefore, this Court should affirm the ruling below, with fees in favor of Chase.

DATED this 14th day of February, 2012.

ROUTH CRABTREE OLSEN, P.S.

By: 
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