

71137-7

71137-7

No. 71137-7

DIVISION I  
COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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DEBORAH McCALLUM, an individual,

Appellant,

v.

GOLF ESCROW CORPORATION, a Washington corporation, et al.,

Respondents.

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RESPONDENT TRUSTEE SERVICES INC.'S BRIEF

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 APR 7 AM 9:13

ORIGINAL

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I.

INTRODUCTION

The trial court correctly granted summary judgment to respondent Trustee Services, Inc. (“TSI”) on the ground that Appellant Deborah McCallum could not prove that any wrongdoing by TSI proximately caused her to suffer any damage.<sup>1</sup> Even if McCallum could prove her claim that her signature on the request for reconveyance was forged and that TSI should have somehow known this, she nevertheless did not suffer any proximately caused damage because she stood in the same position—holding \$320,000 in cash from payoff of a secured debt and a \$230,000 unsecured debt owed by a bankrupt developer—both before and after the alleged wrongdoing by TSI. There is no factual basis or legal authority to support McCallum’s claim for a “lost opportunity” to obtain additional security. Thus, this Court should affirm the trial court’s order granting summary judgment in favor of TSI.

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<sup>1</sup> McCallum states that respondents do not dispute they breached duties. *Brief of Appellant*, p. 12. This statement is not accurate; rather, issues of the existence of any duties or breach of those duties were not before the trial court due to McCallum’s inability to prove the required elements of proximate cause and damages.

## II.

### STATEMENT OF THE CASE

#### A. McCallum's Unsecured Loans to Eaglewood Homes and Reimer.

Between 2004 and 2007, McCallum lent hundreds of thousands of dollars to a developer, Eaglewood Homes, and its owner Craig Reimer, CP 506, all of which McCallum believed were unsecured. CP 528–29. There are no written loan agreements; however, McCallum contends that Reimer and Eaglewood orally agreed to provide deed(s) of trust to secure the loans if McCallum so requested. CP 506-07. McCallum admits that she did not prepare a deed of trust or request other security until December 2008, although she contends that in the spring of 2008 she asked Reimer to pay her back the entire \$550,000 balance then owing. CP 528-29.

Shortly after McCallum asked for payment, on July 9, 2008—despite there being no request by McCallum for security—Reimer recorded a deed of trust for \$320,000 on real property he owned, located at 915 Cedar Street, Edmonds, Washington 98020. CP 528. The deed of trust listed McCallum as the beneficiary and TSI as the trustee, and was notarized by Pamela Lane of Golf Escrow Corporation and recorded by Chicago Title Company. CP 552-54. TSI was not involved in creating or recording the deed of trust. Reimer recorded the deed of trust as part of a refinancing transaction with Sterling Savings Bank, and Golf Escrow facilitated the transaction. CP 550.

Only by encumbering his real property with a deed of trust in favor of McCallum would Sterling Savings Bank allow loan proceeds to be paid to her to obtain clean title. CP 550.

Several weeks later, Reimer gave McCallum a check from Golf Escrow for \$320,000, the amount secured by the deed of trust. CP 528, 562. Shortly thereafter, Golf Escrow asked TSI to process a deed of trust reconveyance as is typically done when a secured debt is repaid. CP 556. Golf Escrow sent TSI the necessary forms, including a filled-out request for reconveyance, a copy of the \$320,000 check, and a title report. CP 556-57. TSI received the request for reconveyance on October 28, 2008. CP 557. It accurately recited the deed of trust instrument number, execution date, recording date, and provided in pertinent part:

The undersigned is the legal owner of the promissory note in the original sum of \$320,000 secured by that certain deed of trust described below:

Original Borrower: EAGLEWOOD HOMES, INC., A  
WASHINGTON CORPORATION  
Original Trustee: TRUSTEE SERVICES, INC.  
Original Beneficiary: DEBORAH MCCALLUM

...

The Note and all other indebtedness secured by said deed of trust, having been fully satisfied, the Note and Deed of Trust are herewith surrendered to you for cancellation and reconveyance.

You are therefore requested upon payment of all sums owing to you, to reconvey without warranty, to the person(s) entitled

thereto, the right, title, and interest now held by you thereunder.

Dated: 10-20-08

[Original Ink Signature]

By: Deborah McCallum

CP 573. In accordance with these instructions, TSI prepared a full reconveyance that it recorded on October 31, 2008. CP 563.

McCallum claims she had no knowledge that the deed of trust was created with her as the beneficiary. CP 528. McCallum also claims she had no knowledge or understanding of where the \$320,000 came from. CP 528. When she received the \$320,000 payment, McCallum claims she voiced her concern that Eaglewood Homes might fail, but that Reimer promised to repay the remaining \$230,000 at a later date. CP 528. McCallum admits that at that time, she did not prepare a promissory note or deed of trust for Reimer's signature. CP 529.

In December 2008—several months after the deed of trust on the Edmonds property was reconveyed, Reimer had still not repaid the remaining \$230,000 in unsecured debt. CP 529. At that time, McCallum prepared—for the first time—a promissory note and deed of trust to secure the \$230,000 unpaid balance, but Reimer refused. CP 529.

In May 2010, McCallum sued Reimer and Eaglewood Homes in Snohomish County Superior Court, No. 10-2-04767-9, and obtained a

judgment for the outstanding \$230,000 loan balance plus interest. CP 510. However, McCallum was unable to collect the judgment because Eaglewood Homes had been dissolved and had no assets, and Reimer declared Chapter 7 bankruptcy. CP 510.

**B. Trial Court Procedural History.**

McCallum commenced the underlying litigation against TSI and the other respondents on October 29, 2012, alleging that when Reimer paid her \$320,000 in July 2008, she was unaware that a deed of trust secured that portion of the loan, and that Reimer forged her signature on the request for full reconveyance. CP 504–08. McCallum asserted negligence, breach of fiduciary duty, and violation of Washington’s Consumer Protection Act (“CPA”) claims against TSI based on its alleged duty to “confirm in writing with McCallum the balance secured by the McCallum DOT and McCallum’s authorization to reconvey the McCallum DOT.” CP 523–24.

Before conducting discovery into the suspicious factual claims made by McCallum,<sup>2</sup> TSI moved for summary judgment on the basis that TSI’s alleged tortious conduct—even if it could be proven—did not proximately

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<sup>2</sup> These include the claim that she did not know about the deed of trust, that she did not know or even question the source of the \$320,000 check (on Golf Escrow paper) but cashed it anyway, the claim that had she known about the deed of trust’s existence she would have convinced Reimer to apply \$230,000 of the \$320,000 to the unsecured portion of the debt, and the claim that she did not sign or know about the request for reconveyance and that her authentic-appearing signature on this document was forged. These factual assertions are not material to the underlying summary judgment ruling or the issues currently before this Court.

cause McCallum any damages. CP 574. The other respondents, Golf Escrow, its owner Pamela Lane, and Sterling Financial Corporation joined in TSI's motion. CP 491, 680. The trial court granted the motions on October 24, 2013, dismissing McCallum's claims, CP 6–10, and this appeal followed.

### III.

#### ARGUMENT

The trial court properly granted summary judgment based on McCallum's inability to prove any proximately caused damages from TSI's conduct. Even if McCallum could eventually prove that TSI should not have reconveyed the deed of trust, the record reflects that she suffered no damage from the reconveyance. The consequences that followed her decision to issue unsecured loans would have resulted absent any involvement of TSI; indeed, without the deed of trust, the consequences for McCallum may well have been worse.

McCallum urges this Court to retroactively apply Reimer's payment to the unsecured portion of her loan and to simultaneously hold TSI liable for the remaining balance that was unsecured from the inception of her business venture. The Court should reject McCallum's attempt to shift the risk of loss caused by her risky lending practices to TSI. TSI could not have deprived McCallum of an opportunity to gain full security that did not exist, and TSI

did nothing to prevent McCallum—who was fully aware of her risk exposure—from taking other steps to protect against Reimer’s default. Moreover, McCallum’s argument to retroactively and unilaterally apportion her payment to the unsecured portion of her debt fails as a matter of law because such an artificial reallocation of the \$320,000 payment would be inconsistent with the parties’ clear mutual contemporaneous intent.

**A. Standard of Review.**

On review of an order granting summary judgment, the Court of Appeals performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Specifically, summary judgment is appropriate if “after viewing the pleadings and record, and drawing all reasonable inferences in favor of the non-moving party, [the court] finds there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Mayer v. Pierce Cy. Med. Bur., Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1996). In addition, “[s]ummary judgment in favor of the defendant is proper if the plaintiff fails to make a prima facie case concerning an essential element of his or her claim.” *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001); *see also* CR 56(c).

The appellant may not ask the court to reverse a summary judgment order based on arguments or authorities not raised at the trial court or on

evidence not presented to the trial court. *Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996) (“an argument that was neither pleaded nor argued to the trial court cannot be raised for the first time on appeal”); *see also Peoples Nat. Bank of Washington v. Peterson*, 82 Wn.2d 822, 829, 514 P.2d 159 (1973) (“issues not raised in the trial court cannot be raised for the first time on appeal . . . court will not review a case on a different theory from that on which it was presented at the trial court level”) (quotations omitted). In contrast, the Court of Appeals may affirm summary judgment in favor of TSI on any basis supported by the record. *See Fabrique v. Choice Hotels Int’l, Inc.*, 144 Wn. App. 675, 682, 183 P.3d 1118 (2008).

**B. The Trial Court Correctly Held That TSI Did Not Proximately Cause McCallum’s Damages.**

“[T]he issue of proximate cause may be determined on summary judgment where the evidence is undisputed and only one reasonable conclusion is possible.” *Id.* at 683. Here, the evidence presented to the trial court was undisputed that McCallum issued a series of *unsecured* loans to Reimer and his company totaling \$550,000, and that TSI’s actions had no impact whatsoever on McCallum’s unsecured status.

**1. TSI Had No Impact on McCallum’s Unsecured Status.**

The trial court held that TSI had no impact on McCallum’s unsecured status. “Summary judgment in favor of a defendant is appropriate if the

plaintiff fails to establish a prima facie case concerning an essential element of his or her claim.” *Id.* at 688. In this case, the deed of trust granted by Reimer secured \$320,000,<sup>3</sup> leaving the remaining \$230,000 of the Reimer’s debt to McCallum unsecured. When McCallum received a payoff check for \$320,000 three weeks later and TSI subsequently reconveyed the deed of trust, the unsecured debt remained unsecured. Thus, as correctly found by the trial court, TSI did not impair McCallum’s ability to collect the unsecured amount. *See, e.g., id.* (affirming summary judgment where plaintiff could not prove beyond mere speculation and conjecture that defendant’s actions caused her injury).

**2. McCallum Cites No Facts or Law to Support Her “Lost Opportunity” to Gain Full Security Argument.**

Acknowledging that TSI did not cause her unsecured status, McCallum argues that TSI somehow deprived her of an “opportunity to obtain full security.” *Brief of Appellant*, p. 15. McCallum’s argument fails, however, because it is not supported by any evidence in the record or any applicable legal authority.

While CR 56 requires the Court to construe evidence in favor of the non-moving party, the Court need not consider unsupported allegations. *See,*

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<sup>3</sup> McCallum appears to have abandoned unsuccessful arguments raised at the trial court that the deed of trust, despite expressly stating that it secures \$320,000, should be interpreted to secure \$550,000. CP 182–187.

*e.g., Exner v. Am. Med. Ass'n*, 12 Wn.App. 215, 225, 529 P.2d 863 (1974) (after review of evidence in favor of non-moving party, record was lacking in proof of plaintiff's claims except for unsupported allegations, which were insufficient to survive challenge of summary judgment). In this case, even when the Court construes facts in favor of McCallum, those facts do not establish that McCallum could have obtained full security had she known about the deed of trust. If McCallum had learned of the deed of trust during the three-week period in 2008 between when it was created and when she received the \$320,00 payoff check, the \$230,000 debt would have remained unsecured. Furthermore, McCallum admits that despite her belief at the time that all \$550,000 of debt was unsecured (and despite receiving warnings from advisors and friends about holding unsecured debt from Reimer), she did not submit a deed of trust for Reimer's signature or take any other steps to protect herself.

In addition, the facts fail to establish that any action by McCallum would have been successful in securing any portion of the loan. For example, even if McCallum had prepared a deed of trust in the summer of 2008, there is no evidence in the record that Reimer would have agreed. Indeed, the record reflects the exact opposite. In December 2008, McCallum did exactly what she contends TSI prevented her from doing when she requested that Reimer obtain full security for the outstanding balance of her

loan. CP 529. McCallum sent a promissory note and deed of trust to Reimer for his review and signature, but Reimer refused to sign. CP 529-30.

McCallum also fails to cite legal authority to support her “lost opportunity” argument. In each of the cases McCallum cites, the defendant was involved in the *initial* transaction, and its actions therefore directly caused damage that otherwise would not have resulted. *See Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) (trustee deferred decision on whether to postpone foreclosure sale to lender and employed notary who falsely notarized notice of sale by predating notary acknowledgement); *Bishop v. Jefferson Title Co., Inc.*, 107 Wn. App. 833, 28 P.3d 802 (2001) (escrow agent erroneously completed unauthorized form documents and failed to advise buyer of the limitations of her practice); *Styrk v. Cornerstone Investments, Inc.*, 61 Wn. App. 463, 810 P.2d 1366 (1991) (escrow agents failed to advise sellers of need for independent legal counsel regarding violation of purchase and sale agreement); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 590, 675 P.2d 193 (1983) (escrow agent failed to advise sellers of real estate to obtain legal advice which would have resulted in a secured sale to buyer); *Pacific Nat’l Bank of Washington v. Hall*, 12 Wn. App. 336, 343, 529 P.2d 855 (1974) (failure of one lender to recommend to a co-lender the need to obtain security for a loan violated a contract between the two lenders). In contrast, TSI played no role in the

initial transactions, *i.e.*, the unsecured loans McCallum decided to issue to Reimer between 2004 and 2007.

TSI's limited role did not begin until Reimer granted a deed of trust in 2008 for a portion of the outstanding balance. The record reflects no evidence that McCallum would have been able to gain full security had the deed of trust not been reconveyed. Moreover, even if Reimer did agree to grant additional security, it would have been in the form of a new deed of trust, independent of the deed of trust involving TSI, for which McCallum was paid in full. Therefore, there is no factual or legal support for McCallum's argument that TSI deprived her of the opportunity to gain full security.

3. **The Trial Court Properly Concluded That McCallum's Inability to Prove Proximately Caused Damages Required Dismissal.**

Finally, McCallum argues that she should have been able to pursue her claims despite the lack of evidence to prove proximately caused damages on the theory that she might have taken other action to protect herself against Reimer's potential default. *Brief of Appellant*, p. 19. As a threshold matter, this Court should not consider this argument because it was not raised before the trial court. *See Sneed*, 80 Wn. App. at 847; *Peoples Nat. Bank of Washington* 82 Wn.2d at 829; RAP 9.12.

Furthermore, the Court should reject McCallum's argument that she would have taken a different course of action had she known about the deed of trust because the argument is based on pure speculation. While Washington law requires that the risk of uncertainty be allocated in favor of the party seeking damages, the rule does not apply to cases in which a party's theory of damages are so attenuated as to render it purely speculative of potential damages. See *Spradlin Rock Products, Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cnty.*, 164 Wn. App. 641, 664, 266 P.3d 229 (2011); *Golf Landscaping, Inc. v. Century Const. Co., a Div. of Orvco, Inc.*, 39 Wn. App. 895, 902, 696 P.2d 590 (1984); *Exner*, 12 Wn. App. at 225 (courts need not consider unsupported allegations). In *Spradlin*, the plaintiff presented sufficient evidence of lost profits in order to survive a motion to dismiss because the claim was based on a specific project that it would have been eligible for if not for the defendant's actions and there was a reasonable basis to believe that the plaintiff would have received that project. *Id.* at 663–64.

In this case, nothing in the record suggests that McCallum would have taken a different course of action had she known about the deed of trust. Moreover, there is no reasonable basis to believe that McCallum would have further protected herself against Reimer's default had she known about the deed of trust because McCallum had full knowledge that Reimer might default on his loans and Reimer had already disappointed her by rendering

only partial payment of the outstanding loan balance. CP 528. At that point, McCallum had full knowledge of Reimer's financial status, yet still failed to execute a deed of trust or file an immediate lawsuit, despite the fact that Reimer only paid her a portion of what was due. McCallum could have then filed lis pendens against Reimer's other properties, but chose not to do so. McCallum's inaction was a choice all her own, and she cannot pass the resulting loss to an uninvolved third-party based on pure speculation.

**C. The Trial Court Correctly Held That McCallum Could Not Unilaterally and Retroactively Apportion Payment.**

McCallum contends that this Court should reverse the trial court's decision because she had the unilateral right to retroactively reapportion payment to a portion of a loan that she chose not to secure. The trial court's decision should stand.

McCallum cannot retroactively reapportion Reimer's payment because there is no question that the \$320,000 payment was to satisfy the \$320,000 deed of trust. Only when a debtor fails to direct how a payment is to be applied can the creditor make the application as he or she sees fit. See *U.S. Fid. & Guar. Co. v. Feenaughty Mach. Co.*, 197 Wash. 569, 579, 85 P.2d 1085 (1939); *Oakes Logging, Inc. v. Green Crow, Inc.*, 66 Wn. App. 598, 601, 832 P.2d 894 (1992). Here, the evidence is undisputed that McCallum in fact applied the \$320,000 payment to the secured portion of the

loan, and there is no legal authority permitting a lender to retroactively change its own previously-made allocation.

In this case, the only reason Reimer executed the deed of trust was to finance Reimer's payment to McCallum. Indeed, Sterling Savings Bank would not finance its loan to Reimer absent the deed of trust. CP 550. It is no coincidence that the deed of trust and the check paid to McCallum were in the same amount. The only reasonable conclusion that can be reached from the evidence is that Reimer intended his payment to apply to that portion of the debt secured by the deed of trust executed for that same amount. In fact, McCallum could not have applied the payment to the unsecured portion of the debt, given that Sterling Savings Bank conditioned its loan to Reimer on execution of the deed of trust, CP 550, and would not have issued the loan to pay off the unsecured debt. As such, Reimer did not fail to direct how the payment should be applied, and McCallum has no right to apportion payment contrary to his intent.

Moreover, even if Reimer did fail to provide instructions as to how the payment should be applied, McCallum still does not have the ability to apportion payment to the unsecured portion of the loan because the payment must be used to exonerate the deed of trust from which the payment was derived. It is longstanding principle in Washington that "where money is derived from a particular source or fund, it must be applied to the relief of the

source or fund from which it derived.” *Cummings v. Erickson*, 116 Wash. 347, 351, 199 P. 736, 737 (1921) (citing cases). As stated by the Washington Supreme Court:

Another exception to the rule that the creditor has the right to apply the payment obtains when the money with which the payment is made is known to the creditor to have been derived from a particular source or fund, in which case he cannot, without the consent of the debtor, apply it otherwise than to the exoneration of the source or fund from which it was derived.

*Id.* In this case, there is no doubt that the source of Reimer’s payment to McCallum was the deed of trust. Therefore, Washington law precludes McCallum from applying the payment to any other portion of the debt.

Finally, even if Reimer did fail to direct how the payment was to be applied, and even if McCallum could retroactively reallocate payment, this case does not warrant the need for this Court to intervene in equity. McCallum willingly chose to loan a speculative real estate developer hundreds of thousands of dollars over the course of several years. When McCallum only received a partial payment of the \$550,000 balance, she chose to wait several months before preparing deed of trust documents to secure the remaining balance of the loan. It would be unjust to shift the loss associated with McCallum’s poor business decision to a third-party that did no more than participate in a transaction that enabled McCallum to receive

any payment at all. This is not the type of case that warrant's this Court's equitable intervention.

#### IV.

#### CONCLUSION

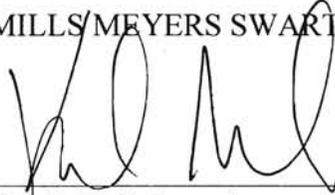
The trial court did not err when it held that McCallum failed to establish TSI proximately caused the damages that flowed from her poor business decision to grant hundreds of thousands of dollars in unsecured loans to a speculative real estate developer. TSI had no impact on McCallum's unsecured status, McCallum cites no facts or law that support her argument that TSI deprived her of the opportunity to gain full security for her loans, and nothing in the record suggests that McCallum could have further protected herself from Reimer's default absent the actions of TSI. The Court should reject McCallum's attempt to shift the risk of loss to a third-party—absent any factual or legal authority—that could have done nothing to secure the remaining portion of her loan. Likewise, the Court should reject McCallum's argument to unilaterally and retroactively reapportion payment of the \$320,000 loan because there is no question that it was intended to satisfy that portion of the loan for the same amount that was secured by the deed of trust.

McCallum's decision to lend hundreds of thousands of dollars to a real estate developer without obtaining adequate security was a choice all her own. The consequences that followed that decision would have resulted

absent any involvement of TSI; indeed, without the deed of trust, the consequences for McCallum may well have been worse

RESPECTFULLY SUBMITTED this April 4, 2014.

MILLS MEYERS SWARTLING

A handwritten signature in black ink, appearing to read 'DMS', written over a horizontal line.

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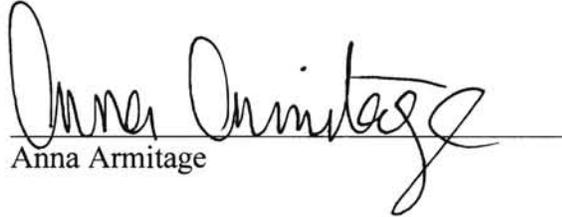
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DATED this 4th day of April 2014.

  
Anna Armitage

From: Div-1CM30-39&75&95@courts.wa.gov  
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Attached is a copy of the Transmittal Letter that was sent to the Court of Appeals, Division I when the document named "140404 FINAL Respondent Brief.pdf" was electronically filed with the court.

**MILLS MEYERS SWARTLING**

**April 04, 2014 - 4:20 PM**

**Transmittal Letter**

Document Uploaded: 711377-140404 FINAL Respondent Brief.pdf

Case Name: McCallum v. Golf Escrow Corporation

Court of Appeals Case Number: 71137-7

Party Represented: Trustee Services Inc.

**Is this a Personal Restraint Petition?**  Yes  No

Trial Court County: Snohomish - Superior Court #  
12-2-08855-0

**The document being Filed is:**

- Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_\_
- Answer/Reply to Motion: \_\_\_\_\_
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: Respondent's Brief

**Comments:**

No Comments were entered.

Sender Name: Kendra Brown - Email: [kbrown@millsmeyers.com](mailto:kbrown@millsmeyers.com)