SUPREME COURT NO. 91779-5
COURT OF APPEALS NO. 72016-3-I

Sandra Shelley Jackson

Petitioner,

v.

Quality Loan Service Corporation of Washington; Mortgage Electronic Registration System, Inc.; McCarthy & Holthus, LLP; U.S. Bank, National Association as Trustee for WAMU Mortgage Pass Through Certificate for WMALT 2006-AR4 Trust Investors in WMALT 2006-AR4 Trust c/o J.P. Morgan Chase Bank, N.A.,

Respondents.

REPLY SUPPORTING PETITIONER FOR REVIEW

Scott E. Stafne, WSBA No. 6964
Mitchel F. Wilson, WSBA No. 49216
Stafne Trumbull, PLLC
239 North Olympic Avenue
Arlington, Washington 98223
Phone: 360-403-8700
Fax: 360-386-4005
Attorney for Petitioner

TABLE OF CONTENTS

I. REPLY 1

A. Chase and Quality offer issues for review that are different from those presented by Ms. Jackson 1

II. ANALYSIS 2

A. The facts contradict Chase and Quality's arguments for this Court to take their presented issue on CPA preservation 3

B. Chase and Quality offer no RAP argument to support their presented CPA preservation issue and this Court should decline review of that issue 5

C. Ruling on Ms. Jackson's presented issue on CR 12(b)(6) conversion to CR 56 would address Quality and Chase's presented issue on CPA preservation 7

D. This Court should disregard Chase's arguments on hearsay preservation — hearsay is not as a distinct issue, but supports granting review of Ms. Jackson's issue 7

E. Nonservice on the attorney general is irrelevant because Ms. Jackson did not need to serve the attorney general at trial and she has now served the attorney general 10

F. This Court should decline review of Chase and Quality's issue on dismissing constitutional challenges because they do not support their issue with the RAPs 14

TABLE OF AUTHORITY

Cases

Albice v. Premier Mortg. Services of Washington, Inc.,
174 Wn.2d 560, 276 P.3d 1277 (2012) 22
BAC Home Loans Servicing, LP v. Fulbright,
180 Wn.2d 754, 328 P.3d 895 (2014) 14
Bain v. Metropolitan Mortg. Group, Inc.,
175 Wn.2d 83, 285 P.3d 34 (2012) 17, 22
Beal Bank, SSB v. Sarich,
161 Wn.2d 544, 167 P.3d 555 (2007) 22
Cox v. Helenius,
103 Wn.2d 383, 693 P.2d 683 (1985) 22, 23
Donovick v. Seattle-First Nat. Bank,
111 Wn.2d 413, 757 P.2d 1378 (1988) 22
Elcon Const., Inc. v. Eastern Washington University,
174 Wn.2d 157 (2012) 14
Fannie Mae v. Steinmann,
181 Wn.2d 753, 336 P.3d 614 (2014) 22
Fed. Way Sch. Dist. No. 210 v. State,
167 Wn.2d 514, 219 P.3d 941 (2009) 20
Felton v. Citizens Federal Sav. and Loan Ass'n of Seattle,
101 Wn.2d 416, 679 P.2d 928 (1984) 22
Fluke Capital & Management Services Co. v. Richmond,
106 Wn.2d 614, 724 P.2d 356 (1986) 22
Frizzell v. Murray,
179 Wn.2d 301, 313 P.3d 1171 (2013) 22
Glidden v. Municipal Authority of Tacoma,
111 Wn.2d 341, 758 P.2d 487 (1988) 22
Grupo Dataflux v. Atlas Global Grp., L.P.,
541 U.S. 567, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004) 17
Kellerher v. Porter,
29 Wn.2d 650, 189 P.2d 223 (1948) 15
Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6,
118 Wn.2d 1, 820 P.2d 497 (1991) 20
Kennebec, Inc. v. Bank of the West,
88 Wn.2d , 565 P.2d 812 (1977) 22

Klem v. Washington Mut. Bank,
176 Wn.2d 771, 295 P.3d 1179 (2013) 8, 22
Loeffelhoz v. University of Washington,
175 Wn.2d 264, 285 P.3d 854 (2012) 13
Lyons v. U.S. Bank Nat. Ass'n,
181 Wn.2d 775, 336 P.3d 1142 (2014) 22
Mahalko v. Arctic Trading Co., Inc.,
99 Wn.2d 30, 659 P.2d 502 (1983) 22
Plein v. Lackey,
149 Wn.2d 214, 67 P.3d 1061 (2003) 22
Queen City Sav. & Loan Ass'n v. Mannhalt,
11 Wn2d 503, 760 P.2d 350 (1988) 22
Rustad Heating & Plumbing Co. v. Waldt,
91 Wn.2d 372, 588 P.2d 1153 (1979) 22
Schroeder v. Excelsior Management Group, LLC,
177 Wn.2d 94, 297 P.3d 677 (2013) 22
SentinelC3, Inc. v. Hunt,
181 Wn.2d 127, 331 P.3d 40 (2014) 13
State v. Monson,
53 Wn. App. 854, 771 P.2d 359 (1989) 14
Udall v. T.D. Escrow Services, Inc.,
159 Wn.2d 903, 154 P.3d 882 (2007) 22
Wachovia SBA Lending, Inc. v. Kraft,
165 Wn.2d 481, 200 P.3d 683 (2009) 22
Washington Federal v. Harvey,
182 Wn.2d 335, 340 P.3d 846 (2015) 22
Washington Mut. Sav. Bank v. U.S.,
115 Wn.2d, 793 P.2d 969 (1990) 22
Wilkinson v. Chiwawa Communities Ass'n,
180 Wn.2d 241, 327 P.3d 614 (2014) 13
Wright v. Colville Tribal Enter. Corp.,
159 Wn.2d 108, 147 P.3d 1275 (2006) 13

Statutes

Const. Art. IV § 6 ..... passim
RCW 59.12 22
RCW 61.12 ..... 17, 21
RCW 61.24.005(16) 21
RCW 61.24.010(2) 21
RCW 61.24.030(5) 14

RCW 61.24.030(7)(a) 21
RCW 61.24.050 21
RCW 65.08.070 14
RCW 7.24.110 ..... 16, 19

Rules

CR 12(b) 8
CR 12(b)(6) ..... passim
CR 56 ..... passim
ER 201 14
ER 201(b)(2) 14
RAP 10.6(a) 19
RAP 10.6(c) 19
RAP 13.4(b) 23
RAP 13.4(b)(1)–(2) 10
RAP 13.4(b)(3) 11
RAP 13.4(b)(4) 7, 10, 21
RAP 13.4(d) 5
RAP 14.4(b)(4) 15

Other Authorities

32 C.J.S., Evidence, § 626 15

I. REPLY

RAP 13.4(d): A party may file a reply to an answer only if the answer seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer.

A. Chase and Quality offer issues for review that are different from those presented by Ms. Jackson

Respondents Quality Loan Service Corporation of Washington, and McCarthy & Holthus, LLP (collectively "Quality") assert Ms. Jackson's presented issues are "misguided." Quality Answer at 2. Respondents JPMorgan Chase, the Mortgage Electronic Registration System, Inc., and US Bank National Association (collectively "Chase") assert Ms. Jackson's presented issues are "misstated." Chase's Answer at 2. Quality completely adopted all of the issues presented by Chase, so Ms. Jackson addresses them as one. *See* Quality Answer at 2.

Chase and Quality present the issue of whether Ms. Jackson preserved a CPA cause of action. Chase Answer at 2. Ms. Jackson did not present this as an issue for review. *See* Pet. at 1–2. Chase and Quality present the issue of whether the Court of Appeals properly affirmed dismissing Ms. Jackson's constitutional challenge of the DTA. Chase Answer at 2. Ms. Jackson did not present this issue for review; the issue she did present asks whether the DTA divests Washington Superior Courts of original jurisdiction under Art. IV § 6. Pet. at 1–2.

Although Chase does not list a distinct issue for review on hearsay in its issue section, it goes on to argue Ms. Jackson waived any issue regarding hearsay. Chase Answer at 10–11. Ms. Jackson did not present a hearsay preservation issue for review, *see* Pet. at 1–2, and she did not make an argument to rule on hearsay in her Petition. *Id.* at 1, 7, 10.

Arguably, the only issue that is similar between the Petition and Answers, is that of CR 12(b)(6) to CR 56 conversion. *Compare* Pet. at 1 *with* Chase Answer at 2. However, Chase's issue states: "even though the Superior Court considered publicly recorded documents and documents discussed in Jackson's complaint." Chase's Answer at 2. Chase and Quality's framing of the issue downplays or hides the fact that the trial court considered a publicly recorded document that was never discussed in Ms. Jackson's complaint. Pet. at 4–5.

II. ANALYSIS

First, the facts of record contradict Chase and Quality's arguments requesting review of CPA claim preservation where Ms. Jackson sought CPA recovery at trial and on appeal. Second, Chase and Quality fail to offer any RAP argument in support of their issue on CPA claim preservation. Third, resolving the case on Ms. Jackson's CR 12(b)(6) to CR 56 issue would address Chase and Quality's CPA preservation issue. Fourth, Ms. Jackson is not seeking ruling on hearsay — the presence of hearsay in publicly recorded documents implicates RAP 13.4(b)(4) in support of converting CR 12(b)(6) to CR 56. Fifth, Ms. Jackson has served the attorney general such that Quality and Chase's presented issue

on those grounds is now irrelevant. Sixth, Chase and Quality's presented issue for review, to dismiss Ms. Jackson's constitutional arguments, is unsupported by the RAPs.

A. The facts contradict Chase and Quality's arguments for this Court to take their presented issue on CPA preservation

In support of their presented issue for review, Chase and Quality argue (wrongly) that Ms. Jackson has waived her CPA cause of action, even abandoned her claim a during oral argument. Quality Answer at 7–8. Quality asserts "Jackson does not disputer (sic) the Court of Appeals' finding that her failure to assign error to and argue against the [trial] Court's decision ... waived any argument as to these claims," but Quality is incorrect. *Id.* at 7–8 (internal quotations omitted). Ms. Jackson specifically disputed the Court of Appeals' finding in her petition. Pet. at 6. Before the Court of Appeals, Ms. Jackson framed her assignments of error regarding *recovery* broadly. Jackson App. Brief at 2. And a *violation* of the DTA can often implicate recovery under the CPA. *See Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 784–96, 295 P.3d 1179 (2013) (Quality's DTA violations were also recoverable under CPA damages). That broad assignment of error on recovery concerned whether Ms. Jackson pleaded that Quality, acting as trustee, breached its duty of good faith; she did. CP 92 ¶ 4.2.5.

In her appellate brief, Ms. Jackson included the following assignments of error: "The trial court erred in dismissing Ms. Jackson's *complaint* under CR 12(b)6)." Jackson App. Brief at 2 (emphasis added).

Ms. Jackson included a violation of the CPA in her complaint, CP 97–104, and she addressed the CPA in the trial court, CP 197–98; accordingly, that assignment of error is stated broadly enough to include CPA damages for DTA violations. Jackson App. Brief at 2. As an underlying issue to that assignment of error, Ms. Jackson asked: "Did Ms. Jackson's amended complaint set forth facts which could result in **liability** for violation of a trustee's duty of good faith?" *Id.* at 2–3 (emphasis added). "Liability" was not specifically limited to that which arises under the DTA. *See id.* at 2–3. In the corresponding section of her appellate brief, Ms. Jackson pointed out the facts she pleaded to show Chase and Quality were liable, and although she stated Chase and Quality violated the DTA, she did not say her resulting damages were limited thereby. *See id.* at 45–46. Regardless, any ambiguity was cured by Ms. Jackson's supplemental briefing, which was not mentioned by the Court of Appeals, *See generally* Pet. Attach., as well as her motion for reconsideration, which was summarily denied. *See* App. Order Denying Jackson Mot. Recons.

After Ms. Jackson filed her appellate opening brief and reply brief,[1] this Court released *Frias v. Asset Foreclosure Services*, and ruled there "that the DTA does not create an independent cause of action for monetary damages based on allegations of its provisions where no foreclosure sale has been completed." 181 Wn.2d 412, 416, 334 P.3d 529 (2014). Because, prior to *Frias*, independent presale damages were arguably recoverable

[1] Jackson Opening Brief filed December 2013, Jackson Reply Brief filed April 2014.

under the DTA, Ms. Jackson specifically sought a DTA cause of action, but she did not limit recovery of damages to exclusively those under the DTA. *See* Jackson App. Brief at 2. Simultaneously, *Frias* clarified that presale DTA violations could be recovered as CPA damages. *Frias*, 181 Wn.2d at 417. Had Ms. Jackson known this area of law would become so technically restricted, she would have put "and CPA" wherever she mentioned the DTA in her appellate brief. Accordingly, Ms. Jackson requested leave to file supplemental briefing soon after *Frias* came out (that same month) and filed a supplemental brief a few weeks later, clarifying that she sought to preserve her DTA causes of action as CPA ones. Jackson Supp. Brief at 7. Ms. Jackson also reminded the Court of Appeals of *Frias* and her CPA cause of action in her motion for reconsideration. Jackson Mot. Recons. at 25.

Accordingly, if this Court grants review of Chase and Quality's issue, Ms. Jackson has preserved a CPA cause of action.

B. Chase and Quality offer no RAP argument to support their presented CPA preservation issue and this Court should decline review of that issue

Chase and Quality make no RAP argument for why this Court should hear their presented issue regarding CPA preservation. *See* Chase Answer at 11; *see* Quality Answer at 7–8. The only interest served by granting review on Chase and Quality's CPA preservation issue would be to correct the Court of Appeals' narrow reading of Ms. Jackson's assignments of error and her complaint. Pet. Attach. at *6, 11. Because

the Court of Appeals' ruling is case specific, there is little precedential value for the Washington public in ruling on that issue. *See* RAP 13.4(b)(4). Contrastingly, Ms. Jackson's presented issue on CR 12(b)(6) conversion to CR 56 involves a dispute between Divisions of the Court of Appeals while there is no dispute between *any* court on Chase and Quality's presented issue. RAP 13.4(b)(1)–(2). Chase and Quality's presented issue on CPA preservation does not present a question of constitutional law either. *See* Chase Answer at 11; RAP 13.4(b)(3). Chase and Quality's presented issue on CPA preservation is also poorly taken when they do not challenge and therefore concede that Ms. Jackson *did* include a CPA cause of action for violation of the trustee's duty of good faith in her complaint. *See* Chase Answer at 11; *see* Quality Answer at 7. For whatever reason, the Court of Appeals failed to see what all of the parties plainly see. *Compare* Pet. Attach. at *11 ("no allegation of bad faith") *with* Pet. at 4. Accordingly, this Court should decline review of an issue on CPA preservation.

Even if this Court decides to take review on this issue, the facts favor Ms. Jackson such that she has preserved a cause of action under the DTA for damages under the CPA. In that instance Ms. Jackson requests this Court frame the issue as follows:

Whether Ms. Jackson preserved recovering damages under the CPA for presale DTA violations when: (1) her assignment of error for recovery was broad enough to include the CPA, (2) she pleaded the CPA in her complaint and argued pursuant to defendants' motion to dismiss, and (3)

this Court released *Frias* after her briefing was filed, foreclosing independent DTA damages presale, and in response she filed supplemental briefing as well as a motion for reconsideration clarifying that her listed causes of action under the DTA were recoverable under the CPA.

C. Ruling on Ms. Jackson's presented issue on CR 12(b)(6) conversion to CR 56 would address Quality and Chase's presented issue on CPA preservation

Granting review and ruling on Ms. Jackson's presented issue on CR 12(b)(6) conversion to CR 56 would put Ms. Jackson in a position to effectively litigate her case, and it would also resolve Chase and Quality's presented issue on CPA claim preservation. Chase Answer at 2. An order reversing the Court of Appeals and remanding to the trial court to convert the motion to dismiss to a summary judgment and an order that the trial court give these (contested) recorded documents the evidentiary weight they deserve would provide Ms. Jackson a remedy where she argued CPA in her motions to dismiss.

The trial court would have the benefit of *Frias*, which clarifies that Ms. Jackson sought CPA damages for DTA violations such as Quality's breach of its duty of good faith. 181 Wn2d at 433.

D. This Court should disregard Chase's arguments on hearsay preservation — hearsay is not as a distinct issue, but supports granting review of Ms. Jackson's issue

Chase misunderstands or misconstrues Ms. Jackson's comments on hearsay and this Court should decline review of any potential issue on

hearsay preservation. Chase Answer at 2, 10 ("Hearsay" Was Not Raised on Appeal and is Waived."). Ms. Jackson did not mention the hearsay in Chase and Quality's judicially noticed documents in order to hash it out as a distinct legal issue for review. *See* Pet. at 10–11. In fact, because Ms. Jackson challenges the veracity of these recorded documents, those documents must be admitted into evidence. Pet. at 10. Accordingly, she is not seeking review of a hearsay issue and is not necessarily challenging the admission of these documents; she requests review of her issue on CR 12(b)(6) conversion to CR 56.

Regardless, acknowledging that Chase and Quality's judicially noticed documents contain hearsay is important in the scheme of granting review on Ms. Jackson's petition. Why? Because the limited scope of CR 12(b)(6) makes it unclear *how* lower courts are noticing or "considering" these recorded documents. *See* Pet. Attach. at *6; Chase Answer at 6–7. Civil Rule 56 would provide for appropriate grounds to begin determining the scope of admissibility of potential hearsay evidence as it would be presented to a jury. In fact, there is only one Washington Supreme Court case ever that even mentions both CR 12(b)(6) and hearsay. *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 120, 147 P.3d 1275 (2006). Contrarily, this Court has discussed CR 56 and hearsay in at least four recent cases.[2]

[2] *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 139–41, 331 P.3d 40 (2014); *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 259–60, 327 P.3d 614 (2014); *Loeffelhoz v. University of Washington*, 175 Wn.2d 264, 270, 285 P.3d 854 (2012);

Under CR 12(b)(6), it may be acceptable to judicially notice the fact that a document *was* recorded. ER 201. In this way, a party could show it met a statutory requisite to a trustee's sale by recording a document. RCW 61.24.030(5). Or a party can, through judicial notice, show it satisfied Race-Notice requirements based on *when* it recorded an instrument. *See BAC Home Loans Servicing, LP v. Fulbright*, 180 Wn.2d 754, 759, 328 P.3d 895 (2014) (citing RCW 65.08.070). However, it is not acceptable to judicially notice that same document as proof of an underlying contract claim when that claim is disputed. ER 201(b)(2) ("sources whose accuracy cannot reasonably be questioned").

As far as reliability goes, the recorded documents at issue are a far-cry from documents issued by a government official. Literally anyone who conforms with formatting requirements and pays the fee can record a document with the recorder's office.[3] Although records prepared by a public official are more reliable than these recorded documents, those public records are nevertheless subject to common law rules of admissibility. *State v. Monson*, 53 Wn. App. 854, 856, 771 P.2d 359 (1989) *aff'd,* 113 Wn.2d 833, 784 P.2d 485 (1989). And even when an official public document is admitted into evidence, it does not mean that it is admitted because it is authentic or true:

Elcon Const., Inc. v. Eastern Washington University, 174 Wn.2d 157, 169 n.8, 273 P.3d 965 (2012).

[3] "We do not interpret documents or check the documents for accuracy (other than compliance with Washington State RCW's concerning formatting)" http://www.kingcounty.gov/depts/records-licensing/Recorders-Office.aspx

> [D]ocuments of a public nature are generally admissible in evidence, although their **authenticity is not confirmed** by the usual and ordinary tests of truth, and the power of cross-examination of the parties on whose authority the truth of the document depends is lacking.

Kellerher v. Porter, 29 Wn.2d 650, 670, 189 P.2d 223 (1948) (citing 32 C.J.S., Evidence, § 626) (emphasis added). Here, the trial court acknowledged it considered the recorded documents in granting CR 12(b)(6) motions to dismiss, but the trial court never explained how those documents affected its rulings. *See* CP 167, 211–217. The trial court acknowledged it considered the recorded documents in granting defendants' 12(b)(6) motions. CP 167,211-17. Accordingly, this Court should require the lower courts to convert a CR 12(b)(6) motion to CR 56 and appropriately weigh the evidence where the truthfulness or credibility of publicly recorded documents is challenged. Given lower courts increasing willingness to decide challenges pursuant to CR 12(b)(6) instead of CR 56, where the authenticity and credibility of such documents can be properly challenged, invokes the public interest pursuant to RAP 14.4(b)(4).

E. Nonservice on the attorney general is irrelevant because Ms. Jackson did not need to serve the attorney general at trial and she has now served the attorney general

Chase and Quality offer a broader issue for review on the constitutionality of the DTA than the issue presented by Ms. Jackson. Chase Answer at 2. Chase and Quality frame their argument this way to oppose review based upon there being no service to the Attorney General

in the trial court. *See* Chase Answer at 12–18; *see also* Quality's Answer at 4–5. However, any issue with service upon the Attorney General is easily resolvable because, (1) there was no need to serve the attorney general before the trial court, (2) nonservice on the attorney general was brought up for the first time in Quality's Appellate Answering Brief, (3) Ms. Jackson has served the attorney general, and (4) there is no RAP argument to support accepting review of Chase and Quality's issue.

The declaratory judgment act provides:

> In *any proceeding* ... and the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

RCW 7.24.110 (emphasis added).

Chase and Quality reason, and the Court of Appeals reasoned, that failure to serve the attorney general barred review of the trial court's interpretation of the statute in light of Const. Art. IV § 6. *See* Pet. Attach. at *7 ("dismissal on that ground alone was appropriate"). But the trial court never dismissed on that ground and it could not because Ms. Jackson only challenged the constitutionality of the DTA after the trial court construed it — Ms. Jackson did not plead a constitutional argument under the declaratory judgment act.[4]

[4] The only time Ms. Jackson sought declaratory judgment was for an order that her MERS deed of trust was unenforceable under provisions of the DTA and this Court's ruling in *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012). CP 140:9–15, 184:14–26.

Ms. Jackson wanted the superior court to assume original jurisdiction of the pending foreclosure proceeding, akin to federal removal jurisdiction. *See Grupo Dataflux v. Atlas Global Grp., L.P.,* 541 U.S. 567, 569-70, 568, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004). Based on the superior court's original jurisdiction in all cases involving title and possession of real property, Const. art. IV § 6, Ms. Jackson reasoned the superior court could "transfer" or transform a nonjudicial foreclosure proceeding into a judicial foreclosure proceeding. *See* RCW 61.12 (judicial foreclosure). The problems with Chase and Quality's issue and argument stems from reading a line appearing early in the complaint: "this lawsuit also challenges the facial constitutionality of the DTA," CP 84, while overlooking the actual substance of that argument: "Jackson asserts a right to have her legal causes of action determined by the Superior Court pursuant to ... those Separation of Powers principles inherent in Washington's constitution." CP 96–97.

Ms. Jackson did plead constitutional violations, but they were not challenges to the DTA, they were for violations of her substantive due process rights where there was not strict compliance with the DTA. CP 95 ¶ 5.13 ("failure to comply with the DTA has violated Jackson's constitutional rights"). Ms. Jackson argued that the superior court had constitutional authority to override a DTA trustee and she only pleaded a challenge to the constitutionality of the DTA where the superior court declined to exercise its jurisdiction because of it. CP 83 ¶ 1.4, 97 ¶ 6.13. In the end, it appears the trial court declined to assume jurisdiction of the

foreclosure proceedings and only considered Ms. Jackson's offensive claims before it dismissed her with prejudice. *See* CP 167, 211–217.

None of the parties at the trial level objected based upon a lack of service on the attorney general. *See e.g.* CP 77 (McCarthy & Holthus Mot. Dismiss); CP 168–74 (Quality Mot. Dismiss); CP 137–49 (Chase, MERS, and U.S. Bank Mot. Dismiss). They did not object because Ms. Jackson did not seek relief for her constitutional challenge under declaratory relief and because any constitutional challenge to the DTA was contingent upon dismissal by the trial court. Chase did not even brief service on the attorney general at the appellate level. *See generally* Chase App. Answer Brief. Only Quality brought up service upon the attorney general as an issue on appeal and incorrectly framed it as grounds to affirm the trial court, even though there was no reason requiring service on the attorney general before the trial court. *See* Quality App. Answer Brief at 5. Regardless, Ms. Jackson lost on appeal and the attorney general was not prejudiced by not being served and heard there.

At the same time, Ms. Jackson does not seek to exclude the attorney general from proceedings here. The Declaratory Judgment statute requires the attorney general shall be served in "any proceeding." *See* RCW 7.24.110. Accordingly, Ms. Jackson has followed the statute and sent copies of these proceedings to the attorney general at the time of filing this Reply. Where the statute requires the attorney general have an opportunity to be heard, RCW 7.24.110, the attorney general can motion for leave to file an amicus brief. RAP 10.6(a). This Court may also invite

the attorney general to file an amicus brief. RAP 10.6(c). Although amicus briefs are typically not filed during a petition, Ms. Jackson would consent to the attorney general filing one. Accordingly, this Court should reject Chase and Quality's presented issue to the extent it relies upon nonservice to the attorney general.

If, assuming arguendo, that Ms. Jackson's failure to serve the Attorney General in the Court of Appeals means she cannot bring a constitutional challenge, then the Court of Appeals should not have analyzed the constitutionality of the DTA. *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 11, 820 P.2d 497 (1991). In those circumstances, this Court should accept review to correct the Court of Appeals for engaging in analysis of the constitutionality of the DTA in a published opinion when it lacked jurisdiction to do so. Pet. Attach. at *10–11. Otherwise, with completed service upon the attorney general, this Court should accept review of Ms. Jackson's Petition and conduct de novo review of the Court of Appeals' analysis. *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523, 219 P.3d 941, 946 (2009) (constitutional interpretation is reviewed de novo).

F. This Court should decline review of Chase and Quality's issue on dismissing constitutional challenges because they do not support their issue with the RAPs

Respondent Chase contends that Ms. Jackson misreads the State Constitution and that she lacks an understanding of the law, which seems to suggest Respondents do want this Court to accept review of DTA

constitutionality. *See* Chase's Answer at 11. Chase and Quality offer lengthy arguments for why they think the DTA *is* constitutional, but both fail to make any explicit RAP arguments for why this Court should accept review of their broader issue and not Ms. Jackson's issue. *See* Chase Answer at 12–19; *see* Quality Answer at 4–7.

It appears that only Chase and Quality's remark concerning alternative dispute resolution ("ADR") arguably invokes RAP 13.4(b)(4). Chase believes invalidating the DTA under Const. Art. 4 § 6 would undermine other forms of ADR. Chase Answer at 1. However, nonjudicial foreclosure is not a form of ADR like arbitration or mediation — it is the execution of a legal remedy for breach of contract. *See* FORECLOSURE, Black's Law Dictionary (10th ed. 2014). Obviously the DTA is an alternative to *judicial* foreclosure, RCW 61.12, but otherwise it bears no other similarity with actual ADRs. Arbitration involves both parties to submit their disputes to an agreed upon arbitrator to resolve mutual disputes. ARBITRATION, Black's Law Dictionary (10th ed. 2014). A nonjudicial foreclosure trustee is unilaterally appointed and primarily exists for the benefit of the foreclosing party. RCW 61.24.005(16); RCW 61.24.010(2). When a lender or loan servicer over-bills the homeowner, the homeowner does not seek resolution through a trustee. Nonjudicial foreclosure can be initiated with just a declaration from the foreclosing party, RCW 61.24.030(7)(a), and completed without any action or participation from the opposing party. *See* RCW 61.24.050. At the end, the cryer issues a trustee's deed and our courts grant unlawful

detainer actions as a result if the homeowner fails to vacate the property. RCW 59.12.

In all of its 23 cases citing the DTA, this Court has never referred to nonjudicial foreclosure as a form of ADR,[5] but as an alternative to judicial foreclosure. *Donovick*, 111 Wn.2d at 419–20. In *Cox v. Helenius*, this Court appreciated that the parties had discussed resolving their nonjudicial foreclosure dispute in arbitration (rather than with the foreclosing trustee). 103 Wn.2d at 386. This Court in *Cox* also discussed resolution of the underlying contract dispute as distinct from getting an injunction to restrain the trustee's foreclosure sale, because trustees do not entertain both sides to a mortgage loan dispute and because trustees do not restrain themselves. *Id.* at 390.

---

[5] *Washington Federal v. Harvey*, 182 Wn.2d 335, 340 P.3d 846 (2015); *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 336 P.3d 1142 (2014); *Fannie Mae v. Steinmann*, 181 Wn.2d 753, 336 P.3d 614 (2014) (per curiam); *Frias*, 181 Wn.2d 412; *Frizzell v. Murray*, 179 Wn.2d 301, 313 P.3d 1171 (2013); *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013); *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012); *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009); *Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 167 P.3d 555 (2007); *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007); *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003); *Washington Mut. Sav. Bank v. U.S.*, 115 Wn.2d, 793 P.2d 969 (1990); *Queen City Sav. & Loan Ass'n v. Mannhalt*, 11 Wn2d 503, 760 P.2d 350 (1988); *Donovick v. Seattle-First Nat. Bank*, 111 Wn.2d 413, 757 P.2d 1378 (1988); *Glidden v. Municipal Authority of Tacoma*, 111 Wn.2d 341, 758 P.2d 487 (1988); *Fluke Capital & Management Services Co. v. Richmond*, 106 Wn.2d 614, 724 P.2d 356 (1986); *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985), *Felton v. Citizens Federal Sav. and Loan Ass'n of Seattle*, 101 Wn.2d 416, 679 P.2d 928 (1984); *Mahalko v. Arctic Trading Co., Inc.*, 99 Wn.2d 30, 659 P.2d 502 (1983); *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 588 P.2d 1153 (1979); *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 719, 565 P.2d 812 (1977).

Regardless of whether nonjudicial foreclosure is some unique form of ADR, Chase's implication that a ruling on the DTA could potentially affect ADR shows why this is important to the public interest, an excellent argument for why this Court *should* accept review of Ms. Jackson's presented issues in light of RAP 13.4(b) (issue of substantial public interest). Review under Chase and Quality's presented issue, which seeks to resolve constitutional review on a procedural bar, would prevent this Court from addressing the issue in compliance with the public interest RAP.

Additionally, Chase misconstrued Ms. Jackson's argument in support of its presented issue. Chase Answer at 18. Obviously the superior courts have original jurisdiction of violations under nonjudicial foreclosure law. That is not disputed. What is disputed, is whether nonjudicial foreclosure law (as it currently stands) revokes superior court's jurisdiction over foreclosures themselves and more specifically the (trustee's) decision to decide whether an entity is lawfully entitled to foreclose. Const. art. IV § 6.

Otherwise, Chase and Quality appear to concede Ms. Jackson's presented issue is novel and ripe for review because they cannot point to a single authority, including *Kennebec*, that has addressed DTA constitutionality under Art 4 § 6. *See e.g.* Chase Answer at 12–18; Quality Answer at 4–5.

DATED this 24th day of August, 2015, in Arlington, Washington.

Respectfully Submitted,

Scott E. Stafne, WSBA No. 6964
Mitchel F. Wilson, WSBA No. 49216
Attorneys for Petitioner
Stafne Trumbull, PLLC
239 North Olympic Avenue
Arlington, WA 98223

CERTIFICATE OF SERVICE

I, Mitchel Wilson, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 24th day of August, 2015, I caused to be served a true and correct copy of the Reply Supporting Petitioner for Review to respondents in the above title matter by causing it to be delivered to:

Davis Wright Tremaine Fred Burnside Zana Bugaighis 1201 3rd Ave, Suite 2200 Seattle, WA 98101 fredburnside@dwt.com zanabugaighis@dwt.com	☐Facsimile ☐Express Mail ✓ U.S. First Class Mail Postage Paid ☐Hand Delivery ☐Legal Messenger ✓ Electronic-Email
Tomasi Salyer Baroway Eleanor DuBay Kathryn Salyer 121 SW Morrison St, Suite 1850 Portland, OR 97204 edubay@tsbnwlaw.com ksalyer@tsbnwlaw.com	☐Facsimile ☐Express Mail ✓ U.S. First Class Mail Postage Paid ☐Hand Delivery ☐Legal Messenger ✓ Electronic-Email
Attorney General Office 3501 Colby Ave #200 Everett, WA 98201	☐Facsimile ☐Express Mail ✓ U.S. First Class Mail Postage Paid ☐Hand Delivery

☐Legal Messenger
☐Electronic-Email

DATED this 24th day of August, 2015 at Arlington, Washington.

Mitchel Wilson
Stafne Trumbull, PLLC

SUPREME COURT NO. 91779-5
COURT OF APPEALS NO. 72016-3-I

Sandra Shelley Jackson

Petitioner,

— *v.* —

Quality Loan Service Corporation of Washington; Mortgage Electronic Registration System, Inc.; McCarthy & Holthus, LLP; U.S. Bank, National Association as Trustee for WAMU Mortgage Pass Through Certificate for WMALT 2006-AR4 Trust Investors in WMALT 2006-AR4 Trust c/o J.P. Morgan Chase Bank, N.A.,

Respondents.

DECLARATION OF SERVICE

Mitchel F. Wilson, WSBA No. 49216
Stafne Trumbull, PLLC
239 North Olympic Avenue
Arlington, Washington 98223
Phone: 360-403-8700
Fax: 360-386-4005
Attorney for Petitioner

I, Shaina Johnson, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

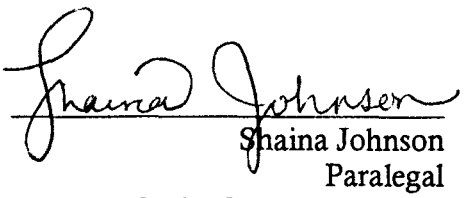
2. That on the 21st day of August, 2015, I caused to be served a true and correct copy of Clerks Papers, Briefing on Appeal from Superior Court, & Briefing on Petition for Review to respondents in the above title matter by causing it to be delivered to:

Davis Wright Tremaine Fred Burnside Zana Bugaighis 1201 3rd Ave, Suite 2200 Seattle, WA 98101 fredburnside@dwt.com zanabugaighis@dwt.com	☐Facsimile ☐Express Mail ✓ U.S. First Class Mail Postage Paid ☐Hand Delivery ☐Legal Messenger ☐Electronic-Email
Tomasi Salyer Baroway Eleanor DuBay Kathryn Salyer 121 SW Morrison St, Suite 1850 Portland, OR 97204 edubay@tsbnwlaw.com ksalyer@tsbnwlaw.com	☐Facsimile ☐Express Mail ✓ U.S. First Class Mail Postage Paid ☐Hand Delivery ☐Legal Messenger ☐Electronic-Email

3. That on the 24th day of August, 2015, I caused to be served a true and correct copy of Clerks Papers, Briefing on Appeal from Superior Court, & Briefing on Petition for Review to respondents in the above title matter by causing it to be delivered by U.S. Priority Mail to:

The Attorney General Office
3501 Colby Ave, #200
Everett, WA 98201

DATED this 24th day of August, 2015 at Arlington, Washington.



Shaina Johnson
Paralegal
Stafne Trumbull, PLLC

OFFICE RECEPTIONIST, CLERK

To: Shaina Johnson; Mr Scott Stafne; Mitchel Wilson; Mr Joshua Trumbull; Fred Burnside; Lisa Bass; Zana Bugaighis; Eleanor A. DuBay; ksalyer@tsbnwlaw.com; Diane Hitti; evelyndacuag@dwt.com
Subject: RE: Jackson v. Quality Loan Service et al. Supreme Court Case No. 91779-5

Rec'd on 8-24-15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Shaina Johnson [mailto:shaina@stafnetrumbull.com]
Sent: Monday, August 24, 2015 3:53 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; Mr Scott Stafne <scott@stafnetrumbull.com>; Mitchel Wilson <mitchel@stafnetrumbull.com>; Mr Joshua Trumbull <josh@stafnetrumbull.com>; Fred Burnside <FredBurnside@dwt.com>; Lisa Bass <LisaBass@dwt.com>; Zana Bugaighis <zanabugaighis@dwt.com>; Eleanor A. DuBay <edubay@tsbnwlaw.com>; ksalyer@tsbnwlaw.com; Diane Hitti <dhitti@tsbnwlaw.com>; evelyndacuag@dwt.com
Subject: Jackson v. Quality Loan Service et al. Supreme Court Case No. 91779-5

Dear Clerk of the Supreme Court:

On behalf of Plaintiff Sandra Jackson in Case #91779-5, Jackson v. Quality Loan Service et al., Mitchel Wilson, WSBA # 49216 of Stafne Trumbull, PLLC located at 239 N. Olympic Ave, Arlington, WA 98223 would like to file the attached documents:

- Reply Supporting Petitioner for Review
- Declaration of Service

Please contact us at 360.403.8700 or mitch@stafnetrumbull.com if you have any questions. Thank you.

Shaina Johnson
Paralegal
Stafne Trumbull, PLLC
239 N. Olympic Ave
Arlington, WA 98223
P:360.403.8700
F: 360.386.4005