72905-5

72905-5

COURT OF APPEALS I NO. 72905-5
WHATCOM COUNTY NO. 10-2-02676-9

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JACK GRANT,

Appellant,

v.

FIRST HORIZON HOME LOANS, et. al.,

Respondents.

APPEAL FROM SUPERIOR COURT FOR WHATCOM COUNTY

APPELLANT JACK GRANT'S OPENING BRIEF

Scott E. Stafne, WSBA# 6964
Joshua B. Trumbull, WSBA# 40992
Brian J. Fisher, WSBA# 46495
STAFNE TRUMBULL, PLLC
Attorneys for Petitioner
239 N Olympic Ave
Arlington, WA 98223
360-403-8700

TABLE OF CONTENTS

that Grant could not prevail under the CPA?

TABLE OF AUTHORITY

Washington Statutes

Washington Cases

Washington Rules

Rules of Appellate Procedure

Federal Cases

Other Authorities

I. INTRODUCTION

This matter comes before this Court again arising from Respondents' First Horizon Home Loans, a division of First Tennessee Bank National Association's ("First Horizon") and Quality Loan Service Corporation of Washington's ("Quality") attempts to nonjudicially foreclose on Appellant Jack Grant's ("Grant") property. Previously this Court held that if BNYM[1] "is not the owner of the note, then neither it nor Quality as its agent[2] and/or trustee had authority to foreclose, and the initiation of that proceeding was unlawful," and remanded this matter back to the Superior Court to resolve the question of ownership. *Grant v. First Horizon, et. al.*, 168 Wn. App. 1021, ___ P.3d ___, *4 (Div. I, 2012) (unpublished) (hereafter, "*Grant I*"). This Court also dismissed Grant's CPA claim, holding that he did not establish a per se CPA violation nor did he establish Quality's conduct had the capacity to deceive a substantial portion of the public. *Id.* at *7.

Following remand, Washington's Supreme Court decided *Bain v.*

---

[1] The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the holders of the Certificates, First Horizon Pass–Through Certificates Series FH05–01, by First Horizon Home Loans, a division of First Tennessee Bank National Association, Master Servicers, in its capacity as agent for the Trustee under the Pooling and Servicing Agreement c/o MetLife Home Loans a division of MetLife Bank NA

[2] "Again, the trustee in a nonjudicial foreclosure action has been vested with incredible power... If the trustee were truly a mere agent of the beneficiary there would be, in effect, only two parties with the beneficiary having tremendous power and no incentive to protect the statutory and constitutional property rights of the borrower." *Klem*, 176 Wn.2d at 791-2.

Metro. Mortg. Grp., 175 Wn.2d 83, 285 P.3d 34 (2012), *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), *Frias v. Asset Foreclosure Servs.*, 181 Wn.2d 412, 334 P.3d 529 (2014), and *Lyons v. U.S. Bank*, 181 Wn.2d 775, 336 P.3d 1142 (2014). On December 2, 2014, the Superior Court found material issues of fact regarding the Respondents' authority to foreclose, but granted summary judgment to respondents because the Superior Court considered this Court's decision in *Grant I* to be controlling regarding Grant's CPA claim and *Frias* controlling with regard to the remaining claims from *Grant I*. CP 308-9.

Grant's appeal focuses on how intervening controlling authority from the Washington State Supreme Court affects law of the case doctrine.

First, the law of the case doctrine was improperly applied by the Superior Court when the trial court ruled that, even though there has been intervening controlling authority from the Supreme Court construing the CPA in contradiction to this court's opinion in *Grant I*, the Superior Court would need this Court's permission to follow the law as determined by the Washington Supreme Court, CP 309:8-10.

Second, the law of the case doctrine was properly applied by the Superior Court when it followed this Court's construction of Ch 61.24 RCW when the Superior Court ruled, "[s]everal entities claimed ownership of the Note before BNYM claimed ownership in these

proceedings. Fact issues exist as to what these transfers were; when they occurred; and their effect, if any, on the ownership of the note." CP 309:5-7; *see also* CP 308:12-309:7. This ruling was consistent with subsequent intervening controlling authority from the Supreme Court construing Ch. 61.24 RCW. *Compare Grant I*, at *4-5 *with* RCW 61.24.030(7)(a); *Lyons*, 181 Wn.2d at 789; *Bain* 175 Wn.2d at 102.

In sum, this appeal requires this Court to determine whether Grant is entitled to the retroactive application of Supreme Court decisions construing Washington's Consumer Protection Act, Ch. 19.86 ("CPA") and the Deeds of Trust Act, Ch. 61.24 RCW ("DTA") while this case was *sub judice*.[3] As the Supreme Court said in *Klem*, "neither due process nor equity will countenance a system that permits the theft of a person's property by a lender" and a trustee who aids in such unfairness "subject[s] itself and the beneficiary to a CPA claim."[4]

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERROR 1:

1. The Superior Court erred in interpreting the law of the case doctrine as requiring it to seek permission from this Court before applying the Consumer Protection Act as construed by the Supreme Court in *Klem*,

---

[3] *Sub judice* is latin for 'under a judge." *Black's Law Dictionary*, 1562 (9th Ed. 2009). Black's defines *sub judice* as "Before the court or judge for determination; at bar." *Id.*

[4] *Klem*, 176 Wn.2d at 790.

Frias, and *Lyons*.

1. ISSUES OF LAW APPLICABLE TO ASSIGNMENT OF ERROR 1:

1. When a case is *sub judice,* must the Superior Court apply controlling intervening Supreme Court precedent construing a statute, even though this Court had construed the statute differently in a prior appeal of that case?

2. If the law of the case doctrine does require this Court to give the Superior Court permission to apply current law as determined by Supreme Court precedent, should this Court grant the Superior Court permission to apply current law in adjudicating the CR 56 motion brought by Respondents?

B. ASSIGNMENT OF ERROR 2:

1. The Superior Court erred when it failed to deny Respondents' motions for summary judgment because Respondents' own evidence established genuine issues of material fact regarding their actions, Respondents offered no admissible evidence showing Grant could not prevail on his CPA claims, and Grant submitted evidence substantiating his CPA claim against Respondents.

2. ISSUE OF LAW APPLICABLE TO ASSIGNMENT OF ERROR 2:

1. Did the Superior Court err in granting Respondents' motion for

summary judgment where Respondents offered no admissible evidence that Grant could not prevail under the CPA?

III. STATEMENT OF THE CASE

In *Grant I*, this Court found Grant's complaint alleged facts sufficient to create a triable issue with respect to the Respondents' right to foreclose, and remanded the case back to Whatcom County Superior Court. *Id.* at *1.

Respondents subsequently moved for summary judgment and attempted to demonstrate their right to nonjudicially foreclose against Grant's property. CP 005-024; CP 116-125. In response, Grant pointed out the multitude of DTA violations evident through public record and the Respondents' moving papers. First, the Respondents submitted evidence that three (3) separate securitized trusts were the single and complete owner of Grant's Note. *Compare* CP 86-7 (Assignment of Deed of Trust purporting to transfer beneficial interest in Grant's Deed of Trust and all interest in the Note from MERS to First Horizon Pass-Through Certificates Series FH05-01) *and* CP 154 (Assignment of Deed of Trust from First Horizon Mortgage Pass-Through Certificates Series FH05-01 to First Horizon Mortgage Pass-Through Certificate Series FHASI 2005-1 dated May 23, 2014) *with* CP 027 at ¶ 5 (Theresa Nichols declaring First Horizon Pass-Through Certificates Series FHASI 2005-1 was in physical

possession of Grant's Note and Deed of Trust from 2005 until January 16, 2014) *and with* CP 007:2-5[5] (Respondents' statement of facts claiming that, pursuant to a pooling and servicing agreement,[6] First Horizon Mortgage Pass-Through Certificate Series Trust 2005-1 Mortgage Pass-Through Certificates Series 2005-1 was in possession of the Note).[7] Grant also showed that his deed of trust named MERS as the beneficiary while a different entity was the original holder of the Note, and that MERS retained legal title to the deed of trust at all times, which rendered the Note unsecured and not able to make anyone a DTA beneficiary. CP 167:23-171:7; CP 037 ("MERS is the beneficiary under this Security Instrument); CP 038 ("Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument…); CP 86-87 (MERS assigning only its beneficial interest in the Deed of Trust together with the Note, not the legal title to the Deed of Trust which MERS actually owns). Grant also pointed to the "beneficiary declaration" made by an employee of Metlife Bank, N.A., that stated Bank of New

---

[5] Quality explicitly adopted and incorporated by reference First Horizon's statement of facts and legal arguments, including the information regarding the relevant pooling and servicing agreement which First Horizon argued gave it authority to nonjudicially foreclose. CP 116:27-117:3.

[6] Respondents cited Exhibit A to the Declaration of Andrew G. Yates, which is the Pooling and Servicing Agreement for First Horizon Mortgage Pass-Through Trust 2005-1 Mortgage Pass-Through Certificates, Series 2005-1. *See* CP 056.

[7] Respondents previously represented to this Court that the owner of Grant's Note was the FH05-01 Trust, *Grant I* at *2, but then later represented to the Superior Court that the owner of Grant's Note was the 2005-1 Trust, CP 007:2-5.

York Mellon as Trustee for the holders of the Certificate, First Horizon Mortgage-Pass Through Certificates Series FH05-01, was the actual holder of the Note as not complying with the DTA because (1) it was not made by the beneficiary, Bank of New York Mellon as Trustee for Trust FH05-01, CP 173:9-11; (2) it was contradicted by Theresa Nichols' statement that Trust FHASI 2005-1 possessed Grant's Note and Deed of Trust in 2010, *see* CP 027 at ¶ 5; and (3) there was no proof that any agency relationship existed between Metlife and the Trust, CP 173:23-24. Grant also pointed out that Quality deferred to the purported beneficiary in determining whether to postpone or cancel a sale in violation of its duty of good faith to Grant. CP 260 (Letter from Quality stating it would sell Grant's property unless they were instructed otherwise by the beneficiary).

Faced with this conflicting evidence regarding the Respondents' authority to foreclose on Grant (and evidence of other violations of the DTA[8]), the Superior Court set forth in its order the material questions of fact which would preclude a grant summary judgment to Respondents under current law relating to nonjudicial foreclosure:

> If the Plaintiff's Consumer Protection Act claims were properly before this Court under current law, the Court would find several issues of material fact would need to be resolved before the propriety of the foreclosure could be determined.

[8] *See, e.g.* CP 308-309 at ¶¶ 1-3.

CP 308; *see also* RP 56:11-20.[9] However, the Superior Court believed it could not apply current law to Grant's case because it was required to follow this Court's superseded construction of the CPA and DTA pursuant to the law of the case doctrine:

> Because the Consumer Protection Act claims were dismissed by the Court of Appeals, this Court will not consider those claims, of the issues [of fact] described in this opinion, without mandate or request from that Court.

CP 309. At oral argument on the Defendants' summary judgment motions, the Superior Court explained "In other words, what I am holding is that I don't believe that I, as the trial judge, have any discretion to revive and open these claims. If I felt I did have discretion, frankly, in the interest of justice I might exercise that discretion to reopen these claims." RP 49:6-11.

IV. ARGUMENT

First, Grant will examine the appropriate standard of review. Next, Grant will examine retroactivity of Supreme Court interpretations of statutes and show how the Superior Court erred when it applied the law of the case doctrine despite contrary controlling intervening Supreme Court case law. Grant will then discuss why, if the Superior Court is correct in

[9] "In my view the Court has been left with the question of whether Quality Loan Services had the authority to proceed with the foreclosure proceedings that it proceeded with. Inherent in that question is the question of whether Quality Loan Services was properly appointed by an entity on behalf of the holder or holder beneficiary who had authority to appoint Quality Loan Services. That I see as requiring several resolutions of fact."

requesting this Court to grant the Superior Court permission to follow controlling Supreme Court precedent, this Court should grant such permission to the Superior Court. Grant will then analyze the Superior Court's proper application of the law of the case doctrine to *Grant I*'s DTA analysis. Finally, Grant will demonstrate that the Respondents failed to meet their initial burden under CR 56 to demonstrate an absence of any genuine issue of material fact.

A. De Novo Standard of Review Is Appropriate

A Superior Court's ruling on summary judgment is reviewed *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Appellate courts must perform an independent inquiry of all materials before the Superior Court to determine whether summary judgment was appropriate. *Id.*, citing *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

On a motion for summary judgment, the court must view the facts and *all* reasonable inferences drawn from those facts in the light most favorable to the nonmoving party. *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 687-688, 317 P.3d 987 (2014) (citing CR 56(c) and *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)). Summary judgment is proper only where there are no genuine issues of

material fact. *Amalgamated Transit v. State*, 142 Wn.2d 183, 206, 11 P.3d 762 (2000); CR 56(c).

The moving party has the burden of establishing the absence of an issue of material fact beyond a reasonable doubt. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 611, 220 P.3d 1214 (2009) (citing *SAS Am., Inc. v. Inada*, 71 Wn. App. 261, 263, 857 P.2d 1047 (Div. I, 1993)). A genuine issue of material fact exists where reasonable minds could differ on, or otherwise draw different conclusions from, the facts controlling the outcome of litigation. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

In granting summary judgment, it must be beyond dispute that a reasonable person could not find in favor of the party against whom the judgment is entered. CR 56(c); *Folsom*, 135 Wn.2d at 663.

> The respective burdens imposed on the moving and nonmoving party by CR 56 are sometimes confusing. Two related points must be kept in mind. First, while the defendant moving for summary judgment is not required to submit affidavits in support of his motion, CR 56(b), this does not mean he does not bear a genuine and substantial burden in supporting his motion. *While CR 56(e) requires the nonmoving party to come forward with facts showing a material issue of fact, this does not occur unless and until the defendant meets his initial burden of showing that there is no issue of material fact.*

Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 234, 770 P.2d 182 (1989) (Dore, J. concurring in part, dissenting in part) (emphasis added);

accord Folsom, 135 Wn.2d at 663 (citing *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979)).

B. The Superior Court Erred When it Failed to Apply Controlling Intervening Supreme Court Precedent Construing the CPA to the Facts in Grant's Case.

This section will discuss: i) why selective prospectivity retroactivity of Supreme Court precedent is inappropriate under familiar principles of *stare decisis* and equity; and, ii). Grant's case was *sub judice*, and controlling intervening Supreme Court Case law must be applied, even though this Court had reached a different conclusion when ruling on a prior appeal and remanding to the Superior Court for further proceedings.

1. Under Principles of Stare Decisis and Equity, the Supreme Court's interpretation of a Statute Relates Back to the Time of Statute's Enactment.

Grant argued to the Superior Court:

> Where the Supreme Court has ruled authoritatively on an issue, its ruling applies retroactively. *Jackowski v. Borchelt,* 114 Wn.2d 720, 731, 278 P.3d 1100 (2012); *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 279-280, 208 P.3d 1092 (2009). When the Supreme Court construes the meaning of a statute while a case is *sub judice*, "that construction operates as if it were originally written into [the statute] ... and that determination [of the statute's meaning] relates back to the time of the statute's enactment." *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). Thus, Mr. Grant is entitled to show that he is entitled to relief under the CPA for those DTA violations the Court of Appeals found tenable.

CP 160:4-14.

Further, the Superior Court should have applied the Supreme Court's construction of the CPA as per *Klem*, *Frias*, and *Lyons* because Washington follows the general rule that a new decision of law applies retroactively unless expressly stated otherwise in the case announcing the new rule of law. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 271, 208 P.3d 1092 (2009) (citing *State ex rel. Washington State Fin. Comm. v. Martin*, 62 Wn.2d 645, 671, 384 P.2d 833, 849 (1963)). The Supreme Court did not indicate in any of these CPA cases that its construction of the CPA should be given only a prospective effect. *See, e.g., Klem,* 176 Wn.2d at 782-795; *Frias,* 181 Wn.2d at 430-433; *Lyons,* 181 Wn.2d at 785-792.

Importantly, the United States Supreme Court noted that giving new decisions retroactive effect, i.e. applying such decision "both to the parties before the court and to all others by and against whom claims may be pressed, consistent with *res judicata* and procedural barriers such as statutes of limitations" was overwhelmingly the norm. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991). Further, the Supreme Court observed retrospective application of new precedent was in keeping with "the traditional function of the courts to decide cases before them *based upon their best current*

understanding of the law." *Id.* (emphasis added)

In *Beam Distilling*, the Supreme Court prohibited federal courts from fashioning a rule of "selective prospectivity."

> Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law is not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules.

501 U.S. at 543, 111 S. Ct. at 2447-48. The Washington Supreme Court adopted *Beam Distilling's* holding and rationale in *Robinson v. City of Seattle*, 119 Wn.2d 34, 73-80, 830 P.2d 318 (1992) and reiterated this holding in *Lunsford*, 166 Wn.2d at 274.

In *Robinson* the Washington Supreme Court explicitly held:

> In accordance with *Beam Distilling,* as we have noted, once this court has applied a rule retroactively to the parties in the case announcing a new rule, we will apply the new rule to all others not barred by procedural requirements, such as the statute of limitation or res judicata.

119 Wn.2d at 77.

The procedural requirements which will bar a party's right to the benefit of an intervening decision in his favor includes only such rules which promote the finality of judgments or which would otherwise prevent a judgment in that party's favor. *See Harper v. Virginia Dep't of Taxation,* 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993)

(controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.); *Huddleston v. Dwyer,* 322 U.S. 232, 236, 64 S. Ct. 1015, 88 L. Ed. 1246 (1944) ("Until such time as the case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.").

2. Grant's case was Sub Judice, therefore the Superior Court Must apply controlling intervening Supreme Court Case law interpreting the CPA, even though the Court of Appeals had reached a different conclusion in a prior appeal of this case.

In *Grant I*, this Court held that Grant could only establish an unfair act or practice by showing "either than an act or practice has a capacity to deceive a substantial portion of the public or that the alleged act constitutes a per se unfair trade practice." *Grant I* at *7. This Court dismissed Grant's CPA claim, holding that he failed to establish a per se CPA violation or the capacity of Quality's conduct to deceive a substantial portion of the public. *Id. Grant I* was decided on May 29, 2012. *Id.* at *1.

Following *Grant I*, on February 28, 2013, the Washington Supreme Court decided *Klem* and added a third way for Plaintiffs like Grant to establish an unfair act or practice: "an unfair or deceptive act or

practice not regulated by statute but in violation of public interest." 176 Wn.2d at 787. The *Klem* Court went on to note that an act or practice can be unfair without being deceptive and still be the basis for a CPA cause of action. *Id.* On October 30, 2014, the Washington Supreme Court went one step further and held that pre-sale violations of the DTA are unfair acts for the purposes of a CPA claim. *Lyons v. U.S. Bank*, 181 Wn.2d 775, 786, 336 P.3d 1142 (2014) ("If Lyons' alleged [DTA] violations are true, NWTS' actions would likely be considered unfair acts, but questions remain as to whether NWTS' actions amounted to such violations."). Thus, *Klem* and *Lyons* changed CPA jurisprudence as it relates to nonjudicial foreclosures, effectively overruling *Grant I* with regard to *Grant I's* CPA analysis.

Washington has long adhered to the principle that when the highest appellate court construes a statute, that construction must be read into the statute as if it had been enacted that way originally. *Johnson v. Morris,* 87 Wn.2d 922, 927-28, 557 P.2d 1299 (1976); *Yakima Valley Bank & Trust Co. v. Yakima Cnty.*, 149 Wash. 552, 556, 271 P. 820, 821-22 (1928). In other words, once the Supreme Court has determined the meaning of a statute, that is what the statute meant since its enactment, and that meaning must be applied to all *sub judice* cases. *Hale,* 165 Wn.2d at 506; *Johnson*, 87 Wn.2d at 928; *Yuchasz v. Dep't of Labor & Indus. of State*, 183 Wn.

App. 879, 888, 335 P.3d 998, 1002 (Div. I, 2014).

Greene v. Rothschild, 68 Wn.2d 1, 414 P.2d 1013 (1966) is the "foundation case for modern analysis" of the law of the case doctrine. Trautman, Philip A. *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 810 (1984) (hereafter Trautman). In *Greene*, the Washington Supreme Court observed:

> Under the doctrine of *stare decisis*, the court is not obliged to perpetuate its own errors. This doctrine means that the rule laid down in any particular case is applicable to another case involving identical or substantially similar facts. *Floyd v. Dept. of Labor and Industries*, 44 Wn.2d 560, 269 P.2d 563 (1954). But the doctrine will not be applied in cases in which to do so would perpetuate error and in which no property rights would be affected by the overruling of the prior decision. *Hutton v. Martin*, 41 Wn.2d 780, 252 P.2d 581 (1953). We see no reason why this principle should not apply where the allegedly erroneous decision is one which was rendered on a prior appeal of the same case. And in fact it is the increasingly accepted view that the doctrine of 'law of the case' is a discretionary rule, which should not be applied where it would result in manifest injustice.

68 Wn.2d at 8.

In *Roberson v. Perez*, the Washington Supreme Court observed that the law of the case doctrine should not be followed in the event an intervening decision changes the law.

> [A]pplication of the doctrine may also be avoided where there has been an intervening change in controlling precedent between trial and appeal. *See* RAP 2.5(c)(2) (authorizing appellate courts to review prior decisions on the basis of the law "at the time of the later review."). This

> exception to the law of the case doctrine also comports with federal law. 1B James Wm. Moore, *Moore's Federal Practice* ¶ 0.404[1], at II–6—II–7 (2d ed. 1996) ("It is clear, for example, that a decision of the Supreme Court directly in point, irreconcilable with the decision on the first appeal, and rendered in the interim, *must* be followed on the second appeal, despite the doctrine of the law of the case.") (footnote omitted); *cf. Crane Co. v. American Standard, Inc.,* 603 F.2d 244, 249 (2d Cir.1979) (concluding that law of case did not preclude trial court reconsideration of whether plaintiff had a cause of action when reexamination is appropriate in light of an intervening United States Supreme Court decision).

156 Wn.2d 33, 42-43, 123 P.3d 844 (2005). The Ninth Circuit also recognizes an exception to the law of the case doctrine in the event of an intervening change of controlling authority. *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281-82 (9th Cir. 1996); c*f. Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896, 117 S. Ct. 1731, 138 L. Ed. 2d 91 (1997).

The Supreme Court's change in controlling precedent in *Klem* (adding an additional way to show an unfair act or practice) and *Lyons* (holding a violation of the DTA is an unfair act) made the potential DTA violations by Respondents as found by this Court in *Grant I* actionable under the CPA. Once the Supreme Court interpreted the CPA in *Bain*, *Klem*, *Frias*, and *Lyons*, that interpretation related back to the date of the CPA's enactment. *See Hale,* 165 Wn.2d at 506; *Johnson*, 87 Wn.2d at 928.

Here, this case was *sub judice* at all times relevant to the Supreme Court's decisions in *Bain*, *Klem*, *Frias*, and *Lyons*. The cases were properly cited and argued before the Superior Court in Grant's response to Respondents' Motions for Summary Judgment and at oral argument.[10] CP 159:22-160:3; CP 173:18-174:12. Grant is entitled to have his case decided under the law as it exists today, just as the plaintiffs in *Robinson* were entitled to have the then controlling law applied to them even though they had not originally pled for such relief:

> We hold that refunds were properly available in this case, pursuant to an alternative theory of relief independent of a civil rights action, as the decisions of this court in *San Telmo* and *R/L Assocs.* were properly applied retroactively.

Robinson, 119 Wn.2d at 79.

Instead of following the Supreme Court's current construction of the CPA in *Bain*, *Klem*, *Frias* and *Lyons*, which related back to the time the CPA was enacted, the Superior Court felt obliged to ask this Court for "permission" to alter this Court's previous construction of the CPA in its unpublished decision.[11] *Grant* I was decided before and without the benefit of the Supreme Court's opinions in *Bain, Klem*, *Frias,* or *Lyons*.

---

[10] *The Lyons* Opinion was released October 31, 2014, a week after Grant's response to Respodnents' Motions for Summary Judgment was due. Grant oited to *Lyons* at the hearing on Respondents' summary judgment motions. RP 20:16-23; 32:15-33:10.

[11] The Superior Court did not explain why *Frias*' interpretation of the DTA precluding pre-sale causes of action under the DTA itself applied, but not *Frias*' interpretation of the CPA allowing for a cause of action for the same pre-sale violations of the DTA. *See Beam Distilling,* 501 U.S. at 543; *Robinson,* 119 Wn.2d at 77; *Lunsford,* 166 Wn.2d at 274.

Allowing the Superior Court to selectively apply *Bain*, *Klem*, *Frias*, and *Lyons* would be incompatible with those principles of *stare decisis* and due process which led to the abrogation of selective prospectivity. *See Below*. It would also be inconsistent with established Washington precedent which requires the Supreme Court's construction of a statute relate back to its enactment. *See Hale,* 165 Wn.2d at 506; *Johnson*, 87 Wn.2d at 928. The Superior Court did not have discretion to apply only parts of *Frias* and *Lyons* while simultaneously ignoring *Klem*, and erred when it refused to deny Respondents' motions for summary judgment without permission from this Court.

In this case, requiring the Superior Court to apply this Court's pre-*Klem* CPA analysis would perpetuate an erroneous decision and result in manifest injustice to Grant, who would be denied the right to have current CPA analysis applied to his case. *Grant I* was remanded to the Superior Court in order to determine whether the nonjudicial foreclosure proceedings were contrary to the DTA. *Grant I* at *5. The Superior Court examined the record and found several issues of fact related to the propriety of the foreclosure proceedings, including (1) the validity of the beneficiary declaration, (2) inconsistencies related to who actually owned and/or possessed Grant's Note, (3) MERS' purported transfer of interest. CP 308-9. Therefore, this Court should require the Superior Court to apply

the current interpretation of the CPA to Respondents' motions for summary judgment in order to facilitate the fair and equal administration of justice to all parties in a similar situation. *See* Trautman, 60 Wash. L. Rev. 810-11; RAP 2.5(c).

Accordingly, the Superior Court should have applied the current law and denied Respondents' motions for summary judgment as it found questions of material fact existed with regard to Respondents' violations of the CPA and DTA. CP 308-309. *See* CR 56; *see also Balise v. Underwood,* 62 Wn.2d 195, 199, 381 P.2d 966 (1963) ("[A] trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact."); *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 456, 166 P.3d 807, 811 (Div. III, 2007) (same). Additionally, this Court should clarify that Superior Courts do not need permission from Courts of Appeal to follow intervening Supreme Court authority where such intervening Supreme Court authority contradicts the law of the case as announced by the Court of Appeals.

C. If the "law of the case" doctrine does require this Court to give the Superior Court permission to apply current law as determined by Supreme Court precedent this court should grant the Superior Court permission to follow controlling Supreme Court precedent.

If this Court determines the Superior Court acted properly in requesting permission from this Court to follow controlling Supreme Court precedent, Grant urges this Court allow the Superior Court to apply

current controlling precedent regarding the facts in controversy in Grant's case, including applying the Supreme Court's most recent construction of the CPA, when determining whether Respondents' motions for summary judgment should be granted.

D. Law of the Case Doctrine was Properly Applied By the Superior Court Regarding Construction of Ch. 61.24 RCW.

This Court's construction of the DTA, announced in *Grant I*, and set forth in full below, should be treated as the law of the case until there is intervening, contradictory precedent by the Supreme Court. *See State v. Sanchez,* 74 Wn. App. 763, 765, n. 1, 875 P.2d 712 (Div. III, 1994) (Unpublished opinions do constitute law of the case).

The following portion of *Grant I* constitutes the law of the case with regard to Respondents' violations of the DTA because no exceptions to law of the case principles apply; there is no intervening contradictory precedent by the Supreme Court nor would it be unfair to hold the Respondents to the same standard as every other purported beneficiary and trustee under the DTA. *See Roberson,* 156 Wn.2d at 42; *State v. Worl,* 129 Wn.2d 416, 425, 918 P.2d 905 (1996). With regard to the DTA, this Court stated in *Grant I*:

Deeds of Trust Act

> Quality issued the notice of default as an agent of BNYM, which it identified as the current owner/beneficiary of the note. In his complaint, Grant alleged it was not clear that

either BNYM or Quality had any right to issue the notice of default or the notice of trustee sale that followed.

Under the deeds of trust act (DTA), chapter 61.24 RCW, the trustee must "have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" before issuing a notice of trustee's sale. Thus, if BNYM is not the owner of the note, then neither it nor Quality as its agent and/or trustee had authority to foreclose, and the initiation of that proceeding was unlawful.

The record indicates that BNYM acquired whatever interest it has in the note and deed of trust by assignment from MERS. But nothing in the record establishes that MERS had any interest in the note to convey. The note makes no mention of MERS. It identifies only "First Horizon Corporation d/b/a First Horizon Home Loans" as the "Note Holder." There is no evidence that First Horizon transferred the note to MERS or BNYM.

Quality argues the DTA does not require it to prove its authority to file the notice of default before doing so. That may be so, but that does not change the requirement that Quality must in fact *be* authorized to act on behalf of the beneficiary. Grant put Quality's authority in question by filing suit to resist the foreclosure, and the question remains unanswered. Dismissal of this claim on a CR 12(b)(6) or CR 12(e) motion was therefore improper.

Grant also alleged Quality violated the DTA because it issued the notice of default as an agent of BNYM before BNYM had acquired any interest in the deed of trust. The notice of default was issued on July 15, 2010. The assignment by MERS to BNYM did not occur until July 20, 2010.

In a somewhat similar scenario, the Massachusetts high court held that foreclosures were invalid. In *U.S. Bank National Association v. Ibanez,* the court addressed two cases in which banks foreclosed on properties and purchased them back at the foreclosure sales. The banks

then filed complaints to clear title, requiring them to establish the validity of the foreclosure sales. The banks were not the original mortgagees, but claimed they had been assigned the mortgages through a complex securitization process. But the only evidence available indicated the banks acquired the mortgages by assignment only *after* the foreclosure sales occurred, and thus had no interest at the time of the foreclosure sale. Accordingly, the banks were not permitted to quiet title. Likewise here, the only evidence indicates that BNYM acquired an interest in the deed of trust only *after* commencing the foreclosure process.

Quality distinguishes *Ibanez* on the basis that it applies Massachusetts, not Washington, law. But the court's principal holding was that "the foreclosing entity must hold the mortgage at the time of the notice and sale in order to accurately identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale." This proposition is consistent with Washington law.

Quality also characterizes Grant's argument as a challenge to the timing of the recordation of MERS' assignment to BNYM of the deed of trust. Quality argues there is no requirement under Washington law for a deed of trust assignment to be recorded before a foreclosure can be initiated. But recordation is not the issue. The question here is whether BNYM was entitled to foreclose. This requires a determination of whether MERS had any interest in the note it purported to assign to BNYM (or whether BNYM obtained the note through some other means), and whether this transfer occurred before the notice of default was issued.

If Quality lacked authority to act because its principal BNYM had no interest in the note, then the foreclosure proceedings were contrary to the DTA. Thus, Grant's complaint contains allegations sufficient to survive CR 12 motions to dismiss. We therefore reverse the dismissal of this claim and remand for further proceedings.

Grant I, at *4-5 (emphasis in original). *Compare id. with* RCW 61.24.030(7)(a); *Lyons*, 181 Wn.2d at 789; *Bain* 175 Wn.2d at 102. The Superior Court properly followed the law of the case doctrine regarding *Grant I*'s construction of the DTA. CPA 308-9.

In this case, Respondents did not argue below this Court's construction of the DTA was not the law of the case or that the construction should be disregarded. Instead, Respondents argued the meaning of the DTA without even discussing this Court's construction of the DTA in *Grant I*. First Horizon's Motion for Summary Judgment (FHMSJ), CP 13:17-20:10; FH Reply, CP 303:1-304:25; Quality's Motion for Summary Judgment (QMSJ), CP 122:1-125:10; Quality Reply, CP 294:20-298:15. Accordingly, under RAP 2.5(a) and the law of the case doctrine, the Respondents may not contest either *Grant I*'s or the Superior Court's construction of the DTA.

Additionally, Grant would note that even when Respondents were allowed to ignore the law of the case regarding their violations of the DTA, the Superior Court nonetheless found and concluded that material questions of fact existed which, if current law applied to Grant, would preclude Respondents from summary judgment and would have to be resolved at trial. CP 308-9.

F. Regardless, Respondents failed to meet their initial burden under CR 56 to show by admissible evidence the absence of an issue of material fact and entitlement to judgment as a matter of law.

As discussed *supra* in the Statement of the Case, neither First Horizon nor Quality made a showing in their opening motions that they were entitled to a judgment of law as a matter of law under CR 56 because controlling precedent had made Grant's CPA claims viable. Further, this section will show Grant's CPA claims must be resolved at trial because he responded to Respondents' summary judgment motions by producing evidence that established a genuine issue of material fact, meeting his burden under CR 56.

Respondents' motions for summary judgment argued Grant's claims of DTA violations involved only declaratory or injunctive relief and were therefore moot because no nonjudical sale was contemplated at the time the motion for summary judgment was filed. FHMSJ, CP 10:25-13:16; 20:11-22. QMSJ, CP 120:20-121:24. However, most of Respondents' motions and replies argued facts attempting to establish Respondents had not violated the DTA. FHMSJ, CP 13:17-20:10; FH Reply, CP 303:1-304:25; QMSJ, CP 122:1-125:10; Quality Reply, CP 294:20-298:15. Importantly, neither of defendants' motions for summary judgment argued (1) the merits of Grant's CPA claims to obtain damages for his economic injuries under current law or (2) why law of the case

principles should not be applied to *Grant I*'s construction of the DTA. FHMSJ, CP 5-23; FH Reply, CP 303:1-304:25; QMSJ, CP 116-125.

In response Grant argued (1) the Supreme Court's construction of the CPA to encompass DTA violations in *Bain*, *Klem*, *Frias*, and *Lyons* related back to the CPA's enactment, CP 156:12-13; 159:22 to 160:13; (2) he was entitled to the retroactive application of Supreme Court precedent which construed violations of the DTA to be unfair or deceptive acts within the meaning of the CPA, CP 156:1-157:3; 159:19-160:13; and (3) that the law of the case doctrine was only applicable to this Court's construction of the DTA in *Grant I*. CP 160:14-161:10. Grant also argued and produced admissible evidence substantiating that he met all the necessary elements to establish a viable CPA claim. CP 173:17-179:12.

It was only by way of reply that First Horizon, not Quality, argued that Grant did not meet the criteria for bringing a CPA cause of action. FH Reply CP 302:13-27. In other words, neither Respondent argued or offered proof as part of their moving summary judgment pleadings that Grant should be denied relief under the CPA.[12]

---

[12] It is in error for a court to rule on issues not raised by a moving party in a motion for summary judgment. *White v. Kent Med. Ctr.*, 61 Wn. App. 163, 169, 810 P.2d 4 (Div. I, 1991) ("Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond....the rule is well settled that the court will not consider issues raised for the first time in a reply brief."). Accordingly, it was in error for the Court to consider Respondents' arguments asserted for the first time in Reply briefs. Even if the Court allows First Horizon to assert a new

Under CR 56 Respondents were required to show in their opening papers for summary judgment "that no issue is generally in dispute and that the moving party is entitled to judgment as a matter of law." CP 161:11-24. Respondents did not do this with regard to Grant's CPA claims based on the DTA violations properly alleged in Grant's complaint, which this Court in *Grant I* remanded back to the Superior Court for further proceedings.

First Horizon objected, without authority and for the first time in its Reply to Grant's Response, that Grant "cannot morph his pleading from a flawed *per se* theory to a more traditional CPA theory." CP 302:15-17. But *Robinson* clearly holds otherwise. *Robinson*, 119 Wn.2d at 79 (law of the case should not be applied where it would result in manifest injustice). Next, First Horizon argued that Grant cannot establish elements (1) (unfair practice act or deceptive practice), (4) (injury) or (5) (causation) CP 302:19-22. But First Horizon cited to no evidence to support this argument and even this Court found in *Grant I* that Grant had properly alleged violations of the DTA, *Grant I*, at *4-5, which amount to unfair or deceptive acts under the CPA. *See, e.g., Lyons*, 181 Wn.2d at 786; *Frias*, 181 Wn.2d at 432-3; *Klem*, 176 Wn.2d at 787; *Bain* 175 Wn.2d at 115-20.

---

argument in its Reply brief, Quality should be precluded from asserting this argument where it did not make this argument below. *See* RAP 2.5(a).

Additionally, Grant submitted evidence of injuries in the form of the time and money he spent investigating the Respondents' authority to foreclose. CP 150 at ¶¶ 5-6.

In any event, the Superior Court found otherwise; concluding that if it could apply current law it would find that summary judgment on Grant's CPA claims would be precluded because of the existence of material factual disputes, and that trial would be necessary. CP 308-309. *See also* CR 56; *See also Balise,* 62 Wn.2d at 199; *Davis*, 140 Wn. App. at 456.

Instead of presenting evidence that Grant has no injury caused by violations of the DTA, First Horizon asked the Superior Court to rely on this Court's earlier CPA analysis that: "Grant's own admitted default is the cause of his [alleged] damages." CP 303:21-22. But *Frias*, which controls, repudiates this argument:

> Because the CPA addresses "injuries" rather than "damages," quantifiable monetary loss is not required. *Panag,* 166 Wn.2d at 58, 204 P.3d 885. A CPA plaintiff can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt. *Id.* at 55–56 & n. 13, 204 P.3d 885. Where a business demands payment not lawfully due, the consumer can claim injury for expenses he or she incurred in responding, even if the consumer did not remit the payment demanded. *Id.* at 62, 204 P.3d 885 ("Consulting an attorney to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a CPA claim. Although the latter is insufficient to show injury to business or property, the former is not."

> (citations omitted)). The injury element can be met even where the injury alleged is both minimal and temporary. *Mason v. Mortg. Am., Inc.,* 114 Wn.2d 842, 854, 792 P.2d 142 (1990).

Frias, 181 Wn.2d at 431; *see also* Grant's briefing on the CPA's causation and injury criteria. CP 177:22-178:13; *see also* CP 150 at ¶¶ 5-6 (Grant Declaration outlining his time and efforts spent investigating the authority of Respondents' to foreclose).

Because the CPA affords Grant relief for injuries caused by unfair or deceptive acts, which include violations of the DTA, the Superior Court should have applied current law as established by the Washington Supreme Court and denied Respondents' motions for summary judgment because they could not show: 1) there were no genuine issue of material fact, or 2) that they were entitled to judgment as a matter of law. CR 56.

V. CONCLUSION

Grant respectfully requests this Court reverse the Superior Court's Order granting Respondents' motions for summary judgment and remand for trial. The Superior Court found issues of material fact related to the issues this Court remanded for resolution in *Grant I*, but incorrectly deemed those issues of material fact moot due to an incorrect application of the law of the case doctrine. CP 308-9. Equity and justice require that Jack Grant be treated like all other Washington citizens and benefit from

the protections offered under the proper interpretation of Washington's CPA as recently announced the Washington Supreme Court in *Bain, Klem, Frias,* and *Lyons*.

DATED this 20th day of May, 2015 at Arlington, Washington.

Respectfully Submitted,
STAFNE TRUMBULL, PLLC

Scott E. Stafne, WSBA# 6964
Joshua B. Trumbull, WSBA# 40992
239 N. Olympic Ave.
Arlington, WA 98223
Phone: (360) 403-8700
Fax: (360) 386-4005

Brian J. Fisher, WSBA# 46495

CERTIFICATE OF SERVICE

I, Ashley Burns, 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 20th day of May, 2015, I caused to be served a true and correct copy of Petitioner Jack Grant's Opening Brief to defendants in the above title matter by causing it to be delivered to:

Andrew Yates Lane Powell 1420 5th Ave Suite 4100 Seattle, WA 98101 yates@lanepowell.com	☐Facsimile ☐Express Mail ✓ U.S. First Class Mail ☐Hand Delivery ☐Legal Messenger ✓ Electronic-Email
Robert McDonald Joseph Ward McIntosh Mary Stearns McCarthy & Holthus 108 1st Ave S, Suite 300 Seattle, WA 98104 rmcdonald@mccarthyholthus.com jmcintosh@mccarthyholthus.com mstearns@mccarthyholthus.com	☐Facsimile ☐Express Mail ✓ U.S. First Class Mail ☐Hand Delivery ☐Legal Messenger ✓ Electronic-Email

DATED this 20th day of May, 2015 at Arlington, Washington.

Ashley Burns
Paralegal
Stafne Trumbull, PLLC