73406-7

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Court of Appeals
Division I
State of Washington

Case No. 73406-7-I

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

FRANK BUCCI

Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.; RCO LEGAL, P.S.; JPMORGAN CHASE BANK, N.A.; U.S. BANK, N.A.; and SELECT PORTFOLIO SERVICING, INC.

Respondents.

BRIEF OF RESPONDENTS NORTHWEST TRUSTEE SERVICES, INC. AND RCO LEGAL, P.S.

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I. STATEMENT OF THE CASE

A. Factual History.

1. Bucci Receives a Loan and Secures Its Repayment With Real Property as Collateral.

On May 22, 2007, Appellant Bucci executed a promissory note (the "Note") in the amount of $1,530,000.00, payable to Washington Mutual Bank, FA ("Washington Mutual"). CP 568-575; CP 681-682 (Bucci Dep.) at 21:21-22:17. In the Note, Bucci agreed that if he did "not pay the full amount of each monthly payment on the date it is due," he would be in default. CP 682 (Bucci Dep.) at 25:10-16; *see also* CP 571, ¶ 7(B).

Bucci also executed a Deed of Trust securing the Note. CP 577-601; *see also* CP 684-685 (Bucci Dep.) at 33:20-34:2; 34:25-35:8. The recorded Deed of Trust encumbers a piece of real property commonly known as 8102 155th Ave. S.E., Newcastle, WA 98059 (the "Property"). *Id.*[1]

Bucci agreed that the Note and security instrument could be sold

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[1] On July 10, 2009, an Assignment of Deed of Trust was recorded with the County Auditor in favor of Bank of America, N.A. as Trustee as successor by merger to Lasalle Bank, National Association as Trustee for WaMu Mortgage Pass-Through Certificates Series 2007-OA6 Trust (the "Loan Trust"). CP 770.

one or more times without prior notice to him. CP 588, ¶ 20; *see also* CP 682 (Bucci Dep.) at 24:5-22; CP 685 at 35:21-37:8; CP 689 at 54:21-55:9. He also agreed that the lender could appoint a successor trustee, who would acquire all "title, power and duties" of the original trustee. CP 590, ¶ 24; *see also* CP 706 (Bucci Dep.) at 147:25-148:8.

2. Bucci Defaults on the Loan.

Between 2007 and 2009, Bucci made payments to Washington Mutual, and then JPMorgan Chase Bank, N.A. ("Chase"). CP 683 (Bucci Dep.) at 29:19-30:16; CP 722 at 271:19-21. Chase appears to have acquired servicing rights to the loan after the F.D.I.C. receivership of Washington Mutual's assets. *See also* CP 683-684 (Bucci Dep.) at 29:24-30:16. During this time, no one sought to foreclose on the Property. CP 701 (Bucci Dep.) at 166:25-167:3.[2]

In March 2009, Bucci voluntarily stopped making payments on the loan. CP 720 (Bucci Dep.) at 252:9-253:1; CP 723 at 276:13-19. No one from either Northwest Trustee Services, Inc. ("NWTS") or RCO Legal, P.S. ("RCO") ever told Bucci to stop paying the loan. CP 686 (Bucci

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[2] After Bucci built the Property and moved in, he continued to collect rental payments on a house in Sammamish that was ultimately foreclosed upon. CP 680 (Bucci Dep.) at 10:15-11:10, CP 729 at 335:19-336:18.

Dep.) at 44:12-17.

On or about April 28, 2009, Chase sent Bucci letters explaining that the loan was in default and offering options. CP 603-605. The letters warned Bucci that if he failed to cure the default, foreclosure would be initiated. *Id.*; *see also* CP 709-710 (Bucci Dep.) at 165:21-166:2.

3. Foreclosure Activities Proceed, But No Sale Occurs.

On or about June 26, 2009, a foreclosure referral to NWTS identified the Loan Trust as the foreclosing entity. CP 1295-1296, ¶¶ 7-8; CP 1303-1305.[3] The referral information and documentation also included confidential, non-public data and documents such as a copy of the Note and loan payment history. *See* CP 563-564, ¶¶ 5, 6. NWTS' business practice was to conduct Washington State foreclosures in the beneficiary's name. CP 1299, ¶ 19.

On or about June 26, 2009, NWTS also ordered a Trustee's Sale Guarantee from First American Title Insurance Company, which provided NWTS with information that is routinely relied upon to process a non-

[3] According to NWTS' Director of Operations, the Loan Trust was known as a securitized trust, meaning that the loan had been deposited and pooled into it, and Bank of America, N.A. was serving as trustee of that trust. In addition, Chase was identified as servicing the subject loan at the time of the foreclosure referral. CP 1295-1296, ¶ 7.

judicial foreclosure referral. CP 1296, ¶ 9. The Trustee's Sale Guarantee assured NWTS of the correctness of information contained therein, it identified the record owners and lists all exceptions of record against a secured property, and it provided the names of those individuals or businesses who should receive foreclosure notices. *Id.* The Trustee's Sale Guarantee received in connection with the Bucci Nonjudicial Foreclosure identified the beneficiary of the subject loan as Bank of America, National Association as Trustee as successor by merger to Lasalle Bank, National Association as Trustee for WaMu Mortgage Pass-Through Certificates Series 2007-OA6 Trust. CP 1307-1316.

On or about June 28, 2009, as a result of Bucci's default on payments due under the secured Note, he was sent a Notice of Default. CP 564, ¶¶ 7-8; CP 607-608. The Notice informed Bucci of the arrearage amount, then exceeding $34,000. CP 608. The Notice also identified the creditor to whom the debt was owed as the Loan Trust. *Id.*

On July 10, 2009, an Appointment of Successor Trustee was recorded with the King County Auditor, naming NWTS as the successor trustee under the Deed of Trust. CP 610; *see also* CP 707 (Bucci Dep.) at 150:4-8 (admitting NWTS is the trustee); *cf.* CP 12 (Am. Compl.), ¶ 40 (claiming "no document appointing a new trustee has been recorded.").

On August 14, 2009, a Notice of Trustee's Sale was recorded with the King County Auditor, setting a sale date for the Property of November 13, 2009. CP 615-619. That sale was postponed on multiple occasions and subsequently discontinued. CP 623-627.

On September 14, 2009, NWTS received an endorsement from First American Title Insurance Company confirming the Loan Trust's identification in the public record as the beneficiary. CP 1297, ¶ 14; CP 1322-1324.

On November 10, 2009, December 7, 2009, and February 4, 2010, Chase provided NWTS with bidding instructions in preparation for potential sales that again identified the beneficiary as the Loan Trust. CP 1298, ¶ 15; CP 1326-1328.

On July 8, 2010, a second Notice of Trustee's Sale was recorded with the King County Auditor, setting a sale date of October 8, 2010. CP 636-640. That sale was also later discontinued. CP 644-645. Between late 2010 and early 2013, Bucci tried to apply for a loan modification, and no foreclosure activity occurred. CP 734-758; *see also* CP 697-698 (Bucci Dep.) at 109:5-110:20.

On May 12, 2011, NWTS was notified via a secure messaging platform that U.S. Bank, N.A. became the successor in interest to Bank of

America with respect to serving as trustee of the Loan Trust. CP 565, ¶ 16. The trust itself stayed the same. *Id.*

4. Foreclosure Activities Continue, But Remain Uncompleted.

On March 11, 2013, NWTS completed a checklist that was both internally prepared and audited, stating that NWTS had confirmed the beneficiary's identity. CP 1299, ¶¶ 19, 20; CP 1333.

On or about March 12, 2013, Bucci was sent a new Notice of Default. CP 647-650; *see also* CP 699 (Bucci Dep.) at 114:11-18. This Notice informed Bucci that the arrearage amount now exceeded $336,337.22. *Id.* Bucci had no reason to doubt the veracity of that information, and did not attempt to contact anyone named in the Notice. CP 699-700 (Bucci Dep.) at 117:25-119:10. The Notice identified the Loan Trust as the Note's owner and Chase as the loan servicer. *Id.*

On April 9, 2013, Bucci was referred to mediation under the Washington Foreclosure Fairness Act. CP 652-659. That referral listed the beneficiary as the Loan Trust, which was consistent with the beneficiary as known to NWTS. *Id.*; *see also* CP 565, ¶ 16. Bucci then suddenly cancelled the mediation process. CP 1299-1300, ¶ 22; *see also* CP 728 (Bucci Dep.) at 324:8-24.

On June 25, 2013, a third Notice of Trustee's Sale was recorded with the King County Auditor, setting a sale date for the Property of October 25, 2013. CP 663-667; *see also* CP 701 (Bucci Dep.) at 123:11-23. The sale was postponed to January 24, 2014, but did not occur. CP 671; *see also* CP 566, ¶¶ 23, 25.

In August 2013, servicing of the loan transferred to Select Portfolio Servicing, Inc. ("SPS"). CP 684 (Bucci Dep.) at 31:16-32:9.

On or about October 24, 2013, NWTS was again informed via secure message that U.S. Bank, in its capacity as trustee for the Loan Trust, was still the beneficiary. CP 566, ¶ 22. No trustee's sale of the Property occurred during Bucci's litigation. *Id.*, ¶ 25.

B. Procedural History.

On August 16, 2013, Bucci filed suit against NWTS, its counsel RCO Legal, P.S. ("RCO"), Chase, and U.S. Bank. CP 1849-1914. On January 10, 2014, Bucci filed an Amended Complaint which became the operative pleading in this action. CP 1-57. The Amended Complaint added SPS as a defendant. CP 1.

On February 27, 2015, NWTS and RCO moved for summary judgment. CP 538-561. On March 2, 2015, Bucci moved for partial summary judgment against NWTS. CP 1139-1163.

On March 27, 2015, after hearing oral argument, the Hon. Judge Tanya Thorp of the King County Superior Court granted summary judgment in favor of NWTS and RCO. CP 1843-1844. Judge Thorp also denied Bucci's partial summary judgment motion, which is not being appealed. CP 1839-1840.[4]

On April 21, 2015, the instant appeal was filed. Case No. 13-2-29758-2 (King Co. Supr. Ct.), Dkt. No. 134.

II. RESPONSE TO ASSIGNMENTS OF ERROR[5]

1. The trial court did not err in granting NWTS' and RCO's Motion for Summary Judgment on Bucci's Consumer Protection Act ("CPA") claim.

2. The trial court did not err in granting NWTS' and RCO's Motion for Summary Judgment on Bucci's Negligence claim.

III. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR[6]

1. The evidence did not support Bucci's CPA claim.

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[4] The Court also granted summary judgment to the other defendants in separate orders. CP 1099-1100; CP 1841-1842.

[5] NWTS and RCO will address the Assignments of Error that specifically pertain to them, *i.e.* those numbered 4(c-e) and 5. Brief of Appellant at 3. It should be noted that Bucci does not assign error to the trial court's decision as to his Declaratory Judgment, Injunctive Relief, and Quiet Title claims. CP 11-13; CP 22-23.

[6] Bucci's Opening Brief does not include Issues Pertaining to Assignments of Error. *Cf.* R.A.P. 10.3(a)(4).

2. The evidence did not support Bucci's Negligence claim.

IV. RESPONSE ARGUMENT

A. Standard of Review.

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

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

If the moving party demonstrates that an issue of material fact is absent, the non-moving party must then articulate specific facts

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

Unsupported conclusory allegations, or argumentative assertions, are insufficient to defeat summary judgment. *See Vacova Co., supra.* at 395, *citing Blakely v. Housing Auth. of King Cy.,* 8 Wn. App. 204 (1973) *rev. denied,* 82 Wn.2d 1003 (1973), *Stringfellow v. Stringfellow,* 53 Wn.2d 639 (1959); *see also Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93 (2000). "Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact." *Id., citing Grimwood v. University of Puget Sound, Inc.,* 110 Wn.2d 355 (1988). Summary judgment is appropriate if, after considering the evidence, reasonable persons could reach only one conclusion. *See Hansen v. Friend*, 118 Wn.2d 476 (1992).

Because Bucci failed to advance a genuine issue of material fact precluding NWTS and RCO from receiving summary judgment on all

claims, the Superior Court's order should be affirmed for the reasons set forth herein.

B. RCO Should be Dismissed From This Appeal.

1. Bucci Does Not Present an Error Involving RCO.

A trial court's order should be upheld when the appellant's briefing lacks an assignment of error or citation to the record that supports a basis for challenging that order. *See, e.g., SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 138 n. 4 (2014) ("[w]hen *neither* the assignments of error *nor* the substance of the briefs raises an issue, the other party might be prejudiced if the court addressed it.") (Emphasis in original); *State v. Sims,* 171 Wn.2d 436, 441 (2011) ("an appellant is deemed to have waived any issues that are not raised as assignments of error and argued by brief."); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992).

Although the law firm of RCO was not the foreclosure trustee and had no involvement in the foreclosure process, Bucci nonetheless named it as a defendant below.

On appeal, Bucci fails to identify how RCO committed an unfair or deceptive act in his assignments of error, and Bucci fails to present any substantive argument concerning RCO in his Opening Brief. The Court should therefore affirm summary judgment in RCO's favor.

2. Bucci's Counsel Should be Sanctioned for a Frivolous Appeal Naming the Law Firm of RCO.

Under R.A.P. 18.9, the Court may award terms to a party who is subject to a frivolous appeal. *See, e.g., Eugster v. City of Spokane*, 139 Wn. App. 21, 34 (2007).

"An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Boyles v. Wash. State Dep't of Ret. Sys.*, 105 Wn.2d 499, 507 (1986), *citing Millers Cas. Ins. Co. v. Briggs,* 100 Wn.2d 9, 15 (1983). Examples of frivolous appeals include "[f]ailing to cite applicable authority in support of arguments in the brief," "[a]ppeal of purely discretionary rulings simply because the appellant disagrees with them, without making a debatable showing of abuse of discretion," and "[a]ppeals based solely on issues which have not been raised below or properly preserved for appeal." Wash. State Bar Ass'n, *Appellate Practice Deskbook* § 26.3(1) (3d ed. 2005).

Here, Bucci does not assign error to the trial court's grant of summary judgment to RCO. *See* Brief of Appellant at 2-4. None of the facts in Bucci's Statement of the Case address RCO. *Id.* at 4-6. Indeed, the sole mention of RCO in Bucci's brief is found in a header referencing

RCO as supposedly "relying on an equivocal declaration," but the related section contains no argument or citation to the record in support of this gratuitous statement. Brief of Appellant at 35. Given these particular facts, there cannot be debatable issues on appeal involving RCO.

The "scorched earth" tactic of including NWTS' legal representative as a defendant was repudiated in the trial court, and Bucci's counsel should be sanctioned for baselessly sweeping RCO into the instant appeal.[7] As such, the law firm of RCO requests an award of compensatory damages upon the filing of a statement of relevant attorneys' fees. R.A.P. 18.9(a); *see also* R.A.P. 18.1(b); R.A.P. 18.1(d).

C. Analysis of CPA Claim Against NWTS.

A CPA violation requires:

> (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.

Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 37 (2009), *citing Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986). The failure to meet any one of these elements is fatal to the claim.

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[7] Bucci even admitted that he possessed no evidence to support a "conflict of interest" theory raised by his counsel. CP 702-703 (Bucci Dep.) at 133:22-134:13; CP 705-706 at 143:14-146:5, CP 707 at 150:17-25.

Sorrel v. Eagle Healthcare, 110 Wn. App. 290, 298 (2002).

Material violations of the Deed of Trust Act ("DTA") may be actionable under the CPA even in the absence of a completed foreclosure sale. *See Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 784 (2014) ("Lyons cannot bring a claim for damages under the DTA in the absence of a sale, but she may bring a claim for similar actions under the CPA."). Because a DTA claim was not available to Bucci, the entirety of his Amended Complaint espoused a host of vague, various malfeasance constituting CPA violations on the part of NWTS. CP 16-18 (Am. Compl.), ¶ 54(a-l); ¶ 55 (a-f).

On appeal, Bucci limits his CPA arguments to certain theories predicated on compliance with the DTA, *i.e.*: 1) that NWTS exclusively relied on an equivocal declaration before recording a sale notice, and 2) that NWTS violated its duty of good faith by not investigating the Loan Trust's status as beneficiary. Brief of Appellant at 35-37.[8]

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[8] Bucci also contends that the Loan Trust had no authority to appoint NWTS through the use of an attorney-in-fact. Brief of Appellant at 33. However, Bucci only ascribes liability to Chase, and not NWTS, for the appointment's occurrence. *Id.*; *but see Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wn. App. 58, 69 (2015) (Chase executed both the Appointment and beneficiary declaration as attorney-in-fact for U.S. Bank; in addressing a CPA claim, this Court found "U.S. Bank, through its agent, Chase, was the holder of the note, which GreenPoint had endorsed in blank. Therefore, U.S. Bank had the authority to appoint NWTS as successor trustee.").

1. A Plaintiff Must Demonstrate the Existence of an Unfair or Deceptive Act With a Capacity to Deceive the Public.

The CPA first requires an act or practice with either: 1) "a capacity to deceive a substantial portion of the public," or 2) that "the alleged act constitutes a per se unfair trade practice." *See Saunders v. Lloyd's of London*, 113 Wn.2d 330 (1989), *quoting Hangman Ridge*, *supra*.

Klem v. Wash. Mut. Bank states that "[t]he Washington legislature instructed courts to be guided by federal law in the area" of CPA liability. 176 Wn.2d 771 (2013). Federal law defines an act or practice as "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits." 15 U.S.C. § 45(n). An act or practice is "deceptive" when it is material, likely to mislead a consumer, and the consumer's interpretation is reasonable. *Id.*

"Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." *Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC*, 134 Wn. App. 210 (2006); *see also Michael v. Mosquera-Lacy*, 165 Wn.2d 595 (2009) (to establish an unfair or deceptive act under the first prong test, there must be shown a real and substantial potential for

repetition, as opposed to a hypothetical possibility of an isolated act being repeated).

2. DTA-Based Violations Also Require a Showing of Materiality and Prejudice.

Both state and federal courts in Washington routinely dismiss CPA claims predicated on DTA violations where a plaintiff fails to demonstrate that his interests were prejudiced by a material failure to comply with statutory mandates. *See, e.g., Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903 (2007) (a borrower who cannot cure default is economically indifferent to procedural defects in the foreclosure process and suffers no prejudice); *Podbielancik v. LPP Mortg. Ltd. et al.*, -- Wn. App. --, 2015 WL 8910144 (2015); *Merry v. NWTS*, 188 Wn. App. 174, 192 (2015) (rejecting liability for "formal, technical, nonprejudicial violations of the DTA"); *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532 (2005) ("Washington state courts have required the borrower to show prejudice before they will set aside a trustee's foreclosure sale in the face of allegations of technical errors."); *Steward v. Good,* 51 Wn. App. 509 (1988) (noting a "requirement that prejudice be established" where a "technical violation" of the DTA occurs and there was "no showing of harm to the debtor"); *Koegel v. Prudential Mut. Sav.*

Bank, 51 Wn. App. 108, 112 (1988) (strict compliance with the DTA does not obviate a borrower's need to show prejudice); *see also Bavand v. OneWest Bank*, 587 Fed. Appx. 392 (9th Cir. Oct. 20, 2014); *Cagle v. Abacus Mortg., Inc.*, 2014 WL 4402136, *4 (W.D. Wash. Sept. 5, 2014) (dismissing CPA claim where Plaintiff did not plead prejudice); *Vawter v. Qual. Loan Serv. Corp. of Wash.*, 2010 WL 5394893, *6 (W.D. Wash. 2010) (dismissing CPA claim where alleged DTA violation "could not be said to be 'of material importance,' " because to do otherwise would effect a "misguided elevation of form over substance."). Courts recognize that while the DTA is strictly construed, it is not a strict-liability statute.

Indeed, it would be inapposite to require materiality and prejudice only in a post-sale DTA-based claim pursuant to RCW 61.24.127, yet totally eliminate the same requirement for "DTA violations that could be compensable under the CPA." *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 430 (2014); *see also Meyer v. U.S. Bank, N.A.*, 2015 WL 3609238, *5 (W.D. Wash. Jun. 9, 2015) (denying reconsideration of reversed CPA judgment against NWTS; "[t]echincal violations of the DTA do not constitute unfair or deceptive acts or practices actionable under the CPA absent a showing of materiality or prejudice.").

Consequently, because Bucci's CPA claim was *wholly predicated*

on purported material non-compliance with the DTA, he needed to demonstrate that he suffered prejudice from NWTS' alleged conduct.

3. Analysis of RCW 61.24.030(7)(a).

The DTA requires a trustee to "have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" before recording a Notice of Trustee's Sale. RCW 61.24.030(7)(a). The Supreme Court recently confirmed this statute is ambiguous "where the owner and the holder of the note are different entities." *Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d 509, 543 (2015), *citing* Dale A. Whitman & Drew Milner, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure without Entitlement To Enforce the Note,* 66 Ark. L.Rev. 21, 26 & n.23 (2013) (stating that RCW 61.24.030(7)(a) was subject to "considerable confusion" because the statute "conflates 'owner' and 'holder' ").[9]

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[9] The Supreme Court found that RCW 61.24.030(7)(a) creates "ambiguity in cases where the owner of the note is different from the holder of the note because the provisions each have a sentence that, standing alone, could be read to support either party's conclusion." *Id.* at 534. Turning to statutory context, case law, and legislative history, the Court disagreed with Brown's premise that beneficiary status equates with ownership. *Id.* at 536-537. Rather, the Supreme Court adhered to its ruling in *Bain v. Metro. Mortg. Grp., Inc.*, finding that "RCW 61.24.005(2) requires the beneficiary be the holder of the note." *Id.* at 540, *citing* 175 Wn.2d 83 (2012). Both *Brown* and *Bain* are in accord with this Court's opinion in *Trujillo v. NWTS*, stating "it is the 'holder' of the note who is entitled to enforce it, regardless of ownership." 181 Wn. App. 484 (2014), *rev'd on other grounds*, 183 Wn.2d 820 (2015).

The statute does not define what "proof" means, but it suggests *one* possible means of easily accomplishing the requirement is through a declaration averring that "the beneficiary is the actual holder of the promissory note or other obligation." RCW 61.24.030(7)(a); *see also Beaton v. JPMorgan Chase Bank N.A.*, 2013 WL 1282225, *4 (W.D. Wash. Mar. 26, 2013).[10] Absent a declaration, the necessary level of proof – otherwise applicable to civil actions – is "a mere 'preponderance.' " *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 608 (2011) ("In order to establish a causal connection in most civil matters, the standard of confidence required is a 'preponderance,' or more likely than not, or more than 50 percent.").[11]

In *Lyons*, the Supreme Court found a beneficiary declaration's reference to RCW 62A.3-301 was ambiguous, and NWTS could not rely on it; however, NWTS could still show compliance with RCW

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[10] Washington law does not mandate recording a beneficiary declaration or providing a copy to the borrower. *See, e.g., Douglass v. Bank of Am. Corp.*, 2013 WL 2245092 (E.D. Wash. May 21, 2013). Bucci had not seen the declaration in question, and lacked knowledge of whether NWTS even possessed it. CP 788-789 (Request for Admission Response Nos. 9, 10).

[11] The preponderance standard makes sense to apply because "a deed of trust is subject to all laws relating to mortgages on real property." RCW 61.24.020. Since 1965, lenders have had the option to either "sue on the obligation [a civil action], judicially foreclose as a mortgage [also a civil action], or nonjudicially foreclose under the trust deed power of sale." John D. Sullivan, Rights of Washington Junior Lienors in Nonjudicial Foreclosure, 67 Wash. L. Rev. 235, 237 (1992).

61.24.030(7)(a) through other evidence. 181 Wn.2d at 791. *Lyons* also found questions of fact existed due to an earlier declaration identifying Wells Fargo in a different capacity. *Id.*

Likewise, in *Trujillo v. NWTS*, the Supreme Court ruled that a beneficiary declaration contained an ambiguity "about whether Wells Fargo actually held the note when it initiated the foreclosure." 183 Wn.2d 820, 833 (2015). As a result, "this ambiguity indicated that the declaration *might be* ineffective." *Id.* (emphasis added). The Supreme Court further held that, "[o]n remand, Trujillo must have the opportunity to *prove that NWTS actually relied* on the impermissibly ambiguous declaration as a basis for issuing the notice of trustee's sale." 183 Wn.2d at 834 (emphasis added).

Here, Bucci was unable to put forward evidence suggesting NWTS solely relied on the Loan Trust's 2009 beneficiary declaration as a basis for recording sale notices. Therefore, Bucci's attempt to impose CPA liability on NWTS for its mere receipt of a beneficiary declaration failed because it is *not the exclusive means* by which a trustee can accomplish the prescript of RCW 61.24.030(7)(a), and NWTS possessed a blizzard of other information corroborating the Loan Trust's beneficiary status. *See Lyons, supra.* at 791; *but see Blair v. NWTS et al.*, -- Wn. App. --, Slip

Opin. No. 32816-3-III, *14 (Mar. 17, 2016) (Division Three had no other documentation in the record beyond the beneficiary declaration).

4. NWTS Satisfied RCW 61.24.030(7).

The evidence reveals that NWTS was consistently and correctly informed that the Loan Trust was the beneficiary, *i.e.* Note holder, prior to recording each Notice of Trustee's Sale.

First, and perhaps most importantly, the Loan Trust was the proper beneficiary at all times relevant to the foreclosure. CP 922 (Edwards Dec.), ¶ 5 (loan deposited into the trust on June 1, 2007).[12] As the Ninth Circuit Court of Appeals ruled in *Myers v. Mortg. Elec. Registration Sys. Inc.*, holding the note is the "bottom line." 540 Fed. Appx. 572 (9th Cir. 2013). Under Washington law, it cannot be unfair or deceptive to take actions based on information that is true. *Cf. Fisher v. World-Wide Trophy Outfitters, Ltd.*, 15 Wn. App. 742 (1976) (promises were deceptive because they did not become true).

Second, the June 26, 2009 foreclosure referral to NWTS identified

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[12] The Loan Trust was entitled to foreclose in its own name even though it delegated temporary custodial possession of the Note to Chase. *See* CP 921-924 (Dec. of Edwards); *see also* RCW 62A.3-201, cmt. 1 ("[n]obody can be a holder without possessing the instrument, either directly or through an agent."); *see also In re Brown*, 2013 WL 6511979 (B.A.P. 9th Cir. Dec. 12, 2013) (recognizing that even a trustee who is a beneficiary's subsidiary could serve as note custodian).

the Loan Trust as the foreclosing entity. CP 1295-1296, ¶ 7, 8; CP 1303-1305. Further, the referral information and documentation included confidential, non-public data and documents such as a copy of the Note and loan payment history, which the foreclosing beneficiary would have in order to conduct a non-judicial process. *See* CP 1295, ¶¶ 5, 6.

Third, NWTS obtained a Trustee's Sale Guarantee that was prepared by an independent third-party, *i.e.*, First American Title Insurance Company. CP 1296, ¶ 9. A Trustee's Sale Guarantee is an insured product assuring its recipient of correct information regarding lienholders and who should be notified of a foreclosure, including the property owner, the lienholders' respective priorities for enforcement, tax information, and other relevant data. The Guarantee identified the Loan Trust as the foreclosing beneficiary. CP 1296-1297, ¶ 10; CP 1307.

Fourth, the Loan Trust, through its attorney-in-fact, appointed NWTS as the successor trustee. *Id.*, ¶ 12; Ex. D. The DTA affords a beneficiary the right to appoint a new successor trustee to foreclose on a deed of trust. RCW 61.24.010(2). A beneficiary may use an attorney-in-fact to execute documents such as the Appointment. *See* n. 8, *supra.*; *see also Brodie v. NWTS*, 579 Fed. Appx. 592 (9th Cir. Jun. 18, 2014) ("The fact that U.S. Bank chose to act through its authorized agent… does not

alter its right to foreclose and to appoint a successor trustee...."); *Richard v. Deutsche Bank Nat. Trust Co.*, 2012 WL 1082602 (D. Or. Mar. 30, 2012), *citing* 3 Am.Jur.2d Agency § 18 (2012) ("Generally, a person may appoint an agent to do the same acts and to achieve the same legal consequences by the performance of an act as if he or she had acted personally.").

After NWTS obtained all of this information and documentation, it issued the first Notice of Trustee's Sale. *Id.*, ¶ 13; *see also* Dec. of Stenman in Support of NWTS' Motion for Summary Judgment, Ex. 7.

Fifth, on September 14, 2009, NWTS received an endorsement from First American Title Insurance Company confirming the Loan Trust's identification in the public record as the beneficiary. CP 1297, ¶ 14; CP 1322-1323.

Sixth, on November 10, 2009, December 7, 2009, and February 4, 2010, Chase provided NWTS with bidding instructions in preparation for potential sales that again identified the beneficiary as the Loan Trust. CP 1298, ¶ 15; CP 1326-1328.

After NWTS obtained all this added information and documentation, it issued the second Notice of Trustee's Sale. CP 1298, ¶ 16; *see also* CP 636-640.

Seventh, on May 12, 2011, NWTS was informed that U.S. Bank became the successor in interest to Bank of America with respect to serving as trustee of the Loan Trust, but the Loan Trust itself continued to hold the loan. CP 1298, ¶ 17; *see also* CP 1295-1296, ¶ 7 (LPS is a secure messaging platform routinely relied upon in the course of NWTS' business as containing accurate information).

Eighth, on July 6, 2011, NWTS received additional screenshots from Chase's electronic records that identified the Loan Trust as the beneficiary. CP 1298-1299, ¶ 18; CP 1330-1331.

Ninth, on March 11, 2013, NWTS completed a checklist that was both internally prepared and audited, stating that NWTS had confirmed the beneficiary's identity. CP 1299, ¶¶ 19, 20; CP 1333.

Tenth, on April 9, 2013, NWTS was informed that Bucci asked for statutory mediation with the Loan Trust. CP 1299, ¶ 21; CP 1335. The mediation referral from the Washington State Department of Commerce named the Loan Trust as the beneficiary, with U.S. Bank as trustee of the Loan Trust, and named Chase as the loan's servicer. CP 1338. The mediation was later cancelled and certified. CP 1346-1347.

After NWTS obtained all of this added information and documentation, it then issued the third and final Notice of Trustee's Sale.

CP 1300, ¶ 23; *see also* CP 663-667.

Thus, putting aside the beneficiary declaration, the totality of evidence shows NWTS had proof that the Loan Trust was the beneficiary prior to recording each Notice of Trustee's Sale. Additionally, at no time during the foreclosure did NWTS receive information reflecting that the Loan Trust was *not* the beneficiary. CP 1300, ¶ 26.

Bucci could not show material prejudice resulting from NWTS' mere receipt of an "ambiguous" declaration, especially when NWTS had the aforementioned documentation truthfully pointing to the Loan Trust as the beneficiary. *See Mickelson v. Chase Home Fin. LLC*, 579 Fed. Appx. 598, 601 (9th Cir. 2014) ("Chase actually held the promissory note during the relevant period. For this reason, even if the Mickelsons were correct that Chase's beneficiary declaration was inadequate under Washington Revised Code § 61.24.030(7)(a), any such failing could not have prejudiced them."). Nothing about Bucci's default or the foreclosure would have changed regardless of the declaration's reference to RCW 62A.3-301.

In sum, it was not an unfair or deceptive act that caused prejudice to Bucci for NWTS to have privately been given a beneficiary declaration when NWTS also had far more than a preponderance of other information

corroborating the Loan Trust's lawful beneficiary status.

5. Even if NWTS Did Not Have Other Evidence that the Loan Trust was the Beneficiary, NWTS Could Have Reasonably Relied on the State of Existing Authority in 2012.

Prior to *Lyons* in 2014, there was no inkling that the Supreme Court might someday find the extraneous language referencing RCW 62A.3-301 in the beneficiary declaration to be ambiguous. And where there is a change in established law, a party is *completely protected* from CPA liability under the "reasonable interpretation of existing law" defense.

In *Leingang v. Pierce Cnty. Med. Bureau, Inc.*, the Supreme Court held that "acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law." 131 Wn.2d 133 (1997), *citing Perry v. Island Sav. & Loan Ass'n*, 101 Wn.2d 795 (1984). *Leingang* held that the insurer "was relying on a reasonable interpretation of existing law to contend that the exclusion was valid," as supported by the decisions of "at least four trial courts and two Court of Appeals decisions." *Id.* at 155.

Here, the beneficiary declaration was dated July 30, 2009 – over five years before *Lyons* was decided in October 2014. CP 613. Prior to

Lyons, trustees in Washington *could* rely – but were not obligated to rely – on beneficiary declarations like the one at issue here, because no reported case criticized a reference to RCW 62A.3-301 in those documents. In fact, numerous decisions *upheld reliance* on the *identical declaration* for purposes of RCW 61.24.030(7)(a). *See, e.g.*, *Mickelson*, 579 Fed. Appx. 598, *supra.* (declaration contained reference to RCW 62A.3-301); *In re Brown*, 2013 WL 6511979 (B.A.P. 9th Cir. Dec. 12, 2013); *Bakhchinyan v. Countrywide Bank, N.A.*, 2014 WL 1273810 (W.D. Wash. Mar. 27, 2014) (reference to RCW 62A.3-301 permissible); *see also Meyer v. U.S. Bank Nat. Ass'n*, 530 B.R. 767, 778 (W.D. Wash. 2015), *reh'g denied*, 2015 WL 3609238 (W.D. Wash. Jun. 9, 2015), *citing Pelzel v. Nationstar Mortg., LLC*, 186 Wn. App. 1034 (2015), *review denied* (Nov. 18, 2015).

At the time sale notices were issued in 2009, 2010, and 2013, case law supported NWTS' ability to rely on the beneficiary declaration alone *if* it so chose. Therefore, just as in *Leingang*, NWTS did not commit an unfair or deceptive act even if it had followed a reasonable judicial interpretation of the law as it stood prior to *Lyons*. *See also Blair* at *20, n. 1, *supra.*

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6. Bucci Did Not Communicate a Concern About the Beneficiary's Identity to NWTS Prior to Any of the Sale Notices.

Bucci also contends that NWTS violated its duty of good faith, presumably thereby committing an unfair or deceptive act, "when it failed to perform a 'cursory investigation' " of Chase's authority to act as attorney-in-fact for the Loan Trust and the Loan Trust's authority as beneficiary. Brief of Appellant at 37; *but see* CP 705 (Bucci Dep.) at 140:16-141:7 (Bucci testified that he did not know how NWTS supposedly acted in bad faith).[13]

In *Lyons*, the Supreme Court accepted the debtor's contention that she had contacted NWTS regarding a change in the beneficiary and her acceptance of a loan modification prior to the sale date. 181 Wn.2d at 788. Under this set of facts, *Lyons* found that a trustee must "adequately inform" itself of a beneficiary's authority through a "cursory" investigation. *Id.* at 788 ("*If* Lyons' allegations are true and *NWTS knew about the conflicting information* regarding their right to initiate

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[13] In order to have a statutory duty of good faith, one must become a trustee. *See* RCW 61.24.010(4). Moreover, only a beneficiary is vested with the right to appoint a trustee under the DTA. *See* RCW 61.24.010(2). That is the only manner, besides a prior trustee's resignation, in which to become a trustee. Because Bucci claimed NWTS failed to act in good faith, he implicitly conceded the statutory duty had accrued – meaning the Loan Trust, through its attorney-in-fact, possessed the authority to appoint NWTS in the first place.

foreclosure but did not look into this matter, there are issues....")
(Emphasis added).

But neither the DTA nor case law recognizes a requirement compelling trustees to conduct a *sua sponte*, open-ended investigation into the veracity of documents provided by the beneficiary or its authorized agent. *See, e.g., Meyer*, 530 B.R. at 779 ("Absent a showing that NWTS violated its duty of good faith *independent* of its reliance on the declarations, the vast weight of case law now deems NWTS's reliance without further inquiry to be proper.") (emphasis in original);[14] *Lucero v. Cenlar FSB*, 2015 WL 520441 (W.D. Wash. Feb. 9, 2015) (NWTS did not have "an independent duty to investigate or confirm the information provided by its principal before issuing the Notice of Default."); *Mickelson v. Chase Home Fin. LLC*, 2011 WL 5553821 (W.D. Wash. Nov. 14, 2011) ("Plaintiffs would have every trustee conduct a secondary investigation into the papers filed by the beneficiary, which is simply too great a demand."); *accord Hallquist v. United Home Loans*, 715 F.3d 1040 (8th Cir. 2013) ("[I]n the absence of unusual circumstances known to the

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[14] *Meyer* cites to *Lyons* and *Klem*, *supra.*, observing that "[i]n both these cases, the Court faulted the trustee for failing to investigate *only when confronted with a host of information* about irregularities in the foreclosure process." (Emphasis added.)

trustee, he may, upon receiving a request for foreclosure... proceed upon that advice without making any affirmative investigation and without giving any special notice to the debtor.").

Significantly, unlike Ms. Lyons, Bucci never expressed any concern to NWTS that some inaccuracy or impropriety existed in the foreclosure process. *See* CP 793 (Request for Admission Response Nos. 17, 18) (Bucci admitted never directly contacting NWTS); CP 566, ¶ 24 (NWTS' business records reveal that Bucci did not personally contact NWTS). Bucci's complete and uncontroverted lack of communication with NWTS concerning a perceived problem with the beneficiary's identity stands in marked contrast to the *Lyons* case.

Without the slightest indication of a flaw in either the referral or related foreclosure documents, as indeed the proper beneficiary was foreclosing, NWTS was not obligated to investigate and verify the beneficiary or its servicer's authority.

7. Bucci Lacked Evidence of a Public Interest Impact.

Case law requires Bucci to show a likely impact on the general public as a result of the alleged acts in question.

Evidence of a likely impact on the public is necessary under the CPA because "[t]he public interest in a private dispute is not inherent."

Tran v. Bank of Am., 2013 WL 64770 (W.D. Wash. Jan. 4, 2013), *citing Hangman Ridge*, *supra.* at 790; *see also Segal Co. (Eastern States), Inc. v. Amazon.com*, 280 F.Supp.2d 1229, 1234 (W.D. Wash. 2003) (granting motion to dismiss CPA claim as allegation "on information and belief that defendant engages in a 'pattern and practice' of deceptive behavior" is insufficient to meet public interest requirement); *accord Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 816 (2010), *citing Burns v. McClinton*, 135 Wn. App. 285, 290-91 (2006) (CPA claim defeated because of no evidence that Wells Fargo's actions had "the capacity to deceive a large portion of the public."); *Westview Investments, Ltd. v. U.S. Bank Nat. Ass'n*, 133 Wn. App. 835, 855 (2006); *but see Bain v. Metro. Mortg. Grp., Inc.*, supra. at 118 ("*considerable evidence* that MERS is involved with an enormous number of mortgages in the country (and our state), perhaps as many as *half nationwide*.") (emphasis added).

As the Hon. Judge Lasnik of the Western District of Washington stated in *McCrorey v. Fed. Nat. Mortg. Ass'n*, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013), "[t]he purpose of the CPA is to protect consumers from harmful practices, which is why plaintiff must allege an actual or potential impact on the general public, not merely a private wrong."

Bucci argues that, because the DTA was amended in 2008 to

protect the public interest, he necessarily established this second prong of the requisite CPA test because NWTS relied on an "equivocal beneficiary declaration." Brief of Appellant at 40. Bucci cites irrelevant deposition testimony from a completely different case concerning a legal opinion about the use of beneficiary declarations, and the fact that NWTS generally conducts many foreclosures in its capacity as trustee. *Id.*

However, the conduct Bucci complained of was specific to him and no one else. The private receipt of a declaration in one particular foreclosure did not, and could not, have the capacity to deceive a substantial portion of the public. Critically, Bucci offered no evidence whatsoever on how the public was likely affected by NWTS' issuance of notices during the subject uncompleted foreclosure process. Moreover, NWTS was able to establish that it had other proof of the Loan Trust's authority to foreclose besides a questionable declaration.

Therefore, Bucci could not meet his burden of proving the public interest prong and his CPA claim was unsubstantiated on this basis as well.

8. NWTS Did Not Cause Injury to Bucci.

An award under the CPA is *strictly limited* to damage "in… business or property…." RCW 19.86.090, *see also Ambach v. French*,

167 Wn.2d 167 (2009). Lost wages or personal injuries, including pain and suffering, are *not* compensable under the CPA. *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons,* 122 Wn.2d 299 (1993); *Demopolis v. Galvin,* 57 Wn. App. 47 (1990) (litigation expenses are *not* an "injury" under the CPA); *Thurman v. Wells Fargo Home Mortg.*, 2013 WL 3977622 (W.D. Wash. Aug. 2, 2013), *citing Gray v. Suttel & Assocs.*, 2012 WL 1067962 (E.D. Wash. Mar. 28, 2012) ("time and financial resources expended to... pursue a WCPA claim do not satisfy the WCPA's injury requirement."), *Coleman v. Am. Commerce Ins. Co.,* 2010 WL 3720203 (W.D. Wash. Sept. 17, 2010) ("The cost of... [prosecuting] a CPA claim is not sufficient to show injury to business or property."); *see also Alejandre v. Bull*, 159 Wn.2d 674 (2007) (tort recovery is barred where damages are purely economic losses based on a contract).

CPA liability also requires a causal link between the alleged misrepresentation or deceptive practice and the purported injury. *Hangman Ridge*, *supra* at 793; *see also Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82 (2007) (a plaintiff must prove that the "injury complained of... would not have happened" if not for the defendant's acts). If a claimed expense would have been incurred regardless of whether a CPA violation existed, causation is not

established. *Panag*, *supra*. at 64.

As the Ninth Circuit Court of Appeals held concerning a CPA claim in the foreclosure context:

> Plaintiffs' foreclosure was not caused by a violation of the DTA because Guild [the foreclosing entity] was both the note holder and the beneficiary when it initiated foreclosure proceedings, and therefore the 'cause' prong of the CPA is not satisfied.

Bhatti v. Guild Mortg. Co., 2013 WL 6773673, *3 (9th Cir. Dec. 24, 2013).

This reasoning was similarly echoed in the recently-published *Blair v. NWTS et al.* opinion. where Division Three (unlike in this case) had *no other evidence* of NWTS' compliance with RCW 61.24.030(7)(a) apart from an ambiguous beneficiary declaration. *Blair* found:

> [h]ad NWTS complied with RCW 61.24.030(7)(a), it would have learned that BoA was the holder of the note indorsed in blank, and that institution of the nonjudicial foreclosure proceeding was arguably proper. Consequently, NWTS's violation of RCW 61.24.030(7)(a) did not cause a wrongful initiation of foreclosure. *Because the initiation of foreclosure was not wrongful, Mr. Blair has failed to establish a causal link between NWTS's wrongful act and his injury.*

Slip Opin. No. 32816-3-III, *20, *supra*. (Emphasis added.)

In the same way, Bucci could not ascribe any injuries to NWTS' mere receipt of a beneficiary declaration. *Accord, e.g.*, *Massey v. BAC Home Loans Serv. LP*, 2013 WL 6825309 (W.D. Wash. Dec. 23, 2013),

citing Babrauskas v. Paramount Equity Mortg., 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) (plaintiff's failure to meet obligation "is the 'but for' cause of the default" and foreclosure), *McCrorey v. Fed. Nat. Mortg. Ass'n*, *supra*. (plaintiffs' failure to pay led to default and foreclosure).

Bucci's claim of confusion about the beneficiary's identity, leading to a supposed inability to negotiate and potentially avoid foreclosure, was meritless. Bucci, through counsel, sought DTA-mandated mediation with the *very same beneficiary* he disclaimed in the underlying litigation as lacking authority. CP 1335-1336.[15]

When Bucci signed the Note and Deed of Trust, he knew precisely what he was obtaining – a loan for over $1.5 million in exchange for continuing to possess the Property. *See* CP 681-682 (Bucci Dep.) at 21:21-22:17. It was Bucci's refusal to make payments associated with keeping the Property that caused the generation of statutorily-required foreclosure notices. *See* CP 720 (Bucci Dep.) at 252-9-11 (Bucci admits not paying the amounts due on the loan); CP 720 at 252:22-253:1 (same); CP 721 at 257:1-7 (Bucci "paid on time up until I didn't"); CP 725 at

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[15] The true motivations of Bucci's "investigation" and "consultation" leading to a lawsuit appear to be plainly stated in his deposition testimony: "[e]verybody wants a free house." CP 712 (Bucci Dep.) at 175:2-7.

291:18-20 (Bucci has history of not making payments); CP 726 at 309:5-10 (Bucci could have paid loan in 2009); CP 727-728 at 321:4-323:2 (Bucci admits default; states "I wasn't making the payments"); *see also* CP 719 at 231:16-23 (Bucci refused to pay property taxes in 2013 and 2014). Bucci willingly conceded that he was *saving* money because of his failure to make loan payments. CP 686-687 (Bucci Dep.) at 45:8-47:18 (Bucci saved $3,200 per month by avoiding repayment of mortgage).

The evidence below did not substantiate Bucci's CPA claim on the necessary causation and injury prongs, and the trial court properly granted summary judgment to NWTS as a result.

D. Analysis of Negligence Claim Against NWTS.

Bucci's position on appeal differs significantly from his contentions below. Bucci presently argues that "Respondents… made errors, misrepresentations, and omissions" that "created a risk of harm" to him. Brief of Appellant at 46. But Bucci's Amended Complaint primarily claimed negligence on the basis that he preferred a judicial foreclosure "by a neutral court and jury; not a trustee…." CP 23-24 (Am. Compl.), ¶ 90.

Regardless of which argument is considered for purposes of this Court's review, Bucci could not prove that NWTS acted negligently while conducting the uncompleted foreclosure.

1. NWTS Fulfilled Its Duties.

A claim of negligence requires "duty, breach, causation, and injury." *Hartley v. State,* 103 Wn.2d 768, 777 (1985). Bucci claimed that NWTS breached statutory duties to him by "resolving legal and factual issues in favor of its client..." and "not following the procedural provisions of the DTA...." CP 24, ¶ 92. But Bucci did not offer evidence of how NWTS acted inappropriately or caused injury to him. Instead, Bucci simply suggested that a judge or juror "would have likely reached a different result." *Id.*[16]

Despite Bucci's allegations, he knew exactly who to pay and he even tried to negotiate a loan modification more than once. CP 683-684 (Bucci Dep.) at 29:24-32:15, CP 686 at 44:21-45:7, CP 698-699 at 113:13-114:10. As explained above, NWTS fulfilled its statutory duty of good faith and its contractual role in the Deed of Trust. The causation of foreclosure rested squarely with Bucci based on his ongoing, unapologetic default. CP 717 (Bucci Dep.) at 198:3-6 ("*I would never be current on the*

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[16] Contrary to Bucci's apparent desire for judicial foreclosure litigation, the DTA was adopted "to supplement... existing foreclosure proceedings to better meet the needs of modern real estate financing. *Wash. Fed. v. Gentry*, 179 Wn. App. 470 (2014). As this Court stated, "the Legislature designed this act 'to avoid time-consuming judicial foreclosure proceedings and to save substantial time and money to both the buyer and the lender'." *Id.*, *citing Peoples Nat. Bank of Wash. v. Ostrander,* 6 Wn. App. 28 (1971).

loan.... It is a pretty bad financial choice to make at this point.") (emphasis added).

Bucci's negligence claim was wholly unsupported based on these facts.

2. The Independent Duty Doctrine Additionally Barred Recovery.

As an alternative ground supporting summary judgment, the Independent Duty Doctrine provided a bar to Bucci's Negligence claim.

"When no independent tort duty exists, tort does not provide a remedy." *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 389 (2010). *Badgett v. Security State Bank*, 116 Wn.2d 563 (1991), provides strong support for NWTS. In *Badgett*, the Supreme Court stated:

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

Id. at 570 (citations omitted; emphasis added). *Badgett* holds, "[t]he Bank

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

Badgett's reasoning demonstrates that the loan agreement in this case overrode Bucci's Negligence claim and the imposition of tort liability, because NWTS' actions were all taken pursuant to the relevant contract, *i.e.*, the Deed of Trust. CP 577-601. In fact, according to the sale notices, consistent with RCW 61.24.020, Bucci was informed that the Property would be sold to "satisfy the expense of the sale and the obligation secured by the Deed of Trust as provided by statute." CP 615-619; CP 636-640; CP 663-667.

Just like the Badgetts, Bucci received the benefit of his contract to borrow money, and Bucci failed to repay the sums owed. Recovery for the tort of Negligence was correctly disallowed.

V. CONCLUSION

Bucci has continued to intentionally avoid his responsibility to repay a $1,530,000.00 loan, while enjoying the use of a large, expensive house securing the loan's repayment. There was nothing wrongful about the foreclosure which commenced after Bucci's default.

Ultimately, Bucci could not overcome the incontrovertible evidence demonstrating that NWTS acted within the scope of its duties as the appointed successor trustee of the Deed of Trust. There was no genuine issue of material fact with respect to Bucci's theories and arguments.

For these reasons, the trial court's summary judgment ruling should be affirmed.

DATED this 1st day of April, 2016.

RCO LEGAL, P.S.

By: /s/ Joshua S. Schaer
Joshua S. Schaer, WSBA #31491
Attorneys for Respondent Northwest Trustee Services, Inc.

Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. On April 1, 2016 I caused a copy of the **Brief of Respondents Northwest Trustee Services, Inc. and RCO Legal, P.S.** to be served to the following in the manner noted below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13th day of April, 2016.

Kristine Stephan, Paralegal