

66252-0

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NO. ~~66252-0~~ 66252-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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DIANNE KLEM, as administrator of the estate of Dorothy Halstien,

Respondent,

vs.

WASHINGTON MUTUAL BANK, a Washington corporation, and

Defendant,

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a  
Washington corporation, and QUALITY LOAN SERVICE  
CORPORATION, a California Corporation

Appellants.

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**BRIEF OF APPELLANTS**

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## INTRODUCTION

***nonjudicial foreclosure.*** (1916) ... A foreclosure method that does not require court involvement.

BLACK'S LAW DICTIONARY, 719 (9<sup>th</sup> Ed. 2009)

Hard cases . . . are apt to introduce bad law.

***Winterbottom v. Wright,*** 10 M&W 109 (1842)

The trial court dismissed all claims against a trustee on summary judgment based on well established Washington law, where a professional guardian for the Deed-of-Trust grantor negligently failed to restrain a duly-noticed foreclosure sale at which the grantor's house sold for about 35% of its market value, paying off a loan secured by the Deed of Trust. Under RCW Ch. 61.24 and a great deal of precedent, the trial court correctly ruled that the guardian's failure to restrain the sale waived the grantor's fiduciary breach, negligence, breach of contract (Deed of Trust), and CPA claims, all of which were based on facts known to the grantor prior to the sale. But the trial court reinstated the latter three claims, and a jury found the trustee 50% liable for negligence, but 100% liable for the same damages under the contract and CPA claims.

The trial court's original waiver ruling was correct. Moreover, none of these claims is supported by the evidence presented at trial. This Court should reverse and dismiss.

## **ASSIGNMENTS OF ERROR**

1. The trial court erred in reconsidering its order dismissing all of PSG, Inc.'s claims and reinstating three of those claims against Quality. CP 270-71, 557-58.
2. The trial court erred in repeatedly ruling contrary to its own ruling that, "[b]y failing to enjoin the foreclosure sale Plaintiff waived its claim that Quality abrogated its duty as a trustee." CP 270.
3. The trial court erred in allowing PSG, Inc. to amend its complaint to add Quality Loan Services Corp. (of California) (QLSC). CP 559-60.
4. The trial court erred in denying QLSC's motion to dismiss based on lack of jurisdiction. CP 646-48.
5. The trial court erred in denying Quality's motion for judgment as matter of law at the close of Klem's case. RP 423.
6. The trial court erred in entering judgment on the verdict and in awarding attorney fees. CP 1582-84.<sup>1</sup>
7. The trial court erred in denying Quality's motion for judgment notwithstanding the verdict. CP 1580-81.

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<sup>1</sup> Quality's Notice of Appeal inadvertently included only the Judgment. All of the prior orders prejudicially affect the Judgment. RAP 2.4(a) & (b). Quality is filing an Amended Notice of Appeal to include these orders.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The trial court initially dismissed all of PSG, Inc.'s claims because, "[b]y failing to enjoin the foreclosure sale Plaintiff waived its claim that Quality abrogated its duty as a trustee." CP 270. The trial court reconsidered solely as to the negligence, breach of contract, and CPA claims. Where, as here, each of these claims is based on Quality's alleged breach of its duties as a trustee, did the trial court err in reinstating these claims, repeatedly denying motions to dismiss, and repeatedly ruling contrary to law and its own earlier decision barring claims based on the trustee's duties?

2. The record shows that Quality duly served and recorded all required statutory notices and that PSG, Inc. knew or should have known of its statutory right and responsibility to restrain the sale. It further shows that PSG, Inc. made precisely two very short phone calls to Quality prior to the foreclosure sale, never sent the REPSA to Quality, never told Quality that the bank was not responding, never moved to restrain the foreclosure sale, and never appeared at the foreclosure sale despite having a signed REPSA in hand. Does the evidence support a negligence finding against Quality?

3. In addition to the above, the record also shows that Quality honestly told PSG, Inc. that the bank would have to agree to

postpone the sale, on express instructions from the bank. Did Quality breach the Deed of Trust by following the beneficiary's instructions or by not – *sua sponte* – halting the foreclosure sale?

4. In addition to the above, the record also shows that Quality predated some Washington notarizations between 2004 and 2007, including Halstien's Notice of Sale, in order to facilitate electronically transferring them between California and a Washington company so that it could transmit, post and record the notices in Washington in a timely fashion. Did Quality violate the CPA or cause any injury to Halstien by following the beneficiary's instructions or by predating the notarizations?

5. In addition to the above, the record also shows that QLSC is a separate legal entity that did not conduct business in Washington. Did the trial court err in joining QLSC as a party?

6. Under the same facts, did the trial court err in refusing to dismiss QLSC?

7. Under the same facts, was Quality an "agent" of QLSC?

## STATEMENT OF THE CASE

- A. Dorothy Halstien took out a \$73,000 loan secured by a Deed of Trust on her home, but she suffered from dementia, neglect and exploitation by her daughter.**

In 1996, Dorothy Halstien, a single woman, bought a home and a lot at 3764 Cascadian Lane, in Greenbank, Washington, on Whidbey Island, for \$147,500. Ex 9, p.1. She received a Statutory Warranty Deed dated July 1, 1996, which was recorded in Island County on July 9, 1996. Ex 9, p. 004 (upper right-hand corner).

In July 2004, Halstien borrowed \$73,000 from Washington Mutual Bank, giving the bank a promissory note secured by a Deed of Trust on her property. Ex 9, p. 007. Under the Deed of Trust, Halstien was the Borrower, the bank was the Beneficiary, and Stewart Title was the Trustee. *Id.* The Deed of Trust had an Adjustable Rate Rider, providing an indexed interest rate "capped" at \$9.950%. *Id.*, p. 025. The Deed of Trust was recorded in Island County on July 29, 2004. *Id.*, p. 007.

Halstien was suffering from dementia. RP 67; *see also, e.g.*, Ex 49, p. 3 (2007 yearly GAL report stating, "Dorothy has been suffering with dementia for many years"). She was not able to make any decisions for herself or to manage her affairs. RP 67. She had a daughter living with her who apparently took advantage

of her. Ex 49, p. 3. In early 2007, DSHS Adult Protective Services accused the daughter of neglect, removed Halstien from the home, and started a guardianship. RP 63, 67.

**B. A court appointed a professional guardian as Halstien's GAL in January 2007, which took until December 2007 to evict the daughter from Halstien's home.**

Puget Sound Guardians, Inc. (PSG, Inc.) was appointed as Halstien's GAL on January 25, 2007. RP 63. PSG, Inc. is a certified professional guardianship agency for disabled, elderly, and/or incapacitated persons. RP 62. Its clients usually have been abused, neglected, and/or financially exploited. *Id.* Three attorneys represent PSG, Inc. in its capacity as GAL on a minimum of 150 cases a year. RP 68, 134. In addition to these three, PSG, Inc. also retains other lawyers with expertise in areas such as eviction or taxes, on an *ad hoc* basis. RP 135. If the client has no funds, PSG, Inc. attempts to find *pro bono* assistance for them. *Id.*

Diane Klem, PSG, Inc.'s executive director, has been with the company or its predecessor since 1992. RP 62. When PSG, Inc. was appointed for Halstien in January 2007, Klem immediately knew that Halstien could not make her mortgage payments. RP 147. Halstien had an annual income of roughly \$11,000. Ex 49, p. 14. Halstien's home was then worth roughly \$233,500, but the

bank's encumbrance had increased to roughly \$75,000. Ex 49, p. 15. Halstien had medical expenses and was approved for Medicaid on February 1, 2007. RP 78; Ex 49, p. 16. The State had a lien, but if Halstien's house was sold, Halstien would lose State assistance until her assets fell back below \$2,000. Ex 49, p. 6. Nonetheless, PSG, Inc. planned to sell Halstien's house to pay off her debts. RP 78.

In order to sell the house, PSG, Inc. first had to remove Halstien's daughter, her boyfriend, and his dog. RP 91. In February 2007 (very shortly after PSG, Inc.'s appointment) Klem sent them a letter, asking them to move out. Ex 62. This did not work, so PSG, Inc. hired an attorney to deal with the problem. RP 136. In May 2007, he sent them a letter, essentially putting them in tenant status. Ex 63. By April 2007, at the latest, PSG, Inc. knew that the daughter would never pay any rent. Ex 61. Yet PSG, Inc. did not obtain an eviction order until November 2007. Ex 65. They lived rent-free in Halstien's home for over a year, but PSG, Inc. finally evicted them in December 2007, nearly a year after becoming Halstien's guardian. Ex 49, p. 7; Ex 66.

**C. Halstien's debt to the bank continued to accrue, the bank declared a default and sent timely foreclosure notices, and PSG, Inc. obtained two orders authorizing it to sell the home, but made no plans to stop the foreclosure sale.**

Meanwhile, PSG, Inc. had received an order directing it to sell Halstien's home on June 14, 2007. Ex 60. As noted above, however, it took the rest of the year to evict the daughter, while Halstien's debt continued to accrue. By October 2007, the bank had appointed Quality Loan Services of Washington (Quality) as successor trustee (Ex 2) and had declared Halstien in default as of July 2007, based on her failure to make payments from July through October, 2007. Ex 3. Quality served Halstien and posted a Notice of Default on her home on October 25, 2007. RP 88; Ex 3. Over 30 days later, Quality sent Halstien a Notice of Foreclosure and Notice of Trustee's Sale, again posted, and recorded these documents in Island County on November 27, 2007. Exs 4, 8, 72. The Trustee's Sale was scheduled more than 90 days later, on February 29, 2008. Ex. 8.

The Notice of Default informed Halstien (and PSG, Inc.) that they could contest the alleged default "on any proper ground" under RCW 61.24.130. Ex 3, p. 3. The Notice of Foreclosure notified them that if they had "legitimate defenses" to the default, they could

start a court action and obtain an injunction. Ex 4, p.2. Consistent with RCW 61.24.040(1)(f)(XI), the Notice of Trustee's Sale told them that "[a]nyone having any objections to this sale on any grounds whatsoever" should seek to restrain the sale, explicitly warning them that failure to do so "may result in a waiver of any proper grounds for invalidating" the sale (Ex 8, p.2):

Anyone having any objections to this sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

Klem had seen maybe three foreclosures in her entire time at PSG, Inc. RP 137. Yet unlike with the eviction, PSG, Inc. did not seek out a foreclosure expert. *Id.* Instead, in January 2008, PSG, Inc. obtained yet a second order directing it to sell the home. Ex 6. PSG, Inc.'s "financial worker," David Greenfield, called Quality and spoke to its employee, Seth Ott, on January 10, 2008. RP 293, 297, 356-57; Ex 23. Greenfield asked Ott about how to stop or delay a foreclosure sale, and Ott said that Greenfield should contact the bank, which would have to authorize any postponement. *Id.* Ott told Greenfield that the bank would likely need a signed REPSA to delay the foreclosure. *Id.* Greenfield

admitted on cross-examination that he did not ask Quality to postpone the foreclosure sale at this time. RP 311-12.

Ott's assertion that the bank would have to authorize any postponement is consistent with the terms of Quality's appointment by the bank. RP 215-16; Ex 12, p. 735 ("Your office is not authorized to postpone a sale without authorization" from the bank or its agent). As the beneficiary of the deed of trust, the bank had full legal authority to replace Quality as trustee. RCW 61.24.010(2) ("The trustee may . . . be replaced by the beneficiary"). As trustee, Quality could not simply ignore the beneficiary's instructions without a strong legal basis to do so. RP 218, 264, 284.

As for PSG, Inc., Klem and Greenfield were obviously well aware that the foreclosure sale was impending. In early 2008, they prepared PSG, Inc.'s 2007 Guardian Report. Ex 49. On February 6 and 7, 2008, they swore under penalty of perjury that their assertions were true and correct. *Id.* at 11 & 13. They asserted that PSG, Inc. would try to sell the home, but if that did not work out, they would just let it go at the foreclosure sale (*id.* at 7):

The property is currently in foreclosure. It is scheduled to be auctioned on 2/18/08 [*sic*]. PSG is open to reasonable offers that might come in before the auction date, but if no acceptable offers come in, the property will go to auction,

after which PSG will petition the court for the remaining proceeds of the auction.

It is unclear why they thought that there would be any remaining proceeds after the foreclosure sale. They apparently were oblivious to the danger. They had no plan to stop the sale, or even to attend the sale.

**D. PSG, Inc. allegedly tried to postpone the sale, but just “got the runaround” from the bank, and never went back to Quality to seek the available assistance, never sought to restrain the sale, and never even attended the sale, despite having a signed REPSA in hand.**

By roughly this same time (early February 2008) PSG, Inc. had cleaned up the property, obtained a real estate agent, and put everything in place to sell the home. RP 98-101. Indeed, by February 18, 2007, PSG, Inc. had obtained a mutually-signed Real Estate Purchase and Sale Agreement (REPSA) for \$235,000. Ex 24. Greenfield claimed that the next day, February 19, he called Quality at 9:15 a.m.. RP 302; Ex 25. Greenfield signed an affidavit under penalty of perjury swearing that he spoke to Ott during this call. RP 322-24; Ex 48.

But in truth, Ott was out on FMLA medical leave in February 2008, and could not possibly have spoken to Greenfield on February 19. RP 375; Ex 15. Neither Quality's nor PSG, Inc.'s phone records show any call from Greenfield at 9:15 (as he

recorded on Ex 25) but rather show two calls around 9:48 that lasted only a minute or two. RP 313-16; Exs 82, 84. Greenfield had to admit under cross-examination that his sworn statements about speaking with Ott were false. RP 323-24. He had also declared that Quality broke a “promise to review” the REPSA, but at trial Greenfield admitted that he never even sent the REPSA to Quality. RP 319, 324. Greenfield nonetheless maintained that he did talk to someone at Quality on the 19<sup>th</sup>, a conversation that lasted about a minute. RP 303-04.

Greenfield contacted the bank to stop the foreclosure, and, in response to their varying requests, attempted to provide the necessary documentation to stop the foreclosure sale. RP 306, 319-21; Exs 26-47. The bank did not believe that his documents met its requirements. CP 173-74, 204-34. But the record reflects no fewer than 22 attempts by Greenfield to ask the bank to postpone the sale between February 19 and February 29, 2008, the day of the sale. RP 306, 319-21; Exs 26-47. Not one of these communications is copied or otherwise directed to Quality. *Id.*

Indeed, despite getting what he called the “runaround” from the bank (RP 330) Greenfield never copied Quality on any of his communications with the bank. RP 318-21, 325. Although the

alleged February 19 call lasted “a minute, tops,” Greenfield claims to have told someone that he had a signed REPSA, mentioned the purchase price, asked them to stop the sale, and confirmed twice that “only the bank” could stop the sale. RP 303-04. But after that call, Greenfield never asked Quality for assistance, never told Quality that the bank was unresponsive, and never sent the signed REPSA to Quality. RP 319-21.

It is unfortunate that Greenfield failed to come back to Quality, which has a home-retention department specifically designed to assist borrowers in reaching their lenders. RP 272. When a borrower calls Quality about a non-responsive lender, Quality can directly connect the borrower to the lender’s hotline via “warm transfer.” RP 276. In the midst of a mortgage crisis, it has not been unusual for borrowers to have trouble reaching lenders, but if PSG, Inc. had told Quality about its difficulties, Quality would have contacted the bank itself. RP 271-72. Quality has never had trouble getting this bank to postpone a sale. RP 270.

Not only did Greenfield fail to come back to Quality after only two brief phone calls, but he never asked PSG, Inc.’s attorneys to go to court to restrain the sale. RP 326. Greenfield admitted that he received the Notice of Foreclosure (Ex 4) and that it informed

him that PSG, Inc. could go to court to stop the sale. RP 326-27, 329. He also admitted that the Notice of Trustee's Sale told him PSG, Inc. must seek to the restrain the sale or risk waiving all proper grounds for invalidating the sale. RP 329-30.

Greenfield plainly took charge of stopping this sale on behalf of Halstien, yet in response to the jury's question, "Why didn't Puget Sound Guardians go to court for a motion to restrain the sale?," Greenfield abjured his responsibility (RP 337):

[T]hat really wasn't my department. I was just the financial worker, so the legal issues went through somebody else.

Ultimately, Greenfield did not even attend the sale on Halstien's behalf. RP 330. He did not send anyone else. *Id.* No one objected to the sale, so the Trustee's representative sold the property to the highest bidder for \$83,088.67. RP 131, 330. The purchaser quickly sold the home for \$235,000. Ex 69.

**E. The trial court wholly granted, but then partially denied, Quality's summary judgment motion based on PSG, Inc.'s failure to take any legal action to restrain the sale, thereby waiving all claims against Quality.**

In April 2008, PSG, Inc. sued Quality and the bank. CP 3-15. It raised seven claims, four of which were against Quality: (1) breach of fiduciary duty; (2) breach of contract (apparently an alleged oral contract to postpone the sale); (3) negligence; and a

Consumer Protection Act (CPA) violation. CP 10-15. PSG, Inc. amended its claim in May 2008, but did not change the substance of these four claims. CP 16-28. Quality answered, denying these claims and alleging, among other affirmative defenses, contributory negligence and waiver. CP 29-35.

In August 2008, PSG, Inc. moved for partial summary judgment dismissing the waiver defense. CP 48-61. Quality cross-moved for summary judgment on all four claims. CP 110-23. In October 2008, the trial court denied PSG, Inc.'s motion and granted Quality's cross-motion. CP 245-48. On the undisputed facts, the trial court ruled that PSG, Inc. had knowledge of the facts giving rise to all of Halstien's claims at least ten days prior to the foreclosure sale, that it thus could have and should have moved to restrain the sale, and that it therefore waived these claims. *Id.*

PSG, Inc. moved for reconsideration. CP 249-57. In November 2008, the trial court granted partial reconsideration. CP 270-71. The court ruled that, "[b]y failing to enjoin the foreclosure sale Plaintiff waived its claim that Quality abrogated its duty as a trustee." CP 270. But the court reinstated three claims against Quality: negligence, breach of contract, and CPA violation. CP 271. Quality sought clarification of this Order, which the trial court

granted, stating that it did not believe that claims other than fiduciary breach were waived by PSG, Inc.'s failure to restrain the foreclosure sale. CP 557.

Halstien died on November 5, 2008. CP 409. In January 2009, Klem had herself appointed administrator of Halstien's Estate. *Id.* In February 2009, PSG, Inc. moved to amend its complaint again, this time on four issues: first, to substitute Klem as plaintiff; second, to add Quality Loan Services Corp. (QLSC – a California sister corporation of Quality, RP 191) as a defendant; third, to clarify that the fiduciary breach claim was dismissed; and fourth, to acknowledge that WAMU was in receivership. CP 272-81. In response, Quality had no objection to removing the dismissed claim and recognizing the receivership. CP 550. While Quality objected to Klem's appointment, that issue is now moot.

Quality did object strongly to adding QLSC. CP 551-53. The relationship between these companies (separate corporations with common ownership and directors) is insufficient reason to excuse PSG, Inc.'s neglect in failing to name QLCS until five months after the cutoff for adding parties. *Id.* The court nonetheless allowed the amendments. CP 559-60.

QLSC then moved to dismiss on the bases of lack of jurisdiction and failure of service. CP 602-07. On jurisdiction, Quality and QLSC are sister corporations with completely separate corporate structures (albeit with common ownership and directors); QLSC does not do business in Washington; and QLSC employees do not perform Washington foreclosures. See, e.g., CP 577-79, 636-38, 630-33, 787-91. Klem presented no evidence to the contrary, despite making many unsupported allegations. See, e.g., CP 617-27. On service, Klem never personally served QLSC's Registered Agent. See, e.g., CP 580-81, 600-01, 633-34. The trial court nonetheless denied QLSC's motion to dismiss. CP 646-48.

**F. Despite the trial court's binding ruling that "[b]y failing to enjoin the foreclosure sale Plaintiff waived its claim that Quality abrogated its duty as a trustee," Klem was permitted to repeatedly argue to the jury that Quality violated its duties to Halstein as a trustee, essentially claiming that Quality had to act like a "judge."**

The case went to trial on January 12, 2010, lasting five court days. RP 1, 58, 114, 290, 437. Quality brought a motion *in limine* to prevent Klem from arguing duty in conflict with the trial court's binding ruling that, "[b]y failing to enjoin the foreclosure sale Plaintiff waived its claim that Quality abrogated its duty as a trustee," including barring expert testimony on duty. CP 1252-75. Quality

relied heavily on the most recent Court of Appeals decision, ***Brown v. Household Realty Corp.***, 146 Wn. App. 157, 189 P.3d 233 (2008), *rev. denied*, 165 Wn.2d 1023 (2009), which is (as discussed below) directly on point and controlling. *Id.*

After Klem essentially admitted that accepting Quality's argument would bar her from presenting her case, RP 24-25, the trial court viewed this as a motion for directed verdict, which she denied, deferring to the prior judge's order. RP 25-26. She did bar the expert from testifying about fiduciary duties, RP 36, but he did it anyway, RP 234. The trial judge struggled with an alleged "distinction" between a trustee's "fiduciary" duty, on one hand, and an alleged duty of "ordinary care" on the other (perhaps apocryphal) hand, saying, "what I am trying to do is figure out where that line is." RP 37-38. Query whether she did.

Quality also moved for directed verdict on all claims at the close of Klem's case. RP 397-408. Quality again pointed out that it had no duty other than its duty as a trustee, and those claims are dismissed. RP 401. There is no separate, free-floating negligence duty. RP 400-401. Nothing Quality allegedly did breached the Deed of Trust or violated the CPA, and Quality did nothing but

perform its duties as trustee. RP 398-400, 403-08. The trial court denied the motion. RP 423.

During trial, Quality acknowledged that it had predated notarizations, including Halstien's, showing them as signed later than they were. See, e.g., RP 163, 167, 194. Klem's point in eliciting this evidence was to argue that Quality improperly "transmitted" the notice of sale too early in order to minimize the time between the notice and the foreclosure sale. See, e.g., RP 385-87. Quality has to get the notices from California, where they are prepared, to Washington, where they are transmitted, recorded, and posted. RP 170-71. When Quality's management learned of the predated notarizations in 2007, it forbade them. RP 198-99.

The trial court sustained Quality's objection to Klem's question about "transmitted" documents because the statute, RCW 61.24.040(1)(b), requires that notices of sale be "transmitted by . . . mail . . . to the following persons or their legal representatives," including the borrower. RP 387. "Transmitted" in this context simply does not refer to intercompany electronic transfers to facilitate transmitting, serving, and recording them in Washington. RCW 61.24.040(1)(b).

As noted above, the trial court had correctly ruled that “[b]y failing to enjoin the foreclosure sale Plaintiff waived its claim that Quality abrogated its duty as a trustee.” CP 270. Yet Klem’s entire closing argument was based on a theory that Quality owed a trustee duty to Halstien under the Deed of Trust and breached that duty. RP 445-72. On negligence, Klem argued that Quality had a duty to “act reasonably” as trustee with regard to the sale. RP 447. She argued that the duty of “ordinary care of a trustee” mandated postponing the sale. RP 457-58.

On the CPA, Klem argued that Quality had a duty not to predate the notaries and that “it is an unfair practice to lie.” RP 450-51, 464. Klem argued that it was improper to “transmit” the Notice of Trustee Sale from California to a service company in Washington prior to the expiration of 30 days, even though it was not transmitted to Halstien until 30 days had passed. RP 452. Klem also argued that “delegat[ing]” Quality’s “authorit[y]” to postpone the sale to the bank was improper. *Id.*; RP 454.

On breach of contract, Klem argued that Quality “breached” the Deed of Trust by failing “to follow” Washington law. RP 465-67. Again, she argued that Quality was a “fiduciary” required to “take reasonable and appropriate steps to avoid sacrificing of the

homeowner's property." RP 466-67. Klem did not explain to the jury that her trustee-duty claims were dismissed. *Id.*

Klem expressly argued that the trustee is a "fiduciary" for both the borrower and the lender. RP 453. She argued that the trustee is "responsible" for the interests of both the borrower and the lender, and must act impartially between them, and it is bound by its office to present the sale under every possible advantage to the borrower as well as the lender. *Id.* Klem argued that the "trustee is that impartial neutral, like a judge . . . ." *Id.*

**G. The jury found both Quality and PSG, Inc. negligent, attributing 50% of the fault to each; found a CPA violation, but rejected exemplary damages; and found a contract breach. But the jury awarded exactly the same damages on each claim, and rejected PSG, Inc.'s claims of negligent misrepresentation and failure to make a "reasonable accommodation."**

The jury found by Special Verdict (attached as App. A) that both Quality and PSG, Inc. were negligent and that both proximately caused Halstien \$151,912.33 in damages (precisely the difference between the \$235,000 REPSA and the \$83,087.67 Halstien owed the bank). CP 1443-44. The jury attributed 50% of the fault to each. CP 1444. The jury also found that Quality acted as QLSC's agent. CP 1443. But the jury rejected PSG, Inc.'s claim

that Quality made a negligent misrepresentation, thus wholly rejecting Greenfield's testimony. CP 1445.

The jury also found a CPA violation, awarding precisely the same \$151,912.33 in damages, but rejecting PSG, Inc.'s claim for treble damages. CP 1446. The jury also found a breach of contract, again awarding the same damages amount. CP 1446-47. Finally, the jury rejected PSG, Inc.'s claim that Quality engaged in an "unfair practice" by "failing to grant her a reasonable accommodation." CP 1447.

**H. The trial court assessed the entire judgment against Quality – with no assessment against PSG, Inc. for its negligence – and awarded attorney fees under the CPA.**

Following the Verdict, various motions were filed, including Quality's "JNOV" motion (CP 1507-21) and PSG, Inc.'s motion for judgment and an injunction (CP 1457-87). The trial court denied these motions. CP 1580-81, 1585-88.

As part of its order denying the injunction, the court made some signal rulings. CP 1585-88. In addition to rejecting PSG, Inc.'s proposed CPA injunction as vague, overbroad, legally unjustified and unenforceable, the court noted the following about PSG, Inc.'s breach of contract claim (CP 1587-88):

The jury found that [Quality] breached its contract under the Deed of Trust. The only evidence and law as to the breach of contract claim was that [Quality] violated Washington law by not fulfilling its duties to the borrower, as required by its Deed of Trust with Mrs. Klem [sic].

[Quality] had a contract with the lender, Washington Mutual, in the form of an “attorney expectation document.” (Exhibit 12 at trial). That document states that “your office is not authorized to postpone a foreclosure without the consent” of Washington Mutual or Fidelity. The jury was instructed as follows as to the status of Washington law in effect at the time of these events: “The trustee is a fiduciary for both the borrower and the lender, it must act impartially between them, and it is bound by its office to present the sale under every possible advantage to the borrower as well as the lender.” Court’s Instruction No. 5.

The law has changed, and no fiduciary duty now exists. However, a contract with a lender that prohibits [Quality] from exercising its discretion to postpone the sale, even when it believes a situation so warrants, could be a violation of the “good faith” to the borrower requirement of the Deed of Trust Act.

### **SUMMARY OF ARGUMENT**

The trial court plainly made materially inconsistent rulings in this case, depriving Quality of a fair trial. It first ruled – entirely consistent with Washington law – that PSG, Inc. had waived all of its claims by failing to take any steps to restrain the foreclosure sale. The court then reinstated the negligence, contract, and CPA claims, albeit while ruling that, “[b]y failing to enjoin the foreclosure sale Plaintiff waived its claim that Quality abrogated its duty as a trustee.” CP 270. It then recognized after trial (as quoted above)

that the jury indeed based all of its decisions on Klem's allegations that Quality abrogated its duty as a trustee.

While this last ruling is an accurate statement of what happened here, it also exposes the fundamental unfairness and impropriety of these entire proceedings. As the jury found, Klem negligently failed to take steps to restrain the sale. She could have done so on the very grounds on which she prevailed at trial. All of her claims were waived.

Beyond that, her claims are also unfounded. On the negligence claim, Greenfield allegedly made two very brief calls to Quality, during which someone told him honestly that the bank would need to approve any postponement. Since the jury was instructed that Quality was a "fiduciary" for **both** the bank and Halstien (CP 1418) Quality could not simply ignore the bank's instructions. The undisputed evidence is that Greenfield turned to the bank to stop the foreclosure, but never came back to Quality. Being honest in two short phone calls is not negligence.

On the contract claim, the trial court accurately noted that the claim was based on the Deed of Trust. Alleged breaches of duties arising out of the Deed of Trust are waived by a failure to restrain the sale. The jury should never have heard this claim. And

the evidence does not establish any breach of the contract: Quality properly and timely gave all required notices. It had no contractual “duty” to *sua sponte* halt the foreclosure sale.

On the CPA claim, whether Quality committed an unfair and deceptive act or practice is a question of law. Klem’s claim that Quality could not “defer” to the bank is simply wrong on the law. Her claim that Quality “lied” by predating notarizations does not amount to a CPA violation. Notwithstanding the notarizations, Klem produced no evidence that the foreclosure sale was held one minute earlier than allowed by law. Halstien and Klem thus suffered no injury from the notaries, and the CPA claim fails.

Finally, Quality was not the “agent” of QLSC. Klem presented no evidence to the jury that Quality acted on behalf of or at the behest of QLSC. They are separate corporations, with QLSC doing business in California (and several other states) and Quality doing business in Washington. Klem never moved to disregard Quality’s corporate form, likely because no evidence would support corporate disregard. The agency claim also fails.

This Court should reverse and dismiss.

## ARGUMENT

### A. Standards of review.

Summary judgments are reviewed *de novo*, applying the same standards as the trial court under CR 56. See, e.g., ***Hearst Commc'ns, Inc. v. Seattle Times Co.***, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Rulings interpreting statutes (like all questions of law) are also reviewed *de novo*. See, e.g., ***Udall v. T.D. Escrow Servs., Inc.***, 159 Wn.2d 903, 908, 154 P.3d 882 (2007). Other decisions on reconsideration are reviewed for an abuse of discretion. See, e.g., ***Rivers v. Wash. State Conf. of Mason Contractors.***, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

### B. Under armloads of controlling Washington precedent, the trial court erred as a matter of law in reconsidering its decision to dismiss all of PSG, Inc.'s waived claims.

At first, the trial court correctly interpreted Washington law to require dismissal of all of PSG, Inc.'s claims based on waiver. Unfortunately, it then reinstated (among other claims)<sup>2</sup> the negligence, breach of contract, and CPA claims, albeit while leaving the breach of fiduciary duty claim dismissed, and while ruling that, “[b]y failing to enjoin the foreclosure sale Plaintiff waived

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<sup>2</sup> Klem lost on her negligent misrepresentation and discrimination claims, so those issues are moot here.

its claim that Quality abrogated its duty as a trustee." CP 270. The reinstatements were in error as a matter of law, as were each of the trial court's subsequent refusals to dismiss these claims.

The Deed of Trust Act protects a grantor like Halstien from any defects in the proceedings leading up to the non-judicial foreclosure by expressly authorizing the grantor to file an action to restrain the sale on any proper legal or equitable ground:

Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale.

RCW 61.24.130(1). The Act further protects the grantor by requiring the Notice of Sale to notify her, just as Quality notified Halstien (Ex 8, ¶ 9), of her right and duty to restrain the sale:

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

RCW 61.24.040(1)(f). The grantor must give the trustee five days' notice of the hearing on restraining the sale. RCW 61.24.130(2).

A grantor who (like Halstien) has received notices of default, foreclosure, and sale that duly informed her of her right and responsibility to restrain the sale waives any right to contest the

foreclosure sale or the underlying debt if she fails to obtain an order or injunction restraining the sale. See, e.g., ***Plein v. Lackey***, 149 Wn.2d 214, 67 P.3d 1061 (2003); ***Cox v. Helenius***, 103 Wn.2d 383, 693 P.2d 683 (1985); ***Brown, supra***; ***Universal Life Church Of Snohomish County v. GMAC Mortgage Corp.***, No. C06-65IRSM, 2007 U.S. Dist. LEXIS 29333, at \*11 (W.D. Wa. 2007); ***Hallas v. Ameriquest Mortgage Co.***, 406 F. Supp. 2d 1176, 1181 (D. Or. 2005) (interpreting Washington's Act), *aff'd*, 280 Fed. Appx. 667 (9<sup>th</sup> Cir. 2008); ***In re Marriage of Kaseburg***, 126 Wn. App. 546, 108 P.3d 1278 (2005); ***Country Express Stores, Inc. v. Sims***, 87 Wn. App. 741, 750-751, 943 P.2d 374 (1997); ***Steward v. Good***, 51 Wn. App. 509, 515-17, 754 P.2d 150, *rev. denied*, 111 Wn.2d 1004 (1988); ***Koegel v. Prudential Mut. Sav. Bank***, 51 Wn. App. 108, 114, 752 P.2d 385, *rev. denied*, 111 Wn.2d 1004 (1988).

In ***Cox***, the grantors gave a deed of trust to San Juan Pool Corporation to secure payment of a promissory note for the installation of the swimming pool. 103 Wn.2d at 385. When the pool proved to be defective, the grantors filed a complaint for damages and reconveyance of the deed of trust. *Id.* at 386. The Trustee, attorney Helenius, served a notice of default and a notice of foreclosure sale after the grantors had filed their Complaint. *Id.*

The Court held that under the Deed of Trust Act, the complaint filed by the grantors prior to the notices of default, foreclosure, and trustee's sale, automatically precluded the trustee from moving forward with the sale because "one of the statutory requisites [no pending action] was not satisfied." *Id.* at 388. In *dicta*, the Court went on to state that an attorney/trustee acting in a conflict-of-interest situation against the interests of the grantors, and a "grossly inadequate purchase price" (5% or less of the home's value) were together sufficient to void a sale. *Id.* at 388-90. That attorney/trustee's actions were particularly egregious because he induced reliance by the grantor's attorney, who thought the sale would not go forward. *Id.* at 389-90.

But **Cox** also held that (1) an action commenced (as here) after the notices of default and foreclosure does not restrain the sale and that (2) RCW 61.24.130 provides the only means to do so:

[W]e conclude that an action contesting the default, filed after notice of sale and foreclosure has been received, does not have the effect of restraining the sale. RCW 61.24.130 sets forth the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.

*Id.* at 388. Failure to restrain the sale “may result in a waiver of any proper grounds for invalidating the Trustee's sale.” RCW 61.24.040(1)(f). PSG, Inc. admittedly failed to restrain the sale.

In ***Plein***, Cameron was a junior creditor behind two secured creditors, Columbia Bank and Sunset Investments. Cameron paid the amounts due to Columbia and Sunset, and they assigned their promissory notes and deed of trust to Cameron. 149 Wn.2d at 219. Cameron hired attorney Lackey to begin non-judicial foreclosure proceedings on the Sunset note and deed of trust. *Id.* at 220.

Plein was a junior creditor who filed suit seeking a permanent injunction barring the trustee sale, but did not obtain a preliminary injunction or an order restraining the sale, so the trustee sold the property to Cameron. *Id.* at 220. Plein argued that when Cameron paid off Sunset, the debt was extinguished and the trustee's sale was accordingly null and void. *Id.* The Supreme Court held that Plein's failure to comply with RCW 61.24.130 by restraining the sale waived any right to contest the propriety of the trustee's sale, even including Plein's argument that there was no debt justifying the foreclosure. *Id.* at 225-26.

At the heart of ***Cox***, ***Plein***, and their progeny, are the three fundamental goals of the Act:

(1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles.

*Universal*, at \*8-9 (citing *Plein*, 149 Wn.2d at 225 (citing *Cox*, 103 Wn.2d at 387, and *Country Express*, 87 Wn. App. at 747-48). Since *Plein*, appellate and federal courts applying these principles “have found that the waiver language of the Deed of Trust Act is broad, and applies both to challenges to the pre-foreclosure process, and to the underlying obligation.” *Universal*, 2007 LEXIS at \*8 (citing *Hallas*, 406 F. Supp. 2d at 1181). *Plein* itself notes that the Court of Appeals has

held that waiver of **any postsale contest** occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale.

*Universal*, at \*9 (quoting *Plein* at 227 (citing *Country Express*, 87 Wn. App. at 749-51; *Steward*, 51 Wn. App. at 515-17; *Koegle*, 51 Wn. App. at 114)) (emphasis added in *Universal*).

The Court of Appeals’ most recent application of these principles is its 2008 *Brown* decision, review of which this Court denied last year. *Brown* is directly on point and controlling authority mandating dismissal here. After a duly-noticed

foreclosure, the grantors sued their lender for (*inter alia*) fraud, breach of the contractual covenant of good faith and fair dealing, CPA violations, and breach of fiduciary duty. 146 Wn. App. at 160, 162. As here, the grantors failed to take any steps to restrain the sale. *Id.* at 162. Also like here, the trial court dismissed these claims on summary judgment, but unlike here, they remained dismissed and the grantors appealed.

The Court of Appeals affirmed. Simply put, the grantors received notice of their right and responsibility to restrain sale, and had actual or constructive knowledge of the facts constituting their defenses, but failed to bring an action to restrain the sale. 146 Wn. App. at 164-66. The dismissal included, as here, the grantors' claims solely for money damages, which arose out of the underlying obligation. *Id.* at 166-69 (citing *Hallas*, *Universal*, and *Kaseburg*, all *supra*). Relying on the three fundamental goals of the act, the appellate court rejected all of these claims (*id.* at 169):

To except tort or other claims for money damages from the waiver provision would frustrate the purposes of the Act because lenders understandably may not be willing to utilize a nonjudicial foreclosure procedure in which the trustee's sale bars any deficiency judgment but leaves the lender subject to potential liability arising out of the underlying obligation even after the property securing the deed of trust has been sold.

The same is true here. First, it is undisputed that these plaintiffs received the statutory notices informing them of their right and responsibility to restrain the sale. Second, they were well aware of the facts supporting their claims. On negligence, Klem argued that Quality had a duty to “act reasonably” with regard to the sale and that the duty of “ordinary care of a trustee” mandated postponing the sale. RP 447, 457-58. She (or her guardian) knew the facts underlying this claim well before the sale itself.

On the contract claim, the trial court accurately noted that the claim was based on an alleged failure to follow the law regarding the foreclosure process incorporated into the Deed of Trust. CP 1587-88. Again, PSG, Inc. knew these alleged facts prior to the sale. In any event, this claim plainly arises out of the underlying debt, so it is barred. *Brown*, 146 Wn. App. at 166-69.

And on the CPA, Klem claimed that Quality could not “defer” to the bank, again based on facts known before the sale. Klem herself alleged (through Greenfield) that Quality twice truthfully told PSG, Inc. that the bank would have to agree to postpone the sale. Klem thus knew all the facts underlying her alleged defenses.

Third, Klem admittedly never sought to restrain the sale. Thus, all of Klem’s claims were waived by PSG, Inc.’s negligent

failure to restrain the sale. This comports well with the Act's fundamental goals. As in **Brown**, Klem sued both the bank and the trustee, and both would be deterred from participating in nonjudicial foreclosures if actions like this are allowed. Protracted litigation makes nonjudicial foreclosures inefficient and expensive, and does nothing to insure interested parties an adequate opportunity to **prevent** wrongful foreclosure. If nonjudicial foreclosures become untenable in Washington, the stability of land titles (and lending) will be undermined, not promoted.

Klem relied most heavily on **Cox**, arguing that it gives her the right to challenge (under various theories) Quality's alleged "misrepresentation" (which the jury rejected) that it could not postpone the sale without the bank's authority. "The key fact distinguishing **Cox** from this case, as well as from the garden-variety foreclosure action, is the trustee's position as both the trustee of the deed of trust and the attorney of record for the beneficiary in an action in which the obligation secured by the deed of trust was being challenged." **Moon v. GMAC Mortgage Corp.**, 2009 U.S. Dist. LEXIS 91933, at \*33 (2009). In **Moon**, Judge Zilly specifically and correctly rejected an argument that **Cox** supports Klem's claims. *Id.* The Court should reverse and dismiss.

**C. The trial court erred in repeatedly ruling contrary to its own earlier ruling that “[b]y failing to enjoin the foreclosure sale Plaintiff waived its claim that Quality abrogated its duty as a trustee.”**

While it erroneously reinstated three claims against Quality, the trial court nonetheless affirmed its earlier decision to dismiss PSG, Inc.’s breach of fiduciary duty claim, ruling that “[b]y failing to enjoin the foreclosure sale Plaintiff waived its claim that Quality abrogated its duty as a trustee.” CP 270. This ruling is correct, but not just as to the fiduciary duty claim. As the cases discussed above make clear, all claims arising out of either the underlying obligation or the trustee’s foreclosure duties are waived. Again, the Court should reverse and dismiss.

On claims arising out of the underlying obligation, for example, a bank purchased property at a foreclosure sale under a Deed of Trust granted by the Ostrandens, and then brought an unlawful detainer action under RCW 61.24.060 to evict them. ***Peoples Nat’l Bank of Wash. v. Ostrander***, 6 Wn. App. 28, 29, 491 P.2d 1058 (1971). The grantors sued the bank, alleging that it had misrepresented the Deed of Trust as a mortgage. *Id.* at 30. The ***Ostrander*** court determined that the grantors knew they signed a Deed of Trust and received the Notice of Foreclosure Sale

well before the sale, so they could have brought an action to restrain the sale, and they thus waived their misrepresentation claim. *Id.* at 32. The summary judgment was affirmed.

On claims arising out the trustee's duties, for example, the grantors sued the trustee for noncompliance with the Act (*e.g.*, failure to record the Notice of Sale 90 days prior to the sale) in ***Steward***, 51 Wn. App. at 511-12, 515. As here, the grantors argued that the inadequacy of the sale price, together with the trustee's non-compliance, were sufficient to ground their claims. *Id.* at 511. The ***Steward*** court held that the grantors waived their claims because "[e]ach of their objections to the trustee's sale was or should have been known by them" prior to the sale. *Id.* at 516.

Klem's negligence claim asserted that the trustee must act "reasonably" with regard to the sale. Klem's contract claim was an alleged failure to follow the law incorporated into the Deed of Trust by not acting "reasonably" regarding the foreclosure sale. Klem's CPA claim was that Quality could not "defer" to the bank regarding postponing the foreclosure sale. All of these claims arise out of the underlying indebtedness and the trustee's foreclosure-sale duties, all were known to Klem prior to the foreclosure sale, and all were

waived when PSG, Inc. failed to even attempt to restrain the foreclosure sale.

At various times, Klem also seemed to argue that the sale price should have put the trustee “on notice” that something was wrong, causing it to *sua sponte* postpone the sale. The sale price here (\$83,088.67) was roughly 35% of the market price (\$235,000). The Court very recently noted that **Steward** found no gross inadequacy when the sale price was only 8% of the intended bid. **Udall**, 159 Wn.2d at 915 (citing **Steward**, 51 Wn. App. at 514-15). The **Udall** Court held that a sale price, as here, a little “more than 35% of the intended opening bid, cannot be deemed grossly inadequate.” *Id.* Klem’s claims are baseless.

The **Steward** court also held that the grantors must show some prejudice arising from the trustee’s alleged failures to follow the Act in the face of a questionable sale price. *Id.* at 515. The **Steward** grantors failed to show prejudice because, as here, even had the trustee inquired, the result would have been the same. *Id.* Mere technical failures by a trustee are not indicative of unfairness to the grantor. *Id.* Again, Klem’s claims fail.

In sum, the trial court got it right the first time and should not have second-guessed itself. Where, as here, the grantor knows or

should know of any claims arising out of the underlying indebtedness or the trustee's alleged technical failures, she must bring an action to restrain the sale. Failure to do so waives the claims. This Court should reverse and dismiss.

**D. In any event, Klem failed to prove her claims at trial.**

Assuming *arguendo* that Klem did not waive the three claims on which she prevailed, she failed to prove them at trial. Again, the Court should reverse and dismiss. But of course, the Court need not reach these arguments if it determines the claims were waived.

It is axiomatic that negligence requires a showing of duty, breach, proximate cause, and damage. On duty, Klem argued that Quality had a “duty” to “act reasonably” with regard to the trustee’s sale. At best, this is a trustee duty, which the trial court itself said remained waived. CP 270. And it is not “unreasonable” to honestly tell the grantor that the beneficiary has reserved the right to veto a continuance – that is the beneficiary’s right.

The source of Klem’s trouble is her apparent belief that a trustee is like a “judge” who may resolve disputes between grantors and beneficiaries. Such trustees must be impartial, but that does not *ipso facto* make them judges. They may not resolve disputes

between grantors and beneficiaries – that is the purpose of an action to restrain the sale. Klem's claim fails.

Nor must trustees disregard their beneficiary's instructions where, as here, the grantor's guardian negligently fails to protect her rights. See, e.g., *Cox*, 103 Wn.2d at 389 (“Washington courts do not require a trustee to make sure that a grantor is protecting his or her own interest”). A “trustee’s management responsibilities under a deed of trust are less extensive than those of trustees in other fiduciary settings.” *Id.* They need only take reasonable steps to avoid sacrificing the debtor’s property. *Id.* Halstien’s property was not sacrificed, it was sold to the highest bidder.

Crucially here, the trustee “**has no obligation to, but may, for any cause the trustee deems advantageous, continue the sale.**” RCW 64.21.040(6) (emphases added). Trustees simply are not clairvoyant: they cannot read a grantor’s mind regarding problems reaching a bank or predict the future of a proposed sale. In order to obtain a postponement, grantors frequently claim that they have “sold” the property. But a trustee has no way of knowing whether those alleged sales will close, or fall apart, when (as here) closings are not scheduled until after the foreclosure sale.

In sum, Klem failed to show duty or breach. She also failed to show proximate cause or damages. The sale was duly scheduled and noticed for February 29. The trustee's representative appeared and cried the sale. No one said "stop" because Klem negligently failed to show up with her REPSA in hand. The property was sold to the highest bidder.

Quality did nothing "unreasonable" at the sale: it followed its *duty* to sell the property to the highest bidder. See RCW 61.24.040(4). Klem was not damaged by anything that happened at the sale. It was her own failure to show up (or to restrain the sale) that injured her.

Klem's contract claim is just her negligence claim in contract clothing. Her allegations of "breach" of the Deed of Trust plainly arose out of the underlying debt and were thus waived, as discussed above. In any event, Klem failed to show a breach or resulting damages.

Again, Klem claimed that Quality "breached" the Deed of Trust in failing to "follow the law" because Quality acted "unreasonably" by not postponing the sale. As noted above, Quality had no duty to postpone the sale. RCW 64.21.040(6). Its honest report that the bank would have to agree to postpone the

sale was not only true, as the jury found in rejecting Klem's misrepresentation claim, but it was perfectly consistent with its duty to act impartially between the grantor and the beneficiary. Quality followed the law and did not breach the Deed of Trust.

Klem's CPA claim arguably had two bases, both of which are faulty. First, Klem claimed that it was an "unfair practice" to "lie" by predating the notaries. The notices and the foreclosure sale were timely as to Klem/Halstien. They suffered no prejudice or damage from the notaries, so their CPA claim fails. *See, e.g., Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986) (plaintiffs must prove all elements of CPA claim); *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007) (plaintiffs must prove "but for" causation of damages).

Similarly, Klem failed to prove that any predated notary harmed – or even had the potential to harm – anyone else, so it failed to prove that the notaries affected the public interest, and her claim fails. *Hangman Ridge*, 105 Wn.2d at 790 (plaintiff must establish a likelihood that additional plaintiffs have been or will be injured in exactly the same manner). While there is some evidence

in the record that other predated notaries occurred, there is no evidence that anyone – including Halstien – was harmed by them.

Klem's other CPA claim was that Quality "deferred" to the bank. This is not an unfair practice as a matter of law, and no case law says that it is. If a beneficiary gives a trustee a standing order that it may not postpone the sale without permission, that is the beneficiary's right. Had the bank told Quality that it simply could never postpone a sale for any reason, that would certainly raise an eyebrow. But that was not the instruction. Ex 12 at 735.

Moreover, there is no evidence that this practice injured anyone, including Halstien. The bank's requirement that it approve a postponement caused no harm to anyone. Quality's representatives testified that if PSG, Inc. had told them it was having trouble with the bank, they would have put them in contact, or contacted the bank themselves. They testified that this bank had never refused to postpone a sale in circumstances like this. The mere right to approve postponement harmed no one.

Nor did it Klem establish a likelihood that additional plaintiffs have been or will be injured in exactly the same manner. ***Hangman Ridge***, 105 Wn.2d at 790. Again, a mere reservation of

approval rights harms no one. Klem presented no evidence that anyone was, or even could have been, harmed by it.

Klem utterly failed to establish her negligence, contract, and CPA claims as a matter of law. They were all waived in any event. Either way, the Court should reverse and dismiss.

**E. The trial court erred in joining QLSC, over which it lacked jurisdiction, and no evidence supports the jury’s “agency” finding in any event.**

The trial court erred in granting PSG, Inc.’s motion to join QLSC, Quality’s sister corporation in California, over five months beyond the deadline for joinder of parties. CP 417. This inexcusable neglect is sufficient reason to deny the motion. *Haberman v. WPPSS*, 109 Wn.2d 107, 174-75, 744 P.2d 1032 (1987); *Tellinghuisen v. King Cy Council.*, 103 Wn.2d 221, 222-24, 691 P.3d 575 (1984). With no reasonable excuse for the delay, the trial court abused its discretion in joining QLSC.

More importantly, the trial court erred in refusing to dismiss QLSC absent evidence that it conducted any business in Washington. See CP 602-04; see generally, e.g., *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767, 783 P.2d 78 (1989); *Tyee Const. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 115-16, 391 P.2d 245 (1963). The very fact that Klem had to allege and

attempt to prove at trial that Quality was QLSC's agent shows that she failed to establish sufficient contacts. The Court should reverse and dismiss as to QLSC.

It is true, however, that if QLSC did conduct business in Washington through Quality as its agent, sufficient contacts are established. See, e.g., RCW 4.28.185(a) (subjecting "[a]ny person . . . who in person or through an agent" transacts business in this state to longarm jurisdiction). Although the jury found that Quality was QLSC's agent, it did so on no evidence. While Quality and QLSC share owners, directors, expenses, and even offices, those facts are not sufficient ground to disregard Quality's independent corporate status. See generally, e.g., **Meisel v. M & N Modern Hydraulic Press Co.**, 97 Wn.2d 403, 645 P.2d 689 (1982); **Rogerson Hiller Corp. v. Port of Port Angeles**, 96 Wn. App. 918, 982 P.2d 131 (1999), *rev. denied*, 140 Wn.2d 1010 (2000); **Norhawk Invest. v. Subway Sandwich Shops, Inc.**, 61 Wn. App. 395, 811 P.2d 211 (1991); **Truckweld Equip. Co. v. Olson**, 26 Wn. App. 638, 618 P.2d 1017 (1980). Only Quality is licensed to do business here, and only Quality does business here. There is no substantial evidence to the contrary.

In sum, the jury had no evidence on which to find that Quality acted as the mere agent of QLSC, rather than simply acting on its own right as an independent corporation licensed to do business in Washington. Because the agency verdict must fall, and no other evidence supports jurisdiction, the joinder ruling falls too. Regardless of the other issues raised above, the Court should reverse and dismiss as to QLSC.

#### CONCLUSION

For the reasons stated above, this Court should reverse and dismiss.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of September 2010.

WIGGINS & MASTERS, P.L.L.C.



Kenneth W. Masters, WSBA 22278  
241 Madison Avenue North  
Bainbridge Is, WA 98110  
(206) 780-5033

**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 3<sup>rd</sup> day of September 2010, to the following counsel of record at the following addresses:

Counsel for Respondent

Frederick P. Corbit  
Northwest Justice Project  
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Kenneth W. Masters, WSBA 22278  
Attorney for Appellants

**FILED**  
KING COUNTY WASHINGTON

JAN 22 2010

SUPERIOR COURT CLERK  
**KARLA GABRIELSON**  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

DIANNE KLEM, as the administrator of the  
estate of Dorothy Halstien,

Plaintiff,

vs.

a Washington corporation; QUALITY LOAN  
SERVICE CORPORATION OF  
WASHINGTON, a Washington corporation;  
and QUALITY LOAN SERVICE  
CORPORATION, a California corporation,

Defendants.

No. 08-2-13989-1 SEA

VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

**QUESTION 1:** Was Quality Loan Service Corporation of Washington, which is a Washington State corporation, acting as the agent of Quality Loan Service Corporation, which is a California corporation?

ANSWER: YES (Write "yes" or "no")

*(INSTRUCTION ON DAMAGE CLAIMS: You may find that the Plaintiff suffered damages based on one or more of the claims listed below. However, the damages are not cumulative. Therefore, if you find that the Plaintiff suffered damages based on more than one of the claims, the Plaintiff's final damage award will be based on the highest damage award you find, rather than by adding together multiple damage awards.)*

**CLAIM 1 - NEGLIGENCE**

**QUESTION 2:** Was Quality Loan Service Corporation of Washington negligent?

Answer: YES (Write "yes" or "no")

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(INSTRUCTION: If you answered "no" to question 2, skip to claim 2.)

QUESTION 3: Was Quality Loan Service Corporation of Washington's negligence a proximate cause of damage to the Plaintiff?

Answer: YES (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to question 3, skip to claim 2.)

QUESTION 4: What is the amount of damages that Quality Loan Service Corporation of Washington caused to the Plaintiff based on its negligence?

ANSWER: \$ 151,912.33

QUESTION 5: Was Ms. Halstien's guardian negligent?

ANSWER: YES (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 5, skip to claim 2.)

QUESTION 6: Was the negligence of Ms. Halstien's guardian a proximate cause of the damages to Ms. Halstien's estate?

ANSWER: YES (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 6, skip to claim 2.)

QUESTION 7: Assume that 100% represents the total combined fault that proximately caused Ms. Halstien's damages. What percentage of this 100% is attributable to Ms. Halstien's guardian and what percentage of this 100% is attributable to the defendants when the percentage of fault is combined? (Your total must equal 100%, but with respect to Ms. Halstien's guardian the amount can be anywhere in between 0% and 100%).

ANSWER:

Percentage of fault attributed to Ms. Halstien's guardian	<u>50</u> %
Percentage of fault attributed to Quality Loan Service Corporation of Washington	<u>50</u> %
TOTAL:	100%

1 **CLAIM 2 – NEGLIGENT MISREPRESENTATION**

2 **QUESTION 8:** Did Quality Loan Service Corporation of Washington make a negligent  
misrepresentation?

3 Answer: NO (Write "Yes" or "No")

4 *(INSTRUCTION: If you answered "no" to question 8, skip to claim 3.)*

5 **QUESTION 9:** Was Quality Loan Service Corporation of Washington's negligent  
6 misrepresentation the proximate cause of damage to the Plaintiff?

7 Answer: \_\_\_\_\_ (Write "Yes" or "No")

8 *(INSTRUCTION: If you answered "no" to question 9, skip to claim 3.)*

9 **QUESTION 10:** What is the amount of the Plaintiff's damages that can be attributed to  
10 Quality Loan Service Corporation of Washington's negligent misrepresentation?

11 ANSWER: \$ \_\_\_\_\_

12 **QUESTION 11:** Was Ms. Halstien's guardian negligent in relying on the misrepresentation  
made by Quality Loan Service Corporation of Washington?

13 ANSWER: \_\_\_\_\_ (Write "yes" or "no")

14 *(INSTRUCTION: If you answered "no" to Question 11, skip to claim 3.)*

15 **QUESTION 12:** Was the negligent reliance of Ms. Halstien's guardian on the  
16 misrepresentation made by Quality Loan Service Corporation of Washington a proximate cause  
of the Plaintiff's damages?

17 ANSWER: \_\_\_\_\_ (Write "yes" or "no")

18 *(INSTRUCTION: If you answered "no" to Question 12, skip to claim 3.)*

19 **QUESTION 13:** Assume that 100% represents the total combined fault based on Quality  
20 Loan Service Corporation of Washington's negligent misrepresentation and the guardian's  
negligent reliance on that misrepresentation. What percentage of this 100% is attributable to Ms.  
21 Halstien's guardian and what percentage of this 100% is attributable to the defendants when the  
percentage of fault is combined? (Your total must equal 100%, but with respect to Ms. Halstien's  
guardian the amount can be anywhere in between 0% and 100%).

22 ANSWER:

23 Percentage of fault attributed to Ms. Halstien's \_\_\_\_\_ %  
24 guardian

1  
2 Percentage of fault attributed to Quality Loan  
Service Corporation of Washington

3 \_\_\_\_\_%

4 TOTAL: 100%

5 **CLAIM 3 – CONSUMER PROTECTION ACT VIOLATION**

6 **QUESTION 14:** Did Quality Loan Service Corporation of Washington violate the Consumer  
Protection Act?

7 Answer: YES (Write "Yes" or "No")

8 *(INSTRUCTION: If you answered "no" to Question 14, skip to claim 4.)*

9 **QUESTION 15:** What do you find to be the Plaintiff's damages based on the Consumer  
10 Protection Act violation?

11 ANSWER: \$ 151,912.33

12 **QUESTION 16:** In addition to actual damages, do you find that there was a violation of the  
Unfair Business Practices – Consumer Protection Act such that additional damages should be  
13 awarded?

14 ANSWER: NO (Write "yes" or "no")

15 *(INSTRUCTION: If your answer to question 16 is "yes" answer question 17. Your answer  
to question 17 cannot exceed \$10,000 or three times the total damage award. If you answered  
16 "no" to question 16, skip to claim 4.)*

17 **QUESTION 17:** What amount of additional damages should be awarded?

18 ANSWER: \$ \_\_\_\_\_

19 **CLAIM 4 – BREACH OF CONTRACT**

20 **QUESTION 18:** Did Quality Loan Service Corporation of Washington breach its contract  
with the Plaintiff?

21 Answer: YES (Write "Yes" or "No")

22 *(INSTRUCTION: If you answered "no" to Question 18, skip to claim 5.)*

1 **QUESTION 19:** What do you find to be the Plaintiff's damages based on the breach of  
contract claim?

2 ANSWER: \$ 151,912.33

3  
4 **CLAIM 5 - FAILURE TO GRANT A REASONABLE ACCOMMODATION**

5 **QUESTION 20:** Did Quality Loan Service Corporation of Washington engage in an unfair  
6 practice against Ms. Halstien by failing to grant her a reasonable accommodation?

7 Answer: NO (Write "Yes" or "No")

8 *(INSTRUCTION: If you answered "no" to Question 20, skip to the end and sign this form.)*

9 **QUESTION 21:** What do you find to be Plaintiff's damages, based on the failure to grant a  
reasonable accommodation?

10 ANSWER: \$ \_\_\_\_\_

11  
12 *(INSTRUCTION: Sign this verdict form and notify the bailiff.)*

13 DATE: 1/21/2010 Valerie Allen  
14 Presiding Juror

Rev. Code Wash. (ARCW) § 4.28.185 (2010)

§ 4.28.185. Personal service out of state -- Acts submitting person to jurisdiction of courts -  
- Saving

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state;

(b) The commission of a tortious act within this state;

(c) The ownership, use, or possession of any property whether real or personal situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting;

(e) The act of sexual intercourse within this state with respect to which a child may have been conceived;

(f) Living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party has continued to reside in this state or has continued to be a member of the armed forces stationed in this state.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

(5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

(6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

**HISTORY:** 1977 c 39 § 1; 1975-'76 2nd ex.s. c 42 § 22; 1959 c 131 § 2.

Rev. Code Wash. (ARCW) § 61.24.010 (2007)

§ 61.24.010. Trustee, qualifications -- Successor trustee

(1) The trustee of a deed of trust under this chapter shall be:

(a) Any domestic corporation incorporated under Title 23B, 30, 31, 32, or 33 RCW of which at least one officer is a Washington resident; or

(b) Any title insurance company authorized to insure title to real property under the laws of this state, or its agents; or

(c) Any attorney who is an active member of the Washington state bar association at the time the attorney is named trustee; or

(d) Any professional corporation incorporated under chapter 18.100 RCW, any professional limited liability company formed under chapter 25.15 RCW, any general partnership, including limited liability partnerships, formed under chapter 25.04 RCW, all of whose shareholders, members, or partners, respectively, are either licensed attorneys or entities, provided all of the owners of those entities are licensed attorneys, or any domestic corporation wholly owned by any of the entities under this subsection (1)(d); or

(e) Any agency or instrumentality of the United States government; or

(f) Any national bank, savings bank, or savings and loan association chartered under the laws of the United States.

(2) The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

**HISTORY:** 1998 c 295 § 2; 1991 c 72 § 58; 1987 c 352 § 1; 1981 c 161 § 1; 1975 1st ex.s. c 129 § 1; 1965 c 74 § 1.

§ 61.24.040. Foreclosure and sale -- Notice of sale

A deed of trust foreclosed under this chapter shall be foreclosed as follows:

(1) At least ninety days before the sale, the trustee shall:

(a) Record a notice in the form described in RCW 61.24.040(1)(f) in the office of the auditor in each county in which the deed of trust is recorded;

(b) To the extent the trustee elects to foreclose its lien or interest, or the beneficiary elects to preserve its right to seek a deficiency judgment against a borrower or grantor under RCW 61.24.100(3)(a), and if their addresses are stated in a recorded instrument evidencing their interest, lien, or claim of lien, or an amendment thereto, or are otherwise known to the trustee, cause a copy of the notice of sale described in RCW 61.24.040(1)(f) to be transmitted by both first class and either certified or registered mail, return receipt requested, to the following persons or their legal representatives, if any, at such address:

(i) The borrower and grantor;

(ii) The beneficiary of any deed of trust or mortgagee of any mortgage, or any person who has a lien or claim of lien against the property, that was recorded subsequent to the recordation of the deed of trust being foreclosed and before the recordation of the notice of sale;

(iii) The vendee in any real estate contract, the lessee in any lease, or the holder of any conveyances of any interest or estate in any portion or all of the property described in such notice, if that contract, lease, or conveyance of such interest or estate, or a memorandum or other notice thereof, was recorded after the recordation of the deed of trust being foreclosed and before the recordation of the notice of sale;

(iv) The last holder of record of any other lien against or interest in the property that is subject to a subordination to the deed of trust being foreclosed that was recorded before the recordation of the notice of sale;

(v) The last holder of record of the lien of any judgment subordinate to the deed of trust being foreclosed; and

(vi) The occupants of property consisting solely of a single-family residence, or a condominium, cooperative, or other dwelling unit in a multiplex or other building containing fewer than five residential units, whether or not the occupant's rental agreement is recorded, which notice may be a single notice addressed to "occupants" for each unit known to the trustee or beneficiary;

(c) Cause a copy of the notice of sale described in RCW 61.24.040(1)(f) to be transmitted by both first class and either certified or registered mail, return receipt requested, to the plaintiff or the plaintiff's attorney of record, in any court action to foreclose a lien or other encumbrance on all or any part of the property, provided a court action is pending and a lis pendens in connection therewith is recorded in the office of the auditor of any county in which all or part of the property is located on the date the notice is recorded;

(d) Cause a copy of the notice of sale described in RCW 61.24.040(1)(f) to be transmitted by both first class and either certified or registered mail, return receipt requested, to any person who has recorded a request for notice in accordance with RCW 61.24.045, at the address specified in such person's most recently recorded request for notice;

(e) Cause a copy of the notice of sale described in RCW 61.24.040(1)(f) to be posted in a conspicuous place on the property, or in lieu of posting, cause a copy of said notice to be served upon any occupant of the property;

(f) The notice shall be in substantially the following form:

## NOTICE OF TRUSTEE'S SALE

### I.

NOTICE IS HEREBY GIVEN that the undersigned Trustee will on the ... day of ....., ....., at the hour of .... o'clock ... M. at ..... [street address and location if inside a building] in the City of ....., State of Washington, sell at public auction to the highest and best bidder, payable at the time of sale, the following described real property, situated in the County(ies) of ....., State of Washington, to-wit:

[If any personal property is to be included in the trustee's sale, include a description that reasonably identifies such personal property]

which is subject to that certain Deed of Trust dated ....., ....., recorded ....., ....., under Auditor's File No. ....., records of .... County, Washington, from ....., as Grantor, to ....., as Trustee, to secure an obligation in favor of ....., as Beneficiary, the beneficial interest in which was assigned by ....., under an Assignment recorded under Auditor's File No. .... [Include recording information for all counties if the Deed of Trust is recorded in more than one county.]

### II.

No action commenced by the Beneficiary of the Deed of Trust is now pending to seek satisfaction of the obligation in any Court by reason of the Borrower's or Grantor's default on the obligation secured by the Deed of Trust.

[If there is another action pending to foreclose other security for all or part of the same debt, qualify the statement and identify the action.]

### III.

The default(s) for which this foreclosure is made is/are as follows:

[If default is for other than payment of money, set forth the particulars]

Failure to pay when due the following amounts which are now in arrears:

IV.

The sum owing on the obligation secured by the Deed of Trust is: Principal \$ ....., together with interest as provided in the note or other instrument secured from the .... day of ....., ....., and such other costs and fees as are due under the note or other instrument secured, and as are provided by statute.

V.

The above-described real property will be sold to satisfy the expense of sale and the obligation secured by the Deed of Trust as provided by statute. The sale will be made without warranty, express or implied, regarding title, possession, or encumbrances on the ... day of ....., .... The default(s) referred to in paragraph III must be cured by the ... day of ....., .... (11 days before the sale date), to cause a discontinuance of the sale. The sale will be discontinued and terminated if at any time on or before the ... day of ....., .... (11 days before the sale date), the default(s) as set forth in paragraph III is/are cured and the Trustee's fees and costs are paid. The sale may be terminated any time after the ... day of ....., ... (11 days before the sale date), and before the sale by the Borrower, Grantor, any Guarantor, or the holder of any recorded junior lien or encumbrance paying the entire principal and interest secured by the Deed of Trust, plus costs, fees, and advances, if any, made pursuant to the terms of the obligation and/or Deed of Trust, and curing all other defaults.

VI.

A written notice of default was transmitted by the Beneficiary or Trustee to the Borrower and Grantor at the following addresses:

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.....  
.....

by both first class and certified mail on the .... day of ....., ...., proof of which is in the possession of the Trustee; and the Borrower and Grantor were personally served on the .... day of ....., ...., with said written notice of default or the written notice of default was posted in a conspicuous place on the real property described in paragraph I above, and the Trustee has possession of proof of such service or posting.

VII.

The Trustee whose name and address are set forth below will provide in writing to anyone requesting it, a statement of all costs and fees due at any time prior to the sale.

VIII.

The effect of the sale will be to deprive the Grantor and all those who hold by, through or under the Grantor of all their interest in the above-described property.

IX.

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

[Add Part X to this notice if applicable under RCW 61.24.040(9).]

.....  
....., Trustee

.....  
..... Address

.....  
..... Phone

[Acknowledgment]

(2) In addition to providing the borrower and grantor the notice of sale described in RCW 61.24.040(1)(f), the trustee shall include with the copy of the notice which is mailed to the grantor, a statement to the grantor in substantially the following form:

NOTICE OF FORECLOSURE  
Pursuant to the Revised Code of Washington,  
Chapter 61.24 RCW

The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to ....., the Beneficiary of your Deed of Trust and owner of the

obligation secured thereby. Unless the default(s) is/are cured, your property will be sold at auction on the .... day of ....., ....

To cure the default(s), you must bring the payments current, cure any other defaults, and pay accrued late charges and other costs, advances, and attorneys' fees as set forth below by the .... day of ....., .... [11 days before the sale date]. To date, these arrears and costs are as follows:

	Currently due to reinstate on . . . . . . . . . .	Estimated amount that will be due to reinstate on . . . . . . . . . . (11 days before the date set for sale)
Delinquent payments , in the amount of \$ /mo.:	\$.....	\$.....
Late charges in the total amount of:	\$.....	\$.....
		Estimated Amounts
Attorneys' fees:	\$.....	\$.....
Trustee's fee:	\$.....	\$.....
Trustee's expenses: (Itemization)		
Title report	\$.....	\$.....
Recording fees	\$.....	\$.....
Service/Posting of Notices	\$.....	\$.....
Postage/Copying expense	\$.....	\$.....
Publication	\$.....	\$.....
Telephone charges	\$.....	\$.....
Inspection fees	\$.....	\$.....
.....	\$.....	\$.....
.....	\$.....	\$.....
<b>TOTALS</b>	<b>\$.....</b>	<b>\$.....</b>

As to the defaults which do not involve payment of money to the Beneficiary of your Deed of Trust, you must cure each such default. Listed below are the defaults which do not involve payment of money to the Beneficiary of your Deed of Trust. Opposite each such listed default is a brief description of the action necessary to cure the default and a description of the documentation necessary to show that the default has been cured.

Default	Description of Action Required to Cure and Documentation Necessary to Show Cure
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

.....

You may reinstate your Deed of Trust and the obligation secured thereby at any time up to and including the .... day of ....., .... [11 days before the sale date], by paying the amount set forth or estimated above and by curing any other defaults described above. Of course, as time passes other payments may become due, and any further payments coming due and any additional late charges must be added to your reinstating payment. Any new defaults not involving payment of money that occur after the date of this notice must also be cured in order to effect reinstatement. In addition, because some of the charges can only be estimated at this time, and because the amount necessary to reinstate may include presently unknown expenditures required to preserve the property or to comply with state or local law, it will be necessary for you to contact the Trustee before the time you tender reinstatement so that you may be advised of the exact amount you will be required to pay. Tender of payment or performance must be made to: ....., whose address is ....., telephone ( ) ..... AFTER THE ... DAY OF ....., ....., YOU MAY NOT REINSTATE YOUR DEED OF TRUST BY PAYING THE BACK PAYMENTS AND COSTS AND FEES AND CURING THE OTHER DEFAULTS AS OUTLINED ABOVE. In such a case, you will only be able to stop the sale by paying, before the sale, the total principal balance (\$ .....) plus accrued interest, costs and advances, if any, made pursuant to the terms of the documents and by curing the other defaults as outlined above.

You may contest this default by initiating court action in the Superior Court of the county in which the sale is to be held. In such action, you may raise any legitimate defenses you have to this default. A copy of your Deed of Trust and documents evidencing the obligation secured thereby are enclosed. You may wish to consult a lawyer. Legal action on your part may prevent or restrain the sale, but only if you persuade the court of the merits of your defense.

The court may grant a restraining order or injunction to restrain a trustee's sale pursuant to RCW 61.24.130 upon five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. This notice shall include copies of all pleadings and related documents to be given to the judge. Notice and other process may be served on the trustee at:

NAME: .....

ADDRESS: .....

.....

TELEPHONE NUMBER: .....

If you do not reinstate the secured obligation and your Deed of Trust in the manner set forth above, or if you do not succeed in restraining the sale by court action, your property will be sold. The effect of such sale will be to deprive you and all those who hold by, through or under you of all interest in the property;

(3) In addition, the trustee shall cause a copy of the notice of sale described in RCW 61.24.040(1)(f) (excluding the acknowledgment) to be published in a legal newspaper in

each county in which the property or any part thereof is situated, once on or between the thirty-fifth and twenty-eighth day before the date of sale, and once on or between the fourteenth and seventh day before the date of sale;

(4) On the date and at the time designated in the notice of sale, the trustee or its authorized agent shall sell the property at public auction to the highest bidder. The trustee may sell the property in gross or in parcels as the trustee shall deem most advantageous;

(5) The place of sale shall be at any designated public place within the county where the property is located and if the property is in more than one county, the sale may be in any of the counties where the property is located. The sale shall be on Friday, or if Friday is a legal holiday on the following Monday, and during the hours set by statute for the conduct of sales of real estate at execution;

(6) The trustee may for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days by a public proclamation at the time and place fixed for sale in the notice of sale or, alternatively, by giving notice of the time and place of the postponed sale in the manner and to the persons specified in RCW 61.24.040(1) (b), (c), (d), and (e) and publishing a copy of such notice once in the newspaper(s) described in RCW 61.24.040(3), more than seven days before the date fixed for sale in the notice of sale. No other notice of the postponed sale need be given;

(7) The purchaser shall forthwith pay the price bid and on payment the trustee shall execute to the purchaser its deed; the deed shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value, except that these recitals shall not affect the lien or interest of any person entitled to notice under RCW 61.24.040(1), if the trustee fails to give the required notice to such person. In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding;

(8) The sale as authorized under this chapter shall not take place less than one hundred ninety days from the date of default in any of the obligations secured.

(9) If the trustee elects to foreclose the interest of any occupant or tenant of property comprised solely of a single-family residence, or a condominium, cooperative, or other dwelling unit in a multiplex or other building containing fewer than five residential units, the following notice shall be included as Part X of the Notice of Trustee's Sale:

X.

#### NOTICE TO OCCUPANTS OR TENANTS

The purchaser at the trustee's sale is entitled to possession of the property on the 20th

day following the sale, as against the grantor under the deed of trust (the owner) and anyone having an interest junior to the deed of trust, including occupants and tenants. After the 20th day following the sale the purchaser has the right to evict occupants and tenants by summary proceedings under the unlawful detainer act, chapter 59.12 RCW.

(10) Only one copy of all notices required by this chapter need be given to a person who is both the borrower and the grantor. All notices required by this chapter that are given to a general partnership are deemed given to each of its general partners, unless otherwise agreed by the parties.

**HISTORY:** 1998 c 295 § 5; 1989 c 361 § 1; 1987 c 352 § 3; 1985 c 193 § 4; 1981 c 161 § 3; 1975 1st ex.s. c 129 § 4; 1967 c 30 § 1; 1965 c 74 § 4.

Rev. Code Wash. (ARCW) § 61.24.060 (2007)

§ 61.24.060. Rights and remedies of trustee's sale purchaser

The purchaser at the trustee's sale shall be entitled to possession of the property on the twentieth day following the sale, as against the grantor under the deed of trust and anyone having an interest junior to the deed of trust, including occupants and tenants, who were given all of the notices to which they were entitled under this chapter. The purchaser shall also have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.

**HISTORY:** 1998 c 295 § 8; 1967 c 30 § 2; 1965 c 74 § 6.

§ 61.24.130. Restraint of sale by trustee -- Conditions -- Notice

(1) Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper ground, a trustee's sale. The court shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed:

(a) In the case of default in making the periodic payment of principal, interest, and reserves, such sums shall be the periodic payment of principal, interest, and reserves paid to the clerk of the court every thirty days.

(b) In the case of default in making payment of an obligation then fully payable by its terms, such sums shall be the amount of interest accruing monthly on said obligation at the nondefault rate, paid to the clerk of the court every thirty days.

In the case of default in performance of any nonmonetary obligation secured by the deed of trust, the court shall impose such conditions as it deems just.

In addition, the court may condition granting the restraining order or injunction upon the giving of security by the applicant, in such form and amount as the court deems proper, for the payment of such costs and damages, including attorneys' fees, as may be later found by the court to have been incurred or suffered by any party by reason of the restraining order or injunction. The court may consider, upon proper showing, the grantor's equity in the property in determining the amount of said security.

(2) No court may grant a restraining order or injunction to restrain a trustee's sale unless the person seeking the restraint gives five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. This notice shall include copies of all pleadings and related documents to be given to the judge. No judge may act upon such application unless it is accompanied by proof, evidenced by return of a sheriff, the sheriff's deputy, or by any person eighteen years of age or over who is competent to be a witness, that the notice has been served on the trustee.

(3) If the restraining order or injunction is dissolved after the date of the trustee's sale set forth in the notice as provided in RCW 61.24.040(1)(f), the court granting such restraining order or injunction, or before whom the order or injunction is returnable, shall, at the request of the trustee, set a new sale date which shall be not less than forty-five days from the date of the order dissolving the restraining order. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (f) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in which the property or any part thereof is situated once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

(4) If a trustee's sale has been stayed as a result of the filing of a petition in federal bankruptcy court and an order is entered in federal bankruptcy court granting relief from the stay or closing or dismissing the case, or discharging the debtor with the effect of removing the stay, the trustee may set a new sale date which shall not be less than forty-five days after the date of the bankruptcy court's order. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (f) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in which the property or any part thereof is situated, once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

(5) Subsections (3) and (4) of this section are permissive only and do not prohibit the trustee from proceeding with a trustee's sale following termination of any injunction or stay on any date to which such sale has been properly continued in accordance with RCW 61.24.040(6).

**HISTORY:** 1998 c 295 § 14; 1987 c 352 § 5; 1981 c 161 § 8; 1975 1st ex.s. c 129 § 6; 1965 c 74 § 13.