

No. 46599-0-II

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

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ZENAIDA MONTOYA

Appellant

v.

BANK OF AMERICA HOME LOANS,  
f/k/a COUNTRYWIDE HOME LOANS, INC.,  
RECONTRUST CO., N.A.,  
ERIN LEE PHILLIPS and JOHN DOE PHILLIPS, husband and wife

Respondents.

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Appeal from Superior Court for Clallam County  
The Honorable Christopher Melly and the Honorable Erik Rohrer

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APPELLANTS' OPENING BRIEF

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## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	4
II. ASSIGNMENTS OF ERROR	5
III. STATEMENT OF THE CASE	5
IV. SUMMARY OF ARGUMENT	10
V. LEGAL ARGUMENT	10
A. <u>Standard of Review</u>	10
1. CR 12(b)(6) Motion to Dismiss	10
2. CR 41(b)(1)	12
3. CR 56 Motion for Summary Judgment	12
B. <u>Dismissal on Summary Judgment of Appellant’s Claim         for Violation of the Consumer Protection Act, RCW         §19.86 et seq. Was in Error</u>	13
1. <u>Unfair and Deceptive Acts Were Caused By Defendants             That Occurred in Trade and Commerce</u>	13
2. <u>Defendants’ Acts Impact the Public Interest</u>	16
3. <u>Appellant Suffered Injury and Damages from             Defendants’ Acts</u>	17
C. <u>The Court Was In Error in Dismissing Appellant’s Claims         For Want of Prosecution</u>	19
VI. CONCLUSION	20

## TABLE OF AUTHORITIES

### CASES

<i>Ashcroft v. Iqbal</i> , 129 S. Ct 1937, 1949, 173 L. Ed. 2d 868 (2009).	11
<i>Bain v. Metro. Mortg. Group, Inc.</i> , 175 Wn.2d 83, 285 P3d 34 (2012).	17
<i>Bavand v. OneWest Bank</i> , 176 Wn. App. 475, 309 P.3d 636 (2013)	12, 17

<i>Berrocal v. Fernandez</i> , 155 Wn.2d 585, 590, 121 P.2d 82 (2005)	12
<i>Bravo v. Dolsen</i> , 125 Wash.2d 745, 750, 888 P.2d 147 (1995)	12
<i>Corvello v. Wells Fargo Bank</i> , No. 11-16234, No. 11-16242, 2013 WL 4017279 at *1 (9th Cir. Aug. 8, 2013)	14
<i>Cutler v. Phillips Pet. Co.</i> , 124 Wn.2d 749, 755, 881 P.2d 219 (1994).	10
<i>Davenport v. Washington Education Association</i> , 147 Wn. App. 704, 715, 197 P.3d 686 (2008).	11, 12
<i>Frias v. Asset Foreclosure Services, Inc.</i> , 334 P.3d 529, 181 Wn.2d 412 (Wash. 2014 En Banc)	15, 16, 18
<i>Hangman Ridge Training Stables v. Safeco</i> , 105 Wn.2d 778, 719 P.2d 531 (1986)	13, 16, 17
<i>Holiday Resort Community Ass'n. v. Echo Lake Associates, LLC.</i> , 134 Wn.App. 210, 218, 135 P.3d 499 (2006).	11
<i>Ivan's Tire Service v. Goodyear Tire</i> , 10 Wn.App. 110, 517 P.2d 229 (1973)	
<i>Klem v. Washington Mutual Bank</i> , 176 Wn.2d 771, 295 P.3d 1179 (2013).	15
<i>Panag v. Farmer's Insurance</i> , 166 Wn.2d 27, 203 P.3d 885 (2009).	17
<i>Postema v. Pollution Control Hearings Board</i> , 142 Wn.2d. 68, 122, 11 P.3d 726 (2000).	11
<i>Short v. Demopolis</i> , 103 Wn.2d 52, 691 P.2d 163 (1984).	14
<i>State v. Kaiser</i> , 161 Wn.App. 705, 254 P.3d 850 (2011)	11
<i>Suleiman v. Lasher</i> , 48 Wn. App. 373, 376, 739 P.2d 712, <i>review denied</i> , 109 Wn.2d 1005 (1987).	11
<i>Tenore v. AT &amp; T Wireless Servs.</i> , 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).	11
<i>Walker v. Quality Loan Service Corp.</i> , 176 Wn. App. 294, 308 P.3d 716 (2013).	15, 16
<i>Watson v. Emard</i> , 267 P. 3d 1048, 165 Wash. App. 691 (2011).	12

**STATUTES**

RCW 19.86 *et seq.* 13  
RCW 19.86.920 14  
RCW 61.24.030(6) 18

**RULES**

CR 12(b)(6) 10, 11, 12  
CR 41(b)(1) 10, 12, 20  
CR 56(c) 12

**REGUALTIONS**

12 C.F.R. 226.23(b)(1) 7

**I. INTRODUCTION**

Respondents engaged in a predatory loan scheme by contacting Appellant and pressuring her to refinance her mortgage loan. Appellant was deceived by Respondents in entering into a loan modification that was an interest-only loan when she was informed that she would be obtaining a conventional fixed-rate 30-year loan. When she could not make the payments, Recontrust, and unlawful foreclosure trustee in Washington, began foreclosure proceedings against Appellant. Although she filed this lawsuit and the Respondents ultimately did not pursue the trustee’s sale, she suffered damage to credit and out of pocket expenses attempting to stop the foreclosure on her property. She never would have agreed to an interest-only loan. Foreclosure is now still a looming possibility. Appellant is an elderly woman who was not well-versed in mortgage transactions and was taken advantage of

by an unfair and deceptive lender, which may ultimately result in depriving her of her home. Some claims in this case were dismissed on summary judgment and the case was ultimately wrongfully dismissed for want of prosecution. The court should reverse these dismissals and remand the case to Superior Court.

## **II. ASSIGNMENTS OF ERROR**

1. The court was in error in granting summary judgment on Appellant's Consumer Protection Act Claim.
2. The court was in error in dismissing Appellant's claim for want of prosecution.

### **Issues Pertaining to Assignments of Error**

1. Whether the court should have denied summary judgment on Appellant's claims against ReconTrust for failing to maintain an office in Washington. (Assignment of Error No. 1).
2. Whether the court should have denied summary judgment on Appellant's claims that she was the victim of Respondents' predatory loan scheme and their unfair and deceptive acts in the course of the loan modification process. (Assignment of Error No. 1).
3. Whether Appellant met the requirements to keep her case open in Superior Court and avoid dismissal for want of prosecution. (Assignment of Error No. 2).

## **III. STATEMENT OF THE CASE**

On April 4, 2007, Erin Phillips from Countrywide sent a solicitation letter to Appellant and later made a solicitation phone call to her. At the time of Phillips' contact with Appellant, Appellant was a single 63-year old woman with modest means earning a Social Security Income of approximately \$680.00 per month, supplemented by occasional gifts from family members. (CP 88-90).

On May 23, 2007, Appellant borrowed money from Countrywide in order to refinance her residential mortgage loan. She executed a Deed of Trust securing the loan. (CP 690-708). The Deed of Trust wrongfully and fraudulently named Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary to secure the promissory note to Countrywide. In the months leading up to the transaction in question, Appellant sought information on selling her home so she could obtain the equity therein. Repairing and maintaining the home had become a financial burden.

Countrywide, through its agent Phillips, filled out the Residential Loan Application on behalf of Appellant on April 30, 2007. (CP 63-66, 130). In the application, Ms. Phillips marked only one form of employment for Appellant, "Grandma's Best," which is the name Appellant used for her home-based business of occasionally baking cupcakes for local children's birthday parties, office parties, and other events. (CP 63). Phillips then falsely inflated Appellant's monthly income when she stated \$3,000.00 income from a second job. (CP 64). This alleged second job is not clarified in the Application, or was the statement supported with tax returns or financial statements of any kind. Phillips fabricated all of this information. Phillips further stated that Appellant had \$50,000.00 in "other assets," which were not itemized as required by the instructions on the Application form. (CP 64). In fact, the other asset listed by Phillips was the future \$48,595.43 check dated June 6, 2007, that Countrywide later issued through escrow after approval of the Application, and the final

home loan agreement was completed. This was also a complete lie and deception.

Phillips and Countrywide lied concerning the income and assets in order to insure that Appellant would qualify for a loan she could not actually afford or normally would have been approved for. This process was widely encouraged and practiced by Countrywide and is well known to have been a major factor of the current worldwide economic collapse. The Truth-In-Lending disclosure statement was tainted by the false Application. The false information in the Application was applied to create an annual percentage rate, and finance charge (which are required for honest disclosure purposes on all Truth in Lending Disclosure Statements), but the statements are inherently dishonest being based on false application numbers.

On or about May 23, 2007, all closing papers, agreements, and disclosures were brought to Appellant's home by an agent notary of Countrywide who claimed to Appellant at that time that he was pressured for time. He then proceeded to quickly flash the paper in front of Appellant, showing only where Appellant was to sign, not giving her time or opportunity to read the papers, and hiding the information particularly found on the Truth In Lending Disclosure Statement.

Appellant only received one copy of her notice of right to cancel, though two are required by federal regulation (12 C.F.R. 226.23(b)(1)), and on the very document Countrywide prepared for Appellant. The type of loan that was negotiated between Appellant and Countrywide and for which Appellant was

wrongly approved changed in name from a “Conventional Uninsured Conf Fixed 30 F&E IF 10/20” loan to an “Interest-Only Loan” marked on the billing statements. Because of this discrepancy, Appellant called Phillips to question how this type of loan could exist when she understood that her payments were “fixed.” Phillips responded that the lack of disclosure on the payment plan must have been an “oversight” on her part.

Appellant expressed a desire to rescind her loan. Phillips responded by telling Appellant that they would not refund her \$310 appraisal fee if she cancelled. Appellant felt trapped, and did not rescind based on Phillips’ comment. Phillips followed up her comment by stating that if Plaintiff did not like the plan she could merely refinance her loan again in the future.

Approximately one week after the finalization of this loan, Appellant called Customer Service at Countrywide. A representative with Customer Service explained that Appellant would only be paying the interest for a period for 120 payments (10 years), at which time her payment amount would increase from \$843.75 per month to \$1,184.10 for a period of 239 payments (approximately 24 years), with an additional payment of \$1,185.68 at the end. This information was not explained to Appellant who would not have agreed to such an arrangement had she been told about it up front. She could not understand how it could be determined to be financially sound that her payments would augment by approximately \$340 when she reached age 73, was living on Social Security, and was already experiencing health problems. The monthly payments exceed any possible monthly revenue she might have.

At some point in March 2009, Appellant was unable to continue making payments. On or about July 7, 2009, ReconTrust sent a Notice of Default to Appellant threatening foreclosure. This notice also suggested, among other things, Appellant sell her property to pay off her loan, or alternatively refinance with a new loan. The house is worth less now than the loan balance, also known as “underwater.”

Appellant began an approximately year long process of trying to work out an agreement for home modification with Bank of America Home Loans, but has succeeded only in earning more late fees, etc. (CP 106). Bank of America Home Loans was not able to approve her for home modification and stalled resolution. On March 31, 2010, ReconTrust and Bank of America Home Loans sent notice of foreclosure and a trustee’s sale to be held on July 2, 2010. This notice required payments totaling \$16,012.14 by June 21, 2010 in order to reinstate the account.

Appellant submitted a letter to the court on the record on May 12, 2014 (CP 143-144) requesting the assignment of a lawyer to aid low income plaintiffs and explaining the facts of the case. Appellant also submitted a letter to the court on the record on May 21, 2014 (CP 141) responding to the court’s request for Appellant to communicate with an assistant Attorney General regarding the appointment of a legal aid attorney and referral to the Consumer Protection Division of the AG’s office. Appellant requested in this letter an extension of time to file a jury demand. The request was made because her counsel of record withdrew from the case. (CP 111-112). This letter also informed the court that

Appellant intended to do whatever she could to continue pursuing her claims. Finally, Appellant submitted a letter to the court on the record on July 18, 2014 (CP 49) which included her appearance *pro se* and adding Bank of New York Mellon as a defendant, as well as a Reply to the Motion to Dismiss for want of prosecution and additional information for the complaint for fraud.

#### **IV. SUMMARY OF ARGUMENT**

On May 21, 2013 the court dismissed some of Appellant's claims on a summary judgment motion. On August 4, 2014, the court dismissed Appellant's case for "want of prosecution," even though her lawyers withdrew from the case and she represented herself *pro se* during the time in question where she was allegedly not prosecuting her case. The court therefore was in error to dismiss under CR 41(b)(1). The court was in error in dismissing Appellant's Consumer Protection Act claims against Respondents on summary judgment because clear evidence was presented meeting all the elements of a Consumer Protection Act claim. The court was also in error in dismissing Appellant's case for want of prosecution when she made it clear that she intended to move the case forward.

#### **V. LEGAL ARGUMENT**

##### **A. Standard of Review**

##### **1. *CR 12(b)(6) Motion to Dismiss***

For purposes of a 12(b)(6) motion, the court presumes the allegations in the complaint to be true. *Cutler v. Phillips Pet. Co.*, 124 Wn.2d 749, 755, 881 P.2d 219 (1994). Dismissal of actions under CR 12 is appropriate only if it appears beyond a

doubt that the Plaintiff can prove no set of facts, consistent with the complaint, which would entitle the Plaintiff to relief. *Holiday Resort Community Ass'n. v. Echo Lake Associates, LLC*, 134 Wn. App. 210, 218, 135 P.3d 499 (2006); *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712, review denied, 109 Wn.2d 1005 (1987). A CR 12(b)(6) motion should be granted “sparingly and with care” and “only in the unusual case in which plaintiff includes factual allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Holiday Resort Community Ass'n.* at 218, citing *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).

A claim is factually plausible when it contains factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 129 S. Ct 1937, 1949, 173 L. Ed. 2d 868 (2009). Washington courts hold that “we must take the facts alleged in the complaint, as well as hypothetical facts consistent therewith, in the light most favorable to the nonmoving party. *Davenport v. Washington Education Association*, 147 Wn. App. 704, 715, 197 P.3d 686 (2008), citing *Postema v. Pollution Control Hearings Board*, 142 Wn.2d. 68, 122, 11 P.3d 726 (2000). Under CR 12(b)(6), a motion to dismiss for failure to state a claim “should be granted only if the plaintiff cannot prove any set of facts which would justify recovery.” *Postema*, 142 Wn.2d at 122. [A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim.” *Bravo v. Dolsen*, 125 Wash.2d 745, 750, 888 P.2d 147 (1995). Such motions "should be granted only ‘sparingly and with care.’” *Bavand v.*

*OneWest Bank, FSB*, 309 P.3d 636, 176 Wn.App. 475, 485 (2013). The court reviews “questions of fact by taking the facts and inferences, both real and hypothetical, in the light most favorable to the Plaintiff.” *Davenport*, 147 Wn. App. at 715.

## **2. *Standard for CR 41(b)(1)***

A court may dismiss a case for want of prosecution by the plaintiff as provided in CR 41(b)(1), which states: “Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff...neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days’ notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.”

## **3. *CR 56(c) Summary Judgment Standard***

Summary judgment is only appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c). In deciding on a motion for summary judgment, the court must consider all facts, and reasonable inferences from those facts, in the light most favorable to the nonmoving party. *Watson v. Emard*, 267 P.3d 1048, 165 Wn.App. 691, 697 (2011), citing *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.2d 82 (2005). Thus, if there are material facts in the case that remain at issue, construing those facts in the light most favorable to the non-moving party, the court may not grant summary judgment.

There are numerous genuine issues of material fact that remain in this case. The foreclosure proceedings were initiated by defendants when none of them were authorized to act as a beneficiary or Trustee. The facts show that Countrywide, Bank of America Home Loans, MERS, and ReconTrust defrauded Appellant, and wrongfully attempted to foreclose on her property. The facts on all these claims are in dispute. As a matter of law, the court should conclude that summary judgment was inappropriate.

**B. Dismissal on Summary Judgment of a Claim for Violation of the Consumer Protection Act, RCW § 19.86 et seq. Was In Error**

The Consumer Protection Act (CPA), RCW 19.86 *et seq.*, prohibits unfair or deceptive business practices, and claims are analyzed under the five elements of *Hangman Ridge Training Stables v. Safeco*, 105 Wn.2d 778, 719 P.2d 531 (1986): (1) an unfair or deceptive act or practice (2) caused by the defendant (3) that occurred in trade or commerce (4) which impacted public interest (5) and caused injury to the plaintiffs in their business or property. *Id.* at 780.

1. *Unfair and Deceptive Acts Were Caused by Defendants That Occurred in Trade and Commerce*

The CPA does not define “unfair” or “deceptive.” Instead, courts have developed standards on a case-by-case basis. *Ivan’s Tire Service v. Goodyear Tire*, 10 Wn.App. 110, 517 P.2d 229 (1973). “To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has the capacity to deceive a substantial portion of the public. Even accurate information may be deceptive if there is a representation, omission or practice that is likely to mislead. Misrepresentation of the material

terms of a transaction or the failure to disclose material terms violates the CPA. Whether particular actions are deceptive is a question of law that we review de novo.” *State v. Kaiser*, 161 Wn.App. 705, 719, 254 P.3d 850 (2011). The CPA is to be “liberally construed that its beneficial purposes may be served.” RCW 19.86.920; *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984).

In 2009, the U.S. Department of the Treasury launched the Home Affordable Modification Program (HAMP) to help distressed homeowners with delinquent mortgages. This program required the Secretary of the Treasury to “implement a plan that seeks to maximize assistance for homeowners and...encourage the servicers of the underlying mortgages...to take advantage of...available programs to minimize foreclosures...” Home loan servicers signed Servicer Participation Agreements with the Treasury that entitled them to \$1,000.00 for each permanent modification they made, but required them to follow Treasury guidelines and procedures.<sup>1</sup> *Corvello v. Wells Fargo Bank*, No. 11-16234, No. 11-16242, 2013 WL 4017279 at \*1 (9th Cir. Aug. 8, 2013).

The clear guidance given by Congress and supported by the Court in *Corvello* is unequivocal in that the HAMP should be implemented to maximize assistance for homeowners and gives incentives to servicers to take advantage of the program to minimize foreclosures. Appellant had the expectation that Bank of America would comply with this law. The Defendants unfairly and deceptively did just the opposite: they attempted to thwart every attempt by the Appellant to protect her interests in her home by seeking a loan modification that would make

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<sup>1</sup> Defendant Bank of America was one such servicer that signed the Servicer Participation Agreement.

her home more affordable and following the rules for applying for a loan modification by submitting the required documents in a timely manner.

The predatory loan scheme and the use of an unlawful trustee to initiate a foreclosure are also unfair and deceptive acts. The Court in *Walker v. QLS* held that violations of the Deed of Trust Act of having unlawful beneficiaries appointing unlawful successor trustees to initiate foreclosure proceedings, and which rendered the foreclosure void or voidable, may constitute unfair and deceptive acts under the CPA. *Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294, 308 P.3d 716 (2013). It is clear from the *Bain* decision that a party cannot contract around a statute. If an unlawful successor trustee (Recontrust) initiates foreclosure proceedings, this constitutes an unfair and deceptive act under the CPA. In *Klem v. Washington Mutual Bank*, the Supreme Court held that “a claim under the Washington CPA may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.” *Klem v. Washington Mutual Bank*, 295 P.3d 1179, 176 Wn.2d 771 (2013).

While a borrower does not have a claim for damages under the Deed of Trust Act if no foreclosure has occurred, the borrower does still have a claim under the CPA for unlawful behavior, even if no foreclosure has occurred. *Frias v. Asset Foreclosure Services, Inc.*, 334 P.3d 529, 181 Wn.2d 412 (2014). In *Walker v. Quality Loan Services*, Mr. Walker raised claims that the Trustee and the servicer violated the CPA. The court in that case found: “(1) Quality sent a notice of

default to Mr. Walker even though it did not meet the requirements of a successor trustee; (2) Quality and Select facilitated a deceptive and misleading effort to wrongfully execute and record documents that contained false statements related to the Appointment of Successor Trustee and Assignment of Deed of Trust; ... and as a result of this conduct, Quality and Select knew that their conduct amounted to wrongful foreclosure...” *Walker v. Quality Loan Service Corp. of Washington*, 176 Wn.App. 294 (2013). These are virtually identical facts as the present case.

## 2. Defendants’ Acts Impact the Public Interest

There is ample documentation and a remaining genuine issue of material fact that the acts of Bank of America, MERS (who was not a defendant in the case), Recontrust, and Countrywide that caused harm to the Appellant are acts that impact the public interest. A plaintiff may show that a deceptive commercial act or practice has affected the public interest by satisfying any of five different factors.

(1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it? *Hangman Ridge*, 105 Wn.2d at 790

In *Bavand*, the court held that “In the context of a similar CPA claim based on MERS’s representation that it was a beneficiary, the *Bain* court noted that ‘there is considerable evidence that MERS is involved with an enormous number of mortgages in the country (and our state)...’ It then concluded that ‘[i]f in fact

the language is unfair or deceptive, it would have a broad impact. This element is also presumptively met.” *Bain*, 175 Wn.2d at 118, *Bavand v. OneWest Bank*, 176 Wn.App. 475, 506-507, 309 P.3d 636 (2013). Here, as in *Bavand*, “MERS’s status as the named beneficiary in this deed of trust presumptively meets the public interest element of a CPA claim. As in *Bain*, the alleged acts of MERS were done in the course of its business, and MERS listing as a “beneficiary” was a generalized practice that was a course of conduct repeated in hundreds of other deeds of trust.” *Bavand*, 176 Wn.App. at 507. Bank of America Home Loans and Countrywide ratified the acts of MERS as a member of MERS, and should be liable for naming a fraudulent beneficiary on the deed of trust.

### 3. Appellant Suffered Damages From Defendants’ Acts

As the court in *Hangman Ridge* concluded, “the injury need not be great, but it must be established.” But, as the Supreme Court noted, “‘Injury’ is distinct from ‘damages.’” Monetary damages need not be proved; unquantifiable damages may suffice.” *Panag v. Farmers Insurance Co. of Washington*, 166 Wn.2d 27, 58, 204 P.3d 885 (2009), quoted in *Bavand* at 508. Because of the unfair and deceptive acts of Countrywide, Bank of America, Recontrust, and MERS, Appellant suffered damage to credit, late fees, and potential loss of her home to foreclosure, which is still a looming possibility. Since Appellant can demonstrate evidence for all elements of a CPA claim, summary judgment should have been denied as to all defendants on this claim.

Recontrust cannot be a trustee on a deed of trust in Washington because it did not maintain a physical presence in the state with a Washington telephone

number which borrowers can contact to discuss a default or a trustee's sale. The Deed of Trust Act mandates that a trustee must maintain a physical office with a telephone service at that address as a prerequisite to issuing a notice of trustee's sale. RCW 61.24.030(6).<sup>2</sup> Recontrust wholly failed to meet this requirement. In the Washington Attorney General's lawsuit against Recontrust for this very act, the AG's investigators found that the physical location used by Recontrust to effectuate trustee's sales in Washington was a location in San Diego, California, and that no physical presence could be located for Recontrust in Washington. At all times material to the present case, Recontrust failed to maintain a physical presence in Washington with a phone number that the Appellant could use to contact Recontrust to discuss a default or trustee's sale. This is a clear violation of the Deed of Trust Act, RCW 61.24.030(6).

This violation of the DTA is an unfair and deceptive act that is actionable under the CPA, even though damages may not be available under the DTA. A CPA plaintiff must establish an injury to the person's business or property. The injuries compensable under the CPA are "relatively expansive." *Frias*, 181 Wn.2d at 431. Quantifiable monetary loss is not required. *Id.* Ms. Montoya has now accrued late fees because of Bank of America's failure to provide her with a reasonable loan modification. The loan has now apparently been transferred to a company known as Bayview, although there does not appear to be an Assignment of Deed of Trust recorded in Clallam County for this transfer. Her credit has suffered because of the default on the loan and the impending

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<sup>2</sup> "(6) That prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address;"

foreclosure. She has expended attorney's fees and costs simply trying to hold the Respondents accountable under the legal options available to her. These should constitute damages and injury for purposes of the CPA.

**C. The Court Was In Error in Dismissing Appellant's Claims For Want of Prosecution**

Appellant submitted a letter to the court on the record on May 12, 2014 (CP 143-144) requesting the assignment of a lawyer to aid low income plaintiffs and explaining the facts of the case. Appellant also submitted a letter to the court on the record on May 21, 2014 (CP 141) responding to the court's request for Appellant to communicate with an assistant Attorney General regarding the appointment of a legal aid attorney and referral to the Consumer Protection Division of the AG's office. Appellant requested in this letter an extension of time to file a jury demand. The request was made because her counsel of record withdrew from the case. This letter also informed the court that Appellant intended to do whatever she could to continue pursuing her claims. Finally, Appellant submitted a letter to the court on the record on July 18, 2014 (CP 049) which included her appearance pro se and adding Bank of New York Mellon as a defendant, as well as a Reply to the Motion to Dismiss for want of prosecution and additional information for the complaint for fraud.

A court may dismiss a case for want of prosecution by the plaintiff as provided in CR 41(b)(1), which states: "Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff...neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was



**DECLARATION OF SERVICE**

I declare that a true and correct copy of Appellant's Opening Brief was served on the following as indicated below:

John A. Goldmark  
Davis Wright Tremaine LLP  
1301 Third Avenue, Suite 3200  
Seattle, WA 98101  
*Attorney for Respondent*  
Via electronic service and First Class Mail

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

Dated this 16<sup>th</sup> day of April, in Seattle, Washington

/s/ Jill J. Smith  
Jill J. Smith

**NATURAL RESOURCE LAW GROUP**

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