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STATE OF WASHINGTON

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SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiff-Petitioner,

v.

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

Defendants-Respondents.

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**AMICUS CURIAE MEMORANDUM OF  
WASHINGTON STATE BAR ASSOCIATION  
SUPPORTING REVIEW**

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ORIGINAL

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## I. INTRODUCTION

This case presents an issue of substantial public interest – whether it is an unfair or deceptive act under the Consumer Protection Act (CPA), Chap. 19.86 RCW, for a business to falsely date a document which must be notarized and filed with the county auditor as a public record. In reversing the jury’s finding of a CPA violation, the Court of Appeals overlooked the broad public importance of ensuring the accuracy of official property records. Also, the Court of Appeals did not consider RCW 42.44.080, which requires notaries to meet strict standards of conduct befitting their positions of public trust. Review should be granted to underscore that the proper functioning of the legal system depends on the honesty of notaries who are entrusted to verify the signing of legally significant documents.

As this Court said in *Werner v. Werner*:

As public officers, notaries enjoy a unique status within our legal system as the notarial seal is a mandatory legal prerequisite to the valid execution of many documents.<sup>1</sup>

This state relies extensively on notaries to verify that people are who they claim to be, and that legally significant events have occurred.

Many of the people involved in transactions requiring notaries have

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<sup>1</sup> 84 Wn.2d 360, 366, 526 P.2d 370 (1974).

limited means and may have no access to justice if misconduct occurs. This case illustrates the importance of notary integrity to vulnerable adults who cannot protect themselves and must rely on notaries to ensure that adequate notice of foreclosure has occurred. If the public cannot trust notaries to accurately state who signed documents, and when, the notary seal will cease to have any meaning.

The practice of falsely dating notarized documents is especially injurious to the public when, as here, the date of signing has legal importance. Respondent Quality Loan Service Corporation (“Quality”) admits it falsely dated a notarized notice of sale which was required to be recorded in the county auditor’s office and mailed to the borrower at least 90 days before the sale. The obvious purpose of the 90-day notice is to protect the consumer – in this case, an elderly and incapacitated woman – from losing property without a fair chance to respond. As the nation pulls out of a mortgage crisis, and in light of the fact that most people at risk of foreclosure cannot afford attorneys, this Court should use this case to draw a hard line against deception in the foreclosure process. By pre-dating the notice of sale, Quality not only hastened a foreclosure to the detriment of a vulnerable property owner, but violated the notarial misconduct statute to the detriment of our legal

system. In sum, there is substantial public interest in preventing deceptive practices by notaries and ensuring the accuracy of property records maintained for the public. For these reasons, review is warranted pursuant to RAP 13.4(b)(4), which calls for this Court to determine issues of major public interest.

## **II. INTEREST AND IDENTITY OF AMICI**

The Washington State Bar Association (WSBA) is an arm of the Washington Supreme Court. Its mission is “to serve the public and the members of the Bar, ensure the integrity of the legal profession, and to champion justice.”<sup>2</sup> WSBA’s guiding principles include promoting public confidence in the legal system.

The WSBA Amicus Curiae Brief Policy, as adopted by the Board of Governors, provides that if a matter is of “substantial interest” to the WSBA, it may appear as amicus curiae. A case is considered to be of substantial interest to the WSBA if it concerns “the effectiveness” of the legal system. The WSBA’s amicus policy is consistent with the purposes of the WSBA as set forth in GR 12.1(a)(2) (“In general, the Washington State Bar Association strives to . . . promote an effective legal system, accessible to all”), as adopted by this Court.

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<sup>2</sup> See <http://www.wsba.org/About-WSBA>.

The WSBA is interested in this case because the false dating of notarized documents undermines the effectiveness of the legal system, which relies on notaries to affirm the truth of legally significant statements. Also, WSBA believes that this case presents a vehicle to promote public confidence in the legal system, and to protect the rights of those lacking access to the justice system, by establishing that false notarization is an unfair and deceptive act subject to CPA sanctions.

### III. DISCUSSION

#### A. **Washington Agencies and Courts Rely Extensively on Notaries to Acknowledge Events, Verify Identities and Screen Applicants.**

In *Werner*, a quiet-title and negligence action, this Court held that Washington courts have personal jurisdiction over California notaries when they affix a notarized forgery to a document affecting Washington land interests. *Werner*, 84 Wn.2d at 367. Discussing this state's interest in holding non-resident notaries accountable for falsely acknowledging deeds, this Court observed that the notary's acknowledgement "is the pillar of our property rights" because "all titles depend on official records" which must bear a notary's certificate of acknowledgement. *Id.* at 366, quoting Wigmore, *Notaries Who Undermine Our Property System*, 22 Ill.L.Rev. 748, 749 (1928).

And these pillars of property become a treacherous support when they are permitted with forgery. A practice which permits forgery is as dangerous in policy as it is unsound in principle.

*Id.*

This Court stated that our entire system of title registration “hinges upon the integrity of the documents which comprise it.” *Id.* at 367. Explaining the “great importance” of the notary public in validating deeds and other legal documents, this Court cited 42 statutes which “incorporate the notarial function” as a way of ensuring that processes affecting the public are well documented. *Id.* at 366.<sup>3</sup>

Courts too, not just agencies, use notaries to ensure reliability of statements and documents. *See, e.g.*, RCW 4.12.050 (allowing parties to change judges upon submitting a notarized affidavit of prejudice); RCW 4.56.090 (requiring a notary’s acknowledgement to assign a judgment); RCW 32.04.070 (admitting certified bank records as evidence). Illustrating the heightened trust placed in notaries, RCW

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<sup>3</sup> For example, notaries have a role in applying for a marriage license (RCW 26.04.150); contesting the election of a legislator (RCW 44.04.100); selling certain absentee-owned property (RCW 11.80.130); recording title of a brand (RCW 16.57.090); recording a plat (RCW 58.17.160); applying for an employment agency’s license (RCW 19.31.100); screening bidders on city electrical projects (RCW 35.92.350); wrecking vehicles to sell parts (RCW 46.80.090); and certifying a local need for a solid waste collector (RCW 81.77.040). Some of the cited statutes and notarization requirements have been repealed since *Werner* was decided.

5.28.010 gives a notary public the same power as a judge to administer oaths and take testimony.

And while GR 13 allows declarations to be used in lieu of notarized affidavits in most court filings, there are notable exceptions. Writings requiring an acknowledgement, such as the notice of trustee's sale at issue in this case, still must be notarized. GR 13(b); RCW 61.24.040(1)(f). In sum, notaries traditionally have played an important role in ensuring the integrity of the legal system by acting as its eyes and ears in verifying facts and events.

**B. The Evidence at Trial Supports a Finding that the False Dating of the Notice of Sale Was Notarial Misconduct.**

A notarization or "notarial act" includes "taking an acknowledgement," "witnessing or attesting a signature," and "certifying that an event has occurred or an act has been performed." RCW 42.44.010(2)(a), (d) and (g). Washington notaries must perform notarial acts in accordance with state standards, including:

In certifying that an event has occurred or an act has been performed, a notary public must determine the occurrence or performance either from personal knowledge or from satisfactory evidence based upon the oath or affirmation of a credible witness personally known to the notary public.

RCW 42.44.080(7). “A notary public commits official misconduct when he or she signs a certificate evidencing a notarial act, knowing that the contents of the certificate are false.” RCW 42.44.160(1). Such misconduct is a gross misdemeanor. RCW 42.44.160(3). Similarly, California imposes penalties up to \$10,000 if a notary takes an acknowledgement without “satisfactory evidence” that the person making the acknowledgement actually executed the instrument.<sup>4</sup>

Here, a California notary employed by Quality signed and affixed his seal to an acknowledgement, appearing on a Notice of Trustee’s Sale, that the following event occurred in San Diego:

*On 11/26/2007, before me, R. Tassell, a notary public...personally appeared Seth Ott **personally known to me...to be the person(s) whose name(s) is..subscribed to the within instrument** and acknowledged to me that he...executed the same...and that by his... signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.”*

Exhibit 8, p. 3 (emphasis added). The Notice of Trustee’s Sale was drafted pursuant to RCW 61.24.040 to warn Dorothy Halstein that Quality would sell her property at an auction on February 29, 2008 because \$3,714 in payments were overdue. Exhibit 8, pp. 1, 3. The problem is that, under RCW 61.24.040(1)(f), such a notice requires a

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<sup>4</sup> Cal.Civ. Code Chap. 4, Art. 3, §1185.

notary's acknowledgement of its signing *before* it is mailed to the borrower, posted on the property and sent to the county auditor for recording. But the notary's acknowledgement of Ott's signing came one week *after* the notice had already been "sent to title to record." Exhibit 73, ¶9; Exhibit 8, p. 3. Thus, the notary could not have personally observed Ott signing the notice on November 26, 2007 because the notice had left the San Diego office by then. And there is no evidence that Quality met the RCW 42.44.080(7) requirement for the notary to "determine the occurrence" of the signing "either from personal knowledge or from satisfactory evidence based upon the oath...of a credible witness." In fact, at trial Quality admitted that Halstein's notice was falsely dated, and that employees were trained to pre-date trustee documents during the period at issue. RP 167, 354.

**C. The Court of Appeals Focused Narrowly on Whether the Deeds of Trust Act, Chap. 61.24 RCW, was Violated, and Overlooked Other Relevant Statutes.**

To prove a violation of the CPA, a plaintiff must show "that the defendant's conduct (1) was 'unfair or deceptive' (2) was 'in the conduct of trade or commerce;' (3) impacted 'the public interest;' (4) injured 'the plaintiff in his or her business or property;' and (5) was causally linked to the 'injury suffered.'" *Bishop v. Jefferson Title Co.*

*Inc.*, 107 Wn.App. 833, 849-50, 28 P.3d 802 (Div. 2, 2001).<sup>5</sup> The first element is established when an act has the capacity to deceive a substantial portion of the public, or when a statute which identifies unfair or deceptive practices has been violated. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785-86, 719 P.2d 531 (1986). Whether particular acts gave rise to a CPA violation is reviewable as a question of law. *Bishop*, 107 Wn.App. at 850. This Court may affirm a verdict on any theory established by the pleadings and supported by proof, even if the trial court did not consider it.<sup>6</sup>

Here, the jury found that Quality committed a CPA violation. Slip Op. p. 7. The Court of Appeals reversed that finding in part because the Deeds of Trust Act, which required Quality to issue the Halstein notice of sale, does not mention “prenotarizing” a notice of sale as an unfair or deceptive act for CPA purposes. Slip Op., pp. 18-19; RCW 61.24.135. Also, the Court found that Quality’s pre-dating did not violate RCW 61.24.030(8), which requires waiting 30 days after mailing a notice of default before mailing, posting and recording a notice of sale. The Court did not consider the notary statute, nor criminal prohibitions against false certification and false swearing, in

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<sup>5</sup> See also RCW 19.86.020.

<sup>6</sup> *LaMon v. Butler*, 112 Wn.2d 193, 201, 770 P.2d 1027 (1989).

determining whether the false notarization was an unfair or deceptive act affecting the public interest.

Review should be granted to clarify that, when a business falsely dates a record requiring a notary's acknowledgement, notary standards and other criminal statutes such as RCW 9A.60.050 are relevant in determining the public interest element of a CPA claim. Any time a crime is committed in the course of business, the public interest is affected, as deterring and punishing crimes is a primary function of government and is necessary to safeguard property and personal safety. Also, this Court should clarify that the public interest is harmed when businesses submit false information for recording by auditors. Unless notary standards are enforced, property records will cease to be reliable, and confidence in the legal system will suffer.

#### IV. CONCLUSION

For the foregoing reasons, this Court should grant review.

Dated this 19th day of April, 2012.

Respectfully submitted by:   
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