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Supreme Court No. 87105-1

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**SUPREME COURT OF THE STATE OF
WASHINGTON**

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

Plaintiff-Petitioner,

v.

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

Defendants-Respondents.

FILED
APR 30 2012
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STATE OF WASHINGTON

**MEMORANDUM OF AMICUS CURIAE
UNIVERSITY LEGAL ASSISTANCE
SUPPORTING PETITION FOR REVIEW**

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Table of Contents

I. INTEREST OF AMICUS1

II. ISSUE ADDRESSED BY AMICUS1

III. ARGUMENT2

 A. The Appellate Court’s Decision Conflicts With a
 Decision of the Supreme Court Because a CPA Claim for
 an Unfair Practice Does Not Have to Meet the
 Requirements of a Deceptive Act2

 B. The Specific Nature of a Foreclosure Trustee’s Duties are
 of Substantial Public Interest and Should Be Clarified by the
 Supreme Court.3

IV. CONCLUSION4

Table of Authorities

CASES

Spiegel, Inc. v. F.T.C.
540 F.2d 287 (1976).....3

Panag v. Farmers Ins. Co. of Washington
166 Wn.2d 27, 204 P.3d 885 (2009).....2

Bain v. Mortgage Electronic Registration Systems, Inc.
Washington State Supreme Court No. 86201-1.....4

RULES

RAP 13.4(b)(1) and (4).....1

STATUTES

15 U.S.C. § 45(n).....2

RCW 19.86.9202

RCW 61.24.010(4).....1,2,4,5

RCW 61.24.010(6).....3

OTHER SOURCES

Federal Reserve Bank of San Francisco, Trends in Delinquencies and
Foreclosures in Washington (2011).....3

I. INTEREST OF AMICUS

Amicus Curiae is University Legal Assistance (ULA). ULA is a nonprofit public interest legal clinic located in the Gonzaga University School of Law's Center for Law and Justice. The clinic provides legal services to elderly and low-income clients who might not otherwise have access to legal services. As part of the services provided by ULA, the clinic offers clients assistance with consumer protection issues, which include Consumer Protection Act (CPA) violations, representation in mortgage modifications, and unfair lending practices. Petitioner, Dianne Klem's petition for review addresses the duties of the foreclosure trustees and how the CPA applies to "unfair" practices that may or may not be deceptive. Since ULA represents clients in CPA cases, the issues raised in the petition for review are of concern to ULA.

II. ISSUE ADDRESSED BY AMICUS

Klem's petition for review should be accepted by the Supreme Court because the petition satisfies Rule 13.4(b)(1) and (4). The petition satisfies RAP 13.4(b)(1) because the Court of Appeals' opinion is in conflict with the ruling of this Court. In addition, the petition satisfies RAP 13.4(b)(4) because it is in the public's interest for the Supreme Court to clarify the duties of a foreclosure trustee so that Quality Loan Service Corporation's continued violation of RCW 61.24.010(4) can be stopped.

III. ARGUMENT

A. **The Appellate Court's Decision Conflicts With the Decision of the Supreme Court Because a CPA Claim for an Unfair Practice Does Not Have to Meet the Requirements of a Deceptive Act.**

The Court of Appeals mistakenly ignored Klem's showing that there were unfair acts and reversed the trial court's CPA judgment because it determined that Klem did not show that there was a deceptive act. However, as Klem pointed out in her petition, the CPA plainly states that "unfair or deceptive acts" are unlawful, and this Court has made clear that "[t]he universe of 'unfair' business practices is broader than, and encompasses, the universe of 'deceptive' business practices." RCW 19.86.020; and *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27 51, 204 P.3d 885 (2009). Based on the plain text of the statute and the holding in *Panag*, a CPA violation does need not be "deceptive" to be unfair.

Furthermore, courts are to construe the CPA liberally and look to federal court and Federal Trade Commission (FTC) decisions for guidance. *See* RCW 19.86.920. The Federal Trade Commission Act defines an unfair act or practice as one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). Under the FTC criteria

for an unfair act or practice, the act need not be deceptive if it “offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” *Spiegel, Inc. v. F.T.C.*, 540 F.2d 287, 293 (1976) (citing *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 243 (1972)) (upholding F.T.C. administrative decision finding that the practice of a mail order company using the Illinois long-arm statute to sue distant out of state customers was unfair.) Using this standard, Quality’s practice of entering into agreements with banks to postpone foreclosures only with the client bank’s permission as well as pre-dating and falsely notarizing notices of sales would be an unfair practices.

The Supreme Court should accept review to rectify the Court of Appeals’ failure to follow this Court’s precedent about what is required to establish a CPA claim.

B. The Specific Nature of a Foreclosure Trustee’s Duties are of Substantial Public Interest and Should be Clarified by the Supreme Court.

Foreclosures are endemic in the state of Washington. A 2011 survey by Federal Reserve Bank of San Francisco reported that mortgages past due in the state of Washington have risen from just over 20,000 in 2006 to over 80,000 in the third quarter of 2010. Federal Reserve Bank of San Francisco, Trends in Delinquencies and Foreclosures in Washington

(2011). Because of the high rate of past due mortgages and foreclosures in Washington, the nature of a foreclosure trustee's duties are of substantial public interest to the citizens of Washington State.

This case raises the issue of whether a trustee violates its duty of good faith to a borrower by giving its discretion to postpone mortgage foreclosure sales to the beneficiary banks. *See* RCW 61.24.010(4). This is an issue of critical importance to many Washington residents who are facing foreclosure because, if the Court of Appeals' decision regarding Klem's CPA claim is not reversed, an injunction cannot be issued and Quality Loan Service Corporation will continue its unfair practices. For example, even though RCW 61.24.040(6) provides the trustee with the authority to postpone foreclosure sales, in recent weeks Quality Loan Service Corporation has made it clear that when it is asked to postpone foreclosure sales, it will only do what the banks direct it to do and will ignore the fact that as a trustee it has a statutory duty of good faith to both the banks and the borrowers pursuant to RCW 61.24.010(4). *See* Declaration of Robert J. Henry, at ¶¶ 10 and 17, the original of which was filed in Thurston County Superior Court Case Number 12-2-00401-1, and a copy of which is attached hereto as an appendix.

The Washington Supreme Court recently began to review the case of *Bain v. Metropolitan Mortgage Group* (No. 86206-1), in which this

Court was asked to decide whether Mortgage Electronic Registration Systems, Inc. (MERS) can serve as a beneficiary under the Washington Deed of Trust Act despite never holding the underlying note. While the issue raised in the *Bain* case is important because it affects many Washington residents facing foreclosure, the primary issue raised by Klem has a larger public impact because if it is not addressed it is likely that a greater number of people will suffer damages. In every foreclosure conducted in Washington the scope of the trustees' duty of good faith to the borrowers comes into play. In those instances where trustees ignore their duty, and delegate to the banks their discretion to postpone foreclosure sales, people like Ms. Halstien are at risk of having their home equity sacrificed.

Review should be accepted to clarify the duties of a foreclosure trustee and so that an injunction can be issued in order to prevent the public from being harmed by Quality Loan Service Corporation's continued disregard of the statutory duty of good faith it owes to borrowers. *See* RCW 61.24.010(4).

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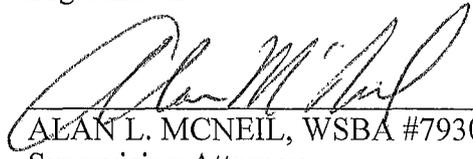
IV. CONCLUSION

For the reasons stated above, ULA urges the Court to accept Klem's Petition for Review.

Respectfully submitted on this 5th day of April, 2012.

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Appendix Stricken
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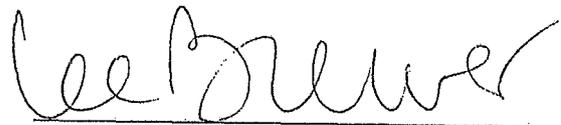
APPENDIX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
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25
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CERTIFICATE OF SERVICE

I certify that on March 5, 2012, I caused a copy of the foregoing document to be delivered via legal messenger and email to the following:

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