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SUPREME COURT
STATE OF WASHINGTON
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

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.

No. 87105-1

RESPONSE TO ULA's
AMICUS MEMORANDUM

FILED
MAY 18 2012
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STATE OF WASHINGTON

I. Identity of Responding Parties & Relief Requested

Respondents Quality Loan Service Corporation of Washington and Quality Loan Service Loan Corporation (collectively, "Quality") ask this Court to deny discretionary review. Because ULA's memo substantially overlaps those of the AAG and WSBA, Quality respectfully suggests that the Court read this response only after reading its responses to the AAG and WSBA, as Quality does not repeat all of the overlapping responses here.

RESPONSE TO AMICUS ULA

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II. Facts Relevant to Motion

Like the AAG and the WSBA, University Legal Assistance of Gonzaga University School of Law (ULA) asks this Court to accept discretionary review of the Unpublished Opinion in this case. ULA's memorandum contains no statement of the case and no record cites, and is so full of factual errors that it will take some effort to unwind them all. As discussed below, it is also wrong on the law.

ULA begins with the materially false statement that the "Court of Appeals mistakenly ignored Klem's [(PSG's)] showing that there were unfair acts and reversed the trial court's CPA judgment because it determined that [PSG] did not show that there was a deceptive act." ULA at 2. Literally none of this is true. The Unpublished Opinion mentions "unfair" acts at least eight times. Unpub. Op. at 17 (one), 18 (seven).

And the appellate court did not reverse because PSG failed to show a deceptive act. Rather, it reversed on the CPA because PSG made only a "conclusory argument that an unfair or deceptive act or practice was shown through evidence that Quality acted impartially and breached a fiduciary duty" *Id.* at 18 (emphasis added). PSG cited "no authority for the proposition that acting

impartially or breaching a fiduciary duty constitutes a per se unfair or deceptive act or practice. Nor does it make any argument as to why Quality's acts had a 'capacity to deceive a substantial portion of the public.'" *Id.* (emphasis added). The appellate court simply never reached the arguments ULA raises because PSG never raised them. See PSG BR at 29-34; see also Quality Response to Attorney General Memorandum.

The second reason the Court of Appeals reversed on the CPA was that predating the notice did not harm Ms. Halstien, where she received her full statutory notice period. See Unpub. Op. at 19-20. As is fully addressed in Quality's response to the WSBA, the absence of evidence of causation of harm moots PSG's CPA claim in its entirety. See Quality Response to WSBA Amicus Memorandum.

ULA's second set of material factual errors come in its suggestion that 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." ULA at 4 (no record cite in original). Again, none of this is accurate. The duty of good faith recently added to the current statute was not

in effect at the time of the February 29, 2008 foreclosure sale in this case. See, e.g., BR 30 n.22 (citing Laws of 2009, ch. 292 § 7, effective July 26, 2009 (adding for the first time a duty of good faith to grantor and beneficiary)). A decision in this case would not address the current statutory language.

And there is no evidence that Quality ever “gave its discretion” to WaMu. Rather WaMu, as the Trust Beneficiary, instructed Quality, as the Trustee, that Quality was not authorized to postpone a foreclosure sale without obtaining WaMu's authorization. Ex 12. A Beneficiary is certainly entitled to insist on strict adherence to the statutory time limits. And Quality never had any problem obtaining authorization from WaMu (RP 270) – in this case, however, PSG failed to tell Quality that it was having trouble getting authorization from WaMu. RP 319-21.

ULA's final factual inaccuracy accompanies its improper attempt to introduce new evidence into this case that was not before the trial court or the appellate court. ULA at 4 & Appendix. The only proper way to do this is a RAP 9.11 motion, which ULA does not even attempt and could not satisfy. Quality is filing a motion strike this appendix and all references to it.

ULA's suggestion that this appendix is relevant here is factually baseless. In that case, it appears the plaintiff – unlike PSG – did precisely what the law requires: she filed a motion to halt the sale. That sale date has not yet arrived, and presumably the trial court will do the right thing, which may be to allow the sale to go forward, as clearing off junior liens is a proper purpose of a foreclosure sale. But it is unclear why the lawyer in that case would believe that Quality should postpone the sale after he has invoked trial court's jurisdiction to resolve that very question. As fully explained in the prior responses to the AAG and WSBA, PSG's failure to bring such a motion here permitted the jury to find PSG 50% liable for Ms. Halstien's damages.

III. Grounds for Relief & Argument

A. The Unpublished Opinion does not conflict with any decision of this Court.

For the reasons fully explained in Quality's Response to the AAG Memorandum, the Unpublished Opinion does not hold that "unfair" acts are not independently sufficient, both because PSG never argued that they were and because the court actually held that PSG failed to prove causation and damages. *Compare* ULA 2

with BR 29-34. Nor did PSG cite the federal authorities ULA cites.
Id. PSG did not raise or argue this issue.

And for the reasons also addressed in the Quality Response to AAG Memorandum, ULA is wrong on the law. “Unfairness” – standing alone – cannot be actionable under the CPA in the absence of a showing of a capacity to harm a substantial portion of the public, causation, and harm. ULA, like each of the amici, utterly fails to address the appellate court’s actual holdings, which moot the issues the amici raise.

B. The trial court dismissed PSG’s claim that Quality violated its duty as a trustee, and PSG did not appeal from that ruling, so it is the law of the case, and the scope of a trustee’s duty is not at issue here.

ULA also misses another key ruling of the trial court: it dismissed PSG’s claim that Quality violated its duties as a trustee, and PSG did not appeal from that dismissal, so it is the law of the case. *See, e.g.*, CP 270; BA 35-38; Quality Reply at 23-24. Thus, the scope of a trustee’s duties cannot possibly be at issue in this case. ULA’s arguments are meritless.

In any event, the Unpublished Opinion cannot affect Washington law, as Washington unpublished opinions have no precedential value. *See, e.g.*, GR 14.1. The Court of Appeals

properly addressed the arguments PSG raised, and affirmed the jury's verdict finding PSG and Quality equally negligent. Quality has accepted the jury's verdict and has paid its share of the judgment. PSG and its amici would like to turn this case into a referendum on the mortgage crisis, but it is simply a case in which a paid professional GAL failed to show up at the Trustee's Sale with a signed REPSA in its possession, depriving both its disabled client and Quality of their last clear chance to save her equity.

IV. Conclusion

For the reasons stated above, this Court should deny review.

RESPECTFULLY SUBMITTED this 18th day of May, 2012.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed a copy of the foregoing
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of May 2012 to the following counsel of record at the following
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OFFICE RECEPTIONIST, CLERK

To: Cheryl Fox
Subject: RE: 87105-1 Klem v. Washington Mutual Bank - Response to ULA's Amicus Memorandum

Received 5/18/12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Cheryl Fox [<mailto:cheryl@appeal-law.com>]
Sent: Friday, May 18, 2012 3:02 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: 87105-1 Klem v. Washington Mutual Bank - Response to ULA's Amicus Memorandum

Attached for filing, please find: RESPONSE TO ULA'S AMICUS MEMORANDUM

Case: *Klem v. Washington Mutual Bank*

Case Number: 87105-1

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Thank you!

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