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NO. 66252-0-1

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

DIANNE KLEM, as administrator of the estate of Dorothy Halstein,
Respondent/Cross-Appellant,

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/Cross-Respondents.

**REPLY BRIEF OF APPELLANT TO BRIEF OF AMICUS CURIAE
ATTORNEY GENERAL OF THE STATE OF WASHINGTON**

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RESPONSE TO STATEMENT OF THE CASE

Without saying so, *amicus* apparently has accepted Klem's allegations about the facts of this case. Like Klem, *amicus* makes several assertions that are unsupported and insupportable by the record. These inaccuracies undermine the Amicus Brief.

For instance, *amicus* alleges that "Klem established at trial that QLS deferred solely to the beneficiary of the deed of trust" Amicus Brief (AB) at 3. While this is Klem's argument, no evidence supports it. As has been made clear in Quality's briefing, Quality did not simply defer to the trust beneficiary. Rather, Quality followed the instructions of its trust beneficiary, according to its fiduciary obligations. Nothing in the record supports Klem's argument that Quality could somehow ignore the trust beneficiary's instructions. *Amicus* cites nothing.

Even more troubling is *amicus'* assertion that "Klem also established that QLS forged the dates on foreclosure notices." AB 3. There is no evidence in this record that Quality "forged" anything, nor was there ever an argument that Quality did so. This assertion is unsupported.

Finally, *amicus* bases its brief on a misstatement of the trial court's rulings. *Id.* For instance, *amicus* omits the primary basis for

the trial court's ruling, that Klem "has not defined, and there is no way this Court can establish, what would constitute 'adequate assurances' that QLS, acting as a trustee under the Deed of Trust Act is satisfying its duties to the borrower." CP 1586. *Amicus* fails to challenge this is sound basis for the trial court's ruling, rendering the remainder of its arguments moot.

RESPONSE TO ARGUMENT

There appears to be an "Argument" heading missing from the Amicus Brief at page 3. If not, all of its arguments are improperly placed in a Statement of the Case, and should be disregarded. See, e.g., RAP 10.3(a)(5).

A. The CPA does not and cannot displace the Civil Rules.

Under its subheading A, *amicus* makes numerous unsupported assertions about the CPA. For instance, its claims that RCW 19.86.090 "states that injunctions are favored as a remedy," yet the quoted language says no such thing:

Any person who is injured . . . may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both,

AB 4 (quoting RCW 19.86.090). Allowing injunctive relief is not the same thing as "favoring" it. Similarly, this same language does not "demonstrate[]" that, unlike non-CPA actions, the Court may award

injunctive relief for a violation of the CPA without further findings of irreparable harm, or absence of a remedy at law.” AB 4 (no citation in original).

Nor is there any authority for *amicus*' basic argument that the CPA somehow tacitly displaces the Civil Rules. The CPA does not and cannot supersede the Civil Rules regarding injunctions. See, e.g., CR 65(e) (as to injunctive relief, “These rules shall prevail over statutes if there are procedural conflicts”). Even if the CPA said it displaced the Civil Rules – which it does not – the Civil Rules would control. CR 81 (with certain inapplicable exceptions, “these [civil] rules supersede all procedural statutes and other rules that may be in conflict”).

Amicus next addresses RCW 19.86.080, the statute pertaining to Attorney General enforcement actions, which this is not. The very fact that this portion of the CPA uses different language than the applicable portions shows they mean different things. See, e.g., ***State ex rel. Pub. Disclosure Comm'n v. Rains***, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976) (where “different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word”); accord ***Service Employees Intern. Union, Local 6 v. Superintended of Pub.***

Inst., 104 Wn.2d 344, 349, 705 P.2d 776 (1985) (quoting ***State v. Roth***, 78 Wn.2d 711, 715, 479 P.2d 55 (1971)). These provisions have no relevance here.

Amicus concedes in a footnote that its next argument – that the CPA somehow authorizes an *ipso facto* declaration of an injunction (AB 4-5) – is contrary to this Court’s ***Girard v. Meyers***, 39 Wn. App. 577, 694 P.2d 678 (1985). AB 5 n.5. ***Girard*** specifically holds that the CPA “does not authorize an action for a declaratory judgment and does not provide a remedy for a person who fails to prove actual damages.” 39 Wn. App. at 589. *Amicus* erroneously attempts to dismiss the first part of this conjunctive sentence (the CPA does not authorize declaratory judgments) based on the second part (and requires actual damages). ***Girard*** is directly contrary to *amicus*’ argument, yet neither *amicus* nor Klem has asked the Court to overrule it. ***Girard*** is good law and contrary to *amicus*’ arguments.

Amicus goes on at length about the CPA’s provisions regarding policing a previously-entered injunction, none of which has anything to say about whether an injunction may be entered in the first instance. AB 5-6. These provisions do not apply because this is not an Attorney General enforcement action. See, e.g.,

RCW 19.86.140 (“for the purpose of this section the superior court issuing an injunction shall retain jurisdiction, and the case shall be continued, **and in such case the attorney general acting in the name of the state may petition for recovery of civil penalties.**”); (“With respect to violations of RCW 19.86.030 [restraint of trade] and 19.86.040 [monopolies], **the attorney general**, acting in the name of the state, may seek recovery of such penalties in a civil action”). None of these penalties is relevant here. The mere existence of an enforcement mechanism cannot obviate the legal requirements for obtaining an enforceable injunction.

Amicus' attempt to evade the ordinary strictures on injunctive relief was neither raised in the trial court nor raised by Klem on appeal, so it is as unpreserved as it is unwise and unsupported. There is simply no reason why a trial court may ignore its own rules governing injunctions simply because a given statute says a party may seek an injunction. Unless and until the Legislature actually attempts to expressly displace the Civil Rules – an act it has no power to do – this Court should not reach this claim.

B. The Legislature knows that our courts will interpret the CPA, which does not mean that the CPA should displace the case law regarding permanent injunctions.

Amicus correctly notes that, like any legislation, our courts will flesh-out the CPA. AB 6-8. But this does not support *amicus*' implication that the trial court should have ignored all of the case law governing permanent injunctions. *Amicus* simply fails to address the actual basis for the trial court's ruling.

C. Attributing incompetence to the trial court steps over the line, and *amicus* fails to understand the facts.

Amicus steps over the line in its next argument. AB 8-9. Attributing to the trial court a failure to consider the "value" of an injunction not only lacks any support in the record, but appears to suggest that the trial court was oblivious. The trial court was fully aware of the "value" of enjoining unlawful behavior. See Klem's many pleadings in the trial court going on at length about why the trial court should grant an injunction. There is simply no basis for this argument.

Equally beyond the pale is *amicus*' assertion that the trial court "could have declared that the foreclosing trustee has a duty of good faith to both parties to the foreclosure, RCW 61.24.010(4), it is an unfair trade practice for the trustee to have a policy of always, and without regard to circumstances, deferring to the lender when

deciding whether to postpone a foreclosure sale.” AB at 9. *Amicus* packs so many errors in this small space that it is easy to miss some of them:

- ◆ The duty of good faith in the current statute does not apply here because it did not exist at the relevant time, as has been thoroughly briefed;
- ◆ no evidence exists in this record that Quality had “a policy of always, and without regard to circumstances, deferring to the lender”;
- ◆ on the contrary, the record is replete with evidence that Quality considers all of the circumstances in any given case and that it does not simply “defer” to the lender (*see, e.g.*, Quality’s Reply at 4-5).

Amicus does not demonstrate a great familiarity with the record. Indeed, it is questionable whether it has thoroughly reviewed all of the briefs. Simply adopting Klem’s wholly unsupported and incorrect arguments about the facts was unwise.

A good example of this is *amicus*’ seventh footnote, asserting that Quality “still maintains on appeal that it may always defer to the lender on whether to postpone a foreclosure.” AB at 9 n.7. As with all of its assertions to this effect throughout the *Amicus* Brief, this one has no citation following it. *Id.* It would have been a simple matter for *amicus* to point out to the Court where in Quality’s opening or reply brief such an assertion was made. It has not done so because it cannot do so.

On the contrary, Quality has continuously maintained that it had a fiduciary duty to follow the trust beneficiary's instructions not to postpone a foreclosure sale without the beneficiary's approval. This is not just "deferring" to the beneficiary, but honoring the trustees' fiduciary duty to its beneficiary. There is no evidence in this record that Quality would not have postponed the sale had Klem or her employee simply contacted Quality to say that WAMU was giving them the runaround. As has been carefully briefed and argued, he made 22 contacts with WAMU, but never told Quality that WAMU was unresponsive. This is uncontroverted evidence in the record that *amicus* chose to ignore. Its arguments are therefore meritless.

D. Quality has been following and will follow the law.

Amicus' final argument concerns the trial court's belief, after hearing all of the testimony at trial, that Quality was no longer engaging in the alleged practices and that it would "follow the law" in the future. This is obviously a credibility determination by the trial court. This Court will not review credibility determinations. See, e.g., *Majer v. Giske*, 154 Wn. App. 6, 23, 223 P.3d 1265 (2010) ("The trier of fact is entitled to evaluate the credibility of witnesses, and this court will not second-guess its determinations").

Amicus admits that injunctive relief is moot if “events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” AB at 10 (citing ***Ralph Williams’ NW Chrysler Plymouth, Inc.***, 82 Wn.2d 265, 272, 510 P.2d 233 (1973)). While this argument was not raised below, the plain fact is that the trial court felt, after hearing testimony from Quality’s Chief Operating Officer, that the alleged actions will not be repeated.

Specifically, as to the question of “deferring” to the trust beneficiary, no doubt the trial court did not believe that Quality should be restrained from following the beneficiary’s directions, since that is Quality’s fiduciary duty. On the issue of postdating notaries, the trial court simply recognized that there was no reason to do it in the first place, that Quality had forbidden the practice and reprimanded those who had engaged in it, and that no reason exists for such conduct to recur. Even under *amicus*’ misreadings of the CPA, the trial court’s rulings are sound.

In sum, the trial court properly followed Washington law in denying injunctive relief. Since the trial court reasonably believed that Quality would not engage in unlawful conduct in the future, there was no reason for it to enter an injunction. The trial court gave careful consideration to the arguments Klem raised in the trial

court, and entered an order denying the injunction based on sound legal principles and thorough findings of fact. The new arguments raised for the first time in the Amicus Brief are too late, and they lack efficacy due to its reliance on unsupportable factual assertions and inapplicable law. This Court should affirm the trial court's appropriate ruling denying injunctive relief.

CONCLUSION

For the reasons stated above, this Court should affirm the trial court's well-reasoned order denying injunctive relief, and in any case, should not adopt the unsupported factual assertions and inapplicable legal assertions proffered by *amicus*.

RESPECTFULLY SUBMITTED this 15th day of April, 2011.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF OF APPELLANT TO BRIEF OF AMICUS CURIAE ATTORNEY GENERAL OF STATE OF WASHINGTON** postage prepaid, via U.S. mail on the 15th day of April 2011, to the following counsel of record at the following addresses:

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