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87105-1

Supreme Court No. _____

Court of Appeals No. 66252-0-1

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.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioner, Dianne Klem (“Klem”), is the administrator of the estate of Dorothy Halstien. Klem was the plaintiff in the Superior Court and the respondent/cross appellant in the Court of Appeals.

II. COURT OF APPEALS DECISION

Consistent with the jury’s verdict in favor of Klem on her Consumer Protection Act (“CPA”), breach of contract, and negligence claims, the Superior Court entered a \$151,912.33 judgment. CP 1488, 1582. On December 19, 2011, the Court of Appeals affirmed the verdict on Klem’s negligence claim, but reversed the verdict on Klem’s CPA and breach of contract claims. App 1. Because the jury’s verdict on the negligence claim was 50% of its verdict on the CPA and breach of contract claims, the Court of Appeals remanded the case to the trial court for re-entry of judgment. *Id.* In addition, because the verdict on the CPA claim was reversed, the Court of Appeals ruled that there was no basis to issue the injunction requested by Klem. *Id.* On January 27, 2012, a majority of the Court of Appeals’ panel denied Klem’s motion for reconsideration. App 25.

III. ISSUES PRESENTED FOR REVIEW

After refusing a request to postpone a foreclosure for a few weeks so that a \$235,000 sale could close, Quality Loan Service Corporation of

Washington (“Quality”), as the trustee, sold 75-year-old Dorothy Halstien’s home for \$83,087.67. RP 61-103. Quality refused to postpone the sale of Ms. Halstien’s home because it does not postpone foreclosure sales without the consent of the lender. RP 205-09, 215-17, 395. The buyer then turned around and resold Ms. Halstien’s former home for \$235,000. RP 132; Ex 69. As a result, Ms. Halstien’s guardian obtained a \$151,912.33 judgment against Quality. CP 1582. On appeal, the judgment was cut in half and Klem’s request for an injunction was denied. App 1. Therefore, this petition presents the following issues:

1. Whether the Court of Appeals’ reversal of the trial court’s judgment on the CPA claim: conflicts with the express language of the CPA that prohibits unfair business practices; conflicts with this Court’s precedent that the CPA must be liberally construed to protect the public; and undermines the public’s interest in ensuring that Quality complies with Washington law in connection with the hundreds of Washington foreclosures it conducts each year?

2. Whether the Court of Appeals’ reversal of the jury’s verdict on the breach of contract claim conflicts with this Court’s precedent that one party to a contract has the right to expect the other party to act in good faith and follow the contract terms?

IV. STATEMENT OF CASE

A. Factual background.

In 2004, Ms. Halstien obtained a loan from Washington Mutual Bank (“WaMu”) that was secured by a deed of trust against her Whidbey Island home. Exs 9, 50. In 2006, Ms. Halstien exhibited symptoms of advanced dementia, was moved to a care facility, and Puget Sound Guardians (“PSG”) was appointed as her guardian. Ex 67.

Because the cost of Ms. Halstien’s care did not leave her with enough money for PSG to make the payments on the home loan, WaMu caused Quality, as the successor trustee, to start a foreclosure. RP 74; Ex 3, 4. All foreclosure notices were prepared in San Diego, California in the office of Quality’s sister corporation. RP 168, 341; Exs 8, 18.

To avoid the need for a foreclosure sale, PSG obtained court approval to sell Ms. Halstien’s home. Ex 60. By February 18, 2008, 11 days prior to the scheduled foreclosure sale, PSG had a fully executed sale agreement that provided for a \$235,000 cash price and for a closing date on or before March 18, 2008. Ex 24. On February 19, 2008, PSG told Quality about the details of the sale agreement and asked for a short postponement of the foreclosure sale. RP 302-06. Quality responded that only WaMu could decide to postpone the sale. *Id.* As a result, PSG

repeatedly asked WaMu to authorize Quality to postpone the sale. RP 306-07.

Pushing back the foreclosure sale for just one week was all that would have been necessary for PSG to close the \$235,000 sale, and thereby have the funds to pay off WaMu and preserve over \$150,000 of Ms. Halstien's equity. RP 131. However, neither WaMu nor Quality postponed the sale, and Quality conducted the foreclosure as scheduled on February 29, 2008. RP 103.

At the foreclosure sale, on behalf of WaMu, Quality made an opening bid of \$83,086.67. Ex 16; RP 131. The bid was equal to the full amount owed to WaMu plus all of Quality's fees and costs. Ex 18.

No potential purchasers from Whidbey Island or any real estate agents went to bid at the sale because they knew, via the Multiple Listing Service, that there was no need for a foreclosure sale because of the signed \$235,000 sale agreement. Ex 24. The only person who came to bid was an investor, from outside of Whidbey Island and who is not a party to this case, who bid \$83,087.67. RP 131-32. The investor's bid was one dollar more than the opening bid and \$151,912.33 less than the purchase offer that PSG had previously brought to Quality's attention. Ex 24. Quality accepted the \$83,087.67 bid, and within months of the foreclosure sale, the buyer resold the property for \$235,000. RP 132; Ex 69.

PSG commenced suit in May 2008 to recover the loss of equity Ms. Halstien suffered. CP 16. Quality and WaMu were initially named as defendants, but WaMu became insolvent and was not an active party by the time this case went to trial. CP 161. In the course of the litigation, Ms. Halstien died and Dianne Klem, the Executive Director of PSG, was appointed as the personal representative for Ms. Halstien's estate and became the substitute plaintiff. RP 62, 66.

Klem conducted pretrial discovery and learned that Quality conducts hundreds of Washington foreclosures each year, and in every instance, it defers to the banks regarding whether or not to postpone a sale. RP 205-09, 215-17, 395. Quality had a confidential, written agreement with WaMu that expressly prohibited it from postponing a sale without first getting WaMu's permission. RP 215-16; Ex 12. In addition, Klem discovered that Quality's practice of deferring to the banks diverges from the practice of other trustees who retain their impartiality and exercise their discretion when it comes to postponing sales. RP 237-46.

Finally, Klem discovered that Quality rushed the Halstien foreclosure, and many others, by systematically pre-dating and falsely notarizing notices. RP 196-99, 254-57, 354-55. A notary public employed by Quality falsely swore that the notice of sale for Ms. Halstien's home was signed in San Diego, California on Monday,

November 26, 2007, which was the first weekday the notice could issue pursuant to RCW 61.24.030(8). Ex 8; RP 392. However, the notice was actually signed and sent out of Quality's office on November 19, 2007 – one week earlier. RP 162, 384-88; Ex 73. Had Quality waited until the 26th so the notice could be honestly dated and notarized before sending it on its way to Washington, and if that extra week delayed the recording of the notice in Island County by just four days, the foreclosure sale could not have been conducted until Friday, March 7, 2008. RP 388. This one week is important because, as Klem testified at trial, it would have been very possible to close the \$235,000 sale by March 7, 2008. RP 131.

B. Procedural Background.

Klem argued at trial that Quality's abrogation of the discretion to postpone the foreclosure was in violation of Washington law that requires that "the trustee must take reasonable and appropriate steps to avoid sacrifice of the homeowner's property," and that the trustee "must act impartially." CP 1417-18. Klem also claimed that it was unfair for Quality to pre-date and falsely notarize the notice of sale in order to speed up the foreclosure. CP 1160-91. Finally, Klem claimed that Quality's acts caused Ms. Halstien's damages and gave rise to the following causes of action: Quality acted negligently; Quality engaged in unfair practices in violation of the CPA; and Quality breached provisions of the deed of trust

contract, including (i) paragraph 16, which states that “[a]ll rights contained in this Security Instrument are subject to any requirements and limitations of Applicable law,” (ii) paragraph 22, which states the trustee “may postpone sale of the Property” as permitted by “Applicable law,” and (iii) the implied covenant of good faith. CP 1160-91, 1436; Ex 51.

Quality responded by alleging that Klem’s claims were waived because she did not seek to enjoin the sale. CP 29-36. However, on a series of pretrial motions, the waiver argument was rejected and the trial court ruled that Klem could proceed to trial on her negligence, CPA, and breach of contract claims. CP 270-71.

The trial commenced on January 13, 2010, and the jury received instructions about the legal obligations that Quality owed to Ms. Halstien. CP 1305-09, 1417-18, 1435-36. The instructions, which were agreed upon by the parties, provide in part:

The law relating to Washington deeds of trust, in effect at the time of the foreclosure of Ms. Halstien’s home, includes the following: ...

- c. The trustee may, for any cause the trustee deems advantageous, postpone the foreclosure sale.
- d. The trustee is a fiduciary for both the borrower and the lender, it must act impartially between them, and it is bound by its office to present the sale under every possible advantage to the borrower as well as the lender.
- e. The trustee of a deed of trust is not required to obtain the

best possible price for the trust property. Nonetheless, the trustee must take reasonable and appropriate steps to avoid sacrifice of the homeowner's property.

CP 1417-18. The instructions also stated that Quality was a party to the deed of trust contract and that its contractual obligations included a "duty of good faith and fair dealing." CP 1417, 1436.

After hearing testimony and considering the trial court's jury instructions, the jury rendered a verdict that Klem, on behalf of the Halstien estate, was entitled to an award against Quality for \$151,912.33 on the contract and CPA claims. CP 1491-92. Regarding the negligence claim, the jury found Quality responsible for 50% of the \$151,912.33 of damages suffered by Ms. Halstien. CP 1489.

Consistent with the jury's verdict on Klem's two most successful causes of action, the trial judge entered a judgment against Quality for \$151,912.33 together with prejudgment interest of \$36,633.58, attorney's fees of \$41,635.00, and costs of \$1,265.88. CP 1582. However, the judge did not enter an injunction because she "assume[d] that, after this case, QLS [Quality] understands its obligations under the law, and that it will in the future fulfill its duty of good faith to borrowers, lest it face endless litigation." CP 1588.

Quality filed a notice of appeal. Quality focused its appellate argument on the assertion that the trial court should have ruled that Klem's

claims were waived. Brief of Appellants pp. 8-17, 26-38. Klem countered by arguing that the trial court was correct on the waiver issue, and argued in a cross appeal that the trial court should have issued an injunction. Brief of Respondent/Cross Appellant pp. 23-26, 41-48.

The Washington State Attorney General filed an *amicus curiae* brief in support of Klem's cross appeal. The Attorney General argued that "The Trial Court's reasons for denying the injunction run counter to the plain language and goals of the CPA." Brief of Amicus Curiae Attorney General of State of Washington in Support of Cross-Appellant, at p. 3.

On December 19, 2011, the Court of Appeals issued its opinion. App 1. The Court of Appeals affirmed that Klem's claims were not waived. App 10-15. The Court of Appeals also affirmed the verdict on the negligence claim because Quality's refusal to postpone sales is a violation of Quality's duty to homeowners and was the cause of Ms. Halstien's damages. App 20-24.

On the CPA claim, and "for different reasons" than those raised by Quality on appeal, the Court of Appeals reversed the trial court. App 18. The parties' limited treatment of the CPA claim in the appeal was focused on whether Quality's deferral of discretion to the bank is an "unfair" practice as that term is used in the CPA. Nevertheless, the Court of

Appeals reversed the jury's verdict because it concluded that Klem did not argue that Quality's acts had a "capacity to deceive." App 18.

On the breach of contract claim, the Court of Appeals reversed the jury's verdict by raising an argument *sua sponte* that was never mentioned by Quality at trial or on appeal. The Court of Appeals reversed the verdict on the breach of contract claim because it concluded that there was no "contract term that made it a breach of the deed of trust for either party to 'not follow' Washington law." App 16.

Because the verdict on the negligence claim was half of the \$151,912.23 awarded on the other claims, the Court of Appeals remanded the case to the trial court for re-entry of judgment. App 24. On December 19, 2011, Klem filed a motion for reconsideration of the Court of Appeals' decision. On January 27, 2012, a majority of the Court of Appeals panel denied the motion for reconsideration. App 25.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review pursuant to RAP 13.4(b)(1) and (4) because the Court of Appeals' decision is in conflict with decisions of this Court and involves an issue of substantial public interest.

A. The Court of Appeals reversal of the trial court's judgment on the CPA claim ignores that the CPA prohibits unfair business practices, conflicts with this Court's precedent that the CPA is to be liberally construed in order to protect the public, and undermines the public's interest in making sure that Quality Loan

Service Corporation complies with Washington law in connection with the hundreds of foreclosures it conducts in Washington each year.

1. The Court of Appeals did not consider that the CPA covers both unfair and deceptive acts.

Pursuant to RCW 19.86.020, the CPA provides that “unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful” (emphasis added). RCW 19.86.090 states that those unfair or deceptive acts give rise to a private cause of action for damages and an injunction. However, the Court of Appeals, without commenting on Klem’s proof that Quality’s acts were unfair, ignored the “or” in the statute, and reversed the jury’s verdict on the CPA claim after it concluded that Klem failed to make an argument that Quality’s acts had a “capacity to deceive a substantial portion of the public.” App 18. Klem respectfully disagrees with the Court of Appeals’ conclusion because she showed that Quality’s practices of falsely notarizing notices and entering into side agreements with banks are deceptive. Nevertheless, and regardless of how this disagreement is resolved, there is still no proper basis for the Court of Appeals’ reversal of the verdict on the CPA claim

because Klem proved that Quality's actions were unfair within the meaning of the CPA.¹

The aforementioned quoted language from the Court of Appeals' opinion comes from this Court's discussion in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785-86, 719 P.2d 531 (1986) about what is necessary to prove that a "deceptive" act occurred. However, *Hangman Ridge* is not the only Supreme Court opinion that must be considered, as a CPA claim can also be based upon an "unfair" act.² In *Panag v. Farmers Ins.*, 166 Wn.2d 27, 51, 204 P.3d 885 (2009), this Court held that "[t]he universe of 'unfair' business

¹ The Court of Appeals found it unfair that Quality entered into an agreement that precluded it from exercising its statutorily granted discretion to postpone a sale, but the Court of Appeals failed to recognize that it was also unfair for Quality to pre-date and falsely notarize the notice of sale. App 22-23. Quality did give a 30 day notice of default and thereafter gave a 90 day notice of the foreclosure sale; however, Quality had to lie under oath so that the 90 day notice could be given as early as it was. The 90 day notice of sale cannot be recorded until 30 days after the notice of default is posted, and the 90 day notice period cannot start to run until the notice of sale is recorded. RCW 61.24.030(8) and 61.24.040(1)(a). Therefore, because Quality's employees were in California they had to sign and falsely notarize the notice of sale, prior to the 30 days elapsing from the posting of the notice of default, in order to send the notice of sale out to be recorded in Island County, Washington in time to schedule a sale on February 29, 2008. RP 388. Moreover, even if Quality had employees in Washington who could have prepared the notice locally, and thereby could have it recorded in Island County more quickly, it is possible that local employees would not have sacrificed their neighbor's property, and they may have actually read Washington's Deed of Trust Act, which Quality's California based employee in charge of the Washington foreclosures admits he never did. RP 384-385.

² This Court in *Hangman Ridge* described two ways a party "may" establish a CPA claim. See *Hangman Ridge*, 105 Wn.2d 785-86. However, the Court of Appeals made a mistake by concluding that the two ways mentioned in *Hangman Ridge* are the only two ways a party "may" establish such a claim.

practices is broader than, and encompasses, the universe of ‘deceptive’ business practices.” Thus, even if an act is not deceptive, it can still be unfair. *Id.*

The *Panag* holding that “unfair” has a broader meaning than “deceptive” is consistent with the decisions of other courts across the country that have examined the issue. In reviewing consumer protection statutes similar to Washington’s, other courts have uniformly concluded that unfairness is not limited to deception or fraud, and that it encompasses other types of wrongful business conduct, such as improper debt collections or wrongful repossessions.³ Moreover, a defendant may violate prohibitions against unfair practices without making any misrepresentations.⁴

If the Court of Appeals had recognized that a CPA claim can be based on an “unfair” or “deceptive” act, then it should have looked to

³ *E.g.*, *State v. O’Neill Investigations, Incorporated*, 609 P.2d 520 (Alaska 1980) (improper debt collection practices are unfair); *Barquis v. Merchants Collection Association*, 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972) (filing of lawsuits in the wrong venue is unfair); *Patterson v. Beall*, 2000 OK 92, 19 P.3d 839 (2000) (filing or attempting to file a false lien is unfair); and *Demitro v. General Motors Acceptance Corporation*, 388 Ill.App.3d 15, 902 N.E.2d 1163 (2009) (wrongful repossession of an automobile is unfair).

⁴ *E.g.*, *South Atlantic Limited Partnership of Tennessee v. Riese*, 284 F.3d 518, 535 (4th Cir. 2002) (plaintiff need only show unfairness or deception); *Cel-Tech Communications, Incorporated v. Los Angeles Cellular Telephone Company.*, 20 Cal. 4th 163, 180, 973 P.2d 527 (1999) (the prohibition against fraudulent acts and the prohibition against unlawful acts are independent prohibitions); and *People ex rel. Hartigan v. Knecht Services*, 216 Ill. App. 3d 843, 575 N.E.2d 1378 (1991) (practice may be unfair without being deceptive).

analogous federal law for help in determining if Quality's actions were unfair, as this Court and the Washington Legislature have directed lower courts to do. *See Panag*, 166 Wn.2d at 47; RCW 19.86.920. If the Court of Appeals in this case had done so, it would have concluded that the jury's verdict must be affirmed.

The Federal Trade Commission ("FTC") has defined what constitutes 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 is not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).

When applying the three parts of the FTC standard to this case, it is clear that Quality's business practices are unfair. First, Quality's practices in fact caused a consumer to suffer a substantial injury; Quality sold Ms. Halstien's home for \$83,087.67 when her home could have been sold for \$235,000. Second, the consumer had no reasonable opportunity to avoid the harm; Ms. Halstien did not know about Quality's secret contract with WaMu, or its practice of falsely pre-dating foreclosure notices, before she signed the deed of trust. Third, there is no countervailing benefit that flows from Quality's unfair acts. Had Quality acted as an impartial trustee and postponed the foreclosure sale, which was reasonably necessary to "avoid sacrifice of the homeowners equity" as required by this Court's

holding in *Cox v. Helenius*, 103 Wn.2d 383, 389, 693 P.2d 683 (1985), WaMu would have been satisfied in full, all of Quality's fees would have been paid, and Ms. Halstien's \$151,912.33 of home equity would have been preserved. Indeed, Quality's willingness to lie in order to speed up foreclosures and its refusal to postpone foreclosure sales are highly anti-competitive, as they may make Quality's services more attractive to the banks than the services of ethical trustees who follow the law.

2. The Court of Appeals ignored that the plaintiff proved all elements of the CPA claim.

The five elements of a CPA claim are: (1) Quality engaged in an unfair or deceptive act or practice; (2) the act or practice occurred in the conduct of the Quality's trade or commerce; (3) the act or practice affected the public interest; (4) Ms. Halstien was injured; and (5) Quality's act or practice caused Ms. Halstien's injury. *See Hangman Ridge*, 105 Wn.2d at 785-93. Quality's argument against the CPA judgment was limited to the assertion that the plaintiff failed to prove the first and the fifth of the five elements, but both of those elements were proven at trial. App 17. As discussed above, Quality engages in unfair acts as part of its business. In addition, as noted by the Court of Appeals, "there was evidence that Quality's actions caused harm" to Ms. Halstien. App 23.

The Court of Appeals decision is thus inconsistent with this Court's decisions in the *Hockley* and *Panag* cases, where this Court held that the legislative purpose of the CPA is "to protect the public" and that the CPA "shall be liberally construed that its beneficial purposes may be served." *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973); *Panag*, 166 Wn.2d at 37; RCW 19.86.920.

Contrary to well-settled precedent, the Court of Appeals issued an opinion based on an overly narrow and incorrect reading of the CPA, which, if not reversed, will adversely impact the public interest. The Court of Appeals' opinion not only precludes a CPA damage claim, but it is a signal to the other trustees following this case that they can, as Quality does, intentionally engage in unfair business practices without fear of an injunction.

3. Contrary to the precedent of this Court, the Court of Appeals reversed the jury's verdict on an issue that Quality never raised.

After the parties engaged in over three years of litigation, the Court of Appeals raised for the first time, *sua sponte*, the issue that it found to be controlling on the CPA claim. The Court of Appeals used that issue to reverse the jury's verdict without giving Klem an opportunity to comment. The Court of Appeals' approach runs counter to the precedent that

objections not made in the trial court cannot be raised on appeal. *See, e.g., Sanders v. Stimson Mill Company*, 34 Wash. 357, 359, 75 P. 974 (1904).

Moreover, if the Court of Appeals had given Klem the opportunity to present written argument before it ruled on an issue that was not briefed on appeal, as is authorized by RAP 12.1(b), Klem would have been able to point out to the Court of Appeals that its conclusion about the CPA claim was incorrect. RAP 12.1(b) states:

If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court.

Alternatively, the Court of Appeals could have provided Klem the opportunity to be heard on her motion for reconsideration. The Court of Appeals did not afford Klem either option.⁵

4. It is of great public interest that this Court reverses the Court of Appeals' decision on the CPA claim so that hundreds of Washington residents can be protected from Quality's continued violation of the Deed of Trust Act.

There are thousands of Washington homes facing foreclosure. *See Realtytrac® Report, available at <http://www.realtytrac.com>.* Quality acts as the trustee in hundreds of these foreclosures, and in each of the

⁵ The argument made in section V.A.4. of this petition also applies to the breach of contract claim. As noted above at page 10, the Court of Appeals reversed the jury's verdict on the breach of contract claim on a theory not raised by Quality.

foreclosures it conducts, it cedes its discretion to postpone sales to the banks – contrary to its duty of good faith to the borrower as delineated in RCW 61.24.010(4). RP 205-08, 395. Therefore, as stated above and as noted by the Attorney General in the *amicus curiae* brief filed in support of Klem’s cross appeal, an injunction is needed to ensure that Quality complies with Washington law.

This case is about more than the dollar amount of the judgment – it is about protecting Washington homeowners at risk of foreclosure by a high-volume trustee service that has, in violation of the duty of good faith it owes to homeowners, given up to the banks its discretion to postpone foreclosure sales. Therefore, during this current home mortgage crisis it is of great public importance that this Court provides guidance on the current duty of trustees to homeowners because the Deed of Trust Act has been modified on several occasions since this Court has last addressed that subject. *E.g.*, Laws of 2009, ch. 292 § 7.

B. The Court of Appeals’ reversal of the jury’s verdict on the breach of contract claim conflicts with this Court’s precedent that a homeowner has the right to expect the trustee to act in good faith and follow the terms of the deed of trust contract.

Not only did the deed of trust provide that Quality had the power to postpone a sale, it also provided that “[a]ll rights and obligations contained in this Security Instrument [including the right of the trustee to

foreclose] are subject to any requirements and limitations of Applicable Law.” Ex 51. As set forth in the agreed jury instructions, the “Applicable Law” with which Quality was required to comply included that Quality “must act impartially” between WaMu and the borrower, and that Quality “must take reasonable and appropriate steps to avoid sacrifice of the homeowner’s property.” CP 1417-18. However, as noted above, Quality did not act impartially between the borrower and WaMu, and did not avoid sacrificing Ms. Halstien's equity. Quality failed to comply with Washington law in connection with the Halstien foreclosure, and as a result of this failure, it breached the deed of trust contract.

In addition, the jury was given stipulated instruction number 22, which provides: “A duty of good faith and fair dealing is implied in every contract.” CP 1436. *See Lonsdale v. Chesterfield*, 99 Wn.2d 353, 357, 662 P.2d 385 (1983). Consequently, instruction 22 is the “law of the case,” and should have been – but was not – considered by the Court of Appeals. *See Ralls v. Bonney*, 56 Wn.2d 342, 343, 353 P.32 158 (1960).

While the covenant of good faith is not a free-floating provision unattached to the underlying legal document, it is a covenant that is implied in every contract and it requires that “the parties to perform in good faith the obligations imposed by their agreement.” *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). The

importance of this implied covenant of good faith was recently reiterated in *Edmonson v. Popchoi*, 172 Wn.2d 272, 256 P.3d 1223 (2011). When this Court in *Edmonson* was called upon to interpret the scope of the duty of good faith in contracts, it stated: “The duty of good faith requires ‘faithfulness to an agreed common purpose and consistency with the justified expectation of the other party.’” *Id.* at 280 (citation omitted).

Pursuant to the rule of law articulated in *Edmonson*, the judgment on the contract claim should have been affirmed because Ms. Halstien and her guardian had a justified expectation that Quality would abide by Washington law. Ms. Halstien and her guardian were justified in assuming that Quality would honestly date and notarize all foreclosure notices, and that Quality would, in good faith, independently exercise its discretion to consider postponing the foreclosure sale. Instead, Quality ignored applicable law and breached the parties’ contract.

VI. CONCLUSION

Pursuant to RAP 13.4(b)(1) and (4), this Court should accept review.

Dated this 21st day of February 21, 2011

NORTHWEST JUSTICE PROJECT

By 
Frederick P. Corbit, WSBA #10999
Attorney for Plaintiff-Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed or caused to be mailed a copy of Dianne Klem's PETITION FOR REVIEW postage prepaid, via U.S. mail on the 21st day of February, 2012, to the following counsel of record at the following addresses:

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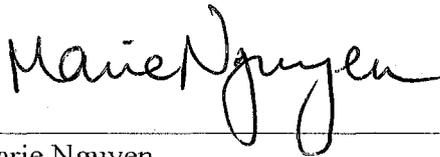
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APPENDIX

App 1-24	Court of Appeals Opinion, filed on December 19, 2011.
App 25	Order Denying Respondent/Cross Appellant's Motion for Reconsideration, filed on January 27, 2012.

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Quality was the trustee in the deed of trust and conducted the foreclosure sale of Halstien's home. The gravamen of PSG's suit was that Quality's acts and omissions, as they related to PSG's request for a postponement of the foreclosure sale, resulted in Halstien's home being sold at auction for approximately a third of the amount for which PSG planned to sell it, as evidenced by a Real Estate Purchase and Sale Agreement (REPSA) signed before the sale. PSG alleged that Quality's acts resulted in a significant loss of Halstien's equity. The main issues presented on appeal are (1) whether PSG waived its claims by failing to bring suit to restrain the trustee's sale and (2) whether the trial court erred in denying Quality's motion for a directed verdict and its motion for judgment notwithstanding the verdict. Quality also argues that joinder of Quality Loan Service Corporation was improper, and PSG cross appeals the trial court's denial of injunctive relief for the CPA claim.

We hold that the waiver doctrine did not apply to these circumstances. We also hold that the evidence at trial did not support the jury's verdict on the breach of contract or CPA claims, but did support the negligence verdict. We reverse the attorney's fee award, which was based on PSG prevailing on the CPA claim, and do not award fees on appeal. Because the jury found Quality and PSG equally negligent, we reverse and remand for re-entry of judgment.

FACTS

In 1996, Dorothy Halstien bought a home on Whidbey Island for \$147,500. She received a statutory warranty deed, which was recorded in Island County on July 9, 1996. In July 2004, she borrowed \$73,000 from Washington Mutual Bank

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(WaMu), giving it a promissory note secured by a deed of trust on her property. Under the deed of trust, Halstien was the grantor, WaMu the beneficiary, and Stewart Title the trustee. It was recorded in Island County on July 29, 2004.

Halstien suffered from dementia, and in 2007 Department of Social and Health Services (DSHS) Adult Protective Services removed her from her home and accused her adult daughter, who had been living with her, of neglect. PSG was appointed as her guardian ad litem on January 25, 2007. Klem was PSG's executive director. PSG is a non-profit, certified professional guardianship agency for disabled, elderly, and incapacitated persons.

Klem recognized that Halstien could not make her mortgage payments and determined that PSG had to sell her home to pay off her debts. Halstien had an annual income of approximately \$11,000. Her home was worth approximately \$233,500 but the bank's encumbrance had increased to roughly \$75,000. Halstien had medical expenses and was approved for Medicaid on February 1, 2007. The State notified PSG that it intended to file a lien on Halstien's home to recover the cost of her care. Once the home was sold, she would be ineligible for state assistance until her assets fell below \$2,000.

On June 14, 2007, the guardianship court entered an order authorizing PSG to sell Halstien's home. To sell the home, PSG sought to evict Halstien's daughter and eventually succeeded. By October 2007, WaMu had appointed Quality Loan Services of Washington (QLSW) as successor trustee and declared Halstien in default as of July 2007, based on her failure to make payments from July through October of 2007. QLSW served Halstien a notice of default and

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posted it on her home on October 25, 2007. The notice of default informed Halstien that she could contest the alleged default "on any proper ground" under RCW 61.24.130. On November 27, QLSW sent Halstien a notice of foreclosure and notice of trustee's sale, posted these on her home, and recorded these documents in Island County. The notice of foreclosure informed Halstien that if she had any "legitimate defenses" to default, she could start a court action and obtain an injunction. The notice of trustee's sale stated:

Anyone having any objections to this sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

The notice stated that Halstien's residence would be sold "at public auction to the highest and best bidder" on February 29, 2008.

In January 2008, the guardianship court entered a second order authorizing PSG to sell Halstien's home. On January 10, 2008, PSG employee David Greenfield called QLSW and spoke to employee Seth Ott. Greenfield asked Ott how to stop or delay the foreclosure sale, and Ott told him to contact WaMu, which would have to authorize a postponement. Ott said the bank would need a signed REPSA. The terms of QLSW's appointment as trustee forbade it from postponing a sale without WaMu's authorization. Greenfield did not ask Ott at this time to postpone the sale, as PSG did not yet have a buyer.

By early February 2008, PSG had finished preparing Halstien's home for sale and hired a real estate agent. By February 18, approximately 11 days before the scheduled sale, PSG entered into a REPSA to sell the home to a buyer for

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\$235,000. The REPSA stated a closing date of on or before March 28, 2008. Greenfield called Quality on February 19 and spoke to Ott or another Quality employee.² Greenfield asked the individual to stop the sale because PSG had a signed REPSA, but was told that only WaMu could delay the foreclosure and Greenfield needed to contact WaMu.

Greenfield contacted WaMu and attempted to stop the sale. On February 27, WaMu foreclosure specialist Martavia Hicks reviewed a letter and supporting documents from Greenfield requesting a postponement. The documents included the signed REPSA and preapproved buyer's loan. Greenfield's letter stated that the sale could not be closed before February 29, the date of the foreclosure auction, and requested that WaMu delay the foreclosure until the closing date of March 28, 2008. Hicks determined that the documents did not meet WaMu's guidelines for continuing a foreclosure and denied the postponement. The record reflects approximately 20 contacts were made between Greenfield and WaMu from February 19 until February 29. There is no evidence that Quality was aware of these communications.

On February 29, the scheduled sale of Halstien's home took place. Although Greenfield was aware of the date and time of the scheduled sale, no one from PSG attended. The home was sold for \$83,087.67, one dollar more than the opening bid made by Quality on WaMu's behalf.³ Greenfield learned

² Whether Greenfield spoke with Ott is disputed. Quality contends that Ott was on leave and could not have spoken to Greenfield. At trial, Greenfield was not sure whether he had spoken to Ott, testifying that he dialed Ott's extension, a male answered the phone, and he assumed it was Ott.

³ The opening bid was the amount owed to WaMu by Halstien.

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shortly thereafter that the property had been sold and at what price. The purchaser re-sold the home for \$235,000.

On April 24, 2008, PSG filed suit against QLSW and WaMu, asserting the following claims against QLSW: (1) breach of fiduciary duty, (2) breach of contract, (3) negligence, and (4) violation of the Consumer Protection Act.⁴ QLSW denied the claims and alleged contributory negligence and waiver, among other affirmative defenses. PSG moved for partial summary judgment to dismiss QLSW's waiver defense. QLSW cross-moved for summary judgment on all claims. The trial court denied PSG's motion and granted QLSW's cross-motion for summary judgment. It ruled that PSG had knowledge of the facts giving rise to its claims at least ten days before the foreclosure sale and that it waived all of the claims by failing to enjoin the sale.

PSG moved for reconsideration, arguing that the trial court should limit the scope of dismissal to claims that "fit within" the waiver doctrine. The trial court granted partial reconsideration by reinstating PSG's claims for negligence, breach of contract, and Consumer Protection Act violations, while also ruling that "[b]y failing to enjoin the foreclosure sale Plaintiff waived its claim that Quality abrogated its duty as a trustee." QLSW sought clarification of the court's order, and the trial court granted this by stating that only the breach of fiduciary duty claim was waived by PSG's failure to restrain the foreclosure sale.

Halstien died on November 5, 2008. In February 2009, PSG moved to amend its complaint to: (1) substitute Klem as plaintiff, (2) add Quality Loan

⁴ Though the complaint named other claims, these are the only ones at issue. PSG amended its complaint in May 2008, but the substance of these four claims remained.

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Services Corporation (QLSC) as a defendant, (3) clarify that the fiduciary breach claim was dismissed, and (4) acknowledge that WaMu was in receivership.

QLSW objected to adding QLSC, which was a separate corporation from QLSW but had common ownership and directors. The trial court permitted the amendments. QLSC moved to dismiss for lack of jurisdiction and failure of service. The trial court denied the motion.

The trial began on January 12, 2010. Quality brought a motion in limine to prevent PSG from arguing that Quality breached any duty toward PSG or Halstien. Quality relied primarily on Brown v. Household Realty Corp., 146 Wn. App. 157, 189 P.3d 233 (2008), rev. denied, 165 Wn.2d 1023 (2009). The trial court treated Quality's motion in limine as a motion for directed verdict and denied it. It ruled, however, that PSG's expert witness could not testify about fiduciary duty. At the close of PSG's case, Quality moved for a directed verdict, arguing that it had no duty other than its duty as a trustee and that because the breach of fiduciary duty claim was dismissed, all claims should have been dismissed. The trial court denied the motion.

The jury found by special verdict that both Quality and PSG were negligent, attributing 50 percent fault to each and finding that Halstien suffered \$151,912.23 in damages.⁵ The jury also found that QLSW acted as QLSC's agent; that Quality committed a CPA violation with damages of \$151,912.23 (it rejected treble damages); and that Quality committed breach of contract, again with damages of \$151,912.23. The jury rejected PSG's claim that Quality

⁵ This was the difference between the REPSA value and the amount Halstien owed WaMu.

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engaged in an unfair practice by failing to grant a reasonable accommodation. Following the verdict, Quality filed a motion for judgment notwithstanding the verdict, and PSG filed a motion for an injunction under the CPA. The trial court denied these motions. As to the motion for an injunction, it ruled that the request was vague, overbroad, legally unjustified, and unenforceable.

The trial court entered judgment on the verdict for \$151,912.33. It also awarded attorney's fees in the amount of \$41,635.00 to PSG under the CPA, prejudgment interest of \$36,633.58, and costs of \$1,265.88. Quality appeals, assigning error to several rulings.⁶ PSG cross appeals the denial of an injunction.

DISCUSSION

Quality argues that all of PSG's claims were waived by its failure to file a suit restraining the sale and that, in any event, PSG failed to prove its claims at trial. Quality also claims that the trial court erred in permitting QLSC to be added as a defendant. PSG cross appeals the trial court's denial of injunctive relief. We hold that (1) the trial court had jurisdiction over QLSC, (2) PSG's claims were not waived, (3) the evidence supported PSG's claims for negligence but did not support PSG's breach of contract or CPA claims, and (4) the denial of injunctive relief was not in error.

Jurisdiction over Quality Loan Service Corporation

"Questions of joinder present mixed issues of law and fact that we review for an abuse of discretion 'with the caveat that any legal conclusions underlying the decision are reviewed de novo.'" Kelley v. Centennial Contractors Enter., Inc.,

⁶ Specifically, Quality claims the following decisions were error: (1) denying its motion for judgment as a matter of law at the close of the case, (2) entering judgment on the verdict, (3) awarding attorney's fees, and (4) denying its motion for judgment notwithstanding the verdict.

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169 Wn.2d 381, 386, 236 P.3d 197 (2010) (quoting Gildon v. Simon Prop. Group, Inc., 158 Wn.2d 483, 493, 145 P.3d 1196 (2006)).

Quality argues that the trial court erred in granting PSG's motion to amend its complaint to add QLSC as a defendant. It contends there was no reasonable excuse for the delay in adding QLSC, and that there was no evidence that QLSC conducted any business in Washington or acted through a Washington agent, QLSW.⁷ Quality argues that the agency verdict must fall, and that because no other evidence supports jurisdiction, the joinder ruling must also fall.

PSG argues that jurisdiction over QLSC was supported by evidence in the record.⁸ It argues that because QLSC transacted substantial business in Washington in its own right and through QLSW as its agent, Washington courts have jurisdiction over QLSC. PSG contends the discovery of the necessary facts to amend the complaint was delayed because QLSW refused to produce any witnesses until it was compelled to do so by the trial court.

Washington's long-arm jurisdiction statute, RCW 4.28.185, reads in pertinent part:

⁷ It concedes that if QLSC did conduct business in Washington, sufficient contacts are established for jurisdiction.

⁸ Specifically it points to evidence that:

- All of the work done by QLSW was supervised by someone at QLSC.
- QLSC, not QLSW, billed WaMu for the Halstien foreclosure.
- All business records related to the Halstien foreclosure were kept in QLSC's San Diego office. CP 330.
- QLSC's Chief Operating Officer, David Owen, was unable to identify the whereabouts of the QLSW employee who supposedly worked from within Washington on the Halstien foreclosure.
- QLSC advertises on its website that it does business in western states, and Owen testified during his deposition that one of those states is Washington.
- QLSC and QLSW are commonly owned and are "sister companies."
- While Ott testified that he worked for QLSW, he admitted that he had never set foot in Washington before trial and that he worked at QLSC and QLSW's shared office in California.

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(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

- (a) The transaction of any business within this state; [or]
- (b) The commission of a tortious act within this state; . . .

We agree with PSG that Washington courts had jurisdiction over QLSC because it conducted business in Washington, as shown by its advertisements and Chief Operating Officer David Owens's testimony, and evidence that it billed WaMu for the Halstien foreclosure. Furthermore, the evidence to which PSG points supports the jury's finding that QLSC acted through an agent, QLSW.

Waiver

The next issue is whether PSG waived its claims by failing to bring a suit to restrain the trustee's sale. Whether a party waived its claims is a mixed question of fact and law, which we review de novo. See Humphrey Indus., Ltd. v. Clay St. Assocs. LLC, 170 Wn.2d 495, 501-02, 242 P.3d 846 (2010). Quality argues that the waiver doctrine applies to all claims arising out of either the underlying obligation or the trustee's foreclosure duties where the grantor knows or should know of any claims and fails to restrain the sale. PSG responds that the waiver doctrine bars only claims that are based on challenges to the underlying debt and that seek to invalidate the trustee sale. PSG points out that it did not seek to invalidate the trustee sale, but instead brought a claim for damages against Quality based on how the trustee conducted the foreclosure process.

The Deed of Trust Act sets out the procedures that must be followed when a trustee sells a grantor's property through nonjudicial foreclosure. Because the Act dispenses with many protections commonly enjoyed by borrowers, "lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower's favor." Amresco Independence Funding, Inc. v. SPS Props., LLC, 129 Wn. App. 532, 537, 119 P.3d 884 (2005) (citing Koegel v. Prudential Mut. Sav. Bank, 51 Wn. App. 108, 111, 752 P.2d 385 (1988)). The Act includes a procedure for restraining a trustee's sale so that an action contesting default can take place. RCW 61.24.130. The Act provides, "Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale." RCW 61.24.130(1). A notice of trustee's sale must include the following language to notify the grantor of its right to restrain the sale:

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

RCW 61.24.040(1)(f). A court cannot grant a "restraining order or injunction to restrain a trustee's sale" unless the party seeking the order has provided five days' notice to the trustee of the attempt to seek the order and has paid amounts due on the obligation secured by the deed of trust. RCW 61.24.130(1), (2); Plein v. Lackey, 149 Wn.2d 214, 225-26, 67 P.3d 1061 (2003). The procedure detailed in RCW 61.24.130 is "the only means by which a grantor may preclude a sale

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once foreclosure has begun with receipt of the notice of sale and foreclosure.”

Brown v. Household Realty Corp., 146 Wn. App. 157, 163, 189 P.3d 233 (2008) (quoting Cox v. Helenius, 103 Wn.2d 383, 388, 693 P.2d 683 (1985)).

Under the waiver doctrine, “[a] party waives the right to postsale remedies where the party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale.” Brown, 146 Wn. App. at 163 (citing Plein, 149 Wn.2d at 227–29). The waiver doctrine is meant to facilitate the following three goals of the Act: (1) to promote an efficient and inexpensive nonjudicial foreclosure process; (2) to ensure an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) to secure the stability of land titles. Brown, 146 Wn. App. at 169.

The waiver doctrine has been applied to bar any post-sale actions arising out of the debt obligation or basis for default, regardless of whom the suit is against or the remedy sought. See Plein, 149 Wn.2d 214 (junior lienholder, by failing to obtain preliminary injunction or other order restraining sale, waived action against corporate officer and officer’s attorney seeking to permanently enjoin trustee’s sale and seeking declaration that deed of trust was void); Brown, 146 Wn. App. 157 (grantor waived claims for damages against a beneficiary arising out of underlying debt obligation by failing to request a preliminary

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injunction or restraining order to enjoin the foreclosure sale);⁹ CHD, Inc. v. Boyles, 138 Wn. App. 131, 157 P.3d 415 (2007) (grantor waived right to raise defense on underlying obligation in post-sale action against beneficiary, seeking proceeds from sale as damages, where it did not attempt to restrain sale); In re Marriage of Kaseburg, 126 Wn. App. 546, 108 P.3d 1278 (2005) (wife waived opportunity to contest underlying debt and sale of home in a dissolution proceeding by failing to employ presale remedies of RCW 61.24.130, and could not collaterally attack foreclosure proceeding by seeking money judgment as her interest in property that did not belong to community at time of dissolution).¹⁰

⁹ The Browns took out loans with Household Finance Corporation, secured by deeds of trust on their home. Household initiated foreclosure on their home. A notice of trustee's sale was recorded on March 13, 2003, setting a sale date of July 13, 2003. The Browns received notice of the trustee's sale and had notice of the sale. They did not attempt to restrain the sale. Household was the highest bidder at the trustee's sale and received a trustee's deed. Brown, 146 Wn. App. at 163. Two years later, the Browns sued Household for fraud, breach of the covenant of good faith and fair dealing, violation of the CPA, violation of the federal Truth in Lending Act, breach of fiduciary duty, and breach of quasi-fiduciary duty. Id. at 160. They alleged that Household failed to disclose the terms and conditions of their loan contracts, induced them to enter loan contracts with excessive fees and interest rates, required them to purchase unwanted credit insurance for the loans, and misled them into believing that they were purchasing unemployment and disability insurance coverage for their first position loan rather than for their second position loan. Id. at 161.

We rejected the Browns' argument that they did not have knowledge of their claims as required for waiver, because they knew the facts forming the basis of their claims before the sale. We also rejected the Browns' argument that waiver did not apply to their tort claim for money damages because it did not interfere with the goals of the Act by affecting the title obtained by a bona fide purchaser. Id. at 166-67. We wrote:

To except tort or other claims for money damages from the waiver provision would frustrate the purposes of the Act because lenders understandably may not be willing to utilize a nonjudicial foreclosure procedure in which the trustee's sale bars any deficiency judgment but leaves the lender subject to potential liability arising out of the underlying obligation even after the property securing the deed of trust has been sold.

Id. at 169 (internal citations omitted).

¹⁰ In Kaseburg, a couple executed a promissory note and deed of trust in favor of the husband's parents, who made them loans to build a home. The husband's parents initiated a nonjudicial foreclosure sale on the home. The wife, who received the statutorily required notices of default and sale, did not contest the foreclosure proceedings. Kaseburg, 126 Wn. App. at 550. During the couple's subsequent dissolution proceedings, the wife asserted that the promissory note was fraudulent and inflated, and the husband concealed from her the value of the home. She sought to have the facts underlying her fraud allegation considered in determining community assets and property. Id. at 551-53.

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The waiver doctrine has also been applied to claims of alleged defects in the foreclosure process where a party seeks to set aside the trustee sale. See Koegel, 51 Wn. App. 108 (grantor's right to contest sale based on allegations of defects in default notices, in a suit against purchaser of foreclosed property, trustee, and beneficiary seeking to set aside sale, recover damages, and quiet title, was waived by failure to enjoin sale); Steward v. Good, 51 Wn. App. 509, 754 P.2d 150 (1988) (action against purchaser of foreclosed property seeking to set aside trustee sale based in part on allegations of trustee's failure to comply with the statutory prerequisites of Deed of Trust Act waived by failure to bring action to restrain sale).

However, in no case that we can identify has waiver been applied, as here, to bar a grantor's post-sale action against a trustee for damages based on allegations of how the trustee conducted the foreclosure process, up to and including the day of the sale.¹¹ Under the circumstances presented in this case, waiver does not apply because the facts supporting PSG's claims did not fully take place until the sale itself and could not have been brought in an action to restrain the sale. One of the requirements for waiver is that a party must have actual or constructive knowledge of the facts supporting the claim. Brown, 146 Wn. App. at 163. Moreover, the language of the Act requires the grantor to be informed that waiver "of any proper grounds for invalidating the Trustee's sale"

¹¹ See also CHD, 138 Wn. App. at 139, citing Cox, 103 Wn.2d at 388 (a party can contest the procedures of a sale in a post-sale action); Steward, 51 Wn. App. at 516-17 (although courts will not allow a grantor to assert a defense to default after sale, challenges to the foreclosure procedure itself are properly raised in a subsequent action); Moon v. GMAC Mortg. Corp., 2009 WL 3185596, *8 (W.D. Wash. 2009), citing CHD, 138 Wn. App. at 139 (waiver doctrine bars claims contesting underlying debt or obligation, but not claims about foreclosure procedure or trustee's sale).

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may result where it fails to bring a lawsuit to restrain the sale. RCW 61.24.040(1)(f). Here, PSG did not seek to invalidate the sale. Given our mandate to strictly construe the Act in the borrower's favor, Amresco, 129 Wn. App. at 537, we conclude that PSG did not waive its claims.¹²

Motion for Judgment Notwithstanding the Verdict

We now address Quality's challenge to the trial court's denial of its motion for judgment as a matter of law at the close of PSG's case and its motion for judgment notwithstanding the verdict. We review both motions de novo, viewing the evidence in the light most favorable to the nonmoving party and granting either motion only if there is no substantial or justifiable evidence to sustain the jury's verdict. Davis v. Microsoft Corp., 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003) (motion for judgment as a matter of law at the close of plaintiff's case); Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 767 n.12, 162 P.3d 1153 (2007) (motion for judgment notwithstanding the verdict).

Quality contends the evidence did not support the jury's verdict on the breach of contract, CPA, or negligence claims. We conclude the evidence did not support the breach of contract or CPA claims, but did support the jury's verdict that Quality was negligent.

Breach of Contract

To prove that Quality committed breach of contract, PSG had to show, under the jury instruction:

- (1) That a defendant entered into a contract [Halstien and/or PSG];

¹² Because PSG does not cross appeal the trial court's ruling that the breach of fiduciary duty claim was waived, we do not decide whether the ruling was error.

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- (2) That the terms of the contract included that the defendant would insure that any foreclosure of [Halstien's] home would be conducted in a manner defined by Washington law;
- (3) That the defendant breached the contract;
- (4) That [Halstien and/or PSG] performed or offered to perform the obligations under the contract; and
- (5) That [Halstien] sustained damages as a result of a defendant's breach.

The contract at issue is the deed of trust. PSG argues that the express terms of the deed of trust provide that Quality agreed to conduct the foreclosure in accordance with Washington law. PSG contends that breach of this purported agreement was proved by evidence that Quality did not comply with Washington law in conducting the foreclosure sale. It contends it showed that: (1) Quality's deference to WaMu was contrary to its obligation to be impartial; (2) Quality made no effort to avoid sacrificing Halstien's equity, and (3) Quality falsely dated the notice of sale in order to speed up the foreclosure process.

We conclude that PSG failed to prove its breach of contract claim because there was no contract term that made it a breach of the deed of trust for either party to "not follow" Washington law. The allegedly breached clause of the deed of trust states, in its entirety:

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

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"Applicable Law" is defined elsewhere as "all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions."

This is a governing law provision, i.e., an agreement that, should the parties need to resort to the courts to enforce the contract, the law of the State of Washington shall apply. The provision cannot be construed, as PSG contends, to mean that any violation of an applicable law gives rise to a breach of contract cause of action against another party to the deed. If a Washington law was violated by either party, the remedy for that violation would be as defined by the Washington law allegedly broken. The evidence did not support breach of contract.

CPA Violation

For the CPA claim, the jury instruction required PSG to prove:

- (1) That [Quality] engaged in an unfair or deceptive act or practice;
- (2) That the act or practice occurred in the conduct of [Quality's] trade or commerce;
- (3) That the act or practice affected the public interest;
- (4) That [PSG] was injured; and
- (5) That [Quality's] act or practice caused [PSG's] injury.

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). PSG argued at trial that Quality committed a CPA violation by failing in its duty as a trustee to act impartially and by predating and notarizing the notice of sale. Quality contends PSG did not meet the first and fifth elements.

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We conclude that, for different reasons, neither claimed act supports the CPA verdict. First, PSG claimed that failing to be impartial in conducting a trustee sale is an unfair act or practice because being impartial is part of a trustee's fiduciary duty under Cox. Whether a particular act or practice is "unfair or deceptive" is a question of law. Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997). The first two elements of Hangman Ridge may be established in one of two ways: (1) showing that an act or practice that has a capacity to deceive a substantial portion of the public has occurred in the conduct of any trade or commerce, or (2) showing that the alleged act constitutes a per se unfair trade practice. Hangman Ridge, 105 Wn.2d at 785-86. A "per se unfair trade practice" occurs when a party violates a statute declared by the Legislature to constitute an unfair or deceptive act in trade or commerce. Id. at 786. Here, the Deed of Trust Act contains a CPA provision, RCW 61.24.135, which defines per se unfair or deceptive acts and practices for CPA purposes. The statute does not mention a trustee's breach of fiduciary duty or any other act or practice applicable here.

PSG makes the conclusory argument that an unfair or deceptive act or practice was shown through evidence that Quality acted impartially and breached a fiduciary duty, as such duty is explained in dicta in Cox. But it cites 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." We will not consider an inadequately briefed argument. First American Title Ins.

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Co. v. Liberty Capital Starpoint Equity Fund, LLC, 161 Wn. App. 474, 486, 254, P.3d 835 (2011) (citing Bohn v. Cody, 119 Wn.2d 357, 368, 832 P.2d 71 (1992); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)). This basis did not support the CPA claim.

The other basis for PSG's CPA claim is Quality's practice of predating and pre-notarizing the notice of sale. PSG argued at trial that Quality did this to minimize the time between the notice and the foreclosure sale. PSG contends that the record shows it could have taken Quality's agent a full week to get notices of sale from its San Diego office to the recording office in Island County. It contends that if Quality correctly dated and notarized the document, the notice of sale may not have been recorded until about December 3, 2007. If the notice was recorded on December 3, the foreclosure could not have been scheduled before Friday, March 7, 2008. PSG claims that had the foreclosure sale been held in March instead of February, it would have had time to close its sale.

Quality all but admits that this practice was improper.¹³ Nonetheless, we agree with Quality that Halstien received the full statutory period required for notice and that her legal rights were unaffected. Under RCW 61.24.030(8), the trustee must transmit written notice of default to the grantor by mail and by posting a copy of the notice (or personally serving it) at least thirty days before notice of sale is recorded, transmitted, or served. The trustee must record the notice of sale, in the office of the county auditor in which the deed of trust is recorded, at least 90 days before the foreclosure sale. RCW 61.24.040(1)(a).

¹³ At trial, Quality acknowledged predating notarizations, including Halstien's. This made the notices appear signed and notarized later than they were. Quality testified that its management forbade predating notarizations when it learned about this practice in 2007.

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The evidence at trial established the following. The notice of default was posted on October 25, 2007. As November 25 was a Sunday, Quality was required to wait until November 26 before it could record, transmit or serve the notice of sale. Quality sent the notice of sale to Halstien and recorded it in Island County on November 27, 2007. So although Quality predated, signed, and notarized the notice of sale in San Diego, it nonetheless abided by the statutory requirement of waiting 30 days before recording, transmitting, or serving the notice of sale. We disagree with PSG that Quality's act in mailing the notice of sale from its San Diego office to a service company in Washington constituted "transmission" under RCW 61.24.030(8).

Furthermore, PSG failed to establish that the predated notice caused Halstien's home to be sold at foreclosure before PSG closed on the home. The closing date specified in the REPSA was on or before March 28, 2008. Klem testified that the closing was to happen sometime in March. The letter from Greenfield to WaMu stated that the closing date was March 28. There was no testimony that PSG actually planned to close with the buyer earlier than March 28—for example, on March 6. The harm alleged to PSG was speculative. The predated notice issue did not support the CPA claim.

Negligence

The jury instruction required that PSG prove, for its negligence claim:

- (1) That [Quality] had a duty to [Halstien/PSG]
- (2) That [Quality] acted, or failed to exercise ordinary care, in one of the ways claimed by [Halstien/PSG] and that in so acting, or failing to act, [Quality] was negligent;
- (3) That [Halstien/PSG] was injured or [her/its] property rights were damaged; and

(4) That the negligence of [Quality] was a proximate cause of the injury to [Halstien/PSG] or the damage to [her/its] property rights.

At trial, PSG argued that Quality was negligent because it should have postponed the foreclosure given the sum of the circumstances present in the Halstien foreclosure, particularly because the value of the home was substantially more than the debt, a REPSA was signed before the sale, and a brief continuance would not have harmed WaMu. The evidence presented at trial, viewed in a light most favorable to PSG, permitted a rational jury to find that Quality was negligent under this theory.¹⁴

First, as to the element of duty, there is no dispute that Quality, as the trustee in the deed of trust, owed a duty of care to PSG, the grantor. Quality only argues that because the fiduciary duty claim was dismissed, any duties it owed as a trustee could not have been considered to support a negligence claim. But Quality points to no authority that a trustee's duties are equivalent to—and no more than—its fiduciary duties. Nor does it point to any authority that a breach of fiduciary duty claim and a negligence claim amount to the same claim and cannot be maintained in the same lawsuit. Furthermore, the jury was not instructed that Quality had a "fiduciary duty" in the negligence instruction. We conclude that Quality owed a duty of care as a trustee to PSG.

¹⁴ PSG also argued that Quality abdicated its duties by not conducting the foreclosure sale itself but having it conducted by a "legal messenger" who "could not make the important decisions that needed to be made when the bidding stopped at one dollar more than what was owed to the Bank." Quality disputes PSG's contention that it used a "legal messenger" to conduct the sale, pointing to the testimony of its COO, David Owen, who stated that Quality retained Priority Posting and Publishing Company (PPPC) to conduct the sale. PPPC is a company that assists in conducting foreclosure procedures. Owen also denied any knowledge that PPPC itself used a "legal messenger." In any event the Act provides that "the trustee or its authorized agent" may conduct the foreclosure auction. RCW 61.24.040(4) (emphasis added). Quality's use of an agent to conduct the sale was authorized by statute.

Next, there was evidence supporting the jury's finding that Quality, as the trustee, breached its duty to PSG. Evidence at trial showed that PSG employee Greenfield told Quality that PSG wanted the sale postponed so that it could sell the home. Quality told Greenfield WaMu would need a signed REPSA. Ten days before the trustee sale, Greenfield informed Quality that PSG had a signed REPSA. Quality told Greenfield it could not postpone the sale without WaMu's approval and instructed him again to contact WaMu. Under the terms of its assignment by WaMu, Quality could not—and told PSG it could not—exercise its statutorily granted discretion to postpone the sale.¹⁵ WaMu's "Attorney Expectation Document" instructed Quality: "Your office is not authorized to postpone a sale without authorization from Fidelity or Washington Mutual."¹⁶ David Leen, an attorney who helped draft the Deed of Trust Act and acted as a trustee on numerous occasions, testified as an expert witness on trustee practices. When asked about the instruction in WaMu's "Attorney Expectation Document," he testified that if a bank gave him such an instruction as a trustee, he would not follow it because it would be improper. He testified, when asked what he would expect a trustee to do, given a situation similar to that in the

¹⁵ The instruction in the Attorney Expectation Document appears to violate RCW 61.24.040(6), which at the time the sale in this case took place stated, "The trustee may for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days" See Laws of 2008, ch. 153 § 3 (effective June 12, 2008); Laws of 2009, ch. 292 § 9 (effective on July 26, 2009). The statute grants authority to the trustee to postpone a sale.

¹⁶ Owen testified at trial that Fidelity was a vendor that banks used to help facilitate communication between the banks and Quality. He testified that Fidelity performed document uploading and facilitated referrals of foreclosures for the banks.

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Halstien foreclosure, "Well, I think a trustee would absolutely have to continue the sale under those assumed facts."¹⁷

Finally, there was evidence that Quality's actions caused harmed to PSG. PSG planned to close the sale of Halstien's home on or before March 28, as indicated in the REPSA. Had Quality postponed its trustee sale long enough for the sale to be realized, and PSG sold the home for \$235,000 as planned, equity for Halstien would have remained after paying the debt owed to WaMu.

Quality argues that the evidence failed to support a negligence claim because it served all required statutory notices and PSG knew or should have known of its statutory right to restrain the sale. This goes to waiver, which, as we have already noted, did not apply. Furthermore, Quality contends the evidence did not support a finding that it was negligent where PSG: made two phone calls to Quality before the foreclosure sale but did not actually send the REPSA to Quality, tell Quality about its difficulties with WaMu, or appear at the sale despite having a signed REPSA. Quality fails to explain how these facts, which go to PSG's actions, preclude its own negligence as a matter of law. Its assertions amount to an argument that because there was evidence that PSG was negligent, Quality could not be negligent. The argument is unavailing.

¹⁷ Leen testified that under the Act, the trustee has the authority to postpone a foreclosure sale. He testified that when he acted as a trustee, the first consideration in whether to continue a sale was whether any party would be harmed by a continuance. He testified, "[I]f there is no harm to the lender and the debt is low and the property appears to be valuable, then a short continuance is not harmful to anybody." He also testified that another consideration was whether the grantor had previously asked for a continuance, noting that "generally the first continuance is kind of a given I think in the trustee industry." Leen testified that if a foreclosure is postponed and the property sold for more than what is owed to the bank, neither the trustee nor the bank suffers any loss.

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It is the jury's role to determine the facts and we will not disturb its findings on appeal unless they are clearly unsupported by substantial evidence. Herring v. Dep't of Soc. and Health Servs., 81 Wn. App. 1, 15-16, 914 P.2d 67 (1996) (citations omitted). Substantial evidence is evidence that would convince an unprejudiced, thinking mind. Id. at 16. The record here contains substantial evidence of Quality's negligence.

Conclusion

Because we hold that the CPA verdict was not supported, we do not review the trial court's denial of PSG's request for injunctive relief under the CPA. Furthermore, we reverse the award of attorney's fees under the CPA and deny PSG's request for fees on appeal under the CPA. Where we uphold the jury's verdict only on the negligence claim, and where the jury allocated 50 percent of fault to Quality and 50 percent to PSG, we remand for re-entry of judgment.

Affirmed in part, reversed in part, and remanded for re-entry of judgment.

WE CONCUR:

Speer, J.

Appelwick, J.

Belleville, J.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

DIANNE KLEM, as Administrator of)
the ESTATE OF DOROTHY HALSTIEN,)

No. 66252-0-1

Respondent/Cross Appellant,)

v.)

WASHINGTON MUTUAL BANK,)
a Washington corporation,)

ORDER DENYING RESPONDENT/
CROSS APPELLANT'S MOTION
FOR RECONSIDERATION

Defendant,)

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

Appellants/Cross-Respondents.)

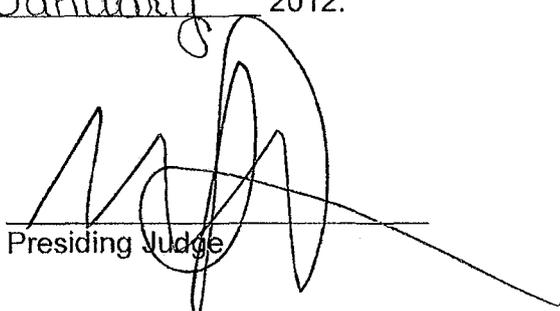
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Respondent/Cross Appellant Dianne Klem filed a motion for reconsideration of the opinion filed in the above case on December 19, 2011. A majority of the panel has determined the motion should be denied.

Now, therefore, it is hereby

ORDERED that respondent/cross-appellant's motion for reconsideration is denied.

DATED this 27th day of January, 2012.


Presiding Judge