

**No. 73705-8-I
COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

KAREN S. POOLEY,
Appellant/Plaintiff,

FILED
November 2, 2016
Court of Appeals
Division I
State of Washington

v.

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a
Washington corporation; QUALITY LOAN SERVICE CORPORATION,
a California corporation; and McCARTHY & HOLTHUS LLP, a
California limited liability partnership,

Respondents/Defendants.

RESPONDENT'S ANSWERING BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Karen Pooley ("Pooley") appeals from the dismissal of her presale wrongful foreclosure claim against Quality Loan Service Corporation of Washington ("QLSWA") and Quality Loan Service Corporation ("QLSC") (collectively, "Quality"). The Court should affirm the Superior Court's dismissal because Pooley failed to submit sufficient evidence to establish the prima facie elements of her claim under the Consumer Protection Act, RCW 19.86 *et seq.* ("CPA").

In April 2007, Pooley, a real estate agent/investor, obtained a loan secured by her home from Washington Mutual Bank, FA ("WaMu"). Two years later Pooley decided she had no equity and chose to discontinue making payments, even though she then had the resources with which to pay. Clerk's Papers ("CP") 3898, 3905, 3909-11. Before commencing foreclosure, the servicer, JPMorgan Chase Bank, N.A. ("Chase") offered foreclosure assistance, but Pooley refused, telling Chase "you are not the party I should be dealing with." CP 6377. When QLSWA later commenced a nonjudicial foreclosure, Pooley sued QLSWA and Bank of America, N.A. ("BANA")—then the trustee of the trust that owns the loan. She voluntarily dismissed these claims after BANA filed declarations detailing the loan's chain of title and the trust's right to commence

nonjudicial foreclosure proceedings. CP 3938-39 and Supplemental Clerk's Papers ("SCP") 9807-9956.

Even before filing her first lawsuit, Pooley had made an extensive study of the various agreements relating to WaMu's securitization of the loan, the subsequent sale of WaMu's assets to Chase, and Chase's authority to service the loan. Pooley refused to acknowledge these agreements, insisting that she needed to see "multiple FedEx receipts" to show that WaMu "physically transferred" the loan into a trust, and "transaction records that show that they [Chase] actually paid money to the FDIC [Federal Deposit Insurance Corporation ("FDIC")] in connection with [her] loan." CP 3958, 3900. Pooley's stance resulted from her concern about purported government and bank malfeasance. CP 3914. During the next two years Pooley stood her ground, disregarding at least 21 letters from Chase offering foreclosure alternatives, and refusing to provide information requested by Chase. CP 5410-11, 5644-45, 6378-6444.

Pooley filed this, her second lawsuit, after QLSWA issued a new Notice of Trustee's Sale. She **falsely** claims that there are competing and contradictory claims to ownership of her loan, that the owner and holder is unknown, and that the loss of the original note impacts the trust's right to nonjudicially foreclose. Many of the statements that her Opening Brief ("OB") represents as fact are refuted by the record (or absence thereof).

Pooley uses these baseless allegations to claim damages for, at most, technical violations of the Deed of Trust Act, RCW 61.24 *et seq.* ("DTA"), which did not cause injury. Pooley's position is essentially that a CPA plaintiff is entitled to a jury trial without regard to whether he or she can meet their evidentiary burden on summary judgment. But summary judgment on a CPA claim involves "a case by case determination of whether the plaintiff can satisfy the requisite elements." *Lyons v. U.S. Bank, N.A.*, 181 Wn.2d 775, 785, 336 P.3d 1142 (2014). Pooley's proffered evidence fell short. There is no material or genuine issue of fact as to any of the following: (1) Pooley defaulted on her note and deed of trust, (2) the WaMu Trust is the owner and holder of the note and beneficiary of the deed of trust (and QLSWA had sufficient proof of said ownership), (3) QLSWA was validly appointed by the WaMu Trust before it commenced to act as Successor Trustee, (4) QLSWA investigated and responded to the numerous inquiries sent by Pooley, (5) even if there were violations of the DTA, they were technical and did not injure Pooley, and (6) Pooley did not suffer any compensable injury that was caused by Quality.

II. COUNTERSTATEMENT OF ASSIGNMENTS OF ERROR

1. Did the Superior Court properly dismiss Pooley's CPA claim as a result of her failure to establish the *prima facie* elements of her claim?

2. Did the Superior Court properly conclude that any nonmaterial and/or technical defects in the foreclosure process did not constitute an unfair or deceptive act and did not injure Pooley, and thus did not give rise to liability under the CPA?

3. Does Pooley's failure to address her common law (non-CPA claims) at the Superior Court and/or failure to address these claims in her Opening Brief result in an abandonment?

4. Whether the Court should disregard Pooley's evidentiary objections made for the first time on appeal but not raised at the Superior Court?

III. COUNTERSTATEMENT OF FACTS

A. The Loan Documents. The Adjustable Rate Note ("Note") includes Pooley's agreements that (1) the Lender may transfer the Note and (2) "[i]f any of the Loan Documents are lost ... then I will sign and deliver ... a Loan Document identical in form and content which will have the effect of the original." CP 2489-90, 2562. The Deed of Trust that secures the Note includes Pooley's agreement that (1) "[t]he Note or a partial interest in the Note (together with this Security Interest) can be sold one or more times without prior notice to Borrower" and (2) the party servicing the loan might be different than the party who eventually held the Note. CP 2490, 2576.

B. Securitization. WaMu securitized the Loan shortly after origination but retained the servicing rights. Consequently, the Loan Documents remained in the custody of WaMu until the FDIC placed WaMu in receivership and transferred its assets (including the right to service the Loan) to Chase, who remains in custody of the Loan Documents today. CP 3858-59, 3696-3740.¹ Notably, every document evidencing these transfers is among the various public records Pooley claims she extensively reviewed before filing her lawsuits. CP 5651-60, 3891-93, 4060-81, SCP 9807-9956. The evidence refutes Pooley's theories for several reasons:

First, WaMu pooled the Loan with other loans and sold it to WaMu Asset Acceptance Corp. ("WaMu Acceptance") pursuant to the terms of the Mortgage Loan Purchase and Sale Agreement ("MLPSA") as supplemented and restated by a Term Sheet. CP 3891, 4064-14. Then, WaMu Acceptance "deposited" the Loan in the WaMu Mortgage Pass-Through Certificates Series 2007-OA5 Trust ("WaMu Trust") under the terms of a Pooling and Servicing Agreement ("PSA") that governed the

¹ Under the Federal Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1811 et seq., the transfer of assets to Chase occurred as a matter of law "without any ... assignment" or other writing evidencing the transfer beyond the Purchase and Assumption Agreement. 18 U.S.C. § 1821(d)(2)(G)(i)(II).

WaMu Trust. CP 4128-4383.² The PSA provides that "[l]egal title to all assets of the [WaMu] Trust shall be vested at all times in the [WaMu] Trust as a separate legal entity." CP 4243, 4225. The PSA appointed LaSalle Bank, N.A. ("LaSalle") as the Trustee of the WaMu Trust. LaSalle later merged into BANA, and BANA was later succeeded by US Bank, N.A. CP 4225, 4454, 4470-81. These changes in the trustee did not change the basic fact that the WaMu Trust is the owner and holder of the Note with the right to foreclose, and, as set forth below, WaMu or its successor, Chase, remained the servicer with the authority to direct foreclosure.

Second, WaMu was named as both the "Servicer" and "Initial Custodian." CP 4184, 4219. As the Servicer, WaMu had "full power and authority," to "effectuate foreclosure or other conversion of the ownership of the Mortgaged Property," and to cause to be executed and delivered on behalf of the Trust, any and all instruments with respect to the loans. CP 4244-45. The Loan Documents were "deposited" with the Trustee to be held by the Custodian on behalf of the Trust and are deemed to be in possession of the Trust. CP 4229, 4225. The Loan Documents were not required to be indorsed or assigned if WaMu was the original lender, as was the case with the Pooley Loan. CP 4189. The WaMu Trust

² The mortgage loan schedule to the PSA includes the Pooley Loan. CP 4143. The PSA defines the "mortgage loans" as loans identified in the mortgage schedule. CP 4192.

acknowledged receipt of the Loan Documents. CP 4232. Thus, the Note remained in the physical custody of WaMu, to be held on "behalf of" and "deemed to be in the possession" of the WaMu Trust. CP 4244, 4252.

C. Chase's Acquisition of WaMu's Assets. On September 25, 2008, the Office of Thrift Supervision closed WaMu and the FDIC assumed WaMu's assets as receiver. That day the FDIC entered into a Purchase and Assumption Agreement ("PAA") which transferred WaMu's assets to Chase. CP 4406-49, 3696-3740. On October 2, 2008, the FDIC recorded in the King County property records an affidavit confirming Chase's purchase of WaMu's assets, including all loans, commitments and servicing rights. CP 3892, 4450-53. Chase succeeded to WaMu's role as servicer and custodian, with physical possession of the Note. CP 3658, 3661, 3663-71.

The following day Chase reopened the WaMu branches, and thereafter conducted business as usual. CP 3658-59, 6362, 6445-47, 6457-58, 6339. Chase later announced that it planned to "complete most systems integration and rebranding by year end 2010." CP 6454-56. The correspondence between Pooley and Chase between late 2009 and 2012 continuously refers to various WaMu entities. CP 2604-07, 2611-20.

Pooley learned of the transfer to Chase on the internet and she reviewed the PAA on the FDIC website:

Q. And was the FDIC representing that was the agreement between itself and JP Morgan Chase?

A. *Yes.*

Q. And you chose to believe otherwise?

A. *Yes.*

Q. So you thought the FDIC was lying about the form of agreement between itself and JP Morgan Chase?

A. *I believe the FDIC has withheld from the public, yes, I do. CP 3917.*

D. **Pooley's Default.** Pooley has not made a payment since June

2009 (CP 5341, 5368) but will not admit she is in default:

Q. You agree that you did not pay the full payment of each monthly payment on the date it is due?

A. *I can't answer the question.*

Q. Why can't you answer that question?

A. *Because you're asking me to -- to talk about a contract where the entire contract is identifying the lender, and I've spent two and a half -- or four and a half years trying to identify the lender.*

Q. I'm not asking you to identify the lender.

A. *No, you're asking --*

Q. I'm asking you to tell me whether or not you paid the full amount of each monthly payment on the date it was due.

That's a yes and no question.

A. *And I opt for not applicable. CP 3906, 3907-08.*

Chase repeatedly informed Pooley about her options for foreclosure assistance. CP 3659, 3751-62, 3807-10. Rather than pursue these options, Pooley followed advice she found on the internet down a path of no return, disputing Chase's right to service her loan and refusing to deal with Chase until they could satisfy her extravagant demands. CP 3929, 3930, 3958, 4015. Pooley admits that no entity other than Chase (and WaMu before it) ever contacted her about the Loan, but she felt entitled to put Chase to its

proof. CP 3904, 3949. Pooley started sending demands to Chase before QLSWA entered the picture. CP 5462, 5465.

E. The Relationship Between Chase and Quality. Both QLSWA and QLSC³ have provided services to Chase for many years, and both also provided services to WaMu before the Chase acquisition. These services include conducting nonjudicial foreclosure of loans serviced by Chase as a result of its acquisition of the servicing rights of WaMu. CP 3578-79. Employees of both QLSWA and QLSC have reviewed the publicly available documents on the FDIC and SEC websites and conferred with Chase about its authority with respect to the loans held in various WaMu trusts and serviced by Chase. *Id.*

Chase and Quality use “LPS Desktop,”—a third party database—to communicate and post documents for review and/or approval in a nonjudicial foreclosure proceeding. The process begins with a Foreclosure Transmittal Package (“Foreclosure Package”), which advises Quality of the identity of the beneficiary and includes a summary of information related to the loan. *Id.* Quality has the ability to access and review electronically stored copies of the associated note and deed of trust, and other documents provided by Chase as may be relevant. CP 3580. These

³ QLSC and QLSWA are separate corporations that provide nonjudicial foreclosure services. CP 3577-80. QLSC sometimes provides services to QLSWA, but for Washington nonjudicial foreclosure proceedings, QLSWA is the trustee. *Id.*

documents may be viewed on the LPS Desktop without being downloaded onto Quality's system or printed for the file. *Id.* Quality then orders a Foreclosure Guarantee from a title insurer. *Id.* The employee then reviews and compares the information Quality has received and prepares the various documents that are part of the nonjudicial foreclosure process. *Id.*

F. The Nonjudicial Foreclosure Proceedings. Quality received the Foreclosure Package for the Loan on January 29, 2010. *Id.*, CP 3584-99. Using the information available on LPS Desktop and documents from the public record, Quality's employees prepared a Declaration of Ownership ("Beneficiary Declaration") and provided it to Chase for review. CP 3580, 6173, 6179-80. The form of declaration used for securitized loans serviced by Chase was carefully vetted by Quality's compliance and legal departments. CP 6181, 6188-89. On February 3, 2010, Chase, acting in its capacity as agent for BANA, trustee of the WaMu Trust, executed the Beneficiary Declaration under oath. Quality received the Beneficiary Declaration on February 10, 2010. CP 3580, 3600-01. Notably, the information contained in the Beneficiary Declaration is consistent with the information in the Foreclosure Package and with the public records. CP 3584-99, 3600, 3658, 3673-87.

On February 18, 2010, QLSWA, acting on behalf of BANA (trustee of the WaMu Trust), sent Pooley a Notice of Default ("NOD"). CP 3581,

3602. Pooley is less than forthright when she states the NOD did not include the "mandatory" loss mitigation form. Documents produced in discovery reveal that, at a minimum, Pooley received this form with the mailed copy of the NOD. CP 6339-54. Pooley focuses instead on her claim that the copy of the NOD posted to her property did not include an ***additional*** copy of this form. CP 73, 6339, 6355-60, 6364, 6492-99.

In any event, Pooley had a nine minute telephone call with the Loss Mitigation Department at Chase the same month she received the NOD. CP 5644-45, 6376-77. The notes she took of her call reflect that she discussed the default status of her loan, including the amount past due, and the fact that she was in foreclosure. Chase recommended that she pursue a loan modification. CP 6376-77. When Chase confirmed that it represented the "investor," Pooley terminated the call, telling Chase "I need to end this conversation as you are not the party in interest that I should be dealing with." *Id.* Pooley did not provide any of the financial information Chase requested (CP 5410-11) and instead Pooley wrote letters to Chase accusing it of "predatory lending" and "servicing schemes" (CP 3928-29) and she hired an attorney to oppose the foreclosure. CP 3934, 4017.

On February 24, 2010, Chase, as attorney-in-fact for BANA, appointed Quality as successor trustee ("First AST"). CP 3581, 3606,

3660, 3818-21.⁴ After receiving a demand letter from Pooley's counsel, QLSWA employees reviewed the LPS Desktop and other file materials to confirm that the WaMu Trust remained the owner of the Loan and then referred the letter to the in-house legal department. CP 3581. On March 22, 2010, QLSWA executed and served a Notice of Trustee's Sale ("First NOTS") which scheduled a sale for June 25, 2010. CP 3581, 3609.

As part of its ongoing internal audit/review process QLSWA prepared, and on May 13, 2010, Chase executed an Assignment of Deed of Trust ("Assignment") assigning any remaining beneficial interest in the Deed of Trust to BANA, as trustee of the WaMu Trust. CP 3581, 3613, 3661, 3843-45. WaMu had already transferred and assigned the Loan under the MLPSA and PSA, but those documents do not appear in the land records, and title insurers want these assignments as a condition of title insurance. CP 6162-63. Having "escalated" the matter for legal review, and after reconfirming that the WaMu Trust owned the Pooley Loan (CP 3581, 6183-85), on May 24, 2010, QLSWA executed and served a second

⁴ On August 26, 2010, BANA appointed QLSWA as successor trustee pursuant to an Appointment of Successor Trustee ("Second AST"). CP 3582, 3620, 3660, 3819-24. This Second AST was redundant of the First AST as QLSWA had previously been appointed.

Notice of Trustee's Sale ("Second NOTS") which scheduled the sale for August 27, 2010.⁵ CP 3581-82, 3616.

G. First Lawsuit. Before the sale, Pooley filed an action against QLSWA and BANA alleging that the owner and holder of the Note and Deed of Trust were unknown. CP 5500. BANA moved to dismiss, filing documents which set forth the WaMu Trust's ownership of the Loan, Chase's authority to service the Loan, and QLSWA's authority to foreclose. SCP 9807-9952. These filings convinced Pooley to dismiss her lawsuit and refrain from naming BANA or Chase in this one. CP 4536.

On or about June 1, 2011, Chase sent the Note to counsel for the WaMu Trust, Fred Burnside of Davis Wright Tremaine ("DWT"). CP 3884, 3886. Pooley went to the offices of DWT where she was shown her wet-ink signature on the original Note. CP 3884. Pooley claims the Note she examined that day was a "forgery" because it was on "thin paper" and she could not feel the indentations of her signature. CP 4537. But the Note

⁵ Pooley questions whether the Second NOTS is void due to an "apparent forgery." No sale occurred or can occur so any issue as to the validity of the Second NOTS is moot. The record which Pooley cites as supporting her argument that Dawson's signature is a forgery is in some instances irrelevant and, in others, inadmissible. Pooley cites CP 14-16 (allegations related to Margaret Dalton (not Bonnie Dawson)) CP 4716-20 (letter to Pooley from Hennessee), CP 4728 (signature of Dawson), CP 4731 (same), CP 4734 (same), CP 4737 (same), CP 4740 (same). Pooley is required to produce admissible evidence to substantiate her claims, and she cannot rest on her personal lay opinions and argumentative assertions. Quality objected to Pooley's Declaration. CP 6531-35. Moreover there are no genuine issues about Dawson's notarial authority as of May 2010.

which she claims is a forgery is the exact form of the Note attached to her Amended Complaint. CP 2558-63.

DWT returned the original Note to Chase on February 9, 2012. CP 3884-85, 3888. Sometime thereafter, the original of the Note was lost while in the possession of Chase. CP 3661. There is no evidence that Quality was informed of the loss of the original Note until July 29, 2013⁶ (CP 1575) when Chase informed Quality not to rely on the Beneficiary Declaration. CP 461. There is also no evidence that Quality relied on the Beneficiary Declaration (or took any other action to advance the nonjudicial foreclosure) after July 29, 2013, but the loss of the original Note does not impact its enforceability under these circumstances.

H. Quality's Investigation of and Responses to Pooley's Demands.

The nonjudicial foreclosure proceeding was placed on hold while Chase conducted an administrative review of Pooley's loan. CP 3945-46, 4058-59. During this period of time, Pooley, first via counsel and later *pro se*, wrote numerous letters to Chase and Quality challenging various aspects of the foreclosure process. *E.g.*, CP 5462, 5464, 4789, 4792. Both Chase and Quality responded independently and repeatedly to Pooley's numerous inquiries. *E.g.*, CP 2601-20, 3644, 3649, 4034, 4035, 6169. Still

⁶ Quality was first informed of the loss of the Note more than three years after the NOD was issued (February 18, 2010) and nearly one year after the third NOTS was served (July 13, 2012). CP 3652-56.

dissatisfied, on May 8, 2012, Pooley sent to Quality a document she had recorded in the King County property records in which she purported to amend QLSWA's duties as trustee. CP 4029-34. A few weeks later, Pooley recorded a "Notice of Disclosure" alerting third parties to her erroneous position that there were competing claims to ownership of her loan. CP 4682-84. These actions appear to have been the product of Pooley's misapprehension of the roles of a trustee, loan servicer, owner, and investor. While Pooley claims that she could not find any information about WMMSC,⁷ the PSA (which Pooley refers to in her Notice of Disclosure) and the related securitization documents, which Pooley states she reviewed, make clear the identity and roles of the servicer (WaMu), owner (WaMu Trust), and investor (WMMSC as administrative agent for investors (CP4121)) and the obligations these parties have to each other.

Pooley asserts that QLSWA did not investigate or respond to her inquiries, or the Notice of Disclosure, but even the exhibits she attaches to her Amended Complaint show that QLSWA did investigate her complaints and responded on numerous occasions. CP 2637, 2657, 2702, 2704. In fact, QLSWA made repeated and significant efforts to investigate

⁷ Pooley states that Chase told her that the "investor/owner" was Washington Mutual Mortgage Securities Corp ("WMMSC"). But the documents she cites (CP 95, 104, 108, 4801) all only use the term "investor" and not the term "owner." This court has recognized that investors in a securitized trust do not own the Note or Deed of Trust. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 347 P.3d 487 (2015).

and respond to Pooley's claims despite the fact that many of the demands she made were repetitive, nonsensical, abusive and otherwise difficult to respond to.⁸ Following the first receipt of an inquiry on Pooley's behalf, in March 2010, her file was sent to legal and received "escalated review." CP 3581, 6184. The record is replete with Quality's investigation of, and responses to, Pooley's continuous and cumbersome demands. CP 3580, 3582, 3642-52, 6183-87.

The September 6, 2012 response summarizes some of the extensive review which QLSWA undertook, and it notes the relevant history of the response to the Notice of Disclosure as set forth below. Each of the referenced letters from Quality are in the Clerk's Papers⁹ and they reveal (1) some of the numerous efforts QLSWA made to respond to Pooley and (2) that Pooley's statement that QLSWA never investigated her claims is simply untrue.

- August 17, 2010, you initiated a lawsuit against Quality, which was dismissed in July 2011.

* * * * *

- May 8, 2012, you sent correspondence which attempted to add duties to Quality that are outside of those prescribed by law for a trustee under a deed of trust, such as Quality.

⁸ On August 2, 2012, QLSWA's counsel wrote to Pooley as follows: "Unfortunately, despite your prior correspondence dated May 8 and June 18, to which Quality responded on May 21 and July 2, respectively, we are still unable to fully respond to your requests as we do not understand the basis on which you allege you may alter the duties of a trustee under a deed of trust." CP 3582, 3644-45.

⁹ CP 3582, 3642, 3643, 3644-45, 3649-52.

- May 23, 2012, I prepared a response to your claims, explaining that Washington law does not allow you to add additional duties to a trustee under a deed of trust.
- June 18, 2012, you sent additional correspondence regarding the same issues raised in the May 8, 2012 letter.
- July 6, 2012, I prepared a second response to your correspondence.
- July 17, 2012, you sent correspondence requesting the declaration of ownership.
- July 18, 2012, you sent additional correspondence regarding the same issues raised in the May 8, 2012 letter.
- July 30, 2012, you sent a letter claiming FDCPA violations.
- July 30, 2012, you sent a letter claiming that Quality is not the trustee.
- August 2, 2012, I prepared yet another response to each of the issues raised your correspondence and provided you with the declaration of ownership.
- August 15, 2012, you sent correspondence alleging "robosigning" and again, attempting to add duties to the trustee, attacking my character personally and alleging that Quality has violated its duty of good faith as trustee. CP 3582, 3649-52.

QLSWA's response also notes that Pooley "continues to raise issues and make demands that have previously been addressed either within your lawsuit against Quality or in Quality's prior responses." *Id.* Pooley may not have agreed with Quality's conclusions, but thorough investigations of her assertions occurred.

I. The Nonjudicial Foreclosure Proceedings/Redux. Pooley's repeated dunning of Quality and Chase in the summer of 2012 occurred because Chase notified her that a trustee's sale date was forthcoming.

Importantly, Chase's communication with Pooley restated the available options for pre-foreclosure assistance including mediation, and provided website links and telephone numbers for the entities who could assist. CP 3809-10, 3945, 4058. Pooley says she did not request mediation after she received Chase's letter because "I was still standing on that they had not followed RCW 21.24 (sic)," and "still dispute that I am dealing with the correct parties." CP 5575-76. On July 13, 2012, QLSWA executed and served Pooley with a Notice of Trustee's Sale ("Third NOTS") setting a sale date of November 16, 2012. CP 3582, 3652-56. Pooley responded by filing this action. The sale did not occur. CP 3582.

J. Second Lawsuit. Pooley's Second Lawsuit is a repeat of the first, with new allegations about the loss of the Note, the change in trustee, and the Third NOTS. Pooley's counsel refused to respond to requests for a private mediation and failed to appear at a mandatory judicial settlement conference. CP 6263-64, 6459-63. And despite the fact that Pooley's claim centers on her position that (1) the WaMu Trust's ownership of the Note is in dispute and (2) Chase has no authority to service her loan, she does not name either the WaMu Trust or Chase in this case.

Pooley's claimed damages reveal how much her disdain for the mortgage industry has consumed her life. She professes to have devoted a whopping 1,489 hours to researching, protesting, lobbying, volunteering

and corresponding, incurring more than \$36,000 in out of pocket costs in the process. CP 4484-86. Most of these costs (more than \$24,000) were amounts paid to attorneys to assist her with her litigation efforts, and the rest was for copying, shipping and travel (mostly to Olympia for her lobbying efforts). CP 4482-90. Pooley did not keep records of how much of these efforts and costs pertained to her issues with QLSWA (as opposed to issues with other trustees, like ReconTrust, or other financial institutions). CP 5588. Pooley does not provide any itemization about which of these expenses are litigation related, but the record shows most expenses were incurred after the litigation began. CP 4576-78.

Pooley admitted that her significant expenditures bore little fruit. Her purported "investigation" revealed that she was not adversely impacted by many of the issues she researched. CP 3912. The attorneys she retained were "ineffective," causing her to demand refunds and accuse at least one of malpractice. CP 5501-2, 5474-6. Despite the fact that she deemed the services to be of no value, she seeks reimbursement of the attorneys' fees as damages. Pooley also claims that the unsuccessful lobbying she did to criminalize violations of the DTA and volunteer work she purportedly did for the Attorney General's office are compensable as damages. CP 5589, 5586, 5587, 5591.

After close of discovery and just a week before trial, the Superior Court granted summary judgment in favor of Quality on all counts.

IV. STATEMENT OF LAW AND ANALYSIS

A. Issues Related to Review.

1. Standards for Review. An order granting summary judgment is reviewed de novo. *Lyons*, 181 Wn.2d at 783. The party moving for summary judgment bears the burden of demonstrating there is no genuine dispute as to any material fact. If the moving party is the defendant, it may meet this burden by pointing out that there is an absence of evidence to support an essential element of the plaintiff's claim. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). To avoid summary judgment, the plaintiff must then make out a prima facie case concerning the essential element of its claim. *Id.* at 225. An opposing party must respond with more than conclusory allegations, speculative statements or argumentative assertions. *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990). Any facts unnecessary to determine the claim are not to be considered. *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). Factual disputes can be decided as a matter of law when reasonable and rational minds could reach but one conclusion or when the factual dispute is so remote it is not material. *Ruffer*, 56 Wn. App. at 628.

2. Evidentiary Issues. Pooley relies on inadmissible evidence and conclusory arguments in an effort to create issues of fact that are not material to the dispute. The inadmissible "evidence" includes (1) Pooley's 57-page declaration which contains legal conclusions, statements made on information and belief, speculation, and argument, (CP 4523-79)¹⁰ (2) the entire deposition transcripts of Cynthia Riley and Lawrence Nardi which were taken in unrelated cases to which Quality was not a party,¹¹ (3) the declaration of William Paatalo, a biased adversary disguised as an expert,¹² and (4) nearly 4,000 pages of documents which are never cited to the court. Quality objected to this evidence. CP 6531-35.

¹⁰Many of Pooley's statements are made "upon information and belief" and not on personal knowledge (e.g., CP 4530 (¶ 10.12; 10.14). The declaration is filled with irrelevant content (e.g. CP 4543-45 (¶¶ 32, 33, 34, 34.1); CP 4547-48, 4550-51, 4559, 4564-65, 4575 (¶ 35.1; 37.1; 44; 47-49; 56); legal conclusions (e.g. CP 4528-30, 4532-34, 4538, 4542, 4552-53, 4560-61 (¶¶ 10.5, 10.7, 10.8, 10.11, 16; 25; 31.1; 38.4; 44.4); speculation (e.g., CP 4528, 4548-49 (¶ 10.4, 36); and argument (e.g. CP 4546, 4560-62, 4570-75 (¶ 34.2; 44.4; 44.8; 54-56).

¹¹Because there is also no evidence that Quality was present or represented at these depositions or received notice of them neither deposition transcript is admissible. CR 32. Pooley tries to do an end run around Rule 32 by requesting judicial notice of the transcripts. Judicial notice is also not appropriate. *Avery v. Dep't of Social & Health Servs. (In re B.T.)*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003).

¹² Paatalo's credentials as an expert are dubious in an industry which courts and regulators have warned is hallmarked by fraud. E.g., *Theiss v. CitiMortgage, Inc.*, 2013 U.S. Dist. LEXIS 120136 (D. Or. Aug. 23, 2013); (<http://www.atg.wa.gov/news/news-releases/consumer-alert-attorney-general-warns-homeowners-about-paying-join-lawsuits>); (www.consumer.ftc.gov/articles/0130-forensic-loan-audits). CP 6532. Paatalo's declaration testimony offers nothing more than irrelevant legal opinions and speculation *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 791-92, 150 P.3d 1163 (2007) (trial court properly refused to consider declaration from witness who sought to explain the respective legal rights of parties). Paatalo did nothing other than review the various securitization documents and speculate about the impact of WaMu's use of an assumed business name. From this limited review, Paatalo offers his less than humble opinion on whether WaMu and WaMu FA are separate entities, restates the contents of

Conversely, Pooley now asserts that the declaration of Kathryn Salyer (Quality's counsel) is inadmissible, but that objection is waived because she did not raise it in any of her voluminous filings associated with the cross motions for summary judgment, as revealed by her failure to cite to the record. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 468, 843 P.2d 1056 (1993) (appellate court will not consider issues not raised at trial court). And the Salyer Declaration appropriately authenticates documents, most of which are from the public record and which were also the subject of a separate Request for Judicial Notice. SCP 9381-9974.

3. Pooley Abandoned Many Claims. Pooley failed to oppose Quality's motion for summary judgment as to her claims for fraudulent concealment, negligence, conspiracy, and declaratory and injunctive relief, and her claim against QLSC for alter ego.¹³ Pooley's Opening Brief fails to

documents filed in the public record, and discloses the amounts paid to investors by the servicer of the WaMu Trust.

¹³ Pooley alleged that QLSC is liable to her under a commingling/alter ego theory but she entirely failed to respond to Quality's Motion for Summary Judgment as to the joint liability of QLSC (CP 5201-23) and she did not assign error or identify any subissues relating to QLSC's alleged joint liability. OB 1-3. Pooley's entire claim against QLSC is premised on a faulty understanding of principles of corporate disregard. A court may disregard the corporate distinction by "piercing the corporate veil," but only in exceptional circumstances to prevent injustice. *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn. App. 695, 707-08, 934 P.2d 715 (1997). The facts of this case do not support any basis for disregarding the corporate form. There is no evidence that QLSWA (1) used QLSC to evade a duty to Pooley or (2) would be unable to pay any potential monetary judgment rendered against it. "The purpose of a corporation is to limit liability." *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 411, 645 P.2d 689 (1982). Thus piercing the corporate veil to hold QLSC liable for QLSWA's foreclosure activities is neither necessary nor required to prevent Pooley from suffering an alleged loss. Piercing the corporate veil under an alter ego theory is appropriate only if

address these same claims, although she discusses them as part of her good faith CPA claim and her claims against QLSWA's counsel, McCarthy & Holthus LLP ("M&H").¹⁴ Appellate courts do not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority. *McKee v. Am. Home Prods, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989); RAP 10.3(a). Pooley's common law claims against Quality are abandoned and waived.

B. Not All DTA Violations Create Liability. Pooley concedes that in order to obtain damages she must establish all of the elements of a CPA claim. *Frias v. Asset Foreclosure Serv.*, 181 Wn.2d 412, 334 P.3d 529 (2014). Much of the conduct that Pooley alleges ran afoul of the CPA involves purported violations of the DTA. Pooley focuses on technical statutory violations which did not cause injury and on an overly expansive view of the trustee's duty of good faith.

1. Technical Defects in the Foreclosure Process. Although the DTA is construed in favor of borrowers, it is not a "strict liability" statute and requires some sort of prejudice before a court will find an actionable

regarding the two corporations as separate would aid in the consummation of a fraud or wrong upon others. *J.I. Chase Credit Corp. v. Stark*, 64 Wn.2d 470, 475, 392 P.2d 215 (1964). Commingling property and interests is not enough to require piercing of the corporate shield. *Norhawk Invest. v. Subway Sandwich Shops*, 61 Wn. App. 395, 401, 811 P.2d 221 (1991). Pooley has no evidence to establish liability under an alter ego theory.

¹⁴ M&H is separately represented and prevailed on summary judgment.

violation. *Podbielancik v. LPP Mortg. Ltd.*, 191 Wn. App 662, 362 P.3d 1287 (2015) (technical violations which do not cause prejudice are not actionable). This principle is particularly appropriate where, as here, a borrower is in default and cannot cure. *See Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007); *Amresco v. SPS Props.*, 129 Wn. App. 532, 119 P.3d 884 (2005) (borrower must show prejudice before technical defects in the foreclosure process can be used to set aside a sale). Indeed, in cases where no sale has occurred, courts are unlikely to find that a technical defect was a material violation of the borrower's rights. *Meyer v. U.S. Bank Nat'l Ass'n*, 530 B.R. 767, 2015 U.S. Dist. LEXIS 47745, *27, 2015 WL 1619048, *10 (W.D. Wash. Apr. 9, 2015) (collecting cases). *Meyer* recognized (citing Washington law) that a technical violation of the DTA is not, in itself, sufficient to constitute an unfair or deceptive practice for purposes of a CPA claim.

2. The Trustee's Duty of Good Faith. The trustee owes a duty of good faith to the borrower, beneficiaries and grantors. RCW 61.24.010(4). Pooley's argument that Quality owes her a fiduciary duty and her citation to *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) are disingenuous. A fiduciary duty existed in *Klem* only because a *prior* version of the DTA applied: "the 2008 amendment expressly rejected the fiduciary standard." *Id.* at 805-06. Pooley seeks to support her good faith

theories with alleged wrongdoing of QLSWA in other cases, but these allegations are irrelevant and do not support Pooley's claims. Pooley was required to identify some specific way in which QLSWA failed to act impartially *to her* or failed to investigate *her* claims.

Pooley would have this court believe that the duty of good faith requires the foreclosure trustee to independently verify and investigate every aspect of a loan prior to commencing nonjudicial foreclosure. But that approach is contrary to one of the DTA's fundamental purposes: the "process should remain efficient and inexpensive." *Bain v. Metro. Mort. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012). A trustee must conduct a cursory investigation of its authority to foreclose, *see Lyons*, 181 Wn.2d at 787, but no court has ever required a trustee to independently verify items such as the balance due and default status. *E.g., Meyer*, 2015 U.S. Dist. LEXIS 47745 at *23 (citing *Pelzel v. Nationstar Mortg., LLC*, 2015 Wash. App. LEXIS 638, 2015 WL 1331666, *6 (Mar. 24, 2015)); *Bavand v. Onewest Bank, FSB*, 587 Fed. Appx. 392, 394, 2014 U.S. App. LEXIS 20038, 2014 WL 5317145 (9th Cir. Wash. 2014); *Mickelson v. Chase Home Fin. LLC*, 2012 U.S. Dist. LEXIS 171242, 2012 WL 6012791 (W.D. Wash. Dec. 3, 2012); *Butler v. One West Bank, FSB, (In re Butler)*, 512 B.R. 643, 657, 2014 Bankr. LEXIS 3015, 2014 WL 3360481 (Bankr.

W.D. Wash. July 9, 2014). Simply put, the duty of good faith is not as capacious as Pooley argues.

C. The Conduct at Issue. Before addressing why Pooley fails to establish each of the elements of a CPA claim, this brief will explain why the conduct Pooley challenges does not support her claims.

1. The WaMu Trust is the Owner and Holder. The central tenet of Pooley's claims is that the beneficiary of the Deed of Trust is unknown or has changed as a result of the change in trustee or loss of the original Note. This argument underpins Pooley's claims that the wrong entity issued the Notice of Default, that QLSWA acted unlawfully as a Successor Trustee, and that QLSWA violated its duty of good faith in various manners. Other than Pooley's baseless conclusion that there is somehow a conflict between Chase's obligation to service the loan and the WaMu Trust's right to receive payments from Chase as required by the PSA, Pooley has never identified any actual competing claim to ownership of the Note and Deed of Trust.¹⁵ Pooley has not produced one shred of

¹⁵ Pooley attempts to mislead this court by claiming that an entity identified as "WMMSC FBO B OF A AS TTEE" is indicated to have a "vested interest" in Pooley's note. WMMSC (Washington Mutual Mortgage Securities Corp) is identified as an "investor." An investor in a securitized trust has no interest in the notes held by the trust. *Cashmere Valley Bank v. State of Washington*, 181 Wn.2d. at 634, 334 P.3d 1100 (2014).

evidence that (1) Chase did not have the authority to service her loan, or (2) the WaMu Trust is not the owner and holder of the Loan.¹⁶ Even Pooley's own "purported expert" verified that the Loan is accounted for in the WaMu Trust. CP 5162-63, 5173.

Because Pooley challenged the Beneficiary Declaration, QLSWA will discuss the evidence it submitted proving the WaMu Trust's ownership of the Loan. Of course, ownership is not dispositive and it is the WaMu Trust's status as holder that entitles it to enforce the obligation. *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 540, 359 P.3d 771 (2015). To enforce a trust deed, "a beneficiary must either actually possess the promissory note or be the payee." *Bain*, 175 Wn.2d at 104. A holder may possess the Note either physically, or, as here, through an agent. In *Bain*, the Supreme Court recognized that an agent can represent the holder, and that the DTA and Uniform Commercial Code also approve of the use of agents. *Id.* at 106; *Butler*, 512 B.R. at 657.

a. The Loan was Transferred to the WaMu Trust. Pooley's assertion that the Loan was never transferred to the WaMu Trust ignores the schedules to the MLPSA (in which WaMu transfers the Loan to WaMu Acceptance) and the PSA (in which WaMu Acceptance deposits

¹⁶ Pooley falsely states that Quality identified a Bear Steans Trust as the owner. OB 9. Pooley cites not to a statement by Quality, but to a letter she received from Chase that incorrectly identifies the investor, not the owner, as a Bear Stearns Trust. CP 4801.

the Loan in the WaMu Trust). The Pooley Loan is specifically identified. CP 4385.¹⁷ Moreover, even Pooley's own purported expert accessed and provided accounting records that show that the Loan is part of the WaMu Trust. CP 5162-63, 5173-75.

The PSA appointed WaMu as the Master Servicer and Custodian. It was for this reason that Pooley made her payments to WaMu until 2008. CP 4219, 4184. When the FDIC sold WaMu's assets to Chase, Chase took over the operations of WaMu, including the servicing of loans such as Pooley's.¹⁸ The Federal Deposit Insurance Act allows the FDIC to transfer assets "without any approval, assignment, or consent." 12 U.S.C. § 1821(d)(2)(G)(i)(II). Thus, the FDIC was empowered to transfer the assets held by WaMu to Chase without an assignment. Courts across the country have uniformly accepted the validity of the transfer from the FDIC to Chase. *E.g., GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JP Morgan Chase Bank, N.A.*, 671 F.3d 1027 (9th Cir. Cal. 2012).

Pooley's argument that the WaMu Trust never obtained a schedule of loans that Chase purchased from the FDIC when WaMu failed shows that

¹⁷ Pooley lacks standing to challenge the MLPSA or the PSA. *See e.g., Tran v. Bank of New York*, 2014 U.S. Dist. LEXIS 40261, *4, 2014 WL 1225575 (S.D.N.Y. Mar. 24, 2014) (compiling case law).

¹⁸ *E.g., Gaspar v. JP Morgan Chase Bank*, 2012 U.S. Dist. LEXIS 13940, 2012 WL 380968 (D. Haw. Feb. 6, 2012) (finding that Chase acquired WaMu's servicing rights from the FDIC); *Mazed v. JP Morgan Chase Bank, N.A.*, 2014 U.S. Dist. LEXIS 48589, *12, 2014 WL 1364929 (C.D. Cal. Apr. 7, 2014) (noting that pursuant to the PAA, "Chase specifically purchased all the servicing rights and obligations of WaMu").

she fails to comprehend what transfers occurred and when they occurred. Chase did not purchase the Loan from the FDIC. Instead, the Loan was deposited into the WaMu Trust over a year before the FDIC placed WaMu in receivership. Thus, there is no evidence that Pooley's loan was transferred to the WaMu Trust after the collapse of WaMu because the Loan had previously been transferred to the WaMu Trust. The Pooley asset Chase purchased from the FDIC was the servicing rights. This makes the otherwise inadmissible Nardi transcript also irrelevant—it matters not whether there was a schedule of Loans sold to Chase, as Pooley's Loan was not sold to Chase.

Pooley also argues that the absence of a secondary market sale notation in disclosures made by WaMu pursuant to the Home Mortgage Disclosure Act, 12 U.S.C. § 2800 *et seq.* ("HMDA"), supports the inference that the Loan was not transferred to the WaMu Trust. Such an inference is unreasonable. The purpose of HMDA is to determine whether housing lenders are serving the needs of their communities and to identify possible discriminatory lending practices. *Id.* at § 2801. Where, as here, the originating lender retained servicing rights upon securitization, the practice of lenders was not to disclose a sale. CP 6537, 6746-63. And WaMu sold to WaMu Acceptance, not to a secondary market investor, further negating an HMDA reporting requirement. CP 6552, 6746-63.

b. Pooley's Arguments about the Indorsement Are Based on Conjecture. The only "evidence" Pooley offers to support her assertion that the Note was fraudulently indorsed is an illogical inference from the inadmissible deposition transcript of a Chase employee, Cynthia Riley. Pooley's argument that the indorsement is fraudulent is not based on any statement from Riley that she did not indorse the Note or authorize her signature to be affixed to it, nor is it based on other evidence admissible to prove forgery. Instead, Pooley falsely argues that Riley did not work for WaMu when the loan was securitized, and so she could not have indorsed the note. First, no one suggests that Riley indorsed the Note at the time it was securitized. Even the inadmissible Riley deposition transcript that Pooley submitted as evidence clearly establishes WaMu's practice and policy was that an endorsement would be placed on the note soon after closing. *See* CP 2455-56. ("The notes after closing occurred were shipped into our office, and we would go through the note review process, endorse them, send them to the custodian. *And that would just be a matter of days.*") (emphasis added). ("Q: So the endorsement would be placed on the note within days after closing as a matter of business practice? A; Yes."). CP 2456. Because, as a matter of course, WaMu endorsed notes contemporaneously with their origination, Pooley's unsupported assertion that the indorsement happened years later, when Riley was employed by

Chase, is wholly implausible. In fact, Ms. Riley's deposition makes clear that she continued to work for WaMu as a Vice President until January 2008, CP 2409-10, and then later worked for Chase. CP 2438. Simply labeling something as fraudulent or a forgery does not make it so.

Pooley also attacks QLSWA's good faith with the assertion that the copy of the Note in QLSWA's file was unindorsed. This is inconsequential. The Note was payable to an identified person (WaMu) that is the person in possession (Chase, as acquirer of WaMu's assets from the FDIC). *See* RCW 62A.1-201(b)(21). Because an indorsement is not required under the PSA, or Washington law, the argument that WaMu's indorsement is fraudulent is not only baseless but also misplaced.

c. The Loss of the Note is a Red Herring. Pooley's counsel conceded at oral argument that loss of the Note does not preclude enforcement (CP 7408), and Pooley admits to the form of Note she executed, which is the exact form that the WaMu Trust seeks to enforce. The UCC expressly provides for enforcement of lost notes where, as here, the terms can be proven and the person seeking to enforce has the right to enforce. RCW 62A.3-309(a) states that:

A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person

cannot reasonably obtain possession of the instrument because ... its whereabouts cannot be determined

Further, under subsection (b), "[a] person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, RCW 62A.3-308 applies to the case as if the person seeking enforcement had produced the instrument." RCW 62A.3-309; *Allen v. US Bank, NA (In re Allen)*, 472 B.R. 559, 2012 Bankr. LEXIS 2634* 13, 2012 WL 2086563 (B.A.P. 9th Cir. 2012) (interpreting Washington law).

Here, the WaMu Trust was in possession of the Pooley Note (via its custodian, Chase) and was entitled to enforce the Pooley Note when it was lost. Pooley has submitted no evidence that suggests that anyone other than an agent of the WaMu Trust was in possession of the original Note at the time it was lost nor has she submitted any evidence to challenge Quality's evidence as to when the Note was lost. Instead, once again she relies on speculation and conjecture. In contrast, Quality submitted evidence that the original Note was in the possession of Chase (on behalf of the WaMu Trust) when Pooley commenced the First Lawsuit. The Note was then transferred to Chase's attorney for presentment to Pooley. CP 3884. After the Note was returned to Chase, it was lost. CP 3661. The WaMu Trust was entitled to enforce the Note when it was lost. The loss was not the result of a transfer or a lawful seizure. And, finally, the WaMu

Trust cannot reasonably obtain possession of the Note because its whereabouts cannot be determined. The WaMu Trust has proven the terms of the Note by having its agent execute a Lost Note Affidavit which attaches a true and correct copy of the Note. RCW 62A.3-309(b). CP 3661, 3847-57. Thus, in accordance with RCW 62A.3-309, the WaMu Trust is entitled to enforce the Note even though the Note was lost.

In sum, the WaMu Trust is the owner and holder of the Note by virtue of (1) its possession of the Note (via Chase as loan servicer and custodian) with the right to enforce, and (2) its status as payee (blank indorsement). The WaMu Trust attested to this status in February 2010 when Chase provided the Beneficiary Declaration to Quality, and reaffirmed in at least two declarations that (1) Chase is servicer and custodian for the WaMu Trust (CP 9834) and (2) the WaMu Trust is the owner and holder of the Note. CP 3660, 3812. Because the WaMu Trust is both the owner and holder of the Note, it had the statutory power to send a NOD (or have its agents do so), *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 229, 370 P.3d 25 (2016), and to appoint Quality as Successor Trustee. There was no violation of the DTA nor of QLSWA's duty of good faith.

2. The Source of the Foreclosure Referral. Pooley contends that there are issues of disputed fact concerning the source of the foreclosure

referral and that Quality should have more thoroughly investigated the information it received from Chase via LPS Desktop (the secure communications system both used).

QLSWA did not contact the WaMu Trust directly to verify the information Chase provided because Chase, as servicer, was the WaMu Trust's authorized agent with respect to foreclosures and loan servicing. Under the PSA, Chase was required to initiate foreclosures on defaulted loans on behalf of the Trust. Pooley's suggestion that the information on the LPS platform may have been put there by someone other than Chase, such as a "hacker" is pure speculation which is negated by the actual evidence: the Quality employee who boards the information from LPS onto Quality's system compares the information from the referral with the information contained in the Note and Deed of Trust to ensure the information matches and later compares it to the documents obtained from public records. CP 3580, 6173-77. This process, combined with the years of experience that Quality has dealing with both WaMu and Chase using LPS Desktop, greatly exceeds any duty created by RCW 61.24.010(4) or any duty of good faith imposed upon QLSWA under these circumstances. The law only requires that a trustee "adequately inform" itself through a "cursory investigation" regarding the beneficiary's right to foreclose. *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn. App. 294, 320, 308

P.3d 716 (2013); *Lyons*, 181 Wn.2d at 787. *See also Mickelson*, 2012 U.S. Dist. LEXIS 171242 at *11, 2012 WL 6012791 at *4 ("duty of good faith extends only to ensuring that there are no obvious or known defects in the documents replacing the trustee"). The referral related issues Pooley raises do not create material issues of fact.

3. The Notice of Default. The NOD was properly issued by the Beneficiary, acting through its agent QLSWA. *See* RCW 61.24.030(8); *McAfee*, 193 Wn. App at 229. Pooley argues that QLSWA violated RCW 61.24.030(8)(l) and the duty of good faith because the NOD allegedly failed to provide the name, address and phone number of the party acting as servicer of the Loan. Pooley concedes that the NOD identified WaMu as the servicer and provided an address for WaMu, but argues that "WaMu did not exist." But QLSWA provided the name and address for WaMu in the NOD because Chase was still using the name WaMu in connection with the WaMu heritage loans during the rebranding period (2008 – 2010) and because WaMu, operated by Chase during the rebranding, was then the proper entity to contact about the Pooley loan as it was responsible for servicing the loan and was custodian of the loan documents. CP 6339. Indeed, the address given in the NOD is the address from which Chase later corresponds with Pooley. CP 6434-35. Courts have recognized that Chase continued to use WaMu's name to do business long after the

acquisition. *E.g., Shatteen v. JPMorgan Chase Bank*, 2012 U.S. Dist. LEXIS 90499, 2012 WL 2524277 (E.D. Texas May 17, 2012).

Moreover, Pooley was in telephone and written contact with Chase the very same month that she received the NOD. CP 6376. Rather than address her default or take advantage of the loan modification process Chase recommended, Pooley "terminated the conversation." CP 6377. In addition to the telephone contact, Pooley wrote Chase at least 11 letters (and received at least 43 letters from Chase). CP 4491-93. It is not plausible for Pooley to have been injured by the absence of a telephone number under these circumstances. Thus, even if QLSWA did not strictly comply with the statutory provision requiring an address for the owner, its deviation was only a technical one because the NOD identified the then relevant entity to contact about loan servicing issues. Pooley is unable to show that this practice was unfair, was likely to deceive, or that she was injured as a result. The Federal District Court held that these precise circumstances did not violate the CPA. *Meyer*, 2015 U.S. Dist. LEXIS 47745, 2015 WL 1619048 (it was proper for the trustee to provide only the contact information for the servicer because the servicer was the relevant entity to address queries from the borrower). The *Meyer* court stated that "[r]egardless of whether NWTs [the trustee] strictly complied with the

language of this statutory provision, the Meyers were unable to point to in any way which they were deceived or otherwise prejudiced." *Id.*

Pooley also argues that she did not receive pre-foreclosure notices with the NOD. But the NOD served on Pooley included the "Beneficiary Declaration Pursuant to Chapter 61.24 RCW (SB 5810)" and the Foreclosure Loss Mitigation Form. CP 6339, 6340-54. While Pooley claims that this form was "not attached" to the NOD which was posted on her door, documents she produced in discovery and provided to her prior attorney show that she in fact received at least the copy of the NOD which was mailed to her. CP 6339, 6355-60, 6364, and 6492-99. QLSWA did not materially violate RCW 61.24.030(8)(i) or its duty of good faith.

4. Compliance with RCW 61.24.030(7). Pooley claims that QLSWA violated RCW 61.24.030(7)¹⁹ and its duty of good faith because it did not have proof that the WaMu Trust was the actual owner or holder of the Note, and that QLSWA was not entitled to rely on the Beneficiary Declaration that Chase provided to QLSWA. The Beneficiary Declaration was not ambiguous as to the identity of the holder of the Note. In *Lyons*,

¹⁹ RCW 61.24.030(7)(a) requires that:

before the Notice of Trustee's Sale is recorded, transmitted, or served, the Trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the Deed of Trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the Deed of Trust shall be sufficient proof as required under this subsection.

the court held that a declaration of ownership was ambiguous because it was phrased in alternative language that made it unclear as to whether Wells Fargo was the holder, or whether Wells Fargo simply claimed it had the "requisite authority" to foreclose. *Lyons*, 181 Wn.2d at 791. The declaration stated Wells Fargo "is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has the requisite authority under RCW 62A.3-301 to enforce said obligation." *Id.* at 780. The court held that the trustee would need to furnish proof of ownership and could not rely on the declaration because the alternative language about authority to enforce created an ambiguity as to whether Wells Fargo was the holder. *Id.* at 791.

Unlike the declaration of ownership at issue in *Lyons*, the Beneficiary Declaration in this case is not presented in the alternative as to the identity of the holder. Instead it unequivocally states that "Bank of America, National Association successor by merger to LaSalle Bank NA as trustee for WaMu Mortgage Pass-Through Certificate Series 2007-AO5 Trust is the actual holder of the promissory note." CP 3580, 3600. It also confirms that "the Note has not been assigned or transferred to any other person or entity." Thus, there is no ambiguity as to whether the WaMu Trust is claiming to be the holder or simply claiming it was otherwise entitled to enforce (as in *Lyons*). Further, the trustee is entitled to treat the

representations in a declaration of ownership as true absent conflicting evidence. *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015). While Pooley complains about competing ownership interests, none of what she identified to QLSWA actually suggests that anyone other than the WaMu Trust was both the owner and the holder.

QLSWA met its good faith obligations by adequately informing itself of its authority to foreclose on behalf of the WaMu Trust and performing more than a cursory investigation of Pooley's claims. QLSWA representatives reviewed the various publicly available documents (such as the PSA and the FDIC materials), spoke with Chase about its acquisition of the servicing rights to the securitized WaMu loans, and educated its employees about these issues and the location of documents in the public record. CP 3580-83, 6204. It thoroughly investigated and responded to Pooley's inquiries and there is absolutely no evidence that it deferred to Chase on any issue. The fact that QLSWA could not meet Pooley's unreasonable evidentiary demands for Fed Ex receipts and proof of consideration paid to the FDIC does not mean that Quality did not perform an adequate investigation.

QLSWA acknowledges that the court in *Lyons* found an issue of fact as to the trustee's duty of good faith. But *Lyons* involved a borrower who made significantly different claims—specifically that the servicer of the

loan had changed and she had negotiated a modification with the new servicer. Because the trustee refused to postpone the sale in the face of this information, the court held that the claim should have survived summary judgment. Pooley's situation is dissimilar to the borrower in *Lyons*. In *Lyons* there was an actual change of servicer. Here, there is simply Pooley's mistaken and erroneous belief that there was a conflicting claim to ownership. In *Lyons*, there was an admitted complete failure to investigate the claims of the borrower. Here, there are repeated investigations of Pooley's claims and prior litigation dismissed by Pooley. In *Lyons*, there is a borrower who negotiated and obtained a loan modification to cure her default. Here, there is a borrower who even refuses to acknowledge responsibility for the debt, much less cure her default. And, unlike the borrower in *Lyons*, Pooley steadfastly refused to discuss her foreclosure options with Chase.

Even if this Court were to find the Beneficiary Declaration suffered an infirmity, QLSWA had proof of ownership sufficient to meet the DTA's requirements. Unlike the trustee in *Lyons*, in addition to having the Beneficiary Declaration, QLSWA had proof that the WaMu Trust was the owner of the Loan. Quality had discussions with WaMu and Chase about Chase's right to service and request foreclosure of the securitized loans held in various trusts, and various representatives of Quality received and

reviewed the various securitization documents for the WaMu Trust. Quality held meetings educating its employees about accessing these documents, which were at all times publicly available to Quality and to Pooley (who also had reviewed them) on the internet. CP 3580-83, 6204. It was on the basis of this proof that Quality prepared the Beneficiary Declaration which Chase then signed under oath. Upon receipt of Pooley's first inquiry, Quality escalated the matter for legal review and then re-verified the WaMu Trust's ownership. CP 3581, 6183-85. When Pooley filed the Notice of Disclosure, Quality's attorneys reviewed, among other things, the various pleadings which included the securitization documents before confirming that it was entitled to proceed. CP 3580-82, 6184. Because it had proof of ownership, QLSWA did not violate RCW 61.24.030(7) or its duty of good faith.

5. The Appointments. Pooley asserts that QLSWA relied on two different and conflicting ASTs in violation of RCW 61.24.010 (outlining the qualifications of the trustee). Pooley's argument is another manifestation of her position that Chase (who executed the First AST) is somehow competing with the WaMu Trust (whose trustee executed the Second AST). The ASTs are not conflicting and both were executed by or on behalf of a proper beneficiary. The First AST was executed by Chase as attorney in fact for BANA. Pooley argues that Chase did not have

authority to execute this AST. But the record is clear that BANA recorded a Limited Power of Attorney appointing Chase as its attorney in fact and recorded it in King County. CP 4455-62. Moreover, even absent the power of attorney, the PSA expressly provides the servicer (Chase) with the authority to execute, or cause to be executed, documents such as the Appointments. CP 4244. The Second AST was executed by BANA as trustee of the WaMu Trust. Although valid, it was unnecessary as QLSWA had previously been appointed. Chase has submitted sworn declarations in two cases brought by Pooley authenticating both Appointments, CP 9835, 9875-81, 3660, 3819-20, 3823-24, and the law is clear that the beneficiary may act through agents. *McAfee*, 193 Wn. App. at 229. QLSWA was validly appointed as of February 24, 2010 and was at all times in compliance with RCW 61.24.010 and its duty of good faith.

6. The Assignment. Pooley asserts that representations made in the Assignment are "factually irreconcilable" with the First AST and, if so, then QLSWA breached its duty of good faith by relying on "false documents." Both the Assignment and the First AST were signed by Margaret Dalton ("Dalton"), a Chase employee. As noted, the First AST was signed by Chase (via Dalton) acting as the attorney in fact for BANA. In contrast, the Assignment was signed by Chase (via Dalton) as the successor in interest to the FDIC. The Assignment assigns the beneficial

interest in the Deed of Trust from WaMu/Chase to the WaMu Trust. The purpose of the Assignment was not to transfer ownership—that transfer had already occurred in 2007 pursuant to the MLPSA and PSA. The Assignment was recorded to clarify the land title records (the PSA does not appear in county records) so that the title insurance company would insure title post foreclosure. CP 6162-63. The Assignment also clarifies that Chase does not have any interest in the Note and Deed of Trust, which negates Pooley's argument that the AST and Assignment are factually inconsistent.

7. **QLSWA's Investigation.** Pooley's statement that "there is no evidence that Respondents conducted any investigation of Ms. Pooley's claims until June 19, 2013, well after this litigation was brought," (OB 13) is false and refuted by the record. Immediately upon receipt of Pooley's first inquiry, QLSWA reviewed its file to confirm that the beneficiary had not changed and referred the file to counsel. CP 3581. This review occurred in March 2010, more than three years before the date on which Pooley claims QLSWA's investigations began. Pooley filed her First Lawsuit in 2010, and during that lawsuit Pooley's claim about ownership of the Loan was extensively researched and refuted. Pleadings were filed that set forth (1) the entire chain of title and (2) the relationship between

the various parties. Her counsel then withdrew and Pooley voluntarily dismissed her claim. SCP 9807-9952.

Pooley then began sending missives to QLSWA. She recorded her purported Election to Add Duties to Trustee and the Notice of Disclosure, and now claims that QLSWA did not investigate the claims she made in those documents. But, the exhibits to her Amended Complaint reflect that QLSWA's attorney responded, referring to the prior dismissed litigation and setting forth a detailed history of some of the many prior exchanges between QLSWA and Pooley. The bottom line is that Pooley's assertion that there were conflicting claims to ownership was without merit and Pooley's real complaint as to QLSWA was that it disagreed with her claims, not that it failed to investigate them. Pooley in fact has a history of refusing to accept conclusions with which she disagrees. After a federal regulator to whom Pooley complained told her there might not be a "doggone thing I can do," CP 6372, she remarked, "I will not hire an attorney to have a government regulator obtain a simple answer from Chase! You will do your job!" CP 6370. QLSWA investigated issues raised by Pooley and proceeded after determining her claims were meritless—including her claim that the WaMu Trust was not the owner.

8. The Third Notice of Sale. Pooley asserts that the Third NOTS runs afoul of the DTA for three reasons: (1) it does not disclose the change

in trustee from BANA to US Bank, (2) it contains purportedly false information, and (3) it was not preceded by statutory preforeclosure notices. As noted above, the beneficiary of the Loan was the WaMu Trust. That entity held and owned the Note. There is nothing in the DTA that requires disclosure of the change in the entity that administers the trust that owns or holds a Note where there is no change in the beneficiary. Second, the Third NOTS contained the statutorily required notice pursuant to RCW 61.24.040(1)(g) which notified Pooley that she had an additional 20 days after service to pursue a mediation. Pooley did not respond to this notice. Finally, Pooley's assertion that the Third NOTS contains false information is specious. The Third NOTS does not state that BANA is the current trustee, but rather recites the history of the transfers which resulted in the Pooley Loan being placed into the WaMu Trust. CP 3652. Pooley's mischaracterization of foreclosure documents does not make them false.

Pooley asserts that QLSWA was "obligated" to refrain from issuing its Third NOTS until Pooley received adequate notice of foreclosure alternatives. But Pooley's deposition testimony and correspondence with Chase show Chase offered foreclosure alternatives, including mediation, to Pooley on no less than 21 separate occasions, including immediately before the Third NOTS. CP (3945, 5644-45, 6376-6444. In her deposition, Pooley steadfastly refused these opportunities (CP 5575-76), refusing to

accept Chase as servicer and relying instead on internet research and advice about how to delay foreclosure by demanding that Chase provide laborious proof that it was entitled to service her loan. CP 3958-3900. As a result of her own conduct, Pooley is unable to show prejudice or that the acts of QLSWA were unfair or deceptive under the circumstances.

a. **Watson is Inapposite.** Pooley also asserts that a new Notice of Default should have been issued prior to the Third NOTS pursuant to *Watson v. Nw. Tr. Servs., Inc.*, 180 Wn. App. 8, 321 P.3d 262 (2014). In *Watson*, the court held that amendments to the DTA applied retroactively to ensure that borrowers would be given additional notice of their pre-foreclosure options. Pooley's reliance on *Watson* is misplaced. First, *Watson* involves a foreclosure sale completed after numerous bankruptcy postponements. After obtaining relief from stay, the foreclosure trustee issued an "amended notice of sale." The court held that because the sale was continued more than 120 days, the DTA required a "new notice." *Id.* at 15. In this case, there was no sale, and Pooley certainly cannot show injury as a result of the failure to be offered mediation, particularly given that she has continuously flaunted her refusal to deal with Chase.

b. **No Per Se CPA Violation.** Pooley's argument that a per se CPA violation occurred rests on a faulty interpretation of RCW

61.24.135(2), the statute that identifies which DTA violations are per se

CPA violations:

It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86 RCW, for any person or entity to: (a) violate the duty of good faith under RCW 61.24.163; (b) fail to comply with the requirements of RCW 61.24.174; or (c) *fail to initiate contact with a borrower and exercise due diligence as required under RCW 61.24.031. (emphasis added).*

A trustee's failure to issue a new Notice of Default is not identified as a per se violation. Instead, all three of the statutes identified in RCW 61.24.135(2), including RCW 61.24.031, the one relied upon by Pooley, impose duties on the beneficiary (in this case, the "WaMu Trust") or its authorized agent (the loan servicer), and not on the trustee. The first two sections pertain to mediation procedures and payments to the state mediation fund, respectively. Neither of these two provisions is at issue in this case. The third statute, RCW 61.24.031, also deals with the duties of the beneficiary prior to commencing foreclosure proceedings. That statute contains nine subsections, but, as noted in the italicized language quoted above, RCW 61.24.135(2)(c) identifies only two duties that give rise to a per se CPA violation. These two specific duties are the duty to initiate contact with the borrower and the duty to exercise due diligence. The duty to initiate contact is found in RCW 61.24.031(1)(b) which provides:

Notice of default under RCW 61.24.030(8) — Beneficiary's duties — Borrower's options.

(1)(b) A beneficiary or authorized agent shall make initial contact with the borrower ...

The duty to exercise due diligence is found at RCW 61.24.031(5). Each subsection imposes duties on the beneficiary or its authorized agent (servicer) not the trustee:

(a) A beneficiary or authorized agent shall first attempt ...

(b)(i) After the letter has been sent, the beneficiary or authorized agent shall attempt ...

(ii) A beneficiary or authorized agent may attempt to ...

(c) If the borrower does not respond within fourteen days after the telephone call ... [has] been satisfied, the beneficiary or authorized agent shall ...

(d) The beneficiary or authorized agent shall provide ...

(e) The beneficiary or authorized agent shall post ...(emphasis added)

The very title of RCW 61.24.031—"Notice of default under RCW 61.24.030(8) - **Beneficiary's duties** - Borrower's options"—reflects that the duties imposed by the statute are on the beneficiary. Thus, on plain language alone,²⁰ Pooley's interpretation is not reasonable. But when one

²⁰ "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Udall*, 152 Wn.2d at 908. "Plain meaning is 'discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Id.* at 909.

considers the entire statutory scheme of the DTA, the unreasonableness of Pooley's interpretation becomes even more manifest. The trustee is a third party, who, unlike the borrower and/or beneficiary, is not in a position to assess or perform any of the foreclosure alternatives (such as reviewing the borrower's financial documents or agreeing to a modification), much less participate in a mediation that contemplates an agreement between the borrower and the beneficiary or servicer/authorized agent.

The legislative history also reveals that only the provisions directed at the beneficiary were intended to be CPA violations. The Bill Analysis prepared for the Judiciary Committee reflects that the requirement to initiate contact with the borrower is so that the beneficiary (or the servicer) can assess the borrower's financial situation. Staff of H. Judiciary Comm., 62nd Leg. 2011 Reg. Sess., Bill Analysis HB 1362 (Comm. Print 2011). The minutes of the hearing held by the committee notes that HB 1362 (codified at RCW 61.24.031):

"makes it a consumer protection act violation for a beneficiary to fail to initiate contact under the meet and confer."

Addressing Homeowner Foreclosures: Protecting and Assisting Homeowners from Unnecessary Foreclosures, Hearing on HB 1362 Before the H. Comm. on Judiciary, 62nd Leg. 2011 Reg. Sess. (Feb. 17, 2011).

Simply put, Pooley's argument that a per se CPA violation occurred is based on a misinterpretation of RCW 61.24.135. If the Legislature had intended to create a per se CPA claim relating to the notice of default, it would have included RCW 61.24.030(8) in RCW 61.24.135; it did not. To the extent that dicta in *Watson* suggests otherwise it is simply incorrect. There is no per se violation in this case.

D. Pooley Failed to Establish One or More Essential Elements of her CPA Claim. To prevail, a CPA plaintiff must show: (1) an unfair or deceptive act or practice,²¹ (2) that occurs in trade or commerce, (3) a public interest, (4) injury to the plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive act and the injury suffered. *Hangman Ridge Training Stables v. Safeco Title Ins., Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Failure to establish any one element is fatal to a CPA claim. *Id.* at 793.

1. Pooley Is Unable to Establish an Unfair or Deceptive Act. A plaintiff may meet the "unfair or deceptive act or practice" element by showing that "the alleged act had the capacity to deceive a substantial portion of the public." *Id.* at 785. However, Pooley did not submit any such evidence. Instead of submitting evidence, Pooley argues that the

²¹ When a statute which is declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated then a "per se" claim arises, and the plaintiff is not required to produce evidence as to this first element. *Lyons*, 181 Wn.2d at 786.

DTA is construed in the borrower's favor and thus every DTA violation must be an unfair or deceptive practice. But that argument is contrary to the express language of the statute and case law. RCW 61.24.135(2) (delineating per se statutory violations); RCW 61.24.130 (same); *Podbielancik*, 191 Wn. App. 662 (technical defects in the foreclosure process which do not cause prejudice are not actionable).²² And "mere speculation that an alleged unfair or deceptive act had the capacity to deceive a substantial portion of the public is insufficient to survive summary judgment" on a CPA claim. *Westview Invs., Ltd. v. U.S. Bank*, 133 Wn. App. 835, 854 n.27, 138 P.3d 638 (2006) (the trial court correctly dismissed CPA claim because plaintiff "failed to adequately show for summary judgment purposes that U.S. Bank's acts or practices had the capacity to deceive a substantial portion of the public"); *Brown v. Brown*, 157 Wn. App. 803, 239 P.3d 602 (2010) (where plaintiff presented no evidence that Wells Fargo's conduct had the capacity to deceive a large portion of the public or injure other consumers, her CPA claim was

²² RCW 61.24.127(c), and case law interpreting that statute require a borrower to show prejudice. *Merry v. Nw. Tr. Servs. Inc.*, held that Plaintiff's "identification of formal, technical nonprejudicial violations of the DTA with no suggestion that they could not have been corrected if timely raised was insufficient to excuse plaintiff's failure to seek a presale injunction, thus the doctrine of waiver precluded his post-sale claim for damages. 188 Wn. App 174, 352 P.3d 830 (2015). It would be incongruent to require prejudice in a post-sale DTA case and not require it for pre-sale DTA violations asserted as claims under the CPA. The same requisites should apply to either claim.

defeated). Pooley's demand for strict construction of the DTA does not make every purported error in the foreclosure process actionable as a CPA violation, particularly given the requirement of materiality. Pooley did not meet her burden of producing evidence of material omissions or errors.

2. Pooley Also Failed to Present Evidence of a Public Interest Impact. A private plaintiff must show "not only that a defendant's practices affect the private plaintiff but that they also have the potential to affect the public interest." *Indoor Billboard Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 74, 174 P.3d 10 (2007). Under the amended CPA standard applicable to all but Pooley's "per se" claims, Pooley may show an act was injurious to the public interest because it (a) injured other persons, (b) had the capacity to injure other persons, or (c) has the capacity to injure other persons in order to establish the public interest element. RCW 19.86.093; *Lyons*, 181 Wn.2d at 786. Pooley offered no evidence that other borrowers were or could have been impacted by the alleged unfair practice and her claim fails on that basis. *See Behnke v. Ahrens*, 172 Wn. App. 281, 290, 294 P.3d 729 (2012) ("given the belated, conclusory, and speculative nature" of plaintiffs' response, the trial court did not err in dismissing the CPA claim on summary judgment). Pooley's reliance on *Trujillo* is unavailing as *Trujillo*

considered the sufficiency of allegations under CR 12, not the sufficiency of evidence under CR 56. 182 Wn. 2d at 820.

There is no evidence that Pooley's unique circumstances present a potential impact to the public interest. *Goodyear Tire & Rubber Co. v. Whiteman Tire*, 86 Wn. App. 732, 935 P.2d 628 (1997), *rev den*, 133 Wn.2d 1033, 950 P.2d 477 (1998) (CPA claim was dismissed on public interest grounds based on a finding that the plaintiff was "not representative of bargainers vulnerable to exploitation"). Unlike the many other homeowners who are grateful for the opportunity to pursue foreclosure alternatives, Pooley rebuffed those opportunities at least 23 times. She had a boastful resolve to deny that Chase was authorized to service her loan, in spite of the fact that Chase had provided her overwhelming evidence of its authority as servicer. The Court should affirm dismissal of Pooley's CPA claim because of a lack of evidence of a public interest impact.

3. Pooley's Alleged Damages Are Not Compensable Injuries Under the CPA. Pooley's statement that "damage can be presumed" (OB 43) is not the law and her assertion that her damages were "exhaustively outlined and generally undisputed" (OB 44) is not true. Proof that defendant's act was both the (1) "but for" cause of (2) a compensable injury are requisite elements of a CPA claim, *Panag v.*

Farmers Ins. Co. of Wash., 166 Wn.2d 27, 62, 204 P.3d 885 (2009), and Quality challenged Pooley's claim as to both issues.

Under the CPA, "[p]ersonal injuries, as opposed to injuries to 'business or property,' are not compensable and do not satisfy the injury requirement." *Id.* at 57. "[D]amages for mental distress, embarrassment, and inconvenience are not cognizable under the CPA." *Id.* Similarly, litigation expenses incurred to institute a CPA claim do not constitute injury. *Id.* at 62; *see also Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990). While "consulting an attorney to dispel uncertainty regarding the nature of an alleged debt" may be sufficient to show injury to business or property under certain circumstances, *Panag*, 166 Wn.2d at 62, such a consultation must be for a specific purpose: the plaintiff must have a reason to resolve the particular uncertainty at issue. *Bakhchinyan v. Countrywide Bank, N.A.*, 2014 U.S. Dist. LEXIS 46943 at *17, 2014 WL 1273810 at *5 (W.D. Wash. Mar. 27, 2014). Having to prosecute a claim under the CPA is insufficient to show injury. *Panag*, 166 Wn.2d at 65. Pooley's purported "injuries" include inability to refinance her home, damages to her credit, cloud on her title, mental anguish due to the prolonged threat of foreclosure, time spent verifying the legal status of the foreclosing entities, shipping, copy and travel expenses, late fees wrongfully charged, diminution of property value, and litigation fees. But

these allegations did not survive Pooley's sworn deposition testimony. She admitted that she had not attempted to refinance because she was unemployed. CP 5593. She claimed diminution in property value, but conceded that her property has increased in value since the foreclosure proceedings began and that the economic downturn caused the original loss in value. CP 5263. She has not actually paid any late fees or foreclosure fees because she did not reinstate the Loan. CP 5600. The time and money she purportedly spent writing letters to legislators and regulators, lobbying and volunteering, was litigation driven and is, at most, a litigation expense. And these expenses cannot be sufficiently proven because Pooley admits that she did not keep any records of the purpose of the expenses and would have to estimate to determine which related to Quality. CP 5588-89. Finally, Pooley was unable to identify any injury to her credit caused by Quality (CP 3954) but even if such an injury occurred, the Federal Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, preempts any state law claims tied to credit reporting. *Ornelas v. Fid. Nat'l Title Co. of Wash.*, 2005 U.S. Dist. LEXIS 40390 at *12, 2005 WL 3359112 at *4 (W.D. Wash. Dec. 9, 2005) (Congress intended FCRA to be sole remedy). Pooley's claimed damages are not compensable CPA injuries, and fail as to proof.

4. There Is No Evidence of "But for" Causation. Pooley must establish that, but for QLSWA's unfair act, she would not have suffered an injury. *Hangman Ridge*, 105 Wn.2d at 795. In other words, Pooley must demonstrate that "the injury complained of ... would not have happened" but for QLSWA's acts. *Indoor Billboard*, 162 Wn.2d at 82. Nothing in Pooley's cumbersome declaration states admissible facts that support a causal link between QLSWA's acts (initiation of nonjudicial foreclosure proceedings) and Pooley's claimed injuries. Pooley fails to acknowledge that her decision to quit paying her mortgage (based on her belief that she had no equity in the property) was the "but for" cause of the damages she claims. She embarked on her investigation and pursuit of Chase and her theory that Chase had no authority to service the Loan long before QLSWA ever contacted her about the Loan. CP 5462, 5465. As for all of the time she spent hiring counsel, lobbying, researching and investigating, these expenses were all related to her efforts to defeat foreclosure. Simply put, Pooley has no facts to demonstrate how her asserted injuries flowed from the initiation of the nonjudicial foreclosure process—an occurrence caused by her own default. Instead, her expenses were caused by her efforts to defeat foreclosure in the face of her default.

Pooley does not now, and did not previously, describe even one item of damage she claims to have suffered as a result of Quality's foreclosure

notices. Between November of 2009 and July of 2012, Chase sent Pooley at least 21 letters inviting Pooley to contact them about foreclosure alternatives, including the mediation opportunities she claims were so vital to her. Pooley testified that she did not respond to these efforts because she disputes that Chase is the servicer of her loan. CP 3939. Indeed, instead of following up on the multiple opportunities Chase provided, Pooley either ignored the letters, or responded with her own letters demanding that Chase cease collection and threatening to assert claims against Chase. CP 5528-30. Pooley, and Pooley alone, is the but for cause of (1) the time and money she invested attempting to defeat foreclosure based on her mistaken assumptions about the role of the servicer and beneficiary of the Loan, and (2) her failure to pursue foreclosure alternatives. Because Pooley offers no facts to demonstrate that but for Quality's conduct, she would not have suffered injuries related to receiving foreclosure notices, she fails to show causation. *Blair v. Nw Tr. Servs., Inc.*, 193 Wn. App. 18, 37, 372 P.3d 127 (2015) (causation may be decided as a matter of law where claimant fails to submit facts sufficient to show a causal link between allegedly unfair act and the claimed injury).

Pooley also failed to address Quality's defenses of failure to mitigate and avoidable consequences (raised in Quality's Motion for Summary Judgment) which bar Pooley from recovering avoidable damages.

TransAlta v. Sicklesteel Cranes, 134 Wn. App. 819, 142 P.3d 209 (2006).

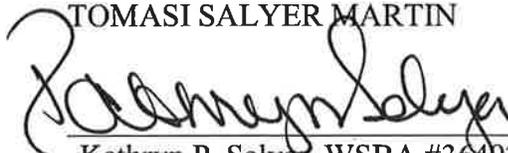
Pooley's self-inflicted "damages" are not recoverable injuries and were not caused by Quality.

V. CONCLUSION

No amount of finger pointing and name calling can save Pooley's claim from her failure to submit sufficient evidence to raise an issue requiring trial. Pooley did not suffer any compensable injury that was caused by anything other than her decision to (1) quit paying her mortgage and (2) wage war with the mortgage industry in an effort to defeat foreclosure of the Loan. The Superior Court's order should be affirmed in all respects.

DATED this 2 day of ^{November}~~October~~, 2016.

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