

NO. 74705-3-I  
COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

FILED  
Sep 08, 2016  
Court of Appeals  
Division I  
State of Washington

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JOHN R. WILSON, a married man, and JACQUELINE M. WILSON, a  
married woman

Appellants,

v.

QUALITY LOAN SERVICE CORP. OF WASHINGTON, a Washington  
Corporation, McCARTHY and HOLTHUS, LLP, a California Limited  
Partnership,

Respondents.

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**RESPONDENT QUALITY LOAN SERVICE CORP. OF  
WASHINGTON'S ANSWERING BRIEF**

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**I. INTRODUCTION AND SUMMARY OF ARGUMENT.**

This is a pre-sale "wrongful foreclosure" case. Petitioners John and Jacqueline Wilson (collectively, "Wilson") ask this Court to reverse the trial court's order granting summary judgment in favor of Quality Loan Servicing Corp. of Washington ("Quality"). The trial court properly applied established case law and its order should be affirmed in all respects.

In 2010 the Wilsons ceased making payments on their mortgage loan because they had more debt than they could pay. Even before they defaulted, and nearly two years before nonjudicial foreclosure proceedings were commenced, Mr. Wilson began researching prevailing foreclosure avoidance theories for pro se litigants. Mr. Wilson claims that he had invested thousands of hours into this research by the time JP Morgan Chase, NA ("Chase") appointed Quality as Successor Trustee to commence nonjudicial foreclosure proceedings.

The Wilsons filed a Complaint challenging the foreclosure, asserting as the central premise that Quality was inherently biased and not a proper trustee, and was not lawfully appointed because Chase was the "servicer" and not the "owner" of their loan. The Complaint alleged numerous theories purportedly arising under the Consumer Protection Act,

RCW 19.86 *et seq.* ("CPA"), including breaches of good faith and violations of the Deed of Trust Act, RCW 61.24 *et seq.* ("DTA").

When faced with Quality's Motion for Summary Judgment, the Wilsons responded with the same hyperbole, innuendo and name calling that permeates their Opening Brief ("OB"). Once the Opening Brief is stripped of its misapprehensions of law and rhetoric (most of which does not derive from evidence in the record) it becomes clear that the Wilsons' claims are based on the faulty premise that Chase was not entitled to appoint Quality as Successor Trustee because Chase was merely the servicer of the loan. But, the undisputed evidence is that Chase has physical possession of the note (which is endorsed in blank).<sup>1</sup> Thus, under the DTA, Uniform Commercial Code, RCW 62A *et seq.* ("UCC"), and Washington case law, Chase is the "holder" of the note and "beneficiary" of the Deed of Trust. As beneficiary, Chase was authorized to appoint Quality as successor trustee to nonjudicially foreclose the loan.

The bottom line is that the Wilsons failed to present sufficient evidence to establish one or more of the elements of their CPA claim including (1) that Quality engaged in acts and omissions that constituted an unfair or deceptive act or practice, or (2) that the Wilsons suffered injuries to business or property that were proximately caused by the

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<sup>1</sup> Chase is also the owner of the loan, although its status as the holder is the relevant inquiry.

purported acts and omissions of Quality. It is because of these evidentiary omissions that the trial court's order should be affirmed.

## **II. COUNTERSTATEMENT OF ASSIGNMENTS OF ERROR.**

1. Whether the trial court properly dismissed the Wilsons' CPA claims as a result of their failure to submit sufficient evidence to establish each essential element of their CPA claim?

2. Whether assertions made by the Wilsons which are not cited to or supported by the Clerk's Papers or other record of proceedings should be stricken?

3. Whether "additional evidence" submitted by the Wilsons on appeal but not submitted to the trial court should be stricken?

4. Whether the Wilsons have abandoned arguments raised below but not raised in their Opening Brief?

## **III. COUNTERSTATEMENT OF THE CASE.**

### **A. Factual Background.**

#### **1. Execution and Terms of the Note and Deed of Trust.**

The Wilsons obtained a loan secured by their home (the "Wilson Loan") from Washington Mutual Bank ("WaMu") in 2005. Clerk's Papers ("CP") 466, 622-23. The Adjustable Rate Note (the "Note") signed by the Wilsons is in the amount of \$567,000 and includes a promise to repay the loan to the holder. CP 469-474. The Wilsons also agreed that the "Lender

may transfer the Note." CP 469. To secure the Note, the Wilsons executed a Deed of Trust (the "Deed of Trust") encumbering their home. CP 466, 476-493, 622-23. The Deed of Trust explains that upon default the Trustee of the Deed of Trust could sell the Wilson's home to repay the Loan. CP 649.

2. *The Failure of WaMu and Transfer of the Loan to Chase.*

In September 2008, the federal government's Office of Thrift Supervision closed WaMu, and the Federal Deposit Insurance Corp. ("FDIC") assumed the assets of WaMu as the receiver. CP 443. Pursuant to the Federal Deposit Insurance Act, 12 USC § 1821(j)(d)(2)(g)(i)(II) (the "FDIA"), the FDIC entered into a Purchase and Assumption Agreement which transferred all of the assets of WaMu to JPMorgan Chase, N.A. ("Chase") on September 25, 2008. CP 371, 409, 466. On October 2, 2008, the FDIC signed and recorded in the Snohomish County, Washington property records an affidavit confirming Chase's purchase of the assets of WaMu, including all loans and commitments. CP 371, 443. In addition, on May 17, 2013, Chase, acting as attorney in fact for the FDIC, the receiver for WaMu, executed an Assignment of Deed of Trust (the "Assignment") assigning the Deed of Trust to Chase. CP 467, 501. Due to this litigation, the original Note (which is endorsed in blank) is in the possession of Chase's counsel. CP 466, 474.

3. **Payment, Default and Efforts to Delay Foreclosure.**

The Wilsons made their loan payments until approximately December 2010, two years after Chase had taken over WaMu's operations. CP 514. The Wilsons ceased making their mortgage payments due to financial hardship after Mr. Wilson closed his company, defaulted on several other consumer debts, and became subject to outstanding federal and state tax liens. CP 376, 386-389.

Shortly after the demise of WaMu and before the payment default Mr. Wilson began expending time and money researching foreclosure avoidance and securitization issues. CP 454-456. Jacqueline Wilson filed for bankruptcy to stay the foreclosure, and, after her bankruptcy case was closed without a discharge, the Wilsons filed this action to enjoin the foreclosure. CP 379, 381 and 631.

**B. Relevant History of the Foreclosure Proceeding.**

1. **Quality's Operations and Relationship with Chase.**

Quality provides nonjudicial foreclosure services to lenders and servicers of mortgage loans. CP 502-504. Quality and its sister company, Quality Loan Services Corp. ("QLSC"), have provided services to Chase for many years. CP 504. These services include conducting nonjudicial foreclosure of loans owned and/or serviced by Chase as a result of its acquisition of the assets of WaMu, including loans and servicing rights

from the FDIC. CP 504. Both Chase and WaMu informed QLSC about the FDIC transfer to Chase and both QLSC and Quality made their employees aware of the transfer and of the fact that documents related to the transfer, including the PAA, were available on the FDIC website. CP 505. At various times, employees of both Quality and QLSC reviewed the publicly available documents on the FDIC and SEC websites and conferred with Chase about its authority to foreclose loans held or serviced by Chase. CP 504-505, 336.

Chase and Quality use a third party database then known as LPS Desktop to communicate and post documents for review and/or approval in a nonjudicial foreclosure proceeding. CP 505. The document that typically starts the process is called a Foreclosure Transmittal Package ("Foreclosure Package"). CP 505. The Foreclosure Package includes a cover page which identifies the name of the entity that currently holds the mortgage. It also includes pages from the "Loan Screen" which provides a summary of information related to the loan, including the identity of the beneficiary. CP 505. Once the Foreclosure Package is received, 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 505. These documents may be viewed on the LPS Desktop without being downloaded onto Quality's system or printed for

the file. CP 505. Quality's employees use the information received in the Foreclosure Package to order a Litigation/Trustee Sale/Guarantee ("Foreclosure Guarantee"). CP 506. Quality's employee then reviews and compares the information Quality has received and prepares the various documents that are part of the nonjudicial foreclosure process as described below. CP 506.

**2. The Referral.**

Quality received the Foreclosure Package for the Wilson Loan on May 18, 2011. CP 506. The Foreclosure Package informed Quality that the mortgage was held by Chase and instructed Quality to foreclose in the name of JPMorgan Chase Bank, National Association. CP 508. On November 19, 2012, Chase, as beneficiary, executed a Declaration of Ownership (the "Beneficiary Declaration") which states that Chase "is the holder of the promissory note or other obligation evidencing the above referenced loan." CP 336, 339, 466, 494 (emphasis applied). Quality received the Beneficiary Declaration on November 30, 2012. CP 336, 341. The information contained in the Beneficiary Declaration is consistent with the information in the Foreclosure Package. CP 466, 508.

**3. Quality's Appointment.**

On October 1, 2012, Chase appointed Quality as Successor Trustee pursuant to an Appointment of Successor Trustee (the "Appointment"). CP

343-345, 466, 497. Just over two weeks later, on or about October 16, 2012, the Wilsons were sent a Notice of Default by Quality acting on behalf of Chase. CP 336, 346-352. The Notice of Default informed the Wilsons that Chase was owner of the Loan. CP 347. The Notice of Default also stated that the Wilsons were behind \$54,239.90 (22 monthly payments). CP 348.

4. **The Sale Notices.**

On December 11, 2012, Quality executed and mailed a Notice of Trustee's Sale ("First Sale Notice") which scheduled a sale for April 12, 2013. CP 336, 354-357. Quality later executed and mailed a Second Notice of Trustee's Sale ("Second Sale Notice") which scheduled a sale for January 24, 2014. CP 337, 362-366. Both the First Sale Notice and the Second Sale Notice were discontinued by recording and mailing Notices of Discontinuance. CP 337, 359-360, 368-369. These filings reflect that Quality postponed the sale on numerous occasions, which postponements provided the Wilsons with over three years of time in which to pursue foreclosure alternatives or find other suitable housing. Importantly, the Wilsons' property was not sold pursuant to either of these sale notices. CP 337.

5. *The Relationship between Quality and McCarthy & Holthus, LLP.*

The Wilsons' Complaint alleges that McCarthy & Holthus, LLP ("M&H") is an alter ego of Quality. M&H is separately represented and prevailed on its own Motion for Summary Judgment ("MSJ"), with declarations establishing that M&H is not a shareholder or officer of Quality, that it does not own, operate or control the operations of Quality, and that Quality maintains its own bank account and does not commingle funds with M&H. CP 330, 331 and 333. The nonjudicial foreclosure documents were all prepared by Quality (*see* CP 333, 335-337) and there is no evidence that the Wilsons had any contact with M&H during the nonjudicial foreclosure proceedings.

6. *Quality's Office Locations.*

At the time Quality was appointed Successor Trustee it maintained an office in Poulsbo, Washington with telephone service at said office. CP 170, 172. During this time Quality's registered agent was M&H. CP 170. On January 2, 2014 Quality moved its physical office to Seattle, Washington. CP 171. After the move to Seattle Quality changed its primary telephone number but the original number remained operational. CP 172. Quality also changed its registered agent to CT Corporation on January 6, 2014. CP 171.

**C. Relevant History of the Litigation.**

**1. The Complaint.**

The Wilsons' Complaint was filed June 3, 2013 and requested as relief: (1) an order declaring Quality unfit, (2) an order restraining Quality from acting as trustee, and (3) an award of damages. CP 631. The Wilsons do not dispute their default, do not dispute that the Notice of Default disclosed that Chase was the owner and holder of the Loan, do not claim that any entity other than Chase has ever contacted them about the Loan or tried to foreclose the Deed of Trust, and do not claim they have ever tried to reinstate their Loan or have the funds to do so. CP 620-631.

**2. Evidentiary Admissions and Omissions.**

Mr. Wilson holds a doctorate degree and claims to have spent over 3,000 hours studying real estate lending and securitization. CP 385, 453. At the time of his deposition he believed (erroneously) that to be entitled to nonjudicially foreclose, one must have formal assignments of the deed of trust. CP 393. He testified that he is not "smart enough" to know whether Chase purchased the assets (including the Wilson Loan) from WaMu. CP 391. Mr. Wilson's attorneys persuaded him there was a "problem," and so his concern is whether "the whole process was handled properly." CP 392, 394.

The Complaint is chock full of nefarious allegations about Quality, M&H and Chase and the mortgage industry in general. The "evidence" the Wilsons offer is Mr. Wilson's opinion that Quality was partial to Chase (in other cases) and his view that Quality could not be trusted. CP 54. He states that Chase was engaged in "fraudulent robo-signing" in other cases. CP 53. Mr. Wilson's beliefs derive not from his own experience, but from news reports. CP 461 ("beliefs based on widespread reports around the nation" and "general principle"). Mr. Wilson references a purported 60 Minutes "expose" about Lender Processing Services and a Wall Street Journal article about Chase, both nonparties. OB 22, 33. Amidst all this, the Wilsons offer no evidence that someone other than Chase holds their loan or is the beneficiary of their Deed of Trust. When asked to identify who they believed was the correct beneficiary of the Deed of Trust the Wilsons responded: "No person identifiable as a lawful beneficiary is known to Plaintiffs." CP 459.

3. **The Wilson Declaration and Discovery Responses.**

The Wilsons also do not claim to be aggrieved by Quality's failure to respond to requests for information, postponements or questions about the identity of the beneficiary. CP 620-631. Indeed, during discovery, the Wilsons repeatedly disavowed that they had ever attempted to contact Quality. In his Interrogatory Answers, Mr. Wilson stated: "I chose not to

discuss my situation with Quality Loan Services due to fear that they were in bed with Chase, basing these concerns from my research on foreclosures. I did not trust them at all due to their bias." CP 452. Mr. Wilson's interrogatory response is consistent with his subsequent deposition testimony where he similarly disavowed any efforts (much less desire) to speak with Quality because he was persuaded that Quality was not a neutral party. CP 394.

In opposition to Quality's Motion for Summary Judgment, Mr. Wilson submitted a declaration ("Wilson Dec") stating that he drove to Quality's Poulsbo office "in the early summer of 2013" and staff were not present. CP 53. The Wilson Dec does not explain why the declaration contradicts the prior discovery responses. The Opening Brief improperly includes an affidavit of a nonparty witness that states that the visit to Quality occurred on June 4, 2013 and the purpose was to serve a "legal document" (presumably the complaint, which was filed the previous day). CP 631.

**4. The Wilsons' Claimed Injuries.**

The Wilsons claim to have suffered damages exceeding \$5,484,640 (CP 453), \$5,000,000 of which is "lost opportunity cost" relating to Plaintiffs' purported plan to start a new company, expand it

internationally and then sell it in 4 or 5 years to a "large conglomerate."  
CP 453, 456.

The Wilsons also seek to be compensated in the amount of \$488,322 for 3,029 hours they claim to have devoted to such activities as "you-tube training," "family discussions," and "flow charting." CP 456. Mr. Wilson stated that these "numbers got away" from him and ultimately the project "got so large ... [he] could not walk away from it." CP 456. He provides only vague details about these activities and no itemization of his expenses:

**Information On Expenses Incurred Involving Foreclosure**

YEAR	ITEM	YEAR					Total Hours	Total \$
		2009	2010	2011	2012	2013		
HOURS	Internet Search	10	30	100	100	100	340	\$ 54,400
	Youtube Training	0	0	20	40	50	110	\$ 17,600
	Reading/Study Real Estate	10	20	100	150	40	320	\$ 51,200
	Reading/Study Securitization	0	5	30	200	100	335	\$ 53,600
	Reading/Study ProSe Options	0	20	30	30	0	80	\$ 12,800
	Meetings/Discussions	10	20	40	50	60	180	\$ 28,800
	Flowcharting/Diagramming	0	10	200	200	300	710	\$ 113,600
	Family discussions	30	30	80	80	80	300	\$ 48,000
	Website Development <sup>1,2</sup>	0	0	0	0	600	600	\$ 96,000
	Driving	0.3	1	8	17	25	54	\$ 8,707
OUT-OF-POCKET COSTS	Travel (Parking, Ferry, Tolls)	\$ 10	\$ 20	\$ 40	\$ 40	\$ 40	-----	\$ 150
	Website Development <sup>1</sup>	\$ -	\$ -	\$ -	\$ -	\$ 50	-----	\$ 50
	Website Development <sup>2</sup>	\$ -	\$ -	\$ -	\$ -	\$ -	-----	\$ -
	URL Costs	\$ -	\$ -	\$ -	\$ -	\$ 70	-----	\$ 70
	Hosting Costs	\$ -	\$ -	\$ -	\$ -	\$ 80	-----	\$ 80
	Automobile depreciation	\$ 15	\$ 250	\$ 500	\$ 1,000	\$ 1,500	-----	\$ 3,265
Miles Driven (trav, meetings, conferences, attorney)	30	500	1000	2000	3000	-----	-----	
<b>TOTAL HOURS</b>		60	139	608	867	1,355	3,029	-----
<b>TOTAL LABOR COSTS</b>		\$ 60	\$ 139	\$ 608	\$ 867	\$ 1,355	-----	\$ 484,707
<b>TOTAL OUT-OF-POCKET COSTS</b>		\$ 25	\$ 270	\$ 540	\$ 1,040	\$ 1,740	-----	\$ 3,615
<b>GRAND TOTAL COSTS</b>		\$ 85	\$ 409	\$ 1,148	\$ 1,907	\$ 3,095	\$ 3,029	\$ 488,322

1- Case-On-A-Page website project undertaken to pay for foreclosure attorney costs  
2- Formalize GoToCollegeFree project undertaken to pay for foreclosure attorney costs

Mr. Wilson characterizes the time and expenses he claims as "incurred involving foreclosure", and footnotes that some of the expense was to pay for "foreclosure attorney costs." CP 456.

5. *The Status of Discovery.*

The Wilsons' Opening Brief is replete with statements and arguments that the MSJ was filed in violation of a "moratorium" on discovery and that they were not allowed enough time to conduct discovery or respond because their attorney unexpectedly withdrew and they had to find new "pro se counsel." OB 13-14. The Wilsons do not cite the record and there is no support in the record for any of these statements, all of which are patently untrue.

The record reflects that the Wilsons hired Scott Stafne to oppose the MSJ. CP 320. Stafne is the same attorney who (1) worked on the Wilsons' case since prior to its filing, (2) signed the original Complaint, and (3) conducted the discovery/depositions. CP 95-96, 12, 386. Despite Stafne's involvement in the purportedly unfinished depositions and discovery there was no request for a continuance to complete any outstanding discovery or conduct additional discovery. The record reflects that over three months elapsed between the filing of Quality's Motion for Summary Judgment and the hearing on the motion, so even without a formal continuance the Wilsons had significant time to complete any additional discovery they deemed relevant or move for a formal continuance. There is no evidence that they did either. They instead created further delay by moving for a change of judge.

6. *The "Forgery" Assertions and "Fraudulent Filings."*

The Wilsons' Opening Brief also contains some statements and conclusory arguments about "forged" declarations and fraudulent filings. There are no issues of forgery raised in the summary judgment proceedings and indeed no forgery occurred. Interestingly the Wilsons' Opening Brief suggests that they intend to add facts or argument about this purported forgery in their Reply Brief ("Declaration Forgery Chronology TDB in Reply"). OB 2.

7. *The Summary Judgment Hearing.*

The Wilsons did not have a record of either the motion to dismiss or the summary judgment proceedings prepared. But their Opening Brief claims to quote exact statements purportedly made by the judge and arguments made by counsel (OB 14) and even describes the facial features and tone of voice purportedly used by the court. OB 36.

IV. **ARGUMENT.**

A. **Standard of Review.**

The parties agree that an order granting summary judgment is reviewed de novo. *Lyons v. U.S. Bank NA*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014). However, the Wilsons misapprehend the parties' respective burdens on summary judgment asserting that "defendants must disprove" the Wilson's allegations of DTA violations. OB 19. But, it is well settled

that a defendant who is moving for summary judgment may meet its burden merely by pointing out that there is an absence of evidence to support an essential element of the plaintiff's claim. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). To avoid summary judgment, the plaintiff must then make a prima facie showing of its claim. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). To survive summary judgment, a plaintiff "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." CR 56(e); *see id.* "If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." *Id.* Summary judgment is warranted "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*

A party opposing summary judgment must respond with more than conclusory allegations, speculative statements or argumentative assertions about the existence of unresolved factual issues. *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990). A disputed fact is material if the outcome of the litigation depends on that fact and is genuine if it is one on which reasonable people may disagree. *Peyton*

*Bldg., LLC v. Niko's Gourmet, Inc.*, 180 Wn. App. 674, 323 P.3d 629 (2014). 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 not material. *Ruffer*, 56 Wn. App. at 628. Finally, 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).

**B. Additional Issues Related to Review.**

Quality has separately filed a Motion to Strike major sections of the Wilsons' Opening Brief. The Motion has not been decided as of the time of filing of this Answering Brief. The Opening Brief contains scores of statements that have no citation to the record, it presents arguments as fact, and it raises issues not raised below, including a belated and unsubstantiated request for additional discovery. In addition, the Opening Brief omits many arguments made below, resulting in an abandonment of the omitted theories.

**1. Consideration of Evidence Not Cited to the Record.**

A party's brief must provide a citation to the record for each factual statement made therein. *See* RAP 10.3(a)(5). The record on review consists *only* of the following: "report of proceedings", "clerk's papers", exhibits and a certified record of administrative adjudicative proceedings.

RAP 9.1(a). *See also e.g. Aba Sheikh v. Choe*, 156 Wn.2d 441, 446-47, 128 P.3d 574 (2006) (granting appellant's motion to strike "dozens of sentences in [respondent's] brief for failure to provide citations and use of improper argument."); *Burrell v. State (in Re K.S.C.)*, 137 Wn.2d 918, 932, 976 P.2d 113 (1999) ("Portions of a brief which contain factual material not submitted to or considered by the trial court should be stricken."); *Nelson v. McGoldrick*, 127 Wn.2d 124, 141, 896 P.2d 1258 (1995) (striking all portions of the respondent's supplement brief which contained "factual assertions unsupported by the record"); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (declining to consider any argument that relies on evidence that is unsupported by a reference to the record or any citation of authority).

**2. Consideration of New Evidence and Arguments on Appeal.**

Generally, an appellate court does not consider an issue that was not raised at the trial court. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 468, 843 P.2d 1056 (1993). An issue not presented to the trial court and raised for the first time during the appellate process will not be considered on appeal. *Pappas v. Hershberger*, 85 Wn.2d 152, 530 P.2d 642 (1975).

3. Abandonment of Issues Below.

An appellate court will 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). Where a brief contains no argument or citation to authority pertaining to omitted issues, the court will deny review of these arguments. *Ang v. Martin*, 154 Wn.2d 477, 486-487, 114 P.3d 637 (2005). Finally, a court will not consider new issues raised for the first time in a Reply Brief. RAP 10.3(c). "A reply brief should ... be limited to a response to the issues in the brief to which the reply brief is directed." Indeed, "[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche*, 118 Wn.2d at 809; *Dickson v. United States Fid. & Guar. Co.*, 77 Wn.2d 785, 788-89, 466 P.2d 515 (1970) ("Contentions may not be presented for the first time in the reply brief").

4. There Was No Request or Basis for A Continuance for Discovery.

While a court may order a continuance to permit additional discovery to oppose a summary judgment motion, a party seeking a continuance must provide an affidavit stating what evidence it seeks and how this evidence will raise an issue of material fact precluding summary judgment. CR 56(f); *Durand v. HIMC Corp.*, 151 Wn. App. 818, 214 P.3d

189 (2009), *rev. den.*, 168 Wn.2d 1020, 231 P.3d 164 (2010). There is no evidence that the Wilsons filed an appropriate motion or affidavit and thus they were not entitled to a continuance. *Id.*

**C. The Trial Court Properly Granted Summary Judgment to Quality Because the Wilsons Failed to Present Prima Facie Evidence to Satisfy Multiple Elements of Their CPA Claims.**

The Wilsons' Opening Brief includes arguments about a wide variety of conduct which allegedly violates the CPA. The Wilsons' arguments can be roughly categorized as related to (1) Quality's appointment by Chase ("Appointment Issues"), (2) whether Quality had a right to rely on the Beneficiary Declaration ("the Beneficiary Declaration Issue"), (3) assertions of comingling and bias ("Comingling/Bias Issues"), and (4) whether Quality maintained a physical presence ("Physical Presence Issue"). The conduct at issue did not violate either statute or common law, but even before addressing the merits of each purported violation, it is important to point out that the Wilsons failed present evidence to establish each of the other elements of their CPA claim.<sup>2</sup>

**1. The Elements of a CPA Claim.**

The issue before the trial court was whether the Wilsons presented sufficient evidence to establish each of the five elements of their CPA

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<sup>2</sup> The Wilsons' Complaint also asserted claims for declaratory and injunctive relief, but no error is assigned to the dismissal of these claims and the Opening Brief does not make argument about them, resulting in an abandonment of these claims. See discussion at page 19.

claim.<sup>3</sup> Whether a party can prevail on a CPA claim involves "a case by case determination of whether the plaintiff can satisfy the requisite elements." *Lyons*, 181 Wn.2d at 785. The requisite elements of a CPA claim are: (1) an unfair or deceptive act or practice, (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.

**a. The Wilsons Failed to Present Evidence to Show that the Alleged Wrongdoing Constituted an Unfair Act or Practice for Purposes of the CPA.**

The Wilsons' list of alleged wrongs include both statutory violations and common law. None of the alleged statutory violations are per se violations of the CPA, so whether the conduct is an unfair or deceptive act is a question of law, a question which turns in part on whether the conduct was likely to deceive a substantial portion of the public. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). Instead of submitting evidence on that issue, the Wilsons argue that the DTA is construed in the borrower's favor and thus a DTA

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<sup>3</sup> There is no damage claim for a violation of the DTA where, as here, no nonjudicial foreclosure sale occurred. *Frias v. Asset Foreclosure Servs, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014). The Wilsons conceded this issue at the trial court. CP 296.

violation must be an unfair or deceptive practice. But that argument is contrary to the express language of the statute, and case law. (delineating per se statutory violations); RCW 61.24.130 (same); *Podbielancik v. LPP Mortg. Ltd.*, 191 Wn. App. 662, 362 P.3d 1287 (2015) (technical violations or defects in the foreclosure process which do not cause prejudice are not actionable).<sup>4</sup>

While the Wilsons' brief makes arguments about the alleged violations (discussed in detail below), they fail to offer evidence of why this purported wrongdoing constitutes an unfair or deceptive act or practice under the CPA or that the act in question had capacity to deceive a substantial portion of the public and was likely to mislead a reasonable person. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d. 27, 48-9, 204 P.3d 885 (2009). The law is quite clear that "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

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<sup>4</sup> Compare *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012) (observing that the DTA should be strictly construed in favor of borrowers and that technical defects in the process can void a sale) with *Amresco v. SPS Props.*, 129 Wn. App. 532, 537-538, 119 P.3d 884 (2005) (sale upheld because notice to legal representatives fulfills notice requirement). See also *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988) (failure to serve notice of trustee's sale more than 30 days after notice of default); *Steward v. Good*, 51 Wn. App. 509, 754 P.2d 150 (1988) (trustee's failure to comply with statutory requisites of the DTA). As the Federal District Court recently noted, "Washington state courts have required the borrower to show prejudice before they will set aside a trustee's foreclosure sale in the face of allegations of technical errors." *Meyer v. U.S. Bank Nat'l Ass'n*, 2015 U.S. Dist. LEXIS 47745, \*27, 2015 WL 1619048, \*10 (W.D. Wash. Apr. 9, 2015).

CPA claim. *Westview Invs., Ltd. v. U.S. Bank*, 133 Wn. App. 835, 854 n.27, 138 P.3d 638 (2006) (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 defeated). Proving that conduct is an unfair or deceptive act or practice is a required element of the Wilsons' claim, and the failure to produce such evidence defeats their claims. *See also Holiday Resort Cmty Ass'n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 266, 135 P.3d 499 (2006).

**b. The Wilsons Failed to Establish a Compensable Injury.**

To establish injury, a plaintiff must demonstrate "out-of-pocket expenses directly resulting from" the defendant's conduct. *Panag*, 166 Wn.2d at 63. To show causation, a plaintiff must establish that, "but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007). In other words, a plaintiff must demonstrate that "the injury complained of ... would not have happened" but for the defendant's acts. *Id.* at 82.

The injury and causation elements will be addressed in the context of each alleged wrongful act below, but in general the Wilsons stopped paying their mortgage in 2010. CP 514. Their default triggered the power of sale and is the cause of the injuries they claim to have incurred, all of which are related to their efforts to stop foreclosure of their home. Mr. Wilson claims to have spent thousands of hours "investigating and self educating," and considerable expenses for copying and travel, but there is no itemization of any of these alleged expenses nor is there any explanation to what they copied or why they traveled. CP 50-51. There is no breakdown of what expenses were litigation related and what were not. CP 50-51. As a result, the Wilsons failed to establish they would not have incurred these expenses "but for" Quality's conduct.

**2. The Appointment Related Issues.**

**a. Chase's Status as Beneficiary is Undisputed.**

The beneficiary of the deed of trust is "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." RCW 61.24.005(2). The holder of the note is the beneficiary because the DTA contemplates that the "security interest will follow the note, not the

other way around." *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012).<sup>5</sup>

The only evidence before this court is that Chase is the holder of the note by virtue of its possession of the note with the right to enforce. Chase attested to this status in October 2012 when it provided the Beneficiary Declaration to Quality, and reaffirmed in a summary judgment declaration that it was the owner and holder of the note (which was in the possession of Chase's counsel for purposes of this litigation). CP 336, 339, 341, 446, 474. The Wilsons make some rather convoluted arguments that a dispute exists as to whether Chase "owns" the Note and/or Deed of Trust. These arguments are a less than clever red herring, because Chase's status as beneficiary depends in this instance solely on whether Chase was the holder of the note.

Numerous appellate decisions have made it clear that the DTA's "definition of 'holder' does not turn on ownership" and "a person need not own a note to be entitled to enforce the note." *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 540, 359 P.3d 771 (2015); *see also Trujillo v. Nw. Tr. Sers, Inc.*, 181 Wn. App. 484, 497-98, 326 P.3d 768 (2014), *rev'd in part on other grounds*, 183 Wn.2d 820, 355 P.3d 1100 (2015) ("The UCC does, however, make clear that the 'person entitled to enforce' a note

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<sup>5</sup> In *Bain*, the Supreme Court rejected a claim by MERS that it was the beneficiary of the deed of trust because it did not hold the note.

is not synonymous with the 'owner' of the note ... [I]t is the status of holder of the note that entitles the entity to enforce the obligation. Ownership of the note is not dispositive.") The pronouncements in *Brown* and *Trujillo* were not new—the Supreme Court had established two years earlier that it is unnecessary to determine who owns the note or who is the beneficiary of the deed of trust as Washington law focuses on who holds the note. *Bain*, 175 Wn.3d at 102-04. The Wilsons submit no actual evidence that anyone other than Chase is the holder (or owner) of the Note. In fact, the Wilsons' Complaint and other filings below state that Chase is the "servicer." CP 627 (Quality appointed by "servicer"); CP 301 (Chase acted in "servicing capacity"). Even if Chase is only the servicer it would still have the right to enforce the Note as a result of its possession of the note. *Brown*, 184 Wn.2d at 537.

Given the holdings of *Bain*, *Brown* and *Trujillo*, the Wilsons' arguments about the chain of title to, and ownership of, the Note are simply irrelevant and must be disregarded. *Grimwood*, 110 Wn.2d at 359.

**b. Chase Became the Beneficiary by Operation of Law Without Regard to the Recording of a Corporate Assignment.**

The Wilsons allege that Quality violated its duty of good faith, and RCW 61.24.010(2), by serving the Notice of Default and later by acting as Successor Trustee on behalf of Chase, who the Wilsons assert was not a

valid beneficiary of the Deed of Trust as of October 2012 when the Appointment was signed. According to the Wilsons, Chase did not become beneficiary until May 23, 2013 when a formal assignment of the Deed of Trust was recorded in Snohomish County. The Wilsons' arguments about when Chase became the beneficiary are built on the same faulty house of cards as their irrelevant and illogical arguments about ownership of the note.

The fallacy of the Wilsons' position is easily resolved by the statutes and controlling case law. There is no requirement under Washington law that a document (such as an assignment) be recorded to reflect a change in beneficiary.<sup>6</sup> The Wilsons simply misapprehend the holding in *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 309 P.3d 636 (2013).<sup>7</sup> There the court held that the trustee was not appointed by a proper beneficiary because the entity that executed the appointment was not the actual beneficiary at the time it executed the appointment. *Bavand* does not stand for the proposition that an assignment of beneficiary must be recorded. It is the appointment of successor trustee that must be recorded to vest powers in the successor trustee. *Bavand*, 176 Wn. App. at 486-487.

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<sup>6</sup> See cases collected at note 9.

<sup>7</sup> Plaintiffs also cite an unpublished decision *Schnall v. Deutsche Bank Nat'l Trust Co*, 2016 Wash. App. LEXIS 1311 (Wash. Ct. App. June 6, 2016) (OB 18).

The appointment of Quality was recorded October 10, 2012, over two months before Quality recorded and served (by mail and posting) the First Notice of Sale. CP 336-337, 343, 354-357. But, here, Chase became the beneficiary pursuant to 12 U.S.C. § 1821(j)<sup>8</sup> by operation of law when it succeeded WaMu in 2010, more than two years before Chase appointed Quality a successor trustee and without the need for a formal assignment. As beneficiary, Chase was legally entitled to appoint Quality. RCW 61.24.010(2) ("trustee may resign at its own election or be replaced by the beneficiary.").

The Wilsons did not meet their burden of submitting evidence that someone other than Chase was the holder (and in possession of the Note) as of October 2012 when the Appointment was signed. Chase was the holder, and as such was the beneficiary, and was entitled to appoint Quality to act as Successor Trustee. RCW 61.24.010(2).

Moreover, the Wilsons cannot base their CPA claim against Quality on the FDIC's recording of a Corporate Assignment of Deed of Trust ("CADT") memorializing Chase's status as successor beneficiary to

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<sup>8</sup> 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, 2012 U.S. App. LEXIS 1866, 2012 WL 280742 (9th Cir. Cal. 2012); *Tariri v. Chase Home Fin., LLC*, 2011 U.S. Dist. LEXIS 86840 (D. Mass. June 9, 2011), *adopted by Tariri v. Chase Home Fin., LLC*, 2011 U.S. Dist. LEXIS 88116 (D. Mass. Aug. 4, 2011); and *Cent. Southwest Tex. Dev., L.L.C. v. JPMorgan Chase Bank, N.A.*, 2015 U.S. App. LEXIS 3247 (5th Cir. Tex. Mar. 2, 2015).

the FDIC. CP 467, 501. First, courts considering the issue have repeatedly held that an assignment of deed of trust is done for notice purpose only. An assignment of deed of trust does not convey any legal interest in the property either in intention or in fact, and such documents are not required to be recorded in any event.<sup>9</sup>

The fact that an assignment of the deed of trust was recorded later does not mean that Chase was not already the holder in October 2012 by virtue of its possession of the Note. Second, a borrower does not have standing to bring claims for relief arising out of an assignment to which he is not a party.<sup>10</sup> Moreover, the CADT was not executed by Quality, but instead by the FDIC, a non-party. CP 501. Finally, the CADT is correct; at the time the CADT was recorded on May 23, 2013, Chase was the holder of the Note and beneficiary of the Deed of Trust. CP 466-467. Once again the Wilsons make much ado about nothing.

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<sup>9</sup> *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1109 (W.D. Wash. 2011) ("Washington State does not require the recording of such transfers and assignments"); *St. John v. Northwest Tr. Servs., Inc.*, 2011 U.S. Dist. LEXIS 111690, 2011 WL 4543658, at \*3 (W.D. Wash. Sept. 29, 2011) (same) (citing RCW 61.24.005(2)); *In re Reinke*, 2011 Bankr. LEXIS 4142, 2011 WL 5079561, at \*10 (Bankr. W.D. Wash. Oct. 26, 2011) ("The [Deed of Trust Act] does not require that an assignment of a deed of trust be recorded in advance of the commencement of foreclosure"). See also *In re United Home Loans, Inc.*, 71 B.R. 885, 891 (Bankr. W.D. Wash. 1987) ("An assignment of a deed of trust ... is valid between the parties whether or not the assignment is ever recorded .... Recording of the assignments is for the benefit of third parties[.]").

<sup>10</sup> *Cagle v. Abacus Mortg., Inc.*, 2014 U.S. Dist. LEXIS 124425, 2014 WL 4402136 at \*5 (W.D. Wash. Sept. 5, 2014) (stating "plaintiff lacks standing to challenge an allegedly fraudulent assignment or appointment of a successive trustee, irrespective of robo-signing").

The Wilsons' make one last timing argument and it, too, is based on a misapprehension of the law. The Wilsons argue that Quality violated the DTA because the Notice of Default was sent prior to the time Quality received the Chase Beneficiary Declaration. RCW 61.24.030(7) requires the trustee to have a declaration or other proof of ownership prior to recording a Notice of Sale, not prior to sending a Notice of Default. RCW 61.24.030(7). *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 370 P.3d 25 (2016) (notice of sale valid where appointment of successor trustee was recorded prior to service); *Trujillo*, 183 Wn.2d at 834, n.10 (observing that Trustee must have requisite proof of ownership before recording notice of sale). None of the Wilsons' arguments create any issues of fact as to Chase's status as owner and holder of the Note. As beneficiary, Chase was entitled to appoint Quality.

**3. The Beneficiary Declaration Issues.**

**a. The Beneficiary Declaration Complies with RCW 61.24.030(7).**

The Supreme Court recently held that "a party satisfies the proof of beneficiary provisions of RCW 61.24.030(7) when it submits an undisputed declaration under penalty of perjury that it is the actual holder of the promissory note." *Brown*, 184 Wn.2d at 544. Under these circumstances, the trustee "can rely on a declaration consistent with its

duty of good faith." *Id.* Ambiguous language in a beneficiary declaration only precludes summary judgment when the trustee relies on it and does not have proof of ownership. RCW 61.24.030(7). *See also Lyons*, 181 Wn.2d 775; *Trujillo*, 183 Wn.2d 820. The beneficiary declarations at issue in *Lyons* and *Trujillo* were considered ambiguous because they did not, as the statute requires, "prove" that the foreclosing entity was the actual owner of the note or other obligation to be foreclosed upon as required by RCW 61.24.030(7)(a). *Lyons*, 181 Wn.2d at 791; *Trujillo*, 183 Wn.2d at 833. Instead, the declarations indicated that the foreclosing entity could be a "nonholder in possession or a person not in possession who is entitled to enforce the instrument." *Id.* This result obtained because the declarations were phrased in alternative language. The declaration at issue in *Lyons* stated that the foreclosing entity is "the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation." *Lyons*, 181 Wn.2d at 779. Similarly, the declaration at issue in *Trujillo* stated that "Wells Fargo Bank, NA is the actual holder of the promissory note ... or has requisite authority under RCW 62A.3-301 to enforce said [note]." *Trujillo*, 183 Wn.2d at 833 (noting that this declaration language differs from RCW 61.24.030(7)(a) by adding the "or" alternative).

In contrast, the Chase Beneficiary Declaration is unambiguous and complies with RCW 61.24.030(7). It unequivocally states that "JPMorgan Chase Bank, National Association, is the **holder** of the promissory note or other obligation evidencing the above referenced loan" (emphasis added). CP 466. The Chase Beneficiary Declaration mirrors the precise statutory language of RCW 61.24.030(7)(a). It does not contain the alternative language which concerned the Supreme Court in *Lyons* and *Trujillo*. Because the Chase Beneficiary Declaration is unambiguous, and was in Quality's possession over two months before the Notice of Sale was recorded, Quality was entitled to rely on it. RCW 61.24.030(7)(b); *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 347 P.2d 487 (2015) (dismissal affirmed where trustee had right to rely on beneficiary declaration).

**b. The Trustee Does Not Have a Duty to Verify an Unambiguous Beneficiary Declaration.**

The Wilsons argue that Quality had a duty to verify the information contained in the Chase Beneficiary Declaration even though the Wilsons failed (then and now) to provide any information to contradict the statements in the Chase Beneficiary Declaration. Recent cases have clarified that, in accordance with the plain language of RCW 61.24.030(7)(b), the trustee is entitled to treat the representations in a

beneficiary declaration as true absent conflicting evidence. *Trujillo*, 181 Wn. App. 484. Courts have uniformly rejected the invitation to import a duty to verify the information contained in the beneficiary declaration into the trustee's duty of good faith. *Meyer v. U.S. Bank Nat'l Ass'n*, 2015 U.S. Dist. LEXIS 47745, 2015 WL 1619048, (W.D. Wash. Apr. 9, 2015) (collecting cases).

The Wilsons' arguments attempt to rewrite RCW 61.24.030(7) to place burdens on the trustee that were expressly rejected by the Legislature<sup>11</sup> and to nullify significant provisions of the statute.<sup>12</sup> In the Wilsons' world, a trustee would be required to seek out and evaluate evidence of every aspect of a homeowner's loan, from origination through the foreclosure referral, before proceeding nonjudicially. That is not, however, what the Legislature prescribed. The Legislature's intent was to ensure that nonjudicial foreclosures were being carried out by entities that have the power to do so, but without imposing overly burdensome requirements on trustees in order to keep the process efficient and

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<sup>11</sup> The Legislature previously considered and rejected burdensome "proof" requirements similar to those that Plaintiffs now seeks to judicially insert into the DTA. *Compare* SB 5810, 61st Legislature, 2009 Regular Session (Feb. 3, 2009) and First Engrossed SB 5810, §7(7)(k)(i), 61st Legislature, 2009 Regular Session (Mar. 12, 2009) with Engrossed Senate Bill 5810, 61st Legislature, 2009 Regular Session, passed House Apr. 9, 2009, passed Senate Apr. 20, 2009.

<sup>12</sup> The court should not interpret a statute in such a way as to render any portion of it "superfluous, void, or insignificant." *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 210 P.3d 297 (2009). Instead, "[w]henever possible, a statute must be interpreted so as to give all of its language meaning." *Sacred Heart v. Dep't. of Revenue*, 88 Wn. App. 632, 639, 946 P.2d 409 (1997).

inexpensive. *See Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). The Legislature rejected even more simple requirements than the Wilsons now propose.

**4. The Commingling/Bias Issues.**

The Wilsons argue that Quality violated its statutory duty of good faith (1) by commingling activities with M&H, (2) by including a "legal disclaimer" contained in an email footer on communications from Quality's in-house counsel, and (3) by virtue of its relationship with Chase. The "evidence" that the Wilsons present to establish that a triable issue of fact exists as to the Commingling/Bias Issues is (1) Judge Okrent's CR 12 ruling, (2) assertions that Quality is (a) owned by lawyers who also own M&H and (b) has vendor relationships and shared clients with M&H, (3) assertions that Quality improperly deferred to Chase, and (4) a legal disclaimer contained in a footer to an email sent from Quality's in-house counsel, Dan Goulding, to Plaintiffs' counsel, Scott Stafne. As set forth below, this "evidence" is not sufficient does not establish that the Wilsons were subjected to an unfair or deceptive act or practice.

**a. Plaintiffs' Reliance on Judge Okrent's CR 12 Order Is Misplaced.**

The Wilsons cite a ruling from Judge Okrent on Quality's Motion to Dismiss pursuant to CR 12 that "[b]ased on the fiduciary duty discussed

in *Klem v. Wa. Mut. Bank*, there is evidence of a prima facie case of commingling." CP 545. But, statutory changes made to RCW 61.24.010(3) before the Wilsons' claims arose eliminated the fiduciary duty that existed in *Klem*.<sup>13</sup> Indeed, RCW 61.24.010(3), as applicable to this case, expressly provides that "[t]he trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons that have an interest in the property subject to the deed of trust." It does not appear that Judge Okrent was informed of the statutory elimination of the fiduciary duty, and there was no "evidence" of commingling presented at the hearing because the case was before the court on a motion to dismiss, a non-evidentiary matter which tests only the sufficiency of the pleadings. See *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 744 P.2d 1032 (1987). Finally, the order was entered prior to the Supreme Court decisions in *Lyons, supra*, and *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) which held that plaintiffs in presale foreclosure cases have no claim under the DTA and must instead prove the additional elements of a CPA claim.

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<sup>13</sup> The concurring opinion in *Klem* specifically notes this statutory change. *Klem*, 176 Wn.2d at 807 n.3.

**b. The Identity/Profession of Quality's Owners Does Not Expand Quality's Duties.**

The Wilsons' CPA claim is premised in part on the incorrect legal conclusion that if the owners of Quality are licensed attorneys, then the ethical responsibilities of attorneys are imposed on Quality. Not so. First, the Rules of Professional Conduct ("RPC") do not apply to Quality,<sup>14</sup> a nonlawyer, but even if the rules applied, the RPC was "never intended as a basis for civil liability." *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992). Thus, a law firm's ethical duty to its clients does not extend to the services provided by a separate entity such as Quality. Instead, a trustee's duties are created by the DTA, and there is nothing in the statute, its legislative history, or case law to suggest that the trustee's duties are expanded by the professions of its owners.

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<sup>14</sup> Comment 4 to RPC 5.7 expressly addresses this situation:

Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that *the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply*. (emphasis added).

**c. The Alleged Commingling and Vendor Relationships Are Not an Unfair or Deceptive Practice As a Matter of Law.**

The Wilsons' Opening Brief waxes eloquently with conclusory statements about Quality's alleged lack of neutrality. The Wilsons surmise that Quality cannot act as a neutral trustee because it shares vendor relationships with M&H and QLSC, is hired by beneficiaries (which is exactly what the DTA contemplates, and because Quality was previously found to have deferred to Chase on a postponement issue in *Klem*.

There is no statutory prohibition in the DTA against the relationships between Quality, QLSC, and M&H.<sup>15</sup> Instead, the DTA imposes on the trustee has a duty of good faith to both the beneficiary and the grantor. RCW 61.24.010(3). The Wilsons' conclusion that these relationships are an ipso facto breach has been rejected by other courts construing Washington law. In *Singh v. Fannie Mae*, the plaintiffs contended that ReconTrust's status as a subsidiary of Bank of America (the beneficiary) created a conflict of interest. 2014 U.S. Dist. LEXIS 15745, 2014 WL 504820 (W.D. Wash. Feb. 7, 2014). The District Court held that this ownership

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<sup>15</sup> The DTA specifically permits an attorney, a professional corporation, or a limited liability company composed entirely of attorneys, to act as trustee, RCW 61.24.010 (1)(c)-(d), and neither the DTA nor any other statute prohibits law firm ownership or operation of a corporate trustee.

by itself, falls well short of establishing a breach of a duty of good faith. Even before the Washington Legislature amended the deed of trust act to abolish a trustee's fiduciary duty to a borrower, its courts recognized that "an employee, agent, or subsidiary of a beneficiary" could serve as a trustee. *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683, 687 (Wash. 1985); see also *Meyers Way Development LP v. University Savings Bank*, 80 Wn. App. 655, 910 P.2d 1308, 1315-16 & n.8 (Wash. Ct. App. 1996) [13] (noting that even the "exceedingly high" fiduciary duty that a trustee owed to a borrower did not prohibit a trustee from "serving simultaneously as the creditor's attorney, agent, employee or subsidiary"). No authority Plaintiffs have cited, and no authority of which the court is aware, prohibits a subsidiary of the beneficiary from serving as a trustee.

*Id.*, at \*12-13.

The Wilsons' assertions that pooling of resources, such as office space or phone expenses, create some conflict, is equally insufficient. Washington law has long been clear that liability based on commingling and alter ego type theories requires proof that the corporate form has been intentionally misused to violate or evade a duty and that disregarding the corporate form is necessary and required to prevent unjustified loss to the injured party. *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 411, 645 P.2d 403 (1982). Importantly, "commingling" is not sufficient to meet the test, nor is the sharing of employees, officers, clients, physical addresses or business interests. See *Norhawk Invest. v. Subway Sandwich Shops*, 61 Wn. App. 395, 811 P.2d 221 (1991)

(notwithstanding the commingling of assets, piercing the corporate veil was not appropriate because the corporate form was not being used to mislead and evade a duty to plaintiff). There is no evidence that Quality shared resources with either M&H or QLSC in order to avoid a statutory duty or that disregard is necessary to prevent a loss. As a matter of law, the Wilsons have not submitted sufficient evidence to establish that the alleged commingling/bias is an unfair or deceptive trade practice or a breach of the duty of good faith.

**d. The Wilsons' Reliance and Focus on *Klem* is Misplaced.**

Quality submitted un rebutted evidence that it substantially modified its policies and practices after the Supreme Court found it violated the DTA in *Klem*. CP 337. The Wilsons' Opening Brief states that the dates in *Klem* "overlap" the Wilson case. OB 47. But the record reveals this is inaccurate. The Wilson nonjudicial foreclosure proceeding commenced in October 2012. CP 336. Conversely the nonjudicial foreclosure proceedings in *Klem* occurred in 2008. *Klem*, 176 Wn.2d at 774. In the interim, Quality changed its policies and procedures and the legislature modified the duties owed by a trustee. CP 337; *Klem*, 176 Wn.2d at 807 n.3. In fact, by the Wilsons' own admissions, they were so entrenched in their beliefs that Quality was not neutral that they did not even contact Quality. CP 452. Nevertheless, the Wilsons now argue that

Quality should have investigated purported "robo-signing" of documents by Chase, even though (1) there is no evidence that the Wilsons raised these specific concerns with Quality and (2) neither Quality nor the Wilsons have standing to challenge documents to which they are not a party.

The Wilsons' accusation that they were denied a postponement akin to *Klem* is also inaccurate. The Wilsons state that Quality was unwilling to postpone the sale absent consent from Chase, but Quality in fact postponed the sale twice. And Quality's response to the Wilson's request for an additional postponement is taken out of context. CP 280-82. The Wilsons requested to know whether they qualified for a loan modification and Quality (who is not the holder and not in a position to address such matters) indicated that this was an issue for Chase. This is not an issue of deferring to Chase, it is simply an issue of Plaintiffs directing their requests at the wrong party. Washington law specifically requires that loan modification issues be directed to the beneficiary. RCW 61.24.030(8). Notably, Quality discontinued the sale in any event. CP 337, 359-360, 368-69.

**e. Use of the Legal Disclaimer Is Not an Unfair or Deceptive Practice.**

Plaintiffs cite a "legal disclaimer" contained in the email footer for certain Quality communications as an unfair practice. The legal disclaimer notifies recipients that Quality is not a "law office" and informs the recipient to seek an attorney if they require legal advice. The disclaimer also states that Quality "would be happy to submit the request to M&H for handling." CP 280. Plaintiffs do not submit any evidence as to why this disclaimer is unfair or deceptive, and this court should find that the disclaimer was not unfair or deceptive as a matter of law because it did not misrepresent something of "material importance," *Holiday Resort*, 134 Wn. App. at 266, and was not likely to mislead a reasonable person. *Panag*, 166 Wn.2d at 48-9 (plaintiff must show the act in question had capacity to deceive a substantial portion of the public and was likely to mislead a "reasonable" person).

**5. Quality Maintained a Physical Presence in Washington.**

**a. The Physical Presence Requirement.**

RCW 61.24.030(6) states that a "trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address." Plaintiffs' Complaint does not allege that Quality violated the physical presence requirement of RCW 61.24.030(6). The Wilsons

raised the physical presence issue for the first time in their summary judgment opposition in an unabashed attempt to capitalize on a dispute between Quality and the Attorney General during the pendency of this case and based on facts which did not involve or injure the Wilsons. CP 95.

No reported case from a Washington state court has interpreted RCW 61.24.030(6). Federal courts in Washington have repeatedly held that the DTA is satisfied where the trustee maintains an agent to receive service of process with a street address and telephone service in the state. *Singh*, 2014 U.S. Dist. LEXIS 15745; *Ayala v. Fannie Mae*, 2013 U.S. Dist. LEXIS 139877 (W.D. Wash. Sept. 17, 2013); *Douglas v. ReconTrust Co, N.A.*, 2012 U.S. Dist. LEXIS 161268, 2012 WL 5470360 (W.D. Wash. Nov. 9, 2012). In *Douglas*, the federal district court explained that the DTA "only requires that the trustee have a 'street address' in Washington for service of process, a 'physical presence' at that address, and 'telephone service.'" 2012 U.S. Dist. LEXIS 161268 at \*13 (quoting RCW 61.24.030(6)). The court rejected the borrowers' argument that the trustee could not have a physical presence via its agent as "inconsistent with the plain meaning of the statute" which it found to be "unambiguous." *Id.* at \*14-15. The court held that "[n]othing in the legislative history suggests that the trustee is prohibited from designating

an in-state agent to provide that physical presence." *Id.* at \*16.<sup>16</sup> Notably, the *Douglas* court reached this conclusion even though ReconTrust had entered into a consent decree with the Washington Attorney General.

Quality previously maintained a physical office in Poulsbo, Washington but in January 2014 moved its physical office to Seattle. CP 171. Nothing in the record contradicts the facts that Quality had physical offices in these locations at these times or establishes that Quality was not otherwise in compliance with RCW 61.24.030(6). Indeed, the Wilsons do not argue that Quality did not have an office or agent but instead observe that Quality was sometimes difficult to reach at its street address, particularly in early January 2014 while it was relocating from Poulsbo to Seattle. There is no evidence that the Wilsons attempted to reach Quality during this time period. Indeed, the Wilson Declaration states that he attempted to contact Quality in the early summer of 2013. CP 53. The trial court found that Wilsons' statement contradicted, without explanation, Wilson's prior deposition testimony and interrogatory responses where he repeatedly disavowed attempts to contact Quality. In an impermissible

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<sup>16</sup> The court reasoned that if "easier access" to trustees were "the legislature's goal, then it is difficult to imagine that the legislature would have disapproved of ReconTrust's designation of an agent in Olympia." *Id.* at \*16 fn. 2. "Nothing would prevent a trustee, for example, from being physically present at an address in Ione, a town in the remote northeast corner of Washington." *Id.* "That would seem much less convenient for most Washingtonians than the Olympia address that ReconTrust chose." *Id.*

attempt to fill the evidentiary gap, the Wilsons submit, for the first time on appeal, an affidavit which reveals that the purpose of the visit was to serve legal process and further reveals that this objective was accomplished that day by leaving the documents with M&H who was then Quality's registered agent. OB Exhibit 3 (Declaration of Brian Munson); CP 170. This evidence alone proves that Quality had a physical presence at the relevant time.

**b. The Attorney General Proceedings Are Inadmissible and Irrelevant.**

The Wilsons also cite to a dispute between Quality and the Attorney General (the "AG Proceedings"). As was true in *Douglas*, these proceedings are irrelevant and do not establish either a violation of RCW 61.24.030(6) or an unfair or deceptive practice. First, the Wilsons citation to the AG Proceedings is improper because those proceedings are not relevant to this matter and are inadmissible. The court "cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties." *Avery v. Dep't of Social & Health Servs. (In re B.T.)*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003), citing *Swak v. Dep't of Labor & Indus.*, 40 Wn.2d 51, 54, 240 P.2d 560 (1952). Here, the court cannot take judicial notice of the pleadings from the AG Proceedings because they are a record

of another independent, separate judicial proceeding which involved parties other than those present. Therefore, the Wilsons' use of AG Proceeding pleadings in this case is improper. Moreover, the AG Proceedings relate to a very discrete time period during Quality's office relocation (February 2014) and the Wilsons do not claim they attempted to contact Quality during that time period.

**6. Plaintiffs Failed to Submit Evidence of a Compensable Injury Caused by Quality's Alleged Wrongful Conduct.**

**a. There Is No Admissible Evidence of a Compensable Injury.**

Plaintiffs fail to establish causation or injury, the fourth and fifth elements of a CPA claim. Most of the injuries claimed by the Wilsons are not compensable under the CPA. The CPA requires that the claimed injury be to either business or property and that requirement excludes personal injury, "mental distress, embarrassment, and inconvenience." *Frias*, 181 Wn.2d at 431. Moreover, a plaintiff must demonstrate "out of pocket" expense directly resulting from the defendant's conduct. *Panag*, 166 Wn.2d at 63. Finally attorney's fees and other litigation expenses incurred related to litigation efforts are not compensable under *Panag*.

The Wilson's alleged injuries are comprised almost entirely of claims that they researched foreclosures, participated in meetings and discussions, and contemplated new business ventures. The former are

related to their litigation efforts and the latter are too speculative to permit recovery. *No Ko Oi Corp. v. Nat'l 60 Minute Tune*, 71 Wn. App. 844, 863 P.2d 79 (1993). Indeed, the Wilson Dec is replete with the sort of conclusory statements and argumentative assertions that courts find are insufficient to create an issue of fact. *Ruffer*, 56 Wn. App at 628.

**b. There Is No Evidence of "But for "Causation.**

In order to establish causation, a borrower must prove that, but for the defendant's unfair or deceptive practice, he would not have been injured. *Indoor Billboard*, 162 Wn.2d at 84; *Blair v. Nw. Tr. Servs., Inc.*, 193 Wn. App. 18, 33 372 P.3d 127 (2016) (finding the borrower would have been injured even if trustee had complied with RCW 61.24.030(7) because it was borrower's default (not the trustee's conduct that was the cause of the foreclosure and injury). While causation is often a question of fact, a plaintiff must aver facts that support a causal link. Absent such facts in the record, summary judgment is proper. *Blair* at 37.

As a matter of law the Wilsons have failed to establish the causal link element of their CPA claim. The Wilsons have identified a broad variety of damages (most of which are not compensable injury as set forth above) but nothing in the Wilson Dec avers facts that support a causal link. There is no evidence that any of the investigation and related costs that the Wilsons claim to have incurred were caused by anything other

than their default and the lender's decision to foreclose. The purpose of the claimed trip to Quality's office was to serve legal process, a litigation expense that is not recoverable under *Panag*. The Wilsons do not present evidence of any injury that was proximately caused by any of the alleged commingling or bias. The Wilson Dec refers to costs of investigation and copying, without any specifics of what was investigated or copied. CP 50-51. The Wilson Dec reveals that some of these expenses are "estimates." CP 50. The Wilson Dec's self-serving statements are insufficient to establish that Quality's purported bias (or any other conduct) caused injury.

Even if Wilson's statements are accepted at face value, Wilson does not identify how his failure to physically meet with Quality injured him in any way. His sworn testimony is that he was unwilling to talk to Quality except thru his "more learned counsel", and since he did not provide evidence that he was there to reinstate his loan, his purported inability to physically meet with Quality did not cause injury. Notably, the Wilsons do not claim, then or now, that they have ever attempted to reinstate or pay the loan. And, throughout much of this period of time, including the day of the purported visit to Quality's offices, this litigation was pending and Plaintiffs were represented by counsel, who was in contact with Quality via Quality's counsel. CP 280.

The Wilsons' arguments about the disclaimer also fail for lack of injury. There is no evidence that the Wilsons ever saw this disclaimer much less that they were injured by it. Indeed, the Wilsons were represented by an attorney (Stafne) and the communications at issue were exchanged between counsel, not directly with the Wilsons. There is no evidence that Wilson ever called M&H for advice, or that M&H agreed to provide advice. In sum, Plaintiffs' reliance on the disclaimer as part of their commingling theory fails because they have not and cannot submit any evidence that the disclaimer caused them injury. *Robinson v. Avis Rent A Car Sys.*, 106 Wn. App. 104, 121, 22 P.3d 818 (2001) (consumers could not establish causation of CPA claim where they did not actually see internal training manuals which they asserted contained deceptive information).

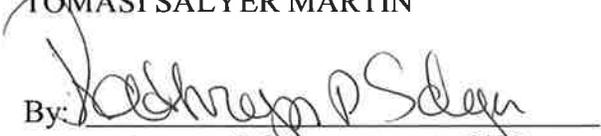
#### V. CONCLUSION.

No amount of finger pointing and name calling can save the Wilsons' claims from their failure to submit sufficient evidence to raise a triable issue of fact. It is undisputed that (1) the Wilsons defaulted on the Note and Deed of Trust that they executed to refinance their property, (2) Chase is the holder of the Note and beneficiary of the Deed of Trust, (3) Quality was validly appointed by Chase before it commenced to act as Successor Trustee, and (4) Quality appropriately relied on an

unambiguous Declaration of Beneficiary when it served and recorded the Notices of Sale and otherwise proceeded in good faith. The Wilsons are unable to prove any unfair practices as a matter of law, and have shown no compensable injuries that were proximately caused by Quality's conduct. The trial court's order should be affirmed.

DATED this 8 day of September, 2016.

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Of Attorneys for Respondent Quality  
Loan Service Corp. of Washington

**CERTIFICATE OF SERVICE**

I, Kathy Salyer, declare as follows:

1) I am a citizen of the United States and a resident of the State of Oregon. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Tomasi Salyer Martin, whose address is 121 SW Morrison Street, Suite 1850, Portland, Oregon 97204.

2) By the end of the business day on September 8, 2016, I caused to be mailed to counsel of record at the addresses, postage prepaid, and in the manner described below, the following documents:

• **RESPONDENT QUALITY LOAN SERVICE CORP.  
OF WASHINGTON'S ANSWERING BRIEF**

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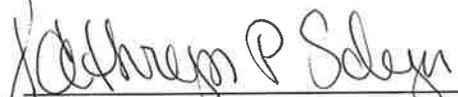
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8<sup>th</sup> day of September, 2016.

  
 Kathryn P. Salyer, WSBA 36492  
 Of Attorneys for Respondent Quality  
 Loan Service Corp. of Washington