

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

DIANNE KLEM, as Administrator of)	
the ESTATE OF DOROTHY HALSTIEN)	No. 66252-0-1
)	
Respondent/Cross Appellant,)	
)	
v.)	
)	
WASHINGTON MUTUAL BANK,)	
a Washington corporation,))
)	
Defendant,)	
)	
)	UNPUBLISHED OPINION
QUALITY LOAN SERVICE)	
CORPORATION OF WASHINGTON,)	
a Washington corporation, and)	
QUALITY LOAN SERVICE)	
CORPORATION, a California)	
corporation)	
)	
Appellants/Cross-Respondents.)	FILED: <u>December 19, 2011</u>

Spearman, J. — Quality Loan Service Corporation of Washington and Quality Loan Service Corporation (jointly Quality) appeal from the judgment entered on a jury verdict finding Quality committed breach of contract and negligence, and violated the Consumer Protection Act (CPA). These claims were brought against Quality by Dianne Klem, the director of Puget Sound Guardians (PSG), which served as guardian for Dorothy Halstien, the deed of trust grantor.¹

¹ For simplicity and ease of reference, this opinion will refer to plaintiff/respondent Klem as PSG because many of the facts below do not involve Klem's actions specifically but those of another

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

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

FACTS

In 1996, Dorothy Halstien bought a home on Whidbey Island for \$147,500. She received a statutory warranty deed, which was recorded in Island

PSG employee and of PSG generally.

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County on July 9, 1996. In July 2004, she borrowed \$73,000 from Washington Mutual Bank (WaMu), giving it a promissory note secured by a deed of trust on her property. Under the deed of trust, Halstien was the grantor, WaMu the beneficiary, and Stewart Title the trustee. It was recorded in Island County on July 29, 2004.

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

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

On June 14, 2007, the guardianship court entered an order authorizing PSG to sell Halstien's home. To sell the home, PSG sought to evict Halstien's daughter and eventually succeeded. By October 2007, WaMu had appointed

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Quality Loan Services of Washington (QLSW) as successor trustee and declared Halstien in default as of July 2007, based on her failure to make payments from July through October of 2007. QLSW served Halstien a notice of default and posted it on her home on October 25, 2007. The notice of default informed Halstien that she could contest the alleged default “on any proper ground” under RCW 61.24.130. On November 27, QLSW sent Halstien a notice of foreclosure and notice of trustee’s sale, posted these on her home, and recorded these documents in Island County. The notice of foreclosure informed Halstien that if she had any “legitimate defenses” to default, she could start a court action and obtain an injunction. The notice of trustee’s sale stated:

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

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

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

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at this time to postpone the sale, as PSG did not yet have a buyer.

By early February 2008, PSG had finished preparing Halstien's home for sale and hired a real estate agent. By February 18, approximately 11 days before the scheduled sale, PSG entered into a REPSA to sell the home to a buyer for \$235,000. The REPSA stated a closing date of on or before March 28, 2008. Greenfield called Quality on February 19 and spoke to Ott or another Quality employee.² Greenfield asked the individual to stop the sale because PSG had a signed REPSA, but was told that only WaMu could delay the foreclosure and Greenfield needed to contact WaMu.

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

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

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On February 29, the scheduled sale of Halstien's home took place. Although Greenfield was aware of the date and time of the scheduled sale, no one from PSG attended. The home was sold for \$83,087.67, one dollar more than the opening bid made by Quality on WaMu's behalf.³ Greenfield learned shortly thereafter that the property had been sold and at what price. The purchaser re-sold the home for \$235,000.

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

PSG moved for reconsideration, arguing that the trial court should limit the scope of dismissal to claims that "fit within" the waiver doctrine. The trial court granted partial reconsideration by reinstating PSG's claims for negligence, breach of contract, and Consumer Protection Act violations, while also ruling that "[b]y failing to enjoin the foreclosure sale Plaintiff waived its claim that Quality

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

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

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abrogated its duty as a trustee.” QLSW sought clarification of the court’s order, and the trial court granted this by stating that only the breach of fiduciary duty claim was waived by PSG’s failure to restrain the foreclosure sale.

Halstien died on November 5, 2008. In February 2009, PSG moved to amend its complaint to: (1) substitute Klem as plaintiff, (2) add Quality Loan Services Corporation (QLSC) as a defendant, (3) clarify that the fiduciary breach claim was dismissed, and (4) acknowledge that WaMu was in receivership. QLSW objected to adding QLSC, which was a separate corporation from QLSW but had common ownership and directors. The trial court permitted the amendments. QLSC moved to dismiss for lack of jurisdiction and failure of service. The trial court denied the motion.

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

The jury found by special verdict that both Quality and PSG were

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negligent, attributing 50 percent fault to each and finding that Halstien suffered \$151,912.23 in damages.⁵ The jury also found that QLSW acted as QLSC's agent; that Quality committed a CPA violation with damages of \$151,912.23 (it rejected treble damages); and that Quality committed breach of contract, again with damages of \$151,912.23. The jury rejected PSG's claim that Quality engaged in an unfair practice by failing to grant a reasonable accommodation. Following the verdict, Quality filed a motion for judgment notwithstanding the verdict, and PSG filed a motion for an injunction under the CPA. The trial court denied these motions. As to the motion for an injunction, it ruled that the request was vague, overbroad, legally unjustified, and unenforceable.

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

DISCUSSION

Quality argues that all of PSG's claims were waived by its failure to file a suit restraining the sale and that, in any event, PSG failed to prove its claims at trial. Quality also claims that the trial court erred in permitting QLSC to be added as a defendant. PSG cross appeals the trial court's denial of injunctive relief. We

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

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

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hold that (1) the trial court had jurisdiction over QLSC, (2) PSG's claims were not waived, (3) the evidence supported PSG's claims for negligence but did not support PSG's breach of contract or CPA claims, and (4) the denial of injunctive relief was not in error.

Jurisdiction over Quality Loan Service Corporation

"Questions of joinder present mixed issues of law and fact that we review for an abuse of discretion 'with the caveat that any legal conclusions underlying the decision are reviewed de novo.'" Kelley v. Centennial Contractors Enter., Inc., 169 Wn.2d 381, 386, 236 P.3d 197 (2010) (quoting Gildon v. Simon Prop. Group, Inc., 158 Wn.2d 483, 493, 145 P.3d 1196 (2006)).

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

PSG argues that jurisdiction over QLSC was supported by evidence in the record.⁸ It argues that because QLSC transacted substantial business in

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

⁸ Specifically it points to evidence that:

- All of the work done by QLSW was supervised by someone at QLSC.
- QLSC, not QLSW, billed WaMu for the Halstien foreclosure.
- All business records related to the Halstien foreclosure were kept in QLSC's San Diego office. CP 330.
- QLSC's Chief Operating Officer, David Owen, was unable to identify the

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

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

- (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
 - (a) The transaction of any business within this state; [or]
 - (b) The commission of a tortious act within this state; . . .

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

Waiver

The next issue is whether PSG waived its claims by failing to bring a suit to restrain the trustee's sale. Whether a party waived its claims is a mixed

whereabouts of the QLSW employee who supposedly worked from within Washington on the Halstien foreclosure.

- QLSC advertises on its website that it does business in western states, and Owen testified during his deposition that one of those states is Washington.
- QLSC and QLSW are commonly owned and are "sister companies."
- While Ott testified that he worked for QLSW, he admitted that he had never set foot in Washington before trial and that he worked at QLSC and QLSW's shared office in California.

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

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

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equitable ground, a trustee's sale." RCW 61.24.130(1). A notice of trustee's sale must include the following language to notify the grantor of its right to restrain the sale:

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

RCW 61.24.040(1)(f). A court cannot grant a "restraining order or injunction to restrain a trustee's sale" unless the party seeking the order has provided five days' notice to the trustee of the attempt to seek the order and has paid amounts due on the obligation secured by the deed of trust. RCW 61.24.130(1), (2); Plein v. Lackey, 149 Wn.2d 214, 225-26, 67 P.3d 1061 (2003). The procedure detailed in RCW 61.24.130 is "the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure." Brown v. Household Realty Corp., 146 Wn. App. 157, 163, 189 P.3d 233 (2008) (quoting Cox v. Helenius, 103 Wn.2d 383, 388, 693 P.2d 683 (1985)).

Under the waiver doctrine, "[a] party waives the right to postsale remedies where the party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale." Brown, 146 Wn. App. at 163 (citing Plein, 149 Wn.2d at 227-29). The waiver doctrine is meant to facilitate the following three goals of the Act: (1) to promote an efficient

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and inexpensive nonjudicial foreclosure process; (2) to ensure an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) to secure the stability of land titles. Brown, 146 Wn. App. at 169.

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

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

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

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

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

Id. at 169 (internal citations omitted).

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

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

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

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

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informed that waiver “of any proper grounds for invalidating the Trustee’s sale” may result where it fails to bring a lawsuit to restrain the sale. RCW 61.24.040(1)(f). Here, PSG did not seek to invalidate the sale. Given our mandate to strictly construe the Act in the borrower’s favor, Amresco, 129 Wn. App. at 537, we conclude that PSG did not waive its claims.¹²

Motion for Judgment Notwithstanding the Verdict

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

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

Breach of Contract

To prove that Quality committed breach of contract, PSG had to show,

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

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under the jury instruction:

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

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

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

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts

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with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

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

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

CPA Violation

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

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

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). PSG argued at trial that Quality committed a CPA violation by failing in its duty as a trustee to act impartially and by predating and

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notarizing the notice of sale. Quality contends PSG did not meet the first and fifth elements.

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

PSG makes the conclusory argument that an unfair or deceptive act or practice was shown through evidence that Quality acted impartially and breached a fiduciary duty, as such duty is explained in dicta in Cox. But it cites no authority for the proposition that acting impartially or breaching a fiduciary

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duty constitutes a per se unfair or deceptive act or practice. Nor does it make any argument as to why Quality's acts had a "capacity to deceive a substantial portion of the public." We will not consider an inadequately briefed argument. First American Title Ins. Co. v. Liberty Capital Starpoint Equity Fund, LLC, 161 Wn. App. 474, 486, 254, P.3d 835 (2011) (citing Bohn v. Cody, 119 Wn.2d 357, 368, 832 P.2d 71 (1992); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)). This basis did not support the CPA claim.

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

Quality all but admits that this practice was improper.¹³ Nonetheless, we agree with Quality that Halstien received the full statutory period required for notice and that her legal rights were unaffected. Under RCW 61.24.030(8), the trustee must transmit written notice of default to the grantor by mail and by

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

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posting a copy of the notice (or personally serving it) at least thirty days before notice of sale is recorded, transmitted, or served. The trustee must record the notice of sale, in the office of the county auditor in which the deed of trust is recorded, at least 90 days before the foreclosure sale. RCW 61.24.040(1)(a).

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

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

Negligence

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

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

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

First, as to the element of duty, there is no dispute that Quality, as the trustee in the deed of trust, owed a duty of care to PSG, the grantor. Quality only argues that because the fiduciary duty claim was dismissed, any duties it owed as a trustee could not have been considered to support a negligence claim. But

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

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Quality points to no authority that a trustee's duties are equivalent to—and no more than—its fiduciary duties. Nor does it point to any authority that a breach of fiduciary duty claim and a negligence claim amount to the same claim and cannot be maintained in the same lawsuit. Furthermore, the jury was not instructed that Quality had a “fiduciary duty” in the negligence instruction. We conclude that Quality owed a duty of care as a trustee to PSG.

Next, there was evidence supporting the jury's finding that Quality, as the trustee, breached its duty to PSG. Evidence at trial showed that PSG employee Greenfield told Quality that PSG wanted the sale postponed so that it could sell the home. Quality told Greenfield WaMu would need a signed REPSA. Ten days before the trustee sale, Greenfield informed Quality that PSG had a signed REPSA. Quality told Greenfield it could not postpone the sale without WaMu's approval and instructed him again to contact WaMu. Under the terms of its assignment by WaMu, Quality could not—and told PSG it could not—exercise its statutorily granted discretion to postpone the sale.¹⁵ WaMu's “Attorney Expectation Document” instructed Quality: “Your office is not authorized to postpone a sale without authorization from Fidelity or Washington Mutual.”¹⁶ David Leen, an attorney who helped draft the Deed of Trust Act and acted as a

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

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

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trustee on numerous occasions, testified as an expert witness on trustee practices. When asked about the instruction in WaMu's "Attorney Expectation Document," he testified that if a bank gave him such an instruction as a trustee, he would not follow it because it would be improper. He testified, when asked what he would expect a trustee to do, given a situation similar to that in the Halstien foreclosure, "Well, I think a trustee would absolutely have to continue the sale under those assumed facts."¹⁷

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

Quality argues that the evidence failed to support a negligence claim because it served all required statutory notices and PSG knew or should have known of its statutory right to restrain the sale. This goes to waiver, which, as we have already noted, did not apply. Furthermore, Quality contends the evidence did not support a finding that it was negligent where PSG: made two phone calls to Quality before the foreclosure sale but did not actually send the REPSA to

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

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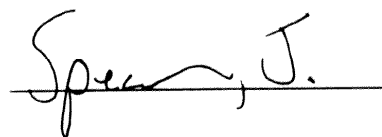
Quality, tell Quality about its difficulties with WaMu, or appear at the sale despite having a signed REPSA. Quality fails to explain how these facts, which go to PSG's actions, preclude its own negligence as a matter of law. Its assertions amount to an argument that because there was evidence that PSG was negligent, Quality could not be negligent. The argument is unavailing.

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

Conclusion

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

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

A handwritten signature in black ink, appearing to read "Spencer J.", is written over a horizontal line.

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WE CONCUR:

Appelwick, J

Schiveller, J