No. 94239-1

SUPREME COURT OF
THE STATE OF WASHINGTON

No. 74266-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

GLOGOWSKI LAW FIRM, PLLC,

Plaintiff/Petitioner,

v.

CITY FIRST MORTGAGE SERVICES, LLC,

Defendant/Respondent,

GLOGOWSKI LAW FIRM, PLLC'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Glogowski Law Firm, PLLC (referred to as "Ms. Glogowski"), a Plaintiff/Counterclaim Defendant in the Superior Court and a Petitioner in this Court.

II. CITATION TO COURT OF APPEALS' DECISION

The Court of Appeals, Division I, issued its decision in an unpublished opinion captioned Glogowski Law Firm, PLLC v. City First Mortgage Services, LLC, No. 74266-3-I, ---P.3d. ---, 2017 WL 478305 (Wash. App. Feb. 6, 2017), and is set forth in the Appendix at pages A-1 through A-10.

III. ISSUES PRESENTED FOR REVIEW

1. In a claim for legal malpractice, whether the failure to assert a defense, a defense which had already been substantially asserted and rejected by the jury in the underlying trial, rises above the level of speculation necessary to create a genuine issue of material fact with regard to "but for" causation?

2. In a claim for legal malpractice, can a court rely on the speculative possibility of a different outcome as the basis for finding a genuine issue of material fact where Washington courts have uniformly held that it is not appropriate to engage in speculation when considering "but for" causation in a legal malpractice action?

IV. STATEMENT OF THE CASE[1]

A. Ms. Glogowski's Representation of City First

Ms. Glogowski was retained by City First to defend it in a lawsuit brought by Donald and Beth Collings for alleged violations of the Credit Services Organizations Act ("CSOA"), Equity Skimming Act, the Washington Consumer Protection Act, and Civil Conspiracy, arising out of the actions of two branch managers Robert Loveless and Andrew Mullen. CP 66-78, 80-84. Specifically, the Collings alleged that City First was vicariously liable for the actions of Loveless and Mullen, an allegation which would later prove dispositive at trial. *Id.*

In City First's trial brief, Ms. Glogowski asserted that Loveless and Mullen were independent contractors, and as such, that City First could not be held vicariously liable for the actions of Loveless and Mullen. CP 275-287. More importantly, she asserted that City First was exempt from the CSOA because City First was a fully licensed consumer loan company in Washington. *Id.* At the close of evidence, Ms. Glogowski submitted a motion for a directed verdict, again raising the defense that

[1] For the purposes of this Petition only, Ms. Glogowski incorporates by reference the Statement of Facts as recited by the Court of Appeals in its Opinion. A-1 to A-4. In addition, Ms. Glogowski relies upon the Clerk's Papers for those facts regarding summary judgment not addressed by the Court of Appeals.

City First was exempt from the CSOA. CP 290-302. The Court did not rule on the motion. CP 520-22.

The jury returned a verdict against City First, finding it vicariously liable for the acts of Loveless and Mullen. CP 304-08. Further, the jury specifically found that Loveless, Mullen and City First were liable to the Collings for violating the CSOA. CP 307. Following the adverse verdict, City First terminated Ms. Glogowski and hired new lawyers to appeal the verdict. CP 329-331.

B. City First's Appeal of the Adverse Verdict

Through its new counsel, City First appealed the judgment, arguing among other things, that City First was exempt from the CSOA because it was a licensed consumer loan company. CP 384-85. In its opinion in the underlying action, the Court of Appeals found that there was sufficient evidence to support vicarious liability on the part of City First for the wrongful conduct of Robert Loveless and affirmed the trial court's rejection of the CSOA exemption defense. Collings v. City First Mortg. Services, LLC, 177 Wn. App. 908, 927, 930, 317 P.3d 1047 (2013). Specifically, a "reasonable jury could readily find that Loveless, designated as the branch manager, was an employee or agent of City First." *Id.* at 926.

C. The Legal Malpractice Action Against Ms. Glogowski

Following the adverse verdict in the underlying trial, City First refused to pay Ms. Glogowski's outstanding attorney fees forcing her to file a collections lawsuit. CP 403-08, 410, 412-21. In response, City First asserted a counterclaim for legal malpractice, raising for the first time criticisms of Ms. Glogowski's representation. CP 423-428.

Ms. Glogowski filed a motion for summary judgment against City First's malpractice counterclaim on the basis of failure of proximate cause and pursuant to the attorney judgment rule. CP 28-53. Oral argument was held before the Honorable Jeffrey Ramsdell. *See* Verbatim Report of Proceedings (VRP June 5, 2015). The trial court invited additional briefing on whether it was proper for a trial court to conclude as a matter of law whether sufficient evidence existed to prove causation in fact ("but for" causation) in an attorney malpractice claim. VRP 103:9-110:4. Of note, during argument, City First specifically conceded that Loveless and Mullen, as individuals, were not, and could not, be FHA, VA and HUD lenders. VRP 57:5-18.

At the request of the trial court, Ms. Glogowski provided additional authority[2] demonstrating that the issue of proximate cause has been and should be decided on summary judgment in legal malpractice actions. CP 1026-71. The trial court dismissed City First's malpractice claim with prejudice. CP 1093-94. City First filed a Motion for Reconsideration which was denied. CP 1767-82, 1193. Following resolution between City First and Ms. Glogowski of the collections action, City First then appealed the trial court's dismissal of its legal malpractice claim against Ms. Glogowski. CP 1201-06.

On February 6, 2017, Division I of the Court of Appeals reversed and remanded the trial court's decision. A-1 to A-10. In reversing, the Court of Appeals held that if Ms. Glogowski had raised the defense of exemption from the CSOA based on City First's status as a licensed lender under the Federal Housing Authority ("FHA") and Dept. of Housing and Urban Development ("HUD") in the underlying trial, City First "could have been determined to be exempt from the CSOA." A-9. Thus, had this defense been asserted, the "outcome of the Collings case may have been

[2] The additional argument and authority requested by the trial court was filed by Glogowski in the form of a Motion for Reconsideration. CP 1026-71.

different." A-10. Ms. Glogowski seeks review of the Court of Appeals' decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Ms. Glogowski respectfully requests that this Petition be granted, under RAP 13.4(b)(1), (2) because the decision of the Court of Appeals is in direct conflict with the previous decision of this Court in Daugert v. Pappas, 104 Wn.2d 254, 257, 704 P.2d 600 (1985), and the Court of Appeals in Smith v. Preston Gates Ellis, LLP, 135 Wn. App. 859, 864-65, 147 P.3d 600 (2006), relating to proof of "but for" causation in a legal malpractice claim. Specifically, to avoid dismissal of a legal malpractice claim on summary judgment, the former client must present evidence that it would have prevailed absent the alleged malpractice – speculation of what would have happened absent the defendant attorney's alleged negligence is insufficient. *Id.*

The Court of Appeal's decision in this matter, however, holds that a plaintiff can survive summary judgment in a legal malpractice case by offering the theory that a different result may have been possible, even if the theory is unsupported and/or contradicted by the material facts in the underlying trial. In effect, this decision significantly lowers a plaintiff's burden of proof in a legal malpractice case and effectively punishes attorneys for choosing one trial strategy over another. If the Court of

Appeals' Opinion is allowed to stand, plaintiffs will be encouraged to sue their counsel for any negative result, simply by asserting the possibility of having achieved a better result, whether based in fact or not – essentially avoiding and invalidating the well-established burden of proof in Washington for legal malpractice cases. This drastic departure from the established burden of proof demands the Court's guidance and intervention.[3]

A. The Court of Appeals' Decision on Conflicts with the Supreme Court's Decision in Daugert v. Pappas, and the Court of Appeals' Decision in Smith v. Preston Ellis Gates, LLP.

The Court of Appeals' decision in this case is in direct conflict with the decision of the Supreme Court in Daugert v. Pappas, 104 Wn.2d 254, 257, 704 P.2d 600 (1985) and the decision from the Court of Appeals in Smith v. Preston Gates Ellis, LLP, 135 Wn. App. 859, 864, 147 P.3d 600 (2006). In Daugert, this Court held that in a legal malpractice case, proximate causation is determined by the "but for" test. *Id.* at 257-58. Specifically, proof that the client would have obtained a better result "but for" the attorney's negligence. Id. The proof must be based on more than

[3] Indeed, this Court has recently accepted another Petition for Review involving proximate cause in the legal malpractice context. See Petition for Review, Christopher Piris v. Alfred Kitching, et al., 186 Wn. App. 265 (2015) (No. 91567-9). The importance, substantial interest and need to provide guidance on proximate cause in legal malpractice is implicitly recognized by the Court's acceptance of this Petition.

just speculation and conjecture. Id. at 260. In line with the "but for" test, the Court of Appeals held in Smith that speculation of what would have happened absent the attorney's alleged negligence cannot be used to defeat summary judgment. Smith, 135 Wn. App. at 865. Speculation as to alternative courses of action or other possibilities does not demonstrate proof of a better result "but for" the attorney's negligence. *Id.* at 870.

Indeed, Washington Court of Appeal's decisions have uniformly held that speculation and possibility cannot be used to create an issue of fact to defeat summary judgment. See Estep v. Hamilton, 148 Wn. App. 246, 257, 201 P.3d 331 (2008) (holding that speculation cannot establish the proximate cause element of a legal malpractice claim); Smith, 135 Wn. App. at 865 (holding that speculation as to another possibility cannot defeat summary judgment in a legal malpractice action); Griswold v. Kilpatrick, 107 Wn. App. 757, 27 P.3d 246 (2001) (holding that expert's speculative and conclusory opinion regarding ability to obtain a better result was insufficient to raise a genuine issue of material fact). "The nonmoving party cannot rely on speculation but must assert specific facts to defeat summary judgment." Smith, 135 Wn. App. at 863 (citing Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). These decisions recognize that simply asserting the possibility of

another outcome does not prove that "but for" the attorney's negligence, he would have obtained a better result in the underlying litigation.

The Court of Appeal's decision here, however, entered into the realm of speculation by holding that, had Ms. Glogowski asserted the defense of exemption to the CSOA based on City First's status as a federally licensed home lender, despite having already asserted the same exemption defense based on state licensure, "the outcome of the Collings case may have been different." A-10. This finding is directly countered by the jury's verdict, *in which they specifically found that, despite assertion of the exemption defense, Loveless, Mullen and City First were liable to the Collings for violating the CSOA*. CP 307. The statutory basis for the exemption defense is identical, whether asserted based on state or federal licensure. RCW 19.134.010(2)(b)(i).[4] Accordingly, the Court of Appeals' decision is based upon the speculative possibility that the jury would have somehow rejected the exemption defense and then

[4] Under RCW 19.134.010(2)(b)(i) a credit services organization subject to the CSOA does not include: (i) Any person authorized to make loans or extensions of credit under the laws of this state or the United States who is *subject to regulation and supervision by this state or the United States* or a *lender approved by the United States secretary of housing and urban development* for participation in any mortgage insurance program under the national housing act. RCW 19.134.010(2)(b)(i) (emphasis added).

inexplicably accepted the same identical defense. It is unclear what facts are being relied upon to support this theory.

The Court of Appeals' decision does not address the jury's verdict on the CSOA claim and is unclear whether the Court of Appeals considered the jury's verdict in its analysis. However, given the jury's clear rejection of the exemption defense, the Court of Appeals' reasoning that asserting the same defense would have yielded a better result amounts to speculation. In other words, there is no evidence in the record to indicate that asserting the exemption defense would have been received differently by the jury. What is undisputed in the record is the jury's clear rejection of the defense.

The Court of Appeal's reasoning encourages and provides a basis for plaintiffs to avoid summary judgment in legal malpractice cases by engaging in speculative theories that run counter to, or ignore, the underlying material facts. It allows a plaintiff to speculate on possible outcomes which are not tied to any facts in the underlying matter, and present this as proof of the "case within the case," upending long established precedent on "but for" causation. Such a result is in direct conflict with this Court's holding in Daugert, and the holding in Smith. More importantly, this substantial lowering of the "but for" causation

standard would be incredibly disruptive to the rights and duties of clients, attorneys, and the practice of law in Washington.

Accordingly, this Court should grant review to resolve the conflict in the Court of Appeals regarding proof of "but for" causation at the summary judgment stage and to reject the assertion that speculative theories which run counter to the underlying facts can create a genuine issue of material fact sufficient to survive summary judgment.

B. The Court of Appeals Cannot Rely on Possible Counterfactual Events as a Basis for Determining "But For" Causation.

The Court of Appeals' decision in this case further conflicts with Daugert and Smith because it relies on an unsupported underlying assumption to find "but for" causation. A-9. Specifically, in addressing the finding of vicarious liability, the Court of Appeals asserts that because a corporation acts through its employees, had Ms. Glogowski raised the exemption defense, she would have "had to argue that Loveless and Mullen were acting within the scope of their authority" and they "could have been determined to be exempt from the CSOA." A-9. In other words, had Ms. Glogowski pursued this strategy at trial, the outcome could have been different.

However, the Court of Appeals' entire analysis is flawed because it is based on an incorrect underlying assumption: that Ms. Glogowski could

have pursued such a strategy at trial. During the litigation, City First informed Ms. Glogowski that Loveless and Mullen had no role, influence or authority in City First's operations. CP 62-64. Based on this understanding, Ms. Glogowski argued at trial that Loveless and Mullen were independent contractors, City First had no involvement in the Loveless scheme and accordingly, City First could not be held vicariously liable for the actions of Loveless and Mullen. CP 275-287.

Given the strategy to distance City First as much as possible from the actions of Loveless and Mullen and frame them as renegade independent contractors, it is unclear how Ms. Glogowski could have argued, as the Court of Appeals suggests, that Loveless and Mullen were instead employees of City First acting within the scope of their authority. Indeed, the Court of Appeals' analysis presumes that this avenue of argument was available, without referring to the record to first determine whether it was in fact available. It was not and doing so in the midst of trial would have completely upended Ms. Glogowski's trial strategy.

Thus, the Court of Appeals' entire analysis, including the conclusion that a better result could have been obtained, is speculative because it goes down a theoretical path that was never available to begin with. See Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 379, 972 P.2d 475 (1999) (holding that causation is speculative when there is

nothing more tangible to proceed upon than conjectural theories of liability and non-liability). That, however, is what the Court of Appeals has presented in its analysis. A possibility upon which the outcome could have been different, which is by definition speculative.

As discussed above, allowing this reasoning to stand has tremendous implications on legal malpractice actions and the standards by which "but for" causation is determined. More importantly, the Court of Appeals' decision essentially condones the second guessing of attorney trial strategy – it theorizes that Ms. Glogowski should have pursued a different trial strategy because that strategy could have resulted in a different outcome, without determining whether such a possibility had any basis in the underlying facts of the case.[5] Indeed, the Court of Appeals' opinion essentially seeks to punish Ms. Glogowski for failing to pursue a strategy which would have run counter to her understanding of the facts, and her entire trial strategy. Daugert and Smith make clear that the

[5] More importantly, this second guessing would run afoul of the "attorney judgment rule," which holds that an attorney generally is immune from liability for professional judgment decisions involving pre-trial case strategy decisions, and whether to object at trial. See Clark County Fire District No. 5 v. Bullivant Houser Bailey P.C., 180 Wn. App. 689, 324 P.3d 743 (2014). See also Halvorsen v. Ferguson, 46 Wn. App. 708, 717, 735 P.2d 675 (1986) ("In general, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice").

positing of possible counterfactual events is insufficient to create a genuine issue of material fact sufficient to survive summary judgment.

VI. CONCLUSION

For the reasons set forth above, Ms. Glogowski respectfully requests that this Court grant review under RAP 13.4(b)(1), (2) in order to address the Court of Appeal's conflicting decision regarding sufficient proof of "but for" causation at the summary judgment.

RESPECTFULLY SUBMITTED this 8th day of March, 2017.

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/s/ Robert D. Lee

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DECLARATION OF SERVICE

The undersigned states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and I am competent to be a witness herein.

On this 8th day of March, 2017, I caused to be filed via electronic filing with the Court of Appeals, Division I, of the State of Washington the foregoing PETITION FOR REVIEW. I also served copies of said document on the following parties as indicated below:

Parties Served	**Manner of Service**
Counsel for Respondent: Donald H. Mullins Daniel A. Rogers Badgley Mullins Turner PLLC 19929 Ballinger Way NE, Suite 200 Seattle, WA 98155 dmullins@badgleymullins.com drogers@badgleymullins.com	☒ ABC LEGAL ☐ Facsimile ☒ Email ☐ U.S. Mail ☐ UPS Express Courier

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

Executed at Seattle, Washington, this 8th day of March, 2017.

/s/ Dava Bowzer
Dava Bowzer, Legal Assistant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GLOGOWSKI LAW FIRM, PLLC, Respondent, v. CITY FIRST MORTGAGE SERVICES, LLC, Appellant.	No. 74266-3-I DIVISION ONE UNPUBLISHED OPINION FILED: February 6, 2017

APPELWICK, J. — Glogowski sued City First for its legal fees, and City First counterclaimed for legal malpractice. The trial court dismissed the legal malpractice claim on summary judgment. We reverse and remand for trial.

FACTS

Glogowski Law Firm PLLC sued City First Mortgage Services LLC for breach of contract after City First failed to pay Glogowski for legal services. City First hired Glogowski to defend it in a lawsuit brought by Donald and Beth Collings. Katrina Glogowski was the attorney primarily responsible for the case.[1]

The Collingses contacted City First after receiving a flier advertising a program for people with credit problems. Collings v. City First Mortg. Servs., LLC, 177 Wn. App. 908, 914, 317 P.3d 1047 (2013). The Collingses were concerned

[1] For clarity, we refer to Glogowski Law Firm PLLC as Glogowski, and Katrina Glogowski, the attorney who handled the Collings case, as Ms. Glogowski.

about falling behind in their payments on their home. Id. Beth Collings first spoke with Gavin Spencer, an employee at a City First Branch in Utah, who assisted her in applying for a loan over the phone. Id. Spencer informed the Collingses that the loan had not been approved, but suggested that his manager might be able to help them. Id.

Spencer introduced the Collingses to Paul Loveless and Andrew Mullen, City First branch managers. Id. Loveless suggested a plan: he would buy the Collingses' home for its appraised value, take out a mortgage on the home, and lease it back to them. Id. at 915. The Collingses agreed, on the condition that the lease would prohibit Loveless from refinancing the home and encumbering it with a home equity line of credit. Id. In accordance with the agreement, Loveless took title to the home and executed a mortgage with City First. Id.

Two years later, the Collingses discovered that Loveless had refinanced the loan with City First and taken out a home equity line of credit. Id. Loveless had failed to make payments, and a foreclosure action had commenced. Id. at 915-16. Once the Collingses learned of the foreclosure action, they stopped making lease payments to Loveless. Id. at 915.

The Collingses sued City First, Loveless, Mullen, and Spencer in March 2009. Id. They alleged equity skimming, a civil conspiracy, usury, and violations of the Residential Landlord-Tenant Act of 1973,[2] the Credit Services Organizations

[2] Chapter 59.18 RCW.

Act (CSOA),[3] and the Consumer Protection Act.[4] They sought damages and injunctive relief.

Loveless defaulted. Collings, 177 Wn. App. at 916. It was undisputed that his scheme constituted illegal equity skimming. Id. After a trial, the jury found that Loveless, Mullen, and City First were liable to the Collingses. Id. It determined that Loveless and City First were liable for $40,311 in compensatory damages and imposed $80,622 in punitive damages against the two under the CSOA. Id. It also imposed $8,000 in punitive damages against Mullen.[5] Id. The court entered judgment against City First in the amount of $120,933. CP 1476-77.

City First appealed. Id. at 917. It argued that there was insufficient evidence of its liability on all of the Collingses' claims. Id. at 923. This court concluded that because City First did not propose a special verdict form to clarify the basis for the jury's verdict, the verdict would stand so long as at least one of the Collingses' claims was supported by the evidence. Id. at 925. It held that there was sufficient evidence to support City First's vicarious liability for Loveless, who defaulted on all of the claims. Id.

Glogowski filed the instant suit due to City First's failure to pay for the legal services rendered in Collings. City First asserted a counterclaim for legal

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[3] Chapter 19.134 RCW.

[4] Chapter 19.86 RCW.

[5] The jury verdict form required the jury to answer a number of questions about liability and damages. The jury found that Loveless and Mullen were liable to the Collingses on their claims. It found that City First was liable for the acts of Loveless, Mullen, and Spencer. It also determined that City First was "independently liable to the Collingses for their claims." The jury also specifically found that Loveless, Mullen, and City First were liable to the Collingses for violating the CSOA.

malpractice. Glogowski moved for summary judgment on the counterclaim. It argued that City First could not prove that Ms. Glogowski's conduct proximately caused the adverse verdict in the Collings case.

The court originally denied Glogowski's motion for summary judgment. Glogowski filed a motion for reconsideration, providing additional authority on the propriety of deciding proximate cause on summary judgment. The trial court granted this motion. It denied City First's subsequent motion for reconsideration. City First appeals.

DISCUSSION

City First asserts that the trial court erred in dismissing its legal malpractice claim. It argues that it created genuine issues of material fact on the issue of proximate cause that preclude summary judgment. City First contends that an issue remains as to whether, had Ms. Glogowski raised exemption from the CSOA or the Consumer Loan Act (CLA) as a defense, the jury would have imposed punitive damages.

This court reviews a summary judgment order de novo. Loeffelholz v. Univ. of Wash., 175 Wn.2d 264, 271, 285 P.3d 854 (2012). The court reviews the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 256, 616 P.2d 644 (1980). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002). A material fact is one upon which the outcome

of the litigation depends, either in whole or in part. VersusLaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 319, 111 P.3d 866 (2005). The court should grant summary judgment when reasonable minds could reach only one conclusion. Id.

There are four elements of a legal malpractice claim: (1) an attorney-client relationship existed, (2) the lawyer had a duty, (3) the lawyer failed to perform the duty, and (4) the lawyer's negligence was a proximate cause of the damage to the client. Halvorsen v. Ferguson, 46 Wn. App. 708, 711-12, 735 P.2d 675 (1986). Attorneys have a duty to exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer practicing in this jurisdiction. Id. at 712.

Proximate cause requires there to be a nexus between the attorney's breach of duty and the resulting injury. Estep v. Hamilton, 148 Wn. App. 246, 256, 201 P.3d 331 (2008). To establish proximate cause, the client must prove that, but for the attorney's negligence, he or she would have prevailed or at least would have achieved a better result. Halvorsen, 46 Wn. App. at 719. Generally, proximate cause is a question for the jury. Smith v. Preston Gates Ellis, LLP, 135 Wn. App. 859, 864, 147 P.3d 600 (2006). But, the court can decide proximate cause as a matter of law if reasonable minds could not differ. Id.

City First argues that the trial court erred in dismissing its legal malpractice claim based on proximate cause. City First argues that Ms. Glogowski failed to raise defenses under the CSOA and CLA, which would have exempted City First from liability. Therefore, the question before us is whether City First could have

received a more favorable outcome if Ms. Glogowski had raised one of these defenses.

Among other things, the CSOA prohibits those who attempt to assist borrowers in preventing or delaying foreclosure from making untrue or misleading representations. RCW 19.134.020, .010(2). It defines a "credit services organization" as

> [A]ny person who, with respect to the extension of credit by others, sells, provides, performs, or represents that he or she can or will sell, provide, or perform, in return for the payment of money or other valuable consideration any of the following services:
>
> (i) Improving, saving, or preserving a buyer's credit record, history, or rating;
>
> (ii) Obtaining an extension of credit for a buyer;
>
> (iii) Stopping, preventing, or delaying the foreclosure of a deed of trust, mortgage, or other security agreement; or
>
> (iv) Providing advice or assistance to a buyer with regard to [any of the above].

RCW 19.134.010(2)(a). The CSOA also specifies what a credit services organization does not include. RCW 19.134.010(2)(b). At issue here is the exemption of,

> Any person authorized to make loans or extensions of credit under the laws of this state or the United States who is subject to regulation and supervision by this state or the United States or a lender approved by the United States secretary of housing and urban development for participation in any mortgage insurance program under the national housing act.

RCW 19.134.010(2)(b)(i).

City First asserts that it is exempt from the CSOA due to this provision, and therefore it should not have been subject to the Collingses' CSOA claim. City First

contends this is so, because City First has held and continuously maintained a license from the Federal Housing Authority (FHA) since at least 1997. And, City First is directly supervised by a federal regulator: the United States Department of Housing and Urban Development (HUD). City First asserts that as its licensees, Loveless and Mullen are also supervised by HUD, and therefore exempt as well.

At the underlying trial, in City First's motion for judgment as a matter of law, Ms. Glogowski argued that City First was exempt from the CSOA. But, she limited her argument to the exemption for " 'any person authorized to make loans or extensions of credit under the laws of this state.' " (Quoting RCW 19.134.010(2)(b)(i)). She quoted this portion of RCW 19.134.010(2)(b)(i), arguing that because City First is licensed by the Department of Financial Institutions (DFI) as a consumer loan company, it is exempt from the CSOA. On appeal, the Collings court rejected that argument. See 177 Wn. App. at 929-30. It determined that DFI regulations indicate that every branch must be licensed in the state to be authorized to make loans or extensions of credit under the laws of Washington. See id. at 930. The City First branch at issue was not licensed in the state. Id.

No mention was made in the trial motion to the language that immediately follows in RCW 19.134.010(2)(b)(i): "or the United States who is subject to regulation and supervision by this state or the United States or a lender approved by the United States secretary of housing and urban development for participation in any mortgage insurance program under the national housing act." This language creates an exemption for entities that are authorized to make loans and extensions of credit under federal law and are regulated by a federal entity. Yet,

Ms. Glogowski did not argue that City First was entitled to this exemption. Nor did she specifically object to jury instruction 19, which summarized the CSOA exemption as, "A 'credit services organization' does not include a person or entity authorized to make loans under the laws of the state of Washington."[6] Consequently, this instruction did not mention that an entity may be exempt if it is authorized to make loans under federal law. And, the Court of Appeals had no reason to consider a federal law exemption in its opinion.

In the malpractice action, City First produced a declaration of Brian Hunt as support for an exemption based on regulation at the federal level. Hunt is general counsel for City First. He stated that the information in his declaration was based on his own personal knowledge. This declaration states that City First has been continuously licensed by the FHA since 1997. And, City First is directly supervised by HUD, so it is an approved HUD and FHA lender. It also states that City First is a licensed mortgage broker. And, it provides that Loveless and Mullen were HUD and FHA approved lenders as licensees of City First.[7] While not conclusive, these statements create a genuine issue of material fact on City First's status under the CSOA.

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[6] Ms. Glogowski generally objected to a list of the Collingses' proposed jury instructions, including instruction 19. But, she did not provide any grounds for the objection. CR 51(f) requires counsel to "state distinctly the matter to which counsel objects and the grounds of counsel's objection" to a particular jury instruction. Where counsel does not clarify the reasons for the objection, a reviewing court will not consider the objection. Walker v. State, 121 Wn.2d 214, 217, 848 P.2d 721 (1993). Indeed, this court determined that City First did not take exception to instruction 19. Collings, 177 Wn. App. at 930.

[7] Unlike the other statements in Hunt's declaration, this comment is a legal conclusion. Thus, we do not consider this portion of the declaration in our analysis.

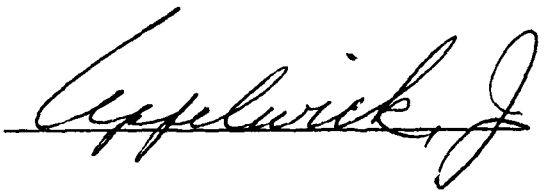
Glogowski argues that even if Ms. Glogowski had raised the exemption defense, the outcome would not have changed, because City First was found vicariously liable for the acts of Loveless and Mullen. It contends that because individuals are not federally regulated, Loveless and Mullen could not have asserted the exemption defense themselves. Consequently, City First would have still been found vicariously liable for Loveless's and Mullen's CSOA violations.

But, a corporation necessarily acts through its officers, directors, employees, and other agents. Diaz v. Wash. State Migrant Council, 165 Wn. App. 59, 76, 265 P.3d 956 (2011). Where a corporation's agents act within the scope of their authority, their actions are the actions of the corporation. Mauch v. Kizzling, 56 Wn. App. 312, 316, 783 P.2d 601 (1989). The only potential agents of City First who were found liable under the CSOA were Loveless and Mullen. Therefore, had Ms. Glogowski raised this defense, she would have had to argue that Loveless and Mullen were acting within the scope of their authority and therefore their actions were actually those of City First itself. Under this legal theory, City First, Loveless, and Mullen could have been determined to be exempt from the CSOA. Or, if Loveless and Mullen were found not to be agents of City First acting in the scope of their authority, they might still have been found liable under the CSOA. But, the determination of vicarious liability made in the Collings case would not control, because the question for the jury would have changed if City First was exempt. The outcome would not necessarily have been the same.

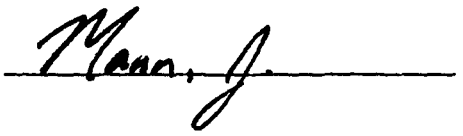
Viewing Hunt's declaration in the light most favorable to City First, we conclude that a genuine issue of material fact exists as to whether City First is

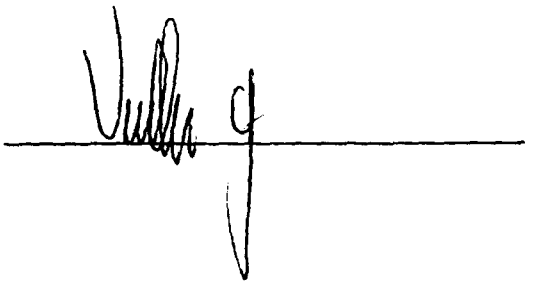
exempt from the CSOA. If Ms. Glogowski had raised the issue of exemption as a federally licensed and regulated lender, the outcome of the Collings case may have been different. The jury awarded $80,622 in punitive damages under the CSOA. Punitive damages were not available under any other statute or theory at issue. Had City First been exempt from the CSOA, the jury would not have been able to award these punitive damages.[8] Ms. Glogowski's failure to assert the federal exemption from the CSOA may have been the proximate cause of at least some damages incurred by City First. Therefore, the trial court erred in granting summary judgment in favor of Glogowski.[9]

We reverse and remand for proceedings consistent with this opinion.



WE CONCUR:





[8] For purposes of this appeal, we need not and do not address whether the CSOA exemption would preclude any liability for City First.

[9] Given the conclusion that City First's argument relating to the CSOA should have barred summary judgment, we need not address City First's argument relating to the CLA.

COZEN O'CONNOR
March 08, 2017 - 2:11 PM
Transmittal Letter

Document Uploaded: 742663-Petition for Review.pdf

Case Name: Glogowski Law Firm v. City First Mortgage Services

Court of Appeals Case Number: 74266-3

Party Respresented: Petitioner Glogowski Law Firm

Is this a Personal Restraint Petition? ○ Yes ◉ No

Trial Court County: ___

Superior Court # ___

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
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- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
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Comments:

A check in payment of the $200 filing fee is being mailed on this date to the Supreme Court of Washington.

Sender Name: Dava Bowzer - Email: dbowzer@cozen.com