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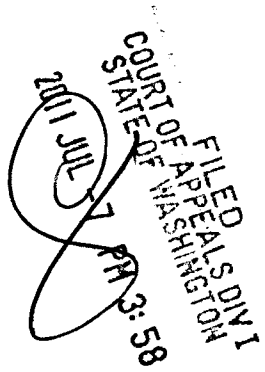

No. 66527-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DONALD AND BETH COLLINGS

Plaintiffs-Appellees,

v.

CITY FIRST MORTGAGE SERVICES, LLC

Defendant-Appellant.

OPENING BRIEF OF APPELLANT CITY FIRST MORTGAGE SERVICES, LLC

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Under Washington law, parties to a settlement agreement concerning claims against one or more but fewer than all parties must disclose that agreement before trial. In this case, Plaintiffs Donald and Beth Collings negotiated and executed such an agreement with regard to two defendants (Andrew and Malinda Mullen) but failed to disclose the existence or terms of that agreement to the trial court, to the jury, and to the other defendants (including City First Mortgage Services, LLC, the appellant herein) prior to or during the trial. Then, when the Mullens did not appear at trial, the Collingses' counsel asked the jury, "Where are [the Mullens]?" and "Why aren't they here [to defend themselves]?"[1] The Collingses then proposed – and the trial court adopted – numerous instructions that were flatly inconsistent with the previously executed settlement agreement. City First did not discover the agreement until two months after trial, when its lawyers noticed a reference to that agreement buried in documentation that the Collingses had filed in support of their request for prevailing party attorneys' fees. As set forth in Section V.B below, based on this error alone, the trial court's judgment cannot stand.

[1] The quotations in the text above can be found in the declaration of Brian Hunt (at CP 1775-77), which is addressed more fully in footnote 5 below.

If the Court vacates the trial court's judgment on that basis, the matter should be remanded for a new trial. The question, then, is what claims should be tried on remand? As discussed in Section V.C below, several of the other claims fail as a matter of law and therefore should not be remanded to the trial court. Those arguments are also separate and independent bases to vacate the trial court's judgment. Finally, as set forth in Section V.D below, the trial court's award of attorneys' fees and costs also should be vacated or, at the very least, substantially reduced. Either way, the matter should be remanded for a new trial – one that does not include improper claims and arguments, misleading jury instructions, and other serious trial court errors.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying City First's motion for judgment as a matter of law under CR 50(a). CP 1150-52.

2. The trial court erred in denying City First's motion for judgment as a matter of law under CR 50(b) or, alternatively, a new trial under CR 59. CP 1859-63.

3. The trial court erred in entering its Order re: Mullins [sic] Release and Motion for New Trial. CP 1859-63.

4. If the trial court struck the declaration of Brian Hunt (the record on this point is unclear), the trial court erred in doing so. RP 6:18-9:19; 80:22-81:13 (Feb. 25, 2011); CP 1775-77.

5. The trial court erred in entering judgment against City First. CP 1135-38, 1353-56, 2171-75.

6. The trial court erred in granting the Collingses' motion for an award of attorneys' fees and costs and for a multiplier. CP 1977-83.

III. ISSUES PRESENTED

1. Whether this Court should vacate the trial court's judgment and remand this matter for a new trial because the Collingses failed to disclose their covenant not to execute any judgment against the Mullens to the trial court, to the jury, and to the parties before trial. (Assignments of Error Nos. 2-5.)

2. Whether this Court should vacate the trial court's judgment and remand this matter for a new trial because (a) some claims asserted by the Collingses fail as a matter of law, (b) other claims asserted by the Collingses are not supported by legally sufficient evidence, and (c) the jury's verdict does not differentiate between the Collingses' claims, thus requiring that the entire judgment be vacated if one or more claims fails. (Assignments of Error Nos. 1-3, 5.)

3. Whether this Court should vacate the trial court's award of attorneys' fees and costs because (a) the Collingses are not prevailing parties for the reasons set forth above, and/or (b) all or some of the fees awarded are not properly recoverable – nor is a multiplier appropriate – given the facts and circumstances at issue. (Assignment of Error No. 6.)

IV. STATEMENT OF THE CASE

A. Factual Background

In early 2006, the Collingses contacted City First in an attempt to refinance their home. RP 12:23-13:9 (Sept. 15, 2010). Ms. Collings spoke with Gavin Spencer, who worked at an independent branch of City First in a business owned by Robert Loveless and Andrew Mullen (both defendants in this case) known as Home Front Services, LLC ("Home Front Services"). RP 97:6-14 (Sept. 15, 2010). Thereafter, the Collingses applied for a "no income loan" – a loan based not on income or assets but rather only on credit score and home equity. RP 18:13-25, 21:25-22:22 (Sept. 14, 2010). The Collingses did not satisfy the requirements for such a loan and were therefore declined. RP 23:14-19, 24:18-25:25, 90:22-91:4 (Sept. 14, 2010); RP 20:13-14, 21:24-22:4, 22:18-21 (Sept. 15, 2010). That result was consistent with the Collingses' expectations. Given his 18-plus years working for lenders on residential mortgage loans (including

for U.S. Bank, another appellant herein), Mr. Collings "knew what the qualifying guidelines are, and [knew] we didn't meet them." RP 20:13-23, 109:9-110:22 (Sept. 14, 2010). It is undisputed that City First did not provide a loan to the Collingses.

Soon after the Collingses received notice that they did not qualify for a loan from City First, Mr. Loveless offered to personally purchase the Collingses' home and, further, to lease it back to them through another business he owned with Mr. Mullen: Home Front Holdings, LLC ("Home Front Holdings"). RP 31:5-10, 31:22-25, 78:13-21 (Sept. 14, 2010); Ex. 3. Under Mr. Loveless's plan, Home Front Holdings would be the landlord and "all payments [from the Collingses were to be] addressed to Home Front Holdings LLC." RP 78:13-21 (Sept. 14, 2010); *see also* Exs. 3, 5. It is undisputed that the Collingses read and understood the terms of that lease. RP 80:3-81:2 (Sept. 14, 2010).

In May 2006, the Collingses and Mr. Loveless executed a purchase and sale agreement, which listed as buyer "Robert Loveless" and "Robert P. Loveless, a married man, as his separate estate." Exs. 6, 104. The Collingses and Mr. Loveless also executed a lease that identified Home Front Holdings as landlord. Exs. 3, 5. City First was not a party to either the purchase and sale agreement or the lease. Exs. 3, 5, 6, 104.

To facilitate his transaction with the Collingses, Mr. Loveless personally put down 10 percent of the purchase price, which the Collingses later repaid to Mr. Loveless's personal bank account. RP 65:9-13 (Sept. 14, 2010); *see also* RP 30:13-25 (Sept. 14, 2010); RP 142:8-143:2 (Sept. 15, 2010); Ex. 110. Mr. Loveless financed the remainder of the purchase price with a purchase-money mortgage loan. *See, e.g.*, Exs. 6, 8. Mr. Loveless used City First to "table fund" that loan, meaning the actual lender was not City First. RP 98:24-102:15 (Sept. 15, 2010). The paperwork was prepared in Mr. Loveless and Mr. Mullen's office and, upon completion, was sent directly to the lender. RP 98:24-103:11, 102:19-22, 133:13-134:6, 181:5-9 (Sept. 15, 2010).

After they sold their house to Mr. Loveless, the Collingses paid the first year's rent to Home Front Holdings. RP 30:13-25 (Sept. 14, 2010); RP 92:12-18 (Sept. 15, 2010). Mr. Collings – who has worked in the residential mortgage industry "for a long time" – admitted that Home Front Holdings, *not* City First, received those rent payments. RP 26:21-23, 94:1-11 (Sept. 14, 2010); RP 92:12-18 (Sept. 15, 2010). Later, Mr. Loveless directed the Collingses to pay rent to yet another one of his businesses: Integrity Management Group ("IMG"). Exs. 7, 10 at 0940;

RP 94:1-11 (Sept. 14, 2010). There is no evidence of any relationship between City First and Home Front Holdings or IMG.

In April 2008, Mr. Loveless defaulted on his loan (which had since been refinanced), resulting in the lender foreclosing on the underlying deed of trust, thus threatening to remove the Collingses from the property. RP 37:5-17 (Sept. 14, 2010). In response, the Collingses filed this case asserting claims against City First, Mr. Loveless, and the Mullens for violations of the Equity Skimming Act, the Residential Landlord-Tenant Act, the Credit Services Organization Act, and the Consumer Protection Act, and quiet title, civil conspiracy, declaratory relief, and usury. *See* CP 1-15. U.S. Bank subsequently intervened, seeking declaratory relief that its deed of trust was valid and that it was entitled to full payment on the debt evidenced by that deed of trust or, alternatively, that it was entitled to an equitable lien on the property in the amount of that debt. *See, e.g.*, CP 2005-19, 2062-78.

B. Procedural Background

After filing, the case proceeded to discovery, including the deposition of Mr. Mullen, which the Collingses scheduled for July 26, 2010. CP 1169-70. Unbeknownst to City First, beginning no later than July 23 and continuing through July 26, 2010, the Collingses'

counsel drafted a covenant not to execute any judgment against the Mullens. CP 1051, 1062. The Collingses' counsel repeatedly communicated and negotiated with the Mullens' counsel about that covenant and revised it accordingly. CP 1051, 1062. All of that was done without City First's knowledge or involvement. *See*, *e.g.*, CP 1081, 1104.

The secret covenant not to execute can be found at CP 1165-67. In relevant part, the covenant states:

> In consideration of the promise to pay $500.00 to plaintiffs do covenant, and agree with defendants Mullen, that plaintiffs (or any successor or assignee) will not execute or otherwise seek to enforce or collect on any judgment entered in the pending lawsuit against defendants Mullen. . . . Should judgment be entered against any defendant who is a party to this agreement, plaintiff will provide that defendant with a Satisfaction of Judgment promptly upon final disposition of all claims in this matter.

Id. While the covenant resolved the Collingses' claims against the Mullens, it purported to preserve the Collingses' claims against the other parties, expressly including "City First Mortgage Services, LLC." *Id.*

As planned, the Collingses deposed Mr. Mullen on July 26, 2010 – the same day that the Collingses and the Mullens finalized their covenant. CP 1051, 1062, 1165-67. The Collingses' counsel admittedly provided the final draft of that covenant to the Mullens before deposing Mr. Mullen. CP 1162. The Mullens' counsel confirmed that fact. CP 1211-14. Even though City First's counsel appeared for that deposition, neither the

Collingses' counsel nor the Mullens' counsel disclosed their negotiations or the existence of that covenant to City First. CP 1081, 1104.

Starting on September 14 and continuing through September 20, 2010, the Collingses, U.S. Bank, and City First (still without knowledge of the covenant) appeared for trial. *See generally* Reported Proceedings (Sept. 14-20, 2010). The Mullens, however, did not. *See id.* Accordingly, the Collingses and City First read the transcript of Mr. Mullen's July 26 deposition to the jury and offered it into evidence. RP 15:12-21; 16:24-17:2; 18:5 (Sept. 16, 2010); Ex. 70. Then, in closing arguments, the Collingses' counsel – the only people in the courtroom who knew of the covenant – asked the jury, "Where are [the Mullens]?" and "Why aren't they here [to defend themselves]?" CP 1775-77.

Not only did the Collingses fail to disclose the covenant and then argue to the jury that the Mullens had inexplicably failed to defend themselves, the Collingses did not inform the trial court that its jury instructions – most of which the Collingses proposed – did not accurately reflect the fact that the Mullens were no longer potentially liable. *See* CP 566-635, 825-34, 837-90. Jury instruction numbers 9-11, 13, and 14 concerned the Collingses' allegations that City First should be held liable

for the Mullens' acts under various theories of vicarious liability. CP 850-53, 855-56. For example, jury instruction number 14 provided in part:

> If you find that Andrew Mullen was an employee or authorized agent of City First Mortgage Services, LLC, then any act or omission by him within the scope of his employment was the act or omission of City First Mortgage Services, LLC.

CP 856. Jury instruction number 12 concerned the Collingses' allegation that the Mullens were agents of City First and, therefore, City First may be liable for their actions. CP 854. Jury instruction numbers 16 and 17 indicated that City First may be liable for the acts of other co-defendants, including the Mullens. CP 858-59. And jury instruction number 36 addressed the Collingses' claim that City First and the Mullens could be jointly and severally liable. CP 883. In total, *nine* instructions directed the jury to decide whether City First could be liable for the Mullens' acts even though the Mullens were *not* potentially liable. *See* CP 837-90.

Based, at least in part, on Mr. Mullen's deposition testimony and the trial court's instructions, the jury returned a verdict in favor of the Collingses. CP 897-901. The jury found City First liable for the acts of Mr. Mullen and his business partner, Mr. Loveless, in the amount of $40,311. CP 898-99 (Questions 3-4). That amount represented the total amount for which City First was liable to the Collingses. CP 899 (Question 5). The jury also awarded punitive damages against City First

and Mr. Loveless in the amount of $80,622 and against Mr. Mullen in the amount of $8,000. CP 900 (Question 10). The Collingses later requested prevailing-party attorneys' fees and costs, including a 20 percent enhancement of their fees. CP 984-95, 1368-75, 1864-73. The trial court granted that request and awarded fees totaling $628,564.20 – more than *15 times* the compensatory damages award. CP 897-901, CP 1977-83.

As noted previously, it was not until the Collingses requested such fees that City First learned of the covenant. In support of their fee petition, the Collingses submitted a 33-page, single-spaced ledger. CP 1033-65. Buried in that ledger were three passing references to a "covenant not to execute." CP 1051, 1062. That was how City First learned of the covenant, now nearly two months after trial. CP 1081, 1103-06. Understandably, City First immediately demanded a copy. *See id.* The Collingses' counsel initially refused to even acknowledge the existence of the covenant. CP 1068-69, 1081, 1106, 1139-49, 1250, 1256-58. Then, *after* the trial court entered judgment against City First (CP 1135-38), the Collingses produced a copy of the covenant as part of a motion asking the trial court to "approv[e] as fair their settlement with Andrew and Malinda Mullen." CP 1155-59.

Following that initial disclosure, the Collingses' arguments regarding the covenant not to execute changed substantially and repeatedly. When City First opposed the Collingses' motion to approve the settlement and also requested a reasonableness hearing (*see* CP 1215-24, 1238-48, 1272-76), the Collingses reversed course and claimed that the issue was actually moot because the Mullens had not yet tendered $500 to the Collingses, as required by the covenant. *See, e.g.*, CP 1278, 1283. The trial court then requested additional briefing and held three oral arguments on the mootness issue – all premised on the Collingses' assertion that they had not yet received payment from the Mullens. *See, e.g.*, CP 1466-91; RP 2:4-11:9 (Jan. 20, 2011); RP 1 (Feb. 25, 2011).

In response to the Collingses' mootness arguments, City First contacted the Mullens and discovered that the Collingses had not asked the Mullens to make that payment until *after* City First objected to the Collingses' motion and, further, that the Mullens had agreed to make the payment promptly. *See, e.g.*, CP 1781-84. These facts were corroborated in a declaration executed by Mr. Mullen, which also explained the circumstances leading up to the execution of the covenant as follows:

> In the days leading up to the deposition, Plaintiffs' counsel and my counsel negotiated a covenant not to execute any judgment against my wife and me in anticipation of that deposition. ***I received the final version of that document from Plaintiffs' counsel on July***

> ***26, 2010 – the morning of my deposition – and was informed that Plaintiffs would only execute the covenant if my deposition testimony was acceptable.*** The covenant was fully executed after my deposition.

CP 1772-74 (emphasis added). Mr. Mullen also confirmed that he was solvent at the time he executed the covenant. *See id.*

In response to the above argument and declaration, the Collingses reversed course yet again. The Collingses informed the trial court and City First that they were withdrawing their mootness argument because they had received payment from Mr. Mullens and again asked the trial court to approve the settlement. RP 47:4-25 (Feb. 25, 2011); CP 1767-71. The Collingses also asked the trial court to (a) strike Mr. Mullen's declaration concerning the circumstances leading up to the execution of the covenant and his solvency, and (b) find that the Mullens were insolvent at the time they executed the covenant. CP 1786-96, 1799-1809.

On March 25, the trial court entered its Order re: Mullins [sic] Release and Motion for New Trial. CP 1859-63. Although the trial court found that "Plaintiffs' settlement with Mullins [sic] was first disclosed after trial," the court refused to vacate its judgment on that basis or any other basis set forth in City First's post-trial motion. *Id.* Instead, the trial court ruled that "[n]o reason appears to discharge City First from liability ...." *Id.*

Turning to U.S. Bank's claims, the trial court found against U.S. Bank and entered judgment quieting title in favor of the Collingses even though they had not (and, to date, have not) made any mortgage, rent, or other payment related to the property since July 2008. CP 1842-58; *see also* RP 96:15-22, 117:5-10 (Sept. 14, 2010). As a result, the Collingses have now lived in the house rent- and mortgage-free for 36 months and now have title to the property without any future payment obligation, any risk of foreclosure, or any requirement to return the $115,644.71 that they received from the sale of the house to Mr. Loveless. CP 1842-58; *see also* RP 148:8-16, 149:1-5 (Sept. 15, 2010).

Both City First and U.S. Bank timely appealed.

V. ARGUMENT

A. Standards Of Review

This Court reviews errors of law – such as the trial court's rulings regarding the Collingses' failure to disclose their covenant not to execute any judgment against the Mullens – de novo. *See Meadow Valley Owners Ass'n v. Meadow Valley, LLC*, 137 Wn. App. 810, 816, 156 P.3d 240 (2007) ("Where the relevant facts are undisputed and the parties dispute only the legal effect of those facts, the standard of review is also de

novo."); *see also Coulter v. Asten Grp., Inc.*, 155 Wn. App. 1, 7 n.2, 230 P.3d 169 (2010) (statutory interpretation reviewed de novo).

This Court reviews the trial court's denial of a motion for a new trial for abuse of discretion. *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 103, 841 P.2d 1300 (1992). A trial court abuses its discretion when its decision is manifestly unreasonable or its discretion is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "A court acts on untenable grounds when its factual findings are not supported by the record; it acts for untenable reasons if it uses an incorrect standard of law or the facts do not meet the requirements of the standard of law." *Sherron Assocs. Loan Fund V (Mars Hotel) LLC v. Saucier*, 157 Wn. App. 357, 361, 237 P.3d 338 (2010).

This Court reviews the trial court's decision as to the amount of an award of attorneys' fees and imposition of a multiplier for manifest abuse of discretion. *Chuong v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices. *Zink v. City of Mesa*, 137 Wn. App. 271, 277, 152 P.3d 1044 (2007). Appellate courts have not hesitated to vacate an award of fees in appropriate cases, such as where there is a

"skewed apportionment" between the parties. *Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 94 Wn. App. 744, 763, 972 P.2d 1282 (1999).

B. This Court Should Vacate The Trial Court's Judgment Because The Collingses Failed To Disclose Their Secret Covenant Not To Execute Before Trial As Required

Under Washington law, settling parties must promptly disclose both the existence and terms of covenants not to execute before trial. In the only Washington case to address this disclosure requirement, *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 841 P.2d 1300 (1992), *aff'd on other grounds*, 125 Wn.2d 1 (1994), the court stated:

> Where appellate courts have permitted such agreements, they also have required pretrial disclosure to the trial court. The trial court can then advise the jury of the agreement so that jurors can consider the relationship in evaluating evidence and the credibility of witnesses.

68 Wn. App. at 104 (citing cases). The court's opinion in *McCluskey* is clear and unequivocal: settling parties must disclose settlement agreements or covenants not to execute so that the trial court can properly adjudicate the case, the jury can properly decide the case, and the parties can properly litigate the case.

The *McCluskey* court cited four opinions in support of that holding, each of which strongly supports City First's arguments. In the first case – *Daniel v. Penrod Drilling Co.*, 393 F. Supp. 1056 (E.D. La.

1975) – the settling parties disclosed their settlement agreement to the court and non-settling parties during trial, but the jury was never informed of the agreement. *Id.* at 1058-59. On this basis, the district court granted the non-settling party's post-trial motion for a new trial. *Id.* at 1061. The court did so without regard to any alleged prejudice, stating that "the jury was not informed of the true posture of the parties." *Id.* at 1059.

In the second case cited in *McCluskey – Ward v. Ochoa*, 284 So. 2d 385 (Fla. 1973) – the Florida Supreme Court similarly mandated pre-trial disclosure. The court reasoned:

> Secrecy is the essence of such an arrangement, because the court or jury as trier of the facts, if apprised of this, would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendants. . . .
>
> The search for the truth, in order to give justice to the litigants, is the primary duty of the courts. Secret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion. To prevent such deception, we are compelled to hold that such agreements must be produced for examination before trial, when sought to be discovered under appropriate rules of procedure.

Id. at 387. Because the secret agreement was not disclosed and because simply setting off the amount paid under that agreement from the final judgment "would be insufficient in correcting possible injustice, and would therefore be inconsistent with due process," the court remanded the case for a new trial. *Id.* at 388.

In the third case cited in *McCluskey* – *Maule Industries, Inc. v. Rountree*, 284 So. 2d 389 (Fla. 1973) – the court reached the same result, for similar reasons. The trial court in *Maule* refused to require pretrial production of a settlement agreement that required some of the defendants to "continue in active defense of the litigation," even though under the agreement "their financial responsibility would be limited" and the "plaintiffs would look solely to the other defendants for satisfaction of the judgment." *Id.* at 390. The Florida Supreme Court reversed and remanded for a new trial based *solely* on the failure to disclose that agreement prior to trial. *Id.* at 390-91.

In the fourth case cited in *McCluskey* – *Ratterree v. Bartlett*, 707 P.2d 1063 (Kan. 1985) – the Kansas Supreme Court likewise mandated "prompt" disclosure of settlement agreements. Surveying applicable case law, the court noted:

> Due to the possibility of prejudice arising from such secret "Mary Carter" agreements, the overwhelming majority of courts, though approving such agreements, have required disclosure of the settlement terms to the parties and the court and, under certain circumstances, to the jury.

Id. at 1074-75 (citing cases). Because such disclosure was not provided in that case, the court remanded the case for a new trial. *Id.* at 1076. Numerous other courts have similarly held.[2]

Also significant here, the federal court in *Daniel* premised its ruling requiring disclosure in part on the duty of candor that lawyers owe to the court. Addressing that issue, the court stated:

> While lawyers owe a duty to their clients, they owe a primary duty to the administration of justice. They profess to be, and they are, officers of the court. If it is their duty to their clients to wage a vigorous struggle, it is their duty also not to dissimulate.

Daniel, 393 F. Supp. at 1059. The Washington Supreme Court has likewise emphasized this duty of candor. *In re Healy*, 43 Wn.2d 266, 270, 261 P.2d 89 (1953) ("It was [counsel's] duty, as an officer of the court, to fully divulge what had transpired that morning at the office of the title

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[2] *See, e.g., Johnson v. Moberg*, 334 N.W.2d 411, 415 (Minn. 1983) ("The overwhelming majority of courts that have considered the issue have required that the trier of fact be apprised promptly of any such agreements."; citing cases); *Thibodeaux v. Ferrellgas, Inc.*, 717 So. 2d 668, 672-73 (La. App. 1998) ("secrecy makes the typical 'Mary Carter' agreement abhorrent," which can be remedied by disclosure to the trier of fact); *Hatfield v. Cont'l Imports, Inc.*, 610 A.2d 446, 452 (Pa. 1992) (requiring disclosure because of "the effect of distorting the adversarial process assumed by the trier of fact to exist"); *Fullenkamp v. Newcomer*, 508 N.E.2d 37, 40 (Ind. Ct. App. 1987) ("without knowledge of the agreement, the fact finder is hampered in its ability to judge witness credibility based upon bias or prejudice"); *Soria v. Sierra Pac. Airlines, Inc.*, 726 P.2d 706, 716 (Idaho 1986) (requiring disclosure because of "the distinct potential for misleading jurors in reviewing evidence and judging witness credibility"); *Gen. Motors Corp. v LaHocki*, 410 A.2d 1039, 1045-47 (Md. 1980) (non-disclosure of settlement agreement had a prejudicial effect on non-settling party; citing cases); *L.J. Vontz Constr. Co. v Alliance Indus., Inc.*, 338 N.W.2d 60, 63 (Neb. 1983) (requiring disclosure as it "bore directly upon the bias and credibility of the witnesses").

company, in order that the judge might have all of the facts before him."). Indeed, many courts – for this very reason – do not even permit such covenants not to execute.[3]

Separate and independent of – and in addition to – the disclosure obligations discussed above, RCW 4.22.060(1) also requires disclosure of settlement agreements to all parties and the court at least five days before *entering* into such agreements.[4] Interpreting this statute, this Court has held that "[u]nder the plain terms of the statute, the claimant must provide five days notice of the intent to settle to all other parties." *Villas at Harbour Pointe Owners Ass'n v. Mut. of Enumclaw Ins. Co.*, 137 Wn. App. 751, 761, 154 P.3d 950 (2007) (further explaining that "claimant" is the settling plaintiff, not the settling defendant), *rev. denied*, 163 Wn.2d

[3] *See, e.g., Dosdourian v. Carsten*, 624 So. 2d 241, 244 (Fla. 1993) (secret agreements "by their very nature, promote unethical practices by Florida attorneys"); *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992) (secret agreements favor partial settlements that promote further litigation, skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment); *Lum v. Stinnett*, 488 P.2d 347, 351 (Nev. 1971) (secret agreements contravene legal ethics and prejudice non-settling parties).

[4] RCW 4.22.060(1) states: "A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. . . ."

1020 (2008). Thus, for this reason too, the Collingses were required to disclose their covenant with the Mullens before trial.

There are, moreover, significant policy reasons supporting such disclosure requirements. A leading commentator described those reasons as follows:

> Because Mary Carter agreements can influence determinations of proportionate fault, their use in Washington courts – which determine liability on a "pure" comparative basis – could inflate the liability of non-agreeing defendants. As a result, Mary Carters conflict with Tort Reform laws enacted in Washington that were designed at least in part to protect deep-pocket defendants from bearing more than their fair share of liability.

J. Michael Phillips, Note & Comment, *Looking Out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation*, 69 Wash. L. Rev. 255, 257 (1994) (footnote and citations omitted). In *Adams v. Johnston*, 71 Wn. App. 599, 860 P.2d 423 (1993), the court likewise explained that the disclosure requirement in RCW 4.22.060 is meant "to protect the nonsettling defendant." 71 Wn. App. at 604.

The court's opinion in *McCluskey*, the cases cited therein, and RCW 4.22.060 – both separately and together – are dispositive on this issue. The Collingses' covenant with the Mullens is not materially different from the agreements at issue in *Maule*, *Daniel*, *Ratterree*, and *Ward* – all of which addressed a plaintiff's claims against some but not all

defendants in a multi-defendant case. Based on that body of case law, as reflected in *McCluskey*, the Collingses were required to disclose their agreement with the Mullens before trial. Further, pursuant to RCW 4.22.060(1), as conclusively interpreted by this Court in *Villas at Harbour Pointe*, the Collingses were required to provide five days' notice of their intent to settle to all parties, including City First. Despite these disclosure requirements and the policy reasons supporting them, neither the Collingses nor their counsel disclosed the existence or terms of the covenant before trial. As in the above cases, the trial court's judgment should be vacated on this basis alone.

While non-disclosure *by itself* is sufficient to require that the trial court's judgment be vacated, the circumstances here are even more egregious. As previously noted, when the Mullens did not appear at trial, the Collingses' counsel asked the jury, "Where are [the Mullens]?" and "Why aren't they here [to defend themselves]?" CP 1775-77.[5] The

[5] As noted in Section II above, it is not clear from the record whether the trial court struck the above-referenced Declaration of Brian Hunt (CP 1775-77). The trial court initially stated orally that it would grant the Collingses' motion to strike this declaration, then stated that it would take the issue under advisement, and then failed to enter a subsequent ruling. *See* RP 6:18-9:19, 80:22-81:13 (Feb. 25, 2011). If and to the extent that the trial court granted the Collingses' motion to strike, City First has assigned error to that ruling. *See* Section II, Assignment of Error No. 4, above. This Court can properly consider the declaration on appeal for at least three reasons. First, as the court noted in *Cameron v. Murray*, 151 Wn. App. 646, 214 P.3d 150 (2009), "[m]aterials (continued . . .)

Collingses' counsel knew precisely why the Mullens did not appear to defend themselves: their liability had been limited to $500 and resolved before trial. As in *Ward,* the jury, "if apprised of this, would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendants." 284 So. 2d at 387. This is especially true here given the Collingses' many assertions of vicarious liability (discussed below) as well as Mr. Mullen's subsequent confirmation under oath that execution of the covenant was predicated on his "deposition testimony [being] acceptable [to the Collingses]." CP 1772-74. For these reasons too, the trial court's judgment cannot stand. *See Ratterree*, 707 P.2d at 1076 (improper closing arguments supported new trial).

Making matters even worse, the Collingses also proposed – and the trial court adopted – numerous instructions that led the jury to erroneously believe that the Mullens were still parties to the case and that City First

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(. . . continued)
submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal." 151 Wn. App. at 658. Second, the trial court initially reasoned that the declaration should be stricken because opening statements and closing arguments were transcribed – which is not factually accurate and therefore constitutes an abuse of discretion. *See State ex rel. Carroll*, 79 Wn.2d at 26 (trial court abuses discretion when decision is based on untenable grounds or for untenable reasons); *see also Sherron Assocs. Loan Fund V*, 157 Wn. App. at 361 (trial court abuses discretion where findings are not supported by record). Third, the Collingses have never challenged the contents of that declaration.

could be held liable for their actions. As just one example (several others are described on pages 9-10 above), Instruction No. 7 states:

> Defendant City First Mortgage Services, LLC is a limited liability company. A limited liability company can act only through its officers, managers, and employees. An act or omission of an officer, manager, or employee is an act or omission of the limited liability company if the officer, manager, or employee is acting within the scope of employment.

CP 837-90. In *Daniel*, the district court required a new trial in such circumstances because "the jury was not informed of the true posture of the parties." 393 F. Supp. 1059. Here, the jury not only was not so informed but was *affirmatively misled.* That, too, requires that the trial court's judgment be vacated. *See Furfaro v. City of Seattle*, 144 Wn.2d 363, 384, 27 P.3d 1160 (reversing judgment because jury instruction was erroneous and misleading), *amended by* 36 P.3d 1005 (2001).

Finally, an additional point merits emphasis: after City First discovered the Collingses' secret settlement agreement with the Mullens, the Collingses' counsel worked very closely with the Mullens' counsel in opposing City First's arguments regarding the legal significance of that agreement. On two separate occasions, the Collingses' counsel drafted and submitted a declaration from the Mullens' counsel supporting the Collingses' arguments. CP 1211-14, 1412, 1414, 1837-39. Such a close relationship between previously adverse parties is an important reason that

courts require disclosure. *See Ward*, 284 So.2d at 387 ("Secret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion."). Here, it is yet another reason that the trial court's judgment should be vacated. The Court should so rule and remand the matter for a new trial on any claims that survive appellate review.

C. The Court Should Also Vacate The Judgment Because Nearly All Of The Collingses' Claims Fail As A Matter Of Law

As explained above, if this Court agrees that the Collingses had a duty to disclose the existence and terms of their secret covenant not to execute before trial, this Court can – and should – vacate the trial court's judgment and remand the matter for a new trial on that ground alone. If the Court does so, the question becomes, what claims should be tried on remand? As set forth in Sections V.C.1-6 below, nearly all of the Collingses' claims against City First – conspiracy, joint and several liability with the Mullens, vicarious liability for the Mullens' actions, vicarious liability for Mr. Loveless's actions, violation of the Credit Services Organizations Act, and violation of the Equity Skimming Act – fail as a matter of law. As set forth in Section V.C.7 below, these arguments are also separate and independent grounds to vacate the trial court's judgment and to remand the matter for a new trial.

of law. *See Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 529, 424 P.2d 290 (1967) ("[C]onspiracy does not necessarily encompass or apply as to all of the verbal or physical actions of parties who, by happenstance, are interested in the same general subject matter.").

For much the same reasons, the Collingses could not – and did not – establish circumstances that are "inconsistent with a lawful or honest purpose and reasonably consistent *only* with the existence of a conspiracy." 70 Wn.2d at 529. There is no evidence that City First's denial of the Collingses' loan application was unlawful or that the loan provided to Mr. Loveless was unlawful. Nor is there any evidence that City First was involved in – let alone agreed to conspire on – Mr. Loveless's default (the act that caused the Collingses' injuries). As noted in *Corbit*, simply because a jury *could* infer an unlawful purpose is insufficient to hold City First liable for conspiracy. *See id.* at 529-31 (directed verdict should be granted where "inferences urged by the plaintiffs certainly are not the *only* possible ones"). For these reasons too, there is no legally sufficient basis to find City First liable for conspiracy.

2. City First Cannot Be Jointly And Severally Liable With The Mullens Or Loveless

Nor can City First be liable based on joint and several liability principles as the jury was instructed and the trial court found. *See* CP 883,

1135-38, 1353-56, 2171-75. That finding is reversible error because the covenant not to execute released the Mullens as a matter of law. *See, e.g.*, *Maguire v. Teuber*, 120 Wn. App. 393, 394, 396-97, 85 P.3d 939 (2004) (reversing trial court and remanding to dismiss settling defendants); *Perkins v. Children's Orthopedic Hosp.*, 72 Wn. App. 149, 160, 864 P.2d 398 (1993) (trial court did not err in dismissing vicarious liability claims). Where a plaintiff has released a defendant, there cannot be joint and several liability between the released defendant and any remaining defendants. *Maguire*, 120 Wn. App. at 395; *see also* RCW 4.22.070(1). In this respect as well, the trial court committed reversible error when it entered judgment against City First and the Mullens jointly and severally.[6]

3. The Collingses' Claim That City First Is Vicariously Liable For The Mullens' Conduct Similarly Fails As A Matter Of Law

As noted above, the trial court read numerous jury instructions – most if not all of which the Collingses proposed – stating that City First could be held vicariously liable for the Mullens' conduct. *See* CP 837-90. Based, at least in part, on those instructions, the jury found City First liable for the Mullens' conduct, and the trial court entered judgment

[6] As the trial court correctly recognized, "[j]udgment has not been entered against Loveless and cannot be at this time due to the Order of the U.S. Bankruptcy Court." CP 1861. For the same reasons explained above, City First could not properly be jointly and severally liable with Mr. Loveless either.

accordingly. CP 897-901, 1353-56, 2171-75. That, too, was reversible error. *See Furfaro*, 144 Wn.2d at 384 (reversing judgment because jury instruction was erroneous and misleading).

There are two reasons that City First cannot be vicariously liable for the Mullens' conduct as a matter of law. The first reason is that the Mullens were solvent when they executed the covenant. Where a plaintiff settles with a solvent agent, a principal is also released from liability. *Hogan v. Sacred Heart Med. Ctr.*, 101 Wn. App. 43, 50, 2 P.3d 968 (2000). Mr. Mullen testified that (a) neither the Collingses nor their counsel ever inquired into the Mullens' financial status at any time, and (b) the Mullens were solvent when they executed the covenant. *See id.* As a result, the Collingses could not – and did not – establish insolvency, and their vicarious liability claims fail on this basis alone.

The second reason that the Collingses' vicarious liability claims fail is that, regardless of any solvency determinations, City First cannot be vicariously liable for the Mullens' conduct because the Collingses failed to demonstrate the reasonableness of their covenant before or during trial. In *Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504, 507, 803 P.2d 1339 (1991), the plaintiffs settled their claims with one of the defendants in exchange for an assignment of vicarious liability claims against

Maryland Casualty (the co-defendant insurer). The plaintiffs did not present evidence on the reasonableness of that settlement at trial. 60 Wn. App. at 508. After the jury returned a verdict in the plaintiffs' favor, the court granted Maryland Casualty's motion for judgment notwithstanding the verdict and dismissed the plaintiffs' claims. *Id.* This Court affirmed, holding that the plaintiffs' failure to present evidence of reasonableness was dispositive of their vicarious liability claims. *Id.* at 512-15.

The Court's decision in *Chaussee* is dispositive on this point. Although the Collingses executed the covenant two months before trial, they did not offer any evidence at trial that the settlement was reasonable. As in *Chaussee*, neither the trial court nor the jury made any findings as to the reasonableness of the covenant, nor were they asked to do so. CP 837-90, 897-901. The Collingses' failure to present such evidence is therefore "fatal" to their vicarious liability claims against City First. *See Chaussee*, 60 Wn. App. at 515. For this reason too, the vicarious liability claims fail.

4. The Jury Did Not Have A Legally Sufficient Evidentiary Basis To Find City First Vicariously Liable For The Actions Of Loveless

The trial court also committed reversible error in denying City First's post-trial motion for judgment as a matter of law on the Collingses' claim that City First is liable for Mr. Loveless's actions. City First's

liability for Mr. Loveless's actions – under the maxim *respondeat superior* – may be based on one of two alleged relationships: principal-agent (either actual or apparent) or employer-employee. As discussed below, the jury lacked a sufficient evidentiary basis to find City First liable under either relationship.

Under the first relationship – principal-agent – City First cannot be vicariously liable for the actions of Mr. Loveless on behalf of Home Front Holdings (*e.g.*, as the Collingses' landlord) because the Collingses did not – and could not – establish that City First had the right to control the manner and means of Mr. Loveless's work for Home Front Holdings as required to impose such liability. *See DeWater v. State*, 130 Wn.2d 128, 137, 141-42, 921 P.2d 1059 (1996) (affirming dismissal of vicarious liability claim because there was no evidence of ability to control the manner and means of independent contractor's work). In fact, there is no evidence in the record of any relationship between City First and Home Front Holdings – a separate business owned by Mr. Loveless and Mr. Mullen. Ex. 58. As in *DeWater*, absent such evidence, City First cannot be vicariously liable for actions of Mr. Loveless taken on behalf of Home Front Holdings.

For much the same reasons, City First also cannot be vicariously liable for the actions of Mr. Loveless on behalf of Home Front Services. *See Morris v. Vaagen Bros. Lumber, Inc.*, 130 Wn. App. 243, 252, 125 P.3d 141 (2005) (trial court properly dismissed claim against employer where plaintiff produced no evidence showing employer retained control). Like City First's other branches in 2006, Home Front Services operated as an independent and "standalone branch" of City First. RP 53:1-8, 154:10-155:2, 184:20-22 (Sept. 15, 2010). Indeed, Mr. Mullen testified that there was "no relationship" or any "sister company relationship" between City First and Home Front Services. Ex. 70 at 9. City First was not involved in day-to-day operations or preparing loan documents originating out of independent branch offices. RP 102:19-22, 133:24-134:6, 136:22-137:2 (Sept. 15, 2010). Accordingly, City First cannot be vicariously liable for the actions of Mr. Loveless taken on behalf of Home Front Services.[7]

Nor was Mr. Loveless an apparent agent of City First. Apparent agency occurs when a *principal* makes objective manifestations leading a third party to believe the alleged agent is actually an agent of the principal.

[7] That City First may have been able to oversee Mr. Loveless or review his work does not change that fact. *See Morris*, 130 Wn. App. at 251 (right to inspect work is insufficient to establish control); *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 875 P.2d 1228 (1994) (right to oversee work is insufficient).

D.L.S. v. Maybin, 130 Wn. App. 94, 98-99, 121 P.3d 1210 (2005). There is no evidence that *City First* made any manifestation to the Collingses that, in purchasing the Collingses' home or leasing it back to them, Mr. Loveless acted for City First. The only relevant representations were made by Mr. Loveless (not City First), and even then Mr. Loveless represented that he was purchasing the house "individually" and that his separate company, Home Front Holdings, would act as the landlord. *See* Exs. 5, 6. As in *D.L.S.*, if the Collingses "assumed" Home Front Holdings and Home Front Services were affiliated with City First (*see, e.g.*, RP 56:19-25 (Sept. 14, 2010)), that is not a legally sufficient basis for liability. 130 Wn. App. at 102-03 (general impression created by advertising is insufficient to create apparent agency relationship). For these reasons too, the jury lacked a legally sufficient basis to find City First vicariously liable for Mr. Loveless's actions based on an alleged principal-agent relationship.

Turning to the second relationship – employer-employee – an employer may be liable only for torts committed within the scope of an employee's employment and in furtherance of the employer's business at the time of the tortious conduct. *See Amend v. Bell*, 89 Wn.2d 124, 127, 570 P.2d 138 (1977); *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 48,

929 P.2d 420 (1997) ("scope of employment limits the employer's vicarious liability"). "The test for determining if an employee is acting in the scope of employment is whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer." *Rahman v. State*, 150 Wn. App. 345, 350-51, 208 P.3d 566 (2009) (internal quotation marks and citation omitted).

The Washington Supreme Court's decision in *McQueen v. People's Store Co.*, 97 Wash. 387, 166 P. 626 (1917), is instructive on this point. McQueen (the plaintiff) was injured when she was thrown from a truck driven by an on-duty employee of People's Store (the defendant). 97 Wash. at 387-88. On appeal, the Washington Supreme Court reversed the trial court's judgment in favor of McQueen and remanded the case with instructions to dismiss the action. *Id.* at 390. In so holding, the court stated that the act complained of "must have been in furtherance of the master's business, and such as may be fairly said to have been either expressly or impliedly authorized by the master." *Id.* at 388-89. The court thus rejected the plaintiff's vicarious liability claims, concluding:

> His employment was to drive the truck. In inviting these girls to ride with him he was neither doing it as a means nor for the purpose of performing that work. It had no connection with his work either directly or indirectly. In extending this invitation

> [employee] was acting without any reference to the business in which he was employed. It was an independent and private purpose of his own contributing to his pleasure, but not to his service. ***While so acting he was his own master, irrespective of the fact that the facilities afforded him to do his work were instrumental in inflicting the injuries complained of.***

Id. at 390 (emphasis added). As *McQueen* confirms, City First can be vicariously liable for Mr. Loveless's conduct only if the allegedly unlawful acts were performed within the scope of his business relationship with City First. Numerous other courts in Washington have similarly held.[8]

The Collingses did not – and could not – offer any such evidence because their vicarious liability claims do not concern any services performed by Mr. Loveless within the scope of his business relationship with City First. There is no evidence that Mr. Loveless's job description included purchasing real property from third parties. Nor is there any evidence that Mr. Loveless's duties or responsibilities included authority to enter into sale and leaseback agreements for City First or to act as a

[8] *See, e.g., Niece*, 131 Wn.2d at 48 (no vicarious liability where employee pursues personal objectives); *Bank of Am. NT & SA v. Hubert*, 115 Wn. App. 368, 383, 62 P.3d 904 (2003) (employer not vicariously liable where party failed to establish scope of employment included kiting checks), *rev'd on other grounds*, 153 Wn.2d 102, 125 (2004); *Woodhouse v. Re/Max Nw. Realtors*, 75 Wn. App. 312, 878 P.2d 464 (1994) (real estate salesperson was not within course and scope of employment while borrowing $44,000 from listing clients); *Hein v. Chrysler Corp.*, 45 Wn.2d 586, 600, 277 P.2d 708 (1954) ("An employee who willfully and for his own purposes violates the property rights of another (by inducing a breach of contract, or in some other manner) is not acting in furtherance of his employer's business.").

landlord for City First. As the Washington Supreme Court stated in *McQueen*, where an injury does not pertain to duties that an employee was employed to perform, the employer cannot be found vicariously liable. *Id.* at 389. The absence of any evidence that Mr. Loveless acted within the scope of any employment relationship with City First is dispositive on this issue.

Indeed, far from serving City First, the record establishes that Mr. Loveless served only himself and his businesses, Home Front Holdings and IMG. Personally, Mr. Loveless purchased the Collingses' house, taking title in his name. *See* Ex. 6. Mr. Loveless then established Home Front Holdings as landlord and directed the Collingses to pay rent to that business and, later, to IMG. *See* RP 94:1-11 (Sept. 14, 2010); RP 92:12-18 (Sept. 15, 2010); *see also* Ex. 5. As the court in *Niece* recognized, and as the many other opinions discussed above confirm, City First cannot be liable for Mr. Loveless's actions as a matter of law because Mr. Loveless pursued his personal objectives, not those of City First. 131 Wn.2d at 48. For all of these reasons, there is no proper basis to hold City First liable for Mr. Loveless's actions.

5. The Collingses' Claim That City First Violated The Credit Services Organization Act Fails As A Matter Of Law

At the conclusion of the Collingses' case and again after judgment was entered, City First moved for judgment as a matter of law on the Collingses' claim that City First could be liable for violating Washington's Credit Services Organization Act, RCW Ch. 19.134 (the "CSOA"). *See* RP 7:2-5 (Sept. 20, 2010); *see also* CP 1081, 1088-1100, 1418-53. The trial court denied both motions. CP 1150-52, 1859-63. As set forth below, the district court's rulings on this issue are demonstrably incorrect.

The CSOA prohibits "credit services organizations" from engaging in certain conduct. RCW 19.134.020. By definition, a "credit services organization" does not include:

> 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). Thus, any person that is both authorized to make loans under Washington state law or federal law and subject to regulation by Washington state or the United States is not a "credit services organization" subject to the CSOA.

The record shows that City First is not subject to the CSOA. City First is a Washington licensee. Since March 7, 2005 – more than one year before the transaction at issue here occurred – City First has held and maintained a license with the Washington State Department of Financial Institutions ("DFI") as a "consumer loan company." Ex. 61. RP 178:4-10 (Sept. 15, 2010). Prior to that time, City First was licensed by DFI as a mortgage broker. Ex. 61. As a result, City First is both authorized to make loans under Washington State law and is subject to regulation by this state.[9] As such, it is not subject to the CSOA and the Collingses' corresponding claim therefore fails.

6. The Collingses' Equity Skimming Act Claim Likewise Fails As A Matter Of Law

As with the CSOA, City First moved for judgment as a matter of law dismissing the Collingses' claim for violation of Washington's Equity Skimming Act, RCW Ch. 61.34 ("ESA"),[10] at the conclusion of the Collingses' case and again after judgment was entered. *See* RP 7:2-5 (Sept. 20, 2010); *see also* CP 1081, 1088-1100, 1418-53. The trial court

[9] Indeed, the Collingses alleged, and the trial court entered judgment finding, that City First was subject to Washington's Consumer Loan Act – liability that is predicated on the fact that City First is regulated by this state. CP 475-76, 529-30, 1353-56, 2171-75.

[10] The ESA has since been renamed and recodified as the Distressed Property Conveyances Act, RCW Ch. 61.34. This case was tried based on the 2006 codification (then known as the ESA), which was in effect when the Collingses sold their house.

denied both motions. CP 1150-52, 1859-63. Because there is no legally sufficient evidentiary basis for finding City First liable for violation of the ESA, the trial court should have dismissed the claim.

The ESA criminalizes patterns and acts of "equity skimming." *Former* RCW 61.34.020(4)(b) (2006). To prove liability under the ESA, a plaintiff must satisfy four statutory elements: (1) "[t]he person purchases a dwelling"; (2) "[t]he person obtains a superior priority loan"; (3) "[t]he person fails to make payments or defaults on the superior priority loan"; and (4) "[t]he person diverts value from the dwelling ... for the person's own benefit or use." *Id.* If the Collingses failed to establish any one of these four elements, their ESA claim fails. *See, e.g., W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 452, 41 P.3d 510 (2002) (term "and" is conjunctive, and where statutory elements are in conjunctive form, all elements must be proven).[11] As set forth below, the Collingses did not – and cannot – satisfy any one of these requirements.

There is no legally sufficient evidence to satisfy the first three elements of an ESA claim. First, City First did not purchase the Collingses' home; rather, Mr. Loveless personally purchased their home

[11] *See also Bowcutt v. Delta North Star Corp.*, 95 Wn. App. 311, 976 P.2d 643 (1999) (applicability of ESA to lender is a question of law), *subsequent appeal at* 2002 Wash. App. LEXIS 342 (Feb. 28, 2002).

as "a married man, as his separate estate." *See, e.g.*, Exs. 6, 103-04. RP 125:2-9 (Sept. 15, 2010). Second, City First did not obtain a loan to purchase the Collingses' home; rather, "Robert P. Loveless" a "married" individual did. *See* Exs. 6, 26-31. Third, City First did not have any obligation to make any payments on the Collingses' home and, therefore, could not have failed to make those payments. *See, e.g.*, Exs. 8, 151-52, 176. Mr. Loveless is the only person who *could* have had such an obligation. *See id.*

Nor is there legally sufficient evidence to satisfy the fourth element of an ESA claim – that City First diverted value from the Collingses' home for its own benefit and use. *See former* RCW 61.34.020(4)(b)(iv) (2006). The only evidence in the record demonstrates that Mr. Loveless and his independent businesses, Home Front Holdings and IMG (with whom City First has no relationship), received equity from the Collingses' home. *See, e.g.*, Ex. 7. Indeed, the Collingses admitted wiring funds to "Robert P. Loveless ***and not some entity that he was a part of***" and, further, that none of the checks was payable to City First. RP 65:9-13, 94:4-11 (Sept. 14, 2010) (emphasis added). For these reasons, the ESA claim likewise fails.

7. If The Court Agrees That One Or More Of The Collingses' Claims Fail As A Matter Of Law, Then The Trial Court's Judgment Must Be Vacated And The Matter Remanded For A New Trial

As set forth in Sections V.C.1-6 above, six of the Collingses' claims against City First fail either as a matter of law or because there was not a legally sufficient basis to find City First liable. If the Court vacates the trial court's judgment based on the arguments set forth in Section V.B above, City First asks that the Court make clear in its ruling that these six claims should not be retried on remand. Separate and apart from the arguments in Section V.B, City First's arguments regarding those six claims are separate and independent bases upon which to vacate the trial court's judgment and remand the matter for a new trial.

The Washington Supreme Court confirmed the controlling legal principle in *Yamamoto v. Puget Sound Lumber Co.*, 84 Wash. 411, 146 P. 861 (1915). The court there explained:

> It is undoubtedly the rule that a general verdict for one entire sum covering two or more independent causes of action is properly set aside in whole, if it be found to be erroneous as to one or more of the causes of action, and these are incapable of separation from the general verdict.

84 Wash. at 413-14; *see also Auwarter v. Kroll*, 79 Wash. 179, 183-84, 140 P. 326 (1914). Thus, where, as here, a verdict incorporates two or

more claims and one or more of those claims is set aside on appellate review, the judgment must be vacated and a new trial granted.

The Washington Supreme Court's decision in *Chase v. Knabel*, 46 Wash. 484, 90 P. 642 (1907), illustrates this point. The plaintiff there sued the defendant-employer for assault and race discrimination based on the acts of defendant's employee. 46 Wash. at 485-86. The jury returned a general verdict in favor of the plaintiff. *Id.* On appeal, the defendant argued that there was insufficient evidence on the plaintiff's race discrimination claim. *Id.* at 486. The court agreed, dismissed that claim, and remanded the case for a new a trial on the other claim because it was "impossible to tell from the record whether the jury allowed damages under one or both causes of action." *Id.* at 488-89.

That same reasoning and result are equally applicable here. Other than the Collingses' claim for violation of the CSOA, the jury's verdict is a general verdict as to the numerous other causes of action asserted by the Collingses. *See* CP 897-901 (Questions 1, 5). The same is true with regard to compensatory damages: the jury awarded only one indivisible sum – $40,311 – across all of the Collingses' claims. *See id.* (Questions 5, 6). Thus, as in *Chase,* it is "impossible to tell from the record whether the jury allowed damages under one or [more] causes of

action." 46 Wash. at 488-89.[12] Accordingly, if this Court finds that one or more of the claims discussed in Sections V.C.1-6 above fail, it should vacate the trial court's judgment and remand the matter for a new trial on those claims that survive appellate review.

D. The Trial Court Abused Its Discretion In Awarding The Collings Attorneys' Fees As Well As A Multiplier

If the Court vacates the trial court's judgment on any basis, the trial court's award of attorneys' fees and costs also must be vacated. *See Sorenson v. Dahlen*, 136 Wn. App. 844, 858-59, 149 P.3d 394 (2006) ("Because we reverse, any award of attorney fees is inappropriate at this time. And the trial court's award of fees is stricken as it must await the outcome of the trial de novo."). But even if the liability determination is

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[12] Moreover, the jury was not properly instructed as to many of the Collingses' claims. For example, Instruction No. 23 did not instruct the jury on all of the elements of equity skimming, omitting the requirement that "[t]he person obtains a superior priority loan . . . ." CP 868-70. In such cases, the Washington Supreme Court has not hesitated to vacate the judgment and remand the matter for a new trial. *See Donner v. Donner*, 46 Wn.2d 130, 134, 278 P.2d 780 (1955) ("[I]t is prejudicial error to give an instruction which purports to contain all of the elements necessary for a verdict for either party, but which neither includes all of such elements nor refers to other instructions which do."). By way of further example, in defining a "credit services organization," Instruction No. 19 erroneously required every branch of a licensee to have "its own Consumer Loan License" for the *licensee* to be exempt from the CSOA. Nor did that instruction inform the jury that that persons authorized to make loans under Federal law – such as City First – are exempt from the CSOA. *See* CP 861. And Instruction No. 32 erroneously instructed the jury that it may find a party liable for conspiracy based only on "a natural inference" (*see* CP 879), rather than circumstances that are "inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of a conspiracy." *See Corbit*, 70 Wn.2d at 529. For these reasons too, the Court should remand the matter for a new trial if one or more of the Collingses' claims fail.

upheld, the Court should vacate or substantially reduce the trial court's award of attorneys' fees and costs for each of the following four reasons.

First, the trial court abused its discretion by awarding $81,181 in fees for work caused by the Collingses' shifting arguments regarding the covenant. In *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), the Washington Supreme Court reiterated that trial courts should exclude wasteful hours from a lodestar. *Id.* at 433-34. Here, as set forth in Sections IV.B and V.B above, the Collingses constantly changed their arguments regarding the covenant, first refusing to confirm its existence, then asking that the covenant be approved as reasonable, then arguing that the issue was moot, and then asking again that the covenant be approved as reasonable. Even ignoring the disclosure requirement in *McCluskey* and RCW 4.22.060(1), this shifting tide of arguments led to substantial briefing and attorneys' fees. Indeed, the Collingses themselves admitted that point. *See* RP 38:9-10 (Feb. 25, 2011) ("That number has increased by 33 percent since the day the jury returned its verdict."). In total, the Collingses requested – and the trial court erroneously awarded – more than $81,181 in attorneys' fees related to this issue. CP 1943-68 (at ¶ 4 & Exs. B, C). That portion of the trial court's award should be set aside.

Second, the trial court also abused its discretion by enhancing the Collingses' requested fees by 20 percent. In *Bland v. Mentor*, 63 Wn.2d 150, 158, 385 P.2d 727 (1963), the Washington Supreme Court held that an award of attorneys' fees is properly denied where it "would be compensating a person for failure to use reasonable diligence, common sense, [and] fair dealing." Given the circumstances surrounding the covenant, the same reasoning applies equally here. In addition, the trial court awarded the enhancement because it concluded that the unique "foreclosure issues" – including "how the foreclosures come about" and "how mortgage loans are transferred" – warranted such a multiplier. RP 9:11-10:15 (May 4, 2011). Those issues related solely to U.S. Bank, *not to* City First. Contrary to the trial court's reasoning, Washington law does not permit a court to award enhanced fees against *one* defendant based on issues that relate solely to *another*. *See, e.g., Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wn. App. 298, 305, 693 P.2d 161 (1984) ("[T]he general rule that attorneys fees and costs in multi-party cases . . . are awarded to different parties on the basis of the separate judgments obtained, not the overall trial result."). The trial court's enhancement is thus untenable.

Third, the trial court likewise abused its discretion in allocating 80 percent of the Collingses' total fees to City First. When a party is entitled to an award of attorneys' fees against one or more but fewer than all parties, the party seeking such an award must segregate the attorneys' fees attributable to the services provided with regard to each of the parties. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 601-02, 849 P.2d 669 (1993) (failure to segregate attorneys' fees in an application precludes an award of attorneys' fees). Here, even if the Collingses are entitled to recover prevailing party attorneys' fees from City First, they cannot recover fees that are attributable to their claims against U.S. Bank.

The court's opinion in *Seattle-First National Bank v. Washington Insurance Guaranty Ass'n*, 94 Wn. App. 744, 972 P.2d 1282 (1999), also speaks to this issue. In that case, although Seattle First and ALC both prevailed on their respective claims, only Seattle First was entitled to an award of attorneys' fees. 94 Wn. App. at 750, 762-63. As Seattle First and ALC were represented by the same counsel, counsel apportioned 21 hours to ALC and the remaining 245 hours to Seattle First. *Id.* The trial court awarded most of the requested fees to Seattle First. *See id.* at 750, 762-63. The Court of Appeals vacated that award, concluding:

> It appears manifestly unreasonable that counsel apportioned the fees between SeaFirst and ALC in such a manner, roughly 92 percent to SeaFirst and 8 percent to ALC.
>
> Based on the record before us, we hold that the trial court abused its discretion by awarding fees to SeaFirst based on such a skewed apportionment. . . . ALC should bear attorney fees in proportion to work performed on its behalf. If work was performed jointly for ALC and SeaFirst, then ALC should pay its pro rata share.

Id. at 763. In so doing, the court rejected counsel's statement that he had appropriately allocated time between ALC and Seattle First. *Id.* at 762.

Despite the clear authority of *Seattle-First* in requiring more than a blanket statement regarding allocations of fees between parties, the Collingses did not detail how they allocated 80 percent of their total attorneys' fees to City First. *See* CP 999-1000, 1379-80, 1864-73. Moreover, the Collingses requested – and the trial court awarded – attorneys' fees that are *plainly* attributable to the Collingses' claims against U.S. Bank. For example:

- $13,351.00 in fees related to the Collingses' motion to enjoin the trustee's sale, which requested "an order enjoining the trustee First American Title Insurance Co. from conducting a non-judicial foreclosure sale . . . ." CP 18-29, 1082, 1107-08, 1943-68;
- $8,041.50 in fees related to Plaintiffs' motion for contempt against "First American Title Insurance Company" and "MERS." CP 77-89, 1082-83, 1115-16, 1943-68; and
- $9,983.00 in fees for motion practice unrelated to claims against City First including, for example, motions for summary judgment

filed by and/or against Defendants First American, U.S. Bank, and MERS. CP 1084, 1121-22, 1943-68.

Under Washington law, including *Seattle-First*, such a skewed apportionment cannot stand.

Fourth, the trial court's award should also be reduced because it is excessive. In *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993), the Washington Supreme Court held that "a lodestar figure which grossly exceeds the amount involved should suggest a downward adjustment" and, for that reason, reduced the trial court's fees award by almost 70 percent. 122 Wn.2d at 150. In this case, the trial court's fees award is more than *15 times* the amount of compensatory damages and there are (as discussed at length above) serious issues regarding the Collingses' failure to properly disclose the covenant not to execute with the Mullens. CP 897-901, CP 1977-83. For all of the above reasons, even if the Collingses are entitled to an award of prevailing party attorneys' fees, the trial court's award should – *at the very least* – be substantially reduced.

VI. CITY FIRST IS ENTITLED TO RECOVER ITS ATTORNEYS' FEES AND COSTS ON APPEAL

Finally, consistent with RAP 18.1, City First also asks that the Court award City First its reasonable attorneys' fees and costs incurred in

this matter from July 26, 2010 (the day that the Collingses and the Mullens finalized the terms of their covenant) to present, including attorneys' fees and costs incurred on appeal. The court's recent decision in *State v. Gassman*, 160 Wn. App. 12, 248 P.3d 91 (2011), is on point. There, the state moved to amend the information on the first day of trial even though the state had known of the facts supporting the amendment for at least three months. 160 Wn. App. at 14-15. The trial court awarded attorneys' fees based on a finding that the "'State was careless in handling certain aspects of this case and that carelessness will result in additional work for . . . defense counsel,'" and its award was affirmed. *Id.* at 15, 17 (citation omitted; ellipsis in original). The court of appeals affirmed. *Id.* at 17. In *State v. S.H.*, 102 Wn. App. 468, 470, 8 P.3d 1058 (2000), the court similarly upheld an award of attorneys' fees as a sanction where an attorney's conduct was "inappropriate and improper."

The above cases, and others like them, amply support City First's request for attorneys' fees. As discussed in detail above:

- the Collingses failed to disclose their secret covenant before trial as required by Washington case law, by rules of candor, and by RCW 4.22.060(1);
- also contrary to applicable rules of candor, the Collingses' counsel improperly asked the jury, "Where are [the Mullens]?" and "Why aren't they here [to defend themselves]?";

- the Collingses' counsel did not inform the trial court that its jury instructions – most of which the Collingses proposed – did not accurately reflect the fact that the Mullens were no longer potentially liable; and
- upon discovering the covenant, City First was forced to contend with a constantly shifting barrage of arguments regarding the legal implications of the covenant, mootness, and the like.

The trial court proceedings must now be repeated. Under these circumstances, the Court can and should award City First its attorneys' fees and costs from July 26, 2010 to present, including fees on appeal.

VII. CONCLUSION

For the foregoing reasons, this Court should (a) vacate the trial court's judgment and remand this matter for a new trial; (b) vacate or at least substantially reduce the trial court's award of attorneys' fees and costs; and (c) award City First its reasonable attorneys' fees and costs as requested in Section VI above.

RESPECTFULLY SUBMITTED this 7th day of July, 2011.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DONALD AND BETH COLLINGS

Plaintiffs-Appellees,

v.

CITY FIRST MORTGAGE SERVICES, LLC

Defendant-Appellant.

CERTIFICATE OF SERVICE

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I certify under penalty of perjury, under the laws of the state of Washington that, on July 7, 2011, I caused the ***Opening Brief of Appellant City First Mortgage Services, LLC,*** to be filed with the Court of Appeals (original and one copy); and caused to be served on the persons listed below in the manner shown:

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