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No. 66527-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DONALD COLLINGS and BETH COLLINGS, husband and wife,

Plaintiffs/Defendants in Intervention/Respondents,

v.

CITY FIRST MORTGAGE SERVICES, LLC,

Defendant/Appellant

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR THE GREENPOINT MORTGAGE FUNDING TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-ARI,

Plaintiff in Intervention/Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENTS COLLINGS IN RESPONSE TO BRIEF OF CITY FIRST MORTGAGE SERVICES, LLC

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF ISSUES RELATING TO ASSIGNMENTS OF ERROR 1

A. Restatement Of Issues Raised By City First. 1

III. RESTATEMENT OF THE CASE 3

A. While City First Strung The Collings Along For Months After Plaintiffs Responded To Its Debt Relief Solicitation, Its Manager Loveless Planned An Equity Skimming Scheme 3

B. City First's Manager Loveless Told The Desperate Collings That He Would Buy Their Home And Lease It Back to Them. The Collings Insisted On Restrictions On Further Encumbrances In The Signed Lease They Delivered To City First. 7

C. In Violation Of The Lease Restrictions, City First Made (And Profited) From Two More Loans To Its Employee Loveless That It Then Sold Into Securitization Channels. 9

D. Despite The Collings Faithful Payments, Loveless Defaulted. City First Began Foreclosure Proceedings Against The Collings. 10

E. City First Destroyed The Lease Restricting Further Encumbrances And Aggressively Pursued Foreclosure, Necessitating This Lawsuit. 11

F. Without Opposition From City First, The Court Entered Judgment Against Its Manager Loveless. After His Deposition The Collings Settled with Mullen, Who Was Penniless. 12

G. At Trial, The Jury Rejected City First's Fact-Based Defenses, Presented Through A Single Witness Hired Three Years After The Equity Scam....14

H. The Trial Court Awarded The Collings Fees And A Modest Multiplier, On Unchallenged Findings Of Fact....15

IV. ARGUMENT....15

A. City First Did Not Except To the Instructions Or The Verdict Form And the Verdict is Supported By Substantial Evidence....15

1. Substantial Evidence Supports Any One Of The Multiple Claims Upon Which The Jury Based Its Verdict....15

2. The Trial Court Did Not Enter A Judgment Holding City First Jointly And Severally Liable With Mullen And Loveless....19

3. City First Was Properly Held Vicariously Liable For The Acts Of Its Manager Loveless....21

4. City First Is Independently Liable To The Collings On Their Numerous Claims....26

a. City First Is Not Exempt From The Credit Services Organizations Act....26

b. City First Is Liable Under The Consumer Protection Act....29

c. City First Is Liable For Its Negligent Supervision Of Its Employees....30

d. City First Is Liable As A Co-Conspirator....31

B. The Trial Court Did Not Abuse Its Discretion In Denying City First A New Trial Because City First, Which Was Directly Liable To The Collings, Could Not Establish Misconduct, Prejudice, Or An Undisclosed "Mary Carter" Agreement. 33

1. This Court Reviews The Trial Court's Denial Of A New Trial Based On Allegations Of The Misconduct of Counsel For Abuse Of Discretion. 33

2. The Trial Court Did Not Abuse Its Discretion In Denying The Motion For A New Trial Because Substantial Evidence Supports Its Findings That City First Suffered No Prejudice. 34

3. The Collings Did Not Enter Into A "Mary Carter Agreement" With Mullen. 38

4. RCW 4.22.060(1) Requires A Settling Defendant, Not Plaintiff, To Obtain A Reasonableness Determination. 43

C. The Trial Court Did Not Abuse Its Discretion In Its Award Of Attorney Fees. 46

D. The Collings Are Entitled to Their Fees On Appeal 49

V. CONCLUSION 49

TABLE OF AUTHORITIES

FEDERAL CASES

Daniel v. Penrod Drilling Co., 393 F. Supp. 1056 (E.D.. La. 1975) 40, 41

Kronisch v. United States, 150 F.3d 112 (2d Cir. 1998) 33

Zurich North America v. Matrix Service, Inc., 426 F.3d 1281 (10th Cir. 2005) 42

STATE CASES

Adams v. Johnston, 71 Wn. App. 599, 860 P.2d 423, 869 P.2d 41 (1993), *rev. denied*, 124 Wn.2d 1020 (1994) 45

Aluminum Co. of America v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 998 P.2d 856 (2000) 3

Baxter v. Greyhound Corp., 65 Wn.2d 421, 397 P.2d 857 (1964) 34

Blair v. Washington State Univ., 108 Wn.2d 558, 740 P.2d 1379 (1987) 47

Booth v. Mary Carter Paint Co., 202 So.2d 8 (Fla. App. 1967) 39

Brewer v. Fibreboard Corp., 127 Wn.2d 512, 901 P.2d 297 (1995) 45

Bros. v. Pub. Sch. Employees of Wash., 88 Wn. App. 398, 945 P.2d 208 (1997) 37

Carmin v. Port of Seattle, 10 Wn.2d 139, 116 P.2d 338 (1941) 25

Chase v. Knabel, 46 Wash. 484, 90 P. 642 (1907) 17

Christie-Lambert Van & Storage Co., Inc. v. McLeod, 39 Wn. App. 298, 693 P.2d 161 (1984) 48

City of Seattle v. Blume, 134 Wn.2d 243, 947 P.2d 223 (1997) 42

Clayton v. Wilson, 168 Wn.2d 57, 227 P.3d 278 (2010) 24

Corey v. Pierce County, 154 Wn. App. 752, 225 P.3d 367 (2010), *rev. denied*, 170 Wn.2d 1016 (2010) 16

Coulter v. Asten Group, Inc., 135 Wn. App. 613, 627, 146 P.3d 644 (2006), *rev. denied*, 161 Wn.2d 1011 (2007) 45

Davis v. Microsoft Corp., 149 Wn.2d 521, 70 P.3d 126 (2003) 16-18

Estate of Stalkup v. Vancouver Clinic, Inc., P.S., 145 Wn. App. 572, 187 P.3d 291 (2008) 36

Ethridge v. Hwang, 105 Wn. App. 447, 20 P.3d 958 (2001) 47, 48

Flint v. Hart, 82 Wn. App. 209, 917 P.2d 590 (1996) 48

Glover for Cobb v. Tacoma General Hosp., 98 Wn.2d 708, 658 P.2d 1230 (1983) 20, 35

Grayson v. Nordic Constr., Co., Inc., 92 Wn.2d 548, 599 P.2d 1271 (1979) 30

Hama Hama Co. v. Shorelines Hearings Bd., 85 Wn.2d 441, 536 P.2d 157 (1975) 28

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778 , 719 P.2d 3531 (1986) 29

Harbison v. Garden Valley Outfitters, Inc., 69 Wn. App. 590, 849 P.2d 669 (1993) 48

Haubry v. Snow, 106 Wn. App. 666, 31 P.3d 1186 (2001) 30

Hodesh v. Korelitz, 123 Ohio St. 3d 72, 914 N.E.2d 186 (2009) 42

Hyatt v. Sellen Const. Co., Inc., 40 Wn. App. 893, 700 P.2d 1164 (1985) 37

La Lone v. Smith, 39 Wn.2d 167, 234 P.2d 893 (1951) 30

Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998) 47

Marriage of Mueller, 140 Wn. App. 498, 167 P.3d 568 (2007), *rev. denied*, 163 Wn.2d 1043 (2008) 32

Mason v. Kenyon Zero Storage, 71 Wn. App. 5, 856 P.2d 410 (1993) 24

Maule Industries, Inc. v. Rountree, 284 So.2d 389 (Fla. 1973) 41

Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 935 P.2d 684 (1997) 17

McCluskey v. Handorff-Sherman, 68 Wn. App. 96, 841 P.2d 1300 (1992), *aff'd*, 125 Wn. 2d 1, 882 P.2d 157 (1994) 19, 39, 40

Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 40 P.3d 1206 (2002) 17

Noland v. Dep't of Labor & Indus., 43 Wn.2d 588, 262 P.2d 765 (1953) 18, 23

Northington v. Sivo, 102 Wn. App. 545, 8 P.3d 1067 (2000) 41

Petersen v. Turnbull, 68 Wn.2d 231, 412 P.2d 349 (1966) 25

Pier 67, Inc. v. King County, 89 Wn.2d 379, 573 P.2d 2 (1977) 33

Poundstone v. Whitney, 189 Wash. 494, 65 P.2d 1261 (1937) 25

Puget Mill Co. v. Kerry, 183 Wash. 542, 49 P.2d 57 (1935) 17

Ratterree v. Bartlett, 238 Kan. 11, 707 P.2d 1063 (1985) 41

Romero v. West Valley School Dist., 123 Wn. App. 385, 98 P.3d 96 (2004), *rev. denied*, 154 Wn.2d 1010 (2005) 39

Schmidt v. Cornerstone Investments, Inc., 115 Wn.2d 148, 795 P.2d 1143 (1990) 44

Sdorra v. Dickinson, 80 Wn. App. 695, 910 P.2d 1328 (1996) 36

Seattle-First Nat'l Bank v. Washington Ins. Guar. Ass'n, 94 Wn. App. 744, 972 P.2d 1282 (1999) 48

Sequoia Mfg. Co., Inc. v. Halec Const. Co., Inc., 117 Ariz. 11, 570 P.2d 782 (1977) 42

Sherman v. State, 128 Wn.2d 164, 905 P2d 355 (1995) 42

Soria v. Sierra Pac. Airlines, Inc., 111 Idaho 594, 726 P.2d 706 (1986) 42

Spratt v. Davidson, 1 Wn. App. 523, 463 P.2d 179 (1969) 35

Sterling Bus. Forms, Inc. v. Thorpe, 82 Wn. App. 446, 918 P.2d 531 (1996), *rev. denied*, 130 Wn.2d 1026 (1997) 32

Tegman v. Accident & Med. Investigations, Inc., 150 Wn.2d 102, 75 P.3d 497 (2003) 43

Todd v. Harr, Inc., 69 Wn.2d 166, 417 P.2d 945 (1966) 34

Tribble v. Allstate Property and Cas. Ins. Co., 134 Wn. App. 163, 139 P.3d 373 (2006) 48, 49

Trosper v. Heffner, 51 Wn.2d 268, 317 P.2d 530 (1957) 35

Villas at Harbour Pointe Owners Ass'n, ex. rel. Construction Assocs., Inc. v. Mutual of Enumclaw Ins Co., 137 Wn. App. 751, 154 P.3d 950 (2007), *rev. denied*, 932 P.2d 1266 (2008) 44

Ward v. Ochoa, 284 So.2d 385 (Fla. 1973) 41

Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993) 34

Wilkinson v. Smith, 31 Wn. App. 1, 639 P.2d 768 (1982), *rev. denied*, 97 Wn.2d 1023 (1982) 22

Wlasiuk v. Whirlpool Corp., 81 Wn. App. 163, 914 P.2d 102 (1996), *modified by*, 932 P.2d 1266 (1997) 17

STATUTES

RCW ch. 4.22 43-45

RCW 4.22.015 ..... 43, 44

RCW 4.22.040 35

RCW 4.22.060 ..... 14, 35, 43-45

RCW 4.22.070 ..... 21, 43, 45

RCW ch. 19.86 29

RCW 19.86.090 ..... 22, 29, 30, 49

RCW ch. 19.134 22

RCW 19.134.010 ..... 26, 27

RCW 19.134.020 26

RCW 19.134.040 26

RCW 19.134.060 26

RCW 19.134.070 29

RCW 19.134.080 ..... 14, 49

RCW ch. 31.04 22

RCW 31.04.027 29

RCW 31.04.208 29

RCW ch. 59.18 22

RCW 59.18.285 7

RCW ch.61.34 22

RCW 61.34.020 22

RULES AND REGULATIONS

CR 51 18

CR 59 36

ER 408 41

RAP 9.3 37

RAP 10.3 47

RAP 18.1 49

RPC 3.4 42

WAC 208-620-250 (2006) 28

WAC 208-620-251 28

WAC 208-620-252 28

WAC 208-620-300 (2006) 28

WAC 208-620-310 (2006) 28

WAC 208-620-380 (2006) 28

OTHER AUTHORITIES

Zachary E. Davies, *Rescuing the Rescued: Stemming the Tide of Foreclosure Rescue Scams in Washington*, 31 Seattle U. L. Rev. 353 (2008) 27

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Tegland, 15A *Wash. Prac., Handbook Civil Procedure* § 88.6 (2010-2011 ed.) 17

I. INTRODUCTION

Donald and Beth Collings were forced to file suit to save their family home from foreclosure. They were the victims of equity skimming and other violations of consumer protection statutes perpetrated by appellant City First Mortgage Services, LLC, and defendants Robert Loveless and Andrew Mullen. Unlike in many lawsuits filed by defaulting borrowers, the Collings borrowed no money; they did not default on any contractual obligations; and their attempts to pay money from their own pocket to avoid foreclosure were rebuffed. This court should reject City First's challenge, based on issues largely unpreserved below, to the judgment entered on the jury's verdict and the trial court's fee award.

II. RESTATEMENT OF ISSUES RELATING TO ASSIGNMENTS OF ERROR

A. Restatement Of Issues Raised By City First.

1. Where a defendant does not except to a general verdict form or propose a special verdict, and the jury finds the defendant liable on multiple claims, must this court affirm the judgment entered on the verdict if there is sufficient evidence to support the defendant's liability as to any one of the multiple claims considered by the jury?

2. Is a lender vicariously liable for the damages caused by its manager's illegal equity skimming scheme, where the lender authorized

the manager to make loans that enabled the skim and profited from three loans enabling the skim, including a second position HELOC that was prohibited by the terms of the plaintiff's lease?

3. Does the Credit Services Organizations Act exempt a lender from liability where its employees made loans to Washington residents in the state of Washington from branches in Utah that were not licensed as required by the Department of Financial Institutions?

4. Does substantial evidence support the jury's verdict, based on unchallenged instructions, that a lender "directly or indirectly" financed a loan to its manager that violated the Equity Skimming Act, engaged in deceptive advertising, failed to supervise its employees, and assisted its manager's equity skimming and self-dealing?

5. Did the trial court abuse its discretion in denying a new trial and finding that in the absence of any evidence of fraud, collusion or false testimony, a defendant that was independently liable to plaintiffs was not prejudiced by a covenant not to execute against a penurious co-defendant?

6. Did the trial court abuse its discretion by awarding attorney fees under the lodestar method and applying a 1.2 multiplier after making unchallenged findings not only that the hourly rates and number of hours were reasonable, but that payment was entirely contingent on the

ultimately successful recovery of damages on statutory claims that further the public interest?

III. RESTATEMENT OF THE CASE

City First challenges the sufficiency of the evidence to support the Collings' claims, but disregards the governing standard of review. On review of a judgment in favor of the plaintiffs, this court reviews the facts in the light most favorable to the prevailing party – in this case, the Collings. ***Aluminum Co. of America v. Aetna Cas. & Sur. Co.***, 140 Wn.2d 517, 529, 998 P.2d 856 (2000) (court must view the "evidence and all inferences that can be reasonably drawn therefrom, . . . most strongly against the moving party"). City First repeatedly, and often flagrantly, ignores this principle, reciting only those facts that favor its legal arguments and ignoring the overwhelming evidence that supports both the jury's verdict and the trial court's findings of fact:

A. While City First Strung The Collings Along For Months After Plaintiffs Responded To Its Debt Relief Solicitation, Its Manager Loveless Planned An Equity Skimming Scheme.

The Collings purchased their home in Redmond, Washington in 1998, and have lived there ever since with their three daughters. (9/14 RP 14-16) They paid their mortgage regularly until mid 2006, when because of a change in Mr. Collings' job duties and income they began experiencing difficulty paying their bills. (9/14 RP 16-18; 9/15 RP 7-10)

Beth Collings received a mail solicitation from appellant City First offering mortgage debt relief. She called City First and spoke with Gavin Spencer, a City First employee at its Home Front branch in Orem, Utah.[1] (9/15 RP 12-13; CP 760)[2] Spencer told Beth that City First could refinance the Collings' home. (9/15 RP 13-14) He took a loan application over the phone. Spencer then called Beth and told her that the Collings' loan had been approved, (9/14 RP 30; 9/15 RP 14), Spencer scheduled several closing dates. (9/15 RP 18, 21) The Collings even flew to San Diego for one scheduled closing. (9/15 RP 22) But each time as closing neared, Spencer told the Collings the closing had been postponed. (9/14 RP 23-25; 9/15 RP 21-22)[3]

After months of waiting and delayed signing appointments, Spencer told Don and Beth what he had known for some time: City First could not find a lender for the refinance. Their loan had not been approved after all. (9/14 RP 23-26; 9/15 RP 18-22) However, the Collings never received federally mandated notices from City First

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[1] City First asserts that there is "no evidence in the record of any relationship between City First and Home Front Holdings." (City First Br. 7, 31) In fact, Home Front Holdings was the investment arm of Home Front Services, which operated the Home Front branch of City First. (CP 792)

[2] The deposition of Andrew Mullen is at CP 728-97, and was Exhibit 70. It was read in its entirety to the jury. (9/16 RP 16-18) For ease of reference, this brief cites to the copy of the deposition in the clerk's papers.

[3] Ironically, City First cites to this testimony to argue that the Collings applied for and were denied a "no income" loan. (City First Br. 4)

informing them that their loan application had been denied. (9/14 RP 26-28)

Based on City First's assurances, the Collings were now in arrears on their mortgage. They could not get a loan elsewhere. They were desperate. (9/14 RP 26-28; 9/15 RP 23-26) Spencer, who was not properly licensed (Ex. 79; 9/15 RP 97), told Beth Collings that his manager at City First, defendant Robert Paul Loveless, had a "solution." (9/14 RP 28; 9/15 RP 23-24) Spencer introduced the Collings to Loveless by telephone. (9/14 RP 28; 9/15 RP 23)

Loveless was a City First manager. (9/15 RP 46, 84-85; Exs. 3-5, 59) Although on appeal City First claims that Loveless was not its employee, City First's representative at trial, Sherri Russett, acknowledged that Utah law regards all loan officers as "employees," and requires that they be supervised by a "primary lending manager" or "principal loan officer." (9/15 RP 55, 186, 197-98) Ms. Russett believed that the owner of City First, Gerret Van Wagoner, served as its primary lending manager. (9/15 RP 55) Further, City First's records proved that Loveless was not given the option of having all of his income reported on an IRS Form 1099. Instead, Loveless was issued a W-2. (Exs. 59(b), 60(b))

Loveless' job at City First was to generate loans for City First. (9/15 RP 46, 101-02; Ex. 59(a)) Defendant Andrew Mullen also worked at a Home Front branch of City First as a manager.[4] (Ex. 3; CP 744) Both Mullen and Loveless used City First email addresses, letterhead and business cards bearing the City First logo. (Exs. 3-5, 32; CP 744) The "Home Front" offices[5] they worked in had City First signs and logos. (CP 742-44) City First had to approve any proposed advertising from the Home Front branches, such as the flyer that had caused Beth Collings to contact Spencer months earlier. (CP 742, 749)

The City First loan file and the escrow file from Chicago Title establish that Loveless began to plan an equity skimming scam while Spencer was telling Beth that City First had approved the Collings' loan. Exhibit 24 supplements the title commitment issued on April 14, 2006 for a proposed loan to the Collings. In Exhibits 27 (dated April 17, 2006) and 28 (dated April 25, 2006), Loveless inquired into mortgage financing *for himself* on the Collings' property. Exhibit 46 is City First's request for a title commitment for a loan to its employee Loveless (not the Collings), dated April 18, 2006.

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[4] Loveless wanted Mullen's assistance because City First ostensibly would not have allowed Loveless to process his own loan. (Ex. 121; 9/15 RP 149-50, 187-88)

[5] City First had two Home Front branch offices – one in Sandy, Utah, and another in Orem, Utah. (CP 742)

B. City First's Manager Loveless Told The Desperate Collings That He Would Buy Their Home And Lease It Back to Them. The Collings Insisted On Restrictions On Further Encumbrances In The Signed Lease They Delivered To City First.

Loveless proposed a plan to the Collings to give them time to repair their credit: he personally would buy the Collings' home for the appraised value, $510,000, and then lease it back to them. Loveless proposed that the Collings pay him a fee of $78,540 (labeled a "nonrefundable deposit"),[6] and sign a lease-back agreement with an option to repurchase the home after three years for $510,000. (9/14 RP 28-29, 63-64; 9/15 RP 24-25; Ex. 5) The Collings would pay Loveless "rent" equal to the monthly mortgage payment on their home, prepaid for the first year with 12 post-dated checks totaling $35,640. (9/14 RP 30, 31) Loveless told the Collings that the rental payment recited in the lease agreement, $2,970 per month, equaled the mortgage payment on the City First loan. (9/14 RP 31)

The Collings, now with no alternatives, agreed to the deal proposed by City First's Loveless. Don Collings was wary, however. He insisted that the lease prohibit further encumbrance of the Collings' home,

[6] Nonrefundable deposits are strictly prohibited under the Washington Landlord Tenant Act. "No moneys paid to the landlord which are nonrefundable may be designated as a deposit or as part of any deposit. If any moneys are paid to the landlord as a nonrefundable fee, the rental agreement shall be in writing and shall clearly specify that the fee is nonrefundable." RCW 59.18.285.

and expressly forbid a home equity line of credit ("HELOC"). (9/14 RP 32) On May 2, Mullen sent Beth Collings a lease-option that contained a restriction against further encumbrances. (Ex. 3 at 3; 9/14 RP 53) This restriction was included in the lease-option the Collings signed and sent to City First. (Ex. 5 at 3; 9/15 RP 39)

Loveless told the Collings he needed the signed lease in advance so that City First could review it before making the loan. (9/14 RP 64-65) The Collings mailed the original signed lease-option to City First, with the additional encumbrances restrictions, before closing. (9/14 RP 64-65; 9/15 RP 25, 39) However, Loveless apparently supported the original June 2006 loan with a second, phony lease-option agreement. The City First loan file for this initial loan contains a lease-option agreement with tenants named "Muniz," not Collings. (9/16 RP 9-10; Ex. 34) The lease recites that it was entered into in 2005, not 2006, although it purports to have been signed in 2006. (Ex. 34 at 1, 6; 9/16 RP 10-11)[7]

City First did not care about these discrepancies, and this was not the only poorly documented loan City First approved for Loveless in the first six months of 2006. (9/15 RP 73-77; *compare* Ex. 25 (loan application) *with* Ex. 53 (listing ownership of property: 10371 N. Solitude

[7] The Muniz property is located in Illinois, not in Redmond, Washington. Mullen was sued in Illinois for his role in arranging the Muniz transaction. He had no money to defend the lawsuit. (CP 763-64, 784-85)

Circle)). The deal closed in June 2006. (Ex. 114; 9/15 RP 63) Loveless took out a $459,000 mortgage loan from his employer City First and paid off the Collings' first and second mortgages. (Exs. 47, 114) Loveless' $51,000 down payment was immediately rebated back to Loveless by means of the illegal $78,540 "nonrefundable deposit" that he obtained from the Collings. (9/14 RP 30, 33, 63-64; Exs. 5, 9; CP 772) The Collings paid all of the closing costs. (Ex. 123)

C. In Violation Of The Lease Restrictions, City First Made (And Profited) From Two More Loans To Its Employee Loveless That It Then Sold Into Securitization Channels.

Don and Beth Collings both testified that Exhibit 5, which prohibited further encumbrance on the Collings' home, was the lease that they and Loveless had executed and that they sent to City First. (9/14 RP 32, 64; 9/15 RP 39) Despite a November 15, 2008 demand that it maintain its records (Ex. 15), City First destroyed the Loveless loan file that contained evidence of the Collings lease. (9/15 RP 63, 66-69)

In December 2006 Loveless placed two new loans on the Collings' home without the Collings' knowledge or consent. Loveless' employer City First wrote these loans, (Exs. 12, 13, 44), both of which clearly violated the lease agreement. One was for a home equity line of credit (HELOC) for $52,500. The other was for an adjustable rate loan of $420,000. The latter is the subject of this litigation.

City First did not consider a lease with an option to repurchase an "arm's length" or merchantable loan qualifying for securitization. (9/16 RP 10-14) City First knew through its employees, Loveless and Mullen, that the refinance violated the Lease. (Exs. 3, 5)

D. Despite The Collings Faithful Payments, Loveless Defaulted. City First Began Foreclosure Proceedings Against The Collings.

Loveless was late on his payments on the June 2006 loan even before taking out these two new loans in December 2006. (Ex. 52 (showing nearly $1,000 in late charges as of December 4, 2006)) Although the monthly payments were lower on the new loan Loveless took out in December 2006 (9/15 RP 29), he began missing payments altogether, and by April 2008 he fell into default. (Ex. 11; 9/14 RP 65) Shortly thereafter, Mortgage Electronic Registration Systems, Inc. ("MERS"), as "nominee" for City First, commenced foreclosure proceedings. (*See* 9/14 RP 65-66; Exs. 11-12) In July 2008, the Collings' daughter came home to find a notice of foreclosure tacked to the home. (Ex. 11; 9/15 RP 29)

The Collings had faithfully made their "lease" payments, which had increased $200 in the second year of the lease-back because Loveless told them the mortgage payments had increased. (9/14 RP 36; 9/15 RP 27) They mailed their payments to Loveless at a Home Front City First

branch office address. (Ex. 5; 9/15 RP 46) They could not understand how their home could be in foreclosure. After their daughter discovered the foreclosure notice, Beth immediately called her husband Don. (9/15 RP 29-30) Don made several efforts to contact Loveless. When Loveless finally returned his calls, he threatened to evict the Collings if they did not send him more money. (9/15 RP 29; 9/14 RP 69; Ex. 14) Don had a colleague search title to his Redmond home. He learned for the first time that Loveless had violated the lease option agreement by entering into the December 2006 refinance. (9/14 RP 67-68) The Collings hired legal counsel.

E. City First Destroyed The Lease Restricting Further Encumbrances And Aggressively Pursued Foreclosure, Necessitating This Lawsuit.

On November 15, 2008, the Collings' counsel wrote to MERS, City First, and Loveless alleging various statutory violations and asking that the foreclosure be stopped. (Ex. 15) The letter also demanded that all City First banking records be made available for inspection.

The Collings received no response to their demand. (9/14 RP 69-72) Instead, City First destroyed the Loveless December 2006 loan file. (9/15 RP 61-69) MERS pressed on, scheduling foreclosure for May 15, 2009. (Ex. 17)

The Collings filed suit on March 19, 2009, seeking to enjoin the MERS trustee's sale. (CP 1-15) The Collings also sought damages from City First, Loveless, and Mullen arising from the equity skim and violation of the Consumer Protection Act and Credit Services Organizations Act. (CP 14-15)

On April 24, 2009, the court enjoined the trustee's sale, finding that there was substantial evidence of violations of the Credit Services Organizations Act, Equity Skimming Act, and Consumer Protection Act. (CP 18-29, 2182-86) MERS, still on behalf of City First, ignored the injunction, taking affirmative steps to resume the foreclosure. (CP 61-76) The court found MERS in contempt. (CP 2201-03) MERS did not cancel the trustee's sale until after it was held in contempt. (Ex. 22)

F. Without Opposition From City First, The Court Entered Judgment Against Its Manager Loveless. After His Deposition The Collings Settled with Mullen, Who Was Penniless.

Loveless did not answer or appear at trial, and the trial court entered two orders of partial default judgment against Loveless. (CP 91-93) City First did not oppose the Collings' motions. The first order quieted title in the Collings' favor, reserving decision on the issue of the alleged lien interest of U.S. Bank, which had intervened in the action claiming it owned the deed of trust executed by Loveless in the refinance. (CP 245-54, 271-80) In quieting title in the Collings, the court found that

Loveless had engaged in a foreclosure rescue scam with the intent to defraud the Collings, and that title to property remained vested in the Collings. (CP 245-54, 271-80) In the second default judgment, the court held Loveless liable for violation of the Residential Landlord Tenant Act, Credit Services Organizations Act, Equity Skimming Act, and Consumer Protection Act, reserving the amount of the Collings' damages for trial. (CP 371-77)

Mullen appeared through counsel (CP 234), and was deposed telephonically from Utah on July 26, 2010. (CP 728-824) City First's legal counsel attended, but asked no questions. After the Collings read portions of Mullen's testimony at trial, City First read Mullen's deposition in its entirety to the jury. (9/16 RP 15-18; CP 728-824) City First did not subpoena and made no arrangements to have either Mullen or Loveless present at trial.

Shortly after his deposition, and after his attorney had filed a notice of withdrawal, the Collings entered into a covenant not to execute with Mullen, in exchange for repayment of $500 of the costs of deposing him. (CP 1162, 1165, 1212) As a condition of the settlement, the Collings required a representation that Mullen was insolvent. Mullen furnished that written statement, which was consistent with his deposition testimony. (CP 784-85) The settlement had no confidentiality provision. Mullen

never informed the court of the settlement or moved for a reasonableness hearing pursuant to RCW 4.22.060. City First did not request in discovery, and neither Mullens nor the Collings disclosed, the settlement.

G. At Trial, The Jury Rejected City First's Fact-Based Defenses, Presented Through A Single Witness Hired Three Years After The Equity Scam.

City First objects to many of the instructions given the jury. (City First Br. 28-29, 43 n. 12) At trial, however, City First excepted to only three instructions (Insts. 6, 8, 21; CP 847, 849, 863-66), and gave no reason why it believed these instructions were error. (9/20 RP 4)

City First also did not object to the verdict form, in which the jury found that City First was independently and vicariously liable to the Collings on their claims. (9/20 RP 4; CP 897-901) Specifically, the jury found that (1) Loveless caused the Collings $40,311 in damages, (2) City First was liable for $40,311 in damages caused by Loveless, and (3) City First independently caused the Collings $40,311 in damages. (CP 898-900) The jury also assessed $80,622 in punitive damages against both Loveless and City First under the Credit Services Organizations Act ("CSOA"), RCW 18.134.080(1). (CP 900) The jury found that Mullen caused the Collings no compensatory damage, but awarded $8,000 in punitive damages against him under the CSOA. (CP 898, 900)

H. The Trial Court Awarded The Collings Fees And A Modest Multiplier, On Unchallenged Findings Of Fact.

The trial court entered judgment on the jury's verdict, denied City First's post-trial motion for judgment as a matter of law or for a new trial, and awarded the Collings' attorney fees. (CP 1859-63, 1977-83, 2171-75) In findings to which City First has not assigned error, the trial court found the hours and rates of the Collings' counsel to be reasonable, that it was reasonable to include in the award fees incurred in defending U.S. Bank's attempt to enforce the City First deed of trust placed on the property by Loveless, and that the contingent nature of the claim warranted a 1.2 multiplier. (CP 1980-81)

IV. ARGUMENT

A. City First Did Not Except To the Instructions Or The Verdict Form And the Verdict is Supported By Substantial Evidence.

1. Substantial Evidence Supports Any One Of The Multiple Claims Upon Which The Jury Based Its Verdict.

The jury answered a series of questions in an unchallenged special verdict form, separately finding that City First was vicariously liable to the Collings in the total amount of $120,933 for the acts of Robert Loveless, and that it was independently liable to the Collings in the total amount of $120,933. (CP 897-901) In arguing that if any "one or more of [the Collings'] claims is set aside on appellate review, the judgment must be

vacated" (City First Br. 42), City First ignores the jury's separate findings establishing these separate bases for liability. Contrary to City First's argument, if there is sufficient evidence to support the jury's verdict on *any* of its findings against City First, this court must affirm. *See* ***Corey v. Pierce County***, 154 Wn. App. 752, 767, 225 P.3d 367 (2010) ("Notwithstanding the elimination of the negligence cause of action, the verdict remains unaffected" where sufficient evidence supported jury's verdict on intentional tort claims), *rev. denied*, 170 Wn.2d 1016 (2010). Here, there is substantial evidence of City First's independent liability and of its vicarious liability for the acts of its manager Loveless.

Further, as to City First's independent liability, the jury entered a general verdict on the Collings' multiple statutory and common law claims. Because City First did not except to the verdict form, this court must affirm the jury's undifferentiated verdict if any one of those claims establishing City First's independent liability is supported by substantial evidence. ***Davis v. Microsoft Corp.***, 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003). As Tegland summarizes the rule:

> In a multitheory case, i.e., a case in which the jury may base its verdict on one of a number of theories of liability asserted by the plaintiff, an appellate court will be obligated to remand if one of the theories is later invalidated on appeal, *but only if the defendant objected to the use of a general verdict and proposed a clarifying special verdict form.*

Tegland, 15A *Wash. Prac., Handbook Civil Procedure* § 88.6 (2010-2011 ed.) (emphasis added), *citing* ***Davis***, 149 Wn.2d 521.[8]

City First's contrary argument relies solely on a 1907 case in which the Supreme Court set aside a verdict in favor of "a colored man, although the complaint does not allege the fact," on claims for assault and battery and for violating his civil rights after he was ejected from a restaurant, on the ground that he did not state a civil rights claim. ***Chase v. Knabel***, 46 Wash. 484, 485, 90 P. 642, 642 (1907) (City First Br. 42). If the Court followed a different rule in ***Chase*** than that it espoused 96 years later in ***Davis***, the more recent case must be deemed authoritative. ***Puget Mill Co. v. Kerry***, 183 Wash. 542, 559, 49 P.2d 57 (1935).

Here, the jury was instructed that it could find City First liable under the Credit Services Organizations Act, (CP 860), the Consumer Protection Act (through the Equity Skimming Act, Credit Services

[8] *See also* ***Mavroudis v. Pittsburgh-Corning Corp.***, 86 Wn. App. 22, 36, 935 P.2d 684 (1997) (where "jury rendered a single monetary verdict on both the strict liability product-warning claim and the negligent failure-to-warn claim" instructional error on "negligent failure-to-warn claim would not affect the judgment."); ***Wlasiuk v. Whirlpool Corp.***, 81 Wn. App. 163, 173, 914 P.2d 102 (1996), *modified by* 932 P.2d 1266 (1997) (where verdict form did not require jury to specify which sections of employee handbook contained enforceable promises of employer, court may affirm "if we find substantial evidence of a breach of any promise of specific conduct"); ***McCluskey v. Handorff-Sherman***, 125 Wn.2d 1, 11, 882 P.2d 157 (1994) (where defendant conceded warning claim properly before jury, court may affirm where verdict form failed to distinguish between liability for negligent design and failure to warn); ***Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP***, 110 Wn. App. 412, 429, 40 P.3d 1206 (2002) (failure to except to verdict form bars challenge on appeal).

Organizations Act and Consumer Loan Act) (CP 868-71), civil conspiracy under the common law (CP 847, 878), if it acted in concert with Loveless, or if Loveless was acting within the scope of his employment with City First. (CP 847) As the trial court held in denying its CR 50(b) motion (CP 1862), City First waived any challenge to these jury instructions either because it did not except, or because it failed to state the grounds for its exception, as required by CR 51. (9/20 RP 4) Thus, the legal standard by which these claims are tested for sufficiency of the evidence is established by the trial court's instructions, which are binding on City First as the law of the case. *See* ***Noland v. Dep't of Labor & Indus.***, 43 Wn.2d 588, 590, 262 P.2d 765 (1953) ("No assignments of error being directed to any of the instructions, they became the law of the case on this appeal, and the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge.").

In the unchallenged verdict form, the jury answered "yes" to the question whether City First was "independently liable to the Collings on their claims?" (CP 899) The verdict form segregated only the Credit Services Organizations Act claim. (CP 900) City First did not except to the verdict form. (9/20 RP 4) This court cannot tell from the jury's verdict whether it found City First independently liable for civil conspiracy, for acting in concert with Loveless, or for a violation of the

CPA on any grounds in addition to the Credit Services Organizations Act. ***McCluskey v. Handorff-Sherman***, 125 Wn.2d 1, 11, 882 P.2d 157 (1994) ("We cannot now dissect the jury's general verdict, nor can we disregard it."). As there is substantial evidence to support each or any of these theories, this court should affirm.

2. The Trial Court Did Not Enter A Judgment Holding City First Jointly And Severally Liable With Mullen And Loveless.

City First argues that it cannot be "jointly and severally liable with the Mullens or Loveless" (City First Br. 27-28) because Loveless filed for bankruptcy before entry of final judgment and because Mullen's release discharged him from joint and several liability with his co-defendants. This argument is predicated on the claimed "joint and several" nature of the defendants' liability. The judgment, however, does not provide for joint and several liability on the jury's award of damages. (CP 1135-38)

No monetary judgment was entered against Loveless, who was ordered in default for failing to answer, and filed for bankruptcy prior to final judgment. (CP 1861) City First's contention that it was held "jointly and severally liable" with Loveless is plainly without merit.

City First's contention that it was held "jointly and severally" liable with Mullen is also wrong. The judgment on the jury's verdict specifies, both in the summary and in the body of the judgment, that City

First is liable for a principal judgment of $120,933 "both independently and vicariously by and through the acts of Robert Paul Loveless and Andrew Mullen," and that Mullen is liable in the principal amount of $8,000. (CP 1136-37, 2172-73) The only reference to "joint" liability is in the judgment summary's identification of City First and Mullen as "joint judgment debtors," and in the recitation that both parties are liable "for civil conspiracy, jointly and severally." (CP 1136-37, 2171-72)

City First argues that the Collings' covenant not to execute released Mullens as a matter of law, but cites no authority for the proposition that a release of one intentional tortfeasor releases a co-conspirator. Because there is no common law right of contribution among intentional tortfeasors, the principles of contribution among at-fault co-defendants that underlie the Tort Reform Act, are inapplicable to defendants who are liable for civil conspiracy. *See* Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 Wash. L. Rev. 233, 235, 237 (1987) (liability at common law for co-defendants committing "intentional torts, frequently criminal in nature, and involv[ing] some sort of combination or conspiracy," was joint, with no right of contribution); ***Glover for Cobb v. Tacoma General Hosp.***, 98 Wn.2d 708, 722-23, 658 P.2d 1230 (1983) (plaintiff who settles with solvent agent releases principal because

settlement extinguishes right of contribution under RCW ch. 4.22). Even were the Tort Reform Act applicable, a party is liable for the "fault" of another "where both were acting in concert," RCW 4.22.070(1)(a), as the jury found here. City First is thus liable for furthering Loveless' equity skimming scheme regardless whether judgment was properly entered against its manager Mullen.

3. City First Was Properly Held Vicariously Liable For The Acts Of Its Manager Loveless.

The jury found City First both independently liable and vicariously liable for the actions of its agent Loveless, who was in default for failing to answer the Collings' complaint. (CP 91-93, 271-80, 371-77) The jury was told that though the Collings still bore the burden of proving their damages, it "must find for the Collings with respect to each of their claims against defendant Robert P. Loveless." (CP 847) City First did not explain its exception to Instruction 6, that City First is liable for any acts of Loveless if the jury found that he was "an employee or authorized agent of City First" (CP 847; 9/20 RP 4), and did not except to other instructions that it was liable if Loveless was acting "within the scope of employment." (CP 850-56) The jury found Loveless liable for a total of $120,933 in damages (Questions 2 and 10) and that City First was liable for Loveless's acts. (Question 3) (CP 898, 900)

City First does not challenge Loveless's liability on appeal. Nor could it, given the uncontested order of default and subsequent judgments. (CP 91-93, 271-80, 371-77) Loveless was liable as a matter of law for fraud in connection with his foreclosure rescue scheme under the Equity Skimming Act, RCW ch. 61.34,[9] the Credit Services Organizations Act, RCW ch. 19.134, the Consumer Loan Act, RCW ch. 31.04, and the Residential Landlord Tenant Act, RCW ch. 59.18, as well as the Consumer Protection Act, RCW 19.86.090.

City First also does not contest that a principal may be liable for its agent's violations of the duties imposed by these statutes. *See* ***Wilkinson v. Smith***, 31 Wn. App. 1, 6, 639 P.2d 768 (1982) (vicarious liability of principal for agent's violation of CPA), *rev. denied*, 97 Wn.2d 1023 (1982). City First instead argues that the jury's verdict lacks "a sufficient evidentiary basis," contending that it did not have "the right to control the manner and means of Mr. Loveless's work for Home Front Holdings." (City First Br. 31) However, the sufficiency of the evidence must be

[9] The foreclosure rescue scheme presented a textbook case of equity skimming: (1) an investor buys a residential property from a homeowner; (2) the home owner directly or indirectly finances all or part of the purchase price; (3) the owner's right to receive the balance of the purchase price is not secured by a lien on the property, or the investor encumbers the property with a mortgage superior to any lien of the homeowner; (4) the investor uses proceeds from the mortgage for his own benefit rather than for the property; and (5) the investor defaults on the mortgage within two years. RCW 61.34.020(b)(i)-(iv).

tested against the trial court's instructions, which establish the law of the case, and not by snippets of case law that City First cherry picks to support a contention that no respondeat superior liability can exist as a matter of law. *See* ***Noland***, 43 Wn.2d at 590.

City First ignores the substantial evidence that Loveless, like Mullen, was a City First employee, that City First gave Loveless and Mullen authority to represent to the public that Home Front Holdings, LLC, was affiliated with City First, and that City First benefitted from the relationship by reaping loan fees from Loveless's acts. (Exs. 8, 55) With City First's oversight and approval, Loveless and Mullen operated Home Front as City First branch offices, making loans on behalf of City First. (CP 736-749; 9/15 RP 52-53; *see* Exs. 59-60) City First employed Loveless as the branch manager at City First's Orem, Utah, Home Front branch. (9/15 RP 46, 84; Ex. 59(a)) Loveless and Mullen attended City First managers' meetings together. (CP 747) City First approved (and insisted on the right to approve) their solicitations and advertising. (CP 749)

City First gave Loveless a City First email account that he used to communicate with the Collings. (9/14 RP 56; Exs. 3-5) The Collings were put in touch with Loveless by another, unlicensed, City First employee, Spencer, after answering a direct solicitation and applying for a

loan with City First. (9/14 RP 22; 9/15 RP 12) Spencer told the Collings that Loveless was his manager at City First. (9/14 RP 28-29) The Collings had never even heard of Home Front until Loveless, using his City First email account, sent a final revised lease to them and directed that they make their lease payments to Home Front Holdings at the same address as City First's branch office. (9/14 RP 54, 123; 9/15 RP 45-46; Ex. 5)

Moreover, City First is liable for Loveless' actions because he was a *manager*, not just an employee. The principles that insulate an employer from respondeat superior liability for the intentional misconduct of an employee are "irrelevant" where "an owner, manager, partner, or corporate officer personally participates" in the misconduct at issue. ***Clayton v. Wilson***, 168 Wn.2d 57, 68, 227 P.3d 278 (2010) (member of marital community may be liable for sexual assault committed by other spouse, who is deemed a "manager" of the marital community).

City First contends that "Loveless served only himself and his businesses" because he benefitted from the second loan and received the Collings' rent payments. (City First Br. 36) But whether a servant's actions – including those amounting to an intentional tort – occur within the scope of employment is a question of fact, which the jury decided against City First in this case. ***Mason v. Kenyon Zero Storage***, 71 Wn.

App. 5, 11-12, 856 P.2d 410 (1993). The fact that Loveless's primary purpose was to benefit himself is irrelevant "unless it clearly appears that the servant could not have been directly or indirectly serving his master." ***Carmin v. Port of Seattle***, 10 Wn.2d 139, 154, 116 P.2d 338 (1941).

The test is whether Loveless's actions in entering into the loans were "expressly or impliedly authorized by the employer . . . [T]he employer is liable if the act complained of was incidental to the acts expressly or impliedly authorized." ***Carmin***, 10 Wn.2d at 153, *quoting* ***Poundstone v. Whitney***, 189 Wash. 494, 499, 65 P.2d 1261 (1937). An agent's conscious deceit may be within the scope of employment if the principal grants the agent authority to make the representations at issue. *See* ***Petersen v. Turnbull***, 68 Wn.2d 231, 233-34, 412 P.2d 349 (1966); *Restatement (2nd) Agency* §§ 230, 257.

Under the unchallenged instructions, now the law of the case, "the employee is acting within the scope of authority if the employee is performing duties that were expressly or impliedly assigned to him . . . [or] engaged in the furtherance of the employer's interest." (CP 851, Inst. No. 10) City First did not have to grant Loveless "authority to enter into sale and leaseback arrangements or . . . act as a landlord" (City First Br. 35-36) in order to be liable for his loan transactions. City First expressly authorized Loveless to market to homeowners who, like the Collings, were

in financial distress. City First profited from Loveless' loans, (Exs. 8, 55), which, as a matter of law, violated the Credit Services Organizations Act. (CP 371-77) The jury's finding that City First was liable for Loveless's illegal equity skimming and foreclosure rescue scam, whether in his capacity as lender, purchaser, or landlord, was supported by overwhelming evidence.

4. City First Is Independently Liable To The Collings On Their Numerous Claims.

In addition to its vicarious liability, City First was also independently liable to the Collings for violating the CSOA and the Consumer Protection Act, as well as for the torts of negligent supervision and conspiracy.

a. City First Is Not Exempt From The Credit Services Organizations Act.

The Credit Services Organizations Act (CSOA) prohibits those who purport to assist a borrower in preventing or delaying a foreclosure from making untrue or misleading representations, or counselling a borrower from making untrue or misleading statements. RCW 19.134.010(2); 19.134.020(3). It also imposes a bonding requirement, RCW 19.134.020(1), requires a detailed disclosure of consumer rights under state and federal law, RCW 19.134.040 and .050, and requires that any contract contain a five day cancellation notice. RCW 19.134.060. *See*

generally, Zachary E. Davies, *Rescuing the Rescued: Stemming the Tide of Foreclosure Rescue Scams in Washington*, 31 Seattle U. L. Rev. 353, 366 (2008).

City First concedes that it did not comply with the CSOA's requirements, but contends that it was "fully licensed" with the Washington State Department of Financial Institutions (DFI), and therefore is exempt under the CSOA's exclusion of persons "authorized to make loans or extensions of credit under the laws of this state . . . who is subject to regulation and supervision by this state." RCW 19.134.010(2)(b)(i).[10] But DFI's regulations in effect in 2006 (and currently) require that *each branch* of a company be licensed in

[10] City First did not claim that is was exempt under federal law until it attempted for the first time to submit evidence of its federal license after trial. The trial court struck its untimely submission. (CP 1862; 2/25 RP 6) City First has not assigned error to that decision or challenged it on appeal.

Washington if those branches do business in Washington.[11] This court should defer to the interpretation of this statute by the agency charged with enforcing it. ***Hama Hama Co. v. Shorelines Hearings Bd.***, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). The City First branches from which Loveless and Mullens operated in Utah were never licensed by the Washington DFI. (9/15 RP 180 (only City First's "home office" and branch in Gig Harbor were licensed); Ex. 61C)

The policy behind this remedial statute supports this restriction on the exemption. A lender reaping financial gain from distressed homeowners seeking to avoid foreclosure should not be able to evade the law's disclosure requirements by setting up multiple branches and soliciting Washington residents from out-of-state satellite offices. City First was not entitled to judgment as a matter of law.

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[11] WAC 208-620-380(1) (2006) ("All locations must be licensed. Any person that conducts business under the act with Washington residents must obtain a license *for all locations from which business is conducted*, including out-of-state locations, with the exception of those office locations providing only underwriting and back office services under WAC 208-620-310 (2006) (emphasis added); WAC 208-620-300 (2006) ("You are not required to maintain a physical presence in this state to get a license but *any location doing business under the act, wherever located, must be licensed.*") (emphasis added); WAC 208-620-250 (2006) ("A licensee must complete a consumer loan license application *for each consumer loan company branch office,* loan servicing location or direct solicitation location, and provide evidence of surety bond coverage for any additional branch. The director may require that all or some of the information provided in the original application be updated.") (emphasis added). Current law still requires registration for all branches and locations from which a lender solicits loans. WAC 208-620-251 ("All locations must be licensed . . . including out-of-state locations . . ."); *see also* WAC 208-620-252.

b. City First Is Liable Under The Consumer Protection Act.

The jury found City First liable for both per se violations of the CPA, RCW 19.86.090, and under the test set out in ***Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.***, 105 Wn.2d 778, 787-93, 719 P.2d 3531 (1986).[12] (*See* CP 868-77) A violation of the CSOA "is an unfair business practice as provided in chapter RCW 19.86." RCW 19.134.070(5). The evidence supports the CPA judgment on this ground alone.

City First is independently liable for its violation of the Consumer Loan Act (CLA),[13] which is also a per se CPA violation. RCW 31.04.208. Apart from these statutory grounds for CPA liability, City First is liable under the ***Hangman Ridge*** test for the deceptive practices of its unlicensed agent Spencer, who falsely assured the Collings that their loan

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[12] (1) An unfair or deceptive act, (2) in the conduct of trade or business, (3) that affected the public interest, and that (4) proximately caused (5) injury to business or property. *See* WPI 310.01.

[13] A violation of the CLA occurs if an entity licensed under that Act, or its officers, directors, employees, or independent contractors, does any of the following: (1) directly or indirectly employ any scheme, device, or artifice to defraud or mislead any borrower, to defraud or mislead any lender, or to defraud or mislead any person; (2) directly or indirectly engage in any unfair or deceptive practice toward any person; (3) directly or indirectly obtain property by fraud or misrepresentation; (4) fail to make disclosures to loan applicants as required by applicable state or federal law; or (5) make, in any manner, any false or deceptive statement or representation with regard to the rates, points, or other financing terms or conditions for a residential mortgage loan or engage in bait and switch advertising. RCW 31.04.027(1)-(4), (6), (7).

had been approved, and then referred them to Loveless in his capacity as a City First manager. City First's deceptive advertising affected the public interest and was the proximate cause of the Collings' injury to business or property under RCW 19.86.090. *See* ***Grayson v. Nordic Constr., Co., Inc.***, 92 Wn.2d 548, 599 P.2d 1271 (1979) (both corporation and its principal who directed deceptive advertising liable under CPA).

c. City First Is Liable For Its Negligent Supervision Of Its Employees.

City First does not address its liability for the negligent supervision of its employees. The tort of negligent supervision makes an employer who fails to exercise reasonable care in "hiring or retaining a servant who is incompetent or unfit" directly liable to an injured plaintiff. ***Haubry v. Snow***, 106 Wn. App. 666, 679, 31 P.3d 1186 (2001) (quotation omitted). Liability for negligent supervision is "entirely independent of the liability of the employer under the doctrine of respondeat superior." ***Haubry***, 106 Wn. App. at 679; ***La Lone v. Smith***, 39 Wn.2d 167, 171, 234 P.2d 893 (1951) ("the doctrine of *respondeat superior* is not involved because the issue is whether appellants were negligent in their retention of [the employee]").

Here, the jury was instructed that City First had "a duty to exercise reasonable supervision over all individuals engaged in the business of

residential mortgage loans on its behalf." (CP 857) It could comply with that duty only if it had "reasonable procedures in place to ensure that it provided adequate supervision." (CP 857) City First does not challenge this instruction or the sufficiency of the evidence to support the jury's verdict under this theory.

City First admitted that it had no policy handbook or manual and no written procedures for the supervision of loan originators. (9/15 RP 60) It had no procedures prohibiting employees from originating loans to themselves or engaging in the type of "foreclosure rescue" that resulted in the loss of the Collings' equity. (9/15 RP 186-87) The Collings' deal was the third foreclosure "rescue" in which Mullen or Loveless had purchased a home and leased it back to the seller. (CP 762-63) The jury's finding that City First is "independently liable to the Collings on their claim" (CP 899) should be affirmed on this ground alone.

d. City First Is Liable As A Co-Conspirator.

The jury also had ample evidence to find that City First conspired with Loveless and Mullen in Loveless's unlawful equity skimming scheme. The jury was instructed on the proper "clear and convincing" burden of proof without exception. (CP 882) Because the jury was given the proper evidentiary standard, this court applies the usual "substantial evidence" test to review the sufficiency of the evidence to support the

jury's verdict, and does not reweigh the evidence. *See* ***Marriage of Mueller***, 140 Wn. App. 498, 505, 167 P.3d 568 (2007), *rev. denied*, 163 Wn.2d 1043 (2008).

As the jury was instructed, again without exception, "[a]n action for civil conspiracy lies when there is an agreement by two or more persons to accomplish some purpose, not in itself unlawful, by unlawful means." (CP 879) *See* ***Sterling Bus. Forms, Inc. v. Thorpe,*** 82 Wn. App. 446, 451, 918 P.2d 531 (1996), *rev. denied*, 130 Wn.2d 1026 (1997). Under the unchallenged instructions, "proof of concert of action or other circumstances giving rise to a natural inference that the acts were done pursuant to a common design." (CP 880)[14]

Substantial evidence supports City First's liability under this standard. A jury could find that City First made the second loan to Loveless with knowledge that the lease actually signed by the Collings expressly prohibited further encumbrances. City First cannot rely on its own illegal destruction of that second loan file to argue that it could not have known that the lease existed. To the contrary, the spoliation of such critical evidence allowed the jury to draw an adverse inference that

[14] For instance, proof that one defendant had cooperated with another in forming a business that competed with the plaintiff, with knowledge that the co-defendant had solicited the plaintiff's customers in breach of a confidentiality agreement, was sufficient to raise a triable issue of fact of liability as a co-conspirator in ***Sterling Business Forms***, 82 Wn. App. at 453-54.

supports the Collings' testimony that they signed the lease and returned it to City First. *See* ***Pier 67, Inc. v. King County***, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977); *see also* ***Kronisch v. United States***, 150 F.3d 112, 130 (2d Cir. 1998) (applying "adverse inference" rule where "the most obvious source of such proof, if it were to exist at all, has been destroyed" by defendant and plaintiff introduces "some evidence tending to show that the document actually destroyed or withheld is the one as to whose contents it is desired to draw an inference.").

Further, City First, through its agent Mullen, knew that the Collings, not the fictitious "Munizes," occupied the Collings' home as tenants under a lease that prohibited Loveless's refinance of "investment" property. (Exs. 3, 5) It nonetheless facilitated Loveless's fraudulent loan. Substantial evidence supports the jury's verdict against City First.

B. The Trial Court Did Not Abuse Its Discretion In Denying City First A New Trial Because City First, Which Was Directly Liable To The Collings, Could Not Establish Misconduct, Prejudice, Or An Undisclosed "Mary Carter" Agreement.

1. This Court Reviews The Trial Court's Denial Of A New Trial Based On Allegations Of The Misconduct of Counsel For Abuse Of Discretion.

This court reviews for abuse of discretion the trial court's denial of City First's motion for a new trial. City First's argument that the trial court's denial of its motion was an "error of law" fails to acknowledge that

the judge who presided over the trial is "better positioned than another to decide" allegations of litigation misconduct. ***Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.***, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (quotation omitted). While this court "is tied to the written record," the trial court can evaluate first hand the nature of the alleged misconduct, including City First's allegation that the parties' testimony was tainted by collusion, and whether a covenant not to execute had any effect on the jury:

> The trial judge, by virtue of his favored position, should be accorded room for the exercise of sound discretion. He sees and hears the witnesses, the jurors, the parties, counsel, and any bystanders. He can evaluate first hand candor, sincerity, demeanor, intelligence, and any surrounding incidents; whereas, the reviewing court is tied to the written record.

Todd v. Harr, Inc., 69 Wn.2d 166, 168, 417 P.2d 945 (1966), *quoting* ***Baxter v. Greyhound Corp.***, 65 Wn.2d 421, 437, 397 P.2d 857 (1964).

2. The Trial Court Did Not Abuse Its Discretion In Denying The Motion For A New Trial Because Substantial Evidence Supports Its Findings That City First Suffered No Prejudice.

The trial court did not abuse its discretion in denying a new trial here because the covenant not to execute did not affect City First's liability in any way. To grant a new trial the trial court must find that the misconduct complained of prejudiced the party's right to a fair trial. In the

absence of prejudice, an order granting a new trial is an abuse of discretion. ***Trosper v. Heffner***, 51 Wn.2d 268, 317 P.2d 530 (1957) (reversing orders granting new trial). "The existence of a mere possibility or remote possibility of prejudice is not enough" to warrant a new trial. ***Spratt v. Davidson***, 1 Wn. App. 523, 526, 463 P.2d 179, 181 (1969) (reversing order granting new trial).

The jury found that City First was directly liable to the Collings, and imposed vicarious liability for Loveless's actions, not those of Mullen. Thus, the "release" of Mullen, whether disclosed or undisclosed, could not have prejudiced City First in any way. *See* ***Glover***, 98 Wn.2d at 720-23 (distinguishing between settlement of vicarious liability and direct liability claims against a principal for purposes of RCW 4.22.040 and .060). City First ignores (and does not assign error to) the trial court's memorandum findings that City First could not establish any prejudice from Mullen's execution of a covenant not to execute. (CP 1861 ("The judgment against City First is fully supported on its independent liability found by the jury (jury verdict questions, 5, 6 and 10).") The jury made separate awards of punitive damages against Mullen and City First under the CSOA. (CP 900) As the trial court found, "No reason appears to discharge City First from liability to Collings for its own acts that damaged Plaintiffs, all independent of what Mullen or Loveless did." (CP 1862)

While City First now argues on appeal that it was prejudiced because the jury's verdict was based "at least in part," on Mullen's testimony (City First Br. 11), City First itself read Mullen's deposition testimony in its entirety to the jury. (9/16 RP 17)[15] City First cannot complain about testimony that it invited the jury to consider. *See* ***Estate of Stalkup v. Vancouver Clinic, Inc., P.S.***, 145 Wn. App. 572, 589, 187 P.3d 291 (2008) ("Under the doctrine of invited error, counsel cannot set up an error at trial and then complain of it on appeal.") (quotation omitted); ***Sdorra v. Dickinson***, 80 Wn. App. 695, 703, 910 P.2d 1328 (1996) (abuse of discretion to grant new trial where party invited the error relied upon in its CR 59 motion).

Further, City First fails to identify any portion of the Mullen deposition that was false, or unfairly prejudicial.[16] Instead, City First attempts to establish prejudice based on its in-house counsel's hearsay statements regarding the content of Collings' closing argument, which allegedly emphasized Mullen's failure to appear at trial. (City First Br. 22) City First acknowledges that the allegedly improper argument was unreported (City First Br. 22-23 n.5), and the trial court struck City First

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[15] Mullen's deposition testimony mirrored his written discovery responses in May 2010, over two months before his deposition. (CP 730-95, 1172-73, 1188-1210)

[16] To the contrary, City First's argued to the trial court that "City First has never suggested that Mr. Mullen perjured himself . . . ." (CP 1821)

counsel's hearsay declaration, and questioned the accuracy of City First's counsel's recollection of the unreported closing argument. (2/25 RP 6-7 ("I don't remember that.")) In the absence of a record, City First's questionable assertions about what was or was not said in closing argument must be rejected by this court. ***Bros. v. Pub. Sch. Employees of Wash.***, 88 Wn. App. 398, 409, 945 P.2d 208 (1997) ("The appellant bears the burden of producing a record from which the appealed issues can be decided."); ***Hyatt v. Sellen Const. Co., Inc.***, 40 Wn. App. 893, 897, 700 P.2d 1164 (1985) ("We will not overrule the trial court on what appears to be a factual issue without the benefit of the full record."); *see* RAP 9.3.

City First also alleges that the jury "was *affirmatively misled"* about the "true posture of the parties" because it was instructed that City First could "only act through its officers, managers, and employees." (City First Br. 24, *quoting* CP 837-90 [sic]) (emphasis in original) There was nothing "erroneous or misleading" about this statement of black letter law. And since the jury found that City First was vicariously liable only for the damages caused by defendant Loveless, but not Mullen, City First's contention that the jury erroneously imposed vicarious liability based on the actions of an agent who had been released by operation of law is directly refuted by the record.

Finally, City First cites to the fact that "Collingses' counsel drafted and submitted a declaration from the Mullens' counsel" in response to City First's motion for a new trial as evidence of "a close relationship between previously adverse parties." (City First Br. 24) This is no more evidence that Mullen provided false testimony or maintained some financial interest in the Collings' recovery than was Mullen's declaration provided by City First post-trial evidence of a close relationship between City First and Mullen. (CP 1772-74) Neither Mullen's testimony nor the jury's verdict was in any way tainted by a covenant not to execute.

3. The Collings Did Not Enter Into A "Mary Carter Agreement" With Mullen.

City First's factual contention that Collings and Mullen had a "collusive" agreement that allied Mullen's interest with the Collings or gave Mullen an interest in the Collings' recovery is without any factual support in the record. Moreover, City First's legal argument – that plaintiff's counsel had an ethical obligation as a matter of law to disclose the covenant not to execute in the absence of a discovery request – has no basis in case law, statute or public policy.

A "Mary Carter" agreement realigns a settling defendant with the plaintiff, by making "what one party receives contingent on a certain outcome produced at trial." (CP 386) *See* Phillips, *Looking out for Mary*

Carter: Collusive Settlement Agreements In Washington Tort Litigation, 69 Wash. L. Rev. 255, 256 (1994) ("Mary Carter" agreement is one in which "the settling defendant retains a financial stake in the plaintiff's recovery. . .") (City First Br. 21); ***Booth v. Mary Carter Paint Co.***, 202 So.2d 8, 10 (Fla. App. 1967) (plaintiff agreed to limit settling defendant's exposure up to a maximum of $12,500 and refrain from collecting anything from the settling defendant if plaintiff's recovery exceeded $37,500 from the solvent co-defendant); ***Romero v. West Valley School Dist.***, 123 Wn. App. 385, 389-90, 98 P.3d 96 (2004) (characterizing agreement giving settling defendant the right to recover half of everything collected by plaintiff in excess of the settling defendant's insurance limits, up to the amount of the settling defendant's personal financial contribution, as "a classic 'Mary Carter' agreement."), *rev. denied*, 154 Wn.2d 1010 (2005). The evil of Mary Carter agreements is that the finder of fact does not know that a testifying defendant's true interests lie in supporting the plaintiff's recovery. That critical fact is absent here, where the covenant not to execute was not contingent on any particular testimony, nor was the nominal $500 consideration dependent upon the Collings' recovery against any other defendant.

In ***McCluskey v. Handorff-Sherman***, 68 Wn. App. 96, 841 P.2d 1300 (1992), *aff'd*, 125 Wn. 2d 1, 882 P.2d 157 (1994) (City First Br. 16),

this court affirmed the denial of a non-settling defendant's motion for a new trial. The trial court had denied the State's motion for a new trial in a highway design case, after the co-defendant driver gave testimony that largely supported the plaintiff and was damaging to the State. The trial court found no evidence of any collusion or Mary Carter agreement between the driver and the plaintiff. This court affirmed, holding the trial court's finding was not an abuse of discretion. While the ***McCluskey*** court noted in dicta that collusive agreements between a plaintiff and a settling defendant should be disclosed so that the factfinder can evaluate "the credibility of witnesses," 68 Wn. App. at 104, this court rejected the motion for a new trial because the State failed to prove that there was any collusive agreement between the plaintiff and the co-defendant driver. If ***McCluskey*** is "dispositive" (City First Br. 21), it mandates affirmance of the trial court's order denying a new trial.

The out-of-state cases cited by the ***McCluskey*** court and by City First make clear that disclosure of *collusive* agreements, not *all* agreements between a plaintiff and a defendant, preserves the "integrity of the trial process." ***Daniel v. Penrod Drilling Co.***, 393 F. Supp. 1056,

1059 (E.D.. La. 1975).[17] City First contends that the terms of the covenant not to execute are "not materially different from the agreements" in these cases, (City First Br. 21) but fails to discuss the collusive terms in each of the out-of-state cases upon which it relies.

In Washington, a trial court abuses its discretion in admitting evidence of a co-defendant's settlement in the absence of clear evidence that the agreement produced an incentive for the witness to change his or her testimony. ***Northington v. Sivo***, 102 Wn. App. 545, 550, 8 P.3d 1067 (2000) ("In the absence of clear conflict in a witness's testimony or a circumstance in which the settlement's content provides a motive for the witness to offer biased testimony, ER 408 does not permit the jury to consider settlement evidence."). Courts from other states also recognize that an agreement that provides no incentive for collusion and that leaves co-defendants with the same incentive to blame each other but united in

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[17] In ***Daniel***, 393 F. Supp. at 1058, the defendant agreed with plaintiff on the first day of trial "not to maintain an aggressive, destructive posture vis-à-vis the plaintiff's case, its witnesses, etc." In ***Ward v. Ochoa***, 284 So.2d 385, 387 (Fla. 1973), the plaintiffs refused to produce an agreement in discovery and the Court reversed, holding that the factfinder was entitled to consider an "agreement [that] shows that the signing defendant will have his maximum liability reduced by increasing the liability of one or more co-defendants." *Accord*, ***Maule Industries, Inc. v. Rountree***, 284 So.2d 389 (Fla. 1973) (following ***Ward***). In ***Ratterree v. Bartlett***, 238 Kan. 11, 24, 707 P.2d 1063, 1073 (1985), the agreement provided "that any money recovered by Ratterree from appellants over and above $150,000 would reduce Hernandez' obligation to Ratterree dollar for dollar regardless of the actual verdict returned against Hernandez." (City First Br. 22)

attempting to minimize the jury's assessment of damages is inadmissible to establish bias.[18]

City First's contention that a lawyer's ethical duty of "candor" require disclosure of *any* settlement lacks any support as well. Attorneys are under no ethical obligation to disclose evidence to an opposing party in the absence of a discovery request. *See* ***Sherman v. State***, 128 Wn.2d 164, 184-85, 905 P2d 355 (1995) (no ethical duty under RPC 3.4 to disclose information to opposing party); ***Zurich North America v. Matrix Service, Inc.***, 426 F.3d 1281 (10th Cir. 2005) (failure to disclose material information in absence of discovery request is not a fraud on the court or misconduct justifying relief from judgment). Parties enter into settlements all the time. They are encouraged as a matter of public policy. *See* ***City of Seattle v. Blume***, 134 Wn.2d 243, 258, 947 P.2d 223 (1997). As a result, and in order to probe the issues of bias, mitigation of damages and other potentially relevant issues, discovery requests routinely include questions regarding payments to or from other sources and agreements and

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[18] *See, e.g.*, ***Hodesh v. Korelitz***, 123 Ohio St. 3d 72, 914 N.E.2d 186 (2009) (undisclosed "high-low" agreement between plaintiff and one defendant not collusive and did not warrant new trial); ***Soria v. Sierra Pac. Airlines, Inc.***, 111 Idaho 594, 726 P.2d 706, 717 (1986) (refusing to require admission of agreement where the agreement does not "create an incentive on an agreeing defendant's part to increase the plaintiff's damage award"); ***Sequoia Mfg. Co., Inc. v. Halec Const. Co., Inc.***, 117 Ariz. 11, 570 P.2d 782, 795 (1977) (agreement should be disclosed to jury only when settling defendant can improve his financial position by ensuring a plaintiff's verdict above a certain amount).

documents between parties, be they joint defense agreements or settlements. If City First wanted to know about the issues that it now claims were relevant, all it had to do was ask. But it asked no questions of Mullen at his deposition, and did not ask the Collings about payments or agreements with other parties.

4. RCW 4.22.060(1) Requires A Settling Defendant, Not Plaintiff, To Obtain A Reasonableness Determination.

City First's argument that the Collings violated the Tort Reform Act, RCW 4.22.060(1), by failing to disclose the covenant not to execute to the court and all other parties prior to trial in the absence of a discovery request is also without merit. RCW 4.22.060(1) is part of the 1986 Tort Reform Act's chapter dealing with "contributory fault." Most of the provisions of RCW ch. 4.22 define "fault" and address the consequences of a jury's finding of fault. *See, e.g.*, RCW 4.22.015, RCW 4.22.070. *See* ***Tegman v. Accident & Med. Investigations, Inc.***, 150 Wn.2d 102, 115, 75 P.3d 497 (2003) (jury cannot assign "fault" under RCW 4.22.070 to defendants who are liable for intentional torts). No Washington court has

applied RCW 4.22.060 in a case that does not allege liability on the basis of "fault" as it is defined in RCW 4.22.015.[19]

Even if RCW 4.22.060(1) applies here, City First's argument that the Collings were required to notify the other defendants of a covenant not to execute lacks any support in the language of the statute.[20] RCW 4.22.060(1) by its terms requires a *settling defendant,* not the plaintiff, to give notice of intent to settle at any time before final judgment:

> 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.

RCW 4.22.060(1) (emphasis added). If there was an obligation to provide notice to City First, the statute places that duty on Mullen, not the Collings.

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[19] While holding that "fault" under RCW ch. 4.22 does not include intentional torts, the Supreme Court in ***Schmidt v. Cornerstone Investments, Inc.***, 115 Wn.2d 148, 161-62, 795 P.2d 1143 (1990), affirmed an offset based on the reasonable value of a settlement under RCW 4.22.060 in a CPA case, but specifically noted that the plaintiffs' claims for intentional torts were joined with their fault based claims.

[20] City First claims that under ***Villas at Harbour Pointe Owners Ass'n, ex. rel. Construction Assocs., Inc. v. Mutual of Enumclaw Ins Co.***, 137 Wn. App. 751, 761, 154 P.3d 950 (2007), *rev. denied*, 932 P.2d 1266 (2008), "the claimant must provide five days notice of the intent to settle to all other parties" (City First Br. 20), but that case does not support this tortured interpretation of the plain language of the statute. The ***Villas at Harbour Pointe*** court held that a subcontractor's insurer was bound by its insured's settlement in a subsequent bad faith action where the insurer had notice and intervened at the reasonableness hearing. The court held that RCW 4.22.060(1) did not entitle a subcontractors' insurer to five days notice of a reasonableness hearing because it was not a party to the underlying litigation. 137 Wn. App. at 761.

Placing the burden of providing notice on the settling defendant furthers the purpose of the statute, which is to obtain a "hearing on the issue of the reasonableness of the amount paid." RCW 4.22.060(1).[21] The trial court's determination that a settlement is reasonable extinguishes contribution rights and "protect[s] the nonsettling defendant from paying more than his or her share of damages." ***Adams v. Johnston***, 71 Wn. App. 599, 604, 860 P.2d 423, 869 P.2d 41 (1993), *rev. denied*, 124 Wn.2d 1020 (1994). The reasonableness determination has no purpose where, as here, liability is not based on a party's relative "share" of damages because the jury makes no findings of comparative fault under RCW 4.22.070.

The trial court correctly held that even if RCW ch. 4.22 applied, a release of Mullen would release City First from joint and several liability for its agent's actions only "if Mullen was solvent at the time of the agreement with Plaintiffs," which it found "unlikely." (CP 1861; *see also* CP 1162) The Collings relied upon Mullen's representation, memorialized in the covenant itself, that "defendants Mullen do not have the financial ability sufficient to pay a judgment of any significant value or

[21] The statute also allows notice and the resulting reasonableness hearing to occur after trial and before final judgment. *See* ***Brewer v. Fibreboard Corp.***, 127 Wn.2d 512, 901 P.2d 297 (1995) (approving settlement entered into one year prior to trial where notice was given to defendant after trial). This court has held that a reasonableness determination may be made even after the conclusion of an appeal. *See* ***Coulter v. Asten Group, Inc.***, 135 Wn. App. 613, 627, 146 P.3d 644 (2006), *rev. denied*, 161 Wn.2d 1011 (2007).

defend this action at trial." (CP 1165; *see also* CP 1212 ("[D]uring my representation of the Mullens, it became apparent that the Mullens were insolvent and would be unable to pay any kind of judgment that the Collings might obtain at trial."), 1837-39 ("Mr. Mullen still has not paid my law firm the fees for representing him and Malinda Mullen") Mullen's deposition, which City First read to the jury at trial, is consistent with that representation. (CP 784-85: Mullen lacked the "means available to fight" with other homeowners over a similar lease transaction).

The trial court gave City First the opportunity to litigate the reasonableness of the settlement or Mullen's solvency once it learned of the covenant, but City First declined. (CP 1861) That decision says much more about the impact of the Mullens' covenant than City First's hyperbole in its opening brief. The trial court did not abuse its discretion in its denial of City First's motion for a new trial.

C. The Trial Court Did Not Abuse Its Discretion In Its Award Of Attorney Fees.

City First challenges the amount of fees awarded by the trial court to the Collings, claiming that the award is excessive and that the court failed to exclude "wasteful hours," failed to properly allocate fees between the defendants, and improperly granted a 1.2 multiplier. The trial court entered extensive findings of fact in support of its award, as required by

Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998), and City First has not assigned error to any of the court's individual findings in support of its award. RAP 10.3(g). *See* Findings of Fact 5, 9 (allocation); 6, 8 (reasonable fees, economical use of time), 11 (120% multiplier) (CP 1979, 1981). City First's challenge should be rejected for this reason alone. If the court addresses the amount of the award on the merits, however, the trial court's fee award, and its 1.2 enhancement of the lodestar, is reviewed for abuse of discretion. ***Ethridge v. Hwang***, 105 Wn. App. 447, 461-62, 20 P.3d 958 (2001).

On appeal City First distances itself from co-defendant, U.S. Bank, claiming that issues relating to transfer of mortgage loans and foreclosure were the basis for the multiplier. But as the trial court found in unchallenged fee finding 10 (CP 1981), City First and U.S. Bank worked in concert in their defense. *See* Subs 62-63. "[T]he court is not required to artificially segregate time in a case, such as this one, where the claims all relate to the same fact pattern, but allege different bases for recovery." ***Ethridge***, 105 Wn. App. at 461 (rejecting challenge to court's failure to segregate), *citing* ***Blair v. Washington State Univ.***, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987). The Collings' proof of City First's fraud was inextricably linked to the Collings' argument that the Loveless Loan and deed of trust were void. The cases cited by City First do not address

allocation or segregation of fees. *See* ***Christie-Lambert Van & Storage Co., Inc. v. McLeod***, 39 Wn. App. 298, 693 P.2d 161 (1984); ***Harbison v. Garden Valley Outfitters, Inc.***, 69 Wn. App. 590, 849 P.2d 669 (1993); ***Seattle-First Nat'l Bank v. Washington Ins. Guar. Ass'n***, 94 Wn. App. 744, 972 P.2d 1282 (1999) (City First Br. 45-46). Even if the U.S. Bank claims were entirely unrelated to City First's fraud and statutory violations, the trial court's award of fees should be affirmed because City First's wrongful conduct required the Collings to defend their title in litigation against U.S. Bank. City First is liable for the resulting fees under the "ABC Rule." *See* ***Flint v. Hart,*** 82 Wn. App. 209, 224, 917 P.2d 590 (1996) ("An equitable ground [for fees] exists when the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others. ") (citation omitted).

City First finally challenges the trial court's modest fee enhancement, but ignores the discretionary nature of this decision as well. ***Ethridge***, 105 Wn. App. at 462 (rejecting challenge to 1.25 multiplier). The trial court found that the Collings' counsel "carried the entirety of the fees and costs for the Collings" for two and a half years. (CP 1981) The contingent nature of representation supports the trial court's fee enhancement. ***Tribble v. Allstate Property and Cas. Ins. Co.***, 134 Wn.

App. 163, 171-72, 139 P.3d 373 (2006). The trial court did not abuse its discretion in its award of attorney fees.

D. The Collings Are Entitled to Their Fees On Appeal.

City First concedes that the Collings are entitled to prevailing party fees under the CPA, RCW 19.86.090, and the Credit Services Organizations Act, RCW 19.134.080. Just as these statutes mandated an award of fees below, they require an award of attorney fees on appeal upon affirmance of the trial court's judgment. RAP 18.1.

V. CONCLUSION

The judgment against City First was based on numerous theories, any and all of which were supported by unchallenged instructions, substantial evidence and the careful exercise of the trial court's discretion. This court should affirm and award the Collings their fees on appeal.

Dated this 30th day of September, 2011.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 3, 2011, I arranged for service of the foregoing Brief of Respondents Collings In Response To Brief Of City First Mortgage Services, LLC, to the court and to the parties to this action as follows:

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