63758-4

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No. 63758-4-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

DICK PELASCINI, CECELIA PELASCINI; THOMAS BOBOTH; and PACIFIC SHORELINE MORTGAGE, INC.

Appellants

v.

VILA PACE-KNAPP
Respondent

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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RESPONDENT'S REPLY TO APPELLANTS' OPENING BRIEF

Melissa A. Huelsman,
WSBA# 30935
Attorney for Respondent
705 Second Avenue, Suite 1050
Seattle, WA 98104
(206) 447-0103

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THIS COURT CLEARLY STATED THE APPELLANTS VIOLATED THE WASHINGTON CONSUMER PROTECTION ACT AND REQUIRED THE TRIAL COURT TO RECALCULATE DAMAGES WITHOUT USING THE RESCISSION REMEDY AND TO FIX ATTORNEYS FEES AND COSTS.

The Court of Appeals, Division One used strong language to affirm the trial court's determination that conduct of Appellants Dick Pelascini, Cecelia Pelascini, Thomas Boboth and Pacific Shoreline Mortgage, Inc. (hereinafter, collectively, "Appellants") violated the Consumer Protection Act, RCW 19.86 ("CPA"). The Supreme Court declined to review its decision and the case was remanded to the trial court to fix the amount of attorneys' fees and costs and to recalculate the damages amount without using the remedy of rescission. There was NOTHING in the decision by the Court of Appeals which challenged the amount of the damages determined by the trial court but rather, it declined to allow the trial court to apply the rescission remedy. Thus, it was entirely appropriate for the trial court to simply recalculate the damages available to Ms. Pace-Knapp for violations of the CPA using the amounts for damages which it had already calculated. In addition, it was proper for the trial court to make the determination of the appropriate amount of attorneys' fees and costs to be awarded to Ms. Pace-Knapp for prevailing on her claim of a violation of the CPA. The trial court properly used the previously fixed damages amounts in recalculating the damages award and thus, its decision should stand. Similarly, the trial court properly evaluated Ms. Pace-Knapp's claims for attorneys fees and costs and entered a judgment amount, as well as awarding her a Lodestar multiplier of 15%, which was supported by the appropriate factual

findings. CP 181-185.

Unfortunately, the Appellants continue to do everything within their power to drag this case out and to cause Ms. Pace-Knapp to incur additional and unnecessary attorneys' fees and costs. After the trial court reviewed all of the relevant briefing and revisited the factual decisions it had made following trial, it held a hearing on May 22, 2009, during which Ms. Pace-Knapp and the Appellants had an opportunity to argue their respective positions. The Court issued a very specific oral ruling and asked counsel for Ms. Pace-Knapp to prepare an Judgment which was consistent with the oral ruling. CP 155-169; 178-180; 181-185. Counsel for Ms. Pace-Knapp prepared a Judgment which she believed was exactly in conformity with the oral ruling made by the trial court. Ms. Pace-Knapp noted the proposed Judgment for presentment and served those pleadings upon counsel for the Appellants. *Id.* The Appellants did file a Response to the Notice and Motion of Presentment which was nothing more than rearguing their points rather than simply advising the Court as it whether the proposed Judgment was in conformity with the Court's oral ruling. *See,* Motion for Remand filed in this case ("Motion for Remand"). Counsel for Ms. Pace-Knapp received this Response but did not file a Reply because she believed it was more appropriate for the trial court to simply determine whether the proposed Judgment was correct or needed revision. *Id.*

Apparently the trial court did not receive the Response filed by the Appellants and signed the Additional Findings Order on June 12, 2009, but entered the Judgment on June 22, 2009. The Court noted over her signature that the Motion for Presentation had been

unopposed. *See,* Motion for Remand at 4-6. Unfortunately, the bailiff for the trial court did not send a copy of the signed Judgment to counsel for Ms. Pace-Knapp until June 22, 2009, at which time it was faxed to her offices. *Id.* There was some misunderstanding about whether counsel for the Appellants had also received a copy of the Judgment and finally on June 29, 2009 it became clear that the Appellants had not yet received a copy of the Judgment. *Id.* As it was clear that the trial court had not reviewed the Response filed by the Appellants prior to signing the Judgment, counsel for Ms. Pace-Knapp expected the Appellants to take immediate steps to correct the situation. *Id.* Instead the Appellants waited ten (10) days and then filed a Notice of Appeal on July 8, 2009. *Id.*

The trial court, realizing its error after the Notice of Appeal was filed, initiated a conference call between the attorneys for the parties trying to ascertain how best to proceed under the circumstances. The call took place on July 15, 2009 and counsel for the Appellants insisted that he was proceeding with the appeal even though the Order was not yet a proper final order. *Id.*

Counsel for Ms. Pace-Knapp filed a Motion with this Court seeking to remand the case back to the trial court for entry of a final order. In Response, the Appellants took the position that they were satisfied with using the Judgment which was entered as a final order in this case. *See,* Appellants' Response to Motion for Remand. Therefore, Ms. Pace-Knapp is proceeding with participating in this appeal based upon the Appellants' agreement that the Judgment is a final Order which triggered their timeline for appealing.

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A. STATEMENT OF THE CASE

Ms. Pace-Knapp filed suit against the Defendants and Windermere Real Estate/Bellevue Commons, Inc. after she was evicted from her home of more than 20 years following entry into a fraudulent real estate transaction which resulted in the loss of ownership of her home.[1] Ms. Pace-Knapp essentially alleged that the Appellants had engaged in a "foreclosure rescue scheme" which deprived her of her home and all of the equity therein. CP 1-9; 10-18. After a lengthy bench trial, Ms. Pace-Knapp prevailed on her claims for fraud in the inducement and violations of the Consumer Protection Act ("CPA"). *Id.*

In its Findings of Fact, the trial court made numerous very specific findings as to Ms. Pace-Knapp's vulnerability and the unsavory and deceptive actions that the Appellants used to acquire title to her home and all of its equity. When entering its decision in support of the trial court's finding for violations of the CPA, this Court noted,

> [T]he trial court found that Pace-Knapp reasonably interpreted the Pelascinis' promises to mean that they would refinance her home, which means she would continue to own it. Taking the unchallenged findings as true, we conclude that the Pelascinis deceived Pace-Knapp when they promised her that they would help her 'save' her home and implied that they would refinance her loan. Simply stated, the point is that they saved her home for themselves so that they would not have to bid at the trustee's sale. They did not help her save her home for her, as suggested. **The Pelascinis' practice of preying on this and other vulnerable home owners on the eve of foreclosure is the type of practice likely to deceive future distressed owners in the same manner.**

[1] Defendant Windermere Real Estate/Bellevue Commons, Inc. was dismissed from the lawsuit after summary judgment on the eve of trial and is not party to this appeal.

Opinion in Case No. 59321-8-I at 5 (emphasis added) (hereinafter "Opinion").

Ultimately, the trial court determined that the proper remedy for the Defendants' fraudulent inducement was rescission and also awarded damages for the violations of the CPA by entering a Final Judgment on December 1, 2006. CP 1-9; 10-18. On appeal, this Court determined that the finding for fraud in the inducement claim was incorrect as was the use of the rescission remedy, but it strongly affirmed the finding of violations of the CPA, remanding the case back to the trial court for recalculation of damages without the use of rescission and to determine the correct amount of attorneys fees and costs. Opinion at 8-12. Because the trial court had utilized the remedy of rescission on her fraud in the inducement claim, she was not awarded money damages and the trial court held that it could not treble her damages, as allowed under the CPA. This did not preclude the award of attorneys fees and costs available under the statute, which was affirmed on appeal by this Court, citing to *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990). Opinion at 8. However, since the rescission remedy was not going to be utilized on remand, it was clear that Ms. Pace-Knapp would be awarded money damages and would be therefore entitled to treble damages under the CPA. *Id.*

The Appellants sought review from the Supreme Court, which was denied. CP 99. Thereafter, Ms. Pace-Knapp brought a Motion before the trial court to put the matter back on its calendar so that it could take up the matters assigned by the Court of Appeals. Motion for Remand at 3-4. After it was back on the trial court's calendar, the parties

submitted their briefing and appeared in court for oral argument on May 22, 2009. Following argument at that hearing, the trial court entered her findings orally and thereafter instructed counsel for Ms. Pace-Knapp to prepare a Judgment consistent with her findings. CP 178-180; 181-185.

Consistent with Ms. Pace-Knapp's position throughout the briefing process, the trial court used the dollar values it had fixed originally following trial as this Court had not found any fault with the manner in which the trial court reached those valuations nor in the dollar amounts fixed by the trial court. *Id.* Thus, the trial court found that Ms. Pace-Knapp lost equity in the total amount of $54,747.00, after deducting the amount paid by the Appellants to Ms. Pace-Knapp and other parties from the property's fair market value, which it had fixed at $226,100. CP 14-15; 183. The trial court also found that the Appellants had charged Ms. Pace-Knapp a total of $1,200.00 in excess rent during the years in question and added that amount to her total damages. *Id.* Further, because the trial court was required by this Court's ruling to calculate Ms. Pace-Knapp's damages as money damages, it was free to award her treble damages under the CPA, which were capped at $10,000, in addition to the attorneys fees and costs. *Id.*

In addition to these damages, the trial court awarded pre-judgment interest to Ms. Pace-Knapp in the amount of $43,579.00, since her damages could be fixed and measured prior to entry. The trial court calculated the interest owed from the date of the transfer of Ms. Pace-Knapp's home to June 12, 2009, the date the trial court entered its Additional Findings of Fact and Conclusions, and Judgment. *Id.*; CP 178-179.

This Court very specifically awarded Ms. Pace-Knapp her attorneys fees and costs because she was the "substantially prevailing party" and because she met "each element of the CPA." Opinion at 8, 12. The trial court considered arguments about Ms. Pace-Knapp's attorneys fees and costs and entered very specific factual findings regarding the attorneys fees and costs which were requested. CP 178-180; 181-185. Ms. Pace-Knapp requested attorneys fees and costs for trial of the case and all work prior to trial in the total amount of $95,992.00. CP 184. In addition, after making factual findings in support of an award of a lodestar multiplier, the trial court awarded Ms. Pace-Knapp an additional 15%. *Id.* Consistent with this Court's Opinion, the trial court also awarded Ms. Pace-Knapp her attorneys fees and costs on appeal of $16,532.50. CP 184; CP 41-43. It appears the trial court did include amounts for work expended on the Supreme Court review and it is up to this Court to determine whether that portion of the award is appropriate, in light of the Supreme Court's Order. CP 34-65; 178-180; 181-185.

Consistent with her entitlement to attorneys fees and costs in connection with bringing this case to trial and prevailing on appeal, Ms. Pace-Knapp sought from the trial court her attorneys fees and costs for bringing the motion for attorneys fees and for fixing the amount correct amount of damages. CP 184. The trial court approved these fees as well. CP 178-180; 181-185. The trial court also awarded Ms. Pace-Knapp her costs in the amount of $2,108.93. CP 184-185. It should be noted that the trial court was very careful about the award of costs and denied Ms. Pace-Knapp amounts for "service of process" to which she was entitled under the statute because they were labeled as "legal

messenger" fees on the invoicing. *Id.* This is but one example of the efforts at adherence to the statutory requirements which the trial court evidenced in making her ruling. There was an error by the trial court in adding duplicative interest, as noted below, but that is nothing more than an error. The rest of the trial court's calculations are precise and supported by a factual finding.

B. STANDARD OF REVIEW

An appellate court should independently determine whether the findings of fact support the conclusions of law. *Crystal China and Gold Ltd. v. Factoria Center Investments, Inc.*, 93 Wn.App. 606, 610, 969 P.2d 1093 (1999); *American Nursery Products, Inc. v. Indian Wells Orchards,* 115 Wn.2d 217, 222, 797 P.2d 477 (1990); *Martin v. Seattle,* 111 Wn.2d 727, 733, 765 P.2d 257 (1988); and *Persing, Dyckman & Toynbee, Inc. v. George Schofield Co., Inc.,* 25 Wn.App. 580, 582, 612 P.2d 2 (1980). Here, the trial court's factual findings support its award of damages to Ms. Pace-Knapp and they are consistent with the legal requirements for claims brought under the CPA.

Ms. Pace-Knapp concurs with the Appellants that conclusions of law are reviewed *de novo*, as are the application of the facts to the law. *Id.; see also, Skamania County v. Columbia River Gorge Commission,* 144 Wn.2d 30, 42, 26 P.3d 241 (2001). Here though, the record is clear that the trial court's award resulted from the proper application of the facts to the law. In addition, a trial court's determination of the amount of an attorneys' fee award is reviewed under the much higher standard of an abuse of discretion. *Progressive Animal Welfare Society v. University of Washington,* 114 Wn.2d 677, 688,

790 P.2d 604 (1990). Unfortunately for Appellants, the trial court utilized the criteria laid out for it by the Washington Supreme Court when awarding damages to Ms. Pace-Knapp under the CPA and in fixing the proper amount of attorneys fees and costs to which she is entitled.

C. ARGUMENT AND AUTHORITY

I. THE TRIAL COURT'S DETERMINATION OF THE PROPER AMOUNT OF ATTORNEYS FEES AND COSTS AND ITS APPLICATION OF THE LODESTAR MULTIPIER IS APPROPRIATE IN THIS CASE.

The U.S. Supreme Court has explained the proper method for calculation of an award of attorney's fees:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. The calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services.

Hensley v. Eckerhart, 461 U.S. 424, 433; 103 S. Ct. 1933, 1939; 76 L. Ed. 2d 40 (1983). So, this is the place to start: "the number of hours reasonably expended on the litigation multiplied by the reasonable hourly rate", which is exactly where Ms. Pace-Knapp started on her request. She provided the trial court with a record of all of her attorneys' time in litigating the case through to trial, as well as all time expended thereafter on appeals and post-trial work. CP 34-65; 113-122. Ms. Pace-Knapp's attorney identified the basis for her hourly rate and the fact that her rate had been approved by other trial courts, and asked the trial court in this case for an award on that basis, exactly as she is required to

do. *Id.* More important than her request, was the fact that the trial court used this is the correct criteria for fixing the amount of Ms. Pace-Knapp's attorneys fees and costs, as required under the law.

The Washington Legislature was very clear when writing the Consumer Protection Act: an award of attorneys fees to prevailing plaintiffs is mandatory, even if the damages award is minimal. *Sato v. Century 21,* 101 Wn.2d 599, 681 P.2d 242 (1984); *St. Paul Ins. Co. v. Updegrave*, 33 Wn.App. 653, 656 P.2d 1130 (1983); *Talmadge v. Aurora Chrysler Plymouth, Inc.,* 25 Wn. App. 90, 605 P.2d 1275 (1979); RCW 19.86, *et seq.* The purpose of this is to encourage the bringing of these cases by attorneys who may be dissuaded from doing so if they are unable to obtain reasonable compensation for their time and effort. Specific monetary damages are not even necessary but a court is nevertheless required to award a prevailing plaintiff his or her attorneys' fees. *Mason v. Mortgage America,* 114 Wn.2d 842, 792 P.2d 142 (1990). *See also, Banuelos v. TSA Washington, Inc.,* 134 Wn.App. 603 (2006); *Keyes v. Ballinger,* 31 Wn. App. 98, 639 P.2d 832 (1980). This Court acknowledged this long held standard in Washington and noted that it applied in this case in its Opinion. Opinion at 8.

The proper method of determining the amount of the attorneys' fee award is for the Court to consider the time required to litigate the case, novelty and difficulty of the questions presented by the case, the character of the services furnished, the prevailing rates for attorneys with similar experience, etc. *Bowers v. Transamerican Title Ins.,* 100 Wn.2d 581, 675 P.2d 193 (1983). Further, although attorneys fees under the CPA should

not be awarded for wholly non-CPA type claims, there is no need for the court to artificially segregate time where all of the claims in the case relate to the same set of facts, as was the case here. *Hensley v. Eckerhart, supra*; *Hume v. American Disposal Co.,* 124 Wn.2d 656, 880 P.2d 988 (1994), *cert. denied sub nom.,* 513 U.S. 1112. 115 S.Ct. 905, 130 L.Ed.2d 788 (1995); *Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677 (2006) (no segregation required where the claims are intertwined); *Etheridge v. Hwang,* 105 Wn.App. 447, 461 (2001); *Smith v. Behr Process Corp.,* 113 Wn.App. 306 (2002); *Safeco Ins. Co. v. JMG Restaurants,* 37 Wn. App. 1, 680 P.2d 409 (1984). In *Blair v. Wash. St. Univ.*, 108 Wn.2d 558, 740 P.2d 1379 (1987) and *Brock v. Tarrant,* 57 Wn. App. 562, 789 P.2d 112, *review denied,* 115 Wn.2d 1016, 802 P.2d 126 (1990), Washington courts allowed attorneys fees in total because there was no reasonable means of segregating the compensable claims from the non-compensable claims. *Id.*

Ms. Pace-Knapp specifically argued to the trial court, and it agreed, that the facts in this case were so intertwined that it would inappropriate to artificially segregate the time for each claim. CP 178-180; 181-185. This is a factual determination made the trial court based upon its lengthy involvement in the case and the totality of the facts and claims. *Id.* Thus, it is appropriate for this Court to defer to the trial court's factual determination on this issue. The Appellants nevertheless make the argument, repeatedly, that Ms. Pace-Knapp should only have been compensated for a fraction of her attorney's time, something which is discussed in *Attorneys Fees in Washington,* a treatise on the subject. In the Commentary on Attorney Fees Statutes with regard to the award of fees

under the CPA, the authors note that,

> [T]here is a possibility that an excessively formulaic reading of RCW 19.86.090, and the cases requiring the segregation of fees incurred on compensable claims from those incurred on non-compensable claims can result in losing sight of the policy of RCW 19.86.090. Discussions about fees can degenerate, for example, into arguments that since plaintiff prevailed on two of eight theories, counsel for the plaintiff should recover 25% of the fees incurred. This is too rigid, particularly if the two successful theories made up the bulk of the case.

Talmadge and Jordan, *Attorney Fees in Washington,* Ch. 6 (p. 61), Lodestar Publishing, Inc. (2007). Yet, this is exactly the argument made by the Appellants – that Ms. Pace-Knapp is only entitled to a fraction of her attorneys fees and costs, even though the trial court has made specific factual findings that the claims are so intertwined as for it to be impractical for Ms. Pace-Knapp to segregate the claims, and because she was been identified as the "substantially prevailing party" by this Court and by the trial court. CP 178-180; 181-185; Opinion at 8. Here, the trial court made findings of fact and conclusions of law in support of its attorneys' fee award and these are the best evidence of the trial court's reasoning. *Rhinehart v. Seattle Times Co.,* 59 Wn. App. 332, 798 P.2d 1155 (1990).

The U.S. Supreme Court asked the same questions when considering the award of attorneys fees and costs in cases brought under the Fair Debt Collection Practices Act, a statute that is analogous to the CPA because it includes provisions allowing for the award of attorneys fees and costs and its purpose is to deter misleading and deceptive behavior by business. It noted that, "The statute and legislative history establish that `reasonable fees' under section 1988 are to be calculated according to the prevailing market rates in

the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." *Blum v. Stenson,* 465 U.S. 886, 895, 104 S.Ct. 1538, 1547 (1984) (footnote omitted). In order to encourage able counsel to undertake these cases, as the Washington Legislature surely intended when it created the CPA (oftentimes referred to as a private attorneys general action), it is necessary that counsel be awarded fees commensurate with those which they could obtain by taking other types of cases. As the Seventh Circuit noted in reviewing an FDCPA case, "Paying counsel in FDCPA cases at rates lower than those they can obtain in the marketplace is inconsistent with the congressional desire to enforce the FDCPA through private actions, and therefore misapplies the law." *Tolentino v. Friedman*, 46 F.3d 645, 652-653 (7th Cir. 1995). The same standard should be applied here.

Washington courts are also quite clear that a prevailing party on a CPA claim must recover its attorneys fees on appeal. *Wash. St. Physicians Ins. Exchange & Ass'n. v. Fisons Corp.,* 122 Wn.2d 299, 858 P.2d 1054 (1993); *Wilkinson v. Smith,* 31 Wn. App. 1, 639 P.2d 768, *review denied,* 97 Wn.2d 1023 (1982). Similarly, a party which is already entitled to attorneys fees and costs can recover their attorneys fees and costs incurred in making the request for attorneys fees and/or defending the entitlement to those fees. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 378, 798 P.2d 799 (1990). Thus, Ms. Pace-Knapp is entitled to her attorneys' fees and costs for this work as well.

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1. The trial court's application of the Lodestar multiplier was entirely appropriate and consistent with the standards required by Washington courts.

One of the first questions that a court must answer when a party seeks to employ the Lodestar multiplier is where there is a contingency fee agreement involved, as is the case here. *Bowers v. Transamerican Title Ins., supra* (approval of a 1.5 multipler); *Washington Physicians Ins. Exch. v. Fisons Corp., supra,* 122 Wn.2d 299 (approval of a 1.5 multiplier); *State v. Ralph Williams,* 87 Wn.2d 298, 314, 553 P.2d 473 (1976) and *Banuelos v. TSA Washington, supra,* 134 Wn.App. 603 (2006) (approval of a 1.5 multiplier).

Similarly, in the Ninth Circuit, the starting point for determining reasonable fees is the calculation of the "lodestar," which is obtained by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate. *Jordan v. Multnomah County,* 815 F.2d 1258, 1262 (9th Cir. 1987), (citing *Hensley v. Eckerhart,* 461 U.S. 424, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)), *Friend v. Kolodzieczak*, 72 F.3d 1386, 1389 (9th Cir. 1995). In determining a reasonable number of hours, a trial court is required to review time records to determine whether the hours claimed by the applicant were adequately documented and whether any of the hours were unnecessary, duplicative or excessive. *Chalmers v. City of Los Angeles,* 796 F.2d 1205, 1210 (9th Cir. 1986), *reh'g denied, amended on other grounds*, 808 F.2d 1373 (9th Cir. 1987). To determine a reasonable rate for each attorney, the Court must look to the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and

reputation. *Id.* at 1210-11. In calculating the lodestar, the Court should consider any applicable factors listed in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67 (9th Cir. 1975), cert. denied 425 U.S. 951, 48 L. Ed. 2d 195, 96 S. Ct. 1726 (1976), that are relevant. *Jordan v. Multnomah County, supra,* 815 F.2d at 1264 n.11.[2] The same standard applies in Washington, and Ms. Pace-Knapp provided the trial court with adequate information and documentation to support her request for attorneys fees and costs, which allowed the trial court to enter specific findings on this subject. CP 181-185. As noted by the Court in *Bowers,* the contingency multiplier is intended to serve two very specific purposes: to "mak[e] it possible for poor clients with good claims to secure competent help" and to encourage attorneys to accept "risky" cases. *Bowers, supra,* 100 Wn.2d at 598-599. A court in awarding a multiplier should also consider whether the award would further purpose behind a multiplier. *Travis v. Washington Horse Breeders Ass'n,* 111 Wn.2d 396, 411-12, 759 P.2d 418 (1988). Here, it is clear that application of the multiplier fulfills these express purposes: it provided Ms. Pace-Knapp, someone who could easily fall into the category of being "poor" under the facts already accepted by this Court in its Opinion, with a competent attorney who was willing to accept the risk of taking a difficult case of a sort which had not been tried in Washington before through to trial and

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2. The *Kerr* factors used for determining reasonable fees are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skills requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

on through the lengthy appellate process. CP 34-40. *See also, Somsak v. Criton Technologies/Heath Tecna,* 113 Wn.App. 84, 98-99, 52 P.3d 43 (2002) (allowing a 1.5 multiplier when there was a "significant risk of defeat" and the case was undesirable) and *Ethridge v. Hwang,* 105 Wn.App. 447, 462, 20 P.3d 958 (2001) (affirming a multiplier of 1.25 without recounting the facts that supported the award). Here, the trial court only added an additional 15%, well below the apparent "ceiling" in Washington of an additional 50% under the lodestar multiplier.

2. Appellants' argument regarding the standard for contemporaneous recording of the attorney time fails entirely.

Appellants repeatedly argued to the trial court and make the same arguments again to this Court that because Ms. Pace-Knapp's attorney was very specific in her statements to the trial court about her timekeeping, indicating that not every single entry was made immediately following completion of the work, that the records were not "contemporaneous" as the phrase is used in cases allowing the award of attorneys fees and costs. Appellant's Brief at 9-11. However, as noted by the trial court, Appellants are misconstruing the language of the relevant cases relating to the appellate courts' use of the word "contemporaneous". The Appellants cite only to the case of *Mahler v. Szucs,* 135 Wn.2d 398, 434, 957 P.2d 632 (1998) as supporting their argument on this issue. Yet, there is nothing in that case which supports Appellants' position. In *Mahler,* the Court's focus was not on the contemporaneous nature of the attorneys' timekeeping. Rather, the Court simply recited the correct standard for application of the lodestar

multiplier, which includes the word "contemporaneous". There was no focus in the case on a definition of the word in this context nor an articulation of the timeframe between completion of a task and the entry of a record of that work in a timekeeping system so that an attorney can use the word "contemporaneous" in briefing. *Id.* Nothing in the *Mahler* case or in any case in the State of Washington holds that an attorney has not properly earned fees because some portion of the attorney time was not recorded immediately following the instant the work was performed. As Ms. Pace-Knapp noted in her initial briefing, for any court to make such a holding would defy reason and the physical limitations of attorneys and their staff. It would require that attorneys keep timekeeping records with them in the courtroom so that immediately upon completion of a hearing, all time spent on the case was recorded somewhere. It would require timekeeping records to be carried with an attorney to any remote location so that the entries could be made instantaneously. Such a position is simply nonsensical, counterintuitive and is **not** a requirement under the Washington Rules of Professional Conduct nor any case law in this state. CP 34-54; 113-122.

While the Defendants repeatedly reference the decision in *Bowers v. Transamerica Title Ins. Co.,* 100 Wn.2d 581, 675 P.2d 193 (1983) as it relates to the proper application of the lodestar multiplier, however, they choose to ignore the language in *Bower* wherein the Court recognizes that all of an attorneys' time might not be documented "contemporaneously". *Bowers,* 100 Wn.2d at 597. As Division Two noted in a 2008 case where one of the parties tried to make similar arguments, "The attorney

requesting attorney fees must provide only 'reasonable documentation of the work performed' and the 'documentation need not be exhaustive or in minute detail.'" *Alpine Quality Const. Services v. Brett Johnson,* 2008 Wash. App. Lexis No. 1485 (6/24/08), citing to *Bowers,* 100 Wn.2d at 587-98.

3. The time for responding to the two summary judgment motions was not improperly duplicative and it did not result in half time devoted to each, as asserted by the Appellants.

As Ms. Pace-Knapp noted in her pleadings presented to the trial court, her Responses to the Motions for Summary Judgment filed by the Appellants and Windemere only differed by a couple of pages, which were devoted to real estate brokerage issues that related solely to Windemere. CP 113-122; 123-135. Thus, the creation of the Responses to the Motions for Summary Judgment was not duplicated in the time-keeping records since the same document was used for both Responses and only a small portion of the briefing specifically referred to the "segregated" claims that would only have applied to Windemere and not to any of the other defendants. *Id.* However, Windemere's involvement also mattered as to the claims against the Pelascini Defendants since its participation (or lack thereof) would necessarily impact potential settlement and/or the progress of the case to trial. *Id.*

Appellants go to great lengths to tear apart Ms. Pace-Knapp's briefing on the issue of summary judgment, but they continue to very conveniently ignore the fact that the briefing as regards their motion and the motion brought by Windemere were virtually identical, except for the pages devoted to Windemere's issues. The only claim against

the Appellants which was dismissed on summary judgment was the claim for breach of fiduciary duty or quasi-fiduciary duty – a very small portion of the case. Opinion at 3. (Appellants sometimes refer to these as two claims, but they are not pled as two separate claims.) Nevertheless, Appellants argue that her attorney time should be reduced to approximately one half of the time expended. Appellants' Brief, 11-12. There is nothing in the *Bowers* case or in any other Washington state court case that supports such a preposterous proposition. *Bowers v. Transamerica Title, supra,* 100 Wn.2d 581 (1983). It is therefore clear that the work on both Responses was most certainly not "unsuccessful". Further, the only "duplication" would only have involved a small portion of the billed time since the argument related solely to Windemere was approximately two pages. CP 113-122.

4. Time expended in preparing draft Findings of Fact and Conclusions of Law for the Court are compensable.

Appellants contend that Ms. Pace-Knapp is not entitled to attorneys fees related to the drafting of proposed Findings of Fact and Conclusions of Law because the Court created its own document. Appellants' Brief, 14. However, it provides no case law support for the proposition that this effort was "wasted time". Appellants' counsel similarly prepared their own document and submitted it to the Court, and it too went unused. This Court can be certain that counsel for the Appellants billed his clients for this time and did not describe it as "wasted time" for which he was not entitled to compensation. The drafting of pleadings requested by the Court were necessary and

therefore could not possibly be described as "wasted time" simply because the trial court ultimately decided to create its own document.

5. There is no legal support for Appellants' assertions about compensation for time expended prior to the filing of a complaint.

Appellants have characterized the time of Ms. Pace-Knapp's attorney prior to her appearance in the lawsuit and the filing of an amended complaint as being non-compensable and positing that it would be unethical to bill a client "for time expended prior to hiring." As is all too common in its briefing, the Appellants provide no legal support for such an assertion and they certainly cannot point to any portions of the Rules of Professional Conduct which prohibit a lawyer from billing for time expended on behalf of a client in investigating claims or preparing to undertake work. Appellants' Brief, 15. Similarly, Appellants falsely contend that Ms. Pace-Knapp sought recovery for work expended in connection with her unlawful detainer action, which occurred while this case was on-going. *Id.* Again, the Appellants' statements are untrue and belied by the contents of the two Declarations filed by Ms. Pace-Knapp's attorney. CP 34-65; 113-122. As noted in those Declarations, which statements are uncontroverted, Ms. Pace-Knapp never sought to recover attorneys fees and costs related to the litigation of the eviction case as she was represented by *pro bono* counsel. *Id.* In the attorney time records which were submitted to the trial court, there is only one mention of research into whether Ms. Pace-Knapp should seek reconsideration of the eviction judgment, and that work needed to be performed as her removal from the property was also an issue in this

case. *Id.* All other references to work on a motion at the end of 2004 are related to moving to amend the complaint on file in this case. *Id.*

Ms. Pace-Knapp did request that the trial court add to her damages award the monies she had to pay to the Appellants as a result of the unlawful detainer judgment, and that request was not granted by the trial court. CP 178-180; 181-185. These are the only amounts for which she sought recovery that were in any way related to the unlawful detainer proceeding. *Id.*

6. Ms. Pace-Knapp is entitled to recovery of all reasonable attorneys fees and costs in connection with the appeal.

As noted above, the case law is clear that Ms. Pace-Knapp is entitled to an award of all of her reasonable attorneys fees and costs incurred in connection with the appeal. A prevailing party on a CPA claim must recover its attorneys fees on appeal. *Wash. St. Physicians Ins. Exchange & Ass'n. v. Fisions Corp., supra*, 122 Wn.2d 299; *Wilkinson v. Smith,* 31 Wn. App. 1, 639 P.2d 768, *review denied,* 97 Wn.2d 1023 (1982). Further, this Court indicated in its Opinion that Ms. Pace-Knapp was entitled to her attorneys fees and costs. Opinion at 8-12. The trial court properly determined that all of the time expended in connection with the appeal was compensable and that factual determination should remain inviolate. Interestingly, the Appellants argue vehemently against this alleged "waste" of attorney time, even as they repeatedly make false representations to the Court about the content of the record and have demonstrated a clear record of filing unnecessary briefing and causing Ms. Pace-Knapp to expend attorney time unnecessarily,

i.e., issues related to the present appeal and finality of the judgment wherein the Appellants refused to take simple actions to correct the record. *See,* Motion to Remand.

7. Appellants' assertions regarding the segregation of time and factual assertions about the contents of the record continue to be false.

Throughout the last pages of Appellants' Brief, they continue to make false representations regarding the contents of the record and the work expended by Ms. Pace-Knapp's counsel. Appellants assert that her attorney time should be significantly reduced because only one page of the complaint, two pages of the response to the motion for summary judgment and three pages of the trial brief are devoted to her CPA claims. Appellants' Brief, 19-22. Of course, the Appellants conveniently ignore that the vast majority of the briefing in both instances included pages of factual assertions, and in the case of the response to the motion for summary judgment, the pleading also involved the drafting, preparation and filing of declarations which included documentary evidence. CP 34-65. Further, there is nothing in any of the case law cited by the Appellants which supports their assertion that the number of pages in pleadings devoted to particular claims alone demonstrates the importance of those claims. Not only is there nothing in the case law cited by the Appellants in support of this position, but no such case law exists in Washington.

It is particularly interesting to consider Appellants' position as regards the briefing submitted on the first appeal, wherein they assert that the entire statement of facts in Ms. Pace-Knapp's briefing was not germane to the CPA claims and that her work on this part

of the case should not be compensated in full. Appellants' Brief, 26. This is interesting because the Appellants were chastised by the Court at oral argument for trying to argue about the facts of the case when it was required to accept the facts entered by the trial court. In fact, the vast majority of the Appellants' briefing on appeal was devoted to arguing about the facts of the case, and Appellants even filed an overlength brief. CP 34-65; 113-122. Perhaps if the Appellants had not improperly devoted so much of their briefing arguing about facts which were uncontroverted, then Ms. Pace-Knapp could have shortened her response brief. *Id.* However, she was required to respond to the assertions made by the Appellants and she did so in her briefing, and she was found by this Court to be the "substantially prevailing party". Opinion at 8-12. If this Court were not interested in awarding Ms. Pace-Knapp attorneys fees and costs in connection with the appeal, it would not have included this language in its decision.

8. Ms. Pace-Knapp is entitled to pre-judgment interest on her damages award and on her award of attorneys fees and costs.

Appellants argue that the awarding of pre-judgment interest to Ms. Pace-Knapp for the lost equity in the property was improper. Appellants' Brief, 29. As noted by the Appellants, the Washington Supreme Court addressed the issue in *Prier v. Refrigeration Eng'r Co.,* 74 Wn.2d 25, 32, 442 P.2d 621 (1968). The Court held that "interest prior to judgment is allowable (1) when an amount is 'liquidated' . . ." or is derived from a specific contract term. *Id.* Here, there is no contract term, so we are required to consider what the Court meant by "liquidated" damages, and it defines the amount as "a sum of

money whose exact amount is fixed and known." *Id.* The fair market value of the property in this case was "fixed and known". The Appellants ignore other language in the *Prier* decision wherein the Court cited with approval language from A. Corbin, *Contracts,* that, "[m]ere difference of opinion as to amount is, however, no more a reason to excuse him from interest than difference of opinion whether he legally ought to pay at all, which has never been held as an excuse." *Prier v. Refrigeration, supra,* 74 Wn.2d 25, 32, citing to A. Corbin, *Contracts* § 1046 n.69 (1964). Although the Corbin treatise was talking about contract claims for interest, the same principle applies here. The Court in *Mahler v. Szucs, supra,* 135 Wn.2d 398, 429, citing to *Hansen v. Rothaus,* 107 Wn.2d 468, 473, 730 P.2d 662 (1986) reached a similar conclusion as to the definition of "liquidated damages", and that decision supports Ms. Pace-Knapp's assertion that she is entitled to pre-judgment interest on her damages claim. Ms. Pace-Knapp reminds this Court that she has been denied the use of the monies which represents the equity in her property and excessive rent for more than seven years now (6 years and 228 days on the date of the Court's findings). Thus, she is entitled to an award of pre-judgment interest on both amounts.

9. <u>There is an award of duplicative interest and as such, the Judgment should be corrected to reflect only interest on the damages dating from the entry of this Court's Order on March 17, 2008</u>.

Appellants have asserted to this Court that the trial court awarded Ms. Pace-Knapp pre-judgment interest in the amount of $43,579.00, calculating the time period as being from the date of the transfer of the property to June 12, 2009, the date of judgment.

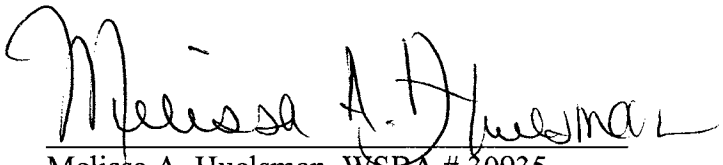
Appellants' Brief, 30. The Appellants are correct about this fact, and it is self-evident on the Final Judgment. CP 178-180. The Appellants are also correct that the Court added additional interest on the Final Judgment in the amount of $16,020 for the period March 17, 2008 through June 12, 2009. Appellants' Brief, 30. This amount is incorrect and appears to have been calculated based upon the total amount due to Ms. Pace-Knapp by the Appellants, including interest, and such a calculation is incorrect under the law. Ms. Pace-Knapp maintains that she is entitled to pre-judgment interest, as noted above, but acknowledges that she is not entitled to interest on interest. Thus, the correct amount of interest due to Ms. Pace-Knapp for the time period from March 2008 through June 12, 2009 is already correctly fixed by the trial court as pre-judgment interest. Additional interest has accrued on the actual and CPA damages (which total $65,947.00) since June 12, 2009 at the rate of 12% per annum. Thus, the Judgment should be amended to reflect the correct amounts payable to Ms. Pace-Knapp based upon interest. The rest of the numbers included on the Judgment are correct.

D. CONCLUSION

Ms. Pace-Knapp respectfully requests that this Court deny the Appellants' appeal except to the extent that the Judgment needs to be amended to remove the additional interest charges as identified above. Ms. Pace-Knapp has clearly demonstrated that the trial court has correctly calculated the damages available to her for violations of the Consumer Protection Act, and her attorney has justified the amounts requested for attorneys fees and costs after prevailing on a CPA claim.

Respectfully submitted this 11th day of January 2009.

LAW OFFICES OF MELISSA A. HUELSMAN, P.S.



Melissa A. Huelsman, WSBA # 30935
Attorney for Respondent Vila Pace-Knapp