

No. 69858-3-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LAURIE SCHIFFMAN, Trustee of the C.B. Special Needs Trust,
Plaintiff/Appellant,

vs.

FINANCIAL FREEDOM ACQUISITION LLC, a California Limited
Liability Company and ONEWEST BANK, FSB, dba, Financial
Freedom;

Defendants/Counter-Claimant/Third Party
Plaintiff/Respondents/Cross-Appellants

vs.

SUSAN ABOLAFYA and JOHN DOE ABOLAFYA, and their
marital community; MERS AS NOMINEE FOR GOLF SAVINGS
BANK,

Third-Party Defendants

RESPONDENT / CROSS-APPELLANT FINANCIAL FREEDOM
ACQUISITION LLC'S REPLY BRIEF

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INTRODUCTION

Respondent/Cross-Appellant Financial Freedom Senior Funding Corporation (“Financial Freedom”) took the precaution of filing a cross-appeal from a portion of Superior Court’s decision in the unlikely event that summary judgment in Financial Freedom’s favor is reversed, and the court’s letter opinion could be interpreted as ruling that Lanora I. Bevins was incompetent and therefore she was not the Acting Trustee of the Charles A. Bevins and Lanora I. Bevins Revocable Trust dated August 6, 1991 (“Bevins Trust”), at the time she executed the documents for the reverse-mortgage loan at issue here. In support of that cross-appeal, Financial Freedom showed, among other things, that Laurie Schiffman (who appears here in her capacity as Trustee of the C.B. Special Needs Trust (“C.B. Trust”)) herself obtained an easement agreement with Ms. Bevins, as Trustee, just one week before the loan transaction — to establish that Schiffman’s own actions demonstrate that Ms. Bevins was competent or, in any event, there is a disputed fact as to whether Ms. Bevins was incompetent and, hence, not the Acting Trustee.

In response, Schiffman contradicts herself in her attempt to obtain summary judgment on appeal. On the one hand, she argues that the issue

of incompetency was not presented to the Superior Court.¹ On the other hand, she argues that the Superior Court properly and correctly held that Ms. Bevins was not competent as the basis for finding Dexter Welch was the Acting Trustee at the time of the loan. Schiffman cannot have it both ways: if the issue of incompetency was not presented to the Superior Court, then it had no basis for holding that, in fact, Welch — not Ms. Bevins — was the Acting Trustee. Absent from Schiffman's response is any attempt to reconcile her transaction acquiring property rights from Ms. Bevins, as Trustee, just one week before the loan and her allegations that, by that time, Ms. Bevins had been incompetent and not the Acting Trustee for years.

ARGUMENT

As a reply in support of Financial Freedom's cross-appeal, this brief is limited to addressing those issues relevant to whether Ms. Bevins was competent and acting as Trustee of the Bevins Trust at the time she signed the reverse-mortgage loan documents in April 2008. Consequently, Financial Freedom's silence with respect to Schiffman's

¹ Schiffman bases this assertion on her unsupported contention that Financial Freedom stipulated to Ms. Bevins's incompetency — in other words, Financial Freedom abandoned its primary argument that Ms. Bevins was the Trustee at the time of the reverse-mortgage loan. As demonstrated below, this contention is frivolous. *See* discussion at 4-8, *infra*.

new arguments on ratification is not intended, and should not be interpreted, as conceding their validity.

SUPERIOR COURT INCORRECTLY FOUND THAT DEXTER WELCH WAS THE ACTING TRUSTEE OF THE BEVINS TRUST

As of April 2008, the Bevins Trust agreement, as amended, provided that Ms. Bevins was the Surviving Trustee, but if she was unable to act as trustee and did not designate a successor, then Dexter Welch *and* Geraldine Ogden (Ms. Bevins's children from a previous marriage), or the survivor thereof, would serve as "Successor Co-Trustees" in the absence of any written designation of a successor trustee.²

As noted in Financial Freedom's opening brief, the record contains no documents demonstrating that Ms. Bevins had resigned, or been replaced, as Trustee as of April 2008. Nor does the record contain any documents or testimony by Ms. Bevins's medical providers or any other professionals to demonstrate that Ms. Bevins was incompetent. To establish that Ms. Bevins was not the Acting Trustee at that time, Schiffman relied solely on declarations by Jerrie Ogden and herself purporting to show that Ms. Bevins was incompetent when she executed the loan documents; and on that foundation, Schiffman argued that Welch

² CP 513

was the Acting Trustee at the time.³ Thus, as framed by Schiffman herself, the question of who was the Acting Trustee of the Bevins Trust as of April 2008 hinges entirely on the question of whether Ms. Bevins was incompetent.⁴

At the outset, Financial Freedom must emphasize again it never conceded that Ms. Bevins was incompetent or that she was not the Acting Trustee at the time she signed the loan documents. Schiffman repeatedly mischaracterizes Financial Freedom's position in the Superior Court:

Financial Freedom did not dispute at summary judgment that Mr. Welch, not Ms. Bevins, was the qualified Trustee of the C.B. Special Needs Trust [sic] in April of 2008. It acknowledged that the "The Trust is correct that under the Fourth Amendment to the Charles A. Bevins and Lanora I. Bevins Revocable Trust Agreement, if at any time Lanora Bevins failed or for any reason was unable to act as Trustee, Dexter Welch would be the Trustee." CP 49. Defendant then went on to argue to the Trial Court that the fact that Lanora was not the duly authorized representative was irrelevant because Dexter Welch, who was the

³ See Respondent/Cross-Appellant Financial Freedom Acquisition LLC's Answering Brief and Cross Appeal Brief ("Responding Brief"), at 21.

⁴ Schiffman has consistently taken the position that Welch was authorized to act alone as Trustee without Ogden's participation. Indeed, Schiffman's other lawsuit was filed against Welch only. This is consistent with the *Fourth* Amendment to the Bevins Trust that provides Welch alone shall succeed as Trustee in the event of Ms. Bevins's death, resignation, or incapacity. CP 483. The First Amendment provides that Welch *and* Ogden shall serve as "Successor Co-Trustees" of the Bevins Trust. CP 513. This was unaffected by the next two amendments to the trust. CP 516-26. Schiffman's reliance on the Fourth Amendment is ironic because Ms. Bevins did not sign that instrument until June 20, 2008, three months after the reverse-mortgage loan. By relying on the validity of the Fourth Amendment to establish Welch's authority, Schiffman herself demonstrates that, at least when it suits her purpose, Bevins was competent during the time period in question.

proper Trust representative, had ratified the reverse mortgage when he signed the beneficiary consent document in his own personal capacity. By Defendant's own argument, Mr. Welch was acting as Trustee during the time period in which the deed of trust was signed.⁵

Schiffman misquotes Financial Freedom's trial-court brief. The language quoted is the first sentence of the section titled "*Even assuming* Lanora Bevins was incompetent when she obtained the reverse mortgage loan, the deed of trust is valid."⁶ Footnote 8 of Financial Freedom's brief below stated: "Financial Freedom *disputes* that Lanora Bevins was *not competent* when she obtained the loan, and *nothing in its Response/Reply should be deemed an admission otherwise.*"⁷ And, Financial Freedom further argued in that same brief that Schiffman's evidence was inadequate to overcome the presumption of Ms. Bevins's competency.⁸ Financial Freedom asked that the motion be continued in order to conduct discovery into Ms. Bevins's competence if the Court found there was an issue of fact on ratification and that Schiffman had made out a *prima facie* case of incompetency.⁹ Schiffman completes her revision of Financial Freedom's arguments by asserting — with no record support — that *Financial*

⁵ Reply Brief, 11

⁶ CP 49 (footnote in original; emphasis added)

⁷ CP 49 (n.8) (emphasis added)

⁸ See CP 63-65. This certainly contradicts Schiffman's assertion that Financial Freedom found her factual argument to be so "compelling" (*see* Reply Brief, 15) that it abandoned its position that Ms. Bevins was the Trustee at the time.

⁹ See CP 62-63

Freedom argued that “Dexter Welch ... was the proper Trust Representative” and ratified the loan.¹⁰ Once again, a direct quote in context establishes Schiffman’s misrepresentation:

Accordingly, *The Trust argues that* when Lenora [sic] Bevins obtained the mortgage loan, Dexter Welch was the trustee and only he had capacity to obtain the loan. Dexter Welch, in fact, knew about, and consented to, the loan.¹¹

In short, Financial Freedom never conceded that Ms. Bevins was incompetent or that she was not the Acting Trustee for any reason. In fact, Financial Freedom specifically disputed Schiffman’s claim, but argued that even if Dexter Welch was the trustee, Financial Freedom was still entitled to summary judgment.

Schiffman’s representations about Financial Freedom’s position are false, and not supported by anything in the record. She claims that the issues of competence and who was the acting trustee were “dispensed with by agreement at the trial court.”¹² Financial Freedom actually agreed merely that the Superior Court did not have to decide who was the acting trustee: (i) if it was Ms. Bevins, the loan was valid because she signed the

¹⁰ Reply Brief, 11. *See also* Reply Brief, 9-10 (“Lanora Bevins ... was not Trustee at the time [the note] was executed, as agreed by [Financial Freedom] in its pleadings, regardless of whether or not she was competent”).

¹¹ CP 49-50 (emphasis added)

¹² Reply Brief, 1

documents; (ii) alternatively, if it was Welch, then he ratified the reverse-mortgage loan.

Schiffman contends that the Superior Court actually found that Ms. Bevins was not the Trustee at the time the deed was signed.¹³ Without providing a transcript of the hearing on the cross-motions in the record on appeal, Schiffman claims that “counsel for both parties agreed at oral argument for the pending cross motions for summary judgment that the case could then be decided on the issue of whether Mr. Welch ratified the reverse mortgage and associated contracts.”¹⁴ All that appears in the *record*, however, is Financial Freedom’s statement in its brief that it was still entitled to summary judgment, even assuming Ms. Bevins was not competent, because the loan was ratified by Welch, who Schiffman contended was the Acting Trustee at the time.¹⁵

It defies logic that Financial Freedom would spontaneously concede that Ms. Bevins was incompetent — which would be the central issue in the case if Financial Freedom’s summary judgment motion were denied — when it repeatedly and specifically disputed that contention with both facts and argument in its pleadings. Schiffman’s attempt to obtain

¹³ See Reply Brief, 1

¹⁴ Reply Brief, 9

¹⁵ See CP 49 (n.8)

both reversal of summary judgment against her and an award of summary judgment in her favor on appeal, is based upon a fabricated stipulation for which she has presented nothing to establish its existence.¹⁶ Schiffman's claims as to Financial Freedom's purported concessions in the trial court are frivolous.¹⁷

If, as Schiffman contends, the Superior Court's decision includes a ruling that Ms. Bevins was incompetent, then Financial Freedom's opening brief demonstrated the many material issues of fact contained in the declarations submitted by Schiffman as well as in the record, which would preclude summary judgment on that issue. Schiffman's response is merely to rehash all the factual allegations she made below and in her opening brief.¹⁸ Conspicuously absent from her response is any attempt to rebut, or even address, the inconsistencies inherent in her declarations or

¹⁶ See *Collings v. City First Mortg. Svces, LLC*, ___ Wn.App. ___, ___ P.3d ___, Slip Opn. at 11 (July 29, 2013) (attorney's declaration purporting to recount what was said at trial "is not a substitute for a record" — either a transcript pursuant to RAP 9.2 or a narrative report of proceedings pursuant to RAP 9.3 is required). (A copy of the relevant portion of *Collings* is attached in Appendix A.) Schiffman notably has not included a transcript of the summary-judgment hearing in the Record on Appeal to support her claim that Financial Freedom orally stipulated that Ms. Bevins was incompetent and not the acting Trustee.

¹⁷ Indeed, Financial Freedom respectfully submits that Schiffman's misrepresentations are so blatantly false and her failure to even attempt to justify their repetition in her reply brief after Financial Freedom established their falsity in its opening brief here are so egregious as to be sanctionable.

¹⁸ Ms. Bevins's inability to place her signature directly on a signature line may reflect physical shortcomings, but it is not determinative of any mental incapacity. Otherwise, one would also have to invalidate the Third and Fourth Amendments to the Bevins Trust Agreement (CP 484, 526).

to explain her own dealings with Ms. Bevins. Specifically, Schiffman does not reconcile Ogden's and her testimony that Mr. and Ms. Bevins were incompetent beginning as early as "several years preceding" May 1998, but that the Bevinses were executing amendments to their trust agreement and Mr. Bevins acted on Schiffman's estate-planning advice in May 1998 and later — some of which Schiffman now relies upon.¹⁹ Nor does she explain how Mr. Bevins purchased a condominium on Mercer Island on Schiffman's advice in 1998, although Ogden testified that he was incompetent by then.²⁰

As Financial Freedom argued in its responding brief here — but Schiffman ignored in her reply — Schiffman herself obtained an easement agreement, which she personally signed, from Ms. Bevins, as Trustee, on April 8, 2008, as part of "an I.R.S. Section 1031 Tax Deferred Exchange."²¹ Schiffman claims that, as of April 15, 2008, "[n]ot only was Lanora incompetent to act as the Trustee, she was also incompetent to enter into *any* contract."²² "The contract at issue here was not a straightforward agreement that is easily understood. ... Instead, this was a

¹⁹ See Responding Brief, 24

²⁰ See *id.*

²¹ CP 35-36; see Responding Brief, 24-25. Curiously, and so far inexplicably, the easement agreement and the reverse-mortgage loan documents were notarized by the same person. See CP 36, 432.

²² Reply Brief, 19 (emphasis added)

very complex ‘reverse mortgage’”²³ Schiffman, however, does not explain why she thought Ms. Bevins was the Acting Trustee and competent to convey an interest in real estate just one week earlier.²⁴ Nor does she explain why Ms. Bevins could not understand a reverse mortgage on April 15, but understood an IRS Section 1031 Tax-Deferred Exchange on April 8. Nor does Schiffman explain why her April 8 transaction with Ms. Bevins is valid although, according to Schiffman, Ms. Bevins could not recognize Schiffman or her parents or understand why they were visiting her just a few weeks earlier²⁵ and had not been the Acting Trustee or even competent for years.

Schiffman also does not respond to the undisputed fact that Sarah Duncan, an attorney, prepared and *notarized* the final, Fourth Amendment to the Bevins Trust Agreement, which was signed by Ms. Bevins in her capacity as Trustee, just ten days before her death.²⁶ Ms. Duncan’s notarization is a telling testimonial by a neutral party with a professional

²³ *Id.*

²⁴ Once again, Schiffman’s own action in accepting a grant of easement signed by Ms. Bevins as Trustee rebuts her contention that “[Ms. Bevins] was not even attempting to act as the Trustee” in April 2008. *See* Reply Brief, 18.

²⁵ *See* Reply Brief, 4

²⁶ *See* Responding Brief, 25-26. Should it become necessary to litigate Ms. Bevins’ competency, Financial Freedom will certainly discover whether Schiffman accepted the \$20,000 bequest made to her in the Fourth Amendment (CP 482), which, according to Schiffman, was executed by Ms. Bevins long after she became incompetent and no longer even recognized Schiffman.

obligation to ascertain that Ms. Bevins was competent and the Acting Trustee at the time. Moreover, just a few months later, Ms. Duncan wrote to Financial Freedom:

This letter serves to notify Financial Freedom ... that Lanora I. Bevins passed away on June 30, 2008. We have been retained by Dexter Welch, who is the Successor Trustee named in the Charles A. Bevins and Lanora I. Bevins Revocable Living Trust dated August 6, 1991, as amended and restated on May 11, 1998, to assist Mr. Welch with the trust administration.

It is our understanding that Lanora I. Bevins (borrower) in her capacity as an individual and as of [sic] the surviving trustee of the Charles A. Bevins and Lanora I. Bevins Revocable Living Trust, took out a reverse mortgage with Financial Freedom shortly prior to her death. The property and loan information is referenced above.

Please send me any and all paperwork relative to the repayment of this loan ...²⁷

The letter is copied to “Dexter Welch, Successor Trustee.”²⁸ Ms. Duncan raised no question whether Ms. Bevins was mentally competent when she took out the loan. Ms. Duncan raised no question about whether Ms. Bevins was the Acting Trustee when the loan was taken out shortly before she died. To the contrary, Ms. Duncan — acting as counsel, and agent, for Welch, the Successor Trustee — states that Ms. Bevins was acting “in her capacity as ... the surviving trustee” of the Bevins Trust when she took out the loan. Thus, Welch himself, acting through his attorney, denies that

²⁷ CP 436

²⁸ CP 437

he was the Acting Trustee when the reverse-mortgage loan documents were executed.²⁹

Melding Schiffman's depiction of Ms. Bevins's mental condition in March 2008 with Schiffman's uncontroverted business transaction in April 2008 reveals the stark contrast between her self-serving testimony now and her contemporaneous actions at the time:

One month before the [reverse-mortgage loan] documents were signed, Lanora could not recognize Laurie and Laurie's parents and was nonsensical when she spoke. CP 332. Lanora's dementia had robbed her of her most basic comprehension skills and it defies reason to suggest that she was competent to enter into a familiar contract, let alone a contract unfamiliar to the general population.³⁰

*On April 8, 2008, Schiffman and her husband had Ms. Bivens execute in her capacity as Trustee of the Bivens Trust, a statutory warranty deed granting an easement "for ingress, egress, utilities, and rights incidental thereto" over Bivens Trust property "pursuant to an I.R.S. Section 1031 Tax Deferred Exchange" and "subject to covenants, conditions, and restrictions as per reported in the preliminary title commitment issues [sic] by Lawyers Title Agency of Washington under Order #379336 Paragraph Numbers 9 and by this reference incorporated herein. See Exhibit A, attached and made part hereof."*³¹

Ultimately, Schiffman cannot hope to receive a judgment as a matter of law invalidating the deed of trust. The record establishes that

²⁹ If Welch was already the Acting Trustee at the time of Ms. Bevins's death, then the Fourth Amendment's change in the designation of trustee would have been unnecessary.

³⁰ Reply Brief, p. 20

³¹ CP 35-36

Welch ratified the reverse-mortgage loan, whether as Acting Trustee at the time the loan was made or as Successor Trustee after Ms. Bevins died, so Financial Freedom was entitled to summary judgment. Should this Court reverse the trial court's summary judgment ruling on the issue of ratification and also determine that Schiffman presented evidence sufficient to establish a *prima facie* case that Ms. Bevins was incompetent, then it should remand for trial on the issue of ratification as well as the issues whether Ms. Bevins was incompetent and who was the Acting Trustee when she signed the reverse-mortgage loan documents.

CONCLUSION

The Superior Court correctly ruled that, *assuming* Schiffman is correct that Dexter Welch was the Trustee of the Bevins Trust at the time the Financial Freedom loan documents were signed by Ms. Bevins, he ratified her actions in encumbering the Property owned by the Bevins Trust. If the Superior Court actually found that Ms. Bevins was incompetent and not the Acting Trustee at the time of the Financial Freedom loan, its decision should be modified by reversing that holding declaring that Ms. Bevins was the Trustee at the time because Schiffman failed to present evidence sufficient to overcome the presumption that Ms. Bevins was competent when she signed the loan documents.

For the foregoing reasons, Financial Freedom respectfully requests that this Court affirm the Superior Court's order and award Financial Freedom its attorney fees on appeal pursuant to RAP 18.1.

Alternatively, should the Court of Appeals determine that neither Welch's ratification nor the identity of the Acting Trustee are established as a matter of law, then Financial Freedom respectfully requests that this Court's decision clarify that Financial Freedom has not conceded that Ms. Bevins was not the Acting Trustee when she signed the loan documents.

Dated this 12th day of August, 2013.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DONALD COLLINGS and BETH COLLINGS, husband and wife,
Respondent,

v.

CITY FIRST MORTGAGE SERVICES, LLC, a Utah limited liability company f/k/a CITY FIRST MORTGAGE SERVICES, L.C.; U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR THE GREENPOINT MORTGAGE FUNDING TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-ARI,
Appellants,

HOME FRONT HOLDINGS, LLC, a Utah limited liability company; ROBERT P. LOVELESS and REBECCA LOVELESS, husband and wife; ANDREW J. MULLEN AND "JANE DOE" MULLEN, husband and wife; GAVIN SPENCER and MARGARET ELIZABETH SPENCER, husband and wife; FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, Trustee; "MERS" MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; and JOHN DOES 1 – 12, unnamed co-conspirators,
Defendants,

No. 66527-8-I
(consolidated with 66820-0-I)

DIVISION ONE

PUBLISHED OPINION

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Collings applied for a loan over the phone. Soon, Spencer reported the loan was approved. Weeks later, after the purported closing date had been pushed back several times, Spencer told the Collingses the loan had not actually been approved but that his manager might be able to help. Spencer introduced the Collingses to Paul Loveless, a City First branch manager, and Andrew Mullen, a branch manager and loan officer.

According to Mr. Collings, Loveless said, "what we can do is buy your home. We will put it in my name."¹ Loveless proposed to buy the Collings home for its appraised value of \$510,000, take out a mortgage on it, and then lease it back for \$2,970 per month, using these funds to make payments on the mortgage. Collings would pay Loveless an up-front fee of \$78,540 and sign a lease-back agreement with an option to repurchase the home after three years for \$510,000.

According to Collings, he agreed to the deal on condition that the lease would prohibit Loveless from refinancing the home and from further encumbering it with a home equity line of credit. Loveless obtained title to the home and, as planned, took out a mortgage on it with City First. The deal closed in June 2006.

In July 2008, a foreclosure notice appeared on the house. Collings, who had timely made all the required monthly lease payments, contacted Loveless. Loveless threatened to evict the Collingses if they did not send him more money. Collings discovered that Loveless, in December 2006, had refinanced the loan with City First and had taken out a home equity line of credit, all in violation of the lease prohibition. This transaction, referred to as "the Loveless Loan," is at the

¹ Report of Proceedings (Sept. 14, 2010) at 28.

center of the ensuing controversy. Collings stopped paying Loveless and obtained legal representation.

In March 2009, Collings sued City First, Loveless, Mullen, Spencer and other parties who were later dismissed. The complaint sought damages and injunctive relief.

Meanwhile, City First had sold the Loveless Loan. The note and deed of trust passed into the hands of appellant U.S. Bank National Association as Trustee for the Greenpoint Mortgage Pass-Through Certificates, Series 2007-AR1. The notice of foreclosure posted on the Collings home was part of a nonjudicial foreclosure instituted in response to Loveless' failure to make payments. Collings filed a lis pendens. Through a court order, he was able to stop the pending foreclosure.

In August 2009, U.S. Bank was granted the right to intervene. U.S. Bank sought a declaration that its security interest, as evidenced by its deed of trust, remained a viable, first priority encumbrance of record in the official records of King County and that it was entitled to payment in full of the debt secured by the deed of trust.

Loveless defaulted. It was undisputed that the Loveless Loan amounted to illegal equity skimming. See RCW 61.34.020(b)(i)-(iv). In February 2010, the court found that Loveless, despite his name on the record title, held only an equitable mortgage. As against Loveless, title to the property was quieted in Collings, subject to any applicable valid and subsisting liens.

Trial began in September 2012. The jury was charged with two tasks. First, resolve the claims alleged in the Collings complaint. Second, issue advisory findings in the U.S. Bank case.

In the City First case, the jury returned a verdict finding Loveless, Mullen, and City First liable to the Collingses. The verdict held Loveless and City First liable for \$40,311 in compensatory damages and also imposed \$80,622 in punitive damages against the two of them under the Washington Credit Services Organization Act, chapter 19.134 RCW. The jury assessed \$8,000 in punitive damages against Mullen, but no compensatory damages. The court denied City First's posttrial motions and entered a judgment against it.

The trial court also entered judgment in favor of the Collingses in the U.S. Bank case. The court declared the deed of trust held by U.S. Bank void and unenforceable, permanently enjoined U.S. Bank from foreclosing on the Collings home, and quieted title in the Collingses as against U.S. Bank. City First and U.S. Bank appeal from the judgments entered against them.

CITY FIRST
ISSUE ONE: Nondisclosure of Settlement Agreement

After the verdict, City First moved unsuccessfully for a new trial under CR 59. One basis for the motion was City First's discovery of a previously undisclosed pretrial settlement. The Collingses, in exchange for Mullen's promise to pay \$500, had agreed they would not execute any judgment they obtained against Mullen.

The litigation of City First's motion for a new trial and the order denying that motion focused primarily on whether the covenant not to execute against Mullen had the effect of releasing City First from its vicarious liability for the acts of Loveless or Mullen. The court concluded that if the settlement did release City First from any judgment rendered against Mullen, it did not release anyone else. The judgment against City First would stand to the extent it was based either on vicarious liability for the acts of Loveless or its own independent acts.²

On appeal, City First is concerned with the significance of the nondisclosure of the Mullen settlement, not with the argument that the settlement operated as a release. Mullen remained a defendant after the settlement, and his 70-page deposition was read into evidence in the plaintiffs' case. City First argues that the settlement was a collusive agreement and that its nondisclosure tainted the trial.

The order denying the motion for a new trial is reviewed for abuse of discretion. McCluskey v. Handorff-Sherman, 68 Wn. App. 96, 103, 841 P.2d 1300 (1992), aff'd, 125 Wn.2d 1, 882 P.2d 157 (1994). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994). A court also abuses its discretion when it "uses an incorrect standard of law or the facts do not meet the requirements of the standard of law." Sherron Assocs. Loan Fund V (Mars Hotel) LLC v. Saucier, 157 Wn. App. 357, 361, 237 P.3d 338 (2010), review denied, 171 Wn.2d 1012 (2011).

² Clerk's Papers at 1859-63, Order Re: Mullens Release and Motion for New Trial, March 24, 2011.

City First contends the Mullen-Collings settlement was a “Mary Carter” agreement, one in which a defendant remains in the trial after settling with the plaintiff in exchange for a limitation of liability. The “Mary Carter” denomination derives from Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). “The key elements of a Mary Carter agreement are a limitation of the settling defendant's liability, a requirement that that defendant remain in the trial, and a guarantee of a certain sum of money to the plaintiff.” J. Michael Philips, Looking Out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation, 69 Wash. L. Rev. 255, 257 (1994). Here the agreement did not require Mullen to remain in the trial, and it also did not give Mullen a financial interest in the Collingses’ potential recovery from City First—an element in some definitions of a Mary Carter agreement. We will nevertheless examine the argument in light of the policy concerns about the potentially pernicious effect of undisclosed settlement agreements.

Washington law on the topic of undisclosed settlement agreements among the parties is sparse. While our courts have not set forth a definitive rule, we have acknowledged the potential for prejudice presented by such agreements. McCluskey, 68 Wn. App. at 103-04.

McCluskey was a wrongful death action arising from a two-car collision on a state highway. The two defendants were each held 50 percent liable for a sizable award of damages, the State of Washington for maintaining an unsafe highway, and the indigent and uninsured teenage driver for negligently operating his vehicle. On appeal, the State invoked the policy concerns about Mary Carter

agreements in its motion for a new trial. The State argued that the driver and the plaintiff, while outwardly appearing to be adversaries, had secretly colluded to obtain a verdict against the State as the defendant with the deep pocket. McCluskey, 68 Wn. App. at 102. We recognized that the “existence of an undisclosed agreement between outwardly adversarial parties at trial can prejudice the proceedings by misleading the trier of fact. . . . Where appellate courts have permitted such agreements, they also have required pretrial disclosure to the trial court. The trial court can then advise the jury of the agreement so that jurors can consider the relationship in evaluating evidence and the credibility of witnesses.” McCluskey, 68 Wn. App. at 103-04 (citation omitted), citing Daniel v. Penrod Drilling Co., 393 F. Supp. 1056 (E.D. La. 1975); Ward v. Ochoa, 284 So. 2d 385 (Fla. 1973) (holding Mary Carter agreements must be disclosed to jury upon proper motion), abrogated by Dossdourian v. Carsten, 624 So. 2d 241 (Fla. 1993) (holding Mary Carter agreements void and inadmissible); Maule Indus., Inc. v. Rountree, 284 So. 2d 389 (Fla. 1973); Ratterree v. Bartlett, 238 Kan. 11, 707 P.2d 1063 (1985). But we concluded that listing parallel positions taken by the plaintiff and the impecunious defendant was not enough to establish collusive conduct. Without direct evidence of some kind of agreement, there was no basis for a new trial. McCluskey, 68 Wn. App. at 103-05.

Here, City First does have evidence of an agreement. City First discovered the settlement in the course of reviewing billing records in connection with the plaintiffs’ posttrial motion for attorney fees. Based in part on the lack of

disclosure of the settlement agreement, City First moved for a new trial. In the course of litigating the motion, City First obtained a declaration from Mullen stating that he was informed Collings would settle with him only if his deposition testimony was "acceptable."³ And he said Collings executed the agreement after the deposition was completed in July 2010.

City First contends a new trial must be ordered because the failure to disclose the Mullen settlement before trial violated a duty that exists in Washington either as a common law duty, a statutory duty under RCW 4.22.060(2), or as an independent ethical duty of counsel.

Courts have adopted different approaches to Mary Carter agreements. Some jurisdictions have banned such agreements as a matter of policy. See, e.g., Dossdourian, 624 So.2d at 246; Cox v. Kelsey-Hayes Co., 1978 OK 148, ¶ 32, 594 P.2d 354, 360; Elbaor v. Smith, 845 S.W.2d 240, 250 (Tex. 1992). Others have allowed Mary Carter agreements but have required that they be disclosed. Hodesh v. Korelitz, 123 Ohio St. 3d 72, 2009-Ohio-4220, 914 N.E.2d 186, at 189; Monti v. Wenkert, 287 Conn. 101, 124, 947 A.2d 261, 275 (Conn. 2008). Some of these courts have required that such agreements must be produced for examination before trial if there is a discovery request. Ward, 284 So. 2d at 387; see Grillo v. Burke's Paint Co., 275 Or. 421, 429, 551 P.2d 449 (1976) (affirming denial of a motion for a new trial based on posttrial discovery of settlement agreement because settlement could have been discovered before trial through due diligence).

³ Clerk's Papers at 1773.

It is fair to say that Mary Carter agreements are not favored. But there is little support for the proposition that City First is trying to establish in this case: that an undisclosed Mary Carter agreement is automatic grounds for a new trial.

In general, for a trial court to grant a party's motion for new trial, prejudice is required. See Spratt v. Davidson, 1 Wn. App. 523, 526, 463 P.2d 179 (1969) (reversing order of new trial and stating the "existence of a mere possibility or remote possibility of prejudice is not enough"). And other courts, in rejecting arguments for a new trial premised on the existence of a Mary Carter agreement, have required prejudice. See, e.g., Med. Staffing Network, Inc. v. Connors, 313 Ga. App. 645, 649, 722 S.E.2d 370 (2012) (concluding that even if the litigants had disclosed their litigation agreement during trial, "it is unlikely that the jury would have reached a different verdict"), cert. denied, ___ U.S. ___ (May 29, 2012); Monti, 947 A.2d at 277 (concluding that "the defendant was not prejudiced by the nondisclosure of the agreement so as to warrant a reversal"). We adhere to our well-established rule that a showing of prejudice is required to warrant a new trial.

City First identifies three portions of the record that allegedly demonstrate how it was prejudiced by not being informed of the settlement with Mullen. The first is a declaration from Brian Hunt, general counsel for City First, submitted to support City First's motion for a new trial. Hunt states that during closing argument, counsel for Collings dramatically drew the jury's attention to the fact that Mullen and his wife did not personally attend the trial: "where are they?" and

"why aren't they here?"⁴ City First argues that with evidence of the agreement to excuse Mullen from having to pay damages, the absence of Mullen could have been readily explained and the credibility of his testimony undermined.

A declaration purporting to describe what was said during court proceedings is not a substitute for a record. The parties agreed that closing argument would not be transcribed.⁵ And City First did not try to make a narrative report of proceedings of closing argument for review. See RAP 9.3 (rule allowing narrative report of proceedings); see also Allstate Ins. Co. v. Huston, 123 Wn. App. 530, 544-45, 94 P.3d 358 (2004) (record insufficient to decide issue and noting that party did not attempt to have an agreed or narrative report of proceedings created), review denied, 153 Wn.2d 1021 (2005). As a result of City First's failure to preserve the pertinent record in any way other than its own self-serving declaration, we must disregard the allegation of prejudice in closing argument.

Second, Mullen stated in his posttrial declaration that he was told Collings would agree to execute a covenant not to enforce judgment against him only if his deposition testimony was "acceptable." While the potential for tailored testimony certainly exists in these circumstances, City First does not show that any specific statement Mullen made was false or misleading. In our review of Mullen's deposition, we find nothing to suggest that his answers were crafted to aid the Collingses against City First. His testimony was largely consistent with the testimony of Sherri Russett, a City First employee since December 2009 who

⁴ Clerk's Papers at 1776.

⁵ See Report of Proceedings (Feb. 25, 2011) at 7.

testified about how City First operated. City First simply does not explain what it would have or could have done differently with Mullen as a witness if it had known the Collingses had agreed not to pursue judgment against him.

Third, City First contends the jury must have been misled by instructions that implied Mullen was actively defending at trial against the allegations of the Collingses, when in reality he was not at risk of having to pay damages.⁶ But City First does not explain how the outcome of the trial would have been different if the jury had instead been informed about Mullen's settlement with the Collingses. Certainly, the nondisclosure of the settlement deprived City First of an opportunity to inquire into the circumstances surrounding the settlement agreement and from asking Mullen about whether the covenant not to execute influenced his testimony. But this abstract possibility of prejudice, which will be present whenever a settlement agreement is kept secret, is too speculative to justify a new trial. We conclude a concrete showing of actual prejudice is necessary and City First has not made such a showing. We decline the invitation to use this case to make a definitive holding concerning Mary Carter-type agreements and the circumstances under which they must be disclosed. The trial court did not abuse its discretion by denying City First a new trial based on the lack of disclosure of the Mullen-Collings agreement.

⁶ See, e.g., Clerk's Papers at 856, Instruction 14, allowing the jury to find City First vicariously liable for Mullen's acts within the scope of his employment for City First.

CERTIFICATE OF SERVICE

I, Kay Spading, certify that on the 12th day of August, 2013, I caused the foregoing document, FFA's Reply Brief, to be delivered to the following parties in the manner indicated below:

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Under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 12th day of August, 2013, at Seattle, Washington.

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