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STATE OF WASHINGTON
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No. 33966-8-II

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

NANCIE HATHEWAY,

Appellant,

v.

U.S. TRUST COMPANY, N.A., a Connecticut corporation

Respondent/Cross Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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III. INTRODUCTION

Plaintiff, Nancie Hatheway, asks this Court to substitute her 20/20 hindsight regarding investment management during the market downturn in 2000-2002, and set aside the determinations of the trial court, which observed and heard the witnesses testify.

However, there is substantial evidence to support the trial court's determination that defendant U.S. Trust Company, N.A. ("U.S. Trust") satisfied its obligations to Ms. Hatheway. She received undivided loyalty and competent, diligent management of her portfolio. The documents admitted into evidence show – without the benefit of hindsight – the attention that U.S. Trust gave to Ms. Hatheway's investments, her knowledge of her portfolio contents and performance, and her ability to effectively question the management of her account. She was fully informed regarding the activities in her portfolio in periodic personal meetings, by phone, by internet, by account statement and by special monthly and quarterly portfolio analyses. Her stated investment goals were confirmed at least four times each year and her investments were diversified according to a plan that was repeatedly reviewed with her.

The fact that the account balance decreased during the significant market downturn that took place between 2000 and 2002 is not a breach of

the investment advisory agreement. In fact, the account was well positioned for the turn-around.

Plaintiff also seeks to impose the statutory standard of care for investment of trust assets upon plaintiff's agency account. However, even if that argument may be appealed, it has no merit. The statute applies to management of trust assets, and there is substantial evidence regarding the standard of care of an investment manager and that defendant satisfied it. The determination of the trial court in favor of defendant should be affirmed.

Defendant cross-appeals the trial court's award of attorneys fees to the extent that the court abused its discretion by applying incorrect legal standards, making findings of fact that are not supported by the record, and relying on arguments that defendant did not have an opportunity to address.

IV. STANDARD OF REVIEW

A. Review Of Findings Of Fact And Conclusions Of Law After Bench Trial.

After a trial court has weighed the evidence, appellate review is limited to a determination of whether substantial evidence supports the trial court's findings of fact, and whether, in turn, those findings support the conclusions of law and judgment. *Organization to Preserve*

Agricultural Lands v. Adams County, 128 Wn.2d 869, 882, 913 P.2d 793, 801 (1996) (speculation undermining findings of facts did not warrant overturning the finding); *Nichols Hills Bank v. McCool,* 104 Wn.2d 78, 82, 701 P.2d 1114, 1116 (1985) (affirming trial court's dismissal of action); *Ridgeview Properties v. Starbuck,* 96 Wn.2d 716, 719-20, 638 P.2d 1231, 1233-4 (1982) (affirming trial court findings which were supported by record).

If the evidence is in conflict, the reviewing court only determines if the evidence most favorable to the prevailing party supports the challenged findings. *Urban v. Mid-Century Ins.,* 79 Wn. App. 798, 807, 905 P.2d 404, 408 (1995) (upholding findings of fact). There is a presumption in favor of the trial court's findings, and appellant has the burden of showing that a finding of fact is *not* supported by substantial evidence. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.,* 115 Wn.2d 364, 369-70, 798 P.2d799, 803 (1990) (affirming findings of trial court).

Substantial evidence is an amount of evidence that is sufficient to persuade a fair minded person of the truth of the declared premise. *Fred Hutchinson Cancer Research Center v. Holman,* 107 Wn.2d 693, 712, 732 P.2d 974, 985 (1987) (affirming findings of fact which have support in the record). Findings of fact should be approved unless they are shown to be "against the weight of the evidence." *Id.* at 710, 732 P.2d at 984.

B. Review of Trial Court's Award of Attorneys' Fees.

An award of attorney's fees will be reversed if it is found that the trial court abused its discretion, that is, if its decision is manifestly unreasonable or based on untenable grounds. *Ryan v. State*, 112 Wn. App. 896, 899, 51 P.3d 175, 177 (2002).

V. ASSIGNMENT OF ERROR ON CROSS-APPEAL

1. Whether the trial court abused its discretion in the award of attorneys fees insofar as its decision was based upon: (a) misapplication of law, (b) findings of fact not supported by the record, and (c) arguments that defendant did not have an opportunity to address as they were not raised by plaintiff but by the trial court at the time the decision was read in open court.

VI. COUNTERSTATEMENT OF ISSUES

A. Whether substantial evidence supports the trial court's findings of fact and, in turn, whether the facts support the conclusions of law?

B. Whether the evidence regarding the standard of care for managing a "discretionary account" should be ignored in favor of the dictionary meaning of discretion?

C. Whether a portfolio manager for an agency account has an obligation to overcome the stated goals and desires of the client if, in hindsight, the client decides that they were not in his or her best interests?

D. Whether (1) plaintiff was aggrieved by the ruling that the Investment of Trust Funds Act, RCW 11.100 does not apply when that argument was raised in opposition to summary judgment and the trial court accepted her other arguments raised to deny summary judgment, or (2) the Investment of Trust Funds Act, RCW 11.100 applies in the context of an investment contract that involves an principal/agent relationship,?

E. Whether the trial court abused its discretion in making its award of attorneys fees by: (1) denying attorneys fees for claims under the Washington State Securities Act when the cause of action was based upon the same facts as the breach of contract and breach of fiduciary duty claims on which defendant prevailed; (2) denying attorneys fees for work spent on an statute of limitations defense when the court previously ruled that there was a question of fact regarding that defense, and applying an incorrect limitations period; (3) applying the statutory definition of costs set forth in RCW 4.84.010 to an award of contractual attorneys fees; (4) stating that it lacked jurisdiction over the prior suit filed by plaintiff regarding the same dispute and contract; and (5) limiting the award of fees

based upon grounds that were not raised by the opposing party and, therefore, could not be addressed by defendant?

VII. STATEMENT OF THE CASE

A. Procedural Background.

This case to recover a decrease in value of an investment account between 2000 and 2002 was commenced in Superior Court, Pierce County on September 29, 2004.[1] All proceedings were heard by Judge Lisa Worswick. The complaint set forth causes of action for: breach of fiduciary duty, breach of contract, and liability under the Washington State Securities Act ("WSSA") for negligent misrepresentation and failure to make proper disclosures. CP 1-6

After discovery, defendant moved for summary judgment on all claims or, in the alternative, for partial summary judgment on the statute of limitations. CP 247- 274 Plaintiff raised a number of arguments in opposition to summary judgment on her breach of fiduciary duty claim, including an assertion that that the "prudent investor" standard of RCW 11.100.050 and RCW 11.100.020 (management of trust funds) was applicable. CP 333-338

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[1] This action was initially commenced in June 2004 in United States District Court for the Western of Washington. In August 2004, plaintiff voluntarily dismissed that District Court action because diversity of jurisdiction was absent. CP 794

The trial court dismissed the WSSA claim, and, although it rejected plaintiff's opposition to summary judgment on the ground that that the statutory standard for a trustee applied; it accepted plaintiff's argument that summary judgment was not appropriate as there were questions of fact precluding summary judgment on the claims for breach of contract and breach of fiduciary duty. CP 553-555; RP 31-31 In regard to defendant's three year statute of limitations defense, which would bar claims arising before September 29, 2001, the trial court ruled that there was a question of fact regarding when plaintiff knew or should have known of her claims. CP 553-555; RP 31-32

This matter was tried to the court, without a jury, on May 23, 24, 25, 26, 31 and June 1, 2005. Presented for trial were plaintiff's claims that defendant had breached the parties' investment management agreement and had breached a fiduciary duty arising from the agreement, and defendant's affirmative defense that all claims arising prior to September 29, 2001 were barred by the statute of limitations. At the beginning of trial, plaintiff represented that she was seeking 1.1 million dollars. RP 60 Plaintiff did not raise the question of whether the "prudent investor" standard, RCW 11.100.050 and RCW 11.100.020 (management of trust funds), was applicable to her claims either by motion, in her trial brief or on closing argument.

Plaintiff, Nancie Hatheway, her companion, Frank Underwood, and Michelle Dicus testified on behalf of plaintiff. Ms. Dicus, who managed the Hatheway and Underwood portfolios while she was an employee of defendant and managed Ms. Hatheway's portfolio after the account with defendant was closed, was a fact and expert witness. RP 248, 320 Plaintiff also offered deposition testimony of Jeffrey Yandle and April Sanderson, employees of U.S. Trust. RP 386 The defense witnesses were Jeffrey Yandle, April Sanderson and Roger DeBard, who testified as an expert witness.

On July 7, 2005, the court issued its ruling dismissing the claims against U.S. Trust Company. RP 783-787 Findings of Fact and Conclusions of Law were entered. CP 688-693 Defendant thereafter moved for attorneys fees and costs. CP 777-792; 793-886; 749-768 Findings of Fact and Conclusions of Law were entered on September 23, 2005 awarding attorneys fees and costs in the amount of $87,773.37. CP 694-700 Judgment was entered on September 23, 2005. CP 701-702

B. Facts

1. Background.

In 1995, when a company which had employed her late husband went public, Ms. Hatheway made the decision – without professional advice – to sell stock that he had received during his employment. She

received over two million dollars. RP 395 Ms. Hatheway deposited the proceeds from the stock in her account at Merrill Lynch. RP 157 She gave her daughter a thirty year mortgage at seven and a quarter percent interest. RP 395

2. The U.S. Trust Account Agreement.

After consulting with her companion, Frank Underwood, Ms. Hatheway elected to open an account at U.S. Trust. RP 158-9 Ms. Hatheway read and signed a letter of agreement dated January 2, 1996 and opened an individual investment account with an approximately 1.3 million dollar deposit from her Merrill Lynch account. RP 396-7 Ex 190

In relevant part, her agreement with U.S. Trust required that U.S. Trust: give the account the benefit of its "continuing study of economic conditions, security markets, industries, and other investment opportunities;" be prepared to review its conclusions with Ms. Hatheway on the basis of these studies; and,

> *With respect to all investments in the Account,* you [U.S. Trust] are to have complete discretion in the management of the Account, make investment changes without prior consultation or approval, and invest and reinvest available funds at such time and in such manner as you [U.S. Trust] deem to be in my best interests and for my account and risk. In order that you may accomplish the foregoing, I [Ms. Hatheway] appoint you my agent and attorney-in-fact with the broadest possible power of management and investment over the Account and, with the assurance of your good faith, I hold you harmless from any loss or damage arising therefrom." (Emphasis added.)

Ex 190 ¶1

Micelle Dicus was plaintiff's portfolio manager until Ms. Dicus resigned from U.S. Trust in late September/early October 1997 to start her own business. RP 319-320; 246 U.S. Trust hired Jeffrey Yandle in November 1997 and he was assigned to Ms. Hatheway's account. RP 476-478 Mr. Yandle was plaintiff's portfolio manager until the account was closed in September 2002. Ex 11

3. Ms. Hatheway's Tolerance For Risk And Awareness Of The Risk Inherent In The Stock Markets.

When the account was opened, an investment policy was established which reflected Ms. Hatheway's investment goals. Exs 11, 25, 307 Until she requested that her investment policy be changed shortly before she closed her account, Ms. Hatheway's policy stated that she was *comfortable with taking risk and had experience in the stock market with investments of her own..* Exs 11, 25, 45, 51, 298, 337, 428, 497, 521, 530, 532, 537

Her comfort with risk was confirmed at the quarterly meetings that Ms. Hatheway and Mr. Underwood had with Mr. Yandle. RP 505-506 In connection with estate and financial planning, she advised U.S. Trust that she had a high tolerance for risk. Ex 124 A letter from U.S. Trust regarding that planning states:

> We have had numerous discussions on asset allocation that center around the differences in each of your risk tolerance levels. . . . .
>
> Therefore each of you must be comfortable with your current risk tolerance. . . . .
>
> Nancy has stated that she is comfortable taking on more risk, as evidenced by her current portfolio. [Her companion], on the other hand, has decided that he is more comfortable adding to the fixed income part of his portfolio to reduce the level of risk. . . .
>
> [Her companion] has stated more than once that he is concerned that by taking less risk than Nancie his heirs will receive less money. Please be aware that higher portfolio risk in the future *may* result in lower returns:

Ex 124

Her tolerance for risk and its possible effect were discussed often while the account was in existence. RP 503-506, 674-676

- She was informed, by U.S. Trust and her companion that her account could do poorly and she could experience periods of great anxiety when the stock market is in a downward cycle. Ex 124
- She advised Mr. Yandle that she had a long-term view of her investments and fully understood the risk reward aspects of the equity market and its propensity for volatility. Ex 300 at NH 2356; RP 425-426
- She never corrected any statement regarding her understanding of risk and the potential for volatility in equity markets although her

companion repeatedly told her that she was too much of a risk taker. RP 505-506

- A number of documents *from Ms. Hatheway's files* showed that the risks in the market had been illustrated to her repeatedly. Exs 287, 296, 295(A), 292; RP 409-413

Not only was her comfort level with risk repeatedly discussed and affirmed, Ms. Hatheway did not give U.S. Trust any reason to doubt her comfort with risk -- she did not correct from 1996 until 2002 what she now asserts was a misstatement. RP 407, 418-420

There is evidence that would have confirmed her investment and business experience.

- She asked U.S. Trust for information about specific stocks. RP 679
- She had decided, on her own, to sell her position in the stock that she received from her spouse. RP 395
- From the time that she opened her account at U.S. Trust, she maintained a separate investment account – initially at Merrill Lynch and later at Schwab. RP 398-399
- She was experienced in business. RP 149-51; 156-57, 439 She prepared tax returns for H.R. Block. She was an independent contractor real estate sales agent. She took many courses and seminars, including

some involving communication skills. She was the president of a Rotary Club for two terms and was on the board of directors of a woman's employment education group. RP 394-5

4. The Investments In The Account Were Diversified In Accordance With Her Investment Goals.

In accordance with her investment goals, income and growth -- the assets in the account were allocated to various equity and fixed income investments. *E.g.*, Exs 104, 135, 154 RP 504, 541-546 At no time was the allocation in her account outside the acceptable ranges that were established and discussed with her at each meeting. RP 546, 503-504 Her allocation was also presented in monthly reports – which she was able to understand. *E.g.,* Ex 154; RP 433

In this litigation after the market downturn of 2000-2002 she asserted that her portfolio should have had a larger allocation to fixed income securities, however, Ms. Hatheway had expressed the opinion that fixed income securities should be held in her account at Merrill or Schwab, rather than U.S. Trust. Exs 81, 7 She did not want to pay U.S. Trust a fee for managing fixed income investments or keeping cash in her account. Ex 300; RP 519 Indeed, in 1999, when her daughter paid off the mortgage that plaintiff held, Mr. Yandle – at Ms. Hatheway's request – recommended a series of bonds that she could purchase. RP 517-518 Ex

81 Ms. Hatheway did not use the funds to purchase fixed income securities at that time, or later. RP 413-415

5. Plaintiff Was Involved In The Management Of Her Account.

Ms. Hatheway was painstakingly involved in the performance and management of her account. She effectively called management errors, small and large, to the attention of U.S. Trust. She did not hesitate to express her displeasure and demand recompense for problems that resulted in small charges to her account – even a loss as little as $2.44. RP 399-403; Exs 328, 66, 336 She also repeatedly expressed concern about capital gains that were realized in her account. Exs 315, 328, 330, 35; RP 525, 450

She expressed her dissatisfaction with the transition from Ms. Dicus to Mr. Yandle. She complained that in the interim between Ms. Dicus' departure and Mr. Yandle's arrival, U.S. Trust had failed to sell a fund that represented less than one percent of her portfolio. RP 422-424; Ex 342 Despite the fact that Mr. Yandle had *multiple* contacts with her between his first meeting with her on November 25, 1997 and January 9, 1998, on January 15, she complained to the client relationship officer, at that time April Sanderson, that she was concerned about a lack of communication and insisted on more. Exs 300, 302, 303, 328

Ms. Hatheway had routine quarterly meetings with U.S. Trust to exchange information. RP 503-504, 443-448 Mr. Yandle also was available to her by phone; as she requested, he let her know when he would be out of the office on vacation and when he returned although other U.S. Trust employees were available to her if he were on vacation. Ex 135; RP 416-417, 440

April Sanderson described Ms. Hatheway's participation as follows:

> She was a client who reviewed her statements very closely. She scrutinized transactions very closely. She questioned transactions frequently. She had many questions about particular stocks that may have been purchased in her account or stocks that may have been sold in her account. There was, you know, a pretty detailed conversation about her account. RP 679

Yet, according to Nancie Hatheway's allegations in this suit, she sat by for eighteen (18) months – watching her account decrease by approximately one million dollars while Jeff Yandle allegedly ignored her alleged instructions. She makes this allegation although she was getting monthly statements and analyses – and she demonstrated that she was able to determine what proportion of her account was in fixed income investments. Ex 154; RP 433

6. Information and Analysis Regarding Account.

In addition to meetings and phone calls, she received a significant amount of written information about her portfolio's holdings, transactions, performance and structure through (1) quarterly reports, (2) account statements, (3) monthly performance reports, and (4) the internet. Exs 104, 135, 154, 286

a. Quarterly Reports and Meetings.

Ms. Hatheway's investment objectives and allocation were discussed in her quarterly meetings with Mr. Yandle. RP 503-506 Quarterly reports prepared for these meetings were generally sent to her in advance of the meetings. Ex 104; RP 446-447 The reports contained an in-depth analysis of the transactions and holdings in the portfolio information including, but not limited to:

- Current asset allocations and estimated income for Ms. Hatheway's and Mr. Underwood's aggregated accounts;
- Ms. Hatheway's investment objectives and a chart – based upon those objectives – showing targets for the percentage of her portfolio to be allocated to each asset class;
- Ms. Hatheway's current asset allocation and estimated income – the asset allocation was shown in dollar value and percentages;

- An analysis of the structure of her portfolio including a chart showing how her equity investments were diversified by strategy (growth, or value) and the theme of stock (productivity, globalization, demographics, communication or infrastructure); a bar graph comparing the percentage of her holdings in various sectors with the S&P 500; detailed information about her ten largest equity holdings, and a comparison of her sector allocations to the S&P.
- Performance measurement of the portfolio showing the total return by percentage for each of the asset allocation groups for the prior month and the year to date; and
- A review of transactions from the previous quarter showing the date, ticker symbol, whether it was a purchase or sale, the number of units purchased, the amount of the transaction and whether the purchase was related to growth, value or income. Ex 104

Ms. Hatheway admittedly received these presentations and reviewed them with Mr. Yandle at their quarterly meetings – at which they spent several hours discussing her portfolio in great detail. RP 441-448

b. Monthly Account Statements.

Ms. Hatheway also received a monthly account statement which stated who was to be contacted for investment questions. The statement detailed: the value of the account as of the date of the statement and the

previous month; a summary of assets by category, in dollars, percentage of value and the tax cost; an income summary for the month, the year to date, the estimated annual income and the current yield by percentage; a summary of gains and losses realized for the year to date; and details of all activity in the account organized in categories of: investments bought and sold, interest, dividends, additions and disbursements, and transfers. Ex 135

Ms. Hatheway admittedly received these reports and looked through them. RP 436-37

c. Monthly Investment Performance Reviews.

In addition, she received a separate monthly investment review detailing the performance of her account. Ms. Hatheway and Mr. Underwood were Mr. Yandle's only clients who asked for or received these monthly reports. RP 524 These reports contained a chart that compared the portfolio performance to five indices, for different time periods, and compared the account's performance with the market indices from the time the account was opened until the date of the report. Ex 154

Ms. Hatheway received these reports, reviewed them and on occasion discussed them with Mr. Yandle. RP 433

7. *Ms. Hatheway Continued to Withdraw $84,000 Each Year from the Account, Despite Her Companion's Admonitions That She Spent Too Much Money.*

The funds in Ms. Hatheway's account were hers; she was entitled to withdraw them at will. RP 330, 365, 298 at p.4 During the Hatheway/Underwood financial planning, U.S. Trust understood that their lifestyle was the key determinant in planning. Ex 124 At meetings with representatives of U.S. Trust, Ms. Hatheway's companion repeatedly told her that she spent too much. RP 505, 675-676 Indeed, she stated that she wanted to enjoy her money with her companion and was not concerned with leaving any to her children. Ex 330 RP 438

For most of the time that Ms. Dicus managed her portfolio, Ms. Hatheway withdrew $60,000 each year. Ex 37 In 1997, Ms. Dicus prepared two analyses regarding the effect of increased withdrawals from the account. One analysis noted that, in a down market, spending would result in a diminished account balance and that in a "bearish decade" any withdrawals were better than none, since money taken out was not invested in a declining market. Ex 298 In the other analysis, Ms. Dicus analyzed the effect of withdrawing $7,000 each month from an account valued at $1,550,000 over a seven year period. Ex 630 Ms. Dicus testified that she satisfied the appropriate standard of care when she managed the account. RP 320

Ms. Hatheway had these analyses in her files. Exs 298, 630 After the analyses were performed, and, while Ms. Dicus was managing the account, Ms. Hatheway did increase her withdrawal to $7,000 per month ($84,000 per year). Exs 37, 317; RP 333-334

It was U.S. Trust's opinion, which was confirmed by Roger DeBard, that – over the long term – Ms. Hatheway's account could support her withdrawals. RP 511-513, 543-545

8. Events Leading Up To the Closing of the Account.

In Ms. Dicus's opinion, the equity portion of the account was well diversified, RP 361, and the account did not perform badly in 2000 and 2001. RP 357-8 Although she testified that the fixed income portion of the portfolio should have been larger, she opined that you could find as many opinions on that as there are investment managers. Ex 115 at MD 50

In the summer of 2002, Mr. Yandle was asked to prepare a proposal to take capital losses in Ms. Hatheway's account, as she had a significant capital gain from the sale of a condominium in Hawaii, and she was also concerned about capital gains in her account. Ex 131, RP 113 Mr. Yandle was also asked to redraft her investment policy, as the downturn in the markets had caused her to reassess her comfort with risk. Exs 110, 107A; RP 510

Mr. Yandle prepared a memo for Ms. Hatheway explaining his efforts in Ms. Hatheway's portfolio over the prior year and discussing her desire to increase fixed income exposure. The memo noted:

> As you know I have been concerned for some time that a switch from stocks (an asset class that has experienced a devastating 2 year downfall) to bonds (which are currently trading at rates not seen in a couple of generations) would be a classic sell low buy high trap. But clearly there has been a dramatic realization of the volatility and risk associated with stocks and as such an increase in fixed income needs to take place.

The memo went on to make some proposals to change Ms. Hatheway's investment profile. Ex 110 (quote is on page NH 002461].

At the same time that Mr. Yandle was preparing a new investment policy, Ms. Hatheway was consulting with her friend Ms. Dicus about transferring her portfolio to Ms. Dicus's management. Ex 306 On or about September 24, 2002, Ms. Hatheway advised U.S. Trust that she was moving her account to Ms. Dicus's management saying that it was just time for a change. Exs 114, 111 At the end of August 2002, the assets in the account totaled approximately $1,112,000. Ex 136

Despite her opinion that – given the allocation in effect at U.S. Trust -- 2001 was the last chance to save the account, Ex 115 at MD 49, Ms. Dicus conceded that it would not surprise her to learn that the account – which was worth slightly more than 1 million dollars at the time it was

closed – would have been worth approximately 1.48 million dollars at the end of 2004 *without a single change in the investment portfolio.* RP 362 That is an increase of almost 50 percent in a little more than two years.[2]

C. The Attorneys Fees.

Pursuant to the investment agreement, Ex 190, U.S. Trust sought to recover its attorneys fees. The agreement stated:

> If suit or action is brought to enforce or interpret this Agreement, the prevailing party shall be entitled to recover, in addition to other relief that the court may award, an amount that the court may award as reasonable attorney fees prior to trial, on trial or on any appeal.

Ex 190, ¶ 15, and,

> I agree to indemnify and hold you harmless from any loss or liability, including attorney fees and other expenses, arising from compliance with the terms of this Agreement or compliance with instructions given to you unless such loss or liability is caused by your gross negligence or misconduct.

Ex 190, ¶14.

Defendant sought attorneys fees and costs in the amount of $231,093.64 based upon both provisions of the contract. CP 777-785 Plaintiff opposed the motion on the grounds that fees related to the breach of fiduciary duty and WSSA claims could not be recovered, that the indemnity provision was void, and that the lodestar should be adjusted to

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[2] Although it is after the fact and hindsight, it validates U.S. Trust's management.

exclude costs that were not covered by RCW 4.84.010, and the legal issues were straightforward. CP 887-910 (On this appeal, plaintiff asserts that the case presents novel issues of law, and that if she prevails, she is entitled to fees and costs pursuant to the parties' agreement. Plaintiff's Brief at pp. 1, 49)

The trial court awarded $87,773.37, ruling, among others things, that costs were limited to those allowed by 4.84.010, attorneys' fees could not be awarded for the WSSA claim or the statute of limitations defense, that the indemnity provision was void, and cut some time of defense counsel as excessive or duplicative. CP 694-700

VIII. ARGUMENT

A. The Findings Of Fact Are Supported By Substantial Evidence And Should Not Be Disturbed.

On this appeal, plaintiff, essentially, argues that there was conflicting evidence at trial and that her view of the evidence should have prevailed. However, this assertion does not warrant reversal of the judgment. If the evidence is in conflict, a reviewing court only determines if the evidence *most favorable to the prevailing party* supports the challenged findings. *Urban v. Mid-Century Ins.,* 79 Wn. App. 798, 807, 905 P.2d 404, 408 (1995) (upholding findings of fact). There is a presumption in favor of the trial court's findings, and appellant has the

burden of showing that a finding of fact is *not* supported by substantial evidence. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369-70, 798 P.2d799, 803 (1990) (affirming findings of trial court).

Plaintiff has not carried this burden. The record shows that each of the findings of fact that she challenges is overwhelmingly supported by substantial evidence, and those factual findings support the conclusions of law. Accordingly, the findings of the trial court should be affirmed.

In her second assignment of error, plaintiff challenges Findings of Fact Nos. 4, 5, 6, 7, 8, 9, 10, 17, 20, 21, 22, 25, 27, 28 to the extent that "each is based upon (a) the Court's finding that Plaintiff Hatheway told defendant U.S. Trust that 'she had a high tolerance of risk'[3]; or (b) that therefore the assets of her account were properly allocated and diversified.[4]

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[3] The finding that plaintiff had a high tolerance of risk is supported by substantial evidence. For example, Ms. Dicus wrote to plaintiff's counsel: "I am sure the files at US Trust have considerable documentation showing that Nancie had a high risk tolerance. I've made it clear to you, too, that when I managed her account at US Trust that is what she always told me." Ex 319 at MD 25. *See also,* Ex 115 April Sanderson stated that Ms. Hatheway had a 'pretty high level of risk tolerance, RP 675, and it was "much higher" than that of Mr. Underwood. RP 676. Mr. Yandle also stated that Ms. Hatheway regularly told him that she was much more comfortable with risk than Mr. Underwood and she was a "risk taker." RP 506 Mr. Yandle also stated that Mr. Underwood often commented that Ms. Hatheway was too aggressive and too much of a risk taker. RP 505

[4] There is substantial evidence that the account was properly allocated. Ms. Dicus agreed that the equities were well diversified, and although she objected to the percentage of fixed income equities, noted that "I doubt that we would have allowed an account of this type to remain allocated at only 10% bonds throughout this period, but you can find

In challenging finding of fact number 4, plaintiff challenges the credibility of the witnesses Jeffrey Yandle, April Sanderson and Roger DeBard. Finding of Fact No. 4 states:

> Jeffrey Yandle, April Sanderson and Roger DeBard testified as witnesses for the defendant. Ms. Sanderson and Mr. Yandle had considerable first hand knowledge of the relevant issues in the litigation. Mr. DeBard testified as an expert for the defendant and is well qualified. Each of these witnesses was credible.

In particular, this Court should not substitute its judgment regarding the evidence when, as here, the trial court has expressly found that defendant's witnesses were credible. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.,* 115 Wn.2d 364, 369-70, 798 P.2d799, 803 (1990) (affirming findings of trial court as it was in a better position to evaluate the credibility of witnesses.). As the Washington Supreme Court has stated:

> As an appellate tribunal, we are not entitled to weigh either the evidence or the credibility of witnesses even though we may disagree with the trial court in either regard. The trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. It is more capable of resolving questions touching upon both weight and credibility than we are.

Matter of Sego, 82 Wn.2d 736, 739-40, 513 P.2d 831, 833 (1973) (affirming trial court).

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as many opinions on that topic as you can find investment managers." Ex 115 at MD 50 Roger DeBard testified that the allocation was appropriate. RP 542-547

Both Mr. Yandle and Ms. Sanderson had considerable first hand knowledge of Ms. Hatheway and her dealing with U.S. Trust. Jeffrey Yandle was Ms. Hatheway's portfolio manager from the time he began working at U.S. Trust in November 1997 until the time that the account was closed. RP 476-478; Ex 11 April Sanderson was the client relationship officer assigned to Ms. Hatheway's account when Mr. Yandle became portfolio manager. RP 669-670 She met and spoke with Ms. Hatheway. RP 669 At the time that she testified and for two and a half years before, Ms. Sanderson was managing director of U.S. Trust in Portland, prior to that she was senior vice president at U.S. Trust and supervised various departments in the Portland office. RP 665

Roger DeBard was well qualified to testify as an expert and based his opinions upon significant review of the documents and testimony in this matter. He worked in the investment industry for more than forty (40) years, has a PhD, and has managed approximately two billion dollars in funds. RP 531-536 In reaching his opinions he reviewed the depositions in this case and many documents, including the claim, the detailed account statements from January 1999 through the time the account left U.S. Trust, the performance review statements and the quarterly report samples, the

investment policy, statements in 2001 and the proposed revised investment policy guideline from the Fall of 2002.[5] RP 540-1

Similarly, each of the other findings of fact is supported by substantial evidence. Attachment A hereto is a chart identifying record support for each challenged finding and where it is discussed in this brief. Accordingly, because the findings of fact are supported by substantial evidence, this Court should affirm the judgment in favor of defendant.

B. U.S. Trust Did Not Breach The Investment Agreement – There Is Substantial Evidence That It Satisfied The Standard Of Care For Management Of A Discretionary Account.

Paragraph 1 of the agreement sets forth the obligations of U.S. U.S. Trust's investment management. It was required to: give the account the benefit of its "continuing study of economic conditions, security markets, industries, and other investment opportunities" and be prepared to review its conclusions with Ms. Hatheway on the basis of these studies, Ex 190 ¶ 1, and

> *With respect to the investments in the account*, you [U.S. Trust] are to have complete discretion in the management of the Account, make investment changes without prior consultation or approval, and invest and reinvest available funds at such time and in such manner as you [U.S. Trust] deem to be in my best interests and for my account and risk. In order that you may accomplish the

[5] In contrast, Ms. Dicus formed her opinion based upon Ms. Hatheway's account statements and possibly "an investment policy statement or two." She never reviewed Mr. Yandle's quarterly reports. She thought that she may have seen one of the monthly investment analyses but she didn't know that she had seen it before she formed her opinion. RP 346

> foregoing, I [Ms. Hatheway] appoint you my agent and attorney-in-fact with the broadest possible power of management and investment over the Account and, with the assurance of your good faith, I hold you harmless from any loss or damage arising therefrom." (Emphasis added.)

Ex 190 ¶ 1

The language of the agreement shows that the discretion to be employed was "with respect to investments" to make *investment changes without prior consultation or approval.* It was not discretion to make investment policy changes or allocation changes without her input.

Although plaintiff seeks to have this Court use the dictionary definition of "discretion," which does not address the standard of care for a manager of a discretionary account, Roger DeBard testified regarding the appropriate standard of care:

> Question: Could you tell me or tell us what the obligations of a portfolio manager are in connection with a discretionary account?
>
> Response: The obligation would certainly include the working with a client and the development of appropriate goals and objective, the establishment of investment policy guidelines, ideally written. Secondly, there would be a high level of diligence in the management of the assets in order to achieve the objectives within guidelines, always. Third, there should be a communication of the ongoing management of the account in terms of the holdings, the level of risk exposure, the performance. And perhaps last, there always should be an effort to put the client's interests first, standard of loyalty. I think that's it.

RP 538-539

Substantial evidence supports a finding that this standard of care was satisfied.

First, significant effort was made to determine Ms. Hatheway's investment goals and to develop a written investment policy that reflected those goals. *E.g.,* Exs 300, 337 The investment policy for the account was established after consultation with Ms. Hatheway, the principal. As her agent, U.S. Trust established the appropriate allocation ranges in the account to carry out the agreed upon policy.[6] Although plaintiff asserts that the allocation was not correct, her own witness stated that "I doubt that we would have allowed an account of this type to remain allocated at only 10% bonds throughout this period, but you can find as many opinions on that topic as you can find investment managers." Ex 115 Difference of opinion is not a breach of the standard of care, an act of disloyalty or evidence of a lack of diligence.

Second, the assets were managed in a manner to achieve Ms. Hatheway's objectives in a volatile market, and to maintain her monthly draw while respecting her desires not to maintain a cash balance in her

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[6] Her account was never outside of those permissible ranges. RP 546, 503-504 There is substantial evidence that the ranges for the allocation were appropriate. RP 546 The comparison of the ranges in the account in the late 90's with those in 1995 and 1996 does not establish that the ranges were impermissibly broad. Ms. Dicus wrote in January 1997 "For both [referring to Mr. Underwood and Ms. Hatheway] rewrite ranges in policy statement [arrow] expand." Ex 428;

account, and to offset the capital gains in her account offset with losses. RP 525, 547-555, Ex 110 Ms. Hatheway's account was *never outside the ranges established by her investment policy*. RP 546, 503-504 Ms. Dicus conceded: "if the actual allocation is within shouting distance of the policy statement, and we do not receive complaints and we're considered to be doing our job." Ex 115 at MD 46-7; RP 353-4 Ms. Dicus also conceded that the equity portion of the portfolio was well diversified. RP 361 Ex 115 The account was reviewed each year by a committee to assure that it was in compliance, and it was. Exs. 334, 505; RP 668

Although plaintiff asserts that U.S. Trust misled her by assuring her that her "investments are diversified in a way for you to continue to benefit from rising markets while not investing so much in volatile securities that you will be badly hurt in a downturn", Ms. Hatheway's portfolio was, in fact, diversified. Her portfolio contained domestic and foreign equities, real estate investment trusts, fixed income and cash. Ex 104. The domestic equities were further diversified among large, mid and small cap investments. They were also diversified by industry and, in addition, by growth and value investments. Ex 104 Ms. Dicus conceded that she would not be surprised to learn that had the equities in the account at the time it was closed been retained, the account would have recovered

to the amount of $1.448 million by December 2004 without any change in the portfolio. RP 362

Moreover, the contemporaneous evidence shows that attention was being paid to the account and the actions in the Hatheway account were reasoned. For example, in September 2002, in response to her request for new policy suggestions, Mr. Yandle explained what he was doing and had been doing with her account:

> The work put into this portfolio over the last 12 months has been an effort to find areas/sectors within the capital markets that would provide better performance relative to the markets as a whole.

Ex 110. The memo goes on to give specific examples of transactions and the reasons for them.

Third, there was communication with Ms. Hatheway regarding the account in terms of the holdings, the level of risk exposure, and the performance. There were written, telephone and face-to-face communications with Ms. Hatheway regarding the transactions in her account, her comfort with risk and the performance of her account. At least quarterly, Mr. Yandle met with Ms. Hatheway and confirmed that she had not changed her goals. RP 505-506 He selected investments – which he then discussed with her – to carry out her goals. RP 490-491, 508

Fourth, there is substantial evidence that U.S. Trust did not breach its obligation of loyalty, and was not inattentive to plaintiff by permitting her to withdraw her own funds, the number of transactions in her account, or incurring occasional overdrafts.

Although plaintiff asserts that it was U.S. Trust's obligation to have kept Ms. Hatheway from making her withdrawals of $7,000 each month, Ms. Dicus, while she was employed at U.S. Trust, analyzed the effect of withdrawals in a down market and concluded that they were acceptable, if not beneficial. Ex 298. Because Ms. Dicus has now changed her mind about the effect does not mean that U.S. Trust breached the investment agreement or was not loyal to Ms. Hatheway. Moreover, there was evidence that the account could support these withdrawals. RP 511-513, 543-545

Similarly, there is substantial evidence that the number of transactions in the account does not show inattention. Many transactions were mandated by the fact that Ms. Hatheway was extremely reluctant to have cash and capital gains in her account and ; therefore, trades to fund her draw or offsetting trades were necessary.[7] RP 548, 526

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[7] In any event, U. S. Trust does not base its fees on the number of transactions, but rather on a percentage of the value of the account. Thus, U.S. Trust would benefit by an *increase* in value in the account, not by a high volume of trades, or a decrease of account assets. Ex 190

Similarly, there was substantial evidence that occasional overdrafts were caused by the fact that plaintiff didn't want to pay U.S. Trust to manage cash, rather than her current assertion that they were caused by inattention. Ex 92, 102; RP 548 In order to fund her monthly payment usually U.S. Trust had to make a transaction. Some of the transactions had settlement dates longer than others. This resulted in a mismatch – if anything, Ms. Hatheway had an interest free loan. RP 547-548, 519-523 This is not a situation where Mr. Yandle was risking Ms. Hatheway's funds by buying an investment and hoping that it could be covered in the future. It is unrelated to the decline in value of plaintiff's portfolio. RP 519-523

The cases from other jurisdictions that are cited by plaintiff regarding the appropriate standard of care are starkly different than the facts in this case. Each involves some element of disloyalty to the client – a conflict of interest, or unauthorized acts.

For example, in *Erlich v. First Nat'l Bank of Princeton,*, 208 N.J. Super. 264, 505 A.2d 220 (1984) (a New Jersey trial court decision), plaintiff's portfolio was not diversified – it was concentrated in one stock, *Id.*. at 295, 505 A.2d at 236, the portfolio manager had a conflict of interest in that he admitted he was "obsessed" with that stock, *Id.*. at 296, 505 A.2d at 238, and, after an initial inquiry regarding plaintiff's

investment objectives, there were no further discussions regarding his objectives. *Id.* at 292, 505 A.2d at 235. Indeed, another court reviewing *Erlich* noted that acts of the broker equaled gross negligence or recklessness. *In re DEC Intern., Inc.*, 282 B.R. 423, 428 (W.D. Wis. 2002).

Similarly, *Twomey v. Mictchum, Jones & Templeton, Inc.*, 262 Cal. App.2d 690, 69 Cal. Rptr. 222 (1968), involved excessive trading, failure to reveal a conflict of interest – the broker was also the principal in the securities transactions – misrepresentation regarding the source of plaintiff's monthly draw of funds, and failure to learn the essential facts of plaintiff's financial situation. *Id.* at 719, 69 Cal. Rptr. At 242.. None of these factors is present in this matter.

Karlen v. Ray E. Friedman & Co. Commodities, 688 F.2d 1193 (8th Cir. 1982), involved a non-discretionary account in which there were unauthorized trading in commodities futures, "an arcane and complicated field," *id.* at 1198, and activity statements that could convey "seriously inaccurate impressions concerning the status of the accounts." *Id.* at 1200.

In contrast, there is substantial evidence in this case that defendant satisfied the industry standard of care as described by Roger DeBard. Accordingly, the conclusion of the trial court that U.S. Trust satisfied its duty to Ms. Hatheway should be affirmed.

C. Defendant at all times satisfied its fiduciary duty to plaintiff. There Is No Evidence That U.S. Trust Acted In Any Way Disloyal To Her Interests.

U.S. Trust did not and does not dispute that it had a fiduciary duty to Ms. Hatheway. However, as set forth herein, there is substantial evidence to support the trial court's finding that it did not breach the duty [8] – it satisfied the appropriate standard of care for a portfolio manager.

Although the Washington courts have not analyzed the extent of an investment advisor's duty in this context, in cases where the Washington Supreme Court has defined the extent of a fiduciary duty, it is a duty of loyalty to the client and avoidance of self-dealing – it does not involve substituting the agent's judgment for the expressed goal of the principal. It is not strict liability or a guarantee of success. For example, real estate brokers must exercise:

> 'utmost fidelity and good faith, the legal, ethical, and moral responsibility on the part of the listing broker, as well as his subagents, to exercise reasonable care, skill, and judgment in securing for the principal the best bargain possible; to scrupulously avoid representing any interest antagonistic to that of the principal in transactions involving the principal's listed property, or otherwise self-dealing with that property, without the explicit and fully informed consent of the principal; and to make, in all instances, a full, fair, and timely disclosure to the principal of all facts within the

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[8] To establish a claim for breach of fiduciary duty, plaintiff must show that there is a fiduciary duty, that defendant breached it, and that the breach was a proximate cause of plaintiff's damages. *Interlake Porsche & Audi, Inc., v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597, 603 (1987); *see also, Senn v. Northwest Underwriters, Inc.,* 74 Wn. App. 408, 416, 875 P.2d 637 (1994).

> knowledge or coming to the attention of the broker or his subagents which are, or may be, material in connection with the matter for which the broker is employed, and which might affect the principal's rights and interests or influence his actions.'

Cogan v. Kidder, Mathews & Segner, Inc., 97 Wn.2d 658, 662, 648 P.2d 875, 877 (1982) (failure to disclose dual agency breach of fiduciary duty) (quoting M*ersky v. Multiple Listing Bureau of Olympia, Inc.,* 73 Wn.2d 225, 437 P.2d 897 (1968) (realtor breached duty by failing to disclose that purchaser was her sister).

Similarly, an insurer's fiduciary duty "is a duty to exercise a high standard of good faith which obligates it to deal fairly and give 'equal consideration' in all matters to the insured's interests." *Van Noy v. State Farm Mutual Automobile Insurance Co.*, 142 Wn.2d 784, 793, 16 P.3d 574, 579 (2001) (class action claim of bad faith in handling claims).

Here, there is substantial evidence to support the finding that indicates that U.S. Trust exercised good faith, was loyal to the stated goals of Ms. Hatheway, did not engage in any self dealing, communicated with her regarding the status of her account, gave the account the benefit of its attention and management, and kept the account within its stated ranges. .[9]

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[9] Ms. Dicus' opinion that an portfolio manager is obligated to 'fire' the client if the client wishes to follow a course that the manager deems ill advised was not supported by the authority upon which she relied. RP 347-353

Accordingly, the trial court's conclusion that there was no breach of fiduciary duty must be affirmed.

1. U.S. Trust Was Plaintiff's Agent, Not Her Trustee; It Did Not Have An Obligation To Overcome Her Expressed Desires.

The investment account agreement sets out the obligations of the parties; and as set forth above, U.S. Trust satisfied them. However, in her allegation of breach of fiduciary duty, plaintiff now seeks to elevate the contractual duty of her agent, U.S. Trust to a duty to overcome her expressed desires and act in her best interests as her trustee.

The investment agreement appoints U.S. Trust as Ms. Hatheway's agent – not her trustee. Ex 190, ¶1 The Supreme Court of Washington has distinguished trust from agency:

> 'The essential distinctions between a trust and an agency are to be found ordinarily in the fact that in a trust the title and control of the property under the trust instrument passes to the trustee who acts in his own name, while the agent represents and acts for his principal, and in the further fact that while a trust may ordinarily be terminated only by the fulfillment of its purposes an agency may in general be revoked at any time.
>
> While it may be difficult to define strictly, at all times, the line of distinction between an agent and a trustee, the essential distinction lies in whether the one who stands in the position of principal or donor parts entirely with the control, possession, and right of disposition of the property involved. For example, where property is irrevocably conveyed to one to manage, sell and reduce it to cash for the benefit of others, the grantor reserving no control, and the party being called a trustee, the

relation is a trust, and not an agency; * * *.'

McCarty v. King County Medical Service Corp., 26 Wn.2d 660, 682, 175 P.2d 653, 665 (1947) (*quoting* C.J.S.). Here, there is substantial evidence that Ms. Hatheway had the right to withdraw her funds and/or close her account at any time. Exs 190 ¶ 12, 298 Therefore, U.S. Trust was her agent, not her trustee.

Loyalty is the chief virtue required of an agent. Failure to make a full disclosure of all facts within the agent's knowledge having to do with the transactions will warrant the court's setting the transaction aside at the behest of the principal. *Moon v. Phipps,* 67 Wn.2d 948, 954, 411 P.2d 157, 161 (1966) *citing Breedlove v. Holto*n, 143 Wn. 347, 255 P. 132 (1927); *Stewart v. Preston*, 77 Wn. 559, 137 P. 993 (1914); *Watson v. Bayliss*, 62 Wn. 329, 113 P. 770, 34 L.R.A.,N.S., 1210 (1911). This loyalty demanded of an agent by the law creates a duty in the agent to deal with his principal's property solely for his principal's benefit in all matters connected with the agency. *Id., citing,* Restatement (Second), Agency § 387 (1958). U.S. Trust satisfied this obligation at all times.

2. The Standard For Management Of Trust Funds Does Not Apply In This Case.

Similarly, plaintiff's assertion that Defendant is held to the prudent investor standard of RCW 11.100.050 and RCW 11.100.020 (Management

of Trust Funds by Fiduciary) is without merit. First, plaintiff was not aggrieved by the trial court's ruling that this statute did not apply. She raised this argument in opposition to defendant's motion for summary judgment. CP 334 It does not appear to have been asserted in her trial brief, or at trial.

A party must be aggrieved by a ruling to raise it as an issue on appeal. RAP 3.1. Although the trial court rejected the argument that RCW 11.100.050 and RCW 11.100.020 applied to claims and warranted denial of summary judgment, other arguments raised in opposition to summary judgment were successful. Accordingly, plaintiff is not an aggrieved party entitled to appeal this decision. *See City of Tacoma v. Taxpayers of City of Tacoma,* 108 Wn.2d 679, 685, 743 P.2d 793, 796 (1987) (party who objects to reasoning of decision as opposed to result is not aggrieved for purpose of RAP 3.1); *see also, Yamada v. Hall,* 145 Wn. 365, 369, 260 P. 243, 244 (1927) (if moving party wants decision upon particular ground, motion may be confined to that ground); *Estate of Lyman,* 7 Wn. App. 945, 953-4, 503 P.2d 1127, 1133 (1973) (party not entitled to attack decision that was favorable even if disagrees with legal theory).

Nevertheless, assuming for the sake of argument that this issue may be appealed, it does not have any merit. First, as set forth above there

was substantial evidence that defendant satisfied the standard of care for a discretionary investment account. Second, those provisions come under the chapter "Investment of Trust Funds." RCW 11.100.010 states

> Any corporation, association, or person handling or investing *trust funds* as a fiduciary shall be governed in the handling and investment of such funds as in this chapter specified. *A fiduciary who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with requirements of this chapter.* The specific requirements of this chapter may be expanded, restricted, eliminated, or otherwise altered by provisions of the controlling instrument.

(Emphasis added.)

Ms. Hatheway's account did not involve a trust instrument – it was a personal investment account. Unlike the beneficiary of a trust, Ms. Hatheway was able to close her account and/or withdraw her funds at will. Therefore, the standard of care found in the statute does not apply as a matter of law.

D. The Trial Court Abused Its Discretion In Its Refusal to Award Certain Reasonable Attorneys Fees And Costs.

U.S. Trust is entitled to recover the reasonable attorneys fees and expenses that it incurred in defense of this action based upon the agreement of the parties. Ex 190 ¶ 15 In determining an award of reasonable attorneys fees, a court abuses its discretion insofar as its decision is based upon untenable grounds and/or was manifestly unreasonable.

> A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. A decision based on a misapplication of law rests on untenable grounds.

Ryan v. State., 112 Wn. App. 896, 899, 51 P.3d 175, 177 (2002) (relying on *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *In re Marriage of Littlefield,* 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997); *Ausler v. Ramsey,* 73 Wn.App. 231, 235, 868 P.2d 877 (1994) (citing *In re Marriage of Bralley,* 70 Wn.App. 646, 651, 855 P.2d 1174 (1993)). Given this standard, several of the trial court's rulings were an abuse of discretion.

1. It Was An Abuse Of Discretion To Refuse To Award Fees Incurred In Defending The WSSA Claim.

For example, the trial refused to award attorneys fees for U.S. Trust's defense of plaintiff's WSSA claim. CP 697; RP 805 U.S. Trust is entitled to full reimbursement of the reasonable attorneys' fees and expenses that it incurred in defending itself against <u>*all*</u> of plaintiff's claims because the facts supporting all of the claims – breach of fiduciary duty, violation of WSSA and breach of contract – were intertwined and were all based upon the relationship established by the contract. *See Ethridge v. Hwang,* 105 Wn. App. 447, 461, 20 P.3d 958, 966 (2001) (court not

required to artificially segregate attorneys' time in a case where the claims all relate to the same fact pattern but allege different bases for recovery); *Western Stud Welding, Inc. v. Omark Industries, Inc.*,43 Wn. App. 293, 716 P.2d 959 (1986) (attorneys' fees awarded for claims other than breach of contract where contract central to existence of claims).

Ms. Hatheway's the complaint relied upon a single list of factual allegations that were incorporated into each cause of action, and, accordingly, all of the discovery in the action related to the facts supporting each and every one of the claims. CP 1-6
Therefore, the trial court did not apply the correct standard in denying fees for the successful defense of the WSSA claim.

2. It Was An Abuse Of Discretion To Refuse To Award Fees Incurred In Connection With The Affirmative Defense Of Statute Of Limitations.

In denying attorneys fees for time spent on the statute of limitations claim the trial court abused its discretion in two different areas. First, it held that the statute of limitations was six years. CP 697; RP 807
The application of the six year statute for breach of contract when the claims are for breach of fiduciary duty has been rejected in this State. *Hudson v. Condon*, 101 Wn. App. 866, 872-7, 6 P.3d 615, 619-21 (2000), *review den.* 143 Wn.2d 1006, 21 P.3d 290 (2001). A three year limitations period applies to actions for breach of fiduciary duty and negligent

misrepresentation. *See First Maryland Leasecorp v. Rothstein,* 72 Wn. App. 278, 286, 864 P. 2d 17, 22 (1993) (three year statute for negligent misrepresentation begins to run when aggrieved party discovers or should have discovered wrongdoing).

Second, the trial court had previously ruled that there was a question of fact regarding when plaintiff knew or should have known of her claims for the purposes of the statute of limitations defense. RP 31-32 CP 553-555 The defense could only could be deemed unnecessary because defendant prevailed at trial. Accordingly, this ruling was based upon incorrect law and was manifestly unreasonable.

3. It Was An Abuse Of Discretion To Limit Costs To Those That Could Be Recovered Under RCW 4.84.010.

The trial court also abused its discretion when it limited the award of costs to those permitted under RCW 4.84. 010.[10] CP 699; RP 803 However, RCW 4.84.330 specifically provides that reasonable attorneys' fees, costs and necessary disbursements shall be awarded to the prevailing party in any case where a *contract* provides for attorneys fees. The statute does not require that there be a contract provision providing for expenses and costs. The Supreme Court of Washington has ruled that attorneys fees

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[10] In her appeal brief, plaintiff asserts that if she were the prevailing party in this matter she would be entitled to an award of attorney's fees "*and costs*". Appellant's Brief at page 49.

include costs and expenses of litigation – they are not limited to statutory costs defined in RCW 4.84.010. *Panorama Village Condominium Owners Assoc. v. Allstate Ins. Co.,* 144 Wn.2d 130, 142-4, 26 P.3d 910, 916-18 (2001) (attorney's fees include costs and expenses of litigation). Therefore, an incorrect legal standard was applied.[11]

4. It Was An Abuse Of Discretion To Limit Fees Based Upon Arguments Not Raised By Plaintiff; This Deprived Defendant Of An Opportunity To Address These Issues.

Other portions of the ruling were raised by the trial court when the decision was being rendered, and not in plaintiff's opposition. Accordingly, defendant was prejudiced by not having an opportunity to direct the court's attention to how defendant had carried its burden.

For example, several of the trial court's findings were based upon its determination that although defense counsel did an excellent job, too much work was put into the case, that there was duplication of time put

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[11] In ruling that the indemnity was void as against public policy, the trial court also applied an incorrect legal standard.. Paragraph 14 of the agreement obligates Ms. Hatheway to indemnify U.S. Trust for "compliance with instructions given to you unless such loss or liability is caused by your gross negligence or misconduct." The trial court determined that Ms. Hatheway was involved and detailed in the performance and management of her account. Therefore, Ms. Hatheway is obligated to indemnify U.S. Trust for its defense. Here, because there was no breach of fiduciary duty – it has been determined that U.S. Trust did not breach the contract and/or the fiduciary duty that existed because of the contract a policy that prohibits indemnity for ones own wrongdoing should have no application. Accordingly, U.S. Trust is entitled to be indemnified for its expenses in this action.

into the case, and that there was duplication of some attorneys' work. RP 804-805

If plaintiff had raised these arguments, defendant would have noted that:

- The fees and costs were reasonable given the fact that the plaintiff was seeking in excess of one million dollars, RP 60, therefore, the total amount spent on the case – including discovery, experts, motion practice, trial and expenses -- was less than one quarter of the damages that plaintiff was seeking. CP 780-781
- Regarding the identification of too many exhibits, defendant would have called to the trial court's attention the fact that exhibit numbers 1 through 120 and 340 through 627 were identified by the plaintiff, not the defendant. CP 556-609 Similarly, if it had been given the opportunity to address this argument, defendant would have called the court's attention to the fact that 280 of those documents were added to plaintiff's list approximately two weeks before trial – this would demonstrate that the time spent was reasonable.
- Regarding the trial court's limiting of co-counsel – who was present at the six day trial and examined defendant's fact witnesses – to ten hours, CP 699; RP 805, defendant would have addressed the value

brought to the case by counsel, and noted that the plaintiff also had two attorneys present throughout trial.

- Regarding the assertion that fees could not be awarded for time spent on the federal law suit because the court did not have jurisdiction, cp 697, RP 806, given the opportunity, the defendant would have pointed out that the parties and the contract were before the trial court and that defendant had not prevailed until the trial court issued its decision.

For the above reasons, defendant submits that the trial court abused its discretion in its calculation of reasonable attorneys fees, and requests that this Court remand this matter for a hearing to award reasonable attorneys fees and costs.

E. Defendant Requests that Attorneys Fees and Costs Be Awarded on this Appeal.

The agreement of Ms. Hatheway and U.S. Trust expressly allows attorneys fees to be awarded to the prevailing party on appeal. The agreement, states:

> If suit or action is brought to enforce or interpret this Agreement, the prevailing party shall be entitled to recover, in addition to other relief that the court may award, an amount that the court may award as reasonable attorney fees prior to trial, on trial or on any appeal.

Ex 190, ¶ 15. Attorneys fees may be awarded on appeal if provided by statute, agreement or equitable principles. *Tacoma Northpark, LLC v.*

NW, LLC, 123 Wn. App. 73, 84, 96 P.3d 454, 459-60 (2004) (awarding fees on appeal to prevailing defendant/respondent); RAP 18.1. Accordingly, respondent/cross-appellant requests an award of its attorneys fees and expenses incurred on this appeal.

IX. CONCLUSION

For the above reasons, defendant U.S. Trust respectfully requests that this Court:

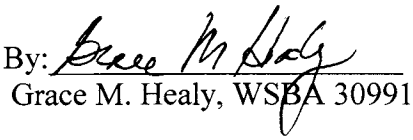
(a) affirm the judgment of the trial court dismissing plaintiff's claims;

(b) affirm the judgment of the trial court awarding attorney's fees, but remand this matter for reconsideration of the amount of reasonable attorneys fees and costs; and

(c) award defendant reasonable attorneys fees and costs on this appeal.

RESPECTFULLY SUBMITTED this 26th day of April 2006

GRACE M. HEALY PLLC

By: 
Grace M. Healy, WSBA 30991

DAVIES PEARSON, P.C.

Peter T. Petrich, WSBA 8316

	ATTACHMENT A	
Allegedly erroneous finding of fact	Evidentiary Support	Page discussed in brief
Finding of Fact No 5. Plaintiff told defendant that she had a high tolerance for risk.	RP 425-426, 503-506,675-676 Exs 11, 25, 45, 51, 124, 298, 319, 337, 428, 497, 521, 530, 532, 537	10-12 24 (fn 3)
Finding of Fact No 6 Plaintiff's high tolerance for risk was discussed often over the period of time that the account was in existence.	RP 503-506, 674-676 Exs 124, 319 @ MD 25	10-11 24 (fn 3)
Finding of Fact No. 7 These discussions were between representatives of defendant and plaintiff, and among plaintiff, defendant and her companion, Frank Underwood.	RP 503-506, 674-676 Ex 124	10-12 16 24 (fn 3)
Finding of Fact No 8 These discussions about risk took place in many face-to-face meetings.	RP 503-506, 674-676 Ex 124	10-12 16 24 (fn 3)
Finding of Fact No 9	RP 425-426 Ex 300	11-13 31

	ATTACHMENT A	
Defendant relied upon Ms. Hatheway's representations regarding her high tolerance for risk		
Finding of Fact No 10 Defendant was entitled to rely upon Ms. Hatheway's representations regarding her high tolerance for risk.	RP 149-151, 156-157, 395, 398-399, 461, 679	10-13 28-19
Finding of Fact No. 17 Plaintiff was involved and detailed in the performance and management of this account.	RP 399-403, 407, 418-420, 422-424, 439, 450, 525-526, 548, 679 Exs 35, 66, 300, 302, 303, 315, 328, 330, 336	14-15 32-33
Finding of Fact No 20 The account was well diversified in equity and debt.	RP 504, 541-546 Exs 104, 135, 154	13 24 (fn 4) 29-30
Finding of Fact No 21 The equity portion of the account was diversified appropriately.	RP 361-362, 503-504, 542-547 Exs 104, 115	13 24 (fn 4) 30-31
Finding of Fact No 22 The funds in the	Exs 111, 114, 190, 298	21 38

	ATTACHMENT A	
account belonged to plaintiff; they were not held in trust for her; she was able to withdraw them at will.		
Finding of Fact No. 25 Overdrafts in the account did not cause plaintiff any damage.	RP 547-548, 519-523 Exs 92, 102	33
Finding of Fact No. 27 Plaintiff's claim that defendant ignored her request to increase her bond position in not consistent with her refusal of defendant's offer to buy bonds with U.S. Trust with the proceeds of a mortgage that she received. It is also inconsistent with the discussions plaintiff had with Mr. Yandle, Ms. Sanderson and Mr. Underwood.	RP 490-491, 505-508, 517-519,679 Exs 7, 30, 81, 110, 507	13-15 31-32
Finding of Fact No 28 The account was appropriately allocated.	RP 503-504, 511-513, 543-547, 668 Exs 115, 334, 505	13-14 20 24 (fn 4) 29-30

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STATE OF WASHINGTON
BY

No. 33966-8-II

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

NANCIE HATHEWAY,

Appellant,

v.

U.S. TRUST COMPANY, N.A., a Connecticut corporation

Respondent/Cross Appellant.

CERTIFICATE OF SERVICE OF BRIEF OF RESPONDENT/CROSS-APPELLANT

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

1. I am one of the attorneys of record for U.S. Trust Company, N.A., Respondent/Cross-Appellant herein.

2. On April 26, 2006, I caused a true and correct copy of the Brief of Respondent/Cross-Appellant to be served on the following counsel of record by causing a true copy thereof to be personally delivered to:

G. Perrin Walker
Vandeberg Johnson & Gandara
1201 Pacific Avenue
Suite 1900
Tacoma, WA 98401-6377

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

DATED this 26th day of April 26, 2006, at Seattle, Washington.

Grace M Healy

Grace M. Healy