

No. 34136-1-II

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

LEVIUS I. DAVIS and DEBBIE L. VIDAL DAVIS,
Husband and Wife,

Appellants,

v.

WELLS FARGO HOME MORTGAGE COMPANY,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
HONORABLE THOMAS FELNAGLE

BRIEF OF APPELLANTS

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I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	3
III.	ISSUES RELATING TO ASSIGNMENTS OF ERROR	4
III.	STATEMENT OF THE CASE	6
A.	The Davises bought their home in July 1998 with a loan from ComUnity Lending and executed an Impound Agreement and Deed of Trust that permitted the lender to charge them \$234/month as reserves for taxes and insurance, plus any annual increases in taxes and insurance	6
B.	Their monthly payment amount was critical to the Davises' purchase decision because they planned on starting a family and needed to rely solely on Mr. Davis's income for support	8
C.	ComUnity Lending immediately assigned the loan to Wells Fargo, as "Norwest Mortgage," which began in November 1999 collecting grossly excessive reserves for taxes and insurance; by August 2000, the Davises' monthly payment increased to \$2,015.00	8
D.	Wells Fargo began demanding these massive increases in the Davises' monthly payments in order to collect sufficient reserves to pay taxes and insurance on the Davises' property <u>and</u> on their neighbors' tax parcel, relying on a handwritten notation on the Davises' Deed referencing the adjacent tax parcel	9
E.	The Davises notified Wells Fargo's representatives several times in late 1999 that they were being overcharged for their impound account and asked Wells Fargo to investigate the reasons, but Wells Fargo failed to conduct any investigation, and instead materially misrepresented the causes of the increase in impound charges	10

F.	Mr. Davis was able to earn enough to pay the increased charges until January 2001, when Wells Fargo breached its agreement to hold post-dated checks for four monthly loan payments, causing the Davises' payments to fall two months behind	11
G.	Wells Fargo refused to accept payments to make up the arrearage, starting foreclosure in May 2002	12
	1. Wells Fargo's wrongful foreclosure damaged the Davises' credit worthiness and their reputations in their community	12
H.	Wells Fargo's wrongful foreclosure forced the Davises to seek bankruptcy protection in September 2001 to save their home	13
I.	Wells Fargo's inflated bankruptcy claims caused the bankruptcy court to order Mr. Davis to deposit over \$2,950/month into the Trustee's account, forcing Mr. Davis to work even longer hours.	14
J.	Wells Fargo continued demanding excessive impound payments even after Mr. Davis notified Wells Fargo in October 2001 that it was erroneously demanding impound payments for a tax parcel that the Davises did not own	14
K.	Unknown to the Davises, Wells Fargo investigated the impound payments and verified that the Davises owned only one tax parcel, prompting Wells Fargo to send Pierce County a refund request on February 28, 2002.	15
L.	Wells Fargo concealed its February 2002 refund request from the Davises, while it continued asserting in the Davises' bankruptcy that the Davises owed impound assessments on two tax parcels	15

M.	The Davises voluntarily dismissed their bankruptcy in June 2002 because Mr. Davis could no longer work the long hours necessary to pay the Ch. 13 Plan payments	16
N.	Wells Fargo started a second foreclosure on June 25, 2002, wrongfully demanding \$44,000.00 to reinstate the loan, including \$15,000.00 in improper impound charges	17
O.	Wells Fargo agreed to modify the loan in August 2002, after the Davises inundated the lender with calls to complain of overcharges, reducing its claimed "arrearage" from \$44,000 to \$29,000 and forcing the Davises pay \$5,400 in cash for Wells Fargo's attorneys fees incurred in the foreclosures	17
P.	The Davises had to wait until January 2004 to refinance their mortgage with a new company because of the damage done to their credit rating.	18
IV.	PROCEDURAL HISTORY	18
A.	The Davises commenced this lawsuit on August 6, 2004, seeking damages for breach of contract and negligence, and emotional distress.	19
1.	The Complaint alleged that Wells Fargo breached the contract by charging them more for the taxes/insurance impound account than allowed by the Deed of Trust. . . .	19
2.	The Complaint alleged that Wells Fargo's excessive charges for taxes and insurance violated the Consumer Protection Act	20
3.	The Complaint alleged that Wells Fargo's negligence included failing to investigate the overcharges in response to the Davises' complaints and misrepresenting the reasons for the huge increase in impound funds	20

4.	The Complaint alleged that Wells Fargo's overcharges and failure to investigate the Davises' complaints led Wells Fargo to foreclose wrongfully on the Davises twice, drove the Davises into bankruptcy, forced Mr. Davis to work excessive hours, and aggravated Mrs. Davis's medical conditions	20
5.	The Complaint's request for relief included the Davises' expenses incurred in the bankruptcy, the loan modification, and refinance, as well as compensation for injuries to their health, reputations and creditworthiness.	21
B.	The attorneys for Wells Fargo and Chicago Title joined forces to inundate Plaintiffs' attorney with multiple summary judgment motions.	22
C.	The Davises moved three months before trial to amend the Complaint to add causes of action for allegations already in the Complaint, which the trial court denied as too close to the trial date.	24
D.	The Davises retained John Hathaway as lead trial counsel in early September 2005 to counterbalance the representation of defendants by four attorneys from two large law firms	25
E.	The trial court's rulings on Defendants' motions in limine reduced plaintiffs to \$21,900.00 in damages that they were allowed to present to the jury.	26
F.	On the third day of trial, Wells Fargo conceded liability and agreed to pay the Davises \$21,900.00 in damages, ending the trial	27

G.	On November 10, 2005, the trial court entered a \$21,900.00 judgment against Wells Fargo, as required by pursuant to the CR 2A Agreement, rejecting Wells Fargo’s attempt to reduce the amount in violation of the agreement	28
H.	The trial court awarded the Davises \$48,000.00 in fees, excluding over \$52,000.00 from their attorneys’ fee applications	29
I.	Plaintiffs filed their notice of appeal on December 5, 2005	30
V.	ARGUMENT	30
A.	The trial court erred by entering Summary Judgment that the Economic Loss Rule bars Plaintiffs’ negligence claim and right to recover noneconomic losses because the Deed of Trust did not allocate the risk of Wells Fargo’s misrepresentations and the Davises lacked the bargaining power to bargain for such allocation	30
1.	The standard of review from a Summary Judgment motion is <i>De Novo</i>	30
2.	The Economic Loss Rule does not apply to the Davises’ claims because theirs is a consumer claim against a lender with whom they had no bargaining power, over breach of impound obligations in the Deed of Trust that does not allocate the risk of Wells Fargo’s misrepresentations to the Davises	31
3.	The existence of a contract claim does not, <i>ipso facto</i> , preclude assertion of tort claims	35

B.	Denying plaintiffs’ Motion to Add Claims was error; The added claims would not unduly prejudice Wells Fargo because the misconduct supporting the claims was stated in the original Complaint, the new claims did not introduce new facts, Wells Fargo had not yet conducted deposition discovery, and three months remained before the trial date	36
	1. The court erred because the additional claims arose from the same transaction as the current claims and concerned facts already alleged in the Complaint	36
	2. Wells Fargo was not unduly prejudiced by adding these claims three months before trial because it had engaged only in interrogatory and document discovery that applied equally to the new claims	38
	3. The Economic Loss Rule does not preclude defendants’ liability for violating the Consumer Protection Act.	38
C.	The trial court erred in prohibiting Plaintiffs from presenting evidence to the jury of damages that were proximately caused by Wells Fargo’s wrongful conduct	39
D.	The trial court’s exclusion of over \$45,000.00 in fees from the Davises’ fee award was erroneous because the court intentionally deviated from the Lodestar Method to exclude these fees, for arbitrary, unwarranted reasons	40
	1. The trial court was required to apply the Lodestar Method for determining the Davises fee award	40

a.	The Lodestar Method does not authorize the court to reduce a fee award by assuming that time was inefficiently spent or that the work of two counsel necessarily involved duplicative effort	40
b.	The court may not limit fees solely on the basis of the amount that Plaintiffs recovered and must take into account fees generated by Wells Fargo’s litigation tactics	41
2.	The trial court acknowledged that the fee award must be determined by the Lodestar Method and that plaintiffs were entitled to services of two trial counsel, but nonetheless violated the Lodestar requirements by excluding over \$45,000.00 in fees after applying lodestar reductions, including all conferences between counsel and all of attorney Nwokike’s trial time	42
a.	The trial court excluded 109 hours of Nwokike time from specific dates based on Lodestar considerations, but erred as to 68.9 of those hours	43
b.	The trial court unreasonably reduced Mr. Nwokike’s time an additional 50 hours for “unfocused” pleadings and an additional \$5,636.00 for seeking “unrealistic damages”	46
c.	The trial court improperly reduced John Hathaway’s fee request by at least 50 hours, plus an additional \$8,459.00 as part of the 25% “penalty”	48

VI. REQUEST FOR ATTORNEYS FEES 49
VII. CONCLUSION 50

TABLE OF AUTHORITIES

I. CASE LAW

Alejandre v. Bull,
123 Wn. App. 611, 98 P.3d 844 (2004) 31, 34

Allard v. First Interstate Bank,
112 Wn.2d 145, 148, 768 P2d 998, 773 P2d 420 (1989) 42

Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1,
124 Wn.2d 816, 821, 881 P2d 986 (1994) 32

Blair v. Washington State Univ.,
108 Wn.2d 558, 570, 740 P2d 1379 (1987) 41

Douglas v. Freeman,
117 Wn.2d 242, 255, 814 P2d 1160 (1991) 39

Edmonds v. Scott Real Estate,
87 Wn. App. 834, 942 P2d 1072 (1997) 35

ESCA v. KPMG Peat Marwick,
86 Wn. App. 628, 939 P2d 1228 (1997) 36

Griffith v. Centex Real Estate Corp.,
93 Wn. App. 202, 206, 969 P2d 486 (1998), 31, 33

Herron v. The Tribune Publishing Co.,
108 Wn.2d 162, 168, 736 P2d 249 (1987) 37

Hiner v. Bridgestone/Firestone, Inc.,
91 Wn. App. 722, 959 P2d 1158 (1998) 30

Mason v. Mortgage America, Inc.,
114 Wn.2d 842, 850,-51, 792 P2d 142 (1990), 38

Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, L.L.P.,
110 Wn. App. 412, - P3d - (2002) 35

<i>Pannell v. Food Serv. of America</i> , 41 Wn. App. 418, 447, 810 P2d 952 (1992)	40
<i>Singleton v. Frost</i> , 108 Wn.2d 723, 733, 742 P2d 1224 (1987)	40
<i>Travis v. Horsebreeders</i> , 111 Wn.2d 396, 411, 759 P2d 418 (1988)	40
<i>Wheeler v. Catholic Archdiocese of Seattle</i> , 65 Wn. App. 552, 574-75, 829 P2d 196 (1992)	41, 44, 46

II. STATUTES AND TREATISES

RCW 4.84.010	40
RESTATEMENT (SECOND) OF TORTS SS 552 (1977)	34

I. INTRODUCTION

The Davises are plaintiff homeowners in this lawsuit against their mortgage company, Wells Fargo, for overcharges to their escrow account for taxes and insurance and for misrepresentations and wrongful foreclosures relating to those overcharges. The Davises are the prevailing parties in the trial court pursuant to a CR2A Agreement entered into the record on the third day of trial. CP 841-48.

This appeal concerns the trial court errors (1) in invoking the Economic Loss Rule to dismiss on summary judgment plaintiffs' negligence claims and noneconomic damages, (2) in refusing to allow plaintiffs to add claims for negligent misrepresentation and violation of the Consumer Protection Act three months before trial, (3) in granting motions in limine excluding evidence of damages that plaintiffs could present to the jury based on the court's view that the causal link was "attenuated," or on speculation that the contracting parties' had not "contemplated" the damage, or on misapplication of the Economic Loss Rule, and (4) in arbitrarily excluding over \$45,000.00 from plaintiffs' fee award under the contract's fee clause in violation of the Lodestar Method.

This lawsuit is a consumer claim of the Davis homeowners against their mortgage lender, Wells Fargo, for demanding grossly excessive deposits into their escrow fund for taxes and insurance, then misrepresenting and concealing the reasons for its excessive charges, then negligently and arrogantly driving the homeowners into bankruptcy by

wrongfully foreclosing on their home, and unjustifiably keeping them in bankruptcy for months after learning of the lender's own negligent conduct. Following the Davises' voluntary dismissal of their bankruptcy, Wells Fargo humiliated the homeowners further by wrongfully foreclosing on them a second time, while concealing from them the lender's knowledge that it had verified the overcharges and already obtained refunds of erroneous tax payments to Pierce County and surreptitiously restored the funds to the Davises' escrow account.

Wells Fargo breached the fiduciary duty that an escrow owes its principal, negligently misrepresented and concealed its wrongdoing and then persisted in its wrongful conduct long after it learned of its negligence. The trial court erroneously applied the Economic Loss Rule to deny the Davises compensation for the damage that Wells Fargo has caused to their creditworthiness, for their humiliation and injury to their reputations, and for the deterioration caused to Mrs. Davis's ongoing medical conditions, which involve seizures and panic attacks.

The trial judge entered summary judgment limiting plaintiffs to their contract claim and to out of pocket losses, allowing Wells Fargo to insulate itself from the consequences of its misrepresentations simply because *part* of its misconduct involved its breach of the escrow account provisions in the Deed of Trust by using \$3,200 from the Davises' escrow account to pay taxes on the wrong property. The trial court erroneously refused to allow the Davises to add negligent misrepresentation and

Consumer Protection Act claims three months before trial and erred further by refusing to allow the Davises to present the jury with damages other than \$21,900.00, which was only part of their out of pocket losses.

Wells Fargo capitulated on the third day of the jury trial, agreeing to entry of judgment against it for \$21,900.00 and agreeing that plaintiffs were deemed prevailing party for purposes of attorneys fees and appeal.

When the Davises presented their attorneys fees application, the trial court erred further by ignoring the Lodestar requirements to deny plaintiffs over \$45,000 in attorneys fees that should have been awarded.

Plaintiffs ask that this court add the \$45,000.00 to the judgment for fees, or, in the alternative, to remand with directions to add \$45,000.00 to the fee award. Plaintiffs further ask that the case be remanded for trial on the causes of action and damages wrongfully disallowed by the trial judge. Finally, the Davises ask for an award of their fees on appeal pursuant to the Deed of Trust's fee clause and the Consumer Protection Act.

II. ASSIGNMENTS OF ERROR

The trial court erred by:

1. Holding on Summary Judgment that Plaintiffs' claims for negligent misrepresentation, emotional distress and noneconomic losses are barred by the Economic Loss Rule.
2. Denying Plaintiffs' Motion to Add Claims three months before the trial date.
3. Prohibiting Plaintiffs from presenting evidence to the jury of damages that were proximately caused by Wells Fargo's wrongful conduct.

4. Intentionally deviating from the Lodestar Method to make over \$45,000.00 in unwarranted, arbitrary exclusions from the Davises' fee award.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

The Davis Plaintiffs submit the following issues for review:

1. Whether the Economic Loss Rule applies to commercial claims where contracting parties have bargained over contract terms that allocate the risk of the specific loss in dispute and not to a homeowner's consumer lawsuit against a mortgage lender arising from overcharges for taxes and insurance and misrepresentations concerning those overcharges, where the terms of the Deed of Trust governing the lender's charges do not contain any language allocating the risk of the lender's overcharges and misrepresentations and the homeowner lacked the bargaining power to bargain for such allocation. (Related to Assignment 1.)
2. Whether the mere existence of a contract claim is insufficient to trigger application of the Economic Loss Rule to preclude a homeowner from recovering damages caused by a mortgage lender's material misrepresentations of charges for the homeowner's tax escrow account. (Related to Assignment 1.)
3. Whether the trial court abused its discretion in denying plaintiffs' Motion to add negligent misrepresentation and Consumer Protection Act claims where the (a) the defendant's misconduct supporting the claims was stated in the original complaint and the new claims did not introduce new facts, (b) the original complaint alleged both misrepresentations and violation of the CPA, but had not set out formal causes of action for those theories of recovery, (c) the parties had engaged only in document discovery and Wells Fargo had not scheduled any depositions, and (d) Wells Fargo's Response did not identify any undue prejudice that would be caused by adding the claims. (Related to Assignment 2.)

4. Whether it is error for the trial court to rule that evidence of damages proximately caused by defendant's breach of contract cannot be presented to the jury as consequential damages because the loss was "too attenuated" from the defendant's misconduct. (Related to Assignment 3.)
5. Whether it is error for the trial court to rule, as a matter of law, that evidence of damages proximately caused by defendant's breach of contract cannot be presented to the jury as consequential damages because, in the trial court's opinion, the loss was not within the contemplation of the parties. (Related to Assignment 3.)
6. Whether, in applying the Lodestar Method to exclude attorney time that is duplicative, wasteful, or devoted to noncontract claims or claims against a co-defendant, the trial court abuses its discretion by excluding 109 hours of one attorney for legal work on specified days and 56 hours of a second attorney for legal work on specified days, where the descriptions in the detailed time records submitted to the court for those dates show that 68.9 hours of the first attorney and 50 hours of the second attorney involved legal services for the prevailing party that were reasonable and necessary, and neither duplicative, wasteful, or devoted to noncontract claims or claims against other parties. (Related to Assignment 4.)
7. Whether the trial court abused its discretion in reducing the attorneys fees awardable to the prevailing party on a contract claim by 50 hours of attorney time, in addition to time reductions required by the Lodestar calculation, because the court found plaintiffs' briefs to be "unfocused and repetitive." (Related to Assignment 4.)
8. Whether the trial court abused its discretion in reducing the attorneys fees awardable to the prevailing party by 50 hours solely on the basis that plaintiffs' briefs were "unfocused and repetitive" where the attorney submitting the fee application had already excluded time devoted to some of the briefing and the exclusions already applied by the court had already eliminated the rest. (Related to Assignment 4.)

9. Whether the trial court abused its discretion in determining a fee award by refusing to award any fees the time that plaintiffs' two trial attorneys communicated to each other, and by excluding all the time that one attorney had devoted to attending the trial, where the second attorney had been associated only a month before trial, the attorneys had already eliminated \$13,000.00 in fees for time "coming up to speed," where the attorneys had divided trial preparation and trial tasks between them, and where the reason for associating the second attorney was to provide plaintiffs with the minimum resources necessary to try their claims against two large, institutional defendants that were *each* represented by two attorneys and two large, sophisticated law firms. (Related to Assignment 4.)
10. Whether the trial court abused its discretion in determining a fee award by reducing the fees of the prevailing party's attorneys by an additional 25%, *in addition to* all Lodestar fee reductions to penalize plaintiffs for asserting damages that the trial court viewed as "unrealistic."
(Related to Assignment 4.)
11. Whether the trial court abused its discretion by reducing the \$108,000.00 in fees requested by plaintiffs' attorneys to \$48,000.00 based, in part, on the trial court's view that the lawsuit could have been much simpler, where the actual driver for the increases in attorney time were the defendants' tactical decision to swamp plaintiffs' counsel with four summary judgment motions brought over an eight month time period and defendant Wells Fargo's refusal to provide meaningful discovery. (Related to Assignment 4.)

III. STATEMENT OF THE CASE

- A. ***The Davises Bought Their Home in July 1998 With a Loan from ComUnity Lending and executed an Impound Agreement and Deed of Trust that Permitted the Lender to Charge Them \$234/Month as Reserves for Taxes and Insurance, Plus Any Annual Increases in Taxes and Insurance.***

Appellants Levis and Debbie Vidal Davis bought their home on July 16, 1998 for \$193,000.00 with the proceeds from a VA mortgage loan from ComUnity Lending, Inc. Note, Ex. 13. Their monthly mortgage payment was \$1,520.00 – \$1,286.00 on the Note and \$234.00 into the lender’s escrow or “impound” account for real property taxes and insurance. *Id.*; Ex. 11 at 6. At closing, the Davises signed a Loan Impound and Disclosure Agreement (CP 161), which explained the manner in which the impound account payments were to be calculated, and received an Initial Escrow Account Disclosure Statement showing the initial deposit into the impound account, the projected taxes and insurance for the next year, and the amount of their monthly payment into the impound account. Ex. 11 (and CP 162-64). They also initialed a statement from ComUnity Lending that stated the monthly payment on the note and amount paid into their impound account. Ex. 11 at 8. The Davises understood that their monthly payment for taxes and insurance would increase annually only by the actual increases in taxes and insurance.

The Davises’ Deed of Trust contained the contract terms governing the lender’s rights and obligations regarding the impound or escrow account for taxes and insurance, including limits on the maximum amount chargeable to the borrowers, the lender’s duties regarding excess funds, and the lender’s obligation to adjust the impound payments annually and to provide the Davises with an annual accounting of credits and debits to the account. DOT, ¶ 2, Ex. 14. The Deed of Trust also contained clauses

requiring that the borrowers pay the lender's attorneys fees if the borrowers breached any of the terms in the Note and Deed of Trust, including failure to pay the lender's monthly charges to the impound account. DOT, ¶ 18, 21, Ex. 14 at 5-6.

B. Their Monthly Payment Amount was Critical to the Davises' Purchase Decision Because They Planned on Starting a Family and Needed to Rely Solely on Mr. Davis's Income for Support.

The Davises were buying their first home and planned to start a family. The amount of their monthly loan payment was important because they knew that they would be relying solely on Mr. Davis's income to support the family. Mr. Davis is a Licensed Practical Nurse who works through a temporary agency. CP 587. Mr. Davis projected that his monthly income from contract work would be sufficient to pay the Davises' living expenses, including the mortgage payment. In fact, Mr. Davis's earnings were sufficient to pay their mortgage from July 1998 to November 1999, when Wells Fargo wrongfully tripled their monthly impound account charges, and his income had increased each year between 1998 and 2002 because of the extra work he had taken on. CP 196, 522; Ex 65.

C. ComUnity Lending Immediately Assigned the Loan to Wells Fargo, as "Norwest Mortgage," Which Began in November 1999 Collecting Grossly Excessive Reserves for Taxes and Insurance; By August 2000, The Davises' Monthly Payment Increased to \$2,015.00.

ComUnity Lending immediately transferred the Davises' loan to Norwest Mortgage, Inc., which later became Wells Fargo Home Mortgage.

Ex. 13 at 6. At the first annual adjustment in July 1999, Wells Fargo increased the Davises' monthly impound payment by \$42.00. CP 383, Ex. 21. In November 1999, Wells Fargo nearly doubled the Davises' monthly impound charges to \$482.00. *Id.* In August 2000, Wells Fargo increased the Davises' monthly impound payment to \$729.00, and their total payment to a whopping \$2,105.15 – an annual increase of \$7,000.00! *Id.*; CP 198.

Wells Fargo collected \$5,784.00 in escrow charges between October 1999 and October 2000, even though the Davises 1999 taxes and insurance totaled only \$3,700.00 and actually *declined* in years 2000, 2001 and 2002. CP 29, 245, 254, Ex. 52 at 11, 18; Ex. 53. Despite this decline, Wells Fargo charged the Davises \$8,749.44 a year for their escrow account. CP 198.

D. Wells Fargo Began Demanding These Massive Increases in the Davises' Monthly Payments in Order to Collect Sufficient Reserves to Pay Taxes and Insurance on the Davises' Property and on their Neighbors' Tax Parcel, Relying on a Handwritten Notation on the Davises' Deed Referencing the Adjacent Tax Parcel.

Wells Fargo tripled the Davises' \$234.00 impound payment in order to collect sufficient funds to pay insurance and taxes on the Davises' lot *and* on the tax parcel adjacent to the Davises' property. The genesis of Wells Fargo's error was a hand written notation on the Davises' Warranty Deed stating the neighbors' tax parcel number. Ex. 15. Wells Fargo persisted in continuing to demand payment of tax reserves for this unrelated parcel until August 2002, when Wells Fargo admitted its error and modified the

loan. See, e.g., Wells Fargo's May 2002 Memorandum in the Davises' bankruptcy claiming that the Davises owned two tax parcels. CP 243-44.

E. The Davises Notified Wells Fargo's Representatives Several Times in Late 1999 That They Were Being Overcharged for Their Impound Account and Asked Wells Fargo to Investigate the Reasons, But Wells Fargo Failed to Conduct Any Investigation, Instead, Materially Misrepresented the Causes of the Increase in Impound Charges.

While Wells Fargo may have begun overcharging the Davises in reliance on a spurious handwritten notation on the Davises' Deed (Ex. 15), it continued assessing these excessive payments after November 1999 only because its personnel refused to investigate the cause of the huge increase in charges after several phone calls from the Davises, complaining about the increase and asking for an explanation. Davis Dec., ¶¶ 9-11, CP 375-76. Instead of investigating, Wells Fargo personnel gave the Davises phony causes that materially misrepresented Wells Fargo's conduct – that the increase was due to changes in escrow procedures which made it necessary for the Davises to deposit more funds into their impound account, or that Wells Fargo was required to increase the payments because the Davises had paid too little. Davis 11/16/04 Dec., ¶ 12. (Supp. Desig. of Clerk's Papers); Davis 2005 Dec., ¶¶ 9-11, 32. CP 375-76, 380. No one from Wells Fargo disclosed to the Davises that Wells Fargo was collecting reserves for two tax parcels, even though that information was readily available. The most cursory of investigations would have led Wells Fargo to discover its error.

F. Mr. Davis Was Able To Earn Enough to pay The Increased Charges Until January 2001, When Wells Fargo Breached its Agreement to Hold Post-Dated Checks for Four Monthly Loan Payments, Causing the Davises' Payments to Fall Two Months behind.

After Wells Fargo increased their monthly payment to \$2,015.00 in November 1999, Mr. Davis began taking on more contract work – as much as 72 hours a week. L. Davis 11/16/04 Dec., ¶ 14. But the work was not always there, so the Davises would periodically fall behind, incurring late fees and penalties that added to their financial burden.¹ CP 383-89; Davis Dec., ¶ ¶ 12,13, CP 376. But, over a few months, Mr. Davis would find enough extra work to catch up, until the early 2001. *Id.*

As of November 2000, the Davises were completely current on all amounts owed Wells Fargo. CP 385. In an effort to avoid future penalties and “phone payment” fees, Mr. Davis and a Wells Fargo Service Rep agreed that Mr. Davis would send Wells Fargo post-dated checks for the next four monthly payments, which the lender would hold then cash as each payment came due. CP 234. But Wells Fargo cashed all four checks immediately, causing the bank to reject them all for insufficient funds. CP 234-35. The rejected checks resulted in the Davises being two months in arrears, even though they had the funds to pay at least one of the payments.

¹Wells Fargo’s policy for accepting payments made paying the arrearage even more difficult. The lender refused to credit the loan with any payment that did not cover a full month, plus all penalties and late charges. If Mr. Davis was paid a day late, he had to wait a month to get the next, increased, “payoff amount.” Before making any payment, he had to phone Wells Fargo to get the exact amount he must pay.

G. Wells Fargo Refused to Accept Payments to Make Up The Arrearage, Starting Foreclosure in May 2002.

Mr. Davis first learned of Wells Fargo's action when he received his bank statement in early February showing over \$400.00 in NSF charges. CP 234. Mr. Davis immediately phoned Wells Fargo and was told to send Wells Fargo a letter explaining the agreement to hold the checks and copies of the NSF charges. *Id.* But Wells Fargo did not wait to receive Mr. Davis's letter. Instead, the lender accelerated the loan on February 2, 2001 because the borrowers were two months delinquent. CP 234. When Mr. Davis phoned Wells Fargo on February 13, 2001 to arrange full payment of the delinquency, if Wells Fargo would waive the penalties and pay the NSF charges, Wells Fargo refused, citing Wells Fargo policy after issuing an acceleration letter. CP 233.

Mr. Davis took on more work in March and April, 2001 to raise funds to pay the full arrearage and penalties, but when he contacted Customer Service in late April 2001 to arrange for payment, he was told that Wells Fargo could not accept any payment from Mr. Davis *at all* because the loan had been transferred to foreclosure. CP 232-33.

1. Wells Fargo's Wrongful Foreclosure Damaged the Davises' Creditworthiness and Their Reputations in Their Community.

Wells Fargo initiated formally nonjudicial foreclosure proceedings in June 2001, conditioning reinstatement of the loan on the Davises paying all the erroneous impound charges. CP 201-12. Wells Fargo notified the

Davises' homeowners' association of the foreclosure and erected foreclosure signs on the Davis's property for his neighbors to see. CP 213; 572. Speculators sought entry to the Davis home in anticipation of the foreclosure sale. The signs, speculators, notice to homeowners' association and the foreclosure itself humiliated the Davises and seriously damaged their reputations and creditworthiness. Davis 11/16/04 Dec., ¶ 41. The Davises tried to find a lender to refinance their loan, but they were declined because of the foreclosure. Davis 11/16/04 Dec., ¶ 39.

H. Wells Fargo's Wrongful Foreclosure Forced the Davises to Seek Bankruptcy Protection in September 2001 to Save Their Home.

To save their home from foreclosure, the Davises filed for Chapter 13 bankruptcy in September 2001. Davis Dec. ¶ 12, CP 376. On October 17, 2001, Wells Fargo filed a Proof of Claim, asserting that the Davises' arrearage totaled \$23,365.00, including all the overcharges. Davis 11/16/04 Dec., Ex. 5; Tr. Ex. 25. During September and October 2001, the Davises tried to refinance their loan with other lenders, only to be rejected because they were in foreclosure on their Wells Fargo loan. Complaint, ¶ 23, CP 7. But the investigation by National City Mortgage disclosed that Wells Fargo had been charging the Davises erroneously for a tax parcel that they did not own. *Id.*, ¶ 22. The Davises phoned the lender twice on October 18, 2001, advising the Customer Representative of the lender's mistake. See Customer Service Log, CP 230. They were ignored.

I. Wells Fargo's Inflated Bankruptcy Claims Caused the Bankruptcy Court to Order Mr. Davis to Deposit Over \$2,950/Month Into the Trustee's Account, Forcing Mr. Davis to Work Even Longer Hours.

The Ch. 13 bankruptcy proceeding put an even greater burden on Mr. Davis's finances and health because the Chapter 13 Plan required that Mr. Davis pay the trustee \$1,460.00 *bi-weekly*, which is over \$2,950.00 a month, to pay trustee's fees, \$2,015.00 in rent and \$612.00 toward the arrearage claimed by Wells Fargo. Davis 11/16/04 Dec., Ex. 16. The Wells Fargo mortgage was the Davises' *only* significant debt. Mr. Davis had to earn enough pay the Trustee \$2,950/month and provide money for his family's living expenses. Complaint, ¶ 20. Mrs. Davis could not work because, at this time, the Davises had two young sons to care for.

J. Wells Fargo Continued Demanding Excessive Impound Payments Even After Mr. Davis Notified Wells Fargo in October 2001 that it was Erroneously Demanding Impound Payments for a Tax Parcel That the Davises Did Not Own.

In the fall of 2001, the Davises tried to refinance with other lenders, only to be rejected because they were in foreclosure. Complaint, ¶ 23, CP 7. But the pre-loan investigation by National City Mortgage revealed that Wells Fargo had been charging the Davises for the adjacent tax parcel. *Id.*, ¶ 22. The Davises phoned Wells Fargo twice on October 8, 2001, each time advising the Service Rep of the lender's mistake and asking Wells Fargo to correct it. Customer Service Log, CP 230. They were ignored.

The Davises *repeatedly* notified the lender of its error after October 8, 2001. Customer Phone Log, CP 230-34; Davis Dec., ¶ 32, CP 380. But Wells Fargo arrogantly persisted in continuing to demand payment for these unrelated taxes and insurance.

K. Unknown to the Davises, Wells Fargo Investigated The Impound Payments and Verified that the Davises Owned Only One Tax Parcel, Prompting Wells Fargo to Send Pierce County a Refund Request on February 28, 2002.

After receiving notice from the Davises in October 2001 that their impound charges erroneously included an unrelated tax parcel, Wells Fargo's tax department checked the history of payments from the impound account and determined on February 25, 2002 that Wells Fargo had improperly used impound funds to pay taxes on an incorrect parcel "several times." 2/25/02 Tax Process Notes, CP 79. The lender's tax department phoned Pierce County on February 28, 200 to request a refund. *Id.* Wells Fargo faxed Pierce County a written refund request on February 28, 2002. CP 30-33. Wells Fargo received the refunds on May 14, 2002. CP 76. But Wells Fargo never disclosed its actions to the Davises.

L. Wells Fargo Concealed Its February 2002 Refund Request From the Davises While it Continued Asserting in the Davises' Bankruptcy That The Davises Owed Impound Assessments On Two Tax Parcels.

The deposit returning the tax refund to the Davises' escrow account was buried in a line item of the lender's June 2002 Account Statement. Ex.

32; Davis 11/16/04 Dec., Ex. 8. During 2002, the Davises' Ch. 13 bankruptcy attorneys obtained an order compelling Wells Fargo to produce documents concerning the Davises' mortgage payments and their impound account, but Wells Fargo stonewalled and, as of May 15, 2002, still had not produced the records. Mot. for Payment Moratorium, 5/15/02 at 1. (Supp. Clerk's Papers). Plaintiffs dismissed the bankruptcy in June 2002 and Wells Fargo never produced the records.

Wells Fargo continued *denying* that the Davises owned only one tax parcel after October 2001, and even after February 2002, when Wells Fargo sought and received a refund of the Pierce County taxes it had paid on the wrong parcel. CP 76-79, 250. Wells Fargo even filed a brief in the Davises' bankruptcy on May 26, 2002 opposing the Davises' claim that they owned only one tax parcel. CP 243-44. Wells Fargo started a second foreclosure in July 2002 that continued to assess the Davises for \$15,000.00 in previous improper impound charges. CP 215-22.

M. The Davises Voluntarily Dismissed Their Bankruptcy in June 2002, Because Mr. Davis Could No Longer Work The Long Hours Necessary to Pay The Ch. 13 Plan Payments.

The strain from overworking began to take its toll on Mr. Davis's health in May 2002. Davis 11/16/04 Dec., ¶ 35. Mr. and Mrs. Davis knew that Mr. Davis could not keep working 72 hour work weeks to make Plan payments and saw no resolution with Wells Fargo. Davis 11/16/04 Dec., ¶ 35. (Supp. C. Papers). The Davises filed a motion in May 2002 for a four

months moratorium on loan payments to allow Mr. Davis “several months breathing room” from the “excessive Plan payments” required because of Wells Fargo’s objections to the proof of claim. Mot. for Moratorium, 5/15/02 at 2. (Supp. Clerk’s Papers). Wells Fargo opposed the motion. The Davises finally dismissed the bankruptcy voluntarily on June 19, 2002, resigned to Wells Fargo taking their home. CP 224; Ex. 33.

N. Wells Fargo Started a Second Foreclosure on June 25, 2002, Wrongfully Demanding \$44,000.00 to Reinstate the Loan, Including \$15,000.00 in Improper Impound Charges.

Wells Fargo started a new foreclosure against the Davises on June 25, 2002. CP 229 The Notice of Trustee’s Sale erroneously claimed an arrearage of over \$44,000.00, but over \$15,000.00 of it consisted of improper impound charges and penalties. CP 215-22. The Affidavit of Posting issued on July 18, 2002 set the trustee’s sale for August 23, 2002. CP 213-15.

O. Wells Fargo Agreed to Modify the Loan in August 2002, After the Davises Inundated the Lender with Calls to Complain of Overcharges, Reducing Its Claimed “Arrearage” From \$44,000 to \$29,000 And Forcing the Davises Pay \$5,400 in Cash for Wells Fargo’s Attorneys Fees Incurred in the Foreclosures.

The Davises phoned Wells Fargo almost daily between June 20th and July 31st, 2002. CP 227-29. On August 1, 2002, Wells Fargo suspended the foreclosure and assigned modification of the loan to Holly Golden, who wrote in the Customer Service Log: “I advised [borrower] that I would call loss mitigation or foreclosure dept to call him back to make pmt

arrangements. I did advise that we were paying on a wrong parcel # for taxes and that, that matter was resolved.” CP 227

Wells Fargo dropped its demand for \$44,000.00 to reinstate the loan, instead adding \$29,000.00 to the Davises’ principal balance, which the lender funded to pay itself unpaid interest. Loan Modif. Agt., CP 74; Ex. 38, 39. The \$15,000.00 reduction consisted of improper impound charges and waiver of all \$1,532.00 in unpaid late charges. CP 218. Wells Fargo conditioned the modification on a cash payment of \$5,381.00 to reimburse it for legal expenses incurred for the wrongful foreclosures. Ex. 37; CP 531; Davis 11/16/04 Dec., ¶ 36, Ex.17. The Davises were forced to accept the modification terms to stop the foreclosure. CP 74; Ex. 38. The modification reduced the Davises’ monthly payment to \$1,689.00, including \$306.00 for the impound account. CP 239.

P. The Davises Had To Wait Until January 2004 to Refinance their Mortgage With a New Company Because of the Damage Done to Their Credit Rating.

Wells Fargo’s relentless overcharges drove the Davises into delinquency, then into bankruptcy. No lender would refinance the loan while the foreclosure was pending. After the August 2002 loan modification, the Davises had to establish a new history of regular payments. The Davises were able to refinance their loan with National City Mortgage on January 20, 2004, at a cost of nearly \$9,000.00. CP 8, 552.

IV. PROCEDURAL HISTORY

A. *The Davises Commenced This Lawsuit on August 6, 2004, Seeking Damages for Breach of Contract and Negligence, and Emotional Distress.*

The Davises retained attorney Raphael Nwokike to assert claims CP 1-14. The Complaint, filed on August 6, 2004, asserted claims against both Chicago Title Insurance Company for writing an unrelated tax parcel number on their Deed. All claims against Chicago Title were settled on October 6, 2005, the second day of trial, and are not part of this appeal. CP 844-45. The Complaint asserted causes of action against Wells Fargo Home Mortgage Company for Breach of Contract, Negligence and Intentional Infliction of Emotional Distress. CP 10-12. It also requested a “Declaratory Judgment” which merely restated the breach of contract claim. CP 10-11.

1. *The Complaint Alleged That Wells Fargo Breached the Contract By Charging Them More for the Taxes/Insurance Impound Account Than Allowed by the Deed of Trust.*

The Davises alleged that Wells Fargo breached the contract by demanding excessive payments to their impound account. Complaint, ¶ 14 at CP 4. The Impound Agreement obligated the Davises to pay into an escrow account 1/12th of the annual tax and insurance costs for their property. CP 161. The Deed of Trust governed “escrow items” for taxes and insurance on the Davises’ property, limiting the charges to the maximum allowed under 12 U.S.C. § 2601 (RESPA). Ex. 14, ¶ 2. The Deed of Trust also required that the lender give the borrower an annual accounting of the escrowed funds, showing credits, debits, “and the purpose

for which each debit to the Funds was made.” *Id.* The lender was required to account to the borrowers for collecting “excess funds in accordance with the requirements of applicable law.” *Id.*

2. *The Complaint Alleged That Wells Fargo’s Excessive Charges for Taxes and Insurance Violated the Consumer Protection Act.*

Although it did not set out a separate cause of action, the Complaint alleged that Wells Fargo’s conduct in charging the Davises for taxes and insurance on their neighbor’s property also violated the Consumer Protection Act. Complaint, ¶ 23, CP 7.

3. *The Complaint Alleged That Wells Fargo’s Negligence Included Failing to Investigate the Overcharges in Response to the Davises’ Complaints and Misrepresenting the Reasons for the Huge Increase in Impound Funds.*

The Complaint alleges that Wells Fargo was negligent in failing to investigate the cause of the increased charges in response to the Davises’ complaints and that Wells Fargo personnel misrepresented the reasons for the increases, blaming them on changing escrow requirements and shortfalls in the Davises’ payments. Complaint, ¶ 13, 19, 38, CP 4, 6, 11.

4. *The Complaint Alleged That Wells Fargo’s Overcharges and Failure to Investigate the Davises’ Complaints Led Wells Fargo to Foreclose Wrongfully on the Davises Twice, Drove the Davises Into Bankruptcy, Forced Mr. Davis to Work Excessive Hours, and Aggravated Mrs. Davis’s Medical Conditions.*

The Complaint alleges that Wells Fargo's refusal to investigate the Davises' complaints, misrepresentations of the reasons for the increased charges and negligence in foreclosing on them twice and driving them into bankruptcy, while still denying the overcharges, constituted negligent conduct that caused the Davises severe emotional distress, most notably by forcing Mr. Davis to work 72 hours a week to comply with the payments imposed by the Ch. 13 Plan and by materially aggravating Mrs. Davis's pre-existing medical conditions, including seizures and panic attacks. Complaint, ¶¶ 19, 20, 22, 25, 38-45, CP 6-13.

5. *The Complaint's Request for Relief Included The Davises' Expenses Incurred in Bankruptcy, Loan Modification, and Refinance, as well as Compensation for Injuries to Their Health, Reputations and Creditworthiness.*

The Complaint requested a judgment reimbursing the Davises for their bankruptcy expenses, the loan modification charges, and the cost of refinancing their loan, plus prejudgment interest as well as damages for loss of reputation caused by the humiliation of two foreclosures, damage to their creditworthiness caused by Wells Fargo's reports to credit agencies and forcing the Davises into bankruptcy, and general damages for injury to Mrs. Davises' health caused by increases in seizures and increased panic attacks. CP13-14. The Complaint sought award of the Davises' actual attorneys fees under the contract and statutory law. *Id.*

B. The Attorneys for Wells Fargo and Chicago Title Joined Forces To Inundate Plaintiffs' Attorney With Multiple Summary Judgment Motions.

On November 11, 2004, David Young, another Wells Fargo attorney from Lane Powell, filed a Motion for Summary Judgment Re: Tort Claims and Declaratory Relief, in which Chicago Title joined. CP 34-41; Joinder – Supp. Clerk's Papers. The Motion was supported by declarations from Cheryl Steiner, a Chicago Title Officer, and from David Neu, one of Chicago Title's attorneys at Preston Gates. CP 21-33.

The Davises filed a responsive brief on November 16, 2004, with declarations from attorney Nwokike and Levius Davis, with attachments. On December 3, the Davises obtained an order continuing the summary judgment hearing to February 25, 2005 to permit completion of discovery. Order Granting Motion--Supp. Clerk's Papers.

On January 28, 2005, David Neu, Chicago Title's attorney, filed a Joint Summary Judgment Motion to dismiss plaintiffs' contract claims based on the statute of limitations, also supported by extensive Declarations from Neu and Steiner. CP 42-176. He noted the hearing for February 25, 2005. CP 42. The Davises responded to both summary judgment motions on February 4, 2005, although the pleading was denominated another response to the summary judgment re: tort claims. CP 177-91. Plaintiff also submitted extensive documents attached to attorney Nwokike's declaration. CP 192-323. Chicago Title filed a joint

Reply to all arguments on February 18, 2005, together with more documents attached to a declaration from Neu. CP 333-44. The Davises responded to the new evidence on February 22, 2005, filing a legal brief (CP 394-409) and documents attached to declarations from Nwokike (CP 345-73) and the Davises (CP 374-93). Wells Fargo's attorney, David Young, then submitted a Reply on February 24, 2004. CP 413-15.

The trial court granted summary judgment on February 25, 2005, dismissing the Davises' tort claims and all claims for noneconomic relief, relying on the Economic Loss Doctrine. CP 420-21. The court refused to grant Chicago Title's joint motion to dismiss the contract claim based on the statute of limitations, but no formal order was entered on the claim.

A few days later, on March 1, 2005, Chicago Title filed a second Motion for Summary Judgment to dismiss contract claims based on the statute of limitations, relying on the previous declarations of Neu and Steiner. Chic. Title's 3/2/05 Mot. For SJ Re: Breach of Contract-Supp. Clerk's Papers. The plaintiffs responded on March 11, 2005 and Chicago Title replied on March 30, 2005. Plaintiffs submitted a supplemental response on April 7, 2005. The trial court entered an order denying the motion on April 15, 2005. See Supp. Clerk's Papers.

Wells Fargo filed yet another Summary Judgment Motion on July 18, 2005, arguing that plaintiffs' claims should be dismissed for lack of damages. See Supp. Clerk's Papers. The Davises responded on August 24, 2005 with a brief and a 29 page declaration from Levius and Debbie Davis,

including attachments. *Id.* Wells Fargo Replied on September 2, 2005 and plaintiff submitted a supplemental Response on September 7, 2005. The trial court entered an order denying the motion on September 9, 2005, but directing that the Davises file a Statement of Damages, with supporting documents. *Id.*; CP 517-574, supplemented at CP 575-90.

C. The Davises Moved Three Months Before Trial To Amend the Complaint to Add Causes of Action for Allegations Already in the Complaint, Which the Trial Court Denied as Too Close to the Trial Date.

The Davises moved on July 13, 2005 for leave to amend their complaint to add causes for action against Wells Fargo for fraudulent or negligent misrepresentation to induce them to pay excessive amounts into their impound account and for violation of the Consumer Protection Act by repeatedly overcharging them and concealing the overcharges by misrepresentations. The Motion pointed out that the claims were just additional grounds of recovery for misconduct already described in the Complaint, involving no new factual allegations and requiring no additional discovery. CP 422-440; 441-078, 496-513, 763-64. Wells Fargo objected to adding claims, but did not assert any specific prejudice. CP 479-95.

Even though nearly three months remained before trial and the parties had not yet taken any depositions, the trial court denied the motion on July 28, 2005, finding “that amending the complaint would cause defendants undue prejudice at this late date.” CP 514.

D. The Davises Retained John Hathaway as Lead Trial Counsel in Early September 2005 to Counterbalance the Representation of Defendants by Four Attorneys From Two Large Law Firms.

The Davises' attorney, Raphael Nwokike, is an experienced attorney in his native Nigeria, but did not start practicing law in Washington until 2003, less than three years before the trial. CP 797. By contrast, Chicago Title and Wells Fargo were each represented by two, and sometimes three, attorneys from two large, sophisticated law firms – Lane, Powell, and Preston, Gates and Ellis. Since the defendants' attorneys had consistently acted in concert, Mr. Nwokike effectively faced four opposing lawyers at trial, drawing on the resources of two of the largest firms in the state. See 10/3RP:2; 10/4RP:103.

In early September 2005, the Davises asked John Hathaway to serve as lead trial counsel. CP 764. Mr. Hathaway was already knowledgeable about the claims and evidence because the Davises had retained him in April 2005 to advise them on damages and he had devoted \$18,000.00 in legal services to researching their claims and assisting Mr. Nwokike prepare the Motion to Amend Complaint. *Id.* Mr. Hathaway represented the Davises at the September 9, 2005 hearing on Wells Fargo's Summary Judgment hearing. Mr. Hathaway was primarily responsible for determining and organizing the trial exhibits of all parties. Mr. Hathaway took telephone depositions of three Wells Fargo employees in late September 2005 and of Jason Black, Chicago Title Branch Manager.

Mr. Hathaway prepared plaintiffs' extensive Statement of Evidence that the trial court had ordered prepared at the September 9, 2005 hearing, and the Supplemental Production of Documents supporting the Statement. CP 517-90. He was also required to respond to multiple joint defense Motions in Limine, gave the plaintiffs' opening statement and conducted the direct examination of Levis Davis on October 4, 5 and 6, 2005. CP 767. The trial ended on October 6, 2005, before completion of Mr. Davis's testimony, when Wells Fargo conceded liability for the \$21,900.00 in damages that the trial court had allowed. See CR 2A Agreement, CP 841-48.

E. The Trial Court's Rulings on Defendants' Motions in Limine Reduced Plaintiffs to \$21,900.00 in Damages That They Were Allowed to Present to the Jury.

The trial commenced on Monday, October 3, 2005. The defendants served plaintiffs' counsel with a flurry of extensive joint motions in limine on the previous Friday, and again on the mornings of October 4 and 5, 2005: (1) General Motions in Limine by Wells Fargo (CP591-601); (2) Motions in Limine by Chicago Title (CP 602-17); (3) Wells Fargo's Motions in Limine to Exclude Improper Damages Evidence (CP 618-47); (4) Memorandum re damages from breach of title policy (10/4/05 Supp. Clerks Papers); Brief re Title Commitment (10/5/05 Supp. Clerk's Papers). Mr. Hathaway filed the Davises' Responses on 10/3/05. CP 717-28. The court excluded as a matter of law those damages that the court considered not to have been within the contemplation of the contracting parties, even if

caused by Wells Fargo's wrongful conduct. 10/3RP:16. The court rejecting plaintiffs' position that all proximately caused damages should be presented to the jury and that arguments over the "contemplation of the parties" either was not relevant or went to the weight of the damages, not their admissibility. *Id.* at 17-19, 25-28. The court ruled that the plaintiffs could not present the jury with evidence of (1) damages from selling 4 automobiles at a loss to obtain funds to make the payments ordered by the Ch. 13 plan (*Id.* at 30); (2) the loss of 28 days of work because of bankruptcy court proceedings (*Id.* at 30); (3) and the loss of a specific U. S. Army education program benefits because the financial burdens imposed by Wells Fargo's wrongful charges prevented Mr. Davis from being able to use the benefits before they lapsed (*Id.* at 42).

The trial court agreed that the damage to the Davises' creditworthiness caused by Wells Fargo's excessive charges and reports to credit agencies was within the contemplation of the contracting parties but prohibited the Davises from presenting the jury with any evidence on creditworthiness, or damage to their reputations, relying again on the Economic Loss Rule. *Id.* at 48-49, 53.

After the trial court had finished excluding claims and damages, the Davises "allowed" damages totaled \$21,900.00. CP 528-29, 843.

F. On the Third Day of Trial, Wells Fargo Conceded Liability and Agreed to Pay The Davises \$21,900.00 in Damages, Ending the Trial.

Plaintiff Levis Davis presented testimony to the jury on October 5 and 6, 2005. At the noon recess on October 6, 2005, Wells Fargo offered to pay the Davises the \$21,900.00 in damages that trial court had allowed plaintiffs to claim, and permit entry of judgment against Wells Fargo for that amount so that the Davises would be considered the prevailing party for purposes of attorneys fees and appeal. The parties also agreed that all trial exhibits that the parties had listed as “agreed” in the Joint Statement of Evidence and subsequent Exhibit List would be deemed admitted for purposes of appeal. The attorneys read the CR 2A Agreement into the record before Judge Felnagle. CP 841-48.

G. On November 10, 2005, the Trial Court Entered a \$21,900.00 Judgment Against Wells Fargo, as Required by Pursuant to the CR 2A Agreement, Rejecting Wells Fargo’s Attempt to Reduce the Amount in Violation of the Agreement.

Wells Fargo filed pleadings objecting to entry of a judgment for the amount set forth in the CR 2A Agreement, arguing that Chicago Title had agreed to pay part of the judgment. The Davises responded that the CR 2A Agreement clearly entitled plaintiffs to a judgment for \$21,900.00 and objected to Wells Fargo’s attempt to manipulate the judgment amount by collusion with Chicago Title. CP 914-17. Wells Fargo also opposed the Davis’s fee application on the ground that plaintiffs had not prevailed because both parties prevailed or neither had prevailed, ignoring both settled law concerning prevailing party and the clear terms of the CR 2A

Agreement. CP 854-55. The trial court entered the \$21,900.00 fees judgment in favor of the Davises on November 10, 2005. CP 928-30.

H. The Trial Court Awarded the Davises \$48,000.00 in Fees, Excluding Over \$52,000.00 From Their Attorneys' Fee Applications.

The Davises' attorneys submitted fee declarations, supported by detailed time records and a legal memorandum. CP 756-61, 762-95, 796-839. Raphael Nwokike's fee declaration showed \$58,962.00 in total fees (\$57,923.00 through trial, plus \$1,039.00 post trial), billed at \$165.00/hr. CP814. Mr. Nwokike excluded \$11,300.00 (68.5 hours) in time devoted (1) to responding to Wells Fargo's Motion for Summary Judgment re Tort Claims, (2) to dealing with Chicago Title as a party, as opposed to discovery from Chicago Title as a witness, and (3) to plaintiffs Motion to Amend the Complaint to Add Claims. CP 799-801, 814. The excluded time is shown in the billing records, so the court could identify the time that has been excluded. *Id.* Mr. Nwokike's net fee request totaled \$48,691.00. *Id.* The trial court awarded only \$17,948.00 of Mr. Nwokike's time.

John Hathaway's fee declaration showed a total of \$60,696.00 in fees, billed at \$235.00/hour. CP 762, 764, 767. Mr. Hathaway excluded \$13,700.00 in legal services researching additional claims and damages. CP 764. Mr. Hathaway requested \$46,996.00 in net fees through trial, plus \$4,700.00 in post trial fees responding to Wells Fargo's post trial motions, for a total of \$51,696.00. CP 767; Reply re Fee App. at 16 – Supp. Clerk's

Papers. The trial court awarded only \$30,077.00 of Mr. Hathaway's time.

Out of \$108,425.00 in fees and costs requested, the court awarded \$48,025.00 in fees and \$7,438.00 in costs, for a total judgment of \$55,463.00.

CP 714, 767-68, 785; 10/11RP:11-17, 19.

I. Plaintiffs Filed Their Notice of Appeal on December 5, 2005

On December 5, 2005, the Davises filed their Notice of Appeal from the February 25, 2006 Summary Judgment Order dismissing plaintiffs' tort claims, the July 29, 2005 Order denying plaintiffs' Motion to Amend Complaint, the November 10, 2005 Judgment for \$21,900.00 and the Judgment for Attorneys Fees and Costs.

V. ARGUMENT

A. The Trial Court Erred By Entering Summary Judgment That the Economic Loss Rule Bars Plaintiffs' Negligence Claim and Right to Recover Noneconomic Losses Because the Deed of Trust Did Not Allocate the Risk of Wells Fargo's Misrepresentations and the Davises Lacked the Bargaining Power to Bargain for Such Allocation.

1. The Standard of Review from a Summary Judgment Motion is De Novo.

The appellate court reviews a summary judgment order *de novo*, considering the evidence in the light most favorable to the nonmoving party. *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 959 P.2d 1158 (1998). Summary judgment is appropriate only when the pleadings and documents establish there are no genuine issues of material fact and

the moving party is entitled to judgment as a matter of law.

2. ***The Economic Loss Rule Does Not Apply to the Davises' Claims Because Theirs is a Consumer Claim, Against a Lender With Whom They Had No Bargaining Power, Over Breach of Impound Obligations in the Deed of Trust That Does Not Allocate the Risk of Wells Fargo's Misrepresentations to the Davises.***

The Court erred in dismissing plaintiffs' negligence claim and noneconomic damages in reliance on the "Economic Loss Rule" because the Rule applies only where equal bargaining power results in the contracting parties expressly allocating the risk at issue. CP 36, 329-31, 415. The Rule developed in disputes arising from construction contracts, which commonly allocate risk of loss and is intended to prevent a plaintiff from seeking tort damages after expressly agreeing in the contract not to. ***Griffith v. Centex Real Estate Corp.***, 93 Wn. App. 202, 206, 969 P.2d 486 (1998). The economic loss rule has **no** application, however, in an essentially consumer case where the plaintiff has no bargaining ability and where the contract does not allocate the risk that is the subject of claims. ***Alejandro v. Bull***, 123 Wn. App. 611, 98 P. 3d 844 (2004).

The parties' obligations concerning the insurance and tax impound account are governed by the Impound Agreement and the Deed of Trust. The Impound Agreement obligates the Davises to pay "1/12th of the total of these charges . . . as reasonably estimated . . . so that there will be funds sufficient to pay any of the foregoing charges at least 60 days before

delinquency.” CP 161. It is silent regarding Wells Fargo’s overcharges.

The Deed of Trust, page 2, ¶ 2, obligates the borrower to pay the lender “escrow items” for taxes and insurance, and permits the lender to “estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with applicable law.” Ex. 14. Deed of Trust’s terms concern only charges for reserves for taxes and insurance on the *Davises’* property. The contract does *not* address the lender’s liability for wrongfully collecting funds for, and spending funds on, property *not owned* by the borrower.

As explained below, the Economic Loss Rule cannot apply where the parties have not bargained for and allocated in the contract the risk of loss that forms plaintiffs’ claims. The Deed of Trust does not address the risk that the lender will impose excessive charges on the borrower, nor that the lender will materially misrepresent the reasons for those charges. The Deed of Trust contains no language limiting the lender’s liability or providing a contract remedy for misrepresentations to the borrowers.

Most of the “Economic Loss Rule” cases are construction delay lawsuits, where the contracting parties actually bargain for allocation of specified risks that the contract breach might cause a delay. The Rule was first mentioned in *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 821, 881 P.2d 986 (1994). The *Berschauer* Court noted that the Rule was developed to allow parties the freedom to

agree for themselves in advance how risks should be allocated. 124 Wn.2d at 822. The court limited parties' remedies to those expressly stated in the contract "to ensure that the allocation of risk and the determination of potential future liability is based on *what the parties bargained for* in the contract." 124 Wn.2d at 826-27 (*Emphasis added*). The *Berschauer* court emphasized that the purpose of the Rule was to promote "certainty and predictability in allocating risk" in "future business activity," and "the construction industry in particular, [in which] we see most clearly the importance of the precise allocation of risk as secured by contract." *Id.* In *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 206, 969 P.2d 486 (1998), another construction case, the court applied the Economic Loss Rule to prevent a class of 162 homeowners from suing the builder of a huge subdivision for negligent misrepresentation because their contract warranties expressly addressed and limited their right to redress for construction defects. The *Griffith* court acknowledged Washington's recognition of negligent misrepresentation claims, except where the parties have expressly bargained for allocation of risk in the contract:

The *Berschauer/Phillips* court . . . acknowledged that Washington recognizes claims for negligent misrepresentation under the RESTATEMENT (SECOND) OF TORTS SS 552 (1977), but rejected reliance on tort principles when a contract controls: "We hold that **when parties have contracted to protect against potential economic liability, as is the case in the construction industry, contract principles override the tort principles** in § § 552 and, thus, purely economic damages are recoverable." *Berschauer/Phillips*, 124 Wn.2d at 827-28.

93 Wn. App. at 212 (*Emphasis added.*) By contrast, the contract in this lawsuit does not contain terms expressly addressing the wrongful conduct in question, and does not involve a commercial context.

The Davises' dispute is closer to that addressed in *Alejandro v. Bull*, 123 Wn. App. 611, 98 P.3d 844 (2004), where the Court of Appeals, Div. III, reversed the trial court's reliance on the Economic Loss Rule to bar a home buyer's negligent misrepresentation claim against the seller concerning a septic system. The court noted that most jurisdictions considering the issue hold that the Economic Loss Rule does not bar misrepresentation claims. 123 Wn. App. at 626. The court reasoned that fraudulent and negligent misrepresentation claims involve conduct that arise outside of the contract: "A party to a contract cannot reasonably be held to the standard of negotiating for the possibility that the other party will deliberately misrepresent terms critical to the contract." 123 Wn. App. at 626. Moreover, Washington limits application of the Rule to disputes in which "the contract allocates risk and future liability." *Id.* In short, the Rule means only that the courts will not allow a plaintiff to bring a tort claim that circumvents express contract limitations that the parties specifically negotiated. 123 Wn. App. at 627.

The earnest money agreement in *Alejandro* was a form agreement in which "the parties normally do not bargain and provide for the allocation of risk and future liability." 123 Wn. App. at 628. And, like the Davises' Deed of Trust, "the specific contract in this case did not contain a negotiated provision like the commercial contract in *Griffith*,

whereby the parties agreed to allocate risk of loss and future liability.” *Id.* Therefore, the *Alejandro* Court held that the trial court had erred in dismissing the homeowner’s negligent misrepresentation claim based on the Economic Loss Rule. *Id.* at 628.

The reasoning of the *Alejandro* Court applies with equal force to the Davises’ claims. They never bargained with Wells Fargo over any contract terms and the contract nowhere allocates the risk that Wells Fargo, as escrow, will demand and collect excessive funds from the borrower. The Deed of Trust provides no remedy in the event of the lender’s liability for such conduct or any language barring the Davises’ claim against Wells Fargo for misrepresenting terms critical to the contract regarding increases in charges for the impound account. The Economic Loss Rule therefore does not bar plaintiffs from asserting their misrepresentation claims and the trial court erred in dismissing their negligent claim and prohibiting their requests for non-economic damages.

3. *The Existence of a Contract Claim Does Not, Ipso Facto, Preclude Assertion of Tort Claims.*

Well Fargo takes the untenable position that, by breaching its contractual duties, the lender has somehow insulated itself from any other claim – whether in tort or under the Consumer Protection Act – and that the Davises’ damages are limited to the amount of Wells Fargo’s refund from Pierce County, before it was restored to the impound account. Wells Fargo’s position is nonsense.

Lawsuits commonly involve both contract and tort claims. See, e. g., *Edmonds v. Scott Real Estate*, 87 Wn. App. 834, 942 P2d 1072 (1997)

(Home buyer's suit against real estate agent for breach of buyer broker contract, breach of fiduciary duty, conversion, misrepresentation, fraudulent concealment, and violations of CPA.); *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, L.L.P.*, 110 Wn. App. 412, - P3d - (2002) (Action against accounting firm for malpractice, breach of contract, fraud, negligent misrepresentation, and violation of CPA.); *ESCA v. KPMG Peat Marwick*, 86 Wn. App. 628, 939 P2d 1228 (1997). (Software company and its lender sought damages from an accounting firm for breach of contract and negligent misrepresentation in preparation of audit.). Examples of such cases are legion. Defendants cannot evade liability for their tortious conduct simply because the tort is committed in the context of a contractual relationship.

B. Denying Plaintiffs' Motion to Add Claims Was Error; The Added Claims Would Not Unduly Prejudice Wells Fargo Because the Misconduct Supporting the Claims Was Stated in the Original Complaint, the New Claims Did Not Introduce New Facts, Wells Fargo Had Not Yet Conducted Deposition Discovery, And Three Months Remained Before the Trial Date.

1. The Court Erred Because the Additional Claims Arose From the Same Transaction as The Current Claims and Concerned Facts Already Alleged in the Complaint.

The plaintiffs moved on July 13, 2005 for leave to assert causes of action against Wells Fargo for negligent misrepresentation and violation of the Consumer Protection Act. CP 422-40. The original Complaint already alleged that Wells Fargo's conduct violated the Consumer Protection Act and contained the same misrepresentation allegations as those stated in the

Motion. CP 7, ¶¶ 13-15, 19, 23. The Complaint had not set out formal causes of action for negligent misrepresentation and for violating the CPA.

The trial court denied the motion on July 29, 2005, three months before the scheduled October 3, 2005 trial date. CP 514. The trial court's only ground was undue prejudice adding claims this close to trial. *Id.*

Leave to file amended pleadings "shall be freely given when justice so requires." CR 15 (a); *Herron v. The Tribune Publishing Co.*, 108 Wn.2d 162, 168, 736 P.2d 249 (1987). A supplemental pleading is merely an addition to, or continuance of, the earlier pleading. *Id.* at 168-169. A court may deny or condition adding supplemental claims *only if* the defendant establishes *actual* prejudice from allowing them. *Id.*

Where, as here, the supplemental claims arise out of the same underlying circumstances set forth in the original complaint, there is a strong judicial preference for adding those claims to the current lawsuit:

The judicial preference for those amendments based on the underlying circumstances set forth in the original complaint--as compared with amendments raising new claims based on new factual issues--is consistent with the policies behind CR 15. When an amended complaint pertains to the same facts alleged in the original pleading, denying leave to amend may hamper a decision on the merits. When the amended complaint raises entirely new concerns, the plaintiff's right to relief based on the facts in the original complaint is unaffected. Moreover, the defendant in the latter case is more likely to suffer prejudice because he has not been provided with notice of the circumstances giving rise to the new claim and may have to renew discovery.

Herron, 108 Wn.2d at 166. The Davises' Motion satisfied all of the concerns raised by the *Herron* Court: they concerned the same events, the

same parties, and involve the same operative facts as the current claims.

2. Wells Fargo Was Not Unduly Prejudiced By Adding These Claims Three Months Before Trial Because It Had Engaged Only in Interrogatory and Document Discovery That Applied Equally to the New Claims.

The parties' discovery before July 2005 consisted solely of interrogatories and document discovery that applied equally to the new claims. Wells Fargo did not take any depositions until August 2005. CP 811. Wells Fargo did not produce any Wells Fargo witnesses for deposition until the week before trial. CP 766. Moreover, all the *facts* supporting the negligent representation and CPA claims involved conduct by Wells Fargo. No expert testimony was necessary to establish or rebut these causes of action, and even if it was, Wells Fargo *was* the expert in mortgage lending practices. The trial court erred in finding that adding these claims 3 months before trial unduly prejudiced Wells Fargo.

3. The Economic Loss Rule Does Not Preclude Defendants' Liability For Violating The Consumer Protection Act.

The Economic Loss Rule cannot be extended to deny plaintiffs' right to assert CPA claims against Wells Fargo for unfair and deceptive practices in handling their impound account. In *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 850,-51, 792 P.2d 142 (1990), mobile home purchasers sued their mortgage lender for breach of contract and for CPA violations over the lender's negligent supervision of the contractor installing the home's foundation. The Supreme Court upheld a CPA judgment for the

buyer, even though the trial court had rescinded the contract, finding that the damages were supported by the buyer's loss of use of the property for months and hardship in living in a garage apartment with three children. 114 Wn.2d at 850-51. Like the *Mason* plaintiffs, the Davises properly pleaded a CPA claim against their mortgage lender for misconduct in carrying out an agreement that was collateral to their loan. By parity of reasoning, the plaintiffs' CPA claims cannot be defeated simply because the parties have a contract.

C. The Trial Court Erred in Prohibiting Plaintiffs from Presenting Evidence to the Jury of Damages that Were Proximately Caused by Wells Fargo's Wrongful Conduct.

The trial court erred by "pre-screening" plaintiffs' damages claims and deciding contested claims concerning what was and was not within the contemplation of the parties. 10/3RP:16. All relevant facts should be presented to the jury. The court can exclude evidence on a motion in limine only if the evidence is described with particularity and the court can determine that the evidence is clearly inadmissible. *Douglas v. Freeman*, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991). The court rejected plaintiffs' argument that all proximately caused damages should be presented to the jury and that defendants' claim that certain damages were too "attenuated" went to the weight of the damages, not their admissibility. *Id.* at 17-19, 25-28. The trial court improperly decided contested damages evidence, which is a province of the jury. These damages include losses from selling four cars while in bankruptcy, the loss of Mr. Davis's ability to

use his U. S. Army education benefits, damage to the Davises' creditworthiness and damage to their reputations.

D. The Trial Court's Exclusion of over \$45,000.00 in Fees From the Davises' Fee Award Was Erroneous Because The Court Intentionally Deviated From the Lodestar Method to Exclude these Fees, For Arbitrary, Unwarranted Reasons.

1. The Trial Court Was Required to Apply the Lodestar Method for Determining the Davises Fee Award.

The prevailing party in a contract dispute is entitled to a fee award if provided in the contract. ***RCW 4.84.020; Singleton v. Frost***, 108 Wn.2d 723, 733, 742 P2d 1224 (1987). The court determines attorneys fees using the Lodestar Method, which requires the trial court to multiply a reasonable hourly rate times the reasonable hours that the attorneys worked on a case, after eliminating duplicative and wasteful time, and time devoted to claims for which no fees are awarded. 108 Wn.2d at 733. The award encompasses time devoted to contract issues and to the "common core" facts that are inseparable among the various claims. ***Pannell v. Food Serv. of America***, 41 Wn. App. 418, 447, 810 P2d 952 (1992); ***Travis v. Horsebreeders***, 111 Wn.2d 396, 411, 759 P2d 418 (1988).

a. The Lodestar Method Does Not Authorize The Court To Reduce A Fee Award By Assuming That Time Was Inefficiently Spent Or That The Work Of Two Counsel Necessarily Involved Duplicative Effort.

The lodestar factors do not support reducing the fee award by assuming that counsel's time was inefficiently spent or duplicated work of

other counsel. *Blair v. Washington State Univ.*, 108 Wn.2d 558, 569-70, 740 P.2d 1379 (1987) (The court may not reduce a fee award in a discrimination case by assuming that plaintiff's public-interest lawyers lacked efficiency and duplicated effort); *Allard v. First Interstate Bank*, 112 Wn.2d 145, 148, 768 P.2d 998 (1989); *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552, 574-75, 829 P.2d 196 (1992), *rev'd on other grounds*, 124 Wn.2d 634, 880 P.2d 29 (1994) (The trial court may not arbitrarily reduce the fee award because two attorneys attended the trial where the record disclosed that they divided responsibility for issues and witnesses and devoted substantial time to the case outside of hours spent in the courtroom.).

b. The Court May Not Limit Fees Solely On The Basis Of The Amount That Plaintiffs Recovered and Must Take Into Account Fees Generated By Wells Fargo's Litigation Tactics.

The amount recovered is not a factor in setting the basic lodestar figure. The court should not reduce the lodestar when plaintiff has fully prevailed simply because the amount recovered is small or less than the full damages sought. *Travis v. Horsebreeders*, 111 Wn.2d 396, 409-10, 759 P.2d 418 (1988) ("The amount in controversy is not listed as a factor in one of our most recent decisions reviewing an attorneys fee award.").

The time devoted to this lawsuit is the defendant's fault. Wells Fargo and Chicago Title filed multiple *joint* motions for summary judgment, including *three* summary judgment motions to dismiss the contract claim on May 28, 2005, March 2, 2005, and July 18, 2005. CP42-52,

Supp. Desig. of Clerk's Papers. Wells Fargo's refusal to provide meaningful discovery of its customer service personnel and policies forced the Davises to move to compel discovery in January 2005, resulting in the Trial Court directing Wells Fargo to provide information. 10/03RP:64. Wells Fargo's discovery misrepresentations and concealment of material facts forced plaintiffs' counsel to submit a lengthy Motion in Limine to exclude evidence from Wells Fargo. CP 665-716, 729-44.

The pleadings demonstrate that the litigation tactics of two large defense firms were the real driver of pretrial attorneys fees, not wasted time by plaintiffs' counsel. Wells Fargo should pay for legal services required to respond to those tactics. *Allard v. First Interstate*, 112 Wn.2d 145, 153, 768 P.2d 998 (1989) ("The plaintiffs should not have to bear the burden" of fees incurred because of "defendant's resistance to discovery and last minute tactics.")

2. *The Trial Court Acknowledged That the Fee Award Must Be Determined By the Lodestar Method and That Plaintiffs Were Entitled to Services of Two Trial Counsel, But Nonetheless Violated the Lodestar Requirements by Excluding Over \$45,000.00 in Fees After Applying Lodestar Reductions, Including All Conferences Between Counsel and All of Attorney Nwokike's Trial Time.*

The trial court acknowledged that it must determine fees according to the Lodestar Method (10/11RP: 5), but also indicated that it intended to exclude more fees than the Lodestar Method allowed:

I am not overly sensitive to being reversed on appeal, but I do have a fatalistic look at this particular decision I have to

make, because I am aware of the times that judges have been overturned for their improper computation of attorney's fees.

10/11RP:8.

a. *The Trial Court Excluded 109 Hours of Nwokike Time From Specific Dates Based on Lodestar Considerations, But Erred as to 68.9 of Those Hours.*

The trial court approved the hourly rates of Nwokike (\$165) and Hathaway (\$235), and acknowledged that “there’s nothing wrong with having two attorneys on a case. There is nothing wrong with attorneys conferring and strategizing.” 10/11RP:5. However, the trial court went on to eliminate all time that Mr. Nwokike and Mr. Hathaway conferred with each other, as well as all of Mr. Nwokike’s trial time (29 hours).

The court first examined Mr. Nwokike’s time records “to whittle out the failed tort theories,” “work done in relation to Chicago Title as defendant,” “duplicative work . . . [and] items that are not recoverable, like 2 hours for filing a documents.” *Id.* Based on this examination, the court found certain “dates where I think attorneys fees were generated that I think fit into the categories that I talked about [and] need to be disallowed, *at least in part.*” 10/11RP:6. (*Emphasis added.*) The court identified 11 dates in 2004 and 17 dates in 2005, plus all four days that Mr. Nwokike attended the trial. *Id.* at 6-7. Mr. Nwokike’s time recorded on these dates are restated in Appendix A to this Brief and total 120.4 hours. The court found that these dates contain an aggregate of “109 disallowable hours, which, at Mr. Nwokike’s hourly rate is \$17,895.” 11/10 RP: 6-7.

An examination of the legal services² performed on these dates discloses that the court improperly excluded fees totaling \$11,369.00:

Allow ¹ / ₂ time* for meeting with Hathaway and attending Wells Fargo Dep. taken by Hathaway	6.0 hours
Mandatory settlement conference (brief + attend)	6.3 hours
Respond and argue against Def. S. J. Motion Re: contract Statute/Limitations**	16.0 hours
Prepare Motion for Standard Case Schedule and Declaration of Counsel	1.0 hours
Read Wells Fargo's multiple Motions in Limine	2.0 hours
Prepare Plaintiffs' Motion in Limine and assist preparation of Response to Wells Fargo's Motions in Limine***	8.0 hours
Attend Trial****	<u>29.6</u> hours
Total (\$11,369.00)	68.9

*Eliminating all attorney time conferring with co-counsel is unreasonable. *Wheeler, supra*, 65 Wn. App. at 575. In this case, the attorney having the lower hourly rate conducted all pretrial discovery until a month before trial, at considerable savings in fees over Mr. Hathaway's higher rate. Charging ¹/₂ of Mr. Nwokike's fees for conferring with Mr. Hathaway and assisting Mr. Hathaway take necessary Wells Fargo depositions is more than reasonable.

²The Davises' counsel had not addressed or considered the legal services provided on any of these dates because Wells Fargo never objected to legal services provided on specific dates. CP 849-62. Wells Fargo just lodged general objections that plaintiffs should not be awarded fees for time that was duplicative or wasteful. *Id.*

******Although this time is listed as responding to defendants' joint motion re tort claims, the pleadings disclose that the time in fact was devoted to preparing plaintiffs' February 4, 2005 response to defendants' summary judgment motion to dismiss plaintiffs' contract claims on statute of limitation grounds. CP 184-87, 799-800, 808.

*******The time records show that plaintiffs' counsel divided trial preparation work between them, to avoid duplication. CP 771-78, 812-14. Mr. Nwokike prepared Plaintiffs' Motion in Limine, supported by Mr. Hathaway's declaration and attachments. CP 729-44, 665-716. The trial court granted Plaintiffs' Motion in Limine to exclude evidence of certain credit reports and an earlier bankruptcy. 10/03RP:55-56. The trial court agreed to exclude Wells Fargo's evidence concerning the conduct of its customer service representatives that was not provided to Plaintiffs' during discovery. *Id.* at 74, 78. This attorney time plainly is compensable.

********There is no basis for excluding all of Mr. Nwokike's trial time. Defendants each had two attorneys throughout this case, with third attorneys preparing motions, jury instructions etc. Mr. Hathaway was brought into this case *because* plaintiffs faced trial against four attorneys from two large law firms, acting in concert in defending against plaintiffs' claims. Defendants each had two attorneys at trial on October 3 and 4, 2005. RP:2, 103. The court cannot infer that Mr. Nwokike's services were superfluous from the fact that Mr. Hathaway conducted the opening statement and half of the direct examination of Mr. Davis before Wells Fargo capitulated. The trial ended before most of witnesses had testified.

Plaintiffs' attorneys had divided up trial preparation and witness examination. Moreover, Mr. Nwokike was necessary to coordinate the large number of complex, multipart exhibits in this document intensive jury trial. CP 779-84; Exhibit Record, Supp. Clerk's Papers. The trial court erred in deciding that Wells Fargo could be defended by two trial attorneys, backed by one of the biggest law firms in the state, but the plaintiffs could not use the services of two solo practitioners to prosecute their claims. *Wheeler; supra*, 65 Wn. App. at 575.

b. The Trial Court Unreasonably Reduced Mr. Nwokike's Time an Additional 50 Hours for "Unfocused" Pleadings and an Additional \$5,636.00 for Seeking "Unrealistic Damages."

In addition to the 109 hours in time reductions under the Lodestar Method, the trial court deducted an additional 50 hours from Mr. Nwokike's time to penalize him for submitting pleadings that the court found to be "overly long, unfocused and repetitive." 11/10RP:7. The court did not identify these pleadings. Adding the 109 hours to the 50 hours (\$8,250.00), "brings me to a total of \$26,145.00 worth of wasted time" to be deducted from Mr. Nwokike's \$48,691.00 in total fees, for a net fee of \$22,546.00. *Id.* at 7-8.

The court was not through reducing Mr. Nwokike's fees, however. The trial court lopped off an additional 25% from the court's final fee calculation because the court felt that the Davises sought unrealistic damages and because, "early in the case, I was quite frustrated with the presentation that I was getting from the plaintiffs and the generation of

extra time that I saw.” 11/10RP:10. The court reduced Mr. Hathaway’s fees 25% as well, even though he was retained only a month before trial. The 25% reduction of Mr. Nwokike’s fees totaled \$5,636.00.

The “overly long” pleadings and “frustrating” presentations that the trial court relied upon to exclude \$13,886.00 in Mr. Nwokike’s legal services can only refer to plaintiffs’ responses to defendants’ multiple joint summary judgment motions. The only other motions were the Motion to Compel Discovery, which the court granted (10/03RP:64) and Plaintiffs’ Motion to Add Claims, time for which Mr. Nwokike had excluded from the fee request. CP 799-801. Penalizing Mr. Nwokike for responses to defendants’ summary judgment motions is unjustified under the Lodestar Method because plaintiffs were forced to incur these fees to respond to defendants’ summary judgment motions.

The trial court’s fee reduction was also wrong for a more practical reason: Either Mr. Nwokike or the trial court had *already excluded all of this time*. Mr. Nwokike excluded 68 hours, including all time devoted to plaintiffs’ response to Wells Fargo’s Summary Judgment re Tort Claims. CP 799-801, 814. His time records show that he also excluded plaintiffs’ responses to the Joint Summary Judgment Motion re Statute of Limitations. CP809. The trial court excluded all remaining summary judgment responses as part of the 109 hours. See Appendix A. So the trial court’s deduction of 50 hours and 25% could not come from any of the legal services that the court found frustrating or overly long. The \$13,886.00 in fees had to come from legal services that had nothing to do with the

“unfocused” briefing or “exaggerated presentations” to the court.

Altogether, the trial court improperly reduced Raphael Nwokike’s time by \$25,255.00 (\$11,369.00 + \$8,250.00 + \$5,636.00). Plaintiffs’ fee award should be increased by this amount.

c. The Trial Court Improperly Reduced John Hathaway’s Fee Request By at Least 50 Hours, Plus an additional \$8,459.00 as Part of the 25% “Penalty.”

The trial court found that Mr. Hathaway’s time records for 17 specific dates describe 56 hours of legal work that the court excluded as “attributable to the failed tort theories, . . . to Chicago Title as a defendant, and . . . duplicative work with what was going on with Mr. Nwokike [totaling] \$13,160.” 11/10 RP: 8. The time records for those dates are restated in Appendix B and total 131.5 hours. None of that time describes work on “failed tort theories,” nor on “Chicago Title as a defendant.” Mr. Hathaway’s September 9, 2005 time representing the Davises’ at the hearing of defendants’ joint summary judgment motion to dismiss plaintiffs’ contract claim for lack of damages is clearly compensable as was time preparing the Damages Statement that the trial court had ordered prepared. Supp. Clerk’s Papers, CP 517-574, 575-90.

The balance of the excluded time was necessary trial preparation, which Mr. Hathaway divided with Mr. Nwokike. Preparation of the trial exhibits relating to Chicago Title’s errors in identifying an unrelated tax parcel in the title commitment and Deed of Trust concerned Chicago Title as a witness, not as a party. The depositions referenced in the time records

are all of Wells Fargo witnesses, except for Jason Black, whose deposition was necessary to preserve testimony of facts admissible against Wells Fargo. CP 766. Preparing plaintiffs single response to Chicago Title's and Wells Fargo's joint Motions in Limine concerned matters affecting Wells Fargo and is clearly compensable. CP 717-28,729-44.

The court had no justification for deducting an additional 25% from Mr. Hathaway's fees on the ground of "unrealistic damages" sought "early in the case" (11/10RP:10.) because Mr. Hathaway was not counsel until shortly before trial and his fees devoted to damages were for preparing the Damages Statement that the court had *ordered* plaintiffs to prepare. Moreover, Mr. Hathaway had *already excluded* \$13,500.00 in fees related to coming up to speed on facts and damages. CP 762-65.

The records show a total of 9 hours that could *arguably* be attributable to "meeting and conferring" with co-counsel. At a minimum, ½ of that time, 4.5 hours, should be awarded, leaving a deduction of \$1,058.00. The time arguably devoted to Chicago Title as a party totaled 1.4 hours, or \$329.00, as shown in Appendix B. Lodestar reductions therefore total \$1,087.00, at most.

The \$8,459.00 in excluded fees, plus the \$11,750.00 improperly excluded under the court's Lodestar determination total \$20,209.00. Adding that to the \$25,255.00 in erroneous exclusions of Mr. Nwokike's time in a total of \$45,464.00 that should be added to the fee award.

VI. REQUEST FOR ATTORNEYS FEES

The trial court awarded plaintiffs' attorneys fees pursuant to RCW 4.84.010 and ¶ 21 of the Deed of Trust, which governs the lender's remedies and provides that the lender would be entitled to recover reasonable attorneys fees in pursuing any remedies. Ex. 14 at 5. This appeal concerns the trial court's errors in failing to award over \$45,000.00 in fees pursuant to the contract, as well as the trial court's error in refusing to allow the Davises to pursue their CPA claim against Wells Fargo. The Davises request that this Court award them their reasonable fees and costs on appeal pursuant to the contract and RCW 19.86.090.

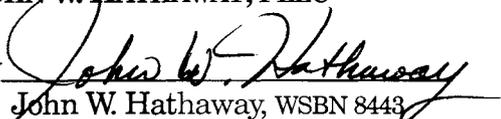
VII. CONCLUSION

From November 1999 through July 2002, Wells Fargo acted like a machine, mindlessly grinding out payment demands and foreclosures, oblivious to the facts within its own possession and unhampered by any concern over the correctness of its conduct or for the damage that its actions were causing the Davises. And when the Davises sued Wells Fargo for redress, the trial court insulated Wells Fargo from the consequences of its conduct. The trial court erred. Plaintiffs ask this court to add \$45,000.00 to the judgment for fees, or, remand with directions to add \$45,000.00 to the fee award, and remanded this action for trial on the causes of action and damages wrongfully disallowed by the trial judge. Finally, they ask for an award of fees on appeal pursuant to contract and the CPA..

Respectfully submitted this 6th day of June, 2006.

JOHN W. HATHAWAY, PLLC

By


John W. Hathaway, WSBN 8443

Attorney for Appellants

**DATES OF RAPHAEL NWOKIKE'S LEGAL SERVICES
THAT TRIAL COURT REDUCED/EXCLUDED FROM FEE AWARD**
(From Time Records, CP 804-14)

The trial court ruled that the following dates in Mr. Nwokike's time records contain descriptions of legal work that the court excluded "to whittle out the failed tort theories," "work done in relation to Chicago Title," and "duplicative work . . . bringing the other attorney up to speed, [totaling] 109 disallowable hours, which, at Mr. Nwokike's hourly rate is \$17,895." 11/10 RP: 6-7. Legal services which might arguably fit into one or more of the categories identified by the trial court have been **bolded**. The table shows the total time charged for each date and the maximum reasonable time devoted to the services described in bold letters.

DATE	DESCRIPTION	TOTAL HOURS	BOLDED TIME
08 06 04	Filing of Complaint & Summons against Wells Fargo Home Mortgage and Chicago Title Insurance Company at Superior Court in Tacoma	2.0	2.0
08 09 04	Delivery of Complaints & Summons for service on Wells Fargo by ABC legal Messengers, Seattle	1.3	1.3
08 17 04	Service on the Deputy Prosecuting Attorney's office in Tacoma with Subpoena Duces Tecum/ ABC Legal Messenger service on the Defendants.	3.0	3.0
08 20 04	Filing of Confirmation of Service at Tacoma.	2.0	2.0
10 04 04 - 10 05 04	Preparation of Stipulated Motion for a Standard Case Schedule/ Plaintiffs Counsel declaration/Certificate of Service.	2.0	0.5
10 07 04	Filing of Jury Demand for the Plaintiffs at Tacoma Court	2.0	2.0

DATE	DESCRIPTION	TOTAL HOURS	BOLDED TIME
10 08 04	Filing of Stipulated Motion for Standard Case Schedule at Tacoma	2.0	2.0
11 07 04 - 11 10 04	Research and Preparation of Plaintiffs' Response to Defendants' Joint Summary Judgment Motion Re: Tort Claim & Declaratory Relief , Plaintiffs' declaration in support with Exhibits & Plaintiffs Counsel's declaration with Exhibits.	12.0	12.0
11 16 04	Filing of Plaintiffs' Motion for Continuance of Defendants Joint Summary Judgment Motion Re: Tort claim & Declaratory Relief	3.0	3.0
11 16 04	Plaintiffs' response to Defendants Joint Summary Judgment Motion RE: Tort claim & Declaratory Relief .	2.0	2.0
11 23 04	Motion for Continuance of Defendants' Summary Judgment Motion RE: Tort claim and Declaratory Relief 12 /3/04 at Tacoma Court	1.0	1.0
12 03 04	Conference with Plaintiff, Levis Davis, and attend oral argument on Plaintiffs' Motion for Continuance on Defendants' joint Summary Judgment Motion: Tort claim & Declaratory Relief	3.0	3.0
01 07 05	Filed Motion to compel Defendants in Tacoma	2.0	2.0
02 02 05	Meeting with Plaintiff, Levis Davis in Preparations for responding to Defendants' reply to Plaintiffs' response to Summary Judgment Motion RE: Tort claim and Declaratory Relief.	3.0	3.0

DATE	DESCRIPTION	TOTAL HOURS	BOLDED TIME
02 03 05	Plaintiffs' research to Defendants supplemental response to Plaintiffs reply to summary judgment , Declaration of Raphael Nwokike in support with Exhibits, Proposed Order and decl. of service et al.	8.0	2.0*
02 04 05	Filing of Plaintiffs' response to reply on Defendants Summary Judgment Motion in Tacoma, proposed Order and Declaration of Raphael Nwokike in support of response to reply.	2.0	2.0
02 21 05	Plaintiffs' Strict Response to Wells Fargo's reply to Plaintiffs' response to Summary Judgment Motion, Levis Davis' declaration in support with Exhibits, declaration of Raphael Nwokike in Support with Exhibits.	8.0	1.0*
02 22 05	Filing of Plaintiffs Strict Response to Chicago Title's Joint Summary Judgment Motion at Tacoma	2.0	2.0
05 17 05	Attend meeting with John Hathaway and Plaintiffs to evaluate Plaintiffs' claims and damages	4.0	2.0
08 20 05 - 08 23 05	Preparation of Plaintiffs' Settlement Conference Letter and proposals with attached 60 exhibits.	5.0	0.0
09 07 05	Filing of Plaintiffs' response to reply in opposition to Wells Fargo's Summary Judgment RE: Breach of Contract.	2.0	2.0
09 07 05	Raphael Nwokike and Levis and Debbie Davis meeting with Honorable Judge David Johnson and Defendants Counsel for settlement conference.	1.3	0.0
09 23 05	Pre-trial conference meeting with John Hathaway , Levis and Debbie Davis.	4.0	2.0

DATE	DESCRIPTION	TOTAL HOURS	BOLDED TIME
09 27 05	Wells Fargo's letter addressing deposition issue on Kevin Mckown.	.20	0.0
09 27 05	Attend deposition of Kevin Mckown at John Hathaway's Office in preparation for trial.	4.0	2.0
09 29 05	Preparations of Plaintiffs' Motion in Limine RE: credit reports, bankruptcy and opposing Wells Fargo's motion in limine	8.0	0.0
09 29 05	Receipt and reading through Wells Fargo's Motion in Limine and attached exhibits.	2.0	1.0
10 03 05	Attend First day at Trial.	9.3	0.00
10 04 05	Attend Second day at Trial	9.0	0.00
10 05 05	Attend Third day at Trial	4.3	0.00
10 06 05	Attend Fourth day at Trial; Conference with Plaintiffs and John Hathaway	7.0	0.00

Total time: 120.4 hours

Trial time: 29.6 hours

Bolded time: 50.8 hours

**DATES OF JOHN W. HATHAWAY'S LEGAL SERVICES
THAT TRIAL COURT REDUCED/EXCLUDED FROM FEE AWARD**
(From Time Records, CP 769-77)

The trial court found that Mr. Hathaway's time records for the following dates contain descriptions of legal work that the court excluded as "attributable to the failed tort theories, . . . to Chicago Title as a defendant, and . . . duplicative work with what was going on with Mr. Nwokike [totaling] \$13,160 [56 hours]." 11/10 RP: 8.

Legal services which might arguably involve communications between co-counsel have been **bolded**. Time devoted to unrelated claims or another party has been underlined.

DATE	DESCRIPTION	TOTAL HOURS	BOLDED TIME
05 17 05	Meet with Raphael Nwokike, Levius and Debbie Davis ; Examine transaction documents, title commitment, correspondence and pleadings; discuss damages and claims ; conduct preliminary legal research.	6.0	2.5
09 07 05	Telcon with Lee regarding trial; Telcon with Raphael re trial issues	.20	.20
09 09 05	Attend oral argument regarding defendants' summary judgment motion on damages; Conference with Lee and Raphael after hearing; Telcon with Lee (twice) .	4.6	.50
09 15 05	Examine documents; Meet with Raphael regarding exhibits and facts ; Telcon with Lee re Chicago Title documents on other sales; Meet with Lee re facts for trial.	4.2	1.0
09 20 05	Read letter from Young regarding my 9/16 letter; Prepare Fax to Young and Neu regarding issues raised in 9/16 letter; Telcon with Young re deposition scheduling, trial subpoenas and claims of the parties; email to Nwokike ; Examine damages research for damages statement; Conference with legal	4.9	0.20

DATE	DESCRIPTION	TOTAL HOURS	BOLDED TIME
	assistant re gathering relevant pattern jury instructions; Continue study of exhibits and payment schedule.		
09 22 05	Telcon with Young regarding pretrial hearing; Prepare for pretrial hearing; Exchange emails re cancelling pretrial hearing; Finish preparing Damages Statement; Prepare Declaration re documents supporting damages statement; Telcon with Nwokike re documents supporting damages; Pull supporting documents and have them copied; Telcon with Young re deposition of Lynnette Olson; Directions to legal assistant re obtaining court reporter for Iowa; Read Nwokike's draft subpoenas for trial; Prepare subpoena language and language of cover letter and email same to Raphael; Telcon with Raphael re trial witnesses and problem with Pierce County; Review and revise damages statement and supporting documents.	8.2	1.00
09 23 05	Telcon with Young regarding meaning of entries in schedule of payments and charges; Email schedule of payments and charges to clients with questions re bounced checks; Estimate damages based on refund of all excess charges and fees; Read email from Young re acceptance of service re trial subpoenas; Telcon with Nwokike re attempts to serve Pierce County Assessor; Prepare exhibits for Olson deposition; Have same numbered and delivered to Young for emailing to witness; Read Declaration from Community Lending personnel; Examine defendants' document productions to decide on trial exhibits; Dictate index to trial exhibits selected by Raphael; Conference with Raphael re subpoena for Jason Black to attend trial.	10.5	0.40

DATE	DESCRIPTION	TOTAL HOURS	BOLDED TIME
09 29 05	Receive Chicago Title's Motion in Limine Receive Wells Fargo's Motion in Limine; Prepare for Kirkle deposition; Analyze payment and penalty schedules; Telcon with court reporter and with Young regarding rescheduling Kirkle deposition for 9/30; Study payment and fees schedule; Study consolidated reports concerning Wells Fargo's activity re clients' account; Prepare index re dates of reports and summarizing material facts; Receive another Motion in Limine from Chicago Title; Direction to legal assistant re legal research to respond to motions; Prepare and email Plaintiffs' Objections to Defendants' trial exhibits; Telcon with accountant re revisions to amortization and payment schedules; Prepare final amortization schedule and payments summary Email same to Young as trial exhibits 71 and 72; Prepare for Kirkle deposition.	10.2	0.00
09 30 05	Take Kirkle deposition; Outline responses to Motions in Limine; Receive Wells Fargo's Motion in Limine and Chicago Titles trial brief; Prepare exhibits for Black's deposition; Prepare for and take Black's deposition; Meet with Lee Davis to discuss his testimony; Meet with Raphael Nwokike regarding subpoenas to Pierce County and trial preparation; Examine exhibit binders for court, witness for completeness; Review and revise index to exhibits; <u>Email from Neu</u> and from Young re objections to exhibits; Incorporate same into index and email final index to opposing counsel; Examine Wells Fargo's Second Revised Exhibit list; Email Young re questions concerning list.	9.5	0.30
10 01 05	Trial preparation; Exchange emails with Young regarding exhibit list; Examine WPI jury instructions for contract cases; Revise WPI instructions; List instructions to come from case law; Legal Research re instructions for measure of damages and for consequential damages;	8.2	1.2

DATE	DESCRIPTION	TOTAL HOURS	BOLDED TIME
	<p>Read motions in limine and conduct legal research re responses; Email opposing counsel the final joint exhibit list; Prepare Declaration supporting Plaintiffs' Motions in Limine and email same to Nwokike; Research legal authority for excluding evidence of first bankruptcy and email same to Nwokike for inclusion in Motion; Meet with clients to discuss testimony; Meet with Nwokike to discuss testimony of witnesses; Prepare exhibits to be used in clients' testimony.</p>		
10 02 05	<p>Receive draft Plaintiffs Motion in Limine from Nwokike; Legal research regarding same; Revise Plaintiffs, Motion in Limine and email revision to Nwokike; Email defense counsel Plaintiffs' Motion in Limine and Declaration Supporting Plaintiffs' Motion in Limine; Prepare response to Defendants' three motions, in limine; Read defendants' trial brief; Directions to legal assistant re additional research for jury instructions; Read email from court reporter re Olson transcript; Read and revise Plaintiffs' proposed Order on Motion in Limine; Examine demonstrative aid proposed by Wells Fargo; Email Young re Plaintiffs' objection to use of aid; Receive and examine Wells Fargo's new trial exhibit no. I 17A; Prepare Plaintiffs' Amended Designation of Exhibits; Directions to legal assistant to prepare checks for court reporters; Receive Kirkle's deposition transcript; Examine Olson deposition Make copies of deposition transcripts for use at trial; Prepare opening statement and oral argument for Motions in Limine.</p>	11.5	0.50
10 03 05	<p>Attend trial; Argue Motions in Limine; Conference with clients regarding trial matters and jury selection; Prepare client's examination; Receive and read McKown deposition; Examine Olson deposition and select portions to be read into record; Examine jury instructions prepared by Nwokike; Prepare jury instructions based on WPI;</p>	9.1	0.5

