FILED
COURT OF APPEALS

06 AUG 24 PM 4:31

No. 34136-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

LEVIUS I. DAVIS and DEBBIE L.
VIDAL DAVIS, husband and wife,

Plaintiffs-Appellants

v.

WELLS FARGO HOME MORTGAGE COMPANY,

Defendant-Respondent

and

CHICAGO TITLE INSURANCE COMPANY,

Defendant

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. Thomas J. Felnagle)

# RESPONDENT'S ANSWERING BRIEF

Ronald E. Beard
WSBA No. 24014
Michael B. King
WSBA No. 14405
David C. Spellman
WSBA No. 15884
David L. Young
WSBA No. 30543
Attorneys for Respondent
Wells Fargo Home Mortgage Company

Lane Powell PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101
Telephone: (206) 223-7000
Facsimile: (206) 223-7107

# TABLE OF CONTENTS

Page

## TABLE OF AUTHORITIES

Page

### CASES

## STATUTES AND COURT RULES

MISCELLANEOUS

## I.

## SUMMARY INTRODUCTION

This appeal's crux is the "theory of massive damages" that the trial court ruled "weren't justified," "permeated the whole case," "took on a life of its own" and made the case "more complex than it needed to be." VRP (Nov. 10, 2005) 9. The Davises seek a radical and unwarranted departure from the common law: a presumption of emotional distress and reputation damages, and abolition of the requirement that a plaintiff prove proximate causation to recover special consequential damages. Their appeal should fail, because they have failed to make the case for such a radical change in the common law.

The Davises' appeal of the amount of attorneys' fees awarded also fails. There was no manifest abuse of discretion in reducing the fee claim from almost $98,000 to $48,025. The trial court considered multiple factors including the unsuccessful claims, massive damage theory, the limited sum of $21,400 that was recovered, "duplicative work," and the unjustified "generation of extra time." (Id.) at 5-9. This is the stuff of a considered exercise of discretion, which any appellate court should affirm with alacrity.

There is no dispute that the Davises became delinquent on their home mortgage. A portion of the delinquency was caused by Wells Fargo's overstatement of $3,575 in property taxes that caused other fees and expenses. But a far more substantial portion was caused by the Davises' failure to make mortgage payments for 18 months.

Moreover, Wells Fargo has compensated the Davises for their bona fide losses. Years before this suit was filed, Wells Fargo credited to the Davises' account the tax overcharge, "acknowledged its error and agreed to have a loan modification," which waived many of the related fees and postponed monthly payments. (CP 7, Complaint at 7:23-26.) Yet, two years after receiving the loan modification from Wells Fargo, the Davises filed a suit demanding over $2 million in damages from both Wells Fargo and Chicago Title (which acted as the closing agent and the title company in the original purchase and sale and loan transaction).

The Davises now have been paid $21,400 in damages -- almost six times the amount of the tax refund. This sum fully compensated the Davises for their actual loss. In addition, the Davises have been paid $51,000 for the <u>reasonable</u> attorneys' fees incurred in this action. The Davises plainly want more -- much more. But the trial court correctly concluded the Davises had no valid legal basis to demand more, and this Court should affirm that determination.

The trial court properly granted summary judgment, which dismissed the tort claims for emotional distress damages. Emotional distress is not a recoverable damage for breach of contract, misrepresentation, and violation of the Consumer Protection Act. Furthermore, the Davises failed to establish the necessary elements of tort claims for emotional distress -- "outrageous" behavior or a threat of personal injury and medical evidence of diagnosable mental distress.

The Davises also have failed to prove the trial court committed a manifest abuse of discretion when it denied the tardy motion to amend the misrepresentation and Consumer Protection Act claims. The timing of the proposed amendments was unduly prejudicial. The motion to amend was made five months after the order that dismissed the tort claims, days after the deadline for filing a motion to change the trial date, and just two weeks before the discovery deadline. The motion would have substantially broadened the issue for trial -- joining a total of eight new causes of action (two against Wells Fargo and six against Chicago Title). The trial court was well within its discretion to deny the Davises' proposed amendment.

The trial court also did not abuse its discretion by preventing the Davises from offering evidence on five items of special consequential damages. The Davises first failed to identify or quantify those items during the discovery period, and later failed to offer sufficient evidence to prove legal causation and to afford a reasonable basis for estimating the loss.

The trial court likewise properly excluded the $300,000 damage to personal reputation claim. As a matter of law, damage to personal reputation is not a compensable damage for breach of contract, negligence, or even violation of the Consumer Protection Act. Rather, the tort of defamation protects a person's interest in his or her reputation, and the limitations period barred a defamation claim when the Davises filed suit. Even if they had made a timely claim, the foreclosure notices offered failed to satisfy the requirements for defamation.

The trial court also properly excluded the $50,000 damage claim for allegedly derogatory information on their credit report. The Davises were fully compensated for any damage to their credit rating after Wells Fargo reimbursed them for the cost of the unnecessary new loan they obtained from another lender. The claim was also excludable as merely a guess that lacked proof of proximate causation and an adequate offer of proof.

The trial court also properly excluded evidence of the $19,878 damage claim for loss of 25 months of GI educational benefits. Mr. Davis failed to use those benefits during a 10 year period that included over two years after the loan modification was made. Wells Fargo's acts were too remote to be the proximate cause and to impose liability on it for the loss of the benefits. Mr. Davis also failed to make an adequate offer of proof on this claim.

The trial court also properly excluded the $3,000 damage claim for selling four vehicles during the bankruptcy and the $3,024 damage claim for 28 days lost work that this action and the bankruptcy allegedly caused. Wells Fargo's acts were too remote to establish proximate causation. The Davises' own decisions resulted in the sale of the vehicles. Mr. Davis failed to provide verifiable documentation supporting his massive claim for lost work and any legal authority supporting such a claim.

Finally, the trial court did not abuse its discretion by applying the multifactor lodestar method to award a reasonable amount of attorneys' fees at slightly more than double the special damages and half the requested amount of fees.

In summary, the trial court's decisions should be affirmed. The Davises' own decisions were the proximate cause of the chain of events that led to Mr. Davis working long hours, suffering any emotional distress, and sustaining any other uncompensated losses.

## II.

## COUNTERSTATEMENT OF ISSUES

The following issues pertain to the Davises' assignments of error:

1. Whether emotional distress damages were recoverable damages under the contract.

2. Whether the Davises offered evidence that satisfied the threshold legal showing for an intentional infliction of emotional distress (outrage) claim or for a negligent infliction of emotional distress claim.

3. Whether the Davises abandoned or waived a claim for emotional distress by failing to make a sufficient offer of proof and by failing to argue the claim in its opening brief.

4. Whether the economic loss rule prevents a party from making claims for negligence and intentional and negligent infliction of emotional distress when the party is already asserting a claim for breach of contract based on the same facts and circumstances.

5. Whether the application of the economic loss rule was harmless error, when the Davises failed to demonstrate any recoverable damage not previously compensated.

6. Whether the trial court committed a manifest abuse of discretion in denying a motion to amend eight new causes of action two weeks before the discovery deadline, where the trial court made a specific finding of prejudice.

7. Whether the Davises pleaded a viable Consumer Protection Act claim or an actionable fraud claim.

8. Whether damage to personal reputation was a recoverable injury under any of the pleaded claims.

9. Whether exclusion of evidence as five items of special consequential damage was an error of law or abuse of discretion.

10. Whether the Davises offered sufficient evidence of proximate cause and foreseeability.

11. Whether the trial court committed a manifest abuse of discretion in applying the lodestar method for determination of fees.

## III.

## COUNTERSTATEMENT OF THE FACTS

### A. The Davises' Home Mortgage Was Transferred to Wells Fargo and, in Reliance on a Note on the Deed, Wells Fargo Mistakenly Charged the Davises Property Taxes for Two Parcels.

In January 1998, the Davises paid an earnest money deposit for a house. (CP 93, 98-99.) Six months later, the Davises closed on the purchase of their new home. A Veterans Administration guaranteed loan through ComUnity Lending, Inc. provided the financing. (CP 865, note; CP 449, indicating VA loan number.) Shortly after closing, ComUnity Lending transferred the mortgage to Norwest Mortgage. (Ex. 13 at

WFHM 35.) Through an acquisition and merger, Norwest became Wells Fargo.

The next year, Wells Fargo mistakenly believed the Davises were required to pay taxes on two parcels. The first title commitment for the house identified the property as Lot 25; however, a later commitment referred to Lot 25 and a strip of Lot 26. (CP 125, 140.) A handwritten note on the warranty deed stated the tax parcel numbers for both lots. (CP 193 ¶ 13, CP 241.) Based upon the handwritten note, Wells Fargo made an unintentional error, which resulted in overcharging the Davises with excess property taxes and fees from 1999 to 2002.

B. <u>The Davises Delivered NSF Checks for Mortgage Payments in Late 1999 and Early 2000</u>.

In July 1999, Wells Fargo increased the monthly impound account for taxes, insurance and assessments by merely $42.00. (Davises' Opening Brief ("Davis Brief") at 9.) The next month, the Davises' monthly payment was late, and they made the payment with a bad check. (CP 383.) In October and November 1999 and in January 2000, they tendered additional bad checks. (CP 383-84.) Those breaches of the mortgage agreement preceded Wells Fargo's mistaken doubling of the monthly impound payment (from $234 to $483) in December 1999. (CP 384.)

C. <u>In 2000, the Davises Received Annual Statements From the County and Wells Fargo. The Statements Gave the Davises the Means to Discover the Additional $3,575 in Property Taxes They Were Mistakenly Charged During Approximately a Three Year Period</u>.

In June 2000, the Davises received from Wells Fargo an Annual Escrow Review and Notice of New Mortgage Payment, which estimated the property tax for the coming year was $6,214 instead of the actual $3,020. (CP 66, Annual Escrow Review of Notice of New Mortgage Payment; CP 67, Assessor's Property Tax Detail.)[1] The Davises received from Pierce County notices that the property tax was $3,020 in 2000 and $3,028 in 2001 -- half the amount estimated by Wells Fargo in those years. (Ex. 53.) During 1999-2001, Pierce County was paid a total of $3,575 in extra property taxes. (CP 30.)

D. After the Davises Stopped Making Any Mortgage Payments, Wells Fargo Posted Default and Foreclosure Notices in the Spring of 2001.

From January 2001 through September 2002, the Davises failed to make any mortgage payments. (CP 387-88.) From 2000 through 2002, the period when the Davises defaulted on the mortgage and declared bankruptcy, their annual income declined.[2] Although the Davises blame Wells Fargo for their financial and quality of life issues, other conditions and decisions caused or contributed to the Davises' plight: shifting from a

[1] At closing, they had also received an escrow account disclosure sheet showing the amount of property taxes. (CP 164.) After they received the December 1999 billing statements, the Davises claimed to have called Wells Fargo and allegedly received inaccurate information about the increased expenses. (CP 375, Decls. of Levius and Debbie Vidal Davis in Supp. of Resp. to Defs.' Summ. J. Motion ¶ 9.) The amount increased in August 2000. (Id. ¶ 10.)

[2] In 1998, the Davises' joint wages were $50,772, of which $24,204 were Mr. Davis's wages. (Ex. 10 at WFHM 23-24.) The 2000 household wages were $67,000 (Ex. 65 at 24), dropping to $62,000 in 2001 (the default notice and bankruptcy) (id. at 26) and $58,000 in 2002 (loan modification) (id. at 14), before increasing to $74,000 in 2003, and $83,000 in 2004 (id. at 1).

two-wage-earner family to a one-wage-earner family, adding two dependents, health problems, and the absence of contract work.[3]

While the Davis family was confronting these dramatic changes, Wells Fargo was not unsympathetic and certainly did not ignore them. Wells Fargo's records reflect its repeated efforts to work with its customer by obtaining updated financial information, entering into payment plans and later pursuing the tax refund and making the loan modification. (CP 224-35.) However, after five months of missed mortgage payments, Wells Fargo posted at the property a May 1, 2001 notice of default. (CP 201-04.) The default notice informed the Davises that, pursuant to the Fair Debt Collection Act, Wells Fargo would assume the calculation of the debt was valid, unless it received written notice that the Davises disputed any portion of the debt within 30 days. (CP 203.) The notice also informed them of presale rights to contest the default under the deed of trust statute. (Id.) There is no evidence the Davises sent a written notice disputing any part of the debt. On June 11, 2001, Wells Fargo posted a notice of trustee's sale, which was scheduled for September 14. (CP 205.)

[3]Although Ms. Davis's income as coborrower was used as a basis for the loan qualification, the Davis brief emphasizes their plan to "rely[] solely upon Mr. Davis's income to support the family," based upon his projection of earnings from "contract work." (Compare Davis Brief at 8 with Ex. 10 at WFHM 00023-24.) The $1,520 monthly mortgage payment was 36 percent of the Davises' joint monthly income but was 75 percent of their monthly income if only Mr. Davis's monthly income was used. (CP 865, Ex. 11; 1520/4231=36%. 1520/2017=75%.) Mr. Davis complains, "the contract work was not always there, so the Davises would periodically fall behind, incurring late fees and penalties, which added to their financial burden." (Davis Brief at 11.)

E. In the Fall of 2001, the Davises Filed Chapter 13 Bankruptcy and Informed Wells Fargo They Were Being Overcharged for Taxes. In May 2002, They Received a Credit for the Tax Refund.

In September 2001, the Davises retained a lawyer and filed Chapter 13 bankruptcy. (CP 533-34.)[4] Pending approval of their Chapter 13 plan, the Davises made payments to the trustee instead of making payments to creditors, including Wells Fargo.[5]

In October 2001, Wells Fargo filed in bankruptcy court a proof of claim. (CP 199-200.) Wells Fargo's records for that month confirm a call from the Davises reporting the overcharge for property taxes after they had contacted another lender. (CP 230, item for Oct. 8, 2001; CP 380-81, Decls. of Levius and Debbie Davis ¶¶ 33-34.) Starting with their October 2001 telephone call, the Davises clearly had actual knowledge of the discrepancy, and thus they could no longer claim actual and detrimental reliance upon any inaccurate information supplied by Wells Fargo.

Four months later, in February 2002, although the Davises had not made a mortgage payment for over a year, Wells Fargo applied for the tax refund from the County. (CP 30, refund letter; CP 56-61, Petitioner Refund.) In May 2002, the refund was credited to the Davises' account. (CP 982, May 2002 informational statement showing $3,575 credit.)

[4]See generally 28 Marjorie Dick Rombauer, Washington Practice Creditors' Remedies -- Debtors' Relief, §§ 9.48-9.53, 9.132, 9.136-9.137 at 316-23, 410-18 (1998) (describing bankruptcy's automatic stay, Chapter 13 plans and payments pursuant to an unapproved plan).

[5](CP 994-95, the proposed Chapter 13 plan); see 28 Washington Practice at 417 (stating payments are made to the trustee before confirmation of the plan).

Meanwhile, Wells Fargo continued to provide the Veterans Administration written status reports about the mortgage. (CP 227, 230.)

F. In May 2002, the Davises Also Planned to Start Making Mortgage Payments Again and to Resolve Issues With Wells Fargo in August 2002.

In May 2002, the Davises filed with the bankruptcy court a motion for a moratorium on payments under their unapproved plan. (CP 990-91, Ex. 13 to Decl. of Levius Davis in Supp. of Resp. to Deny Defs.' Mot. Re: Tort Claim and Decl. Relief (Nov. 15, 2004).) The grounds for the motion included their belief that they had been overcharged for property taxes and their expectations that the amount of arrearages would be reduced, and they would "start making regular payments on August 1, 2002 when it is anticipated that all of the issues should be resolved with Wells Fargo Financial." (Id.) Their expectations were satisfied.

G. In August 2002, Wells Fargo "Acknowledged the Error" and Resolved the Property Tax Mistake and the Missing 18 Mortgage Payments by Entering Into a Loan Modification Agreement.

On June 19, 2002, the Davises voluntarily dismissed the bankruptcy. (CP 224.) Upon dismissal, the Davises received from the trustee the plan funds that had never been disbursed. By the next month, July 2002, Wells Fargo had not received any mortgage payments for 18 months; as a result, Wells Fargo then sent amended notices for a trustee's sale and foreclosure scheduled for August 23. (CP 215-21, notices.) On August 1, Wells Fargo informed the Davises that the property tax issue was resolved (CP 7, Complaint at 7:23-26), and as admitted in the Davises' complaint, Wells Fargo "acknowledged the error and agreed to have a loan modification." (CP 7, Complaint at 7:23-26.)

The loan modification[6] added to the loan $29,052 in interest that the Davises had failed to pay and waived $15,000 in impound fees and late charges.[7] Although the loan modification required them to pay $5,381 for expenses incurred by Wells Fargo, the Davises received other consideration -- the new monthly payments were postponed two months until November, and the Davises retained the Chapter 13 funds that the trustee returned.[8] There is no claim that the Davises reserved any claim against Wells Fargo, when they signed the loan modification.

Fifteen months after the loan modification, the Davises refinanced with another lender. (CP 8, Complaint ¶ 24; CP 13, 552, 554 (Jan. 2004 refinance).) The reason for the refinance was not financial: "we . . . wanted to part ways with Wells Fargo as a result of how we were treated

[6]CP 69-73. Their new estimated monthly payment of $1,689 was $172 less than the $1,861 monthly payment stated on the May 2002 statement that Wells Fargo earlier sent them for informational purposes. (Compare CP 982, the June 2002 informational statement, with CP 997-98, Aug. 8, 2002 letter.)

[7]Earlier in the foreclosure, Wells Fargo had calculated the past due amount as over $40,000 -- including the $3,575 in property taxes paid for the adjacent property. (CP 217, stating total arrears were $41,954.)

[8]Earlier in May 2002, Wells Fargo calculated the loan amount as $226,413 ($188,678 as the principal balance with $37,735 due on June 1, 2002). (CP 982, Informational Account Statement, and CP 74, showing original principal and new amount under the modification.) In the loan modification agreement, the new loan amount was $217,731 → $5,381 payment ($217,731 + $5,381 = $223,112) effective November 1, 2002. (CP 69-70, showing loan amount and new monthly payment date; CP 74, 53; Exs. 37-39.)

by them during the Chapter 13 bankruptcy proceedings in 2001 and 2002." (CP 1180, Decls. of Levius and Debbie Davis ¶ 36 (Aug. 24, 2005).)

H. In May 2002 and April 2004, the Davises' Lawyers Sent Chicago Title Demand Letters for Increasing Amounts of Damages Escalating to Over $2 Million.

Earlier in May 2002, while the Davises were anticipating resolving the dispute with Wells Fargo, their lawyer sent Chicago Title a demand letter. (CP 251-52.) The letter asserted that Chicago Title's erroneous note on the deed caused the Davises' losses (id.) and demanded over $500,000. (CP 90, 251-52, 169.) Almost two years later, in April 2004, the Davises' lawyer sent Chicago Title a letter that demanded an amount in excess of $2 million. (CP 90; CP 171-76 (letter).)

I. The Davises' Complaint Against Wells Fargo and Chicago Title Requested $18,000 in Special Damages Plus Emotional Distress and Other Unquantified Damage.

In August 2004, the Davises filed a suit jointly against Wells Fargo and Chicago Title. The Davises asserted against Chicago Title and Wells Fargo claims for breach of contract, declaratory relief, negligence, and intentional and negligent infliction of emotional distress. (CP 1-14.) The complaint pleaded only $18,000 in special damages ($10,000 in refinance fees -- the actual sum was $8,590 -- and $8,000 for legal fees incurred in the bankruptcy). (CP 13-14, CP 529 showing $8,590 for refinance fees.)

J. The Trial Date Was Postponed When the Case Was Placed on the Standard Case Schedule.

Early in the suit, the Davises stipulated to moving the case from an expedited case schedule to a standard case schedule. As a result, the trial date was postponed eight months and the new trial date was October 2005. (CP 1256-60.)

K. The Davises' Discovery Responses Itemized Only the $18,000 in Special Damages Pleaded in the Complaint and Failed to Provide Medical Evidence to Support Their Emotional Distress Claims and Documentary Evidence to Support Their Other Damage Claims.

In response to the damage interrogatory, the Davises identified the excess mortgage payments, $18,000 in special damages, and uncalculated amounts for other damage items.[9] During discovery, the Davises failed to supplement their responses. (CP 1208-10, Wells Fargo's Reply in Supp. of Mot. for Summ. Judgment Re Breach of Contract at 3-5:18 (Sept. 2, 2005).) The Davises' answers to discovery failed to identify either any medical treatment for emotional distress, or any nonparty witnesses, and failed to produce records supporting their other damage claims (CP 1301-04, Answers to Interrogatory Nos. 12-15, Response to Request No. 15, Ex. B to Decl. of David Young (Sept. 2, 2005).)

L. The Trial Court Granted Summary Judgment, Which Dismissed the Tort Claims for Emotional Distress.

Three months after this case was filed, Wells Fargo and Chicago Title filed summary judgment motions to dismiss the emotional distress, tort and declaratory relief claims.[10] After a several month continuance of

[9]The Davises provided uncalculated amounts for credit damaged, GI benefits not used, public embarrassment from foreclosure notices, extra shifts worked, and quality of life issues such as "spouse being pregnant during ordeal," lack of purchasing power, and harassing phone calls from creditors. (CP 8-9, 634.)

[10](CP 34-52; 941-47.) Chicago Title later filed an additional joint motion based on the statutes of limitations and the failure to prove the requirements for intentional or negligent infliction of emotional distress (continued . . .)

the hearing on the motions, the court granted summary judgment that dismissed the emotional distress and negligence claims. (CP 416-21, Journal Entries, CP 420-21, order.)

M. The Davises' Mandatory Disclosures Failed to Identify Any New Items of Damage, Any Nonparty Witnesses, or Any Expert Opinions.

The Davises' witness disclosures failed to identify any nonparty witnesses and any factual foundation or opinion testimony to support the claims of special damages, consequential damage to reputation, loss of value of automobiles sold, GI benefits, and loss of work.[11]

N. The Trial Court Denied the Motion to Amend Eight New Causes of Action Two Weeks Before the Close of Discovery.

Almost five months after the summary judgment order and two weeks before the discovery cutoff, the Davises filed a motion to amend eight new claims. (CP 422, 490.) The new claims would have presumptively reclassified the case to a "complex case" for the purposes of case scheduling and discovery under Pierce County Local Rule 1(h)(4). The court found the amendments would cause "undue prejudice to Defendants at this late date" and denied the Davises' tardy motion. (CP 514-16.)

---

(. . . continued)
claim. (CP 42-52, Chicago Title motion at 2:7-16; 6:14-7:3.) The Davises were granted a continuance of the hearing on motions. (CP 1019-20.)

[11](CP 620-22, Wells Fargo's Mot. in Limine to Exclude Improper Damages at 3:13-5:2; CP 1293, 1304.) The case schedule required the Davises to disclose primary witnesses on April 25 and rebuttal witnesses on June 13. (CP 1256.) Pierce County Local Rule 5 required the disclosures to include descriptions of lay witnesses' relevant knowledge and a summary of opinions by expert witnesses.

O. After Discovery Closed, the Davises Identified New Damage Items and Calculations.

Nine days after the close of discovery in mid-August, the Davises filed a declaration containing a litany of new damages items and calculations. (CP 1777-81.) On September 9, the court ruled the Davises had done a "poor job of landing on theories and responding to the needs of discovery," and while denying a summary judgment motion to dismiss the contract damage claim (CP 602, 623, excerpts of transcript at CP 644-47) nonetheless required the Davises to provide a list of damages and supporting evidence. In late September, the Davises provided the itemization for over $412,000 in damages (CP 527-29) to be asserted at the October 3 trial.

P. The Trial Court Precluded the Davises From Offering Evidence on Some of the Damage Items That Were Unquantified and Not Supported During Discovery. The Trial Court, However, Permitted Them to Present Evidence on $21,400 in Damages That Was Greater Than the $18,000 in Special Damages Pleaded in the Complaint and Disclosed During Discovery.

Wells Fargo and Chicago Title filed motions in limine to exclude the tardy damage claims.[12] In ruling on the challenged damage items, the court stated, "[T]here's a strong argument that none of this bankruptcy was contemplated. Now, I have rejected that, and I think I am bending over backwards in plaintiff's favor in doing so." VRP (Oct. 3, 2005) 27:17-21. The court expressed concern that submitting to the jury every alleged charge relating to the bankruptcy would result in "some vague or unknown

[12](CP 592, 603-04, 610-14, 618-47, 648-49.) On October 3, the Davises calculated an additional damage item: $5,086 for the amortized impound account balance without late charges, phone charges, and certain other claimed expenses. Exs. 71-72; VRP (Oct. 3, 2005) 6:24-11:9.

test" and that would not permit them to determine compensable damages. (Id.) 27:24-28:11. The court permitted submission of expenses incurred in the bankruptcy (legal fees, photocopy expenses, phone expenses) and other expenses such as the loan modification fee paid to Wells Fargo, and the subsequent refinance with another lender. These damages were $21,400 of the $412,000 then claimed by the Davises.

Q. The Parties Stipulated to Judgment for the $21,400 Damages for the Purpose of Determining Fees and for Any Appeal.

After three days of trial, the parties agreed to dismiss the case, and the defendants agreed to pay the $21,400 in damages that the trial court had ruled could be offered to the jury. (CP 843-44.) The $21,400 settlement was treated as a judgment against Wells Fargo for the purpose of a fee award and any appeal of the pretrial rulings.[13] (Id.) The trial court granted the Davises $48,025 in attorneys' fees.

R. The Davises Are Appealing the Exclusion of Five Items of Damage and the Trial Court's Application of the Lodestar Method to Their Claim for Attorneys' Fees.

On appeal, the Davises assert the trial court erred in dismissing or precluding them from offering evidence on five damage items. (Davis Brief at 27.) The Davises also claim the trial court improperly applied the lodestar approach and denied them $45,000 in additional fees.[14] Wells

[13]Wells Fargo paid $7,227 and Chicago Title paid $14,173. (CP 911-13.)

[14]The court ruled that $300,00 for loss of reputation was "not compensable under these kind [sic] of circumstances. . . ." VRP (Oct. 3, 2005) 53:13-18. The $19,078 for loss of GI Bill benefits were not foreseeable damages. (Id.) 42:12-23. The court struck the $50,000 for loss of credit rating, because the Davises failed to identify a mechanism to (continued . . .)

Fargo has dismissed its cross-appeal that contested the Davises' entitlement to recover fees.

IV.

## ARGUMENT

A. The Trial Court Properly Granted Summary Judgment Dismissing the Contract Claims for Emotional Distress; Washington Law Precludes Emotional Distress Damages for Breach of Contract.

Without waiving the argument that the Davises have abandoned the assignment of error regarding emotional distress damages,[15] Wells Fargo submits primarily three alternative arguments against the recovery of emotional distress damages. Emotional distress damages are not recoverable under the contract, the Davises failed establish tort claims for emotional distress, and the economic loss and the doctrine of waiver rule the negligence-based claims.

In Washington, it is a black letter principle that emotional distress damages are not recoverable for breach of contract; thus, the trial court did not commit an error of law. Almost 50 years ago, the Washington

(. . . continued)
"assess" or "identify" or "specify" the "financial loss." (Id.) 48:13-49:12. The court ruled the $3,108 for sale of the four vehicles was "removed from what is central to a bankruptcy . . ." (Id. 30:5-8) and the $3,029 for 28 days lost work was not contemplated. (Id. 30:11-16.)

[15]Although the Davises assigned error to dismissal of the emotional distress losses (Assignment of Error No. 1, Davis Brief at 3), the Issues Relating to the Assignments of Error make no reference to emotional distress (Davis Brief at 4), and the Davises also fail to make any arguments that support these losses. Therefore, the Davises should be deemed to have abandoned this assignment of error. See, e.g., Cashmere Valley Bank v. Brender, 128 Wn. App. 497, 510, 116 P.3d 421 (2005) (ruling abandonment of issues on appeal by failing to marshal authorities and argument).

Supreme Court reversed a jury award for "mental anguish, loss of sleep, humiliation and damages to reputation" from the breach of a contract to sell a special model automobile. See Pettaway v. Commercial Auto. Serv., Inc., 49 Wn.2d 650, 651-52, 655, 306 P.2d 219 (1957) (stating damages were too speculative and variable to be contemplated). As recently as 1991, the Supreme Court held emotional distress damages were not recoverable in an employment contract case, and ruled the trial court erred in denying the defendant's motion to preclude damages for emotional distress. See Gaglidari v. Denny's Restaurants, Inc., 117 Wn.2d 426, 432-33, 440-48, 815 P.2d 1362 (1991). Moreover, the Supreme Court warned that the award of emotional distress damages would be "a profound change in the law," which should be addressed by the Legislature and not the court and described the probable consequences:

> The impact of allowing emotional distress damages for breach of contract would indeed be enormous. It is easily predictable there would be a jury issue on emotional distress in nearly every employee discharge case and in fact in nearly every breach of contract case. The contractual consensus of the parties will become secondary to an action in tort.

Id. at 448.[16] The mortgage agreement falls at the end of the spectrum of contracts, where it was not particularly likely that a $3,575 overcharge would cause severe emotional distress.

---

[16]The test set forth in the Restatement (Second) of Contracts § 353 (1982) prevents any recovery for emotional distress damages in this case. While identifying contracts for proper disposition of dead bodies, the Restatement contrasts other contracts as falling on the other end of the spectrum, where emotional distress is unlikely and is not actionable: "Breach of other types of contracts, resulting for example in sudden impoverishment or bankruptcy, may by chance cause even more severe emotional disturbance, but, if the contract is not one where this was a
(continued . . .)

B. The Trial Court Properly Granted Summary Judgment Dismissing the Tort Claims for Emotional Distress and Negligence.

The trial court properly dismissed the tort claims on the ground that the economic loss rule precluded the negligence-based tort claims. Alternatively, the Davises failed to satisfy threshold legal requirements for their tort claims.

1. Wells Fargo's Conduct Fails to Satisfy the Threshold Legal Requirement of Extreme/Outrageous Behavior, Because There Is No Evidence of Intentional Misconduct, Wells Fargo's Conduct Was Privileged, and the Likelihood of Severe Emotional Distress Damages Was Slight. To establish outrage, the Davises had the burden of proving three elements: (1) Wells Fargo engaged in extreme and outrageous conduct; (2) it intentionally or recklessly caused emotional distress; and (3) its conduct caused severe emotional distress on the part of the Davises. Reid v. Pierce County, 136 Wn.2d 195, 202, 961 P.2d 333 (1998) (citing Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989)).

The first element is a threshold question of law. Only if the court determines reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability will the issue go to the jury. Robel v. Roundup Corp., 148 Wn.2d 35, 51, 59 P.3d 611 (2002); Jackson v. Peoples Fed. Credit Union, 25 Wn. App. 81, 84, 604 P.2d 1025 (1979) (reversing judgment and ruling plaintiff failed to establish as a matter of

---

(. . . continued)
particularly likely risk, there is no recovery for such disturbance." § 353 cmt. a.

law the tort of outrage). This threshold issue is "particularly important in the creditor-debtor situation," where the policy considerations militate against "emasculat[ing] legitimate creditor remedies . . . or open[ing] the floodgates of litigation" for spurious outrage claims. See Jackson, 25 Wn. App. at 85-86. Conduct is extreme and outrageous only when it is so extreme in degree and outrageous in character as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. Restatement (Second) of Torts § 46 cmt. d (1965); Reid, 136 Wn.2d at 202.

The five nonexclusive factors for deciding this threshold element required dismissal of the outrage claim as a matter of law.[17] There was no evidence that Wells Fargo's actions were "clearly and obviously excessive," or were "a serious invasion" of the right to privacy. Jackson, 25 Wn. App. at 86-87 (emphasis in original). This case does not involve any extreme and repeated harassment or illegal threats that other courts have found necessary to establish outrage. Compare Jackson, 25 Wn. App. at 85-90 (reversing judgment for tort of outrage) with Restatement (Second) of Torts § 46 cmt. e, illus. 7 (outrage where creditor repeatedly

[17]The five factors are (1) the position occupied by the defendants; (2) whether the plaintiff was particularly susceptible to emotional distress, and if the defendant knew of that fact; (3) whether the defendant's conduct may have been privileged under the circumstances; (4) whether the degree of emotional distress caused by the defendant was severe as opposed to mere annoyance, inconvenience, or normal embarrassment; and (5) whether the actor was aware that there was high probability that his or her conduct would cause severe emotional distress and proceeded in conscious disregard of it. Jackson, 25 Wn. App. at 86-90 (restating the five factors in the context of creditor/debtor relations); Seaman v. Karr, 114 Wn. App. 665, 684-87, 59 P.3d 701 (2002).

threatens suit without bringing it, reviles debtor, threatens to garnish and to bother her employer so much debtor will be discharged, etc.). During the relevant period, the litigation privilege that grants absolute immunity from tort liability for statements related to the bankruptcy proceeding and the qualified privileges for protecting property interests insulated Wells Fargo's actions.[18] There was also no evidence of a high degree of probability that Wells Fargo's actions would cause emotional distress to the Davises. See Jackson, 25 Wn. App. at 89 (although credit union had knowledge of debtor's diabetes, that did not equate with knowledge of a susceptibility to emotional distress). Wells Fargo acted in good faith by acknowledging its error and entering into the loan modification, which constituted an "account stated" and gave the Davises additional consideration -- postponing new payments until November 2002 and permitting them to retain the plan payments. In these circumstances, the Davises cannot prove the threshold requirement for outrage.

[18]"The defense of absolute privilege applies to statements made in the course of judicial proceedings and avoids all liability." Twelker v. Shannon & Wilson, Inc., 88 Wn.2d 473, 475, 564 P.2d 1131 (1977). The absolute immunity applies to all tort claims arising from the publication. See Bruce v. Byrne-Stevens & Assocs., 113 Wn.2d 123, 131-34, 776 P.2d 666 (1989) (rejecting argument that witness immunity is restricted to defamation cases); Abbott v. Thorne, 34 Wash. 692, 694, 697-99, 76 P. 302 (1904) (stating privilege applies to a claim for malicious prosecution); Gustafson v. Mazer, 113 Wn. App. 770, 774-79, 54 P.3d 743 (2002) (applying immunity to defamation and negligence claims); see also Pettitt v. Levy, 28 Cal. App. 3d 484, 104 Cal. Rptr. 650, 653 (1972) (stating privilege applies to negligent infliction of emotional distress); Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 Utah 9, 70 P.3d 17, 32, 34 (Utah 2003) (stating privilege applies to intentional infliction of emotional distress and deceit).

Even if the Davises could satisfy the threshold requirement, they also were required to prove severe emotional distress and causation.[19] The Davises fail to satisfy this standard. It is impossible to segregate the emotional distress that resulted from Mr. Davis's efforts to double his income and support their new dependents from the emotional effects resulting from failure to make 18 months of mortgage payments, and from the emotional effects that resulted from being charged an excessive amount of fees for property tax or from Wells Fargo's immune actions in the bankruptcy.

In short, the Davises failed to satisfy the three requirements for "outrage."[20] Accordingly, the trial court properly dismissed this claim.

2. The Economic Loss Rule Bars the Davises From Pursuing Negligence, Negligent Misrepresentation, and Negligent Infliction of Emotional Distress Claims When There Were Contractual and Statutory Remedies and No Personal Injury or Property Damage. "The economic loss rule marks the fundamental boundary between the law of contracts,

---

[19]Mere annoyance, inconvenience, or the embarrassment that normally occurs in a confrontation between parties is not enough. Restatement (Second) of Torts § 46 cmt. j; Woodward v. Steele, 32 Wn. App. 152, 154-55, 646 P.2d 167 (1982) (reasonable distress justified by the circumstances).

[20]The Davises failed to establish the elements of a negligent infliction of emotional distress claim: duty, causation, and medical evidence of a diagnosable emotional distress disorder. See, e.g., Snyder v. Med. Serv. Corp., 145 Wn.2d 233, 243-46, 35 P.3d 1158 (2001) (affirming summary judgment that dismissed a negligent infliction of emotional distress claim because of failure to prove a duty to refrain from negligently causing emotional distress); Hegel v. McMahon, 136 Wn.2d 122, 135, 960 P.2d 424 (1998) (holding plaintiff must satisfy the requirement of proving from medical evidence there is a diagnosable emotional distress disorder); CP 329, Chicago Title's Reply to Pls.' Resp. to Defs.' Joint Summ. J. Mot. at 6:1-12.

which is designed to enforce the expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on others. . . . The economic loss rule was developed to prevent disproportionate liability and allow parties to allocate risk by contract." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 821-22, 881 P.2d 986 (1994).[21] "Washington does apply the economic loss rule to bar negligent misrepresentation claims if the contract allocates risk and future liability." Alejandre v. Bull, 123 Wn. App. 611, 627, 98 P.3d 844 (2004).

The complaint's gist is an economic loss resulting from disappointed contractual expectations, and not property damage or personal injury resulting from violation of a standard of care imposed independent of the contract. (CP 1-14, Complaint.)[22] The Davises succinctly admitted: "This case involves claims for breach of contract damages, negligence and emotional distress that arose out of a contractual relationship . . . ." (CP 948, Pls.' Resp. to Defs.' Summ. J. Mot. Re Tort

---

[21]Economic loss describes damages that fall on the contract side of the line between tort and contract, while noneconomic loss falls on the side of physical harm or property damage. 124 Wn.2d at 822; see also Carlson v. Sharp, 99 Wn. App. 324, 329, 994 P.2d 851 (1999). "Particular damages may be remediable in tort as well as in contract, but if the damages fall on the contract side of the line and are more properly remediable in contract, tort recovery is precluded." Hofstee v. Dow, 109 Wn. App. 537, 543, 36 P.3d 1073 (2001).

[22]The Davises' complaint alleged tort and contract claims for the taxes (CP 6-7, 11, Complaint ¶¶ 18-19, 23, 35-38), that Wells Fargo "waited for more than one year before modifying the Mortgage Payments" leading the Davises to file bankruptcy and refinance the loan (id. ¶ 38), and that Wells Fargo placed "wrongful foreclosure notices" on the property and caused them to file bankruptcy. (CP 12, id. ¶ 42.)

Claim and Declaratory Relief.) This admission is telling; indeed, the claim arose from the contractual relationship and the Davises failed to pursue, and hence waived, any claim with an independent basis such as a statutory or professional duty imposed outside of the contract.

a. A Fraud Claim Supports Only Pecuniary Damages and Fails as a Matter of Law. The Davises' reliance on a fraud claim to avoid the economic loss doctrine fails for two substantive reasons.[23] First, even if the Davises could prove fraud, emotional distress damages and loss of personal reputation are not recoverable pecuniary damages.[24] Therefore, a fraud claim does not support nonpecuniary damages. Second, the Davises failed to plead and offer clear, cogent, and convincing evidence to support the nine elements of fraud,[25] which includes resulting

---

[23]The Davises did not assert a fraudulent inducement claim that is an exception to the doctrine. See Alejandre, 123 Wn. App. at 619-28 (affirming buyer's fraudulent concealment or misrepresentation claim against seller about the status of a septic field and rejecting economic loss doctrine defense).

[24]"So far as misrepresentation has been treated as giving rise in and of itself to a distinct form of tort liability, it has been concerned and identified with the resulting pecuniary loss." Restatement (Second) of Torts, Division 4 Misrepresentation, ch. 22, Scope Note at 54 (1977). See, e.g., Restatement (Second) of Torts § 549(1) (1977) (measure of damages for fraudulent misrepresentation is the "pecuniary loss to him of which the misrepresentation is a legal cause"); Robert L. Dunn, Recovery of Damages for Fraud § 4.9 at 174-75 (3d ed. 2004) (listing jurisdictions denying emotional distress damages).

[25]Although the Davises' appeal brief alleges concealment of the tax refund, neither the complaint nor the facts support the claim. Compare Davis Brief at 2 with (CP 982) (tax credit) and (CP 1-14), (Complaint ¶¶ 15-16). The motion to amend made no new factual allegations. The complaint alleges the two parcel numbers on the deed but failed to allege any intentional misrepresentation by Wells Fargo. (CP 1-14, Complaint ¶ 11.) There are nine essential elements of fraud:
(continued . . .)

damages.[26] Wells Fargo's statements about the reasons for the increased fees were based upon its mistaken opinion that the deed required the Davises to pay taxes on two parcels. A mistaken legal opinion is ordinarily not an actionable basis for fraud. Furthermore, any alleged misrepresentations made during the bankruptcy failed because (1) the absolute litigation privilege immunized them, the Bankruptcy Court had jurisdiction over them,[27] or (2) they caused no damage, especially after Wells Fargo paid their direct and incidental expenses incurred in the bankruptcy. Even if there were an actionable basis for fraud, the Davises' best scenario was that once they actually discovered the property tax mistake in October 2001, as a matter of law, they <u>waived</u> the claim when they later signed the August 2002 loan modification, <u>after</u> Wells Fargo "acknowledged the error . . . ." (CP 7, Complaint ¶ 24 (acknowledgment

---

(. . . continued)
(1) representation of an existing fact; (2) materiality of the representation; (3) falsity of the representation; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that it be acted upon by the plaintiff; (6) plaintiff's ignorance of the falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages. <u>Hoffer v. State</u>, 110 Wn.2d 415, 425, 755 P.2d 781 (1988), <u>aff'd on reh'g</u>, 113 Wn.2d 148, 776 P.2d 963 (1989). Neither the allegations of the complaint nor the amendment satisfy these elements.

[26]The Davises failed to bring forth sufficient facts to substantiate their tort claims and make a prima facie showing. <u>Labriola v. Pollard Group, Inc.</u>, 152 Wn.2d 828, 842, 100 P.3d 791 (2004).

[27]<u>See</u> <u>supra</u>, n.18 (discussing the absolute privilege). Knowingly filing a false or overstated proof of claim is a federal crime similar to perjury. <u>Compare</u> 18 U.S.C. § 152(4) (filing false proof of claim) <u>with</u> 18 U.S.C. § 1621 (perjury); <u>In re Shank</u>, 315 B.R. 799, 815-16 (Bankr. N.D. Ga. 2004) (discussing unlawful proof of claims). The bankruptcy court should have exclusive jurisdiction over misrepresentations made in the course of a bankruptcy.

of error); Davis Brief at 13); see Bonded Adjustment Co. v. Anderson, 186 Wash. 226, 231-34, 57 P.2d 1046 (1936) (affirming dismissal of fraud claim when borrower signed renewal note and made payments after discovery of fraud).

b. The Economic Loss Rule Applies to Consumer Transactions. The Davises' second argument is that the economic loss doctrine governs only commercial contracts. Griffith v. Centex Real Estate Corp., 93 Wn. App. 202, 213, 969 P.2d 486 (1998), where the rule was applied against private home buyers, refutes this argument.

c. The Uniform Mortgage Agreement Provided an Accounting Remedy and Incorporated the Specific Remedies Granted in RESPA and the Deed of Trust Statute. The Davises Never Bargained to Alter the Uniform Agreement. Moreover, the Loan Modification Agreement and Their Actions Prevent the Davises From Pursuing Negligence-Based Claims. The Davises' third argument is that the economic loss doctrine does not apply, because the contracts "do not bargain and provide for the allocation of risk and future liability." (Davis Brief at 34.)[28] Their argument conflicts with the common law and the mortgage agreement.

---

[28]The Davises argue by analogy based upon the earnest money agreement in Alejandre v. Bull, 123 Wn. App. at 628, where a purchaser sought from a seller damages for misrepresentation of the condition of a septic system. The trial court ruled the misrepresentation claim failed and the economic loss rule barred the claims. Division III properly reversed those rulings. The decision differs for two reasons. First, the Davises have no fraudulent inducement claim. Second, unlike an earnest money agreement, the mortgage agreement creates continuing duties that survive closing. The earnest money agreement merely promises to convey clear title in exchange for a promise to pay the agreed price, those promises were satisfied at the closing, and they did not bar a fraudulent concealment/inducement claim (continued . . .)

The common law is: "The limitation of foreseeability is often applied in actions for damages for breach of contracts to lend money." Restatement (Second) of Contracts § 351 cmt. e (1981). "In most cases, then, the lender's liability will be limited to the relatively small additional amount that it would ordinarily cost to get a similar loan from another lender." Id. In servicing the mortgage, Wells Fargo had no reason to foresee that the Davises' presale losses would exceed the ordinary direct and incidental damages for loss of use of funds and would include massive special consequential damages, including emotional distress.[29]

As part of the mortgage loan, the Davises signed a uniform promissory note, deed of trust and impound agreement (collectively referred to as the "mortgage agreement").[30] The Davises did not alter the uniform agreements to add a special duty for the lender to refrain from negligently

---

(. . . continued)
against the seller. Id. at 628; see also 18 William B. Stoebuck & John W. Weaver Washington Practice Real Estate: Transactions §§ 16.7-16.9 at 240-50 (2004) (stating remedies for breach of earnest money agreements include damages for failure to close, out-of-pocket expenses for an aborted sale, specific performance, rescission and restitution).

[29]Although courts have recognized a tort of bad faith that exposes insurance companies to extracontractual liability, courts have refused to extend that cause of action to other relationships. Stephen S. Ashley, Bad Faith Actions: Liability and Damages § 11.06 at 11-27 (1997 & 2006 Cum. Supp.).

[30](CP 865-66) (uniform note); (CP 867-75) (deed of trust); (CP 444-46) (loan impound disclosure and agreement); (CP 162-63) (signed information sheet on RESPA). The uniform agreements established by the Federal National Mortgage Association ("Fannie Mae") and Federal Income Loan Mortgage Association ("Freddie Mac") reduce transactional costs and comport with the requirements of the secondary market for assignment of mortgages. Accord, 18 Washington Practice § 18.18 at 334-55. A deed of trust is a power of sale mortgage authorized by statute. Id. § 20.2 at 405-06.

causing them emotional distress damage or to permit them to recover remote special damages. See Snyder v. Medical Service Corp., 145 Wn.2d 233, 243-46, 35 P.3d 1158 (2001) (affirming summary judgment of emotional distress claim when plaintiff failed to clearly articulate duty was violated). However, an optional impound account for payment of property taxes and assessments was a specific requirement for the loan to the Davises. (CP 494.) A uniform covenant required the lender to provide estimates and an annual accounting for property tax charges. Another document signed by them at the closing disclosed the expectation that the borrower would compare the original statement for the property tax with later statements.[31] In this case, the Davises have complained that Wells Fargo made erroneous estimates of the amount of taxes due in 1997-2002, and the foreclosure notices contained erroneous charges for the property taxes. The mortgage agreement expressly grants two applicable remedies: (1) an accounting of funds "in accordance with the requirements of applicable law" which includes RESPA, and (2) the presale remedies under the deed of trust statute.[32] The Real Estate Settlement Procedures Act ("RESPA") requires a lender to timely respond to a qualified

[31]At closing, the Davises received an information sheet about RESPA that disclosed they would receive an "annual escrow analysis statement." (CP 162-63.) They also received an initial escrow account disclosure statement, which directed them to compare their statements: "Please keep this statement for comparison with the actual activity in you[r] account at the end of the escrow accounting computation year." (CP 164.)

[32]"If the Funds held by Lender exceed the amounts permitted to be held by applicable law, Lender shall account to the Borrower for the excess Funds in accordance with the requirements of applicable law." (CP 455, ¶ 2 in the deed of trust) (copy attached as the only Appendix to this Brief). The nonjudicial foreclosure covenant is ¶ 21, Acceleration, Remedies. (CP 458-59.)

written request from a borrower about errors in the impound account. 12 U.S.C. § 2605(c). A lender's violation of that section creates a claim by the borrower for actual damages, additional damages up to $1,000 if there is a pattern or practice of noncompliance, and attorneys' fees. § 2605(f).[33]

The covenant that governs a nonjudicial foreclosure sale (CP 458-59, deed of trust, § 21 Acceleration, Remedies) requires that a notice of default inform the borrower of "the right to bring a court action to assert the nonexistence of default" and other matters required by "applicable law." The referenced "applicable law" is the deed of trust statute that grants a borrower presale rights to bring a legal action to restrain a sale, fixes a minimum period for a new sale date after bankruptcy is dismissed (RCW 61.24.130), and permits a borrower to contest the reasonableness of fees demanded or paid to reinstate the mortgage (RCW 61.24.090(2)). The actual notices of default sale and foreclosure that were delivered to the Davises specifically informed them about these presale remedies. (CP 203, 208, 211.)

---

[33]Section 2609 requires lenders to provide annual escrow statements and to notify borrowers of shortages, and imposes penalties for noncompliance. The RESPA regulations require that if there is a surplus in excess of $50, then the borrower receives a refund; however, the regulations on surpluses apply when the borrower is current at the time of the analysis. (24 C.F.R. § 3500.17(f).) If the borrower is not current, then the lender may retain the surplus in accordance with the loan documents. (Id.) Another remedy is pursuant to RCW 19.148, Mortgage Loan Servicing, which is similar to RESPA. RCW 19.148.030(b) (requiring a bank servicing a mortgage to "respond within fifteen business days upon the receipt of a written request for information . . .") (emphasis added). A violation of the statute creates a claim for "actual damages" and reasonable attorneys' fees. RCW 19.148.030(3). The Davises were also protected by the provisions of the Fair Credit Reporting Act. (See infra, n.61.)

The Davises elected a contractual remedy and waived other remedies in two ways. First, they pursued a contractual remedy of an accounting and entered into the loan modification agreement, and failed to pursue the other incorporated by reference rights/remedies under RESPA and deed of trust statute.[34] (They had pursued other remote self-help actions, such as filing bankruptcy and retaining the unapproved plan payments in addition to entering into the loan modification agreement.) Second, the Davises elected a contractual remedy and waived other remedies by failing to assert them in the trial court.[35] In contrast, the

---

[34]After disputes arose, the loan modification operated as an "account stated," that barred the prior claim for withholding of excessive funds, and waived any misrepresentation claim. See Cashmere Valley Bank, 128 Wn. App. at 506-07 (affirming summary judgment that doctrine of account stated barred claims on two prior loans; the debtor paid the amounts and there was an absence of an objective manifestation of protest or intent to negotiate the disputed sum in the future); Anderson, 186 Wash. at 231-34.

[35]The complaint's essence was breach of contract. The negligence claims were for violating a duty to keep accurate financial information and failing to respond reasonably to the Davises' complaint. (CP 11, Complaint ¶¶ 37-38.) Yet, the Davises admitted: "The negligent conduct of Wells Fargo . . . resulted in breach of contract." (CP 8-9, Complaint ¶ 25.) The complaint also requested declaratory relief on the breach of contract. (CP 10-11, Complaint ¶ 34.) The Davises failed to assert a bona fide independent tort claim. Regarding their claim, that Wells Fargo failed to respond to their requests, the May 2002 bankruptcy pleading filed by the Davises' counsel was not a "qualified written request." 24 C.F.R. § 3500.21(e). Because the Davises were in material default and in bankruptcy, Wells Fargo's reporting obligations were suspended until the Davises dismissed the bankruptcy. Id. Months earlier, Wells Fargo issued a credit for the tax refund, later disclosed the May refund payment on the June 2002 "informational" statement (CP 982), and acknowledged the tax problem in the August 2, 2002 telephone log records. (CP 226.) As a result, Wells Fargo's actions fell within the safe harbor, "nonliability" provision in the RESPA regulations. A servicer is not liable for a violation, if within 60 days after discovering an error, before the commencement of an action under the section and receipt of written notice of the error from the borrower, the lender notifies the borrower about the

(continued . . .)

Davises argued that Chicago Title owed them fiduciary and statutory duties independent from the contract; yet, the Davises failed to raise below similar specific arguments against Wells Fargo.[36] In summary, the uniform provisions in the mortgage agreement allocated the future risks and provided remedies for any erroneous amounts stated in the impound account and foreclosure notices. The contractual remedy was an accounting in accordance with the requirements of applicable law. As a result of this contractual remedy, the prior loan modification, and the circumstances of their case, both the economic loss rule and the doctrine of waiver prevent the Davises from pursuing independent tort claims for negligence and negligent misrepresentation. The Davises did not bargain to radically change the uniform agreement to authorize recovery of emotional distress and other remote damages. In these circumstances, they should not be permitted under the guise of a tort claim to circumvent

(. . . continued)
error and "makes whatever adjustments are necessary in the appropriate account to ensure that the person will not be required to pay an amount in excess of the amount that the person otherwise would have paid." § 3500.21(f)(2). Wells Fargo satisfied those requirements by crediting the refund, acknowledging its error, and entering into the loan modification. If the Davises had made a qualified written request, they would have temporarily suspended any derogatory reports to credit agencies. § 3500.21(e)(4).

[36]The Davises claim that Wells Fargo breached the fiduciary duty an escrow owes its principal. (Davis Brief at 2.) Yet, below, the Davises failed to assert a breach of fiduciary duty claim against Wells Fargo. Rather, the Davises attempted to join a breach of fiduciary duty claim against Chicago Title. (CP 422, 433-43, arguing breach of fiduciary and legal malpractice claims against Chicago Title "Independent of the Terms of the Escrow Contract" (CP 434).) Having failed to assert the claim below, the Davises cannot pursue the claim on appeal.

the uniform mortgage agreement and create special liability for noneconomic losses, when there was no "outrageous" behavior.

The Davises' fourth argument for avoiding the economic loss rule is the Consumer Protection Act. As demonstrated infra, at 36-38, the Act does not provide a remedy for personal injuries. Moreover, the Davises sought to amend a Consumer Protection Act claim along with seven other claims shortly before the close of discovery -- a trial by ambush tactic that the trial court was entitled to reject.

C. The Davises Failed to Demonstrate Manifest Abuse of Discretion by the Trial Court in Denying Their Motion to Add Eight New Causes of Action, Five Months After the First Summary Judgment and Two Weeks Before the Discovery Deadline.

Six weeks before trial, the motion to amend sought a complete metamorphosis of the case through addition of eight new causes of action -- six against Chicago Title (breach of fiduciary duty, indemnification, legal malpractice, violation of the Consumer Protection Act, equitable indemnity, and insurance bad faith) and two against Wells Fargo (fraudulent/negligent misrepresentation and violation of the Consumer Protection Act).[37] The proposed amendments would have caused the parties to retain expert witnesses on the malpractice claims and to file new summary judgment motions when one week was left for filing dispositive motions.[38]

---

[37](CP 1256) (setting Jan. 31, 2005 as deadline for confirmation of joinder of parties, claims and defenses).

[38](CP 492), Wells Fargo's Opp. to Mot. to Pls.' Mot. to Amend at 2 (July 27, 2005), citing Donald B. Murphy Contractors, Inc. v. King County, 112 Wn. App. 192, 199-200, 49 P.3d 912 (2002) (affirming denial of motion to amend claims for tortious interference, breach of fiduciary duty, and improper actions as an insurance adjuster, filed two months (continued . . .)

The governing standard of review is: "a manifest abuse of discretion standard. . . . The trial court's decision 'will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, exercised on untenable grounds, or for untenable reasons.'"[39] Even if the amendment concerns the same events, that alone does not satisfy the manifest abuse of discretion.[40]

---

(. . . continued)
before discovery cutoff, less than three months before the deadline for pretrial dispositive motions, when witnesses were already determined and new experts would need to be retained). See also Del Guzzi Constr. Co., Inc. v. Global Northwest, Ltd., 105 Wn.2d 878, 888-89, 719 P.2d 120 (1986) (affirming denial of motion to amend filed a little more than a week before a summary judgment hearing, where trial court attempted to protect the nonmoving parties from an untimely and unfair amendment to the pleadings and the prejudice to them). The Davises argue that one issue relating to the assignment of error is that Wells Fargo's response failed to identify any undue prejudice. (Davis Brief at 4, Issue No. 3 relating to assignments error.) Yet both Wells Fargo's brief and Chicago Title's brief identified the prejudice. (CP 492, Wells Fargo's Opp. to Mot. to Pls.' Mot. to Amend at 2 (July 27, 2005)); (CP 483-90, Def. Chicago Title Ins. Co.'s Resp. to Mot. to Amend Complaint at 5-12); (CP 1262-63, Def. Chicago Title Ins. Co.'s Surresponse (July 29, 2005) at 2-3).

[39]Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) (quoting Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)); see McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 737, 837 P.2d 1000 (1992) (stating the standard for review and affirming denial of motion to amend CPA claim and property damage claim when the policy contained a one year limitation provision and suit was filed three years after damage occurred); Herron v. Tribune Publ'g Co., Inc., 108 Wn.2d 162, 164-69, 736 P.2d 249 (1987) (stating the standard of review and affirming denial of motion to amend claims for additional defamatory articles published before and after the original complaint, where the trial court was concerned about unfair surprise and prejudice to defendants when the case had been pending for a substantial period of time, would broaden issues, and would require defendant to engage in new efforts to secure evidence).

[40]Cf. Wilson v. Horsley, 87 Wn. App. 563, 570-71 & n.5, 942 P.2d 1046 (1997) (affirming denial of proposed amendment 30 days before trial), aff'd in part and rev'd in part on other grounds, 137 Wn.2d 500, 974 P.2d 316 (1997) (deferring to trial court's finding that proposed
(continued . . .)

Wells Fargo was prejudiced, because the trial date had already been postponed once, and the deadlines for joinder, disclosure of rebuttal witnesses, and motions to change the trial date had passed.[41] The deadlines for completion of discovery and filing dispositive motions were looming, and new discovery would be required. The inclusion of the six new claims against Chicago Title indirectly caused Wells Fargo additional prejudice and case management issues by complicating additional discovery, causing jury confusion, and introducing "remote issues" affecting the length of trial, and changing the case from a standard case to a complex case.

The prejudice was coupled with the undue surprise[42] and the undue and unexplained delay, which were also good cause to deny the motion to amend.[43] After the prior summary judgment, the lack of timeliness in

---

(. . . continued)
amendment of counterclaim would be contrary to the purpose of MAR). In addition to inaccurately asserting there is a "strong judicial policy" for adding the claims (compare Davis Brief at 37 with Heron, 108 Wn.2d at 167 (omitting the word "strong" and referring only to "the judicial preference")), the Davises also inaccurately assert they were adding a "supplemental pleading" or "supplemental claims." (Compare Davis Brief at 37 with CR 15(d) ("supplemental pleading setting forth . . . events that . . . happened since the date" of the original complaint).)

[41]The amended order set the trial date for October 3, 2006, with disclosure of rebuttal witnesses on June 13, motions to change the trial date on July 11, the discovery deadline on August 15, and dispositive motions on September 9. (CP 1256.)

[42]Unfair surprise is one factor that may be considered in determining whether an amendment will cause prejudice. Wilson, 137 Wn.2d at 507.

[43]Accord, Saluteen-Maschersky v. Countrywide Funding Corp., 105 Wn. App. 846, 857, 22 P.3d 804 (2001) (affirming striking of equitable estoppel and negligent misrepresentation claims raised for the first time in opposition to lender's motion for summary judgment;
(continued . . .)

asserting new causes of action was a separate basis for affirming the trial court's discretionary decision.[44] The Davises failed to provide any explanation why they waited five months after the summary judgment to propose these new causes of action, when the original complaint already had alluded to the Consumer Protection Act and misrepresentations, but failed to plead them as causes of action. (Davis Brief at 36-37.)

The amendment of the new claims against Wells Fargo was futile,[45] because the claims were not actionable, supported only pecuniary damages,[46] and thus merely duplicated the pending contract claims and could only confuse the jury.[47]

The Consumer Protection Act claim was futile, because the Davises failed to plead the three elements, especially the capacity to

---

(. . . continued)
complaint failed to provide fair notice of claims and bases; decision to grant leave to amend was within the discretion of the trial court).

[44]See Doyle v. Planned Parenthood of Seattle-King County, Inc., 31 Wn. App. 126, 130-31, 639 P.2d 240 (1982) ("[w]hen a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation").

[45]The futility of the proposed fraud/misrepresentation claim was previously addressed. See supra, at 25-27.

[46]Among the damages the Davises identified for their Consumer Protection Act claim were emotional distress and humiliation. (CP 498-99, Pls.' Reply to Def.'s Resp. to Pls.' Mot. to Amend at 3:17-4:8.) But see Keyes v. Bollinger, 31 Wn. App. 286, 296-97, 640 P.2d 1077 (1982) (ruling mental distress not compensable under Consumer Protection Act); see infra, n.56.

[47]Cashmere Valley Bank, 128 Wn. App. at 510 (affirming summary judgment dismissing a Consumer Protection Act claim for failing to establish an effect on public interest because nothing more than a breach of contract claim between private parties).

deceive and the public interest impact requirements.[48] There was merely a private dispute about a breach of contract that affected only the parties and triggered no public interest impact. Where the legislative branch has adopted consumer/debtor protection statutes regulating specific practices in an industry, and where no per se claim was asserted, the courts carefully apply the general Consumer Protection Act's public impact requirement in a manner consistent with those statutes. For three reasons, it is unlikely that others have been or will be injured in exactly the same fashion.[49] First, years before any suit was filed, Wells Fargo acknowledged the error and entered into a loan modification agreement.[50] Second, the Davises could have avoided any injury if they had merely compared the annual tax statement from the County with the annual review from Wells Fargo, or requested an independent real estate tax service as referenced in the Deed of Trust. (CP 455, ¶ 2); see copy attached as Appendix. Third, the

---

[48]Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 790-91, 719 P.2d 531 (1986) (stating five factors for a consumer transaction and four factors for a private dispute).

[49]Hangman Ridge, 105 Wn.2d at 790 (regarding a private dispute); see Lightfoot v. MacDonald, 86 Wn.2d 331, 334, 544 P.2d 88 (1976) ("A breach of a private contract affecting no one but the parties to the contract, whether that breach be negligent or intentional, is not an act or practice affecting the public interest"); Henery v. Robinson, 67 Wn. App. 277, 289-91, 834 P.2d 1091 (1992) (reversing CPA claim; conduct directed against small group cannot support a claim).

[50]Cf. Mason v. Mortgage Am. Inc., 114 Wn.2d 842, 845, 847-51, 792 P.2d 142 (1990) (cited by the Davises, where the consumer was forced to file suit to compel removal of the wrong mobile home and reconveyance of land by a lender that had taken a deed, not a deed of trust, and who had received a fee for oversight of site preparation, yet testified he felt he had no duty to oversee, and was tied with the seller of the mobile home).

Davises could have avoided injury by pursuing the other statutory safeguards that protect borrowers, the presale remedies under the Deed of Trust Act and the notices of dispute under the Fair Credit Reporting Act and RESPA. See supra, n.35; infra, n. 61 (Fair Credit Reporting Act preempts a CPA claim for credit reporting).

Even if the trial court committed error by denying the motion to amend or by applying the economic loss rule, the errors were harmless, because the law and the evidence cannot support the Davises' theory of massive damages for emotional distress and other remote special, consequential damages.

D. The Trial Court Properly Limited Damages to $21,400, Which Exceeds the $18,000 in Special Damages Pleaded in the Complaint and Disclosed During Discovery. The Trial Court Did Not Commit Any Error of Law or Abuse of Discretion by Denying Five Items of Special Consequential Damage.

CR 9(g) required the Davises to plead special damages with specificity.[51] A trial court may exclude special damages not specifically

---

[51] Special damages arise from the special circumstances of the case and are the natural, but not the necessary, result of an injury, and are not implied in law. Jensen v. Torr, 44 Wn. App. 207, 214, 721 P.2d 992 (1986). "'General damages' are those which are the natural and necessary result of the wrongful act or omission asserted as the basis for liability. They are presumed by or implied in law to have resulted from the injury." Id. at 214. The general damages were the excess property taxes paid and the fees. See, e.g., McGee v. Wineholt, 23 Wash. 748, 752, 63 P. 571 (1901) (affirming the award of interest as general damage for breach of contract to loan money); Culp v. Western Loan & Bldg. Co., 124 Wash. 326, 326-27, 214 P. 145 (affirming the award of loan commissions, title insurance, and closing fees as special damages), aff'd on reh'g, 127 Wash. 249, 220 P. 766 (1923) (ruling on appeal, the lender could not challenge for the first time whether the later loan was for a lower interest rate). Any other damage claims were special damages. Special damages are the same as consequential damages. See 1 Dan B. Dobbs, Dobbs Law of Remedies § 3.3(4) at 302 (1993) ("the term special damages means the same as (continued . . .)

asked for in the complaint and sustain an objection to the admission of evidence related to those damages.[52]

The Davises pleaded nominally $18,000 in "special damages" for legal fees incurred in the bankruptcy and the loan modification fee, and during discovery quantified only these two items. As a result, the trial court did not abuse its discretion and did not commit an error of law when it excluded the five other claims after the Davises' failures to comply with discovery and the case schedule[53] and to comply with foundational requirements.[54]

There is no presumption that automatically entitles the Davises to recover special consequential damages They fail to make any meaningful argument on appeal to support these claims and to prove proximate

---

(. . . continued)
consequential damages"). "Consequential damages are sustainable if they flow naturally and inevitably from a breach of contract and are so related to it as to have been within the contemplation of the parties when they entered into it." Pettaway, 49 Wn.2d at 655; Foss v. Pacific Tel. & Tel. Co., 26 Wn.2d 92, 94, 95, 99, 100, 173 P.2d 144 (1946) (rejecting consequential damages for loss caused by a fire asserted against a telephone company failing to respond to a call and connect the telephone line to a nearby fire department).

[52] Jensen v. Torr, 44 Wn. App. 214-15 (affirming exclusion of special damages not pleaded in the complaint).

[53] The trial court may exercise its discretion to exclude witnesses not timely disclosed as required by local court rules or the scheduling order. Port of Seattle v. Equitable Capital Group, Inc., 127 Wn.2d 202, 209-13, 898 P.2d 275 (1995) (affirming exclusion); Carlson v. Lake Chelan Comm. Hosp., 116 Wn. App. 718, 737-41, 75 P.3d 533 (2003) (affirming exclusion).

[54] A trial court may also exclude a fact witness who fails to offer the bases and calculations for his opinions. Equitable Capital, 127 Wn.2d at 210-13 (affirming exclusion).

causation.[55] Any reputational damages and the other remote special consequential damages allegedly caused by the foreclosure notices and bankruptcy pleadings cannot be presumed and are unproven.

1. The $300,000 Damage to Personal Reputation Claim Was Actually an Invalid Defamation Claim. The Davises Failed to Offer the Necessary Evidence to Prove Defamation and Special Economic Damages. In their postdiscovery statement of damages, the Davises claimed $300,000 for loss of reputation resulting from the two foreclosure notices. (CP 529.) They identified only themselves as witnesses. This claim failed as a matter of law.

Damage to personal reputation is not a recoverable damage for breach of contract. Pettaway, 49 Wn.2d at 652, 654-55 (reversing jury verdict for mental anguish and "damage to his reputation").[56] "The tort of

---

[55]See Restatement (Second) of Contracts § 351(3) & cmt. f (1981) (court's equitable authority to impose limitations on foreseeable damages in particular circumstances). Proximate cause may be considered as a matter of law when reasonable minds could reach only one conclusion from the facts. Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 203-05, 15 P.3d 1283 (2001) (affirming summary judgment on lack of duty and causation; legal cause is a question of law; remoteness may be dispositive on the issue of legal cause; responsibility for negligence must terminate at some point in time). The legal causation element of proximate cause is a policy issue resting on "mixed considerations of logic, common sense, justice, policy, and procedure." Hartley v. State, 103 Wn.2d 768, 778-79, 698 P.2d 77 (1985); Minahan v. Western Wash. Fair Ass'n, 117 Wn. App. 881, 888, 73 P.3d 1019 (2003) (reversing trial court's denial of summary judgment and granting judgment in favor of defendants).

[56]"A plaintiff cannot recover for damage to its reputation arising out of an alleged breach of contract." 22 Am. Jur. 2d Damages § 49 at 92 (2003) (section entitled "Elements usually not considered: mental suffering and loss of reputation"); accord, Wells v. Stone City Bank, 691 N.E.2d 1246, 1249 (Ind. Ct. App. 1998). A damage to reputation claim also is not (continued . . .)

defamation protects a person's interest in his or her good reputation."[57] Having no defamation claim, the Davises cannot recover damages for loss of personal reputation. Moreover, any defamation claim would have failed for three substantive reasons. First, although the foreclosure notices contained inaccurate amounts of taxes and charges, the notices accurately reflected that the Davises failed to make mortgage payments for a lengthy period (18 months in June 2002), and thus the truthful "sting" of the notices caused no actionable damage.[58] Second, as previously discussed, Wells Fargo's statements were privileged. See supra, n.18. Third, the Davises failed to offer the critical evidence proving damage to their reputation and proximate causation.[59] The only putative evidence was an

---

(. . . continued)
viable under the Consumer Protection Act. In Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 318, 858 P.2d 1054 (1993), the Washington Supreme Court concluded: "Personal injuries are not compensable damages under the CPA." The Davises are not making claim for damage to "business reputation and loss of good will [which] are compensable damages under the CPA." Id. at 316.

[57]16A David K. DeWolf & Keller W. Allen Washington Practice Tort Law & Practice § 19.1 at 2 (2000). "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1979) (defining defamatory communication); see, e.g., Ernst Home Center, Inc. v. United Food & Comm. Workers Int'l Union, AFL-CIO, Local 1001, 77 Wn. App. 33, 44, 888 P.2d 1196 (1995) (defamatory false statement must present a substantial danger to the plaintiff's personal or business reputation).

[58]See Schmalenberg v. Tacoma News, Inc., 87 Wn. App. 579, 603, 943 P.2d 350 (1997) (affirming summary judgment dismissing defamation claim when the sting of the article was true and thus caused no damage), rev. denied, 134 Wn.2d 1013 (1998).

[59]Schmalenberg, 87 Wn. App. at 599-602 (defamation plaintiff must prove proximate causation requirement for general and special
(continued . . .)

inadmissible hearsay letter from the homeowners' association representatives. (CP 572.) At most, the letter expressed concern about receiving assessments; yet, those assessments were paid from the impound account, even when the Davises failed to make mortgage payments. The letter was not admissible evidence of damage to reputation. The loss of credit rating claim suffers from the same fatal flaws.

2. The $50,000 Damage to Credit Rating Claim Fails for the Same Reason as the Damage to Personal Reputation Claim. Furthermore, Federal Law Preempts the Claim. One week before trial, the Davises quantified a $50,000 claim for loss of credit rating, with no supporting exhibits.[60] The trial court had at least three grounds for excluding this guess. First, the Davises could not satisfy the notice of dispute to a credit reporting agency element and "malice or intent to injure" element for a claim under the Fair Credit Reporting Act, which preempts most state law negligence and defamation claims concerning reports to credit bureaus.[61]

(. . . continued)
damages); see generally 2 Dan B. Dobbs, Dobbs Law of Remedies § 7.2(7)-(11) (2d ed. 1993) (describing elements of reputational harm and economic damages for defamation).

[60](CP 529.) The Davises complained about notification to "the Credit Bureau." (CP 976 ¶ 9.) Although the complaint at ¶ 24a (CP 8) alleged Wells Fargo sent names to the credit department, and specific companies denied them credit because of derogatory information on their "credit report," the Davises failed to provide responsive information during discovery.

[61]The Fair Credit Reporting Act imposes duties on furnishers of credit information and creates claims akin to defamation with "malice or willful intent to injure" the consumer. 15 U.S.C. § 1681e. A consumer lacks standing to bring a claim against a furnisher of credit information, unless the consumer notifies a credit reporting agency of a notice of dispute, and the agency determines the claim is viable and contacts the
(continued . . .)

Second, even if they had a viable credit rating claim that was not preempted, the Davises failed to identify any method for calculating the credit loss[62] and to offer the necessary specific evidence of distinct damage.[63]

(. . . continued)

furnisher of the information, thereby activating a duty to investigate. Roybal v. Equifax, 405 F. Supp. 2d 1177, 1179-80 (E.D. Cal. 2005) (dismissing complaint even though consumer allegedly had directly contacted the furnisher of the information). The Act also preempts various state common law claims ("defamation, invasion of privacy, or negligence") and state law business practice act claims unless that malice/willful intent standard is satisfied, § 1681h (quoted language); § 1681t. See, e.g., Howard v. Blue Ridge Bank, 371 F. Supp. 2d 1139, 1143-41 (N.D. Cal. 2005) (ruling Congress intended Act to preempt state law claims relating to duties of furnishers of credit information and the remedies available against them); Barnhill v. Bank of Am., N.A., 378 F. Supp. 2d 696, 699-705 (D.S.C. 2005); Gordon v. Greenpoint Credit, 266 F. Supp. 2d 1007, 1012-13 (S.D. Iowa 2003).

[62]See Burkheimer v. Thrifty Inv. Co., Inc., 12 Wn. App. 924, 928-29, 533 P.2d 449 (1975) (affirming trial court's decision that computation of damages was too speculative); Equitable Capital Group, Inc., 127 Wn.2d at 210-13 (affirming exclusion of opinion testimony); Hedlund v. White, 67 Wn. App. 409, 413 n.4, 836 P.2d 250 (1992) (affirming exclusion of testimony when at best plaintiff's qualifications as an expert were arguable); ESCA Corp. v. KPMG Peat Marwick, 86 Wn. App. 628, 641, 939 P.2d 1228 (1997) (reversing verdict for plaintiff, because of failure to establish reasonable basis for damages, without mere speculation or conjecture, cited by Davises).

[63]See, e.g., Acton v. Bank One Corp., 293 F. Supp. 2d 1092, 1097-01 (D. Ariz. 2003) (granting summary judgment dismissing claim that consumer lost a low finance rate for auto lease when no evidence was presented that auto dealership relied upon credit report, and dismissing consumer's generalized claims of inability to purchase home and of termination of two credit accounts when the consumer failed to offer specific evidence). The Davises' original loan application revealed a prior bankruptcy and either a foreclosure or a deed in lieu of foreclosure during the prior seven years. (Ex. 10 at WFHM 00025.) In these circumstances, injury to the Davises' credit "must necessarily be of the most uncertain value." Seattle Crockery Co. v. Haley, 6 Wash. 302, 312, 33 P. 650 (1893) (denying loss of credit damages in a claim against an attachment bond). In addition, the limitations period barred a common law or statutory claim for defamation of credit. Finally, the Davises have already received $8,590 in refinance costs they paid another lender to replace the loan modification granted by Wells Fargo. The Davises converted from a

(continued . . .)

3. The $19,878 Claim for Loss of 25 Months of GI Bill Education Benefits Was Conjectural, Unforeseeable, and Unproven When Mr. Davis Failed to Use the Benefits During a 10 Year Period. One week before trial, the Davises quantified a $19,878.18 claim for lost GI education benefits administered by the Veterans Administration. Mr. Davis had 25 months of unused benefits, which expired on February 4, 2005 -- over two years after the August 2002 loan modification agreement.[64] Mr. Davis's claim was he worked overtime to make payments pursuant to the unapproved bankruptcy plan and lost the opportunity to use the education benefits payable within 10 years of active duty.[65] The bankruptcy was pending for nine months. Wells Fargo's actions are no more the legal or factual cause of the alleged loss than any other events occurring during the 10 year period, including the Davises' domestic plans, health issues, and whether or not Mr. Davis requested an extension. Mr. Davis's lost opportunity claim was even more unforeseen and conjectural, because he

(. . . continued)
fixed rate loan with Wells Fargo to a variable rate loan with another lender. See VRP (Oct. 3, 2005) at 32:15-33:26. Other than the loan fees, the Davises failed to offer specific documentary evidence about the terms of the new loan, whether they were mitigating damages or increasing damages, and whether the actual loss was a portion of the fees. See CP 554, estimated settlement charges for the new loan. The Davises offered no evidence that the later refinance was reasonable -- so $8,590 probably overcompensated them, and any additional compensation would be double recovery for damage to credit.

[64](CP 529, 587) (these were the only records supplied).

[65](CP 9, Complaint ¶ 27); see http://www.gbill.va/pamphlets/CH30/C30_Pamphlet_General.htm (Aug. 11, 2006) ("You usually have ten years to use your MGIE benefits, but the time can be . . . longer in certain circumstances"); 38 U.S.C. § 3462 (10 years from date of discharge time limit).

failed to use the unexpired benefits during the two years after he received the loan modification, and because after his education benefits expired, he failed to pay for classes himself and seek reimbursement from either Wells Fargo or the Veteran Administration. Mr. Davis failed to offer specific evidence accounting for his time during the 10 year period, and his exaggerated lost opportunity claim is insufficient proof.[66]

4. <u>The $3,000 for the Sale of Four Automobiles and $3,024 for 28 Work Days Allegedly Lost During the Bankruptcy and This Suit Were Conjectural, Remote, and Unproven</u>. These losses were not foreseeable and Wells Fargo was not the legal cause of the putative loss. The Davises seek additional quantum leaps in the chain of causation.

The Davises claim they lost $3,000 by selling four Nissan vehicles. The sales were voluntary and not compelled either by the bankruptcy court or Wells Fargo. The Davises' bankruptcy plan was never approved. They failed to prove either foreseeability or causation.[67] They sold one vehicle with 128,000 miles for $600 in October 2002 -- four months <u>after</u> they dismissed the bankruptcy -- thus undermining the claim that the <u>unapproved</u> bankruptcy

[66]"Where pecuniary damages are sought, there must be evidence not only of their actuality but also of their extent, and there must be some data from which the trier of fact can with reasonable certainty determine the amount. Where there is evidence as to injuries or loss resulting from various causes, for some of which the defendant cannot be held responsible, but no evidence of the portion of such injuries or loss for which the defendant may be liable, the proof is too uncertain to enable the jury to determine the amount of such injury or loss." <u>Wappenstein v. Schrepel</u>, 19 Wn.2d 371, 375, 142 P.2d 897 (1943); <u>Keesling v. City of Seattle</u>, 52 Wn.2d 247, 254, 324 P.2d 806 (1958).

[67](CP 1179, Decl. ¶ 25); (CP 1196, 1985 Nissan Maxima wagon, 1986 Nissan wagon, two 1987 Nissan sedans).

plan required them to sell the vehicles. (CP 542, Ex. 44.) They offered no photographs, bids, maintenance or ownership records, sworn statements by the buyers, or independent valuations that might support the amount of damage. The only records belatedly produced were handwritten bills of sale produced after the close of discovery. The claim was speculative.

After the close of discovery, Mr. Davis made a new claim that he lost 28 days of work because of the bankruptcy and this action.[68] He failed to provide any authority supporting such a claim and failed to provide records that identified specific days spent for depositions and mandatory court appearances. (CP 529, 586.) His attorneys' billings alone refute this claim.

Those damage claims were too remote, conjectural, speculative, and misleading, and a waste of time to be submitted to a jury. See ER 104, 403. The trial court did not err, and any error is harmless, given the amount of those two items versus the exaggerated claims of damage and the self-help measures taken by the Davises in failing to make mortgage payments for 18 months.

---

[68] As an earlier unquantified item of damage, the Davises claimed the bankruptcy forced Mr. Davis to work 72 hours a week; however, after discovery closed, this item of damage was dropped and new claims were made. (CP 1310, Attachment to Interrogatories, Ex. B to Decl. of David Young (Sept. 2, 2005) (stating claim for additional shifts for one year); (CP 1178-80, Decls. of Levius and Debbie Davis in Supp. of Resp. to Opp.'ing Wells Fargo's Summ. J. Mot. re Breach of Contract) (Aug. 24, 2005) (dropping unliquidated claim for working additional shifts, but adding new claims for lost 28 days of time spent in bankruptcy and this suit and for food expenses, gas, parking, and copying expenses in the bankruptcy).) Yet, on appeal, the Davises continue to allude to this dropped claim. (Davis Brief at 21.) "The bankruptcy docket indicates the dates for appearing in court and the other pleadings filed." See In re Davis, No. 01-48922-PBS (Bankr. W.D. Wash.) docket at https:// ecf.wawb.uscourts.gov/cgi-bin-DktRprt.pl?114913305084523-L_985_01.

E. The Trial Court Did Not Manifestly Abuse Its Discretion by Applying the Lodestar Method in This "Rare Case" With "Unique Circumstances."

Although the recovered damages were $21,400, the Davises asked for $98,000 in fees. The trial court accepted the hourly rates but modified the allowable hours. As a result, Mr. Nwokike was awarded $22,145 of $48,691 in claimed fees and Mr. Hathaway $33,836 of $46,996 in claimed fees. (Nov. 10, 2005 Tr. at 7-8.) The trial court made a further 25 percent reduction and awarded $48,025. (Id. at 10.) "Generally, in order to reverse a fee award, it must be shown that the trial court manifestly abused its discretion." Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993). The Davises' appeal rests on three false premises: (1) duplicate efforts are not a basis for reducing a fee claim, (2) the amount recovered is not a consideration, and (3) the court must precisely account for every dollar requested or adjusted. Yet, the trial court was required to "discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time."[69] A fee award may be adjusted downward based on a lodestar figure that greatly exceeds the amount in controversy.[70] The trial court did not

---

[69]Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983); see, e.g., Yousoufian v. Office of Ron Sims, 114 Wn. App. 836, 856-57, 60 P.3d 667 (2003) (affirming reduction in fee as having tenable grounds for unsuccessful motions, excessive research, and futile discovery), aff'd in part, rev'd in part on other grounds, 157 Wn.2d 421, 98 P.3d 463 (2004).

[70]Scott Fetzer Co., 122 Wn.2d at 150; Osborn v. Grant County, 130 Wn.2d 615, 628-29, 926 P.2d 911 (1996) (ruling requested fees were excessive in light of the amount in controversy); Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998) (stating the trial court is required to exclude any wasteful or duplicative hours and any hours pertaining to unsuccessful theories and claims); cf. Travis v. Washington Horse (continued . . .)

abuse its discretion in limiting the fees to double the special damages, which were less than 10 percent of the lowest of the massive damage claims, which bounced from approximately $412,000, $500,000, $765,328, to $2,000,000 and eventually $265,328 before trial.[71] The trial court was in the best position to weigh the multiple factors that determine the reasonable fees.[72]

For example, Mr. Nwokike applied for 15.3 hours (over 12 percent of the total hours listed on his Appendix A) for nonlegal work serving and filing pleadings, not recoverable as legal fees. (CP 6:5-7:6.)[73] His overreaching tainted the balance of his fee request and exemplifies the problems with the case. The trial court complained about the "nightmare" of segregating unsuccessful theories, weeding out other litigants, and

---

(. . . continued)
Breeders Ass'n, Inc., 111 Wn.2d 396, 409-10, 759 P.2d 418 (1988) (stating amount in controversy is merely one factor to be considered and the amount of the damage award in relation to the size of the fees "is in itself not decisive").

[71](CP 169, $500,000); (CP 175, 259, $2,000,000); (CP 907, $404,000) (five weeks before trial); (CP 28-29, $412,000) (pretrial revised claim of damage); (CP 908, $265,328 -- one month before trial).

[72]Wells Fargo had specifically identified the erroneous computation of Mr. Nwokike's time, hours spent on the tort claims for emotional distress, the unsuccessful motion to enforce a subpoena to Pierce County for tax records readily obtainable under the Public Records Act, which was served on the wrong department (CP 410-12, 752), the hours spent on claims against Chicago Title, the batch time entries, the nonlegal services, and the questionable costs such as a parking ticket. (CP 858-61.)

[73]Accord, In re Matter of Mathwig, 68 Wn. App. 472, 476, 843 P.2d 1112 (1993) (ruling no abuse of discretion to reduce fee request by hours spent on nonlegal work); In re Estate of Larson, 103 Wn.2d 517, 530-31, 694 P.2d 1051 (1985) (no entitlement to fees at professional rate if services could be performed by staff); Absher Constr. Co. v. Kent Sch. Dist. No. 415, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995) (stating paralegal time must be legal services to be compensable).

looking for duplicative and wasteful time, where there is lack of specificity in the time entries. VRP (Nov. 11, 2005) 3:19-4:8. The court identified examples of dates where the requested fees fell in disallowable categories. (Id. at 6:17-7:3; 8:7-11.) As examples, the court disallowed approximately 109 hours for duplication that resulted from bringing a new lawyer up to speed and backtracking. (Id. at 5:19-6:4.) Approximately 50 hours were for wasted time from long, unfocused pleadings and arguing facts to the exclusion of law, (id. at 7:13-25) and additional time attributed to claims against Chicago Title. (Id. at 6:5-7:6.)[74]

Appendix A and B to the Davis brief are misleading for three reasons. First, the Davises waived their new guesses about discrete line items of fees; they failed to assert below the new reallocation/ recategorization of hours now identified through the emboldening and asterisks in the brief. (See Davis Brief at 44-45 & App. A and B.) Second, the Appendices fail to list all the hours that could fall within the trial court's categories for disallowance. Third, the specific hours spent on task, especially when there are block descriptions, do not mean the hours are reasonable.

A significant factor in the discretionary ruling was the "theory of massive damages" that was "unjustified," "took on a life of its own" and made the case more complex than it needed to be. VRP (Nov. 11, 2005)

---

[74]The Davises argue the trial court failed to take into account fees generated by defendants' three summary judgment motions, an order compelling Wells Fargo to produce documents, and other discovery disputes. (Davis Brief at 41-42.) Yet, the trial court stated it took the discovery disputes into account. VRP (Oct. 3, 2004) 9:22-10:3.

10. The massive damage theory continued even after Mr. Hathaway formally appeared in the case a month before trial, after informally working on the case for several months. (CP 28-29, 908.) The trial court found this "a rare case" with "unique circumstances" that required a 25 percent adjustment of the fee claim, because of the amount of recovery and presentation by plaintiffs' counsel and the "generation of extra time." VRP (Nov. 11, 2005) 8:20-10.

In sum, there was no manifest abuse of discretion by the trial court in its application of the multifactor test to determine the reasonable amount of fees.

## V.

## CONCLUSION

The Davises were fairly compensated for their actual compensable losses, and received a reasonable attorneys' fees award. As they are entitled to nothing further, this Court should affirm.

RESPECTFULLY SUBMITTED this 24th day of August, 2006.

LANE POWELL PC

By Michael B. King

Ronald E. Beard
WSBA No. 24014
Michael B. King
WSBA No. 14405
David C. Spellman
WSBA No. 15884
David L. Young
WSBA No. 30543
Attorneys for Respondent
Wells Fargo Home Mortgage Company

# APPENDIX

In addition to a copy of the relevant page from the Deed of Trust, CP 455, a typed version of a portion of the text has been included for ease of review

POOR QUALITY ORIGINAL

which has the address of 11503 132ND STREET EAST
[Street]

PUYALLUP , Washington 98374 ("Property Address");
[City] [Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. **Payment of Principal and Interest; Prepayment and Late Charges.** Borrower shall promptly pay when due the principal of and interest on the debt evidenced by the Note and any prepayment and late charges due under the Note.

2. **Funds for Taxes and Insurance.** Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly payments are due under the Note, until the Note is paid in full, a sum ("Funds") for: (a) yearly taxes and assessments which may attain priority over this Security Instrument as a lien on the Property; (b) yearly leasehold payments or ground rents on the Property, if any; (c) yearly hazard or property insurance premiums; (d) yearly flood insurance premiums, if any; (e) yearly mortgage insurance premiums, if any; and (f) any sums payable by Borrower to Lender, in accordance with the provisions of paragraph 8, in lieu of the payment of mortgage insurance premiums. These items are called "Escrow Items." Lender may, at any time, collect and hold Funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may require for Borrower's escrow account under the federal Real Estate Settlement Procedures Act of 1974 as amended from time to time, 12 U.S.C. § 2601 *et seq.* ("RESPA"), unless another law that applies to the Funds sets a lesser amount. If so, Lender may, at any time, collect and hold Funds in an amount not to exceed the lesser amount. Lender may 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.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is such an institution) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items. Lender may not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. However, Lender may require Borrower to pay a one-time charge for an independent real estate tax reporting service used by Lender in connection with this loan, unless applicable law provides otherwise. Unless an agreement is made or applicable law requires interest to be paid, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender may agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds, showing credits and debits to the Funds and the purpose for which each debit to the Funds was made. The Funds are pledged as additional security for all sums secured by this Security Instrument.

If the Funds held by Lender exceed the amounts permitted to be held by applicable law, Lender shall account to Borrower for the excess Funds in accordance with the requirements of applicable law. If the amount of the Funds held by Lender at any time is not sufficient to pay the Escrow Items when due, Lender may so notify Borrower in writing, and, in such case Borrower shall pay to Lender the amount necessary to make up the deficiency. Borrower shall make up the deficiency in no more than twelve monthly payments, at Lender's sole discretion.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender. If, under paragraph 21, Lender shall acquire or sell the Property, Lender, prior to the acquisition or sale of the Property, shall apply any Funds held by Lender at the time of acquisition or sale as a credit against the sums secured by this Security Instrument.

3. **Application of Payments.** Unless applicable law provides otherwise, all payments received by Lender under paragraphs 1 and 2 shall be applied: first, to any prepayment charges due under the Note; second, to amounts payable under paragraph 2; third, to interest due; fourth, to principal due; and last, to any late charges due under the Note.

4. **Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines and impositions attributable to the Property which may attain priority over this Security Instrument, and leasehold payments or ground rents, if any. Borrower shall pay these obligations in the manner provided in paragraph 2, or if not paid in that manner, Borrower shall pay them on time directly to the person owed payment. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this paragraph. If Borrower makes these payments directly, Borrower shall promptly furnish to Lender receipts evidencing the payments.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain

2. Funds for Taxes and Insurance. Subject to applicable law or to a written waiver by Lender, Borrower shall pay Lender on the day monthly payments are due under the Note, until the Note is paid in full, a sum ("Funds") for: (a) yearly taxes and assessments which may attain priority over this Security Instrument as a lien on the Property . . . . These items are called "Escrow Items." Lender may, at any time collect and hold Funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may require for Borrower's escrow account under the federal Real Estate Settlement Procedures Act of 1974 as amended from time to time, 12 U.S.C. § 2601 et seq. ("RESPA"), unless another law that applies to the Funds sets a lesser amount. If so, Lender may, at any time, collect and hold Funds in an amount not to exceed the lesser amount. Lender may 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.

The Funds shall be held in an institution whose deposits are insured. . . . Lender may not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charger. However, Lender may require Borrower to pay a one-time charge for an independent real estate tax reporting service used by Lender in connection with this loan, unless applicable law provides otherwise. . . . Lender shall give to Borrower, without charge, an annual accounting for the Funds, showing credits and debits to the Funds and the purpose to which each debit to the Funds was made. The Funds are pledged as additional sums secured by this Security Instrument.

If the Funds held by the Lender exceed the amounts permitted to be held by applicable law, Lender shall account to Borrower for the excess funds in accordance with the requirements of applicable law. If the amount of the Funds held by Lender at any time is insufficient to pay the Escrow Items when due, Lender may so notify the Borrower and in such case Borrower shall pay to the Lender the amount necessary to make up the deficiency. . . .

Upon the payment of all funds secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender. . . .

(CP 455, ¶ 2 in the deed of trust).

FILED
COURT OF APPEALS
DIVISION II

06 AUG 24 PM 4:32

STATE OF WASHINGTON
BY ____ DEPUTY

No. 34136-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

---

LEVIUS I. DAVIS and DEBBIE L.
VIDAL DAVIS, husband and wife,

Appellants/Cross-Respondents

v.

WELLS FARGO HOME MORTGAGE COMPANY,

Respondent/Cross-Appellant

and

CHICAGO TITLE INSURANCE COMPANY,

Defendant

---

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. Thomas J. Felnagle)

---

# DECLARATION OF SERVICE

---


Ronald E. Beard
WSBA No. 24014
Michael B. King
WSBA No. 14405
David L. Young
WSBA No. 30543
Attorneys for Respondent/Cross-Appellant
Wells Fargo Home Mortgage Company

Lane Powell PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101
Telephone: (206) 223-7000
Facsimile: (206) 223-7107

I, Kathryn Savaria, declare under penalty of perjury as follows:

1. I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-captioned action, and competent to testify as a witness.

2. I am employed with the law firm of Lane Powell PC, 1420 Fifth Avenue, Suite 4100, Seattle, Washington.

3. On August 24, 2006, I caused to be served true copies of the following documents: Respondent's Answering Brief on the following parties in the manner as indicated below:

| | |
|---|---|
| John W. Hathaway Esq.<br>John W. Hathaway, PLLC<br>4600 Columbia Center<br>701 Fifth Avenue<br>Seattle, WA 98104-7097<br>Phone: (206) 624-7100<br>Fax: (206) 624-9292<br>Email: jhathaway@seanet.com | ☒ U.S. Mail<br>☐ Facsimile<br>☐ E-mail<br>☐ FedEx<br>☐ Legal Messenger |
| Raphael Nwokike Esq.<br>9834 Sixteenth Avenue SW<br>Seattle, WA 98106<br>Phone: (206) 242-0050<br>Fax: (206) 767-0890 | ☒ U.S. Mail<br>☐ Facsimile<br>☐ E-mail<br>☐ FedEx<br>☐ Legal Messenger |

David C. Neu Esq.
Preston Gates & Ellis LLP
925 Fourth Avenue, Suite 2900
Seattle WA 98104-1158
Phone: (206) 623-7580
Fax: (206) 623-7022

☒ U.S. Mail
☐ Facsimile
☐ E-mail
☐ FedEx
☐ Legal Messenger

The foregoing statements are made under penalty of perjury under the laws of the State of Washington and are true and correct. Signed at Seattle, Washington, this 24th day of August, 2006.

Kathryn Savaria

Kathryn Savaria