

Case No. 35163-7

**IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III**

STEVE MILLER AND LETICIA MILLER, husband and wife,

Plaintiffs-Appellees,

vs.

DREW DALTON, individually, as a representative of the marital  
community, and as Partner/Member of Ford Law Offices; and FORD  
LAW OFFICES, PS, a Washington corporation,

Defendants-Respondents,

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**RESPONDENT/CROSS-APPELLANT'S BRIEF**

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## **I. INTRODUCTION AND ASSIGNMENTS OF ERROR**

Our system of justice works. It worked in this case to protect clients from the malfeasance of an attorney. An attorney is ethically obligated to convey to his client any offers of settlement. In this case, Steve and Leticia Miller had fought with their bank for over three years to obtain a mortgage that had been promised to them. When the bank threatened foreclosure, the Millers hired Drew Dalton to represent them. Shortly after Attorney Dalton appeared, the bank made an offer to settle the claim on terms more favorable than those initially sought by the Millers. Attorney Dalton failed to convey the terms of that offer to his clients and instead subjected them to an additional 18 months of stressful litigation that resulted in a judgment against them for \$566,000 and an order of foreclosure of the sale of their home.<sup>1</sup> At trial, the jury found that Attorney Dalton was negligent and as a result of his negligence, his clients were left with a large judgment and order of sale of their family home. The jury awarded damages it determined were proximately caused by Attorney Dalton's negligence and necessary to pay the judgment so that the Millers would not lose their home. The verdict was within the range of the evidence. Attorney Dalton now complains that the jury awarded the Millers

too much money. Instead of recognizing that the jury awarded his clients a just amount for the damages they suffered, he argues that the verdict was the result of passion and prejudice.

When the Millers hired Attorney Dalton, they were seeking to finalize the terms of a HAMP mortgage with their bank.<sup>2</sup> As a result of the Attorney Dalton's negligence, the Millers ended up with a substantial judgment and foreclosure potentially resulting in the imminent loss of their home. In order to avoid the loss of their home, the Millers were forced to file bankruptcy. The jury was properly instructed on the measure of damages. The damages awarded were within the evidence and were not excessive. Attorney Dalton's arguments that the damages were excessive and the result of passion and prejudice lack merit.

Attorney Dalton's failure to convey the favorable offer to his clients was intentional and egregious. The Millers suffered significant emotional distress proximately caused by the Attorney Dalton's negligence. They worried constantly about losing their home and endured the stress of needless litigation. Attorney Dalton never advised them that he had received an acceptable settlement offer early in the case. They sought

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<sup>1</sup> Much of the detail of this stressful litigation is revealed in the appeal of the underlying case in SunTrust Mortgage Inc. v. Miller, 186 Wn. App. 1015 (2015)

<sup>2</sup> HAMP is an acronym for Home Affordable Modification Program which was a federally inspired program that would permit banks to make low interest loans to homeowners who

emotional distress damages from the Attorney. The trial judge failed to instruct the jury on emotional distress damages ruling that the Attorney's negligence was not sufficiently egregious to justify a recovery of emotional distress damages. This was error.

Furthermore, the Millers sought recovery under the Washington Consumer Protection Act, RCW 19.86 et. seq. The attorney's acts and practices were unfair and deceptive and violated a number of legal and ethical requirements. The trial judge failed to instruct the jury on the elements of a CPA claim. The trial judge erred.

The Millers are asking this court to uphold the trial judge's decision denying a new trial or remittitur and to remand this case for a trial on emotional distress damages and the CPA claim.

## **II. ASSIGNMENTS OF ERROR ON CROSS APPEAL**

- A. The trial court erred dismissing Millers claim for emotional distress damages on summary judgment.
- B. The trial judge erred in failing to give Appellants proposed instruction No.P'14 on damages that included a reference to emotional distress damages.
- C. The trial court erred in dismissing as a matter of law Millers' claim under the Washington Consumer Protection Act (RCW 19.86 et. seq)

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were caught up in the economic recession of 2008 and having trouble obtaining a reasonable mortgage.

D. The trial court erred in failing to give Appellants proposed instructions number P18 –P21 defining the parameters of the Consumer Protection Act claim.

### **III. STATEMENT OF THE CASE**

Steve and Leticia Miller and their three daughters live on acreage in Rockford, Washington. They lived in a single wide mobile home for a number of years while they saved up enough money to build their dream home. In 2006 they started building their dream home. The entire family was excited about the prospects of living in a real home and moving out of the cramped quarters of the mobile home. (RP 455 - 464)(Ex. 65-66) They hired a neighbor to build the home. The contractor turned out to be less than reputable. The result was significant cost overruns on the construction. They finished the home on their own to the point they could move into it. They moved in to the home on Thanksgiving 2007. (RP 465 – 469, 471 -74)

The Millers initially sought a conventional loan from Bank of Whitman. Their monthly mortgage payment was \$2,400 a month. The loan was sold to SunTrust Mortgage. The loan was a financial burden on the family. They paid the mortgage payments for about eight months. They then learned about and applied for a HAMP mortgage. SunTrust initially modified the loan by reducing the payments to \$2,100 which included taxes and insurance. (RP 475- 81)(Ex. 105) The family continued to negotiate

with SunTrust resulting in a second modification from SunTrust that resulted in a reduction in the monthly mortgage payment to \$1,311.87. The modification indicated that the monthly payment included a reserve for taxes and insurance.<sup>3</sup> (RP 481- 82)(Ex, 106) They paid the modified mortgage payment for 4 months and then SunTrust reneged on its modification and attempted to increase the mortgage payment back to \$2,100 a month with an interest rate of 4.875%. (RP 486 – 88) (Ex. 107) At that point Steve Miller started on a three year quest to get SunTrust to live up to its previous modification proposal that included a monthly payment of \$1,311.87. During most of this fight he continued to pay the \$1,311.87 payment to SunTrust. He wrote letters to the SunTrust CEO, Freddie Mac,<sup>4</sup> his Senator, the Washington State Attorney General and the Washington Division of Financial Institutions (DFI). (RP 488 – 493)

By April of 2012, SunTrust started to threaten that they were going to foreclose on the Miller's home. Steve Miller decided at that point to hire an attorney to protect his family from a mortgage foreclosure and the potential loss of the family home. He contacted Drew Dalton. He told

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<sup>3</sup> The modification indicated \$0 contribution to reserves. This was not a major issue however because Millers were willing to pay the taxes and insurance outside of the \$1,311.87 mortgage payment. (RP 483-86)

<sup>4</sup> Freddie Mac is a nickname for the Federal Home Loan Mortgage Corporation, a government based organization that purchases mortgages on the secondary market and sells them back to investors on the open market thereby increasing the supply of available mortgage funds in the market.

Attorney Dalton the entire story and provided him with a number of documents. He impressed on Attorney Dalton the importance of being able to keep the family home. The Attorney told Steve Miller that he had a good argument for a contract with SunTrust and agreed to represent Steve and Leticia. Attorney Dalton agreed to represent the Millers on a contingent fee of 30%. The Attorney did not provide the Clients with a written fee agreement. The “oral” agreement was simply a 30% contingent fee.<sup>5</sup> The Attorney asked for and was paid a \$500 retainer fee. (RP 582-95)(Ex. 17)

Shortly after their meeting, Attorney Dalton prepared a demand letter to SunTrust. Attorney Dalton had advised Steve Miller on the phone that he had a good damages lawsuit against SunTrust. (RP 595-600)(Ex. 14) Shortly after the demand letter was sent SunTrust Vice President, Cheryl Scott wrote a letter to Attorney Dalton offering to settle the case on terms more favorable than the Millers had been seeking over the previous three years. SunTrust agreed to accept a monthly mortgage payment of \$1,311.87 and to reduce the interest rate on the mortgage from 4.875% to 2.0%. (Ex. 11)

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<sup>5</sup> Attorney Dalton claimed that he thought the Millers had signed a written fee agreement but could not find one in his file. (RP 834) Steve Miller testified that he did not sign a written contingent fee agreement.(RP 761)

**Inexplicably, Attorney Dalton never advised his clients of this favorable offer.** He never showed a copy of the offer letter to Steve or Leticia. (RP 430-31, 437, 484-85, 602)<sup>6</sup> If Attorney Dalton had shown the offer to Steve or Leticia they would have accepted it immediately. (RP 431-32, 602-06) Steve Miller was in contact with Attorney Dalton by telephone on a regular basis during this time. Dalton told him that SunTrust was willing to settle for a monthly payment of \$1,311.87 but he was waiting for the specific terms of the offer. (RP 600-602, 616-17) Attorney Dalton told Steve Miller that he was waiting for the settlement documents and that the delay was probably because everyone was on vacation. (Id) The Millers were excited that they might finally get a fair resolution of their claim. (RP 600-02)

Attorney Dalton never advised the Millers of the offer he had received from SunTrust. (RP 615-18) The offer had a 15 day acceptance time limit. (Ex. 11) Not once did he disclose to the Millers that he had received an acceptable offer back in May of 2012. (RP 615-18)<sup>7</sup>

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<sup>6</sup> Attorney Dalton claims he read the offer letter to Steve Miller over the phone. (RP 824–26) Steve Miller denies this. Attorney Dalton’s billing records do not support his assertion. (RP 829-30) In the months of litigation that followed Attorney Dalton never once referred to the offer. (RP 896, 897) The jury obviously rejected this testimony.

<sup>7</sup> During this litigation Attorney Dalton claimed that he did not act on the offer because SunTrust’s attorney, Leigh Peplinski, revoked the offer. (RP 928 – 29) He claimed that the 15 day time limit was revoked and that SunTrust was going to make him a new offer. (RP 825, 949-50) Ms. Peplinski testified that she did not revoke the offer and had no authority to do so and never had a conversation with Attorney Dalton on that subject. (RP 1012 – 14)

In September 2012, SunTrust filed suit against the Millers seeking a judgment and order of foreclosure and sale of the family home. Steve Miller and his wife were distraught when they learned that SunTrust was suing them and attempting to foreclose on their family home. (RP 618)

After suit was filed, Attorney Dalton then embarked on a quest to change his fee agreement with the Millers and to get money out of them to fund the lawsuit. Attorney Dalton told Steve Miller that he was going to bring a counterclaim against SunTrust for banking violations and that they would likely recover a substantial sum of money from SunTrust. (RP 621-22) On April 5, 2013 Attorney Dalton send Steve Miller a new fee agreement. This agreement was on substantially different terms than the original 30% fee agreement. It required the Millers to pay Attorney Dalton a \$10,000 retainer. Attorney Dalton did not advise the Milers that they had the right to refuse his offer to change their fee arrangement and he did not advise the Millers to seek independent counsel on the matter. (RP 623-25)(RP 633-640)(Ex. 26) In addition the new fee agreement provided for **both** an hourly fee agreement at \$350 and hour *plus* a contingency fee of 30% of all money recovered in the counterclaim. (*Id.*) Attorney Dalton told Steve Miller that he needed the \$10,000 retainer “to get your file moving.” (*Id.* at 640) Attorney Dalton told Steve Miller that he had hired Alan Hurd and Frank Malone as expert witnesses and needed the \$10,000

to cover expert witness fees. Mr. Hurd was a mortgage broker and would testify on financial issues and Mr. Malone was an attorney who would testify about some legal issues related to the counterclaim. (RP 641-43)

In April of 2013, Attorney Dalton offered to meet with Steve Miller to discuss the need for Steve to put up \$10,000 or more to pay for experts. (Ex. 27) Attorney Dalton wrote to Steve Miller that “despite my original percentage agreement with you, I cannot continue to operate without spending money.” (*Id.*) Steve Miller concluded that his case was not going anywhere unless he came up with the additional money. He felt “strong armed” into paying Dalton more money. (RP 644-45) The day after receiving the email Steve and his dad met with Attorney Dalton, Alan Hurd and Frank Malone. Attorney Dalton again emphasized that Steve Miller needed to pay more money. He suggested that Steve Miller take out a loan on an additional 20 acres that he owned to raise money to pay to Attorney Dalton. Attorney Dalton suggested that Alan Hurd, the financial expert, could put a loan together on the 20 acres. Attorney Dalton indicated that Steve Miller would have to raise as much as \$55,000 to pay expert witness fees.<sup>8</sup> Steve did not believe he could raise the extra money but to keep the

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<sup>8</sup> Unknown to Steve Miller was the fact that Attorney Dalton had hired Frank Malone as co-counsel and had agreed to pay him for his attorney work at the rate of \$350 per hour. (RP 954-58)

case going he offered to change the contingent fee agreement to a 50% contingency. (RP 646-650)

Not having reached an agreement on the \$55,000 loan, Attorney Dalton wrote to Steve Miller a few days later offering to draw up the papers of a loan. Attorney Dalton wrote that “we are taking a cash payment” in a reference to having Steve Miller borrow \$55,000 to pay to Attorney Dalton, Attorney Malone and expert witness Hurd. Dalton also wrote “Please be aware, if this goes to litigation, there may be an escalation clause to 40 percent 60 days before trial.” (RP 654-58)(Ex. 29)

After receiving the email Steve and Leticia Miller went to Attorney Dalton’s office to sign papers. They were provided with loan documents that took a security interest in their 20 acers and charged them interest on the loan at 13% per annum. Leticia refused to sign the documents and the meeting ended. (RP 658-62) In a further attempt to get Steve Miller to sign the loan and put up additional cash, Attorney Dalton wrote his client again and advised that the fee agreement was a one-third contingency gong up to forty percent if there was a trial. He told his client that this was “cheap” and these cases mostly go for a contingency fee of 40% to 50% and \$20,000 - \$30,000 in advanced costs. He said he needed the money to pay Alan Hurd and Frank Malone so that Steve Miller could “get the money you want [from the case].” Attorney Dalton wrote the he was into the case

over \$15,000.<sup>9</sup> Attorney Dalton told his client that “But to win, I need the funds to do the job.” He also wrote “If you want, I can drop the experts, get half or third as much.” Steve Miller felt like his attorney had abandoned him and betrayed him. He felt pressured so he borrowed \$5,000 from his dad and paid it to Attorney Dalton. (RP 667-74)(Ex. 32)

In August of 2013, the trial judge granted SunTrust’s summary judgment motion dismissing all of the Millers counterclaims against SunTrust. Attorney Dalton told Steve “your house is – you lost your house” and that “Either you leave – you know, you either – leave your home or you file an appeal.” (RP 676-77) Attorney Dalton filed an appeal and then asked Steve Miller for more money. Steve Miller had received a tax refund of \$3,000 so he gave Attorney Dalton that money. (RP 678) The Court of Appeals upheld the summary judgment dismissing the counter claims. As a result SunTrust obtained a judgment against the Millers for \$566,000 and an order of foreclosure and sale of the family home. The Millers had no ability to pay the judgement. In order to avoid foreclosure and sale of their home they were forced to file bankruptcy. (RP 679-83)(Ex. 51)

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<sup>9</sup> At that time Attorney Dalton’s billing records showed that he had not advanced any costs other than the filing fee and his hourly billings were \$6,700. (Ex.12 )

The jury awarded the Millers \$503,500.00 in damages. The verdict included \$7,000 on the breach of fiduciary duty claim and \$496,000 on the negligence claim. (CP 822-23) The jury was considerate in its award. The Millers had sought \$8,500 on the fiduciary duty claim. The jury deducted from the amount \$1,500 that Attorney Dalton had returned to the Millers during trial. Likewise, the jury awarded the Millers \$496,000 on their negligence claim. The amount represents the full amount of the pending judgment (\$566,000) less the payment of \$1,311.87 a month from August 2012 through the trial date which is a deduction suggested by Attorney Dalton's own expert. (RP 1046) The Millers had been paying this amount to SunTrust from the beginning but discontinued paying that amount after SunTrust started their lawsuit.

The amount of the damages in this case was clearly in dispute. Paul Murray, the appraiser called by the Millers, testified that the fair market value of the family home was between \$620,000 and \$640,000. (RP 369-76) The Millers damages expert, Eric Knowles testified that the damages would reasonably be \$566,000 plus accrued interest to pay off the judgement and avoid foreclosure. He opined that when the Millers hired Attorney Dalton there was no judgment against them or order of sale. After Attorney Dalton's representation of the Millers they faced a judgment of \$566,000 and an order of sale of their home. (RP 532-47) Defendants

expert opined that the damages would be in the range of \$140,000 to \$268,000 based on the theory that the Millers would be able to come out of bankruptcy and borrow the difference between that amount and the amount of the judgment to avoid the sale of the family home. He assumed the value of the Miller home to be \$520,000. (RP 1038- 47) The jury rejected Attorney Dalton's experts approach and endorsed the approach of Miller's expert.

#### **IV. ARGUMENT IN RESPONSE TO ATTORNEY DALTON'S APPEAL**

##### **A. THE COURT SHOULD DISREGARD ATTORNEY DALTON'S ARGUMENTS THAT THE JURY WAS NOT PROPERLY INSTRUCTED ON THE MEASURE OF DAMAGES.**

Attorney Dalton argues that the jury calculated its award using the wrong formula. In effect, he argues that the trial court should have instructed the jury on a different measure of damages. He has not preserved this claimed error.<sup>10</sup> The Attorney Dalton's only exceptions to jury instructions were the failure to give an instruction advising the jury that Plaintiff was not entitled to recovery emotional distress damages and the trial court's failure to instruct on comparative fault and mitigation. (RP 1090-94) Attorney Dalton did not except to the measure of damages

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<sup>10</sup> His only preserved error on this point is his claim that the trial judge abused his discretion when denying Attorney Dalton's motion for a new trial. (See brief, *infra*)

instruction. Therefore, his argument that the jury should have applied some other measure of damages is improper.

Attorney Dalton argues that there is *no conceivable way* that the jury, **following the law** could award the damages included in the verdict in this case.<sup>11</sup> He goes on to argue that the verdict is not supportable **under any interpretation of existing law**.<sup>12</sup> He argues that the jury should have applied the “law of lost houses” in arriving at its verdict.<sup>13</sup> These are legal arguments related to jury instructions. These legal arguments are not properly before the Court on this appeal and should be ignored.

Furthermore, Attorney Dalton’s argument that the jury must offset any award by the amount of a potential mortgage is meritless and not supported by any case law. The issue was addressed in a markedly similar case, *Parker v. Bank of Am., NA*, 2012 WL 5944882, at \*1 (D. Nev. 2012).<sup>14</sup> In *Parker*, the homeowner was in default in her home loan and sought to obtain a mortgage modification pursuant to the Making Homes Affordable (“MHA”) guidelines and directives. MHA was a part of the

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<sup>11</sup> *Id.* at 14

<sup>12</sup> *Id.* at 15

<sup>13</sup> *Id.* at 17 citing *Munger v. Moore*, 11 Cal. App. 3d 1, 11 (1970).

<sup>14</sup> This is an unpublished opinion from the District Court in Nevada. It is cited in accordance with GR 14.1 that was adopted in 2007 at the recommendation of the Washington State Bar Association and allows citations to unpublished federal cases decided on or after January 1, 2007. GR14.1.Citation to Unpublished Opinions, 2 Wash. Prac., Rules Practice GR 14.1 (8th ed.)

HAMP program.<sup>15</sup> The homeowner signed onto a modification of her mortgage for \$1,482 a month. She made the requisite payments and was offered a permanent modification. The permanent modification was for \$1,856.00. The modification was unacceptable to the homeowner. She was told by the bank's officer that she should not remit any further payments on the mortgage until the matter was resolved. After 18 months, she was offered another modification at \$1,710 a month, but this was also unacceptable. Eventually, the home was sold at a trustee's sale for \$180,000. The bank officer told her that she did not qualify for a modification because of her income. The bank had the wrong income figures. She was told that if the bank had used her actual income figure she would have qualified. She sued the bank for damages. The bank moved for summary judgment on the damages issue arguing that the homeowner did not suffer any damages because the property was auctioned and sold for \$180,000, and plaintiff owed \$319,198.15 so there was no equity from which Plaintiff could have profited. The homeowner was entitled to expectation damages described as:

“The injured party has a right to damages based on his expectation interest as measured by (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less [(c)] any cost

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<sup>15</sup> <https://www.makinghomeaffordable.gov/pages/default.aspx>

or other loss that he has avoided by not having to perform. Restatement (Second) of Contracts § 347.

In denying the bank's motion for summary judgment, the *Parker* court wisely noted:

Though Defendants' argument is factual, it limits the expectation interest to the moment of their breach and subsequent liquidation of the property. Had Defendant performed and Plaintiff been allowed to cure the default with the loan modification, and had both parties performed through the remaining of the contract, Plaintiff's expectation interest would necessarily amount to the value of the real property free of a mortgage, unencumbered with debt. Further, even while the property remains mortgaged, at some point in the future it is just as likely as not that the Plaintiff would be in an equity position on her property; market fluctuations determining the reality of this. Thus, since expectation damages are to place the non breaching party in as good a position as if the contract had been performed, **the amount of those damages is not necessarily limited to the property's value at the time of breach, which in this case, was long before the contract's maturity date. . . .** (Emphasis added)

*Parker* at \*5. The trial judge further noted that:

. . . . If the expectation at the completion of the contract is to own an unencumbered home attached to a parcel of real estate which is freely transferrable by devise or sale, then the value of the property less the mortgage burden at the time of the breach may not fairly or accurately be the only measure of expectation damages.

*Parker* supports the logic that a person's home is more than a fungible chattel. At bar, the Millers had a home that they expected to live in and eventually own. They lost that opportunity because of the negligence of

Attorney Dalton. The jury properly awarded the Millers sufficient funds to permit them to keep their home. Again, Attorney Dalton's argument to the contrary is superfluous since Attorney Dalton has not challenged the court's damage instruction in this case that permitted the jury to award money necessary to restore them to the position they would have been if their Attorney had met the standard of care.

**B. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE ATTORNEY DALTON'S MOTION FOR NEW TRIAL**

**i. STANDARD OF REVIEW.**

Attorney Dalton is asking this Court to reverse the trial court's decision denying him a new trial based on his claim that the verdict was excessive. The Court of Appeals will review for abuse of discretion a trial court's denial of a CR 59(a) motion for a new trial. *Sommer v. Dep't of Soc. & Health Servs.*, 104 Wash.App. 160, 170–71, 15 P.3d 664, *review denied*, 144 Wash.2d 1007, 29 P.3d 719 (2001). The test for determining such an abuse of discretion is whether “such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent [the] litigant from having a fair trial.” *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wash.2d 517, 537, 998 P.2d 856 (2000) (quoting *Moore v. Smith*, 89 Wash.2d 932, 942, 578 P.2d 26 (1978)). The appellate court will review a trial court's denial of a new trial more critically than its grant of a

new trial because a new trial places the parties where they were before, while a decision denying a new trial concludes their rights. *State v. Taylor*, 60 Wash.2d 32, 41–42, 371 P.2d 617 (1962).

**ii. THE TRIAL COURT DID NOT ABUSE HIS DISCRETION IN DENYING THE ATTORNEY DALTON’S MOTION FOR A NEW TRIAL ON THE BASIS THAT THE JURY VERDICT WAS EXCESSIVE**

The trial judge instructed the jury on the measure of damages in Instruction No. 9 as follows:<sup>16</sup>

If your verdict is for Steve and Leticia Miller on the legal malpractice claim, then you must determine the amount of money that will reasonably and fairly compensate Steve and Leticia Miller for such damages, if any, as you find were proximately caused by the negligence of Drew Dalton.

If you find for Steve and Leticia Miller on the legal malpractice claim, you should consider the amount of economic loss actually sustained and the award necessary to restore Steve and Leticia Miler to the position they would have been in if Drew Dalton had met the standard of care.

(CP 815)(RP 1109) Within this framework, the jury had complete discretion to determine from the evidence the proper amount of damages. To prevail on this appeal, Attorney Dalton must establish that the verdict was so clearly the result of passion and prejudice that the trial judge’s denial of their motion for a new trial was a judicial abuse of discretion.

The standard of “passion and prejudice” is a high bar. As our Supreme Court noted in *James v. Robeck*, 79 Wash. 2d 864, 870–71, 490 P.2d 878, 882 (1971):

Whatever may be the distinguishing features which separate these two lines of cases, it is our opinion that the rule now and for some time prevailing in this jurisdiction **requires that the passion and prejudice be of such manifest clarity as to make it unmistakable.** To synthesize what may seem to be a disparity, when the trial court is called to rule upon questions of excessive or inadequate verdict as distinguished from the question of granting or denying a new trial outright, we think the court should first look to the scope or range of the evidence in relation to the verdict. In those instances where the verdict is reasonably within the range of proven damages, whether conflicting, disputed or not, and where it can be said that the jury, in exercising its exclusive power, could believe or disbelieve some of it and weigh all of it and remain within the range of the evidence in returning the challenged verdict, then it cannot be found as a matter of law that the verdict was unmistakably so excessive or inadequate as to show that the jury had been motivated by passion or prejudice solely because of the amount. (Emphasis added)

The verdict of a jury does not carry its own death warrant solely by reason of its size. When the amount awarded exceeds rational bounds to the extent that the award could only have been reached by a jury that had forsaken sensible thought and reached its verdict out of outrage, animosity or spite, it is then, and only then, that a court should interfere with a jury verdict because of its size. *Johnson v. Marshall Field & Co.*, 78 Wash. 2d

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<sup>16</sup> The instruction was a correct statement of the law on this issue of damages. The Millers also argue that the court should have instructed the jury on Millers’ emotional distress

609, 478 P.2d 735 (1970); *Hogenson v. Serv. Armament Co.*, 77 Wash. 2d 209, 461 P.2d 311 (1969); *Leak v. U.S. Rubber Co.*, 9 Wash. App. 98, 511 P.2d 88 (1973); *Allen v. Union Pac. R. Co.*, 8 Wash. App. 743, 509 P.2d 99 (1973); *Duchsherer v. N. Pac. Ry. Co.*, 4 Wash. App. 291, 481 P.2d 929 (1971); *Ryan v. Westgard*, 12 Wash. App. 500, 513, 530 P.2d 687, 696 (1975). The amount of damages must be so excessive as to be outside the range of evidence or so great as to shock the court's conscience. There must be no reasonable evidence or inference to justify the award. *Nord v. Shoreline Sav. Ass'n*, 116 Wash. 2d 477, 486–87, 805 P.2d 800 (1991). This high bar that has not been met by Attorney Dalton in this case. The verdict is within the range of the evidence and not the product of passion or prejudice.

The evidence at trial established a potential range of damages from a high of \$566,000 to a low of \$140,000. The Millers argued that the proper award of damages would be the amount needed to pay off the judgment in order to avoid the sale of their home. Attorney Dalton argued that the Millers only needed \$269,000 and they would be able to borrow the balance of the money needed to pay of the judgment and save their home. The jury awarded an amount lower than requested by the Millers and

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damages as well. (See brief, *infra*.)

higher than requested by Attorney Dalton. More importantly, they awarded an amount that was within the range of the evidence.

When the Millers hired Attorney Dalton, they did not have a \$566,000 judgment against them and they were not faced with the imminent judicial sale of their home. If Attorney Dalton had met the standard of care, the Millers would not now be facing a \$566,000 judgment and order of sale of their home. The only way that the Millers could be restored to their previous position (of not having a large judgment or order of sale) would be to satisfy the judgment. They had no ability to stop the execution of the judgment by offering to pay the judgment holder \$1,311.87 a month on the judgment at an interest rate of 2%. They did not have the resources available to them to pay off the judgment and avoid the sale. They were in bankruptcy and it was unlikely that they would be able to borrow \$566,000 to pay off the judgment and avoid the court ordered sale. The jury decided that an award of \$495,000 would be fair. They did not award the Millers the entire amount of the judgment. They reduced the award by nearly \$69,000 to account for the fact that the Millers had discontinued payment of the \$1,311.87 in August of 2012, on the advice of their attorney. The jury's award demonstrated their fairness and thoughtfulness.

Other than making the conclusory statement that the jury's verdict was the result of passion and prejudice, Attorney Dalton offers no analysis as to how the verdict is excessive. Instead, he argues that the verdict gives the Millers a windfall that somehow renders the verdict invalid. He then devotes two entire sections of his brief to the law on the measure of damages. (Appellants Brief, IV(A)(1) & (2)). However, that is not a matter before this court, nor was it before the trial court on the motion for new trial. The measure of damages was properly set forth in the jury instructions without any exception by Attorney Dalton. His citation to cases like *Shoemaker ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 195, 225 P.3d 990, 991 (2010) are entirely irrelevant as is his reference to the "law of lost houses." His argument that there is "[N]o Washington law allowing recovery for the cost of redeeming a house where it exceeds the value of the house (sic) [judgment] is as puzzling as it is irrelevant. If the Attorney thought that the damages instruction should have been limited in this fashion, then he should have made those arguments at trial, not in this appeal. These arguments are not relevant and should not be considered

Attorney Dalton is arguing that had the Millers been able to accept the SunTrust offer they would still have owed SunTrust money on a mortgage, therefore the jury could only award damages that contemplate the existence of a mortgage. This argument ignores the fact that as a result

of Attorney Dalton's negligence the Millers are now faced with a \$566,000 judgment that they were never faced with before, as well as a foreclosure sale, that if completed, would leave the Millers without a home at all. The only way to avoid the consequence of the judgment, an event created by Attorney Dalton's negligence, is to provide Millers sufficient damages to pay off the judgement and avoid the foreclosure. This is exactly what the jury did.<sup>17</sup> The damage is the inability to pay the entire mortgage immediately.

The trial judge carefully considered the Attorney's arguments for a new trial and ruled that the jury's verdict was within the parameters of the evidence and was not the result of passion or prejudice. The trial judge heard the evidence and is in the best position to determine if the verdict was the result of passion or prejudice. He determined that it was not. His decision was not an abuse of discretion. The trial judge noted that the verdict was within the evidence and not the product of passion and prejudice. The learned judge stated:

Now, the defense suggests those appeals were emotional appeals not within the evidence and I can see their point, but

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<sup>17</sup> For example, assume that a homeowner had a \$400,000 mortgage on his home that he was able to pay on monthly installments, but because of the negligence of his attorney, the bank accelerated the mortgage and demanded the entire \$400,000 or it would sell the home. Unless the jury awarded the homeowner the amount of money needed to avoid the acceleration the home would be lost. Certainly, the attorney cannot argue that there were no damages in that case because the homeowner had a mortgage that it owed at the time of acceleration.

I disagree. For example, defense suggests that the verdict must have been unmistakably due to the passion of these folks losing their home or from emotional appeals from the daughters, I would suggest that it could have just as easily be the jury finding that a lawyer lied to his client, and as a result significantly prejudiced their ability to maintain their home such that they no longer had a mortgage available, but rather were subject to a judgment such that their ability to retain their house wasn't any longer dependent on their ability to make monthly payments, but rather the judgment required them to pay the judgment in full to retain their home.

(RP Hearing 1/19 & 2/1 at 17). Furthermore, the trial judge addressed Attorney Dalton's windfall argument and noted:

So while I see that element of kind of unjust enrichment or windfall, I think in the end how that is made consistent in terms of the jury's verdict is the difference between a mortgage and a judgment and it was very clearly within the evidence.

*(Id.)*

Finally, the trial court properly noted that the jury verdict was clearly within the parameters of the evidence where he stated:

The jury heard the testimony of both experts and, frankly, very well-qualified experts certainly, but I noted particularly on the defense side. I understood what he had to say, he took issue with what the plaintiff's expert had to say, and the jury simply chose not to accept that. That I think is within their purview. So as I started out saying, mathematically it makes sense to me because it seems to me had the offer been accepted there would have been a mortgage and there would still be a mortgage that was owed, but here there was evidence that that offer of a mortgage was no longer available to them, wasn't even known for a period of a couple of years by the time they were into foreclosure and bankruptcy and now had no ability to preserve their home

with installments payments but only with the payment of a large judgment. Even then, the jury didn't find that, gave them credit for payments made.

(RP 1/19 & 2/1, 17-18).

The jury's verdict was within the parameters of the evidence. The jury followed the court's instruction and awarded what they believed under the evidence were damages proximately caused by the Attorney Dalton's negligence. The trial judge did not abuse his discretion in denying the Attorney Dalton's motion for a new trial.

### **C. THE TRIAL COURT PROPERLY DENIED THE ATTORNEY'S MOTION FOR REMITTITUR**

#### **i. STANDARD FOR REVIEW**

Denial of a motion for remittitur also strengthens the verdict. *Bunch v. King County Dep't of Youth Servs.*, 155 Wash.2d 165, 180, 116 P.3d 381 (2005) \*82 (citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 330, 858 P.2d 1054 (1993)). When reviewing a trial court's ruling on a motion for remittitur, “[The appellate courts] strongly presume the jury's verdict is correct,” *Bunch*, 155 Wash.2d at 179, 116 P.3d 381 (quoting *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 654, 771 P.2d 711, 780 P.2d 260 (1989)); thus, it will not disturb a jury's damages award “unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been

arrived at as the result of passion or prejudice” after viewing the evidence in the light most favorable to the non-moving party. *Bunch*, 155 Wash.2d at 179, 116 P.3d 381 (quoting *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wash.2d 831, 835, 699 P.2d 1230 (1985)). When the proponent of a new trial argues that the verdict was not based on the evidence, this Court must review the record to determine whether there was sufficient evidence to support the verdict. *Sommer*, 104 Wash.App. at 172, 15 P.3d 664. The Court of Appeals will review a trial court's denial of remittitur for an abuse of discretion. *Bunch*, 155 Wash.2d at 176, 116 P.3d 381. *Collins v. Clark Cty. Fire Dist. No. 5*, 155 Wn. App. 48, 81–82, 231 P.3d 1211, 1229 (2010), *as corrected on denial of reconsideration* (Apr. 20, 2010).

**ii. THE REQUEST FOR REMITTITUR WAS PROPERLY DENIED.**

For the same reasons that Attorney Dalton argues for a new trial on damages, he also argues for a remitter of the jury verdict to \$140,000 or \$269,000. Attorney Dalton’s damages expert opined that the Millers’ damages ranged between \$269,000 and \$140,000. He argues the same “windfall” theory to support his claim of a remittitur. The trial judge did not abuse his discretion in denying the remitter. The jury verdict was well within the range of the evidence.

**D. THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF ALISA MILLER AND BRIANNA MILLER.**

**i. STANDARD FOR REVIEW**

Attorney Dalton seeks review of the trial court's decision on his motion in limine to permit the limited testimony of the Millers' two daughters, Alisa and Brianna. This Court reviews a trial court's decisions as to the admissibility of evidence under an abuse of discretion standard. *E.g.*, *State v. Pirtle*, 127 Wash.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996); *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995) (this court will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion); *State v. Swan*, 114 Wash.2d 613, 658, 790 P.2d 610 (1990) (the admission and exclusion of relevant evidence is within the sound discretion of the trial court and the court's decision will not be reversed absent a manifest abuse of discretion). When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. *Powell*, 126 Wash.2d at 258, 893 P.2d 615. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239, 1257 (1997). Furthermore, even if the admission of the evidence is improper the Court must also consider whether this is has harmful or harmless error.

**ii. THE DAUGHTERS' TESTIMONY WAS PROPERLY ADMITTED.**

In support of their motion for a new trial, the Defendants argue only that the verdict was the product of irrelevant prejudicial evidence. They contend that the background testimony from the Millers' daughters about the building of the family home and the family's general excitement about finally getting a home was irrelevant. They made this same argument before trial and the Court correctly ruled that the evidence was relevant. The trial court determined that the evidence was relevant and that its probative value was not outweighed by danger of unfair prejudice (RP 155-57) The evidence went directly to the Defendants' claim that Steve Miller did not want to accept the offer (Ex. 11) because of some questions regarding the apportionment of approximately \$9,000 in escrow fees that had been collected. (RP 823 – 829) Attorney Dalton claimed that Steve Miller was unwilling to accept the offer with this \$9,000 issue unresolved even though Attorney Dalton warned him that they could lose the offer if they didn't act right away. The trial judge ruled that the evidence of the family members about how much they wanted to keep this home and how much they loved it was relevant as general background and on the issue that Steve Miller would risk losing the home over \$9,000 in escrow fees or the monthly costs of taxes and insurance. (Id) The fact that the entire family loved this home and wanted to stay in the home was relevant in the jury's determination of whether Steve and Leticia Miller would have

passed up an offer over back taxes. In fact, as the trial judge noted, the testimony of the daughters was no more emotional than the testimony of Leticia on the same subject. Furthermore, as the Court pointed out in its ruling, since the jury was not instructed that they could award emotional distress, there was no harm in allowing this evidence on the issue in question. (RP Hearing Jan 19 & Feb 1, 14-16)

The testimony was certainly probative on a central issue in the case. It was not unduly prejudicial. (RP 153-55) The Court was clear that the evidence would be limited and it was. (Id.) Alisa and Brianna testified that they were excited about having a new home, that they were excited about having their own rooms and that the entire family was happy and excited about building and moving into their new home. (RP 387 – 90, 394 – 96) This evidence directly contradicts Attorney Dalton’s testimony that Steve Miller rejected an offer that would keep his family in this beloved home because the offer did not include the payment of approximately \$9,000 of back taxes and interest. The testimony met the requirements of Wash. R. Evid. 403. The evidence did not result in an emotional response instead of a rational decision. In fact, the testimony of Leticia Miller on the same subject was much more detailed and came in without any objection from Attorney Dalton. Attorney Dalton does not suggest that her testimony was irrelevant or unduly prejudicial. (RP 403 – 10, 13- 22)

The Attorney argues that the admission of the testimony of the two daughters is akin to the admission of the undocumented status of the injured plaintiff in *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583, 586 (2010). There is no realistic comparison. The prejudicial effect of the status of an undocumented worker seeking damages for a workplace injury clearly exceeds the very low probative value of that evidence. *Salas* notes that the prejudicial effect is “obvious.” The testimony at issue before this court does not bear the same “obvious” prejudicial effect. Likewise, the Attorney’s reliance on *Trevino v. Gates*, 99 F.3d 911, 922 (9th Cir. 1996), *holding modified by Navarro v. Block*, 250 F.3d 729 (9th Cir. 2001) is misplaced. There the court excluded the testimony of a five year old witness regarding her emotional distress on hearing of her father’s death, which occurred before she was born. The Court noted:

The district court did not abuse its discretion in refusing to allow Trevino to testify. Trevino would have testified regarding the emotional distress she suffered due to the loss of her father. Trevino was not yet born when her father was killed, and she was only five years old at the time of the trial. The district court thus concluded that there was little probative value to Trevino's testimony because she could not meaningfully testify as to the distress she had suffered in the past or would suffer in the future. Trevino's counsel intended to question her on her “impression of what happened to her father ... and how she thinks her father died.” The district court concluded that any probative value of Trevino's testimony was outweighed by the clear prejudicial effect of having a highly sympathetic child testify who knew nothing about the circumstances of her father's death.

Again, there is simply no reasonable comparison to the evidence in this case. Likewise the case of *Grimes v. Employers Mut. Liab. Ins. Co. of Wisconsin*, 73 F.R.D. 607, 610 (D. Alaska 1977) is of little help in resolving the issue at bar. In *Grimes* the federal district court trial judge ruled that parts of a “day-in-the-life” film of an injured plaintiff should be excluded at trial. The trial judge concluded that the scenes of the plaintiff with his daughter and with his quadriplegic brother serve little purpose other than to create sympathy for the plaintiff and that the prejudicial effect of those scenes outweighed the probative value of the evidence. At bar, the daughters testimony had a clear relevance and served a purpose beyond creating sympathy.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice. ER 403; *Kirk v. Wash. State Univ.*, 109 Wash.2d 448, 462, 746 P.2d 285 \*618 (1987) (concluding evidence of prior abortions was prejudicial). Evidence may be unfairly prejudicial under ER 403 if it is evidence “dragged in” for the sake of its prejudicial effect or is likely to trigger an emotional response rather than a rational decision among the jurors. Nearly all evidence will prejudice one side or the other in a lawsuit. The burden of showing prejudice is on the party seeking to exclude the evidence. *Id.* at 225, 867

P.2d 610. *Hayes v. Wieber Enterprises, Inc.*, 105 Wn. App. 611, 617–18, 20 P.3d 496, 499–500 (2001) In *Hayes* the plaintiff was injured when she fell at a well-known establishment in Spokane, the Park Inn. She put on evidence that at the time of her fall both of the then Park Inn owners were present in the bar. While of marginal probative value the evidence of the presence of the owners at the bar was relevant. The *Hayes* court noted that evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is relevant evidence. *Lamborn v. Phillips Pac. Chem. Co.*, 89 Wash.2d 701, 706, 575 P.2d 215 (1978); *Maicke v. RDH, Inc.*, 37 Wash.App. 750, 752, 683 P.2d 227 (1984) The *Hayes* court upheld the jury verdict and concluded:

The issue is not whether the owners' presence in the bar was prejudicial, but whether it was *unfairly* prejudicial. ER 403. The decision to admit evidence is within the discretion of the trial court. *Cox*, 141 Wash.2d at 439, 5 P.3d 1265. And so we find reversible error only in exceptional circumstances under ER 403. *Carson*, 123 Wash.2d at 226, 867 P.2d 610. Again, the question is whether the owners knew or should have known of a dangerous condition, and whether they did anything about it. The trial judge did not abuse his discretion. The evidence was relevant and not used (argued) unfairly.

*Id.* at 618.

Even if it was error to admit the evidence, which it was not, the error was harmless. When a trial court makes an erroneous evidentiary ruling, the question on appeal becomes “whether the error was prejudicial, for error

without prejudice is not grounds for reversal.” *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wash.2d 188, 196, 668 P.2d 571 (1983). An error will be considered not prejudicial and harmless unless it affects the outcome of the case. *Brown*, 100 Wash.2d at 196, 668 P.2d 571. “[I]mproper admission of evidence constitutes harmless error if the evidence is cumulative or of only minor significance in reference to the evidence as a whole.” *Hoskins v. Reich*, 142 Wash.App. 557, 570, 174 P.3d 1250 (2008). *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 728–29, 315 P.3d 1143, 1156 (2013); *Colley v. Peacehealth*, 177 Wn. App. 717, 727, 312 P.3d 989, 995 (2013).

**E. THE COURT’S REFUSAL TO INSTRUCT ON COMPARATIVE FAULT AND MITIGATION WAS PROPER.**

**i. STANDARD OF REVIEW**

Attorney Dalton seeks review of the trial court’s ruling refusing to instruct the jury on the issues of comparative fault and mitigation of damages. The trial court determined that the facts did not support either instruction. The Court of Appeals will review a trial court's rejection of a party's jury instruction for an abuse of discretion. *State v. Pesta*, 87 Wash.App. 515, 524, 942 P.2d 1013 (1997). Although the proposed instruction may be an accurate statement of the law, the trial court does not abuse its discretion when it rejects the instruction if the party is able to

argue his theory of the case without it. The review is not *de novo*. *De novo* review only applies to included instructions that allegedly contain an error of law. *State v. Winings*, 126 Wash.App. 75, 86, 107 P.3d 141 (2005). A trial court's decision not to include an instruction is reviewed for an abuse of discretion. *State v. Picard*, 90 Wash.App. 890, 902, 954 P.2d 336 (1998). In accord, *City of Seattle v. Pearson*, 192 Wn. App. 802, 820, 369 P.3d 194, 203 (2016).

**ii. THE ISSUE OF COMPARATIVE FAULT AND MITIGATION WERE NOT PROPERLY PART OF THIS CASE.**

Attorney Dalton attempts to shift the responsibility for his professional negligence to his client. The argument is specious. Attorney Dalton relied on *Martin v. Northwest Washington Legal Services*, 43 Wn. App 405 (1986) in support of his comparative fault argument.<sup>18</sup> The trial court correctly determined that *Martin* did not apply and that there was insufficient evidence in the record to instruct the jury on comparative fault and mitigation. In his brief Attorney Dalton argues that it was the failure of the Millers to pay the loan amount that lead to the judgment and order of foreclosure. That argument is disingenuous and deserves only a minimal response. The Millers were willing to pay 1,311.87 on the mortgage but Attorney Dalton never advised them that SunTrust had

agreed to accept their proposal. After the suit was filed the Millers never had the opportunity to make those payments. The reason that the Millers are now facing a \$566,000 judgment and order of sale of their home is because Attorney Dalton failed to carry out his fundamental obligations to his clients and did not convey to them the offer from SunTrust. The trial judge was correct in ruling that there was no evidence in the record that would support a comparative fault instruction.

Attorney Dalton, in an effort to avoid his own malfeasance, also argues that the Millers should have accepted offers made after the May 12, 2012 offer in order to mitigate their damages. Again, this argument is meritless. While the successor in interest to the SunTrust loan made later offers of a mortgage at a substantially higher principle payment and a substantially higher interest rate, Attorney Dalton was telling the Millers that they had a good counter-claim against SunTrust and would win the case. The offers were reviewed by the Millers and their counsel and rejected. (Ex. 42) It makes no sense for Attorney Dalton to now argue that the Millers should have taken one of the offers made during the litigation in order to mitigate the damages that they have against Attorney Dalton for his negligence in handling that claim. Attorney Dalton raises the issue

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<sup>18</sup> Martin was cited to the trial court at the time the comparative fault and mitigation instructions were argued. Attorney Dalton does not rely upon it in his briefing before this court.

based on the trial judge's ruling refusing to allow his expert to opine about what would happen if the Millers had accepted one of the offers. (RP 1055-56) The trial judge properly sustained the objection to that testimony.

Attorney Dalton cites a single case in support of his argument, *Clements v. Blue Cross of Wash. & Alaska*, 37 Wn. App. 544, 553. *Clement* provides him little help. In *Clements* the trial court refused to allow evidence or argument regarding Clements comparative fault. The Defendants claimed that Clement was negligent on two theories: (1) because she was illegally in the crosswalk, having entered against the amber or red light, and (2) because she failed to look while crossing the street after being warned of approaching automobiles where the traffic signal changed while she was crossing. *Id.* at 548. The oncoming driver had honked his horn twice at her but she kept walking into the oncoming traffic. The appellate court correctly determined that under the facts of *Clements* that Clements should have known to look for oncoming traffic even though she was legally in the crosswalk. *Id.* at 553. The *Clements* ruling has no place in the case at bar. At bar, the Plaintiff was unaware of their Attorney's negligence and cannot be held liable on the theory of comparative fault or failure to mitigate.

The case law does not support Attorney Dalton's mitigation argument. The duty to mitigate is not absolute but consists of what is reasonable under the circumstances. The burden of proof is on the party alleging that mitigation should have occurred to show its efficacy. *Sutton v. Shufelberger*, 31 Wash.App. 579, 643 P.2d 920 (1982); In accord, *Martin v. Nw. Washington Legal Servs.*, 43 Wn. App. 405, 411, 717 P.2d 779, 783 (1986) The Millers had no duty to mitigate where they made a reasonable choice to decline an offer. *Cobb v. Snohomish County*, 86 Wash.App. 223, 230, 935 P.2d 1384 (1997), review denied, 134 Wash.2d 1003, 953 P.2d 96 (1998) If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen. *Id.* at 233, 935 P.2d 1384 (quoting *Hogland v. Klein*, 49 Wash.2d 216, 221, 298 P.2d 1099 (1956)). *Bullard v. Bailey*, 91 Wn. App. 750, 760, 959 P.2d 1122, 1128 (1998).

Millers did not know that Attorney Dalton had already received an acceptable offer in their case. They were sued and during the course of the litigation various offers were made to settle the case. The offers were far worse than the settlement that Millers believed they were entitled to and that unbeknownst to them had been offered. They made a reasonable choice to decline the offers. For Attorney Dalton to now argue that the Millers should have accepted one of these subsequent offers that he knew

was worse than the offer he had received and not communicated to his clients in order to reduce the damages claim against him for his own malpractice is as offensive as it is meritless. The trial judge properly refused to instruct the jury on comparative fault and mitigation.

## **V. MILLERS ARGUMENTS ON THEIR CROSS APPEAL**

### **A. THE COURT ERRED IN GRANTING ATTORNEY DALTON'S SUMMARY JUDGMENT MOTION REGARDING EMOTIONAL DISTRESS DAMAGES AND IN FAILING TO INSTRUCT THE JURY THAT THE MILLERS WERE ENTITLED TO RECOVER EMOTIONAL DISTRESS DAMAGES.**

#### **1. STANDARD OF REVIEW**

The trial judge granted Attorney Dalton's motion on summary judgment to dismiss the Clients emotional distress damages claims. (CP 30-32, 46-48)(CP 581-83) The issue was raised again at the time of jury instructions. The trial judge's order granting the summary judgment motion and his failure to instruct the jury on the issue of emotional distress damages are errors of law. The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002); *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274, 1276 (2003). Likewise, the standard of review for failure to give the emotional distress damages instruction is also *de novo*.

State v. Walker, 136 Wash.2d 767, 771–72, 966 P.2d 883 (1998)(A trial court's decision to give or refuse to give a jury instruction is reviewed *de novo* if based upon a matter of law). In accord, *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286, 288 (2009). In this case the refusal to instruct the jury on emotional distress damages was not fact-based but was based on the trial judge's determination that the existing case law does not permit injured clients from recovering emotional distress damages that were proximately caused by the malfeasance of their attorney. This ruling should be reviewed *de novo*.

**2. THE CLIENTS ARE ENTITLED TO RECOVER THEIR EMOTIONAL DISTRESS DAMAGES IN THIS CASE.**

The Millers sought emotional distress damages resulting proximately from the negligence of their attorney. Steve and Leticia Miller contacted Attorney Dalton when they feared that they were going to lose their family home. SunTrust had threatened them with foreclosure. Steve Miller advised Attorney Dalton of his 3 year battle with SunTrust and his genuine fear that he may lose his family home. (RP 582-95) It should have been perfectly clear to Attorney Dalton that if he mishandled the Millers case they would run the risk of a foreclosure and loss of their family home which would result in significant emotional distress. In addition, Attorney Dalton's malpractice is particularly egregious. The duty of a lawyer to

convey offers to the client and assist the client in accepting favorable offers is fundamental to the practice of the law. There is simply no excuse for not conveying an offer to the client. The obligation is both a legal and ethical one. In addition, after the litigation ensued Attorney Dalton continued to act in a manner that can fairly be described as egregious. Attorney Dalton agreed to represent the Millers on a 70/30 contingent fee agreement. However, later on in the litigation Attorney Dalton did a “bait and switch” and insisted that the Millers sign a contingent fee agreement for a higher amount. (RP 299 – 302). Attorney Dalton agreed to represent the Millers on a contingent fee agreement, but he collected money from them that was applied to his hourly fees or was not accounted for at all. These collected fees totaled \$8,500. He represented to the Millers that the collected fees were for expert costs but the money was actually applied to his hourly fees.(RP 306 – 11) Attorney Dalton insisted that the Millers sign a promissory note at 13% interest secured by other real estate in order to raise money for experts, despite the fact that Attorney Dalton never hired a single expert on his case. (RP 313 – 17) After failing to accept the SunTrust offer and thereby committing malpractice, Attorney Dalton had a conflict of interest that he did not disclose to the Millers. He did not disclose this conflict because he was hopeful in obtaining a larger fee in the

litigation. RP 302 – 04) This conduct, considered as a whole, was egregious.

*Schmidt v. Coogan*, 181 Wn.2d 661, 335 P.3d 424, 431 (2014), establishes the rule regarding the recovery of emotional distress in legal malpractice claims. Judge Wiggins, writing for the majority concluded:

We hold that the plaintiff in a legal malpractice case may recover emotional distress damages when significant emotional distress is foreseeable from the sensitive or personal nature of representation or when the attorney's conduct is particularly egregious.

Id. at 671 (Judges Johnson and Owens concurring) Judge Wiggins noted that there was “[N]o reason to categorically preclude [emotional distress damages] in attorney malpractice actions. Id. at 672 The issue is whether Attorney Dalton’s conduct was egregious or the relationship between the Clients and Attorney Dalton was sufficient enough that he should have foreseen the likelihood of emotional distress damages. The conduct certainly raised a jury question on whether it was egregious.

**a. ATTORNEY DALTON’S ACTS WERE EGREGIOUS**

Clients rely on their attorney to protect them and to communicate with them, especially regarding matters of potential settlement of their claim. The duty to convey offers to a client is not only a standard of care, it is an ethical duty. In this case, the failure of Attorney Dalton to communicate to his clients an offer that was more favorable they were

seeking and protect them from losing their family home was clearly egregious. Our Supreme Court upheld a six month suspension of an attorney who, *inter alia*, failed to communicate an offer. *In re Disciplinary Proceeding Against Pfefer*, 182 Wn.2d 716, 721, 344 P.3d 1200, 1202 (2015). The Court in *Deadwyler v. Volkswagen of Am., Inc.*, 134 F.R.D. 128, 140 (W.D.N.C. 1991), *aff'd sub nom. Moore v. Volkswagen of Am., Inc.*, 966 F.2d 1443 (4th Cir. 1992) noted that:

No type of misbehavior by an attorney is more universally and categorically condemned, and is therefore more inherently in “bad faith,” than the failure to communicate offers of settlement.

To make it even more egregious, Attorney Dalton misrepresented the situation to his clients. He told the clients he was waiting for terms of an offer when he was not; he failed to disclose the offer to the clients at any time later in the litigation; he attempted to have his clients pay him more money for representation even though he knew that an acceptable offer had been made in the case and when the clients sued him after learning about the offer he claimed that the offer had been revoked when it is clear that it had not. It is hard to imagine more egregious misconduct that is at bar. Attorney Dalton was aware of the real possibility that the Millers may lose their home. He knew or should have known that the loss of their home

would cause significant emotional distress to them. The Millers should be entitled to recover emotional harm in this case.

**b. THE EMOTIONAL DISTRESS WAS FORESEEABLE.**

The Millers emotional distress that would result from being forced to endure unnecessary litigation and lose their family home is significant emotional distress that is foreseeable from the sensitive or personal nature of representation. The loss of one's family home, with all of its memories, protections and comfort would most certainly result in severe emotional distress to every member of the family. See for example, *Bloor v. Fritz*, 143 Wn. App. 718, 744–45, 180 P.3d 805, 820 (2008). In *Bloor* the Court awarded emotional distress damages for the loss of the plaintiff's home in a failed real estate transaction. The Court noted:

The Fritzes do not challenge the trial court's findings of fact in support of emotional distress damages. These include that the Bloors suffered from anxiety and discomfort as a result of the loss of their home, personal effects, and keepsakes. Ed Bloor experienced symptoms of depression, his sister noticed changes in his personality, and he blamed himself for what had happened and felt like he had let his family down. Eva Bloor also experienced anxiety, resulting in a trip to the emergency room because she thought she was having a heart attack. A doctor diagnosed her with anxiety and panic attacks and prescribed medication to reduce her anxiety. The trial court did not err in awarding emotional distress damages.

*Id.*

Similarly, the Millers potential loss of their family home at a time when Leticia Miller was being treated for cancer would reasonably result in emotional distress.<sup>19</sup> A reasonable attorney standing in the Attorney Dalton's shoes would easily foresee that his breach is likely to cause significant emotional distress to his clients.

The Millers established sufficient facts under *Schmidt* to permit them to recover emotional distress damages. The malpractice of Attorney Dalton was particularly egregious. His complete failure and disregard of the Millers interest in obtaining a settlement that they had fought for over three years is inexplicable. His complete failure to follow through and accept the offer fell far below the standard of care and was simply egregious. Furthermore, his representation of the Millers was a sensitive and personal matter. The Millers were trying to save their family home from foreclosure. They met with Attorney Dalton and explained the personal battle that they had fought with SunTrust and their concern that they now might lose their family home. Attorney Dalton assured them that they had a good case and that they would not lose their home. He certainly must have understood that if the Millers lost this battle they would suffer significant emotional harm. Where the action by the attorney

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<sup>19</sup> See for example the publication from the American Psychological Association regarding the emotional distress commonly suffered by families when they lose their home as a result of a fire. <https://www.apa.org/helpcenter/residential-fire.aspx>

directly causes the harm that will reasonably lead to emotional harm recovery for emotional distress is allowed. *Schmidt*, supra. Whether the emotional distress damages are reasonably foreseeable is a jury question. The Court should have allowed the jury to determine the issue based on proper instructions as to the parameters of such an award.

**B. THE TRIAL COURT ERRED IN DISMISSING THE CONSUMER PROTECTION ACT CLAIM.**

**i. STANDARD OF REVIEW.**

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274, 1276 (2003)

**ii. THE ELEMENTS OF THE CONSUMER PROTECTION ACT WERE MET IN THIS CASE.**

Initially, the trial judge denied Attorney Dalton’s motion for summary judgment on the Consumer Protection Act (CPA) claim under RCW 19.86 et. seq. (CP 581-83) He reversed his ruling just before the case went to the jury. (RP 1086 – 89) The trial judge focused on the advertising aspects of the claim but did not consider the client retention aspects of the claim. In *Short v. Demopolis*, 103 Wn.2d 52, 53, 691 P.2d 163, 164 (1984) our Supreme Court held that the Washington Consumer Protection Act, RCW

19.86 et. seq. applies to the entrepreneurial aspects of an attorney's practice. Entrepreneurial aspects include "how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains and dismisses clients." *Quimby v. Fine*, 45 Wn. App. 175, 180, 724 P.2d 403, 405 (1986) The elements of a CPA claim are (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest, (4) injury to plaintiff in his or her business or property, and (5) a causal link be established between the unfair or deceptive act complained of and the injury suffered. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784–85, 719 P.2d 531, 535 (1986).

The Millers allege a number of claims that violate the CPA, including:

- 1) Attorney Dalton failed to convey to the Millers a favorable offer of settlement that they would have accepted and which would have avoided extensive litigation. (RP 272-73, 276-79)
- 2) Attorney Dalton agreed to represent the Millers on a 70/30 contingent fee agreement. However, later on in the litigation Attorney Dalton did a "bait and switch" and insisted that the Millers sign a contingent fee agreement for a higher amount. (RP 299 – 302)
- 3) Attorney Dalton agreed to represent the Millers on a contingent fee agreement, but he collected money from them that was applied to his hourly fees or was not accounted for at all. These collected fees totaled \$8,500. He represented to the Millers that the collected fees were for expert costs but the money was actually applied to his hourly fees.(RP 306 – 11)(Ex. 12)

- 4) Attorney Dalton insisted that the Millers sign a promissory note at 13% interest secured by other real estate in order to raise money for experts, despite the fact that Attorney Dalton never hired a single expert on his case. (RP 313 – 17)(Ex. 32)
- 5) Attorney Dalton failed accept an offer from SunTrust that the Millers wanted to accept, because Attorney Dalton would not make any money on that settlement offer and he believed that he would get a larger fee on the claim or counterclaim that he pursued on behalf of the Millers.
- 6) After failing to accept the SunTrust offer and thereby committing malpractice, Attorney Dalton had a conflict of interest that he did not disclose to the Millers. He did not disclose this conflict because he was hopeful in obtaining a larger fee in the litigation. RP 302 – 04)
- 7) Attorney Dalton hired Frank Malone as co-counsel and agreed to pay him on an hourly basis because he was unwilling to work on a contingent fee basis. Attorney Dalton did not disclose this to Steve Miller. He represented to Steve Miller that Mr. Malone was being hired as an expert witness. (RP 915 – 16; 952 – 958; 641 – 46).

All of these claims have to do with “how the price of legal services is determined, billed and collected and the way the law firm obtains retains and dismisses clients. They have to do with the entrepreneurial aspects of Attorney Dalton’s practice. Whether a party acted for entrepreneurial purposes is a question of fact. *Eriks v. Denver*, 118 Wn.2d 451, 465, 824 P.2d 1207, 1214 (1992)(Attorney’s acts violated the CPA if he failed to disclose a conflict for the purpose of obtaining clients or increasing profits. Determining whether he acted for entrepreneurial purposes is a question of fact citing *Quimby*, 45 Wash.App. at 182, 724 P.2d 403);

*Triple Diamond Investments, LLC v. Tonkon Torp, LLP*, C15-5594 BHS, 2016 WL 337266, at \*4 (W.D. Wash. Jan. 28, 2016)(Defendants improperly increased their rates, which constitute acts done for the purpose of increasing profits. Washington law is clear that such acts are covered by the CPA); *Eifler v. Shurgard Capital Mgmt. Corp.*, 71 Wn. App. 684, 697, 861 P.2d 1071, 1079 (1993)(Evidence was sufficient to support an inference that the unfair or deceptive act or practice affected the public interest. An act or practice affects the “public interest impact”, when (1) it is part of a pattern or generalized course of conduct, and (2) there is a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff)

- **UNFAIR AND DECEPTIVE ACT IN TRADE OR COMMERCE**

Attorney Dalton's actions in attempting to change the fee basis of his representation, collecting money from the Millers under false pretense, attempting to have the Millers sign a usurious promissory note for expert fees when no expert had been retained (or was ever retained) and his failure to settle the case on terms favorable to his client because he was attempting to achieve a greater fee, are all unfair and deceptive acts committed in trade and commerce. *Quimby v. Fine*, 45 Wn. App. 175, 181, 724 P.2d 403, 406 (1986); *Rhodes v. Rains*, 195 Wn. App. 235, 381 P.3d 58 (2016)(Clams that attorney fabricated or created a bill after the

fact to justify keeping the entire retainer fee are actionable under *Short v. Demopolis*).

- **PUBLIC INTEREST ELEMENT**

Under the CPA the public interest element is met if the evidence would establish that the unfair and deceptive conduct injured other persons, had the capacity to injure other persons, or has the capacity to injure other persons. *Rhodes v. Rains*, Id. at 247-48.

Here, the attempted “bait and switch” of the fee agreement, the collection of money under false pretense, the collection from the client of money to pay against hourly fees in a contingent fee case, the “strong arming” the client to pay additional retainer fees under the threat of losing the case and the attempts to have the Millers sign a usurious note are all capable of reoccurring and clearly are deceptive acts. At the very least these facts create a jury question. These actions have the capacity to impact public interest and are much more than a breach of a private contract.

- **INJURY TO PLAINTIFFS’ BUSINESS AND PROPERTY**

The Millers have clearly been injured by the deceptive practices of Attorney Dalton. At the very least the Millers were tricked into paying Attorney Dalton \$8,500 that was applied to Attorney Dalton’s hourly fees in this contingent fee case. In addition, he continued to represent the

Milers even though he had a conflict of interest. Furthermore, his failure to advise the Millers of the favorable offer resulted in a judgment of \$566,000 and an order of sale. The Millers clearly have been injured in their business and property.

- **CAUSAL LINK**

There is a clear link between Attorney Dalton's unfair and deceptive acts and practices and the injury to the Millers. If Dalton had been forthright and disclosed to his client the offer the matter would have likely resolved without the \$566,000 judgment and order of sale.

The Millers have established a *prima facie* case under the CPA. The matter should have been submitted to the jury with appropriate instructions.

## **VI. CONCLUSION**

The trial judge did not abuse his discretion when he denied Attorney Dalton's motion for a new trial or remittitur. The jury's verdict was within the range of the evidence and was not the product of passion or prejudice. The trial judge did not abuse his discretion by admitting the relevant testimony of the Millers daughters. The trial judge did not abuse his discretion when he refused to instruct the jury on the issues of

comparative fault and mitigation. The verdict was just, as far as it went, and the judge's rulings to that effect should be affirmed.

Respectfully, the trial judge did err when he dismissed the Millers emotional damages claims and their claims under the CPA. This Court should remand the matter to the trial court for a trial on the amount of emotional distress damages and whether the CPA was violated.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of October, 2017.

JERRY MOBERG & ASSOCIATES, P.S.

A handwritten signature in black ink, appearing to read "Jerry J. Moberg", is written over a horizontal line.

JERRY J. MOBERG, WSBA No. 5282

Attorney for Respondents/Cross-Appellants

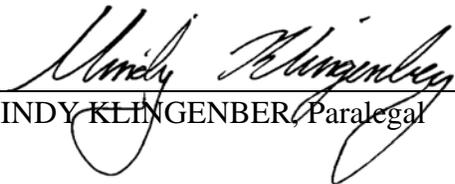
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I certify that on this date I mailed a copy of the document to which this is affixed by electronic mail and first class U.S. mail, postage prepaid, to:

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DATED this 16<sup>th</sup> day of October, 2017 at Ephrata, WA.

JERRY MOBERG & ASSOCIATES, P.S.

  
MINDY KLINGENBER, Paralegal

**JERRY MOBERG & ASSOCIATES, P.S.**

**October 16, 2017 - 4:54 PM**

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