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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 / Cross-Appellants,

v.

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-Appellants / Cross-Appellees.

APPELLANT'S REPLY / RESPONSE
TO CROSS-APPELLANT'S BRIEF

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I.

INTRODUCTION

The very fact that necessitated this appeal has not been addressed in Respondents' Brief—there is no mathematical way for the verdict to be correct if established Washington law was applied by the jury.

Respondents Steve and Leticia Miller do not contest the law, they do not contest the math, and their explanation that the jury should have discretion to award damages is true only until the jury reaches the bounds of the law. Juries *never* have discretion to rewrite the law, which is what this jury did.

It is true that the jurors selected damages from the range of scenarios presented to them, it is true that the judge hesitatingly approved of the damages award in a post-trial motion, and it is true that the trial court judge ultimately disagreed with the arguments presented here in making that decision. Respondent's Brief repeats all of that several times. But what the brief does not do is explain how those decisions could possibly be right; how it is possible in any way, shape, or form, for this verdict to comply with the law. It is true that the Millers' expert said the jury should award the full judgment, and the jury did. But where is the argument that the expert's calculation of damages was consistent with the law? It is true that the court rejected the motion for new trial after saying "mathematically [Dalton's position] makes sense to me..." but where is

the authority stating that a verdict can be affirmed when it does not add up? What Respondent's Brief lacks is the one thing it was required to have—a mathematical explanation for how the jury could be correct under current law. The appeal ends there.

However Dalton's argument doesn't end there—he also demonstrates, with actual evidence, that the jury was inflamed by improperly admitted testimony of the Millers' school-age daughters. Dalton explains how the judge, in his own words, did a Rules of Evidence 401 calculation but never did a Rule 403 calculation. It is superb that the Millers do one here, and helpful that they attempt to distinguish Dalton's authority, but the Millers do not present their own authority allowing this kind of inflammatory and irrelevant testimony, the Millers do not take issue with the facts as presented, or contest the plainly emotional record, or even provide some new explanation for the tenuous relevance of the testimony.

And while litigants can take inconsistent positions, the Millers' position here is a puzzle: congratulating the judge on admitting the inflammatory evidence because he correctly noted it could not be harmful given that emotional distress damages were disallowed, while at the same time advocating for emotional distress damages to be allowed. The cross-appeal lacks basic merit, and is a transparent attempt to even the score in

favor of affirmation. But when the errors are examined closely, there is only one possible result consistent with Washington law—the jury’s verdict must be vacated as higher than possible because it failed to account for the mortgage the Millers would have had absent Dalton’s alleged negligence.

Accordingly, a new trial should be ordered, or the court should reduce the verdict to the maximum amount allowed by law -- \$140,000.

II.

WHETHER OCCASIONED BY AN EMOTIONAL RESPONSE OR NOT, THE VERDICT CANNOT BE RECONCILED WITH THE LAW OF THE STATE OF WASHINGTON

The primary principle presented in this appeal is that the verdict is a legal and mathematical impossibility, which itself requires a new trial or remittitur. The fact that it was likely engendered by inadmissible testimony is true, as is the fact that the jury was unable to render a verdict on contributory fault or mitigation, but neither of those arguments is necessary to reversal.

A. The Millers Fail to Explain How the Jury Verdict Can Be Correct Under Any Interpretation of Existing Law.

To date, no one—not the trial judge, not the Millers, and certainly not Dalton—has explained a theoretical scenario wherein absent Dalton’s negligence the Millers would have had a home with no mortgage on it.

Perhaps because they focus entirely on the damages *instruction* in their brief, the Millers fail to explain how the verdict would “restore Steve and Leticia Miller to the position they would have been in if Drew Dalton had met the standard of care.” [Instruction No. 9 (CP 815)] The Millers also pointedly ignore clear authority from the same circumstance:

Accordingly, where a mortgagee or trustee makes an unauthorized sale under a power of sale he and his principal are liable to the mortgagor for the value of the property at the time of the sale in excess of the mortgages and liens against said property.

Munger v. Moore, 11 Cal.App.3d 1, 11, 89 Cal. Rptr. 323 (1970). This is fatal to the jury’s verdict.

The Millers are correct that Dalton did not challenge instruction number nine— and Dalton is not challenging instruction number nine now, either, which renders the Millers’ entire appellate argument on the impossibility of the verdict irrelevant. Other than arguing about how Dalton should not be able to contest the instruction now, which is not at issue in this appeal, the Millers’ brief simply concludes that the jury had “discretion” to award \$566,000 in damages because that was the amount of the foreclosure judgment.

But that is not the issue either—as the instruction mandates, the Millers must be put in the position “they would have been in if Drew

Dalton had met the standard of care.” The Millers’ entire argument is that *they would have accepted the loan modification* if Dalton had met the standard of care by presenting it to them. Indeed, in the very next breath, when arguing that the emotional testimony of the Miller daughters was relevant to a “central issue” in the case, the Millers argue that the testimony demonstrates that Steve Miller would have taken the loan modification offer. [Resp. Brief at 28-29] And if they would have taken the loan modification offer, they would have had a modified loan on the home then, at the time of this trial was held, and for thirty-seven years thereafter. The trial court explicitly found that fact to be true.¹

The fact that precluding the acceptance of the mortgage *was* the alleged negligence simply cannot be ignored, and the Millers have provided no legal way to allow the court to ignore it. Giving “discretion” to the jury to accept one expert over another is fine, and “discretion” to the judge to accept a verdict is also just fine as a standard of review, but if the verdict does not comport with the law, no amount of “discretion” is going to solve the problem. This is that case.

¹ The trial court noted that it was “nearly unquestioned” that in the alternate scenario (*e.g.*, absent negligence) the house would have had a mortgage on it. [RP (McMaster) at 16:5-12] Specifically, the court held that “certainly” “had the offer been conveyed and had the Millers accepted it, there would have been a mortgage for an amount of money...” [RP (McMaster) at 16:16-19]

Out of the tens of thousands of cases spanning every jurisdiction in the 240-year history of our country, the Millers can apparently only find one, a district court summary judgment ruling in federal court in Nevada, to cite in support of their position— *Parker v. Bank of America*, 2012 U.S. Dist. LEXIS 167898 (D. Nev. 2012) —and it utterly fails to provide the critically-needed support. *Parker* does not support the Millers’ position, as the *Parker* judge did *not* decide that a judgment could be used as damages when it exceeded the value of collateral and there was no recourse obligation. *Parker* did not even decide that damages could be awarded for the value of the house, excluding the mortgage, assuming the Millers are now arguing the value of the house is the proper starting point to measure damages. The *Parker* court noted, in the context of summary judgment, that there was a triable issue of material fact on numerous damages theories plaintiffs could propose. *Parker, supra*, 2012 U.S. Dist. LEXIS 167898 at 10-19. The court never decided any of those damages were actually available, because the case settled before trial occurred.

Second, the analysis in *Parker* was specifically in the context of a breach of contract case, and more specifically in the context of “expectation” damages, which are not available in tort actions in Washington. *See Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist.*

No. 1, 124 Wn.2d 816, 821-22, 881 P.2d 896 (1994) (explaining the difference between tort damages and expectation damages).

Third, the *Parker* court insinuated, while noting the defendants' position was correct "factually," that theoretically one could put on evidence of damages *after* the time of the breach. *Parker, supra*, 2012 U.S. Dist. LEXIS 167898 at 13-14. But in Washington, tort damages are measured at the time of the loss. *Aker Verdal A/S v. Neil F. Lampson*, 65 Wn. App. 177, 183, 828 P.2d 610 (1992) (citing cases).

Last, the *Parker* court explained that in order to achieve its hypothetical scenario the evidence would have to include the market value of the home increasing over time and an assumption that "both parties performed through the remaining of the contract." *Parker, supra* at 14. In the case at bench there was no evidence of what the value of the property would have been at the conclusion of the modified mortgage as compared with how much the Millers would have paid over 37 years, so this hypothetical² example—even if *Parker* contained an actual pronouncement of what the law was instead of a finding of a material issue of fact on what could happen, if it was binding on this court, if this was a breach of contract case, if one could ignore the law requiring

² And it is hypothetical. One struggles to envision a court allowing a damages calculation speculating about the value of a house 37 years from now and asking the jury to determine if the plaintiff would have paid 37 years of her mortgage, then deciding the time value of money. Alas, that decision is not before this court.

damages to be measured at time of loss, and if the damages would have been calculated based on the value of the house and not the amount of the judgment—is irrelevant. Because the evidence of the theoretical other damages model, involving a paid-off mortgage, was never presented in this trial, this court need not decide whether it has any merit, though Dalton is confident it would never pass muster under Washington law.

There are at least three problems with the verdict, and the Millers assuage concerns about none. Nowhere in the brief do the Millers provide justification for using the judgment (\$566,000) instead of the value of the home (\$520,000)³ as the starting point for damages, despite the fact that the judgment itself makes clear that the creditor cannot collect on the judgment in excess of the foreclosure proceeds from the house. [Ex. P56, cite at 4:13-17] And nowhere in the brief do the Millers explain how the verdict can wipe away a loan on the home that everyone concedes they would have had “if Drew Dalton had met the standard of care” and

³ The Millers do at one point suggest in passing that the value of the house is “between \$620,000 and \$640,000.” [Resp. Brief at 12, ¶ 2.] But a brief review of the evidence cited demonstrates that the record does not say that at all—the Millers expert said it would be worth that *when done*, with no estimate for how much that would cost. [RP, Vol. IV at 374:24-375:12 (“Sure. If completely finished.”); 378:15-19 (“Q: And the Millers’ home is not finished? A: Right.”)] That left only Dalton’s expert to testify on value, which he suggested without objection was \$520,000. [RP, Vol. VIII at 1044:10-1045:22]

conveyed the loan offer to them.⁴ While the Millers celebrate the jury taking off the value of the accrued hypothetical mortgage payments up to the time of the verdict as “fair” and “thoughtful” (Resp. Brief at 21), nowhere do the Millers explain how that can be reconciled with the verdict ignoring the fact that the very same payment was due the month of the verdict, and the month after, and the month after, and so on for the next 448 months. Indeed, removing the past payments shows just how arbitrary the verdict was: if the verdict had been delivered a month before, it would have presumably been \$1,311.87 more, and a month later \$1,311.87 less, *even though those payments were admittedly never made*. That is incomprehensible.

The facts of this case are very simple: if Dalton had done as the Millers contend he should have (and the jury apparently believed), he would have conveyed a loan modification to the Millers, who would have accepted it. Because he did not, their house is subject to a foreclosure judgment. The loss is either the judgment minus the amount of the

⁴ Indeed, in their explanation the Millers rely upon the trial court’s analysis, further illustrating the error: “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.” [Resp. Brief, at 24 *citing* the trial court at RP (McMaster) at 17:16-20 (emphasis added)] If the verdict was the “difference between a mortgage and a judgment,” as the court stated, it would have been defensible (setting aside use of the judgment amount versus the house value), but it wasn’t. *The amount of the mortgage the Millers “would have had” was never addressed in the verdict; indeed no forward-looking mortgage was addressed in the verdict.*

modified mortgage the Millers *would have had*, or it is the value of equity in the house if they ultimately lose it to foreclosure. The jury awarded neither, and therefore the verdict cannot stand.

B. The Jury Verdict Was the Result of the Jury’s Passion, Stoked by Inadmissible Testimony of Sympathetic Witnesses With No Admissible Evidence to Offer

And the source of the error is obvious: the Miller daughters’ testimony. Interestingly, the Millers’ argument in support of the inadmissible evidence was that the court admitted similar evidence of the Miller daughters’ mother, Leticia Miller. [Resp. Brief at 29 (“the testimony of the daughters was no more emotional than the testimony of Leticia on the same subject.”)] Setting aside the fact that those portions of Leticia’s testimony should have been excluded also, the fact is that the Millers only further undermine their position in conceding the daughters’ testimony was cumulative. Instead of stopping the tears and emotion with someone who ostensibly knew about the attempts to obtain a loan modification and presumably had some say in whether to accept it, the court also allowed *two* young women to provide emotional testimony with none of those marks of relevance. When, apparently, even the Millers admit that the testimony was duplicative.

The Millers also do not address the most telling part of this “relevant” testimony—nobody asked Steve Miller if his children loved the

house, or if that would have influenced his decision to accept a loan modification.⁵ The Millers' daughters just testified about how hard life was in their old house, and how much they loved the new house the Millers could not afford, with emotion and crying, and nobody ever tied it in to the fact of the case it was ostensibly admitted to bolster. And that tells the story—the Miller daughters' testimony was never admitted to prove a relevant fact. It was admitted, pure and simple, to engender sympathy. And that strategy appears to have worked wondrously, but to the severe detriment of justice.

While the Millers attempt to distinguish *Trevino v. Gates*, 99 F.3d 911, 1996 U.S. App. LEXIS 28299 (9th Cir. 1996),⁶ they do not dispute the two operative facts that dictated exclusion of the testimony: (1) the child did not know about the facts of the underlying tort; and (2) a child's testimony of that nature is necessarily emotional. Both facts are equally true here, and in that case emotional distress *was* an issue in the case, making the *Trevino* testimony arguably more relevant. The Millers also never address the *Trevino* analysis that the testimony could have come in

⁵ This is not a merely theoretical discussion, either. As every parent knows, the fact that a child wants something has to be balanced against adult decisions, like whether you can afford that something.

⁶ The same is true of *Grimes v. Emp'rs Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 610 (D. Alaska 1977)—while the facts of that case are certainly somewhat different than those at bar, it presents another example of exclusion of emotional evidence involving children where there was little probative value.

through other means—like Leticia Miller, who the Millers admit presented the same testimony. *See also Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 463, 746 P.2d 285 (1987) (“The availability of other means of proof is an appropriate factor for consideration in deciding whether to exclude evidence on grounds of unfair prejudice.”)

The testimony is one part of the equation, but interestingly the Millers did not believe it was possible to defend counsel’s closing argument, talking about making a family homeless for the holidays. So they just ignored the point. Not only was the argument untrue (the foreclosure is still stayed by order of the bankruptcy court to this day), it was the kind of argument that crosses the line between advocacy and playing on the emotions of the jury. Nowhere in the Respondent’s Brief is the closing *even mentioned*, and nowhere do the Millers even contend that those remarks were appropriate.

Yet the only case the Millers posit in earnest to support their position (which does not involve a child, or emotional testimony, at all) makes this very point. *Hayes v. Wieber Ent., Inc.*, 105 Wn.App. 611, 20 P.3d 496 (2001). In *Hayes* the court noted that “The evidence was relevant **and not used (argued) unfairly.**” [Resp. Brief at 32 *citing Hayes, supra*, 105 Wn.App. at 618 (emphasis added).] The Millers do not dispute that after admission of the evidence it was argued entirely

improperly, with statements in closing like the Millers “would have enjoyed the Christmas holidays in [their] home today without worrying about it being sold and [them] being homeless.” (RP, Vol. IX at 1122:11-17).

Accordingly, the record establishes that the evidence was emotional, the parties agree it was cumulative, the testimony had little probative value, and the Millers concede in silence it was improperly used. If that does not require reversal, no record will.

C. Allowing Testimony of the Judgment as Damages, the Court Compounded the Error by Refusing to Allow Dalton to Show that the Millers had Contributed to their Own Situation, Both Before and After the Loan Modification Offer

Other than name-calling, like complaining that the argument is “specious” and “makes no sense,” the Millers do nothing to support the trial court’s decision to refuse to instruct on issues the jury heard substantial evidence on. Indeed, the Millers cite a multitude of cases offering the principle that mitigation is a jury question because it rests on the reasonableness of the conduct—all true, which illustrates Dalton’s point. The judge never gave the jury the chance to decide whether the conduct was reasonable or not.

1. The contributory fault instruction should have been given because there was ample evidence that the Millers contributed to the judgment and amount thereof.

There was ample evidence that the Millers could have avoided the foreclosure process, from failing to make any payments to using the refinance money to buy a truck, to having the chance to pay back the total arrearages with a stock purchase with substantial realized gains, but did none of those things. One example was the fact that the Millers failed to make the payments from the time they allegedly had the modification they wanted until the time they first met Dalton. The expert calculated that if they would have done so, the September, 2014 judgment would have been \$45,000 less. But the jury was not allowed to consider the Millers behavior in its verdict, because the court refused to provide an instruction.

This failure was exacerbated by the fact that the judge allowed the jury to consider the judgment itself as the damage. The Millers had the choice of continuing to make payments during the pendency of the litigation (indeed, they testified that they could make the \$1,311 payment plus taxes and insurance) but did not do so. Indeed, the Millers were the ones who did not make the mortgage payments, leading to the default and foreclosure proceedings in the first instance. But none of this evidence amounted to anything without an instruction that Dalton could argue at closing.

2. The mitigation instruction should have been given because there was evidence in the record, and excluded evidence, providing sufficient support for the jury to find a failure to mitigate

After the alleged error (passing on the offer of a loan modification), there is no question that the Millers had opportunities to mitigate their damage by taking reasonable steps. The court refused to allow testimony of one loan modification example (RP, Vol. VIII at 1055:13-20), but some of the testimony was later admitted (RP, Vol. VIII at 1056:2-13) to illustrate the potential for the Millers to mitigate their damages. If they lost loan modification option one, but could have taken loan modification option two, even if it cost more money, then they cannot claim the entirety of the harm of not having a loan modification as damages.

Indeed, the law set forth in Respondent's Brief only illustrates the point. The Millers provide a litany of cases discussing the factual inquiry necessary to determine whether a plaintiff acted reasonably under the circumstances for purposes of mitigation. That is indeed the law—mitigation is a fact-intensive inquiry made by the jury. If the jury had found no failure to mitigate, there would be little to discuss on appeal. But the problem was that the jury was never allowed to reach that inquiry, and

there was more than enough evidence to allow the instructions proffered by Dalton.

III.

**THE TRIAL COURT PROPERLY DISMISSED
EMOTIONAL DISTRESS DAMAGE CLAIMS
BECAUSE THE MILLERS CANNOT POSSIBLY
FIT IN THE NARROW EXCEPTIONS TO THE RULE
BARRING SUCH DAMAGES**

The Millers cannot reverse the trial court's ruling that emotional distress damages are unavailable in this case because emotional distress damages are generally not compensable in legal malpractice actions, and the Millers' case fits under no recognized exception. The law is clear in Washington that "simple malpractice resulting in pecuniary loss that causes emotional upset does not support emotional distress damages." *Schmidt v. Coogan*, 181 Wn.2d 661, 671, 335 P.3d 424 (2014). Indeed, there are only two limited circumstances in which an exception can be considered: 1) the sensitive or personal nature of the representation; or 2) particularly egregious attorney conduct causing great damages. *Schmidt, supra*, 181 Wn.2d at 671, 674. No Washington court has ever affirmed an

emotional distress damage award in these circumstances,⁷ and this case is hardly egregious enough to be the first.⁸

A. The Threatened or Actual Loss of a House is not the Type of Deeply Personal Representation That Gives Rise to Emotional Distress Claims, as Numerous Courts Around the Country Have Held.

This case is a garden-variety legal malpractice case, and not the kind that is considered for emotional distress damages. The Millers argue “[t]he loss of one’s family home... would most certainly result in severe emotional distress to every member of the family.” [Resp. Brief at 43.] Yet numerous jurisdictions have explicitly rejected this very claim by holding that the threatened or actual loss of a home does not qualify as the kind of deeply personal injury that supports a claim for emotional distress damages in a legal malpractice case. *See Vincent v. DeVries*, 72 A.3d 886, 895-96 (2013).

For example, in *Vincent v. Devries*, 193 Vt. 574, 72 A.3d 886 (2013)—which *Schmidt* relied upon—the Vermont Supreme court held

⁷ *Schmidt, supra*, 181 Wn.2d at 671 (opening the door to emotional distress damages in Washington legal malpractice cases [noting that “no Washington case has settled whether emotional distress damages are available in a legal malpractice action”] but holding that the attorney’s conduct was egregious and the subject matter of the litigation was not particularly sensitive); *see also Munoz Munoz v. Bean*, 2016 Wn. App. LEXIS 374, 2016 WL 885043 at *24 (affirming summary judgment dismissal of emotional distress claims); *Arden v. Forsberg & Umlauf, PS*, 189 Wn.2d 315, 331 n. 7, 402 P.3d 245 (2017) (noting that emotional distress damages under a legal malpractice theory were unavailable under *Schmidt v. Coogan*, 181 Wn.2d 661, 335 P.3d 424 (2014) (plurality opinion))

⁸ Dalton agrees that the standard of review for summary dismissal of emotional distress claims is de novo. *Haubry v. Snow*, 106 Wn. App. 666, 674, 678-79, 31 P.3d 1186 (2001).

that the threatened loss of a home was not sufficiently deeply personal enough to support a legal malpractice claim. *Vincent*, 72 A.3d at 897. In *Vincent*, an 82-year old man faced the possible loss of his house after his attorney's alleged negligence. *Id.* at 889. Although the elderly man avoided the house loss through settlement, a jury awarded the man \$80,000 in emotional distress damages in a subsequent malpractice suit. *Id.* at 890. The Vermont Supreme Court reversed, relying on numerous jurisdictions that had explicitly denied emotional distress damages in legal malpractice cases for the threatened or actual loss of a house. *Id.* at 895-97 (citing and discussing *Garland v. Roy*, 2009 ME 86, ¶¶ 24-27, 976 A.2d 940 (Maine 2009) (holding that "ownership interest in land is economic, and not personal"); *Crone v. Nestor*, No. 09-0231, 2010 Iowa App. LEXIS 867 (Iowa Ct. App. 2010) (denying emotional distress damages in legal malpractice case that resulted in the foreclosure of a house); *Richards v. Cousins*, 550 So. 2d 1273, 1274 (La. Ct. App. 1989) (denying emotional distress damages after the loss of a house because "Plaintiffs' losses were strictly pecuniary.")). Although the Vermont Supreme Court recognized the anxiety and stress associated with the potential loss, it also recognized the extremely high threshold for emotional distress damages in malpractice cases:

We do not mean to suggest that the anxiety associated with the threatened loss of one's home cannot be profound. But in contrast to the loss of liberty or one's child — very significant losses for which there may be no adequate measure of pecuniary damages, and in connection with which serious emotional distress can be readily expected — what plaintiff ultimately lost in this case was money. We consider plaintiff's losses in this case to be economic, and reverse the trial court's award of emotional distress damages to plaintiff.

Id. at 897. Indeed, it even noted that “[i]n many ways, this case is less compelling than the loss-of-home cases cited above; plaintiff here did not lose his home but, rather, faced a threatened loss of his home which he ultimately avoided by settling the case.” *Id.* at 897. The court concluded by holding that the pecuniary loss of a house did support emotional distress damages in legal malpractice cases. *Id.*

This case is indistinguishable from *Vincent*, *Garland*, *Crone*, and *Richards*. Similar to the plaintiffs in those cases, the Millers faced the potential of losing a house due to alleged malpractice. [RP 682 – RP 685.] Even more, like in *Vincent*, the Millers faced the less-compelling *threat* of losing a house, as opposed to the actual loss of a house. Like the plaintiffs in those cases, the Millers alleged that their emotional distress solely derived from the pecuniary threatened loss of a house. They failed to provide any evidence or argument showing how the loss of the house was more than pecuniary. It is well established that such pecuniary loss does

not give rise to emotional distress damages in legal malpractice cases, and this court should not reverse the trend here.

The Millers rely on *Bloor v. Fritz*, 143 Wn.App. 718, 744-45, 180 P.3d 805, 820 (2008), in support, but *Bloor* is entirely inapposite for numerous reasons: (1) it is not a legal malpractice case and does not apply that standard to the evidence, (2) the court relied on more than just the loss of a house in affirming emotional distress damages, and (3) the underlying facts forced the plaintiffs into an immediate and dangerous situation—all of which the Millers neglected to mention. In *Bloor*, the sellers chose not to inform buyers that former tenants had cooked meth in the house. *Bloor*, 143 Wn.App. at 725-726. Once the buyers learned of the house's previous drug history and notified the county health department, the health department instructed the buyers to leave immediately, without retrieving their personal belongings for fear of cross-contamination. *Id.* at 726. The health department then ordered the buyers to pay for remediation, and further instructed that entry of the house would give rise to criminal liability. *Id.* The buyers were forced to repurchase clothing, bedding, furniture and other necessities. *Id.* The buyers also suffered physically; the husband experienced depression and the wife suffered from anxiety and panic attacks that resulted in a trip to the emergency room after believing she experienced a heart attack. *Id.* at 744. The court reasoned

that the buyers experienced emotional distress and anxiety “due to the loss of their home, *personal effects, and keepsakes*[,]” (*id.* at 726 (emphasis added)), in addition to their *physical afflictions*. Nothing of the sort is present here in this legal malpractice case, so *Bloor* is inapplicable.

B. Dalton’s Conduct Was not Egregious in Any Way, and Certainly not to the Level Required by the Cases.

The Millers also cannot fit within the exception requiring egregious conduct and substantial harm. The *Schmidt* decision resulted in Washington’s adoption “of the national trend of allowing emotional distress damages when the attorney’s actions are particularly egregious and the harm is both great and foreseeable.” *Schmidt, supra*, 181 Wn.2d at 674 (discussing a case where the loss was the client’s liberty). Here, the damages are not great comparatively as they are entirely monetary, and the conduct does not approach the level of egregiousness required. Indeed, never has a case in Washington met that standard.

The vast majority of jurisdictions have stringently interpreted “particularly egregious conduct” as a very high bar. *See Vincent v.*

DeVries, 72 A.3d 886, 2013 VT 34 (2013).⁹ Those jurisdictions show that “particularly egregious” conduct must be willful, wanton, malicious, extreme, outrageous, or intentional. *See, e.g., Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 561-62 (Minn. 1996)

⁹ *Citing Boros v. Baxley*, 621 So. 2d 240, 244 (Ala. 1993) (“There can be no recovery for emotional distress, where [the legal malpractice] does not involve any affirmative wrongdoing but merely neglect of duty, and the client may not recover for mental anguish where the contract which was breached, was not predominately personal in nature” (quotations omitted)); *Reed v. Mitchell & Timbanard, P.C.*, 183 Ariz. 313, 903 P.2d 621, 626 (Ariz. Ct. App. Div. 1995) (“We hold that simple legal malpractice resulting in pecuniary loss which in turn causes emotional upset, even with physical symptoms, will not support a claim for damages for emotional distress.”); *Aller v. Law Office of Carole C. Schriefer, P.C.*, 140 P.3d 23, 26-27 (Colo. App. 2005) (“emotional distress or other non-economic damages resulting solely from pecuniary loss are not recoverable in a legal malpractice action based on negligence” (quotations omitted)); *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 561-62 (Minn. 1996) (emotional distress damage award improper where lawyer’s conduct was merely negligent and not willful, wanton or malicious); *Selsnick v. Horton*, 96 Nev. 944, 620 P.2d 1256, 1257 (Nev. 1980) (damages for emotional distress not available in legal malpractice suit premised upon ordinary negligence, with no allegation of extreme and outrageous conduct); *Akutagawa v. Laflin, Pick & Heer, P.A.*, 2005-NMCA-132, ¶ 25, 138 N.M. 774, 126 P.3d 1138 (“[E]motional distress damages alone are not compensable in a legal malpractice case where, as here, there are no allegations of intentional infliction of emotional distress or some heightened level of culpability resulting in severe distress such that no reasonable person could be expected to endure.”); *Gautam v. De Luca*, 215 N.J. Super. 388, 521 A.2d 1343, 1348 (N.J. Super. Ct. App. Div. 1987) (“[E]motional distress damages should not be awarded in legal malpractice cases at least in the absence of egregious or extraordinary circumstances.”); *Dombrowski v. Bulson*, 19 N.Y.3d 347, 971 N.E.2d 338, 340, 340-41, 948 N.Y.S.2d 208 (N.Y. 2012) (finding “no compelling reason to depart from the established rule limiting recovery in legal malpractice actions to pecuniary damages” even where client alleged wrongful loss of liberty as result of criminal defense lawyer’s negligence); *Hilt v. Bernstein*, 75 Ore. App. 502, 707 P.2d 88, 94-96 (Or. Ct. App. 1985) (plaintiff not entitled to emotional distress damages in legal malpractice claim where she was not alleging intentional or reckless conduct, and where legal interest that was compromised — financial loss — did not rise to level of claims such as unlawful disinterment of remains or infringement of custody of child, for which emotional distress damages are allowed even without physical injury); *Douglas*, 987 S.W.2d at 885 (“[W]hen a plaintiff’s mental anguish is a consequence of economic losses caused by an attorney’s negligence, the plaintiff may not recover damages for that mental anguish.”); *see also* 3 R. Mallen & J. Smith, *Legal Malpractice* § 21:11 (2013 ed.) (“With some jurisdictional exceptions, the rule is that damages for emotional injuries are not recoverable if they are a *consequence* of other damages caused by the attorney’s negligence or a fiduciary breach that was not an intentional tort.”).

(emotional distress damages available only where attorney conduct is willful, wanton, or malicious, which did not include attorney's failure to notify client of adverse summary judgment and failure to timely appeal); *Akutagawa v. Laflin, Pick & Heer, P.A.*, 2005-NMCA-132, Para. 25, 138 N.M. 774, 126 P.3d 1138 (damages only available if allegations of intentional infliction of emotional distress); *Hilt v. Bernstein*, 75 Or. App. 502, 707 P.2d 88, 94-96 (1985) (damages only available if attorney conduct is intentional or reckless).

Here, the Millers seek emotional distress damages for conduct that amounts to no more than alleged negligence. There were no claims or findings of fraud or intentional misconduct. The Millers argue that Dalton's conduct was egregious because of an alleged failure to communicate a settlement, and for charging increased fees as the litigation increased in size and scope. [Resp. Brief at 39-43.] As to the former, while the passing on of the offer was the most-disputed portion of the trial, the record shows that Dalton communicated the settlement offer with Steve Miller by reading it to him over the phone, and then informing Steve Miller that an updated one would be forthcoming. [CP 36-39.] Yet even if Dalton had negligently failed to follow up on the terms of the settlement and communicate those terms to the Millers, the failure to pass on important information was exactly the kind of allegation rejected in

Akutagawa, even when combined with a blown deadline in that case. This kind of conduct is garden-variety malpractice, particularly where a jury is required to make a determination of credibility in a heavily disputed factual scenario. Putting emotional distress damages on such facts would soon swallow the rule via exception, which is why no court (including this trial court) known to Dalton has ever done it.

Regarding Dalton's request for increased fees, it is not unreasonable for an attorney to request additional monies to cover unexpected costs as litigation progresses. First, very little additional money was paid, so the allegations are more about what Dalton allegedly *tried* to do as opposed to what he did. The jury awarded a very small verdict on this issue, certainly not the "great" damage required by *Schmidt* when combined with egregious behavior. More importantly, it is not as though Dalton is accused of stealing money, or not paying the experts, or any fraudulent conduct. There was not even a fraud claim presented to the jury, much less decided. Even if Dalton could have drafted a contingency fee agreement more clearly, or better communicated the need for increased fees to continue with litigation, any alleged negligent fee increases or demands were just that: mere negligence. The trial court should be affirmed.

IV.

THE TRIAL COURT PROPERLY DISMISSED THE CPA CLAIM AS GIVEN THE INAPPLICABILITY OF THE CPA TO PRIVATE CONTRACTUAL DISPUTE BETWEEN AN ATTORNEY AND CLIENT INVOLVING NOBODY ELSE

The Millers’ argument that the trial court improperly dismissed the Consumer Protection Act (“CPA”) falls short because, as the trial court correctly held, Dalton’s acts did not affect the public interest, thereby failing to satisfy a basic element for a CPA claim.

To succeed on a CPA claim against Dalton, the Millers must prove by a preponderance of evidence: (1) an unfair or deceptive act or practice¹⁰ (2) occurring in trade or commerce (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.¹¹ *Rhodes v. Rains*, 195 Wn. App. 235, 242, 381 P.3d 58 (2016) (citing *Hangman*

¹⁰ Because the absence of the public interest element is clear, Dalton need not spend much time on the other elements, but much, if not most, of the conduct alleged is not subject to the CPA *at all*. An attorney’s conduct related to the gathering and analysis of facts, the timeliness of filings and settlement negotiations, and obtaining certain judgments are exempt. *Short v. Demopolis*, 103 Wn.2d 52, 61-62, 691 P.2d 163 (1984) (“Since these claims are directed to the competence and strategy employed by plaintiffs’ lawyers, they amount to allegations of negligence and malpractice and are exempt from the CPA.”); *see also Eriks v. Denver*, 118 Wn.2d 451, 463-64, 824 P.2d 1207 (1992) (“The provision of legal services does not generally fall within the definition of ‘trade or commerce’ [necessary for a CPA claim], except as those services relate to the ‘entrepreneurial aspects’ of the practice of law.”); *Quimby v. Fine*, 45 Wn. App. 175, 180, 724 P.2d 403 (1986). Here, the only “harm” briefed under the causation section is the lost settlement opportunity—which is exempt from CPA analysis. A plaintiff must prove that an attorney’s services related to the entrepreneurial aspects of law by showing that the attorney engaged in certain conduct for the purpose of increasing profits or gaining clients. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

¹¹ Because the trial court summarily dismissed the Miller’s CPA claims (RP 1086-RP 1089), the standard of review is *de novo*. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784–85, 719 P.2d 531, 535 (1986)).

There is no evidence that the dispute between the Millers and Dalton is anything more than a private dispute between parties. Private disputes do not satisfy the ‘public interest’ element of a CPA claim. *See Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 790, 719 P.2d 531 (1986) (“Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest.”) (citing and relying on *Lightfoot v. MacDonald*, 86 Wn.2d 331, 338-39, 544 P.2d 88 (1976) (“Since the appellant has not shown that an attorney’s breach of contract causing damage to no one but his client has a sufficient impact on the public to qualify it as one of those acts or practices which are prohibited under RCW 19.86, we conclude that the trial court correctly dismissed the action.”); *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984) (attorney-client)). “This is often the case with legal services.” *Behnke v. Ahrens*, 172 Wn. App. 281, 293, 294 P.3d 729 (2012).

“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.” *Eifler v. Shurgard Capital Management Corp.*, 71

Wn. App. 684, 861 P.2d 1071 (2003) (quoting *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 790 (1986); *Travis v. Washington Horse Breeders Ass'n*, 111 Wn.2d 396, 407, 759 P.2d 418 (1988)). The Millers neither produced evidence of a pattern of conduct, nor presented any evidence of potential for repetition with other members of the public. Indeed, the brief simply suggests some conduct by Dalton could be repeated; while theoretically true, such speculation would turn every private dispute into a CPA claim.

By contrast, the cases that have found potential attorney liability for CPA claims revolve around advertising to the general public and the attorney's initial solicitation, because that circumstance is far more likely to implicate the potential for repetition because other people are solicited. *Hangman Ridge Training Stables*, 105 Wn.2d at 794; *see also McRae v. Bolstad*, 101 Wn.2d 161, 166, 676 P.2d 496 (1984) (noting that there was a potential for repetition based on the defendant's numerous advertisements placed before the general public). "[I]t is the *likelihood* that additional plaintiffs *have been or will be injured in exactly the same fashion* that changes a factual pattern from a private dispute to one that affects the public interest." *Hangman Ridge*, 105 Wn.2d at 791 (emphasis added); *McRae*, 101 Wn.2d at 166 (same). "There must be shown a real and substantial potential for repetition, as opposed to a hypothetical

possibility of an isolated unfair or deceptive act's being repeated.”

Michael v. Mosquera-Lacy, 165 Wn.2d 595, 604-05, 200 P.3d 695 (2009)

(citation and internal quotation marks omitted) (affirming dismissal of a CPA claim given the lack of evidence that the defendant advertised to the public in general or solicited the plaintiff in particular to be a patient).

Here, the Millers never offered any evidence other than a hypothetical possibility that Miller could follow a similar course of conduct with other clients, so the trial court correctly found that “there is no evidence that Dalton advertised his services. There is no indication that he solicited Mr. Miller as a client. There is no indication that he solicited the public in general as holding himself out as any type of authority or expert in HAMP modifications.” [RP 1088.] In the four sentences the Millers devoted to briefing the public interest prong on appeal, the Millers fail to cite to any evidence that contradicts the trial court's findings. [Resp. Brief at 49.] Nothing the Millers discuss establishes the factual predicate for their claims, let alone satisfies their burden of showing by a preponderance of evidence, that the dispute is anything more than a private one between two parties. The trial court should be affirmed.

V.

CONCLUSION

The court has no viable rationale for jury's verdict before it, and not even a request for a change in existing law. For that reason alone, the case should be set for a new trial, or the verdict subject to remittitur to \$140,000. But the court has many other reasons to overturn the verdict, starting with the admission of inappropriate emotional testimony from the Millers' daughters, who admittedly knew nothing of the relevant facts and for whom the disguised reason to allow their testimony was among the most tenuous imaginable. The court then compounded the error by refusing to instruct the jury on Dalton's arguments, and even excluding some of that evidence on grounds of relevance. For the primary reason that the verdict is impossible, or any of them, the judgment cannot stand.

Dalton respectfully requests that the judgment be vacated, and the court enter remittitur or order a new trial.

DATED: November 16, 2017

KLINEDINST PC

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PROOF OF SERVICE

I, Sharon K. Hendricks, certify that on November 16, 2017, I filed the foregoing APPELLANT'S REPLY / RESPONSE TO CROSS-APPELLANT'S BRIEF with the Clerk of the Court for the Washington State Court of Appeals, Division III, by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Sharon K. Hendricks _____
Sharon K. Hendricks, Legal Assistant

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