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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,

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-Appellants / Cross-Appellees.

CROSS-APPELLANT MILLERS' REPLY BRIEF

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I. INTRODUCTION

Attorney Dalton argues that emotional distress damages are not recoverable in this case because the case did not meet the standards set forth in *Schmidt v. Coogan*, 181 Wn.2d 661, 335 P.3d 424 (2014), requiring egregious conduct or a “sensitive” attorney client relationship. He also argues that the Consumer Protection Claim must fail because the attorney’s conduct did not meet the public interest requirement. The Millers were fighting to keep their home out of foreclosure. Attorney Dalton knew exactly what was at stake and the emotional and economic impact that the Millers would suffer if they lost their home. Furthermore, knowing well the family’s concerns, Attorney Dalton failed to convey to them an offer of settlement that would have fully resolved the case because he thought he could make more money in fees by continuing the litigation. The trial judge should have permitted the jury to determine if the relationship was “sensitive” and Attorney Dalton’s conduct was sufficiently egregious to entitle the Millers to emotional distress damages.

In addition, Attorney Dalton improperly manipulated his clients in an attempt to have them pay him money that he was not owed or entitled to. He attempted to have his clients sign a usurious loan agreement to raise money to pay himself and his co-counsel without fully disclosing to

the Millers their rights. He pressured the Millers to pay him money that was not due with threats of refusing to continue in the litigation and by using the retained expert witness as a liaison to set up a loan. Attorney Dalton's acts are clearly capable of repetition and would directly impact the public interest. In fact, the attempt to have his clients sign a usurious loan agreement is a *per se* public interest violation. The trial court should have ruled as a matter of law that the CPA applies or, at the very least, the matter should have been submitted to the jury.

II. ARGUMENT ON EMOTIONAL DISTRESS DAMAGES

The central question related to the Millers' right to seek emotional distress damages **involves a factual dispute** that should have been submitted to the jury for determination. Instead, the trial court ruled as a matter of law that the facts did not support a claim for emotional distress damages. The trial judge decided that Attorney Dalton's relationship with Plaintiffs did not involve the "sensitive" relationship that would permit emotional damages. The trial court also decided that Attorney Dalton's malpractice was not sufficiently "egregious" to support a claim of emotional distress. These are factual issues which should have been presented to the jury for resolution under proper instructions. The Court should reverse the trial court's rulings and remand the matter to the trial

court to allow the jury to make the necessary factual determinations related to emotional distress damages.

A. THE TRIAL COURT ERRED IN CONCLUDING THAT THE RELATIONSHIP BETWEEN THE CLIENT AND ATTORNEY WAS NOT SUFFICIENTLY SENSITIVE TO PERMIT AN AWARD OF EMOTIONAL DISTRESS DAMAGES

Attorney Dalton argues that the Millers cannot prevail on this claim because “emotional distress damages are generally not compensable in legal malpractice actions and the Millers’ case fits under no recognized exception.” The only recognized exceptions are contained in *Schmidt v. Coogan*, 181 Wn.2d 661, 335 P.3d 424 (2014). The outcome of this case depends on a full consideration of the scope of the “exceptions” in *Schmidt*.

Schmidt was a slip and fall case where the attorney failed to timely file the complaint. The trial court denied the client’s claim for emotional distress damages. On appeal, the Supreme Court then addressed the emotional distress damages claim and stated:

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. However, **simple malpractice** resulting in pecuniary loss that causes emotional upset does not support emotional distress damages. Here, the nature of representation was not sensitive nor was Coogan's conduct particularly egregious. (Emphasis added.)

Schmidt v. Coogan, 181 Wn.2d 661, 671, 335 P.3d 424 (2014). The *Schmidt* court based its emotional distress damages rule on the concept that courts are cautious in awarding damages for emotional distress where there is no actual physical harm. However, the majority readily indicated that reluctance to award emotional distress damages quickly disappears where an intentional tort is committed. *Id.* at 671–72. Justice Charles Wiggins, writing for the majority of the Court, held that such damages should not be categorically excluded but could be permitted if they were reasonably foreseeable. *Id.* The opinion relied primarily on *Price v. State*, 114 Wn.App. 65, 71–74, 57 P.3d 639 (2002) in defining the relationship necessary to trigger an award of emotional distress damages. *Id.* To understand Justice Wiggins’ analysis, a careful review of the *Price* opinion may be helpful.

In *Price*, adoptive parents and their natural daughter sued DSHS for its failure to disclose information regarding their adopted son. In determining if emotional distress damages without a physical injury or objective symptomology would be allowed, the court reviewed other Washington cases including *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983), a wrongful birth case. In answering a question certified by the federal District Court, *Harbeson* determined that a cause of action existed in Washington for a child born with birth defects. In

ruling that the parents could recover emotional distress damages, it compared this claim to that of a statutory parent/child injury claim under RCW 4.24.010.

The *Price* court also cited to *Berger v. Sonneland*, 144 Wn.2d 91, 94, 26 P.3d 257, 259 (2001), where the plaintiff's doctor disclosed her confidential medical information to her former spouse (who was also a physician) resulting in her former spouse filing a child custody action against her. In a malpractice action, the *Berger* court held that the patient could recover emotional distress damages without proving objectively verifiable symptoms since she did not claim negligent infliction of emotional distress and her physician cited no authority for his proposition that the objective symptoms requirement should be extended to other causes of action. 144 Wn.2d at 113.

Price also relied on *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 2 P.3d 1029 (2000), *rev. denied* 142 Wn.2d 1017, 20 P.3d 945 (2001), a bad faith claim brought against the insurer for failing to disclose the existence of uninsured motorist coverage and the improper handling of plaintiff's claim, including making low settlement offers, performing an unreasonable investigation of the claim and an unreasonable delay in payment. The *Anderson* court held that the insured would be entitled to recovery of emotional distress damages "because bad faith is a tort" and

she alleged that she and her husband suffered emotional distress due to State Farm's bad faith failure to disclose a pertinent coverage and the resulting delay in obtaining coverage. 101 Wn.App. at 333. The Millers' relationship with Attorney Dalton fits squarely within the parameters of *Price* and the cases cited therein. Their case is at least as compelling as the claims for wrongful birth, unauthorized disclosure of medical information and insurance company's bad faith in dealing with its insured.

Attorney Dalton relies on a Vermont case for his argument that the loss of a home “does not qualify as the kind of deeply personal injury that supports a claim for emotional distress.” His reliance on *Vincent v. DeVries*, 72 A.3d 886, 894–95 (Vt. 2013) is misplaced. The *Schmidt* majority referred to *Vincent* in passing.¹ In fact, the dissent noted that *Vincent* was distinguishable:

The lead opinion also characterizes Schmidt's harm as primarily pecuniary, though her testimony at trial suggested that her personal injury has materially affected every aspect of her life. The authorities the lead opinion cites to draw a dividing line between negligence that foreseeably causes emotional distress and negligence that produces only economic losses do not support cutting off Schmidt's emotional distress damages. Lead opinion at 431–32 (citing *Vincent v. DeVries*, 2013 VT 34, 193 Vt. 574, 72 A.3d 886, 894–95 (2013); Restatement (Third) of the Law Governing Lawyers § 53 cmt. g (1998)). Rather, they speak

¹ The reference was: “Many jurisdictions do not allow emotional distress damages for legal malpractice unless there has been an intentional act, egregious conduct, or physical injury. See *Vincent v. DeVries*, 2013 VT 34, 193 Vt. 574, 72 A.3d 886, 894–95.” *Schmidt*, 181 Wn.2d at 673.

to *commercial* transactions or purely pecuniary losses. A personal injury involves much more. As the Court of Appeals recognized in *Price*, emotional distress damages are appropriate when negligence occurs in the context of a relationship preexisting the defendant's duty, i.e., within a special relationship. *Price*, 114 Wn.App. at 71, 57 P.3d 639. [Internal reference to record deleted]

Schmidt, 181 Wn.2d at 687-88.

Vincent involved the sale of a home by an 82-year-old man and his older sister for \$52,000. Before the sale closed the sister died and the plaintiff (Vincent) decided he did not want to go through with the sale. The buyers sued for specific performance. While Vincent had viable defenses to the lawsuit his lawyer failed to raise them. Vincent settled the underling claim by paying the buyers \$68,000 for the breach of contract and \$35,000 in attorney fees. Vincent then sued his former attorney for malpractice. *Vincent* at 576–77. At trial on the malpractice claim the jury returned a verdict of \$103,000 for economic losses resulting from the breach of contract and \$80,000 in emotional distress damages. The *Vincent* court adopted a different rule on emotional distress damages than did *Schmidt*. The *Vincent* court adopted a stricter standard when allowing emotional distress damages in an attorney malpractice case. *Vincent* limits emotional distress damages to cases involving loss of personal liberty and loss of custody of children. *Vincent*, 72 A.2d at 895. Therefore, *Vincent* held that the threatened loss of one's home was not “the kind of deeply

personal injury -- like a loss of liberty or separation from one's child -- that can support a claim for emotional distress damages in a legal malpractice case.” 72 A.3d at 895. *Vincent* is not dispositive on the damages issue.²

By contrast, the rule adopted by our Court in *Schmidt* was more expansive. The Court defined the exception thusly:

[W]e hold that emotional distress damages are available for attorney negligence when emotional distress is foreseeable due to the particularly egregious (or intentional) conduct of an attorney or the sensitive or personal nature of the representation.

Schmidt, 181 Wn.2d at 674. The Millers have raised a triable issue of fact regarding the sensitive nature of the relationship of the parties and the foreseeability of the emotional distress damages. The trial court erred in not submitting this issue to the jury.

B. ATTORNEY DALTON’S CONDUCT WAS SUFFICIENTLY EGREGIOUS TO WARRANT EMOTIONAL DISTRESS DAMAGES.

Attorney Dalton’s conduct was certainly egregious. At the very least, his conduct presented a jury question on egregiousness. It is the jury

² Interestingly, *Vincent* did conclude that where Vincent had to pay \$103,000 to stay in his home that was valued on the tax rolls at \$52,700 the jury verdict awarding him \$103,000 was reasonable **because it was what was required to restore plaintiff to the position he would have been in—living in his lifelong home—had defendant not committed malpractice.** “Moreover, although a settlement substantially out of sync with the actual market value of the property would not be objectively reasonable, a jury could reasonably conclude that the decision to pay a modest premium over market value in circumstances like this—to avoid the costs and risks of moving a vision-impaired octogenarian from his lifetime home in the final years of his life—was entirely reasonable.” 72 A.3d at 900. (Emphasis added.)

and not the trial court that should determine if the egregious action exception was proven. As the *Schmidt* court explained its holding:

We have quite clearly said that egregious action is one way of establishing a claim for emotional distress damages: “emotional distress damages are available for attorney negligence when emotional distress is foreseeable due to the particularly egregious (or intentional) conduct of an attorney or the sensitive or personal nature of the representation.” [Internal citation deleted] In other words, **egregious action is sufficient**, but not necessary. (Emphasis added)

Schmidt, 181 Wn.2d at 675. In the Millers’ case, at the very least, it is a jury question whether the nature of the representation or the egregiousness of Attorney Dalton’s conduct fits within the *Schmidt* holding. As Justice Stevens noted in her dissent in *Schmidt*:

Instead, the lead opinion places a new restriction on plaintiffs alleging legal malpractice: they must prove the attorney’s negligence was “particularly egregious.” Lead opinion at 429. “Egregious” means “[e]xtremely or remarkably bad.” Black’s Law Dictionary 629 (10th ed.2014). The lead opinion provides no additional guidance on how plaintiffs might show this. Yet, the lead opinion holds as a matter of law that Coogan’s actions were not egregious. Lead opinion at 431–32. Coogan failed to file a personal injury lawsuit against the correct defendant before the statute of limitations ran. *Schmidt* repeatedly inquired about the case, and Coogan ridiculed her for not trusting him. These actions look “remarkably bad” to me.

Schmidt, 181 Wn.2d at 687.

While in *Schmidt* the failure to file a case before the statute of limitations expires may not fit the majority’s view of egregious as a matter

of law, the Millers' case is much more compelling. Attorney Dalton's actions were not a mere mistake; they were intentional and outrageous. Knowing that his clients had fought for three years to obtain a settlement with the bank and after obtaining from the bank a settlement that was better than the Millers had sought, Attorney Dalton failed to communicate this offer to his clients. This act alone is sufficiently egregious to trigger emotional distress damages. There was sufficient evidence in the record that the jury could conclude that the failure to communicate the offer to his clients was intentional because Attorney Dalton believed he would make more money under his contingent fee agreement if the case did not settle. At the very least, failure to communicate the offer was egregious misconduct. In addition, Attorney Dalton committed a number of additional acts that the jury could reasonably decide were egregious. This included the following:

- 1) 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 fee agreement that included both the contingent fee and hourly fee agreement. (RP 299 – 302.)
- 2) 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.)

- 3) 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.) Knowing that co-counsel would only work on an hourly fee basis, Attorney Dalton tried to get the Millers to sign a new fee agreement that was an hourly fee plus contingent fee agreement.
- 4) In order to pay co-counsel and to pay him an hourly fee, Attorney Dalton insisted that the Millers sign a promissory note at 13% interest secured by other real estate owned by the Millers. The loan was usurious. Attorney Dalton represented to the Millers that the money was to pay experts when in fact it was to pay him and co-counsel. He even had the financial expert that he hired arrange to broker the loan with the Millers. (RP 313 – 17.) (Ex. 32.) Attorney Dalton conspired with co-counsel and the financial expert to get the Millers to sign a note they were not otherwise obligated to sign for the sole benefit of Attorney Dalton, co-counsel and the financial expert.
- 5) 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.) In fact, he implied that SunTrust would never settle and that the Millers should continue the litigation to collect what was justly owed to them.

A jury could easily find that these actions or any combination of them were egregious, entitling the Millers to emotional harm damages. This significant question of fact should have been decided by the jury at trial and not by the trial judge as a matter of law.

Attorney Dalton cites a number of cases from foreign jurisdictions that he claims set a very high bar for egregious conduct. He cites *Vincent*

and then in a footnote string cites a number of other cases, none of which stand for the proposition that the actions of Attorney Dalton in this case were not egregious conduct. *Vincent* did not address the egregious conduct issue. *Vincent* concluded that since the damages were pecuniary the client was not entitled to emotional distress damages. It assumed that the client must prove both the nature of the harm and the egregiousness of the conduct and the claim failed because the nature of the harm was insufficient. However, *Schmidt* makes it clear that the nature of the harm is a separate element from the egregiousness of the conduct and egregious conduct alone is sufficient to justify emotional distress damages. *Schmidt*, 181 Wn.2d at 675. *Vincent* is of no help in resolving the egregious conduct issue.

Attorney Dalton also argues that in some other foreign jurisdictions emotional distress damages are allowed only if the attorney's conduct is willful, wanton, malicious, extreme, outrageous or intentional citing *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 561-62 (Minn. 1996), *Akutagawa v. Laflin, Pick & Heer, P.A.*, 126 P.3d 1138 (N.M.App. 2005) and *Hilt v. Bernstein*, 707 P.2d 88 (Or.App. 1985), *rev. denied* 715 P.2d 92 (1986). The problem with this argument is that the law of these jurisdictions is not the law in

Washington as established by *Schmidt*. In Washington, the conduct need only be egregious, not willful, wanton or malicious.

Likewise, the footnoted string cite cases in Attorney Dalton's brief do not offer any helpful analysis about the conduct of Attorney Dalton in this case. These cases do not involve misconduct comparable to the misconduct of Attorney Dalton in this case. *Boros v. Baxley*, 621 So. 2d 240 (Ala. 1993) (an attorneys failure to timely file client's underlying fraudulent misrepresentation action); *Reed v. Mitchell & Timbanard, P.C.*, 903 P.2d 621 (Ariz. App. 1995) (an attorney's failure to adequately secure a promissory note); *Aller v. Law Office of Carole C. Schriefer, P.C.*, 140 P.3d 23 (Colo. App. 2005) (a case where a client disclosed personal and confidential information to attorney when attorney represented her in a matter involving the termination of a business. Later, attorney represented client's business associate in a lawsuit against plaintiff), *cert. denied* 2006 WL 1530184 (Colo. 2006); *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 559 (Minn. 1996)(A case where the attorneys did not timely appeal, nor did they notify client of an adverse summary judgment until the time for appeal had passed); *Selsnick v. Horton*, 620 P.2d 1256 (Nev. 1980) (attorney failed to prosecute an appeal of a summary judgment, allowed the entry of a dismissal without prejudice a claim against a party and gave poor

advice to a client regarding to release certain funds pursuant to a stipulation); *Akutagawa v. Laflin, Pick & Heer, P.A.*, 126 P.3d 1138 (N.M.App. 2005) (a case of negligent drafting of a complicated trust agreement); *Gautam v. De Luca*, 521 A.2d 1343 (N.J. Super. Ct. App. Div. 1987) (a case where the attorney was extremely dilatory in complying with the court's discovery orders and, after lengthy delays and repeated motions, plaintiffs' complaint was ultimately dismissed), *cert. denied* 532 A.2d 1107 (1987); *Hilt v. Bernstein*, 707 P.2d 88 (Or.App. 1985) (a case where the attorney represented both husband and wife in a dissolution and prepared and advised wife to sign a power of attorney which gave her husband the power to borrow money, using the house as collateral, and to obligate plaintiff on that loan; husband used the power of attorney to borrow money, ostensibly to remodel the house but converted the funds to his own use), *rev. denied* 715 P.2d 92 (1986); *Douglas v. Delp*, 987 S.W.2d 879 (Tex. 1999) (a case where the attorney was sued for mishandling of the settlement agreement and for failing to adequately prepare client for her testimony in the temporary injunction hearing). Not one of these cases addresses conduct that is at all similar to the egregious conduct at bar.

Attorney Dalton attempts to explain away his misconduct as mere negligence. His argument points up the problem. He claims he advised

the Millers of the settlement offer. The Millers absolutely deny this claim and suggest that he intentionally failed to advise them of the settlement offer to feather his own nest. The former may be pure negligence but the latter is egregious. The trial court should have submitted the issue to the jury for determination. Attorney Dalton passes off the intentional efforts to have his client sign a usurious promissory note for his own benefit as a reasonable request for additional money to cover unexpected costs as the litigation progressed. Attorney Dalton claims this conduct was not fraudulent. In fact, there was evidence that Attorney Dalton and his co-counsel and expert witness conspired to get the Millers to sign a note not needed to be signed in order to line their own pockets. The jury very well could find that the actions were fraudulent. **It is a jury question.** Attorney Dalton fails to address his other serious fiduciary breaches, all of which the jury could have easily concluded constitute egregious conduct. The trial court erred in failing to submit this issue to the jury. This Court should remand the case with instructions to have a damages only trial on the sole issue of emotional distress damages.

III. ARGUMENT ON THE CONSUMER PROTECTION ACT

The Washington State Consumer Protection Act (CPA), RCW Ch. 49.60, was adopted to protect consumers from unfair and deceptive

practices in trade or business. The CPA clearly applies to the legal profession when lawyers are acting in their proprietary or entrepreneurial functions. The only question in this case is whether the “affecting public interest” element of the CPA is satisfied.³ Attorney Dalton argues that this is a “private dispute” that does not impact the public interest. More precisely he is arguing that the “public impact” element of the CPA has not been met in this case. *Rhodes v. Rains*, 195 Wn. App. 235, 381 P.3d 58, 62 (2016).

The Millers contend that the public impact element is met *per se* based on Attorney Dalton’s attempts to have the Millers sign a usurious promissory note to pay him hourly fees that were never owed. They also contend that the cumulative wrongful actions of Attorney Dalton meet the public impact element of the CPA.

A. MILLERS HAVE *PER SE* ESTABLISHED THE PUBLIC IMPACT ELEMENT.

Attorney Dalton was desperate to raise capital to continue the litigation that he created by not advising the Millers of the bank’s favorable offer to settle. His fee agreement did not require the Millers to advance litigation costs. However, Attorney Dalton conspired with his co-

³ In a footnote, Attorney Dalton effectively concedes that the other elements of the CPA are not in serious dispute which include an unfair or deceptive act or practice; occurring in trade or commerce; injury to a person's business or

counsel and financial expert to have the Millers sign a secured loan that carried a usurious interest rate of 13 %. The effort to have the Millers sign a usurious interest rate loan is alone sufficient to meet the public interest test. This Court so held in *Cuevas v. Montoya*, 48 Wn.App. 871, 740 P.2d 858 (1987), wherein it stated at 878:

The public interest requirement may be satisfied **per se** by showing that a statute has been violated which contains a specific legislative declaration of public impact. *Hangman Ridge*, at 791, 719 P.2d 531. The usury statute, RCW 19.52.005, contains a declaration of policy which meets the per se public interest requirement:

RCW 19.52.005, 19.52.020, 19.52.030, 19.52.032, 19.52.034, and 19.52.036 are enacted in order to protect the residents of this state from debts bearing burdensome interest rates; and in order to better effect the policy of this state to use this state's policies and courts to govern the affairs of our residents and the state; and in recognition of the duty to protect our citizens from oppression generally.

(Emphasis added)

Attorney Dalton's attempt to obtain usurious interest from his client is a violation of the usury statutes and would "*per se*" establish the public interest element.

B. THE OVERALL CONDUCT OF ATTORNEY DALTON MEETS THE PUBLIC IMPACT ELEMENT.

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

When establishing the public interest element, the main focus is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion. This changes a factual pattern from a private dispute to one that affects the public interest. *Hangman Ridge*, 105 Wn.2d at 790. In this case, Attorney Dalton entered into an oral contingent fee agreement that provided he would pursue the case and would be paid 30 % of the recovery. He then attempted to modify the agreement by submitting to the Millers a written fee agreement that included the 30 % contingent fee and added an hourly fee component requiring the Millers to pay Attorney Dalton \$300 per hour in addition to the 30 % contingent fee. He attempted to have his clients advance costs in the litigation even though he had no agreement for advanced costs in his original fee agreement. He represented to his clients that advance costs were needed to pay expert witnesses when in fact the money was to pay him an hourly fee that was never agreed to and to pay co-counsel an hourly fee even though Attorney Dalton never disclosed to the Millers that he had hired co-counsel. He attempted to have the Millers sign a secured usurious interest rate loan to pay his hourly fees by threatening the Millers that he may not be able to continue in the litigation or that the results of the case would be far less than they were entitled to unless they advanced these fees. These “bait and switch” tactics are all clearly capable of repetition.

Attorney Dalton argues that his entrepreneurial acts are not capable of repetition, although he does not explain why. He cites *McRae v. Bolstad*, 101 Wn.2d 161, 676 P.2d 496 (1984) to support his conclusory argument. In *McRae*, a realtor misrepresented the condition of the property related to runoff water that impacted the property. The CPA question on appeal was whether the misrepresentation met the public interest test. The trial court determined that it did and the Court of Appeals agreed. The *McRae* case involved a single misrepresentation by the realtor that was published on a multiple listing website. 101 Wn.2d at 166.

In contrast, Attorney Dalton made multiple misrepresentations to the Millers regarding their obligations under the fee agreement all of which are easily capable of repetition, including:

1. He misrepresented his experience in the area of HAMP cases;
2. He continually misrepresented to the Millers the need to continue the litigation when he knew that the bank had made Millers an acceptable offer to settle that would have ended the litigation;
3. He failed to disclose to the Millers that he had committed malpractice by not advising them of the settlement offer and by failing to keep the offer open thereby continuing the litigation;
4. He misrepresented Millers' obligations under the oral 70/30 contingent fee agreement;

5. He attempted to change the fee agreement without advising the Millers that they were not under any obligation to modify their fee agreement;
6. He misrepresented that he could unilaterally increase the contingent fee amount;
7. He misrepresented that Millers were obligated to provide him additional funds to “hire experts” when in fact the money he was seeking was to pay him and his co-counsel for hourly fees never agreed to by the Millers;
8. He applied a retainer fee ostensibly for costs to his hourly charges when he had agreed to handle the case on a contingent fee basis;
9. He improperly attempted to have the Millers sign a usurious loan agreement secured by other real estate they owned without advising the Millers that they had no obligation to do so and implying that they had an obligation under the oral contingent fee agreement to provide him these funds; and
10. When the Millers finally acquiesced to Attorney Dalton’s illegal demands for monetary payments, instead of applying the funds to expert witnesses he paid himself for work that was part of the contingent fee agreement.

While the Millers could not prove that Attorney Dalton made these same misrepresentations to his other clients, they have established that he made multiple misrepresentations to the Millers which is evidence the jury should have been allowed to consider in determining whether his misrepresentations were capable of repetition.

The question of whether in this case Attorney Dalton committed unfair and deceptive acts that were capable of repetition is a factual issue that should be resolved by the jury. He argues that the Court should adopt

a bright-line “first bite” rule that requires the injured consumer to prove that he had committed similar deceptive acts in another case. The case law does not require that result. The attempt to have the Millers sign a usurious interest note is singularly sufficient to establish the public interest element. The multiple misrepresentations made by Attorney Dalton to the Millers are also sufficient to meet the public interest test. The matter should have been submitted to the jury for determination.

IV. CONCLUSION

Attorney Dalton knew that the Millers were concerned about losing their family home. He knew that they had fought for three years to obtain a resolution that included an affordable mortgage. He assured them that he was capable of handling the claim and achieving success for the Millers. When the bank made an offer that was even better than the Millers expected, he purposely failed to tell his clients about the offer. Instead, he forced the Millers into years of painful and unsuccessful litigation that resulted in the judgment against the Millers for \$566,000 and an order to sell their home. His actions were egregious. The Millers were entitled to have their emotional damages claim submitted to the jury under proper instructions. The trial court erred in failing to do so.

Attorney Dalton attempted to have his clients sign a promissory note that they were not obligated to sign, at usurious interest rate of 13 % per annum. This act alone meets the public impact element of the Consumer Protection Act. In addition, Attorney Dalton made multiple misrepresentations to his client and made multiple breaches of his fiduciary duties owed to his client, all of which are capable of repetition. The trial court erred by failing to submit the CPA claim to the jury.

The jury verdict in favor of the Millers was proper, as far as it went. This Court should affirm the jury's verdict in this case. In addition, this Court should remand the case for a limited issue trial to determine the amount of the Millers' emotional distress damages and whether the public impact element of the CPA has been established.⁴

RESPECTFULLY SUBMITTED this 18th day of December, 2017.

JERRY MOBERG & ASSOCIATES, P.S.



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Attorney for Respondents/Cross-Appellants

⁴ The practical impact of a jury finding that the CPA applied would be to permit the trial court to then double the already awarded damages up to \$25,000 and to award the Millers their attorney fees incurred in this case.

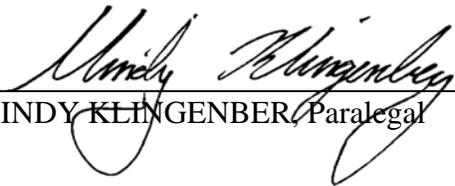
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I certify that on this date I mailed a copy of the document to which this is affixed by electronic mail and first class U.S. mail, postage prepaid, to:

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DATED this 18th day of December, 2017 at Ephrata, WA.

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