

**No. 351653-III**

**COURT OF APPEALS, DIVISION III**  
**OF THE STATE OF WASHINGTON**

---

**STADELMAN FRUIT, LLC, a Washington limited liability  
company,**

**Plaintiff/ Respondent,**

**v.**

**JIM D. VOORHIES, a single person; JOHN E. HOWARD,**  
**as Personal Representative for the ESTATE OF**  
**FLORENCE E. HOWARD,**

**Defendants/Appellants.**

---

**RESPONSE BRIEF OF STADELMAN FRUIT, LLC**

---

**PETER M. RITCHIE, WSBA #41293**  
**Attorneys for Plaintiff/Respondent**  
**Meyer, Fluegge & Tenney, P.S.**  
**P.O. Box 22680, Yakima, WA 98907-2680**  
**(509) 575-8500**

Table of Contents

**I. INTRODUCTION..... 1**

**II. RESPONSE TO ASSIGNMENTS OF ERROR..... 3**

**III. COUNTER STATEMENT OF CASE..... 3**

**A. SUMMARY OF BACKGROUND FACTS..... 3**

**B. FRUIT HANDLING AGREEMENT..... 4**

**C. THE MORTGAGES STADELMAN  
    REQUIRED UNDER THE FRUIT  
    AGREEMENT ..... 8**

**D. DEFENDANT’S FAILURE TO PAY.....10**

**E. PROCEDURAL FACTS.....12**

**F. SUMMARY JUDGMENT MOTIONS.....14**

**IV. ARGUMENT.....18**

**A. STANDARDS OF REVIEW.....18**

**B. RULES SPECIFIC TO SUMMARY  
    JUDGMENT.....19**

<b>C.</b>	<b>THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO PLAINTIFF.....</b>	<b>21</b>
1.	The Fruit Handling Agreement Expressly Contemplates Repayment of Advances/Loans .....	22
2.	The Mortgage Is Not Limited to the 2008 Crop Year and Covers All Amounts Owed under the Fruit Agreement .....	28
3.	Stadelman’s Accounting Is Accurate and Cannot Reasonably Be Disputed.....	32
<b>D.</b>	<b>THE TRIAL COURT PROPERLY DISMISSED DEFENDANT’S COUNTERCLAIMS .....</b>	<b>37</b>
1.	The Trial Court Properly Dismissed the CPA Counterclaim .....	37
2.	The Trial Court Properly Dismissed the Negligence Counterclaim .....	43
<b>E.</b>	<b>DEFENDANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY’S FEES. STADELMAN IS ENTITLED TO FEES ON APPEAL.....</b>	<b>49</b>
<b>F.</b>	<b>CONCLUSION.....</b>	<b>49</b>

## TABLE OF AUTHORITIES

### Cases

<u>Alejandro v. Bull</u> 159 Wn.2d 674 (2007).....	44, 47
<u>American Nursery v. Indian Wells</u> 115 Wn.2d 217 (1990).....	47, 48
<u>Bogomolov v. Lake Villas Condominium Ass'n of Apartment Owners</u> 131 Wn. App. 353 (2006).....	26
<u>Borish v. Olson</u> 155 Wn. App. 892 (2010).....	41
<u>Carlile v. Harbour Homes</u> 147 Wn. App. 193 (2008).....	38
<u>Champagne v. Thurston Cty.</u> 134 Wn. App. 515, 141 P.3d 72 (2006), aff'd on other grounds, 163 Wn.2d 69, 178 P.3d 936 (2008)....	19
<u>Davies v. Holy Family Hosp.</u> 144 Wn. App. 483,183 P.3d 283 (2008).....	19
<u>Eastwood v. Horse Harbor Found., Inc.</u> 170 Wn.2d 380, 241 P.3d 1256 (2010).....	44, 47, 48
<u>Eifler v. Shurguard</u> 71 Wn. App. 684 (1993) .....	47

<u>Griffith v. Centex</u>	
93 Wn. App. 202 (1998) .....	47
<u>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</u>	
105 Wn.2d 778, 719 P.2d 531 (1986).....	38, 40
<u>Hansen v. Rothaus</u>	
107 Wn.2d 468, 730 P.2d 662 (1986).....	33
<u>Hearst Commc'ns, Inc. v. Seattle Times Co.</u>	
154 Wn.2d 493, 115 P.3d 262 (2005).....	23, 31
<u>Henery v. Robinson</u>	
67 Wn. App. 277 (1992).....	41
<u>Highland Sch. Dist. No. 203 v. Racy</u>	
149 Wn. App. 307, 202 P.3d 1024 (2009).....	18
<u>Jolley v. Blueshield</u>	
153 Wn. App. 434, 220 P.3d 1264 (2009).....	37
<u>Keystone Masonry, Inc. v. Garco Const., Inc.</u>	
135 Wn. App. 927, 147 P.3d 610 (2006).....	24
<u>Lakes v. von der Mehden</u>	
117 Wn. App. 212, 70 P.3d 154 (2003).....	33
<u>Leingang v. Pierce County Medical Bureau Inc.</u>	
131 Wn.2d 133 (1997).....	38
<u>LePlant v. State</u>	
85 Wn.2d 154, 531 P.2d 229 (1975).....	20

<u>Lightfoot v. MacDonald</u> 86 Wn.2d 331 (1976).....	40
<u>Mayer v. Pierce County Medical Bureau Inc.</u> 80 Wn. App. 416 (1995).....	23
<u>Mejia v. Irwin</u> 45 Wn. App. 700, 726 P.2d 1032 (1986).....	20
<u>Michael v. Mosquera-Lacy</u> 165 Wn.2d 595 (2009).....	40
<u>Mut. of Enumclaw v. USF Ins. Co.</u> 164 Wn.2d 411, 191 P.3d 866 (2008).....	24
<u>Nationwide Mut. Ins. Co. v. Hayles, Inc.</u> 136 Wn. App. 531, 150 P.3d 589 (2007).....	23
<u>Olympia Fish Products, Inc. v. Lloyd</u> 93 Wn.2d 596, 611 P.2d 737 (1980).....	20
<u>Prier v. Refrigeration Eng'g Co.</u> 74 Wn.2d 25, 442 P.2d 621 (1968).....	33
<u>Roats v. Blakely Island Maint. Comm'n, Inc.</u> 169 Wn. App. 263, 279 P.3d 943 (2012).....	26
<u>Sanders v. State</u> 169 Wn.2d 827, 240 P.3d 120 (2010).....	19
<u>Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton</u> 158 Wn.2d 506, 145 P.3d 371 (2006).....	19

<u>Snodgrass v. Spokane</u>	
87 Wash. 308 (1915).....	47
<u>Sunnyside Valley Irr. Dist. v. Roza Irr. Dist.</u>	
124 Wn.2d 312, 877 P.2d 1283 (1994).....	32
<u>Teagle v. Fisher &amp; Porter, Co.</u>	
89 Wn.2d 149, 570 P.2d 438 (1977).....	20
<u>Universal/Land Const. Co. v. City of Spokane</u>	
49 Wn. App. 634, 745 P.2d 53 (1987).....	23
<u>Viking Bank v. Firgrove Commons 3, LLC</u>	
183 Wn. App. 706, 334 P.3d 116 (2014).....	22
<u>Viking Props., Inc. v. Holm</u>	
155 Wn.2d 112, 118 P.3d 322 (2005).....	27
<u>Wallace v. Kuehner</u>	
111 Wn. App. 809, 43 P.3d 823 (2002).....	28
<u>Weyerhaeuser Co. v. Commercial Union Ins. Co.</u>	
142 Wn.2d 654, 15 P.3d 115 (2000).....	23
<b><u>Statutes</u></b>	
RCW 4.84.185.....	50
RCW 19.52.010.....	34
RCW 19.86.020.....	37
<b><u>Court Rules</u></b>	
CR 56(c).....	20
RAP 18.1.....	49, 50

**Other**

Collins English Thesaurus (2017).....25  
Merriam-Webster Dictionary (2017).....25

## **I. INTRODUCTION**

This case involves a not unfamiliar scenario: a party voluntarily enters into a contractual agreement he believes is beneficial; he later discovers he does not like the terms or conditions have changed such that they are less favorable to him; he then seeks a way out by nonpayment or by claiming the other party was responsible. That is precisely what occurred here.

In 2008, Defendant entered into a valid, binding fruit handling agreement with Plaintiff Stadelman Fruit, LLC.<sup>1</sup> The agreement was secured by a mortgage covering Defendant's real property. It is undisputed that Stadelman paid Defendant over \$550,000 in loans (advances) for crop financing that Defendant never fully repaid. Defendant blames his own poor returns and failures as an orchardist on Stadelman to escape liability.

Stadelman sued to foreclose on the mortgage. The trial court, after reviewing and considering the records and evidence

---

<sup>1</sup> There are technically several defendants listed in the caption. Only Defendant Jim Voorhies appealed. For ease of reference, we will refer to him as if he were the sole "Defendant."

and testimony via declaration, granted complete summary judgment to Stadelman. Defendant now appeals the entry of Stadelman's motion for summary judgment, the denial of his cross-motion, as well as the judgment and decree of foreclosure.

The issues in this case are simple and controlled by longstanding Washington case law and the language of the governing documents. Defendant asks the Court to ignore this well-established case law and the plain language of the agreement and mortgage, and, in an effort to manufacture an issue of fact, asks the Court to adopt a strained, unreasonable, and ultimately untenable interpretation that is supported neither by the law nor the actual agreements.

Defendant's appeal brief raises no issues or legal arguments to cast any doubt on the trial court's decisions. It relies on a plea for sympathy. The trial court properly granted summary judgment to Stadelman. The trial court's decisions were appropriate and based in law and fact. The Court should affirm the trial court's decisions in their entirety.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The trial court properly granted summary judgment to Stadelman. The agreement and mortgage create valid, binding contractual obligations for repayment for 2008 and beyond, and Defendant failed to honor the agreements.
2. The trial court properly denied Defendant's cross motion for summary judgment. The independent duty doctrine does not apply, and there is no factual or legal basis for any Consumer Protection Act claim.

## **III. COUNTER STATEMENT OF CASE**

### **A. SUMMARY OF BACKGROUND FACTS**

Stadelman is a Washington business that handles, packs, markets, and sells tree fruit grown by third party farmers in the Yakima Valley. CP at 32. At the relevant time, Defendant was an apple grower in the Yakima Valley. CP at 359.

Defendant entered into a "Fruit Handling Agreement" (the "Fruit Agreement") with Stadelman. CP at 72-82. Under the terms of the Fruit Agreement, Defendant agreed to deliver his fruit crop to Stadelman for handling, packing, marketing, and sale. CP at 72-73. Stadelman made operating loans, or advances

to Defendant, secured by a mortgage. CP at 84-91. Defendant defaulted in the repayment of those advances.

## **B. FRUIT HANDLING AGREEMENT**

There are two controlling documents in this case. The first is the Fruit Agreement. The second is the mortgage securing the Fruit Agreement. The terms of both are clear and unambiguous and resolve the issues on appeal.

It is undisputed Defendant signed the Fruit Agreement on March 5, 2008. CP at 72. It required Defendant to deliver to Stadelman all of his marketable grade fruit grown on his orchards during the term of the Fruit Agreement. In exchange, Stadelman, in its sole discretion, would handle all necessary processing of the fruit for market after harvest, including cleaning, sorting, packing, labeling, transporting and storing, as well as marketing the fruit for sale. CP at 72-73.

It is undisputable that under the Fruit Agreement Stadelman was entitled to deduct the charges for handling and

marketing the fruit from any proceeds it received from the sale of the fruit. CP at 76 ¶ 6.1.

The Fruit Agreement at Paragraph 7 also provided a term to allow financial advances to provide financing to Defendant. CP at 77. Stadelman could, in its discretion, lend Defendant money to finance the production and harvest of his fruit:

ADVANCES: Handler may make **discretionary advances** to Grower to grow and harvest Grower's fruit crop on such terms and conditions as Handler shall, in its sole discretion, determine to be appropriate. **If Handler has agreed to make an advance to Grower, Grower hereby agrees to execute any security agreement, promissory note, financing statement, and other documents deemed reasonable and necessary by Handler to ensure the repayment of such advances** and, in addition, any subordination agreements determined reasonable and necessary by Handler for such purpose. Handler's decision to make advances in any particular instance shall not constitute an obligation or agreement by Handler to provide such advances to Grower in the future, and Grower acknowledges and agrees that such advances are discretionary with Handler.

CP at 77 (emphasis added).

Contrary to Defendant's position below and on appeal, it

is clear from the language used in Paragraph 7 (e.g., “Grower hereby agrees to execute any security agreement, promissory note, financing statement, and other documents deemed reasonable and necessary by Handler to ensure the repayment”) that the Fruit Agreement explicitly contemplates repayment of the “advances” (i.e., loans), and it indeed uses the term “repayment.” CP at 77.

As with the fruit handling charges, the Fruit Agreement provides that any such advances/loans could be offset from the proceeds of sale of the fruit:

The parties understand and agree that Handler shall have the right to offset **all advances, assessments, charges and expenses owed by Grower** prior to the payment of any funds to Grower or any third party having an interest in Grower’s crops or the proceeds thereof.

CP at 76 ¶ 6.2 (emphasis added).

The term of the Fruit Agreement was for the 2008 crop year, but Paragraph 3 contains an automatic renewal clause that would apply unless either party terminated the Fruit Agreement.

CP at 75. It also expressly states that the Fruit Agreement would be extended to include all subsequent crop years until Defendant paid off all obligations and advances:

3. TERM: The term of this Fruit Agreement is for the 2008 crop year; **provided, however, that this Fruit Agreement shall be considered as automatically renewed from year to year thereafter, unless either party terminates this Fruit Agreement** by giving the other party written notice not later than March 1 of the crop year in which termination is desired. **In addition, the term of this Fruit Agreement shall automatically be extended and shall include all subsequent crop years and crops grown during such crop years until all obligations, including advances, owed by Grower to Handler under the terms of this Fruit Agreement have been paid in full unless otherwise determined by Handler.** In other words, it is contemplated that so long as Grower is indebted to Handler, Grower will continue to bring Grower's fruit to Handler for the purpose of handling and marketing in order to accommodate Handler's economic interest as a handler and packer of Grower's fruit and for the purpose of protecting Handler's rights as a creditor of Grower . . . .

CP at 75 (emphasis added).

It is undisputed that Defendant never terminated the Fruit Agreement, nor is there any evidence in the record of any attempt

to do so. Thus, the Fruit Agreement, through its automatic renewal mechanism, continued past 2008 and applies to each year Stadelman provided advances (i.e., 2008-2010).

Finally, Paragraph 14.2 of the Fruit Agreement provides for attorney's fees for the prevailing party. CP at 81.

### **C. THE MORTGAGES STADELMAN REQUIRED UNDER THE FRUIT AGREEMENT**

It is also undisputed that the same day Defendant signed the Fruit Agreement (March 5, 2008), he also executed two mortgages to Stadelman to secure his performance under the Fruit Agreement, including repayment of any advances. CP at 84-91. *See also* CP at 77 (contemplating such security instruments). The first mortgage encumbered the following real property situated in Yakima County and owned by Defendant:

#### Parcel A

The West 1/2 of the West 1/2 of the Northwest 1/4 of Section 23, Township 14 North, Range 17, E. W. M., EXCEPT right of way of County Road along the North line thereof.

Assessor's Parcel No. 171423-22002

Parcel B

The East 1/2 of the West 1/2 of the Northwest 1/4 of Section 23, Township 14 North, Range 17, E.W.M., EXCEPT right of way for County Road along the North line thereof.

Assessor's Parcel No. 171423-22001

CP at 84-86.

The second mortgage encumbered Defendant's interest in a real estate contract. CP at 89-91.<sup>2</sup>

The Mortgage contains several provisions that are relevant to this case and dispositive of the issues on appeal. Page one expressly provides that it covers repayment of advances and all sums due, the purpose of the Mortgage being:

**[T]o secure the payment of all sums due Mortgagee pursuant to the crop handling agreement of even date herewith between Mortgagor and Mortgagee, including all sums advanced to provide crop financing for the crop to be grown upon the following described real estate [followed by legal description of Assessor's Parcel Nos. 171423-22001 and 171423-22002].**

---

<sup>2</sup> Though not germane to the issues on appeal, it is Plaintiff's understanding Defendant subsequently defaulted on the real estate contract and forfeited the interest under the second mortgage. Regardless, this Mortgage is not at issue, and subsequent references to the "Mortgage" will refer to the first mortgage located at CP 84-86

CP at 84 (emphasis added).

Page two similarly states the that Mortgage is

[t]o secure the performance of each agreement of the mortgagor herein contained and the payment of all sums due Mortgagee in providing crop financing for the 2008 crop to be grown upon said premises, **including all renewals, modifications, and extensions thereof, and also such additional sums as shall be agreed upon.**

CP at 85 (emphasis added).

Thus, the Mortgage expressly secures payment of all sums due under the Fruit Agreement, including all sums “advanced” for crop financing. This cannot reasonably be disputed. What is also important from this language is that Defendant gave the Mortgage against the entire property, in addition to the crops grown on it, to secure all sums owed to Stadelman, including to secure repayment of all sums advanced for crop financing.

#### **D. DEFENDANT’S FAILURE TO PAY**

Pursuant to the Fruit Agreement, Stadelman handled all of Defendant’s fruit during the 2008, 2009, and 2010 crop years. CP at 5 ¶ 2.4. This is undisputed. It is also undisputed that during

that time, Stadelman advanced over \$550,000 to Defendant, as shown in the *Supplemental Declaration of Tim Welch*, CP at 469, the chief financial officer for Stadelman. CP at 330.

It is undisputed that Defendant did not challenge the accounting prior to the lawsuit. Indeed, he admitted below that, prior to the lawsuit, he was given the summary and accounting of advances provided to him by Stadelman and that, though asked to provide a plan to bring those amounts current, he refused to do so. *Compare* CP at 6 ¶ 2.5 and CP at 25 ¶ 10.

Complete documentation of the amounts advanced, paid, received, and which remain due and owing from Defendant was provided to the trial court below. A summary is found attached to the *Supplemental Declaration of Tim Welch*. CP at 469. The evidence shows that from 2008-2010, Stadelman advanced Defendant \$575,252.95 for crop financing. CP at 469. It received \$464,080.22 in pool returns and receipts to offset the advances, CP at 469, leaving an overdue principal balance of \$111,172.93. Stadelman also paid \$23,831.99 in property taxes for the

mortgages property to prevent foreclosure, and paid off a senior lien in the amount of \$42,380.92 to preserve the collateral, CP at 469, for a principal balance owed of \$177,385.73.

Because Defendant did not fully pay the principal balance, and because the amount was liquidated, prejudgment interest was charged. CP at 469. Attorney's fees were included in the accounting as allowed under Paragraph 14 of the Fruit Agreement. CP at 469; CP at 81 (¶ 14).

#### **E. PROCEDURAL FACTS**

On July 25, 2011, Stadelman filed a complaint to foreclose on the mortgage. CP at 3-9.

Stadelman filed an Answer on October 28, 2011. CP at 24-28. Notably, Defendant admitted he entered into the Fruit Agreement and executed the Mortgage in favor of Stadelman. *Compare* CP at 4-5 ¶¶ 2.1-2.2 (Stadelman's allegations) and CP at 25 ¶¶ 6-7 (Defendant's answers). He admitted Stadelman handled his fruit for the 2008-2010 crop years. *Compare* CP at 5 ¶ 2.4 (allegation) and CP at 25 ¶ 9 (Answer).

He also admitted he received advances (i.e., loans) from Stadelman in 2008-2010 and that under Stadelman's accounting he owed a balance. CP at 25 ¶ 9. Finally, he admitted (1) he received Stadelman's grower statements and accountings of the advanced made and monies owed prior to the lawsuit, (2) he was asked to meet with Stadelman to develop a plan to settle the account, and (3) he failed to do so. *Compare* CP at 6 ¶ 2.5 (Stadelman's allegation) and CP at 25 ¶ 10 (Defendant's answer).

Defendant asserted counterclaims for negligence and violation of the CPA. CP at 26. Regarding negligence, he merely alleged that "Stadelman was negligent and failed to follow the instructions of Voorhies in its packing and selling of Voorhies' crops so that the returns to Voorhies were artificially deflated." CP at 26. The boilerplate CPA counterclaim simply alleges that

Stadelman's "acts and/or omissions" "constitute unfair and deceptive acts or practices." CP at 26.<sup>3</sup>

#### **F. SUMMARY JUDGMENT MOTIONS**

Stadelman filed a motion for summary judgment on December 21, 2016, asking the trial court to foreclose on the mortgage and dismiss the counterclaims because they were either devoid of merit or unsubstantiated by any evidence. CP at 31-62.

On January 9, 2017, Defendant filed a response as well as a "cross motion" asking the trial court to rule in his favor on his counterclaim. CP at 356-58, 337-355. Notably, he did not dispute he received the crop financing advances from Stadelman listed in Mr. Welch's Declaration, or that he never fully repaid the money. *See* CP at 337-355.

Instead, he took the same flawed position he now takes: that the mortgage only covers the 2008 crop year, and the Fruit

---

<sup>3</sup> The case was initially set for trial on August 12, 2013. CP at 46. The trial date was stricken after Defendant filed bankruptcy on the eve of trial. Following dismissal of the bankruptcy case based on Defendant's "unreasonable delay," CP at 329, the trial was reset for May 16, 2015. CP at 47. That date was stricken due to the unavailability of a judge to hear the matter. CP at 48.

Agreement creates no obligation to repay the advances, and the accounting failed to credit some of his returns. CP at 345-351. He also argued against an award of interest and attorney's fees by stating that neither is awardable per the terms of the Fruit Agreement. CP at 350.

Stadelman filed a reply on January 13, 2017, pointing out there are no issues of fact because the actual language in the agreements contradict Defendant's theory, the accounting in fact shows that Defendant was credited the returns he claimed were omitted, and Defendant failed to offer any evidence to support his counterclaims. CP at 441-454.

The competing motions were heard on February 3, 2017, by Judge Michael McCarthy. *See* RP at 1. After lengthy oral argument, the trial court orally granted summary judgment to Stadelman as to the CPA and negligence counterclaims, and took the mortgage foreclosure claim under advisement. RP at 44.

On February 13, 2017, Judge McCarthy issued a written memorandum decision, granting Stadelman's summary

judgment motion in its entirety and denying Defendant's cross motion. CP at 473. The trial court specifically found that (1) there was a valid mortgage, (2) Defendant failed to make payments, (3) the property listed in the mortgage is subject to foreclosure, and (4) fees were appropriate under the Fruit Agreement in an amount to be determined by affidavit. CP at 473.

Stadelman then noted for presentation a proposed final order and a judgment and decree of foreclosure, which contained a request for fees, prejudgment interest, and costs. CP at 532-545. To support the proposed judgment, counsel for Stadelman submitted declarations with detailed invoices as well as explanations for the time and rates charged. CP at 474-531, 597-622.

Defendant filed a brief objection to the proposed judgment only, arguing, without any authority, that prejudgment interest should not be included. CP at 548. He also argued that the attorney's fees requested should be reduced by \$11,456.50, an

amount which Stadelman incurred in an ultimately unsuccessful attempt to have a receiver appointed. CP at 548.<sup>4</sup>

Except as stated above, Defendant did not object to the amount of the attorney's fees, nor did he object to the reasonableness of the rates charged. CP at 547-548. In fact, at the presentation hearing, Defendant's counsel only objected that the attempted receivership was not a "wise expenditure of attorney's fees," and conceded he "didn't object to anything else." RP at 58.

On March 10, 2017, the trial court entered a formal order granting Stadelman's Motion for Summary Judgment. CP at 584-587. The order awarded Stadelman summary judgment on all of its claims, denied Defendant's cross-motion for summary judgment, and dismissed Defendant's counterclaims. CP at 586.

The same day, the trial court entered a Judgment and Decree of Foreclosure, foreclosing the mortgage and awarding Stadelman the principal sum of \$177,385.73. CP at 588-593. The

---

<sup>4</sup> He also argued it was improper to include a senior lien payoff. CP at 547. He does not raise any issues with the payoff on appeal, so it is not addressed.

trial court, in exercising its discretion, and based on the information provided by declaration, also awarded Stadelman \$103,632.95 in prejudgment interest<sup>5</sup> and \$93,663.05 in fees and costs incurred in the litigation of the case. CP at 588.<sup>6</sup>

Defendant filed a Notice of Appeal on March 31, 2017, appealing the Order Granting Stadelman's Motion for Summary Judgment, and the Judgment and Decree of Foreclosure. CP 580.

#### **IV. ARGUMENT**

##### **A. STANDARDS OF REVIEW**

Review of a trial court's award of fees is reviewed under an abuse of discretion standard. Highland Sch. Dist. No. 203 v. Racy, 149 Wn. App. 307, 312, 202 P.3d 1024 (2009). Likewise,

---

<sup>5</sup> The Court may note that the initial accounting from Mr. Welch listed a higher number for prejudgment interest (\$184,475.28). CP at 469. This was because interest was calculated as beginning the date when the advances/loans were made. Defendant latches on to this to claim interest was inappropriately charged "from 2008 through 2011, prior to any lawsuit." *Def.'s Opening Brief at 29*. However, this ignores the records. Because prejudgment interest generally begins to accrue at the time of breach/default, Stadelman at the summary judgment level revised the number down to \$103,632.95, in Defendant's favor, to reflect that the start date was the date the complaint was filed (July 25, 2011), at which point there was clearly a default/breach of the repayment obligation. This calculation is shown at CP at 564, and is the amount the trial court actually awarded. CP at 588. For additional rebuttal of Defendant's argument, see pages 31-34, *infra*. It is also noteworthy that Defendant has never provided a countervailing calculation.

<sup>6</sup> The trial court removed from the amount of fees awarded the fees incurred in the unsuccessful attempt to establish a receivership. RP 58; CP at 588.

the amount of fees awarded is reviewable only for abuse of discretion. Sanders v. State, 169 Wn.2d 827, 866, 240 P.3d 120 (2010). Moreover, an “award of prejudgment interest is reviewed for abuse of discretion.” Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton, 158 Wn.2d 506, 519, 145 P.3d 371 (2006).

“A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons.” Davies v. Holy Family Hosp., 144 Wn. App. 483, 497, 183 P.3d 283 (2008). “An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court.” Id.

This Court “can affirm a trial court on any alternative basis supported by the record and pleadings, even if the trial court did not consider that alternative.” Champagne v. Thurston Cty., 134 Wn. App. 515, 520, 141 P.3d 72 (2006), aff’d on other grounds, 163 Wn.2d 69, 178 P.3d 936 (2008)

## **B. RULES SPECIFIC TO SUMMARY JUDGMENT**

The purpose of summary judgment is to avoid a useless

trial when there is no genuine issue of any material fact. Olympia Fish Products, Inc. v. Lloyd, 93 Wn.2d 596, 611 P.2d 737 (1980). A motion for summary judgment is appropriate whenever the pleadings, depositions, and other records on file, together with any affidavits submitted with the motion, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); Teagle v. Fisher & Porter, Co., 89 Wn.2d 149, 570 P.2d 438 (1977). Once the moving party presents evidence showing he is entitled to judgment, the non-moving party must come forward with factual, probative evidence, not mere assertions, demonstrating there are unresolved material factual questions. LePlant v. State, 85 Wn.2d 154, 158, 531 P.2d 229 (1975).

Summary judgment should be also granted when reasonable persons could reach but one conclusion from the facts after considering all of the evidence and the reasonable inferences therefrom most favorably to the non-moving party. Mejia v. Irwin, 45 Wn. App. 700, 705, 726 P.2d 1032 (1986).

**C. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO PLAINTIFF**

Defendant's argument on appeal, and to the trial court below, is that the Fruit Agreement and Mortgage only apply to the 2008 crop year, and thus there is no obligation to repay the other advances/loans. *Def.'s Opening Brief at 23-29, 31-33.* Defendant does not deny he entered into the Fruit Agreement and Mortgage. He also does not deny Stadelman made the advances/loans of \$555,252.95 for crop financing. He just does not think he should have to repay the loans made in 2009- 2010.

Defendant's argument at best misstates or misreads the controlling documents, and at worst misrepresents them. Regardless, the argument is untenable. The Fruit Agreement and Mortgage explicitly state, in plain, unambiguous language, that they apply to all advances (i.e., loans) made and amounts owed, including those after 2008. The trial court did not err, and appropriately granted summary judgment to Stadelman.

1. **The Fruit Handling Agreement Expressly Contemplates Repayment of Advances/Loans**

On appeal, Defendant argues the Fruit Agreement does not contain language requiring him to actually pay back “advances,” and therefore he has no obligation to repay Stadelman. *Def.’s Opening Brief at 23-28*. His position, then, is that his fruit returns would offset the advances, and, apparently, any residual balance if the returns were insufficient would be a gift. *Def.’s Opening Brief at 26-27*. In all candor, the argument that the Fruit Agreement does not contain a “repayment” obligation is simply incredible. It completely ignores the actual language of the Fruit Agreement, and even a cursory review of the document conclusively establishes the argument is false.

The Fruit Agreement is a contract. Washington follows the “objective manifestation theory” of contract interpretation. The focus is on the reasonable meaning of the contract language to determine the parties’ intent. Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 712–13, 334 P.3d 116 (2014) (citing

Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005)). Courts “give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” Id. As this Court noted in Universal/Land Const. Co. v. City of Spokane, 49 Wn. App. 634, 637, 745 P.2d 53 (1987), “Words should be given their ordinary meaning; courts should not make another or different contract for the parties under guise of construction.”

Further, “we view the contract as a whole, interpreting particular language in the context of other contract provisions.” Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 669–70, 15 P.3d 115 (2000). “Ordinary meaning” is considered to be the dictionary definition of the word. Nationwide Mut. Ins. Co. v. Hayles, Inc., 136 Wn. App. 531, 537, 150 P.3d 589 (2007).<sup>7</sup>

The crucial provision of the Fruit Agreement is Paragraph

---

<sup>7</sup> “Interpretation of an unambiguous contract is a question of law. ‘If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.’” Mayer v. Pierce County Medical Bureau Inc., 80 Wn. App. 416, 420 (1995).

7, which deals with advance payment (i.e., loans) for financing and expressly contemplates a mortgage to secure repayment of the advances/loans:

7. ADVANCES: Handler may make discretionary advances to Grower to grow and harvest Grower's fruit crop on such terms and conditions as Handler shall, in its sole discretion, determine to be appropriate. **If Handler has agreed to make an advance to Grower, Grower hereby agrees to execute any security agreement, promissory note, financing statement, and other documents deemed reasonable and necessary by Handler to ensure the repayment of such advances . . . .**

CP at 77 (emphasis added).

The only reasonable, rational interpretation of this provision is that the Fruit Agreement was intended to, and does in fact, cover the advances made by Stadelman.<sup>8</sup> It expressly mentions "advances" and "repayment of such advances." CP at 77. Those words are not ambiguous. By its very nature, to

---

<sup>8</sup> The interpretation of the Fruit Agreement is proper for the trial court. When a contract presents no ambiguity and no extrinsic evidence is required to make sense of the contract terms, contract interpretation is a question of law. Mut. of Enumclaw v. USF Ins. Co., 164 Wn.2d 411, 424 n. 9, 191 P.3d 866 (2008); Keystone Masonry, Inc. v. Garco Const., Inc., 135 Wn. App. 927, 932, 147 P.3d 610 (2006) ("[a]bsent disputed facts, the legal effect of a contract is a question of law that we review de novo.").

“repay” means “to pay back” or “to make a return payment to.” Merriam-Webster Dictionary (2017). An “advance” means “a provision of something (such as money or goods) before a return is received.” Merriam-Webster Dictionary (2017).

Further, that the money advanced was a loan is not a “conclusory allegation[ ],” as Defendant claims, *Def.’s Opening Brief at 26*, but is expressly supported by the plain meaning of the words in the documents themselves. The noun “advance” is a synonym for “loan.” Collins English Thesaurus (2017).

The structure of the Fruit Agreement is clear. There can be no doubt the Fruit Agreement covers the advances/loans, and this is further evidenced by the fact that the Mortgage, as shown below, explicitly states that it is given to secure payment of “all sums advanced to provide crop financing.” CP at 84. Oddly, and perhaps tellingly, in his discussion of the Fruit Agreement Defendant does not even attempt to even try to explain away (or

discuss) the language in the Mortgage, which confirms the clear meaning of this language.<sup>9</sup>

Defendant's interpretation would have the Court ignore the plain language of the Fruit Agreement and would result in the Court either reading the terms "advance" and "repayment" out of the contract, or ignoring their common meaning and rendering them meaningless; and in either scenario creating a new agreement the parties never bargained for or negotiated. "When interpreting a document, the preferred interpretation gives meaning to all provisions and does not render some superfluous or meaningless." Bogomolov v. Lake Villas Condominium Ass'n of Apartment Owners, 131 Wn. App. 353, 361 (2006).

Further, to adopt Defendant's construction would lead to absurd results. He seems to acknowledge that Stadelman properly secured the first year's advance, but would argue that it

---

<sup>9</sup> If there is more than one document and they have been executed together, they must then be read together to reach the correct interpretation. *See* Roats v. Blakely Island Maint. Comm'n, Inc., 169 Wn. App. 263, 274, 279 P.3d 943 (2012). Thus, the Fruit Agreement and Mortgage must be read and construed together, which Defendant has not even attempted to do.

somehow continued advancing him money without any security in future years, which is an absurdity. Courts should avoid the sort of “forced or strained” interpretations of contract language Defendant suggests. Viking Props., Inc. v. Holm, 155 Wn.2d 112, 122, 118 P.3d 322 (2005). Defendant’s argument ignores the plain language of the Fruit Agreement, is inconsistent with the ordinary use of the terms used, and is untenable.

Defendant’s argument that the absence of a promissory note suggests that the Fruit Agreement does not create a repayment obligation, *Def.’s Opening Brief at 26*, is equally flawed. The Fruit Agreement does have a provision for a “security agreement, promissory note, financing statement, or other documents” in order to ensure repayment, and its very purpose is to ensure repayment. CP at 77. But the contract does not require a promissory note. Stadelman did in fact (wisely) ensure repayment of the advances by requiring execution of the Mortgage. CP at 84. If the Fruit Agreement does not create a repayment obligation, then the Mortgage would be superfluous.

There would be no need for a mortgage to secure a loan whose sole possible source of repayment is crop proceeds.

Finally, the case law Defendant cites that he has no obligation to repay the advances, Wallace v. Kuehner, 111 Wn. App. 809, 43 P.3d 823 (2002), has no relevance to this case. In Wallace, a father loaned money to his daughter, and rejected a promissory note before giving the money. Thus, there was no document securing repayment. Id. at 816. The Court of Appeals held that no contract was ever formed because the father anticipatorily repudiated the promissory note. Id. at 817. Wallace does not involve even remotely similar facts or legal issues and offers no assistance.

2. **The Mortgage Is Not Limited to the 2008 Crop Year and Covers All Amounts Owed under the Fruit Agreement**

Defendant also incorrectly argues the Mortgage only secured obligations for the 2008 crop year. *Def.'s Opening Brief at 32*. He relies on what can only be charitably called an incomplete reading of the Mortgage (which could be rectified by

actually reading the entire document), and completely ignores the dispositive provision that totally undermines his argument.

The documents make it clear the Mortgage secured the obligation to repay all of the loans Stadelman made, not just those in 2008. The Mortgage states it is

[t]o secure the performance of each agreement of the mortgagor herein contained and the payment of all sums due Mortgagee in providing crop financing for the 2008 crop to be grown upon said premises, **including all renewals, modifications, and extensions thereof, and also such additional sums as shall be agreed upon.**

CP at 85 (emphasis added).

The Mortgage previously states, on page one, (a portion that Defendant does not cite in his brief, or discuss, and in fact ignores) that it is being given

**to secure the payment of all sums due Mortgagee [Stadelman] pursuant to the crop handling agreement of even date herewith between Mortgagor and Mortgagee, **including all sums advanced to provide crop financing for the crop to be grown upon the following described real estate** [followed by legal description of Assessor's Parcel Nos. 171423-22001 and 171423-22002].**

CP at 84 (emphasis added).

It is apparent from the plain, unambiguous language in both provisions that the Mortgage was to secure payment of all sums due under the Fruit Agreement, specifically including “all sums advanced to provide crop financing.” CP at 84. This language could not be clearer and includes the advances made in 2009-2010. In addition, Defendant admits he agreed to receive the advances after 2008, which are the “additional sums” contemplated under the Mortgage. Defendant’s argument that the Mortgage does not secure repayment obligations after 2008 ignores the language of the document itself and his obligations and responsibilities under it. That Defendant continues to present the same argument in light of the contradicting language in the Mortgage is difficult to comprehend.

Defendant’s argument that he “never agreed to an extension of the mortgage beyond advances for crop year 2008,” *Def.’s Opening Brief at 32*, is demonstrably false and also ignores the actual language of the documents. The Mortgage by

its terms extends to all sums due Stadelman under the Fruit Agreement. CP at 84-85. As noted, this includes the “additional sums” (i.e., advances) he agreed to take in 2009-2010. How could he agree to accept the advances, but not agree the advances were secured by the Mortgage? Moreover, Paragraph 3 of the Fruit Agreement states that it is self-renewing unless terminated. CP at 75. If Defendant only intended to be obligated to pay 2008 crop advances, he could have terminated the contract after 2008, which he never did.

It is the plain contractual language, not the unexpressed intent of the parties, that governs agreements. Hearst Commc’ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (“[W]e attempt to determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.”). Reading the renewal provision of the Fruit Agreement together with the Mortgage (securing “the payment of all sums due Mortgagee pursuant to the crop handling agreement”), it is

manifest that the Mortgage did, and does, extend to the 2009-2010 crop years, regardless of Defendant's subjective belief.

**3. Stadelman's Accounting Is Accurate and Cannot Reasonably Be Disputed**

On appeal, Defendant challenges the interest charged, claims some of his apple revenues were not included in the accounting, and argues the accounting inappropriately includes pre-suit fees. *Def.'s Opening Brief at 29-30.*

As a preliminary issue, it is undisputed that Defendant admitted he never contested the accounting. Thus, his argument is barred by the doctrine of account stated. Under that doctrine, “[a] party’s retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent.” Sunnyside Valley Irr. Dist. v. Roza Irr. Dist., 124 Wn.2d 312, 315, 877 P.2d 1283 (1994). It operates as a binding admission “of the facts asserted and a promise by the debtor to pay the sum indicated.” Id.

Even if the doctrine does not apply, Defendant’s

arguments still fail. Defendant's argument seems to be that there is no basis for interest in the Fruit Agreement. *Def.'s Opening Brief at 29*. Whether the Fruit Agreement mentions interest is irrelevant. Prejudgment interest is not dependent on a contractual provision. As a matter of law, a prevailing party is entitled to prejudgment interest when the damages are liquidated. Lakes v. von der Mehden, 117 Wn. App. 212, 214, 70 P.3d 154 (2003).

A "liquidated" claim is a claim "where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." A dispute over the claim, in whole or in part, does not change the character of a liquidated claim to unliquidated.

Hansen v. Rothaus, 107 Wn.2d 468, 472, 730 P.2d 662 (1986).

Interest, as a rule, is payable for the detention of such a liquidated sum whether the duty to pay springs from a promise, or is one which is imposed by law apart from contract. This has been based upon the view that one who has had the use of money owing to another should in justice make compensation for its wrongful detention.

Prier v. Refrigeration Eng'g Co., 74 Wn.2d 25, 32, 442 P.2d 621 (1968).

Thus, irrespective of the agreements, the inclusion of

prejudgment interest was appropriate because the measure of damages is readily calculable without the exercise of discretion. It is hard to imagine a more “liquidated” claim than this.<sup>10</sup>

The rate was also appropriate. Prejudgment interest rate is determined by RCW 19.52.010, which provides for 12 percent. Here, prejudgment interest calculated at 12 percent was added to the accounting, starting on July 25, 2011. CP at 564. The trial court did not abuse its discretion in awarding interest.

Likewise, Defendant’s argument that the accounting does not include some of his apple revenue fails. He argues Stadelman failed to credit him \$26,014 in revenue for 2008, and \$11,896.11 for 2010. *Def.’s Opening Brief at 30*. Finally, he argues there is a discrepancy of \$35,708.14 when one compares the “pool return” and grower statement for 2009.

It is hard to understand how or why Defendant continues

---

<sup>10</sup> Defendant never submitted any calculations of his own to contest Stadelman’s numbers and create an issue of fact. He simply misreads Stadelman’s documents. Thus, his argument is entirely unsupported. As noted in footnote 5, he mistakenly believes interest was charged from the date the advances were made. This is clearly not the case, and the amount the trial court awarded is from the date the complaint was filed. CP at 564, 588.

to make these arguments, which the trial court properly rejected. They are contradicted by the records and evidence, and there is absolutely no basis for them, and they seem to be based on a willful misreading of the documents. Stadelman pointed out in detail to the trial court, complete with diagrams, that it did in fact credit all of the returns in those years, and it demonstrated this clearly on pages 2 and 3 of the *Supplemental Declaration of Tim Welch*. CP at 456-457. There is no doubt they were credited, and no issue of fact to be manufactured.

Finally, Defendant claims the “pool return” statement and the “grower return” statement for pool 4 show inconsistent amounts credited to his account in 2009. *Def.’s Opening Brief at 31*. Yet, Stadelman clearly established that Defendant’s interpretation of the 2009 “pool return” is based on a misunderstanding of the statements. CP at 457-460.

The pool return statement does show a “net to be credited to your account” of \$61,662.89, and the grower statement shows a “net to be credited to your account” of \$25,954.75. But this is

not an inaccuracy or inconsistency. Defendant fails to recognize that the pool statement is an internal accounting document intended for Stadelman (thus the reference of \$61,662.89 “to be credited to your account” refers to Stadelman’s account); and the grower statement is intended for Defendant (thus \$25,954.75 was to be (and actually was) credited to his account). CP at 459. This is clearly shown in Mr. Welch’s uncontested sworn statement. CP at 457-460.

The statements are in fact completely consistent and accurate. Defendant on appeal, as below, does not even attempt to explain the actual records, and presents no evidence to support his arguments.

Finally, Defendant challenges some of the fees included in the accounting. *Def.’s Opening Brief at 30*. He provides no analysis or argument on this issue, so it is not clear what exactly he is challenging. Whatever the basis, it is clear the Fruit Agreement at Paragraph 14.2 contains an attorney’s fee provision for the prevailing party, and the provision is not limited

to fees incurred after the suit is filed, CP at 81, and Defendant provides no authority supporting that conclusion.<sup>11</sup>

#### **D. THE TRIAL COURT PROPERLY DISMISSED DEFENDANT'S COUNTERCLAIMS**

##### **1. The Trial Court Properly Dismissed the CPA Counterclaim**

In his brief, Defendant articulates the CPA counterclaim as follows: (1) Defendant was entitled to accurate accountings under the Fruit Agreement, and (2) Stadelman provided inaccurate accountings. *Def.'s Opening Brief at 34*. This is the same flawed argument the trial court rejected, and which this Court should likewise reject.

The CPA prohibits any unfair or deceptive act or practice in trade or commerce that impacts the public interest and causes injury to a party's business or property. Jolley v. Blueshield, 153 Wn. App. 434, 450, 220 P.3d 1264 (2009); RCW 19.86.020.

A CPA action consists of five elements: the plaintiff must

---

<sup>11</sup> We do not agree with Defendant's analysis, but even assuming it had some viability the remedy would not be to vacate the judgment, but to remand for findings on the limited issue of whether the contested parts of the accounting should be included.

show (1) an unfair or deceptive act or practice, (2) occurring in the conduct of trade or commerce, (3) affecting the public interest, and (4 and 5) causing injury to the plaintiff in his business or property. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986). All elements must be present; a finding that any element is missing is fatal to the claim. Id. at 793.<sup>12</sup>

The CPA claim was properly dismissed for several reasons. First, Defendant has failed to show that any of the acts alleged against Stadelman have the capacity to deceive a substantial portion of the public (i.e., the requirement to establish the “unfair or deceptive act or practice” element). There is no evidence presented that Stadelman engaged in any false and

---

<sup>12</sup> “The determination of whether a particular statute applies to a factual situation is a conclusion of law. Consequently, whether a particular action gives rise to a Consumer Protection Act violation is reviewable as a question of law.” Leingang v. Pierce County Medical Bureau Inc., 131 Wn.2d 133, 150 (1997) (reversing trial court and holding that alleged acts were not unfair or deceptive). “Whether an alleged act is unfair or deceptive is a question of law.... [I]t needs the capacity to deceive a substantial portion of the public.” Carlile v. Harbour Homes, 147 Wn. App. 193, 211 (2008). Thus the claim was properly addressed on summary judgment, and Defendant does not appear to argue otherwise.

deceptive practice. The CPA counterclaim is based on alleged inaccuracies in the accounting. RP at 33.

But the accounting is accurate, as the trial court found, and as discussed in detail *supra*. All of the alleged inaccuracies are the result of Defendant's misreading of the documents. Moreover, it is noteworthy that Section 3 of the Fruit Agreement provides either party could terminate the Fruit Agreement no later than March 1 of the crop year in which termination is desired (by Defendant if no funds were owing to Stadelman). CP at 75. In other words, Defendant could have canceled the Fruit Agreement prior to the respective March of the 2009 or 2010 crop years.

Second, Defendant failed to show the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion (i.e., the requirement to establish the "public interest" element). Defendant has not and cannot establish the public interest element because his counterclaim involves facts and circumstances unique to the relationship between him and

Stadelman and cannot be shown to have been similarly directed towards any others. In other words, it involves a private contract.

Conduct which merely constitutes a “private dispute” does not satisfy the public interest element of a CPA claim: “It 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. . . . There must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated or deceptive act’s being repeated.” Michael v. Mosquera-Lacy, 165 Wn.2d 595, 604 (2009) (emphasis added).

A breach of a private contract affecting no one but the parties to the contract, whether that breach be negligent or intentional, is not an act or practice affecting the public interest.

Lightfoot v. MacDonald, 86 Wn.2d 331, 335 (1976). *See also* Hangman Ridge, 105 Wn.2d at 790 (“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.”).

In Henery v. Robinson, 67 Wn. App. 277, 291 (1992), the Court of Appeals confirmed that an isolated communication to a single buyer does not have the capacity to deceive a substantial portion of the public. In Henery, the defendant represented to plaintiff statements about the financing terms necessary to be able to purchase a mobile home, i.e., a “creative financing scheme.” Id. at 290-291. The Court of Appeals held that because the communications in question were an “isolated communication” by defendant to plaintiff that as a matter of law there was no CPA violation and reversed the trial court. Id.<sup>13</sup>

Thus, a CPA claim arising from a private contract affecting only those to the contract should be dismissed because it cannot be shown to have a public interest impact.

Defendant’s counterclaim is simply a private party dispute

---

<sup>13</sup> Further, in Borish v. Olson, 155 Wn. App. 892, 903, n. 6 (2010), a purchaser alleged a negligent misrepresentation claim against a seller claiming structural deficiencies and irregularities which were not disclosed on a seller disclosure statement, and which did not surface during a home inspection pursuant to an inspection contingency nor in an appraisal made by an appraiser hired by the bank. The Court of Appeals stated that the CPA did not apply because it was essentially a private dispute: “Finally, the CPA does not apply because this is a private party dispute and lacks the required public interest in the outcome for these claims.” Id.

only involving agreements between him and Stadelman. He failed to present any evidence of any kind of actions which could deceive a substantial portion of the public. Indeed, in his appeal briefing Defendant does not explain how any of Stadelman's conduct can rise to the level of a CPA violation. Defendant merely alleges that Stadelman's accounting is incorrect and as such he was prevented from taking his crops elsewhere as long as he was indebted to Stadelman (as provided in the agreement he signed). No "capacity to deceive a substantial portion of the public" is present.

Defendant's argument that other growers could have been "subject to the same inaccuracies and charges" is completely unsupported and speculative. Moreover, his claim that other fruit handlers, such as Monson Fruit, "could well have derived the Voorhies revenue for sorting and packing [sic]," *Def.'s Opening Brief at 36*, does not make sense and at best would be conjectural.

In addition, Defendant—below and on appeal—fails to establish any damages, which is a required element of a CPA

claim. Defendant has never provided a statement as to what his supposed damages are, and the closest he comes to mentioning it is when he alleges he had “lined up” an apple packer to pay off Stadelman, and “that amount would have been significantly less” if the accounting was accurate. *Def.’s Opening Brief at 35*. At best, this is purely speculative. The trial court did not err in dismissing the CPA counterclaim.

## **2. The Trial Court Properly Dismissed the Negligence Counterclaim**

In the Answer, Defendant alleges “Stadelman was negligent and failed to follow the instructions of Voorhies in its packing and selling of Voorhies’ crops so that the returns to Voorhies were artificially deflated.” CP at 26.

That claim, too, was properly summarily dismissed below, in the first place, because it is barred by the “economic loss rule” (also called the “independent duty doctrine”), which holds that parties to a contract cannot ignore a contractual relationship by electing to sue under a tort theory instead of the contract itself:

[T]he purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.

Alejandro v. Bull, 159 Wn.2d 674, 688 (2007).

The rule was renamed the “independent duty doctrine” in Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 389–90, 241 P.3d 1256 (2010). In its present form, it states that where an alleged tortious act or omission is already within the context of the contractual duties inherent in the parties’ agreement, courts will not allow a plaintiff to ignore the contract and instead pursue a tort theory of recovery. *See* Eastwood, 170 Wn.2d 380.

The sole basis for the negligence theory is the claim Stadelman failed to use reasonable care. RP at 30. But, as the trial court correctly pointed out, that duty is inherent in the contract, because the contract provides that Stadelman will handle, market, and sell the fruit in accordance with industry standards and customs. RP at 30-31, 44. Pursuant to Paragraph 1.4 of the

Fruit Agreement, Stadelman was obligated to handle and market the fruit in accordance with industry customs and standards (i.e., exercise reasonable care):

1.4. Handling and Marketing: Handler shall handle and market Grower's fruit in accordance with the customs and standards of the industry and in accordance with Handler's standard practices, which Handler may, in its sole discretion; change from time to time, provided such changes shall apply to and treat all growers similarly situated with respect to quality, quantity and varieties of fruit alike.

CP at 77 (emphasis added).

Under Paragraph 1.2, Stadelman was contractually given the “sole discretion [as it] determines to be in Grower's best interest” to “handle and market Growers fruit.” CP at 77. Further defining the obligations, Paragraph 1.4 goes on to state that “Unless otherwise agreed in writing . . . Handler shall have the following rights, obligations and authority with respect to the handling and marketing” of the fruit:

- a) “To determine the type of pack and packaging of Growers fruit to establish standards for packs and types of packs, which standards may be greater than those established by state, federal or industry

grades.” Paragraph 1.4.1

- b) To determine “which fruit, if any, may be placed” in CA. Paragraph 1.4.1.
- c) To market “at such times and prices, and in such quantities as the market will accept and as Handler, in its sole discretion, deems to be in the best interest of Grower.” Paragraph 1.4.2.
- d) To divert fruit from the fresh market to processors or other outlets “when, in Handler’s sole discretion, market, quality, or other conditions reasonably justify such a diversion.” Paragraph 1.4.3.

CP at 77.

Defendant acknowledged at oral argument and in his briefing below that the Fruit Agreement contains provisions requiring Stadelman to meet industry standards, and that doing so would have inherently satisfied the applicable standard of care for purposes of his negligence claim. RP at 32; CP at 353.

The broad discretionary authority conferred upon Stadelman under the Fruit Agreement displaces and supplants any common law tort duties which might otherwise exist between the parties. Any tort duty is subsumed into the contract

by its express terms. As between the parties to an agreement, the provisions of the Fruit Agreement control and abrogate common-law tort duties. Eastwood, 170 Wn.2d at 390 (where duties are spelled out by contract independent tort duties do not apply, discussing Alejandre, 159 Wn.2d 674); Griffith v. Centex, 93 Wn. App. 202, 213 (1998) (where terms of agreement specifically cover subject matter at issue, such terms control over common-law tort duties); Snodgrass v. Spokane, 87 Wash. 308 (1915) (provisions of contract between railroad and adjacent landowner controlled duty of care between the parties).

“[A] party to a contract can limit liability for damages resulting from negligence.” Eifler v. Shurguard, 71 Wn. App. 684, 690 (1993) (citing American Nursery v. Indian Wells, 115 Wn.2d 217 (1990)). In American Nursery a six-page agreement between the parties (delivery of rootstock for development and growing) outlined the duties of the parties, the allocation of risk, guidelines for acceptance and rejection of deliveries, and available remedies. The court held that the limitation in the

agreement on recovery for incidental and consequential damages also limited that recovery under a negligence theory, noting that the agreement was one for mutual benefit, that the parties to the contract had equal bargaining strength, and the orchard was free to choose another commercial operation for the services being rendered. American Nursery, 115 Wn.2d at 232.

Here, the Defendant contractually limited his remedies. The detailed provisions of the Fruit Agreement conferring discretion and other rights upon Stadelman supplant and replace any tort duties which Defendant may argue otherwise exist between the parties. Since the Fruit Agreement provides that Stadelman would adhere to the standards and customs of the industry, there is no legal basis to assert a negligence claim. Thus, no “independent duty” exists beyond that which is already provided for in the contract and, accordingly, the tort claim fails as a matter of law. Eastwood, 170 Wn.2d at 389–90.

As a secondary basis to affirm the trial court’s order, Defendant provided no evidence, or inferences, to establish that

Stadelman was in fact negligent in the handling of the fruit, beyond his conclusory allegations. He submitted no evidence that the fruit prices Stadelman procured were below average. Thus, there is no evidence to support a claim.

**E. DEFENDANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES. STADELMAN IS ENTITLED TO FEES ON APPEAL**

Defendant is not entitled to an award of attorney's fees under either the Fruit Agreement or the Mortgage. As noted *supra*, the trial court did not err and thus there is no basis for fees.

On the other hand, the Court should grant Stadelman attorney's fees pursuant to RAP 18.1. As Defendant recognizes, both the Fruit Agreement and the Mortgage contain prevailing party attorney's fee provisions.

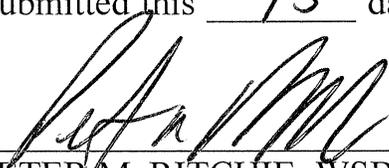
**F. CONCLUSION**

The Court should affirm the decisions and judgment of the trial court and hold that Stadelman's motion for summary judgment was properly granted and the judgment and decree of foreclosure properly entered. This appeal, like Defendant's

counterclaims and pleadings below, raises issues that are either devoid of merit or not actionable. The evidence below, and this appeal, raise no debatable issues and Defendant presents arguments unsupported by fact or law.

The trial court's decisions below were correct, appropriate, based on sound legal doctrine and established facts, and in no way were based on an abuse of discretion or error. The Court should affirm them in their entirety. The Court should also award Stadelman its costs and attorney's fees on this appeal under RCW 4.84.185 and RAP 18.1.

Respectfully submitted this 15<sup>th</sup> day of September, 2017.

  
\_\_\_\_\_  
PETER M. RITCHIE, WSBA #41293  
Meyer, Fluegge & Tenney, P.S.  
Attorneys for Stadelman

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

<b>J. Jay Carroll, Esq. Halverson Northwest Law Group P.C. 405 East Lincoln Avenue Yakima WA 98901</b>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> fax <input type="checkbox"/> e-mail <input checked="" type="checkbox"/> hand delivery
<b>Zachary Hummer, Esq. Carlson Boyd PLLC 230 South Second Street Suite 202 Yakima WA 98901</b>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> fax <input type="checkbox"/> e-mail <input checked="" type="checkbox"/> hand delivery
<b>Court of Appeals, Division III 500 N. Cedar Street Spokane, WA 99201</b>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> fax <input checked="" type="checkbox"/> e-mail <input type="checkbox"/> hand delivery

DATED this 15<sup>th</sup> day of September, 2017, at Yakima, Washington.

  
\_\_\_\_\_  
Carol Switzer, Legal Assistant  
Meyer, Fluegge & Tenney, P.S.

**MEYER, FLUEGGE & TENNEY**

**September 15, 2017 - 11:07 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35165-3  
**Appellate Court Case Title:** Stadelman Fruit, LLC v Jim D. Voorhies, et al  
**Superior Court Case Number:** 11-2-02654-9

**The following documents have been uploaded:**

- 351653\_Briefs\_20170915105031D3035218\_1031.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was stadelman 351653-III response brief.pdf*

**A copy of the uploaded files will be sent to:**

- jcarroll@halversonNW.com
- jfitzsimmons@halversonnw.com
- zhummer@cbblawfirm.com

**Comments:**

---

Sender Name: Carol Switzer - Email: switzer@mftlaw.com

**Filing on Behalf of:** Peter McGillis Ritchie - Email: ritchie@mftlaw.com (Alternate Email: switzer@mftlaw.com)

Address:  
230 S. 2nd Street  
Yakima, WA, 98901  
Phone: (509) 575-8500

**Note: The Filing Id is 20170915105031D3035218**