101369-8

COA No. 54462-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

SOUTH SOUND RV PARK, LLC, A WASHINGTON LIMITED LIABILITY COMPANY,
Petitioner,

vs.

CASCADE PROPERTIES PH, LLC, A WASHINGTON LIMITED LIABILITY COMPANY
Respondent.

PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

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October 12, 2022

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COMES NOW South Sound RV Park, LLC ("SSRVP"), the Petitioner and petitions the Washington Supreme Court to review the decision of the Court of Appeals herein.

I. IDENTITY OF THE PETITIONER

South Sound RV Park, LLC (SSRVP) is a Washington State limited liability company owned by Justin Bartlett, a defendant below. Petitioner was the plaintiff in the Pierce County Superior Court Case 19-2-04563-4 wherein SSRVP was the substantially prevailing party.

II. COURT OF APPEALS DECISION

Petitioner seeks review of S. Sound RV Park, LLC v. Cascade Props. PH LLC, 21 Wn. App. 2d 311, 313, 504 P.3d 885, 886 (2022), Court of Appeals No. 54462-8-II ("Decision") decided on September 8, 2021. Appendix 1. A motion for reconsideration was timely filed and denied on September 12, 2022. Appendix 2.

III. ISSUES PRESENTED ON APPEAL

Issue 1: Did the Decision err in reversing the trial court as to the account stated doctrine? In so erring did the Decision depart from prior Supreme Court precedent in Sunnyside Valley Irrig. Dist. v. Roza Irrig. Dist., 124 Wn.2d 312, 877 P.2d 1283 (1994) and Court of Appeal precedent in Rustlewood Ass'n v. Mason Cty., 96 Wn. App. 788, 981 P.2d 7 (1999) by inappropriately expanded a common, yet limited, defense thereby also impacting a significant public interest?

Issue 2: Did the Decision err in failing to adhere to the Court of Appeals precedent in Associated Petroleum Products, Inc. v. Northwest Cascade, Inc., 149 Wn. App. 429, 437, 203 P. 3d 1077 (2009) which allows a party to challenge one's assent "*if the other party engaged in fraud* ***or inequitable conduct.*** (Emphasis added)."

Issue 3: Did The Decision err by departing from Supreme Court precedent in Dahlhjelm Garages v. Mercantile Ins. Co., 149 Wash. 184, 191, 270 P. 434, 437 (1928) and

Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 766-67, 733 P.2d 530, 533 (1987) relating to deeming a complaint amended to conform to the evidence in concluding that SSRVP had not raised the issue of fraud or mistake to challenge an account stated when it was prominently argued (and responded to by Cascade) in the Petitioner's Motion for Partial Summary Judgment?

Issue 4: Did the Decision err in not following Supreme Court in Ryan v. Dowell, 86 Wash. 76, 80, 149 P. 3d 343 (1915), Baxter v. Lockett, 2 Wash. Terr. 228, 6 P. 429, 433 (1884) and Merritt v. Meisenheimer, 84 Wash. 174, 179-80, 146 P. 370 (1914); Court of Appeals guidance in Black Diamond Dev. Co. v. Union Bank, N.A., No. 76079-3-I, 2018 Wash. App. LEXIS 1267 (Ct. App. June 4, 2018) (Cited per GR 14.1) and statutory authority under RCW 61.24.090(b)(2) allowing post-adjustment recovery of improper charges after an escrow closing? Further, in so doing, did the Decision fail to consider the substantial public interest as discussed in Klem v.

Wash. Mut. Bank, 176 Wn.2d 771, 789, 295 P.3d 1179, 1188 (2013) and Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 570, 276 P.3d 1277, 1283 (2012) that non-judicial trustee sales be conducted fairly, per statute and not a tool to leverage admittedly improper payoffs?

Issue 5: Did the Decision err in finding that the SSRVP had not met the first element of the Consumer Protection Act Claim despite the trial court finding unfair and deceptive assertion of inaccurate interest, improper compound interest and improper late fees? Such Decision conflicts not only with the factual record but with the Supreme Court precedent in Ryan v. Dowell, Baxter v. Lockett, and Merritt v. Meisenheimerand Court of Appeals guidance in Diamond Dev. Co., LLC v. Union Bank, N.A.?

Issue 6: In so erring as set forth in Issues 1 – 5, did the Decision err in not further considering SSRVP's cross-appeal wherein it should have found an unenforceable penalty when Cascade charged an in illegal $46,916.87 late fee on a

$938,337.40 principal that Cascade's principal admitted bears no relationship with Cascade's actual damages?

IV. STATEMENT OF THE CASE

a. Procedural History:

A summons and complaint were filed on January 9, 2019 alleging breach of contract, improper accounting, conversion and breach of the consumer protection act. CP 1-5. Cascade answered and asserted affirmative defenses including account stated. Summary judgments were filed in November 2019. CP 16-28, 122-138. The trial court ruled that the Niwara Purchase Amount of $949,478 accrued 24% interest from February 1, 2019, found the 5% late fee on the Niwara principal balance was proper, struck Cascade's account stated defense and reserved the rest for trial. CP 265-267. Appendix 3. Justin Bartlett the member/manager of SSRVP and Dale Huffman, CPA, the manager of Cascade were the sole witnesses. CP 473. 67 exhibits were admitted. CP 381-384. Findings of facts and conclusions of law (Appendix 4) and judgment (Appendix 5)

was entered in favor of SSRVP for breach of contract and conversion, provided consumer protection act damages, and awarded attorney fees with a 1.2 Lodestar multiplier. CP 473-480. Cascade appealed. CP 481-504. SSRVP filed a cross-appeal as to the 5% Late Fee. CP 505-530.

b. Factual History as to Response:

SSRVP originally borrowed $848,000 from Nirawa, LLC. Exhibit 3. Such amount was due on January 10, 2017. Exhibit 3. This was private lending and would be what is considered a "hard money" loan. 2 VR 181. Such note did not contain compound interest. Exhibit 3.

SSRVP had bought a derelict RV park, cleaned it up, cleared up an easement issue and had sought to sell it. 1 VR 14-16. The sale was delayed for various reasons and the Nirawa Note became due. 1 VR 18. SSRVP then sought a lender to refinance the Nirawa Note and was, through third parties, put in touch with Cascade. 1 VR 18-19.

Cascade simply bought out the Niwara note by a "Loan Agreement". 2 VR 205, Exhibit 8. Cascade loaned another $186,000 in a new note paying off another loan and covering loan fees. CP 30. Exhibit 6. No one ever mentioned compound interest nor is it documented. 1 VR 29. See Exhibits 2, 6 and 8. Such Loan Agreement Section 1.2 discusses that the rate was going to be 10.5% and then jumped to 24% after six months. Exhibit 8.

Just before SSRVP sold the RV Park, Cascade demanded a 5% late fee on the entire balance as the loan. Exhibit 52. That was in addition to the 24% interest. Exhibit 52. The Niwara Note (Exhibit 3) has a 5% late fee only on the installment payments. On the new $186,000 loan with Cascade (Exhibit 6) it provides the late fee applies to "any monthly payment."

Cascade made representations of the interest owed six times with no compound interest mainly related to trustee sale notices. CP 22, 24, 29, 30, 31, and 31 Cascade's then attorney

was not asserting compound interest – as admitted by Huffman. 2 VR 210.

Bartlett asked Huffman for a payoff in July 2018. 1 VR 40-42. Huffman sent a three-page spreadsheet. 1 VR 40-42. Exhibit 27. The handwriting was on the document when it was sent to Bartlett. CP 37. The interest was confused as in one point it is compounding on a monthly basis but in handwriting, it is simple interest. Exhibit 27. Huffman agreed in cross examination if SSRVP paid the amounts in the Notice of Trustee Sale "we'd have to go with this". 2 VR 214 referring to Exhibit 32. Such Exhibit 32 did not contain the Late Fee on the principal balance.

Thereafter, SSRVP entered into a sales contract. Exhibit 28. The sale closed on September 28, 2018. Exhibit 46. Escrow requested a loan payoff from Cascade. Exhibit 41. Cascade, the day before closing provided a much inflated balance. Exhibit 43-44. The earlier payoff amount in amount on Page 1 of Exhibit 27 was $1,270,007.10. The payoff two

months later was almost $200,000 higher. Exhibit 44. Even adding combined the per diem at the amounts shown on Exhibit 9 ($791.07 per day) at the days from 7/20/18 to 9/27/18 – it would be only $56,165.97 more. CP 40, Exhibit 70. Bartlett did not see the payoff until 10:29 a.m. on the day of closing. CP 475 (Finding 25). The loans were paid off at closing. Exhibit 37. Cascade had a trustee sale scheduled the next week for the property at issue. Exhibit 31. Huffman testified that despite the various foreclosure notices being incorrect, he never read them and he took no step to stop the sale. 2 VR 218. The escrow company would not close if Bartlett protested the Cascade payoff amount. 1 VR 62.

Shortly after escrow closed, Bartlett's wife went over the settlement statement as to the overcharges. 2 VR 63-64. Bartlett wrote a lengthy email dated October 4, 2018 to Huffman protesting and pointing out the inflated amounts. Exhibit 47. Huffman did not respond. Exhibit 48. Later on October 4, 2018, Bartlett wrote an email to Rick Peterson, the

principal of Cascade, pointing out $158,512.04 of overpayment. Exhibit 48. Peterson sent Bartlett a dismissive email. Exhibit 48. When SSRVP got its attorney involved, Cascade then tried to increase the late charge from 5% to 10%, adding interest on late fees including the large late fees on the entire balance. Exhibit 52.

Cascade had set the foreclosure sale as to the property in escrow for October 5, 2018 - a week from the sale closing date. 1 VR 59. If Bartlett had immediately protested – Cascade would have simply refused to accept such lower amount, the transaction would not have closed and Cascade would have foreclosed and taken everything – a foreclosure that would leave Bartlett potentially responsible under the personal guaranty that Bartlett signed. 1 VR 59, CP 6-15. Cascade had placed Bartlett in a no-win situation. 1 VR 58, 59. Findings of Fact 30-31. CP 473-480. All relevant documents were either drafted by the original lender Niwara, LLC (Exhibits 1-4) or Cascade which drafted the Loan Agreement and related

documents. 2 VR 206, Exhibits 8, 9. The documents were presented to Bartlett on a "take it or leave it" basis per Huffman. 2 VR 206-7.

Given the Summary Judgment as to the Late Fee, Bartlett requested a refund of the overpayment of $94,714.12[1] and prejudgment interest at 24% which is the default rate Cascade charged SSRVP. 1 VR 70-71.

Bartlett acknowledged the loans were in default. 1 VR 18. He did not protest the default interest on behalf of SSRVP. CP 43, Exhibit 70. 1 VR 39. SSRVP did not protest the attorney fees and cost run up in the foreclosures. CP 43, Exhibit 70. SSRVP only protested items that it never agreed to and which never came up until very late in the process and up against the foreclosure Cascade was leveraging to force payment of the inflated payoff. CP 44. Exhibit 70.

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[1] Such amount has an arithmetic error wherein the amount owed on the larger note was overstated by $9,324.00 when "rent's received" of $4,662 were added, not subtracted from the loan

The Loan Agreement by Cascade wherein it bought the Niwara Note provides that its purchase was for everything owed to Niwara at the time of purchase. Exhibit 8. Such Exhibit 8 recites $928,636.02 was what was "validly owed by Borrower and Guarantor and consists of the principal balance of $848,000 plus unpaid default interest **and fees**...." (emphasis added). Exhibit 8. The $928,636.02 price was inclusive of any late fees accrued. Exhibit 8.

Niwara transferred the note and deed of trust by an assignment of deed of trust (Exhibit 11) that assigned the deed of trust "together with all monies secured thereunder". The importance of this fact is that Cascade bought "all moneys secured" for $938,337.41 which would have included the 5% late fee if that had been applied at maturity of the Niwara Note six months prior

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balance. A motion to correct will be sought if the trial court judgment is reinstated.

SSRVP had problems with Cascade losing payment checks and charging late fees. 1 VR 33, 2 VR 112. Moreover, despite earlier assurances, Cascade waited until three days before the loan matured to deny an extension. 1 VR 38-39. This was not denied by Cascade.

Huffman admitted the Notice of Default and Notices of Trustee Sales Cascade sent to the SSRVP contained no mention of a five percent (5%) late fee. 2 VR 210. Not only did Cascade send inconsistent legal documents, once the SSRVP defaulted on its loan from Cascade, Cascade sent a stranger to the park and just took the rents from the SSRVP's property manager. 2 VR 131-132.

Huffman admitted there was no dispute as to the loan amount prior to payoff. 2 VR 236. Waiting until the last minute and producing inflated figures placed SSRVP in the position of losing a sale or face foreclosure. 1 VR 58-59. Huffman justified inflating the last minute payoff $150,000 because Bartlett "did not honor his obligation" and because "[h]e didn't

object". 2 VR 214-215. After the default, Cascade admitted to making many errors regarding interest and late payments:

> **Q. You're a CPA for a couple decades, you're making a lot of errors here.**
> **A. Yep, we all do, all of us CPAs.**

(Bold added). 2 VR 228. Huffman admitted he never corrected his foreclosure attorney for not including the late fees, compound interest and retroactive interest. VR 212-213. When asked if the late fee "does not bear in any way to any damages you [Cascade] suffered," Huffman answered "correct." and if "you [Cascade] were fully compensated" without the late fee he replied "Correct. Absolutely, no question about it." 2 VR 233-234. Nothing in the Loan Agreement between Cascade and South Sound provides for a 5% late fee as South Sound agreed to repay the "Niwara Purchase Amount". Exhibit 8. After adjustment, such amount was $938,337.41. Finding of Fact 9. CP 471.

c. Additional factual history related to cross-appeal.

In regards to Section 8 of the Loan Document, regarding late charges, a "late payment charge of five percent (5%) of the installment payment shall be added to the **scheduled payment**." (Bold added). Exhibit 3. The Niwara Note contains no language implying that the late charge should be added to the entirety of the principal amount. Exhibit 3. The Niwara Note also was executed in conjunction with a "Loan Worksheet" which refers to "interest only payments" and "monthly interest payments" and then discusses the Late Fee as being 5% "of past due payment amounts." Exhibit 1. The Loan Worksheet ties the Late Fee explicitly to "installment" payments. Exhibit 1.

Furthermore, Cascade admitted to being unaware of the exact meaning and nature of the five percent late fee in the original Niwara loan but agreed Niwara never charge the Late Fee. 2 VR 234.

V. ARGUMENT

a. Standard of Review.

Review is sought under RAP 13.4 (1), (2) and (4) for the reasons and authority set forth herein.

b. Account stated does not apply to single transactions.

As set forth in the facts, SSRVP had one transaction with Cascade that resulted in a single loan agreement that was broken into two promissory notes. The notes had identical due dates. The notes were to be paid off in the sale at the same time. One request for payoff was provided to Cascade and Cascade provided only one payoff to escrow. The Decision conflicts with Rustlewood Ass'n v. Mason Cty., 96 Wn. App. 788, 797-98, 981 P.2d 7, 12 (1999) which held: "Typically, periodic residential utility debts do not constitute an account stated because single item liquidated debts for a sum certain do not often qualify for this defense. 6 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS, § 1304 (1962).

Accounts stated generally concern open accounts, where the amount a party owes at a given moment is difficult, if not impossible, to fix precisely. CORBIN, § 1303."

The Decision held: "Payment of a statement can also establish an account stated if paired with a failure 'to objectively manifest either protest or an intent to negotiate the sum at some future time.' *Sunnyside Valley Irrig. Dist. v. Roza Irrig. Dist.*, 124 Wn.2d 312, 316 n.1, 877 P.2d 1283 (1994)." S. Sound RV Park, LLC, at 317. However, in such reliance, the Decision ignored that Sunnyside was an open account situation where payments and objections were ongoing for approximately 10 years to an irrigation district. The Decision ignored the authority that "an account stated does not apply to a single transaction such as the payoff of Appellant's contract. See M. Rombauer, 27 Wash. Practice, Creditors' Remedies - Debtors' Relief § 5.49 ('Single item liquidated debts for a sum certain do not qualify for the doctrine…')". SSRVP was a promissory note situation - not an open account. The Decision

erred in extending the doctrine. In doing so it has inappropriately expanded a common defense and disregarded precedent.

c. Cascade engaged in inequitable conduct leading up to the signed escrow payoff giving SSRVP the right to challenge such assent.

The factual section sets forth the misconduct by Cascade including, *inter alia*, changing payoffs, delays in providing payoffs, and providing a payoff at the last minute significantly changed from prior payoffs. The Decision properly cited to Associated Petrol. Prods., Inc. v. Nw. Cascade, Inc., 149 Wn. App. 429, 437, 203 P.3d 1077 (2009) to say that "A party may challenge an account stated by showing their assent was induced by fraud or mistake...Similarly, a unilateral mistake entitles a party to challenge an account stated if the other party engaged in fraud." S. Sound RV Park, LLC at 317 citing Associated Petrol. But then the Decision fails to allow SSRVP to do just that. As set forth in the facts, the principal of Cascade admitted mistakes. Mr. Bartlett testified to the

inequitable conduct and the trial court made explicit findings as to deceptive, inequitable conduct. Fraud is recognized as an equitable defense. Goodwin v. American Surety of New York, 190 Wash. 457, 469, 68 P.2d 619 (1937). Mistake and inequitable conduct are also equitable defenses. Kaufmann v. Woodard, 24 Wn. 2d 264, 270, 163 P. 2d 606 (1945). Conduct that is unfair is also inequitable. Black's Law Dictionary (11th Ed. 2019) ("*inequitable ... adj. (17c) Not fair*..."). Here, the trial court found in Finding of Fact 37 the conduct of Cascade was unfair and deceptive. CP 477. Finding 37 thus also establishes Cascade's conduct was inequitable. In Finding 37, the trial court found multiple acts of Cascade were unfair or deceptive. "*The last minute inclusion of unjustified compound interest, inaccurately calculated per diem interest, early default interest and previously unasserted late fees was both unfair and deceptive.*" CP 477. In contrast, the Decision opinion fails to mention Finding 37. By doing so not only did the Decision

invade the province of the trial court, it deviated from established precedence.

d. Fraud and mistake were raised and argued.

Seemingly trying to bolster its determination that the account stated applied and cut off avenues for the trial court to properly obviate the effect thereof, the Decision stated "SSRP failed to allege fraud or mistake that would entitle it to later challenge the account stated." S. Sound RV Park at 317-18. But this is not accurate. The complaint is replete with allegations of "wrongful demand", "making excessive payoff", "wrongfully providing an improper payoff" and engaging in "unfair and deceptive" practices. CP 3,4. The complaint sought a proper accounting. CP 4. SSRVP's Motion for Partial Summary Judgment sets forth the very Associated Petroleum authority related to "fraud or inequitable conduct". CP 22-23 and Cascade agreed "*that* [SSRVP] *is entitled to show error and mistake in the payoff demand*..." CP 200-01. Moreover, the doctrine of "account stated" is a defense. Sound RV *in*

passim. Put otherwise, the Decision ignores that Cascade raised the defense and SSRVP responded thereto. The Decision ignores that SSRVP raised the fraud issue early on and it was argued by the parties. The court rules allow issues to be raised by the implied consent of the parties. CR 15 (b) provides, in pertinent part, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings…" Case law provides "the complaint will be deemed amended to correspond with the proofs." Dahlhjelm Garages v. Mercantile Ins. Co., 149 Wash. 184, 191, 270 P. 434, 437 (1928). No objection was made as to the evidence and testimony related thereto. "Where evidence raising issues beyond the scope of the pleadings is admitted without objection, the pleadings will be deemed amended to conform to the proof." Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 766-67, 733 P.2d 530, 533 (1987). Here, the record reflects the parties raised the issue of mistake in the trial court. Fraud and

mistake – along with inequitable conduct - were raised and argued and the Decision erred and deviated from established Supreme Court precedence in so doing.

e. Case law and statute allow post-closing recovery of improper charges and fees.

The Decision compounded its error by failing to adhere to both Supreme Court precedent and statutory guidance allowing post-closing actions to recover improperly charged inflated payoffs and improper fees. Indeed, as discussed infra, it is also a basis for CPA claims. Washington cases which allow post-payoff adjustment or recovery of improper charges. See Ryan v. Dowell, 86 Wash. 76, 80, 149 P. 3d 343 (1915); Baxter v. Lockett, 2 Wash. Terr. 228, 6 P. 429, 433 (1884) ("Plaintiffs in error were entitled to show fraud, error, or mistake which had come to their knowledge after the account became a stated account, whether the knowledge came to them before or after suit was brought."); Merritt v. Meisenheimer, 84 Wash. 174, 179-80, 146 P. 370 (1914). The Court of Appeals has allowed post-closing accounting when a loan payoff is

found to be inaccurate. Black Diamond Dev. Co. v. Union Bank, N.A., No. 76079-3-I, 2018 Wash. App. LEXIS 1267 (Ct. App. June 4, 2018), at *1 (Wash. Ct. App. June 4, 2018)(Cited per GR 14.1) and Black Diamond Dev. Co. v. Union Bank, NA, No. 71114-8-I, 2015 Wash. App. LEXIS 686 (Ct. App. Mar. 30, 2015) (cited per GR 14.1).

The Decision also disregarded the fact that the payoff – which effectuated a discontinuance of the trustee sale scheduled by Cascade a week from the closing date – has statutory protections:

> **Any person entitled to cause a discontinuance of the sale proceedings shall have the right**, before or **after reinstatement, to request any court**, excluding a small claims court, for disputes within the jurisdictional limits of that court, **to determine the reasonableness of any fees demanded or paid as a condition to reinstatement. The court shall make such determination as it deems appropriate, which may include an award to the prevailing party of its costs and reasonable attorneys' fees, and render judgment accordingly.** An action to determine fees shall not forestall any sale or affect its validity."

(bold added) RCW 61.24.090(b)(2). Given the Cascade loan was matured, the entire amount so that the full pay off was the

only practical way to "cause a discontinuance of the sale." This Court has previously warned of the danger of non-judicial deed of trust sales and the lack of judicial oversight. "The power to sell another person's property, often the family home itself, is a tremendous power to vest in anyone's hands. Our legislature has allowed that power to be placed in the hands of a private trustee, rather than a state officer, but common law and equity requires that trustee to be evenhanded to both sides and to strictly follow the law." (citations omitted) Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 789, 295 P.3d 1179, 1188 (2013); See also, Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 570, 276 P.3d 1277, 1283 (2012). Not only does the Decision conflict with Supreme Court, Appellate Court and statutory authority, it impacts a public interest by cutting off an important method of oversight in these extra-judicial sale and should not be allowed to stand. The Decision essentially tells unscrupulous lenders how to "get away with it" by allowing Cascade to shove in a bloated payoff right before foreclosure

and then not answer phone calls and emails. The message here is that the worse the situation the lender puts the borrower in…the more likely the lender is to get away with it.

f. Submission of bloated payoffs with improper fees is an unfair and deceptive practice.

The Decision myopically viewed the "assent" in the payoff without viewing the surrounding circumstances as the trial court had. In doing so, its decision conflicts with decisions of the Supreme Court and other decisions of the Court of Appeals. Further, the "assent" the court allowed would swallow almost all escrowed pay-off situation which require approvals of settlement statements and payoff authorizations. The Court concluded SSRVP does not meet the first element of a CPA Claim. Decision p. 7-8; App. 1. To the contrary, in Finding of Fact 37, the trial court found as follows:

> The conduct of Cascade was unfair and deceptive. The last minute inclusion of unjustified compound interest, inaccurately calculated per diem interest, early default interest

> and previously unasserted late fees was both unfair and deceptive. (CP 477)

The first element of a Consumer Protection Act claim is an unfair or deceptive act or practice. Klem at 772. Finding 37 is sufficient to establish the first element of Respondent's CPA claim.

In light of Ryan v. Dowell, Baxter v. Lockett, and Merritt v. Meisenheimer, *supra,* Cascade's acceptance of SSRVP's payoff demand does not preclude SSRVP's CPA claim. Further case law makes such point. Courts have taken payoff demands seriously and have even held that improper charges can lead to Consumer Protection Act violations:

> The amount of the "Misc Service Chgs" is then included in the total sum due to pay the mortgage in full. Including nonsecured fees with secured obligations has the capacity to deceive reasonable consumers into believing that they must pay the fees before Kislak will release the mortgage.
>
> The Washington Legislature passed the Consumer Protection Act for a laudable purpose: to protect Washington citizens from unfair and deceptive trade and commercial practices. "To this end, this act

> [should] be liberally construed that its beneficial purposes may be served." Our holding protects Washington citizens by ensuring that they are clearly and accurately informed about the nature and extent of their obligations to Kislak.

(footnote omitted) Dwyer v. J.I. Kislak Mortgage Corp., 103 Wn. App. 542, 547–48, 13 P.3d 240, 243 (2000). The Court of Appeals reversed a trial court and reinstated a consumer protection claim for further consideration as to a $26.00 reconveyance fee. Peterson v. Kitsap Cmty. Fed. Credit Union, 171 Wn. App. 404, 287 P.3d 27 (2012). The present Decision conflicts with Supreme Court and Court of Appeals precedent and for such reason should be reviewed and reversed.

g. By ruling as it did, the Decision precluded consideration if the late fee charged by Cascade was an unenforceable penalty.

As set forth in the fact section, Cascade's principal flat-out admitted the 5% late fee bore no relationship to its damages and that it was made whole with the default interest and attorney fees. This court has already made the law clear that "a provision in a contract that bears no reasonable relation to

actual damages will be construed as a penalty. *Walter Implement,* 107 Wash.2d at 559, 730 P.2d 1340." Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 893, 881 P.2d 1010, 1017 (1994). Such court continued and said "that while proof of actual damages is no longer a requirement, nevertheless, actual damages may be considered where they are so disproportionate to the estimate that to enforce the estimate would be unconscionable." (citation omitted) Id. at 894. Such decision also considered as a factor in upholding liquidated damages being the "difficulty in estimating damages." Id. at 893. Here there is no difficulty in determining damages as it is a loan for a sum certain. Such penalty should be reviewed and its imposition rejected and the matter remanded to the trial court to recalculate.

h. Attorney fees should be awarded Petitioner.

In the event SSRVP prevails on this Petition, Petitioner requests an award of reasonable attorney fees on appeal, pursuant to the Niwara note and the Cascade Loan Agreement

(EX 3, 8), RCW 4.84.330, RAP 18.1 (a) and Marine Enterprises, Inc. v. Security Pacific Trading Corp., 50 Wn. App. 768, 773-74, 750 P. 2d 1290 (1988).

VI. CONCLUSION

For the reasons set forth above, the Petitioner requests that this court accept review, reverse the Court of Appeals reinstating the Trial Court judgment excepting only the issue of the late fee addressed in V. g. above which should be remanded to the Trial Court to add to the judgment in favor of SSRVP. Additionally, attorney fees and costs should be awarded.

The undersigned attorney certifies the number of words contained in the document, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images totals 4755 words.

RESPECTFULLY SUBMITTED this 12th day of October, 2022.

MARTIN BURNS, WSBA No. 23412
Attorney for Petitioner SOUTH SOUND RV PARK, LLC

VII. APPENDICES

APPENDIX 1

Published Opinion

Filed
Washington State
Court of Appeals
Division Two

February 23, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SOUTH SOUND RV PARK LLC, a Washington limited liability company, Respondent/Cross-Appellant, v. CASCADE PROPERTIES PH LLC, a Washington limited liability company; DALE HUFFMAN and JANE DOE HUFFMAN, on behalf of his separate estate and marital community; and H.F. PETERSON and JANE DOE PETERSON, on behalf of his separate estate and marital community, Appellants/Cross-Respondents.	No. 54462-8-II PUBLISHED OPINION

VELJACIC, J. — South Sound RV Park (SSRP) received financing from Niwara to purchase a disused recreational vehicle (RV) park. SSRP defaulted on this loan and sought to refinance with Cascade Properties (Cascade). Cascade purchased the Niwara promissory note, extended an additional loan to SSRP, and entered into a new loan agreement (Loan Agreement) with SSRP. SSRP defaulted on both loans, and found a buyer to purchase the property to satisfy its debts. On the transaction closing day, SSRP received a payoff statement from Cascade that contained compound interest and late fees. SSRP closed the transaction, but sued Cascade to recover a refund for overpayments under the inflated payoff statement.

Both parties moved for summary judgment. In its order, the trial court denied Cascade's motion for summary judgment in part and also struck Cascade's defense of account stated.

At a bench trial, the court ruled that Cascade had violated the Consumer Protection Act (CPA), chapter 19.86 RCW. Cascade appeals the trial court's partial summary judgment order striking its defense of account stated and its ruling finding a violation of the CPA.

We conclude that as a matter of law the parties' conduct satisfies the doctrine of account stated and that Cascade's conduct did not violate the CPA. Accordingly, we reverse and remand to the trial court to enter judgment dismissing SSRP's claims against Cascade.

FACTS

Justin Bartlett, the managing member of SSRP, sought to purchase a disused RV park, improve it, and sell it. To complete the purchase, Bartlett borrowed $848,000 from Niwara. The parties memorialized the loan in a promissory note (Niwara Note). The Niwara Note was a hard money loan[1] with a 12 percent interest rate, requiring monthly interest payments with a balloon payment comprised of the entire principal amount due at the end of the loan period. The default interest rate was 24 percent. SSRP had previously taken out approximately 200 hard money loans.

The default interest provision in section 4 of the Niwara Note states:

> DEFAULT INTEREST RATE. If [SSRP] defaults upon any payment when due, including monthly payments or final balloon payment, any unpaid principal, fees and interest shall bear interest at the Default Interest Rate of Twenty-Four percent (24.00%) per annum in addition to the Late Charge set forth in Section 8 below.

Clerk's Papers (CP) at 45.

SSRP defaulted on the Niwara Note, and reached out to a loan broker, to help it refinance. The broker referred SSRP to Cascade. Cascade does not advertise for its services and did not reach out to SSRP.

[1] Hard money loans occur between private parties and usually charge higher interest rates, including higher default interest.

SSRP and Cascade entered into the Loan Agreement under which Cascade agreed to purchase the Niwara Note for $928,636.02, and advance a new loan of $186,000 to SSRP. The Loan Agreement included compound interest and a default interest rate of 24 percent. It is undisputed that SSRP defaulted on the Loan Agreement.

Instead of seeking refinancing, SSRP decided to find a buyer for the property. SSRP eventually found a buyer, and on the day of closing it received the payoff amount from the escrow company. The payoff amount included default compound interest and late charges. SSRP signed the escrow papers without any protest, and affirmed that it "READ, REVIEWED AND APPROVED" the payoff demand. CP at 13.

A few days after signing the escrow papers, SSRP contacted Cascade to dispute the payoff amount. When Cascade refused to provide a refund, SSRP sued. Both parties moved for summary judgment. SSRP sought a partial summary judgment order that the Niwara Note and the Loan Agreement did not include compound interest, that the late charge was chargeable only to the interest payments not all payments, and that Cascade's defense of account stated be stricken. Cascade's motion for summary judgment sought dismissal of SSRP's lawsuit under the doctrine of account stated (amongst other defenses), and an award of attorney fees.

The trial court entered a summary judgment order that granted and denied in part both parties' motions and included three rulings. The court determined that simple interest of 24 percent began accruing on the Niwara purchase amount of $939,478 on February 1, 2018, when SSRP defaulted. The court also determined that the 5 percent late charge was "properly assessed on the Niwara Purchase Amount." CP at 267. Lastly, the court struck Cascade's defense of account stated. The court reserved all other issues for trial.

After a bench trial, the trial court entered multiple findings of fact and conclusions of law relevant here. In finding 38, the court addressed the CPA issue, finding that Cascade's conduct impacted the public interest. It stated: "Given that many such loans and a majority of such loans are closed through escrow that clears existing encumbrances by getting payoff amounts from lenders, the ability to submit last minute inflated payoffs in an unregulated industry does raise the real prospect of repetition and impact on the public." CP at 477.

Conclusion 59 states that Cascade violated the CPA: "Cascade has engaged in unfair and deceptive acts impacting the public interest in a manner that may be replicated thus violating the Washington Consumer Protection Act, RCW 19.86.020 entitling Plaintiff to damages of $94,714.12 and treble damages in the amount of $25,000 based upon such limitation set by RCW 19.86.090." CP at 479. In conclusion 60, the court stated, "Prejudgment interest at the contract default rate of 24% from September 28, 2018 until entry of judgment is warranted." CP at 479.

Cascade appeals the trial court's partial summary judgment order striking the defense of account stated and its conclusion that Cascade violated the CPA.

ANALYSIS

I. DOCTRINE OF ACCOUNT STATED

Cascade argues that because SSRP signed the escrow papers and did not indicate on the papers its objection to the payoff amount, SSRP waived its claim under the doctrine of account stated and the doctrine should not have been stricken at summary judgment. SSRP argues that the doctrine of account stated does not apply to the type of transaction in this case. We conclude that the parties' conduct satisfies the doctrine of account stated, and therefore the trial court should have granted judgment to Cascade.

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A. Standard of Review

We review a trial court's order granting summary judgment dismissal de novo, and perform the same inquiry as the superior court. *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 300, 449 P.3d 640 (2019); *RockRock Grp., LLC v. Value Logic, LLC*, 194 Wn. App. 904, 913, 380 P.3d 545 (2016). We consider the facts and the inferences from the facts in a light most favorable to the nonmoving party. *Bremerton Pub. Safety Ass'n v. City of Bremerton*, 104 Wn. App. 226, 230, 15 P.3d 688 (2001). The court may grant summary judgment if the pleadings, affidavits, and depositions establish 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.'" *Value Logic, LLC*, 194 Wn. App. at 913 (quoting CR 56(c)).

B. Legal Principles of the Doctrine of Account Stated

The doctrine of account stated applies when both the debtor and creditor agree that a specific sum is the amount due. *Discover Bank v. Bridges*, 154 Wn. App. 722, 728 n.4, 226 P.3d 191 (2010). Payment of a statement can also establish an account stated if paired with a failure "to objectively manifest either protest or an intent to negotiate the sum at some future time." *Sunnyside Valley Irrigation Dist. v. Roza Irrigation Dist.*, 124 Wn.2d 312, 316 n.1, 877 P.2d 1283 (1994).

A party may challenge an account stated by showing their assent was induced by fraud or mistake. *Associated Petroleum Prod., Inc. v. Nw. Cascade, Inc.*, 149 Wn. App. 429, 437, 203 P.3d 1077 (2009). Fraud occurs when a party "conceals a material fact that it has a duty to disclose to the other party." *Id.* Similarly, a unilateral mistake entitles a party to challenge an account stated if the other party engaged in fraud. *Id.*

We conclude that the trial court erred in ruling that the account stated defense was inapplicable here. The facts presented at summary judgment unquestionably establish that Cascade provided SSRP with a statement of account and that SSRP paid the account without objectively manifesting protest or an intent to negotiate. SSRP received the final payoff figure prior to signing the escrow documents. Even though the payoff amount exceeded the sum SSRP expected, it signed the escrow papers. Prior to signing, SSRP failed to protest the payoff amount or indicate to Cascade its intent to negotiate. Indeed, SSRP signed the documents after it expressly "READ, REVIEWED AND APPROVED" the payoff demand. CP at 13. After a few days had passed, SSRP finally wrote to Cascade to challenge the payoff amount and request a refund. Under *Sunnyside Valley Irrigation District*, SSRP's decisions to sign the escrow documents without protest constitutes an account stated. 124 Wn.2d at 316-17. Further, SSRP failed to allege fraud or mistake that would entitle it to later challenge the account stated. The trial court erred in granting partial summary judgment to SSRP, because the account was settled by SSRP signing the escrow documents and tendering payment to Cascade without protest. Accordingly, we remand to the trial court to enter judgment in Cascade's favor.

Because we conclude the parties' conduct satisfies the doctrine of account stated, we do not reach Cascade's or SSRP's other bases for appeal, including the issue of attorney fees. We do however address the trial court's CPA ruling.

II. CONSUMER PROTECTION ACT

We address the CPA claim in the interest of clarifying that a successful account stated defense, while foreclosing the CPA claim on the facts of this case, may not always yield that result. That is, a CPA claim may well succeed in the face of a successful account stated defense in the appropriate factual scenario.

Cascade argues that the trial court erred when it found Cascade had violated the CPA. It asserts that its payoff demand was not deceptive, SSRP was not deceived by it, and that if it was, the transaction is unique to Cascade and SSRP and therefore was unlikely to deceive a substantial portion of the public. We agree the trial court erred in ruling Cascade violated the CPA, but we only address the first element of the CPA claim. We conclude that, on these facts, SSRP does not meet the first element of a CPA claim.

We review conclusions of law de novo and findings of fact for substantial evidence. *Conway Constr. Co. v. City of Puyallup*, 197 Wn.2d 825, 830, 490 P.3d 221 (2021). Substantial evidence exists when there is "a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true." *Id.* (quoting *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008)).

"The [CPA] declares unlawful unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Behnke v. Ahrens*, 172 Wn. App. 281, 290, 294 P.3d 729 (2012). "To prevail in a private [CPA] claim, the plaintiff must prove (1) an unfair or deceptive act or practice (2) occurring in trade or commerce (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation." *Id.*

To prove that an act was deceptive, a plaintiff must show that it had the "'capacity to deceive a substantial portion of the public.'" *Id.* (emphasis omitted) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986)). "Whether a deceptive act has the capacity to deceive a substantial portion of the public is a question of fact." *Ahrens*, 172 Wn. App. at 292. Here, SSRP accepted the payoff demand, even confirming by signature that the demand was "READ, REVIEWED AND APPROVED." CP at 13. SSRP accepted the amount without objection. On the facts of this case, where there was no fraudulent

or coercive conduct on the part of Cascade, we are hard pressed to simultaneously conclude that there was an unfair or deceptive act or practice. Accordingly, SSRP cannot satisfy the first of the required elements of a CPA claim. *See id.* The claim fails.

CONCLUSION

We conclude that as a matter of law the parties' conduct satisfies the doctrine of account stated and that Cascade was entitled to judgment as a matter of law. Therefore, we reverse and remand to the trial court to enter judgment in Cascade's favor.

Veljacic, J.

We concur:

Worswick, J.

Glasgow, A.C.J.

APPENDIX 2

Denial of Reconsideration

Filed
Washington State
Court of Appeals
Division Two

September 12, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SOUTH SOUND RV PARK LLC, a Washington limited liability company, Respondent/Cross-Appellant, v. CASCADE PROPERTIES PH LLC, a Washington limited liability company; DALE HUFFMAN and JANE DOE HUFFMAN, on behalf of his separate estate and marital community; and H.F. PETERSON and JANE DOE PETERSON, on behalf of his separate estate and marital community, Appellants/Cross-Respondents.	No. 54462-8-II ORDER DENYING MOTION FOR RECONSIDERATION

Respondent/Cross-Appellant, South Sound RV Park LLC, moves this court to reconsider its February 23, 2022 published opinion. Appellants/Cross-Respondents, Cascade Properties PH LLC responded to the motion, requesting that reconsideration be denied. After consideration, we deny the motion for reconsideration. It is

SO ORDERED.

Panel: Jj. Worswick, Glasgow, Veljacic.

FOR THE COURT:

Veljacic, J.

APPENDIX 3

Summary Judgment Order

FILED
DEPT 5
IN OPEN COURT
DEC 13 2019
PIERCE COUNTY Clerk
By
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

SOUTH SOUND RV PARK, LLC, a Washington Limited Liability Company,

Plaintiff,

v.

CASCADE PROPERTIES PH, LLC, a Washington Limited Liability Company; DALE HUFFMAN and JANE DOE HUFFMAN, on behalf of his separate estate and marital community; and H.F. PETERSON and JANE DOE PETERSON, on behalf of his separate estate and marital community,

Defendants,

NO. 19-2-04563-4

SUMMARY JUDGMENT ORDER

This matter having come on for hearing on the cross motions for summary judgment by the parties, and the Court having reviewed the records and files herein, considered the arguments of counsel, and reviewed the following memoranda and declarations,

1. Plaintiff's Motion for Partial Summary Judgment;

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2. Declaration of Justin Bartlett;

3. Cascade Properties PH, LLC'S Cross Motion for Summary Judgment and Response to Plaintiff's Summary Judgment Motion;

4. Declaration of Dale Huffman;

5. Plaintiff's Opposition to Defendants' Motion for Summary Judgment;

6. Response Declaration of Justin Bartlett;

7. Reply Memorandum of Cascade Properties PH,LLC

8. Supplemental Declaration of Dale Huffman;

9. Reply Memorandum of Plaintiff;

And the Court, being otherwise fully advised in the premises, it is now, therefore

ORDERED, ADJUDGED AND DECREED

A. Plaintiff's Motion for Partial Summary Judgement is Denied; in part and granted in part

B. Cascade Properties PH LLC's Motion for Summary Judgment is ~~Granted~~. ^ denied in part and granted in part

~~C. All claims asserted in Plaintiff's complaint against Dale Huffman, Jane Doe Huffman, H.F. Peterson, and Jane Doe Peterson are hereby dismissed with prejudice.~~

~~D. Plaintiff's First Cause of Action (Breach of Contract) is hereby dismissed~~ with ~~prejudice~~.

~~E. Plaintiff's Second Cause of Action (Improper Accounting) is hereby dismissed with prejudice.~~

~~F. Plaintiff's Third Cause of Action (Conversion) is hereby dismissed with prejudice.~~

~~G. Plaintiff's Fourth Cause of Action (Consumer Protection Act) is hereby dismissed with prejudice.~~

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~~H. Defendants are awarded their attorney's fees and costs in an amount~~ to be ~~determined by subsequent proceedings~~.

Dated: December 13, 2019

The Honorable Shelly K. Speir

Presented by:

FOSTER GARVEY PC

By _____
Mark A. Rowley, WSBA #7555
Attorneys for Defendants

FILED
DEPT 5
IN OPEN COURT
DEC 13 2019
PIERCE CO. Clerk
By

Approved as to form and content,
notice of presentment waived by:

BURNS LAW, PLLC

By _____
Martin Burns WSBA #23412
Attorney for Plaintiff

(1) The Niwara Purchase amount of $939,478 accrues simple interest at 24% from February 1, 2018 until the date of payment.

(2) The 5% late fee is properly assessed on the Niwara Purchase Amount

(3) The Affirmative Defense of Account Stated is Stricken.

(4) All other matters reserved for trial

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APPENDIX 4

Findings of Facts and Conclusions of Law

IN THE SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

South Sound RV Park, LLC, a Washington Limited Liability Company, Plaintiff, vs. **Cascade Properties PH, LLC, a Washington Limited Liability Company; Dale Huffman and Jane Doe Huffman, on behalf of his separate estate and marital community; and H.F. Peterson and Jane Doe Peterson, on behalf of his separate estate and marital community;** Defendants.	NO. 19-2-04563-4 FINDINGS OF FACTS AND CONCLUSIONS OF LAW

FILED
DEPT 6
IN OPEN COURT
FEB 28 2020
PIERCE COUNTY, Clerk
By _____ DEPUTY

THIS MATTER having come on before this court for trial commencing on January 28, 2020, in the above entitled matter, Plaintiff being represented by and through its attorney of record, Martin Burns of Burns Law, PLLC, and the Defendants being represented by their attorney of record, Mark A. Rowley of Foster Garvey, PC, and having reviewed the admitted exhibits and having heard testimony from Justin Bartlett and Dale Huffman, the court hereby enters Findings of Facts and Conclusions of Law with regards to the issues raised in this case.

I. FINDINGS OF FACTS

1. The case involves parties who live and/or do business in Pierce County Washington.
2. The case involves lending that was entered into in Pierce Count relating to property in Pierce County Washington.
3. Plaintiff South Sound RV Park, LLC owned property on River Road in Puyallup that was

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in need of substantial rehabilitation.

4. Justin Bartlett is the owner, member and manager of the plaintiff LLC.
5. In the course of its ownership, Plaintiff borrowed $848,000 from Niwara LLC which came due on January 10, 2017,
6. Plaintiff defaulted on the Niwara note.
7. Plaintiff sought to refinance the Niwara note and a commercial loan broker, Chris Hart, arranged for Defendant Cascade Properties PH, LLC to both purchase the Niwara note and to make a second loan for $186,000.
8. The parties executed a Loan Agreement, Promissory Note and a Deed of Trust securing the second loan on July 17, 2017. On July 18, 2017 Cascade closed the purchase of the Niwara note and disbursed the second loan
9. The Loan Agreement froze the Niwara Purchase Amount ("NPA") and such amount, per the escrow closing statement was $938,337.41.
10. Such NPA bore interest at 10.5% while not in default.
11. The Loan Agreement and the second note were due on January 31, 2018.
12. Both the NPA and the second loan bore simple interest.
13. The Loan Agreement and the second loan went into default and 24% interest accrued starting February 1, 2018.
14. ~~The 5% late fee set forth in the Niwara note was properly chargeable by Cascade.~~ The late 5% late fee set forth in the Niwara note was properly chargeable by Cascade.
15. The damages set forth by Cascade occasioned by the Plaintiff's default was the inability to relend the money and obtain 2- to 12-point loan fees on an annualized basis. if any payment, including the total amount of the loan was late.
16. The loan fees charged by Cascade to Plaintiff was 4 points with an additional 2 points to the loan broker Chris Hart who is not part of Cascade. paid by Plaintiff
17. Cascade declared the notes in default in March 2018 by issuing notices of default pursuant to RCW 61.24.030 by Cascade's then attorney, Shannon Jones.
18. Cascade later issued notices of trustee sale dated June 29, 2019 through their then attorney, Shannon Jones, for sales on October 5, 2018 and October 26, 2018 on the second loan and

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the Niwara note, respectively. prepared by Shannon Jones

19. None of the notices of default or the notices of trustee sale charged compound interest, charged the 5% late fee or tried to charge later claimed forborne default interest back to the date of the Loan Agreement.

20. Cascade also issued a payoff statement for a potential refinance lender that did not explicitly set forth ~~compound interest~~, the 5% late fee or such claimed forborne interest.

21. Plaintiff obtained a purchaser for the RV Park in a transaction to close on or before October 1, 2018.

22. Cascade had scheduled a trustee sale on October 5, 2018 to foreclose the second loan

23. Due to the demands of escrow, the buyer and the buyer's financing, the transactional document needed to be signed on September 28, 2018.

24. Cascade provided a payoff to the escrow company in the afternoon of September 27, 2018.

25. After escrow had incorporated the Cascade payoff into its closing statement, the documents were sent to Justin Bartlett to review at 10:29 a.m. on Friday, September 28, 2018, the date that all involved parties were hoping the deal would close.

26. The payoff to Cascade was materially incorrect, overstated the amount owed by Plaintiff, added new fees and charges that had not been previously disclosed in prior payoffs and which were not supported in the Loan Agreement, the Niwara note or the second loan.

27. The September 27, 2018 loan payoff was incorrect in four respects. First, its per diem witness was inflated by $109.59 per day. Second, the inflated per diem when applied to the days in default was further inflated $36,293.80. Third, the payoff started default interest on January 1, 2018 when the loan matured and went into default on February 1, 2018. Fourth, the principal exceeded the principal of the NPA and the second loan.

28. Unsure if the payoff was merely an error or intentional, Bartlett tried to contact the Cascade principals who did not return his call.

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29. Up until the September 27, 2018 Cascade Payoff, there had been no dispute as Bartlett had acknowledged the breach and was not contesting the default interest.

30. Bartlett was faced with a situation where if Plaintiff did not close, it faced a specific performance and/or damages lawsuit from Plaintiff's buyer. If Plaintiff did not close, the foreclosure on the Cascade second loan was scheduled to occur on October 5, 2018 wherein Plaintiff would likely lose most to all equity in the RV park. Further, Bartlett would then be likely faced with litigation from Cascade on the Loan Agreement/Niwara Note. On the other hand, if Plaintiff did close, it would be faced with the arguments that it consented to such payoff amount.

31. Plaintiff took the best of the two possibilities it was placed in by the conduct of Cascade by submitting an inflated payoff and then going incommunicado, by closing the transaction.

32. Plaintiff timely protested the payoff and asked for a refund. Although he attempted to contact Cascade before he signed the final payoff papers, he could not reach anyone. He sent a detailed email to Cascade which include his objections to the payoff calculations on Friday, October 4, 2018.

33. The approving of escrow paying the inflated amount to Cascade was an attempt to mitigate damages and avoid breaching the sales agreement and further expense and foreclosure under the Loan Agreement, Nirwara note and second loan.

34. The approving of escrow paying the inflated amount to Cascade, Plaintiff was not entering into an express agreement or a settlement of a dispute. Nothing Plaintiff did in approving such payment was a representation that Cascade relied upon.

35. Hard money lending is prevalent in public commerce. Bartlett alone has taken out near 200 such loans and four on this very River Road project.

36. Hard money lending is not regulated and hence there is less oversight raising the heightened possibility of unscrupulous actors acting unfairly and deceptively.

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37. The conduct of Cascade was unfair and deceptive. The last minute inclusion of unjustified compound interest, inaccurately calculated per diem interest, early default interest and previously unasserted late fees was both unfair and deceptive.

38. Given that many such loans and a majority of such loans are closed through escrow that clears existing encumbrances by getting payoff amounts from lenders, the ability to submit last minute inflated payoffs in an unregulated industry does raise the real prospect of repetition and impact on the public.

39. The Loan Agreement, the Niwara Note and the second loan all have attorney fee provision as does the Consumer Protection Act.

40. All of the pertinent loan documents except the Niwara note were drafted by Cascade.

41. Justin Bartlett testified that he was a real estate broker, a contractor, and a landowner. He had worked as a loan officer and for a foreclosure company previously, and had participated in the foreclosure process as a buyer on hundreds of properties.

42. Although Mr. Bartlett had a great deal of knowledge relating to loans and foreclosures from a buyer's perspective, he had no experience as a lender.

43. Mr. Bartlett testified that in prior real estate transactions involving hard money loans, the hard money lenders had always paid off any prior loans and issued a new note. Here, Mr. Bartlett initially did not appreciate the financial or legal consequences of Cascade opting to purchase the note from Niwara outright rather than pay Niwara off and write a new note. In that sense, he was not a sophisticated borrower.

44. At trial, Mr. Huffman explained that the reason Cascade purchased the note from Niwara was to take advantage of the 24% default interest rate, which could be applied all the way back to the date of Cascade's purchase. Based on Mr. Huffman's testimony, this information was never discussed with Mr. Bartlett.

45. Mr. Bartlett testified that at the time he was negotiating the loans from Cascade, there was no explanation of the specific terms of the loan documents. Specifically, he did not recall

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anyone from Cascade explaining the terms for the 5% late fee or compound interest with him.

46. There was a clear imbalance in bargaining power between the parties. During trial, Mr. Huffman summed up Cascade's position: "He [Mr. Bartlett] could take it or leave it."

47. Mr. Bartlett testified that in prior real estate transactions involving a hard money loans, if there were errors in the final payoff calculations, he had been able to sign the payoff statement, pay the amount requested, and then get a refund if there was an overpayment. On September 28, 2018, when presented with Cascade's final payoff statement which Cascade now admits contained multiple errors, Mr. Bartlett believed that he would be able to sign, pay the amount requested, and get a refund for any overpayment to Cascade. He did not believe that when he signed the document he was waiving the right to claim a reimbursement.

48. Mr. Bartlett testified that escrow would not have accepted his signature on Cascade's final payoff statement if he had written in any objection or reservation. He believed he needed to sign the payoff statement, even though it was calculated incorrectly, for the sale of South Sounds' property to close in time to avoid foreclosure.

49. Cascade overcharged Plaintiff in the amount of $94,714.12 as of September 28, 2018.

50. Such amount is liquidated.

51. Plaintiff is the prevailing party.

II. CONCLUSIONS OF LAW

52. This court has jurisdiction and the venue is proper.

53. All contracts have an implied duty of good faith and fair dealing

54. Cascade breached its contracts with Plaintiff by knowingly demanding inflated amounts and the manner in which it did so being demanded late the day before closing and then refusing to respond to legitimate inquiries breached the implied duty of good faith and fair dealing.

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55. Because Mr. Bartlett had no "intent" that his signature on Cascade's final payoff statement would signify a "full satisfaction of the disputed claim," Cascade's defense of accord and satisfaction fails.

56. Because Mr. Bartlett believed that he would still be able to get a refund after the errors in Cascade's payoff statement had been corrected, because the trustee sales on South Sound's property were imminent, and because Mr. Bartlett was afraid of the legal consequences if he did not go through with an immediate sale of South Sound's property, he did not intentionally or voluntarily waive his right to claim a reimbursement when he signed Cascade's erroneous payoff statement. Cascade's defense of waiver fails.

57. Again, because Mr. Bartlett believed that he would still be able to get a refund after the errors in Cascade's payoff statement had been corrected, because the trustee sales on South Sound's property were imminent, and because Mr. Bartlett was afraid of the legal consequences if he did not go through with an immediate sale of South Sound's property, Cascade failed to establish that Mr. Bartlett took any action indicating that he agreed to Cascade's erroneous calculations in its final payoff statement at any time prior to September 28, 2018. Cascade's defense of estoppel fails.

58. Cascade improperly took and has retained $94,714.12 of Plaintiff's money with the intent to deprive the Plaintiff permanently thereof thus committing conversion.

59. Cascade has engaged in unfair and deceptive acts impacting the public interest in a manner that may be replicated thus violating the Washington Consumer Protection Act, RCW 19.86.020 entitling Plaintiff to damages of $94,714.12 and treble damages in the amount of $25,000 based upon such limitation set by RCW 19.86.090.

60. Prejudgment interest at the contract default rate of 24% from September 28, 2018 until entry of judgment is warranted.

61. Plaintiff is entitled to attorney fees and cost per contractual position and RCW 19.86.090 and should be entered by subsequent order of the court and in compliance with CR 54.

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Having made the Findings of Facts and Conclusions of Law above, the court shall enter judgment by separate document.

DONE IN OPEN COURT this 28th day of February, 2020.

Judge Shelly K. Speir

Presented by:

BURNS LAW, PLLC

By_____
Martin Burns, WSBA No. 23412
Attorney for Plaintiff

FILED
DEPT 5
IN OPEN COURT
FEB 28 2020
PIERCE COUNTY, Clerk
By_____ DEPUTY

Approved as to form:

FOSTER GARVEY, PC

By_____
Mark A. Rowley, WSBA No. 7555
Attorneys for Defendant Cascade

M:\30000\30706 Bartlett (v.Cascade Properties)\Trial Prep\Proposed FOF & COL - V2.doc

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APPENDIX 5

Judgment

The Honorable Shelly K. Speir
Presentation
Hearing: February 28, 2020 @ 1:30 p.m.

IN THE SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

FILED
DEPT. 5
IN OPEN COURT
FEB 28 2020
PIERCE COUNTY, Clerk
By _____ DEPUTY

South Sound RV Park, LLC, a Washington Limited Liability Company, Plaintiff, vs. **Cascade Properties PH, LLC, a Washington Limited Liability Company; Dale Huffman and Jane Doe Huffman, on behalf of his separate estate and marital community; and H.F. Peterson and Jane Doe Peterson, on behalf of his separate estate and marital community;** Defendants.	NO. 19-2-04563-4 **JUDGMENT**

JUDGMENT SUMMARY

Judgment Debtor:	Cascade Properties PH, LLC
Judgment Creditor:	South Sound RV Park, LLC
Principal Judgment Amount	$94,714.12
Consumer Protection Act Damages	$25,000.00
Principal Judgment Amount for Attorney Fees and Costs:	$ 50,932.93
Prejudgment Interest:	$31,388.01
Judgment Interest Rate:	12%
Attorney for Judgment Creditor:	Martin Burns
Attorney for Judgment Debtor	Mark Rowley
Total Judgment Amount:	$ 202,035.06

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THIS MATTER coming on regularly before the above entitled Court, and based upon Findings of Fact and Conclusions of Law entered on February 28, 2020, and the Court having reviewed

1. Plaintiff's Motion for Attorney Fees and Costs;
2. The supporting Declaration of Martin Burns and exhibits attached thereto;
3. Cascade Properties' Objections to Plaintiff's Proposed Findings of Fact and Conclusions of Law and Motion for Attorneys' Fees; and
4. Plaintiff's Reply Regarding Attorney Fees and Costs; and
5. Plaintiff's Reply Regarding Findings of Facts and Conclusions of Law;

Therefore, the Court further finds as related to attorney's fees as follows:

1. The attorney fees and costs incurred are significant and reasonable.
2. Plaintiff is the prevailing party in this case.
3. Plaintiff's attorney fees and costs are reasonable, with regard to the time and labor required, the novelty and difficulty of the questions pertaining to this case, the skill requisite to perform the legal services properly, the preclusion of other employment, the customary fee in the community for similar work, time limitations, the amounts involved and the results obtained, the experience, reputation, and ability of the attorneys, the undesirability of the case, the nature and length of the professional relationship of Plaintiff's counsel with Plaintiff, and awards in similar cases.
4. While the case was not technically contingent, Burns Law, LLC, did relax its fee collection requirements taking on more risk if there was an adverse judgment. Moreover, the improperly increased payoff in this case decreased Plaintiff's ability to pay Burns Law, PLLC, on an earlier, related case on the underlying property to which the lending I this case occurred. As such, Burns Law, PLLC, had significant risk in this case and rendered the case, in a pragmatic manner, partially contingent.

BURNS LAW, PLLC
524 Tacoma Ave. S.
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5. Martin Burns' rate of $285.00 per hour is reasonable as is the rate of his associates Mindie Flemins and Ryan Moore at $235.00 per hour. The paralegal rates of $145.00 per hour are reasonable. The office clerk's rate of $45.00 per hour is reasonable. The hours claimed are reasonable and generally low in the legal Pierce County community, and the Court notes that the billings have significant "no charge" entries to avoid the client being billed for more secretarial type work and to not have clients pay for lawyers talking amongst themselves.

6. The costs and fees incurred are reasonable as the Court notes that Plaintiff tried to minimize expenses and did little discovery. Plaintiff also attempted early to resolve this matter by summary judgment. Overall, Plaintiff worked to keep legal fees down.

7. The legal work of Burns Law was of good quality and satisfactory to the Court and given the Consumer Protection Act interests, the risk to the law firm, the public interest in promoting such cases and the lack of other agencies to providing oversight and relief in commercial lending, a Lodestar multiplier of 1.5 is appropriate in this case. It is therefore

ORDERED, ADJUDGED AND DECREED that Plaintiff South Sound RV Park, LLC, a Washington LLC, is hereby awarded judgment against the Defendant Cascade Properties PH, a Washington Limited Liability Company in the principal amount of $94,714.12, Consumer Protection Act punitive damages of $25,000 prejudgment interest and February 28, 2020, in the amount of $31,388.01; it is further

ORDERED, ADJUDGED AND DECREED Plaintiff South Sound RV Park, LLC, a Washington Limited Liability Company, is hereby awarded judgment against the Defendant Cascade Properties PH, PLLC, a Washington Limited Liability Company, in the sum **$41,182.30** for multiplied (~~1.5x~~ 1.7) to ~~$61,773.45~~ 45418.76 of attorney fees and $1,514.17 for costs, for a total attorney fees and cost judgment of ~~$63,287.62~~ 50932.93 it is further

DONE in Open Court this 28th day of February, 2019.

FILED
DEPT 5
IN OPEN COURT

FEB 28 2020

PIERCE COUNTY, Clerk
By _____ DEPUTY

THE HONORABLE SHELLY K. SPEIR, JUDGE

BURNS LAW, PLLC
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Tacoma, Washington 98402
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Presented by:

BURNS LAW, PLLC

By _____
Martin Burns, WSBA No. 23412
Attorney for Plaintiffs

Agreed ~~to/by~~ as to form.

GARVEY SCHUBERT BARER, P.C.

By _____
Mark A. Rowley, WSBA #7555
Attorneys for Defendants

M:\30000\30706 Bartlett (v.Cascade Properties)\Trial Prep\Judgment.docm

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CERTIFICATE OF SERVICE

I certify that on the 12th day of October, 2022, I caused a true and correct copy of the affixed ***Petition for Review by the Washington Supreme Court*** to be served on the following to:

Attorney for Plaintiff:

Mark A. Rowley
Kelly Ann Mennemeier
Foster Garvey PC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
Email: Darlyne De Mars
darlyne.demars@foster
Mark Rowley
mark.rowley@foster.com;
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mckenna.filler@foster.com
Attorney for Defendant/Appellant

☐ Via Legal Messenger
☐ Via Postage Prepaid USPS/first-class mail
☒ Via Washington State Appellate Courts' Portal

Clerk
Washington State Court of Appeals, Division II
909 A. Street
Tacoma WA 98402

☒ Via Washington State Appellate Courts' Portal

DATED this 12th day of October, 2022, at Tacoma, Washington.

BURNS LAW, PLLC

By: _____
Sheila Gerlach, Paralegal

BURNS LAW, PLLC

October 12, 2022 - 3:31 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	54462-8
Appellate Court Case Title:	South Sound RV Park LLC, Respondent/Cross App v Cascade Properties PH LLC, Appellant/Cross Resp
Superior Court Case Number:	19-2-04563-4

The following documents have been uploaded:

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Comments:

Sender Name: Sheila Gerlach - Email: sheila@mburnslaw.com
Filing on Behalf of: Martin Burns - Email: martin@mburnslaw.com (Alternate Email:)

Address:
524 Tacoma Ave S
Tacoma, WA, 98402
Phone: (253) 507-5586

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