66527-8

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No. 66527-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DONALD AND BETH COLLINGS

Plaintiffs-Appellees,

v.

CITY FIRST MORTGAGE SERVICES, LLC

Defendant-Appellant.

REPLY BRIEF OF APPELLANT CITY FIRST MORTGAGE SERVICES, LLC

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I. INTRODUCTION

In its opening brief, City First argued that the Collingses' failure to disclose their covenant not to execute with the Mullens is *by itself* sufficient to require that the trial court's judgment be vacated. Op. Br. at 16-25.[1] The Collingses respond by arguing that such relief is not warranted unless "the misconduct complained of prejudiced [City First's] right to a fair trial." Resp. Br. at 34. That is not an accurate statement of Washington law. As discussed in Section III.A below, it is the *potential* for prejudice caused by secret covenants that has led the majority of states, including Washington, to require disclosure of such covenants before trial. Other states – based on similar reasoning – do not even permit parties to enter into such covenants. This Court should send a clear message that such gamesmanship *will not be permitted* in Washington courts.

If prejudice is relevant, the result is the same. Mr. Mullen testified that the Collingses' counsel told him that they would execute the covenant *only if* he testified favorably at his deposition that afternoon. Mr. Mullen apparently did so, and Plaintiffs later read portions of that transcript to the jury. At the conclusion of the trial, the Collingses' counsel asked the jury,

[1] Defined terms (such as the Collingses, Home Front Holdings, Home Front Services, and the like) have the same meaning as in City First's opening brief. In addition, "Resp. Br." refers to the Collingses' brief of respondent and "Op. Br." refers to City First's opening brief.

"Where are [the Mullens]?" and "Why aren't they here [to defend themselves]?" CP 1775-77. The Collingses then proposed and the court adopted numerous instructions that were inconsistent with the previously executed covenant. Under these circumstances, prejudice is manifest.

Nearly all of the Collingses' claims against City First fail also for additional reasons. In response to those arguments, the Collingses argue that evidence sufficient to uphold *one* claim is sufficient to uphold the entire judgment. Resp. Br. at 16. That argument is irrelevant if the Court vacates the judgment based on the Collingses' failure to disclose their covenant because, in that instance, the only issue is what claims should be tried on remand. But even if the Court rejects that threshold argument, the judgment must be set aside if *any one* of the Collingses' claims fail because those claims are separate from each other rather than intertwined factual theories. Here, the relevant analysis is especially straightforward because the Collingses *do not even dispute* City First's arguments that their claims based on vicarious liability for the Mullens' conduct and violation of the Equity Skimming Act fail as a matter of law.

Finally, the Collingses' arguments regarding attorneys' fees likewise fail. If the Court vacates the trial court's judgment because the Collingses failed to disclose the covenant not to execute before trial, then

not only is there no basis upon which to award attorneys' fees to the Collingses but fees should be awarded to City First. *See* Op. Br. at 48-50. Significantly, the Collingses do not even attempt to refute that point. If the Court nonetheless concludes that the Collingses are entitled to recover attorneys' fees, the amount of those fees should be reduced for the reasons set forth in Section V.D of City First's opening brief and in Section III.C below. Either way, the trial court's final judgment should be vacated.

II. RESPONSE TO THE COLLINGSES' RESTATEMENT OF THE CASE

Because the Collingses repeatedly mischaracterize the underlying facts, City First provides the following brief response regarding some of the more egregious misstatements in the Collingses' response brief:

1. The Collingses falsely assert that "City First wrote these loans," that City First "did not care" about discrepancies in the loan documents, and that "City First destroyed the Loveless loan file." Resp. Br. at 8-9. As the record shows, *all* of the work at issue was performed in Mr. Loveless's office and, upon completion, was sent directly to the lender. RP 98:24-103:11, 102:19-22, 133:13-134:6, 136:22-137:2, 181:5-9 (Sept. 15, 2010). Because City First did not prepare the loan documents or underwrite the loans, and because none of those documents was sent to City First's corporate office, City First could not have written the loan documents and could not have destroyed the loan files.

2. The Collingses similarly misrepresent the record in stating that "Home Front Holdings was the investment arm of Home Front Services, which operated the Home Front branch of City First." Resp. Br. at 4 n.1. The testimony and two documents on which

the Collingses rely do not establish *any* legal relationship between City First and Home Front Holdings, nor do they evidence any legal relationship between City First and Mr. Loveless's other business, IMG. Exs. 7, 10 (at 0940); RP 94:1-11 (Sept. 14, 2010). At most, Mr. Mullen's testimony confirms the separate legal existence of City First, Home Front Services, and Home Front Holdings. CP 791-92; Ex. 58.

3. Also contrary to the Collingses' arguments, this is not a case of unsophisticated consumers duped by a sophisticated businessman. Mr. Collings has worked in the residential mortgage industry for more than 18 years and is familiar with lenders, residential mortgage guidelines, and countless other details of residential mortgages. *See* RP 20:13-23, 94:14-95:4 (Sept. 14, 2010). Before they applied for a no-income loan, the Collingses "knew" the requirements for that type of loan, and "knew" they did not meet them. RP 20:13-23 (Sept. 14, 2010). And before they agreed to sell their home to Mr. Loveless "personally" (Resp. Br. at 7), the Collingses "understood" the terms of that transaction (RP 80:3-81:2 (Sept. 14, 2010)).

Additional misrepresentations are addressed below, along with City First's corresponding arguments.

III. ARGUMENT

A. The Collingses' Admitted Failure To Disclose Their Covenant Not To Execute Is By Itself A Sufficient Basis To Vacate The Trial Court's Judgment.

1. This Court Can And Should Review The Collingses' Failure To Disclose Their Covenant De Novo.

In its opening brief, City First argued that settling parties must disclose the existence and terms of covenants not to execute before trial so that the trial court can properly adjudicate the case, the jury can properly decide the case, and the parties can properly litigate the case. In response,

the Collingses first argue that the Court should review this issue for abuse of discretion. Resp. Br. at 33-34. The proper standard of review, as City First explained, is de novo. *See Meadow Valley Owners Ass'n v. Meadow Valley, LLC*, 137 Wn. App. 810, 816, 156 P.3d 240 (2007) ("Where the relevant facts are undisputed and the parties dispute only the legal effect of those facts, the standard of review is also de novo.").

The court's opinion in *Todd v. Harr, Inc.*, 69 Wn.2d 166, 417 P.2d 945 (1966) (Resp. Br. at 34), does not change that standard. In *Todd*, the court recognized that an abuse of discretion standard of review should apply to allegations of misconduct because the trial judge is better positioned to decide such issues. *Id.* at 168. But here, the trial court is not in a better position to decide this issue because the only facts that matter are not disputed: the Collingses admit, as they must, that "neither Mullens nor the Collings disclosed the settlement." Resp. Br. at 14. The only issue is the *legal* effect of those undisputed facts, which this Court reviews de novo.[2]

[2] In a similar vein, the Collingses claim that "City First ignores (and does not assign error to) the trial court's memorandum findings that City First could not establish any prejudice from Mullen's [sic] execution of a covenant not to execute." Resp. Br. at 35. That is both irrelevant and wrong. It is irrelevant because, as set forth herein, prejudice is immaterial. It is wrong because, as City First's opening brief shows, City First assigned error to that memorandum in Assignment of Error No. 2. Op. Br. at 2.

2. The Collingses Were Required To Disclose Their Covenant But Admittedly Failed To Do So.

Moving to the merits of City First's arguments, the Collingses make the bizarre argument that they "did not enter into a 'Mary Carter Agreement' with Mullen" and therefore had no obligation to disclose the covenant. Resp. Br. at 38. That argument fails easily. In *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 841 P.2d 1300 (1992), *aff'd on other grounds*, 125 Wn.2d 1 (1994), the court recognized that "[w]here appellate courts have permitted such agreements, they also have required pretrial disclosure to the trial court." *Id.* at 104. Nothing in *McCluskey* or the cases cited in that opinion limit the disclosure obligation only to traditional Mary Carter Agreements, as the Collingses suggest.

The cases cited in *McCluskey* confirm that point. In *Daniel v. Penrod Drilling Co.*, 393 F. Supp. 1056, 1059-61 (E.D. La. 1975), the court granted a post-trial motion for a new trial even though the undisclosed settlement agreement did not condition the settling defendant's liability on supporting the plaintiff's theory or amount of recovery, both of which are typical provisions in Mary Carter Agreements. Similarly, in *Ratterree v. Bartlett*, 707 P.2d 1063, 1076 (Kan. 1985), the court specifically found that the agreement at issue "[was] not a classic 'Mary Carter' agreement" and did *not* realign the parties, but nonetheless

vacated the judgment and remanded for a new trial because the agreement – as here – was not disclosed to the trial court and the parties before trial.

Ignoring this body of law, the Collingses attempt to distort *McCluskey*, claiming that "it mandates affirmance of the trial court's order denying a new trial." Resp. Br. at 40. In so arguing, the Collingses analogize City First to the State in *McCluskey*, which failed to prove that "any kind of agreement, written or otherwise" existed. 68 Wn. App. at 104. In contrast to *McCluskey*, the Collingses *admittedly* executed such an agreement. CP 1165-67. As such, the clear holding of *McCluskey* required the Collingses to disclose their covenant before trial. 68 Wn. App. at 103-04.

The court's opinion in *Northington v. Sivo*, 102 Wn. App. 545, 8 P.3d 1067 (2000) (Resp. Br. at 41-42), does not change that disclosure obligation. The court in *Northington* said nothing about the obligation to disclose a settlement agreement to the trial court and the parties before trial because – unlike the Collingses – the parties there complied with such disclosure obligations. *Id.* at 548. And unlike the witness in *Northington* who "offered virtually no definitive information" and whose "credibility was not especially relevant" (*id.* at 550-51), the Collingses admit that Mr. Mullen had a significant role in the events leading up to their lawsuit.

See, e.g., CP 522-42. The other cases cited by the Collingses (Resp. Br. at 42 n.18) likewise confirm that settlement agreements *must* be disclosed to the trial court *before* trial.[3]

In addition to the common law obligation to disclose – as reflected in *McCluskey* and cases cited therein – the Collingses' counsel also had an *ethical* duty to do so. *See* Op. Br. at 19-20. In response to that argument, the Collingses cite *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995), and *Zurich North America v. Matrix Service, Inc.*, 426 F.3d 1281 (10th Cir. 2005), for the proposition that their counsel had no such obligation. Resp. Br. at 42. But in *Sherman*, the complaining-party knew of the settlement agreement at issue. 128 Wn.2d at 185. In *Zurich*, the court similarly stated that the settling-party "could reasonably assume" that the complaining-party knew of the agreement. 426 F.3d at 1292. Here, in contrast, there is no dispute that "neither Mullens nor the Collings

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[3] *See Hodesh v. Korelitz*, 123 Ohio St. 3d 72, 2009-Ohio-4220, 914 N.E.2d 186, at ¶ 6 (recognizing disclosure to trial court before trial and stating that such disclosure "is more reasonable and compatible with Ohio's approach to settlement agreements"); *Soria v. Sierra Pac. Airlines, Inc.*, 726 P.2d 706, 715-16 (Idaho 1986) (recognizing disclosure to trial court and parties "[s]hortly after the agreement was reached" and stating that "the weight of case law does require such agreements to be disclosed to the jury"); *Sequoia Mfg. Co. v. Halec Constr. Co.*, 570 P.2d 782, 794-95 (Ariz. Ct. App. 1977) (disclosure to trial court and parties same morning agreement was finalized). These cases reflect the fact that there are infinite potential variations of Mary Carter Agreements "limited only by the ingenuity of counsel and the willingness of the parties to sign." *Maule Indus., Inc. v. Rountree*, 264 So. 2d 445, 447 (Fla. Dist. Ct. App. 1972), *rev'd by* 284 So. 2d 389 (Fla. 1973). Regardless of form, such agreements must be disclosed prior to trial.

disclosed the settlement." Resp. Br. at 14. In cases such as this, counsel "have a duty not to deceive the trier of fact, an obligation not to hide the real facts behind a façade." *Daniel*, 393 F. Supp. at 1061. Washington law is no different in that regard.[4]

In addition to the common law and ethical duties discussed above, RCW 4.22.060(1) also requires disclosure of settlement agreements "to all other parties and the court" before *entering* into such agreements. The Collingses respond to this argument by asserting that Washington's Tort Reform Act, RCW ch. 4.22 (the "TRA"), is inapplicable because "fault" is not at issue. Resp. Br. at 43-44. But the test of whether the TRA applies is not "fault," as the Collingses argue, but rather the potential for joint and several liability. *See Waite v. Morisette*, 68 Wn. App. 521, 524-25, 843 P.2d 1121 (1993) ("Joint and several liability, as modified by the 1981 provisions (including RCW 4.22.060), continues to apply where defendants act in concert, a person acts as an agent or servant of a party, or a claimant is not at fault."); *Leader Nat'l Ins. Co. v. Torres*, 113 Wn.2d 366, 373, 779 P.2d 722 (1989) (TRA applies if joint tortfeasors). As

[4] *See In re Healy*, 43 Wn.2d 266, 270, 261 P.2d 89 (1953) ("It was [counsel's] duty, as an officer of the court, to fully divulge what had transpired that morning at the office of the title company, in order that the judge might have all of the facts before him.").

discussed in Section III.B.2 below, the Collingses alleged and the trial court found joint and several liability. As such, the TRA applies.

The Collingses next claim that if the TRA applies it requires only the Mullens (not the Collingses themselves) to disclose the covenant. Resp. Br. at 44-45. That argument is flatly inconsistent with this Court's opinion in *Villas at Harbour Pointe Owners Ass'n v. Mutual of Enumclaw Insurance Co.*, 137 Wn. App. 751, 154 P.3d 950 (2007), *rev. denied*, 163 Wn.2d 1020 (2008). The court there explained that "[u]nder the plain terms of the statute, the *claimant* must provide five days notice of the intent to settle to all other parties" and further noted that "claimant" refers to the settling plaintiff, not the settling defendant. *Id.* at 761 (emphasis added). For this reason too, the Collingses were required to disclose their covenant with the Mullens before trial.

Finally, the Collingses assert that City First is somehow at fault for *the Collingses' failure* to disclose the covenant because it did not request the covenant in discovery. Resp. Br. at 42-43. City First had no reason to request the covenant because (a) it did not know that the covenant existed, (b) the Collingses were required to disclose any such covenant whether or not they were requested to do so, and (c) the existence and terms of the covenant were responsive to several of the Mullens' requests for

production and would therefore be produced to all parties in response thereto. *See* CP 1199, 1203, 1206-07. Yet "neither Mullens nor the Collings disclosed the settlement." Resp. Br. at 14.

In summary, the disclosure issue in this case is not only an important issue on appeal, it is an exceptionally important issue in Washington courts generally. Whether as a matter of common law, based on the ethical duty of candor, or under the TRA, such agreements *must* be disclosed before trial. The Court should confirm that point in its decision so that such gamesmanship does not occur in subsequent cases. For the same reasons, because such disclosure *admittedly* did not occur here, the trial court's judgment should be vacated on this basis alone.

3. Even If City First Were Required To Establish Prejudice, It Has Done So.

The same cases discussed above also directly refute the Collingses' argument that a new trial is warranted only if "the misconduct complained of prejudiced [City First's] right to a fair trial." Resp. Br. at 34. The court in *McCluskey* did not so hold, nor did the cases cited therein. To the contrary, the Kansas Supreme Court in *Ratterree* required disclosure because "the *potential* for injustice is so great from the use of secret settlement agreements." 707 P.2d at 1076 (emphasis added). In *Ward v. Ochoa*, 284 So. 2d 385, 387-88 (Fla. 1973), the Florida Supreme Court

likewise required disclosure because of "possible injustice" and the potential to mislead judges and juries. And in *Daniel*, the court explained that even if a court cannot surmise how a jury would respond to an undisclosed settlement agreement, "'we know only that appellant had the right to litigate his case without hazarding the prospect that such considerations might affect the jury's verdict.'" 393 F. Supp. at 1060 (quoting *Lum v. Stinnett*, 488 P.2d 347, 353 (Nev. 1971)).

While non-disclosure by itself is sufficient to require that the judgment be vacated, the record is replete with evidence of prejudice. In their brief, the Collingses ignore Mr. Mullen's sworn testimony that the Collingses would execute the covenant *only if* he testified favorably:

> I received the final version of [the covenant not to execute] from Plaintiffs' counsel on July 26, 2010 – the morning of my deposition – and was informed that Plaintiffs would only execute the covenant if my deposition testimony was acceptable. The covenant was fully executed after my deposition.

CP 1772-74. The Florida Supreme Court addressed a similar issue in *Ward* and stated that "if apprised of this, [the jury] would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendants." 284 So. 2d at 387. The court in *Daniel* expressed a similar concern, noting that the jury could erroneously perceive the settling-defendant as resisting plaintiffs' claims even though

there was "no adverse interest . . . [or] real risk of loss." 393 F. Supp. at 1059.

Attempting to deflect this point, the Collingses claim that City First invited error by reading Mr. Mullen's testimony to the jury. Resp. Br. at 36. That argument is specious at best. Absent knowledge of the covenant, City First could not have known that Mr. Mullen had been incented to testify favorably regarding the Collingses. Moreover, City First read Mr. Mullen's testimony to the jury because the Collingses had indicated that they would otherwise read to the jury only *misleading portions* of that testimony. Far from inviting error, City First was attempting to provide context for Mr. Mullen's unfavorable testimony. RP 15:12-18:5 (Sept. 16, 2010). For both of these reasons, City First could not have invited error. *See Smith v. Whatcom Cnty. Dist. Court*, 147 Wn.2d 98, 113, 52 P.3d 485 (2002) (absent evidence that party "knowingly" invited error, invited error doctrine is inapposite).

The Collingses also ignore the many ways in which their lawyers significantly magnified the prejudice to City First. As noted previously, the Collingses' lawyer asked the jury: "Where are [the Mullens]?" and "Why aren't they here [to defend themselves]?" CP 1775-77. Of all the people in the courtroom, only the Collingses and their counsel knew why

the Mullens had not appeared for trial: the Mullens' liability had been limited to a nominal sum and *resolved* months before trial. The Collingses not only failed to disclose those facts, they used the Mullens' absence to bolster their argument that City First should be held liable because of the Mullens' undefended misconduct. In this respect as well, the statements of the Collingses' counsel *caused* prejudice to City First.[5]

Equally significant and also ignored in their brief, the Collingses proposed numerous instructions – which the trial court adopted – that led the jury to erroneously believe that the Mullens were still parties to the case and that City First could be held liable for their actions. CP 850-53, 855-56. In *Ratterree*, the Kansas Supreme Court expressly held that such misstatements require that the trial court's judgment be vacated. 707 P.2d at 1076 (vacating judgment where parties to settlement agreement failed to disclose agreement and made erroneous statements to the jury). Here too, the jury was affirmatively *misled* as to the true posture of the parties.

[5] The Collingses' only response to these statements is to claim that the trial court "struck City First counsel's hearsay declaration, and questioned the accuracy of City First's counsel's recollection of the unreported closing argument." Resp. Br. at 36-37. The trial court expressly reserved ruling on that issue. RP 80:22-81:13 (Feb. 25, 2011). The Collingses do not identify any subsequent order striking that declaration. Nor do they deny that these statements were made or that this Court can consider the underlying declaration *even if* stricken. *See* Op. Br. at 22 n.5.

Thus, even if prejudice were required, the trial court's judgment should be vacated.

B. Separate From And Independent Of The Failure To Disclose Issue, Which By Itself Requires That The Trial Court's Judgment Be Vacated, Nearly All Of The Collingses' Claims Fail On Additional Grounds.

1. The Court Can And Should Vacate The Trial Court's Judgment If One Or More Of The Collingses' Claims Fail As A Matter of Law.

In its opening brief, City First argued that under Washington law the Court must vacate the trial court's judgment if even *one* of the Collingses' claims fails. Op. Br. at 41-43. Before addressing whether that legal proposition is correct, it is important to clarify how the Court's ruling on the failure to disclose issue affects this issue. If the Court vacates the trial court's judgment because the Collingses failed to disclose their covenant, the question then becomes: what claims should be tried on remand? In deciding that issue, it is immaterial whether some or all of the claims on appeal survive appellate review. Only the claims that survive such review should be remanded.[6]

If, on the other hand, the Court rejects City First's argument that the trial court's judgment should be vacated because the Collingses failed

[6] In addition, if the Court so holds, then City First should recover its attorneys' fees as set forth in Section VI of City First's opening brief. Critically, the Collingses do not refute that analysis.

to disclose their covenant as required by Washington law, then it matters whether *some* or *all* of the Collingses' claims survive appellate review because the Court's decision on that issue will directly impact whether the Court vacates the trial court's judgment:

- If the Court holds that the trial court's judgment must be vacated if even one of the Collingses' claims fails, then it can and should grant such relief because the Collingses *do not dispute* City First's arguments that two of their claims – vicarious liability for the Mullens' conduct and violation of the Equity Skimming Act – fail as a matter of law. *See* Op. Br. at 28-30, 38-40.

- Conversely, if the Court holds that the trial court's judgment cannot be vacated and the matter cannot be remanded for a new trial unless *all* of the Collingses' claims fail, then once again it already knows enough to so rule because two of the Collingses' claims (negligent supervision and violation of the Consumer Protection Act) are not at issue on appeal.

As set forth below, it is City First – and not the Collingses – that is correct with regard to this potentially dispositive issue.

Indeed, as City First established in its opening brief, Washington law has been clear for more than 100 years that where a jury may have based its verdict on one or more causes of action that are later set aside on appellate review, the entire judgment must be vacated and the matter remanded for a new trial. *See* Op. Br. at 41-43. The Washington Supreme Court addressed that issue in *Yamamoto v. Puget Sound Lumber Co.*, 84 Wash. 411, 413-14, 146 P. 861 (1915), and squarely held that "a general

verdict for one entire sum covering two or more independent causes of action is properly set aside in whole, if it be found to be erroneous as to one or more of the causes of action." This legal principle is dispositive here because (a) the Collingses admit that the Court cannot tell from the jury's verdict the specific causes of action upon which the jury found City First liable (Resp. Br. at 18-19), and (b) there is no dispute that two of the Collingses' claims – vicarious liability and violation of the Equity Skimming Act – fail as a matter of law (Op. Br. at 28-30, 38-40).

In response to this argument, the Collingses point to a series of cases that – they claim – establish that if there is evidence sufficient to uphold any *one* of their causes of action, then the Court must uphold the *entire* judgment. Resp. Br. at 16. The Collingses' reliance on those cases is misplaced. In *Corey v. Pierce County*, 154 Wn. App. 752, 767, 225 P.3d 367 (2010), the court explained that "[b]ecause the evidence presented for damages from the intentional torts is coextensive – or broader – than necessary to prove damages from negligence, the full verdict stands [notwithstanding the elimination of the negligence cause of action]." Similarly, in *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 36, 935 P.2d 684 (1997), the court explained that "[b]ecause we affirm the judgment with respect to the strict liability product-warning

claim, a reversal of the negligent failure-to-warn claim would not affect the judgment." Unlike in *Corey* and *Mavroudis*, the Collingses' causes of action here are *not* intertwined or coextensive. Rather, each such cause of action has different elements, has a different standard of proof, and relies upon different evidence.

The other cases cited by the Collingses (Resp. Br. at 16-17) are similarly inapposite. In each of those cases, the court considered the situation where one or more factual theories – not independent causes of action – were not supported by sufficient evidence.[7] When one factual theory fails, a general verdict need not be set aside if another factual theory is sufficient to support it. But where, as here, an independent cause of action is set aside and the jury may have relied on that cause of action in awarding damages, the entire verdict must be vacated under the rule set forth in *Yamamoto*. That is precisely the situation here because there is

[7] *See Davis v. Microsoft Corp.*, 149 Wn.2d 521, 532-38, 70 P.3d 126 (2003) (employment discrimination claim based on failure to accommodate in current job or accommodate by reassignment); *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 166, 914 P.2d 102 (1996) ("wrongful discharge based on the company's employee handbook"); *McCluskey*, 125 Wn.2d at 4-5 (wrongful death claim based on negligent maintenance of roadway and failure to warn of unsafe conditions on that same roadway). In one of the cases cited by the Collingses – *Micro Enhancement International, Inc. v. Coopers & Lybrand, L.L.P.*, 110 Wn. App. 412, 40 P.3d 1206 (2002) – the court did not even *consider* multiple causes of action reflected in a general verdict. *Id.* at 429. All of these cases are inapposite. *See McCord v. Maguire*, 873 F.2d 1271, 1273 (9th Cir. 1989) (case law concerning the "situation where the jury may have based its conclusions on a legal theory unsupported by substantial evidence" is not controlling in "case[s] involv[ing] a claim that one or more factual theories were unsupported by sufficient evidence").

no dispute that the vicarious liability and Equity Skimming Act claims fail as a matter of law and also because (as set forth below) several other claims similarly fail.

2. In Addition To The Vicarious Liability And Equity Skimming Act Claims (Which The Collingses Do Not Address), Nearly All Of The Collingses' Other Claims Likewise Fail As A Matter Of Law.

a. The Jury Did Not Have A Legally Sufficient Evidentiary Basis To Find City First Liable For Conspiracy.

In response to City First's argument that the jury did not have a legally sufficient basis to find City First liable for conspiracy (Op. Br. at 26-27), the Collingses argue that the jury "could" find conspiracy (Resp. Br. at 32). As an initial matter, that argument erroneously relies upon a "substantial evidence" standard. Resp. Br. at 31. Where the standard of proof at trial is clear and convincing evidence – as it is for the conspiracy claim – the required facts "must be shown to be 'highly probable.'" *Douglas Nw., Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 678, 828 P.2d 565 (1992) (citation omitted). The same standard applies on appeal. *See In re Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973).

Moreover, even if a "jury could find that City First made the second loan to Loveless with knowledge that the lease actually signed by the Collings expressly prohibited further encumbrances," as the Collingses

claim (Resp. Br. at 32), such knowledge does not establish with high probability that City First agreed to conspire. *See Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008) (knowledge of complaint, without more, insufficient to prove conspiracy). Nor does it establish with high probability a common goal. *See Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 529, 424 P.2d 290 (1967) ("[C]onspiracy does not necessarily encompass or apply as to all of the verbal or physical actions of parties who, by happenstance, are interested in the same general subject matter."). And it also does not establish with high probability circumstances consistent *only* with a conspiracy. *Id.* at 531 (directed verdict should be granted where "inferences urged by the plaintiffs certainly are not the *only* possible ones" (emphasis in original)).

The Collingses' spoliation argument – that "City First cannot rely on its own illegal destruction of that second loan file to argue that it could not have known that the lease existed" (Resp. Br. at 32) – is equally deficient. Neither the trial court nor the jury found spoliation, and there was no adverse-inference instruction. Equally important, any such spoliation would not have relieved the Collingses of their burden to prove each element of conspiracy. *Walker v. Herke*, 20 Wn.2d 239, 249, 147 P.2d 255 (1944) (inference from spoliation "cannot be treated as

independent evidence of a fact otherwise unproved"). The Collingses' spoliation argument therefore fails, as does the conspiracy claim.

b. City First Cannot Be Jointly And Severally Liable With The Mullens.

The Collingses acknowledge, as they must, that the trial court's judgment identified "City First and Mullen as 'joint judgment debtors'" and that the trial court held City First and the Mullens liable "'for civil conspiracy, jointly and severally.'" Resp. Br. at 20 (citation omitted). Yet as discussed in City First's opening brief (Op. Br. at 27-28), City First cannot properly be jointly and severally liable with the Mullens because the covenant not to execute released the Mullens as a matter of law. *See, e.g., Maguire v. Teuber*, 120 Wn. App. 393, 394, 396-97, 85 P.3d 939 (2004). The trial court's judgment is therefore legally wrong.

The Collingses attempt to circumvent this issue by claiming that the trial court properly entered judgment against City First *severally*. *See* Resp. Br. at 20. Contrary to the Collingses' argument, the judgment holds City First and the Mullens liable "for civil conspiracy, *jointly and severally*." CP 1135-38, 1353-56, 2171-75 (emphasis added). Moreover, Washington law is clear that "[t]he liability of conspirators is joint and several." *Sterling Bus. Forms, Inc. v. Thorpe*, 82 Wn. App. 446, 454, 918 P.2d 531 (1996).

The Collingses next claim that the trial court's judgment is proper because "a party is liable for the 'fault' of another 'where both were acting in concert,' RCW 4.22.070(1)(a), as the jury found here." Resp. Br. at 21. That argument erroneously assumes that judgment could properly be entered against the Mullens. That is incorrect. *See* RCW 4.22.070(1) ("Judgment shall be entered against each defendant except those who have been released . . . ."). For these reasons too, the trial court committed reversible error when it entered judgment against City First and the Mullens jointly and severally.

c. The Jury Did Not Have A Legally Sufficient Evidentiary Basis To Find City First Vicariously Liable For Mr. Loveless's Conduct.

Turning to City First's argument that the jury lacked a legally sufficient basis to hold City First liable based on employer-employee and principal-agent principles (Op. Br. at 30-36), the Collingses argue that City First's liability is not confined by the scope of its business relationship with Mr. Loveless. Instead, the Collingses claim that City First can properly be held liable for Mr. Loveless's conduct "as lender, purchaser, or landlord." Resp. Br. at 26. That argument misses the point. If Mr. Loveless was an employee of City First, "[i]t is elementary that the employer is liable for the tort of an employee only when the employee is

acting within the scope of his employment at the time of the tortious conduct." *Amend v. Bell*, 89 Wn.2d 124, 127, 570 P.2d 138 (1977). Alternatively, if Mr. Loveless was an agent of City First, City First may be vicariously liable only if it had the right to control the manner and means of his work. *See DeWater v. State*, 130 Wn.2d 128, 137, 141-42, 921 P.2d 1059 (1996). Either way, the scope of City First's relationship with Mr. Loveless circumscribes its potential liability.

The Collingses' argument that "City First gave Loveless and Mullen authority to represent to the public that Home Front Holdings, LLC, was affiliated with City First" (Resp. Br. at 23) is similarly misguided. In support of that argument, the Collingses cite Exhibit 8 (Mr. Loveless's HUD-1 statement) and Exhibit 55 (Mr. Loveless's Escrow Receipt and Disbursement Authorization). Neither document mentions Home Front Holdings, Home Front Services, or IMG, let alone establishes that City First authorized Mr. Loveless to publicly represent that any of those businesses was affiliated with City First.

The Collingses attempt to overcome this lack of a relationship between City First, on the one hand, and Home Front Holdings, Home Front Services, and IMG, on the other, by asserting that "City First did not have to grant Loveless 'authority to enter into sale and leaseback

arrangements or . . . act as a landlord' in order to be liable" because "City First expressly authorized Loveless to market to homeowners." Resp. Br. at 25 (citation omitted; ellipsis in original). But City First's business is to sell loans (RP 46:24-47:4 (Sept. 15, 2010)), and Mr. Loveless's job – as the Collingses admit – "was to generate loans for City First" (Resp. Br. at 6). As in *McQueen v. People's Store Co.*, 97 Wash. 387, 166 P. 626 (1917), when Mr. Loveless eschewed that role to enter into a "personal" transaction with the Collingses (Resp. Br. at 7), he "was his own master, irrespective of the fact that the facilities afforded him to do his work were instrumental in inflicting the injuries complained of." 97 Wash. at 390. As such, the jury lacked a sufficient basis to find City First vicariously liable for Mr. Loveless's actions.

The Collingses' argument that City First is liable for "[Mr.] Loveless' actions because he was a *manager*, not just an employee" (Resp. Br. at 24 (emphasis in original)) is equally misguided. The fact that a person is a manager does not make the business vicariously liable for *all* the acts of that person. See *De Leon v. Doyhof Fish Prods. Co.*, 104 Wash. 337, 340, 176 P. 335 (1918) (analyzing scope of employment to determine whether employer is liable for acts of superintendent). Nor does *Clayton v. Wilson*, 168 Wn.2d 57, 227 P.3d 278 (2010) (Resp. Br. at

24), broaden an employer's liability beyond the scope of employment. Indeed, the court in *Clayton* addressed marital dissolution issues and distinguished employment cases as "irrelevant." *Id.* at 68.

Finally, although City First received fees for loan processing as a result of Mr. Loveless's actions, that does not make it vicariously liable either. The Washington Supreme Court's decision in *McNew v. Puget Sound Pulp & Timber Co.*, 37 Wn.2d 495, 224 P.2d 627 (1950), is instructive on this point. There, McNew (the plaintiff) was injured in an auto accident with an employee of Puget Sound Pulp & Timber Co. ("PSPT," the defendant) after the employee visited his family and purchased goods for PSPT. *Id.* at 495-96. The Washington Supreme Court affirmed the trial court's dismissal of the action even though PSPT received an "incidental" benefit (purchased goods) as a result of the actions that caused McNew's injuries. *Id.* at 499 (citing cases). The Collingses' argument on this point (Resp. Br. at 23) therefore fails.

d. City First Is Exempt From The Credit Services Organization Act.

The Collingses do not dispute that an entity licensed as a consumer loan company by Washington's Department of Financial Institutions ("DFI") is exempt from the CSOA or that City First has been licensed as a consumer loan company since 2005. Rather, they argue that because *each*

and every branch of City First was not licensed, City First is not exempt. Resp. Br. at 27-28. This argument fails because the dispositive issue under the DFI is whether City First is a "licensee," which the DFI defines as "a person to whom one or more licenses have been issued." RCW 31.04.015(3) (2006); *see also* WAC 208-620-010 ("'Licensee' means a person who holds one or more current licenses."). City First *is* such a licensee and, as such, is exempt from the CSOA.

Moreover, the Collingses alleged, and the trial court found, that City First was subject to the CLA. CP 475-76, 529-30, 1353-56, 2171-75. City First cannot properly be held liable under the CLA unless it is regulated by Washington State. *See* RCW 31.04.025 (2006) ("Each loan made to a resident of this state by a licensee is subject to the authority and restrictions of this chapter . . . ."). Because City First is "subject to regulation and supervision by this state" (RCW 19.134.010(2)(b)(i)) and because City First is authorized to make loans under Washington State law (*see* Ex. 61, RP 178:4-10), it is exempt from the CSOA. The Collingses' corresponding claim therefore fails.

C. The Trial Court Abused Its Discretion In Awarding The Collingses Attorneys' Fees As Well As A Multiplier.

If the trial court's judgment is vacated and the matter remanded for a new trial, the trial court's award of attorneys' fees and costs fails as well.

See Op. Br. at 43. But even if the trial court's liability is upheld, the Court should vacate or substantially reduce the trial court's award of attorneys' fees and costs for the many reasons set forth in Section V.D of City First's opening brief. Specifically: (1) the trial court abused its discretion by awarding $81,181 in fees for work caused by the Collingses' shifting arguments regarding the covenant; (2) the trial court also abused its discretion by enhancing the Collingses' requested fees; (3) the trial court likewise abused its discretion in allocating 80 percent of the Collingses' total fees to City First; and (4) the award is excessive.

Significantly, the Collingses do not squarely address City First's first argument or its fourth argument (points 1 and 4 above). As to City First's allocation argument (point 3 above), the Collingses attempt to circumvent that body of law by claiming that City First is liable for attorneys' fees based on work directed at U.S. Bank "under the 'ABC Rule.'" Resp. Br. at 48. The case cited by the Collingses in support of this argument (*Flint v. Hart*, 82 Wn. App. 209, 917 P.2d 590 (1996)) shows very clearly why the argument fails. The court in *Flint* recognized that in certain unique cases involving claims by third parties, attorneys' fees can be recovered "*as an Element of Damages.*" *Id.* at 224 (emphasis in original). The Collingses *never* pursued any such theory in the trial

court. *See, e.g.*, CP 521-42, 984-95, 1368-75, 1864-73. Nor could they. Their reliance on the ABC Rule is therefore misplaced.

The Collingses also claim that they were not required to segregate fees because "City First and U.S. Bank worked in concert in their defense." Resp. Br. at 47. That, too, is wrong. None of the cases cited by the Collingses recognizes such an exception to the segregation requirement. And any such exception would be contrary to controlling case law, which requires segregation of fees "[r]egardless of the difficulty involved in segregation." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 344-45, 54 P.3d 665 (2002); *see also Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 850, 726 P.2d 8 (1986) (unjust to allow recovery of all fees "because of complexity" of segregation).

As to City First's multiplier argument (point 2 above), the Collingses argue that the trial court properly enhanced the fee award based on the "contingent nature of representation." Resp. Br. at 48. The trial court did not so rule. Rather, it awarded an enhancement based solely on issues unrelated to City First. *See* Op. Br. at 45; RP 9:11-10:15 (May 4, 2011). Significantly, the Collingses do not defend that analysis. Nor, as noted, do they specifically respond to City First's argument that an enhancement is *especially* inappropriate here given the serious issues

regarding the Collingses' failure to disclose the covenant not to execute. *See* Op. Br. at 45. For that reason too, the trial court's award of attorneys' fees should – at the very least – be reduced.[8]

IV. CONCLUSION

For the foregoing reasons, this Court should (a) vacate the trial court's judgment and remand this matter for a new trial; (b) vacate or at least substantially reduce the trial court's award of attorneys' fees and costs; and (c) award City First its reasonable attorneys' fees and costs from July 26, 2010 to present, including fees on appeal.

RESPECTFULLY SUBMITTED this 5th day of December, 2011.

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[8] The Collingses also argue that "City First has not assigned error to any of the court's individual findings in support of its award." Resp. Br. at 47. That argument ignores City First's Assignment of Error No. 6, which assigns error to the trial court's order awarding such fees. Op. Br. at 3 (assigning error to CP 1977-83).