74266-3

74266-3

NO. 74266-3

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

CITY FIRST MORTGAGE SERVICES, LLC

Appellants

v.

GLOGOWSKI LAW FIRM, PLLC

Respondents.

APPELLANT'S BRIEF

BADGLEY MULLINS TURNER, PLLC
Donald H. Mullins, WSBA #4966
Daniel A. Rogers, WSBA #46372
19929 Ballinger Way NE, #200
Seattle, Washington 98155
Telephone: (206) 621-6566
Facsimile: (206) 621-9686

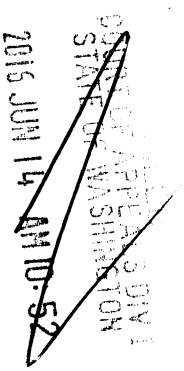


TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

The primary issue in this appeal[1] is whether the trial court in the Malpractice Action erred in allowing Glogowski Law Firm PLLC, ("Ms. Glogowski") to avoid liability for legal malpractice where she knowingly failed to assert defenses that would have conclusively exonerated her client City First Mortgage Services, LLC ("City First") in the Underlying Case.

In 2009 City First was sued by Beth and Donald Collings ("Collingses") in regards to a foreclosure action for their Redmond Home. The Collingses were falling behind on payments for their home and were looking to refinance. Because they could not obtain financing, they entered into an agreement with Paul Loveless, a licensee of City First, whereby Paul Loveless in his personal capacity would purchase the Collingses' home and lease it back to the Collingses with an option for the Collingses to purchase the home in three years. When Paul Loveless defaulted on the mortgage the Collingses sued City First and Paul Loveless, among others, for damages and injunctive relief in the Underlying Case.

In the Underlying Case, Ms. Glogowski knew about, but failed to assert, two defenses that would have conclusively resulted in dismissal of the claims against City First as a matter of law. Within a month of being

[1] For clarity, the action by the Collingses against City First and Loveless is referred to as the "Underlying Case" and the instant case is referred to as the "Malpractice Action."

hired, City First's attorney Katrina Glogowski knew City First could employ these defenses and even told Brian Hunt, City First's in-house counsel, as to the Credit Services Organization Act ("CSOA"), that "the statute does not apply to you." Likewise, the Consumer Loan Act ("CLA") was not applicable to the transaction that was the subject of the Underlying Case, in large part because the borrower was from Utah, not Washington.

Even with knowledge of the available conclusive defenses, Ms. Glogowski never presented either defense to these claims throughout the entirety of her representation. She never filed a CR 12(b)(6) motion, she did not affirmatively plead the exemptions as affirmative defenses (or plead ***any*** affirmative defenses), she didn't challenge the claims on summary judgment, she did not take exception to the misstated jury instructions which explicitly excluded the language exempting City First, she did not object to the verdict form which did not differentiate between the majority of the claims, and she could not properly bring a CR 50 motion as a result of her failure to make these objections. Thus, Stoel Rives LLP, City First's post trial and appellate counsel, could not properly challenge these issues in a CR 50 motion.

As a result of these errors both individually and collectively, Ms. Glogowski threw away the opportunity for City First to mount a credible appeal in the Underlying Case. Ms. Glogowski failed to make a record of

these defenses at the trial court level, and the appellate court could not and would not consider any arguments regarding the CSOA or the verdict form. Ms. Glogowski's inadequate representation of City First caused it to lose the chance to assert its conclusive defenses as well as its chance to assert and test other theories in the Underlying Case.

In the subsequent Malpractice Action, the undisputed evidence presented by City First to the trial court did not involve speculative facts, but rather consisted of legal arguments that City First was not liable to the Plaintiffs in the Underlying Case under the CSOA and the CLA as a matter of law. If Ms. Glogowski's failure to employ an exemption as a defense does not meet the causation standard for malpractice then causation is an impossible standard in Washington.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The trial court erred when it ordered that "Counterclaim Defendant Glogowski Law Firm, PLLC's Motion for Reconsideration is hereby GRANTED and Counterclaim Plaintiff City First Mortgage Services, LLC's claims against it are dismissed with prejudice." Clerk's Papers (CP) at 1093-1094.

Assignment of Error No. 2

The trial court erred when if ordered that Counterclaim Plaintiff City First Mortgage Services, LLC's "Motion for Reconsideration is Denied." CP 1193.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Under CR 56(c) and applicable Washington law, did the trial court err as a matter of law when it found that the conduct of Glogowski Law Firm, PLLC did not proximately cause City First Mortgage Services, LLC's damages despite the fact that Glogowski Law Firm, PLLC knowingly failed to assert defenses at every level of the litigation that would have conclusively exonerated City First? (Assignments of Error 1 and 2).

III. STATEMENT OF THE CASE

A. Factual History of the Underlying Case.

In the Underlying Case, the Plaintiffs, Beth and Donald Collings purchased a Redmond home in 1998. CP at 1374-75. The Collingses alleged that they became unable to make their mortgage payments on their home in late 2005 due to a reduction in their income. CP at 1374-75. In 2006, Beth Collings contacted City First, a small FHA, HUD, and VA approved mortgage loan company located in Utah, in an attempt to refinance their home. CP at 1374-75 and CP at 1097-98. Plaintiffs,

however, did not qualify for a loan through City First. CP at 1374-75. Soon thereafter, the Collingses were introduced to Robert Loveless ("Loveless"), a City First branch manager also in Utah and Andrew Mullen ("Mullen"), a branch manager and loan officer also with City First. CP at 1374-75. Mr. Loveless offered, in his personal capacity, to obtain a loan to purchase Plaintiffs' property and, further, to lease it back to them through his independent business, Home Front Holdings, LLC ("Home Front"). CP at 1374-1410. Under Loveless' plan, Home Front would also be the landlord, and "all payments [were to be] addressed to Home Front Holdings, LLC." CP at 1385-1410.

In May 2006, the Collingses and Loveless executed a purchase and sale agreement and other documents, all of which listed "Robert Loveless" or "Robert P. Loveless, a married man, as his separate estate" as buyer. CP at 1377-84. City First was not a party to the purchase and sale agreement. CP at 1377-84. Plaintiffs and Loveless also executed a written lease that identified Home Front as the landlord. CP at 1385-1410. City First was not a party to the lease. CP at 1385-1410.

To facilitate their transaction with Loveless, the Collingses made a "nonrefundable deposit" of $78,540 to Loveless and made monthly lease payments of $2,970 per month. CP at 1374-75. Loveless secured the remainder of the financing by personally obtaining a purchase-money

mortgage loan from City First. CP at 1377-1384 and CP at 1413-14. A defendant in the Underlying Case, Andrew Mullen together with his wife, Malinda Mullen, (the "Mullens") completed the paperwork for that loan. CP at 1416-29. Unbeknownst to City First, Andrew Mullen was one of the two members of Home Front – the entity that, along with Loveless personally, stood to profit from Loveless's transaction with Plaintiffs. CP at 1431-32. There was no relationship – membership, management, or otherwise – between City First and Home Front. CP at 1434-50. Loveless and Mullen, in their own right, were also approved FHA and VA licensees and licensed brokers. CP 1752.

By April 2008, Loveless defaulted on his loan, which resulted in one or more lenders foreclosing on the underlying deed(s) of trust. CP at 1374-75. On March 19, 2009, the Collingses filed the Underlying Case captioned *Collings v. City First Mortgage Services*, Superior Court, King County, Case No. 09-2-13062-1 SEA "to enjoin the trustee sale scheduled by First American." CP at 1481-93. The Collingses sued City First, Loveless, Mullen, Gavin Spencer and other parties who were later dismissed. CP at 1481-93. Loveless – the primary individual in this transaction – never appeared in this action and the Collingses obtained a default judgment against him. CP at 1452-1458.

On September 13, 2010, through September 20, 2010, City First appeared for trial. Neither Loveless nor Mullen appeared. CP at 1753. At trial, Plaintiffs introduced the transcript of Mullen's July 26 deposition as evidence and read it to the jury. CP at 1434-50. Based, in part, on Mullen's deposition testimony, the jury returned a verdict in Plaintiffs' favor. CP at 1470-74. The verdict held Loveless and City First liable for $40,311 in compensatory damages and $80,622 in punitive damages under the Washington Credit Services Organizations Act, chapter 19.134 RCW. CP at 1473. After trial, the Collingses moved for an award of attorney fees against City First owing to their status as the 'prevailing party' under the Consumer Protection Act (RCW 19.86 et seq.) ("CPA"), and the Credit Services Organization Act (RCW 19.134 et seq.). *See Collings v. City First Mortg. Services., LLC*, 177 Wn. App. 908, 927, 317 P.3d 1047 (2013). The Collingses further asked that the fee award be enhanced by a factor of 1.2. *Id.* The trial court granted the request, awarding a total of $628,564.20 in attorneys' fees and $42,307.41 in costs which was affirmed by the Division One Court of Appeals. *Id.* 177 Wn. 2d at 927-929. A judgment was eventually entered against City First to include the damages awards, costs and attorneys' fees. CP at 1741-44.

City First immediately terminated Ms. Glogowski after trial based on her performance and hired Stoel Rives LLP to perform post-trial work and then the appeal of the Underlying Case. CP at 1753.

B. Ms. Glogowski's Conduct Defending City First in the Underlying Case.

City First hired Ms. Glogowski as its lawyer in the Underlying Case because she stated she could adequately represent City First in this area of practice. CP at 1753. Ms. Glogowski was hired several months after the complaint in the Underlying Case was filed. *Id.* Nearly a year after the Complaint was lodged against City First for Equity Skimming, Fraud, Constructive Trust, Equitable Mortgage, Usury, Quiet Title, Consumer Protection Act violations, Residential Landlord Tenant Act violations, Credit Services Organization Act violations, punitive damages, civil conspiracy and an injunction, Ms. Glogowski filed an Answer. CP at 1481-1500.

1. Ms. Glogowski failed to defend City First on the basis that it was exempt from several statutes it was ultimately found liable under.

Ms. Glogowski knew that City First was exempt from the CSOA and the CLA yet she never raised the issue of exemption at any time during the Underlying Case. CP at 28-51 and CP at 1026-33. Despite waiting nearly a year from her date of engagement and ultimately

answering the Collingses' Complaint, Ms. Glogowski never moved to dismiss the CSOA and CLA claims under CR 12(b)(6). CP at 1481-1500.

2. Ms. Glogowski failed to assert or develop any affirmative defenses.

Even though Ms. Glogowski researched some of the claims brought against City First, she filed an Answer which raised no affirmative defenses. CP at 1495-1500 and CP at 1757. This was her second opportunity to defend City First on the basis of its exemption, yet Ms. Glogowski again failed to raise the exemption defenses, of which she was fully aware. CP at 1481-1500. As discussed *supra*, she also failed to develop the appropriate defenses for trial. It was only the Stoel Rives law firm, which replaced Ms. Glogowski as City First's counsel, that argued these issues and defenses for the first time, albeit too late, in its post-trial Motion for Judgment as a Matter of Law, or Alternatively, New Trial. CP at 1690-1725.

3. Ms. Glogowski Failed to File a Motion for Summary Judgment.

Ms. Glogowski testified in her deposition that not she, but the client's in-house counsel Mr. Hunt, failed to file a motion for summary judgment in the Underlying Case because ***he*** missed the deadline, and this was his obligation alone. CP at 1728-30. Ms. Glogowski further testified that the deadline for moving for summary judgment came and went while

she awaited Mr. Hunt's draft summary judgment motion.[2] CP at 1728-30. In contrast, in the Malpractice Action she argued in her summary judgment papers that given certain admissions by City First related to their involvement with Loveless and Mullen, ***she*** could no longer pursue dispositive motions previously anticipated regarding statutory exemption and agency. CP at 32.

In direct contradiction of that statement, she also testified in her deposition to the following in the context of a summary judgment motion: "I do believe that the applicability of the Consumer Loan Act had a chance of being successful . . . ." and "[City First is] properly licensed under this statute which is purely a question of law. Whether you're licensed or not is public record, and it would have been a fairly simple motion for summary judgment." CP at 1520-23. Similarly, Ms. Glogowski had also revealed, in email correspondence to City First, a defense to the CSOA claim: "[s]eriously, I have researched the Credit Services Organization Act and the statute does not apply to you. . . . The landlord stuff did not and does not apply so we are getting closer[.]" CP at 1757.

//

//

---

[2] Mr. Hunt contests her assertion that he was solely responsible for the summary judgment motion. CP at 1754.

4. Ms. Glogowski Failed to Properly Object to Patently Erroneous Jury Instructions.

Ms. Glogowski failed to state the specific grounds for any exceptions to any and all of the proposed jury instructions. CP at 1157. This fact is undisputed. Additionally, many of the key instructions adopted by the Court failed to include essential statutory language whose provisions exempted City First from liability as a matter of law. CP at 1102-55.

Instruction No. 23 is the only instruction that covered the Consumer Loan Act, chapter 31.04 RCW (the "CLA"). City First was held responsible for violations of the CLA (RCW 31.04.025) in making loans to Mr. Loveless—a resident of Utah, not of Washington—even though only loans made to a ***Washington*** resident are subject to the provisions of the statute. CP at 1470-74. Instruction No. 23 is silent on this issue. CP at 1470-74.

Ms. Glogowski also failed to object to instruction No. 19 which related to the CSOA, chapter 19.134 RCW. CP at 1157. City First was held liable under the CSOA, which by definition does not apply to it. CP at 1470-74. Ms. Glogowski accepted an instruction that failed to include the key portions of the statute which explicitly exempted City First from liability under the CSOA. CP at 1126.

Instruction No. 19 changed the scope of the language in RCW 19.134.020(2)(b)(i) by adding the "each branch" language to the statute and did not include the applicable exceptions listed under RCW 19.134.020(2)(b) which unequivocally applied to City First. This is discussed at length *infra* in section IV(C)(2)(a). When City First later appealed based on this exemption, the Court of Appeals rejected all of its arguments because "City First did not take exception to instruction 19." *Collings*, 177 Wn. App. at 913.

5. Ms. Glogowski Failed to Provide a Special Verdict Form.

Ms. Glogowski failed to provide any special verdict form with her jury instructions. CP at 1787-1788. At trial, she admitted to the judge she did not know that a verdict form should have been provided with City First's jury instructions. CP at 1787-1788. Instead she agreed to use the Court's form that merely asked whether the Defendants were "liable to the Collings' [sic] on their claims." CP at 1470-74. This form failed to differentiate among those claims and therefore failed to ask the jury to decide elements of proof, standards of proof, or affirmative defenses that were particular to the specific causes of action. CP at 1470-1474.

The jury was instructed that it could find City First liable under the CSOA, the CPA (through the equity skimming act, CSOA and the CLA) and for civil conspiracy. CP at 1125-55 and CP at 1470-74. Again, the Court

of Appeals rejected City First's appellate arguments in part because Ms. Glogowski had failed to propose a special verdict form. *Collings v. City First Mortg. Services, LLC*, 177 Wn. App. 908, 924-25 317 P.3d 1047 (2013). Additionally, the appellate court held the verdict stood because at least ***one*** of the Collingses' theories was supported by the evidence. *Id.*

6. Ms. Glogowski's additional fundamental errors in defending City First.

First, Ms. Glogowski failed to propound written discovery on behalf of City First, even though she had authority to do so. CP at 1759-1763. It later emerged that the Collingses had settled with the Mullens, a fact that should have been uncovered in written discovery. CP at 1754.

Second, Ms. Glogowski failed to timely respond to discovery requests on behalf of City First. In numerous emails from Ms. Glogowski to Mr. Hunt she tells him that if objections are not timely served, they are waived. CP at 115-133. Despite this, Ms. Glogowski allowed two separate discovery deadlines to pass without preserving any objections to those discovery requests.[3] CP at 33-34. In its Order granting plaintiffs' motion to compel discovery and for sanctions, the trial court ruled that any

[3] Strangely, in a June 9, 2009 time entry, Ms. Glogowski states "Review file and pleadings to provide discovery responses Conference with client regarding discovery responses Prepare Response to Form Interrogatories Cause same to be served." CP at 399. She clearly did not complete the discovery related activities.

objections made in response to the Collingses' discovery requests were waived. CP at 1732-1735.

Third, Ms. Glogowski failed to submit a witness list required under the case schedule and LCR 4. CP at 1506-1510. Because she failed to submit this information, the Court issued an order precluding City First from calling any witness besides Sheri Russett. CP at 1369 and CP at 1512.[4] Ms. Russet was hired by City First in December of 2009, years after the subject transactions took place. CP at 1753. Thus, she did not have any first-hand or contemporaneous knowledge about the relationship between City First and its co-defendants.

Fourth, Ms. Glogowski failed to investigate and/or argue lack of proximate cause in the Underlying Case. CP at 1368. The Collingses' came into contact with defendants Loveless and Mullen because they were about to lose their house. CP at 1481-93. They alleged that they indeed lost their house, after their interactions with Loveless and Mullen. CP at 1481-93. Ms. Glogowski never explored whether plaintiffs were any

[4] Mr. Hunt testified that he urged Ms. Glogowski to ensure the presence of both Mullen and Loveless at trial. CP at 1514-1518. To the contrary, Ms. Glogowski testified she asked Mr. Hunt to arrange for Mr. Loveless to testify at trial. CP at 1520-1523. Irrespective of their positions, she was precluded from calling Mullen and Loveless as witnesses because she failed to preserve the right to call any witnesses but Sherri Russett. CP at 1512 and CP at 1748.

worse off as a result of Defendants conduct under the theory that, absent the intervention of Loveless and Mullen, the original lender would have foreclosed. CP at 1369.

Finally, Ms. Glogowski understood the importance of Loveless and Mullen's testimony very early in the litigation, yet she failed to establish they were acting on their own. In an email correspondence at the inception of the litigation, Ms. Glogowski suggested preparing a counterclaim against Loveless and Mullen for "indemnity/torts/anything else that I can think of. Even if they are judgment proof, I do not want to try the case without an empty chair for the jury . . . gravity kills as they say." CP 1765-1766.

Mr. Hunt later enlisted the help of Ms. Coombs, a City First underwriter, to find Paul Loveless. CP at 980. On or about March 9, 2010, Ms. Coombs provided a memo to Mr. Hunt that summarized an interview she conducted with Loveless. CP at 980-985. Ms. Coombs reported Loveless was willing to cooperate in City First's defense; City First was uninvolved in the wrongdoing the Collingses' alleged; and that Ms. Coombs believed Mr. Loveless would take full responsibility for the dealing with the Collingses. CP at 982-985.

In the course of Ms. Glogowski's reconsideration proceedings, Mr. Loveless testified that the statements made by Ms. Coombs in her memo

were accurate. CP at 1012-1016. Mr. Hunt provided this memo to Ms. Glogowski and urged her to call both Mullen and Loveless at trial, but she took no action. CP at 1754. Additionally, while she argued in her trial brief that she had documents to support vicarious liability, none of the exhibits presented at trial provided direct support for City First's position that Mullen and Loveless were independent contractors. CP at 1749-1750.

C. City First Provided Extensive Expert Testimony to Support its Claims in the Malpractice Action.

City First hired Jeffry Downer to opine on whether Ms. Glogowski violated the standard of care of a reasonable, prudent attorney in the State of Washington in relation to her representation of City First in the underlying matter. CP at 954. Mr. Downer opined, in two separate opinions that Ms. Glogowski indeed

> made several fundamental errors. . . [s]ome of those errors viewed individually violated the standard of care. Viewed as a whole, they present a compelling case of legal malpractice. . . . Ms. Glogowski repeatedly failed to do her job in pleading, presenting evidence on, litigating, and making a record regarding, those arguments in her client's favor.

CP at 959.

Mr. Downer opined that Ms. Glogowski violated the standard of care by (1) failing to propound any written discovery; (2) failing to plead

any affirmative defenses;[5] (3) violating deadlines for discovery; (4) failing to bring a motion for summary judgment; (5) failing to object to the Collingses' proposed jury instructions; (6) failing to preserve the right to call witnesses, including the co-defendants, with first-hand knowledge of the transaction; (7) failing to bring a timely CR 50(a) motion; (8) failing to submit jury instructions and a special verdict form that would properly state the law and allow her to argue City First's theory of the case; (9) failing to offer any more than token evidence and testimony at trial; (10) failing to oppose the motion that opening and closing arguments not be recorded and therefore not present a sufficient record on review; (11) failing to submit jury instructions that reflected applicable law; (12) failing to timely serve and file a list of trial witnesses; (13) failing to argue lack of proximate causation of the Collingses' alleged damages; and (14) various other issues. CP at 957-979.

D. It is Undisputed that City First has Maintained a License with the Federal Housing Administration Making it Exempt Under the CSOA.

Since at least September 25, 1997, City First has held and continuously maintained a license with the Federal Housing Administration (the "FHA"). CP at 1098. City First is directly supervised

[5] This included the failure to plead the affirmative defenses of exemption under both the CSOA and CLA.

by a federal regulator, that is, HUD. CP at 1098. Thus, it is an approved HUD, VA and FHA lender. CP at 1098. City First is also a licensed mortgage broker. City First extends credit in its own right, and in its own name, rather than extending the credit of others, making it much more highly regulated than other entities that do not provide this service. CP at 1098. City First is an actual mortgage banker because it makes loans with its own money. CP at 1098.

Notably, Robert Loveless and Andrew Mullen were HUD, VA and FHA approved lenders as licensees of City First. CP at 1098. They were also licensed mortgage brokers under City First's license. CP at 1098.

E. PROCEDURAL FACTS OF THE MALPRACTICE ACTION

Glogowski brought a complaint against City First for breach of contract, claiming she was owed $54,268.83 for unpaid legal services. CP 1-10. City First filed an Answer, Affirmative Defenses and Counterclaim wherein it asserted numerous affirmative defenses and a claim for professional negligence. CP 11-16. In its counterclaim, City First alleged, that Glogowski breached her duty of care "by, for example and not by limitations: (a) not issuing any written discovery to the other parties; not submitting a witness list; and various other acts and omissions, which may be the subject of expert testimony in this action." CP at 14. City First further pled, "[b]ut for Glogowski's actions and/or omissions, City First

would have prevailed in the *Collings v. City First* action or at least achieved a better result had Glogowski not been negligent and/or committed malpractice." CP at 14. Additionally, City First alleged that "[a]s a result of Glogowski's acts and/or omissions, City First suffered damages in an amount to be proven at trial." CP at 14.

Glogowski filed a summary judgment motion arguing that the trial court should summarily dismiss City First's claim for professional negligence arguing (1) City First could not prove that Ms. Glogowski's conduct proximately caused the adverse verdict in the underlying case and (2) City First's allegations of attorney malpractice fall under the scope of the attorney judgment rule. CP 28-51. After a hearing on June 5, 2015, the trial court denied Ms. Glogowski's motion for summary judgment. CP 1020-1023.

Thereafter, Ms. Glogowski filed a Motion for Reconsideration arguing that the court's role was to make its own determination regarding the sufficiency of the evidence on causation in fact and legal causation and the evidence presented by City First failed to rise to the level of fact and specificity to prevent summary judgment. CP 1026-1033. Glogowski also argued that if the Court allowed City First to use this allegedly speculative evidence to prove causation that it would have a tremendous impact on the legal profession in Washington. CP at 1030-1031. Despite a response to

the contrary, (CP 1072-1082), the trial court agreed with Glogowski, simply stating, "Counterclaim Plaintiff City First Mortgage Services, LLC's claims against [Glogowski Law Firm, PLLC] are dismissed with prejudice." CP 1093-1094. City First then filed a Motion for Reconsideration regarding the order dismissing its claim, (CP at 1767-1782), which was denied by the trial Court. CP at 1193. City First resolved its claim with Katrina Glogowski in regards to her breach of contract claim and the parties filed a Stipulation and Proposed Order for Voluntary Dismissal on October 13, 2015. CP at 1197-1200. City First timely appealed. CP at 1201-1206.

IV. ARGUMENT

A. Standard Of Review

When reviewing a summary judgment order, this Court engages in the same inquiry as the trial court. See CR 56(c); *M.W. v. Dep' t of Soc. & Health Servs.*, 149 Wn. 2d 589, 595, 70 P.3d 954 (2003). "Under CR 56(c), summary judgment is appropriate if the record presents no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Biggs v. Nova Servs.,* 166 Wn.2d 794, 801, 213 P. 3d 910 (2009).

With regard to questions of law, this Court employs a de novo review. *M.W.*, 149 Wn. 2d at 595. With regard to questions of fact, this

Court also employs a de novo review, considering the evidence and all reasonable inferences therefrom in the light most favorable to City First. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn. 2d 255, 256, 616 P.2d 644 (1980); *Halvorsen v. Ferguson*, 46 Wn. App. 708, 712, 735 P.2d 675 (1986) review denied, 108 Wn.2d 1008 (1987). The burden is on Glogowski to prove that there is no genuine issue as to any material fact. *La Plante v. State,* 85 Wn. 2d 154, 158, 531 P. 2d 299 (1975). But "[w]hen material issues of fact exist, they may not be resolved by the trial court and summary judgment is inappropriate." *Halvorsen*, 46 Wn. App. at 712. And "a trial is absolutely necessary if there is a genuine issue as to any material fact." *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152 (1977).

B. City First Conclusively Demonstrated that there Remain Genuine Issues of Material Fact Related to Causation in the Malpractice Action.

Despite pleadings, depositions, undisputed facts, and declarations showing that Ms. Glogowski failed to properly defend City First in the Underlying Case, the trial court in the Malpractice Action improperly dismissed City First's claim on Ms. Glogowski's Motion for Reconsideration. CP at 1093-1094. Contrary to Ms. Glogowski's arguments in her Motion for Reconsideration, (CP 1026-1033), the facts are not such that reasonable persons could reach but one conclusion. *Clark*

Cnty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C., 180 Wn. App. 689, 707, 324 P.3d 743 (2014).

In the Malpractice Action Ms. Glogowski never raised factual challenges related to her conduct. Additionally, she has never legally challenged the fact that City First was exempt under the CLA and the CSOA. CP at 28-51 and CP at 1026-1033. In her own words, the CSOA "does not apply to [City First]." CP 1757. Indeed, she actually admitted causation. CP at 1520-1523 and CP at 1757. Additionally, she has ***never argued*** that City First and its licensees are not exempt under the CLA and the CSOA. CP at 28-51 and CP at 1026-1033. Rather, she asserted that her failure to raise these defenses was part of her "strategy," an argument that has never been supported as objectively reasonable by testimony in a declaration. City First's unimpeachable argument with regard to proximate causation that it was, and should have been adjudged, exempt under two statutes was sufficient to survive summary adjudication. Therefore, for the reasons stated herein, this court should (1) reverse the trial court's order dismissing City First's claim; and (2) remand for trial on City First's claim for professional negligence.

//

//

//

C. The Trial Court Erred in Dismissing City First's Claims Based on Proximate Cause.

To establish a claim for legal malpractice, a plaintiff must prove the following four elements: (i) the existence of an attorney-client relationship giving rise to a duty of care on the part of the attorney toward the client; (ii) an act or omission by the attorney in breach of such duty of care; (iii) damage to the client; and (iv) a causal link between the attorney's breach of duty and the damage incurred. *Hizey v. Carpenter*, 119 Wn. 2d 251, 260–61, 830 P.2d 646 (1992).

With respect to the fourth element, proximate cause provides "the nexus between breach of duty and resulting injury." *Estep v. Hamilton*, 148 Wn. App. 246, 256, 201 P.3d 331 (2008). Establishing proximate cause requires showing that the alleged breach of a duty was both a cause-in-fact and a legal cause of the claimed injury. *Nielson v. Eisenhower & Carlson,* 100 Wn. App. 584, 591, 999 P.2d 42 (2000).

In the legal malpractice arena, Washington courts strictly adhere to the "but for" standard of causation. *Daugert v. Pappas*, 104 Wn. 2d 254, 260–63, 704 P.2d 600 (1985); *Nielson*, 100 Wn. App. at 584. In most instances, the question of "but for" causation is one of fact for a jury. *Daugert*, 104 Wn. 2d at 257, 704 P.2d 600. For example, when the alleged

malpractice consists of an error during trial, the cause-in-fact issue to be decided by the jury is whether the client would have fared better "but for" the attorney's mishandling. *Id.* 104 Wn. 2d at 257–58. However, the court can determine cause in fact as a matter of law if reasonable minds could not differ. *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 864, 147 P.3d 600 (2006), review denied, 161 Wn. 2d 1011 (2007).

The *Daugert* Court clarified the "but for" test noting it does not require certainty, but merely a showing that the alleged malpractice "more likely than not" caused the damage. 104 Wn. 2d at 263, 704 P.2d 600. *See e.g.*, *Taylor v. Bell*, 185 Wn. App. 270, 340 P.3d 951 (Div. I 2014) (trial court erroneously dismissed legal malpractice claim that was supported by sufficient evidence); *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 111 P.3d 866 (Div. I 2005) (trial court erroneously dismissed malpractice claim in ruling that attorney negligence did not result in damage to client); *Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson,* 95 Wn. App. 231, 974 P.2d 1275 (Div. I 1999) (trial court improperly granted summary judgment to law firm, despite lack of evidence that client had valid defense to claim against it; failure to make timely challenge to default judgment would have had a bearing on the damages assessed against client).

In *Versuslaw*, the former client's decision to settle its dispute with the other party to a license agreements did not necessarily insulate the law firm from liability for the alleged negligence in its representation of the client, namely, the negligent drafting of agreements and failing to advise the client to timely assert its claim for unpaid royalties under the agreement. *Versuslaw*, 127 Wn. App. at 329. There, based on traditional principles of proximate causation, the court held it was a jury question whether the settlement was disadvantageous and what impact this had on damages. *Id.*

Additionally, in *Taylor*, the expert's testimony, which was excluded at the trial court level, contained evidence that, but for the attorney's alleged negligence, the harm to Taylor would not have occurred. *Taylor*, 185 Wn. App. at 286-288. Furthermore, the attorney failed to offer a valid basis for limiting the consequences of his alleged negligence. *Id.* Accordingly, the court held that the expert's testimony, with regard to proximate causation, was sufficient to survive summary adjudication. *Id.* 185 Wn. App. at 288.

In her Motion for Reconsideration Ms. Glogowski relied on *Griswold v. Kilpatrick*, 107 Wn. App. 757, 760–61, 27 P.3d 246 (2001), to support her position that City First did not provide sufficient evidence to survive summary judgment on the issue of proximate causation. CP at

1029-1030. In *Griswold*, the court held that summary judgment in favor of the attorney was appropriate because the former client failed to demonstrate that the attorney's delay in scheduling mediation resulted in a lesser settlement amount. *Id.* at 760.

Ms. Glogowski also relied on *Smith v. Preston Gates Ellis, LLP* in her Motion for Reconsideration. CP at 1029. In *Smith*, the former client sued Preston Gates Ellis, LLP, alleging legal malpractice for its representation of him in drafting and reviewing a contract for the construction of his residence. *Smith*, 135 Wn. App. at 863. Division One of the Court of Appeals held that even though Smith noted various deficiencies in the construction contract to support his malpractice claim, summary judgment was appropriate because he had failed to demonstrate, with specificity, that but for these deficiencies he would have had a better result. *Id.* at 865. Smith alleged that if he had been advised of the deficiencies in the contract, he never would have signed it. *Id.* The court held, however, that this allegation was insufficient to defeat summary judgment because Smith could not identify an alternative that would have led to a better outcome. *Id.*

Unlike the appellants in *Smith* and *Griswold*, City First produced clear and sufficient evidence that but for Ms. Glogowski's negligence, the trial court in the Underlying Case would have dismissed claims against

City First as a matter of law. On Summary Judgment and on Reconsideration, City First at least created genuine issues of material fact with respect to causation. It showed Ms. Glogowski failed to (1) properly defend City First, (CP at 1495-1500), (2) properly present jury instructions and/or object to improper proposed instructions that failed to include essential statutory language which exempted City First from liability as a matter of law (CP at 1157 and CP at 1102-1155), and (3) submit a proposed jury verdict form that would have clarified on what grounds the jury rested its verdict (CP at 1470-1474). Further, Ms. Glogowski admitted causation in her deposition and in client communications early on in her representation of City First.[6] CP at 1520-23 and CP at 1757.

Notably, in her Motion for Reconsideration Ms. Glogowski only focused on evidence related to allegedly speculative testimony of Loveless and Mullen regarding vicarious liability. CP at 1026-1033. She never even discussed her errors listed in the paragraph above and discussed in detail below. CP at 1026-1033. These topics however, were the focus of City First's arguments in its Response and Opposition to Glogowski Law Firm,

[6] Specifically, Ms. Glogowski was asked a question regarding the chance of success of a motion for summary judgment on the issue of the CLA's inapplicability to City First. Ms. Glogowski responded, "Whether you're licensed or not is a public record, and it would have been a fairly simple motion for summary judgment." CP 1523.

PLLC's Motion for Reconsideration (CP at 1072-1082) and its own Motion for Reconsideration. (CP at 1767-1782).

D. Ms. Glogowski Never Asserted Conclusive Defenses on Behalf of City First in the Underlying Case.

1. City First is exempt under RCW 19.134.101(b).

City First was held liable under the CSOA, which by definition does not apply to it. CP 1470-1474. In order to be held liable under the CSOA, the entity or person must meet the definition of a "Credit Services Organization." RCW 19.134.010(2)(a). The CSOA prohibits "Credit Services Organizations" from engaging in certain conduct. RCW 19.134.020. Additionally, the CSOA excludes certain persons from liability under this statute. RCW 19.134.010(2)(b)(i) states that a "'Credit services organization' ***does not include***:"

> Any person authorized to make loans or extensions of credit under the laws of this state or the United States who is subject to regulation and supervision by this state or the United States ***or a lender approved by the United States secretary of housing and urban development*** for participation in any mortgage insurance program under the national housing act;

(emphasis added).

Ms. Glogowski did not propose an instruction that included the above highlighted portions of the statute which explicitly exempt City First from liability under the CSOA. CP 1167. Additionally, Ms. Glogowski

failed to properly object to instruction No. 19, which covered the CSOA. CP 1157-1158. Instruction No. 19 changed the scope of the language in RCW 19.134.020(2)(b)(i) by eliminating the applicable exceptions and adding the "each branch" language. CP 1126. Regardless of City First's license status in the state of Washington and any arguments related thereto, it is and has always been exempt under the statute as a HUD lender.

The CSOA does not apply to City First as a matter of law. As provided above, the definition of a "credit services organization" explicitly ***excludes*** "a lender approved by the United States secretary of housing and urban development for participation in any mortgage insurance program under the national housing act [.]" RCW 19.134.010(2)(b)(i). In other words, under this provision, persons who are authorized to make loans or extensions of credit under federal law are explicitly exempt from liability under the CSOA. Since at least September 25, 1997, City First has held and continuously maintained a license with the FHA. CP at 1098. City First is directly supervised by a federal regulator, that is, HUD. CP at 1098. Thus, City First is an approved HUD, VA and FHA lender. CP at 1098. City First licensees, i.e. Mullen and Loveless are also directly supervised by HUD. CP at 1098. These facts are not in dispute. Thus, City First, Mullen and Loveless are exempt under the CSOA as a matter of law.

2. City First does not meet the statutory definition of a Credit Services Organization.

RCW 19.134.10(2)(a) defines a Credit Services Organization as follows: "any person who, ***with respect to the extension of credit by others***, sells, provides, performs, or represents that he or she can or will sell, provide, or perform, in return for the payment of money or other valuable consideration any of the following services[.]" (emphasis added).

City First extends credit in its own right, and in its own name, rather than extending the "credit of others," making it much more highly regulated than other entities that do not provide this service. CP at 1098. Accordingly, City First does not meet the definition of a "credit services organization" under 19.134.010(2)(a). Ms. Glogowski did not make this argument in the Underlying Action.

Again, the CSOA does not apply to City First as a matter of law. Had the court issued a proper jury instruction reflecting the statute as it applied to City First the jury ***could not*** have found City First liable for $80,000 in punitive damages under the CSOA. Likewise, had the trial court in the Malpractice Action performed a proper analysis of the facts and law it would have determined that City First met its burden in establishing proximate cause. The failure to raise City First's exemption from the CSOA, for which it was found liable in the Underlying Case, demonstrates with

certainty that Ms. Glogowski proximately caused the jury to determine that City First violated the CSOA. This determination resulted in a substantial attorney's fee award under CSOA as a per se violation of the CPA.

3. City First was also exempt under the Consumer Loan Act.

RCW 31.04.025(1) of the Consumer Loan Act ("CLA") states "[e]ach loan made to ***a resident of this state*** by a licensee, or persons subject to this chapter, is subject to the authority and restrictions of this chapter." (emphasis added). Additionally, RCW 31.04.015(3) of the CLA defines "Borrower" as any person who consults with or retains a licensee or person subject to this chapter in an effort to obtain, or who seeks information about obtaining a loan, regardless of whether that person actually obtains such a loan.

Instruction No. 23 is the only instruction that covered the CLA. CP 1133-1135. City First was held responsible for violations of the CLA (RCW 31.04.025) in making loans to Mr. Loveless (CP at 1470-1474)—a resident of Utah (CP at 1374-1375), not of Washington—when only loans made to a ***Washington*** resident are subject to the provisions of the statute. *See* RCW 31.04.025(1). Instruction No. 23 made no mention that the loans in question must be "made to a resident of this state[.]"

A loan made to a resident of ***another state*** is not subject to the authority and restrictions of this chapter. Nowhere in the underlying litigation was it asserted that City First "made" a loan to the Collingses; rather, the only loans made by City First were to Loveless, a resident of Utah. This fact is not in dispute and the statute was thus wholly inapplicable to any party in the litigation as a matter of law.

Additionally, the Collingses did not meet the statutory definition of "borrower" under RCW 31.04.015(3) provided above, because they did not borrow any money from City First. CP at 1377-1384. It was only Loveless who borrowed money from City First. CP at 1377-1384. This essential definition was glaringly missing from the instruction, yet Ms. Glogowski took no written exception to the instruction. CP at 1157. In addition, there was no proof that City First committed any act in regards to the loan to Loveless that the statute proscribed, such as engaging in any unfair or deceptive practice toward any person or obtaining property by fraud or misrepresentation. *See* RCW 31.04.027.

As a result of her negligence, the trial court in the Underlying Case held, in denying City First's CR 50(b) motion, that City First waived any challenge to this jury instruction because it did not identify any preserved error. *Collings*, 177 Wn. App. at 946.

Ms. Glogowski's failure to argue the CLA's inapplicability to City First in the Underlying Case proximately caused City First to incur a substantial attorney's fee award under the CLA as a per se violation of the CPA.

E. Ms. Glogowski Missed Every Opportunity to Assert City First's Conclusive Defenses in the Underlying Case.

1. Ms. Glogowski Waived City First's Defenses

Generally, affirmative defenses are waived unless they are (1) affirmatively plead, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties. *Farmers Ins. Co. v. Miller*, 87 Wn. 2d 70, 76, 549 P.2d 9 (1976); *Ebling v. Gove's Cove Inc.*, 34 Wn. App. 495, 500, 663 P.2d 132, review denied, 100 Wn. 2d 1005 (1983); *Rainier Nat'l Bank v. Lewis*, 30 Wn. App. 419, 422, 635 P.2d 153 (1981).

Ms. Glogowski did not affirmatively plead any affirmative defenses *at all* (CP at 1495-1500), nor did she raise any defenses in a motion brought pursuant to CR 12(b)(6). These facts are undisputed. City First's exemption defense was raised for the first time *after* judgment had already been entered in its post-trial Motion for Judgment as a matter of Law, or Alternatively New Trial. CP at 1690-1725. Jeff Smyth, counsel for the Collingses, timely objected to its application in opposition to City

First's Motion noting that City First never plead the affirmative defenses of exemption, comparative fault, and "empty chair." CP at 962. The trial court, in its post-trial denial of City First's Motion for a New Trial, determined that City First's exemption from the CSOA as an FHA-, HUD-, or VA-approved lender had been waived by its (or more accurately, its counsel's) failure to raise that issue until after judgment had been entered. CP at 451. Accordingly, Ms. Glogowski effectively waived City First's affirmative defenses which would have absolved City First from liability.

2. Ms. Glogowski Failed To Properly Object To Patently Erroneous Instructions.

Ms. Glogowski failed to state the specific grounds for any exceptions to any and all proposed jury instructions. CP at 1157. This fact is undisputed. As explained *infra*, some of these instructions failed to include essential statutory language which exempted City First from liability as a matter of law.

The legal standard for taking exception to a jury instruction is well settled. CR 51(f) provides in part: "[t]he objector ***shall state distinctly the matter to which he objects and the grounds of his objection***, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made." On review of an instruction the relevant inquiry is "whether the exception was sufficient to apprise the

trial judge of the nature and substance of the objection." *Crossen v. Skagit Cy.*, 100 Wn. 2d 355, 358, 669 P.2d 1244 (1983). "If an exception is inadequate to apprise the judge of certain points of law, 'those points will not be considered on appeal.'" *Walker v. State*, 121 Wn. 2d 214, 217, 848 P.2d 721 (1993) (quoting *Crossen*, 100 Wn. 2d at 359, 669 P.2d 1244). Indeed, one issue that City First appealed in the Underlying Case was the trial court's jury instruction No. 19. However, the Court of Appeals rejected this argument, in part, because "City First did not take exception to instruction 19." *Collings*, 177 Wn. App. at 913.

3. Ms. Glogowski did not provide a proposed verdict form nor did she object to the trial court's flawed verdict form.

Based on the questions asked in the verdict form, neither the trial court nor the appellate court could tell from the jury's verdict whether it found City First independently liable for civil conspiracy, for acting in concert with Loveless, or for a violation of the CPA on any other grounds than the CSOA. *Collings*, 177 Wn. App. at 925. CP at 966-967. It was impossible to determine which defendant was liable on each legal theory. CP at 966.

Some, but not all of the Collingses' causes of action supported a claim for attorneys' fees. The failure to offer a verdict form from which the jury would identify the specific claims on which plaintiffs prevailed

deprived City First of a record to advance the argument that the Collingses were only entitled to a *pro rata* share of attorney's fees, which exceeded $600,000. CP at 967.

Once again, the court of appeals rejected City First's appellate arguments in part because Ms. Glogowski failed to propose a special verdict form. *Collings,* 177 Wn. App. at 923-25. Additionally, the appellate court held the verdict stood because at least ***one*** of the Collingses' theories was supported by the evidence. *Id.*

There is a clear nexus between Ms. Glogowski's failure to defend City First and the award against City First. City First has set forth definitive evidence that the trial court could not have awarded punitive damages against City First had Ms. Glogowski properly defended City First under the CSOA. This is not speculative. Rather, the evidence provides certainty of Ms. Glogowski proximately causing damage to City First as there are no genuine issues of material fact with respect to the statutes from which City First was exempt. The per se violations of the CPA through these particular statutes resulted in the trial court in the Underlying Case leveling a substantial attorney's fees award against City First.

//

//

//

F. Ms. Glogowski cannot argue that these errors were part of her "strategy."

The law does not immunize attorneys from tort liability for their professional negligence. *Halvorsen*, 46 Wn. App. at 717, 735 P. 2d 675; *see Cook, Flanagan & Berst v. Clausing*, 73 Wn. 2d 393, 395-96, 438 P.2d 865 (1968). Washington courts apply an "attorney judgment rule," pursuant to which "mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice." *Halvorsen,* 46 Wn. App. at 717; *see Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 324 P.3d 743 (2014). The "attorney judgment rule" has particular relevance when the alleged error involves an "uncertain, unsettled, or debatable proposition of law." *Halvorsen*, 46 Wn. App. at 717, 735 P.2d 675.

To combat the "attorney judgment rule," a malpractice plaintiff must show either (a) the attorney's judgment was "not within the range of reasonable choices from the perspective of a reasonable, careful and prudent attorney in Washington," or (b) even if the decision was within the range of reasonable choices, the attorney breached the standard of care in making the decision. *Clark County*, 180 Wn. App. at 704-706, 324 P.3d 743. To establish that the attorney's judgment was outside the range of reasonable choices the plaintiff must submit evidence that "no reasonable Washington attorney would have made the same decision as the defendant attorney." *Id.*

at 752. If the plaintiff proffers sufficient evidence to demonstrate a factual issue as to whether the judgment was within the range of reasonable choices and/or was the product of negligence, then the matter must be decided by a jury. *Id.* at 753.

Here, Ms. Glogowski's errors and omissions are far beyond the range of appropriate personal choices. They constitute a violation of the standard of care, not professional judgment. The defendants were hit with an $80,000 punitive damages award related ***only*** to the CSOA because the jury was not properly instructed and the CSOA claims were not knocked out via a motion pursuant to 12(b)(6) or a motion for summary judgment. CP at 1470-1474. Further, the CSOA judgment ultimately led to an enormous award of attorneys' fees. *Collings,* 177 Wn. App. at 927-29.

There is nothing subjective about failing to employ a defense, particularly that of exemption, on behalf of your client and then failing to preserve the right to properly apply the law. Certainly, this raises a factual issue as to whether her judgment was reasonable and/or a product of negligence. It would be nonsensical and disingenuous to claim that Glogowski's strategy was to omit the applicable exculpatory law in the jury instructions. Rather, this was purely negligence. As the Ninth Circuit Court of Appeals has stated, "[t]here is nothing strategic or tactical about ignorance[.]" *Pineda v. Craven*, 424 F. 2d 368, 372 (9th Cir. 1970).

G. City First provided sufficient proof that Ms. Glogowski's Errors and Omissions were the Proximate Cause of its injuries.

The evidence provided above is more than sufficient to establish the existence of proximate cause. There is no factual dispute that Ms. Glogowski failed to defend City First under the CSOA and the CLA during the entire litigation. This includes her failure to (1) file a 12(b)(6) motion on the CLA and CSOA, (2) plead any affirmative defenses, (3) move for summary judgment, (4) properly present jury instructions and/or object to improper proposed instructions, (5) draft a verdict form and/or object to the court's verdict form, and (6) preserve the right to appeal the issues surrounding the jury instructions and verdict form. It is also undisputed that the loan in question was between a Utah entity and a Utah citizen and that City First is a federally regulated lender. These facts on their own exclude City first from liability under the CLA and the CSOA respectively.

Because these facts are undisputed, what is left is a purely legal analysis of the claims that does not involve any speculation. Had Ms. Glogowski acted properly, no reasonable jury could have determined City First was liable under the CSOA or the CLA because the jury would never have had an opportunity to decide those claims. There are no competing

facts and thus no facts to weigh. The fact of City First's and Loveless' undisputed status creates an undeniable question of law.

This could and should have been decided at the trial court level in the Underlying Case. Likewise, it could and should have been decided at the trial court level in the Malpractice Action. Because the Court reviews this error de novo, it has the same ability to decide this issue and remand the case to the trial court.

The Court can reach only one conclusion: that Ms. Glogowski was negligent in her representation of City First and had she properly defended City First they would not have been held liable under the CLA and CSOA. Summarily dismissing City First's claim was not proper and City First's Malpractice Action should be decided by a jury.[7]

H. Legal Causation Standard

Legal causation depends on considerations of "logic, common sense, justice, policy, and precedent." *King v. Seattle*, 84 Wn. 2d 239, 250, 525 P.2d 228 (1974). It involves the "determination of whether liability should attach as a matter of law given the existence of cause in fact." *Hartley v. State*, 103 Wn. 2d 768, 779, 698 P.2d 77 (1985). To determine whether the cause in fact of a plaintiff's harm should also be deemed the

[7] It bears repeating that these issues, in the underlying litigation, should never have been presented to a jury; they were determinable in City First's favor as a matter of law.

legal cause of that harm, a court may consider, among other things, the public policy implications of holding the defendant liable. *Id.* Thus, the plaintiff must show that the relationship between his injury and the defendant's conduct is "proximate" enough to justify imposition of responsibility on the defendant. *M.H. v. Corporation of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 252 P.3d 914 (2011), review denied, 173 Wn. 2d 1006, 268 P.3d 943 (2011).

Here, there is no question that Ms. Glogowski's errors caused City First's injury. She allowed her client to be found liable under two statutes from which it was exempt. Ms. Glogowski also failed to properly inform the jury on numerous issues and allowed a questionable verdict form to move forward. Additionally, she breached the standard of care in other respects, such as failing to preserve the right to call any witnesses with actual knowledge at trial and failing to argue proximate cause at trial. Her negligence caused City First to incur well over a million dollars in damages. There exists no public policy implication of holding Ms. Glogowski liable. Again, if this case does not meet proximate causation, then causation is an impossible standard in this State.

V. CONCLUSION

City First, through its counsel Ms. Glogowski, put on no viable defense in the Underlying Case. Had Ms. Glogowski properly raised the

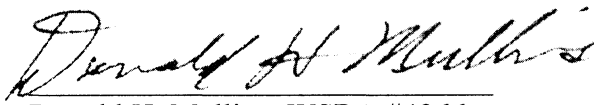
issue of exemption from both the CSOA and the CLA the jury could not have determined City First was liable under either statute. Additionally, these claims would have likely been dismissed on an early motion to dismiss or a motion for summary judgment. Neither of these statutes apply to City First as a matter of law, yet City First was found liable under these statutes due to Ms. Glogowski's negligence. There is no evidence or reasonable inference from the evidence to justify the decisions of the trial court and the decision to dismiss City First's claim for professional negligence is contrary to existing law under CR 59(a)(7).

The trial court erred. For the foregoing reasons, this Court should: (1) reverse the trial court's order dismissing the claims of City First; and (2) remand for trial on City First's claim for professional negligence.

Dated this 9th day of June, 2016.

Respectfully submitted,

BADGLEY MULLINS LAW GROUP PLLC



Donald H. Mullins, WSBA #4966
Daniel A. Rogers, WSBA #46372
Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Staci Wilkie, paralegal for BADGLEY MULLINS TURNER PLLC, attorneys for Appellant in the above entitled action, hereby certify under penalty of perjury that I am over the age of eighteen (18), and am competent to testify to the facts contained herein. On the 9th day of June, 2016, I served by sending a true and correct copy in the manner indicated below of the following documents:

1. APPELLANT'S OPENING BRIEF

upon the attorneys of record herein, as follows, to wit:

Glogowski Law Firm, PLLC — ***via hand delivery***
Katrina Glogowski, WSBA No. 27483
22000 64th Avenue W., #2F
Mountlake Terrace, WA 98043
Email: katrina@glogowskilawfirm.com
Respondent

William H. Walsh, WSBA No. 21911 — ***via electronic mail***
Robert D. Lee, WSBA No. 46682
Cozen O'Conner
999 Third Avenue, Suite 1900
Seattle, WA 98104
Email: wwalsh@cozen.com
Email: rlee@cozen.com
Attorneys for Respondent

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 JUN 14 AM 10: 52

Staci Wilkie, Paralegal