74266-3

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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.

REPLY BRIEF OF APPELLANT (WITH REVISIONS)

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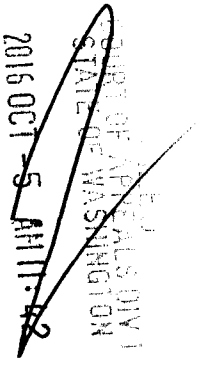

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I. INTRODUCTION

Appellant City First Mortgage Services, LLC[1] ("City First") respectfully submits the following Reply Brief to Appellee Glogowski Law Firm, PLLC's ("GLF") Brief ("Resp. Br."). As set forth below, City First was unable to mount a credible defense in the Underlying Case[2] as a result of GLF's failure of representation.[3] This failure proximately caused a substantial monetary judgment of approximately $800,000[4] against City First that should never have occurred. Further, GLF's errors and omissions caused City First to lose the trial and the subsequent appeal of the Underlying Case because it failed to properly create and preserve a record that accurately represented the facts in the Underlying Case.

As stated in the Appellant's Opening Brief, "[g]enerally, the but for aspect of proximate cause is decided by the trier of fact." *Clark Cnty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 707, 324 P.3d 743 (2014) (citing *Smith v. Preston Gates Ellis, LLP*, 135 Wn.

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[1] City First is a small mortgage banker and not an investment firm.
[2] *Collings v. City First Mortg. Services, LLC*, 177 Wn. App. 908, 925, 317 P.3d 1047 (2013).
[3] GLF suggests that City First brought this action only because GLF filed an action to collect fees. Resp. Br. 6-7. City First fired GLF and hired Stoel Rives to handle post-trial arguments and the appeal of the Underlying Case. While the Underlying Case was still pending on appeal the statute of limitations for filing a malpractice action was still in the distant future. Once GLF filed her action, City First was forced to include its malpractice claim as it was a compulsory counterclaim.
[4] This amount includes an award of attorney's fees.

App. 859, 147 P.3d 600 (2006)). "However, proximate cause can be determined as a matter of law if reasonable minds could not differ." *Id.* As demonstrated below, reasonable minds could find that GLF's errors and omissions proximately caused the judgment against City First.

The touchstone for this appeal is vicarious liability. As discussed in the Appellant's Opening Brief and below, City First could not have been found liable under the Consumer Loan Act ("CLA"), Equity Skimming Act ("ESA"), or the Credit Services Organization Act ("CSOA") unless it was found to be vicariously liable for the conduct of Paul Loveless and Andrew Mullen in the Underlying Case. However, Loveless and Mullen's actions were so far outside the course and scope of their employment that no reasonable jury could have found City First to be vicariously liable for their frolic.[5] Unfortunately, GLF offered no evidence to oppose this finding and argued that Loveless and Mullen were independent contractors, the wrong theory for relief from vicarious liability in this instance, which ultimately caused the substantial judgment against City First.

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[5] "Frolic" is defined as "An employee's significant deviation from the employer's business for personal reasons." Black's Law Dictionary 739 (9th ed. 2009

II. ARGUMENT IN REPLY

A. GLF's Failure to Proffer a Special Verdict Form Precluded City First from Any Chance of Success on Appeal in the Underlying Case.

In City First's appeal of the Underlying Case, the Court of Appeals held that "[b]ecause City First did not propose a special verdict form that would have clarified on what grounds the jury rested its verdict, City First cannot gain a new trial merely by showing that at least one of Collings' claims fails for insufficient evidence." *Collings v. City First Mortg. Services, LLC*, 177 Wn. App. 908, 925, 317 P.3d 1047 (2013). As a result of GLF's failure to propose a special verdict form, the Court of Appeals in the Underlying Case held that "so long as at least one of the Collings' theories is sufficiently supported by the evidence, the verdict will stand." *Id.* The court held that the record was sufficient to support a finding that Loveless was acting within the scope of his authority as a City First agent with respect to "...both the sale and lease-back arrangement and the Loveless loan." *Id.* 177 Wn. App. at 927.

The verdict form in the Underlying Case did not single out any of the Collings' claims except for those under the CSOA. CP 304-7. GLF's failure to take exception to the special verdict form and propose a more specific one put City First at a fatal disadvantage on appeal following its loss at trial. As a direct result of this omission, City First was held to be

vicariously liable for conduct under the CSOA and none of the Collings' other claims were even discussed by the Court of Appeals.[6]

The verdict form incorrectly provided for a determination of vicarious liability and again no exception was taken. In fact, the special verdict form allowed the jury to find that City First was "liable to the Collings for a violation of the [CSOA]" (CP 307), a statute from which City First was legally exempt. RCW 19.134.010(2)(b)(i). It is crucial to note that the subject loan in the Underlying Case was made by City First to Loveless, not by City First to the Collings. CP 1013. Loveless, in his individual capacity, violated the CSOA by carrying out his lease-back scheme with the Collings. *Id.*

The effect of the failure to take exception to the special verdict form meant that the Court of Appeals looked at only one of the claims to see if there was sufficient evidence to support the verdict:[7] whether City First was vicariously liable for the conduct of Loveless.[8] In so doing, the court looked at City First's defense to vicarious liability for which GLF had offered no supporting evidence at the trial court. This failure represents a breach of GLF's standard of care. CP 966-67.

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[6] *Collings*, 177 Wn. App. at 923-25.
[7] *Id.* 177 Wn. App. at 925.
[8] *Id.*

GLF's only witness was the company representative, essentially a records custodian with respect to the vicarious liability issue, who had no records or first-hand knowledge to dispute the Collings' agency argument.[9] Not surprisingly, given GLF's wholly ineffective and incorrect defense, the Court of Appeals concluded that there was sufficient evidence to find Loveless was acting within the scope of his authority. *Collings*, 177 Wn. App. at 927.

As discussed below, GLF argued in the trial brief that it would proffer evidence to demonstrate that Mullen and Loveless were independent contractors and thus that City First could not be vicariously liable for their conduct. CP 284-86. However, GLF offered no evidence to support this argument at trial. Had this been offered, the trial court or Court of Appeals may have determined that there was not sufficient evidence to support the verdict. More importantly, if she had argued and offered evidence in support of the theory that Loveless and Mullen were acting outside the scope of their authority, the trial court or Court of Appeals could not have found City First to be vicariously liable.

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[9] GLF did not serve on a timely basis the list of witnesses and the trial court ruled that she could only call one witness and the witness that she could call was the company representative. Another breach of GLF's duty of care. CP 969.

B. City First Could Not Have Violated the CSOA As a Result of the Actions of Loveless and Mullen.

In its Response Brief, GLF argues that "...the threshold issue before the Court is whether the exemption defenses could have immunized City First from vicarious liability." Resp. Br. at 18. However, GLF's failures with respect to vicarious liability are two-fold. First, GLF's legal argument against vicarious liability was inadequate and it also failed to offer any evidence to support its flawed theory. Second, GLF argues that City First's exemption from the CSOA could not immunize it from vicarious liability of individuals who are not entitled to the defense. *Id.* at 14. GLF's argument is a red herring. City First is an LLC and thus it can only act through its agents. If Loveless's and Mullen's actions were within the course and scope of their agency, City First should be exempt. GLF should have, at a minimum, argued this point. If Loveless and Mullen's actions were outside the course and scope of their agency, then City First could not be held vicariously liable for their conduct. Though she presented a motion to the court on the CSOA issue, the motion was either ignored by the court or lost in the shuffle.

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1. **GLF Argued that City First was not Vicariously Liable for the Actions of Loveless and Mullen and then Offered No Evidence to Support this Argument.**

GLF argued in her trial brief that City First could not be held vicariously liable for the actions of Loveless and Mullen because they were independent contractors. CP 284-87. However, she set forth no evidence to support this theory at trial. The only witness GLF called at trial was Sherri Russett.[10] CP 699. Ms. Russet was hired several years after the subject transactions took place. CP 1753. Thus, she had no personal knowledge of the subject transactions and was not able to offer any testimony with respect to the parameters of Loveless's or Mullen's contracts or authority with City First. Additionally, GLF did not call either Loveless or Mullen nor did it call any witness with personal knowledge of the subject transactions.

GLF also failed to offer any documentary evidence in support of its argument that Loveless and Mullen were independent contractors. CP 1748-51. The only exhibit that is even related to this argument is Exhibit 22, "Agent Commission and Fee Agreement dated 12/12/2006 for Andrew Mullens (sic) (on form generated by City First)." CP 1750. No such document was submitted related to Loveless. CP 1748-51. Furthermore,

[10] Glogowski did not submit a witness list which resulted in her only being allowed to call Sherri Russett at trial. CP 699.

GLF failed to submit City First's Corporate Policy Handbook into Evidence. *Id.* It also failed to submit any similar documentation with respect to Loveless being an independent contractor. *Id.*

With the total lack of evidentiary support for GLF's independent contractor argument, as well as City First's only witness directly contradicting this argument, it follows that the Court of Appeals concluded that there was sufficient evidence to find Loveless was acting within the scope of his authority, since there was no evidence to the contrary. *Collings*, 177 Wn. App. at 927. GLF did not call Loveless or Mullen as witnesses during trial, despite Loveless's willingness to testify. CP 1013.

GLF proffered no evidence in support of the independent contractor argument and this topic was not the subject of any interrogation by GLF. Furthermore, GLF offered no records for Ms. Russett to authenticate that would have demonstrated the terms of Loveless or Mullen's contract or authority with City First. This complete dearth of evidence in support of the argument that Loveless and Mullen were independent contractors proximately caused City First to be found vicariously liable for their actions and was below the applicable standard of care. CP 966.Vicarious liability could not have been applied to City First had GLF reasonably offered evidence to advance the argument that

Loveless and Mullen were independent contractors and that there conduct was outside the scope of their agreements.

2. GLF Failed to Present Any Evidence to Demonstrate that Mullen and Loveless's Conduct was Outside the Course and Scope of Their Agency.

GLF's argument that City First could not be vicariously liable for the actions of Loveless and Mullen because they were independent contractors does not address the course and scope of their agency as raised by the Collings. The Collings argued that Loveless and Mullen were agents and employees of City First. CP 1374. In addition to or instead of the independent contractor argument, GLF needed to argue that Loveless and Mullen's scheme was not within the course and scope of their employment or agency, which would have made vicarious liability impossible for City First.

In the Underlying Appeal, relying on the dearth of evidence related to the scope of Loveless's authority, the court reasoned that "an employer is liable if the act complained of was incidental to acts expressly or impliedly authorized." *Collings*, 177 Wn. App. at 927 (citing *Carmin v. Port of Seattle*, 10 Wn. 2d 139, 116 P.2d 338 (1941)). However, the facts in *Carmin* are easily distinguished from those related to Loveless's authority in the Underlying Case. In *Carmin*, a Port of Seattle employee, whose job was generally described as promoting the goodwill of the port,

was driving to a business meeting that was to take place at his home when he struck a pedestrian. *Carmin*, 10 Wn. 2d at 141. The court reasoned that the port employee's drive home was "incidental" to his authority because he drove home for a business meeting and also "charged to appellant port the mileage consumed on the trip in question." *Id.* 10 Wn. 2d at 153.

In the Underlying Case, Loveless and Mullen were paid no commission for the loan that Loveless, himself, took out. CP 632-33. It can hardly be argued that taking out a loan personally for the purpose of skimming equity off of a borrower's property was "incidental" to Loveless' authority. Loveless clearly stepped aside from City First's business to effect a fraud for his own benefit.

"A master is responsible for the servant's acts under the doctrine of respondeat superior when the servant's acts are within the scope of his or her employment and in furtherance of the master's business." *Kuehn v. White*, 24 Wn. App. 274, 277, 600 P.2d 679 (1979). "If the servant 'steps aside from the master's business in order to effect some purpose of his own, the master is not liable.'" *Bratton v. Calkins*, 73 Wn. App. 492, 498, 870 P.2d 981 (1994) (citing *Kuehn*, 24 Wn. App. 274).

The determination of whether an agent was acting within the course of his employment is "whether the employee was, at the time, engaged in the performance of the duties required of him by his contract

of employment, *or* by specific direction of his employer; *or*, as sometimes stated, *whether he was engaged at the time in the furtherance of the employer's interest.*" *Dickinson v. Edwards*, 105 Wn.2d 457, 467, 716 P.2d 814 (1986) (emphasis in original) (citing *Elder v. Cisco Constr. Co.*, 52 Wn.2d 241, 324 P.2d 1082 (1958)). The benefit to the principal is emphasized in this analysis. *Dickinson*, 105 Wn.2d at 467. "Where the servant's intentionally tortious or criminal acts are not performed in furtherance of the master's business, the master will not be held liable as a matter of law even though the employment situation provided the opportunity for the servant's wrongful acts or the means for carrying them out." *Kuehn*, 24 Wn. App. at 278.

As argued in more detail *supra* § A, the failure to properly note exceptions to the verdict form precludes any insight into the jury's basis for its decision in the Underlying Case. However, the one issue that the Court of Appeals analyzed was that of vicarious liability, reasoning that there was sufficient evidence to find Loveless was acting within the scope of his authority. *Collings*, 177 Wn. App. at 927. Since GLF did not offer any evidence that Loveless and Mullen were independent contractors, rather than agents and employees of City First, we can assume that the jury agreed with the Collings' argument that Loveless and Mullen were agents and employees of City First. CP 1374. This also lines up with the

description of City First's relationship with Loveless and Mullen that City First's general counsel, Brian Hunt, told GLF early on in the Underlying Case. CP 62.

City First had no relationship with the Collings other than denying their application for a loan. CP 1374-75. The actions of Loveless in furtherance of his scheme to defraud the Collings tells the story of a greedy man who used his relationship with City First as a means of reeling in a victim to perpetrate a fraud that solely benefitted his own interests. Loveless then proceeded with the Collings in a manner that was totally outside the course and scope of his employment with City First. CP 1013

Following City First's denial of a loan to the Collings, Loveless proposed an alternative plan. CP 1374-1375. Loveless proposed that he personally take out a mortgage on the Collings' home and the Collings would pay him a fee of $78,540 and sign a lease-back agreement with an option to repurchase their home. CP 1375. The Collings would then pay Loveless an amount equal to the mortgage payments as "rent." *Id.* Loveless could have taken this loan out from any lender. The fact that he chose City First does not make City First vicariously liable for his conduct. Loveless then refinanced the home in violation of the lease-back agreement and subsequently defaulted on the mortgage. *Id.* In Loveless's scheme, City First merely approved loans to Loveless, not to the Collings.

CP 1013; CP 276-79. City First was totally unaware of the separate lease-back agreement executed by the Collings and Loveless. CP 1013; CP 276-79.

At a minimum, there is a genuine issue of material fact as to whether Loveless acted in the interest of City First or for his own benefit. CP 1013. It can hardly be argued that the actions of Loveless were within his authority. GLF missed a golden opportunity to submit evidence that these actions were outside the course and scope of Loveless's employment. Loveless essentially engaged in criminal fraud and the only action he took, which was remotely related to City First was to personally apply for a mortgage for **himself** from City First. However, he did this in the capacity of a consumer, it was Mullen who processed the loan application. CP 632-33. It is essential to note that Mullen did not take any commission for this transaction. CP 633. The scope of Loveless and Mullen's agency was to originate loans for which they received a commission. CP 62-64. Mullen's decision to not take a commission on the subject loan demonstrates his own understanding that these actions were not within the scope of his employment. CP 335; CP 354; CP 841.

It is absurd to argue, as the Collings did, that City First hired or contracted Loveless so that he could take out loans on his own behalf. His role was to solicit those who needed credit. Not to take it out himself and

make a profit personally. GLF should have raised the absurdity of this argument in a motion to dismiss, motion for summary judgment, or at the trial. Furthermore, had GLF argued that Loveless and Mullen's actions were outside the scope of their authority she could have emphasized that neither Mullen nor Loveless were paid a commission for the subject loan in the Underlying case. CP 633.

It is important to note that City First did not benefit from Loveless's scheme any more than they would have in a standard loan transaction. City First received its standard fee for loan origination when it made the loan to Loveless. CP 633. The Collings were not a party to any agreement with City First; the Collings worked only with Loveless and his company, Home Front Holdings. CP 1013. The Collings were certainly on notice that they were not taking out a loan from City First, as City First had already denied their application. CP 1374-75. Mr. Collings understood who he was dealing with, he had over twenty years of experience as a mortgage broker. CP 860.

It was only after the City First's denial of the Collings' loan application that Loveless came forward with his scheme. CP 1375. GLF failed to set forth evidence that would demonstrate the patently obvious argument that this conduct was outside the course and scope of Loveless's employment. Again, she did not call Loveless as a witness nor did she

enter any documentary evidence related to the scope of his agency, despite his willingness to testify in the Underlying Case. CP 1013. This omission was below the standard of care for a reasonable attorney and proximately caused the finding of vicarious liability against City First. CP 965.

3. City First Cannot Be Both Vicariously Liable Under the CSOA and Exempt From the CSOA.

"A corporation can act only through its agents, and when its agents act within the scope of their authority, their actions are the actions of the corporation itself." *Mauch v. Kissling*, 56 Wn. App. 312, 316, 783 P.2d 601 (1989) (citing *Houser v. Redmond*, 91 Wn.2d 36, 586 P.2d 482 (1978)). The CSOA 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[.]

RCW 19.134.010(2)(b)(i).

City First is licensed by the FHA and directly supervised by HUD, a federal regulator. CP 1098. City first is an approved HUD, VA, and FHA lender and is also a licensed mortgage broker. *Id.* GLF claims that these statements contained in the declaration of Brian Hunt are

inadmissible. However, GLF did not object to the admission of this statement in its moving papers. CP 988. Furthermore, these statements are based on the personal knowledge of Brian Hunt who is general counsel for City First. CP 1098. This declaration was submitted in connection with the motion for summary judgment and the declaration covered the licensing of City First as well as its agents Loveless and Mullen. *Id.* Counterclaim Defendant, GLF, took exception only to a distinctly different portion of the declaration. CP 988. Nothing was said or raised as to the portion regarding City First's or its agents' licenses.[11]

Exemption to the CSOA was the subject of jury Instruction 19 in the Underlying Case. CP 861. The Court of Appeals in the Underlying Appeal reasoned in dictum that "as Collings argues, the Department's regulations support the 'each branch' interpretation of the statute provided by instruction 19." *Collings*, 177 Wn. App. at 913. However, this issue was never before the Court of Appeals because GLF "did not take exception to instruction 19." *Id.*[12] This failure to take exception to instruction 19 breached GLF's standard of care. CP 963-64.

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[11] If GLF sought to strike or exclude this testimony it had to make a motion or object in the reply.

[12] GLF inexplicably accuses City First of misstating the record with respect to GLF's failure to take exception to instruction 19. Resp. Br. at 20. As cited above, the Court of Appeals held that GLF did not take exception to instruction 19.

GLF put a motion before the trial court in the Underlying Case arguing City First's exemption to the CSOA, *inter alia*. CP 520-22. The trial court did not address the motion at the time. *Id.* It is unclear whether it was ever ruled upon. *Collings*, 177 Wn. App. at 913. This demonstrates that GLF was aware of this issue but did not ever properly put it before the trial court. This devil may care attitude toward the disposition of the CR 50 motion violated the standard of care. CP 966.

C. GLF Cannot Hide Behind the Attorney Judgment Rule for its Failure to Effectively Raise City First's Exemption from the CSOA.

The attorney judgment rule "dictates that lawyers do not breach their duty to clients as a matter of law when they make informed, good-faith tactical decisions." *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 702, 324 P.3d 743 (2014). This rule is a "recognition that if an attorney's actions could **under no circumstances** be held to be negligent, then a court may rule as a matter of law that there is no liability." *Id.* (citing *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 981 P.2d 236 (1999)).

Under the attorney judgment rule, "an attorney cannot be liable for making an allegedly erroneous decision involving honest, good faith judgment if (1) that decision was within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent

attorney in Washington; and (2) in making that judgment decision the attorney exercised reasonable care." *Bullivant*, 180 Wn. App. at 704.

GLF argues City First's exemption from the CSOA for the actions of its agents is an unsettled point of law. Just because there is no case law that spells out this aspect of Hornbook law on vicarious liability does not mean that GLF's failure to raise it was warranted. GLF knew that City First was exempt early on in the case or at least that it was a strong argument against liability. CP 62-64. However, even though GLF knew of this argument, and believed it was dispositive of the CSOA claims against City First, she failed to ever properly put the issue before the trial court. CP 88; CP 520-22; *Collings*, 177 Wn. App. at 913.

III. CONCLUSION

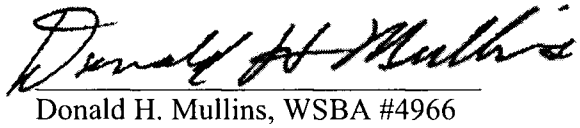
City First would have achieved a better result in the Underlying Case, but for the actions and omissions of GLF. GLF failed to properly argue and put forth evidence that would have demonstrated City First's relationship with Loveless and Mullen or how Loveless and Mullen's conduct was outside the course and scope of that relationship. Since this evidence was never put before the jury in the Underlying Case, there is a genuine issue of material fact as to whether a jury would find City First vicariously liable for the frolic of Loveless and Mullen. Additionally, City First has set forth myriad errors and omissions GLF committed in the

Underlying Case that contributed to the substantial judgment against City First.

Dated this 29th day of September, 2016.

Respectfully submitted,

BADGLEY MULLINS TURNER PLLC



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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 29th day of September, 2016, I served by sending a true and correct copy in the manner indicated below of the following documents:

1. APPELLANT'S REPLY BRIEF (AMENDED)

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

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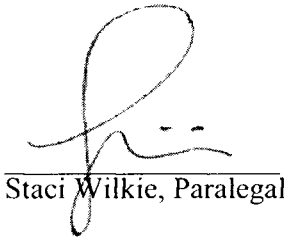

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