74266-3

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Court of Appeals
Division I
State of Washington

No. 74266-3-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CITY FIRST MORTGAGE SERVICES, LLC,

Appellant,

v.

GLOGOWSKI LAW FIRM, PLLC,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

After losing at trial, City First Mortgage Services, LLC ("City First") blamed its attorney, Katrina Glogowski,[1] and accused her of committing malpractice. City First accused Ms. Glogowski of failing to assert certain direct defenses to statutory claims that it speculates would have "conclusively exonerated"[2] City First, notwithstanding the undisputed fact that City First was found vicariously (and not directly) liable. Because City First could not and did not establish that, "but for" Ms. Glogowski's actions and omissions, it would have achieved a better result, the trial court properly concluded as a matter of law that City First's malpractice claim must be dismissed. Accordingly, this Court should affirm.

II. ISSUE PERTAINNG TO ASSIGNMENTS OF ERROR

Whether City First's legal malpractice claim was properly dismissed on summary judgment, where City First failed to come forward with admissible evidence to prove that the result of the underlying litigation would have been better "but for" its attorney's alleged mishandling?

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[1] Ms. Glogowski and her law firm, the Glogowski Law Firm, LLC, are collectively referred to herein as "Ms. Glogowski" or "Glogowski."
[2] Appellant's Opening Brief (AOB), at 1, 4.

III. STATEMENT OF THE CASE

A. The Underlying Action Against City First

The facts in the underlying action against City First are undisputed and are set forth in this Court's opinion in *Collings v. City First Mortgage Servs., LLC*, 177 Wn. App. 908, 317 P.3d 1047 (2013) ("*Collings*") (affirming verdict rendered in King County, Case No. 09-2-13062-1 SEA).

Donald and Beth Collings purchased a family home in Redmond, Washington in 1998. *See Collings*, 177 Wn. App. at 914. In early 2006, Ms. Collings received a mail solicitation from City First offering mortgage relief to people with credit problems. *Id*. She contacted City First to apply for a loan and spoke with its employee, Gavin Spencer. *Id*. Mr. Spencer informed the Collings that their loan had not been approved but that his manager could help them. *Id*.

The Collings were then introduced to Robert Paul Loveless and Andrew Mullen, branch managers at City First. *Id*. at 915. Their jobs were to generate loans for City First and, in turn, they were paid commissions by City First. CP 62-64. Loveless proposed a plan to accommodate the Collings' financial situation: Loveless would personally buy the Collings home for the appraised value, $510,000, and then lease it back to the Collings. *Collings*, 177 Wn. App. at 915. The Collings agreed

on the condition that it prohibit any further encumbrance of the home or home equity line of credit. *Id*. The deal closed in June 2006. *Id*.

In December 2006, Loveless secretly took out two new loans on the Collings home in violation of the lease. *Id*. at 915. Loveless defaulted on the loan and foreclosure proceedings began. *Id*. The Collings later discovered the foreclosure and Loveless' scheme on the property. *Id*. The Collings initiated suit on March 19, 2009, to prevent the foreclosure and seek damages. CP 66-78. They sued City First, Robert Loveless, Andrew Mullen, Gavin Spencer, First American Title Insurance Co., and MERS, Inc.[3] *Id*. As against City First, the Collings asserted violations of the Credit Services Organizations Act ("CSOA"), Equity Skimming Act, the Washington Consumer Protection Act, and Civil Conspiracy. *Id*. More importantly, the Collings alleged that City First was *vicariously liable for the actions of Loveless and Mullen,* an allegation which would later prove dispositive at trial. *Id*. Loveless defaulted and it was undisputed at trial that the Loveless scheme amounted to illegal equity skimming. *Id*. at 916.

1. Glogowski's Representation of City First

On June 1, 2009, Brian Hunt, General Counsel for City First, retained Ms. Glogowski to defend City First against the Collings' claims

[3] In August 2009, U.S. Bank intervened in order to obtain a declaratory judgment regarding ownership of title to the property. *Collings,* 177 Wn. App. at 916.

under a flat fee arrangement. CP 80-84. On May 29, 2009, Hunt informed Ms. Glogowski that Loveless and Mullen had no role, influence, or authority in City First's operations. CP 62-64. Based on this information, Ms. Glogowski researched the Collings' claim under the Credit Services Organizations Act, and on June 2, 2009, provided Mr. Hunt with her initial assessment that the statute did not apply to City First. CP 88. Ms. Glogowski made no assessment regarding Loveless or Mullen. *Id*.

2. The Underlying Trial and The "Secret" Mullen Agreement

In City First's trial brief, Ms. Glogowski asserted on behalf of City First that Loveless and Mullen were independent contractors, and as such, that City First could not be held vicariously liable for the actions of Loveless and Mullen. CP 275-287. She further argued that City First had no involvement in the Loveless scheme. *Id*. More importantly, she asserted that City First was exempt from the CSOA because City First was a fully licensed consumer loan company in Washington. *Id*. Ms. Glogowski's position throughout the underlying Collings case was to distance City First as much as possible and frame Loveless and Mullen as renegade independent contractors.

At the close of evidence, Ms. Glogowski submitted a motion for a directed verdict, again raising the defense that City First was exempt from the CSOA. CP 290-302. The Court did not rule on the motion. CP 520-22. The jury returned a verdict against City First, finding it vicariously liable for the acts of Loveless and Mullen. CP 304-07. City First terminated Ms. Glogowski and hired new lawyers at Stoel Rives to appeal the verdict. CP 329-331.

Following the verdict against City First, the parties discovered that the Collings had entered into a secret agreement involving a covenant not to execute any judgment against Andrew Mullen, in exchange for repayment of the $500 cost of deposing him. *Collings*, 177 Wn. App. at 917.

3. City First's Appeal in the Underlying Action

Through its new counsel, City First appealed the judgment, arguing that the Mullen agreement was a collusive agreement and its nondisclosure tainted the trial and that the non-disclosure of the Mullen settlement agreement was prejudicial. CP 340-400. Further, City First again asserted Ms. Glogowski's argument that it was exempt from the CSOA because it was a licensed consumer loan company. CP 384-85.

In its opinion in the underlying action, this Court concluded that City First failed to prove that it suffered actual prejudice as a result of the

Collings' non-disclosure of the Mullen settlement agreement prior to trial. *Collings*, 177 Wn. App. at 914. More importantly, this Court determined that there was sufficient evidence to support vicarious liability on the part of City First for the wrongful conduct of Robert Loveless. *Id*. at 925. Specifically:

> Loveless's job was to generate loans for City First. City First paid Loveless and profited from the loans he made. All of the loans done by the branch were through City First. Advertising and communication directed at Collings, including e-mail from Loveless, bore the City First label. City First retained the right to approve the solicitations and advertising generated by Home Front Services. Collings thus had reason to believe he was dealing with City First when he entered into the sale and lease-back agreement with Loveless. **A reasonable jury could readily find that Loveless, designated as the branch manager, was an employee or agent of City First.**

Id. at 926 (emphasis added). Loveless acted not only for his own benefit, but also "within the scope of his authority to act for City First in all of his transactions involving Collings, both the sale and lease-back arrangement and the Loveless Loan." *Id*. at 927.

B. <u>This Instant Legal Malpractice Action Against Glogowski</u>

1. Glogowski Sues City First for Unpaid Legal Fees, and City First Counterclaims

After the conclusion of the underlying trial defending City First against the Collings lawsuit and while the appeal was pending, Ms. Glogowski's fees remained outstanding and despite multiple requests

for payment of her fees, City First did not pay. CP 403-08, 410. At no time during the representation did City First object to or complain regarding the flat fee charged by Ms. Glogowski. CP 337. On June 27, 2011, Ms. Glogowski initiated suit to collect her unpaid fees. CP 412-421. In response, City First asserted a counterclaim for legal malpractice, raising for the first time criticisms of Ms. Glogowski's representation. CP 423-428.

2. The Trial Court Grants Glogowski's Motion for Summary Judgment Dismissal of City First's Legal Malpractice Claims

Ms. Glogowski filed a motion for summary judgment against City First's malpractice counterclaim on the basis of failure of proximate cause and pursuant to the attorney judgment rule. CP 28-53. Oral argument was held before the Honorable Jeffrey Ramsdell. *See* Verbatim Report of Proceedings (VRP June 5, 2015). The trial court invited additional briefing on whether it was proper for a trial court to conclude as a matter of law whether sufficient evidence existed to prove causation in fact ("but for" causation) in an attorney malpractice claim. VRP 103:9-110:4. Of note, during argument, City First specifically conceded that Loveless and Mullen, as individuals, were not, and could not, be FHA, VA and HUD lenders. VRP 57:5-18.

At the request of the trial court, Ms. Glogowski provided additional authority[4] demonstrating that the issue of proximate cause has been and should be decided on summary judgment in legal malpractice actions. CP 1026-71. The trial court dismissed City First's claims with prejudice. CP 1093-94. City First filed a Motion for Reconsideration that the trial court denied. CP 1767-82, 1193. City First and Ms. Glogowski resolved Ms. Glogowski's collections action, and filed a Stipulation and Proposed Order for Voluntary Dismissal. CP 1197-1200. City First appeals the trial court's dismissal of its legal malpractice claim against Ms. Glogowski. CP 1201-06.

IV. ARGUMENT

A. Summary of Argument

With the benefit of hindsight, City First presents an exhaustive list of potential actions that it maintains Ms. Glogowski could have undertaken on behalf of City First in the underlying action. Her strategic judgment calls during the course of representation are, of course, not actionable as legal malpractice.

City First's primary argument is to speculate that if Ms. Glogowski had just asserted the defense of exemption from claims under the Credit

[4] The additional argument and authority requested by the trial court was filed by Glogowski in the form of a Motion for Reconsideration. CP 1026-71.

Services Organization Act and Consumer Loan Act ("CLA"), the outcome of the underlying *Collings* matter would have changed. City First's argument, however, glosses over a key aspect of the jury's verdict and this Court's decision: *that City First was vicariously liable for the actions of Robert Loveless and Andrew Mullen*.

Given that City First does not dispute the fact that Loveless and Mullen were not individually licensed HUD, VA, or FHA lenders, even asserting exemption from the CSOA and CLA would not have immunized City First from being found vicariously liable for the actions of individuals who themselves were not entitled to the defense. Put another way, as City First would have been found vicariously liable even if Glogowski had asserted a defense that City First was exempt from the CSOA and CLA, City First would have been found liable; it therefore logically follows that City First's malpractice claim against Glogowski fails.

B. <u>Standard of Review</u>

A motion for summary judgment is properly granted when "the moving party is entitled to a judgment as a matter of law." CR 56(c); *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *see also* RAP 9.12. Speculation or argumentative assertions that unresolved factual issues remain cannot defeat summary judgment. *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 483 n.1, 260 P.3d

915 (2011). "A fact is an event, an occurrence, or something that exists in reality. … It is what took place, an act, an incident, a reality as distinguished from supposition or opinion." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

A defendant is entitled to summary judgment in a legal malpractice claim where, as here, the plaintiff failed to present evidence supporting a *prima facie* case of malpractice. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 711, 735 P.2d 675 (1986). Appellate courts review summary judgment orders *de novo*. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

C. <u>City First Failed to Establish Proximate Causation</u>

The trial court's dismissal of City First's legal malpractice action should be affirmed because City First failed to offer admissible evidence proving that, but for Ms. Glogowski's actions and omissions, it would have achieved a better result in the underlying *Collings* case.

To establish a *prima facie* case for legal malpractice, the plaintiff (here, City First) bears the burden of demonstrating:

> (1) the existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client;
>
> (2) an act or omission by the attorney in breach of the duty of care;
>
> (3) damage to the client; and

> (4) proximate causation between the attorney's breach of the duty and the damage incurred.

Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992) (citations omitted). In a legal malpractice action, proximate cause is determined using "but for" causation. *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson,* 95 Wn. App. 231, 235-36, 974 P.2d 1275 (1999). This test requires that the plaintiff prove that "the client's initial cause of action was lost or compromised by the attorney's alleged negligence." *Shepard Ambulance.* 95 Wn. App. at 235 (citing *Daugert v. Pappas,* 104 Wn.2d 254, 257, 704 P.2d 600 (1985)). Additionally, the plaintiff must prove that the result of the underlying litigation would have been better "'but for' the attorney's mishandling of the initial cause of action." *Shepard Ambulance,* 95 Wn. App. at 236 (citing *Daugert,* 104 Wn.2d at 257).

The element of proximate cause in malpractice actions is closely tied to the judgmental immunity doctrine. "Because of innumerable variables and subjective considerations, an action based on tactical or strategic error usually fails because the plaintiff cannot prove that a better result would have happened had the attorney acted otherwise." Mallen & Smith, LEGAL MALPRACTICE (2015 ed.) ("Mallen & Smith"), § 19.23, p. 1274.

While proximate cause can in some instances be an issue for the jury to decide, a court has the authority to decide it 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); *see e.g.*, *Estep v. Hamilton*, 148 Wn. App. 246, 257, 201 P.3d 331 (2008) (trial court properly granted summary judgment where plaintiff failed to show that alleged negligence proximately caused damage); *Smith*, 135 Wn. App. at 865 (affirming summary judgment where plaintiff failed to offer sufficient evidence that but for the deficiencies in the construction contract, he would have achieved a better result); *Griswold v. Kilpatrick*, 107 Wn. App. 757, 27 P.3d 246 (2001) (affirming summary judgment of legal malpractice claim where plaintiff produced insufficient proof that, but for the delay in prosecuting the case, the claim would have settled for a larger sum); *Geer v. Tonnon*, 137 Wn. App. 838, 155 P.3d 163 (2007) (affirming summary judgment dismissal of legal malpractice claim where plaintiff failed to establish causation).

To avoid dismissal of its malpractice claim on summary judgment, the former client must present evidence that it would have prevailed absent the alleged malpractice. *Estep*, 148 Wn. App. at 257. Speculation of what would have happened absent the defendant attorney's alleged

negligence will not defeat summary judgment. *Smith*, 135 Wn. App. at 865.

As discussed below, City First's arguments regarding Ms. Glogowski's failure to assert the defense of exemption under the CSOA and the CLA are speculative, based on inadmissible evidence, and insufficient to raise a genuine issue of material fact regarding proximate causation.

1. City First Has Not Offered Admissible Evidence Proving that the Exemption Defense Would Have Immunized It From Vicarious Liability

City First's Brief is entirely based on the premise that if Ms. Glogowski asserted the defense of exemption from the CSOA and CLA (whether in a dispositive motion, jury instructions, or proposed verdict form), it would have changed the outcome of the underlying *Collings* matter. City First's argument, however, glosses over a key aspect of the jury's verdict and this Court's decision: that *City First was vicariously liable for the individual actions of Robert Loveless and Andrew Mullen*. CP 304-307; *see Collings*, 177 Wn. App. at 925-27.[5] City First's brief focuses on Ms. Glogowski's omissions with regard to the

[5] Further, City First's underlying premises is incorrect. City First glosses over the fact that Ms. Glogowski did raise the defense that City First was exempt from the CSOA because City First was a fully licensed consumer loan company in Washington. CP 275-88, 290-302.

exemption defense, but fails to answer the threshold issue: whether asserting the defense of exemption from the CSOA could have immunized it from being found vicariously liable for the actions of individuals who themselves were not entitled to the defense.

Indeed, City First could not have successfully asserted the CSOA or CLA exemption defenses against the findings of vicarious liability because it is undisputed that Loveless and Mullen (and their branch) were not individually approved HUD, VA or FHA lenders. CP 1097-98; VRP 57:5-18. In other words, Loveless and Mullen could not have asserted the exemption defenses. *Id.* Given the jury and Court of Appeals' factual findings regarding vicarious liability, City First's own status as an HUD, VA, or FHA approved lender would not have changed the result of the Collings matter because they were liable for the individual actions of Loveless and Mullen, not City First.

Accordingly, whether or not Ms. Glogowski raised the exemption defenses in pleadings, summary judgment, jury instructions, or verdict form, is a red herring because City First has not offered admissible evidence proving that the defenses would have changed the result of the *Collings* case. Speculation does not equal concrete, admissible evidence sufficient to create an issue of fact regarding proximate cause. Without substantive evidence to support its claim of a better outcome, City First's

claims are speculative at best, and puts City First squarely in line with the plaintiffs in *Smith*, *Estep*, *Griswold*, and *Geer*. *See Smith*, 135 Wn. App. 859; *Estep*, 148 Wn. App. 246; *Griswold*, 107 Wn. App. 757; *Geer*, 137 Wn. App. 838. As such, the Court should affirm the trial court's summary judgment dismissal.

2. There is No Proof that Loveless and Mullen Could Have Asserted the Exemption Defenses as Licensees of City First

City First's theory that Loveless and Mullen were somehow entitled as "licensees" to share in City First's exemption defenses is speculative and based on inadmissible evidence. A trial court may not consider inadmissible evidence when ruling on a summary judgment motion. *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 790, 150 P.3d 1163 (2007) (citing *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986)). Declarations must be made on personal knowledge, set forth facts that would be admissible in evidence, and show the affiant is competent to testify on the matter. *Id.* (citing CR 56(e)).

City First's licensee theory is not based on deposition testimony from Loveless or Mullen, statutory language from the CSOA/CLA, or case law interpreting the CSOA/CLA, but based solely on the declaration of Brian Hunt submitted in support of City First's Motion for

Reconsideration.[6] CP 1097-98. In the declaration, Hunt states, in one sentence, that Loveless and Mullen were "HUD, VA and FHA approved lenders as licensees of City First." CP 1098. The statement is not based on personal knowledge, and lacks the foundational basis necessary to show that Hunt is competent to testify on the individual operations of Loveless and Mullen, their operational arrangement with City First or the application of the CSOA/CLA. Further, the statement is classic inadmissible hearsay as it seeks to prove that Loveless and Mullen were operating under City First's license at the time of the Loveless scheme. *See* ER 801(c).[7] The Hunt declaration is inadmissible, and the trial court properly granted Ms. Glogowski's motion for reconsideration.

Moreover, if, as City First suggests, Loveless and Mullen could have relied on City First's status as an FHA-approved lender, a strategic dilemma would have been created during trial. That is, Loveless and Mullen could only have asserted the defense if they were agents of City First – a position vehemently opposed by City First at trial (and appeal).

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[6] Mr. Hunt's Declaration reiterates the same conclusory statements regarding Loveless and Mullen previously submitted to the trial court in Hunt's Declaration in Support of City First's Response to Ms. Glogowski's Motion for Summary Judgment. CP 939-42.

[7] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible unless it fits within an exception. ER 802.

CP 275-88, 290-302, 837-72. Indeed, City First argued repeatedly that Loveless and Mullen were not employees and vicarious liability was inappropriate. *Id*. Merely hypothesizing after the fact that the exemption defense would have changed the result of the *Collings* matter, without addressing its interplay with the other strategic considerations and defenses asserted at trial, is insufficient to defeat summary judgment.

a) The Exemption Defense Was Raised by Glogowski at Trial and on Appeal

The speculative nature of City First's exemption defense is highlighted by the fact that the defense was raised by Ms. Glogowski and City First's appellate counsel in the *Collings* matter and rejected. Ms. Glogowski raised the exemption defense (based on City First's status as a consumer loan company licensed in Washington) in City First's Trial Brief, and Motion for Judgment as a Matter of Law. CP 275-88, 290-302. City First's appellate counsel also raised the same defense in its motion for judgment as a matter of law and appellate brief, thereby undermining its complaints about Ms. Glogowski's representation. CP 340-400, 837-72.

b) Glogowski Did Not Admit Causation

Without case law or any authority, City First repeatedly relies on the supposed "admission" of Ms. Glogowski that the CSOA "does not apply to [City First]" and asserts that Ms. Glogowski conceded causation in this matter. CP 1757. City First's selective quote, however, ignores the

fact that Ms. Glogowski's analysis was offered during the early stages of her retention on June 9, 2009, and dealt strictly with regard to City First only. *Id.* Nowhere in the e-mail is there any analysis of Loveless or Mullen with regard to the CSOA. *Id.*

City First's attempt to use Ms. Glogowski's June 9, 2009 e-mail is misplaced. Again, the threshold issue before the Court is whether the exemption defenses could have immunized City First from vicarious liability. This is not the issue addressed in Ms. Glogowski's June 9, 2009 e-mail and thus, is not an admission of causation nor is it an admission as to the viability of the exemption defense against vicarious liability. City First's speculative assertions regarding the applicability and viability of the CSOA/CLA defenses does not equate to concrete, admissible evidence sufficient to create an issue of fact regarding proximate cause.

D. The Missed Opportunities Detailed by City First Amount to Nothing More Than Baseless Speculation

City First's Opening Brief promises "conclusive" proof that City First would have been "exonerated" had Ms. Glogowski asserted certain defenses and objected more. AOB at 1. With the benefit of hindsight after learning of the adverse verdict, City First and its new lawyers identify a long list of "what ifs" in an effort to scapegoat Ms. Glogowski. Upon close examination, it becomes clear that City First's "conclusive"

proof of "exoneration" is nothing more than baseless speculation, and that—considering the high burden of proof in legal malpractice cases—the proffered rhetoric falls short of the summary judgment standard.

1. Defenses Were Raised After the Answer Was Filed

At the outset, City First does not, and cannot cite to any order from the trial court that precluded City First from asserting the exemption defense in the *Collings* matter. AOB at 34 (citing its own discovery responses). Contrary to City First's assertions, Ms. Glogowski was not prevented from asserting the exemption defense, and did assert the defense in City First's trial brief and Motion for Judgment as a Matter of Law. CP 275-88, 290-302. More importantly, as discussed above, there is no reason to believe that asserting the exemption defense as an affirmative defense based on City First's status as an FHA, HUD, or VA lender would have changed the outcome. On the contrary, the trial court and this Court rejected the exemption defense at trial and on appeal. City First's theory is speculative and fails to raise a genuine issue of material fact regarding proximate cause.

2. Glogowski Objected to Jury Instruction No. 19

Again, City First cites to Ms. Glogowski's failure to object to certain jury instructions but fails to prove, with admissible evidence, how this could have changed the result in the underlying *Collings* case in light

of the undisputed facts relating to vicarious liability. With respect to Jury Instruction No. 19, Ms. Glogowski *did* object to the instruction. CP 1157-58. Thus, City First's assertion that the alleged failure to object to Jury Instruction 19 solely led to the rejection of the CSOA defense is factually incorrect. This Court held that the regulations supported the "each branch" interpretation of the statute provided by Instruction 19, not that the failure to take exception was the sole cause. *Collings*, 177 Wn. App. at 913. City First cannot be permitted to create an issue of fact by misstating the record.

3. The Verdict Form Confirmed the Jury's Finding of Vicarious Liability

City First's argument that proposing a verdict form which differentiated between the different claims asserted would have changed the outcome is discredited by the jury's other findings. Question 8 of the jury instructions shows that the CSOA claim was segregated from the others, and each individual defendant was identified, so that it could be discerned which defendant was liable for each claim. CP 304-07. Further, in answering Question 3, the jury specifically found that City First was vicariously liable for the acts of Loveless, Mullen and Spencer. *Id.* Proposing an alternative special verdict form that differentiated the claims would not have changed these jury findings.

Again, this Court heard and denied this same argument, stating that "so long as at least one of Collings' theories is sufficiently supported by the evidence, the verdict will stand." *Collings*, 177 Wn. App. 925. Loveless was liable on all counts – City First was vicariously liable for those actions. CP 304-07. Thus, City First's assertion is speculative and would not have changed the result. "[W]e conclude there was sufficient evidence to support vicarious liability on the part of City First for the wrongful conduct of Loveless, who defaulted on every claim." *Collings*, 177 Wn. App. at 925.

E. Glogowski is Protected by the Attorney Judgment Rule

City First's argument regarding Ms. Glogowski's failure to assert exemption under the CSOA and CLA also fails as a matter of law because Ms. Glogowski is immune under the attorney judgment rule for errors involving uncertain, unsettled or debatable proposition of law.

Under the "attorney judgment rule," an attorney is immune from liability for professional judgment decisions involving settlement evaluation, pre-trial case strategy decisions, and whether to object at trial. *See Clark County Fire District No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 324 P.3d 743 (2014); *see also Halvorsen*, 46 Wn. App. at 717 ("In general, mere errors in judgment or in trial tactics do not

subject an attorney to liability for legal malpractice"); Mallen & Smith, § 19.23, fn. 1, p. 1274 (citing cases). This Court has stated:

> An attorney has to make many judgment calls during the course of representing a client in a complex case. The law does not require perfect judgment, nor the ability to divine what an appellate court will do in a case of first impression. Decisions made in good faith after fully investigating the law and facts are not actionable as malpractice absent negligence.

Bush v. O'Connor, 58 Wn. App. 138, 148 n.3, 791 P.2d 915 (1990) (citing *Cook, Flanagan & Berset v. Clausing*, 73 Wn.2d 393, 394, 438 P.2d 865 (1968)). Thus, "[a]n attorney has broad discretion concerning the initial strategy in selecting the forum in which to sue, the theories to plead, how to oppose a motion for summary judgment, what defenses to raise, the tactics in litigation, what evidence to present, whether to cross-appeal, recommendation of settlement, the manner in which to appeal, and the issues to be raised." Mallen & Smith, § 33:15, p. 691 (citations omitted).

Washington courts have made clear that the attorney judgment rule is applicable where the error alleged "involves an uncertain, unsettled or debatable proposition of law." *Bullivant Houser Bailey P.C.*, 180 Wn. App. at 704 (quoting *Halvorsen*, 46 Wn. App. at 717). Indeed, a difference of opinion among experts regarding litigation strategy is not enough to impose liability on an attorney. *Id*. A proposition of law is unsettled until the state Supreme Court has decided on the issue. *See*

Graham Neighborhood Ass'n v. F.G. Assocs., 162 Wn. App. 98, 109, 252 P.3d 898 (2011) (holding that Court of Appeals' decision was uncertain authority until consideration by the Washington Supreme Court); *Lehman Bros v. Schein*, 416 U.S. 386, 391 (1974) (holding that certifying a propositions of law to a state's highest court is appropriate where the state law is unsettled).

Here, the issue is not whether the CSOA or CLA applies to City First, but whether exemption could immunize it from the actions of individuals who themselves were not exempt lenders. CP 1097-98. City First's brief offers no case law on this issue, because it is undisputed that exemption under the CSOA and CLA have not been interpreted or addressed by the Washington Supreme Court. There is no legal authority to support City First's interpretation of the CSOA and CLA. Accordingly, whether the defense would have been accepted by a Court or jury is unsettled, debatable, and speculative at best.

Indeed, City First's appellate counsel in the underlying *Collings* matter unsuccessfully attempted to persuade this Court using the same argument – that the plain language of the CSOA exempted anyone authorized "to make loans under Washington state law or federal law and subject to regulation by Washington State or the United States." CP 384-85. As the viability of the exemption (which was rejected by this Court)

has not been considered by the Washington Supreme Court, it is uncertain and debatable. Accordingly, the attorney judgment rule immunizes Ms. Glogowski against City First's legal malpractice claim.

V. CONCLUSION

The trial court's dismissal of City First's legal malpractice claim is warranted as a matter of law because City First has not and cannot establish that, "but for" its former attorney's actions and omissions, it would have achieved a better result in the underlying action. For the reasons set forth herein and stated by the trial court, it is appropriate for this Court to affirm.

RESPECTFULLY SUBMITTED this 10th day of August, 2016.

COZEN O'CONNOR

/s/ Melissa O'Loughlin White
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DECLARATION OF SERVICE

The undersigned states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and I am competent to be a witness herein.

On the date below, I served a copy of said document on the following parties as indicated below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 10th day of August, 2016.

/s/ Dava Bowzer
Dava Bowzer, Legal Assistant

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