

NO. 62912-3-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

V&E MEDICAL IMAGING SERVICES, INC., a Washington corporation, doing
business as AUTOMATED HOME SOLUTIONS,

Plaintiff,

vs.

MARK DECOURSEY and CAROL DECOURSEY, husband and wife, individually
and the marital community composed thereof,

Respondents,

and

HOME IMPROVEMENT HELP, a Washington corporation; RICHARD BIRGH,
an individual; CONSTRUCTION CREDIT CORPORATION, a Washington
corporation; HERMAN RECOR, ARAKI, KAUFMAN, SIMMERLY &
JACKSON, PLLC,

Third Party Defendants,

and

PAUL STICKNEY and WINDERMERE REAL ESTATE, S.C.A., INC.,

Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Michael J. Fox, Judge

BRIEF OF APPELLANTS

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I. NATURE OF THE CASE

The DeCourseys were looking to buy a house. A friend referred the DeCourseys to real estate agent Paul Stickney. The DeCourseys had Stickney write an unsuccessful offer on the Barr home. They continued to work with Stickney. They looked at dozens of homes. They made unsuccessful offers on two of those homes. Stickney introduced the DeCourseys to a remodel contractor.

A month later, the DeCourseys looked at the Barr home again. The DeCourseys purchased the Barr home for \$280,000. The remodel contractor remodeled the house.

The DeCourseys were not satisfied with the remodel. They made claims against a host of individuals and entities. They obtained a \$270,000 settlement from the remodel contractor for construction defects. They also recovered a judgment in excess of \$1,000,000 against Stickney. The DeCourseys' theory was that Stickney was a virtual insurer of the remodel contractor because Stickney had not told them he had a social and business relationship with the remodel contractor.

Under Washington law the DeCourseys were not entitled to the house, and the \$270,000 and the \$1,000,000 judgment. Herein we shall review the multiple legal mistakes which led to this result. Appellants

received neither a fair trial nor a correct trial. That is why we are on appeal.

II. ASSIGNMENTS OF ERROR¹

Appellants² assign error to:

1. Entry of the November 14, 2008 judgment. (CP 996-1000)
2. Entry of the order denying appellants' motion for JNOV. (CP 1050-51)
3. Entry of the amended judgment in the sum of \$522,200. (CP 1052-53)
4. Entry of order granting plaintiffs' motion for attorney fees, costs, and a multiplier in the sum of \$508,427. (CP 1456-58)
5. Entry of the \$1,030,427 judgment. (CP 1492-95)
6. Granting plaintiffs' motion to exclude plaintiffs' settlement with Home Improvement Help. (10/28/08 RP 120)
7. Denying appellants' motion for a set-off and allowing plaintiff a double recovery. (12/05/08 RP 5-7)

¹ Copies of challenged jury instructions and pertinent jury instructions not given are contained in the Appendix hereto.

² Appellants are Paul Stickney, Windermere Real Estate/SCA, Inc., and Paul H. Stickney Real Estate Services, Inc.

8. Giving Instruction No. 7 (CP 973) over objection.
(10/29/08 RP 8-9)

9. Giving Instruction No. 9 (CP 975) over objection.
(10/29/08 RP 10)

10. Giving Instruction No. 16 (CP 982) over objection.
(10/29/08 RP 10-11)

11. Refusing to give a proposed instruction which began “A conflict of interest.”³ (10/29/08 RP 9)

12. Refusing to give a proposed instruction which began “An agent is not required.” (10/29/08 RP 9)

13. Refusing to instruct the jury as to the correct time to measure damages. (10-29 RP 10-11)

14. Rejecting all evidence that other parties caused the construction defect damages.

III. ISSUES ON APPEAL

A. Did Judge Fox err when he overruled Judge Erlick’s finding that the DeCourseys had dismissed their attorney fee claim?

³ Regarding Assignments of Error Nos. 11-12, Clerk’s Papers numbers have not been prepared yet by the superior court for the designated proposed jury instructions (subnumber 344, p. 11).

B. Did Judge Fox err when he reinstated the DeCourseys' attorney fee claim notwithstanding that the DeCourseys did not move to modify Commissioner Neel's denial of discretionary review of Judge Erlick's dismissal of the DeCourseys' attorney fee claims?

C. Did Judge Fox allow the DeCourseys a double recovery when he refused to set off the contractor's construction defect settlement against the jury's award of construction defect damages?

D. Was the DeCourseys' CPA claim fatally flawed by their failure to prove the "public interest impact"?

E. Did Judge Fox violate *Mahler* when he entered the order awarding attorney fees, awarding a multiplier, and awarding costs without benefit of specific findings, segregation of activity, or the basis for enhancement?

F. Does the Economic Loss Rule bar the DeCourseys from recovering tort damages?

G. Were appellants denied a fair trial because the court:

1. allowed the DeCourseys to link a conflict of interest claim to construction defect damages;
2. erroneously instructed on conflict of interest;

3. failed to recognize that appellants were neither the cause in fact nor the legal cause of the DeCourseys' construction defect damages;

4. failed to instruct on when damages are measured;

5. rejected all evidence that other parties caused the construction defect damages;

6. failed to enforce the contract in which the DeCourseys took responsibility for selecting the contractor?

IV. RESUME OF PLEADINGS AND PROCEEDINGS

This case began in the district court in Issaquah. (CP 7-10) V&E Medical Services d/b/a Automated Home Solutions sued Mark and Carol DeCoursey and Home Improvement Help ("HIH") in March 2006. The claim was for \$15,302.38. (CP 10) The essence of the claim was that the plaintiff had furnished labor and materials for a remodel of the DeCourseys' home, and that the DeCourseys had not paid. (CP 8-9)

While the DeCourseys appeared through counsel (CP 12-13), they filed a pro se Notice of Removal to Superior Court. (CP 14-15) In April 2006, the DeCourseys filed a 27-page pro se pleading captioned "Answer, Counterclaim, Cross-Claim and Third Party Claim." (CP 16-42) Therein, the DeCourseys delineated a host of factual and legal disagreements with

the plaintiff (CP 16-19), several “affirmative defenses” (CP 19-25), seven counterclaims, including breach of contract, unlawful practice, endangerment, fraudulent representation, damage to property, harassment and conspiracy to defraud (CP 25-36), a claim against a Wells Fargo account (CP 37) and a Western Casualty bond (CP 38), and a third-party claim against the “attorneys for plaintiff” (CP 39-40) for their participation in preparing the lawsuit against the DeCourseys. Finally, the DeCourseys sought judgment against the plaintiff for the cost of repairs and for pain and suffering (CP 40-42) and a judgment against HIH and its president, Richard Birgh (CP 41), and the money in the Wells Fargo account and the Western Casualty bond (CP 41), and a judgment against the attorneys for the plaintiff. (CP 42)

On May 1, 2006, the DeCourseys filed a pro se motion for removal delineating why the case should be in superior court. (CP 49-50) Also on May 1, the DeCourseys filed a 43-page pro se amended answer, counterclaim, cross-claim and third-party claim. (CP 55-97) In their “Executive Summary” (CP 55-56), the DeCourseys stated that they would charge that the plaintiff and others had “engaged in a form of real estate and renovation confidence game that might be called ‘equity sucking.’” (CP 56) They sought judgment against the plaintiff, HIH, and HIH’s

president, the plaintiff's law firm, and money from Wells Fargo and Western Surety. (CP 95-97)

HIH filed an answer to plaintiff's complaint (CP 117-22) generally denying plaintiff's allegations and asking that plaintiff's claim be dismissed.

On May 22, 2006, the DeCourseys filed a 63-page pro se pleading. (CP 127-89) In their "executive summary," the DeCourseys alleged that "the conspirators" had engaged in a confidence game that might be called "equity raiding." (CP 128)

The DeCourseys set out a third-party claim against appellant Paul Stickney. (CP 183-84) They alleged he breached his fiduciary duty to them, and engaged in fraudulent representation, conspiracy to defraud, breach of contract, and unlawful practice. The DeCourseys alleged that Stickney had acted as real estate agent to the DeCourseys from April 2004 through February 2005 (CP 144), that he had recommended HIH, that he had represented that he was independent of HIH (CP 144-45), but that he was a vice president of HIH. (CP 145-46)

The DeCourseys also alleged that appellant Windermere was legally responsible for Stickney's role in the home renovation and the resulting damage to the DeCourseys. (CP 184) The DeCourseys alleged

that Windermere was negligent in the duty to supervise Stickney. (CP 184)

The DeCourseys alleged that HIH, Stickney, and Windermere were jointly and severally responsible. (CP 187) They asked for judgment against appellant Stickney for losses due to breach of fiduciary trust and betrayal of duties as a real estate agent, and for fraud. (CP 188-89)

Additional pleadings were filed relative to removing the case to superior court. (CP 197-99, 225-30, 231-412, 423-85) In the latter, the DeCourseys set out a summary of perjury, extortion, and fabrication by one of the lawyers. (CP 437-57)

Appellant Stickney filed his answer. (CP 413-22) He admitted that he was the DeCourseys' real estate agent, that he had shared with DeCoursey his knowledge based on 20 years of real estate experience, and that he represented that HIH was a contractor which did quality work (CP 414).

In June 2006, the court entered an order removing the case to superior court. (CP 1-3)

In April 2007, the DeCourseys filed a 63-page pro se second amended answer (CP 488-550) which appears similar to the May 2006 pleading filed in district court. (CP 127-89) Among other things, they sought recovery of "statutory costs and legal fees," alleging they "have

had legal expenses” (CP 546), and “[l]egal expenses.” (CP 549) As to appellant Stickney, they sought judgment for breach of fiduciary duty (CP 549-50), and as to appellant Windermere, they sought judgment for failure to supervise Stickney. (CP 545)

In May 2007, the court entered an order (CP 553-55) which provided that all contact with the court was to be through the bailiff, that the DeCourseys were to “refrain from name-calling and any other harassing, annoying, vexatious conduct or behavior directed at any party or attorney in this matter,” and that failure to comply with the order might result in the imposition of sanctions, including dismissal of claims.

The DeCourseys then filed a 110-page pro se pleading. (CP 556-666) Among the 11 causes of action DeCoursey alleged fraud by Stickney and HHH (CP 599-602), breach of fiduciary duty by Stickney and Windermere (CP 603-04), negligence by Windermere and Stickney (CP 604), breach of contract by Stickney (CP 605), and violation of the Consumer Protection Act by HHH, Stickney, and Windermere. (CP 607) The DeCourseys sought an award of “reasonable attorney fees pursuant to” the Consumer Protection Act. (CP 611)

In June 2007, appellants Windermere and Stickney answered the DeCourseys’ claim. (CP 693-703) It was admitted that Stickney acted as the DeCourseys’ real estate agent, that he shared with the DeCourseys his

knowledge and experience, and that he referred HIH to the DeCourseys “as a resource to consider for the renovations.” (CP 698)

On August 23, 2007, a hearing was held in front of Judge John Erlick. (8/23/07 RP 1-63) The DeCourseys had moved for a protective order while the City of Redmond had moved for sanctions. (*Id.* at 39) The focus was on a July 18, 2007 deposition. The DeCourseys complained that they were harassed while the City complained the DeCourseys would not answer questions, tape-recorded the deposition, and gave speeches. The DeCourseys told the court they were not making a mental distress claim. (*Id.* at 35-37, 60-61) They also said they were not making any claim for attorney fees other than the \$125.00 statutory attorney fee. (*Id.* at 59-60)

Judge Erlick entered an order (CP 704-07) which provided, in part, that the DeCourseys could assert marital privilege, that the DeCourseys were not to interrupt or coach during depositions, that the DeCourseys would not be required to testify regarding attorney fees, that the DeCourseys are dismissing “any claim for attorney fees beyond statutory fees of \$250” and that the DeCourseys are dismissing any claim for general damages and there shall be no discovery into any claim for general damages. (CP 707)

The DeCourseys filed a pro se motion to reconsider. (CP 708-39) They claimed that they had not waived all attorney fees. (CP 709-11) A law firm appeared for the DeCourseys (CP 747-49) and filed a brief. (CP 750-53)

Redmond filed a brief in opposition to reconsideration (CP 758-67), pointing out that in open court, the DeCourseys agreed to waive their claim for attorney fees in exchange for the court changing the order so that it provided that the DeCourseys would not be required to testify regarding attorney fees. (CP 762)

Judge Erlick denied reconsideration. (CP 768) The DeCourseys sought discretionary review. (CP 900-07) On February 15, 2008, Commissioner Neel denied discretionary review. (CP 908-18)⁴ She summarized the procedural history of the case both before and after the August 23, 2007 order. She reviewed what occurred at the hearing (CP 913):

[Judge Erlick] orally ruled that opposing counsel could inquire into any attorney fees the DeCourseys' incurred, i.e., the name of the attorneys and the amounts paid, but communications with the attorneys was privileged unless otherwise waived. Mark DeCoursey responded that they were not claiming attorney fees other than the \$125 statutory attorney fees. [Judge Erlick] then ruled that the

⁴ The cause number was No. 60775-8-I.

DeCourseys were not required to answer questions about attorney fees and that any claim for attorneys fees above and beyond statutory attorney fees shall not be pursued. When the City's counsel inquired whether that included attorney fees under the CPA, [Judge Erlick] responded that it included "any and all attorney's fees."

While the DeCourseys argued that they did not knowingly waive their right to CPA attorney fees, HIH pointed out that the DeCourseys had made a calculated decision to waive attorney fees to avoid having to answer questions about attorneys but that now, with the assistance of counsel, they changed their strategy. (CP 916)

Commissioner Neel concluded that the DeCourseys had failed to demonstrate probable error, and had not demonstrated that their inability to obtain attorney fees substantially altered the status quo. (CP 916-17) The DeCourseys did not file a motion to modify nor seek further appellate review. (908)

The case came on for trial before Judge Michael Fox on October 21, 2008. The only parties still in the case were the respondents DeCourseys who had claims against the appellants Stickney and Windermere. The claims were breach of fiduciary duty, conflict of interest, CPA, and fraud. (10/21/08 RP 3; CP 919-45) No attorney fee claim was mentioned.

Another issue arose from the DeCourseys' \$270,000 settlement with HIH/Birgh. (CP 950)⁵ The DeCourseys argued that under the collateral source rule (CP 946-52), not only should the jury not be informed of the settlement but that appellants should not have the benefit of an offset. Appellants argued that the construction defect settlement should be admitted and any damage award should be offset by the amount of the construction defect settlement. (CP 953-55)

Defense counsel pointed out that the essence of plaintiffs' position was self-contradictory: Stickney was part of HIH, but HIH was independent of Stickney. (10/21/08 RP 8) The court initially denied the motion to exclude the settlement (*Id.* at 12), and ordered the settlement agreement to be produced. (*Id.* at 39-40) He prohibited any reference to the settlement during opening. (10/22/08 RP 5-6)

The trial court told counsel that he did not understand the Collateral Source Rule ("CSR"). (*Id.* at 48-54) Specifically, he stated that the position advanced by counsel for plaintiff "doesn't make any sense to me." (*Id.* at 50)

⁵ The \$270,000 Mutual Settlement Agreement is at CP 1040-43. It applied to "construction defects in remodeling" the DeCourseys' home. It released "HIH/Birgh" and all "agents," "officers" and "shareholders." (CP 1040)

Subsequently, the court said he would rule for plaintiffs on the CSR such that the fact that plaintiff had settled with HIH could not be disclosed to the jury. (10/28/08 RP 120) But if there was a verdict for plaintiff, they would take up the question of an offset. (*Id.* at 120) The court stated again “for the record” that the application of the CSR “in this type of case makes absolutely no sense to me.” (*Id.* at 121-22) As a consequence of the ruling, plaintiffs’ counsel was able to ask the jury for \$525,000 in construction defect damages notwithstanding that the contractor who caused the defect damages had paid plaintiff \$270,000 and been released. (10/29/08 RP 28) He told the jury that Stickney acted as the sales agent for HIH, and that Stickney bears the risk of HIH’s non-performance. (10/29/08 RP 22)

Post trial, the court stated: “My obligation here is to . . . allow essentially a double recovery by [the plaintiff].” (12/5/08 RP 6, ll. 22-25)

The jury trial commenced October 21, 2008. Throughout the trial, DeCoursey took the position that appellant Stickney was “responsible for the faulty work done by” Birgh and HIH. (10/20/08 RP 191) He could not distinguish between HIH, Birgh, and Stickney. (10/23/08 RP74) He told the jury how Stickney caused Birgh to do “that bad work.” (10/28/08 RP 168) Plaintiffs’ damages expert testified that everything he gave a price for was to repair the remodeling work done by HIH and Birgh. (*Id.*

at 53) This included the work done contrary to code, work done contrary to specifications, and work which was not done but should have been. (*Id.* at 141-42)

On the sixth day, the jury was instructed. (CP 964-85, 1485) After two days of deliberations, it returned a verdict (CP 986-88, 1485-86) in which it found that appellant Stickney did have an interest in HIH, that Stickney had a conflict of interest because of his relationship with HIH, that Stickney did not disclose the conflict, and that the DeCourseys were damaged by the failure to disclose the conflict in the amount of \$515,900. The jury also found that the DeCourseys had failed to prove fraud but that they had proved a \$6,300 CPA claim. The total damages were \$522,200.

A judgment for \$522,200 was entered November 14, 2008. (CP 996-1000) Appellants Stickney and Windermere filed a post trial motion. (CP 1001-15) Among other things, it was pointed out that there was no evidence of a conflict, that a conflict could not give rise to construction defect damages, that the economic loss rule barred recovery for construction defect damages, and that the \$270,000 HIH construction defect settlement should be set off against the jury verdict.

The DeCourseys opposed the motion (CP 1016-37) and filed a copy of the three-and-a-half-page \$270,000 Mutual Settlement Agreement between DeCoursey and HIH/Birgh. (CP 1040-43) The agreement

provided that it included claims against Stickney as an officer, agent, shareholder, or representative of HIH. (CP 1040)

The court denied appellants' motion (CP 1050-51) and entered an amended judgment. (CP 1052-53)

In January 2009, the DeCourseys filed a motion for attorney fees (CP 1054-70) supported by a DeCoursey declaration and 154 pages of exhibits. (CP 1071-1233) Their counsel filed additional material (CP 1234-84) as did the DeCourseys. (CP 1285-1304, 1305-24)

Appellants filed a notice of appeal from the judgment, the order denying JNOV, and the amended judgment. (CP 1327-37)

Appellants opposed the motion for attorney fees (CP 1338-42), pointing out that Judge Erlick's order (CP 704-07) stated that any claim for fees beyond \$250.00 were dismissed. And that Judge Erlick denied reconsideration when the DeCourseys made the we-did-not-understand argument. (CP 768) It was also noted that no cost bill was submitted and that it would be impossible to draft findings on the matter submitted. (CP 1341-42)

The DeCourseys' counsel filed more material. (CP 1343-1448, 1449-55)

In February 2009 (CP 1456-58), the court granted the DeCourseys' motion for attorney fees. Judge Fox claimed that he was not

“reconsidering, revising or reversing [Judge Erlick’s] ruling” that any claim for fees beyond \$250.00 was dismissed. (2/6/09 RP 6) He also said he was not disrespecting Judge Erlick. (*Id.* at 7) He made no specific findings as to reasonable billing rates or as to reasonable hours. And then he increased the award by a 1.3 multiplier. When some of the deficiencies were pointed out to him (*Id.* at 8-10), he said he was “not going to make any supplemental findings or respond.” “I made the findings that I am going to make.” (*Id.* at 11)

A \$1,030,427 judgment was entered in favor of the DeCourseys (CP 1492-95) that was comprised of construction damages of \$522,200, costs of \$45,000, and attorney fees of \$463,427. Appellants filed a \$1,500,000 supersedeas bond (CP 1498-1502) and filed an Amended Notice of Appeal. (CP 1503-22)

V. STATEMENT OF THE FACTS

The DeCourseys moved to the Seattle area from Virginia in August 2003 for Mr. DeCoursey to work for Microsoft. (10/22/08 RP 7) They lived in a rented house and began looking for a house to buy in December 2003. (*Id.* at 8) A friend who was on the United Methodist Church Board of Directors with Paul Stickney referred the DeCourseys to Stickney in April of 2004. (*Id.* at 8-9) They decided to work with Stickney because of the referral and his position in the church. (*Id.* at 181)

Stickney assisted the DeCourseys in writing offers on several homes. (10/23/08 RP 102) Early on, the DeCourseys had located the “Barr house” and went to see Stickney about helping them write an offer for the property. (10/22/08 RP 184) The DeCourseys made an offer of \$265,000 on April 4, 2004. (*Id.* at 184, 187) That offer was rejected. (*Id.* at 185)

The DeCourseys instructed Stickney not to put his name on the purchase and sale agreement as the Barr home was a “for sale by owner” house. The DeCourseys said they would pay him by a consulting fee instead. (*Id.* at 182) The fee for the consultation work was \$6,300. (Ex. 24) Of that amount, \$5,000 was paid by Microsoft. (10/22/08 RP 183)

The DeCourseys also considered another house that required a lot of work, the “Jones house.” (*Id.* at 15-17) When the DeCourseys expressed an interest in the house, Stickney recommended an inspector and Dick Birgh. (*Id.* at 15-16) The DeCourseys did have the home inspected and consulted with Birgh about the property. (*Id.* at 16-17) They ultimately chose not to pursue the property because of rat droppings. (*Id.* at 16-17)

Stickney met Birgh almost a decade before the DeCoursey transaction, and the two became friends. (10/23/08 RP 104) In 1998, Stickney and Birgh entered into a joint venture to develop some property

in King County that Birgh owned. (Ex. 4) The plan was to apply for a plat and sell the property. (*Id.*) The intention was for quick completion and sale of the project, but everything changed when the City of Sammamish incorporated in 1999 and imposed a moratorium on the property. (10/23/08 RP 115, 121) Only part of the property could be developed today. (*Id.* at 122) Under the terms of the joint venture agreement, Stickney is responsible for paying the loan secured by the property. (*Id.* at 112-13) Stickney and Birgh also had a “gentleman’s agreement” with Birgh that if Stickney could not make a loan payment, he could ask whether Birgh could make it instead. (*Id.* at 113-14)

The DeCourseys alleged that Stickney was actually an officer and shareholder of Birgh’s company, Home Improvement Help, Inc. (*Id.* at 56-57) It appears that Birgh listed Stickney as an officer and shareholder of the company when he formed it. The formation documents were admitted for the limited purpose of establishing’ Birgh’s actions, and not for the truth of the matter. (*Id.* at 57-58; Exs. 1-2) DeCoursey acknowledged Birgh’s explanation that he unilaterally added Stickney’s name because he thought he needed a third officer. (10/23/08 RP 58) Judge Fox commented that no evidence that Stickney actually was a shareholder or officer was ever introduced. (*Id.* at 145) In the end, DeCoursey maintained his claim that Stickney was an officer and

shareholder, but conceded that it was not “causative.” (10/28/08 RP 178-79)

Over the years, Stickney recommended Birgh to many of his clients. He produced a list of nearly 30 clients to whom he had recommended Birgh. (Ex. 16; 10/23/08 RP 131) With that list, the DeCourseys were able to locate one client who had any complaints about Birgh, the Calmes. (See 10/23/08 RP 68.) Mr. Calmes complained that Birgh was not on the jobsite regularly as he had promised, but acknowledged that Birgh’s wife was ill at the time. (*Id.* at 90-91) Mrs. Calmes testified that she told Stickney that Birgh was not completing the work on time. (*Id.* at 96) The DeCourseys presented no evidence that Stickney had any knowledge of any construction defects from any of the nearly 30 times he recommended Birgh.

Eventually, the DeCourseys decided to reconsider the “Barr house.” (10/22/08 RP 19) In mid-May 2004, the DeCourseys met Stickney and Birgh at the property to discuss whether it could be remodeled. (*Id.* at 19-20) Stickney prepared notes of the meeting. (*Id.* at 21-23; Ex. 20) The work included cosmetic work as well as some limited structural work. (10/22/08 RP 20, 26-27) The notes included an estimate of the total cost for the house and remodeling of \$360-380,000. (*Id.* at 23-24)

The DeCourseys made another offer on May 20, 2004. (*Id.* at 25; Ex. 33) The parties reached agreement on May 21, 2004. (Ex. 33) The agreement was contingent on an inspection. (Ex. 33 at Inspection Addendum) The DeCourseys used the same inspector as they had for the Jones house. (10/22/08 RP 28) He identified a few issues such as rot and a gutter problem, as well as building code violations. (*Id.* at 28-29) Following the inspection, Birgh, Stickney, and the DeCourseys met on June 8, 2004. (*Id.* at 32-33) In preparation for that meeting, DeCoursey sent Birgh and Stickney a lengthy list of things required by building codes, things that were “highly desired” and things that the DeCourseys “would like to do but might not be able to afford.” (Ex. 34)

After the June 8 meeting, Stickney produced a lengthy memo detailing the anticipated work. (10/22/08 RP 33-34) At this time, the project was still in a “conceptual stage.” (*Id.* at RP 201) Stickney estimated that the cost of the work would be “around \$110,000.” (Ex. 21, p. 1) Stickney sent the memo to the DeCourseys in a June 9, 2004 email stating that “From here, you and Dick and [sic] create a written scope of work and then do it!” (Ex. 23 at last page; 10/23/08 RP 154-55) DeCoursey responded to the memo with extensive interlineations asking questions and suggesting changes. (Ex. 23)

On June 10, 2004, the DeCourseys closed the purchase of the home. (10-22 RP 58) At that time, the DeCourseys had no formal agreement with Birgh. (*Id.* at 58, 208)

Q. Okay. So if it is in Exhibit 21, to your understanding, on the day you closed, it was part of your agreement?

A. We had a gentleman's understanding. We were not holding it rigidly to that, and neither was Birgh holding us rigidly to that. That described the scope of work that we were doing more or less, and it also described the scope of the prices more or less. But there were modifications, and there were changes in the next few months.

(*Id.* at 208)

On June 13, 2004, Stickney informed the DeCourseys that he was delivering a copy of his June 8 memo to Birgh and that Birgh would reply quickly. (Ex. 23, p.1)

Stickney's involvement in the project ended in July 2004. (10/22/08 RP 209; 10/23/08 RP 21) After the closing, the DeCourseys negotiated directly with Birgh, resulting in written Range Estimates on July 2, July 28, and a Construction Estimate on October 12, 2004. (Exs. 10-12; 10/22/08 58) The estimate of the cost of the work changed during those negotiations from \$110,000 on June 8 to \$128,475 on July 2, to \$105,265 on July 28 to \$139,350 on October 12. (Exs. 10-12) Each of

these estimates states that it “SHALL NOT BE CONSTRUED as a FIRM BID.” (Exs. 10-12; 10/22/08 RP 63-64, 210-11; 10/23/08 RP 24)

After Stickney’s involvement ended, the scope of the work was increased to include removing and replacing half of the upper level of the home and extending an exterior wall with a cantilever. (See Exs. 10-11; 10/22/08 RP 65-71.) These changes are identified in the plans dated August 15, 2004. (Ex. 11) Both the July 2 and July 28 estimates are “to complete work per plan dated xx/xx/04.” (Exs. 10-11) The October 12 estimate is “per plans dated 10/10/04.” (Ex. 12) DeCoursey testified that he thought plans were attached to the July 2 estimate (10/22/08 RP 210) and that he has plans dated October 15, 2004 (10/23/08 RP 25-26), but no other plans were produced as exhibits at trial.

While the DeCourseys negotiated the scope and cost of the work, Birgh began work. (10/22/08 RP 58) Also while the negotiations continued, the DeCourseys applied for a permit with the City of Redmond to do \$20,000 of work on their home. (Ex. 30) DeCoursey testified that most of the handwriting on the document is his, but professed ignorance of the stated cost of the work. (10/23/08 RP 22-24)

Birgh promised the DeCourseys that they would be in their newly remodeled home by Christmas of 2004. (10/22/08 RP 39-40) However,

when Christmas came, the project was nowhere near complete and already had exceeded the budget.

Q. When Christmas came and went in 2004, you weren't living in the house, were you?

A. No.

Q. So by that time, you knew the project was late?

A. Yes.

Q. And the project was nowhere near done?

A. Correct.

Q. So you knew it was going to be very late?

A. We knew it was going to be late.

Q. And by that time, they had already exceeded the original estimate that you thought this project was going to cost, right?

A. At the end of the year, yes, they had.

Q. So at the end of 2004, the project wasn't done on time, there was more work to be done, and you -- you were already over budget, right?

A. Yes.

Q. Okay. And you were there almost every day?

A. Yes.

(10/23/08 RP 27) The DeCourseys, however, did not tell Birgh that he had breached the agreement. Instead, they asked him what could be done about it. (*Id.* at 28-29)

On February 10, 2005, Birgh told the DeCourseys that the project would cost a total of \$196,000, of which they had paid \$120,000.

(10/22/08 RP 43-44) The DeCourseys contacted Stickney, not to

complain, but for assistance in refinancing the property. (*Id.* at 45) They did not tell Stickney why they needed the money. (10/23/08 RP 29) The DeCourseys refinanced the property as a finished house in April 2005. (*Id.* at 38-40)

On May 19, 2005, Birgh sent the DeCourseys a letter proposing a resolution under which the DeCourseys would pay him \$45,000 and he would finish the project. (Ex. 15; 10/22/08 RP 82-85) When he received the letter, DeCoursey “knew that we couldn't pay HIH, and so I felt badly about that, that I couldn't pay all the money that he was asking for.” (10/22/08 RP 85) Birgh ceased work on the project in May of 2005, (10/23/08 RP 41)

Although the DeCourseys claim to have discovered defects in the house since Birgh left, there was no evidence of any repairs. For example, the DeCourseys complained about an “electrified” bathtub in the house. (10/22/08 92; CP 33 at ¶ 46, 74 at ¶ 23, 157 at ¶ 142, 485 (Invitation to Electrified Bathtub Party)) In September of 2005, they had it inspected by an electrician, who said that the other circuits in the house were fully functional and offered to “come by within the next few days” to simply disconnect it. (10/23/08 RP 33-36) The DeCourseys, however, chose to do nothing. (*Id.* at 36)

Nor did the DeCourseys assert any claims against Birgh for failing to complete the work. This litigation began when one of the subcontractors sued the DeCourseys and HIH claiming they had not been paid for their work. (CP 7-10) That was almost a year after Birgh ceased work on the project. (10/23/08 RP 41)

All of the other parties except Stickney and Windermere settled or were dismissed before trial. (CP 959-61, 962-63, 1460-63, 1464-67, 1468-70, 1471-72, 1473-75; 12/5/08 RP 5-6) The DeCourseys' entire case was based on their claim that Stickney was responsible for the faulty work done by Birgh (10/22/08 RP 191):

Q. Now in this lawsuit you are saying that Mr. Stickney is responsible for the faulty work done by Mr. Birgh . . . ?

A. Yes.

DeCoursey admitted that it was Birgh's performance which caused the damages to their house. (*Id.* at 191) But he characterized Birgh and Stickney as a "team" working "together to produce a single result" (*Id.* at 193), said Stickney was acting as a salesman for HIH (*Id.* at 195; 10/23/08 RP 53), and characterized him as an "agent of HIH." (10/23/08 RP 29-30) DeCoursey told the jury that he believed that Stickney really was "operating as an officer of HIH." (*Id.* at 58-59) It was his contention that Stickney was a 20% owner of HIH (*Id.* at 59-60), and his contention that

Stickney was “in fact” vice present and a shareholder of HIH. (10/22/08 RP 177)

DeCoursey went so far as to testify that he could not “distinguish between HIH, Birgh and Stickney” (10/23/08 RP 74). He called Stickney a “proprietor of HIH.” (*Id.* at 81) DeCoursey did admit that when the insurance company came forward to settle⁶ for HIH/Birgh, Stickney “was a 20 percent owner of that insurance policy.” (*Id.* at 74-76)

The jury also heard that the DeCourseys have little or no reluctance to speak up on their own behalf. Testimony brought out that, earlier, the DeCourseys had gotten into a dispute with their RE/MAX real estate agent back in Virginia because the house they bought smelled of cat urine. (10/28/08 RP 157-58) When RE/MAX would not pay to fix the problem, the DeCourseys took to the streets with signs and placards. RE/MAX had to go to court to get an injunction to force the DeCourseys to back off. (*Id.* at 157-59)

In this case, the DeCourseys picketed Windermere offices and maintain an internet website publicizing their accusations against not only the defendants, but also their attorneys. (*Id.* at 160-61; *see* CP 25 at ¶ 44, 27 at ¶ 13, 440-41, 759-61, 911-12, 1041, 1168-69)

⁶ See \$270,000 Settlement Agreement at CP 1018, 1040-43.

VI. SUMMARY OF ARGUMENT

The appeal presents a multitude of specific legal questions. The first deals with Judge Fox's decision to reinstate, after trial, the DeCourseys' attorney fee claim which had been dismissed 18 months before. In so doing, he reversed Judge Erlick's finding that the DeCourseys had dismissed the claim in open court. He had no authority to revisit the question because the DeCourseys had not moved to modify the commissioner's ruling on the dismissal of attorney fee appeal.

In his order awarding attorney fees, Judge Fox failed to follow the guidelines in *Mahler*. He unquestionably accepted everything presented by counsel and made none of the required independent findings.

Notwithstanding the prohibition on double recovery for the same injury, Judge Fox allowed the DeCourseys to recovery from Stickney exactly the same construction defect damages they had already recovered from the contractor.

The DeCourseys' CPA claim was fatally flawed when they failed to prove the "public interest" element.

The appellants were denied a fair trial because of the trial court's misleading and incomplete jury instructions on conflict and damages.

VII. ARGUMENT

A. JUDGE FOX ERRED IN REINSTATING THE ATTORNEY FEE CLAIM.

1. Judge Erlick's Finding That the DeCourseys "In Open Court . . . Are Dismissing/Not Pursuing Any Claim For Attorney Fees" Was Not Reviewable by Judge Fox.⁷

Judge Fox's reversal of Judge Erlick's order is so out of the ordinary that for a moment it is easy to overlook how fundamentally flawed it is. We know what he did was wrong; the problem is counting the ways it is wrong.

Let us begin with exactly what is in Judge Erlick's order (CP 707):

(8) The DeCourseys shall not be required to testify regarding attorneys' fees incurred, . . . and the amount paid. . . . **In open court, the DeCourseys are dismissing/not pursuing any claim for attorneys fees beyond statutory fees of \$250.**

(Boldface emphasis added.)

What is that? That is a finding of fact. What is a finding of fact?

"If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact. . . ." *State v. Niedergang*, 43 Wn. App. 656, 658, 719 P.2d 576 (1986).

⁷ Whether a party is entitled to attorney fees is an issue of law reviewed de novo. *Taliesen v. Razore Land Co.*, 135 Wn. App. 106, 141, 144 P.3d 1185 (2006). *Harmony at Madrona Park Owner's Ass'n v. Madison Harmony Development*, 143 Wn. App. 345, 363, 177 P.3d 755, *rev. denied*, 164 Wn.2d 1032 (2008).

Inland Foundry Co. v. Dept. of Labor & Indus., 106 Wn. App. 333, 340, 24 P.3d 424 (2001).

Judge Erlick heard and saw the DeCourseys at the August hearing. He determined what occurred at the hearing. That determination is fixed and final. The determination was that the attorney fee claims were dismissed.

It is well settled that this court is constitutionally prohibited from substituting its judgment for that of the trial court in factual matters.

Dearborn Lumber Co. v. Upton Enterprises, 34 Wn. App. 490, 494, 662 P.2d 76 (1983).

This is because it is the superior court which hears and sees the witnesses, or the parties. It was Judge Erlick, not Judge Fox, who heard and saw the DeCourseys that day in August. He assessed the DeCourseys' credibility from their statements and in answering the court's questions. He found as fact that the DeCourseys gave up their attorney fee claim in exchange for not having to answer questions about what lawyers they had consulted. Judge Erlick's determination of the DeCourseys' credibility cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

Judge Fox did not hear the DeCourseys. Judge Fox did not see the DeCourseys. Eighteen months later, all Judge Fox had was a pile of paper

from the DeCourseys' attorney. The situation is not unlike what this Court faces when an appellant questions a trial judge's factual finding. Neither this Court nor Judge Fox has the constitutional mandate to substitute its judgment for Judge Erlick's finding.

2. The DeCourseys' Failure to Seek Review of Commissioner Neel's Ruling Barred the DeCourseys From Asking Judge Fox to Reverse Judge Erlick.

Of the rulings made by Judge Fox, none is more odd than his resurrection of the DeCourseys' attorney fee claim 18 months after Judge Erlick had dismissed it. While denying that he was "reconsidering, revising, or reversing [Judge Erlick's] ruling" (2/6/09 RP 6), that is precisely what he was doing. He had no authority to do so.

At the August 2007 hearing, Judge Erlick (8/23/07 RP 1-63) entered the following order (CP 707):

(8) The DeCourseys shall not be required to testify regarding attorneys' fees incurred, including the identity of the attorney, the fees incurred, and the amount paid. This does not effect [sic] attorney client privilege. In open court, the DeCourseys are dismissing/not pursuing any claim for attorneys fees beyond statutory fees of \$250.

The indicated words were added by Judge Erlick. He had originally ruled (orally) that the DeCourseys had to testify in discovery regarding attorney fees. The following then took place:

MR. DECCOURSEY: We did not claim for attorney fees. Mr. Bridgman is basing that whole issue about attorneys and attorney fees on a single word.

THE COURT: Are you waiving any claim for attorney's fees?

MR. DECOURSEY: We're not waiving the statutory attorney fees that normally come with a-

THE COURT: The \$125?

MR. DECOURSEY: Yeah, but we're not making any claim for attorney fees.

THE COURT: Okay. Can I dismiss any claim for attorney's fees other than the statutory attorney's fees?

MR. DECOURSEY: There wasn't any claim to begin with.

THE COURT: I'm going to state they're not required to testify-

....

THE COURT: I'm going to state they're not required to testify and that any claim for attorney's fees above and beyond statutory attorney's fees shall not be pursued.

Mr. BRIDGMAN: That would include then also the CPA attorney's fees.

THE COURT: Includes any and all attorney's fees.

(8/23/07 RP 59-60) (emphasis added).

What occurred at the August 2007 hearing was summarized by Commissioner Neel (CP 913):

[Judge Erlick] orally ruled that opposing counsel could inquire into any attorney fees the DeCourseys' incurred, i.e., the name of the attorneys and the amounts paid, but communications with the attorneys was privileged unless otherwise waived.

Mark DeCoursey responded that they were not claiming attorney fees other than the \$125 statutory attorney fees.

[Judge Erlick] then ruled that the DeCourseys were not required to answer questions about attorney fees and that

any claim for attorneys fees above and beyond statutory attorney fees shall not be pursued.

When the City’s counsel inquired whether that included attorney fees under the CPA, [Judge Erlick] responded that it included “any and all attorney’s fees.”

(Emphasis added.)

The DeCourseys moved for reconsideration of the attorney fee ruling. (CP 708-39, 750-53) In response, it was pointed out that the DeCourseys had agreed in open court to waive their claim for attorney fees in exchange for Judge Erlick changing the order. (CP 762) Judge Erlick considered the DeCoursey argument that they had not understood what they were doing when they were face-to-face with Judge Erlick.

Judge Erlick refused to change the order. He confirmed his ruling: The DeCourseys had no claim for attorney fees save statutory attorney fees, and in particular no claim for attorney fees under the Consumer Protection Act. (CP 768) Judge Erlick’s denial of reconsideration confirmed he intended to dismiss and did in fact dismiss the attorney fee claims.

The DeCourseys sought immediate review of the order dismissing their attorney fee claims. (CP 900-07) Commissioner Neel reviewed the record, the DeCourseys’ argument that they did not knowingly waive their CPA attorney fee claim, and the response that the DeCourseys had made a calculated decision to waive attorney fees to avoid having to answer

questions about attorneys, but that now, with the assistance of counsel, they changed their strategy. (CP 916) Commissioner Neel denied discretionary review. (CP 908-18)

The DeCourseys did not file a RAP 17.7 motion to modify Commissioner Neel's decision. That makes Judge Erlick's order dismissing the attorney fee claim the law of the case. When a motion to modify is not filed, the ruling in question becomes the final decision of the court.

We read in the WSBA, WASHINGTON APPELLATE PRACTICE DESKBOOK § 16.7 (3d ed. 2005):

Generally, if a motion to modify is not filed, the ruling becomes the final decision of the court. . . . An unchallenged ruling by the commissioner becomes the decision of the court and can . . . affect the scope of review on the merits.

We may also note in 3 Tegland, WASH. PRACTICE, *Rules Practice*, at 55 (6th ed. Supp. 2008):

In the absence of a timely motion to modify, the ruling stands. The court will not revisit the propriety of the ruling when deciding the case on the merits.

Commissioner Neel's decision is "the final decision of" this Court. This Court will not revisit the ruling. If her ruling is final as to the court of appeals, then it is most certainly final as to the superior court.

In *Gould v. Mutual Life Ins. Co.*, 37 Wn. App. 756, 758, 683 P.2d 207 (1984), the court stated:

Because Gould did not move to modify that ruling pursuant to RAP 17.7, that ruling of the commissioner became the final decision of the court.

In *Hough v. Ballard*, 108 Wn. App. 272, 277 n.3, 31 P.3d 6 (2001), Division II stated:

If an aggrieved party fails to seek modification of a commissioner's ruling . . . , the ruling becomes a final decision of the court.

The court pointed out that "ruling becomes final" means that neither party is entitled to further review of the issue presented (*Id.* at 278):

Hough did not file a motion to modify; thus, the commissioner's ruling became final in that **neither party was entitled to further review as a matter of right.**

(Emphasis added.)

If the DeCourseys wanted further review of the attorney fee ruling, they had to file a motion to modify. They did not do so. Therefore, they could not seek review by Judge Fox.

What is the significance of the fact the DeCourseys chose to represent themselves? None. It makes no difference that the DeCourseys

chose to conduct their legal affairs without the benefit of counsel.⁸ In *In re Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155, *rev. denied*, 100 Wn.2d 1013 (1983), the court said:

Mrs. Wherley may not have understood the full effect that signing the documents would have on her property rights. Unfortunately for her, the law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws. *Bly v. Henry*, 28 Wn. App. 469, 624 P.2d 717 (1980).

See also, In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993); *Batten v. Abrams*, 28 Wn. App. 737, 739 n.1, 626 P.2d 984, *rev. denied*, 95 Wn.2d 1033 (1981).

Why Judge Fox chose to try to rewrite the record is inexplicable. He did indicate that he felt sorry for the Lane Powell firm. (2/6/09 RP 7) If he did not give them something, they would get “nothing.” He overlooked the fact that Lane Powell took the case after Judge Erlick had dismissed the attorney fee claim. (CP 747-49) They could hardly claim surprise.

He felt sorry for the DeCourseys because if he were to rule otherwise, Lane Powell would “dispossess the DeCourseys of their

⁸ However, it must be noted that even without the benefit of counsel, the DeCourseys had no problem generating extensive and comprehensive pleadings. (CP 14-15, 16-42, 55-97, 127-89, 437-57, 488-550, 556-666, 708-39)

house.” The relationship between attorney and client hardly seems a basis for legal rulings.

He stated (2/6/09 RP 7):

So I would also note that if I were to rule otherwise, it either means that Lane Powell takes this case and gets nothing, with a rather extreme amount of effort involved, or, if they do collect on their fee, they have to dispossess the DeCourseys of their house.

While expressing his empathy for Lane Powell and the DeCourseys, he appears to have overlooked that for the prior 18 months the case had been handled with no attorney fee component. And he certainly forgot that Stickney had relied on the DeCourseys’ giving up of their attorney fee claim.

The dismissal of the attorney fee claim was part of a quid pro quo. The DeCourseys gave up their attorney fee claims but were no longer required to testify about these attorneys. By reinstating the attorney fee claim, the court destroyed that arrangement. Judge Fox’s reinstatement of the attorney fee claim was error. It must be reversed.

B. JUDGE FOX’S ORDER AWARDING ATTORNEY FEES IS CONTRARY TO WASHINGTON LAW.

In *Mahler v. Szucs*, 135 Wn.2d 398, 433-435, 957 P.2d 632, 966 P.2d 305 (1998), the Supreme Court set out “a clear and simple formula” for trial court judges to follow when making an attorney fee award. If the

method is followed, it will give the “appellate courts a clear record upon which to” review the fee decision. *Id.* at 433.

While the burden of proof is on the party seeking fees (*Id.* at 434), the court has a very significant role. In *Mahler*, the Supreme Court sent a couple of messages. First, it said: “Courts must take an *active* role in assessing the reasonableness of fee awards rather than treating cost decisions as a litigation afterthought.” *Id.* at 434 (Court’s emphasis).

Then it said:

Courts should not simply accept unquestioningly fee affidavits from counsel.

Id. at 434-35.

That is exactly what happened here. The only specific finding made by Judge Fox was that counsel had given him “roughly, I would say, three inches of paper to consider.” (2/6/09 RP 11) He did not take “an active role.” When defense counsel reminded him that he was supposed to make specific findings as to the reasonable hourly rate and specific findings as to the reasonable number of hours, he said (*Id.* at 11) “I am not going to make any supplemental findings or respond.” Rather, he “unquestioningly” accepted what counsel gave him and said everything counsel did was “reasonable” and all their billing rates are “reasonable,”

too. (CP 1457, ¶¶ 6-7) Everything they did was fine.⁹

We must not overlook the fact the court should have segregated the attorney fees as to unsuccessful claims, claims against other parties, and claims for which attorney fees are not authorized. *Hume v. American Disposal Co.*, 124 Wn.2d 656, 672-73, 880 P.2d 988 (1994), *cert. denied*, 513 U.S. 1112 (1995).

On those rare occasions when no reasonable segregation of successful and unsuccessful claims can be made, the court is to give a “clear explanation that the CPA work could not be segregated.”¹⁰ This record contains no “clear explanation.” What it contains is an example of the court unquestionably accepting whatever counsel put in front of him (CP 1457 ¶8) He made no effort to give a clear explanation of the lack of segregation (2/6/09 RP 2-11).

In Washington, once the lodestar fee is correctly calculated, that fee “may, in rare instances, be adjusted upward or downward” (135 Wn.2d at 434). “The party requesting a deviation from the lodestar bears the

⁹ In reading through the transcript of the February 6, 2009 hearing (2-6 RP 1-11), one is led to the conclusion that Judge Fox had run out of interest in this case. The hundreds of pages filed by the DeCourseys relative to the resurrected claim for attorney fees was the last straw. (CP 1054-70, 1071-1233, 1234-84, 1285-1304, 1305-24, 1343-1448, 1449-55) He was no longer going to “take an active role in assessing” the fee award. It was all now just fine. Let the Court of Appeals figure it out. (2/6/09 RP 1)

¹⁰ *Mayer v. Sto Indus., Inc.* 156 Wn.2d 677, 693, 132 P.3d 115 (2006).

burden of justifying it.” *Pham v. City of Seattle*, 159 Wn.2d 527, 541, 151 P.3d 976 (2007).

In *Pham*, the court goes on to discuss the many factors that are to come into play when considering an adjustment. Here, the court identified only one factor to justify a 30 percent multiplier: “[T]he high-risk nature of this particular litigation.” (2/6/09 RP 5) He did not explain what was “high-risk” about this case. He did not explain how this case differed from every other case being tried to a jury in the courthouse that day.

Moreover, while he was describing the case as “high-risk,” he was stating that the factors leading to the CPA violation “were really undisputed.” (*Id.* at 5) What kind of high-risk case has undisputed facts? Defense counsel did point out to the judge that he was being inconsistent. (*Id.* at 9) He reminded him that a case where the facts which framed liability were conceded from the beginning was not a “high-risk” case and did not justify a multiplier.

We turn again to *Mahler* (135 Wn.2d at 435):

Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.

Given the enormity of the trial court’s error as to attorney fees, it would be easy to overlook the error as to the award of \$45,000 in costs.

We note first that cost awards in a CPA case are limited. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 694, 132 P.2d 115 (2006):

This court has held that “it gives the plaintiff in a Consumer Protection Act action an unwarranted recovery to extend costs beyond those statutorily defined in RCW 4.84.010.” *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987). RCW 4.84.010 entitles a prevailing party to recover, in general, filing fees, costs for service of process, notary fees, reasonable expenses for reports and records entered into evidence, statutory attorney and witness fees, and “[t]o the extent that the court ... finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial.”

See also Hume v. American Disposal, 124 W.2d 656, 674, 880 P.2d 988 (1994) (“Absent a statute . . . plaintiffs are not entitled to such generous cost awards.”)

Where the \$45,000 number came from is not evident. (CP 1286, 1456-58, 1492-95; 2/6/09 RP 5) While the DeCourseys submitted hundreds of pages, there was no effort to break out the costs as per RCW 4.84.010. The court simply announced the number (2/6/09 RP 5). It was not even expressly set out in the order he signed (CP 1456-58). There was no Cost Bill as such.

The casual reader may scrutinize the Order Granting Plaintiffs Motion for Attorneys’ Fees (CP 1456-58) from beginning to end and back again, but the reader will find no findings, and no conclusions to support

the attorney fee award, the adjustment, or the costs. The trial court did not merely abuse its discretion, it acted contrary to the Supreme Court directions.¹¹

C. JUDGE FOX ERRED IN FAILING TO OFFSET THE \$270,000 BIRGH/HIH SETTLEMENT.

Judge Fox complained that he did not understand the Collateral Source Rule (10/22/08 RP 48-54), that it did not make sense (10/28/08 RP 121-22), and that it was forcing him to allow the plaintiff “essentially a double recovery” (12/5/08 RP 6). His confusion led him to err in significant ways. First, he failed to recognize that the DeCourseys’ theory of the case (*i.e.*, that Stickney and Birgh/HH were intimately related) meant that the \$270,000 settlement payment on behalf of Birgh/HH was a payment that did not come from a source “wholly independent of and collateral to” the appellants.¹² Second, his failure to set off the \$270,000

¹¹ Given the clarity of the rules announced by the Supreme Court, and the fact that the form of the order is not changing, the review here is *de novo*. “The process of applying the law to the facts . . . is a question of law and is subject to *de novo* review.” *Tapper v. State Employment Sec. Dept.*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993); *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007).

¹² *Meyer v. Dempsy*, 48 Wn. App. 798, 802, 740 P.2d 383, *rev. denied*, 109 Wn.2d 1009 (1987).

settlement and to thus allow a double recovery was contrary to Washington's doctrine of equitable setoff.¹³

The DeCourseys' theory of the case was that Stickney was responsible for the faulty work done by HIH/Birgh. DeCoursey told the jury that in this lawsuit he was contending that Stickney was "responsible for the faulty work done by Mr. Birgh." (10/22/08 RP 191) He told the jury how Stickney caused Birgh to do "that bad work." (10/28/08 RP 168) Plaintiffs' damages expert testified that everything he gave a price for was to repair the remodeling work done by HIH/Birgh. (*Id.* at 53)

DeCoursey told the jury he could not distinguish between Birgh/HIH and Stickney. (10/23/08 RP 74) He characterized Birgh and Stickney as a "team" working "together to produce a single result." (10/22/08 RP 193) He testified that Stickney was acting as a salesman for HIH (*Id.* at 195; 10/23/08 RP 53) and characterized him as an "agent of HIH" (10/23/08 RP 29-30). DeCoursey told the jury that he believed that Stickney really was "operating as an officer of HIH." (*Id.* at 58-59) Further, it was his contention that Stickney was a 20 percent owner of

¹³ *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 702, 9 P.3d 898 (2000); *Public Employees Mut. Ins. Co. v. Kelly*, 60 Wn. App. 610, 618, 805 P.2d 822, *rev. denied*, 116 Wn.2d 1031 (1991) ("[I]t is a basic principle of damages—tort and contract—that there shall be no double recovery for the same injury.").

HIH. (*Id.* at 59-60) He said Stickney was “in fact” vice president and shareholder of HIH. (10-22 RP 177)

In *Meyer v. Dempsy*, 48 Wn. App. 798, 802, 740 P.2d 383, *rev. denied*, 109 Wn.2d 1009 (1987), the court said:¹⁴

... the collateral source rule forbids consideration of payments received by the plaintiff from sources wholly independent of and collateral to the wrongdoer which have a tendency to mitigate the consequences of the injury to reduce damages otherwise recoverable.

It was the DeCourseys’ theory of the case that Stickney was inextricably intertwined with Bergh/HIH. That being the case, the DeCourseys cannot argue that Stickney was “wholly independent of” Bergh/HIH when the \$270,000 payment was made to the DeCourseys on behalf of Bergh/HIH.

In addition to misapplying the collateral source rule, the court failed to discern that inasmuch as the DeCoursey were seeking exactly the same damages from Stickney as they had recovered by settlement from Birgh/HIH, Stickney was entitled to a setoff for the settlement. Failure to give the setoff did result in a prohibited double recovery for the DeCourseys.

¹⁴ See also *Peterson-Gonzales v. Garcia*, 120 Wn. App. 624, 636, 86 P.3d 210 (2004) (the collateral source rule prevents a tortfeasor from receiving a benefit from payments made by a source “wholly independent of the tortfeasor,”), *rev. denied*, 152 Wn.2d 1027 (2004).

Washington's common law equitable setoff doctrine is set out in *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 9 P.3d 898 (2000). Here, a condominium association obtained a \$77,441 judgment against the condo developer for breach of warranties arising out of defective construction. The condo association had already settled with the contractor for \$65,000 for defective construction.

The developer asked for a \$65,000 offset for the contractor's settlement. The trial court granted "an equitable setoff of \$55,000 for the . . . settlement" with the contractor. *Id.* at 701.

Division I affirmed the equitable setoff. It ruled that the trial court was correct to conclude that an offset was necessary as a matter of equity to ensure that the condo association did not recover damages from both the developer and general contractor for the same defects. The court stated:

In setting off the Brixx settlement, the trial court's equitable purpose was to assure that the Association did not recover from both Brixx and Coy for the same damage. ***It is a basic principle of damages, both tort and contract, that there shall be no double recovery for the same injury.***

Id. at 702 (emphasis added).

The *Eagle Point* prohibition on double recovery is based on a long line of Washington case law. In *Ashley v. Lance*, 80 Wn.2d 274, 281, 493 P.2d 1242 (1972), the Supreme Court pointed out that an injured party was

entitled to recover only the amount necessary to compensate for the actual harm suffered:

Having determined that the defendants are liable to plaintiff under the provisions of the restrictive covenant in their partnership agreement, we turn to plaintiff's claim seeking additional damages for conspiracy. Absent special provision, damages recoverable by an injured party are limited to the amount necessary to compensate for the harm which has been suffered. Enhanced or multiple damages are not permissible. *Brink v. Griffith*, 65 Wash.2d 253, 396 P.2d 793 (1964).

This prohibition on double recovery, i.e., recovering twice for the same elements of damage growing out of the same event, is expressed in a multitude of cases:¹⁵

In *Brink v. Griffith*, 65 Wn.2d 253, 259, 396 P.2d 793 (1964), the court pointed out that while the plaintiff was entitled to set out alternative theories on separate claims, public policy would not allow him to recover twice "for the same elements of damage":

¹⁵ *Seafirst Ctr. Ltd. P'ship v. Erickson*, 127 Wn.2d 355, 365, 898 P.2d 299 (1995) (the law does not sanction double recovery); *Wilson v. Brand S Corp.*, 27 Wn. App. 743, 747, 621 P.2d 748 (1980) (double recovery is contrary to the principle of compensatory damages), *rev. denied*, 95 Wn.2d 1010 (1981); *Brink v. Griffith*, 65 Wn.2d 253, 259, 396 P.2d 793 (1964) (plaintiff not entitled to twice recover under defamation and invasion of privacy claims for same elements of damage growing out of same occurrence); *Pannell v. Food Servs. of Am.*, 61 Wn. App. 418, 444-45, 810 P.2d 952, 815 P.2d 812 (1991) (plaintiffs' employment discrimination action damages for front pay were duplicative as a matter of law to damages for lost business opportunity), *rev. denied*, 118 Wn.2d 1008 (1992); *Kammerer v. W. Gear Corp.*, 27 Wn. App. 512, 526-27, 618 P.2d 1330 (1980) (award of damages for fraudulently inducing contract and breach of same contract was improperly duplicative), *aff'd*, 96 Wn.2d 416, 635 P.2d 708 (1981).

In short, while the plaintiff in the instant case was entitled to allege the respective theories of recovery alternatively or in separate claims, he was not entitled to recover twice for the same elements of damage growing out of the same occurrence or event.

Here, there is no question, the DeCourseys sought to recover from Stickney exactly the damages caused directly by Birgh/HIH. (10/22/08 RP 191; 10/28/08 RP 53, 168; 10/29/08 RP 21-22)

Examination of DeCoursey's testimony and his counsel's argument leaves no question but that the damages DeCoursey sought from Stickney were exactly the same damages as he had already recovered from Birgh/HIH. Judge Fox erred when he failed to offset the \$270,000 settlement.

Given that Judge Fox erroneously felt that he was forced to allow a "double recovery" (12/5/08 RP 6), he made an error of law and is to be reviewed de novo. In addition, basing his ruling on an erroneous view of the law was a manifest abuse of discretion. *Hoskins v. Reich*, 142 Wn. App. 557, 566, 174 P.3d 1250, *rev. denied*, 164 Wn.2d 1014 (2008); *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

D. THE DECOURSEYS FAILED TO PROVE THE "PUBLIC INTEREST IMPACT" ELEMENT OF THEIR CPA CLAIM.

Earlier this year, the Supreme Court pointed out that the CPA is not intended to cover all disputes. In *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 695 (2009), the Court reversed the Court of Appeals

because it had applied the CPA to a fact situation wherein the defendant's conduct did not impact the public interest.¹⁶

In *Michael*, the court reviewed the basics:

To establish a CPA violation, the plaintiff must prove five elements: (1) an unfair or deceptive act or practice that (2) occurs in trade or commerce, (3) impacts the public interest, (4) and causes injury to the plaintiff in her business or property, and (5) the injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986). A plaintiff alleging injury under the CPA must establish all five elements.¹⁷

Id. at 602.

Turning to the public impact element, the court emphasized that the CPA was not intended to apply to private disputes. To invoke the CPA, the claimant must demonstrate that additional plaintiffs "will be injured in exactly the same fashion." A hypothetical possibility of an isolated unfair act being repeated is insufficient. *Id.* at 604-05.

While pointing out that it may well be difficult to show that a private dispute has a public component, the court identified four factors which the court must evaluate:

¹⁶ The question of whether particular conduct gave rise to a CPA violation is reviewable as a question of law. *Svensen v. Stock*, 143 Wn.2d 546, 553, 559, 23 P.3d 455 (2001).

¹⁷ The burden of proving all five elements is on the DeCourseys.

The factors are: (1) whether the alleged acts were committed in the course of defendant's business; (2) whether the defendant advertised to the public in general; (3) **whether the defendant actively solicited this particular plaintiff, indicating potential solicitation of others**; (4) whether the plaintiff and defendant have unequal bargaining positions.

Id. at 605 (emphasis added).

Although none of the factors are dispositive nor must all the factors be present, the court pointed out that the absence of two of the factors was fatal to the claim. The court said there was no evidence the defendant advertised to the public in general; there was no evidence the defendant actively solicited the plaintiff in particular.

The situation here is identical. There is no evidence Stickney advertised to the public in general. Moreover, Stickney did not actively solicit the DeCourseys. The DeCourseys were referred to Stickney by a member of the United Methodist Church Board of Directors. (10/22/08 RP 8-9, 181) Stickney did not seek out the DeCourseys; the DeCourseys sought out Stickney. The DeCourseys could have chosen any real estate agent. The DeCourseys chose Stickney because of the referral and his position with the church. (10-22 RP 181)

The DeCourseys did not introduce any evidence to show unequal bargaining positions. The DeCourseys are not unsophisticated consumers.

The fact is DeCoursey was employed at Microsoft as a “software development engineer.”¹⁸ (10-22 RP 180-81)

The DeCourseys had the burden of introducing substantial evidence of all five elements of a CPA claim. While it is questionable whether there was substantial evidence of elements 1, 2, 4 and 5, there is no question but there was a total failure of proof of element 3: “Impacts the public interest.” To show public interest, the DeCourseys had to show among other things, solicitation by Stickney, advertising by Stickney, and unequal bargaining position. The DeCourseys offered up no evidence whatsoever of relative bargaining position and no evidence of Stickney’s advertising to the public. But the DeCourseys did prove that Stickney did not “actively” solicit the DeCourseys. The DeCourseys’ proof (10/22/08 RP 8-9, 181) negated the element he was required to prove. That is fatal to their claim.

In light of this failure of proof, the judgment for CPA damages and CPA attorney fees must be reversed.

¹⁸ On this point, we must note the DeCourseys’ experience in taking to the streets with signs and placards in their dispute with RE/MAX (10-28 RP 157-58), their picketing at Windermere offices (10/28/08 RP 161), and their utilization of web pages to broadcast their view of events. (*Id.* at 149, 159-60) In addition, Mrs. DeCoursey had been a real estate agent. (*Id.* at RP 155)

E. JUDGE FOX COMMITTED MULTIPLE ERRORS BECAUSE HE ALLOWED THE DECOURSEYS TO LINK A CONFLICT OF INTEREST CLAIM TO CONSTRUCTION DEFECT DAMAGES.

Before trial, Windermere brought a motion to exclude evidence of construction defects because such damages cannot be recovered in a conflict of interest case.¹⁹ (10/21/08 RP 31-32) Judge Fox denied the motion. (*Id.* at 33) He stated the entire case was “about” construction defects. (*Id.* at 31) When Judge Fox prepared the jury instructions, he deleted the other parties from the caption, leaving only Stickney and Windermere. (10/29/08 RP 7-8)

When defense counsel referred to the parties who caused the construction defects in closing argument, Judge Fox summarily prohibited any such reference.

MR. DAVIS: Good afternoon. This is really a construction defect case, and yet the DeCourseys have chosen to sue not the guy that did the work, not the people that approved nine permits, but the real estate agent.

MR. NOURSE: Your Honor, I have to object to that. This is getting really close to prior rulings.

THE COURT: Sustained. There is not an issue here about choice of defendant in the case, and the jury is instructed to disregard that. Go ahead.

(*Id.* at 32-33)

¹⁹ Clerk’s Papers numbers have not been prepared yet by the superior court for the designated motions in limine (subnumber 332, pp. 3-5).

In this way, Judge Fox sent the case to the jury with instructions and evidence that effectively directed it to award all of the construction defect damages if it found that Stickney had a conflict of interest. Those rulings misled the jury on the definition of a conflict of interest, as well as the measure and standard of damages. Stickney and Windermere were denied a fair trial.

1. Judge Fox Erroneously Instructed the Jury on Conflict of Interest.

Judge Fox all but directed the jury to find a conflict of interest, consistent with his comments to counsel during the trial. (10/22/08 RP 170) Judge Fox gave two instructions on conflicts of interest.

Paul Stickney had a duty to the DeCourseys to disclose any conflicts of interest he may have had in his dealings with the DeCourseys. Defendant Paul Stickney had a duty to disclose any financial or business relationships, or prospects for personal gain or benefit he may have had with or through any third party involved in any way with the transaction at issue in this case.

Richard Birgh and HIH, Inc. are such third parties in the transaction in this case.

(CP 973, Instruction No. 7)

An agent has a conflict of interest if he has any interest in a transaction adverse to the principal. Here, Stickney owed a duty to the DeCourseys to scrupulously avoid representing any interest antagonistic to that of the DeCourseys in transactions relating to their home, or otherwise engaging in self-dealing, without the explicit and fully informed consent of the DeCourseys.

If you find that Paul Stickney violated his duties with relation to the DeCourseys, you must determine the amount of damages proximately caused to the DeCourseys by Paul Stickney's violation.

(CP 975, Instruction No. 9) Defense counsel took exception to these instructions and proposed a clarification:

“A conflict of interest is one that affects the person's performance as opposed to a mere theoretical division of loyalties,” and that “An agent is not required to disclose business relationships with other parties if those relationships do not affect the agent's performance with the client.”

(10/29/08 RP 8-9) These exceptions were noted. (*Id.* at 9-10)

Under the court's instructions, any time any real estate agent has any business or professional relationship with any third party who is involved in any way in a transaction, that agent would have a conflict of interest. Moreover, that agent would be required to disclose the details of every such relationship, no matter how remote or innocent or immaterial it might be.

This Court need not look far to see the nonsense such a rule generates. DeCoursey agreed his claim could be summarized as follows:

- Q. [S]o your belief is that Mr. Stickney said, "I need Birgh to have money so he can pay the loan, so I will send the DeCourseys to Birgh to do the work that he is not qualified to, but he will still get money, and he will be able to pay the loan." Is that a fair summary?
- A. Except for your third clause, yes.

Q. Third clause being?

A. That, again, the certainty he would be unable to do it.

(10/28/08 RP 177) In closing argument, plaintiffs' counsel elaborated the same theme:

This case arises from a conflict of interest and not just a little one. We know through, again, undisputed testimony that Mr. Paul Stickney had a joint venture. He had a signed agreement with Mr. Richard Birgh who he had known, as of now, for at least ten years. But at the time in 1997, he had a joint venture for the development of Mr. Birgh's land. Mr. Stickney, as a result of that joint venture, was a personal guarantor on a loan secured by that land.

We know that Mr. Stickney and Mr. Birgh were having trouble paying on the loan. Mr. Stickney told you, and it is confirmed in the joint venture agreement, that he bore the burden; he bore the risk of paying the loan payments. He was the capital partner. And by the time of the DeCourseys' interaction with him, he was invested, he guesses, greater than a hundred thousand dollars on a land deal that had stalled.

But that's okay because he had an agreement with Mr. Birgh that if he couldn't make the payments -- "he" being Mr. Stickney -- that he would call Birgh and see if Birgh could make the payments. And if Birgh couldn't, then they didn't make the payments.

And so what does that mean? Why is that important? It's important because Paul Stickney was personally a guarantor on that loan, to ensure that the land didn't get taken as a result of the default on the loan, the land that he had invested a hundred thousand dollars in. He had an interest in making sure that Mr. Birgh had income. He had an interest in making sure that HIH was doing work.

(10/29/08 RP 16-17) In the end, the entire case was based on the belief that Stickney referred people to HIH so that Birgh would have work and therefore would have money to pay the loan if Stickney did not.

The fact that this never happened was no impediment to liability.

Again, as summarized by plaintiffs' counsel in closing argument:

Now, you heard the instructions from the Court which effectively say if he had a prospect for personal gain or a financial interest or a business with a third party, that must be disclosed. Richard Birgh -- as you were instructed -- and HIH, is such a third party. There is no evidence that disputes it. He didn't disclose it. You heard him say it himself. He didn't disclose it. In fact, he said the opposite. Does that constitute a conflict of interest? Yes, it does.

(10-29 RP 19-20) Judge Fox's instructions supported this argument by defining a conflict of interest to include the theoretical possibility of an indirect benefit.

In *Girard v. Myers*, 39 Wn. App. 577, 694 P.2d 678 (1985), the Court discussed a genuine conflict of interest for a real estate agent. Myers, a real estate agent, acquired a 290-acre parcel. It was then divided into seven parcels. Myers kept a 13.2-acre parcel for himself and entered into agreements with investors on the remaining parcels. Those agreements required the investors to list the properties for sale with Myers. Myers later acquired an adjacent 51 acres. One of the original investors, Girard, then sold part of his property. But he refused to pay Myers a

commission. The Court held that Myers was not entitled to a commission because he had an undisclosed conflict of interest.

The record does not support Myers' argument that all material facts giving rise to the conflict of interest were fully disclosed to Girard. Myers' conflict was unusual in this case because he could profit personally by arranging sales of properties in which he had a personal interest and, at the same time, he could frustrate a sale by Girard to a prospective purchaser interested in both properties, through his claimed right of first refusal and an 11 percent discount. The findings of the trial court on the conflict issue are supported by substantial evidence. We conclude that Myers' claim for a commission should be denied because Myers breached his fiduciary duty as a selling agent.

Id. at 588. Myers' interest was clearly antagonistic to Girard's because the very act of furthering his interest would undermine Girard's interest.

This case is totally different. Stickney had no interest in defective construction. To the extent that his joint venture was affected at all, his only interest was for Birgh to get work, do a good job and get paid. Those interests are not antagonistic; they are not in conflict.

2. The Measure of Damages for a Conflict of Interest Does Not Include Construction Defect Damages.

Even if Judge Fox had instructed the jury on the correct definition of a conflict of interest, he erroneously permitted the DeCourseys to seek construction defect damages. The measure of damages for failing to disclose a conflict of interest is disgorgement of the benefit obtained by the party failing to disclose the interest. In *Mersky v. Multiple Listing*

Bureau of Olympia, Inc., 73 Wn.2d 225, 231, 437 P.2d 897 (1968), the Supreme Court explicitly stated the measure of damages for failing to disclose a conflict of interest:

This, in turn, entitles the principal, upon discovery of the undisclosed relationship, to rescind the transaction, recover any profit gained by the broker from the transaction, or recoup the commission paid to the broker by virtue of the transaction.

In the vast majority of cases, forfeiture of the commission is the only remedy permitted by the Court. *Girard v. Myers*, 39 Wn. App. 577, 588, 694 P.2d 678 (1985); *Ross v. Perelli*, 13 Wn. App. 944, 946, 538 P.2d 834 (1975); *Koller v. Belote*, 12 Wn. App. 194, 198-199, 528 P.2d 1000 (1974).

Judge Fox refused to limit the evidence of damages to any benefit derived by Stickney for no other reason than doing so would “preclude the introduction of all evidence relating to this.” (10/21/08 RP 33) The fact that plaintiff has based his case on the wrong measure of damages does not make that evidence admissible. Construction defect damages caused by the faulty performance of a third party have no place in a conflict of interest case. The trial court erred in permitting the DeCourseys to link a conflict of interest claim to construction defect damages.

3. Stickney Did Not Cause the Construction Defects.

Even if Stickney had a conflict of interest, and even if construction defect damages could be recovered in such cases, the DeCourseys failed to prove causation as a matter of law. Proximate cause consists of “cause in fact” and “legal causation.” Both must be proven. *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 864, 147 P.3d 600 (2006), *rev. denied*, 161 Wn.2d 1011 (2007). Neither was proven.

a. The DeCourseys Did Not Prove Cause In Fact.

First, the cause must be “in a direct sequence unbroken by any new independent cause.” Here, the direct cause of the defects was the work performed by Birgh. If Birgh had not performed defective work, no damages would have resulted. Stickney did not do the work. DeCoursey never claimed that Stickney’s failure to disclose a conflict caused the defective work; rather, they claimed that the failure to disclose set into a motion a sequence of events under which they decided to hire Birgh and under which Birgh subsequently did defective work.

It is true that some authority exists for finding proximate cause through an attenuated chain of events, but nothing remotely like this case: *Schatter v. Bergen*, 185 Wash. 375, 380-81, 55 P.2d 344 (1936); *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998).

This case is remarkably similar to *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 147 P.3d 600 (2006), *rev. denied*, 161 Wn.2d 1011 (2007). There, the client sued his lawyer for poorly drafting a contract for the construction of the client's dream home. The Court's summary of the case reads like a summary of the facts in this case:

Terry Smith brought a legal malpractice case for negligence relating to the construction contract on his "dream home." He contends that if defendants had informed him of the risks of the contract he would not have entered into the contract and would not have experienced cost overruns, delays, and alleged contractor malfeasance. The trial court granted summary judgment to defendants . . . because plaintiff failed to provide evidence of proximate causation. We affirm.

....

To complete a prima facie case for legal malpractice and survive summary judgment, Smith needs to show the deficiencies caused the harm. Smith needs to demonstrate that a better contract or full disclosure would have prevented the injury or improved his recovery. Smith points to several deficiencies in the construction contract to support his malpractice claim. The contract was a "cost plus" contract without a guaranteed price ceiling, there was no provision allowing for audits of the contractor's records, it did not require a personal guarantee from the company owner, it did not specify the luxury quality of workmanship desired, and the required insurance and contractor bonds were insufficient. However, he fails to demonstrate that "but for" these deficiencies in the contract he would have had a better result.

Id. at 861, 864-65. After setting out an analysis of the elements of proximate cause, the Court noted that the client had failed to tie the alleged lawyer deficiencies to the damages. That failure of proof of

causation was fatal. Just as in *Smith*, there is no evidence that the failure to disclose a conflict was a cause in fact of any construction defects.

b. Stickney Was Not the Legal Cause.

Even if the DeCourseys could establish cause in fact, they cannot prove legal causation. While cause in fact is often a question of fact, legal cause is a question of law. “Legal cause is the second prong of proximate causation and ‘[is] a question of law’ for the court.” *McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 359, 961 P.2d 952 (1998).” *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 204, 15 P.3d 1283 (2001).

“Legal causation involves a determination of whether liability should attach given cause in fact and is a question of law for the court based on policy considerations as to how far the consequences of the defendant’s act should go.” *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 51, 176 P.3d 497 (2008). Applied to the facts of this case, that question is whether a real estate agent who fails to disclose a joint venture with a contractor should, as a matter of policy, be liable if the contractor performs defective work. This determination begins with considerations of “common sense.” *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 283, 979 P.2d 400 (1999).

Washington courts consistently apply “common sense” to prevent tort liability from extending beyond reason. Here, the construction defects

were completely unconnected with either of the alleged conflicts. The DeCourseys did not allege that Stickney had an interest in defective work, only that he had an interest in seeing that Birgh was hired and received payment. If Birgh performed faulty work, he likely would not be paid, thereby defeating the theoretical purpose of referring business to him. Stickney had no interest in defective work.

In *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008), the Court demonstrated how public policy and common sense come together. The Court stated: “‘unless a reasonable limit on the scope of defendants’ liability is imposed, defendants would be subject to potentially unlimited liability to virtually anyone who suffers mental distress caused by the despair anyone suffers upon hearing of the death or injury of a loved one.’” *Id.* at 52. The grief of a father is no less just because he was not present at the accident. But for public policy reasons, he did not have a claim.

In *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 15 P.3d 1283 (2001), a car rental company left keys in a car. It was stolen. The thief caused an accident. The person injured in the accident sued the rental agency, claiming that the accident would not have happened if it had not left the keys in the car. The Supreme Court rejected legal cause because of the remoteness in time and because: “One who fails to remove

the keys from his or her vehicle should not be ‘answerable in perpetuity for the criminal and tortious conduct of others.’” *Id.* at 205.

The Court should consider the myriad of decisions and actions of the DeCourseys which occurred after Stickney’s failure to disclose the conflict of interest. DeCoursey testified that Stickney’s involvement effectively terminated in July 2004 before any plans were drawn. (*See* 10/22/08 RP 209; 10/23/08 RP 21.)

The terms of the agreement were subsequently modified between the DeCourseys and Birgh, culminating in a final October 12, 2004 Construction Estimate. (10/23/08 RP 24-26; Ex. 12) The earliest set of construction drawings that was entered into evidence was dated August 15, 2004. (Ex. 11, pp. 3-4) The final estimate refers to plans dated October 10, 2004. (Ex. 12) The DeCourseys did not apply for a permit until August 27, 2004. (Ex. 30) To the extent that Stickney set in motion a chain of events, his involvement was limited to a small segment at the beginning of the chain. He had no role in deciding where it went.

“Common sense” and sound policy do not support the conclusion that a failure to disclose was the legal cause of the construction defects. On this legal question, the Court should rule that the connection is too

tenuous, too broken by subsequent events, and too remote for Stickney to be the proximate cause of the construction defects.

4. The Trial Court Erroneously Refused to Instruct the Jury on When Damages Are Measured.

Even if Stickney and Windermere could be liable for construction defect damages, the trial court erroneously refused to instruct the jury that damages are measured at the time they are sustained. (10/29/08 RP 10-11; CP 982, Instruction No. 16) Washington law uniformly measures damages at the time they are incurred. The Supreme Court recently elaborated on this rule in *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 458, 105 P.3d 378 (2005). The Court reaffirmed the general applicability of the “lesser than” rule.

As we articulated in *Hogland*, the general “lesser than” rule is: “The owner is entitled to recover the entire cost of restoring a damaged building to its former condition unless such cost exceeds its diminution in value as the result of the injury, in which event the recovery must be limited to the amount of such diminution.” *Hogland*, 49 Wn.2d at 220 (quoting 15 AM. JUR. § 113, at 524). Under this rule, an owner is entitled to recover the entire cost of restoring a damaged building to “its” former condition unless those costs exceed “its” diminution in value.

The only damages after the loss that can be recovered are for loss of use, and those are limited to the reasonable time to complete the repairs. *E.g.*, *Falcone v. Perry*, 68 Wn.2d 909, 912-14, 416 P.2d 690 (1966); *Harkoff v. Whatcom County*, 40 Wn.2d 147, 152, 241 P.2d 932 (1952).

The time for measuring damages is not an academic question in this case. The DeCourseys established the cost to repair with the testimony of Howard “Tom” Dealy of Empire Construction. (10/27/08 RP 60-62) Dealy prepared a July 31, 2008 estimate of \$525,289.78 to repair the house that the DeCourseys purchased in 2004 for \$280,000. (Ex. 49) At trial, Dealy was confronted with another estimate prepared by the owner of his own company in November 2005. It indicated the repairs could be done for \$171,000. (10/28/08 RP 62-65; CP 433-36) He also was asked why his estimate was many times that provided by HIH in 2004. (10/28/08 RP 70-71)

Dealy’s consistent explanation for tripling his own company’s estimate for the project was that costs had increased over time. (*Id.* at 71, 76-79) In fact, he testified that construction costs overall had increased fourfold between 2005 and 2008.

Q. Has the cost of painting increased fourfold since --

A. Yes, it has.

Q. Since 2005?

A. Yes, it has.

Q. Does it generally cost four times as much to build a house today as it did then?

A. Pretty much, yes.

(*Id.* at 85) According to plaintiff’s expert, the cost to repair when the damages were fully known would have been substantially less. (*Id.* at 40-

41) The DeCourseys' expert was somewhat handicapped in his assessment because he never even saw a contract for Birgh's work and did not know what Birgh had agreed to do. (*Id.* at 75-76, 141-43) DeCoursey confirmed that he and Birgh were never very specific about the scope of the job. (*Id.* at 145-46)

The DeCourseys sought no damages other than the cost of repair. The jury unmistakably awarded damages based on the 2008 repair estimate, which the DeCourseys' own expert testified were four times the 2005 cost. (*Id.* at 140) The trial court's erroneous instruction was prejudicial.

5. The Trial Court Wrongly Precluded Evidence that Others Caused the Damages.

In a case where the DeCourseys themselves accused eight third parties of everything from conspiracy to fraud, it was somewhat surprising that Judge Fox absolutely forbade any evidence or argument that other parties caused the DeCourseys' damages. *E.g.*, 10/29/08 RP 32-33; CP 127-89, 556-614.

Even when DeCoursey agreed at trial that Redmond caused some of his damages, Judge Fox sustained counsel's objection and instructed the jury not to consider the issue at all:

I will instruct the jury to disregard any inference that the City of Redmond is an at-fault party in this case and is

responsible for anything, and that's the response to the objection.

(See 10/23/08 RP 37-38.) Judge Fox would not even let defense counsel ask DeCoursey if he believed that Stickney actually caused his damages.

Q. Wouldn't you agree that Birgh caused your damages more than Stickney did?

MR. NOURSE: Objection, Your Honor.

THE COURT: Sustained.

MR. NOURSE: I would ask for an instruction to the jury as well.

THE COURT: I'll instruct the jury to disregard the question.

BY MR. DAVIS:

Q. Do you really think that Mr. Stickney is the person who caused your damages?

MR. NOURSE: Same objection, Your Honor.

THE COURT: Sustained.

(10/28/08 RP 180)

The evidence was more than ample for Stickney to argue that the actions of others was the cause of the DeCourseys damages, or at least superseded any act of Stickney.

“Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are *not* reasonably foreseeable are deemed superseding causes.”

Cramer v. Department of Highways, 73 Wn. App. 516, 520-21, 870 P.2d 999 (1994) (Court's emphasis). Parties are entitled to argue their theory of

the case based on the evidence presented. *Humes v. Fritz Companies, Inc.*, 125 Wn. App. 477, 499-500, 105 P.3d 1000 (2005). It is difficult to argue your theory of the case if the Court drops an iron curtain between your evidence and the jury box. Judge Fox summarily precluded Stickney from even inquiring, much less presenting, evidence that the conduct of others was a contributory, much less superseding, cause. Appellants are entitled to a new trial where they can present evidence that others caused the DeCourseys' damages.

6. Liability for Birgh's Conduct Is Barred By the Parties' Agreement.

Finally, Judge Fox's decision to permit the DeCourseys to seek construction defect damages contradicted not only the law, but also the express terms of the purchase and sale agreement. If people who make recommendations and referrals effectively became guarantors of the performance by the person referred, no sensible person would ever offer a recommendation. Washington has thus far rejected the trend in some states to make employers liable for information in employee references, but the potential liability still restrains many from providing information.²⁰

²⁰ See *Richland School Dist. v. Mabton School Dist.*, 111 Wn. App. 377, 386-89, 45 P.3d 580 (2002) (*rejecting* RESTATEMENT (SECOND) OF TORTS § 311), *rev. denied*, 148 Wn.2d 1002 (2003).

For this reason, Stickney included a Windermere Additional Clauses Addendum in the purchase and sale agreement, which states:

RECOMMENDATIONS AND REFERRALS. Agent may assist Buyer or Seller with locating, selecting or scheduling service providers, such as home inspectors, contractors and lenders. **Agent cannot guarantee, ensure or be responsible for the quality or performance of the services or to the financial responsibility of third parties.** Other vendors are available, and the price and quality of such services is competitive. Buyer and Seller agree to exercise their own judgment regarding such service providers.

(Ex. 33 at Windermere Additional Clauses Addendum) (emphasis added).

DeCoursey admitted that this provision was part of his contract. The provision to the contrary notwithstanding, he still was trying to hold Stickney responsible for Birgh's work.

Q. Now, is this part of your agreement?

A. Yes.

....

Q. So paragraph 6 says, "Recommendations and referrals: Agent may assist buyer or seller with locating, selecting, or scheduling service providers such as home inspectors, contractors, and lenders. Agent cannot guarantee, insure, or be responsible for the quality or performance of the services or to the financial responsibility of third-parties. Other vendors are available, and the price and quality of such services is competitive. Buyer and seller agree to exercise their own judgment regarding such service providers."

Do you see that?

A. Yes.

Q. Now, in this lawsuit you are saying that Mr. Stickney is responsible for the faulty work done by Mr. Birgh, aren't you?

A. Yes.

....

Q. ... wouldn't you agree, that Mr. Birgh's performance of your agreement with him is what caused the damages we are talking about here?

A. The damages to the house, yes.

(10/22/08 RP 188-91)

The Supreme Court recently went back to the basics and stated:

“It is black letter law of contracts that the parties to a contract shall be bound by its terms.” *Torgerson v. One Lincoln Tower, LLC*, ___ Wn.2d ___, 210 P.3d 318, 322 (2009) (emphasis added).

Here, the DeCourseys signed a contract taking responsibility for choosing Birgh/HIH, finally reached an agreement with Birgh/HIH on the project months after Stickney was “out of the picture,” and repeatedly modified the agreement and proposal without Stickney’s participation. Yet they still were permitted to bring the very claim that they agreed not to. This Court should follow *Torgerson* and dismiss the DeCourseys’ lawsuit.

F. THE “ECONOMIC LOSS RULE BARS THE DECOURSEYS FROM RECOVERING TORT DAMAGES IN LIGHT OF THE CONTRACT AND THE ECONOMIC LOSS.

Washington follows the economic loss rule. *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007). “In short, the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses.” *Id.* at 683. Stickney and the DeCourseys had a contractual relationship. (Ex. 24; 10/22/08 RP 205) Economic losses are distinguished from personal injuries and property damage. *Alejandre*, 159 Wn.2d at 683-84.

The damages claimed in this case are economic losses. *See, e.g., Alejandre*, 159 Wn.2d at 684-86 (damages for defective septic system and construct defect damages generally are economic losses); *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 818, 881 P.2d 986 (1994) (delay damages caused by architect, inspector, and engineer on construction project were economic losses);

The economic loss rule applies to claims for service contracts. *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 420-22, 745 P.2d 1284 (1987) (construction services); *Berschauer* 124 Wn.2d at 827-28 (professional services). The DeCourseys here sought and recovered economic damages under a tort theory despite their contractual relationship with Stickney, and, indeed, despite their contractual

agreement not to bring such claims. (Ex. 33 at Windermere Additional Clauses Addendum; 10/22/08 RP 188-91) The Court should reverse the award of tort damages under the Economic Loss Rule, and dismiss the case.

VIII. CONCLUSION

How did the DeCourseys end up with the house, the \$270,000, and the \$1,000,000 judgment? It was not easy. The court had to make multiple mistakes: making a real estate agent into a virtual insurer of a remodel contractor; reinstating a dismissed attorney fee claim; giving a double recovery; linking a conflict of interest with construction defect damages; giving misleading instruction as to the definition of conflict; giving misleading instructions on damages. These are just the most obvious ones.

Stickney and Windermere accept that they were not entitled to a perfect trial. But they were entitled most assuredly to a fair trial. They were entitled to legal rulings consistent with Washington law. What they received was neither fair nor correct.

This Court needs to reverse the judgment and remand the case with instructions to dismiss.

DATED this 7th day of August, 2009.

REED McCLURE

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OCT 29 2008

SUPERIOR COURT CLERK
BY D. COLE MAIER
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

MARK DECOURSEY and
CAROL DECOURSEY

Plaintiff,

v.

NO. 06-2-24906-2 SEA

PAUL H. STICKNEY, a single person,
WINDERMERE REAL ESTATE/ SCA, INC.,
a Washington corporation, and PAUL H.
STICKNEY REAL ESTATE SERVICES,
INC., a Washington corporation

Defendants.

COURT'S INSTRUCTIONS TO THE JURY

DATED THIS 29 DAY OF OCTOBER, 2008.



JUDGE MICHAEL J. FOX

APPENDIX

964

INSTRUCTION NO. 7

Paul Stickney had a duty to the DeCourseys to disclose any conflicts of interest he may have had in his dealings with the DeCourseys. Defendant Paul Stickney had a duty to disclose any financial or business relationships, or prospects for personal gain or benefit he may have had with or through any third party involved in any way with the transaction at issue in this case.

Richard Birgh and HIH, Inc. are such third parties in the transaction in this case.

INSTRUCTION NO. 9

An agent has a conflict of interest if he has any interest in a transaction adverse to the principal. Here, Stickney owed a duty to the DeCourseys to scrupulously avoid representing any interest antagonistic to that of the DeCourseys in transactions relating to their home, or otherwise engaging in self-dealing, without the explicit and fully informed consent of the DeCourseys.

If you find that Paul Stickney violated his duties with relation to the DeCourseys, you must determine the amount of damages proximately caused to the DeCourseys by Paul Stickney's violation.

INSTRUCTION NO. 16

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the DeCourseys, you must determine the amount of money that will reasonably and fairly compensate the DeCourseys for such damages as you find were proximately caused by Paul Stickney's breach of agency duty or violation of the Consumer Protection Act.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

THE HONORABLE MICHAEL J. FOX

FILED
KING COUNTY, WASHINGTON
OCT 28 2008

SUPERIOR COURT CLERK
BY D. COLE MAIER
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

V & E MEDICAL IMAGING SERVICES, INC.,

Plaintiff,

v.

MARK DeCOURSEY, et ux., et al.,

Defendants,

v.

RICHARD BIRGH, et al.,

Third-Party Defendants.

NO. 06-2-24906-2 SEA
WINDERMERE'S REUSED
~~JURY~~ PROPOSED JURY
INSTRUCTIONS [~~CITED~~]

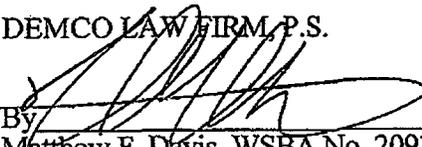
The parties submit the following proposed, cited Jury Instructions with notations.

DATED: October 16, 2008

LANE POWELL PC

DEMCO LAW FIRM, P.S.

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MARK AND CAROL DECOURSEY'S PROPOSED
JURY INSTRUCTIONS [CITED] - 1
NO. 06-2-24906-2

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