

CASE NO. 63758-4-I

Court of Appeals
of the State of Washington
Division I

DICK PELASCINI and CECILIA PELASCINI;
THOMAS BOBOTH;
and PACIFIC SHORELINE MORTGAGE, INC.

Appellants,

v.

VILA PACE-KNAPP

Respondent.

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Appellants' Opening Brief

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I. ASSIGNMENT OF ERROR

The trial court erred in awarding improper damages, interest and attorneys fees.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. ISSUES PERTAINING TO ATTORNEYS FEES AWARD:

1. ISSUE: Whether the trial court erred in awarding attorneys fees that were not contemporaneously recorded?
2. ISSUE: Whether the trial court erred in awarding attorneys fees for duplicative and non-productive work?
3. ISSUE: Whether the trial court erred in failing to segregate the attorneys fees awarded?

B. ISSUES PERTAINING TO DAMAGES:

1. ISSUE: Whether the trial court erred in awarding pre-judgment interest on an unliquidated claim?
2. ISSUE: Whether the trial court erred in awarding duplicative interest?
3. ISSUE: Whether the trial court erred in fashioning its judgment, which included pre-judgment interest in the “Amount of Judgment,” leading to the potential for plaintiff to collect further compound interest post judgment?

III. STATEMENT OF CASE

Plaintiff, Vila Pace-Knapp, respondent on this appeal (hereinafter “plaintiff” or “Pace-Knapp”), brought this action against defendants Dick and Cecilia Pelascini, Thomas Boboth, Pacific Shoreline Mortgage, Inc.

(hereinafter, collectively “defendants”), and Windermere Real Estate/Bellevue Commons, Inc.¹ CP 1-2.

Plaintiff claimed against defendants for, fraud, fraud in the inducement, violations of the Consumer Protection Act (hereinafter “CPA”), intentional and negligent infliction of emotional distress, unconscionability, and breach of fiduciary or quasi-fiduciary duty. CP 6-8.²

Plaintiff’s claim for breach of fiduciary or quasi-fiduciary duty was dismissed on summary judgment. CP 11.

At the commencement of trial, plaintiff conceded her claim for negligent infliction of emotional distress. *Id.*

After an extended bench trial, the court denied plaintiff’s claims for unconscionability (CP 15-16), and intentional infliction of emotional distress. CP 18.

The trial court also denied plaintiff’s claim for fraud in the execution, holding that defendants’ “misrepresentations were in the nature of intentions, rather than misrepresentations of existing fact,” and

¹ Windermere was dismissed on summary judgment and is not a party to this appeal. CP 10-11.

² In its (1st) Findings the trial court ruled on both fraud and fraud in inducement (CP 16); the Complaint seems to only allege one fraud, but alleges both negligent and intentional infliction of emotional distress, and breach of both fiduciary and quasi fiduciary duty. CP 6-8.

concluded, therefore, that plaintiff had failed to prove the requisite elements of fraud. CP 16.

Nonetheless, the trial court ruled for plaintiff on her claim for fraud in the inducement and, on this basis, granted rescission. CP 16-17. The trial court also found for plaintiff on her claim under the Consumer Protection Act (CPA). CP 17-18.

Defendants appealed. On appeal, the Court of Appeals ruled that plaintiff had “waived the right to rescission” and reversed the trial court’s determination of fraud in the inducement. CP 93-96. However, the Court of Appeals affirmed the trial court in regard to plaintiff’s CPA claim, and remanded the case to the trial court for a redetermination of damages and an award of attorneys fees and costs. CP 96.

Defendants’ Petition for Review to the Washington State Supreme Court was denied. The Supreme Court’s ruling denying this petition instructed plaintiff to bring her request for fees and costs before the Clerk pursuant to RAP 18.1(d). CP 99.

On remand to the trial court, after extensive briefing, a two hour hearing regarding damages and attorneys fees took place on May 22, 2009³.

³ There is no record of this hearing.

Following oral argument, the trial court awarded plaintiff damages in an amount equal to the difference between the amount defendants paid for the property and the property's fair market value, which the trial court had previously found to be \$226,100. CP 15. The purchase price of the property was \$164,000. CP 14. (1st F's 247: FOF 15). Ms. Pace-Knapp received \$7,353 at closing.⁴ *Id.* Plaintiff's net loss of equity thus totaled \$54,747. CP 183. The trial court also awarded \$1,200 "excess rent," and pursuant to the CPA, "treble damages" in the amount of \$10,000. *Id.* Therefore, the trial court's award of actual damages totaled \$55,947.⁵

In addition to these damages the trial court awarded pre-judgment interest in the amount of \$43,579.00. *Id.* The trial court calculated this interest from the date of sale ("6 years, 228 days") to June 12, 2009, when the trial court entered its Additional Findings and Conclusions, and Judgment. *Id.*

The trial court then included this \$43,579 in its calculation of what it identified as "Total Damages," to reach a total of \$109,526, which included the \$10,000 in "trebled" CPA damages. *Id.* On this basis, the

⁴ Neither this figure nor the \$164,000 paid by defendant takes into account defendants' (undisputed) payment of Ms. Pace-Knapp's delinquent property taxes in the amount of \$2,789.49 for the period of time she owned the property.

⁵ \$54,747 + \$1,200 = \$55,947. The \$10,000 in CPA treble damages are in the nature of punitive, not actual damages.

Judgment entered by the trial court itemized the “Amount of Judgment” as this same \$109,526 (which included the \$43,579 in pre-judgment interest to date of Judgment). CP 178.

The trial court’s Judgment also awarded an additional \$16,020 in pre-judgment interest from the date of the Court of Appeals ruling (3/17/08) to the date of entry of judgment (June 12, 2009). CP 179. This interest, calculated at 12%, is based on the “Amount of Judgment” (\$109,526), which included the \$43,579 previously awarded as pre-judgment interest from the date of sale to the date of entry of Judgment.

The trial court further awarded attorneys fees in the amount of \$95,992.00 through trial (every minute of the 328.7 hours requested by plaintiff’s attorney at \$275 per hour). CP 184. The trial court then applied a multiplier of .15 (\$14,398.88) to this amount. *Id.*

The trial court also awarded plaintiff all the attorney’s fees she requested, \$16,532.50 (58.8 hours at \$275 per hour), for opposing both defendants’ appeal to the Court of Appeals, and defendants’ Petition for Review to the Supreme Court. CP 184; CP 41-43.

The trial court additionally awarded fees in the amount of \$5,392.50 for the attorneys fees plaintiff requested for work performed in moving for these attorneys fees and damages awards, and Entry of

Judgment. CP 184. These attorney hours were, without explanation or evidence, awarded at \$300/hour, rather than the \$275/hour had plaintiff's attorney had previously requested (\$5,130 for 17.1 hours of attorney time at \$300/hour, plus 2.1 "law clerk" time at \$125/hour⁶).

Finally, the court awarded statutory costs in the amount of \$2,108.93. CP 184-185.

These amounts when combined are purported to equal the \$134,425.30 awarded in the "Amount of Judgment" as taxable costs and attorneys fees. CP 179.

IV. STANDARD ON REVIEW

Plaintiff disputes the trial court's conclusions as set forth in the Judgment. Conclusions of law are reviewed *de novo*, a standard which permits the appellate court to substitute its judgment for that of the trial court. *See: e.g., Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

A trial court's determination of the amount of an attorneys fee award is reviewed for an abuse of discretion. *Progressive Animal Welfare*

⁶ As with the paralegal time previously requested, plaintiff never identifies this "law clerk" or provides any statement as to what qualifications he or she possesses that might justify a wage of \$125/hour.

Society v. University of Washington, 114 Wn.2d 677, 688, 790 P.2d 604 (1990).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard... it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

[A] trial court's determination regarding attorneys' fees utilizing an improper criteria or method requires correction.

Progressive Animal Welfare Society, supra, at 890.

In this case, the trial court's rulings, as incorporated in the judgment, are outside the range of acceptable choices given the applicable legal standard, based on an incorrect standard, and on facts that do not meet the requirements of the correct standard.

The trial court's award of attorneys fees for the total time requested by plaintiff, despite a complete lack of evidence that plaintiff's attorney recorded her time contemporaneously, is legal error, based on facts that do not meet the requirements of the correct standard.

The trial court's award of fees without any attempt to segregate time expended on plaintiff's CPA claim from time spent unproductively, wastefully, and/or duplicative on other, unsuccessful claims or matters is

also an error of law, outside the range of acceptable choices given the correct legal standard.

The trial court's award of pre-judgment interest on unliquidated and unspecified damages is an error of law.

The trial court's award of duplicative interest, and its fashioning of a judgment that awards post-judgment interest on the interest previously awarded, are also errors of law.

When the facts are undisputed, application of the facts to the law is reviewed *de novo*. *Crystal, China and Gold, Ltd. v. Factoria Center Investments*, 93 Wn. App. 606, 610, 969 P.2d 1093 (1999); *and see: Seattle v. Sheperd*, 93 Wn.2d 861, 867, 613 P.2d 1158 (1980); *State v. Niedergang*, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986).

V. ARGUMENT

A. ISSUES PERTAINING TO ATTORNEYS FEES AWARD:

In assessing the amount of attorneys fees Washington courts employ the lodestar method.

Under the lodestar methodology, a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. *Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims. Fetzer*, 122 Wash.2d at 151, 859 P.2d 1210, *Counsel must provide contemporaneous records documenting the hours worked.*

Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998), emphasis added; *see also: Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 169-70, 795 P.2d 1143 (1990)

The burden of proving the reasonableness of attorneys fees “always remains on the fee applicant.” *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 847, 917 Wn.2d 1086 (1996), citations omitted.

Here plaintiff’s attorney entirely failed both to segregate her hours between the successful CPA claim and her unsuccessful claims, *and* to provide the requisite “contemporaneous records documenting the hours” she claimed to have worked.

Nevertheless, the trial court awarded *all* of the attorneys and paralegal⁷ fees plaintiff requested.

1. ISSUE: WHETHER THE TRIAL COURT ERRED IN AWARDING ATTORNEYS FEES THAT WERE NOT CONTEMPORANEOUSLY RECORDED?

Ms. Huelsman’s Declaration of May 1, 2009 does not state when the attached time records were recorded, instead admitting that at least

⁷ For the sake of (much needed) simplicity, defendants have omitted specific discussion of plaintiff’s paralegal fees. The analysis that follows applies to these fees just as it does to those of plaintiff’s attorney. In addition, there is no evidence in the record establishing these paralegal(s) experience or training, which might serve to qualify them for a wage of \$125/hour. The absence of this evidence, in itself, prohibits an award of these fees. *Absher Const., supra*, at 845.

some of these records were not actually contemporaneously recorded, but were “approximated,” or “re-created.” CP 32, CP 114. On the basis of this declaration no one can determine which, if any, of these records were contemporaneously generated: It furthermore impossible to determine if these records were created later on the day the services were rendered, later that week, later that year, or on the very day, years after the performance of services, when plaintiff’s attorney prepared her declaration.

Plaintiff has claimed it is physically impossible, “nonsensical” to require an attorney to record his or her time when the services in question are performed. CP 126. However, such prompt recording is exactly what is meant by the word “contemporaneously.”

It is in fact quite easy to jot down a note of the time expended as soon as a hearing or deposition concludes, and to transfer that note to the computer upon return to the office. Despite ample opportunity and incentive to do so, plaintiff has never even claimed she followed such a procedure. Instead, plaintiff’s attorney boldly admitted she approximated and re-created her time records at some indeterminate time, after the fact.

Plaintiff’s failure to come forward with specific evidence tending to prove that these records were contemporaneously documented renders

them mere speculation, an inappropriate basis for an award of fees (see CP 102). *Mahler, supra*, at 434.

2. ISSUE: WHETHER THE TRIAL COURT ERRED IN AWARDING ATTORNEYS FEES FOR DUPLICATIVE AND NON-PRODUCTIVE WORK?

The trial court awarded plaintiff an amount equal to the total number of hours plaintiff's attorney requested, times the hourly rates she alleged for herself and her assistants.

Necessarily, therefore, the trial court awarded plaintiff fees for the following:

a. Fees for Opposing Windermere's Successful Motion for Summary Judgment:

In or about December of 2005, both defendants and Windermere (separately but more or less simultaneously) moved for summary judgment.

Plaintiff's attorney's time records indicate at least 9.1 hours exclusively expended in responding to Windermere's successful motion for summary judgment. CP 53-57. Plaintiff did not prevail in opposing Windermere's motion and is, therefore, not entitled to an award of fees for these hours; these hours were not expended in prosecuting plaintiff's CPA claim against defendants. Yet the trial court awarded plaintiff fees against defendants for all of this time.

Plaintiff was also awarded fees for an additional, co-mingled 39.2 hours for her attorney's work in opposing these two separate summary judgment motions, one against Windermere, and another (raising quite different issues) against defendants. Plaintiff's time records give no indication of how many of these co-mingled additional hours were spent opposing Windermere's motion, and how many of these hours were devoted to opposing defendants' motion. CP 53-57.

Though Windermere's motion was wholly successful, and defendants prevailed against plaintiff's claims for breach of fiduciary and quasi fiduciary duty, the trial court awarded plaintiff the full 39.2 she requested for this work.

This was error, the court must:

exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.

Mahler, supra, at 434.

The time spent opposing Windermere was clearly "unproductive:" Windermere prevailed on its summary judgment.

The trial court should have, but did not segregate time spent on unproductive and duplicative efforts from that spent prosecuting plaintiff's CPA claim.

A reasonable method of segregation, based on plaintiff's own work product, was suggested by defendants. CP 74-75; 78; 80-81. Given that both of plaintiff's Responses in Opposition to these Motions for Summary Judgment were of roughly equal length⁸, these commingled 39.2 hours should have been distributed equally, and no more than one half this time (19.6 hours) should have been taxed against defendants as fees.

The time spent in unsuccessfully opposing Windermere's summary judgment was clearly unproductive. Yet the trial court awarded plaintiff fees for all of this time.

Therefore, plaintiff's total fee request for time expended opposing summary judgment ($9.1 + 39.2 = 48.3$) should be reduced by the 28.7 hours ($9.1 + 19.6 = 28.7$) expended in her unsuccessful attempt to oppose Windermere's Motion for Summary Judgment.

Leaving aside for the moment the fact that plaintiff's efforts on summary judgment were divided among all her claims (the CPA claim and the other, ultimately unsuccessful claims), plaintiff is entitled to an award

⁸ Plaintiff's Response to Windermere's summary judgment totaled 20 pages; her Response to defendants' motion totaled 18 pages.

of fees for no more than 19.6 hours (total 48.3 – 28.7 = 19.6) of the time she spent opposing defendants’ motion for summary judgment.⁹

This amount should be further reduced by the fact that plaintiff was unsuccessful in opposing summary judgment against her claims against defendant for breach of fiduciary and quasi-fiduciary duty, two of plaintiff’s seven initial claims.

The court must limit the hours awarded by discounting “hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.” *Bowers v. Transamerica Title*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

b. Fees for Preparing Proposed Findings and Conclusions Entirely Rejected by the Trial Court:

Plaintiff’s attorney claimed to have expended 6.3 hours in August of 2006 preparing proposed Findings and Conclusions for the trial court. CP 61. Given that the trial court completely rejected plaintiff’s proposed draft, and was ultimately forced to prepare its own Findings and Conclusions, the time plaintiff’s attorney spent on this was wasted.

Fees should not be awarded for wasted time. *Mahler, supra*, at 434.

⁹ This approach presents, as the law requires, a reasonable method of segregating plaintiff’s attorneys fees. This question is more fully addressed infra.

c. Additional Fees for Work Performed Prior to Hiring, on Other Separate Litigation, and Other Duplicative and Unproductive Work:

Plaintiff sought to recover, and the trial court awarded, attorneys fees incurred in a separate unlawful detainer action. CP 47-48. However, plaintiff did not prevail in this unlawful detainer action, and the CPA was not litigated therein. Attorneys fees under RCW 19.86.090 can only be awarded to a plaintiff who prevails on a claim under the CPA.

The time records produced by plaintiff's attorney indicate some 8.1 hours expended on the unlawful detainer action in 2004. CP 47-48.

That the trial court awarded plaintiff fees incurred in opposing this separate and distinct action, is error. None of the fees incurred in plaintiff's unsuccessful attempt to resist eviction can be properly awarded under the CPA.

The first page of the fee records submitted by plaintiff's attorney seeks to recover fees for time expended prior to accepting representation. CP 47-48.

However, lawyers get paid after they agree to represent clients, not before. Undersigned counsel seriously questions whether it would be ethical to bill a client for time expended prior to hiring. These hours total some 4.9 hours and cannot be properly awarded.

d. Fees for Bringing an Unnecessary and Improper Motion for Fees to the Court of Appeals, After that Court had Explicitly Remanded this Issue to the Trial Court:

In early March and April of 2008 plaintiff moved the Court of Appeals for an award of fees and costs on appeal. However, the Court of Appeals had previously remanded this very question to the trial court for determination. CP 42.

When, after the Supreme Court's denial of review, this case was returned to the trial court, plaintiff sought, and the trial court awarded, the 2.2 hours plaintiff's attorney claimed based on her misguided attempt to seek her fees in the Court of Appeals. It's hard to even imagine a more wasteful expenditure of time.

The failure of plaintiff's attorney to simply read and comprehend the ruling of the Court of Appeals (see CP 96) wasted not only defendants' time in being forced to respond, but also that of the Court of Appeals in re-affirming its instruction that this very matter was to be brought before the trial court.

No fees can be awarded on this basis.

Fees cannot be awarded for wasteful and unproductive efforts.

Mahler, supra, at 434; *Bowers, supra*, at 597.

This, again, was clear error.

SUMMARY: The total number of hours claimed by plaintiff's attorney, 387.5 hours¹⁰, should be reduced by the above described 46.2 hours¹¹ illegitimately included in plaintiff's calculations. Therefore, of the total hours claimed, no more than an absolute maximum of 341.3 hours¹² can properly be awarded.

3. ISSUE: WHETHER THE TRIAL COURT ERRED IN FAILING TO SEGREGATE THE ATTORNEYS FEES AWARDED?

To the extent plaintiff's time is compensable at all, it should have been, but was not, segregated between time legitimately spent on plaintiff's CPA claim, and time spent on her other, unsuccessful claims.

To allow the trial court to calculate a "reasonable attorney's fee" under the lodestar method,

¹⁰ These are the total hours plaintiff claims to have expended prior to her motions of April 10, 2009: 328.7 (through trial) + 58.8 (on appeal) = 387.5.

¹¹ 27.7 hours on Windermere's summary judgment, 4.9 hours in pre-hiring fees, 5.1 hours in fees for time expended on the unlawful detainer action, 6.3 hours spent on preparing useless Findings and Conclusions, and 2.2 hours in mistakenly petitioning the Court of Appeals for a fee award.

¹² Note that defendants have (with some difficulty) extracted these numbers of plaintiff's claimed hours from the time records submitted with Ms. Huelsman's Declaration. These numbers may not conform to the figures requested in plaintiff's briefing.

[A]ttorneys must provide reasonable documentation of the work performed. This documentation need not be exhaustive or in minute detail... The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.

Bowers v. Transamerica Title, supra, at 597, emphasis added.

While segregation may, under certain limited circumstances be unnecessary, this is true *only if* “no reasonable segregation of successful and unsuccessful claims *can* be made” (*Mayer, supra*, at 693, citations omitted, emphasis added). In the case *sub judice*, however, defendants proposed a method based on plaintiff’s own work product, by which exactly such a reasonable segregation *can* be made. CP 74-75; 78; 80-81.

Plaintiff has presented neither evidence nor argument tending to indicate that the segregation method suggested by defendants is unreasonable in any respect.

Given that plaintiff, as the party seeking fees, has the burden of proof on the issue of reasonableness (*Mahler, supra*, at 433), plaintiff’s failure to even dispute the reasonableness of the method proposed by defendants, militates for the acceptance of this, in fact quite reasonable, method of segregation. If there is a reasonable way of segregating fees,

[T]he court must separate the time spent on those theories essential to the CPA and the time spent on legal theories relating to the other causes of action.

Travis v. Horse Breeders, 111 Wn.2d 396, 411, 759 P.2d 418 (1988).

Regardless, here the trial court failed to insist on (or even suggest) segregation, and awarded fees for every minute requested by plaintiff. This is error.

As indicated by the relative proportions of plaintiff's attorney's own work product, plaintiff is entitled to an award of fees for no more than a fraction of the total hours billed.

As to the award of fees for the specific hours requested by plaintiff at the various stages in this litigation:

a. Through Trial:

Here, despite the fact that plaintiff initially brought some seven (7) separate causes of action against defendants (nine (9) if one includes her somewhat incoherent claims under the Mortgage Broker's Act and TILA. CP 6) and only prevailed on one, she now seeks compensation for all the time expended by her attorney. However,

[A]ttorney fees should be awarded only for those services related to the causes of action which allow for fees.

Travis v. Horse Breeders, 111 Wn.2d 396, 410, 759 P.2d 418 (1988).

Plaintiff has suggested that all of her claims were so interrelated as to make segregation impossible, that, “all of the facts adduced at trial were necessary in order to prove her CPA claim.” CP 184. But this naked conclusion simply will not do:

[W]hile there may be an interrelationship as to the basic facts, the legal theories which attach to the facts are different. Thus the court *must* separate the time spent on those theories essential to the CPA and the time spent on legal theories relating to other causes of action.

Travis, supra, at 411, emphasis added.

Here, as in *Travis*, while there may be similarities as to the basic facts, the legal theories underlying plaintiff’s various claims (CPA, negligent and/or intentional infliction of emotional distress, unconscionability, fraud and/or fraud in the inducement, and breach of fiduciary or quasi-fiduciary duty) are quite distinct.

Breach of fiduciary duty or quasi-fiduciary duty requires proof of a confidential relationship of trust. For plaintiff to prove these claims she needed to prove such a relationship and a breach of that trust. Fraud requires proof of nine elements including (fatally in this case) proof of the misrepresentation of an existing fact. Unconscionability and infliction of emotional distress require proof of behavior that is outrageous or “shocks the conscience of the court.”

Contrarily, under her CPA claim plaintiff was required to prove that defendants' behavior was no more than unfair or deceptive. Almost any conduct, no matter how innocuous, that actually deceived plaintiff (and might deceive others), could meet this modest standard.

Regardless of the difficulty involved in segregation, the *Travis* decision makes it clear that the trial court *must* undertake the task if it can be done on a reasonable basis. *See also: Smith v. Behr Process*, 113 Wn.2d 306, 344-45, 54 P.3d 665 (2002); *and see: Mayer v. Sto Industries*, 123 Wn. App. 443, 460, 98 P.3d 116 (2004).

In reversing a trial court award of attorneys fees that had failed to segregate time spent on unsuccessful claims, the Supreme Court held:

Plaintiff prevailed only on one claim out of four. It does not appear that her successful and unsuccessful claims were inseparable, or that it would have been unnecessarily complex for her to have segregated her requests for attorneys fees among her four claims. Accordingly, we hold that the trial court erred in refusing to award plaintiff attorney's fees only for her successful claim of marital status discrimination.

Kastanis v. Educational Employees Credit Union, 122 Wn.2d 483, 502, 859 P.2d 26, 36 (1994).

In *Kastanis*, plaintiff had claimed for sexual discrimination, discrimination based on marital status, wrongful discharge, and infliction of emotional distress. These four claims are no less, and perhaps more, interrelated than the seven separate claims brought before the court by Ms.

Pace-Knapp. If it was error to fail to segregate Kastanis' three unsuccessful claims, it is likewise error to fail to segregate Ms. Pace-Knapp's six unsuccessful claims.

Under the lodestar methodology, "[T]he party seeking fees bears the burden of proving the reasonableness of the fees." *Mahler, supra*, at 433-434, citations omitted. Plaintiff made little or no effort to carry this burden. Yet the trial court granted all the fees requested.

In this case reasonable segregation is relatively simple. Plaintiff's attorney's work product itself indicates the extent to which only a fraction of plaintiff's attorney's efforts were directed to her CPA claim.

Plaintiff's Complaint totals eight pages, but less than one page is devoted to her CPA claim.¹³

Plaintiff's response to Pelascini and Boboth's Motion for Summary Judgment totaled 18 pages, but less than two of those pages are devoted to plaintiff's CPA claim.¹⁴

Plaintiff's trial brief totaled twenty-seven pages, yet only three of those pages were directed to the CPA claim.

¹³ The numbers of briefing pages set forth here duplicate the numbers used in defendants' Response brief in the trial court. CP 74-84. Plaintiff has never disputed these numbers.

¹⁴ This question was previously addressed in detail regarding plaintiff's fees in opposing the defendants' and Windermere's simultaneous Motions for Summary Judgment. That discussion will not be repeated here.

On this basis, if fees are awarded at all, a reasonable segregation of the time plaintiff's attorney spent on her CPA claim and the time spent on her other, unsuccessful claims, should be in the proportion of one (1) to nine (9). Thus, of the total of 282.5 hours that could be claimed by plaintiff through trial (after deduction of the above-described unproductive, wasteful, and duplicative time), the court should have awarded fees for no more than 31.4 hours.

It may be argued that any fee award should take into account the alleged interrelationship of basic facts. Even granting this (for the sake of argument), and including the entire "fact" statement sections contained in plaintiff's attorney's work product, based on the number of claims and theories on which plaintiff was unsuccessful and the ratios revealed by plaintiff's attorney's work product, the proportion of the fees requested that should actually be awarded should not exceed one to five, i.e., plaintiff should be awarded fees for no more than 56.5 hours through trial for the only claim she prevailed on - the CPA claim.

Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel.

Mahler, supra, at 434-435, citations omitted.

[T]he trial court, instead of merely relying on the billing records of the plaintiff's attorney, should make an independent decision as to what represents a reasonable amount for attorney fees. The amount actually spent by the plaintiff's attorney may be relevant, but it is in no way dispositive.

Nordstrom v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987)¹⁵

In this case the trial court took *no* active role and made *no* independent decision in awarding fees. The trial court merely rubber-stamped plaintiff's fee request, awarding plaintiff *all* the fees requested by her attorney.

This is error.

b. On Appeal to Court of Appeals:

Plaintiff's attorney claimed a total of 58.8 hours expended on this case in the appellate courts. CP 43. However, of these hours, 20.3 involved plaintiff's Response to defendants' Petition for Review to the Supreme Court. Fees for these hours should not have been awarded by the trial court: The Supreme Court ordered plaintiff to submit an affidavit regarding these fees (and costs) to the Supreme Court Clerk for determination. CP 99. Plaintiff failed to do this, and by so failing, waived her right to recover these fees.

¹⁵ Here of course no one can say how many hours plaintiff's attorney actually spent: plaintiff's time records were re-created and approximated after the fact.

As previously discussed herein, another 2.2 of the hours claimed by plaintiff's attorney were incurred when plaintiff moved the Court of Appeals for an award of fees and costs, *after* that court had remanded this very question to the trial court for determination. No fees can be awarded on the basis of this motion: Fees cannot be awarded for wasteful and unproductive efforts. *Mahler, supra*, at 434; *Bowers, supra*, at 597.

Thus, plaintiff is entitled to a fee award for *no more* than 36.3 of the hours her attorney expended on appeal.¹⁶ Yet the trial court awarded fees for the full 58.8 hours requested. CP 184.

Moreover, that remainder of 36.3 hours must (like all fees awarded under the CPA) be contemporaneously documented, and segregated from time expended on unsuccessful claims.

We decline to grant plaintiffs' request for attorney fees for several reasons... the total plaintiffs requested includes attorney time for the entire appeal, which consisted of approximately 13 issues not related to Consumer Protection Act claims. The entire amount requested, therefore, cannot be lumped together and awarded under the Consumer Protection Act... Third, the attorney fee declaration plaintiffs filed with this court does not segregate those hours spent pursuing Consumer Protection Act claims from hours spent pursuing the several other issues raised. The request for attorney fees is denied.

Schmidt v. Cornerstone Investment, 115 Wn.2d 148, 170-71, 795 P.2d 1143 (1990), citations omitted.

¹⁶ $58.8 - 20.3 = 38.5 - 2.2 = 36.3$.

On the prior appeal to this court the parties only addressed two issues: the trial court's grant of rescission (based on fraud in the inducement) and the CPA claim. Segregation of plaintiff's time on appeal starts with this fact. Defendants prevailed on the question of rescission; plaintiff prevailed in regard to the CPA. CP 94-96.

Here again it is useful to look at plaintiff's work product in determining a reasonable segregation: Plaintiff's responsive brief to the Court of Appeals totaled 33 pages, but only 8-9 of those pages discussed the CPA issues. The issues regarding rescission are quite distinct from those raised by plaintiff's CPA claim.

Defendants, not plaintiff, prevailed on the rescission issue. Therefore, even if the entire statement of facts were germane to plaintiff's CPA claim (and it is not), plaintiff should be awarded fees for no more than one-quarter to one-third of the time she can claim to have expended in the Court of Appeals.¹⁷

Despite this, the trial court yet again awarded plaintiff fees for all the time plaintiff requested. This is error.

[T]he time a party spends developing theories essential to the CPA claim *must* be segregated from time spent on other legal theories relating to other causes of action.

¹⁷ After subtraction of the time spent responding to defendants' Petition for Review.

Mayer v. Sto Industries, supra, at 459, emphasis added; and see: *Sign-O-Lite Signs v. Delaurentis Florists*, 64 Wn.2d 553, 566, 825 P.2d 714 (1992).

c. For Opposing Petition to Supreme Court:

i. *Failure to Submit Fee Request Pursuant to Supreme Court Order:*

As discussed, the trial court awarded plaintiff fees incurred in responding to defendants' Petition for Review to the Supreme Court.

However, plaintiff failed to timely submit an affidavit of the fees she claimed to the Supreme Court Clerk pursuant to RAP 18.1(d) and that court's order. CP 99.

This failure precludes an award of these attorneys fees. *Nate Leasing Co. v. Wiggins*, 114 Wn.2d 508, 521-22, 789 P.2d 89 (1990); *Dobbins v. Commonwealth Aluminum Corp.*, 54 Wn. App. 788, 794, 776 P.2d 139 (1989).

The Supreme Court's Order awarding fees (CP 99) was explicitly based on RAP 18.1(j), which provides that "The commissioner or clerk of the Supreme Court will determine the amount of fees..." That section further provides:

[T]he party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d).

RAP 18.1(j). RAP 18.1(d) requires the submission of a fee declaration within ten days.

The Supreme Court's Order denying defendants' Petition for Review (CP 99) echoes these rules: To recover her fees plaintiff was required to submit a proper affidavit to the Supreme Court Clerk within ten days of that ruling. Plaintiff's failure to do so precludes any award of her fees in opposing defendants' Petition.

Plaintiff is entitled to no award for time expended responding to defendants' Petition for Review.

ii. *Failure to Segregate:*

In plaintiff's Response in Opposition to defendants' Petition for Review, plaintiff raised the question of whether the Court of Appeals had erred in reversing the trial court's grant of rescission.¹⁸ Plaintiff devoted a substantial percentage of her Answer in Opposition to defendants' Petition for Review to the rescission question.

Even if the 20.3 hours plaintiff claims for opposing this Petition are granted (and, based on RAP 18 and the Supreme Court's Order, they should not be), this time should also be segregated based on the ratio between the amount of plaintiff's attorney's work product devoted to her

¹⁸ Defendants' Petition for Review only addressed the CPA issues, plaintiff independently raised extensive argument on the issue of rescission.

unsuccessful rescission argument and the CPA claim. Defendants'

Petition for Review never addressed the rescission issue.

B. ISSUES PERTAINING TO DAMAGES:

1. **ISSUE: WHETHER THE TRIAL COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST ON AN UNLIQUIDATED CLAIM?**

In addition to improperly awarding plaintiff's attorneys fees, the trial court granted plaintiff an unjustified award of pre-judgment interest on damages.

The rule in Washington is that interest prior to judgment is allowable (1) when an amount is "*liquidated*" or (2) when the amount of an unliquidated claim is for an amount due upon a specific *contract* for the payment of money *and* the amount due is *determinable by computation with reference to a fixed standard contained in the contract*, without reliance on opinion or discretion.

Prier v. Refrigeration Eng'r Co., 74 Wn.2d 25, 32, 442 P.2d 621 (1968), citations omitted; *see also: Mahler v. Szucs*, 135 Wn.2d 398, 429, 957 P.2d 632 (1998), emphasis added.

A liquidated amount is "a sum of money *whose exact amount is fixed and known.*" *Id.*, emphasis added, citations omitted.

At trial there was conflicting testimony and evidence as to the value of the property. The amount of damages (market value less sale price equaling lost equity) remained disputed, unfixed and unknown until

the trial court's decision, October 16, 2006. Only *after* the trial court fixed the market value of the property, was the amount of damages known.

Nevertheless, plaintiff requested, and the trial court granted \$43,579 in pre-judgment interest, calculated from the date of sale (6 years, 228 days) to the date of judgment. CP 183.

No award of pre-judgment interest should have been granted prior to the trial court's decision on October 16, 2006. Until that time all damage amounts were unliquidated, unfixed.

2. ISSUE: WHETHER THE TRIAL COURT ERRED IN AWARDING DUPLICATIVE INTEREST?

Not only did the trial court improperly award \$43,579 in pre-judgment interest from the date of sale (6 years, 228 days) to the date of the entry of judgment (June 12, 2009), it also awarded additional interest in the amount of \$16,020 for the period between March 17, 2008 and June 12, 2009, the date of judgment. CP 179. By doing so, the trial court assessed interest on the latter period (3/17/08 to 6/12/09) twice.

In Washington, compound interest is never implied- it is permitted only by express language in a statute or agreement.

Caruso v. Local 690, 50 Wn. App. 688, 689, 749 P.2d 1304 (1988); *and see: Goodwin v. Northwestern Mutual Life Ins.*, 196 Wn. 391, 404, 83 P.2d 231 (1938).

The difference between the \$164,000 (paid by plaintiffs) and \$226,100 (and the fair market value) is \$62,100. When this sum is reduced by the \$7,353 defendants paid plaintiff on sale, the total equals the \$54,747 awarded as actual damages, the amount of plaintiff's lost equity. CP 183. The trial court added to this amount \$1,200 in excess rental payments and \$10,000 in treble damages under the CPA.¹⁹

The trial court also added to this amount the \$43,579 in pre-judgment interest it had awarded, and reached a total of \$109,526, which it identified as "Total Damages." CP 183. Neither this interest, nor the \$10,000 of CPA punitive damages should have been included in the total of actual damages.

The trial court exacerbated this error by inserting this \$109,526, so-called "Total Damages" into the Judgment, and identifying it as the "Amount of Judgment." CP 178,

Further compounding the problem (and the interest), the trial court then granted the above-referenced additional \$16,020 in double interest on that \$109,526, charging this interest from the date of the Court of Appeals ruling (March, 2008) to the date of entry (June, 2009).

¹⁹ However, this amount should have been no more than \$6,767: *something* must have been trebled. The way the trial court calculated this amount, it is not a trebling of damages, but simply a flat fine in the amount of \$10,000.

However, the pre-judgment interest (\$43,579) granted for the period between the date of sale (6 years and 228 days prior to the entry of Judgment) and the date of entry of the judgment (June, 2009) already includes interest from the date of the Court of Appeals ruling (March, 2008) to the date of judgment.

The trial court's Judgment not only improperly awarded interest on interest, it also imposed interest on the period from March, 2008 to June 2009 twice: first as pre-judgment interest on the lost equity from the date of sale to the entry of Judgment (June, 2009), then again on the "Total Damages/Amount of Judgment" from the date of the Court of Appeals ruling (March, 2008) until the date of entry.

This is clear error.

3. ISSUE: WHETHER THE TRIAL COURT ERRED IN FASHIONING ITS JUDGMENT, WHICH INCLUDED INTEREST AWARDED AS A DAMAGE, LEADING TO THE POTENTIAL FOR FURTHER COMPOUND INTEREST?

Not only has the trial court improperly awarded pre-judgment interest, erroneously charged interest on that interest, and done so twice from March, 2008 until June, 2009, it has also created the real possibility that further interest will be awarded on this interest post-judgment.

Because the “Amount of Judgment” is identified as \$109,525 (CP 178), which includes the \$43,579 in pre-judgment interest, it would seem that post-judgment interest could be assessed against that amount: still more interest on interest.

Unless a statute specifically provides for the compounding of interest, there is no authority for its application.

Caruso, supra, at 690.

As the Washington State Consumer Protection Act does not provide for the compounding of interest, the trial court’s judgment is again in error.

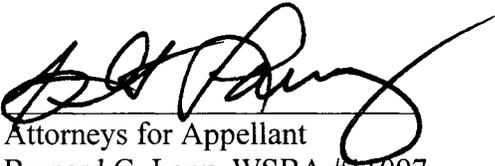
VI. CONCLUSION

Defendants ask this court to vacate the trial court’s Judgment, adopt the reasonable method of segregation based on plaintiff’s attorney’s work product as suggested by defendants, and remand the case to the trial court with specific instructions regarding a proper calculation of damages, interest, and attorneys fees.

DATED this 9th day of December 2009.

Respectfully Submitted,

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