

63758-4

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CASE NO. 63758-4-I

Court of Appeals  
of the State of Washington  
Division I

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

Appellants,

v.

VILA PACE-KNAPP

Respondent.

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APPELLANTS' REPLY BRIEF

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## I. STATEMENT OF THE CASE

Initially it should be noted that the brief entitled “Respondent’s Reply to Appellants’ Opening Brief” (hereinafter the “Response”) concedes that the \$16,020 in interest that appears in the Judgment entered by the trial court is duplicative, and was awarded in error. Response, pp. 8, 24-25.

It is also worth noting that respondent (hereinafter “plaintiff” or “Ms. Pace-Knapp”) has chosen to all but abandoned her argument for an award of attorneys fees for opposing appellants’ (hereinafter “defendants”) Petition for Review to the Supreme Court. (Response, p. 6) This is only reasonable: One must assume that any attorney whose time is billed at \$275-300 per hour is fully capable of reading and understanding the Supreme Court’s ruling on that Petition and the rules referenced therein. (See CP 99 and RAP 18.1) If Ms. Pace-Knapp’s attorney did read and understand this order, her failure to timely file an “affidavit with the Clerk of the Washington State Supreme Court” as that order required, was a waiver of her right to recover those fees. Therefore, the trial court’s

subsequent award of those fees was also in error.<sup>1</sup> 20.3 x \$275 = \$5,582.50.

In her Response, Ms. Pace-Knapp also concedes that post-judgment interest should only be awarded on the damages awarded by the trial court, \$65,947, and not on the \$109,526 that appears in the Judgment entered by the trial court. Response, p. 25; and see CP 178.

That said, the following contested issues remain before this court for resolution:

## II. ARGUMENT

### A. THE TRIAL COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST FROM THE DATE OF SALE.

The trial court assessed \$43,579 in pre-judgment interest on Ms. Pace-Knapp's actual damages from the date of sale to the date of entry of Judgment. CP 183

In her Response Ms. Pace-Knapp contends "her damages could be fixed and measured prior to entry" (Response, p. 6) and that the property's fair market value was "fixed and known." Response, p. 24.

In a very limited sense, this is true enough. These numbers were fixed and known *after* the trial court's oral ruling on June 7, 2006, but they

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<sup>1</sup> Ms. Pace-Knapp does not dispute that the trial court awarded her fees for 20.3 hours for her attorneys work on this Petition. See Appellants' Opening Brief, p. 24.

could not have been fixed or known prior to that date, and most certainly were not fixed on the date of sale. Though other evidence was introduced at trial<sup>2</sup>, on the date of sale, the *only* concrete evidence of fair market value was the actual sale price paid by defendants, \$164,000. CP 14. If this, rather than the \$226,100 value the trial court set years later (CP 15), was the fair market value, then plaintiff suffered no damages on which pre-judgment interest *could* accrue; she was paid fair market value.

Thus, liquidated damages (if awarded at all) should have been calculated from the date of the trial court's oral ruling (not the date of sale) to the date of entry of judgment. This period (from June 7, 2006 to June 12, 2009) is three years and five days, *not* "6 years and 228 days" as set forth in the Additional Findings. CP 183. The amount of these actual damages was established at \$55,947 in the trial court's oral ruling and the Additional Findings (CP 183). Simple interest at the rate of 12% on \$55,947<sup>3</sup>, for a period of three years and five days, is \$20,229<sup>4</sup>, *not* \$43,579.

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<sup>2</sup> At trial plaintiff testified to her opinion that the property was worth \$300,000; Defendants' expert testified to a fair market value of \$184,000. CP 15.

<sup>3</sup> Pre-judgment interest cannot be awarded at all on the CPA trebled damages. These were not awarded until the judgment was entered in June of 2009.

<sup>4</sup> 1,100 days with a per diem of \$18.39

Ms. Pace-Knapp seems to be contending that because, *after* the trial court ruled on damages and fair market value those amounts were fixed and known, therefore, those amounts were fixed and known at the time of sale.

If this is a proper basis for liquidated damages, then every award of damages is eligible for an award of pre-judgment interest: Under plaintiff's analysis, after a trial court (or jury) rules on the amount of damages, that amount is fixed, and relates back to the time of injury. Then, because they are fixed, those damages ground an award of pre-judgment interest from the time of injury.

For example, under plaintiff's analysis, if one is injured in a car accident and two years later a fact-finder assesses damages in the amount of \$10,000, then the injured party is entitled to two years of pre-judgment interest on this \$10,000.

This approach cannot be conformed to the case law,

Prejudgment interest is allowed in civil litigation... when a party to the litigation retains funds rightfully belonging to another and *the amount at issue can be calculated without reliance on opinion or discretion.*

*Mahler v. Szucs*, 135 Wn.2d 398, 429, 957 P.2d 632 (1998), citations omitted, emphasis added.

Pre-judgment interest cannot be awarded here because the amount of Ms. Pace-Knapp's damages were not, and could not be "calculated" until the trial court exercised its discretion (after weighing the lay and expert opinions expressed at trial) to set a fair market value for the property.

When the amount of damages to be awarded involves the exercise of a fact-finder's discretion, the sum ultimately awarded is not liquidated, and will not properly base an award of pre-judgment interest. *Styrk v. Cornerstone Investments*, 61 Wn. App. 463, 469-470, 810 P.2d 1366 (1991).

**B. MS. PACE-KNAPP'S FAILURE TO PROVIDE CONTEMPORANEOUS TIME RECORDS RENDERS THE RECORDS PROVIDED MERELY SPECULATIVE AND INADEQUATE TO GROUND AN AWARD OF FEES.**

Ms. Pace-Knapp's attorney admits that some (unidentified) portion of the time records she submitted to the trial court, and upon which the trial court awarded fees, were "approximated" or "recreated" (CP 32, 114), i.e., an after-the-fact guess. This amounts to mere speculation, and as such cannot serve as an evidentiary basis for a fee award.

Counsel must provide contemporaneous records documenting the hours worked.

*Mahler, supra*, at 434.

One obvious purpose of requiring contemporaneous documentation is to avoid attorneys approximating or re-creating their time in increased or higher amounts *after* learning they are to be awarded attorneys fees by the court. Contemporaneous record keeping guards against the natural human tendency to exaggerate time records created under these circumstances. The point is to award fees for the actual work performed, not the work that might have been performed, could have been performed, or would have been performed had the attorney known fees would be awarded.

Plaintiff, somewhat vaguely, admits that her time records

were not “contemporaneous” as the phrase (sic) is used in cases allowing the award of attorneys fees and costs

(Response, p. 16)<sup>5</sup>, but contends the case law requiring contemporaneous recording is mere *dictum*, and questions whether the word “contemporaneous” is sufficiently defined. *Id.*, p. 17.

RCW 5.45.020, which defines business records as evidence, states that such records are evidentiary if made “at or near the time of the act, condition, or event.” See Appendix A. Dictionaries are also useful in defining words:

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<sup>5</sup> Ms. Pace-Knapp had little choice in this given the record created by her attorney’s previous declarations. See CP 32, 114.

Contemporaneous: existing or happening in the same period of time.

Webster's New World Dictionary of the American Language, World Publishing, 1968, p. 306.

Applying these definitions to the contemporaneous recording question here presented, one might conclude that the word "contemporaneous" means time records should be recorded at or near the time in which the work occurred. Yet here, it is impossible to ascertain *when* plaintiff's attorney's records were created: They may have been created immediately after the work in question was performed, or the next day, or a week, month, or year later.

In fact, nothing in the appellate record contradicts the conclusion that these records were created the day Ms. Pace-Knapp's attorney filed her "approximated" or "re-created" time records with the court, as much as four years after performance of the work in question. Such records are not contemporaneous documentation. They are not evidence and cannot properly ground an award of attorneys fees.

The lodestar method employed in Washington,

allows a court to reach a reasonable attorney fee based on *actual and true evidence*, adjusting the rate for other variables.

*In re Dynan*, 152 Wn.2d 601, 617, 98 P.3d 444 (2004), emphasis added.

Here, while the trial court adjusted the rate by a multiplier of .15, it totally disregarded the requirement for “actual and true evidence.”

The time records submitted by Ms. Pace-Knapp’s attorney are mere speculation. See Defendants’ Objections and Motion to Strike, CP 101-103. The record on review consists of plaintiff’s attorney’s guesses (after-the-fact “approximations”) as to the work performed. As such, this record contains *no* competent evidence of the hours of work performed.

The burden of proving fees “always remains on the fee applicant.” *Absher Const. Co. v. Kent School District No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1990).

Ms. Pace-Knapp has failed to carry the burden of proving her fees and is not entitled to an award.

C. THE TRIAL COURT ERRED IN AWARDING FEES FOR WASTED, DUPLICATIVE AND UNPRODUCTIVE EFFORT.

Ms. Pace-Knapp does not deny that the trial court awarded her attorneys fees for every minute of time she requested. See Appellants’ Opening Brief, pp. 5-6. Yet much of this work was wasteful, duplicative, and performed on unsuccessful claims. Awarding fees for such work is error. *Pham v. Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007),

For example:

1. Time Spent on Unsuccessfully Opposing Windermere's Motion for Summary Judgment:

Ms. Pace-Knapp claims that her Responses to the two Motions for Summary Judgment were “virtually identical,” differing by only “a couple of pages.” Response, pp. 18-19. No evidence, and nothing in the appellate record supports this allegation, and it should be disregarded in its entirety.<sup>6</sup>

In any event, this unsubstantiated allegation begs the question: Plaintiff is arguing that because her briefs in opposition to summary judgment duplicate each other, all her billed time on this project can be properly awarded. If plaintiff's briefs in opposition to summary judgment duplicate each other, they are duplicative, by definition, regardless of their success or lack thereof. Fees cannot be awarded for unsuccessful *or* duplicative work. *Pham, supra*, at 538

If Ms. Pace-Knapp's responses to these two motions required a total of 48.3 hours (see Appellants' Opening Brief, pp. 11-12), and she prevailed on only one of these two, she is not entitled to an award of fees for all of this time.

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<sup>6</sup> Ms. Pace-Knapp's citation, to 2008 Wash. App. Lexus No. 1485, an unpublished opinion, should also be stricken and disregarded pursuant to GR 14.1. (See Response, p. 18)

Ms. Pace-Knapp's own time records reflect at least 9.1 hours exclusively devoted to Windermere's motion. CP 53-57. Those records do not specify to which motion the remaining 39.2 hours were directed. Perhaps this is another of the problems associated with "approximating" and "re-creating" time records but, if so, that problem cannot excuse the additional and subsequent failure to segregate.

On summary judgment plaintiff not only lost to Windermere, she also lost her claims for breach of fiduciary and quasi-fiduciary duty against defendants. Given that fees are only awarded for successful claims, Ms. Pace-Knapp cannot be entitled to an award of fees for every minute she worked on these two responses. While documentation "need not be exhaustive or in minute detail," in awarding fees

The court *must* limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated or otherwise unproductive time.

*Bowers v. Transamerica Title*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983)

2. Time Spent Petitioning this Court for Fees on Appeal, After this Court Remanded that Issue to the Trial Court:

As set forth in Appellants' Opening Brief (pp, 16-17), the trial court awarded Ms. Pace-Knapp her attorneys fees for seeking a fee award from this court, after this court had remanded the fee issue to the trial

court. CP 42. That discussion will not be repeated here. It is, however, hard to imagine a more perfect illustration of wasted effort.<sup>7</sup>

3. Pre-hiring Time Expended on a Separate and Unsuccessful Cause of Action:

According to Ms. Pace-Knapp's attorney's time records, prior to accepting representation that attorney expended substantial time in researching or preparing (it's unclear which) a motion for reconsideration opposing Ms. Pace-Knapp's eviction in a separate unlawful detainer action brought by defendants. CP 47-48. No Motion for reconsideration was filed.

Attorneys fees may only be awarded for work on successful claims. *Mahler, supra*, at 434; *Schmidt, supra*, at 169-170.

These fees were also erroneously awarded by the trial court. See Appellants' Opening Brief, p. 15.

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<sup>7</sup> In this regard, one must additionally question whether any attorney who is incapable of reading and complying with court orders is really worth \$275-300 per hour

D. THE TRIAL COURT ERRED IN FAILING TO EVEN ATTEMPT TO REASONABLY SEGREGATE THE TIME EXPENDED BY MS. PACE-KNAPP'S ATTORNEY ON UNSUCCESSFUL CLAIMS FROM THE TIME SPENT ON HER CPA CLAIM.

The trial court's Additional Findings state that "all of the facts adduced at trial were necessary to prove (Ms. Pace-Knapp's) CPA claim." CP 184.

On this conclusory basis, standing alone, the trial court awarded Ms. Pace-Knapp's attorney fees for all the time she (and her unidentified and unqualified paralegal) worked on the entire case.<sup>8</sup>

Ms. Pace-Knapp brought to court some 8 causes of action: fraud, fraud in the inducement, breach of fiduciary duty, breach of quasi-fiduciary duty, intentional infliction of emotional distress (outrage), negligent infliction of emotional distress, unconscionability, and violation of the CPA. See CP 15-18; 5-8. She sought damages, as well as restitution by way of rescission. CP 8. While all eight of these claims require proof of resulting damages, proof of the facts making up the breaches of the various duties (predicating the award of resulting damages on each of these various claims), differ quite substantially.

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<sup>8</sup> And, as if this were not enough, added a multiplier.

Proof of unconscionability focuses on the parties agreement and its written expression as well as the relationship between the parties. Proof of fraud or fraud in the inducement requires proof of nine elements, including intentional misrepresentation of an existing fact<sup>9</sup>, justifiable and actual reliance. Proof of outrage requires evidence of intentional and extreme conduct. Proof of negligent infliction of emotional distress requires evidence of a special relationship and special injuries. Proof of a breach of fiduciary or quasi-fiduciary duty focuses on evidence of a close relationship, characterized by trust and justifiable reliance.

In contrast to the evidence and issues raised by these unsuccessful claims, (apart from resulting damages) proof of a CPA claim requires only proof of a unfair act in the course of trade or commerce that potentially impacts the public interest.

Segregation may not be simple, it may even be complex, but, to allow a plaintiff, on the basis of complexity alone, to avoid all segregation and all effort to segregate, while still to recovering all his fees would be unjust. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 850, 726 P.2d 8 (1986).

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<sup>9</sup> Which plaintiff failed to prove. CP 16.

The parties' briefing on the first appeal brought to this court clearly illustrates the complexities created by Ms. Pace-Knapp's attempt to seek both rescission and damages. Plaintiff's brief on that appeal devoted at least as much space to the issue of rescission, as it did to that of the CPA. While Ms. Pace-Knapp obtained an award of damages, she was not, despite her attorney's strenuous efforts, successful on her claim for rescission. Nevertheless the trial court awarded plaintiff fees for all of the time claimed by her attorney, both at trial and on appeal.

Of the eight causes of action pursued by Ms. Pace-Knapp, she failed to prevail on seven. The great weight of authority under Washington case law requires segregation: See, e.g.: *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998); *Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 795 P.2d 1143 (1990); *Travis v. Horse Breeders*, 111 Wn.2d 396, 759 P.2d 418 (1988); *Nordstrom v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987); *Bowers v. Transamerica Title*, 100 Wn.2d 581, 675 P.2d 193 (1983); *Mayer v. Sto Industries*, 123 Wn. App. 443, 98 P.3d 116 (2004); *Smith v. Behr Process*, 113 Wn.2d 306, 54 P.3d 306 (2002); *Sign-O-Lite Signs v. DeLuarentis Florists*, 64 Wn. App. 553, 825 P.2d 714 (1992).

There is however a secondary line of authority (usually appearing as *dictum*) suggesting that fees may be awarded regardless of the failure to segregate when the trial court finds that the issues are so intertwined that no reasonable segregation of successful and unsuccessful claims can be made. *See: e.g., Mayer, supra*, at 693. In *Mayer*, the appellate court relied on the trial court's "clear explanation" of why segregation was impossible. *Id.* However, in the case *sub judice*, the trial court provides *no* explanation, still less a "clear explanation," of its failure to segregate.

Ms. Pace-Knapp seems to believe that the mere conclusory incantation of the magic words that "all of the facts adduced at trial were necessary to prove her CPA claim" (CP 184) is enough to relieve the trial court of any obligation to even attempt to reasonably segregate. This is simply not so. Despite the trial court's express finding that the issues were "intertwined" and could not be separated out, the appellate court, in *Smith v. Behr Process, supra*, reversed the trial court's award of fees stating,

Regardless of the difficulty involved in segregation, the *Travis* court made it clear that the trial court has to undertake the task.

*Id.*, at 344-345. Oddly, plaintiff cites this very case in support of the proposition that there is no need to segregate. Response, p. 11.

In *Scott Fetzer Company v. Weeks*, 114 Wn.2d 109, 121, 786 P.2d 265 (1990), the court rejected the mere incantation of the phrase “fair play and substantial justice” as a basis on which to award fees. As the court noted following remand, this phrase gives “little guidance to either the trial or the appellate courts.” *Scott Fetzer Company v. Weeks*, 122 Wn.2d 141, 148, 859 P.2d 1210 (1993).<sup>10</sup>

In *Scott Fetzer*, the trial court had initially awarded fees in the amount of \$180,000 on a \$19,000 claim. After reversal and remand by the Court of Appeals, the trial court reduced this fee award to some \$72,000. *Scott Fetzer, supra*, 122 Wn.2d, at 143. The Washington State Supreme Court, reviewing the \$72,000 amount set after remand, noted:

While the amount in dispute does not create an absolute limit on fees, that figure’s relationship to the fees requested or awarded is a vital consideration when assessing their reasonableness.

*Id.*, at 150. That court then reduced the fees awarded by the trial court to \$8547.15. *Id.*, at 156.

In the case *sub judice*, plaintiff prevailed on her CPA claim and was awarded \$65,947 in damages, and additionally awarded attorney fees compensating plaintiff for every hour her attorney claimed to have put in

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<sup>10</sup> “[T]he court should provide a record for the basis of its fee award...” *In re Dynan*, 152 Wn.2d 601, 615, 98 P.3d 444 (2004), fn. 15, citations omitted.

on the litigation, even though plaintiff failed to prevail on seven other causes of action and on her request for rescission. The attorneys fees awarded by the trial court (\$134,425.20, CP 179) more than doubled the amount of plaintiff's recovery. This is a "vital consideration," and one that this court cannot evaluate given the complete absence of an adequate record on which to do so.

Where a plaintiff achieves only limited success, the trial court should award only an amount of fees that is reasonable in relation to the result obtained. *Pham, supra*, at 540.<sup>11</sup>

Defendants' suggested a reasonable method of segregation based on Ms. Pace-Knapp's attorney's actual work product. See Appellants' Opening Brief, pp. 22-26. The trial court rejected this method, without explanation.

Contrary to Ms. Pace-Knapp's contention<sup>12</sup>, the method defendants suggested did take into account the possibility that the facts were "intermingled," and suggested altering the applicable ratios accordingly. See Appellants' Opening Brief, pp. 23 and 26.

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<sup>11</sup> For this proposition, the *Pham* court cites with approval to *Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1940).

<sup>12</sup> Response, p. 22.

While this “work product” method might be applied too mechanically and rigidly, it’s hard to imagine a method more mechanistic than that actually applied by this trial court: Plaintiff was awarded fees for every minute of time she claimed. If plaintiff’s attorney claimed it, the trial court awarded it.

[T]he trial court, instead of merely relying on the billing records of plaintiff’s attorney, should make an independent decision as to what represents a reasonable amount for attorney fees.

*Nordstrom, supra*, at 744.

The work product segregation method suggested by defendants could certainly, as a minimum, be utilized by the trial court as a starting point for making a reasonable segregation of fees: After applying this method, the trial court could, at its discretion, based on its first-hand perspective, adjust the resulting award to reach a fair result.

Unfortunately, on the record before this court it appears that the trial court exercised no discretion at all, merely rubber-stamping the Ms. Pace-Knapp’s fee request.

Courts must take an *active* role in assessing the reasonableness of fee awards... Courts should not simply accept unquestioningly fee affidavits from counsel.

*Mahler, supra*, at 435.

Here the trial judge abdicated that “active role.” Even under an abuse of discretion standard this is error. When it is incumbent on the trial court to exercise discretion, the failure to exercise any discretion at all, while itself discretionary, is a manifest abuse of discretion: an “exercise of discretion on untenable grounds or for untenable reasons.” *Pham, supra*, at 538.

### III CONCLUSION

Defendants’ ask this court to reverse the Judgment entered by the trial court and remand the case for recalculation of a proper and accurate award of damages and attorneys fees.

DATED this 12<sup>th</sup> day of February 2010.

Respectfully Submitted,

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**C**

West's Revised Code of Washington Annotated Currentness

Title 5. Evidence (Refs & Annos)

Chapter 5.45. Uniform Business Records as Evidence Act (Refs & Annos)

→ **5.45.020. Business records as evidence**

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

CREDIT(S)

[1947 c 53 § 2; Rem. Supp. 1947 § 1263-2. Formerly RCW 5.44.110.]

Current with all 2009 legislation

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**APPENDIX A**