

**FILED**

**JUL 27 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 293793

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

---

DONALD J. ROKKAN, individually; and DONALD J.  
ROKKAN, personal representative for the Estate of Marsaelle  
F. McHale, deceased,  
Appellant,

v.

GESA CREDIT UNION, a Washington non-profit corporation;  
and PAULA MILLER and JOHN DOE MILLER,  
Respondents.

---

SUPPLEMENTAL BRIEF OF RESPONDENTS

---

Lucinda J. Luke WSBA #26783  
Pamela E. Peterson WSBA #27885  
COWAN MOORE STAM LUKE PETERSEN & CARRIER  
503 Knight Street, Suite A  
Richland, Washington 99352  
(509)943-2676  
Attorneys for Respondents

**ORIGINAL**

TABLE OF CONTENTS

I.	IDENTIFICATION OF PARTIES.....	1
II.	SUMMARY OF RESPONSE.....	1
III.	RELIEF REQUESTED.....	3
IV.	STATEMENT OF THE CASE.....	3
	A.    Gesa’s Statement of Procedural Facts Specifically Related to Rokkan’s Failure to Timely File His Appeal.....	4
	B.    Gesa’s Statement of Facts .....	7
V.	ARGUMENT.....	12
	A.    Standard of Review.....	12
	1. Dismissal of Claims.....	12
	2. Preclusion of Evidence.....	13
	3. Denial of Judgment as a Matter of Law.....	14
	4. Conclusions of Law.....	15
	B.    Rokkan’s Legal Argument on Review Far Exceeds the Scope of His Appeal.....	16
	C.    Response to Rokkan’s Assignment of Error No. 1: The Trial Court Properly Dismissed Rokkan’s Consumer Protection Act Claims.....	16
	1.    Rokkan Did Not Meet the Requirement for a Prima Facie Case of Violation of the Consumer Protection Act.....	16
	2.    The Consumer Protection Act is Pre-Empted by Federal Law...	19

D.	Response to Rokkan’s Assignment of Error No. 2: Evidence at Trial was Not Sufficient to Support Rokkan’s Claims That Gesa Employees Were Negligent....	27
	1. The Evidence at Trial Supported That Paula Miller Did Not Breach Any Duty and Did Not Engage in Self-Dealing (Rokkan’s Issue #2)..	27
	2. If Gesa Employees Provided Legal Advice, They Could Be Subjected to Prosecution for the Unauthorized Practice of Law (Rokkan’s Issue #3).....	28
E.	Response to Rokkan’s Assignment of Error No. 3: The Trial Court Properly Dismissed Rokkan’s Claim of Fraudulent Concealment.....	30
F.	Response to Rokkan’s Assignment of Error No. 4: The Trial Court Properly Dismissed Rokkan’s Claims for Negligent Supervision and Training.....	35
G.	Response to Rokkan’s Assignment of Error No. 5: The Trial Court Properly Denied Rokkan’s Motion for a Judgment as a Matter of Law.....	36
H.	Response to Rokkan’s Assignment of Error No. 6: The Trial Court Properly Applied the Deadman’s Statute to Preclude Rokkan’s Self-Serving Testimony About Statements by the Decedent, Ms. McHale.....	39

I.	Response to Rokkan’s Assignment of Error No. 7: The Trial Court Was Correct in Holding that the Filing of The Jury Verdict on July 9, 2010 was the Order of the Court for Purposes of Appeal.....	41
1.	The Jury’s Verdict is the Court’s Order or Decision in a Jury Proceeding Where Money Damages or Fees are Not Awarded.	41
2.	Response to Rokkan’s Issue No. 11: Rokkan Timely Filed His Appeal of the Order Denying His Motion for Leave But Failed to Timely File His Underlying Motion as Required by CR 59’s Strict Timelines.....	43
3.	Rokkan Failed to Timely Request Leave of the Trial Court to File a Motion for a New Trial Subsequent to His Two Requests for Reconsideration.....	45
VI.	CONCLUSION.....	48

TABLE OF AUTHORITIES

CASES

<i>Alpine Industries, Inc. v. Goh</i> 101 Wash.2d 252, 676 P.2d 488 (1984).....	46, 48
<i>Bentzen v. Demmons</i> 68 Wash.App. 339, 842 P.2d 1015 (1993).....	40
<i>Brown v. Brown,</i> 157 Wash.App. 803, 239 P.3d 602 (2010).....	17, 18, 19
<i>Burns v. McClinton</i> 135 Wash.App. 285, 143 P.3d 630 (2006).....	17, 18, 19
<i>Cingular Wireless, LLC v. Thurston County</i> 131 Wash.App. 756, 129 P. 3d 300 (2006).....	12
<i>Colonial Imports, Inc. v. Carlton Northwest, Inc.</i> 121 Wash.2d 726, 853, P.2d 913 (1993) .....	31
<i>Faust v. Albertson</i> 167 Wash.2d 531, 222 P.3d 1208 (2009).....	14
<i>Favors v. Matzke</i> 53 Wash.App. 789, 770 P.2d 636 (1989).....	31
<i>Giraud v. Quincy Farm &amp; Chemical</i> 102 Wash.App. 443, P.3d 104 (2000), review denied, 143 Wash.2d 1005 (2001).....	32
<i>Griffith v. Centex Real Estate Corp.</i> 93 Wash.App. 202, 969 P.2d 486 (1998).....	17
<i>Hangman Ridge Training Stables, Inc., v. Safeco Title Ins. Co.</i> 105 Wash.2d 778, 719 P.2d 531 (1986).....	17, 18
<i>Herried v. Pierce County Pub. Transp. Benefit Auth. Corp</i> 90 Wash.App. 468, 475, 957 P.2d 767, review denied, 136 Wash.2d 1005, 966 P.2d 901 (1998).....	36

<i>In re Estate of Wind</i> 27 Wash.2d 421, 178 P.2d 731 (1947).....	40
<i>In re marriage of Zier</i> 136 Wash.App. 40, 147 P.3d 624 (2006).....	15
<i>Knight v. Trogdon Truck Co.</i> 191 Wash. 646, 71 P.2d 1003 (1937).....	13
<i>Lasher v. Univ of Wash.</i> 91 Wash.App. 165, 957 P.2d 229, review denied, 136 Wash.2d 1029, 972 P.2d 464 (1998) .....	39
<i>McCurry v. Chevy Chase Bank, FSB</i> 169 Wash.2d 96, 233 P.3d 861 (2010) .....	23, 24
<i>McGugart v. Brumback</i> 77 Wash.2d 441, 444-45, 463, P.2d 140 (1969).....	39
<i>Miller v. U.S. Bank</i> 72 Wash.App. 416, 865 P.2d 536 (1994) .....	20, 23
<i>Minehart v. Morning Star Boys Ranch, Inc.</i> 156 Wash.App. 457, 232 P.3d 591 (2010).....	13, 14
<i>Moe v. Wise,</i> 97 Wash.App. 950, 989 P.2d 1148 (1999).....	12
<i>Oates v. Taylor</i> 31 Wash.2d 898, 904, 199 P.2d 924 (1948).....	31
<i>Odalovich v. Weir</i> 124 Wash. 57, 231 P. 170 (1924).....	13
<i>S.H.C. and F.M. v. Sheng-Yen Lu</i> 113 Wash.App. 511, 54 P.3d 174, 176-177 (2002).....	35
<i>State ex rel. Carroll v. Junker</i> 79 Wash.2d 12, 482 P.2d 775 (1971).....	13

<i>State v. Hernandez</i> 85 Wash.App. 672, 935 P.2d 623 (1997).....	14
<i>Stiley v. Block</i> 130 Wash.2d 486, 925 P.2d 194 (1996).....	14
<i>Taylor v. Stevens cy.</i> 111 Wash.2d 159, 168, 759 P.2d 447 (1988).....	31
<i>Westview Invs., Ltd. V. U.S. Bank Nat'l Ass'n</i> 133 Wash. App. 835, 138 P.3d 638 (2006).....	18

STATUTES

RCW 2.48.....	29
RCW 4.44.460.....	12
RCW 5.60.030 .....	41
RCW 19.86.020.....	16
RCW 19.86.170.....	20
RCW 31.12.....	22
RCW 31.12.015 .....	21
RCW 31.12.402.....	22
RCW 31.12.516(1) .....	22
RCW 4.44.44 .....	42
RCW 4.44.460.....	42
12 U.S.C. § 4301.....	22
12 C.F.R. § 230 .....	22, 23

12 C.F.R. § 701.35 .....	25, 26
12 C.F.R. § 707 .....	21
12 C.F.R. § 1751 .....	25, 26
12 U.S.C. 1751 .....	23

COURT RULES

Rules of Appellate Procedure (RAP) 2.4.....	8, 9, 10
Court Rule (CR) 50 .....	12
Court Rule (CR) 59.....	5, 6, 12, 42, 44, 45, 46, 47
WAC 208-680G .....	22

OTHER AUTHORITIES

WA Practice, Vol. 15, §38.6 (2003).....	17, 47
---	--------

## **I. IDENTIFICATION OF PARTIES**

Plaintiff at trial in this matter, Donald J. Rokkan, individually, and as personal representative of the Estate of Marsaelle F. McHale, deceased, will hereinafter be referred to as “Rokkan.” Defendants at trial, Gesa Credit Union and Paula Miller, will be collectively referred to hereinafter as “Gesa.”

## **II. SUMMARY OF RESPONSE**

In its initial Brief, Gesa responded only to the issues relating to the Superior Court’s September 8, 2010 Order that is before this Court on appeal. In its initial brief Gesa did not accept Rokkan’s assignments of error numbers 1 through 6 because they exceed the scope of the Order that is subject to this appeal. Gesa maintains that position and respectfully requests that this Court either strike or disregard those portions of Rokkan’s brief addressing Assignments of Error numbers 1 through 6.

Rokkan’s Assignment of Error number 7 (“[t]he trial court erred in holding that filing of the jury verdict on July 9,

2010, was ‘the order of the court for purposes of. . . appeal’’) was argued to the trial court on September 7, 2010. Gesa responded in its initial brief to this assignment of error because it related to the timeliness of Rokkan’s motion for leave. Rokkan did not assign any other error to the trial court’s September 8, 2010 Order Denying Motion for Leave to File a Motion for New Trial.

In its initial brief Gesa did not accept Rokkan’s Issues Pertaining to Assignments of Error Nos. 1 through 10 because they also exceed the scope of review. Gesa maintains that position and respectfully requests that this Court either strike or disregard those portions of Rokkan’s brief addressing Issues Pertaining to Assignments of Error numbers 1 through 10.

Rokkan’s Issue number 11 (“[w]hether the Notice of Appeal herein was timely filed? (Assignment of Error No. 7.)”)) does appear to be an issue before this Court on review. Gesa points out however, Rokkan did not identify any other issue

concerning the trial court's September 8, 2010 Order Denying Motion for Leave to File Motion for New Trial.

### **III. RELIEF REQUESTED BY GESA**

Gesa requests that any hearing on the merits be precluded, that portions of Rokkan's brief be stricken or disregarded (relating to Errors 1 – 6 and Issues 1 – 10), that the trial court's September 8, 2010 Order be affirmed, and Rokkan's appeal be denied. Gesa also requests this Court order the payment of Gesa's reasonable attorney's fees and costs in this appeal.

### **IV. STATEMENT OF THE CASE**

The Statement of the Case submitted by Rokkan does not fairly or accurately state the facts and procedures relevant to this review. In keeping with its position that Rokkan's briefing and argument exceed the scope of his appeal, it is Gesa's position that Rokkan's Statement of Facts far exceeds the facts and procedures relevant to this review. Further, Rokkan's Statement of Facts is argumentative and misstates facts.

**A. Gesa's Statement of Procedural Facts Specifically Related to Rokkan's Failure to Timely File His Appeal**

On April 1, 2008, Rokkan filed his Complaint. CP 002.

The trial commenced on June 28, 2010. RP 1.<sup>1</sup> On July 7, 2010, after Rokkan rested his case, the court entertained Gesa's Motion for Judgment as a Matter of Law. RP 391-434. After argument of counsel, the court dismissed Rokkan's Consumer Protection Act claim, negligent estate planning, fraudulent concealment, negligence and negligent supervision claims. RP 391-434. On this same date, Rokkan requested reconsideration of the court's order concerning Rokkan's Consumer Protection Act claim. RP 435. Upon hearing argument of counsel, the court denied the request. RP 438. Rokkan's remaining claims were negligent misrepresentation and breach of fiduciary duty. RP 434. Gesa then presented its case. RP 438-484.

On July 8, 2010, at the conclusion of Gesa's case, Rokkan

---

<sup>1</sup> Report of Proceedings (RP) references are to the verbatim report of proceedings consisting of pages 1-543, filed on December 17, 2010, by court reporter John McLaughlin.  
SUPPLEMENTAL BRIEF OF RESPONDENTS - 4

again requested reconsideration as to the court's order dismissing his Consumer Protection Act claim. RP 494. After hearing argument of counsel, the court denied Rokkan's second request for reconsideration. RP 494.

On July 9, 2010, the trial court received the jury's verdict, the clerk read the verdict into the record, and the verdict was filed with the court. CP 507-09, 527.

On July 16, 2010, Rokkan filed his Motion for New Trial and scheduled a hearing on the motion for August 13, 2010. CP 530-32. Rokkan did not properly note the hearing before the trial court. CP 533-34.

Gesa filed its Response to Rokkan's Motion on August 18, 2010. CP 586. In its response, Gesa requested dismissal of the Motion for New Trial based upon Rokkan's failure to comply with CR 59(b) and CR 59(j) requirements that leave of court be obtained prior to filing multiple requests/motions. CP 586.

On August 24, 2010, Rokkan sought to cure his CR 59 deficiencies by filing a Motion for Leave to File a Motion for New Trial. CP 592. On September 3, 2010, Gesa filed its response to Rokkan's Motion for Leave. CP 605.

On September 7, 2010 a hearing was conducted and argument of counsel was heard on Rokkan's Motion for Leave of Court to File Motion for New Trial. CP 636; RP Pelletier, 1-11.<sup>2</sup> The court held that Rokkan failed to timely seek leave of court to file a motion for new trial, as required by CR 59(j) and 59(b) and denied Rokkan's motion for leave to file another motion for new trial. CP 639; RP Pelletier 10. As noted by Gesa counsel during the hearing, that day Gesa prepared an Order consistent with the court's decision, provided a copy to Rokkan's counsel, and presented it for entry. CP 636; RP 10. The Order was entered on September 8, 2010. CP 637.

On September 15, 2010, Rokkan filed his Notice of

---

<sup>2</sup> RP Pelletier refers to the verbatim report of proceedings consisting of pages 1-12, filed on December 13, 2010, by court reporter Cheryl A. Pelletier.

Appeal of the Order Denying his Motion for Leave to File a Motion for New Trial. CP 646.

**B. Gesa's Statement of Facts**

On March 1, 2000 Marsaelle McHale made stops at her attorney, Wayne Gladstone's office to pick up her husband's death certificate, U.S. Bank to pick up a check in the amount of \$94,832.09 (closing out this account), and then Gesa Credit Union's Richland Branch to deposit the U.S. Bank check. RP 43. Mr. Rokkan had made the arrangements for the U.S. Bank check. RP 301. On that day, Oneta Denson drove and accompanied Ms. McHale. RP 42.

Ms. McHale worked at and was a supervisor at the Hanford Site from 1946 to 1974. RP 355-56. She had a college degree. RP 356. At the time of her husband's death, she and her late husband owned assets in excess of \$800,000. RP 335. Ms. McHale took care of her own bills. RP 32. She kept a meticulous check register to the penny. RP 322. See also RP 287, 289-291.

Ms. McHale had a brother, niece and nephew. RP 315. Mr. and Ms. McHale had many close friends in the Richland area. RP 315. Defendant Paula Miller and her family were next door neighbors and close family friends with the McHales. RP 246. Paula and her family spent holidays, birthdays, and other occasions with the McHales. RP 475-76. The McHales gave the Daniels Easter baskets, Christmas gifts, birthday gifts, monetary gifts and took her on trips with them. RP 475-76; 342-43. Plaintiff Donald Rokkan and his family were also close family friends with the McHales. RP 275-76.

On March 1, 2000, when Ms. McHale was coming through the doors at Gesa, Paula Miller was on her way down Gesa's front stairs. RP 233-34; 469-70. Ms. Miller's trip downstairs was during the course of her work. RP 236. Ms. Miller visited with Ms. McHale. RP 235; 351-52. Ms. Miller assisted Ms. McHale to member services representative Cindy Cook's desk so that Ms. McHale could conduct a transaction. RP 234; 351-52. Ms. Miller

left Cindy Cook's desk prior to Ms. McHale conducting her transaction. RP 83, 107, 236.

Gesa is required by law to inform its members of what type of accounts are available to them. RP 225. On that day, Ms. McHale opened three term share certificates with six month maturity dates. EXS 6 – 8. Ms. McHale provided the amounts for each certificate and she named beneficiaries on each certificate. RP 108-113.

The first certificate was for \$75,000 and named her brother as beneficiary. EX 6. The second certificate was for \$75,000 and she named her niece and nephew as joint beneficiaries. EX 7. The third certificate was for \$50,000 and she named Paula Miller as beneficiary. EX 8. Ms. McHale was given a copy of each certificate when she left that day. RP 113. Oneta Denson sat with Ms. McHale during the transaction which took approximately 45 minutes. RP 113. Oneta Denson did not raise any concerns over the transaction until after Ms. McHale's death five (5) years later.

RP 311. Mr. Rokkan did not follow up on the specifics of what happened with the U.S. Bank check only that Ms. McHale had made the transfer from U.S. Bank to Gesa. RP 334, 302.

Ms. McHale subsequently received maturity notices and account statements reflecting the fact that she had these three certificates in addition to her checking and savings accounts at Gesa. EXS 9-13 and 17-18.

In 2002, Ms. McHale met with attorney Thomas J. Heye for the purpose of preparing estate planning documents. RP 3-4. Mr. Heye met with Ms. McHale and subsequently prepared Ms. McHale's Will. RP 4. Mr. Heye did not have notes in his file indicating he had asked any questions of Ms. McHale regarding any non-probate assets she owned. RP 23. Ms. McHale's Will left \$5,000 to her niece and nephew. RP 7. Her Will left the balance of her estate to Donald Rokkan. RP 7. At the time of her death, the balance of Ms. McHale's estate was in excess of \$600,000. RP 7.

Between January, 2000 and Ms. McHale's death, Rokkan had Ms. McHale's power of attorney. Ex. 1. During that time he did not use the power of attorney to obtain information concerning the certificates of deposit. RP 340; 345. Between March 1, 2000 and Ms. McHale's death in 2005, Ms. McHale and Mr. Rokkan consulted with financial planners concerning Ms. McHale's financial planning. RP 329.

Between the time of the March 1, 2000 transaction and Ms. McHale's death, Paula Miller had occasion to speak with and meet with Oneta Denson concerning one of her family members' bad checks written on a Gesa account. RP 248. The conversations and meetings that were conducted regarding these bad checks were not pleasant. RP 248.

Between March 1, 2000 and until after McHale's death, Paula Miller did not know of the existence of the term share certificate that named her as beneficiary. RP 238, 253, 258, 265. She (and the other beneficiaries) did not cash in and close their

respective certificates until 2008. RP 253-54.

## **V. ARGUMENT IN RESPONSE TO BRIEF OF APPELLANT**

### **A. STANDARD OF REVIEW**

#### **1. Dismissal of Claims**

Either party may move for judgment as a matter of law after both sides have presented their evidence, but before the case is submitted to the jury. CR 50(a)(2). In determining whether the case presents an issue of material fact, the court takes into account the overall burden of proof that applies to the case. When deciding a motion for judgment as a matter of law, a judge must view the evidence presented through the prism of the substantive evidentiary burden. *Moe v. Wise*, 97 Wash.App. 950, 989 P.2d 1148 (1999). Substantial evidence is “evidence that would persuade a fair-minded person of the truth of the statement asserted.” *Cingular Wireless, LLC v. Thurston County*, 131 Wash.App. 756, 768, 129 P.3d 300 (2006).

Despite the rules that favor a decision by the jury, the

courts have rejected the contention that every case must go to the jury, whether there is supporting evidence or not. The quantum of evidence needed to submit a case to the jury must amount to more than a scintilla. There must be something of substance in the evidence. *Knight v. Trogdon Truck Co.*, 191 Wash. 646, 71 P.2d 1003 (1937). If the court is without doubt as to the insufficiency of the plaintiff's proof, it can enter a judgment for the defense without misgivings. *Odalovich v. Weir*, 124 Wash. 57, 231 P. 170 (1924).

## **2. Preclusion of Evidence**

An appellate court reviews a trial court's evidentiary rulings for abuse of discretion. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wash.App. 457, 463, 232 P.3d 591 (2010). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Id.* citing *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). Thus, even where an appellate court disagrees with a trial court, it may not

substitute its judgment for that of the trial court unless the basis for the trial court's ruling is untenable. *Minehart*, 156 Wash.App. at 463.

Here the trial court properly applied the deadman's statute to preclude Rokkan's self-serving evidence.

### **3. Denial of Judgment as a Matter of Law.**

In reviewing a ruling on a motion for a judgment as a matter of law, the court engages in the same inquiry as the trial court. *Faust v. Albertson*, 167 Wash.2d 531, 538, 222 P.3d 1208 (2009) citing *Stiley v. Block*, 130 Wash.2d 486, 504, 925 P.2d 194 (1996). The court "must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *Faust*, 167 Wash.2d at 538 quoting *State v. Hernandez*, 85 Wash.App. 672, 675, 935 P.2d 623 (1997).

In the case at hand, Rokkan is challenging the trial court's decision denying his motion for judgment as a matter of law that

Paula Miller and /or Cindy Cook were acting as agents of Gesa even if their actions were determined to be self-dealing. The trial court decided that there was testimony, credibility issues and evidence for the jury to consider regarding Paula Miller and/or Cindy Cook's actions and whether or not those actions were within the scope of their employment. The trial court properly determined that these questions should go to the jury. RP 486-87.

#### **4. Conclusions of Law.**

The appellate court reviews a trial court's conclusions of law de novo. *In re Marriage of Zier*, 136 Wash.App. 40, 45, 147 P.3d 624 (2006). In this case, the trial court properly determined that Rokkan's a motion for appeal was untimely based, in part, on the date that the jury verdict was entered. Please see section I below regarding specific argument that in a jury trial, where there is no award of damages or fees, the jury's verdict is considered the "order" of the court.

**B. ROKKAN’S LEGAL ARGUMENT EXCEEDS THE SCOPE OF HIS APPEAL AND HIS APPEAL WAS UNTIMELY**

Please see Gesa’s initial brief for its response regarding scope and timeliness of this appeal as they relate to Rokkan’s Assignment of Error Nos. 1 – 6.

**C. RESPONSE TO ROKKAN’S ASSIGNMENT OF ERROR NO. 1: THE TRIAL COURT PROPERLY DISMISSED ROKKAN’S CONSUMER PROTECTION ACT CLAIMS**

**1. Rokkan Did Not Meet the Requirements for a Prima Facie Case of Violation of the Consumer Protect Act.**

Washington’s Consumer Protection Act (“CPA”) prohibits “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce[.]” RCW 19.86.020. To prevail in a private action based on a CPA violation, a party must establish five elements: (1) an unfair or deceptive act or practice (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff’s business or

property, and (5) causation. *Brown v. Brown*, 157 Wash.App. 803, 815, 239 P.3d 602 (2010) citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986). A plaintiff must make a prima facie showing of all five elements in order to survive summary judgment. *Id.* citing *Griffith v. Centex Real Estate Corp.*, 93 Wash.App. 202, 214, 969 P.2d 486 (1998). Failure to meet one of these elements is fatal to the claim. *Hangmen Ridge*, 105 Wash.2d at 793.

In *Brown*, one of the claims was a CPA claim against Wells Fargo Bank for allowing Brown's power of attorney to withdraw almost all of the equity from Brown's home by accepting at face value that Brown was competent when she signed the power of attorney. *Brown*, 157 Wash.App. 815-16.

In *Brown* the Court looked to another case, *Burns v. McClinton*, 135 Wash.App. 285, 143 P.3d 630 (2006) regarding the first element of a CPA claim. In *McClinton*, an investor sued his accountant for unauthorized fee increases. The court

on review reversed a trial courts award of attorneys fees, treble damages and injunction under the CPA, because the record lacked evidence that any of the accountant's other clients were deceived. *Brown*, 157 Wash.App. at 816 discussing *McClinton*, 135 Wash.App. at 305.

The *Brown* Court determined, like the Court in *McClinton*, that the record showed no evidence that Wells Fargo relied on questionable POAs or neglected to verify residency and third party credit counseling when dealing with other reverse mortgage applicants. *Brown* asked the Court to find that “the bank’s lending practices. . . are likely to affect or to have affected other consumers in like circumstances.” *Brown*, at 816. The Court stated that “mere speculation that an alleged unfair or deceptive act had the capacity to deceive a substantial portion of the public is insufficient to survive summary judgment” on a CPA claim. *Brown* at 816-17 quoting *Westview Invs., Ltd. v. U.S. Bank Nat’l Ass’n*, 133 Wash.App. 835, 854 n. 27, 138 P.3d

638 (2006). The Court held that Brown's CPA claim failed.

Like the court in *Brown*, the trial court determined that there was a lack of evidence and that Rokkan failed to present evidence that 1) the acts complained of were part of a pattern or general course of conduct of business, 2) the defendant did similar acts or practices prior to the act involved, 3) the acts complained of had a tendency to deceive substantial portions of the public. RP 411-12. Like the court in *McClinton*, the trial court here reflected on the fact that only one transaction was complained of and it was not shown that any other customers were affected or likely to be affected. RP 411-12.

**2. The Consumer Protection Act is Pre-Empted by Federal Law.**

The court did not reach the question of pre-emption in dismissing the CPA claim. RP 411. However, pre-emption would have provided the court with another basis to dismiss the CPA claim.

The Legislature specifically exempts from the CPA

certain actions or transactions that are “otherwise permitted, prohibited or regulated under laws administered by . . . any other regulatory body or officer acting under the statutory authority of . . . a State or the United States.” RCW 19.86.170; *Miller v. U.S. Bank*, 72 Wash.App. 416, 420, 865 P.2d 536 (1994)(internal citations omitted). The CPA’s statutory exemption was examined in *Miller v. U.S. Bank*, 72 Wash.App. 416, 865 P.2d 536 (1994).

In *Miller*, plaintiff U.S. Bank offered a limited partnership (LLP) a line of credit conditioned upon various guarantees. *Miller*, 72 Wash.App. at 419. The court noted that “[w]hen a court and an agency have jurisdiction over a matter, the doctrine of primary jurisdiction determines whether the court or agency should make the initial decision.” *Id.* at 421 (citations omitted).

The court also examined the relative competence of the court and the agency to resolve the issue of loan collection

practices. The court held that:

Given the pervasive federal regulation of the banking system, [the federal statute's] intent to regulate unfair and deceptive practices, and the statutory enforcement function of the [federal agency], the [agency] is uniquely qualified to regulate and resolve disputes arising in the bank-customer relationship. . . [c]ourts are less competent to do so.

*Id.* at 422.

The court then found that because issues involving unfair or deceptive loan collection practices are governed by federal statute, the court's decision could potentially conflict with the agency's decisions and regulations.

In Washington, the relationship between a credit union and its members concerning whether the credit union's account practices are unfair or deceptive is specifically regulated by the state's Department of Financial Institutions, Division of Credit Unions (DFI/DCU) and by the National Credit Union Administration (NCUA). RCW 31.12.015; 12 C.F.R. §707. The DFI governs and enforces the statutory powers granted to

credit unions to issue shares to and receive deposits from members. RCW 31.12.402.

The DFI requires each credit union to conduct business in compliance with Chapter 31.12 RCW and has the authority to enforce any violations of credit union regulations by issuing cease and desist orders, compelling credit unions to cease and desist from an unlawful practice, to enforce compliance with WAC 208-680G, or any rule, regulation, or order of the director; and to make referrals to other regulatory or law enforcement agencies. RCW 31.12.516(1); WAC 208-680G-030.

Washington's credit unions are also governed by the Federal Truth in Savings Act. 12 U.S.C. §4301, 12 C.F.R. § 230. This Act governs the disclosure requirements for deposit accounts. Specifically, the Act requires financial institutions, including credit unions, to disclose the terms of the legal obligation of the account agreement between the consumer and

the financial institution. 12 C.F.R. § 230.3 – 230.6.

Compliance with the Truth in Savings Act is enforced by the National Credit Union Administration (NCUA) Board pursuant to the Federal Credit Union Act. 12 U.S.C. 1751 *et al.*

In the case at hand, the agencies that govern credit union actions and transactions include the DFI and the NCUA. Both have significant enforcement powers that include resolving issues related to opening a deposit account and disclosing information about such an account, to the extent of ordering a financial institution to pay a member if a complaint is substantiated. *Id.* Either agency would have primary jurisdiction in the matter now before the court because a credit union's relationship with its members is regulated and these two agencies have the power to grant relief. See *Miller*, 72 Wash.App. at 422.

In a recent case, Washington's Supreme Court reviewed a CPA claim in the context of a contract case between individuals and a bank. *McCurry v. Chevy Chase Bank, FSB*, 169 Wash.2d

96, 233 P.3d 861 (2010). In *McCurry*, the plaintiffs conveyed a deed of trust to Defendant Chevy Chase Bank (“Bank”). Upon reconveyance of the deed of trust to the McCurrys, the Bank charged McCurry fees in excess of those allowed by the deed of trust. The plaintiffs sued under contract and CPA claims. The trial court subsequently dismissed the McCurry’s case against the Bank based upon the Bank’s defense of federal preemption.

On review, the Court found that “generally applicable laws, such as contract or commercial law, are not preempted where they only incidentally affect the lending operations or are otherwise consistent with the purposes of [preemption].” *McCurry*, 169 Wash.2d at 104. The Court held that although the questioned fees are set by federal regulation, contract law “does not impose requirements on loan-related fees; state contract law instead requires parties to adhere to the terms of their contracts.” *Id.* The Court also held that requiring a bank to comply with the terms of its contract “only incidentally effects the loan-related fees” that are

permitted by federal regulation.” *Id.* Finally, the Court held that “to the extent the [Plaintiffs] argue the CPA regulates *how or when* ... *fees can be charged*, the CPA, as applied to the loan-related fees, is preempted.” *Id.* at 105.

The dispositive issue in the case at hand is whether the generally applicable state law more than incidentally affects the federally regulated area. Gesa Credit Union is a state chartered institution. However, since it is federally insured, Gesa is subject to the same regulations as federally chartered credit unions. The National Credit Union Administration is the regulatory authority for credit unions that are federally chartered and/or federally insured. *See, generally*, 12 C.F.R. § 1751 *et al.* NCUA regulations, which apply to Gesa Credit Union, provide that credit unions may offer share certificate accounts (which Gesa Credit Union refers to as term share accounts). 12 C.F.R. §701.35(a). Federal credit unions may also determine loan or account fees or charges “*and other matters affecting the opening . . . of a . . . share*

*certificate account.* 12 C.F.R. §701.35(c). The Act further provides that “[s]tate laws regulating such activities are not applicable to federal credit unions.” *Id.*

Here, Gesa Credit Union is federally insured and is therefore considered a federal credit union for purposes of regulation. 12 C.F.R. § 1751 *et al.* Plaintiff claims, among other things, that Gesa Credit Union and its employee, Paula Miller, failed to advise Ms. McHale to request legal advice or estate planning advice prior to opening her share certificate accounts with named beneficiaries.

Plaintiff’s notion that credit unions must tell all members to seek legal or estate planning advice prior to opening accounts has more than an incidental affect on federally and state regulated credit unions. Under Plaintiff’s analysis, all of Washington’s credit unions would be required to change their operations and policies regarding opening term share accounts by sending their members away for legal or estate planning advice prior to opening such an account.

Neither the state nor the federal government envisioned use of a state law to change federally regulated account practices of financial institutions. Since the National Credit Union Administration regulates how credit unions open term share accounts, the Act preempts Washington's Consumer Protection Act.

**D. RESPONSE TO ROKKAN'S ASSIGNMENT OF ERROR NO. 2: EVIDENCE AT TRIAL WAS NOT SUFFICIENT TO SUPPORT ROKKAN'S CLAIMS THAT GESA EMPLOYEES WERE NEGLIGENT.**

**1. The evidence at trial supported that Paula Miller did not breach any duty and did not engage in self-dealing (Rokkan's Issue No. 2).**

The only person who raised the question of Paula Miller's March 1, 2000 conduct was Oneta Denson. And she did not do so for over five years after the transaction in question and not until after Ms. McHale's death. RP 311. Further, during the intervening period, she and Paula Miller had had "unpleasant" telephone conversations and meetings concerning bad checks

that one of Ms. Denson's relatives was involved in. RP 248.

Ms. Denson is the only witness who indicated that Paula Miller tried to influence Ms. McHale's decisions on March 1, 2000. Ms. Denson was the only witness who has stated Paula Miller kneeled next to Ms. McHale during the 45 minute transaction.

There was evidence that Paula Miller was not present at the time that Ms. McHale made decisions about what accounts to open and whether to name account beneficiaries. RP83-84; 107. There was evidence that Paula Miller did not participate in the opening of Ms. McHale's certificates of deposit. RP 83-84; 104-5; 107; 252-54. There was evidence that Paula Miller did not know about being named a beneficiary on one of the accounts until after the death of Ms. McHale. RP 238; 253, 258; 265.

**2. If Gesa employees, who are non-lawyers, provided legal advice, including but not limited to estate planning advice, they could be subjected to prosecution for the unauthorized practice of law (Rokkan's Issue No. 3).**

Non-lawyers are defined to include a person who is not an active member in good standing of the state bar. When a non-lawyer practices law, or holds himself or herself out as entitled to practice law (i.e. gives legal advice), that act constitutes the unlawful practice of law. RCW 2.48 et seq. Unlawful practice of law is a crime; a single violation is a gross misdemeanor. Id. Subsequent violations are class C felonies. Id.

If Gesa employees, who are non-lawyers, provided legal advice, including but not limited to estate planning advice, they could be subjected to prosecution for the unauthorized practice of law.

Rokkan claims that Gesa engaged in estate planning by allowing its Member Services employee, Cynthia Cook, to open new accounts for Ms. McHale and by filling in Ms. McHale's beneficiaries on each. As an alternative argument, Rokkan claimed that Gesa employees should provide legal advice to its

members when they open new accounts. Gesa does not provide nor does it give estate planning advice to its members; Gesa simply follows each member's wishes and instructions.

If Rokkan's arguments were accepted, it would have far-reaching effects to almost any situation a person wishes to direct the completion of a beneficiary designation or conduct any other transaction in which assets of their estate could be affected, including but not limited to employers who provide their employees with benefits that require the naming of a beneficiary, life insurance in which beneficiary designations are completed (usually by the insurance agent), and many other similar situations.

**E. RESPONSE TO ROKKAN'S ASSIGNMENT OF ERROR NO. 3: THE TRIAL COURT PROPERLY DISMISSED ROKKAN'S CLAIM OF FRAUDULENT CONCEALMENT.**

**Specifically, Paula Miller did not know of her interest in the term share account and Rokkan did not inquire of beneficiary designations on the term share accounts when he inquired of Ms. Miller about allowing the term share accounts to mature when they first matured.**

Where the parties through the course of their dealings have established a fiduciary or other “special relationship,” a duty to disclose material facts arises. *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wash.2d 726, 732, 853 P.2d 913 (1993). The existence of a duty is a question of law. *Id.* at 731, citing *Taylor v. Stevens Cy.*, 111 Wash.2d 159, 168, 759 P.2d 447 (1988). A duty to disclose material facts arises where the facts are peculiarly within the knowledge of one party to a business transaction and could not be readily obtained by the other, where one party is relying on the specialized knowledge and experience of the other, and where by lack of business experience of one of the parties, the other takes advantage of the situation by remaining silent. *Colonial Imports*, at 732, citing *Oates v. Taylor*, 31 Wash.2d 898, 904, 199 P.2d 924 (1948); *Favors v. Matzke*, 53 Wash.App. 789, 796, 770 P.2d 686 (1989). “If there is a special relationship between the parties, such that the law imposes an affirmative duty to disclose

material information, silence may be sufficient to establish fraudulent concealment.” *Giraud v. Quincy Farm & Chemical*, 102 Wash.App. 443, 453-6 P.3d 104 (2000), review denied, 143 Wash.2d 1005 (2001).

The only evidence Rokkan presented was his own testimony that he called Paula Miller when he saw the first term share account maturity notices and asked her whether he should let the term share accounts renew. RP 307. He claims that at that time Paula Miller had a duty to tell him that she was a beneficiary on one of the term share accounts. CP 8. Rokkan’s own testimony was that he never specifically inquired about Ms. McHale’s term share certificates and he did not inquire whether beneficiaries had been designated. RP 307. His testimony was that his inquiry was limited to whether to let the certificates renew at that time. RP 307. Further, there was no evidence presented that he presented the power of attorney to anyone at Gesa.

The evidence showed that Paula Miller did not know until after Ms. McHale's death that she had been named a beneficiary. RP 238; 253; 258; 265. The evidence showed that Paula Miller was not present at the time that Ms. McHale provided account information and provided beneficiary names to Gesa member services employee Cindy Cook. RP 83-84; 107; 252-54.

Rokkan's testimony was that he did not use the power of attorney Ms. McHale had given him to obtain account information. RP 340; 345. Evidence showed that Rokkan took no reasonable initiative as power of attorney for Ms. McHale to obtain information concerning Ms. McHale's accounts and beneficiary designations. RP 309-11; 340-41; 345.

Evidence was that Rokkan had received dozens of account statements and maturity notices for the accounts. RP 340-41. The evidence reflected that Rokkan knew of the new accounts but did not inquire further about them. RP 340-41;

345. Rokkan's testimony was that many of the statements and maturity notices were unopened and placed in a box at his home. RP 340-41.

Rokkan's own testimony indicated that although he stated he was assisting Ms. McHale with the management of her estate assets that he did not seek information to determine accurate and complete account information necessary for him to understand and assist in management of the nature and extent of her assets. RP 334-37; 345.

Evidence showed that after the March 1, 2000 Gesa transactions, Ms. McHale engaged in estate planning with her attorney, Thomas J. Heye. RP 4. She had the opportunity at that time to discuss her assets, accounts, and discuss the affect of beneficiary designations with her estate planning attorney, Thomas J. Heye. RP 3-4.

Further, between 2000 and 2005, Ms. McHale and Mr. Rokkan sought the advice of financial planners regarding Ms.

McHale's assets. RP 329. They both had the opportunity to discuss beneficiary designations with the financial planners. RP 329.

There was no evidence whatsoever that Ms. McHale was ever concerned or had any question about the March 1, 2000 transactions. There was evidence that she was knowledgeable about the Gesa accounts, paid her own bills, and maintained meticulous records. RP 32; 322; 287; 289-91.

**F. RESPONSE TO ROKKAN'S ASSIGNMENT OF ERROR NO. 4: THE TRIAL COURT PROPERLY DISMISSED ROKKAN'S CLAIMS FOR NEGLIGENT SUPERVISION AND TRAINING.**

Negligent supervision creates a limited duty to control an employee for the protection of a third person. The employer is not liable for negligent supervision of an employee unless the employer knew, or in the exercise of reasonable case, should have known that the employee presented a risk of danger to others. *S.H.C. and F.M. v. Sheng-Yen Lu*, 113 Wash.App. 511, 517, 54 P.3d 174, 176-177 (2002).

Where there is no viable tort claim for the underlying acts of the employee, there is no viable claim against the employer for negligent supervision. *Herried v. Pierce County Pub. Transp. Benefit Auth. Corp.*, 90 Wash.App. 468, 475, 957 P.2d 767, *review denied*, 136 Wash.2d 1005, 966 P.2d 901 (1998).

Here, there is no viable claim against Cynthia Cook. The evidence indicated that Ms. Cook followed the wishes and directions of Ms. McHale. There is no claim against Paula Miller; the evidence was that she had no knowledge of and did not participate in Ms. McHale's transactions. Therefore, there is no viable claim against Gesa for negligent supervision or training.

**G. RESPONSE TO ROKKAN'S ASSIGNMENT OF ERROR NO. 5: THE TRIAL COURT PROPERLY DENIED ROKKAN'S MOTION FOR A JUDGMENT AS A MATTER OF LAW.**

Rokkan identifies as his Assignment of Error No. 5 that the trial court erred in refusing to find as a matter of law that certain employees of Gesa were acting within their scope of

their employment.

The issues Rokkan identifies related to this Assignment of Error No. 5 are:

7. Whether the trial court erred in refusing to grant judgment as a matter of law that Cynthia Cook and respondent Paula Miller, employees of Gesa, were acting within the scope of their employment when providing assistance and advice to Ms. McHale and to Mr. Rokkan as her attorney-in-fact?

Rokkan is challenging the trial court's decision denying his motion for judgment as a matter of law that Paula Miller and /or Cindy Cook were acting as agents of Gesa during the course of their employment, even if their actions were determined to be illegal and/or self-dealing. The trial court decided that there was testimony, credibility issues and evidence for the jury to consider regarding Paula Miller and/or Cindy Cook's actions and whether or not those alleged actions of self-dealing were within the scope of their employment. The trial court properly

determined that these questions should go to the jury. RP 486-87.

8. Whether, in the absence of any proof of acts or omissions not performed in furtherance of Gesa's interests, the trial court erred in refusing to give Plaintiff's Sixth Proposed Instruction No. 5B (CP 0476), that would have instructed the jurors that the acts and omissions of Cynthia Cook and respondent Paula Miller, employees of Gesa, were the acts and omissions of Gesa?

The trial court gave a portion of Plaintiff's Sixth Proposed Instruction No. 5B - the first paragraph concerning agency. RP 495. The balance of the proposed instruction incorrectly stated that the acts of Paula Miller then automatically became the acts of Gesa, and likewise of Cindy Miller. RP 476.

9. Whether the trial court erred in giving Instruction No. 7 (CP 0494) and Instruction No. 8 (CP 0495), thereby allowing the jurors to find that Cynthia Cook and Paula Miller, employees of Gesa, were not acting within the course of their employment with Gesa?

The trial court properly stated the law of agency in the

jury instructions given. The court did not allow use of Rokkan's jury instructions that defined agency so broadly as to include all potentially illegal or self-serving actions that Rokkan alleged against Miller.

**H. RESPONSE TO ROKKAN'S ASSIGNMENT OF ERROR NO. 6: THE TRIAL COURT PROPERLY APPLIED THE DEADMAN'S STATUTE TO PRECLUDE ROKKAN'S SELF-SERVING TESTIMONY ABOUT STATEMENTS BY THE DECEDENT, MS. MCHALE.**

The purpose of RCW 5.60.030, the deadman's statute, is to prevent interested parties from giving self-serving testimony about conversations or transactions with the deceased. *McGugart v. Brumback*, 77 Wash.2d 441, 444-45, 463 P.2d 140 (1969); *Lasher v. Univ. of Wash.*, 91 Wash.App. 165, 169, 957 P.2d 229, *review denied*, 136 Wash.2d 1029, 972 P.2d 464 (1998). The statute bars testimony by a "party in interest" regarding "transactions" with the decedent or statements made to him by the decedent. RCW 5.60.030. A "party in interest" under is "one who stands to gain or lose in the action in

question.” *Bentzen v. Demmons*, 68 Wash.App. 339, 344, 842 P.2d 1015 (1993). A “transaction” under the dead man's statute is broadly defined as “ ‘the doing or performing of some business between parties, or the management of any affair.’ ” *Id.* at 344, 842 P.2d 1015 (quoting *In re Estate of Wind*, 27 Wash.2d 421, 426, 178 P.2d 731 (1947)). The test of a “transaction” is whether the deceased, if living, could contradict the witness of his own knowledge. *Id.*

In this case, Donald Rokkan sued in his individual capacity and as the Personal Representative of the Estate of Marsaelle McHale. Mr. Rokkan’s individual interest in this litigation is clear – he was the residual beneficiary of Ms. McHale’s \$800,000+ estate and he also had a significant financial stake in any asset which may come into her estate as the result of the outcome of this case. Clearly, Mr. Rokkan is a party in interest.

This entire litigation is related to transactions Mr. Rokkan had with the defendants during Ms. McHale’s lifetime as her

attorney-in-fact and transactions Ms. McHale had with the defendants during her lifetime. During the trial, Rokkan was proposed that he be allowed to submit testimony about discussions he had with Ms. McHale about her dealings with the defendants, her wishes for handling the funds she deposited with defendant Gesa or other similar information. The Deadman's Statute would preclude Mr. Rokkan from testifying about any personal transaction or discussion he had with the decedent.

Accordingly, the Gesa requested and the court properly excluded any such testimony because it was inadmissible under the Deadman's Statute.

**I. RESPONSE TO ROKKAN'S ASSIGNMENT OF ERROR NO. 7: THE TRIAL COURT WAS CORRECT IN HOLDING THAT THE FILING OF THE JURY VERDICT ON JULY 9, 2010 WAS THE ORDER OF THE COURT FOR PURPOSES . . . OF APPEAL.**

**1. The Jury's Verdict is the Court's Order or Decision in a Jury Proceeding Where Money Damages or Fees are Not Awarded.**

At the hearing on September 7, 2010, Rokkan argued that the court below failed to enter a “judgment” so the time for filing a motion for new trial was tolled. RP Pelletier 4-7. Rokkan consistently references the term “judgment,” but did not recognize that Civil Rule 59 references the terms “judgment, order *or* other decision.” CR 59(b). *Id.*

In a jury trial where there is no award of damages or fees, the jury’s verdict is considered the “order” of the court.<sup>3</sup> RCW 4.44.460. The statute provides that once the court determines that a jury’s verdict meets the requirements of the civil rules and of Chapter 4.44 RCW, the clerk files the verdict. At that point, the verdict is “complete” and the jury is discharged from the case. The verdict “shall be in writing, and under the direction of the court shall be substantially entered in the record as of the day's proceedings on which it was given.”

---

<sup>3</sup> “Judgments” are awards for money damages. See, generally Chapter 4.56 RCW. RCW 4.64.030 identifies different types of judgments as those for money, real property and ownership. RCW 4.56.210 and RCW 6.17.020 provide that a judgment has a life of 10 years in most instances.

In the instant case, the court instructed the clerk of the court to read the verdict's questions and answers into the record, and after polling the jury, the court stated on the record that the verdict was accepted. CP 527. The clerk then filed the verdict as the decision or order of the court. CP 507.

The timeline for post-trial motions and appeals became operational on July 9, 2010 upon entry of the verdict. Rokkan failed to timely request leave of court to file a motion for new trial within 10 days of July 9, 2010, and failed to schedule a hearing within 30 days of July 9, 2010.

**2. Response to Rokkan's Issue No. 11: Rokkan Timely Filed His Appeal of the Order Denying His Motion for Leave But Failed to Timely File His Underlying Motion as Required by CR 59's Strict Timelines**

Rokkan filed his Notice of Appeal of the Order Denying Motion for Leave to File Motion for New Trial on September 15, 2010 and within the time required to file such a Notice. CP 174. However, as to Rokkan's underlying Motion for Leave to

File Motion for New Trial, Rokkan failed to comply with Civil Rule 59. Therefore, the court's decision below was correct and its Order Denying Motion for Leave to File Motion for New Trial should be affirmed.

CR 59 provides a means for a party to request reconsideration or a new trial. The Rule provides various causes for which such relief may be granted and provides specific rules with which the party seeking relief must comply, including timelines and means for filing a second request for relief on a particular issue. CR 59(b), (j).

CR 59 includes three requirements for filing a second motion for new trial or request for consideration. The motion/request must be filed within 10 days of entry of the trial court's "order, judgment or decision." The party must also note a hearing to be held within 30 days of entry of the order, judgment or decision. If the party has already requested reconsideration prior to entry of the order, judgment or decision,

as occurred twice in this case, the party must *first* obtain leave of the court to file a second request for reconsideration or, as in this case, a motion for new trial.

As noted in the procedural history of this case, Rokkan failed to timely request leave of court to file his motion for a new trial after the “order, judgment or decision” was filed on July 9, 2010. Rokkan also failed to timely set a hearing on his motion for a new trial, as he ultimately set the hearing well beyond the 30-day requirement. The Civil Rules determine how a case moves forward, and Rokkan’s failure to comply with the Rules should result in the Court’s decision to deny his motion for leave to be affirmed.

**3. Rokkan Failed to Timely Request Leave of the Trial Court to File a Motion for a New Trial Subsequent to His Two Requests for Reconsideration.**

CR 59(j) limits how multiple motions may be brought regarding a particular issue. It provides that:

If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard *before*

*entry of the judgment, no further motion may be made without leave of the court first obtained for good cause shown (1) for a new trial[.]*

CR 59(j)(emphasis added). See also *Alpine Industries, Inc. v. Gohl*, 101 Wash.2d 252, 253, 676 P.2d 488 (1984)(explaining a CR 59(j) application for leave was “necessary” to file a second new trial motion.)

On July 7, 2010 the trial court granted Defendants’ motion to dismiss Rokkan’s Consumer Protection Act claim. RP 412. On that same date, after Rokkan rested, Rokkan requested reconsideration of the court’s decision regarding the CPA. RP 435. The court denied this motion. RP 438.

After Gesa’s case was completed on July 9, 2010, Rokkan once again moved the court for reconsideration of the decision dismissing his CPA claim. Rokkan presented a prepared argument and cited case law, cited to testimony, and thoroughly briefed the matter, albeit verbally rather than in writing. The

court heard from both parties, considered the matter, then once again denied Rokkan's request for reconsideration.

Rokkan apparently continues to argue that his motions for reconsideration of the court's decision to dismiss his CPA claims were not really motions for reconsideration because they were verbal and the court's decisions were verbal. In everyday practice, a CR 59 request for reconsideration is regularly invoked as a device for seeking reconsideration of any type of order or decision. WA Practice, Vol. 15, §38.6 (2003).

As noted above, at trial in this case, Rokkan took two opportunities to present requests for reconsideration to the court regarding its dismissal of his CPA claim. Rokkan then sought a third opportunity for the trial court to rule on this matter when he raised the issue again in his July 16, 2010 Motion. However, Rokkan was required to comply with the Civil Rules to first seek leave of the court to file a motion for new trial, obtain a ruling on that matter, and if he prevailed, he must file the motion

for new trial and set a hearing within 30 days of the July 9, 2010 verdict. Rokkan failed to timely follow these steps as required by the Civil Rules. The time for a proper motion for leave of the court and motion for a new trial has come and gone.

As noted in *Alpine*, leave of the court is “necessary” after a party has previously requested a request for reconsideration. Here, two such motions were presented to and ruled upon by the court. Rokkan simply failed to comply with the Rules. The ruling of the court below should be affirmed.

## **VI. CONCLUSION**

In this appeal, Rokkan again seeks redress to which he is not entitled. Rokkan’s Notice of Appeal clearly extends only to the Superior Court’s September 8, 2010 Order that denied his Motion for Leave to File Motion for New Trial. Rather than assigning error to the court’s denial of his Motion for Leave, Rokkan assigns errors to the trial court’s actions at trial and to the jury’s verdict. In his brief, Rokkan inappropriately re-argues

the case he presented at trial.

Gesa respectfully requests that any hearing on the merits of this appeal be precluded, that the trial court's Order Denying Leave to file a Motion for New Trial be affirmed, that those portions of Rokkan's brief that exceed the scope of this review be stricken, and that his appeal be denied. Gesa also requests this Court order the payment of Gesa's fees and costs in this appeal.

RESPECTFULLY SUBMITTED THIS 26th day of July,  
2011.

**COWAN, MOORE, STAM, LUKE PETERSEN & CARRIER**  
*Attorneys for Respondents*

By:   
\_\_\_\_\_  
LUCINDA J. LUKE, WSBA # 26783

CERTIFICATE OF MAILING

I HEREBY CERTIFY under penalty of perjury under the laws of the State of Washington that on the 26<sup>th</sup> day of July, 2011, I caused to be delivered via First Class U.S. Mail, postage prepaid, a true and correct copy of Supplemental Brief of Respondents to the following person:

Martin Gales  
Attorney at Law  
MARTIN GALES, PLLC  
3337 East 16<sup>th</sup>  
Spokane, WA 99223

  
\_\_\_\_\_  
JULIE R HIGUERA