

No. 62912-3-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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V&E MEDICAL IMAGING SERVICES, INC.,

Plaintiff,

v.

MARK DeCOURSEY and CAROL DeCOURSEY,

Defendants/Third-Party Plaintiffs/Respondents,

v.

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

Third-Party Defendants/Appellants.

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. Michael J. Fox)

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RESPONDENTS' ANSWERING BRIEF

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2009 OCT -9 PM 1:15  
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COURT OF APPEALS  
STATE OF WASHINGTON

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## I. INTRODUCTION AND SUMMARY

Appellants Paul Stickney, Paul H. Stickney Real Estate Services, Inc. and Windermere Real Estate/SCA, Inc. (collectively, “Windermere”) ask how the DeCourseys could receive a million dollar judgment. Simple. Stickney was the DeCourseys’ real estate agent and owed fiduciary duties to them. Stickney put together a home purchase and renovation package for the DeCourseys without telling them that the contractor he was bringing into the deal—Dick Birgh of Home Improvement Help (“HIH”)—was his friend and business partner in an ongoing joint venture. Nor did Stickney tell the DeCourseys that he was once listed as an officer and shareholder of HIH and that he had a financial incentive to steer work to Birgh/HIH. Despite his assurances that Birgh/HIH was qualified to do the advanced renovation Stickney recommended, Stickney had never actually seen Birgh/HIH do that kind of work in the past. Indeed, it turned out that HIH was not even a licensed contractor. After Birgh/HIH demanded that the DeCourseys pay over \$211,000 for the work—work later discovered to be grossly defective—Stickney continued to serve his own interests (and Birgh’s) by helping Birgh/HIH collect the money.

The DeCourseys did not want litigation. When they learned of Stickney’s conflict of interest, they met with Windermere’s principals in an effort to resolve the matter amicably. At the meeting, Windermere

practically dared the DeCourseys to sue, betting that they did not have sufficient determination or resources to vindicate their rights. Windermere bet wrong. The DeCourseys represented themselves for over a year, and later found lawyers to help. When the case went to trial, Windermere simply had no defense. It called no witnesses (the DeCourseys had 11), and Stickney did not testify on his own behalf. The jury heard undisputed evidence that Stickney violated his fiduciary duties and the Consumer Protection Act (“CPA”). As a result, the jury awarded the DeCourseys \$522,000 in damages and the trial court awarded them a similar amount in reasonable attorney’s fees and costs. That’s how the DeCourseys rightfully received a million dollar judgment.

Windermere grasps at everything but the kitchen sink in an effort to find error, but finds none. This Court should affirm the jury’s verdict and the trial court’s fee award for the following reasons:

- The trial court properly awarded the DeCourseys attorney’s fees and costs. Neither the court’s own prior ruling, nor the appellate commissioner’s denial of discretionary review, created “law of the case” that barred the trial court from awarding fees. The trial court’s fee award easily satisfies *Mahler* by including specific findings to show that it carefully considered the fee request and found it reasonable without further segregation. The record is equally clear that the trial court acted within its discretion in awarding both a thirty percent multiplier and litigation costs.
- The trial court also properly excluded evidence of the DeCourseys’ settlement with Birgh/HH under the collateral source rule. Stickney and Birgh had business

together, but they had different interests and were subject to different claims; the settlement did not indemnify or release Windermere or Stickney. Nor did the court err in refusing to offset damages. Windermere did not carry its burden of showing that the Birgh/HIH settlement compensated the DeCourseys for the same damages awarded by the jury. Rather, the record shows that the settlement was allocated to the DeCourseys' unique claims against Birgh/HIH, as well as the agreement's confidentiality provisions.

- Substantial evidence supports the jury's finding that Stickney's failure to disclose a business relationship with Birgh/HIH had a "public interest impact" under the CPA. Stickney's conduct occurred in the course of his and Windermere's business, which is widely advertised to the public. It was further undisputed that Stickney had previously induced over 30 of his clients to hire Birgh/HIH without disclosing his conflict of interest. Stickney was able to induce the DeCourseys and others to use Birgh/HIH because of the fiduciary status he enjoyed over his clients.
- The trial court correctly instructed the jury on conflict of interest. The instructions tracked well-settled law defining a real estate agent's duty to disclose conflicts. The same is true with respect to the court's instructions on damages. Washington law holds that a buyer may recover all damages proximately caused by a real estate agent's breach of fiduciary duty, not just return of the agent's commission. There is no authority to support Windermere's argument that the jury was not entitled to award the DeCourseys damages based on the present-day costs of repair.
- Substantial evidence also supports the jury's finding of causation. It was undisputed that but for Stickney's failure to disclose his conflict of interest and false assurances that Birgh had the expertise to do the job, the DeCourseys never would have bought the house nor hired Birgh/HIH and, thus, never would have been damaged. That Birgh/HIH actually performed the faulty work does not break the causal chain; substantial evidence supports the jury's finding that Birgh/HIH's mistakes were reasonably foreseeable and, therefore, not a superseding cause. The

court properly held that public policy, justice and common sense supported a commensurate finding of legal causation.

- Finally, the trial court correctly rejected Windermere's argument that the DeCourseys' CPA and fiduciary duty claims were barred by the economic loss rule. No court has ever dismissed a CPA or fiduciary duty claim against a real estate agent on the basis of the economic loss rule, and for good reason. An agent's obligation to disclose conflicts of interest arise from statutory and common law fiduciary duties, not any contractual relationship.

Windermere's various other minor arguments are equally baseless. The judgment below should be affirmed.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Did the trial court properly exercise its discretion when it awarded the DeCourseys their reasonable attorney's fees and costs and, if so, was its award sufficiently supported by findings of fact?

2. Did the trial court properly exercise its discretion when it ruled that evidence of the DeCourseys' settlement with Birgh/HHH was barred by the collateral source rule and that Windermere was not entitled to an equitable offset?

3. Was there substantial evidence to support the jury's finding that Stickney's unfair and deceptive conduct satisfied the "public interest impact" element of the CPA?

4. Did the trial court properly instruct the jury on a real estate agent's duty to disclose conflicts of interest and the correct measure of

damages for breach of that duty?

5. Was there substantial evidence to support the jury's finding that Stickney's breach of fiduciary duty was the proximate cause of the DeCourseys' damages?

6. Did the trial court properly allow Windermere to introduce evidence and argue that other parties caused the DeCourseys' damages?

7. Did the trial court properly conclude that the Residential Real Estate Purchase and Sale Agreement ("REPSA") did not exculpate Windermere for Stickney's breach of fiduciary duty?

8. Did the trial court properly conclude that the economic loss doctrine did not bar the DeCourseys' CPA and fiduciary duty claims?

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. Factual Background.**

Consistent with its conduct in the trial court, Windermere misrepresents and mischaracterizes the voluminous pleadings, evidence, testimony, court rulings and case law. Space does not permit addressing each and every example. Only the following relevant and undisputed facts are necessary for resolution of this appeal.

Stickney Brings Birgh Into The Real Estate Transaction. After Mark DeCoursey took a job with Microsoft, the DeCourseys moved from Virginia to Washington in August 2003. RP (10/22/08) at 7. They began

looking for a house and, after realizing they would need the help of a real estate professional, a friend referred them to Paul Stickney, a Windermere agent. *Id.* at 8-9. Stickney helped the DeCourseys make a modest offer for a dark and dreary house they had found (the “Barr house”). When the Barrs declined the offer, he continued to send the DeCourseys information about other houses and directed them to the Windermere website. *Id.* at 11-14. When the DeCourseys became interested in another house needing repair, Stickney told them “he knew a very good contractor,” Dick Birgh, whose work “he had seen ... over the years.” *Id.* at 16. Stickney assured the DeCourseys that Birgh did “the best work for the best prices.” *Id.* Stickney brought Birgh to the house, where he and Stickney discussed repairs. *Id.* The DeCourseys decided not to buy the house, however, because of a rodent problem. *Id.* at 17.

After more searching and another failed offer, Stickney suggested that the DeCourseys reconsider the Barr house and get Birgh’s opinion on whether he could affordably modify the house to their satisfaction. *Id.* at 18-19. Stickney arranged for a meeting with DeCourseys, Birgh, and himself, and during a walk-through, Stickney and Birgh proposed various cosmetic and structural changes to the house; Stickney wrote out a list of features and came up with a price range for each. *Id.* at 19-21, 194; Ex. 20. Stickney led the DeCourseys to believe that he had seen Birgh do

similar renovations in the past. *Id.* at 27. The DeCourseys would not have considered buying the house, but Stickney convinced them they could afford to buy and renovate. *Id.* at 24. Stickney told them that if they invested \$100,000, not only would it improve the house, it would increase its value by \$200,000. *Id.* at 25-26. Based on Stickney's advice, the DeCourseys made an offer to buy the house, which was accepted. *Id.*

Stickney's Business Relationship With Birgh. Birgh was the only contractor Stickney mentioned to the DeCourseys (*id.* at 26), even though it was Windermere's policy that agents give multiple referrals. RP (10/22/08) at 151; RP (10/23/08) at 10. Yet, Stickney admitted that whenever a client needed renovations, he recommended Birgh and no one else. RP (10/23/08) at 131. Moreover, and also contrary to Windermere policy (and state law), Stickney did not tell the DeCourseys (or any of the other 30 or so clients to whom he had recommended Birgh) that he had ongoing business and financial entanglements with Birgh and his company, HIH. RP (10/22/08) at 28; RP (10/23/08) at 11, 134. To the contrary, Stickney admitted telling the DeCourseys that "he had nothing to gain from recommending Birgh." RP (10/22/08) at 28; RP (10/23/08) at 142. It wasn't the only time Stickney told a client that. Stickney's prior clients, the Calmes, also had hired Birgh based on Stickney's advice. RP (10/23/08) at 84-86. Like the DeCourseys, Stickney told the Calmes that

“he had no financial relationship with Mr. Birgh,” and “wasn’t involved in the financial aspect of his company.” *Id.* at 94-94. It wasn’t true.

Stickney had known Dick Birgh since 1995 or 1996, and the two were good friends. RP (10/23/08) at 104. But more than that, they were business associates. Stickney admitted that he and Birgh started a joint venture in 1996 to develop six acres of land in Sammamish. *Id.* at 105. Under their agreement, Stickney was responsible for capital contributions in the form of quarterly payments on a \$150,000 loan that he and Birgh co-signed to develop the land, and on which Stickney was a personal guarantor. *Id.* at 106-108, 113, 119; Exs. 5 & 17. Stickney made more than \$100,000 in payments on the loan. *Id.* at 123. Pursuant to their agreement, if Stickney was unable to make a monthly payment, he would look to Birgh. *Id.* at 113, 116, 125. If neither could pay, then the unpaid loan payment would become part of the principal. *Id.* at 115.

Over time, it became more difficult for Stickney to make the monthly payments, and the principal amount of the loan grew to around \$400,000. *Id.* at 115-116. Because HIH was Birgh’s major source of income, his ability to help Stickney make loan payments was directly related to Birgh’s success in getting construction contracts—something that Stickney did with over 30 clients between 1999 and 2004. *Id.* at 50-51; Ex. 16. In short, the more money Birgh/HIH made renovating houses,

the less likely Stickney would have to pay money out of his own pocket to satisfy the loan, and the less exposure he would have on the personal guarantee. Windermere never disputed these facts.

Indeed, the jury heard undisputed evidence that Stickney relied on Birgh in order to facilitate the sale of houses needing renovation, as was the case with the DeCourseys. In his bill for services, Stickney wrote that the home was “unacceptable to DeCourseys in as is condition.” RP (10/23/08) at 138; Ex. 24. Stickney paid for Birgh’s cell phone so he could consult with him on a moment’s notice; he also gave Birgh access to his office computer to store HIH documents. RP (10/22/08) at 179; RP (10/23/08) at 130-131. Indeed, there was also evidence showing that HIH was making direct payments to Stickney. RP (10/22/09) at 172-73, 175; RP (10/23/09) at 55; Exs. 8 & 9. The jury also heard evidence that Stickney had agreed to be an officer of HIH. RP (10/22/08) at 134-36, 173, 176-77; RP (10/23/08) at 58-60; 127-128; Exs. 1 & 2.

Birgh/HIH Begin The Renovations. The evidence is undisputed that had the DeCourseys known that Stickney had a business relationship with Birgh and a financial interest in pushing work his way, they never would have hired him—indeed, they would not have bought the Barr house. RP (10/23/08) at 138, RP (10/22/08) at 24. But the DeCourseys didn’t know; they trusted Stickney’s endorsement of Birgh’s company as

an “independent reference.” *Id.* So, after the DeCourseys’ offer was accepted, the DeCourseys, Stickney and Birgh moved forward on the renovations. *Id.* at 29. In June 2004, a few days before closing, they met to nail down a final list of features; Stickney recorded their discussion, and later had it transcribed into a memo to “guide” Birgh. *Id.* at 32-33; RP (10/23/08) at 154-56; Exs. 21 & 35. Stickney told the DeCourseys that if they did all the work outlined in the memo, it would cost about \$110,000, but it would increase house’s value from \$280,000 to \$500,000. RP (10/22/08) at 35. The DeCourseys accepted the package and hired Birgh.

Work began in June and was supposed to be finished by Christmas, 2004. But by the end of December, little progress had been made; indeed, the work was still not complete in May 2005 when the DeCourseys were forced to move in. *Id.* at 39-40. Along the way, Birgh produced a series of estimates that eventually culminated in a bill for \$211,000—\$100,000 more than Stickney and Birgh originally estimated. *Id.* at 40, 43-44, 60-65, 71; Exs. 10-13. With no cash, the DeCourseys asked Stickney about refinancing the house so that they could pay Birgh. *Id.* at 45, 57-58.

Stickney was quick to help. He referred the DeCourseys to a mortgage broker and drew up a list of comparable houses to “help” the appraiser. *Id.* The DeCourseys refinanced the house, took money from an annuity, borrowed from credit cards and life insurance, and cashed in a

401(k). *Id.* at 88, 103-107. When the DeCourseys still could not come up with the cash, Birgh asked Stickney to help draft a demand letter proposing that the DeCourseys pay another \$45,000 and sign a promissory note secured by a lien on the house. *Id.* at 83-86, 88-89; RP (10/23/08) at 44-45, 61-63; Ex. 15. The DeCourseys ultimately paid Birgh/HHI approximately \$163,000 for the “renovations.” RP (10/22/08) at 105.

Birgh’s Faulty Renovation. The DeCourseys did not get what they paid for; there were massive problems with Birgh’s work. As it turned out, and unbeknownst to the DeCourseys at the time Stickney brought him into the transaction, Birgh was not a licensed contractor, nor had he done that kind of advanced construction before. RP (10/23/08) at 37, 139-140; RP (10/28/08) at 168. Evidence at trial—including testimony from an appraiser, an electrician, a structural engineer, a roofer, and a contractor—showed that Birgh’s poor work had damaged the structural integrity and safety of the house, left important items unfinished, and failed to comply with relevant building codes. *Id.* at 41; 89-92; 98-99; RP (10/23/08) at 31-36; 41-42; 179-80; RP (10/27/08) at 8-9; 14-18; 32-48; 68-97; RP (10/28/08) at 12-26; 36-37. Indeed, the home was so unsafe that the City of Redmond would not issue the DeCourseys an occupancy permit. RP (10/23/08) at 36. Windermere put on no contrary evidence.

The DeCourseys’ construction expert—after examining the house

and having discussions with framers, electricians, plumbers, drywallers, floorers, and carpenters—testified that extensive work would have to be done to fix the problems left by Birgh and bring the house up to code. RP (10/27/08) at 83-84; 97-123; RP (10/28/08) at 46-47. He estimated that it would cost over \$525,000, not including sales tax, to fully repair the house. *Id.* at 48; Ex. 49. By the same token, the DeCourseys’ appraiser testified that, as a result of Birgh’s shoddy work, the DeCourseys’ home is now essentially worthless because the cost of repairing the house exceeds its market value. RP (10/23/08) at 185-188, 204. Windermere complains that there is no evidence that the DeCourseys actually repaired their house (Op. Br. at 25) and, for the most part, it is right. The DeCourseys’ experience with Windermere, Stickney and Birgh left them with no money and, as discussed below, no choice but to seek a remedy in court.

**B. History of Proceedings.**

The DeCourseys did not initiate this lawsuit. In late March 2006, one of Birgh’s subcontractors, V&E Medical Imaging Systems (“VEMIS”), sued the DeCourseys and HIH in district court. RP (10/23/08) at 111; CP 7-10. On April 4, 2006, the DeCourseys sent all parties (and Windermere) a letter imploring amicable settlement outside the legal system. CP 1085. After hearing nothing, the DeCourseys, acting *pro se*, filed a counterclaim, cross-claims against HIH, and third-party

claims against Birgh and others. CP 16-42; 55-97. While researching their claims, the DeCourseys had uncovered corporate registration records identifying Stickney as a vice president of HIH. *See* CP 858-59; 867. Shocked at such a breach of trust, the DeCourseys met with Windermere executives. At the May 18, 2006 meeting, Windermere's lawyer told the DeCourseys that they would pay the DeCourseys nothing for their losses, telling them instead that if they wanted compensation from Windermere, they would have to sue. RP (10/28/08) at 166-67. With no other choice, the DeCourseys gave Windermere and Stickney what they asked for.

The DeCourseys filed a second amended answer that asserted third-party claims against Windermere and Stickney. CP 127-189; 488-550. The case was subsequently removed to superior court (CP 1-3), where the DeCourseys, still acting *pro se*, filed a third amended answer. CP 556-666. The DeCourseys again asserted claims against Windermere and Stickney alleging, among other things, fraud, breach of fiduciary duty, and violation of the CPA. *Id.* As discussed in detail below, on August 23, 2007, following a hearing on a discovery dispute, Judge Erlick entered a order stating, in part, "the DeCourseys are dismissing/not pursuing any claim for attorney's fees beyond statutory fees of \$250." CP 704-707. The DeCourseys promptly filed a motion for reconsideration (CP 708-739) and retained counsel, who supplemented it (CP 747-753), but Judge

Erlick summarily denied the motion. CP 768. The DeCourseys sought discretionary review, which was denied as well. CP 908-918.

As trial approached, it became clear that Windermere and Stickney had no intention to settle the case in good-faith—something that the trial court would later note when enhancing the DeCourseys’ attorney’s fee award. RP (2/06/09) at 5 (“I also don’t see any evidence that there was any sincere effort made to settle this case.”). Indeed, prior to trial, Stickney’s counsel told the DeCourseys’ counsel that the DeCourseys should accept a low-ball offer because “everyone knows your clients are out of money” and could not afford to go to trial. CP 1237. Birgh and HIH knew better. On the eve of trial, the DeCourseys and Birgh/HIH agreed to settle the DeCourseys’ claims, and Birgh and HIH were dismissed by stipulation. CP 959-61. The settlement did not allocate any of the settlement funds to repair costs, and specifically excluded “the DeCourseys’ claims against Paul Stickney ..., Paul H. Stickney Real Estate Services, Inc., and/or Windermere.” CP 1040-43.

When trial began, the DeCourseys’ fraud, fiduciary duty and CPA claims against Windermere and Stickney were the only ones remaining. RP (10/21/08) at 3.<sup>1</sup> Windermere stipulated to vicarious liability in the

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<sup>1</sup> The DeCourseys also asserted identical claims against Paul H. Stickney Real Estate Services, Inc. Following the jury’s verdict against all three defendants, Windermere argued there was insufficient evidence to support a judgment against Paul H. (continued . . .)

event the jury found Stickney liable. *Id.* at 35. The DeCourseys moved *in limine* under the “collateral source rule” to preclude Windermere from introducing any evidence of the DeCourseys’ settlement with Birgh/HIH. The trial court initially denied the DeCourseys’ motion (RP (10/21/08) at 12), but—after argument (*id.* at 14), consideration of the DeCourseys’ brief on the issue (CP 946-952) and hearing the DeCourseys’ evidence during their case-in-chief—revised its ruling, and held that the collateral source rule applied. RP (10/28/08) at 120. The court further ruled that Windermere could not seek to unfairly influence the jury by arguing that the DeCourseys should have sued Birgh/HIH or some other party, instead of Windermere and Stickney. *Id.* at 121.

The case was tried over five days between October 22 and October 29, 2008 before Judge Fox. Amazingly, Windermere put on no witnesses at trial. Stickney himself did not testify in his own defense, and never answered a single question from his own counsel. RP (10/23/08) at 42. Thus, Windermere did not contest the facts showing that Stickney’s relationship with Birgh/HIH was not a conflict of interest, nor did they deny that he improperly induced the DeCourseys to hire Birgh/HIH to further his own self-interest. Likewise, Windermere put on no witnesses

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(. . . continued)

Stickney Real Estate Services, Inc. CP 1012. The trial court disagreed and denied the motion. CP 1050-51. Stickney does not assign error to this ruling on appeal.

to refute the DeCourseys' lay and expert testimony regarding the damages to their house and the costs of repair. The jury was instructed on October 29 (CP 964-985) and returned a verdict on October 31, 2008. CP 986-988.

The jury found in favor of the DeCourseys on the breach of fiduciary and CPA claims, but not the fraud claim. *Id.* The jury found that Stickney's failure to disclose his conflict of interest with Birgh/HHH proximately caused the DeCourseys \$515,900 in damages. The jury awarded the DeCourseys a further \$6,300 on their CPA claim, for a total of \$522,200. *Id.* The trial court entered judgment on November 14, 2008. CP 996-97. The court subsequently denied Windermere's post-judgment motion (CP 1050-51), and entered an amended judgment. CP 1052-53.

The DeCourseys then moved for an award of attorney's fees and costs. CP 1054-70. They supported the motion with multiple declarations showing that they did not waive their right to fees (CP 1071-1233), and that their request was reasonable and warranted a 50% enhancement. CP 1234-84. After noting that he was not "reconsidering, revising, or reversing" Judge Erlick's prior ruling, Judge Fox granted the DeCourseys' request in part. RP (2/6/08) at 4. The court entered written findings awarding the DeCourseys \$356,142 in reasonable attorney's fees, enhanced by 30% (RP (2/6/09) at 5), for a total of \$462,985. CP 1456-58. The trial court further awarded the DeCourseys \$45,442 in litigation

expenses. *Id.*; CP 1491. A final judgment was entered. CP 1492-94.<sup>2</sup>

#### IV. ARGUMENT

##### A. **The Trial Court Did Not Abuse Its Discretion Awarding The DeCourseys Their Attorney's Fees And Litigation Costs.**

The trial court properly found that the DeCourseys were entitled to an award of attorney's fees and costs. CP 1456-58; CP 1491. Windermere argues that the trial court erred because (1) Judge Fox was bound by Judge Erlick's prior ruling on waiver and/or the appellate commissioner's denial of the DeCourseys' motion for discretionary review, and (2) the trial court did not make findings to support the reasonableness or segregation of the fees, the basis for a 30% enhancement, or its award of costs. For the reasons that follow, none of Windermere's arguments have merit.

##### 1. **Neither Judge Erlick's Nor The Commissioner's Prior Orders Prevented Judge Fox From Awarding Fees.**

In arguing that Judge Erlick's August 23, 2007 order is "fixed and final" (Op. Br. at 30), Windermere mischaracterizes the nature and effect of both that order and the appellate commissioner's denial of discretionary review. Neither ruling prevented Judge Fox from reaching the merits of the DeCourseys' motion for attorney's fees and granting it. In fact,

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<sup>2</sup> The final judgment, which was signed by counsel for both parties, has a scrivener's error. It shows \$463,427.00 for the fee award and \$45,000 for the cost award. CP 1492. It appears that \$442.00 was erroneously added to the attorney's fee award and subtracted from the cost award. Neither party caught the error and it is non-material; the total award, \$508,427, is the same as the court's original order. CP 1458.

Windermere does not assign error to the trial court's factual finding that the DeCourseys were entitled to attorney's fees under the CPA and the REPSA. In any event, substantial evidence amply supports the finding that the DeCourseys were entitled to an award of fees on both grounds.

**a. Judge Fox Did Not “Reverse” Judge Erlick, But He Had Authority To Do So In Any Event.**

Judge Erlick's August 23, 2007 order was not a “finding of fact” regarding the DeCourseys' purported waiver of their right to attorney's fees. It was a hand-written order resolving a discovery motion filed by the DeCourseys against another party (the City of Redmond). CP 704-707. Nor did it reflect a credibility assessment of the DeCourseys made after an evidentiary hearing; as discussed below, the order was based entirely on a vague statement made by Mr. DeCoursey while acting *pro se*. RP (8/23/2007) at 59-60. The issue of waiver was not argued in the briefing or hearing. *Id.*; CP 1110-1123. For these reasons, it was well within Judge Fox's discretion to construe Judge Erlick's prior order to permit the “award of attorney's fees since that time,” without “reconsidering, revising, or reversing that ruling.” RP (2/6/2009) at 6.

But even if Judge Erlick's August 23, 2007 order were considered a finding that the DeCourseys waived their right to attorney's fees, Judge Fox was not bound by it. To begin with, the August 23, 2007 order was interlocutory, and did not contain a CR 54(b) finding that “there is no just

reason for delay,” nor did it direct entry of judgment. Thus:

In the absence of any such findings, determination and direction, any order or other form of decision ... shall not terminate the action as to any of the claims or parties, ***and the order or other form of decision is subject to revision at any time before the entry of judgment ...***

CR 54(b) (emphasis added). Similarly, Washington case law is clear that the “law of the case” doctrine does not prevent trial courts from modifying earlier rulings, factual or otherwise, even when made by a different judge.

In *MGIC Fin. Corp. v. H.A. Briggs Co.*, 24 Wn. App. 1, 8, 600 P.2d 573 (1979), one judge made a pre-trial ruling denying the defendant’s motion for summary judgment. Several days later, a second judge saw things differently, and granted the motion. In rejecting the same argument Windermere raises here, the court held that the “law of the case” doctrine applies only where the parties raise identical issues on successive *appeals*, not where similar issues are raised in the trial court. The court noted there was no authority to extend the doctrine to trial court rulings. *Id.* The law is unchanged. See *Central Puget Sound Reg. Trans. Auth. v. Eastey*, 135 Wn. App. 446, 462-63, 144 P.3d 322 (2006) (Cox, J., concurring) (the “trial judge was entitled to reconsider” an earlier judge’s ruling; “[t]he law of the case doctrine did not prohibit reexamination of the matter”). In sum, even if Judge Fox “overruled” Judge Erlick, there was no error.

**b. The Commissioner's Denial Of Discretionary Review Is Not Law Of The Case.**

Windermere's claim that Judge Fox was precluded from reaching the attorney's fees issue because of Commissioner Neel's ruling denying discretionary review is equally baseless. The commissioner did not decide that the DeCourseys waived their right to attorney's fees. CP 910-18. Indeed, she recognized that "the DeCourseys may not have understood the full impact of their decision to waive attorney fees." CP 916. Rather, she denied the DeCourseys' motion based on RAP 2.3(b)(2)'s "probable error" that "alters the status quo" standard for discretionary review. *Id.* When the DeCourseys did not file a motion to modify, only that narrow ruling became the decision of the Court—nothing else.

The law of the case doctrine refers to "the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand." *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003). But the doctrine applies only if the appellate court reaches an issue on the merits. *Id.*; *Holst v. Fireside Realty, Inc.*, 89 Wn. App. 245, 258, 948 P.2d 858 (1997). The RAP expressly states that "denial of discretionary review ... does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision." RAP 2.3(c); *Ollie v. Highland Sch. Dist. No. 203*, 50 Wn. App. 639, 641, 749 P.2d 757 (1988) (denial of discretionary review "does not preclude

later review”). Commissioner Neel never reached the waiver issue on the merits and, thus, her ruling had no preclusive effect whatsoever.<sup>3</sup>

Windermere does not, and cannot, cite any law to the contrary—for good reason. If Windermere’s argument were accepted, parties would be reluctant to move for discretionary review for fear that a denial—for whatever reason—would be deemed a final decision on the merits. That possibility would chill the discretionary review process and, for those who gamble and lose, cause irreparable prejudice—despite the truncated procedure and unique standards that govern such motions. It would also create greater burdens for the Court; every ruling by a commissioner denying review would become the subject of a motion to modify, which the Court would have to carefully scrutinize. Commissioner Neel’s ruling was nothing more than what it purported to be: a discretionary ruling denying interlocutory review. It was never a decision on the merits.

**c. The Trial Court’s Unchallenged Fee Award Is Supported By Substantial Evidence.**

Apart from claiming that Judge Fox was bound by Judge Erlick’s and/or Commissioner Neel’s rulings, Windermere does not substantively

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<sup>3</sup> The two cases cited by Windermere can be easily distinguished on this basis. Neither *Gould v. Mutual Life Ins. Co.*, 37 Wn. App. 756, 683 P.2d 207 (1984) nor *Hough v. Ballard*, 108 Wn. App. 272, 31 P.3d 6 (2001) dealt with a denial of a motion for discretionary review. Rather, in both, the commissioner decided the cases were ripe for appeal. Because the parties opposing appealability did not move to modify those rulings, they were barred from thereafter raising the issue with the merits panel.

challenge the trial court's findings of fact that the DeCourseys were entitled to an award of attorney's fees and costs. The trial court found:

1. The Order on Plaintiffs' Motion for Protective Order dated August 23, 2007 does not prohibit or otherwise waive Plaintiffs' rights to recover attorneys' fees and costs under RCW 19.86, *et seq.* or upon any other basis in law or equity;
2. Plaintiffs are entitled to recover from Defendants reasonable attorneys' fees and costs under RCW 19.86, *et seq.* ...  
\* \* \*
5. Plaintiffs are entitled to recover attorneys' fees and costs from Defendants under the attorneys' fees clause of the Residential Purchase and Sales Agreement that was at issue in this lawsuit.

CP 1457. Windermere did not assign error to any of these findings, nor does it challenge them on the merits, choosing instead to rely solely on its erroneous "law of the case" arguments. Op. Br. at 2-5. These findings are thus verities that cannot be challenged on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992); RAP 10.3(g) ("A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number."). The findings are unassailable in any event.

The trial court did not abuse its discretion in finding that the August 23, 2007 order did "not prohibit or otherwise waive Plaintiffs'

rights to recover” fees. CP 1457.<sup>4</sup> Waiver is an intentional relinquishment of a known right, and the existence of that intent must be clear. *Keyes v. Bollinger*, 31 Wn. App. 286, 293-94, 640 P.2d 1077 (1982). “If the right claimed to have been knowingly waived requires an appraisal of the legal significance of particular conduct or documents, the lack of counsel at the time of an alleged waiver ... is a factor to be considered.” *Id.*<sup>5</sup> In a declaration supporting their motion, the DeCourseys stated unequivocally that “[w]e at no time waived our right to be reimbursed for the costs of the suit ..., and our statutory right to attorney fees ... under the Consumer Protection Act.” CP 1080 (¶ 54). The factual circumstances of, and actual colloquy at, the August 23, 2007 hearing amply support the DeCourseys’ assertion and the trial court’s unchallenged findings.

At the August 23 hearing, Judge Erlick heard motions regarding alleged discovery violations. The DeCourseys represented themselves *pro se*. CP 1072 (¶ 5); RP (8/23/07) at 2. None of the parties had raised the

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<sup>4</sup> A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). This Court will not substitute its judgment for that of the trial court’s, but will seek only to determine if substantial evidence supports the court’s conclusion. *West v. Port of Olympia*, 146 Wn. App. 108, 122, 192 P.3d 926 (2008).

<sup>5</sup> This is particularly true in the context of the CPA. As Judge Fox noted: “The whole reason for the statutory award of attorney fees in Consumer Protection actions is that often any victory by one whose rights have been violated under the CPA would be a Pyrrhic victory and there wouldn’t be enough damages involved to produce a fee. That certainly would be the case here, where the attorney’s fees approach the amount of damages.” RP (2/6/09) at 7-8.

issue of waiver, and the DeCourseys were not prepared to address it. CP 1075 (¶ 19); CP 1110-23; CP 1325.<sup>6</sup> Indeed, the question came up only at the end of the hearing, after Judge Erlick had ruled, as the parties were attempting to reduce his rulings to writing. The relevant colloquy was:

THE COURT: The DeCourseys shall testify regarding attorney's fees incurred, including the identity of the attorney, the fees incurred, and the amount paid. ...

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

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

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

THE COURT: The \$125?

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

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

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

\* \* \*

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

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<sup>6</sup> Indeed, the attorney for the City of Redmond (the party opposing DeCourseys in the discovery dispute) provided a declaration in support of the DeCourseys' motion for fees stating that: "[T]he relief I requested was to compel the DeCourseys to 'answer depositions [sic] questions ...' My proposed order did not request dismissal of any claims by the DeCourseys for attorneys' fees." CP 1325.

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

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

RP (8/23/07) at 59-60. The DeCourseys never stated that they intended to waive their right to fees. As they later explained to Judge Fox, when Mr. DeCoursey said, "[w]e're not waiving the statutory attorney fees that normally come with a—," he was about to cite the CPA, but was cut-off by Judge Erlick, who finished the sentence with reference to "\$125." CP 1076 (¶ 30). Indeed, because the DeCourseys were *pro se* at the time, they did not even understand they had a claim for fees. CP 1075 (¶ 22).

In the end, the only person to reference the CPA was the City's attorney, not the DeCourseys. No one mentioned the REPSA at all. As the DeCourseys would also explain to Judge Fox, when, in response to the City's inquiry, Judge Erlick indicated that his ruling would include any and all attorney's fees, the DeCourseys were upset, but did not want to defy the court by speaking up. CP 1077 (¶ 39). They signed the order to acknowledge receipt, but never assented to its terms. CP 1078-79 (¶ 47). Still acting *pro se*, the DeCourseys filed a motion for reconsideration to clarify that they did not intend to waive their right to recover attorney's fees (CP 708-714), but Judge Erlick denied it without explanation. CP 768. Given the foregoing, Judge Fox was well within his discretion when he found that August 23, 2007 order did not constitute a prospective

waiver of fees in this matter. Waiver is not a game of “gotcha.”<sup>7</sup>

Substantial evidence also supports Judge Fox’s finding that the DeCourseys were entitled to attorney’s fees under the REPSA—a ground for recovery that did not arise until after Judge Erlick’s ruling. The REPSA entitles a prevailing party to “reasonable attorneys’ fees and expenses.” CP 1438. Windermere argued at trial and continues to argue on appeal that Stickney was an intended beneficiary of the REPSA. RP (10/29/08) at 55-56; Op. Br. at 67-69. The jury rejected Windermere’s argument, but Judge Fox correctly ruled that—“having argued that they were third-party beneficiaries”—Windermere was bound by the REPSA’s fee provision. CP 1457 (¶ 4). Where, as here, a party asserts rights under a contract against another, it is subject to the contract’s fee clause, even if there was no binding agreement between them. *Herzog Aluminum, Inc. v. General Amer. Window Corp.*, 39 Wn. App. 188, 194-97, 692 P.2d 867 (1984). In short, Windermere must take the bitter with the sweet.

## **2. The Trial Court’s Findings Properly Support The Award of Attorney’s Fees And Costs.**

Windermere next complains that the trial court’s order granting the DeCourseys attorney’s fees and costs was improper. Op. Br. at 37-42. It

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<sup>7</sup> Even if Judge Erlick’s ruling on the matter were considered “law of the case,” the result would be the same. It is well-recognized that the law of the case doctrine is discretionary, and should not apply if the result would be “manifest injustice.” *State v. Worl*, 129 Wn.2d 416, 424, 918 P.2d 905 (1996); *see also* RAP 2.5(c). Under these circumstances, denying the DeCourseys attorneys fees would be a manifest injustice.

does not, however, actually challenge, nor assign any error to, the findings of fact made by the trial court in connection with its award:

6. The number of hours expended by Plaintiffs' attorneys in prosecution of their claims against Defendants was reasonable;
7. The billing rates of Plaintiffs' attorneys in prosecution of their claims against Defendants were reasonable;
- \* \* \*
9. Plaintiffs are entitled to recover attorneys' fees and costs from Defendants in the amount of \$462,985.

CP 1457-58. Windermere only assigns error to the order itself on the grounds that Judge Fox "violate[d] *Mahler* when he entered the order ... without benefit of specific findings, segregation of activity, or the basis for enhancement." Op. Br. at 2-4. In short, Windermere does not challenge the amount or the reasonableness of the fee award, only the form of the order.<sup>8</sup> The reasonableness of the award is therefore a verity on appeal. *Cowiche*, 118 Wn.2d at 819; RAP 10.3(g). Because the trial court's order satisfied *Mahler*, and was otherwise proper, the award must be affirmed.<sup>9</sup>

**a. The Trial Court's Order Satisfies *Mahler*.**

Windermere argues that the fee award was improper for lack of

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<sup>8</sup> This is the same approach Windermere took below. Judge Fox noted, "the defense has taken the position that there is no eligibility for attorney's fees whatsoever, end of argument." He further noted, "I don't find any particular dispute with any particular individual entries that have been presented to me." RP (2/6/09) at 4.

<sup>9</sup> Even were the Court to find that the form of the order was deficient in some respect, the result would not be reversal of the fee award; it would be a remand for further findings. *Mahler*, 135 Wn.2d at 435.

specific findings, as required by *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998). The concern in *Mahler* was appellate consideration of fee awards in the absence of a record for review. *Id.* at 433-35. To address this concern, *Mahler* held that trial courts must enter “findings of fact and conclusions of law ... to establish such a record.” *Id.* at 435. Windermere disingenuously claims that the “only specific finding made by Judge Fox was that counsel had given him ‘roughly, I would say, three inches of paper to consider.’” Op. Br. at 38 (*quoting* RP (2/6/09) at 11). Not so. The trial court specifically followed *Mahler* after considering the DeCourseys’ extensive submissions and the argument of counsel, and it entered the express findings and conclusions set forth above (CP 1456-58)—findings that Windermere fails to quote anywhere in its brief.

Nor did the trial court “accept unquestionably fee affidavits from counsel,” as Windermere suggests. Op. Br. at 38. During the hearing on fees, the court noted that it did not just *receive* “three inches of paper to consider,” it *considered* those papers when making its findings:

Let me say that there is a considerable record before me and the papers filed with regard both in opposition - - well, primarily in support of the motion are before me. I am not going to make supplemental findings or respond. I made the findings that I am going to make. I have had roughly, I would say, three inches of paper to consider. ***And that is where the material is that I have relied on, as well as my experience in viewing the trial.***

RP (2/6/09) at 11 (emphasis added). The court also noted, “I have

reviewed the billings presented by plaintiffs.” RP (2/6/09) at 4. Far from showing that the trial court did not take an “active role” in assessing the DeCourseys’ fee request, the record shows that it did exactly what *Mahler* requires. Additional findings were unnecessary.

Lastly, even had Windermere challenged the amount of the award, the DeCourseys satisfied their burden of proving reasonableness. Fees are “calculated by multiplying a reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result.” *Id.*, 135 Wn.2d at 434. “Counsel must provide contemporaneous records documenting the hours worked,” excluding hours related to “unsuccessful theories and claims.” The records must also inform the court of, “the type of work performed, and ... who performed the work.” *Id.* The declaration provided by the DeCourseys’ attorneys provided all this information:

- The declaration attached all attorney time records, which detailed, on a daily basis, the hours worked, the attorney or paralegal performing the work, and a description of the particular tasks performed. CP 1234 (¶ 3); CP 1240-1279. The declaration then identified the billable rates for all attorneys and paralegals working on the case *Id.* (¶ 4).
- The declaration stated that, “[t]ime which was not related to the DeCourseys’ prosecution of their Consumer Protection Act claims against Windermere and Stickney have [sic] been redacted.” *Id.* (¶ 3). The time entries themselves were redacted, confirming that time/fees related to abandoned or unsuccessful claims, were excluded from the fee request. CP 1240-1279.

- The declaration provided a detailed explanation of how Windermere’s aggressive litigation strategy drove up the amount of the DeCourseys’ attorney’s fees prior to and at trial. CP 1236-1237 (¶¶ 9-17).

After deducting approximately \$100,000 in non-recoverable fees, the DeCourseys requested an award of fees in the amount of \$356,142.54 (CP 1065), which the trial court granted (and, as discussed below, enhanced by 30%). RP (2/6/09) at 5. The trial court’s finding that this amount was reasonable, based on the “considerable record” before him, as well as his “experience in viewing the trial” (*id.* at 11) was not a manifest abuse of discretion. *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001) (reasonableness subject to manifest abuse of discretion standard).

**b. Segregation Of Fees Was Impossible.**

As noted, the DeCourseys’ fee request was already limited to fees actually incurred in prevailing on their claims against Windermere and Stickney, and did not include fees related to claims and parties that never went to trial (including Birgh/HH). CP 1234 (¶ 3); RP (2/6/09) at 10-11. Windermere apparently argues that, with respect to the claims against it and Stickney, the trial court should have further segregated fees related to the CPA claim from fees related to the fiduciary duty claim. Op. Br. at 39. But, “[t]he court is not required to artificially segregate time in a case, such as this one, where the claims all relate to the same fact pattern, but allege different bases for recovery.” *Ethridge*, 105 Wn. App. at 461;

*Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006) (no abuse of discretion to refuse to segregate CPA and non-CPA claims that were “so related that no reasonable segregation ... can be made”).

Contrary to Windermere’s claim that the trial court failed to give a “clear explanation” of its ruling on this issue, the court could not have been more clear. It specifically found no segregation was possible:

8. Upon examining the records submitted with Plaintiffs’ motion, it would be impracticable to segregate attorney time and fees between proof of claims for breach of fiduciary duties, RCW 18.86, *et seq.*, and violations of RCW 19.86, *et seq.*;

CP 1457. As the DeCourseys’ attorneys stated by declaration, and what the trial court saw at trial, the DeCourseys’ CPA and fiduciary duty claims were identical. CP 1238 (¶ 18). The only “unfair and deceptive trade practice” at issue was Stickney’s failure to disclose a conflict of interest—the same non-disclosure that constituted a breach of fiduciary duty. That is what the DeCourseys argued to the jury (RP (10/29/08) at 31), and what the jury found. It is not an abuse of discretion to award unsegregated fees where, as here, different claims involve the same theory and evidence. *Ethridge*, 105 Wn. App. at 461; *also Bloor v. Fritz*, 143 Wn. App. 718, 747, 180 P.3d 805 (2008) (“claims arose out of the same set of facts”).

**c. A 30% Enhancement Of Fees Was Appropriate.**

The DeCourseys asked the trial court to award a 50% enhancement

on their \$356,142 lodestar fee request based on the contingent nature of the representation, as well as the difficulty, novelty and uncertainty of the litigation. CP 1066-69. The court awarded a 30% upward adjustment, yielding a total fee award of \$462,985. RP (2/6/09) at 5; CP 1456-58. It is well-settled that a trial court may increase a fee award to reflect the contingent nature of success and the quality of work performed. *Pham v. Seattle City Light*, 159 Wn.2d 527, 541, 151 P.3d 976 (2007). Regarding the former, the court should consider the contingent nature of success at the outset of the litigation. “This is necessarily an imprecise calculation and must largely be a matter of the trial court’s discretion.” *Id.* at 541; *Ethridge*, 105 Wn. App. at 462-63. There was no abuse of discretion here.

The trial court found that an enhancement was justified based on the “high-risk nature of this particular litigation” (RP (2/6/09) at 5)—a finding supported by substantial evidence. When the DeCourseys’ attorneys appeared, the DeCourseys had limited finances, and there was a significant risk that they would never recover their fees. CP 1235 (¶ 7). After all, they appeared only weeks after Judge Erlick issued his August 23, 2007 order. CP 747-49. Not only were fees in doubt, so was the outcome of the case. While Stickney’s conflict of interest was clear, as the trial court recognized, “[t]he implications of that were strenuously fought.” RP (2/6/09) at 5. Even now, *Windermere* characterizes the case

as “difficult” and “unique,” where “factual complexity was mirrored by the legal complexity.”<sup>10</sup> The trial court agreed, and properly took this into account when enhancing the award. *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 336, 858 P.2d 1054 (1993) (affirming 1.5 multiplier in novel case). There was no abuse of discretion.

**d. The Cost Award Was Proper.**

Finally, Windermere complains that the basis of the trial court’s cost award “is not evident” and was not “expressly set out in the order he signed.” Op. Br. at 41. Windermere is wrong on both counts. The court’s order contains two amounts. The first is \$462,985, which is the \$356,142 lodestar fee enhanced by the 30% multiplier. The second is \$508,427, which is the total amount awarded. CP 1457-58. The difference between the two is \$45,442, which is the amount of costs awarded—a fact clearly recorded in the clerk’s minutes. CP 1491. That number, in turn, was derived from the DeCourseys’ declaration “Concerning Costs of Case.” CP 1285-1304. The declaration itemized the litigation-related expenses incurred by the DeCourseys following Judge Erlick’s ruling, not including attorney’s fees. CP 1286. The amount of those expenses, reflected on page 2, is \$45,442.03—the same figure adopted by the trial court. *Id.*

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<sup>10</sup> See Decl. of Matthew F. Davis in Support of Appellants’ RAP 10.4(b) Motion to File Overlength Brief.

There is no basis to overturn the cost award even if it compensated the DeCourseys for expenses beyond that allowed under RCW 4.84.010. Where a statute entitles a party to recover “reasonable attorney fees,” in addition to “costs,” a court has equitable discretion to award “necessary expenses” as part of an attorney’s fee award. *Panorama Village Condo. Owners Ass’n Bd. of Dir. v. Allstate Ins. Co.*, 144 Wn.2d 130, 142-44, 26 P.3d 910 (2001). Of course, the CPA contains a distinct attorney’s fee provision. RCW 19.86.090.<sup>11</sup> In any event, the trial court also found the DeCourseys entitled to an award under the REPSA (CP 1457), a finding that Windermere does not challenge on appeal. As noted, the REPSA allows an award of fees “and expenses.” CP 1438. The trial court had discretion to construe the term “expenses” more broadly than the statutory term “costs,” and courts have interpreted this exact language to allow the recovery of expert witness fees, travel expenses and the like. *Bloor*, 143 Wn. App. at 745-46. The cost award was proper on this basis as well.

**B. The Trial Court Properly Applied The Collateral Source Rule And Refused To Offset The \$270,000 Birgh/HH Settlement.**

The DeCourseys settled with Birgh/HH for \$270,000 shortly before trial. CP 1040-43. Windermere claims that the trial court should

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<sup>11</sup> *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 694, 132 P.2d 115 (2006), did not consider whether expenses beyond statutorily defined “costs” under RCW 4.84.010 can be independently recovered under the CPA’s “reasonably attorney’s fee” provision.

have allowed it to exploit the settlement in either or both of two ways. *First*, Windermere argues that the court should have permitted it to introduce evidence of the settlement at trial. *Second*, Windermere argues that the court should have offset the jury's damages award in the amount of the settlement. There was no error. The trial court properly exercised its discretion when ruling that evidence of the settlement was inadmissible under the "collateral source rule," and that no offset was warranted.

**1. The Collateral Source Rule Applied To The Settlement.**

The trial court ruled that the collateral source rule barred Windermere from introducing evidence of the DeCourseys' settlement with Birgh/HH. RP (10/28/08) at 120. That ruling cannot be overturned absent a showing of a manifest abuse of discretion. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). The collateral source rule operates to prevent a defendant-tortfeasor from receiving the benefit of payments made to a plaintiff from a source independent of the defendant. *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 523, 844 P.2d 389 (1993). "The very essence of the collateral source rule requires exclusion of evidence of other money received by the claimant so the fact finder will not infer the claimant is receiving a windfall and nullify the defendant's responsibility." *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 803, 953 P.2d 800 (1998). The Supreme Court has noted that, "in a collateral source situation, the

receipt of a windfall by one party or the other is unavoidable, and that, as between an injured plaintiff and a defendant-wrongdoer, the plaintiff is the appropriate one to receive the windfall.” *Xieng*, 120 Wn.2d at 523.

The trial court properly concluded that the Birgh/HIH settlement was a collateral payment “from a source independent of” Windermere and Stickney. Windermere/Stickney and Birgh/HIH were separate parties, represented by different counsel, and subject to different theories of recovery which raised different factual allegations: Stickney violated his statutory and fiduciary duties by failing to disclose his relationship with Birgh/HIH; HIH breached its contractual duty by failing to properly perform renovations to the DeCourseys’ home. That there was a business relationship between Stickney and Birgh/HIH—the basis for a finding of a conflict of interest (CP 1351)—does not mean that Windermere/Stickney and Birgh/HIH were the same person. And, contrary to Windermere’s cherry-picked citations to Mr. DeCourseys’ testimony, that was not the DeCourseys’ theory at trial. Mr. DeCoursey testified explicitly:

Q. Are you essentially saying that Paul Stickney and HIH were the same person?

A. Absolutely not.

Q. So HIH was separate from Mr. Stickney even though he was an officer and shareholder?

A. Yes

\* \* \*

Q. Okay. And you are not suggesting that they have any shared interests, are you?

A. I do believe they have shared interests.

Q. Are you suggesting they had the same interests?

A. Probably not, no.

RP (10/22/08) at 177-178. In short, the DeCourseys' theory—which was proven at trial—was that Stickney and Birgh were joint-venturers with overlapping interests, not overlapping identities. Why else would Birgh and HIH settle claims asserted against them without including Stickney?

Moreover, when evaluating whether a settlement was made by an “independent source,” courts examine the “nature of the benefit” as much as its source—an issue upon which the defendant carries the burden of proof. *Xieng*, 120 Wn.2d at 524-26. To avoid the collateral source rule, a defendant must prove that the payment was intended to indemnify the defendant. *Id.* Windermere presented no such evidence and, indeed, the settlement agreement shows that Birgh/HIH intended no such benefit:

This release, accord and satisfaction includes, but is not limited to release of HIH/BIRGH, their insurers and bonding companies, from any liability, obligation or duty relating to THE LAWSUIT. This release specifically includes all claims against Paul Stickney, who is a defendant in THE LAWSUIT, but only in the capacity of an officer, director or representative of HIH. ***This release does not include, and does not affect, THE DeCOURSEYS' claims against Paul Stickney individually, or in any other capacity, Paul H. Stickney Real Estate Services, Inc., and/or Windermere.***

CP 1040-41 (emphasis added). The Birgh/HHH settlement was intended to benefit Birgh/HHH only, not Windermere or Stickney; the agreement left the DeCourseys' claims against them untouched. *Id.* The court properly exercised its discretion to exclude evidence of the DeCourseys' separate settlement with a separate party concerning separate claims. As the court noted when denying Windermere's post-trial motion, if the jury learned of the settlement, it "would have led them to perhaps make a deduction in the total verdict ... on an improper basis." RP (12/5/08) at 6. The collateral source rule was created for just that purpose. *Johnson*, 134 Wn.2d at 803.

**2. There Was No Basis For An Equitable Offset.**

The trial court also properly refused to reduce the judgment by the \$270,000 settlement amount. RP (12/5/08) at 6-7. The collateral source rule is a principle of both evidence and remedy. *Johnson*, 134 Wn.2d at 803; *Cox*, 141 Wn.2d at 439. Where it applies, as here, the rule allocates the potential windfall that arises from a collateral payment; either the plaintiff may receive a windfall in the form of a potential double recovery, or the defendant may receive a windfall in the form of diminished liability. The rule directs that the windfall go to the plaintiff, for, "as between an injured plaintiff and a defendant-wrongdoer, the plaintiff is the appropriate one to receive the windfall." *Cox*, 141 at 439-40 (*quoting Xieng*, 120 Wn.2d at 523). Although the DeCourseys received no "windfall" here, as

a matter of law, the collateral source rule prevented Windermere from exploiting the Birgh/HHH settlement to lessen its culpability and liability.

Even if the court could consider an offset on equitable grounds, there was no abuse of discretion. *Robinson v. McReynolds*, 52 Wn. App. 635, 640, 762 P.2d 1166 (1988) (offset reviewed for abuse of discretion). A defendant may be entitled to an offset of a settlement amount against a judgment, but only if the settlement and judgment represent damages for precisely the same injury. *Id.* at 639-40; *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 359, 177 P.3d 755 (2008). Where there is no evidence that the settlement was intended to compensate the plaintiff for the same damages awarded by the jury, there should be no reduction to the award. *Harmony*, 143 Wn. App. at 359; *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 452, 922 P.2d 126 (1996); *Robinson*, 52 Wn. App. at 639-40.<sup>12</sup> In order to receive the benefit of an offset, the defendant bears the burden of showing how the settlement was allocated. *Puget Sound Energy, Inc. v. Alba Gen. Ins. Co.*, 149 Wn.2d 135, 141, 68 P.3d 1061 (2003).

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<sup>12</sup> The case Windermere relies upon, *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 702, 9 P.3d 898 (2000), is distinguishable on this basis. The plaintiffs sued the seller and a contractor for breach of the Condominium Act for the same damages "without any differentiation as to the party responsible." *Id.* at 702. Unlike here, in *Eagle Point*, there was no evidence to show that plaintiffs' settlement with the contractor was intended to satisfy a claim separate from those asserted against the remaining defendant, nor did the settlement contain an exchange of consideration unrelated to the plaintiffs' damages claims generally (such as the confidentiality provision at issue here).

Windermere presented no evidence that the Birgh/HIH settlement compensated the DeCourseys for the damages it or Stickney caused. Windermere had more than a month from the verdict (October 31, 2008) until argument on its post-trial motion for an offset (December 5, 2008) to conduct discovery on the allocation issue, but it did nothing. To be sure, the agreement itself does not allocate the settlement amount to any aspect of the DeCourseys' damages—many of which were unique to Birgh/HIH. Specifically, prior to settlement, the trial court ruled that HIH violated the CPA by failing to register as a contractor, and awarded the DeCourseys summary judgment on this basis. CP 1229-31. The DeCourseys would have received a substantial award of attorney's fees against Birgh/HIH on their CPA claim, and the settlement explicitly releases "all types of claims, including but not limited to, claims for damages, costs, *attorney's fees* . . . that might have been asserted in THE LAWSUIT." CP 1042 (emphasis added). The DeCourseys also claimed that Birgh/HIH over-billed them and deprived them of the use and enjoyment of their home (CP 592-595 (¶¶ 197, 203, 214)), neither of which were included in the jury's award.

Moreover, a critical aspect of the settlement was an agreement that the DeCourseys "delete" all references to Birgh/HIH found on various websites published by the DeCourseys, and to "forever refrain from publishing or re-publishing" references to Birgh/HIH. CP 1041-42. These

provisions were so valuable to Birgh/HIH that the agreement contains a liquidated damages clause that entitles Birgh/HIH to an award of \$25,000 each time they are breached. *Id.* As they explained to the trial court, the DeCourseys greatly value their freedom of speech, and they used that freedom to express their concerns about the consumer impact of Windermere's conduct, primarily through the website renovationtrap.com. CP 1033-34; RP (10/28/09) at 159-60, 166; CP 25 (¶ 44); CP 1041. The settlement reflects a substantial payment from Birgh/HIH to limit the DeCourseys' freedom to publicly recount their experiences, on the one hand, and to preserve Birgh/HIH's privacy, on the other. If the settlement is used to offset the DeCourseys' judgment against Windermere, then they would receive nothing for their agreement to surrender this valuable right.

The decision in *Pederson's Fryer Farms* is instructive. There, the plaintiff brought suit against its insurer to recover expenses for cleaning up a contaminated underground tank. Prior to bringing suit, the plaintiff settled with two other insurers. 83 Wn. App. at 435-36. After the jury returned a verdict in favor of the plaintiff, the insurer asked the court to offset the award in the amount the plaintiff had received in settlement, but the trial court refused. *Id.* at 451. The court of appeals affirmed:

Transamerica argues that Pederson's will recover more than it expended in cleaning up the contamination and thus receive an inappropriate "double recovery." ...[¶] The settlement, however, was not mere payment for Pederson's

cleanup costs; it was in exchange for a release of liability for all past, present and future environmental claims. Transamerica did not demonstrate what part, if any, of the settlement was attributable to cleanup costs. Thus, no showing of double recovery was made. The trial court acted appropriately by not reducing the award.

*Id.* at 451-52. The same is true here. Just as in *Pederson's*, Windermere made no effort to prove, and there is no evidence in the record to show, that the Birgh/HHI settlement resulted in a double recovery for the DeCourseys. The settlement was not “mere payment” to the DeCourseys for the cost of repairing their home; it was a payment made in exchange for a release from liability for various claims and for future confidentiality.

**C. The DeCourseys Proved The “Public Interest Impact” Element Of Their CPA Claim.**

The jury found in favor of the DeCourseys on their CPA claim. CP 999. A CPA claim requires (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. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Windermere challenges the verdict with respect to the “public interest impact” only. Op. Br. at 47-50. Although Windermere suggests that this Court can substitute its judgment for that of the jury (*id.* at n. 16), it cannot. The question of “[w]hether the public has an interest in any given action is to be determined by the trier of fact.” *Hangman*

*Ridge*, 105 Wn.2d at 790. The jury was properly instructed on the “public interest impact” and substantial evidence supported its finding.

A private dispute has a public interest impact where there is a likelihood that “additional plaintiffs have been or will be injured in exactly the same fashion.” *Hangman Ridge*, 105 Wn.2d at 790. This inquiry, in turn, is determined based on several non-exclusive factors, including:

- (1) Were the alleged acts committed in the course of defendant’s business?
- (2) Did defendant advertise to the public in general?
- (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others?
- (4) Did plaintiff and defendant occupy unequal bargaining positions?

*Id.* at 790-791. No factor is dispositive and not all of the factors need be present. *Id.* The trial court properly instructed the jury on these factors. CP 978 (Instr. No. 12). Windermere does not challenge the instruction, nor could it. It mirrors the *Hangman Ridge* criteria and was taken straight from the Washington Pattern Jury Instructions. *See* WPIC 310.05.

Substantial evidence supports the jury’s finding that the public interest impact element was satisfied. For sure, Stickney’s conduct was committed in the course of both his and Windermere’s business; indeed, the DeCourseys hired him because he was a well-established Windermere agent. RP (10/22/08) at 9. Moreover, undisputed evidence proved that Stickney’s unfair and deceptive conduct—inducing the DeCourseys to hire Birgh without revealing his conflict of interest—was not an isolated event,

but was consistent with Stickney's prior dealings with other clients:

- Stickney admitted that he had induced at least 30 other clients to hire Birgh/HIH between 1999 and 2004; in fact, Stickney testified that Birgh was the only person he recommended to his clients for that type of work (RP (10/23/08) at 131);
- Stickney also conceded that, as with the DeCourseys, he never informed any of these other clients that he had a joint venture or financial interests with Birgh/HIH (*id.* at 134);
- Stickney's admissions were corroborated by the Calmes—clients of Stickney before the DeCourseys—who testified that Stickney encouraged them to use Birgh/HIH without disclosing the conflict of interest (*id.* at 86-87);
- Mrs. Calmes testified that Stickney “actually said he had no financial relationship with Mr. Birgh” (*id.* at 94-95); Stickney admitted he told the DeCourseys the same thing, *i.e.*, that he had “no financial gain from recommending HIH” (*id.* at 142); and
- Also like the DeCourseys, the Calmes testified that Stickney's promise that Birgh/HIH could do the work were proved wrong; the Calmes ultimately fired Birgh/HIH because of poor performance (*id.* at 87-89, 95).

This evidence was more than sufficient to persuade a fair-minded, rational jury that “additional plaintiffs have been or will be injured in exactly the same fashion.” *Hangman Ridge*, 105 Wn.2d at 790.

Contrary to Windermere's claim that “there is no evidence Stickney advertised to the public in general” or “did not actively solicit the DeCourseys,” the jury heard plenty of both. Stickney provided services to the DeCourseys through Windermere, who widely advertises its real estate

services through the media, websites, lawn signs and the like. RP (10/22/08) at 11-14, 185; RP (10/23/80) at 137-38. Stickney had an office and staff, and used business cards to advertise his services and solicit clients, including the DeCourseys. RP (10/22/08) at 9-10; RP (10/23/08) at 103-104; 108. He directed the DeCourseys to the Windermere website, on which he is featured. RP (10/22/08) at 12-14; 185. Lastly, Windermere's suggestion that Stickney and the DeCourseys shared equal bargaining positions defies the facts and common sense. The DeCourseys were inexperienced in the Washington real estate market, and that is why they retained Stickney—who had been a licensed agent for over fifteen years. RP (10/22/08) at 8-9; 205-206; RP (10/23/08) at 8. Of course, the DeCourseys also relied on Stickney's false representations that he had seen Birgh do similar work in the past when they agreed to purchase the house and have HIH renovate it.

Washington case law is replete with decisions finding a violation of the CPA based on the deceptive acts of real estate agents and brokers. *See Svendsen v. Stock*, 143 Wn.2d 546, 559, 23 P.3d 455 (2001); *McRae v. Bolstad*, 101 Wn.2d 161, 166, 676 P.2d 496 (1984); *Bloor*, 143 Wn. App. at 737; *Edmonds v. John L. Scott Real Estate*, 87 Wn. App. 834, 847, 942 P.2d 1072 (1997); *Harstad v. Frol*, 41 Wn. App. 294, 301, 704 P.2d 638 (1985). These cases have found the “public interest impact” element

satisfied on facts nearly identical to those at issue here. *Id.*; also *Sing v. John L. Scott, Inc.*, 83 Wn. App. 55, 65-66, 920 P.2d 589 (1996), *rev'd on other grounds*, 134 Wn.2d 24, 948 P.2d 816 (1997). *Edmonds* is typical.

There, the buyer's broker failed to inform its client that if a dispute arose over the earnest money agreement, the broker could unilaterally determine whether the buyer was in default and, if it determined that, then the broker could keep a portion of the earnest money. "In sum a purchaser is never informed that, while acting as his or her agent, Scott may simultaneously act ... in furtherance of its own financial interests as well." *Edmonds*, 87 Wn. App. at 846. The broker admitted that it followed this policy "dozens, perhaps hundreds, of times" in a period of four years. In affirming the trial court's judgment in the buyer's favor, this Court held:

The third element ..., public interest impact, is clearly present here. The public interest is impacted by a private dispute where there is a likelihood that "additional plaintiffs have been or will be injured in exactly the same fashion." Scott's "dozens, perhaps hundreds" obviously satisfy this test. Other factors showing public interest, as enumerated in *Hangman*, are also present: the acts were committed in the course of Scott's business, Scott advertises to the public in general, and Scott and Edmonds occupied unequal bargaining positions.

*Id.* at 847 (citation omitted). The court also found a public interest impact because the broker gave a "subsequent purchaser of the house another property information form she knew contained similar false statements." *Id.* at 849. The jury heard similar evidence here. Stickney induced at least

30 clients to hire Birgh without disclosing his conflict of interest, and he recommended him to the DeCourseys even after he knew that there had been problems with Birgh/HHH's work. RP (10/23/08) at 96-97, 131. This Court should affirm the jury's finding of a CPA violation.

**D. There Was No Error In The Trial Court's Instructions Regarding Conflict Of Interest Or Damages.**

Windermere also challenges the trial court's instructions on the issues of conflict of interest and damages, claiming that they "effectively directed [the jury] to award ... construction defect damages if it found that Stickney had a conflict of interest." Op. Br. at 52. The instructions were entirely proper and did not compel the jury's verdict; the undisputed facts did. "Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). "[W]here a jury instruction correctly states the law, as here, the court's decision to give the instruction will not be disturbed absent an abuse of discretion." *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002).

**1. The Court Properly Instructed The Jury On A Real Estate Agent's Duty To Disclose Conflicts Of Interest.**

Windermere argues that the instructions on conflict of interest imposed too stringent of a duty on real estate agents to disclose conflicts

to their clients. The trial court instructed the jury first that:

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

CP 973 (Inst. 7). It next instructed the jury that:

Here, Stickney owed a duty to the DeCourseys to scrupulously avoid representing any interest antagonistic to that of the DeCourseys in transactions relating to their home, or otherwise engaging in self-dealing, without the explicit and fully informed consent of the DeCourseys.

CP 975 (Inst. 9). Both instructions were entirely consistent with well-established Washington law defining the fiduciary duty owed by an agent to a principal generally, and a real estate agent to a client specifically.

Pursuant to RCW 18.86.050(1)(b), a buyer's agent has a duty "[t]o timely disclose to the buyer any conflicts of interests." The statute does not define "conflicts of interests," but leaves the definition to the common law. RCW 18.86.110; *Jackowski v. Borchelt*, 209 P.3d 514, 520 (2009) (RCW 18.86 does not abrogate fiduciary duties of real estate agents). An agent owes its principal a fiduciary duty of disclosure to "insure the undivided loyalty of the agent and to assure the principal that he may rely upon the impartial and unreserved fidelity of his agent throughout the course of the transaction for which the agent was employed." *Cogan v. Kidder, Matthews & Segner, Inc.*, 97 Wn.2d 658, 662, 648 P.2d 875

(1982) (citation omitted). This duty requires the agent to fully disclose all facts relating to his interest in and his actions involving the transaction. *Crisman v. Crisman*, 85 Wn. App. 15, 22, 931 P.2d 163 (1997) (citing *Moon v. Phipps*, 67 Wn.2d 948, 955-56, 411 P.2d 157 (1966)).

This duty of disclosure is particularly well-defined, and stringent, in the real estate agent context. In *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, 73 Wn.2d 225, 230, 437 P.2d 897 (1968), the Supreme Court held that a seller's agent breached her fiduciary duties by failing to disclose to her principal that the buyer was the agent's sister. In so doing, the Court defined the duties owed by a real estate agent to its principal:

[T]here flows from this agency relationship and its accompanying obligation of utmost fidelity and good faith, the legal, ethical, and moral responsibility on the part of the listing broker ... to exercise reasonable care, skill, and judgment in securing for the principal the best bargain possible; to scrupulously avoid representing any interest antagonistic to that of the principal in transactions involving the principal's listed property, or otherwise self-dealing with that property, without the explicit and fully informed consent of the principal; and to make, in all instances, a full, fair, and timely disclosure to the principal of all facts within the knowledge or coming to the attention of the broker ... which are, or may be, material in connection with the matter for which the broker is employed, and which might affect the principal's rights and interests or influence his actions.

*Id.* at 229. "The disclosure rule of *Mersky* ... reflects a prophylactic concern for maintaining unmitigated loyalty in the principal-agent relationship. It guards against the possibility of compromising an agent's

absolute duty to his principal.” *Cogan*, 97 Wn.2d at 663. For that reason, an agent’s duty of disclosure is breached regardless “of the materiality of the undisclosed circumstance.” *Mersky*, 73 Wn.2d at 233.

The court’s instructions correctly stated the law, and repeated much of the exact language used in *Mersky*. Windermere studiously ignores *Mersky*, and cites no contrary authority.<sup>13</sup> Indeed, Windermere did not even propose an alternative instruction; it asked only “that the Court include with that instruction” the following additional language:

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

RP (10/29/08) at 8-9. The court properly rejected Windermere’s proposed language. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 90, 18 P.3d 558 (2001) (court may refuse instruction that misstates the law). The language apparently was derived from Sixth Amendment ineffective assistance of counsel cases. *See State v. Dhaliwal*, 150 Wn.2d 559, 570, 79 P.3d 432 (2003). These cases have nothing to do with the fiduciary duties of a real

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<sup>13</sup> Windermere’s citation to *Girard v. Myers*, 39 Wn. App. 577, 694 P.2d 678 (1985), is no exception. The question of what constitutes a conflict of interest was not even an issue in *Girard*. There, the agent’s conflict of interest was an undisputed fact, and the only issue was whether the agent properly disclosed that fact to his principal—an issue the trial court decided without a jury. *Id.* at 587. In fact, the *Girard* court expressly followed the rule of disclosure articulated in *Mersky*. *Id.*

estate agent, or agency law. More important, the proposed language contradicts *Mersky*'s prophylactic holding that an agent breaches the duty of disclosure even if it "did not result in injury to the principal, or ... materially affect the principal's ultimate decision in the transaction." *Mersky*, 73 Wn.2d at 231. There was no error in refusing the instruction.<sup>14</sup>

## **2. The Trial Court Properly Instructed The Jury On The Measure Of Damages.**

The trial court instructed the jury to "determine the amount of money that will reasonably and fairly compensate the DeCourseys for such damages." CP 982. The jury awarded the DeCourseys \$515,900 as a result of Stickney's breach of fiduciary duty. CP 987. It is difficult to discern whether Windermere raises an evidentiary or instructional challenge regarding the measure of damages (Op. Br. at 56-57), assuming it preserved either issue for review.<sup>15</sup> Either way, it does not matter. The DeCourseys were entitled to recover all damages proximately caused by Stickney's breach—not just the return of his commission.

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<sup>14</sup> Even if it was error not to give Windermere's additional instruction, it was harmless. There was substantial evidence that Stickney's relationship with Birgh/HH resulted in more than a "theoretical" division of loyalty; it directly drove Stickney to recommend Birgh/HH to the DeCourseys, and his subsequent efforts to help Birgh/HH collect payment from the DeCourseys. The jury would have reached the same result.

<sup>15</sup> Windermere did not assign error to the trial court's denial of its motion to exclude evidence of construction defect damages. RP (10/21/08) at 33. Moreover, while Windermere objected to the trial court's instruction on damages, it only raised the issue of when damages were measured, nothing else. RP (10/29/08) at 10-11. Failure to raise specific grounds of objection precludes review on appeal. *See* CR 51(f); *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 615-17, 1 P.3d 579 (2000).

In *Cogan*, the Supreme Court specifically held that a real estate “agent is subject to any losses incurred from his breach of duty.” 97 Wn.2d at 667. Both prior and subsequent case law confirms that recoverable “losses” are not limited to an agent’s commission. The *Cogan* court expressly approved an earlier court of appeals decision which held: “Breach of duty by an agent may result in forfeiture of the agent’s commission *as well as liability for damages.*” *Meerdink v. Krieger*, 15 Wn. App. 540, 545, 550 P.2d 42 (1976) (emphasis added). Following *Cogan*, the court of appeals likewise held:

[W]e hold that a rational trier could find that Fireside, through Bourgeois, began representing Rader as Rader’s agent. If a rational trier did so find, it could also find that Fireside breached its duty to Holst by not disclosing its dual agency, and require restitution of Fireside’s commission. ***Nothing herein means that Holst is (or is not) entitled to a trial on damages in addition to the commission,*** for this record shows nothing about whether Fireside’s breach, if any, was a legal or factual cause of such damages.

*Holst*, 89 Wn. App. at 259 (emphasis added). There is nothing exceptional about this rule. It follows the longstanding tort principle that one who breaches a fiduciary duty is liable for all damages proximately caused thereby. *Senn v. Northwest Underwriters, Inc.*, 74 Wn. App. 408, 414 875 P.2d 637 (1994); *Interlake Porsche & Audi, Inc. v. Buchholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1986). *Windermere* ignores this precedent entirely, and it does not identify any public policy to support an exception

to the general rule in the real estate agent context. There is none.

Windermere disingenuously argues that *Mersky* and the other cases stand for the proposition that “forfeiture of the commission is the only remedy permitted by the Court.” Op. Br. at 57. They do no such thing. In every case, the commission was the *only* damages sought or incurred; indeed, almost all of Windermere’s cases involve an agent suing a client for a commission. *Mersky*, 437 Wn.2d at 898 (plaintiffs “seek recovery of a real-estate commission” against agent); *Girard*, 39 Wn. App. at 588 (agent’s counterclaim for commission denied); *Ross v. Perelli*, 13 Wn. App. 944, 947-48; 538 P.2d 834 (1975) (agent’s claim for commission denied); *Koller v. Belote*, 12 Wn. App. 194, 199, 528 P.2d 1000 (1974) (same). Notably, in *Koller*, the court affirmed an award of general damages in favor of the client on its counterclaim against the agent. 12 Wn. App. at 199. At bottom, none of these cases establish the novel standard Windermere urges. The cases merely show that damages may include the agent’s commission, but are not limited by it.

**3. The Trial Court Properly Instructed The Jury On When Damages Are To Be Measured.**

There is no merit to Windermere’s argument that the trial court should have instructed the jury “that damages are measured at the time they are sustained.” Op. Br. at 63. This argument likewise finds no support in Washington law. Indeed, such a limitation would perversely

punish innocent victims and reward recalcitrant wrongdoers where, as here, the wrongdoers not only refuse to admit liability at the outset, but engage in a scorched-earth litigation strategy that unreasonably delays the victim’s rightful recovery for years. The trial court instructed the jury:

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

\* \* \*

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

CP 982 (Inst. 16). This instruction was derived from the Washington Pattern Jury Instructions (WPIC 30.01.01) and, as explained above, correctly states the measure of damages for breach of fiduciary duty by a real estate agent. After all, “[t]he purpose of awarding damages in cases involving injury to real property is to return the injured party as nearly as possible to the position he would have been in had the wrongful act not occurred,” a decision best “left to the trier of fact.” *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 459, 105 P.3d 378 (2005).

Windermere fails to cite to even a single case holding that repair costs must be measured at the time damages are suffered. *Thompson*, the case cited by Windermere, has nothing to do with that issue, but instead involves the “lesser than” rule—which is a completely different concept. Where the “lesser than” rule applies, a property owner can recover repair

costs or the diminution in value of the property, whichever is less. *Id.* at 458. Because it is an equitable defense, the defendant bears the burden of proving that repair costs exceed diminution in value. *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 428-29, 10 P.3d 417 (2000). Windermere did not ask the trial court to instruct the jury on the “lesser than” rule, much less reference the rule in its objection. RP (10/29/08) at 10-11. Nor did it introduce any evidence on the issue, as was its burden. Indeed, beyond mere citation to *Thompson*, Windermere does not even argue for application of the “lesser than” rule on appeal; its argument relates solely to the timing of repair costs.

Even if there was support for Windermere’s novel rule of damages, failure to so instruct the jury was harmless. The DeCourseys’ expert did not testify that it would cost “four times” more in 2008 to repair the DeCourseys’ home than it would have in 2005. Mr. Dealy was shown a “very preliminary scope of work” prepared by his boss in 2005, which he characterized as a rough “guesstimate.” RP (10/28/08) at 63-65. At the time of the 2005 “guesstimate,” many problems in Birgh’s work had not yet been discovered. *Id.* at 140; 143-44. As Mr. Dealy testified:

Q. ... Is that the same scope of work that is there now?

A. No, it’s not.

Q. What’s the difference?

A. The difference that I've seen briefly looking at this is there is not a lot of structural exterior work being done, not removing siding. There is some interior structural work to be done. There is resupporting the back of the house, minimal. There is not all the -- based on the new information that we have from the engineer, there is a lot of work that is missing that I've seen in this scope.

Q. So there is more structural work to do now?

A. There is more structural work, more electrical work to be done.

\* \* \*

Q. Do you have knowledge as to whether or not discoveries as to errors in the walls or in the structure came to be known after November 2005?

A. Yes.

Q. So - - we can't rely, then, on the estimate from 2005 because we have to do more work?

A. There is more work, yes.

RP (10/28/08) at 125-126. For the completed 2008 estimate, on the other hand, Mr. Dealy consulted with engineers and subcontractors to determine what needed to be done to bring the house up to code. RP (10/27/09) at 83-85. Windermere had no expert to rebut Mr. Dealy's testimony.

As to the purported four-fold difference between the amount Birgh/HH originally estimated in 2004, and Mr. Dealy's 2008 estimate, the comparison is apples-to-oranges. Birgh badly underestimated what it would cost to renovate the house in the first place and, in any event, Mr. Dealy estimated what it would cost to **both** remove Birgh's mistakes **and** replace the defective work in safe and structurally sound manner:

Four years' difference, costs goes up, labor goes up, and also it takes time to take things apart and put them back together correctly.

RP (10/28/08) at 71; *id.* at 77 (“We have to take apart and rebuild what is there.”). In the end, Mr. Dealy testified only that if the repair work were done in 2005 or 2006, “it would have been less” than the 2008 estimate because some costs have gone up (*id.* at 141), but Windermere put on no witnesses, no experts and no evidence demonstrating how much it would have cost to repair the DeCourseys’ house in 2005 or any other year. The DeCourseys’ evidence was the only evidence on the issue, and the jury accepted it. There are no grounds for reversal.<sup>16</sup>

**E. The Jury Properly Found That Stickney’s Breach Of Fiduciary Duty Caused The DeCourseys’ Damages.**

Windermere does not challenge the trial court’s proper instructions on proximate cause. CP 980. Rather, it challenges the jury’s verdict itself on the grounds that Stickney’s breach of fiduciary duty did not cause the DeCourseys’ damages. Op. Br. 58-63. Proximate cause consists of “cause in fact” and “legal causation.” *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). As explained below, the DeCourseys satisfied

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<sup>16</sup> The same is true with respect to the “lesser than” rule. Even had Windermere asked for an instruction based on the rule, it would not have made a difference because Windermere introduced absolutely no evidence on the alleged diminution in the value of the house as a result of Birgh/HHH’s faulty work. *See Panorama*, 102 Wn. App. at 428-29 (defendant bears burden of proving diminution). Only the DeCourseys put on an appraisal expert, and he testified that—as a result of Birgh/HHH’s defective work—the property was worthless. RP (10/23/08) at 188.

their burden of showing both “cause in fact” and “legal causation.”

**1. Stickney’s Non-Disclosure Was A “Cause In Fact” Of The DeCourseys’ Damages.**

Windermere argues that “if Birgh had not performed defective work, no damages would have resulted.” Op. Br. at 58. But that is not the test. Cause in fact refers to “but for” consequences—the connection between an act and an injury. *Id.* at 778. “But for” causation exists where the defendant’s conduct produces an unbroken sequence of events resulting in the plaintiff’s damages. *Hertog v. City of Seattle*, 138 Wn.2d 265, 282-83, 979 P.2d 400 (1999). Thus, the relevant question is not whether Birgh’s conduct contributed to the DeCourseys’ damages, but whether Stickney’s conduct produced an unbroken sequence of events that resulted in those damages. Substantial evidence supports the jury’s finding of an unbroken sequence of events here. *Id.* at 275 (cause in fact is a question for the jury); *Hartley*, 103 Wn.2d at 778 (same).

The jury found that Stickney violated his fiduciary duty by urging the DeCourseys to hire Birgh/HH without disclosing his financial interest in the transaction—a finding that Windermere does not challenge. CP 986. In addition, Stickney told the DeCourseys that he had seen Birgh’s work over the years on similar renovations. RP (10/22/08) at 27-28; RP (10/23/08) at 56. He told them that Birgh “was an expert in construction,” “the best I’ve seen,” and Birgh would do “high quality” work. RP

(10/23/08) at 56; RP (10/28/08) at 163-64, 168. The DeCourseys trusted Stickney's statements as an "independent reference." RP (10/22/08) at 39. Unfortunately, not only did Stickney have a conflict, he had never seen Birgh do that kind of work before and, worse, he knew that the Calmes had fired Birgh because of poor performance. RP (10/23/08) at 91, 96-97; RP (10/28/08) at 168, 173-74.

Mr. DeCoursey repeatedly testified that had he known of Stickney's business relationship with Birgh/HIH, they would not have bought the house and hired Birgh. RP (10/22/08) at 38-39; RP (10/28/08) at 174.<sup>17</sup> By the same token, had Stickney disclosed that business relationship, the DeCourseys would not have relied on his assurances that Birgh was qualified to renovate the Barr house. "If we had known that Stickney had a financial relationship with Birgh, then we would have understood that he was a salesman for HIH, which puts a completely different perspective on his statements"; "a testimonial from a salesman is empty words." RP (10/22/08) at 38-39. This testimony was undisputed and was corroborated by other evidence. When Stickney recommended

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<sup>17</sup> This fact alone distinguishes *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 147 P.3d 600 (2006), a case decided on summary judgment. In *Smith*, there was no evidence that, had the attorney properly advised the client of certain deficiencies in the construction contract, "he would have achieved a better result"—a unique standard that applies in attorney malpractice cases. *Id.* at 870. The client stated only that he "would have probably sought another builder." *Id.* In contrast, here, the jury believed the DeCourseys' undisputed testimony that they would not have hired Birgh "but for" Stickney's breach of fiduciary duty.

that the DeCourseys use an inspector who Stickney had “worked with for a long time,” the DeCourseys declined, and chose to hire an “independent inspector” instead. *Id.* at 15. The DeCourseys would have done the same thing again had they known of Stickney’s relationship with Birgh/HH.

Windermere apparently concedes that “but for” Stickney’s non-disclosure, the DeCourseys never would have hired Birgh and, thus, would not have been damaged by his defective work. It argues, however, that because Birgh’s work was a “direct cause” of the damages, his actions break this unbroken sequence of events. But there may be more than one proximate cause, and the acts of a third party do not necessarily break the causal chain. *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 207, 667 P.2d 78 (1983). “Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are not reasonably foreseeable are deemed superseding causes.” *Crowe v. Gaston*, 134 Wn.2d 509, 519, 951 P.2d 1118 (1998). The foreseeability of an intervening act, like “cause in fact” generally, is a question for the jury to decide. *Id.* at 520; *Cramer v. Dep’t of Highways*, 73 Wn. App. 516, 520, 870 P.2d 999 (1994).

The jury was instructed on these principles (CP 980), and they found that Stickney should have reasonably foreseen the possibility that

Birgh's work would be defective. An intervening act is unforeseeable only if it is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Crowe*, 134 Wn.2d at 519-20. Construction defects and delays are hardly extraordinary or improbable; that is why Windermere has a policy that agents give multiple references to clients. RP (10/23/08) at 10. This is especially true here; the jury heard evidence that Stickney knew when he recommended Birgh to the DeCourseys that the Calmes had previously fired him. *Id.* at 96-97. The jury also knew that Stickney had never even checked to see if Birgh/HIH was a licensed contractor. *Id.* at 138-141. In sum, substantial evidence amply supports the jury's finding that Stickney's breach of duty set in motion the foreseeable consequences that resulted in the DeCourseys' damages.

**2. Stickney's Breach Of Fiduciary Duty Was The Legal Cause Of The DeCourseys' Damages As Well.**

In deciding "legal causation," this Court must decide "whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Minahan v. W. Wash. Fair Ass'n*, 117 Wn. App. 881, 890, 73 P.3d 1019 (2003). This decision turns on "mixed considerations of logic, common sense, justice, policy, and precedent." *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998). None of these considerations justify overturning the jury's finding of causation.

By statute and at common law, a real estate agent must observe the “utmost fidelity and good faith,” and “to scrupulously avoid representing any interest antagonistic to that of the principal in transactions ... without the explicit and fully informed consent of the principal.” *Cogan*, 97 Wn.2d at 662 (*quoting Mersky*, 73 Wn.2d at 231). Further:

The policy underlying this duty of disclosure is obvious; it is both to insure the undivided loyalty of the agent and to assure the principal that he may have and rely upon the impartial and unreserved fidelity of his agent throughout the course of the transaction for which the agent was employed.

*Id.* at 662-63. The law is equally clear that where the agent violates this trust, especially for purposes of furthering his own self interest, the “agent is subject to any losses incurred from his breach of duty.” *Id.* at 667.

Here, the DeCourseys had every reason to believe that Stickney was acting with undivided loyalty when he urged them to hire Birgh/HIH. Stickney violated his duties and the DeCourseys’ trust by:

- Failing to provide the DeCourseys with multiple referrals, as required by Windermere policy;
- Encouraging the DeCourseys to hire Birgh without disclosing (and falsely representing) his financial entanglements with Birgh/HIH;
- Telling the DeCourseys that he had seen Birgh/HIH perform similar advanced renovations in the past when, in fact, he had not;
- Recommending Birgh/HIH even though HIH was not a licensed contractor; and

- Urging the DeCourseys to buy a house that was otherwise unacceptable with assurances that Birgh's work would make the house acceptable and substantially increase its equity value.

In sum, Stickney breached his fiduciary duties by recommending an undisclosed business partner, Birgh, for a job that he knew or should have known Birgh could not handle. He did so to serve his own self interest at the expense of his clients'. Under these circumstances, common sense, justice, and public policy dictate the Windermere and Stickney must bear legal responsibility for the same conduct from which they stood to benefit.

This is not a case like *Kim v. Budget Rent-A-Car*, 143 Wn.2d 190, 15 P.3d 1283 (2001), where liability means the defendant is "answerable in perpetuity" for the conduct of an unrelated third person. Here, Stickney recommended Birgh because he would personally benefit if Birgh were hired; Stickney knew what Birgh was being hired for and helped prepare the original scope of work (RP (10/22/08) at 19-21, 32-33); and, contrary to Windermere's suggestion, Stickney's involvement did not "effectively terminate" before any plans were drawn. Stickney's involvement in Birgh's work continued and, poignantly, was directed primarily at helping Birgh get paid—something that would secretly benefit Stickney. When Birgh demanded more money, Stickney helped the DeCourseys refinance to raise cash and, when that failed, helped Birgh draft a demand letter. *Id.* at 57-58, 83-86. Put simply, Stickney did not cause an accident by merely

leaving his keys in the car; Stickney tossed the keys to a reckless and unlicensed driver. The jury's causation finding should be upheld.

**F. The Trial Court Did Not Preclude Evidence That Others Caused The DeCourseys' Damages.**

Plucking scattered objections from the trial transcript, Windermere claims that the trial court precluded evidence that other parties were responsible for the DeCourseys' damages. Op. Br. at 65-67. The court did no such thing. As discussed below, Windermere vigorously argued and examined witnesses at length regarding its theory that blame should be shifted to Birgh/HIH, which the trial court allowed. However, the trial court did prevent Windermere from suggesting that the DeCourseys should have sued someone other than Windermere and Stickney:

MR. DAVIS: And the last question, just because again, I don't want arguments in front of the jury, I would like to ask Mr. DeCoursey, "Why isn't HIH here?" And I think that's a totally fair question.

THE COURT: I don't think you can ask that question. That will go into the issues that would be prejudicial and have absolutely no probative value.

RP (10/22/08) at 55. The Court later said the same thing: "I don't think any question can be asked consistent with the ruling that I just indicated, like where is Mr. Birgh?" RP (10/28/08) at 121. The court properly concluded that the DeCourseys' choice of defendant was totally irrelevant to whether Windermere and Stickney were liable for Stickney's breach of

fiduciary duties and violation of the CPA, or whether his conduct was a proximate cause of the DeCourseys' damages. RP (10/29/08) at 33 ("There is not an issue here about choice of defendant in the case, and the jury is instructed to disregard that."). There was no abuse of discretion. *Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992) (exclusion of evidence reviewed for abuse of discretion).

Moreover, the trial record reveals that Windermere had no difficulty presenting evidence and argument that others caused the DeCourseys' damages. Even if evidence was improperly excluded on this issue, it was cumulative and harmless. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994). Windermere put on no witnesses, but repeatedly asked Mr. DeCoursey to admit, without any objection, that Birgh/HHH (and others)—not Stickney—was the primary cause of the DeCourseys' damages. For example:

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

A. The damages to the house, yes.

Q. Okay. But for the damages to the house, you wouldn't have had to refinance?

A. Correct.

Q. Can you think of any damages that Mr. Birgh wasn't the primary cause of?

A. Yes. There were other parties in this lawsuit.

Q. Okay. We'll get to those in a bit. Can you think of any damages - - any elements of damage that Mr. Birgh wasn't a cause of?

A. I understand that the electrician may have been responsible for some of the damages in the house.

RP (10/22/08) at 191-92. Indeed, there was never a dispute that the damage to the DeCourseys' house stemmed almost entirely from Birgh/HHH's faulty construction—a fact Mr. DeCoursey readily admitted:

Q. ... Did Paul Stickney hammer any nails in the house?

A. No.

Q. Did he use a saw? Was he sawing anything?

A. No.

Q. Did he build the roof?

A. No.

RP (10/23/08) at 162-163. Windermere's counsel emphasized this "Stickney-didn't-hold-the-hammer" theme in closing argument:

And I would submit that that's where we are. We are talking about somebody who did not cause these damages. We are talking about somebody who can be sued.

\* \* \*

And I have to tell you that Mr. Birgh not doing his job - - I would argue other things, too, but I don't think I can - - that there were, in fact, here other, independent causes that resulted in the damage that had been argued by the DeCourseys. Once you have this new, independent cause, you are not longer the proximate cause.

RP (10/29/08) at 34, 47. There was no "iron curtain" preventing Windermere from introducing evidence of Birgh's culpability, and arguing

that it was a superseding cause of the DeCourseys' damages. The jury simply rejected that flawed argument for the reasons explained above.

**G. The Jury Properly Rejected Windermere's Argument That The REPSA Barred The DeCourseys' Claims.**

Windermere's argument that the REPSA's "Recommendations and Referrals" clause bars the DeCourseys' claims can be rejected on both factual and legal grounds. Windermere does not challenge the sufficiency of the evidence here, and for good reason. Stickney did not sign the REPSA, contrary to Windermere policy and Washington law. RP (10/22/08) at 148. Nevertheless, Windermere cross-examined Mr. DeCoursey about the REPSA and, during closing argument, asked the jury to find that it absolved Windermere and Stickney of liability. RP (10/22/08) at 190-191; RP (10/29/08) at 55-56. The jury simply refused to accept Windermere's self-serving interpretation of the REPSA.

Nor does the REPSA bar the DeCourseys' claims as a matter of law. The "Recommendations and Referrals" clause provides in part:

Agent may assist Buyer or Seller with locating, selecting or scheduling services providers, such as home inspectors, contractors and lenders. Agent cannot guarantee, ensure or be responsible for the quality or performance of the services ... third parties.

CP 1445. But the DeCourseys never sought to hold Stickney responsible for Birgh's work as a guarantor; they sought to hold Stickney responsible for his own improper conduct, *i.e.*, failure to disclose a patent conflict of

interest. The “Recommendations and Referrals” clause does not exculpate Stickney for violation of his statutory and common law fiduciary duties.

The clause could not have such an effect in any event. A real estate agent’s statutory duties—including the duty to “disclose to the buyer any conflicts of interest”—cannot be waived as a matter of law. RCW 18.86.050(1). Similarly, “[e]xculpation from any potential liability for unfair or deceptive acts or practices,” under the CPA, “clearly violates public policy.” *Scott v. Cingular Wireless*, 160 Wn.2d 843, 854-55, 161 P.3d 1000 (2007). Put simply, and for the reasons discussed below, the REPSA does not exculpate Stickney because his liability arose exclusively from extra-contractual statutory and fiduciary duties. It would be perverse if Stickney could escape liability for the same non-disclosure that induced the DeCourseys to agree to the “Recommendations and Referrals” clause in the first place; plainly, the DeCourseys never would have agreed to the clause had they known of Stickney’s business dealings with Birgh/HH.

**H. The DeCourseys’ CPA And Breach Of Fiduciary Duty Claims Are Not Barred By The Economic Loss Rule.**

Almost as an afterthought, Windermere argues that the DeCourseys’ damages are barred by the “economic loss rule,” requiring this Court to “dismiss the case.” Op. Br. at 71. As a threshold matter, it is well-settled that the economic loss rule, even where it applies, does not bar CPA claims. *See Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 211,

194 P.3d 280 (2008) (rule barred misrepresentation claim, but not CPA claim); *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213, 969 P.2d 486 (1998) (same). Thus, even if the rule were relevant to the DeCourseys' fiduciary duty claim (it is not), as explained above, the DeCourseys would still be entitled to judgment on their CPA claim (pp. 42-47) and the corresponding award of attorney's fees (pp. 17-34).

Washington law is equally clear that the economic loss rule does not bar the DeCourseys' fiduciary duty claim. *Windermere* fails to cite any case applying the rule to such a claim. To the contrary, in *Jackowski v. Borchelt*, Division 2 recently held in a nearly analogous situation that statutory and common law claims brought by home buyers against their real estate agents were not barred by the economic loss rule:

[T]he Jackowskis contend that their claim that Hawkins-Poe and Johnson breached statutory duties owed under RCW 18.86.030, as well as common law duties should have survived summary judgment. We agree.

\* \* \*

For clarity, we reiterate that chapter 18.86 RCW does not abrogate professional and fiduciary duties of real estate agents. [¶] Neither do we believe that the economic loss rule, as described in *Alejandre*, abrogates all professional malpractice claims, particularly where a client hires a professional and, therefore, establishes a privity of contract with that professional. We distinguish this holding from *Alejandre*, which did not involve a buyer suing his real estate agent, but rather, suing the seller. We are not willing at this time to expand our Supreme Court's holding in *Alejandre* to preclude all recovery for economic loss against professional agents, as to do so would be to abrogate professional malpractice claims for all cases not

involving physical harm.

*Id.*, 209 P.3d at 520. This reasoning is consistent with a myriad of cases in which plaintiffs have successfully asserted fiduciary duty claims against real estate agents with whom they also had a contractual relationship. *See Edmonds*, 87 Wn. App. at 851; *Holst*, 89 Wn. App. at 255-58. As these cases recognize, Stickney’s (and thus Windermere’s) liability to the DeCourseys arises out of Stickney’s statutory and common law fiduciary duties as a real estate agent, not a contractual relationship.

Finally, if Windermere’s argument were accepted, then virtually every fiduciary duty and malpractice claim for breach of a professional duty would be barred by the parties’ contractual relationship where, as here, the damage is economic. Such a result would be unprecedented, and contrary to policies underlying the economic loss rule. The rule “prevents a party to a contract from obtaining through a tort claim benefits that were not part of the bargain.” *Alejandre v. Bull*, 159 Wn.2d 674, 683, 153 P.3d 864 (2007). But where an agent fails to disclose a conflict of interest, there is no fair bargain, and no ability for the “parties to negotiate toward the risk distribution that is desired or customary.” *Id.* Indeed, it is the uneven nature of the relationship that led the legislature to impose the strictest fiduciary duties on real estate agents—duties “which may not be waived.” RCW 18.85.030. Simply put, the economic loss rule cannot

eviscerate the very fiduciary and professional duties the legislature intended to place beyond the reach of the parties' ability to contract.

**I. The DeCourseys Are Entitled To Attorney's Fees On Appeal.**

The DeCourseys are entitled to an award of attorney's fees and costs incurred on appeal. It is well-established that authority for awarding attorney's fees in the trial court supports an award of fees on appeal under RAP 18.1(a). *See Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 506, 761 P.2d 77 (1988). If this Court affirms the trial court's award of fees and costs, an award here is equally appropriate.

**V. CONCLUSION**

The judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 9th day of October, 2009.

LANE POWELL PC

By   
\_\_\_\_\_  
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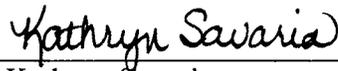
**CERTIFICATE OF SERVICE**

I hereby certify that on October 9, 2009, I caused to be served a copy of the foregoing **RESPONDENTS' ANSWERING BRIEF** on the following person(s) in the manner indicated below at the following address(es):

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- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**

  
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Kathryn Savaria