Supreme Court No. _____

COURT OF APPEALS NO. 57878-6-II

SUPREME COURT
OF THE STATE OF WASHINGTON

DOROTHY HELM,

Appellant,

v.

KRISTYAN CALHOUN ET VIR AND

THOMAS PARKER ETUX.,

Respondents.

PETITION FOR REVIEW

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I. Tables

A. Table of Contents

Appendix

B. Table of Authorities

Cases

Statutes

Rules

II. Identity of Petitioner

Appellant Dorothy Helm asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part III of this petition.

III. Citation to Court of Appeals Decision

Opinion in *Dorothy Helm v. Kristyan Calhoun et al.*, No. 57878-6-II (Wash. Ct. App. Oct. 15, 2024) (unpublished), and subsequent order denying motion for reconsideration, filed March 18, 2025. A copy of the decision is in the Appendix at pages A-1 through A-43. A copy of the order denying petitioner's motion for reconsideration is in the Appendix at pages A-44.

IV. Issues Presented for Review

1. Did the trial court improperly dismiss on summary judgment Helm's CPA claims against Calhoun and Parker and Helm's claim of participation in a breach of fiduciary duty

against Parker?

2. Does Calhoun as a professional fiduciary and certified professional guardian (CPG) have fiduciary duties independent of the UPOAA (RCW ch. 11.125)?

3. When evaluating Calhoun's conduct while acting under a power of attorney, should she be held to the higher standard of a CPG, as opposed to the standards for a lay person?

4. Is the jury given insufficient guidance if asked to determine whether real property sold was for an "inappropriate amount" instead of fair market value?

5. Did the trial court manifestly abuse its discretion by failing to admit under ER 404(b) plaintiff's evidence of a similar transaction between Calhoun and Parker regarding (Sorenson's) real property?

V. Statement of the Case

This Petition for Review raises the significant issue of whether it was an unfair or deceptive act or practice for a

professional fiduciary (Calhoun) acting under a power of attorney (POA) to sell a vulnerable adult's (Helm's) house to the fiduciary's friend (Parker) in a private sale at a price well below fair market value without consulting the principal (Helm).

This case involves a lawsuit by Appellant, Dorothy Helm, against Kristyan Calhoun, who held a POA signed by Helm and construed by the trial court and court of appeals to authorize Calhoun to sell all of Helm's real estate. There was no mention of price, terms of sale or any other particulars. Calhoun then sold in early 2017 the first of Helm's properties, a single-family residence for which Helm paid $117,000 in 2005, to Calhoun's friend, Thomas Parker, for $28,000, a price well below fair market value and without consulting Helm. Helm contended that Calhoun, as a professional fiduciary and certified professional guardian (CPG), had a fiduciary duty to obtain the best possible price in the sale of the property and consult with her principal, as described in *Allard v. Pacific Nat'l Bank,* 99

Wn.2d 394, 406, 663 P.2d 104, 773 P.2d 420 (1983), and her failure to do so violated Calhoun's fiduciary duty and any course of action any reasonable fiduciary.

Thomas Parker, Calhoun's friend, was also a named defendant. Helm alleged three theories of recovery against him: participation in a breach of fiduciary duty, violation of the CPA, and civil conspiracy. All of Helm's claims against Parker were dismissed on summary judgment, and the court of appeals affirmed that ruling.

Subsequently, Helm's CPA claim against Calhoun was dismissed on summary judgment. Helm's claim against Calhoun for civil conspiracy and breach of fiduciary duty proceeded to trial. The civil conspiracy claim was dismissed upon the close of the evidence.

Only Helm's breach-of-fiduciary-duty claim was submitted to the jury. The jury rendered a verdict against Helm on her breach-of-fiduciary duty claim and in favor of Calhoun.

The Court of Appeals affirmed the trial court in all respects. Helm filed a motion for reconsideration and a motion to publish. In the motion for reconsideration, Helm pointed out numerous factual errors in the Court of Appeals decision that may have caused the court to rule as it did.

The Court of Appeals ultimately denied Helm's motions, declining to revise its opinion or publish the decision. Helm timely filed the present petition for review to this Court.

VI. Argument

A. This Appeal Involves Issues of Substantial Public Interest under RAP 13.4(b)(4).

The issues on this appeal involve substantial public interest because they affect the financial wellbeing of vulnerable individuals, including those with cognitive impairments and mental health issues, who must rely on professional fiduciaries for help with their financial assets.

Certified professional guardians (CPGs) are appointed by this Court and are accordingly given a high position of trust and

confidence within our society. The issues in this appeal raise questions about the standard of care for CPGs when they are selling real estate under a POA, a commonly used less restrictive alternative to a guardianship or conservatorship.

The issues in this appeal include whether it was an unfair or deceptive act or practice for a professional fiduciary acting under a POA to sell her vulnerable principal's property to the fiduciary's friend for a price well below market value without consulting the principal.

Another substantial public interest relates to real estate sales in Washington. Not only did the conduct of the defendants prevent Helm from receiving the best possible price for her property, but it also deprived other potential buyers of a fair opportunity to compete for the property. In this way, "the marketplace is disrupted artificially and a fraud on the market has occurred." *Sing v. John L. Scott*, Inc., 134 Wn.2d 24, 45-46, 948 P.2d 816 (1997).

1. The trial court improperly dismissed Helm's CPA claims against Calhoun and Parker and Helm's claim of participation in a breach of fiduciary duty against Parker.

Summary judgment rulings are reviewed on appeal *de novo*. *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 547, 374 P.3d 121 (2016). The party moving for summary judgment bears the initial burden of showing that there is no disputed issue of material fact." *Young v. Key Pharms.*, Inc., 112 Wash.2d 216, 225, 770 P.2d 182 (1989). In conducting this inquiry, the court must view all facts and reasonable inferences in the light most favorable to the nonmoving party. *Keck v. Collins,* 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

In affirming the trial court, the Court of Appeals determined that "Helm cannot show that Parker and Calhoun participated in an unfair or deceptive practice." *Helm*, *Slp. Opn.* at 37. Helm respectfully disagrees.

a) Summary judgment dismissal of the CPA claim against Parker was error.[1]

The unfair act or practice alleged by Helm was Parker's knowing purchase of property well below fair market value from a known fiduciary without any inquiry as to the owner's motivation to sell at such a discounted price. AB 25-26. CP 7-8. Parker willfully put his blinders on.

In his motion for summary judgment regarding the CPA claim against him, Parker essentially argued that there were no disputed facts because "there was nothing unfair or deceptive about Parker purchasing property at the lowest price he can negotiate." CP 82. Parker seemed to implicitly concede that he got a good deal, i.e., below fair market value, and asserted that it wasn't unfair. AB 16-18. Parker's argument did not compel Helm to set out admissible evidence on the fair market value of

[1] The record on Parker's summary judgment motion includes CP 1 to CP 348, which corresponds to proceedings up through the trial court's pre-trial order denying Helm's motion for reconsideration of Parker's dismissal from the case. CP 347.

the property. *Preston v. Duncan*, 55 Wn.2d 678, 682-83, 349 P.2d 605 (1960).

Helm was "justified in relying on the allegations in her pleadings" when Parker did not challenge in his motion for summary judgment that the price he paid was below fair market value. *Preston v. Duncan*, at 682-83. It was up to Parker to demonstrate *in his motion for summary judgment* that there could be no admissible evidence establishing the elements of Helm's CPA claim against him. *Id.* He did not do so, not even submitting his own declaration in support.

Helm responded to Parker's motion with evidence to support the elements of her claims. She included evidence that the sale price of the property was indeed below fair market value. For example, she provided an excerpt from Parker's deposition in which he testified the tax-assessed value was $64,570, more than double the price he was paying for the property. CP 256 at 82. She also provided evidence that Parker was an experienced

real estate broker, had had multiple transactions with Calhoun in both a fiduciary and personal capacity going back at least 12 years, and did not make inquiry into Helm's motivation to sell at such a low price. CP 102-3; CP 220-221, ¶ 11; CP 250 at 47-48; CP 260-63.

On a motion for summary judgment, neither the trial court nor the Court of Appeals should have accepted Parker's argument at face value, for his knowledge of the value of the property is peculiarly within himself and can only be determined at trial by the assessment of his credibility by the trier of fact. AB 30-33; *Riley v. Andres*, 107 Wn. App. 391, 395, 27 P.3d 618 (2001).

In reply, Parker challenged Helm's evidence of fair market value as inadmissible. The trial court granted Parker's summary judgment dismissal of Helm's claims against him without explanation. CP 302.

Helm moved for reconsideration, providing additional

evidence of the fair market value of Helm's property in the form of a retrospective appraisal by a certified appraiser. CP 323. The court denied Helm's motion for reconsideration on the basis that it "states an insufficient basis for reconsideration under CR 59." CP 347.

The Court of Appeals affirmed the trial court's dismissal of the CPA claim, reasoning that Parker "testified that he never had any contact with Helm whatsoever regarding the transaction" and that Calhoun and Parker "testified that they negotiated over the price[.]" *Slp. Opn.* at 37. But this reasoning is erroneous because it assumes that the unfair act alleged was Parker's participation in a breach of fiduciary duty, when the actual unfair act alleged as to the CPA claim was Parker's knowing purchase of property well below fair market value from a known fiduciary without any inquiry as to the owner's motivation to sell at such a discounted price. AB 25-26; CP 7-8.

This Court has observed:

> "... Summary judgment . . . is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury *if they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists. ..."

Preston v. Duncan, 55 Wn.2d at 683 (quoting *Whitaker v. Coleman*, 115 F.2d, 305, 307 (5th Cir., 1940)) [*italics added*].

Here, Helm *really did have evidence* that showed Parker's purchase price of $28,000 was far below the fair market value of $115,000, based on an appraisal of the property. CP 304. She *really did have evidence* that Parker purchased the property from a known fiduciary without any inquiry as to the owner's motivation to sell at such a discounted price. CP 102-3; CP 220-221, ¶ 11; CP 250 at 47-48; CP 260-63. This evidence plainly shows the unfair act alleged.

The trial court effectively excluded Helm's otherwise admissible evidence of market value when it denied her motion for reconsideration. It apparently did so without considering the

Burnet factors. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

The trial court's dismissal of Helm's CPA claim against Parker should be reversed. CP 347.

b) Summary judgment dismissal of the CPA claim against Calhoun was error.

The Court of Appeals determined that Helm failed to prove the first element of her CPA claim against Calhoun. The reason given was that Helm signed the POA and Service Agreement instructing Calhoun to liquidate Helm's properties, so Helm cannot show that Calhoun's actions constituted an unfair or deceptive act or practice under the CPA. *Slp. Opn.* at 13.

However, this conclusion ignores the discrepancy in the price at which the Rhapsody Drive property was sold and its fair market value. It is at least a disputed issue of material fact whether a professional fiduciary's selling real property under a POA for less than market or fair value under the circumstances

of this case is an unfair or deceptive act or practice, and that issue should not be resolved on summary judgment. And even if *Allard* did not apply, a fiduciary—and especially a professional fiduciary—must at least act *in the principal's best interest* under RCW 11.125.140(1)(a). Selling real property for a fraction of its value cannot, as a matter of law, be in the principal's best interest, despite Calhoun's belated arguments to the contrary. The trial court erred in granting summary judgment on Helm's CPA claim against Calhoun.

Of course, both Calhoun and Parker denigrated the property with *speculation* about whether the septic system was working, the trees posed a danger to the house, the supposed threat of a lawsuit, the house was filled with the smell of marijuana and the neighbor's concerns that the house was a drug house. *Slp. Opn.* at 5. But they made no attempt to show what effect any of these alleged issues had on the value of the property.

Helm had not been released from the mental institution she

was in at the time that Calhoun and Parker were discussing Calhoun's sale of Helm's property to Parker.[2] There is no evidence that Calhoun knew the value of the property, or made any effort to find out, other than to accept a number casually thrown out by real estate agent Allen of $40,000 to $50,000 based on a supposed CMA that was never produced in court and was not shown to even exist.[3] She simply negotiated Parker's price up from $26,000 to $28,000 and agreed to a private sale to him. A reasonable person could conclude that it was an unfair or deceptive act or practice on the part of Calhoun to sell Helm's property to her friend Parker at a below market price without discussing the matter with Helm, particularly in light of the fact that Calhoun had recently done it before with another client. *See § A.5 infra re Sorenson transaction.*

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[2] Calhoun and Parker discussed the sale in December 2016 (CP 607), and Helm was released from HSC Yankton in August 2017 (CP 689).

[3] CP 687-89.

Helm also argued that she can show how Calhoun's sale of the property to Parker affected other consumers or the public, the third element of a CPA claim. *Slp. Opn.* at 37. RCW 19.86.093(3) sets forth how the public interest test may be met if an act or practice "(a) [i]njured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons. RCW 19.86.093(3). If the Sorenson transaction is disregarded, Calhoun's conduct still had the capacity to injure other persons in any other case in which she held a power of attorney. AB 27-29. If this Court applies the thrust of *Allard* to the instant facts, as it should, the unfairness of Calhoun's conduct will even be more apparent.

Helm therefore satisfied the elements of a CPA claim for purposes of summary judgment, and it was error to dismiss her CPA claims against Calhoun on summary judgment.

c) Summary judgment dismissal of the participation in a breach of fiduciary duty against Parker was error.

Helm also alleged that Parker participated in Calhoun's

breach of fiduciary duty.

The Court of Appeals ruled that "in order for Parker to be liable for participating in a breach of fiduciary duty, Parker must owe Helm a duty. But Helm has not shown that a duty existed." *Slp. Opn.* at 37.

The Court of Appeals did not address Helm's authority to the contrary, which does not require every participant in a breach to owe a duty to the plaintiff.[4] AB at 30; CP 306.

It is a matter for the trier of fact to determine whether Parker knowingly assisted Calhoun in violating her fiduciary duty. The Court should reverse summary judgment dismissal of Helm's claim of participation in a breach of fiduciary duty against Parker.

2. Calhoun as a professional fiduciary and CPG has fiduciary duties independent of the UPOAA (RCW ch. 11.125).

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[4] These cases were *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 783, 496 P.2d 343, *review denied*, 81 Wn.2d 1003 (1972) and *Locke v. Andrasko*, 178 Wash. 145, 153, 34 P.2d 444 (1934).

The trial court determined that the scope of Calhoun's fiduciary duties owed to Helm were circumscribed within the four corners of the recently enacted Uniform Power of Attorney Act, RCW ch. 11.125 (UPOAA). CP 1668-69 (Jury Instruction 11). The Court of Appeals essentially agreed with the trial court stating that "the jury instructions as a whole, including instruction 11, accurately conveyed the applicable law to the jury." *Helm*, at 33. The jury instructions were predicated on the assumption that Calhoun's status as a CPG and the CPG standards of practice are irrelevant and that duties applicable to trustees as announced in *Allard* do not extend to POAs. *Slp Opn.* 34.

The Court of Appeals' resulting narrow construction of the UPOAA is inimical to the public interest and should be modified by this Court. The UPOAA does not preclude the extension of *Allard* to professional fiduciaries acting as attorneys-in-fact. RCW 11.125.210 ("the principles of law and equity supplement"

the UPOAA). RCW 11.125.230 (remedies under the UPOAA "are not exclusive and do not abrogate any right or remedy under the law of this state other than this chapter" of the UPOAA). AB 64.

That *Allard* should apply to a CPG acting under a POA seems like common sense. After all, if a CPG were acting as a guardian or conservator, she is in "an important position of trust" and owes "the highest duty of care to the individual for whom they are appointed."[5] In selling the client's assets, the CPG's duty would include obtaining the "best price" while avoiding "conflicts of interest and self-dealing."[6]

If the CPG were acting as a trustee, the *Allard* rule has a similar requirement. The CPG's duty would require informing the beneficiaries of the sale and sale price, as well as obtaining the "best possible price." *Allard,* 99 Wn.2d 394, at 405.

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[5] https://www.courts.wa.gov/guardianship/FAQ.html.

[6] *Id.*

Why should the rule be any different for a CPG acting under a POA? In the instant case, Calhoun was acting under a POA. This Court should accept review to address this significant issue of public interest.

The Court of Appeals should have applied the rule of *Allard*, because Calhoun was a professional fiduciary in a position of trust, and her acting under a POA and self-drafted Service Agreement rather than a trust instrument should not be determinative. Substance over form is a common principle applied in many situations. *Spokane County v. Specialty Auto*, 153 Wn.2d 238, 245, 103 P.3d 792 (2004). Principles of law and equity supplement the Uniform Power of Attorney Act (UPOAA). RCW 11.125.210.

The significant class of disabled people who are served by professional holders of a POA deserve the protection of the *Allard* rule when their real property is being sold without being under their supervision. Such application of *Allard* would

prevent the loss which occurred here to Helm, and may occur to others.[7]

3. When evaluating Calhoun's conduct while acting under a power of attorney, she should be held to the higher standard of a CPG, as opposed to the standards for a lay person.

The trial court barred testimony about the qualifications of Calhoun as CPG and the standard of care which specifically governs a CPG's professional practice. RP 694, 1145, 1196, 1885-1886. These evidentiary rulings were predicated on the trial court's interpretation of the law governing agents under a POA as contained solely within the four corners of the UPOAA.

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[7] ". . . [The Uniform Power of Attorney Act (UPOAA)] now enacted in a total of twenty-eight states since approved by the Uniform Law Commissioners in 2006, represents a significant advancement in clarifying and regulating the use of powers of attorney. Given the widespread use of powers of attorney and their great potential for abuse and misuse, a comprehensive set of rules--both default and mandatory--are warranted." Simmons, Thomas E., Restraining the Unsupervised Fiduciary, 66 South Dakota Law Review, No. 2, (June 2021), at 209.

RP 687-88. This was error. RCW 11.125.230 provides that the UPOAA does not preclude application of other rules of law. RCW 11.125.230.

The standard of care governing the practice of a CPG is codified in the *Standards of Practice Regulations* for certified professional guardians (SOPs). GR 23(c)(3)(ii); GR 23(d)(1). *Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 823-24, 306 P.3d 920 (2013); *In re Mesler*, 21 Wn. App.2d 682, 703-704, 507 P.3d 864, 877 (2022) (CPG Standards define a professional guardian's obligations and scope of services). The jury should have been so instructed, e.g., Helm's proposed instruction 9 (CP 1652).

The Court of Appeals also determined that a "CPG license and the standards pertaining to said license status were irrelevant" if it cannot be established that the license was a factor in the principal's selection of a CPG as an agent under a DPOA, apparently looking to RCW 11.125.140(5). *See* Appendix, A-45.

Since this statute states that the agent's special skills or expertise *must* be considered if the agent was selected on the basis of such skills, the statute does not *preclude* the consideration of special skills or expertise under other circumstances where appropriate.

4. The jury is given insufficient guidance if asked to determine whether real property sold was for an "inappropriate amount" instead of fair market value.

Fair market value is frequently used as a measure of damages or value. *Merchant v. Peterson*, 38 Wn. App. 855, 858, 690 P.2d 1192 (1984) ("Absent willful misconduct, the measure of damages for conversion is the [wholesale] fair market value of the property at the time and place of conversion."); *Estate of Jones*, 152 Wn.2d 1, 15, 100 P.3d 805 (2004) (fair market value used in valuing assets of probate estate); *Highline Dist. v. Port of Seattle*, 87 Wn.2d 6, 14 n.5, 548 P.2d 1085 (1976) ("In inverse condemnation actions, as in eminent domain proceedings, the landowner is entitled to full and fair compensation for the loss of his property rights. In many

instances this measure is the difference between the market value of the land before the injury and that value immediately after the injury.") [Citation omitted.]

The Court of Appeals' reference to *Dahl-Smyth v. City of Walla Walla*, 148 Wn.2d 835, 848, 64 P.3d 15 (2003) cited by Helm references an objective standard, i.e., "measurable damages." *Slp. Opn.* at 35. Helm's Proposed Jury Instruction 11, ¶ 1 referred to her damages as the loss of money on the sale of the Rhapsody Drive property as measured by the difference between the fair market value and the sale price of the property as of the date of sale. CP 1618.

The jury instruction as given by the trial court stated that "Plaintiff claims that Defendants breached their fiduciary duty to Plaintiff by selling Plaintiff's Rhapsody Drive property for an inappropriate amount." Jury Instruction 5, CP 1661; AB 69-70. An "inappropriate amount" is a completely subjective amount untethered to any objective standard. Even the trial court's

reference to RCW 11.125.170 to the effect that such statute "doesn't say fair market value" is misleading. RP 2177.

RCW 11.125.170 states that an "agent that violates this chapter is liable to the principal or the principal's successors in interest for the amount required to restore the value of the principal's property to what it would have been had the violation not occurred." If Calhoun violated her fiduciary duty in selling Helm's property at too low of a price, then the amount required to *restore the value* of her property would be the difference between the $28,000 Calhoun sold the property for and what she should have sold it for, i.e., the fair market value at the time of sale as determined by the trier of fact. Absent an objective standard such as *fair market value*, the jury would have no idea how to calculate damages. Helm's proposed Jury Instruction 6 (CP 1651) on the definition of fair market value should have been used in this regard. The trial court's rejecting Helm's proposed jury instruction regarding "fair market value" was therefore

erroneous.

5. The trial court manifestly abused its discretion by failing to admit under ER 404(b) plaintiff's evidence of a similar transaction between Calhoun and Parker regarding (Sorenson's) real property.

As an initial matter, the Court of Appeals erroneously stated that Helm alleged or argued that the Sorenson transaction should have been admitted under ER 406 (evidence of habit). *Slp. Opn.,* 22.[8] This is not accurate. There is no such "allegation" or "argument" by Helm. Helm requested in her motion for reconsideration to the court to correct this inaccuracy in its opinion, but the Court of Appeals declined to do so.

Helm actually had submitted exhibits of the Sorenson transaction under ER 904, and defendants did not make their

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[8] The Court of Appeals may have been misled by respondent's misleading statement that "Helm conceded that it was not under ER 406. RP 631." RB (Calhoun) 27. The fuller context was that Young was politely trying to disabuse the trial judge of the judge's misplaced emphasis on ER 406, stating "it's not exactly under 406." RP 631. Young *never* argued that ER 406 was applicable in the instant case.

ER 406 within the required 14 days under ER 904(b):

Ex. #	Document	Author	Objection
18	Purchase & Sale Agreement Sorenson, signed 10-10-16	Thomas and Susan Parker 3516 Highview Dr Yakima, WA 98902-1532 (509) 961-1192	ER 402 Relevance; ER 403 Prejudice, confusion and waste of time
19	Escrow Instructions (Sorenson), signed 10-27-16	Thomas and Susan Parker 3516 Highview Dr Yakima, WA 98902-1532 (509) 961-1192 – and - Kristyan Calhoun 5110 Tieton Dr #370 Yakima, WA 98908 (509) 248-8539	ER 402 Relevance; ER 403 Prejudice, confusion and waste of time
20	Closing (Sorenson), dated 11-29-2016	Vicki Woodward, Escrow Agent Valley Title Guarantee 502 N 2nd St P.O. Box 1625 Yakima, WA 98907	ER 402 Relevance; ER 403 Prejudice, confusion and waste of time
21	Deed (Sorenson) to Parkers dated 11-30-2016	Kristyan Calhoun 5110 Tieton Dr #370 Yakima, WA 98908 (509) 248-8539	ER 402 Relevance; ER 403 Prejudice, confusion and waste of time
22	Korn Appraisal of 606 S 19th Yakima	Korn's Appraisal Service Steve Korn	ER 402 Relevance; ER 403 Prejudice, confusion and

CP 1346 (ER 904 exhibits 18-22).

Nevertheless, Calhoun moved to exclude all references to the Sorenson transaction in her motion in limine no. 16. CP 1562-1565. The motion conceded that the Sorenson evidence had relevance to show "a pattern … of underselling client property" but confusingly argued that it was "specifically forbidden" under ER 404(b), which of course it is not. CP 1563; AB 47-48. The motion was heard and argued extensively by Calhoun's counsel

at trial. RP 625-634.

The trial court granted defendants' motion in limine, adopting Calhoun's rationale. CP 634. When Young tried to argue his ER 404(b) basis for admission of the evidence, the trial court's response was "it does not show habit" and "I've already made my ruling." RP 633. See also, RP 711.

The Court of Appeal's analysis assumes an ER 404(b) analysis that the trial court never conducted. The trial court never weighed the probative value of the Sorenson transaction against the prejudicial effect required for the evidence to be admissible under ER 404(b). RP 711.

The Sorenson transaction need only show a "pattern or plan with *marked similarities* to the facts in the case before it" to be admissible under ER 404(b). [Italics added.] *State v. DeVincentis*, 150 Wn.2d 11, 13, 74 P.3d 119 (2003). *Slp. Opn.* at 19-21. Uniqueness is not required. *Id.* at 21. The marked similarities between the Sorenson transaction and the instant

transaction involving Helm are the following:

(1) Both involved Calhoun and Parker, with Callhoun's acting as a professional fiduciary seller of residential real property (as the PR in Sorenson[9] and under a POA in Helm[10]) and Parker's acting as the buyer of "investment rental property"[11];

(2) Both sales were private sales, and in neither sale did Calhoun obtain an appraisal or expose the property to the market;

(3) Both sales occurred within three months of each other;

(4) In both sales the purchase price was about one-half or less of the fair market value of the property as shown by an appraisal. In Sorenson the purchase price was $68,000;[12] the

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[9] CP 625-26.

[10] CP 616.

[11] CP 624; CP 615.

[12] CP 624.

appraised value was $135,000).[13] In Helm the purchase price was $28,000; the appraised value was $115,000.[14]

(5) In both cases the CMA relied upon was either missing or defective (in Helm no CMA was ever found and submitted as evidence; in Sorenson the CMA was prepared by a fellow broker in the same office as Parker and in looking for comparable properties, the preparer inserted a search price range of $60,000 to $90,000, thereby eliminating any properties valued at over $90,000).[15]

Calhoun's pivot to an ER 406 argument was a Hail Mary at trial because of the uncomfortable similarities between the Helm sale and the Sorenson sale. Calhoun could not explain why the superior court's authorization of the Sorenson sale or

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[13] Dec. of Appraiser Steve Korn, CP 562.

[14] Dec. of Appraiser Mark Percival, CP 323.

[15] AB at 18, referring to Trial Ex. 34 at 10-40, which is the CMA prepared for the sale of the Sorenson property; see specifically Trial Ex. 34 at 21 for the limitation on the price search criteria.

DSHS's approval of it undermines these marked similarities. Helm does not challenge the validity of the Sorenson court's order or the DSHS approval of it; rather, she merely points out the deception involved in obtaining court authorization for the Sorenson sale to Parker. If the court had been aware of the deception and aware of the appraised value, which it was not, because no appraisal was submitted to it, it might have made a different ruling. The Sorenson court's ruling was immaterial to Calhoun's and Parker's common plan or scheme.

Young's extensive offer of proof regarding the Sorenson transaction made no difference. The trial court simply stated that "it does not change my decision with regard to the Sorenson property." RP 699-711.

It was a manifest error for the trial court to exclude the Sorenson evidence based on Calhoun's argument that it was not habit evidence, something that Helm never alleged or argued. The trial court should have analyzed the offeror's (Helm's) basis

for admissibility, namely, ER 404(b), but refused to do so. This likely affected the trial outcome.

VII. Conclusion

This Court should grant review of the issues raised in this petition for review.

RESPECTFULLY SUBMITTED this 17th day of April 2025.

I certify that under RAP 18.17(b) this brief contains 4,999 words.

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Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DOROTHY HELM, an individual, Appellant, v. KRISTYAN CALHOUN and JAMES CALHOUN, wife and husband; THOMAS PARKER and SUSAN PARKER, husband and wife; and SENIOR AVENUES LLC, d/b/a SENIOR AVENUES, Respondents.	No. 57878-6-II UNPUBLISHED OPINION

VELJACIC, A.C.J. — Dorothy Helm[1] appeals the trial court's summary judgment orders dismissing her Consumer Protection Act (CPA) claim against Kristyan Calhoun and all of her claims against Parker.[2] Helm also appeals the mid-trial dismissal of her civil conspiracy claim against Calhoun, several evidentiary rulings during trial of her remaining civil conspiracy and breach of fiduciary duty claims against Calhoun, the denial of her motion for new trial, several jury instructions, and the trial court's award of attorney fees to Calhoun.

[1] Helm is also referred throughout the record via her maiden name Dorothy O'Dell. However, we will refer to her as "Helm." No disrespect is intended.

[2] Although Thomas and Susan Parker are both named parties in the present suit, we will refer to both as "Parker." No disrespect is intended.

Helm argues that the trial court erred when it (1) excluded a portion of Helm's deposition, (2) when it excluded evidence of a prior property transaction between Calhoun and Parker (the Sorenson transaction), and (3) when it admitted Helm's medical records. She further asserts the trial court erred in barring evidence regarding Calhoun's professional background and the Certified Professional Guardian (CPG) Standards of Practice (SOPs), and in giving and denying several jury instructions. Finding no error, we affirm.

FACTS

I. BACKGROUND

In 2005, Helm purchased two investment properties, one on Feigley Road and one on Rhapsody Drive, in Kitsap County for $177,500 and $117,000, respectively.

Ten years later, following a move to South Dakota, Helm was involuntarily committed to the South Dakota Human Services Center (SDHSC)[3] following a five-day mental health crisis. While at SDHSC, Helm was diagnosed with an unspecified neurocognitive disorder, schizoaffective bipolar fade—"a severe [and] persistent mental illness," hypothyroidism, hyperlipidemia, a history of transient ischemic attack, and essential tremor. 3 Rep. of Proc. (RP) at 1263. Helm also showed signs of memory deficits, so her treatment team wanted her, following discharge, to live in a facility that would provide medication management, transportation, and financial management.

[3] The SDCS is an involuntary commitment facility that takes in adults transferred from the adult acute psychiatric or geriatric nursing home program. *See* https://dss.sd.gov/docs/behavioralhealth/HSC/program/Psychiatric_Rehabilitation_Program.pdf (last visited Sept. 24, 2024).

In 2016, social worker Jennifer Luke-Anderson, who was part of Helm's care team at SDHSC, began reaching out to facilities in Washington that might help Helm move back to Washington in order to be close to family. Unfortunately, none of the facilities she contacted could meet Helm's needs. However, one suggested Luke-Anderson reach out to Senior Avenues[4] and its director, Kristyan Calhoun.

Following the advice, Luke-Anderson reached out to Senior Avenues and Calhoun in November 2016. Luke-Anderson testified that Calhoun had a lot of knowledge about facilities in the area. She then met with the other members of Helm's care team, who decided that Senior Avenues and Calhoun could assist them in getting Helm back to Washington and into a place where her needs would be met.

II. POWER OF ATTORNEY AND SERVICE AGREEMENT

Following conversations between Helm, Calhoun, and Luke-Anderson regarding Helm's history, desires, and priorities, a power of attorney (POA) was recommended. However, Luke-Anderson stated the POA was neither required nor was it a stipulation of discharge. Calhoun and Luke-Anderson stated discharge planning included discussion of moving back to Washington, taking her car and some other belongings with her, and the sale of her properties. Luke-Anderson then reached out to an attorney in South Dakota, Heather LaCroix, to assist in the drafting and execution of the POA.

LaCroix testified that she met with Helm. LaCroix drafted the POA using "typical" POA language, which granted the attorney-in-fact broad powers. 3 RP at 1377. She also testified that she alone determined that Helm was competent to sign without looking at her medical records or

[4] Senior Avenues was a geriatric case management company Calhoun owned. The company offered Guardian Ad Litem, power of attorney, trustee, and probate services along with some court-appointed special services such as CPG. However, Calhoun retired her CPG license in 2021.

talking with Luke-Anderson. LaCroix testified that because the POA granted Calhoun the power to sell property, she expressly advised Helm of that fact when reviewing the document with Helm.

Helm signed the POA on December 16, 2016. The POA granted Calhoun the power to "sell, either at private sale or public auction, any and all property, real or personal" Helm owned. Clerk's Papers (CP) at 29. It also allowed Calhoun to "make all necessary arrangements for [Helm] at any hospital, hospice, nursing home, convalescence home, or similar establishment and to assure that all of [Helm's] essential needs are provided for at such facility." CP at 31. That same day, LaCroix faxed a signed copy of the POA to Calhoun.

On January 3, 2017, Calhoun faxed over a Geriatric Care Management Service Agreement (agreement) she drafted for signature. The agreement contained the following provision:

> Kristyan Calhoun will act as the power of attorney for Ms. Helm O'Dell. Kristyan will coordinate the transfer of Ms. Helm O'Dell's vehicle being moved to Yakima Washington. Kristyan and her staff at Senior Avenues will coordinate a move from South Dakota to Yakima. *Kristyan will address the properties being liquidated to fund Ms. Helm-O'Dell's care costs at the least restrictive alternative possible.* Kristyan will coordinate with staff to meet Ms. O'Dell in S. Dakota and to facilitate the move.

CP at 35, 185 (emphasis added). The agreement also outlined a fee schedule. Helm signed the agreement. Calhoun testified that she had no idea of the circumstance under which Helm signed the agreement or on what day exactly but received it the next day.

III. SALE OF THE PROPERTIES

Calhoun called Thomas Parker, a licensed real estate broker in Yakima, regarding an onsite visit of Helm's properties in Kitsap County. Parker also invests in property. Being unfamiliar with that county's market, Parker referred Calhoun to a Kitsap County broker named Beth Allen.

During the phone call, Calhoun stated that she would be driving to the Rhapsody Drive property to do an onsite visit. Parker met Calhoun at the property, which he described as "a dump." 3 RP at 1047. After knocking on the door twice and being allowed inside by the tenant's son, Parker described the inside of the property as "rough inside," "trashed," and "smell[ed] of pot." 3 RP at 1048-49. There were problems with the septic system, along with other habitability concerns. Parker also took pictures of the outside of the property.

Allen visited and conducted a comparative market analysis (CMA) on the Rhapsody property. Allen e-mailed the CMA and discussed the marketability of the Rhapsody property in an e-mail chain that included Parker. Allen noted she valued the property at $40,000 to $50,000. Allen noted she did not have anyone interested in the property as of yet before listing and recommended it be "scraped." 4 RP at 1518. Calhoun told Allen not to list the property. Allen testified she was unaware that Parker may be interested in the property.

Around January 19, 2017, Parker e-mailed Calhoun regarding the Rhapsody Drive property. Parker offered $26,000 for the property, but Calhoun declined because it was too low. Parker then made a $28,000 all-cash, as-is offer for the property. Parker testified at his deposition that he made the offer because he wanted it as an "investment property." CP at 255.

On January 20, Calhoun spoke again with Helm about her move to Washington and what that entailed. That same day, Calhoun, signed the purchase and sale agreement as attorney-in-fact, accepting Parker's $28,000 offer for the Rhapsody property. Calhoun expressed that she was happy with the ultimate offer given the scenario and the need to remove the debris from the property as Allen recommended. The transaction closed and Parker took title by warranty deed dated February 1, 2017. At the time of the sale, the Rhapsody property had a Washington State

Section 8 Housing tenant, Kevin Loop. However, Loop stopped paying his portion of the rent, even after the property sold, and Parker kept him as a tenant.

Calhoun and Parker also testified that Parker previously completed other transactions with Senior Avenues and Calhoun. Specifically, three months prior to the Rhapsody transaction, Parker was the buyer in the Sorenson transaction—a court ordered transfer from Calhoun to Parker. However, the court barred evidence of that transaction, finding it irrelevant and prejudicial because it was not ER 404(b) evidence, as Calhoun was serving as a court-appointed personal representative of the estate, the Department of Social and Health Services (DSHS) approved the sale, and the court oversaw settlement of the estate.

Calhoun sought out Allen in listing Helm's second property—Feigley Road. Allen conducted a CMA on the property, which valued it at around $125,000. She listed the property in May for $124,950. Allen noted the property was vacant at the time of listing. Allen received the first offer from Marshall Consulting, an all-cash offer, at $125,000. However, that fell through. The second offer Allen received was from Lun Zang for $125,000. However, his offer came with contingencies and after an inspection , which showed septic system issues and a need for redesign of the drain field. Nevertheless, Zang ultimately purchased the property in June 2017 at a reduced price of $116,000.[5] Calhoun also signed off on this sale as attorney-in-fact.

IV. DISCHARGE AND PROCEDURAL HISTORY

SDHSC discharged Helm in August 2017. At that time, Helm did not express regret over the sale of her properties. With Calhoun's help and funds from the sale of the properties, Helm moved into a facility in Yakima.

[5] In 2022, following repairs including new floors, paint, and septic system, the Feigley Road property was sold for $300,000.

On November 19, 2018, Helm filed suit in Kitsap County against Calhoun, Senior Avenues, and Parker. In her complaint, Helm alleged that Calhoun's sale of the Rhapsody Drive property was a breach of fiduciary duty, which Parker participated in, and that Calhoun and Parker conspired to breach Calhoun's fiduciary duty and violate the Washington CPA.

On July 29, 2019, Parker filed a CR 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted; it was denied. On February 28, 2020, Parker filed a motion for summary judgment to dismiss Helm's claims against them. Following a response from Helm and a subsequent reply from Parker, the trial court dismissed with prejudice Helm's claims against Parker.

In March 2020, Helm's attorney filed a motion to appoint a litigation guardian ad litem (LGAL). The petition noted that Helm was incapacitated and could no longer assist her attorney in the preparation of her case. Seven months later, following an investigation, the court granted the motion and appointed a LGAL.

In November 2020, Calhoun filed a motion to compel and for sanctions resulting from alleged discovery violations. The trial court held a hearing after which it continued trial to April 2021 to permit Calhoun to complete discovery. The court also limited evidence of Helm's mental or physical condition unless submitted within 30 days, and ordered that Helm could not offer testimony at trial, even if competent, unless Calhoun had the opportunity to depose her prior to trial.

In January 2021, Helm moved for partial summary judgment pertaining to the breach of fiduciary and CPA claims against Calhoun. The trial court denied the motion. The following month, Calhoun moved for partial summary judgment on all but the breach of fiduciary duties regarding the Rhapsody Drive property. The trial court granted Calhoun's motion for partial

summary judgment with respect to the CPA claim only, leaving the civil conspiracy claim and the breach of fiduciary duty claim.

In March 2021, Calhoun moved to strike Helm's declaration and deposition testimony, which Helm relied on for the competing summary judgment motions. Calhoun argued the deposition and declaration were part of a guardianship proceeding in Yakima County and, therefore, were inadmissible in the case at hand. Further, Calhoun argued that given Helm's incapacitated state, Calhoun had no opportunity to impeach the deposition testimony regarding the issues in this suit. The trial court granted the motion to strike Helm's deposition and declaration. Helm moved for reconsideration; it was denied.

In the summer of 2021, Calhoun made two CR 68 offers to Helm, both of which were declined by Helm's LGAL. The case proceeded to trial.

V. TRIAL

The trial began on August 31, 2022, and lasted for four weeks—until September 22. Calhoun, Luke-Anderson, Parker, LaCroix, and Loop all recounted the aforementioned facts via their testimony at trial. The trial court allowed exhibit 108—a synopsis of Helm's hospital stay.

The trial court also heard testimony from two expert witnesses—William Dussault and Daniel Smerken on behalf of Helm and Calhoun, respectively. Smerken, a professional fiduciary in care management, testified regarding fiduciary duties under the agreement Helm signed. Specifically, Smerken stated that the agreement between Calhoun and Helm was typical and provided some specific actions for Calhoun to take without continuously going back to Helm for instructions. He noted that such actions were in the paragraph on page two, which granted Calhoun the authority to "address the liquidation of the properties." 4 RP at 1782. Smerken added that it is not always the primary duty of the attorney-in-fact to maximize the profit from the sale of a

property, the duty is to maximize the interest of the principal which is distinct. For example, he continued, with older individuals, at times, there is a specific need, and their assets are what pay for their long-term care, and therefore, it is in their interest to have that need met by utilizing the resources at hand, which often does not maximize profit. Smerken also stated that if there are any limitations to POAs, they are in the POA documentation or under the Uniform Power of Attorney Act (UPOAA). So, he said, if the document provides the power to sell property, that fiduciary can sell it for whatever they want and whenever they want. Consequently, according to Smerken, unless Helm revokes the POA, the agent retains the authority granted under the document, including the power to sell property.

Additionally, Smerken testified that CMAs, instead of appraisals, are good in determining general value and what a property should be listed at to attract buyers, given that they are a good example of what is happening in real-time with the market. Smerken opined that because CMAs, unlike appraisals, do not cost money, they are a good option for clients who do not have the financial resources to pay for an appraisal. Therefore, he did not think it was unreasonable for a fiduciary to not place a property on the market, depending on the client's situation.

During cross-examination, Helm tried to impeach Smerken, noting his testimony as contradictory to the SOPs for CPGs. The trial court ruled that the CPG SOPs may not be raised.

Helm's expert witness, Dussault, an attorney, testified that he reviewed the POA and agreement in question along with LaCroix's deposition and e-mails between Luke-Anderson and Calhoun. Based on his review, Dussault testified that the duties of a fiduciary "exist based on the agreement between the two individuals," as well as those "based on the statute under which [the agreement] is established." 3 RP at 1134. In other words, Dussault stated that fiduciary duties are typically created in two ways. The first is "by some agreement between the parties," which can

be written—such as a POA or trust document—or "by the Court appoint[ing] someone," or "by general operation of law." 3 RP at 1135. Dussault highlighted that in Helm's case, the duties Calhoun owed her were created under the POA she signed. And that although there is a general common law regarding POAs, the agreement prevails. However, he then stated that no matter what the agreement states, the POA cannot just go out and sell whatever property they want; they still need to confer with the principal, and if they agree to sell, the POA has to maximize value.

Nevertheless, Dussault opined that Calhoun did not follow the accepted general practices of a fiduciary.[6] This is because Calhoun (1) failed to communicate effectively to determine Helm's wishes before acting, (2) did not maximize the value of assets nor did she get an evaluation of the property to maximize value, and (3) did not follow the terms of the agreement because she did not conduct an active investigation of Helm's eligibility for government benefits or whether benefits were consistent with her wishes.

Dussault added that when a POA sells the property, getting an appraisal is the "standard" and the "best thing you can get" because it establishes the value of the property without an agent, commission, or brokerage fee. 3 RP at 1157.

At the closing of Helm's case-in-chief, Calhoun moved for judgment as a matter of law pursuant to CR 50 regarding the breach of fiduciary duty and civil conspiracy claims. The court granted the CR 50 motion and dismissed the civil conspiracy claim only, stating its basis as insufficient evidence. Only the claim of breach of fiduciary duty went to the jury.

[6] Following an objection by Calhoun's attorney, the trial court limited Dassault's testimony and instructed Dussault and counsel to use the term "generally accepted practices of fiduciaries" instead of "standard of care." *See* 3 RP at 1127-31, 1228, 1230-1232.

Both parties offered proposed jury instructions.[7] The trial court extensively discussed the proposed jury instructions. Ultimately, the jury found in Calhoun's favor.

Calhoun then moved for an award of fees and costs under the Trust and Estate Dispute Resolution Act (TEDRA), using CR 68 offers of judgment as evidence to support her motion. Following oral argument, the court awarded attorney fees and costs to Calhoun in the amount of $84,530.04. Helm appeals.

ANALYSIS

I. CLAIMS AGAINST CALHOUN

A. Summary Judgment

Helm argues that the trial court erred in granting Calhoun's motion for partial summary judgment. She argues there are issues of material fact regarding the CPA claim. She notes that Calhoun's motion for partial summary judgment address only three out of the five elements for a CPA claim.

Calhoun responds that Washington courts have routinely declined to apply the CPA to matters involving professional judgment. Calhoun also argues that because all five elements under a CPA must be proven to establish a claim, the fact that she attacked only three elements of a CPA claim does not defeat her summary judgment motion. We agree that the trial court did not err in granting summary judgment to Calhoun on the CPA matter.

[7] Calhoun concedes that her proposed instructions were not part of the record provided to this court. However, Calhoun submitted her proposed instructions as an appendix to her response brief, pursuant to RAP 10.3(a)(8), which provides that a party may provide jury instructions to this court in the appendix of a brief in accordance with RAP 10.4(c).

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). When determining whether a genuine issue of material fact exists, we consider all the evidence in the light most favorable to the nonmoving party. *Vargas v. Inland Wash., LLC*, 194 Wn.2d 720, 728, 452 P.3d 1205 (2019).

If the defendant moves for summary judgment and shows "an absence of evidence to support the plaintiff's case," then the burden shifts to the plaintiff "to set forth specific facts that rebut the moving party's contentions and show a genuine issue of material fact." *Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wn. App. 178, 183, 401 P.3d 468 (2017). The plaintiff "'may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.'" *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 722, 425 P.3d 837 (2018) (quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). The party must offer more than conclusory statements. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014).

If a reasonable person could reach only one conclusion based on the evidence presented, then summary judgment is proper. *Vargas*, 194 Wn.2d at 728. We review summary judgment orders de novo, "'engaging in the same inquiry as the trial court.'" *Id.* (quoting *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013)). "We may affirm on any basis supported by the record." *Bavand v. OneWest Bank*, 196 Wn. App. 813, 825, 385 P.3d 233 (2016).

A CPA claim requires the plaintiff to show an "'(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation.'" *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 782, 295

P.3d 1179 (2013) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). A claimant must establish all five elements to prevail. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007).

Helm fails to meet the first element under the CPA. She argues that the sale of the Rhapsody property without obtaining an appraisal or exposing it to the market nor consulting with her prior to selling and obtaining express consent to do so constituted an unfair or deceptive act or practice. Further, Helm asserts that because she signed a POA and Calhoun signed property sale documents as attorney-in-fact, that made her a de facto trustee of her properties.

Helm relies on *Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 663 P.2d 104 (1983), for the proposition that our Supreme Court expressly requires a *trustee* holding real property to obtain an appraisal or expose the property to the market and failure to do so constitutes a breach of fiduciary duty. But Calhoun was not a trustee. Because Helm has provided no authority supporting her allegation that we should apply *Allard* to *attorneys-in-fact*, we decline to do so.

Additionally, Helm cannot establish an issue of material fact. She does not dispute that she signed the POA and service agreements. Because we hold herein that the service agreement provision relating to the liquidation of property is unambiguous, both documents instruct Calhoun to liquidate the properties in order to fund the move from South Dakota and Helm's care. Consequently, Helm cannot show that Calhoun's actions constituted an unfair or deceptive practice under the CPA. Accordingly, we affirm the trial court's grant of partial summary judgment on the issue.

B. Pretrial Evidentiary Ruling

Helm identifies five evidentiary rulings she claims were erroneous. She argues that she was prejudiced because the trial court's rulings reduced her case over time to a single claim and excluded her "most powerful evidence." Br. of Appellant at 2. Helm also argues that the trial court should have allowed evidence of the Sorenson transaction, ambiguity in the service agreement, professional SOPs for CPGs, and evidence of Calhoun's professional background. Finally, she argues that the court should not have allowed her medical records to be admitted. We disagree.

We review a trial court's evidentiary rulings for an abuse of discretion, deferring to the trial court's judgment unless no reasonable person would agree. *Saldivar v. Momah*, 145 Wn. App. 365, 394, 186 P.3d 1117 (2008). A trial court abuses its discretion when its decision is manifestly unreasonable or it bases its decision on untenable grounds. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). "'[E]videntiary error is grounds for reversal only if it results in prejudice.'" *Bengtsson v. Sunnyworld Int'l, Inc.*, 14 Wn. App. 2d 91, 99, 469 P.3d 339 (2020) (alterations on original) (quoting *City of Seattle v. Pearson*, 192 Wn. App. 802, 817, 369 P.3d 194 (2016)). An error is prejudicial if the outcome of the trial would have been materially affected had the error not occurred. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

1. Ambiguity in Service Agreement

Helm argues that the trial court erred by barring any argument regarding the wording of the service agreement relating to the sale of the properties. Specifically, she argues that the service agreement was ambiguous in regards to the section stating Calhoun would "'address the properties.'" Br. of Appellant at 53 (quoting CP at 35). Helm argues the word "address" has

multiple meanings, therefore making it unclear whether the agreement noted whether Calhoun would either "*deal with*" the properties or "*discuss* the properties and take action later based on the discussion" with Helm or if she would "*entrust* the care of the properties to another." Br. of Appellant at 53 (emphasis in original).

Calhoun counters that the service agreement clearly specified that Calhoun would act as POA for Helm and coordinate her move from South Dakota to Washington to a setting that was the least restrictive possible. Notably, Calhoun argues that she took the wording to state she was to liquidate the properties to fund Helm's care and the costs of moving. Further, Calhoun argues that one cannot introduce vagueness or ambiguity in a contract by simply asserting that it could be interpreted in different ways. Therefore, Calhoun argues, there must be some evidence that the agreement or section is subject to more than one interpretation by the parties, not just an inference or allegation that the parties could potentially interpret it differently. We agree that the contract is unambiguous.

Contract interpretation is a question of law and is reviewed de novo. *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 769, 275 P.3d 339 (2012). "It is a fundamental precept of contract law that contracts must be interpreted in accordance with all of their terms." *Storti v. Univ. of Wash.*, 181 Wn.2d 28, 38, 330 P.3d 159 (2014). "The touchstone of contract interpretation is the parties' intent." *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). "[A] court's primary goal is to ascertain the parties' intent at the time they executed the contract." *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 282, 313 P.3d 395 (2013). But a court does "not interpret what was intended to be written but what was written." *Hearst Commc'ns v. Seattle Times*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

Courts view the contract as a whole and give words their ordinary meaning. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d 116 (2014).

A contract is ambiguous if it is uncertain or is subject to two or more reasonable interpretations. *Id.* An interpretation of the contract that gives effect to all provisions is preferred to an interpretation that renders a provision ineffective. *Kiona Park Estates v. Dehls*, 18 Wn. App. 2d 328, 335, 491 P.3d 247 (2021). If a provision in the contract is subject to two possible constructions, one of which would make the contract unreasonable and the other of which would make it reasonable, courts adopt the reasonable interpretation. *Berg v. Hudesman*, 115 Wn.2d 657, 672, 801 P.2d 222 (1990).

But when a contract is plain and unambiguous, a person who has signed without reading it is nevertheless bound by its terms so long as there was reasonable opportunity to examine the contract in as great a detail as the person signing cared, and the contracting party has failed to do so for personal reasons. *McCorkle v. Hall*, 56 Wn. App. 80, 83, 782 P.2d 574 (1989).

At summary judgment, contract interpretation may be determined as a matter of law "when the only dispute relates to the legal effect of language in a written contract." *George D. Poe & Co. v. Stadium Way Props.*, 7 Wn. App. 46, 49, 498 P.2d 324 (1972). Interpretation of a contract provision is a question of law when the interpretation does not rely on the use of extrinsic evidence or only one reasonable inference can be drawn from the extrinsic evidence. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 85, 60 P.3d 1245 (2003).

Washington follows the objective manifestation theory of contract interpretation, under which the subjective intent of a contract is irrelevant if intent can be determined by the actual words used. *In re the Marriage of Watanabe*, 199 Wn.2d 342, 354, 506 P.3d 630 (2022).

Here, the relevant language of the contract provides:

> Kristyan Calhoun will act as the power of attorney for Ms. Helm O'Dell. Kristyan will coordinate the transfer of Ms. Helm O'Dell's vehicle being moved to Yakima Washington. Kristyan and her staff at Senior Avenues will coordinate a move from South Dakota to Yakima. Kristyan *will address the properties being liquidated to fund Ms. Helm-Odell's care costs at the least restrictive alternative possible.* Kristyan will coordinate with staff to meet Ms. O'Dell in S. Dakota and to facilitate the move.

CP at 35 (emphasis added). When viewing the contract provision as a whole, the trial court's interpretation is reasonable because it clearly states that Calhoun, as POA, was to coordinate Helm's move and care cost from South Dakota to Washington, which included the properties being liquidated to fund such move and care.

Moreover, Helm failed to provide evidence showing ambiguity of the service agreement provision. The trial court did not restrict Helm from later arguing ambiguity if she provided some evidence in support, but she did not. Accordingly, the trial court did not err.

2. Helm's Deposition

Helm argues that the excerpt from her deposition from her guardianship case in Yakima County, stating she told Calhoun not to sell her properties, was admissible under ER 804(b)(1). Specifically, she argues that the testimony was given as a witness in a deposition in another proceeding, which is not excluded by the hearsay rule "'if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross or redirect testimony,'" and Calhoun had such an opportunity when taking the deposition in question Br. of Appellant at 44-45 (quoting ER 804(b)(1)). We disagree.

ER 804 provides exceptions to the rule against hearsay when the declarant is unavailable. One of those exceptions is for "Former Testimony" by the declarant. ER 804 (b)(1) (emphasis omitted). The rule states:

> **(b) Hearsay Exceptions**. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, *had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.*

ER 804(b)(1) (emphasis added).[8] In addition, a deposition is admissible if the witness resides out of the county more than 20 miles from the site of the trial. CR 32(a)(3).

Here, the other party—Calhoun—was unable to develop Helm's testimony in relation to the claims at issue in the case presently before us for review (whether Calhoun breached her fiduciary duty when selling Helm's properties) because the deposition was a part of an entirely different case, a guardianship case brought by Calhoun.[9] The guardianship case concerned whether Helm lacked capacity stemming from her poor physical health and mental health diagnosis. The issues here are different—related to fiduciary duties and alleged conspiracy to commit unlawful acts—illustrating that Calhoun would not have had opportunity at the deposition to question Helm on issues relevant here yet unrelated to the guardianship proceeding.

Additionally, exclusion of the deposition followed Calhoun's motion to strike based on the trial court's prior discovery sanction, which Helm did not appeal, and which ordered:

> [Helm] cannot offer testimony at trial, even if competent, unless [Calhoun] has had the opportunity to depose her prior to trial. If [Helm's] attorney learns that [Helm] has become competent, he shall immediately advise [Calhoun's] attorney. Despite

[8] A declarant is unavailable if she is absent from the proceedings and the proponent was not able to procure their attendance, including due to an existing physical or mental illness or infirmity. ER 804(a)(4), (5). Here, Helm was unavailable due to being deemed incapacitated and unable to assist in her defense, and because Calhoun was unable to depose her on the matters at issue before trial.

[9] The Yakima superior court dismissed Calhoun's guardianship petition on April 19, 2019. As part of the dismissal, Calhoun was ordered to resign as representative payee of Helm's social security benefits, and the POA and service agreement were revoked and terminated.

> any discovery cutoffs stated above, [Calhoun] shall have the right to depose [Helm] if she becomes competent prior to trial.

CP at 542. Therefore, for the deposition to be admissible, Calhoun must have been afforded the opportunity to cross-examine and develop Helm's testimony on the assertions raised in this case—violation of the CPA, civil conspiracy, and breach of fiduciary duty under a POA, in order for the deposition to be admissible under ER 804(b)(1). This did not occur. The deposition excerpt provided to the trial court in support of Helm during summary judgment proceedings was not developed in that manner regarding the claims at issue in the case before us for review. But additionally, Calhoun was not provided the opportunity to depose Helm prior to trial, as required by the discovery order. Her testimony was therefore inadmissible even in the form of a prior deposition. Accordingly, the trial court properly excluded the excerpt testimony from Helm's deposition from the guardianship proceedings.

C. Mid-Trial Evidentiary Rulings

1. Sorenson Transaction

Next, Helm argues that the trial court should have allowed evidence regarding a similar sale between Helm and Parker—the Sorenson transaction—to show motive or a common scheme or plan. Helm relies on *State v. DeVincentis* for the proposition that the trial court "need only find that the prior acts show a pattern or plan with marked similarities to the facts in the case before it" be admissible under ER 404(b). Br. of Appellant at 46 (quoting 150 Wn.2d 11, 13, 74 P.3d 119 (2003)).

Calhoun responds that the trial court correctly excluded evidence of the Sorenson transaction because Helm would be offering it to argue that Calhoun had a propensity for selling undervalued properties to Parker, which is a violation of ER 404(b). Calhoun further argues that Helm failed to show how the Sorenson transaction between her and Parker would have bearing on

the issue of whether she breached her fiduciary duty as it was an entirely different sale, at a different time, in a different county, under different circumstances, and was court and DSHS authorized. Lastly, Calhoun argues that the only other purpose for the possible inclusion of the Sorenson transaction could be under ER 406 (habit, routine practice), but that argument fails for the same reasons. We agree.

We review the exclusion of evidence under ER 404(b) for abuse of discretion. *DeVincentis*, 150 Wn.2d at 17. A trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010).

ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence of a person's prior misconduct is admissible only when the party seeking to admit the evidence (1) demonstrates by a preponderance of the evidence that the misconduct occurred, (2) identifies the purpose for the evidence's admission, (3) establishes the evidence's relevance to proving an element of the charged crime, and (4) weighs the evidence's probative value against its prejudicial effect. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). A party seeking to introduce evidence under ER 404(b) has the burden of proving the first three of these elements, and we presume that evidence of prior misconduct is inadmissible. *Id.* Regarding the fourth element, the trial court should balance the probative value of the evidence against its prejudicial effect on the record before using its discretion to admit evidence under ER 404(b). *State v. Gogolin*, 45 Wn. App. 640, 645, 727 P.2d 683 (1986).

Under ER 406, relevant evidence is admissible to prove behavior in conformity with habit on a particular occasion. ER 406 provides:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Notably, our Supreme Court defined habitual behavior in *Washington State Physicians Insurance Exchange & Association v. Fisons* as "'semi-automatic, almost involuntary and invariabl[y] specific responses to fairly specific stimuli.'" 122 Wn.2d 299, 325, 858 P.2d 1054 (1993) (alteration in original) (quoting ER 406 cmt. 1).

The trial court did not abuse its discretion when it excluded evidence regarding the Sorenson transaction. Although Helm provides the similarity of Parker buying property at a lower price than market value from Calhoun and Senior Avenues, she also concedes that the Sorenson transaction was different because Calhoun was a court-appointed trustee of Sorenson's estate and both DSHS and the court overseeing the settlement of the estate approved the sale—making the Sorenson transaction factually different from the case at hand. Therefore, Helm fails to show how the Sorenson transaction shows a "pattern or plan with marked similarities to the facts in the case before it." *DeVincentis*, 150 Wn.2d at 13. Accordingly, the probative value of this inadmissible evidence cannot be deemed to outweigh the prejudicial effect required for it to be admissible under ER 404(b).

Next, regarding ER 406, the court stated:

> Under 406, it has to be routine or practice. It has to be routine or habit that would be such that you can't even pick out a specific property. This is what they always do—they always have their—25 different examples of properties that were subject to—that were sold for undervalue to the same person from her. I've got one other sale that we're talking about—it's one sale. And that's not sufficient under 406.

> And the other [Sorenson transaction] was signed off by the Court and signed off by DSHS.
>
> It is confusing for the jury as far as what this all means in light of the fact that the Court signed off on it. It does not show habit; it does not show routine practice.
>
> There's not sufficient routine or habit shown to bring it in. Conspiracy does not need to have a routine practice or habit to be able to show the same either.

2 RP at 631-33. Notably, Helm cites nothing more to lend additional support to her allegations that this should have been admitted under ER 404 or 406, and instead agrees that the evidence "[is] not exactly under 406." 2 RP at 631. And because Helm does not dispute the basis of the court's ruling—the fact that this was a transaction where Calhoun was court-appointed as trustee of Sorenson's estate and that at the time of the sale both DSHS and the Yakima court approved the sale of the property—she fails to show that Calhoun's and Parker's actions fit within the definition of habitual behavior under *Fisons*. Accordingly, the trial court's determination was not so unreasonable as to constitute an abuse of discretion.

2. Professional Standards of Practice and Background for CPGs

Next, Helm argues that the trial court's ruling barring testimony about the qualifications of Calhoun as a CPG was predicated on an interpretation of the law governing attorneys-in-fact as contained within the "four corners of the [UPOAA and ch. 11.125 RCW]." Br. of Appellant at 49. Helm argues and cites to *Walker v. Bangs*, 92 Wn.2d 854, 607 P.2d 1279 (1979), for the common law principle, codified in RCW 11.125.140(5), that "[g]enerally, one who holds himself out as specializing and as possessing greater than ordinary knowledge and skill in a particular field, will be held to the standard of performance of those who hold themselves out as specialists in that area." Br. of Appellant at 50 (quoting *Walker*, 92 Wn.2d at 860). Therefore, when the trial court directed Helm's expert witness to refrain from using "standard of care" and instead use the term "generally accepted practices of fiduciaries," she was unable to impeach Calhoun's expert

regarding SOPs for CPGs. Finally, Helm argues that the SOPs regarding CPGs should have been allowed because it would have allowed the jury to learn of the special skills or experience Calhoun possessed as the only care management firm in central Washington.

Calhoun responds that Helm cannot show that her CPG license and license status were factors in why she was selected to be POA. Therefore, her CPG license and the standards pertaining to said license were irrelevant to Helm's claims. We agree.

Here, the trial court did not err in excluding evidence of the standard of practices for CPG's. The issues at trial were whether Calhoun breached her fiduciary duty to Helm as POA, and whether Parker and Calhoun conspired when purchasing and selling the Rhapsody property. Neither dealt with Calhoun's role as a CPG; she was not hired to be one in this case, nor was she acting as one. Helm offers no other evidence to show Calhoun acted as a CPG when taking on Helm's case. Additionally, Helm does not dispute or allege that she did not sign the POA, making Calhoun her attorney-in-fact. Accordingly, the court did not err when limiting and restricting testimony regarding CPG standards of care.

3. Helm's Medical Records

Next, Helm argues that the court erred in admitting exhibit 108 over her objection. She asserts that the subject passage did not "relate to Helm's medical condition." Br. of Appellant at 56. Helm writes the

> italicized statements express[ed] opinions which were not even based on first-hand knowledge of the doctor writing the summary, but on information provided by unnamed people in 'Social Work.' Furthermore, these opinions related to the very issues before the jury.

Br. of Appellant at 56.

The passage at issue reads:

> Social Work involved her family both here and in Washington state so that it would be possible to have two properties that she owned sold, she would retain ownership of her car, which was going to be transferred out to Washington State at discharge so she would have that. The properties were in disrepair so they had to be worked on to close out the ownership of the properties so that she would have sufficient funds, as there were apparent credit difficulties with her credit and so from what I understand from social work, the properties did have to be sold and subsequently were.

Ex. 108, at P.009-010.

Here Helm, while not expressly doing so, at least appears to assert inadmissibility based on (1) lack of first-hand knowledge, (2) possibly hearsay within hearsay, (3) impermissible opinion, and (4) ultimate issue. However, Helm offers only minimal argument, and provides authority only regarding opinions in medical records and hearsay. We, therefore, address only opinions in medical records and hearsay.

Helm cites to *Erickson v. Kerr*, 69 Wn. App. 891, 851 P.2d 703 (1993), *affirmed in part, reversed in part*, 125 Wn.2d 183, 883 P.2d 313 (1994), for the proposition that medical records are not admissible if they express opinion, conjecture, or speculation. But more accurately, the *Erickson* court held it was not an abuse of discretion to exclude medical records containing opinion, conjecture, or speculation. *Id.* at 904. *Erickson* does not stand for the principle for which Helm cites it. Even so, Helm offers no reasoned analysis on this issue, so her argument fails.

Next, we address Helm's hearsay objection. Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). There are various exceptions to the rule against hearsay, including business records and statements made for the purposes of medical diagnosis or treatment. RCW 5.45.020; ER 803(a)(4).

A business record is:

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

RCW 5.45.020. However, "routine records created in the normal course of business may be inadmissible if they contain conclusions or opinions based on the preparer's special degree of skill or discretion." *In re Welfare of M.R.*, 200 Wn.2d 363, 380, 518 P.3d 214 (2022). If hearsay evidence is wrongly admitted, we must determine whether the admission was prejudicial or harmless. *In re Welfare of X.T.*, 174 Wn. App. 733, 739, 300 P.3d 824 (2013). The admission is not prejudicial "'unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *Id.* at 739 (internal quotation marks omitted) (quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Under this standard, "[t]he improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *In re the Dependency of A.C.*, 1 Wn.3d 186, 194, 525 P.3d 177 (2023).

We agree that exhibit 108 contains hearsay. However, the trial court admitted it under the business records exception to the hearsay prohibition and Helm does not explain why that exception does not apply, asserting only that the records do "not relate to Helm's medical condition." Br. of Appellant at 56. Helm's bare assertion that it does not relate to Helm's medical condition is unavailing. Considering her argument, we must conclude that it fails.

Helm also asserts that the information in the note is "not even based on first-hand knowledge of the doctor writing the summary, but on information provided by unnamed people in 'Social work.'" Br. of Appellant at 56. But again, Helm provides no analysis of how these bare

observations relate to an analysis of the business records statute, RCW 5.45.020. Accordingly, her argument fails.

As for prejudice, Helm's argument is lacking. Even if it is hearsay that should not have been admitted, the error was harmless because the trial court properly determined that Helm's mental health issues had been known throughout the trial. Helm's mental health was the basis for her involuntary commitment and was why she needed the attorney-in-fact to coordinate her move and care, ultimately involving Calhoun.

Next, Helm's argument that the medical records should have been redacted of opinions lacking first-hand knowledge and statements having potential for undue prejudice is unpersuasive. Because Helm requested redaction after the entirety of the exhibit was admitted and after both parties cited and relied on it during witness questioning, she waived her objection on this issue. *See Wolff v. Coast Engine Prods., Inc.*, 72 Wn.2d 226, 230, 432 P.2d 562 (1967) ("counsel objecting to the hospital record must point out the portions to which he is objecting, thus giving the trial court an opportunity to pass upon the question of what should be deleted from the record at the time it is offered"). Accordingly, the trial court did not abuse its discretion in admitting exhibit 108.

D. Civil Conspiracy Claim

Next, Helm argues that the trial court erred when orally dismissing her civil conspiracy claim for insufficient evidence against Calhoun at the close of her case.[10] She argues that the jury

[10] The trial court also dismissed Helm's claim of breach of fiduciary duty against Calhoun for insufficient evidence. But Helm does not raise that in her appeal, so we do not consider it. We do not consider issues unsupported by argument, authority, and references to relevant parts of the record. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

could have found that Calhoun entered into an agreement with her friend, Parker, in the financially exploitative non-market purchase and sale of the Rhapsody property.[11]

Calhoun responds that the trial court's dismissal was proper as the only evidence Helm presented was the fact that Parker bought the home from her following a separate individual being contracted to do the CMA. Lastly, Calhoun argues that Helm abandoned this argument due to not providing authority for her assertion as well as for making a conclusory assertion that there was sufficient evidence for a jury to find civil conspiracy. We agree with Calhoun.

To state a claim for civil conspiracy, the plaintiff must allege that "(1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy." *All Star Gas, Inc. of Wash. v. Bechard*, 100 Wn. App. 732, 740, 998 P.2d 367 (2000). The plaintiff must demonstrate the existence of the conspiracy by clear, cogent, and convincing evidence. *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 529, 424 P.2d 290 (1967). "'Mere suspicion or commonality of interests is insufficient.'" *All Star Gas*, 100 Wn. App. at 740 (quoting *Wilson v. State*, 84 Wn. App. 332, 351, 929 P.2d 448 (1996)). And if "'the facts and circumstances relied upon to establish a conspiracy are as consistent with a lawful or honest purpose as with an unlawful undertaking, they are insufficient.'" *Puget Sound Sec. Patrol, Inc. v. Bates*, 197 Wn. App. 461, 470, 389 P.3d 709 (2017) (internal quotation marks omitted) (quoting *All Star Gas*, 100 Wn. App. at 740).

[11] Helm also references the Sorenson transaction as further proof that the jury could have considered. However, as we previously determined exclusion of said evidence was proper, we do not consider it here.

Insofar as Helm attempts to show a conspiracy between Parker and Calhoun to accomplish an unlawful purpose, the only unlawful purpose she expresses is the private "as-is" sale of the Rhapsody property. She also merely raises evidence that was previously excluded—the Sorenson transaction, which we have previously noted is irrelevant and dissimilar in circumstance. Additionally, Parker's testimony further mentioned that in regard to the Rhapsody property, he did bargain with Calhoun regarding the purchase price of the property, originally offering $26,000, which Calhoun rejected. Consequently, the fact that he got a good deal is insufficient to support a civil conspiracy claim. Accordingly, Helm failed to show clear, cogent, and convincing evidence that Calhoun and Parker conspired to commit financial exploitation.

E. Jury Instructions

Helm argues that the trial court erred by giving several improper jury instructions and by failing to give some of her proposed instructions. We disagree.

Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and inform the trier of fact of the applicable law. *Helmbreck v. McPhee*, 15 Wn. App. 2d 41, 57, 476 P.3d 589 (2020). We review a trial court's instructions for legal error de novo. *Id.* Absent legal error, we review instructions for an abuse of discretion. *Id.* We also review a trial court's refusal to give a requested instruction for an abuse of discretion. *Bulzomi v. Dep't of Lab. & Indus.*, 72 Wn. App. 522, 526, 864 P.2d 996 (1994). We read jury instructions as a whole when determining sufficiency. *Helmbreck*, 15 Wn. App. 2d at 57.

CR 51 governs jury instructions. CR 51(f) provides:

> Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which counsel objects and the grounds of counsel's objection, specifying the number,

> paragraph or particular part of the instruction to be given or refused and to which objection is made.

This rule enables the trial court to correct any mistakes in the instructions in time to prevent the unnecessary expense of a second trial. *Estate of Ryder v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978). Failure to object to an instruction in compliance with CR 51(f) generally precludes appellate review of the instruction. *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 310, 372 P.3d 111 (2016). When no party objects to an instruction below, it becomes the law of the case. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001).

Specifically, Helm argues the trial court failed to instruct the jury properly in the eight instances below:

1. Jury Instruction 8—Contract Modification

Jury instruction 8 states:

> Once a contract has been entered into, mutual assent of the contracting parties is essential for any modification of the contract.
>
> To establish a modification, the party asserting the modification must show, through the words or conduct of the parties, that there was an agreement of the parties on all essential terms of the contract modification, and that the parties intended the new terms to alter the contract.

CP at 1664.

Helm argues that jury instruction 8 "presupposes erroneously that the Service Agreement was a valid, unambiguous, and enforceable contract." Br. of Appellant at 60. Helm goes on to assert that the agreement itself did not require mutual assent to cancel it, but instead allowed *cancellation* by either party for any reason with notice. She continues that any fiduciary duty would exist independent of any obligation under the service agreement and that the relationship was governed by the fiduciary duties, not the contract. Her final point to all this is that the

instruction allowed the jury to rely on the agreement as controlling, over Calhoun's fiduciary duties.

In response, Calhoun argues that the contractual provisions of the agreement assist in proving that she did not breach her fiduciary duties. She argues that Helm does not analyze why her cited principles make instruction 8 erroneous. Calhoun asserts that the instruction was necessary in light of Helm's attack on the circumstances surrounding the execution of the agreement, and that considering the whole of the instructions, instruction 8 was not erroneous. 'We agree that instruction 8 was not erroneous.

Helm relies on *Yeager v. Dunnavan*, 26 Wn.2d 559, 174 P.2d 755 (1946), for the proposition that the party's relationship is governed by fiduciary duties, not by any contractual undertakings in the agreement, necessarily making her claim based in tort and not contract law.

We agree that *Yeager* held that we decide whether an action is primarily in contract or tort by examining the essential allegations of the complaint rather than the form or title the plaintiff adopted or counsel's or the trial court's understanding. *Id.* at 562. And that we consider "the complaint as a whole, and not by particular words or allegations considered apart from the context." *Id.*

But whether the causes of action alleged by Helm sound in tort or contract is beside the point. Here, while Helm is free to disagree, the contract was relevant to defining the duties Calhoun owed to Helm. And as set out above, instructions as a whole must be supported by the evidence, allow each party to argue its theory of the case, and, when read as a whole, properly inform the trier of fact of the applicable law.

The agreement was admitted into evidence. This supported the giving of instruction 8. Instruction 8 also allowed Calhoun to argue her theory of the case that the agreement defined her

duties, contrary to Helm's theory that she owed fiduciary duties independent of the agreement. And, when read as a whole, the instruction informed the jury of the applicable law, especially considering that there were thirteen instructions given—instruction 5 provided a summary of the case, discussing fiduciary duty without referencing contractual obligations. Instruction 9 recited statutory duties under a POA without referencing the contract. Instruction 10, in turn, discussed the agent-principal relationship and obligations. And instruction 11 instructed the jury on how to decide the case addressing fiduciary duty.

Helm's other arguments also miss the mark. That instruction 8 goes against the termination language in the POA is inapposite because termination is not an issue in this case. Additionally, whether the agreement is controlling over other alleged fiduciary duties, or whether those alleged duties exist independent of the service agreement are immaterial to whether this jury instruction was proper. These are theories of the case that Helm was free to put forth and do not inform on whether the instructions meet the three part analysis under *Helmbreck*, as set out above.

We conclude that instruction 8 was supported by the evidence, that the instructions as a whole allowed the parties to argue their theories of the case, and that taken together, they informed the jury of the applicable law. Instruction 8 was not given in error.

2. Proposed Jury Instruction 10A—Procedural Unconscionability

Helm argues that in light of the trial court providing instruction 8 to the jury, it should have then also given her proposed instruction 10A regarding procedural unconscionability. Specifically, Helm argues that the "hallmarks of procedural unconscionability" were present in respect to the agreement because (1) Helm is a lay person, (2) Calhoun prepared the agreement herself, (3) there was no discussion regarding the language in the agreement, (4) the language "blatantly" disregarded Helm's expectation her properties not be sold, (5) the agreement placed

the term that purported to allow the sale of the properties deep into the contract and wrapped the terms in ambiguous language, and (6) Helm had no meaningful choice but to sign the POA and agreement to be released. Br. of Appellant at 62. We disagree.

Unconscionability is a feature of contract law, which we review de novo. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004); *McKee v. AT & T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845 (2008). When considering procedural unconscionability, courts look to "(1) the manner in which the contract was entered, (2) whether [the parties] had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print, to determine where a party lacked a meaningful choice." *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 54, 470 P.3d 486 (2020). Helm presented no evidence justifying her proposed instruction 10A.

Helm presented no evidence that Calhoun was present or facilitated the execution of the agreement and POA. Additionally, Calhoun testified that she did not know the circumstances under which Helm executed the documents because Helm was in South Dakota. Testimony at trial established that the agreement and POA were drafted following conversations between Luke-Anderson and Calhoun, and Calhoun and Helm. The court did not abuse its discretion when it refused to give Helm's requested instruction for procedural unconscionability.

3. Jury Instruction 11—Burden of Proof Regarding Breach of Fiduciary Duty

Helm argues that jury instruction 11 as provided to the jury is incomplete because it failed to instruct the jury on the relevant law on the SOPs for a CPG under *Allard*, 99 Wn.2d 394.

Calhoun argues that Helm's argument on this instruction is another iteration of the same argument for instruction 5 and her proposed instruction 10A, which are unpersuasive. She argues that instruction 11 was issued after the court heard arguments from both parties but ultimately

adopted Calhoun's version of the instruction. Finally, Calhoun argues that the language used from the UPOAA in instruction 11 was the same as the one in instruction 9, which Helm agreed to. We conclude that the jury instructions as a whole, including instruction 11, accurately conveyed the applicable law to the jury. .

Instruction 11 states:

> Plaintiff has the burden of proving each of the following propositions on her claims of breach of fiduciary duty:
>
> (1) That Ms. Calhoun or Senior Avenues owed a fiduciary duty to Ms. Helm at the time of the acts in question (this element is not disputed by [Calhoun])
>
> (2) That Ms. Calhoun or Senior Avenues failed to comply with the fiduciary duty by one or more of the following acts:
>
> a. By acting contrary to Ms. Helm's instructions or best interest, or
> b. By not acting in good faith; or
> c. By acting beyond the scope of her authority; or
> d. By having a conflict of interest; or
> e. By not exercising the care, competence, and diligence ordinarily exercised by agents in similar transactions;
>
> (3) That Ms. Helm was damaged; and
>
> (4) That the violation of the fiduciary duty was a proximate cause of Ms. Helm's damage.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for Ms. Helm. On the other hand, if any of these propositions has not been proved, your verdict should be for Ms. Calhoun and Senior Avenues as to this claim.

CP at 1668-69.

The instruction lists the duties Calhoun owed. Whereas Helm was required to show Calhoun breached as a fiduciary. Because we previously concluded that Calhoun's duties as a CPG were not relevant to the claim before the trial court, related SOPs of a CPG are also irrelevant. Accordingly, the trial court did not abuse its discretion in providing instruction 11 to the jury. The jury instructions as a whole accurately informed the jury on applicable law.

4. Helm's Proposed Jury Instruction 5A—*Allard* Instruction

Next, Helm argues that the trial court erred when it refused to instruct the jury on the common law principle that a fiduciary is required to obtain an appraisal or expose the property to the market before selling it, and failure to do so constitutes a breach of fiduciary duty under *Allard*.

Calhoun responds that *Allard* and Helm's proposed instruction applies to trustees and not POAs. We agree.

Helm asserts that "Calhoun was acting essentially as a de facto trustee in selling Helm's Rhapsody property." Appellant's Reply Br. at 48. However, she offers no analysis or authority to support her assertion that *Allard* extends to those acting under a POA, which entails its own statutory duties. We conclude there is no such authority. *See DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."). We decline to extend trustee law to those acting under a POA. Accordingly, the trial court did not abuse its discretion when refusing to give Helm's proposed *Allard* instruction.

5. Helm's Proposed Jury Instructions 9 and 10—CPG Standards of Practice

Helm argues that the trial court's refusal to instruct the jury based on her proposed jury instructions 9 and 10 outlining CPG's standards of practice, Calhoun's duty to consult and defer to Helm's decision making, and the standard of care of a fiduciary under *Allard* was error. However, we previously concluded that Calhoun's CPG status and the SOPs relating thereto are irrelevant, and we decline to extend trustee law to POAs. The trial court did not err.

6. Helm's Proposed Jury Instruction 5—Summary of The Claims Containing Amount for Damages

Next, Helm argues that the trial court's instruction on damages is incorrect because it suggests that Calhoun breached her fiduciary duty to Helm only if she sold the properties for an "inappropriate amount" instead of fair market value. Br. of Appellant at 69. However, she provides no authority for this proposition, from which we assume there is no such authority. *See DeHeer*, 60 Wn.2d at 195.

7. Helm's Proposed Jury Instruction 6—Fair Market Value

Helm argues that the trial court's refusal to adopt her proposed instructions regarding fair market value was error. She relies on *Dahl-Smyth, Inc. v City of Walla Walla*, 148 Wn.2d 835, 848, 64 P.3d 15 (2003), for the proposition that the general rule for calculating damages for permanent injury to property is "'the difference between the market value of the property immediately before the damage and its market value immediately thereafter.'" Br. of Appellant at 70 (emphasis omitted). Helm further argues that the court's repeated allowed use of the term "fair market value" during trial supports her assertion that her proposed instruction should have been allowed. Br. of Appellant at 70-71. We disagree.

To start with, the Supreme Court in *Dahl-Smyth* addressed what is to be included in the calculation of "measurable damages" under the scope of annexation of a utility granted pursuant to a certificate of public convenience and necessity from the city of Walla Walla. 148 Wn.2d at 840-41. But our circumstances here are different. There is no provision in the UPOAA that requires calculation of "measurable damages." The UPOAA states that if the agent is found liable—which Calhoun was not—the damages are the "amount required to restore the value of the principal's property to what it would have been had the violation not occurred." RCW 11.125.170. Consequently, *Dahl-Smyth* is inapposite.

Finally, the fact that the court allowed the use of the term "fair market value" during trial does not in itself lend a sufficient basis to provide the jury with an instruction such as the one Helm proposed. And because Helm offers no authority that says otherwise, her argument necessarily fails.

8. Helm's Proposed Jury Instruction 11—Future Damages and Lost Rental Income

Finally, Helm argues that the trial court erred when it declined to follow *Spencer v. Badgley Mullins Turner, PLLC*, 6 Wn. App. 2d 762, 789, 432 P.3d 821 (2018), by refusing to give her proposed instruction regarding future damages, which included lost rental income.

However, besides a passing citation, Helm fails to show how *Spencer* is relevant. Moreover, testimony at trial noted that Loop, the Rhapsody Drive property tenant, did not pay rent. As for the Feigley property, there was no evidence of a tenant residing at the property at the time of the sale or after. Therefore, there is no evidence to support an instruction requiring lost rent as part of damages.

II. CLAIMS AGAINST PARKER

Helm argues that the trial court's summary judgment dismissal of her claims against Parker under the CPA, for civil conspiracy, and participation in breach of Calhoun's fiduciary duty to Helm was error. We disagree.

As set forth above, we review summary judgment orders de novo, "'engaging in the same inquiry as the trial court.'" *Vargas*, 194 Wn.2d at 728 (quoting *Afoa*, 176 Wn.2d at 466). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

Under the UPOAA,

> [a] person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid and still in effect, the agent's authority were genuine, valid and still in effect, and the agent had not exceeded and had properly exercised the authority.

RCW 11.125.190(3).

It is undisputed that Helm signed the POA, making Calhoun attorney-in-fact and providing authority to "sell, either at private sale or public auction any and all property, real or personal" that Helm owned. CP at 29. Further, in order for Parker to be liable for participating in a breach of fiduciary duty, Parker must owe Helm a duty. But Helm has not shown that a duty existed. Parker was not the attorney-in-fact, and had no comparable authority—he merely purchased the home at a private sale.[12]

The same goes for Helm's claim under the CPA. Helm cannot show that Parker and Calhoun participated in an unfair or deceptive practice. First, Parker testified that he never had any contact with Helm whatsoever regarding the transaction. Additionally, Parker and Calhoun both testified that they negotiated the price, with Parker initially offering $26,000 and Calhoun rejecting the offer.

Moreover, given the mid-trial exclusion of evidence pertaining to the Sorenson transaction, Helm is unable to show how Parker's purchase of the property affected other consumers or the public—a required element of a CPA claim. *See Indoor Billboard/Wash., Inc. v. Integra Telecom*

[12] In conjunction with her breach of fiduciary duty argument, Helm argues that Parker can be liable for "participating" in a breach if he had knowledge of the breach via the actual value of the property and did nothing about it. But, as noted, the record is deplete of any evidence that at the time of the summary judgment he knew of the breach, therefore, there is no evidence that Parker participated in said breach. Her argument fails.

of Wash., Inc., 162 Wn.2d 59, 74, 170 P.3d 10 (2007) (holding that a claimant must establish all five elements to prevail).

Additionally, Parker relied on the POA when making the offer to buy the property and when going through with the sale. There is no evidence he had knowledge of whether the POA was valid or if Calhoun was exceeding her authority.

Finally, in regards to the civil conspiracy claim, as previously stated, Helm offered no evidence showing that the private "as-is" sale of the Rhapsody property was unlawful. Instead, she raises speculative and previously excluded evidence of the Sorenson transaction as proof of circumstantial similarities. However, as we previously concluded, evidence of the Sorenson transaction is irrelevant because it is dissimilar in circumstance. There simply is no evidence of any agreement.

Accordingly, the trial court did not err when dismissing Helm's claims against Parker for insufficient evidence.

III. OTHER ARGUMENTS

A. Reconsideration

Helm argues that the trial court erred in denying her timely motion for reconsideration. However, she fails to brief this issue in her opening brief, only going into detail in her reply. We will not consider an issue raised for the first time in a reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Accordingly, we decline to consider this argument.

B Cumulative Error Doctrine

Helm argues the cumulative error doctrine applies because her ability to present her case was "significantly prejudiced" by the trial court's several rulings, including summary judgment

dismissal of five out of six of her original claims. Br. of Appellant at 72. Helm also argues that the accumulation of errors deprived her of a fair trial and just result, entitling her to a new trial under CR 59(a)(8) and (9).

As an initial matter, although the cumulative error doctrine is not often applied to civil proceedings, Division III of this court has noted that there is no case which prohibits consideration of the doctrine in the civil context. *Rookstool v. Eaton*, 12 Wn. App. 2d 301, 311-12, 457 P.3d 1144 (2020) ("no case has been cited that prohibits consideration of cumulative error in the civil context"). Consequently, we briefly address Helm's argument.

The cumulative error doctrine applies "'when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.'" *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 172, 288 P.3d 1140 (2012) (quoting *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)). However, because we previously determined that the court did not err in its evidentiary rulings nor its granting of summary judgment, there is no error, and the cumulative error doctrine does not apply. Accordingly, Helm is not entitled to a new trial.

V. ATTORNEY FEES

A. Attorney Fees at the Trial Court

Helm argues that the trial court erred in awarding Calhoun attorney fees under RCW 11.96A.150 because in doing so it improperly considered evidence of settlement negotiations, which evidence, she argues, was misleading because it purported to show that Helm made no offers to settle when in fact she did. We conclude the trial court did not err in awarding attorney fees.

"Washington follows the American rule 'that attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity.'" *Panorama Vill. Condo. Owners Ass'n Bd. of Dir. v. Allstate Ins. Co*., 144 Wn.2d 130, 143, 26 P.3d 910 (2001) (quoting *McGreevy v. Or. Mut. Ins. Co*., 128 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995)).

CR 68 creates a procedure for defendants to offer settlement before trial. *Critchlow v. Dex Media W., Inc*., 192 Wn. App. 710, 717, 368 P.3d 246 (2016). The rule's purpose is "to encourage parties to reach settlement agreements and to avoid lengthy litigation." *Id.* The rule provides for an award of costs to a defendant in cases where the defendant made an offer of judgment to the plaintiff that was larger than the judgment ultimately obtained. *Estep v. Hamilton*, 148 Wn. App. 246, 259, 201 P.3d 331 (2008).

Additionally, RCW 11.96A.150 grants trial courts the authority to award attorney fees in any action initiated under Title 11 RCW. *Sloans v. Berry*, 189 Wn. App. 368, 379, 358 P.3d 426 (2015). Under RCW 11.96A.150(1), a court may award fees at its discretion, as it deems equitable, considering any and all factors it determines to be relevant and appropriate. RCW 11.96A.150(2) provides

> This section applies to all proceedings governed by this *title*, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem.

(Emphasis added.)

The standard of review for an award of attorney fees involves a two-step process. *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012). First, we review de novo whether a statute, contract, or equitable theory authorizes the award. *Id.* Second, if such authority exists, we review for abuse of discretion the amount of the award. *Id.*

Here, we focus on whether the attorney fee award was authorized. The trial court awarded Calhoun attorney fees under RCW 11.96A.150(1). Helm's suit arises out of a claim for breach of fiduciary duty of a POA under the UPOAA, codified within Title 11 at chapter 11.125 RCW.

Helm cites to *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, 170 Wn.2d 495, 508, 242 P.3d 846 (2010), for the proposition that "[e]vidence of settlement negotiations of an underlying claim is not admissible to prove attorney fees awardable for that claim." Br. of Appellant at 74. But Helm misreads *Humphrey*. There, the court focused on the impropriety of evidence of negotiation conduct to establish a theory of arbitrary, vexatious, and bad faith litigation. *Humphrey* does not stand for the proposition that CR 68 evidence is inadmissible as evidence of attorney fees under RCW 11.96A.150.

But whether CR 68 evidence is properly considered in awarding fees under RCW 11.96A.150 is immaterial. No showing of bad faith, or a CR 68 offer, is necessary to award attorney fees under RCW 11.96A.150, which is a broad provision[13] anchored only by what the

[13] RCW 11.96A.150(1) reads as follows:

> Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

trial court deems equitable.[14] We conclude the trial court did not err in awarding attorney fees to Calhoun.

B. Attorney Fees and Costs on Appeal

Calhoun requests attorney fees on appeal pursuant to RAP 18.1 and costs pursuant to RAP 14.2. We grant Calhoun's request for attorney fees and costs.

RAP 18.1(a), (b) provides a party the "right to recover reasonable attorney fees or expenses on review" provided that the party requests the fees in its opening brief and "applicable law" grants the right to recover. We awards attorney fees to the prevailing party "'only on the basis of a private agreement, a statute, or a recognized ground of equity.'" *Tedford v. Guy*, 13 Wn. App. 2d 1, 17, 462 P.3d 869 (2020) (quoting *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 506, 761 P.2d 77 (1988)). Additionally, RCW 11.96A.150(1) grants us discretion to award attorney fees to any proceeding under the title. RAP 14.2 provides for an award of costs to the party that substantially prevails on review.

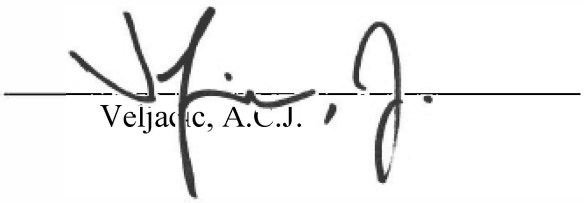
Because Calhoun substantially prevailed on appeal, we grant Calhoun's request for reasonable attorney fees and costs on appeal.

CONCLUSION

We affirm the trial court's orders and award attorney fees and costs to Calhoun on appeal.

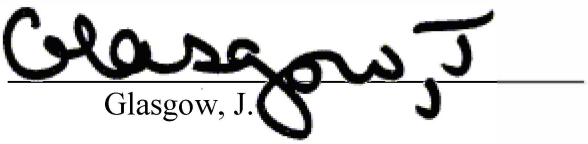
[14] We can affirm the trial court's rulings on any grounds the record and the law support. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

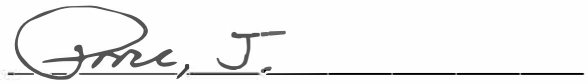


Veljacic, A.C.J.

We concur:



Glasgow, J.



Price, J.

Filed
Washington State
Court of Appeals
Division Two

March 18, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DOROTHY HELM, an individual, Appellant, v. KRISTYAN CALHOUN and JAMES CALHOUN, wife and husband; THOMAS PARKER and SUSAN PARKER, husband and wife; and SENIOR AVENUES LLC, d/b/a SENIOR AVENUES, Respondents.	No. 57878-6-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Dorothy Helm, moves this court to reconsider its October 15, 2024 opinion. After consideration, we deny the motion. It is

SO ORDERED.

Panel: Jj. Glasgow, Veljacic, Price

FOR THE COURT:

Veljacic, A.C.J.

RCW 11.125.140

Agents—Duties—Liability—Disclosures.

(1) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:

(a) Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

(b) Act in good faith; and

(c) Act only within the scope of authority granted in the power of attorney.

(2) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

(a) Act loyally for the principal's benefit;

(b) Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(c) Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

(d) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(e) Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

(f) Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(i) The value and nature of the principal's property;

(ii) The principal's foreseeable obligations and need for maintenance;

(iii) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and

(iv) Eligibility for a benefit, a program, or assistance under a statute or rule.

(3) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

(4) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

(5) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

(6) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

(7) An agent that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person, provided however that the agent shall not be relieved of liability for such person's discretionary acts, that, if done by the agent, would result in liability to the agent.

(8) Unless RCW 11.125.110(1) applies, an agent may only delegate authority to another person if expressly authorized to do so in the power of attorney and may delegate some, but not all, of the authority granted by the principal. An agent that exercises authority to delegate to another person the authority granted by the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person, provided however that the agent shall not be relieved of liability for such person's discretionary acts, that, if done by the agent, would result in liability to the agent.

(9) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested in writing by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. Such request by a guardian, conservator, or another fiduciary acting for the principal must be limited to information reasonably related to that guardian, conservator, or fiduciary's duties. If so requested, within thirty days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional thirty days.

[**2016 c 209 s 114**.]

JURY INSTRUCTION 5

Plaintiff claims that Defendants, Kristyan Calhoun and Senior Avenues, LLC, had a fiduciary duty to Plaintiff pursuant to the power of attorney appointment. Defendants acknowledge and affirm that this duty exists.

Plaintiff claims that Defendants breached their fiduciary duty to Plaintiff by selling Plaintiff's Rhapsody Drive property for an inappropriate amount. Plaintiff has the burden of proof on this claim. Defendants maintain that they sold Plaintiff's Rhapsody Drive property for an appropriate amount.

Plaintiff claims that Defendants breached their fiduciary duty to Plaintiff by selling Plaintiff's Feigley Road property for an inappropriate amount. Plaintiff has the burden of proof on this claim. Defendants maintain that they sold Plaintiff's Feigley Road property for an appropriate amount.

The foregoing is merely a summary of the claims of the parties. You are not to take the same as proof of the matters claimed; and you are to consider only those matters which are established by the evidence. These claims have been outlined solely to aid in understanding.

JURY INSTRUCTION 11

Plaintiff has the burden of proving each of the following propositions on her claims of breach of fiduciary duty:

(1) That Ms. Calhoun or Senior Avenues owed a fiduciary duty to Ms. Helm at the time of the acts in question (this element is not disputed by the Defendants);

(2) That Ms. Calhoun or Senior Avenues failed to comply with the fiduciary duty by one or more of the following acts:

a. By acting contrary to Ms. Helm's instructions or best interests, or

b. By not acting in good faith; or

c. By acting beyond the scope of her authority; or

d. By having a conflict of interest; or

e. By not exercising the care, competence, and diligence ordinarily exercised by agents in similar transactions;

(3) That Ms. Helm was damaged; and

(4) That the violation of the fiduciary duty was a proximate cause of Ms. Helm's damage.

If you find from your consideration of all the evidence that each of

these propositions has been proved, your verdict should be for Ms. Helm. On the other hand, if any of these propositions has not been proved, your verdict should be for Ms. Calhoun and Senior Avenues as to this claim.

Jury Instruction 6

Fair market value means neither a panic price, auction value, speculative value, nor a value fixed by depressed or inflated prices. Fair market value means the amount of money which a purchaser willing, but not obliged, to buy the property would pay an owner willing, but not obliged, to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied.

Donaldson v. Greenwood, 40 Wn.2d 238, 252, 242 P.2d 1038 (1952); *In re Schmitz*, 44 Wn.2d 429, 434, ___ P.2d ___ (1954)

Jury Instruction 9

The CPG Board has adopted and implemented policies and regulations setting forth minimum standards of practice that professional guardians and conservators shall meet. The standards encompass duties on the part of the professional guardian. The professional guardian has those duties while acting under a Power of Attorney.

Accordingly, Ms. Calhoun has a duty, while acting as an agent under a Power of Attorney, to consult with Ms. Helm and defer to Ms. Helm's autonomous decision-making capacity when possible.

GR 23(c)(3)(ii); In re Mesler, ___ Wn. App. ___, 507 P.3d 864, 877 (2022); RCW 11.125.140(5).

CERTIFICATE OF SERVICE

I hereby certify that, on this day, a copy of the foregoing Petition for Review, including Appendix, was served via the Court of Appeals Electronic Filing portal to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: April 17, 2025, at Seattle Washington.

Camille Minogue

LAW OFFICE OF DAN R. YOUNG

April 17, 2025 - 4:18 PM

Transmittal Information

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Appellate Court Case Number:	57878-6
Appellate Court Case Title:	Dorothy Helm, Appellant v. Krystyan Calhoun, et al., Respondents
Superior Court Case Number:	18-2-03124-1

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