IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

V&E MEDICAL IMAGING SERVICES, INC., a Washington corporation, d/b/a AUTOMATED HOME SOLUTIONS,	)	
Plaintiff.	)	DIVISION ONE
	)	No. 62912-3-I
RICHARD BIRGH, JANE DOE BIRGH, individually and the marital community, HOME IMPROVEMENT HELP, a Washington corporation, CONSTRUCTION CREDIT CORPORATION, HERMAN RECOR ARAKI KAUFMAN SIMMERLY & JACKSON PLLC, KENNETH MICHAEL BACON, JANE DOE BACON, individually and their marital community MICHAEL JOHN CONNOLLY, JANE DOE CONNOLLY, individually and their marital community, CITY OF REDMOND, WELLS FARGO BANK ACCOUNT 6000398773 in lieu of bond, JOHN DOE (1) and JOHN DOE(2),	)	UNPUBLISHED OPINION
Third Party Defendants.	)	
MARK DeCOURSEY and CAROL DeCOURSEY, husband and wife and the marital community composed thereof,	)	
Respondents,	)	
v.	)	FILED: November 8, 2010

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

Dwyer, C.J. —Mark and Carol DeCoursey purchased a home intending to remodel it. Their real estate agent, Paul Stickney, recommended a contractor but did not disclose that he was financially connected to the contractor. The contractor performed inferior work and the DeCourseys eventually sued Stickney. Stickney appeals from the jury's verdict finding him liable for breach of his fiduciary duty and for a violation of the Consumer Protection Act (CPA), ch. 19.86 RCW, contending that the trial court erred in several respects. We agree that the trial court's award of costs to the plaintiffs was erroneous. However, finding no other error, we otherwise affirm the judgment, remanding only for a recalculation of the cost award.

I

In 2004, the DeCourseys moved to Washington. They purchased a home with the help of Paul Stickney, a Windermere Real Estate agent. The DeCourseys intended to renovate the home, and Stickney recommended the hiring of contractor Home Improvement Help, Inc. (HIH), which was owned and operated by Richard Birgh. Numerous issues arose with the quality and the nature of HIH's work. The remodeled home was finished behind schedule and

presented structural and other safety concerns. The DeCourseys were unable to obtain an occupancy permit.

A subcontractor of HIH sued the DeCourseys because it had not been paid for work performed on the DeCourseys' home. The DeCourseys answered and filed a third-party complaint against Birgh, HIH, Stickney, Windermere,[1] the City of Redmond,[2] and others. The DeCourseys alleged claims for fraud, breach of contract, negligence, and violation of the CPA against these parties. The DeCourseys initially proceeded pro se, although they received advice from several attorneys.

After the discovery process began, the DeCourseys filed a motion for a protective order related to questions asked in a deposition, including questions about which attorneys they had consulted and paid. At a hearing before Judge John Erlick, the defendants argued that because the DeCourseys were claiming attorney fees, they should be required to answer questions regarding who they had contacted and what fees they had incurred. The DeCourseys responded that while they had contacted "lawyers," those lawyers were not "attorneys." Report of Proceedings (RP) (Aug 23, 2007) at 44-46.

The trial court then determined that opposing counsel could inquire into any attorney fees that the DeCourseys had incurred. At this point, Mark

[1] At trial, Windermere agreed, and the jury was instructed, that if Stickney was found liable for any of the claims against him, Windermere was vicariously liable. Thus, unless the context indicates otherwise, we refer to Stickney and Windermere jointly as "Stickney" throughout this opinion.

[2] The DeCourseys alleged that the City of Redmond failed to properly permit and inspect the project, which allowed HIH to work in violation of the city's ordinances and state law.

DeCoursey responded that they were not claiming attorney fees other than the statutory attorney fee. The trial court accepted that the DeCourseys were waiving or dismissing any claim for attorney fees beyond the statutory attorney fee. As a result, the trial court orally ruled that the DeCourseys were not required to answer questions about their attorneys and that "any claim for attorney's fees above and beyond statutory attorney's fees shall not be pursued." RP (Aug. 23, 2007) at 61. When asked whether the ruling included fees for the CPA claim, the trial court responded that it "[i]ncludes any and all attorney's fees." RP (Aug. 23, 2007) at 61. The written order is more limited, stating:

> (8) The DeCourseys shall not be required to testify regarding attorneys' fees incurred, including the identity of the attorney, the fees incurred, and the amounts paid. This does not affect attorney client privilege. In open court, the DeCourseys are dismissing/not pursuing any claim for attorney fees beyond statutory fees of $250.

Clerk's Papers (CP) at 707. The DeCourseys moved for reconsideration, which was denied.

In September 2007, attorneys began representing the DeCourseys. The DeCourseys filed a notice of discretionary review of Judge Erlick's order, seeking review of the order to the extent that it dismissed their right to seek attorney fees, including fees associated with their CPA claim. A commissioner of this court denied the motion.

In November 2007, the trial court granted summary judgment in favor of

the DeCourseys on their claims against HIH because HIH was an unregistered contractor. Prior to trial, in October 2008, Birgh and HIH settled with the DeCourseys, agreeing to pay them $270,000. The settlement released Birgh and HIH from all claims and also released Stickney in his capacity as an officer of HIH but not in his individual capacity. It also required that the DeCourseys delete, remove, and refrain from publishing any references to any Birgh family member, business, or lawyer on any of the DeCourseys' several web sites. The DeCourseys will owe $25,000 per breach if they violate this settlement condition.

Subsequently, all of the parties except Stickney and Windermere were dismissed from the litigation and, in November 2008, the trial proceeded between the DeCourseys and Stickney. The DeCourseys' only remaining claims were for breach of fiduciary duty, fraud, and violation of the CPA.

Evidence presented at trial established that Stickney had breached his fiduciary duty when he failed to disclose his conflict of interest. In 1996, Stickney and Birgh had entered into a joint venture to develop real property. Together, they incurred a joint debt obligation, which at the time of trial had a principal amount of $400,000. Under the terms of their joint venture agreement, Stickney was responsible for making the loan payments. However, when Stickney could not afford to make payments, Birgh would do so if he had the financial resources available. Other evidence suggested that Stickney was entangled with Birgh and HIH. Stickney had provided Birgh with a cellular

telephone and Birgh had used Stickney's computer server to store HIH documents. In addition, HIH's incorporation documents stated that Stickney was the company's vice president and a 20 percent shareholder, although no non-hearsay evidence showed Stickney to be directly involved with HIH. Stickney testified that he did not know that he was named as HIH's vice president until after the DeCourseys' lawsuit began.

Joseph and Mary Calmes, two of Stickney's former clients, testified that Stickney recommended Birgh and HIH to them and that Stickney actively represented that he had no financial relationship with Birgh. The Calmeses testified that they fired Birgh and HIH because their remodel was not being timely completed and the work appeared to be substandard. However, the Calmeses both testified that they did not recall reporting their dissatisfaction with Birgh or HIH to Stickney other than to relate their concern about the slow pace of the construction.

In addition to the DeCourseys and the Calmeses, Stickney had referred 29 of his clients to Birgh between 1999 and 2004. Stickney testified that Birgh was the only contractor that he recommended, although he always informed his clients that they could compare Birgh to other contractors. There was no evidence presented of any other clients who were dissatisfied with Birgh's work. Stickney did not remember telling any of his clients that he was involved in a joint venture with Birgh because, as he testified, he "felt there was no conflict of

interest." RP (Oct. 23, 2008) at 134.

Several witnesses testified regarding the damages to the DeCourseys' house as a result of Birgh's work. The estimated cost of repair was $525,289.78.

The jury returned a verdict in favor of the DeCourseys on their claims for breach of fiduciary duty and for violation of the CPA but found that the DeCourseys failed to prove fraud.[3] The jury awarded the DeCourseys $515,900 in damages for Stickney's breach of fiduciary duty and $6,300 for Stickney's violation of the CPA: a total damage award of $522,200. Stickney moved for judgment as a matter of law, a new trial, or remittitur. This motion was denied. The trial court then granted the DeCourseys' motion for an award of attorney fees. It found $356,142 in fees reasonably incurred and increased this by a 30 percent multiplier, resulting in a total attorney fee award of $462,985. In addition, the DeCourseys were awarded $45,442 in costs.[4]

Stickney appeals.

II

[3] The jury answered 10 questions on a special verdict form related to the three claims, including specific questions about whether Stickney had a conflict of interest, whether he failed to disclose such a conflict of interest, and whether his failure to disclose had proximately caused the DeCourseys to incur damages.

[4] The amount of the total attorney fee award and the amount of the total cost award that we recite herein are obtained from the trial court's oral statements. These amounts are different than those recited in the judgment summary contained within the final judgment. The judgment summary apparently contains a "scrivener's error. . . . It appears that $442.00 was erroneously added to the attorney's fee award and subtracted from the cost award." Respt's Br. at 17. Furthermore, the judgment entered against Stickney is in the amount of $1,030,427.00. This is $200 less than the sum of the jury's verdict, the cost award, and the attorney fee award.

Stickney first contends that the trial court's instructions to the jury regarding conflicts of interest were erroneous. We disagree.

"Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). We review de novo the adequacy of challenged jury instructions. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). "[W]here a jury instruction correctly states the law . . . 'the court's decision to give the instruction will not be disturbed absent an abuse of discretion.'" Singh v. Edwards Lifesciences Corp., 151 Wn. App. 137, 151, 210 P.3d 337 (2009) (quoting Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002)). The jury instructions given herein correctly stated the law governing conflicts of interest and were consistent with relevant statutes and with common law principles of agency.

In 1996, the legislature enacted comprehensive legislation defining the duties of real estate agents. Sing v. John L. Scott, Inc., 134 Wn.2d 24, 32-33 n.3, 948 P.2d 816 (1997). Specifically, pursuant to chapter 18.86 RCW, a buyer's real estate agent owes several nonwaivable duties to the buyer. The statute imposes on real estate agents a duty to timely disclose to the buyer any conflicts of interest, a duty of loyalty to the buyer requiring that the agent take "no action that is adverse or detrimental to the buyer's interest in a transaction,"

a duty "to advise the buyer to seek expert advice on matters relating to the transaction that are beyond the agent's expertise," and a duty not to disclose confidential information from or about the buyer. RCW 18.86.050. The buyer's real estate agent also owes nonwaivable duties of care, including the duty to exercise reasonable skill and care, to deal honestly and in good faith, and "to disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party." RCW 18.86.030. These statutory requirements are consistent with the traditional common law fiduciary duties owed by agents to principals.

Under the common law, "[a]n agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship." Restatement (Third) of Agency § 8.03 (2006). An official comment to this section states that this duty is formulated broadly so that an agent is required to "disclose adverse interests to the principal so that the principal may evaluate, as only the principal is situated to do, how best to protect its interests in light of the agent's interest." Restatement, supra, § 8.03 cmt. b, at 293; see also Mersky v. Multiple Listing Bureau of Olympia, Inc., 73 Wn.2d 225, 229, 437 P.2d 897 (1968) ("[T]here flows from this agency relationship . . . the legal, ethical, and moral responsibility . . . to make, in all instances, a full, fair, and timely disclosure to the principal of all [material] facts . . . which might affect the principal's rights and interest or influence his actions.").

The phrase "conflicts of interest" is defined neither in chapter 18.86 RCW nor in the Restatement. However, the definition of "conflict of interest" contained in Black's Law Dictionary is informative: "A real or seeming incompatibility between one's private interests and one's public or fiduciary duties." Black's Law Dictionary 341 (9th ed. 2009).

Here, the trial court instructed the jury that:

> Paul Stickney had a duty to the DeCourseys to disclose any conflicts of interest he may have had in his dealings with the DeCourseys. Defendant Paul Stickney had a duty to disclose any financial or business relationships, or prospects for personal gain or benefit he may have had with or through any third party involved in any way with the transaction at issue in this case.
>
> Richard Birgh and HIH, Inc. are such third parties in the transaction in this case.

Instruction 7 (CP at 973). The trial court also instructed the jury that:

> An agent has a conflict of interest if he has any interest in a transaction adverse to the principal. Here, Stickney owed a duty to the DeCourseys to scrupulously avoid representing any interest antagonistic to that of the DeCourseys in transactions relating to their home, or otherwise engaging in self-dealing, without the explicit and fully informed consent of the DeCourseys.
>
> If you find that Paul Stickney violated his duties with relation to the DeCourseys, you must determine the amount of damages proximately caused to the DeCourseys by Paul Stickney's violation.

Instruction 9 (CP at 975).

The trial court's instructions on Stickney's duty and on that which constitutes a conflict of interest correctly stated the law, as reflected in chapter 18.86 RCW and in the Restatement (Third) of Agency.[5] They were not

[5] Stickney proposes that where there is only a possibility that the agent will receive an indirect benefit by not disclosing a business or professional relationship, the agent does not have

misleading. Therefore, the trial court properly instructed the jury.[6]

III

Stickney next contends that the breach of his fiduciary duty to disclose any conflicts of interest was not proved to be a proximate cause of the DeCourseys' injuries arising from the negligent remodeling of their house.[7] We disagree.

"[P]roximate cause consists of two elements: cause in fact and legal causation." City of Seattle v. Blume, 134 Wn.2d 243, 251, 947 P.2d 223 (1997). Cause in fact concerns actual "but for" causation, which exists when the act produced events "in a direct unbroken sequence which would not have resulted had the act not occurred." Hertog v. City of Seattle, 138 Wn.2d 265, 282-83, 979 P.2d 400 (1999). Legal causation "involves the question of whether liability should attach as a matter of law, even if the proof establishes cause in fact." Blume, 134 Wn.2d at 252.

---

a duty to disclose this potential conflict of interest. However, such a limitation is not supported by the statute or by common law, and it does not advance the purpose of requiring the full disclosure of conflicts of interest, which is to protect the principal and allow the principal to properly evaluate how best to protect his or her interests. See Restatement, supra, § 8.03; Mersky, 73 Wn.2d at 229-31. The trial court did not err by not instructing the jury on such a limitation.

[6] In addition, the trial court did not err by refusing to give Stickney's proposed conflict of interest instruction, which was based on criminal cases discussing circumstances in which an attorney has an impermissible conflict of interest pursuant to professional obligations in a Sixth Amendment context. Conflicts of interest that would implicate a criminal defendant's right to conflict-free counsel are vastly different from the type of conflicts that Stickney had a duty to disclose to his principals.

[7] "Whether a duty exists is a question of law that we review de novo, while breach and proximate cause are generally questions for the trier of fact." Estate of Bordon v. Dep't of Corrections, 122 Wn. App. 227, 235, 95 P.3d 764 (2004). "We will overturn a jury verdict only when it is clear there is no substantial evidence to support it." Doyle v. Nor-West Pac. Co., 23 Wn. App. 1, 4, 594 P.2d 938 (1979).

To satisfy the "but for" test, the DeCourseys had to establish that the act complained of "probably caused" the alleged injury. Daugert v. Pappas,104 Wn.2d 254, 260, 704 P.2d 600 (1985). The question is whether "'the performance of the defendant's duties would have avoided loss, and what loss it would have avoided.'" Senn v. Nw. Underwriters, Inc., 74 Wn. App. 408, 418, 875 P.2d 637 (1994) (quoting Barnes v. Andrews, 298 F. 614, 616 (S.D.N.Y. 1924)). "Cause in fact is usually a question for the jury." Joyce v. Dep't of Corr., 155 Wn.2d 306, 322, 119 P.3d 825 (2005).

Stickney argues that the DeCourseys did not prove cause in fact because they failed to present concrete evidence connecting Stickney's breach of fiduciary duty to the DeCourseys' injuries. In support of this argument, Stickney relies on our holding in Smith v. Preston Gates Ellis, LLP, 135 Wn. App. 859, 147 P.3d 600 (2006). In our decision in Smith, a legal malpractice action, we held that the plaintiff had "to demonstrate that a better contract or full disclosure would have prevented the injury or improved his recovery." 135 Wn. App. at 864. In so holding, we stated that the plaintiff therein could not survive summary judgment because:

> Smith could not specifically identify an alternative that would have led to a better outcome. "I can't tell you what I would have done but I would not have entered into this contract." He could only speculate that he might have looked for another builder but that he was committed to building his "dream home." Smith cannot rely on such speculation to defeat summary judgment. He must present specific facts to rebut Preston's claims. Smith's conjectures do not rise to the level of fact and specificity necessary to prevent summary judgment.

Smith, 135 Wn. App. at 865 (citations omitted).

In contrast to the plaintiff in Smith, the DeCourseys presented more concrete evidence of a possible better outcome: the DeCourseys would not have hired Birgh and HIH had they known about the conflict of interest. Stickney told the DeCourseys that Birgh was "a very good contractor" and did "the best work for the best prices." RP (Oct. 22, 2008) at 16. Mark DeCoursey testified that they took Stickney's recommendation as "an independent reference." RP (Oct. 22, 2008) at 39. When Stickney recommended Birgh, the DeCourseys "believed Stickney was operating in our best interests." RP (Oct. 22, 2008) at 38. Mark DeCoursey testified that had Stickney informed him about the conflict of interest, he would have recognized that Stickney was "operating as a salesman, not as my trusted real estate agent." RP (Oct. 23, 2008) at 53. Thus, had the DeCourseys been informed that Stickney had a conflict of interest, they would have been skeptical of Stickney's recommendation and they would have recognized that Stickney's recommendation was not necessarily made with the DeCourseys' best interests in mind. As a result, Mark DeCoursey testified, the DeCourseys would not have hired Birgh and HIH if they had known about Birgh's and HIH's relationships with Stickney. Furthermore, Mark DeCoursey also testified that he and his wife would not have even purchased the house had it not been for Birgh's assurances that he could complete the desired renovations within the DeCourseys' price limit.

This testimony is bolstered by the fact that Birgh and HIH were operating as unlicensed contractors. Mark DeCoursey testified that they would not have hired Birgh had they known that he was not a licensed contractor. In addition, evidence was presented that Birgh had previously performed deficiently and untimely. The jury was entitled to believe that the DeCourseys truly would not have hired Birgh and HIH had Stickney informed them about his conflict of interest. "'The inferences to be drawn from the evidence are for the jury and not for this court.'" Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1994) (quoting State v. O'Connell, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)). We do not "disturb the jury's determinations as to persuasiveness of the evidence or credibility of witnesses." Valdez-Zontek v. Eastmont Sch. Dist., 154 Wn. App. 147, 158, 225 P.3d 339 (2010).

Therefore, there was sufficient evidence from which the jury could find that Stickney's failure to inform the DeCourseys about his conflict of interest led the DeCourseys to hire Birgh, who was an unlicensed contractor who had performed poorly in the past. "But for" Stickney's recommendation made in violation of his fiduciary duty to disclose his conflict, the DeCourseys would have hired a competent, licensed contractor and they would not be the owners of an essentially valueless house. Cause in fact is a question for the jury, Joyce, 155 Wn.2d at 322; sufficient evidence supports the jury's determination herein.

To determine whether the DeCourseys have proved legal causation, we

must ask whether "[t]he injury suffered is not so remote as to preclude liability." Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 483, 951 P.2d 749 (1998). "[D]etermination of legal liability will be dependent on 'mixed considerations of logic, common sense, justice, policy, and precedent.'" Hartley v. State, 103 Wn.2d 768, 779, 698 P.2d 77 (1985) (quoting King v. Seattle, 84 Wn.2d 239, 250, 525 P.2d 228 (1974)). Legal causation is grounded in "policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact." Hartley, 103 Wn.2d at 779. We must consider whether the connection between the defendant's act and its ultimate result is "too remote or insubstantial to impose liability." Hartley, 103 Wn.2d at 781.

Determining legal causation in this instance rests on whether the DeCourseys' damages are too remote from Stickney's recommendation of Birgh and HIH made without disclosing his conflict of interest. Real estate agents owe their buyer-principals the duty of utmost loyalty. The agent has an "obligation to be forthright and straightforward in the handling of [the] principal's business." Mersky, 73 Wn.2d at 230-31. The policy behind requiring disclosure of conflicts of interest is to allow buyer-principals to make informed decisions. There is an inherent risk "that the agent's objectivity may be distorted" by a conflict of interest, and the principal should be aware of potential bias inherent in the

agent's recommendations or suggestions. Mersky, 73 Wn.2d at 230. The information may potentially influence the buyer's actions. "As Justice Brandeis once wrote: 'Sunlight is said to be the best of disinfectants, electric light the most efficient policeman.'" Cogan v. Kidder, Mathews & Segner, Inc., 97 Wn.2d 658, 663, 648 P.2d 875 (1982) (quoting L. Brandeis, Other People's Money, ch. 15 (1914)). This is why it is "of no consequence . . . that the broker may be able to show that the breach of his duty of full disclosure and undivided loyalty did not involve intentional or deliberate fraud, or did not result in injury to the principal, or did not materially affect the principal's ultimate decision in the transaction." Mersky, 73 Wn.2d. at 231.

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

Cogan, 97 Wn.2d at 662-63 (quoting Mersky, 73 Wn.2d at 230). In the absence of required disclosures, buyers reasonably and justifiably assume that their real estate agent is acting in their best interests.

The DeCourseys were justified in assuming Stickney's recommendation for a good contractor was being made by their agent who was acting in their best interests and with undivided loyalty. Stickney's failure to disclose his conflict of interest prevented the DeCourseys from making a meaningful, informed decision about their choice of contractor. That the contractor they chose was ultimately

unlicensed and negligent may not be the direct fault of Stickney, but their decision to choose that contractor was made without the necessary information that Stickney's recommendation was biased and potentially not made in their best interest. Therefore, the "'mixed considerations of logic, common sense, justice, policy, and precedent'" weigh in favor of holding that Stickney's wrongful action was a legal cause of the DeCourseys' injuries. Hartley, 103 Wn.2d at 779 (quoting King, 84 Wn.2d at 250).[8]

Accordingly, Stickney's breach of his duty to disclose his conflict of interest was properly found by the jury to be a proximate cause of the DeCourseys' damages.[9]

---

[8] Stickney argues that his actions were not the legal cause of the DeCourseys' injuries because "[t]o the extent that Stickney set in motion a chain of events, his involvement was limited to a small segment at the beginning of the chain. He had no role in deciding where it went." Appellant's Br. at 62.

When there is an intervening act that is not reasonably foreseeable, "'it must be regarded as a superseding cause negating the claim of proximate or legal cause.'" Maltman v. Sauer, 84 Wn.2d 975, 982, 530 P.2d 254 (1975) (quoting Cook v. Seidenverg, 36 Wn.2d 256, 264, 271 P.2d 799 (1950)). Thus, when there is an independent intervening act of a third person that was not foreseeable, there is a break in the causal connection between the defendant's breach and the plaintiff's injury. Schooley, 134 Wn.2d at 482.

Stickney may not have intended that Birgh and HIH perform negligently by causing large delays, performing substandard work, and causing numerous cost overruns, and no direct evidence was presented establishing that Stickney was aware that Birgh and HIH had ever so performed for Stickney's clients previously. However, whether an independent cause—here, Birgh's and HIH's negligence—"is reasonably foreseeable is generally a question of fact for the jury." McCoy v. Am. Suzuki Motor Corp., 136 Wn.2d 350, 358, 961 P.2d 952 (1998). The jury herein was instructed that "it is not a defense that some other cause may also have been a proximate cause, if in the exercise of ordinary care, the defendant should have anticipated the other proximate cause." CP at 980. In finding for the DeCourseys, the jury plainly determined that Birgh's and HIH's negligence was reasonably foreseeable. There was ample evidence presented from which the jury could make such a determination.

[9] Stickney argues in his opening brief that he was denied a fair trial because the trial court "absolutely forbade any evidence or argument that other parties caused the DeCourseys' damages." Appellant's Br. at 65. Our rules require an appellant to set forth "[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4). We "will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." RAP 10.3(g). Stickney assigns error to the trial court "[r]ejecting all evidence that other

IV

Stickney next contends that the trial court erred by permitting the DeCourseys to seek an award of construction defect damages. This is so, Stickney alleges, because only disgorgement of the real estate commission can be awarded against an agent who fails to disclose a conflict of interest. We disagree.

Stickney is correct that several reported cases discuss forfeiture of the real estate agent's commission as a remedy for a failure to disclose a conflict of interest. See, e.g., Girard v. Myers, 39 Wn. App. 577, 588, 694 P.2d 678 (1985); Ross v. Perelli, 13 Wn. App. 944, 946, 538 P.2d 834 (1975). In these cases, however, there was an absence of any actual injury to the principal. See also Restatement, supra, § 8.01 cmt. d(2), at 259 ("Forfeiture may be the only available remedy when it is difficult to prove that harm to a principal resulted

---

parties caused the construction defect damages." Appellant's Br. at 4-5. The related issue on appeal is stated to be whether Stickney was "denied a fair trial because the court: . . . rejected all evidence that other parties caused the construction defect damages." Appellant's Br. at 5. There are no specific assignments of error to particular evidentiary rulings by the trial court. We will not conduct an independent, exhaustive search of the lengthy record in this case in an effort to identify possible rulings in order to determine whether they constituted an abuse of discretion. Accord United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim. . . . Especially not when the brief presents a passel of other arguments. . . . Judges are not like pigs, hunting for truffles buried in briefs.").

As to those specific evidentiary rulings noted by Stickney in his briefing, Stickney contends only that those evidentiary rulings were in error because they prevented Stickney from arguing his theory of the case. Stickney claims that the trial court excluded "all evidence" tending to show that the actions of others besides Stickney were superseding or even contributory causes of the DeCourseys' damages. However, the record establishes otherwise. In fact, abundant evidence was presented at trial regarding the negligence of Birgh, HIH, the City of Redmond, and others. During closing arguments, Stickney's attorney forcefully argued that the actions of others were superseding causes of the DeCourseys' injuries and that Stickney could not have foreseen that Birgh and HIH would perform negligently. The trial court's rulings did not prevent Stickney from arguing his theory of the case.

from the agent's breach or when the agent realizes no profit.").

"An agent is subject to any losses incurred from his breach of duty." Cogan, 97 Wn.2d at 667 (holding agent who breached duty of loyalty responsible for both commission and the additional interest that had accrued due to an extension of time granted by seller at agent's request). An agent who breaches his or her fiduciary duty is responsible for the amount of actual damages sustained by the principal as a result. Monty v. Peterson, 85 Wn.2d 956, 959, 540 P.2d 1377 (1975); Restatement, supra, § 8.01 cmt. d. In addition, when agents breach their duty of undivided loyalty to the principal, courts have the discretion to order the commission disgorged if necessary to prevent such agents from benefiting from their wrongful conduct. Monty, 85 Wn.2d at 959-60; Restatement, supra, § 8.01 cmt. d(2).

Stickney's assertion that the DeCourseys' only remedy was disgorgement of Stickney's $6,300 commission is without merit.

V

Stickney next contends that there was insufficient evidence presented that his actions impacted the public interest and, thus, the DeCourseys failed to prove their CPA claim. We disagree.

To establish a CPA violation, a plaintiff must prove five elements: that the defendant engaged in (1) an unfair or deceptive act or practice that (2) occurred in trade or commerce, (3) impacts the public interest, (4) and caused injury to the

plaintiff in her business or property, and (5) that the injury is causally linked to the unfair or deceptive act. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Only the public interest element is at issue in this appeal.

Disputes between real estate agents and their clients are private disputes, as opposed to consumer transactions. Hangman Ridge, 105 Wn.2d at 790 (citing McRae v. Bolstad, 101 Wn.2d 161, 676 P.2d 496 (1984) (realtor-property buyer); Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 675 P.2d 193 (1983) (escrow closing agent-client)). However, while these disputes may be private, they will be found to affect the public interest if there is a likelihood that others have been or will be injured in exactly the same fashion. Hangman Ridge, 105 Wn.2d at 790. "[T]here must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act's being repeated." Eastlake Constr. Co. v. Hess, 102 Wn.2d 30, 52, 686 P.2d 465 (1984). When a private dispute is the basis of the CPA claim, four factors—none of which is dispositive and not all of which need to be present—indicate whether the public interest is affected:

> (1) whether the alleged acts were committed in the course of defendant's business; (2) whether the defendant advertised to the public in general; (3) whether the defendant actively solicited this particular plaintiff, indicating potential solicitation of others; (4) whether the plaintiff and defendant have unequal bargaining positions.

Michael v. Mosquera-Lacy, 165 Wn.2d 595, 605, 200 P.3d 695 (2009) (citing

Hangman Ridge, 105 Wn.2d at 791).[10]

Here, the alleged unfair or deceptive act or practice was Stickney's failure to disclose his conflict of interest. The evidence introduced at trial was sufficient to establish that there was a real and substantial likelihood that others have been or would be injured in exactly the same fashion and that this unfair practice had a substantial potential for repetition. First, Stickney testified that he recommended *only* Birgh and HIH to his clients and did not ever explain his joint venture with Birgh to any client. Second, Stickney's client list reveals that he had referred Birgh and HIH to 31 clients in five years. Stickney's breach of his fiduciary duty to the DeCourseys was not an isolated event but, rather, was a generalized course of conduct. Thus, Stickney's failure to disclose his conflict of interest was shown to impact the public interest.

Stickney argues that the DeCourseys did not satisfy the four factors indicating that a private dispute affects the public interest.[11] However, it is not necessary that all four of the factors discussed in Hangman Ridge be established. 105 Wn.2d at 790-91. Here, Stickney's actions were committed in the course of his real estate business, there was evidence that he advertised to the general public,[12] and there was evidence that the DeCourseys and Stickney

[10] Whether a particular action gives rise to a violation of the CPA is a question of law, whereas the question of whether a party committed a particular act is reviewable under the substantial evidence test. Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., 64 Wn. App. 553, 560-61, 825 P.2d 714 (1992).

[11] Stickney is correct that the third factor is absent: the undisputed evidence was that Stickney did not actively solicit the DeCourseys' business. Rather, the DeCourseys contacted Stickney after getting a referral through a neighbor.

[12] Stickney identified himself as a Windermere real estate agent, and Windermere

were in unequal bargaining positions.[13] Thus, evidence was presented that three of the four factors were satisfied. Furthermore, because Stickney recommended only Birgh to more than 30 clients, the DeCourseys showed a "real and substantial potential for repetition." Eastlake Constr. Co., 102 Wn.2d at 52. Therefore, substantial evidence was presented by which the jury could find that all of the elements of the DeCourseys' CPA claim were proved.

VI

Stickney next contends that the trial court erred by refusing to offset the amount of damages awarded by the jury by the amount of the DeCourseys' settlement with Birgh and HIH and by refusing to permit evidence of the settlement based on the collateral source rule. He argues that the trial court's errors resulted in a double recovery for the DeCourseys. We disagree.

Where a plaintiff has obtained a judgment against a nonsettling defendant but has already recovered proceeds for the same damages from settling defendants, the defendant may be entitled to seek an offset. See Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 674-75, 15 P.3d 115 (2000); Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co., 83 Wn. App. 432, 451-52, 922 P.2d 126 (1996). However, where a nonsettling defendant claims a right

---

advertises widely in the area through its web site and signage. In fact, Stickney directed the DeCourseys to use the Windermere web site in reviewing real estate listings that he sent to them.

[13] Stickney was an experienced Washington real estate agent. The DeCourseys were new to Washington and had purchased only one other home, and they were relying on Stickney as their real estate agent. The jury could reasonably find that the DeCourseys were not in an equal bargaining position with Stickney.

to offset its responsibility to pay monetary damages because the plaintiff received proceeds from settling defendants, the nonsettling defendant "has the burden of establishing what part of the settlement was attributable to the claim it seeks to offset." Puget Sound Energy, Inc. v. Alba Gen. Ins. Co., 149 Wn.2d 135, 141, 68 P.3d 1061 (2003).[14] Thus, the nonsettling defendant bears the burden of proving double recovery. Were it otherwise, "'such a rule would encourage litigation and reward the nonsettling [party] for refusing to settle.'" Puget Sound Energy, 149 Wn.2d at 141 (quoting Weyerhaeuser, 142 Wn.2d at 674). Where the settlement did not constitute payment for only the plaintiff's damages for which the judgment was obtained, the defendant must prove what portion of the settlement should be offset.

The settling defendants in Puget Sound Energy, Weyerhaeuser, and Pederson's obtained a benefit from the settlement beyond merely making a monetary payment for the plaintiffs' claims. The settling defendants in Puget Sound Energy "obtained a release . . . from any number of risks and expenses associated with, among other things, the trial and appeal process." 149 Wn.2d at 141. The settling defendants in Weyerhaeuser "also purchased certainty by avoiding the risks of an adverse trial outcome—not to mention forgoing the expenses associated with a lengthy trial and appeal." 142 Wn.2d at 673. The settling defendants in Pederson's did not merely pay for the plaintiff's cleanup

[14] A trial court's decision to grant or deny an offset is reviewed for an abuse of discretion. Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 701, 9 P.3d 898 (2000).

costs but, rather, the settlement was made "in exchange for a release of liability for all past, present and future environmental claims." 83 Wn. App. at 452. In each of those cases, the nonsettling defendants did not demonstrate what portion of the settlement monies was attributable to the same injuries for which the nonsettling defendants were responsible and, thus, no offset was warranted. Puget Sound Energy, 149 Wn.2d at 142; Weyerhaeuser, 142 Wn.2d at 675; Pederson's, 83 Wn. App. at 452.

Here, the same is true. Birgh and HIH, as the settling defendants, did more than just settle a claim with the DeCourseys. They also avoided the risks and expenses of trial and appeal. See Puget Sound Energy, 149 Wn.2d at 141; Weyerhaeuser, 142 Wn.2d at 673. This settlement was not mere payment for negligent construction; the monetary settlement was made in exchange for a release of liability for all claims relating to Birgh's and HIH's work on the DeCourseys' house, including a release from payment of attorney fees and costs. Moreover, the settlement limits the DeCourseys' ability to discuss Birgh's and HIH's negligence. Thus, Birgh and HIH obtained an enforceable restriction on the DeCourseys' public disparagement of them, their work, and their honesty. The settlement here did not simply constitute payment only for the DeCourseys' direct injuries. See Weyerhaeuser, 142 Wn.2d at 673.

To the extent that the settlement monies compensated the DeCourseys for the construction defects, it was Stickney's burden to prove that the

DeCourseys received a double recovery. However, Stickney did not demonstrate what part, if any, of the settlement was attributable to construction defects. "Thus, no showing of double recovery was made." Pederson's, 83 Wn. App. at 452. The trial court acted properly by not reducing the amount of the award entered against Stickney.

For the same reason, assuming—without deciding—that the collateral source rule pertains to this settlement, Stickney was not entitled to have evidence of the settlement admitted at trial and was not entitled to a reduction in the judgment entered against him. The collateral source rule precludes a defendant from offsetting the plaintiff's damages with evidence of payments received by the plaintiff from a source independent of the defendant, for the *same injury* caused by the defendant. Ciminski v. SCI Corp., 90 Wn.2d 802, 804, 585 P.2d 1182 (1978).[15] The defendant, seeking the benefit of the other source, has the burden of showing that the payments were made to compensate for the same injury. This was not proved at trial. The trial court did not err.[16]

VII

[15] "The very essence of the collateral source rule requires exclusion of evidence of other money received by the claimant so the fact finder will not infer the claimant is receiving a windfall and nullify the defendant's responsibility." Johnson v. Weyerhaeuser Co., 134 Wn.2d 795, 803, 953 P.2d 800 (1998).

[16] Stickney assigns error to the trial court's decision to grant the DeCoursey's motion to exclude evidence of the DeCourseys' settlement with Birgh and HIH. Appellant's Br. at 2 (Assignment of Error 6). Stickney does not provide a corresponding issue statement pertaining to this assignment of error, contrary to our rules. RAP 10.3(a)(4). RAP 10.3(a)(6) requires the appellant to present argument supporting the issues presented for review, citations to legal authority, and references to relevant parts of the record. Stickney presents neither legal authority nor argument supporting this assignment of error. Therefore, Stickney has waived this assignment of error and we will not further consider it. Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986).

Stickney next contends that the trial court erroneously refused to instruct the jury that the DeCourseys' damages were to be measured at the time they were sustained rather than at the time of the trial. He makes this contention because the estimate prepared in 2008 by the DeCourseys' expert regarding the cost of repairing the DeCourseys' house was in an amount significantly higher than estimates prepared in 2004 and in 2005.

RAP 10.3(a)(6) requires argument supported by citation to authority. Stickney fails to cite any authority relevant to his proposition.[17] In addition, Stickney's argument has no merit considering that the testimony at trial was that the cost estimate from 2008 included repairs for damage that was discovered after the earlier estimates were generated. Thus, the earlier estimates did not account for all of the DeCourseys' losses. The trial court's instruction on the measurement of damages was not erroneous.

VIII

Stickney next contends that the economic loss rule prevents the DeCourseys from recovering any economic damages based on their breach of

[17] Instead, Stickney cites to Thompson v. King Feed & Nutrition Services, Inc., 153 Wn.2d 447, 105 P.3d 378 (2005), Falcone v. Perry, 68 Wn.2d 909, 416 P.2d 690 (1966), and Harkoff v. Whatcom County, 40 Wn.2d 147, 241 P.2d 932 (1952). These decisions address various methods for measuring damages, including the method that calculates the cost to repair the damaged property and the method that calculates the diminution in the market value of the property as a result of the damage caused by the defendant. These decisions discuss the appropriate circumstances for utilizing different methods for calculating damages and explain which one the finder of fact should follow in awarding damages to the plaintiff. They do not, however, address the appropriate time frame for measuring the cost to repair damaged property. Thus, these decisions are inapposite to Stickney's contention that the DeCourseys' damages should have been measured based on the cost of repair as calculated using 2005 prices, when the damage initially occurred, rather than the cost of repair based on 2008 prices.

fiduciary duty claim against him. Stickney, however, failed to interpose this issue in this litigation in a timely manner. Thus, he cannot be afforded appellate relief.

In the trial court, Stickney did not raise the economic loss doctrine[18] as a defense until he brought a postverdict motion for judgment as a matter of law, a new trial, or remittitur. This was untimely. "[T]he post-trial discovery of a new theory of recovery is not sufficient reason to either grant a new trial or reconsider a previously entered judgment pursuant [to] CR 59." Vaughn v. Vaughn, 23 Wn. App. 527, 531, 597 P.2d 932 (1979) (plaintiff sued her insurance company for bad faith in handling her tort action; after trial court ruled against her, she moved for reconsideration on an alternative theory of recovery). "'A new claim of error brought forward for the purpose of reversing a judgment is too late if made for the first time on the motion for new trial.'" Teratron Gen. v. Institutional Investors Trust, 18 Wn. App. 481, 489-490, 569 P.2d 1198 (1977) (quoting Puget Sound Marina, Inc. v. Jorgensen, 3 Wn. App. 476, 480-81, 475 P.2d 919 (1970)). Indeed, a party finding a jury verdict unsatisfactory may not "suddenly propose a new theory of the case." JDFJ Corp. v. Int'l Raceway, Inc., 97 Wn. App. 1, 7,

[18] The economic loss rule prohibits plaintiffs from recovering in tort those economic losses "'to which their entitlement flows only from a contract.'" Alejandre v. Bull, 159 Wn.2d 674, 682, 153 P.3d 864 (2007) (internal quotation marks omitted) (quoting Factory Mkt., Inc. v. Schuller Int'l, Inc., 987 F. Supp. 387, 395 (F.D. Pa. 1997)). The reason for this rule is that "'tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.'" Alejandre, 159 Wn.2d at 682 (quoting Factory Mkt., 987 F. Supp. At 395). However, the prohibition of the economic loss rule does not extend to all professional malpractice claims. Boguch v. Landover Corp., 153 Wn. App. 595, 618, 224 P.3d 795 (2009); Jackowski v. Borchelt, 151 Wn. App. 1, 14-15, 209 P.3d 514 (2009), review granted, 168 Wn.2d 1001, 226 P.3d 780 (2010).

970 P.2d 343 (1999) (plaintiff moved for posttrial reconsideration alleging that it was entitled to treble rather than actual damages under a statute not raised at trial). As we recently stated:

> [H]ere, the motion for reconsideration arguments were based on new legal theories with new and different citations to the record. [Appellant] offers no explanation for why these arguments were not timely presented. CR 59 does not permit a [party] to propose new theories of the case that could have been raised before entry of an adverse decision.

Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

Stickney did not raise the applicability of the economic loss rule to the trial court, either orally or in writing, at any time prior to entry of the jury's verdict. Further indication that Stickney did not identify the economic loss doctrine as a potential defense prior to finding the jury's verdict unsatisfactory is that Stickney did not propose any jury instructions on this defense theory.

> The burden is on the parties to a lawsuit to propose jury instructions covering their respective theories. A party is bound by the legal theories pleaded and argued before the jury renders a verdict.
>
> . . . .
>
> In our judgment it follows that if a party fails to propose instructions on a particular theory of recovery, that theory is taken out of the case, and it cannot be reinstituted under the guise of a [postverdict] motion.

Browne v. Cassidy, 46 Wn. App. 267, 270, 728 P.2d 1388 (1986) (citations omitted). The same is true for most theories of defense as it is for theories of recovery. By failing to timely present the defense, Stickney waived it.

For all of the reasons discussed above, Stickney raised this theory too

late for it to be considered by the trial court.

Nor is Stickney entitled to raise this issue on appeal. "A lawsuit cannot be tried on one theory and appealed on others." Teratron, 18 Wn. App. at 489; see also RAP 2.5. This rule does not exist for our convenience. Rather,

> [i]t proceeds upon the salutary principle that it is in the public interest that the trial court be the forum both for thought and after thought to the end that litigation may be terminated as early in the litigation process as possible, thereby avoiding unnecessary appeals. The rule would seem especially applicable when the issues raised are in the nature of affirmative defenses requiring a factual hearing and findings to resolve the factual issues raised.

Puget Sound Marina, Inc. v. Jorgensen, 3 Wn. App. 476, 480-81, 475 P.2d 919 (1970).

The applicability of the economic loss doctrine was a mere afterthought, first raised following the trial. The economic loss doctrine was not part of, or even closely related to, the defense theories presented at trial. The applicability of the economic loss doctrine to the DeCourseys' claims constitutes an issue that was not properly preserved for appellate review.

IX

Stickney next contends that the Real Estate Purchase & Sale Agreement (REPSA) between the DeCourseys and the seller of the house limits his liability to the DeCourseys. This is so, he avers, because of the REPSA provision purporting to limit the real estate agent's liability for damages arising out of referrals of contractors.[19] Stickney's argument fails.

To begin, Stickney was not even a party to the REPSA. More importantly, Stickney was not sued as a guarantor of his referral. Rather, he was sued for his breach of fiduciary duty. Stickney's duty to disclose conflicts of interest was not waivable. RCW 18.86.050(1). Therefore, no provision in the REPSA could limit Stickney's liability for his breach of such a fiduciary duty. Accordingly, his contention lacks merit.

X

Stickney next contends that Judge Fox, the trial judge, was precluded from awarding attorney fees to the DeCourseys because he could not modify Judge Erlick's earlier order stating that the DeCourseys were "dismissing/not pursuing" any claim for attorney fees. We disagree.

---

[19] The relevant REPSA provision, in an "Additional Clauses Addendum," provides:

> RECOMMENDATIONS AND REFERRALS. Agent may assist Buyer or Seller with locating, selecting or scheduling service providers, such as home inspectors, contractors and lenders. Agent cannot guarantee, ensure or be responsible for the quality or performance of the services or to the financial responsibility of third parties. Other vendors are available, and the price and quality of such services is competitive. Buyer and Seller agree to exercise their own judgment regarding such service providers.

EX. 33 at 11.

Initially, we note that we are not convinced that Judge Fox modified Judge Erlick's order. The circumstances surrounding the entry of Judge Erlick's order reveal that the DeCourseys were dismissing a claim to attorney fees for those attorneys whom they had consulted prior to the hearing. Judge Erlick's order was made in connection with the DeCourseys' CR 26(c) motion for a protective order, in which the DeCourseys sought to preclude questions regarding several attorneys whom the DeCourseys had earlier consulted. Judge Erlick ordered that the DeCourseys did not have to disclose information about the attorneys because the DeCourseys were not attempting to have the defendants pay the fees incurred for those attorneys' services. It is not the case that Judge Erlick's order related to other, yet-to-be-hired lawyers. Therefore, Judge Fox was not precluded from determining that Judge Erlick's order contained "nothing in it which would preclude the award of attorney fees since that time." RP (February 6, 2009) at 6.

However, even assuming that Judge Erlick's order was intended to apply to future attorney services, a modification of this order was not necessarily improper. Generally, a trial court's pretrial ruling is subject to modification. The trial judge is entitled to reexamine the matter and reconsider the ruling unless it was denominated a final decision. Central Puget Sound Reg'l Transit Auth. v. Heirs & Devisees of Eastey, 135 Wn. App. 446, 464-65, 144 P.3d 322 (2006) (Cox, J., concurring); accord MGIC Fin. Corp. v. H.A. Briggs Co., 24 Wn. App. 1,

8, 600 P.2d 573 (1979). Pursuant to CR 54(b), a decision that adjudicates fewer than all of the claims in an action is not final unless the trial court makes a written finding that there is no just reason for delay of the entry of judgment. In the absence of such a finding, a ruling resolving fewer than all claims "is subject to revision at any time." CR 54(b). Where the initial order did not resolve all of the claims against all of the parties and the trial court made no CR 54(b) certification, the trial court "had authority to modify its initial judgment." Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co., 150 Wn. App. 1, 14 n.33, 206 P.3d 1255, review denied, 167 Wn.2d 1007 (2009).

In this case, Judge Erlick's pretrial ruling regarding attorney fees did not resolve all of the claims against all of the parties and the trial court made no CR 54(b) certification. Accordingly, the trial court "had authority to modify its initial judgment." Ledcor, 150 Wn. App. at 14 n.33.[20] Thus, Judge Fox was entitled to reexamine Judge Erlick's earlier ruling.

Nevertheless, Stickney incorrectly contends that the denial of discretionary review by a commissioner of our court somehow precluded Judge Fox from awarding fees. The cases Stickney cites in support of his argument are readily distinguishable: they were decided on the merits. Hough v. Ballard, 108 Wn. App. 272, 31 P.3d 6 (2001); Gould v. Mut. Life Ins. Co., 37 Wn. App. 756, 683 P.2d 207 (1984). The "denial of discretionary review of a superior

[20] We recognize that Judge Fox did not believe that he was modifying Judge Erlick's earlier order. However, we may affirm the trial court on any basis supported by the record, whether or not the trial court relied on that basis in its decision. Amy v. Kmart of Wash. LLC, 153 Wn. App. 846, 868, 223 P.3d 1247 (2009).

court decision does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision." RAP 2.3(c). Nor does denial of discretionary review affect the trial court's authority to modify its rulings. Indeed, Stickney cites to no authority suggesting otherwise.

Stickney also argues that Judge Fox was statutorily disqualified from ruling on the DeCourseys' request for attorney fees because he was "not present and sitting as a member of the court at the hearing of a matter submitted for its decision." RCW 2.28.030(2). However, RCW 2.28.030 "means no more than that a judge may not pass upon a matter that was never properly submitted to him." In re Jaime v. Rhay, 59 Wn.2d 58, 61, 356 P.2d 772 (1961). "[A] successor judge lacks authority to enter findings of fact on the basis of testimony heard by a predecessor judge," In re Marriage of Crosetto, 101 Wn. App. 89, 95, 1 P.3d 1180 (2000), but a successor judge can enter findings of fact based on testimony and argument that was actually presented to that judge. Cf. Wold v. Wold, 7 Wn. App. 872, 877, 503 P.2d 118 (1972) (new trial required in dissolution action where findings of fact inadequate and trial judge no longer on the bench). The matter of attorney fees was properly submitted to Judge Fox. He made his decision based on the evidence and argument presented to him.

Stickney also argues that Judge Erlick's order is a final order because the DeCourseys did not appeal from it. He is correct that Judge Erlick's order became final—it became final at the conclusion of the trial court proceedings

when the judgment was entered. The DeCourseys did not cross-appeal, assigning error to the order. This is of no moment. The present finality of Judge Erlick's order in no way affected Judge Fox's earlier decision to award attorney fees to the DeCourseys.

By virtue of the finality of Judge Erlick's order, the DeCourseys cannot now attempt to obtain an award of attorney fees for the lawyers they consulted while they were acting pro se. They do not seek to.

Judge Fox did not err in ruling that the DeCourseys were entitled to an award of attorney fees.[21]

XI

Stickney next contends that the amount of the trial court's award of attorney fees was in error because the trial court did not enter specific findings of fact, did not require segregation of fees, and applied a 30 percent loadstar multiplier. We disagree.

A party may recover attorney fees only when a statute, contract, or recognized ground of equity so permits. Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910 (2001). "Whether a party is entitled to attorney fees is an issue of law that we review de novo." Little v. King, 147 Wn. App. 883, 890, 198 P.3d 525 (2008). "Whether the fee award is reasonable is a matter of discretion for the trial court, which we

[21] The DeCourseys moved to strike portions of Stickney's reply brief, contending that portions of Stickney's reply brief contain new arguments regarding Judge Fox's decision to award attorney fees. Given our resolution of this issue, the motion is moot.

will alter only if we find an abuse of discretion." Bloor v. Fritz, 143 Wn. App. 718, 747, 180 P.3d 805 (2008).

The trial court must use the lodestar method of calculating an award of attorney fees,[22] which requires that the trial court determine that a reasonable number of hours were expended and that the hourly rate is reasonable. Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632, 966 P.2d 305 (1998). The trial court must independently decide what is reasonable, rather than merely relying on billing records. Mayer v. City of Seattle, 102 Wn. App. 66, 79, 10 P.3d 408 (2000). The court must exclude any wasteful or duplicative hours. Mahler, 135 Wn.2d at 434. The trial court must also create an adequate record for appellate review of fee award decisions. Mahler, 135 Wn.2d at 435.

The trial court herein made specific findings that the number of hours expended and the billing rates charged by the DeCourseys' attorneys were reasonable. The trial court was presented with evidence of the billing rate of each of the DeCourseys' attorneys and with more than 50 pages of detailed billing statements, which had been reviewed and abridged in order to remove the hours expended on claims unrelated to the prevailing claims against Stickney.[23] Therefore, the trial court established an adequate record for review.

The trial court must segregate fees applicable to each claim where

[22] "The lodestar fee is the reasonable number of hours incurred in obtaining the successful result multiplied by the reasonable hourly rate." Bloor, 143 Wn. App. at 750.

[23] The trial court did not discuss the DeCourseys' submission concerning the attorneys they had consulted while they were still acting pro se. However, based on the amount of attorney fees actually awarded, it is apparent that these fees were not included within the award of attorney fees.

possible. Smith v. Behr Process Corp., 113 Wn. App. 306, 344-45, 54 P.3d 665 (2002). However, where the trial court finds that the claims are "so related that no reasonable segregation of . . . claims can be made, there need be no segregation of attorney fees." Hume v. Am. Disposal Co., 124 Wn.2d 656, 673, 880 P.2d 988 (1994). Here, the trial court made a specific finding that segregation of attorney fees between claims would be impracticable. While this is not a finding of impossibility, our Supreme Court has accepted a trial court's finding that segregation of CPA fees could not realistically be done because proof of the CPA claims required proof of the elements of the other claim. Mayer v. Sto Indus., 156 Wn.2d 677, 692-93, 132 P.3d 115 (2006). Here, the DeCourseys' CPA claim was based on Stickney's breach of fiduciary duty. Therefore, the trial court's finding that segregation was impracticable was proper.

Stickney also contends that the trial court erred by applying a 1.3 multiplier to its award of attorney fees, arguing that the evidence does not support an enhancement. The trial court awarded the 1.3 multiplier "because of the high-risk nature of this particular litigation." RP (Feb. 6, 2009) at 5. The trial court made no additional statements with regard to why a multiplier was appropriate and the written order awarding fees does not provide any factual findings regarding the appropriateness of the multiplier. The DeCourseys argued below that it was financially risky for their attorneys to accept their case

because, although they had an hourly fee agreement, there was a possibility that their attorneys would not be able to recover fees from the DeCourseys if they did not prevail because the DeCourseys were so indebted.

In rare instances, the trial court may, in its discretion, award an adjustment to the attorney fees based on factors that the lodestar calculation has not already taken into account, including the contingent nature of success in the case and the quality of the work performed. Morgan v. Kingen, 166 Wn.2d 526, 539, 210 P.3d 995 (2009); Bowers, 100 Wn.2d at 593-94. When the trial court considers the contingent nature of success, it is "'necessarily an imprecise calculation and must largely be a matter of the trial court's discretion.'" Morgan, 166 Wn.2d at 539 (quoting Chuong Van Pham v. Seattle City Light, 159 Wn.2d 527, 542, 151 P.3d 976 (2007)). "'A trial court awards a contingency adjustment solely to compensate for the possibility . . . that the litigation would be unsuccessful and that no fee would be obtained.'" Morgan, 166 Wn.2d at 539 (quoting Bowers, 100 Wn.2d at 598-99).

Here, there was a possibility that no fees would be obtained. At the time that the DeCourseys' attorneys appeared on the DeCourseys' behalf, the DeCourseys had limited finances and there was a significant risk that the attorneys would never recover their fees if the DeCourseys did not prevail in the lawsuit. The trial court recognized that the legal implications of Stickney's failure to disclose "were strenuously fought." RP (Feb. 6, 2009) at 5. Moreover, the

attorneys accepted the DeCourseys' representation shortly after Judge Erlick's order. The uncertainty caused by Judge Erlick's ruling made it a possibility that the DeCourseys would not be able to recover any attorney fees. Thus, the trial court did not abuse its discretion in deciding to award a 30 percent multiplier.

Accordingly, the trial court's calculation of attorney fees was not made in error.

XII

Stickney finally contends that the trial court's award of costs was in error. We agree.

In addition to permitting an award of attorney fees, the CPA permits a successful plaintiff to recover the costs of his or her lawsuit. RCW 19.86.090. However, the plaintiff in a CPA action cannot recover costs beyond those statutorily defined in RCW 4.84.010. Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 743, 733 P.2d 208 (1987). "RCW 4.84.010 entitles a prevailing party to recover, in general, filing fees, costs for service of process, notary fees, reasonable expenses for reports and records entered into evidence, [and] statutory attorney and witness fees." Sto Indus., 156 Wn.2d at 694.

Here, the record reveals that the $45,442 in costs awarded to the DeCourseys included costs for parking, faxing documents, photography, transcription, expert witnesses, and legal research. These costs are not authorized by RCW 4.84.010. The trial court did not demonstrate how the award

of these costs is consistent with Nordstrom.[24] Therefore, the trial court erred by awarding costs in excess of those authorized in RCW 4.84.010. Remand is necessary to correct the cost award.

XIII

The DeCourseys request an award of attorney fees on appeal pursuant to RAP 18.1. Where a statute or contract allows an award of attorney fees at trial, an appellate court has authority to award fees on appeal. Standing Rock Homeowners Ass'n v. Misich, 106 Wn. App. 231, 247, 23 P.3d 520 (2001).

The CPA provides adequate grounds for such an award in the present case. However, the attorney fees awarded to the DeCourseys must be limited to those portions of the appeal related to the CPA claim. There is no separate, contractual basis to award attorney fees. See Boguch v. Landover Corp., 153 Wn. App. 595, 615, 224 P.3d 795 (2009).[25] Upon proper application, a

---

[24] The DeCourseys contend that, pursuant to the REPSA, they were entitled to expenses beyond those authorized in RCW 4.84.010. The REPSA states, "If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses." CP at 1438. The plain terms of this provision authorize an award of attorney fees and expenses only when the buyer and seller are engaged in litigation with one another concerning the sale of the house. The DeCourseys have not sued the seller of the house and, contrary to the DeCourseys' contention, this provision does not authorize an award of expenses against Stickney beyond those authorized in RCW 4.84.010.

[25] In our decision in Boguch, we held that attorney fees could not be awarded pursuant to the contract because the plaintiff's claim alleging that his real estate agents had breached their statutory duties under chapter 18.86 RCW was a tort claim, rather than a claim on the contract. 153 Wn. App. at 617. We stated:

> A prevailing party may recover attorney fees under a contractual fee-shifting provision such as the one at issue herein only if a party brings a "claim on the contract," that is, only if a party seeks to recover under a specific contractual provision. If a party alleges breach of a duty imposed by an external source, such as a statute or the common law, the party does not bring an action on the contract, even if the duty would not exist in the absence of a contractual relationship.

Boguch, 153 Wn. App. at 615; see also CHD, Inc. v. Boyles, 138 Wn. App. 131, 140, 157 P.3d 415 (2007) ("The contract containing the attorney fees provision must be central to the

commissioner of this court will enter an appropriate order.

Affirmed in part. Reversed in part and remanded to the trial court for a corrected calculation of the award of costs.

Dwyer, C.J.

We concur:

Schindler, J.

Appelwick, J.

controversy.").

We do not concern ourselves with the basis for the trial court's award of attorney fees, as that issue was not raised on appeal. RAP 2.5.