Windermere, et al.

No.: 35740-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

EDDIE BLOOR and EVA BLOOR, husband and wife,

Plaintiffs/Respondents,

v.

ROBERT A. FRITZ and CHARMAINE A. FRITZ, and the marital community comprised thereof, et al,

Defendants/Appellants.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The analysis in the Respondents' ("Bloors") brief does not overcome the trial court's numerous errors identified in the Windermere Appellants' opening brief. A review of the record shows there is a lack of substantial evidence to support the trial court's findings and conclusions. Since the Windermere Appellants' opening brief fully discusses the assignments of errors they will focus only on select issues raised in the Bloors' brief.

II. DISCUSSION AND ARGUMENT

A. ALL ASSIGNMENTS OF ERROR HAVE BEEN PERSERVED

In order to aid judicial efficiency, the Windermere Appellants join in the argument made by Appellants Fritz in their reply brief regarding the preservation of assignments of errors.

The Bloors allege Windermere has abandoned their Assignments of Error numbered 10, 14 and 15 because they failed to argue these issues in their brief. This allegation is contrary to the briefing submitted to the Court. These issues were fully discussed in Windermere's opening brief. These Assignments of Error are directly related to Findings of Fact 16, 59, 61, and 62 which are comprehensively addressed in the brief. Further, the Assignments of Error numbered 10 and 15 relate to the failure to disclose claim which is discussed on pages 23-40. The Assignments of Error

numbered 15 is directly related to the Consumer Protection Act violation which is addressed in pages 40-44. Therefore, all of the Windermere Appellants' Assignments of Error have been properly preserved and should be considered by the Court.

B. THERE IS A LACK OF SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS OF FACT

The Bloors state the trial Judge may determine the credibility of a witness. This is not disputed. The Windermere Appellants dispute there is substantial evidence to support the trial Judge's findings. "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Ridgeview Properties,* 96 Wn.2d at 719. A trial court's findings not supported by substantial evidence will be stricken on appeal. *Miles v. Miles,* 128 Wn. App. 64, 69-70, 114 P.3d 671 (2005). A review of the record shows the trial court's findings are contradicted by the evidence presented at trial.

The Windermere Appellants identified numerous errors in the trial court's findings and conclusions. For brevity, the appellants will re-address a few of the findings discussed in the Bloors' brief. The other findings have been adequately addressed in the opening brief and do not warrant further discussion.

1. Finding of Fact No. 10

The Bloors continue to allege Jayson Brudvik read the article published in the Longview Daily News on Sunday, February 1, 2004. However, there is no evidence on the record that proves he read this article. The only evidence on the record is he read an article in the Longview Daily News. The only testimony Brudvik provided was during his deposition. (RP 714-722) His testimony did not specify the date of the article or the date he read the article. Brudvik testified he did not know about the illegal drug manufacturing and his knowledge of the drug bust was limited to marijuana. (RP 714) Again, the Bloors presented no evidence that suggests the February 1, 2004 article is the only article written about the drug arrests in the Longview Daily News. The Bloors refer to the Joint Narcotics Task Force press release on January 31, 2004 however; there is no evidence on the record that shows Brudvik read the press release.

2. Finding of Fact 16

The Bloors support Finding of Fact No. 16 by stating the trial Judge found Miller's testimony not credible because law enforcement would be much more impressed with the meth than with the marijuana. This is pure speculation which is not supported by the evidence on the record. If law enforcement was impressed with the meth why did they fail

to report it to the health department? (RP 1540-1541) It is logical and credible that if law enforcement failed to tell the health department about the meth which is required by law they would fail to tell a real estate agent. The record shows the officers involved with the drug arrests were not impressed by the meth. The officers testified there was no indication that a meth lab was operated inside the home. (RP 628) The officers determined the lab was inactive. (RP 658) Due to the type of items discovered at the property the officers felt comfortable not using their full protective gear routinely used when working with meth labs. (RP 663, 664)

The Bloors state the detectives would not have told Miller there was no meth activity on the property. They base this claim on testimony given by detectives Darren Ullman and Kevin Tate. (RP 608, 625, 680) However, this testimony is not related to Miller. The detectives are testifying about their communication with Mrs. Fritz not Miller. Further, there is no evidence on the record that shows Miller ever talked to detective Ullman or detective Tate regarding the property. In fact, the detectives testified they did not inform Brudvik, Miller or Windermere about the presence of the meth lab. (RP 630, 670, 704) The Bloors did not present evidence that shows any law enforcement representative informed Miller illegal drug manufacturing occurred on the property. (RP 900, 489)

3. Finding of Fact 59

The Bloors claim Miller knew about the history of illegal drug manufacturing from one or all three of his contacts with Brudvik from his report of the article in the newspaper, from Charmaine Fritz relative to her contacts with the Task Force and from his personal contact with law enforcement. In support of these claims the Bloors simply repeat the court's Findings of Fact. However, the testimony cited contradicts the claim that Miller had knowledge of the illegal drug manufacturing. As discussed above, there is no evidence on the record to support the finding Brudvik read the newspaper article or that law enforcement informed Miller about the illegal drug manufacturing. Further, Mrs. Fritz testified she did not inform Brudvik or Miller there was meth activity on the property. (RP 591-592)

4. Finding of Fact 61

The Bloors cite Brudvik's testimony in RP 714, 715, and 721 to support the court's finding that Miller knew of the history of illegal drug manufacturing and of the potential contamination. However, not once does Brudvik testify that he knew about or told Miller about the illegal drug manufacturing. To the contrary, Brudvik clearly testifies he had no knowledge of the meth located on the property. (RP 714, 717, 718, 727, 728) Additionally, they cite Miller's testimony in RP 763, 768, 771-73,

785-87, 790-91, 1164-66, and 1208 to support the claim Miller knew about the illegal drug manufacturing. However, the pages cited support the fact Miller had no knowledge of the illegal drug manufacturing. (RP 1165, 1166, 776)

C. IF MILLER HAD NO KNOWLEDGE OF ILLEGAL DRUG MANUFACTURING ALL BLOORS' CLAIMS FAIL.

As discussed in the Windermere Appellants' opening brief in order to prevail on the failure to disclose, negligent misrepresentation and Consumer Protection Act claims the Bloors must show Miller had actual knowledge of the illegal drug manufacturing. Similarly, to make Miller liable for the errors in the Seller Disclosure Statement the Bloors must prove Miller had independent knowledge the information contained in the statement was false. As clearly shown throughout this brief, the record does not support the finding Miller had knowledge of the meth activity on the property.

D. MARIJUANA GROW OPERATION IS NOT A MATERIAL FACT

As stated in the Windermere Appellants' opening brief the trial court's ruling on whether a marijuana grow operation is considered a material fact under RCW 18.86 is unclear. It appears the Bloors are conceding the manufacture of marijuana is not a material fact. If this is the

case, the trial court's conclusions stating the production of marijuana was also illegal drug manufacturing; Miller, Windermere and other members of the real estate industry have historically denied that production of marijuana is illegal drug manufacturing; the denial by Miller and Windermere that production of marijuana is illegal drug manufacturing is indication of their willingness to interpret the law in favor of the seller without regard to the risks to the buyer of property; and such conduct is a threat to the health and safety of the public, unless it is corrected, is likely to result in future losses similar to that suffered by the Bloors (CL 14) should be stricken from the record.

E. BLOORS FAILED TO ESTABLISH ELEMENTS OF CPA CLAIM

The court in *Hangman Ridge* clarified the law regarding a private right of action under the CPA. *Hangman Ridge*, 105 Wn.2d at 783. *Hangman Ridge* established five essential elements of a CPA claim, and particularly an impact on the public interest, because the legislature imposed that proof requirement, and the legislature chose to retain the public-interest language in the statute after several courts had interpreted the CPA to contain a public-interest requirement. *Id.* at 783-84, 788-89 (citing RCW 19.86.920; *Lightfoot v. MacDonald*, 86 Wn.2d 331, 544 P.2d 88 (1976)).

The *Lightfoot* Court recognized the public-interest-impact element of a CPA claim. *Lightfoot*, 86 Wn.2d at 333. Washington courts at that time followed a looser public-interest-impact test, requiring only "potential for repetition" of the wrong. *Anhold v. Daniels*, 94 Wn.2d 40, 46, 614 P.2d 184 (1980). The Court in *McRae v. Bolstad*, 101 Wn.2d 161, 166, 676 P.2d 496 (1984) distinguished consumer and private transactions ("[i]t is the likelihood that additional buyers will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest"; real estate agent's knowing failure to disclose property defect in advertisement made repetition of the wrong likely). But the *Hangman Ridge* Court, 105 Wn.2d at 784, noted "confusion surrounding private rights of action has steadily increased," and therefore established different standards for CPA claims in "consumer" versus "private" transactions.

> Where the transaction was essentially a private dispute, it may be more difficult to show that the public has an interest in the subject matter. Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest. However, **it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion** that changes a factual pattern from a private dispute to one that affects the public interest.

Id. at 789-91 (citations omitted; emphasis added).

Though the *Hangman Ridge* Court clearly meant for public-interest impact to be harder to prove in private transactions than in consumer transactions, the factors the Court established wrongly imply otherwise:

Consumer Transaction	**Private Transaction**
(1) Were the alleged acts committed in the course of defendant's business?	(1) Were the alleged acts committed in the course of defendant's business?
(2) Are the acts part of a pattern or generalized course of conduct?	(2) Did defendant advertise to the public in general?
(3) Were repeated acts committed prior to the act involving plaintiff?	(3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others?
(4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff?	(4) Did plaintiff and defendant occupy unequal bargaining positions
(5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?	

Id. On their face, the *Hangman Ridge* "consumer transaction" factors appear easier to meet than the "private transaction" factors, even though the Court clearly meant the latter to be more stringent. But blind application of the "private transaction" factors without relating them to misconduct in question would transform virtually every private commercial wrong into a CPA violation. The wrong always would be committed in the course of the defendant's business; most businesses

advertise publicly, solicit customers, and have unequal bargaining position with clients and customers. It is harder to prove that acts in a "consumer transaction" were part of a generalized course of business, that defendants performed repeated similar acts, that a real potential exists for repetition, or that many consumers were affected.

Since the *Hangman Ridge* Court never meant to make public-interest impact easier to prove in private disputes than in consumer transactions, the Court clearly wanted trial courts to consider the factors in factual context. The Court did not hold that the public-interest element was met when some or even all of the factors existed. Instead, it set out the legal standard for public-interest impact in private transactions — "the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion" — and factors that courts may consider in answering that question. Otherwise, the factors have no context and no meaning.

The Post-*Hangman Ridge* reported decisions have correctly applied the factors in answering the central question whether additional plaintiffs would be injured in exactly the same fashion. *Sloan v. Thompson*, 128 Wn. App. 776, 792, 115 P.3d 1009 (Div. I 2005) ("ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest"); *Cashmere Valley Bank v. Brender*, 128 Wn. App. 497, 510, 116 P.3d 421

(2005) (applying "private transaction" factors, court held there was "no evidence suggesting that these allegations are likely to occur with other members of the public"); *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 847, 942 P.2d 1072 (1997) (public-interest impact turned on proof of "dozens, if not hundreds" of other, identical wrongs); *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 744-45, 935 P.2d 628 (1997); *Sing*, 83 Wn. App. at 66 (defendant's procedures expressly permitted misconduct to recur; public-interest impact factors showed other consumers would suffer identical harm); *Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 702-03, 754 P.2d 1262 (1988); *Broten v. May*, 49 Wn. App. 564, 570-71, 744 P.2d 1085 (1987) (competing real estate brokerages filed CPA claims against each other, but neither proved that "additional plaintiffs have been or will be injured in *exactly* the same fashion" (emphasis in original)).

The very purpose of the court's consideration of the factors is to decide whether additional plaintiffs have been or will be injured in exactly the same fashion. Failure to focus on that ultimate question defeats the purpose of the factors. Here, the Bloors never proved Miller did or will commit any similar act.

Consideration of the *Hangman Ridge* factors for public-interest impact in a private transaction under the facts of this case shows the

Bloors had no proof of a public-interest impact. First, while the alleged conduct occurred in Miller's business, that fact alone does not suggest repetition. There was no proof that his conduct was a recurring business practice. This factor weighs against a public-interest impact.

Second, while Miller advertises to the public, his advertising was not related in any way to the conduct at issue. There was no false or misleading information in the advertisement of the property. The Seller Disclosure Statement is not part of the listing or marketing of the property. Advertising a property does not include making representations regarding the condition of the property. A public-interest impact may arise when defendant publicly advertises that he will accomplish certain things that in fact he does not. *Jackson v. Harkey*, 41 Wn. App. 472, 479, 704 P.2d 687 (Div. I 1985) (citation omitted); *Fisher v. World-Wide Trophy Outfitters*, 15 Wn. App. 742, 551 P.2d 1398 (1976)). In this case the Bloors did not show Miller advertised any false promises. This factor weighs against a public-interest impact.

Fourth, there was no proof that the Bloors and Miller had unequal bargaining positions any more than in any relationship between a buyer and a real estate agent. The Bloors had bought and sold another home before the subject property. (RP 283, 284, 285) The purchase and sale agreement contained an inspection contingency addendum. However, the

Bloors did not hire a professional inspector to inspect the property. Mr. Bloor was a contractor and felt confident with his ability to inspect the property. (RP 276, 277,491) There was no unequal bargaining relationship that created a likelihood of repetition. *See also Hangman Ridge*, 105 Wn.2d at 794 (no public-interest impact where plaintiffs had extensive business experience). Therefore, the Bloors fail to establish the public interest impact element of a Consumer Protection Act claim.

III. CONCLUSION

The Bloors fail to provide any testimony that supports the findings and conclusions identified in Windermere's opening brief. All of the testimony cited by the Bloors does nothing to support the court's ruling. The Windermere Appellants use the same testimony to show there is a lack of substantial evidence to support the court's findings and conclusions. The Bloors admitted at trial they have no evidence to support the claim that the Windermere Appellants had knowledge of the illegal drug manufacturing. (RP 899, 900, 488, 489) Nothing has changed.

DATED this 15th day of October, 2007.

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COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

EDDIE BLOOR AND EVA BLOOR, husband and wife, Plaintiffs/Respondents, v. ROBERT A. FRITZ and CHARMAINE A. FRITZ, and the marital community comprised thereof; et al., Defendants/Appellants.	NO. 35740-2-II DECLARATION OF MAILING

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I am an employee of the Demco Law Firm and on this date, actual notice was made by me to all known parties of the above-entitled action by mailing a copy of the Appellants' Reply Brief and Declaration of Mailing addressed to each parties' last known address, postage prepaid, as follows:

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