No. 44209-4 -II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

FA ALA A SAILI and LISA A. SAILI
Respondents

vs.

PARKLAND AUTO CENTER, INC.
Appellant

APPELLANT'S REPLY BRIEF (Amended)

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C. ARBITRATION

Initially in its responding brief, Saili argues that Parkland's brief failed to address the contractual basis for the arbitration procedure and was primarily relying on public policy. Saili Brief, at p. 2. This argument is perplexing as the Parkland's initial brief directed the court to the parties' agreement and the contracts that contain the arbitration clauses. Parkland Brief, at p. 9. Furthermore, Parkland gave the reason for the six month delay being the need to take Mrs. Saili's deposition (which was delayed over a period of time to accommodate schedules) so as to avoid spurious denials of the agreement. Parkland Brief, at pp. 16-17.

Although Saili attempts to distinguish Parkland's cited caselaw on the grounds that they do not address Retail Installment Sales Contracts, it is undisputed that Saili read and executed the arbitration clauses in the Vehicle Buyer's Order and also in the Supplemental Disclosure and Agreement despite initially testifying that it looked like her signature but that she wasn't sure, then that it was potentially "forged", then that she did sign it but not in front of the particular person noted on the form. CP127-128, 178. Notwithstanding, Mrs. Saili did acknowledge that she signed the Vehicle Buyer's Order which also contained an arbitration clause. CP 124, 165. As such, the contractual agreements that contained arbitration clauses were part of the transaction.

1. Saili cites no caselaw to support argument that the arbitration clause must be contained in the Retail Installment Sales Contract

Saili argues that because RCW 63.14.020 requires that the Retail Installment Sales Contract be a single document that contains the entire agreement of the parties, the arbitration clauses are not enforceable. Saili cites the court to no caselaw in support of

that proposition.

RCW 63.14.180 sets forth the penalties for failure to comply with the act; such being solely that the seller cannot enforce collection costs such as "service charges, official fees, or any delinquency or collection charge under or in connection with the related retail installment contract". It does not provide as a remedy that the buyer can then escape a security interest or other contractual obligations such as an arbitration clause. Saili's argument seeks to expand the clear language of the statute to eliminate anything not contained within the RISC. However, such is simply not provided for within the statute itself. The remedies for the buyer are expressly limited, and any attempt to expand the Act to provide for additional remedies not expressed by the legislature has been rejected by our Supreme Court. *See Cazzanigi v. General Electric Credit Corp., 132 Wn 2d 433, 446-448 (1997 – rejection of an implied cause of action exceeding the statutory language).*

2. The arbitration agreement is not "substantively unconscionable"

Saili argues that because the Vehicle Buyer's Order allows for self help remedies such as repossession, it constitutes a "eat your cake and have it too" agreement. Saili provides no caselaw in support of this contention other than the general language of *Alder v. Fred Lind Manor, 153 Wn 2d 331, 334 (2004)* where the court states that substantive unconscionability is where a clause or term is one-sided or overly harsh; but Saili then fails to mention the court's additional language of "shocking to the conscience", "monstrously harsh" and "exceedingly calloused" which the court also uses to describe substantive unconscionability. *Alder, supra, at p. 344-345 citing Nelson v McGoldrick,*

127 Wn 2d 124, 131 (1995). However, the fact pattern in *Alder* and the court's decision is distinguishable from the present case. In *Alder*, the court held that a 180 day statute of limitation and requirement that both sides bear the costs of their own attorney's fees to be substantively unconsionable. However, a similar argument of eat your cake and have it too was rejected by the court. *Alder, supra, at p. 352 (claim that employer didn't have to use arbitration for its claims against an employee).* Instead, the court focused on the issue of attorney's fees (agreement required both to bear their own attorney's fees while Alder would have been entitled to seek his fees if the action was brought in court). *Alder, supra, at pp. 354-355.* As well as the issue of the statute of limitations (unconsionable to impose a statute of limitations on an action substantially less than provided for by statute). *Alder, supra, at p. 355.*

It should also be noted that Saili's argument that Parkland's right to repossession while Saili was required to go to arbitration ignores the fact that even in arbitration Saili would still have the same rights as if in a court of law. Specifically, Saili would still have the right to argue RCW 63.14, subject to its limitations, and the Consumer Protection Act, with the right to damages, etc. As such, the arbitration clauses did not deny Saili any legal right she would have otherwise had. It is undisputed that Parkland retained the Suburban and did not dispose of it such that an arbitration order to return the vehicle would have been just as effective as a court's order. Furthermore, even if the Suburban had been disposed of, Saili would still have all her rights in seeking damages for that disposal. Therefore, Saili would not have lost any rights by arbitrating the matter as opposed to having the matter tried by a court.

3. Parkland did not "waive" its right to arbitration

Saili argues that because extensive discovery was conducted and six months elapsed before the demand for arbitration, Parkland waived its right to arbitration. And further that Saili would have been "unduly prejudiced" if arbitration had been compelled. Saili brief, 9-11.

Regarding the issue of "unduly prejudiced", Saili does not reference any clerk's papers in support of this argument. Saili never argued "undue prejudice" before the Trial Court, and its reference to CP 68-82, which is in its brief opposing arbitration, and CP 85-88 her unsigned Response, demonstrates the Saili never raised this issue at the Trial Court level, and that there is no evidence to support this allegation. Furthermore, as pointed out in section 2 above, Saili would have had the same rights in arbitration as before the court such that no substantive prejudice would have existed.

Regarding "waiver", as stated in Parkland's opening brief, the Court in *LWSD v. Mobile Modules, 28 Wn App 59 (1980)* addressed specifically the issue of waiver and held that (1) waiver requires a showing of a voluntary and intentional relinquishment of a known right, (2) that such a waiver is a power exclusive to the party relinquishing that right, (3) that a delay in seeking arbitration, without more, is insufficient to establish a waiver, and (4) that time elapse due to the conduct of one party was not evidence of waiver. *LWSD, supra, at pp. 61, 63-64.*

Saili cites *Ives v. Ramsden, 142 Wn App 369 (2008)* in support of its proposition that Parkland waived its right to arbitration by engaging in discovery for six months prior to filing a motion to compel arbitration. However, the reason the trial court found waiver

in *Ramsden*, and it was upheld on appeal, is because Ramsden sought arbitration after 3 years and 4 months and only sought arbitration on the eve of trial. *Ives, supra, at p. 384.*

In the present case, Parkland explained why it delayed seeking arbitration: that Mrs. Saili spuriously denied signing the arbitration agreement intimating that her signature had been forged. Parkland needed to depose Mrs. Saili to establish that in fact she had signed the arbitration agreement, not only in the Supplemental Disclosure and Agreement, but also on the Vehicle Buyer's Order. See Parkland's Appellate Brief, at pp. 16-17. Furthermore, the deposition of Mrs. Saili was delayed over time to accommodate her and counsel's schedules. See CP 46 (Declaration of Ockerman).

D. MATERIAL ISSUES OF FACT

Saili argues that Lonn Ostrem's declaration regarding the acceptance of the RISC by Reliable Credit was hearsay, that the contract was "rejected" and therefore the contract was void, and that the failure of Mrs. Saili to pay the full down payment violated the contract making it a nullity.

Initially, Parkland would note that Saili raises the issue of hearsay for the first time on appeal, and that it was never addressed by the Trial Court. Appellate Courts do not consider evidentiary issues for the first time on appeal. *State v. Curtiss, 161 Wn App 673, 696 (2011).* The failure to raise an issue before the trial court precludes the raising of that issue on appeal. *Grant v. First Horizon, 168 Wn App 1021 (2012).*

1. Ostrem's testimony was not hearsay

The testimony at issue is Mr. Ostrem's declaration relating why the Reliable Credit declination letter was sent in err. The testimony for the purposes of the hearsay

issue is "When Ms. Saili's retail installment contract was sent to Reliable Credit, the manager there called me on May 11, 2011 and told me that her credit history was insufficient unless I wanted to give an unconditional guaranty. I maintain a 'book of business' with Reliable Credit where Reliable Credit agrees to purchase any loan that I send to them if I unconditionally guaranty the performance of that loan. I agreed to transfer the loan to my book of business and unconditionally guaranty the loan. It is my understanding that Reliable Credit sent a declination letter to Ms. Saili by mistake on May 17, 2011 as I had already agreed to place the loan in my 'book of business' with Reliable Credit. There was no decline of the terms and conditions of Ms. Saili's loan by Reliable Credit, only the requirement that I unconditionally guaranty the loan, which I did." CP 109.

The material issue of fact relating to Saili's argument is whether or not the loan was actually accepted by Reliable Credit. If it was accepted by Reliable Credit, then the contract would not have been "void" under any of the circumstances argued by Saili.

Mr. Ostrem's testimony was that he placed the Saili loan in his "book of business" which was an unconditional guaranty of the loan. That testimony was of an action he took personally and, therefore, is not hearsay. The fact that Reliable Credit always accepted loans in Mr. Ostrem's "book of business" (which were thereby unconditionally guaranteed) is a factual statement of a business procedure, and therefore not hearsay. A routine business practice is not hearsay, and it is at the discretion of the trial court to determine the admissibility of such a statement. *Torgeson v. State Farm, 91 Wn App 952, 962 (1998).* Because the record is silent on the issue of an evidentiary

ruling on "hearsay", it must be presumed that the trial court considered and rejected the issue. As such, where the record is silent as to the trial court's reasoning for a discretionary evidentiary ruling, the matter will not be reviewed on appeal. *State v. Ramirez, 62 Wn App 301, 305 (1991).*

2. Even if Reliable Credit declined the contract, such did not negate or void the contract.

The material issue of fact before the trial court was whether or not the contract was voided because of a declination of credit. If Mrs. Saili received a loan on the RISC, regardless of whether or not Reliable Credit declined the loan, then the contract would not be void. The distinction is that Reliable Credit would not have been the lender; not that the contract would not be funded from a financial sense. The dispute, therefore, is whether or not a loan existed based on the terms and conditions of the RISC.

Saili argues that the Vehicle Buyer's Order states that if a third party doesn't buy the RISC, the Vehicle Buyer's Order will not remain binding. However, Saili refers the court to CP 446. Unfortunately, CP 446 is virtually illegible and does not contain the full Vehicle Buyer's Order agreement. CP 225-227 contains the full Vehicle Buyer's Order. As such, the court should note that the statement referenced by Saili doesn't contain the additional language "See paragraph 12 on the other side of this agreement." Paragraph 12 states in pertinent part "If for any reason you and we do not complete the Vehicle sale and purchase, financing is not obtained, or this Agreement is declared void, this section 12 applies". CP 226.

This additional language uses the disjunctive tense identifying three issues: first, if the parties don't complete the sale, second if financing is not obtained, or third the

agreement is declared void. As such, impliedly, that where any one such action did not occur the contract would continue in force.

In the present case, regardless of Reliable Credit's decision, Parkland had the option to complete the contract itself or through another lender.

The other documents signed by Mrs. Saili support this conclusion. The Retail Sales Installment Addendum specifies that "in the event Seller is denied assignment of this agreement by a financial institution, this agreement between Buyer and Seller becomes null and void." Such language contemplates that the Seller may seek assignment to any number of different financial institutions, with the operative factor being the inability to assign it to anyone. The language does not specify Reliable Credit as the sole or only financial institution.

Saili also references the document "Conditions of Financing". CP 446. However, this document expressly states in bold letters "If this condition is not met, the contract is void, *except as provided for in any attached sales contract documents.*" Those attached sales contract documents would have included the Vehicle Buyer's Order.

Because Reliable Credit did accept the Saili RISC based on the "book of business" unconditional guaranty pursuant to its business practices, there exists a material issue of fact whether or not the contract was void or enforceable, and the matter should not have been decided on summary judgment. Furthermore, the real issue isn't whether or not Reliable Credit accepted the assignment of the RISC, but whether anyone accepted the assignment of that contract. Parkland argued that the RISC was in force (as Parkland, via its unconditional guaranty, was required to repurchase the contract from Reliable

Credit), and that Mrs. Saili was both the beneficiary of and responsible for the terms and conditions to which she had agreed. And it is most interesting to note that Mrs. Saili admitted that she agreed to and wanted the terms and conditions of the RISC as well as the collateralization of the Suburban as additional collateral to that loan; that those terms were satisfactory to her. CP 130. Accordingly, Mrs. Saili received the benefit of her bargain regardless of whether Reliable Credit ultimately accepted the contract.

3. Failure to pay the full down payment did not obviate the contract

In this appeal Saili appears to argue for the first time that her failure to make the full down payment by issuing an NSF check constituted a negation of the contract because of Saili's failure to pay the full down payment. Saili brief, pp. 18-19.

Saili offers no caselaw or other authority for this argument. But this argument makes no logical sense since the failure to pay the full down payment was a default triggering event pursuant to the contract. CP 176 (section 3 of the RISC)

4. The terms of the agreement did not change

Saili also appears to argue that the terms of the parties' agreement did change in that "it was conditioned upon the approval of plaintiff's credit application and payment of $1,000 down." of which Saili argues neither happened.

Again, Saili offers no caselaw or other authority for this argument. And again, this argument makes no logical sense in that there exists no changes from the terms and conditions of the transaction that Mrs. Saili agreed to and to which she found acceptable. CP 130.

5. The Certificate of Fact and circumstances demonstrate a security interest in the Suburban.

Saili argues that the trial court's rationale that the RISC allowed for the repossession of the Sonoma but not the Suburban because the Suburban was not mentioned or listed on the RISC should be sustained because its based on RCW 63.14.020, and as such the repossession was "wrongful". Saili offers no caselaw or authority for this argument.

As set out in its initial brief, Parkland argues that the trial court erred in its application of RCW 63.14.020 by expanding it beyond the legislative intent as identified in RCW 63.14.180, and relies on that argument in this reply.

Also set out in its initial brief, Parkland argues that one does not need a RISC to create a security interest in a chattel. Instead, a security interest is an expression of intent of the parties, regardless of its form, to create a security interest in personal property, and relies on that argument in this reply.

E. CONSUMER PROTECTION ACT

Saili essentially relies on the oral rationale of the trial court, but also now argues that WAC 308-66-152 requires additional collateral to be listed on the security agreement, and RCW 46.12.530(1)(b) that the vehicle subject to security interest have the name and address of the secured party on the title. These arguments were not raised before the trial court. Saili brief at pp. 26-28. Saili also briefly reiterates its argument from its motion for reconsideration, that *Sherwood v. Bellevue Dodge* and RCW 46.70.005 and RCW 46.70.310 allow the court to find that a wrongful repossession is a per se violation of the Consumer Protection Act without any further citation to authority

or argument.

Initially, Parkland would note that WAC 308-66-152 is the administrative code relating to false, deceptive or misleading advertisements under RCW 46.70.180(1). Saili does not specify which section applies in the present matter. Notwithstanding, Parkland would note that this argument was not argued before the trial court in the motions for summary judgment or reconsideration and is being raised now for the first time on appeal. Where the issue was not raised before the trial court, it should not be considered on appeal. *Grant v. First Horizon, ibid.*

Parkland would also note that RCW 46.12.530(1)(b) was not raised before the trial court in the motions for summary judgment or reconsideration and is now being raised for the first time. Again, since this issue was not raised before the trial court, it should not be considered on appeal. *Grant v. First Horizon, ibid.* However, the language cited by Saili in her brief at p. 28 with the citation reference of RCW 46.12.530(1)(b) deals with the "secured party", not the registered owner. Parkland was the "secured party" for the purposes of the language cited by Saili in her brief and, therefore, complied with this language. Parkland is unable to decipher what Saili's argument is based on its claim set forth in her brief: "... in spite of this requirement, defendant elected to use the power of attorney signed by plaintiff to transfer title without showing plaintiff as registered owner." *Saili Response Brief, at p. 28.*

1. If there is no wrongful repossession, then the Consumer Protection Act is not applicable under Saili's theory

Saili's theory of a violation of the Consumer Protection Act is based on a

wrongful repossession of the Suburban. Parkland would simply note that if the repossession was not wrongful, then Saili's legal theory fails, and the court need not reach the other issues before it.

Essentially, Saili's legal theory of wrongful repossession is based on the trial court's findings that Parkland's failure to note the Suburban on the RISC was a violation of RCW 63.14 and therefore implied that Parkland had no security interest in that vehicle. See Saili brief at p. 21 (citing the trial court's oral decision).

Parkland would initially note that RCW 63.14 does not allow a court to negate a security interest because of a violation of that Act as RCW 63.14.180 contains the specific legislative pronouncements as to what remedies are available. Effectively, those remedies are a "shield" to protect the consumer from collection costs, attorney's fees, service charges, etc., not a sword to a private right of action beyond those limited defensive remedies. *Cazzanigi v. General Electric Credit Corp., 132 Wn 2d 433, 446-447 (1997).*

Parkland would also argue, as it did in its initial brief, that a security interest reflects the intent of the parties regardless of its form, and that the Certificate of Fact together with the Power of Attorney and Mrs. Saili's stated intent to create a security interest in the Suburban is sufficient to establish a lawful security interest. See Parkland's Appellate Brief, pp. 9-12.

Finally, Parkland would reiterate its argument from its opening brief that you cannot convert that to which you have lawful title. And a determination of whether that title is lawful is a question of fact and not subject to a motion for summary judgment.

See Parkland's Appellate Brief, pp. 12-13.

2. RCW 62A.9A.609 is not a basis for a "per se" finding of a violation of the Consumer Protection Act

It should be initially noted that Saili admits that there was no violation of RCW 46.70.180(1), and that such is not a basis for a "per se" finding relating to the Consumer Protection Act. Saili brief, at p. 24

Effectively, Saili's argument rests on the idea that a wrongful repossession constitutes a "per se" violation of the Consumer Protection Act. This stems from the pre-*Hangman Ridge* case of *Sherwood v. Bellevue Dodge, 35 Wn App 741 (1983)* where the court held that RCW 46.70.101 allowed for a finding of a per se violation based on a wrongful repossession. The critical analysis is whether or not a statutory scheme designed solely for enforcement by the Department of Licensing can transport the repossession statute of RCW 62A.9A.609 into RCW 46.70 and thereby become the basis for a per se finding either judicially or under RCW 46.70.310. Parkland sets forth its argument on this matter in its opening brief and relies on same. Parkland Appellant's Brief, at pp. 13-15.

F. ATTORNEY'S FEES

Saili argues now for fees not only under the Consumer Protection Act (RCW 19.86.090), but for fees under RCW 4.84.330 and RCW 46.70.190. The argument for fees under RCW 4.84.330 and RCW 46.70.190 are being raised for the first time on appeal and were not argued or considered by the trial court.

1. The court requires an affidavit or sworn declaration upon which to base its award; and the failure to provide that basis does not allow the court to make an attorney fee award

Saili in her brief argues that *Collins v. Clark Co. Fire District No. 5, 155 Wn App 48 (2010)* does not require a trial court to base its attorney's fee award on a sworn statement or affidavit as to those fees. Saili brief, at pp. 30-31. However, *Collins* simply addresses the issue of quality of evidence the trial court should consider.. Saili's argument based on *Collins* is misplaced because it ignores that the party seeking fees in that case provided affidavits setting out the basis for the fees being requested. Furthermore, Saili ignores the court's ruling in *Animal Welfare Society v. U.W., 54 Wn App 180, 186 (1989)* where the court explicitly stated that the failure to submit an affidavit that contains sufficient explanation for a basis on the reasonableness of fees requires reversal of the fee award. It is undisputed that Saili did not submit any affidavit or sworn statement as to her fees or the basis for the reasonableness of those fees. Without such an affidavit or sworn statement, the trial court erred in entering a fee award.

2. Authorities for fees raised for the first time on appeal should not be considered

Saili raised the issue of attorney's fees before the trial court, but solely on the basis of the Consumer Protection Act (RCW 19.86.090). Saili now raises for the first time on appeal, RCW 4.84.330 and RCW 46.70.190 as additional basis for fees. Our courts have ruled that questions regarding authority for fees should not be considered for the first time on appeal. *In Re Marriage of Freeman, 146 Wn App 250, 259 (2008 – affirmed In Re Freeman, 169 Wn 2d 664 – 2010).*

3. RCW 46.70.190 can only be awarded where a violation of RCW 46.70 where the person is injured in his "business or property".

RCW 46.70.190 is limited to a person who is "injured in his business or property." The statute then goes on to discuss dealership franchises. The apparent intent of this statute relates, therefore, to businesses and not individuals. In the present case, Mrs. Saili acknowledged in her deposition that she does not operate any business and had no intention then or now to use the Suburban for any business purpose. CP 138.

Even if the court was to consider RCW 46.70.190 as a basis for attorney's fees, the court would also need to find that a violation of RCW 46.70 had occurred that injured Mrs. Saili in her business or property. There was no such finding made by the trial court under this statute.

4. RCW 4.84.330 relates to the enforcement of a contract, not to a situation where a contract does not exist.

In the present action, Saili's argument is all based on the contract being void or not existent. If Saili prevails in that argument, then the contract doesn't exist such that no fees would be awarded as the basis for fees in the contract is based on the contract's enforcement, not its negation. RCW 4.84.330 specifically allows an award of attorney's fees "which are incurred to enforce the provisions of such contract of lease." Parkland is not suing Saili to enforce any provision of the contract. Instead, Saili sued Parkland on the basis that the contract did not exist. As such, the Saili's attorney's fees were sought under the Consumer Protection Act for wrongful repossession based on the absence of any contract (same being void). Where no valid contract exists, there is no legal basis to award attorney's fees. *Bartlett v Betlach, 136 Wn App 8, 17 (2006).*

G. CONCLUSION

Issues that were not raised before the trial court should not be considered on appeal. Saili's raising the issue of "hearsay" regarding Mr. Ostrem's declaration, "undue prejudice" relating to the arbitration clause, that the contract was not enforceable because of the lack of down payment, and RCW 46.70.190 and RCW 4.84.330 are all issues that were not raised before the trial court. However, even if the "hearsay" is considered for the first time on appeal, the critical material fact at issue is whether or not the RISC was placed with Reliable Credit or with anyone, and Mr. Ostrem's testimony goes to his personal actions of placing the Saili RISC on his "book of business" which operated as a business practice to cause that RISC to be accepted by Reliable Credit. Whether or not this constituted compliance with the contractual documents is a question of fact, and should not have been resolved on summary judgment. Furthermore, whether or not the Suburban as additional collateral, or the arbitration clause existed in the RISC, the sole remedy of Saili was the avoidance of collection costs pursuant to statute, not the negation of the contract or other contractual agreements. The trial court erred in applying RCW 63.14 beyond the remedies outlined by the legislature in RCW 63.14.180 including finding that no collateralization of the Suburban could exist. And as Saili admitted that she intended to give Parkland a security interest in the Suburban as evidenced by the Certificate of Fact and Power of Attorney, Parkland did not "wrongfully" repossess the Suburban; particularly as Parkland was the titled owner of the Suburban at the time. And if there was no wrongful repossession, then the Consumer Protection Act theory advanced by Saili cannot stand. But even if there was a wrongful repossession, RCW

62A.9A.609 does not provide a basis for a "per se" finding of a violation of the Consumer Protection Act. And finally, the fact that Saili did not submit an affidavit or sworn statement relating to attorney's fees is reversible error as it is contrary to the requirements of proof of attorney's fees reasonableness and necessity, but the court only need reach that decision if the court upholds the trial court's decision of a violation of the Consumer Protection Act.

Respectfully submitted this 15th day of May, 2013.

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CERTIFICATE OF SERVICE

Frederick H. Ockerman certifies that on May 15, 2013, he caused the foregoing Appellant's Brief (Amended) to be filed with the Court of Appeals Division II by faxing same to said Court, and served Plaintiff/Respondent's counsel, Alan Rasmussen, electronically via email as well as mailing a copy of same to him at P.O. Box 118, Spanaway, WA 98387.

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