Supreme Court No. 94521-7

Court of Appeals, Division II, No. 47905-2-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LARRY D. RILEY,

Petitioner,

v.

IRON GATE SELF STORAGE; ESMS PARTNERS LP; GLEN L. ARONSON EVE ARONSON TRUST; PRIME COMMERCIAL PROPERTY, INC.; ALL DBA IRON GATE SELF STORAGE; DBA IRON GATE STORAGE - CASCADE PARK

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

Paul R. Xóchihua, WSBA #18729
Christopher M. Parker, WSBA #48561
DAVIS ROTHWELL EARLE &
XÓCHIHUA, P.C.
Attorneys for Respondents
200 SW Market Street, Suite 1800
Portland, Oregon 97201
(503) 222-4422

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I. INTRODUCTION

This case arises from the sale of items stored by plaintiff Larry Riley in a storage unit leased from one of the defendants, which are referred to collectively as "Iron Gate." Iron Gate sold the items at auction after plaintiff defaulted on his rent. Plaintiff now seeks to avoid contractual value and damage limitation provisions in his rental agreement. Iron Gate asks this Court to deny plaintiff's petition for review because the Court of Appeals correctly applied Washington law in holding that such provisions are enforceable.[1]

II. RESPONSE TO ISSUES FOR REVIEW

Plaintiff identifies seven issues for review, but some of them appear to be related. As best as Iron Gate can discern, plaintiff's petition for review discusses three primary issues:

1. Whether the record proffered by plaintiff is sufficient to support a finding that Iron Gate committed the tort of conversion (an issue not decided by either the trial Court or the Court of Appeals);

2. Whether the record is sufficient to support a finding that

[1] The Court of Appeals affirmed the trial court in part, but reversed in part as to plaintiff's claim under the Consumer Protection Act ("CPA"). *Riley v. Iron Gate Self Storage*, 198 Wash. App. 692, 709, 395 P.3d 1059, 1069 (2017). Iron Gate requests that review be denied, but if it is accepted, Iron Gate requests the Court to also review the Court of Appeals' decision on the CPA claim.

Iron Gate committed intentional or willful misconduct so as to preclude the applicability or enforcement of the contractual value/damage limitation provisions; and

3. Whether the Self-Storage Facility Act, RCW 19.150 *et seq* ("Self-Storage Act"), precludes enforcement of the contract provisions at issue.

III. COUNTERSTATEMENT OF THE CASE

A. Rental Agreement

Plaintiff began renting the storage unit at issue in 2003 pursuant to a written rental agreement. CP 18 (pages 49-50). Plaintiff signed and initialed the agreement many times, including eight times on the first two pages where the value/damage limitations provisions are located. CP 21-26. The contract is fully integrated. CP 23 (section 11). Plaintiff agrees that he read and understood the agreement before entering into the lease. CP 19 (page 56:7-13 of plaintiff's deposition).

Plaintiff expressly agreed in the Rental Agreement that Iron Gate's liability would in no event exceed $5,000:

> Notwithstanding anything contained in this Rental Agreement, In no event shall Operator or Operator's Agents be liable to Occupant In an amount In excess of $5,000 for any damage or lose [sic] to any person, Occupant or any property stored in, on or about the Premises or the Project arising from any cause whatsoever, Including, but not limited to, Operators Agents' active of [sic] passive acts,

omissions or negligence.

CP 22. Plaintiff initialed right below these provisions, indicating he "read, understands and agrees to the provisions of this paragraph 7." *Id.*

The $5,000 limitation on damages was based on plaintiff's acknowledgement that the kind, quality or value of the property would not be a concern and that the value of the property in the unit was not anticipated to be at or near $5,000:

> * * * It is understood and agreed that Occupant [plaintiff] may store personal property with substantially less or no aggregate value and nothing herein contained shall constitute or evidence, any agreement or administration by Operator [Iron Gate] that the aggregate value of all such personal property is, will be, or is expected to be, at or near $5,000. It Is specifically understood and agreed that Operator need not be concerned with the kind, quality, or value of personal property or other goods stored by Occupant in or about the Premises pursuant to this Rental Agreement.

CP 21.

Plaintiff represented that he would insure the subject property for 100 percent of its actual cash value:

> INSURANCE. **OCCUPANT, AT OCCUPANT'S SOLE EXPENSE, SHALL MAINTAIN ON ALL PERSONAL PROPERTY, IN, ON OR ABOUT THE PREMISES, TO THE EXTENT OF AT LEAST 100% OF THE ACTUAL CASH VALUE OF SUCH PERSONAL PROPERTY, A POLICY OR POLICIES OF INSURANCE COVERING DAMAGE BY FIRE, EXTENDED COVERAGE PERILS, VANDALISM**

> **AND BURGLARY. Occupant may satisfy the Insurance requirement for personal property stored in the enclosed Space by electing coverage under the Insurance plan**. . . .

CP 22 (capitalization and bold in original). Directly below this provision, plaintiff initialed the box titled "self-insure," thereby agreeing to "personally assume all risk of loss or damage[.]" *Id.*

At the time plaintiff entered into the Rental Agreement, Iron Gate used a third-party broker/insurer offering various levels of coverage to renters. CP 46 (paragraph 4 of Glen Aronson's Declaration). By initialing the "self-insure" box, plaintiff confirmed his decision to self-insure the property, without providing any indication to Iron Gate that he intended to store items with an anticipated value in excess of $5,000. CP 22.

B. <u>The Auction</u>

It was not an unusual circumstance for plaintiff to fall behind in his rent payments to Iron Gate. CP 46 (paragraph 5 of Aronson Declaration). Iron Gate sent plaintiff a number of past due notices, Notices of Lien, a Notice of Cutting Lock, and a Notice of Auction in the months leading up to the auction. *Id.* At the time these notices related to the auction were sent, Iron Gate believed they complied with Washington law. *Id.* However, it appears a mistake was inadvertently made in that one of the notices contained an auction date less than 14 days from the date of the

notice. CP 10 (paragraph 7) and 151.

Iron Gate auctioned the contents of plaintiff's unit, excluding personal papers and personal photographs, on July 15, 2010. CP 46 (paragraph 6 of Aronson Declaration). Iron Gate successfully recovered many or most of the auctioned items by repurchasing them from the winning bidder and storing them at no cost to plaintiff until he was able to retrieve them several months later. *Id.*

C. Trial Court Upholds Value/Damage Limit

The trial Court held the $5,000 value/damage limitation provisions in the Rental Agreement were enforceable and that plaintiff's damages on all claims were limited to a maximum of $5,000. CP 305-306. Iron Gate thereafter tendered to plaintiff a check in the amount of $23,000, representing three times the $5,000 value/damage limit set forth in the contract, plus interest. RP 91-92 (July 7, 2015 hearing). Based on this tender (which plaintiff agreed represented his maximum potential recovery), the trial Court entered a Final Judgment. CP 307-308. Plaintiff did not object to the form or entry of the Final Judgment. RP 92 (lines 12-14).

D. Court of Appeals Affirms, in Part

Plaintiff appealed to the Court of Appeals, Division II, which affirmed in part, and reversed in part. *Riley*, 198 Wash. App. at 713. The

Court of Appeals rejected plaintiff's arguments that the value/damage limitation provisions were unconscionable, against public policy, or otherwise unenforceable. *Id.* at 701-12. The Court of Appeals held the subject contract provisions applied to all of plaintiff's claims, *except* his claim under the CPA. *Id.* at 709. The Court of Appeals held that application of the value/damage limit to plaintiff's CPA claim would be against public policy. *Id.*[2]

E. Plaintiff's Petition for Review

Plaintiff now asks this Court to reverse the Court of Appeals' decision as it relates to all of his claims, *except* his CPA claim. In other words, plaintiff requests a ruling from this Court that the value/damage limitation provisions do not apply to *any* of his claims.

IV. ARGUMENT

Plaintiff relies upon three of the criteria in RAP 13.4(b) to support his petition for review; namely, that the Court of Appeals' decision conflicts with decisions of this Court and/or other decisions from the Court of Appeals; and that the lower Court's decision would undermine

[2] In reversing the trial Court's ruling as to plaintiff's CPA claim, the Court of Appeals referenced how the CPA sets a limit on treble damages in the amount of $25,000, which is higher than the $5,000 limit in the contract, and higher than the $23,000 previously tendered by Iron Gate. *Id.*

the substantial public interest of the Self-Storage Act.[3] Plaintiff is wrong. None of the RAP 13.4(b) criteria for accepting review apply in this case. Iron Gate respectfully requests that review be denied.

A. RAP 13.4(b)(1) Does not Apply Because the Court of Appeals Followed This Court's Precedent

Plaintiff has not cited a single decision from this Court holding that contractual limitations on value/damages are unenforceable.[4] Instead, plaintiff attempts to distract the Court with a lengthy discussion regarding the elements of conversion. Plaintiff goes as far as contending that the Court of Appeals' ruling "changes the tort of conversion." That contention is without merit. The Court of Appeals did not address (much less *change*) the elements of conversion. Whether Iron Gate is liable to

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[3] RAP 13.4(b), in relevant part, provides that a petition for review will be accepted only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
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> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> * * *
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

[4] Nor could he, as this Court has consistently recognized the "black letter law of contracts that the parties to a contract shall be bound by its terms." *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318, 322 (2009) (citation omitted). The freedom of contract rule applies to contractual value/damage limitation provisions. They *are* enforceable. *Id.* at 522-23 (enforcing damage limitation provision in connection with real estate agreement).

plaintiff for conversion is *not* at issue in this appeal. Plaintiff's discussion of the tort of conversion is irrelevant, and it certainly does not establish any conflict between the lower Court's decision here and any decision from this Court.

Plaintiff also repeats his argument that because Iron Gate's conduct related to the auction was "volitional," such conduct amounts to "willful" misconduct so as to preclude the enforcement/applicability of the contract provisions at issue. This argument was correctly rejected by the Court of Appeals based on the rule that "volition alone is insufficient to support a finding of 'willfulness.' 'Willful' requires a showing of actual intent to harm." *Riley*, 198 Wash. App. at 707 (citing *Zellmer v. Zellmer*, 164 Wn.2d 147, 155 n.2, 188 P.3d 497 [2008]).

Plaintiff does not provide, or attempt to provide, any good reason why this Court should revisit the rule from its decision in *Zellmer*. The Court of Appeals' decision correctly followed and applied this Court's precedent.

B. RAP 13.4(b)(2) Does Not Apply Because There are no Conflicting Court of Appeals' Decisions

Plaintiff has not cited any decision from any Division of the Court of Appeals that conflicts with the Court of Appeals' decision in the case at bar. To the contrary, the Court of Appeals relied, in part, on its prior

decision in *Eifler v. Shurgard Capital Mgmt. Corp.*, 71 Wn. App. 684, 689-96, 861 P.2d 1071 (1993), in which the Court enforced a liability disclaimer in a self-storage lease agreement that barred several of the plaintiff's claims. If claims can be *barred* by a disclaimer, they can certainly be limited by a value limitation set forth in the agreement.

The Court of Appeals' decision is also consistent with other decisions from the Court of Appeals rejecting the same or similar public policy arguments presented by plaintiff here.[5] Because the Court of Appeals' decision is not in conflict with another decision of the Court of Appeals, RAP 13.4(b)(2) does not apply.

C. RAP 13.4(b)(4) Does Not Apply Because the Lower Court's Decision Does Not Undermine the Substantial Public Interest of the Self-Storage Act

Plaintiff also contends this Court should accept his petition under RAP 13.4(b)(4) because the Court of Appeals' ruling would "eviscerate" the substantial public interest protected by the Self-Storage Act. This contention is without merit.

The Court of Appeals correctly held the Self-Storage Act does *not* bar contractual limitations on value/damages. *Riley*, 198 Wash. App. at

704 n.6 (citing RCW 19.150.140). The Court also correctly noted that a recent amendment to the Self-Storage Act confirms this point and acknowledges that such limitations in rental agreements have existed and that the amendment serves to clarify the purpose of such limits.[6]

The Self-Storage act does not, and has never, precluded contractual limitations on value or damages. The intent of the legislature was to leave open the possibility of such agreements among the parties. *See* RCW 19.150.140. Plaintiff's contention that the Court of Appeals' opinion undermines the substantial public interest of the Self-Storage Act is without merit. Nor do plaintiff's complaints regarding the form of this particular rental agreement, or the circumstances unique to this particular auction, present the type of broader public policy concerns necessitating review by this Court.

D. If the Court Accepts Review, Iron Gate Requests it also Review the Decision on Plaintiff's CPA Claim

Iron Gate asks this Court to deny plaintiff's petition for review. But if review is accepted, Iron Gate respectfully requests that the Court

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[5] *See e.g.*, *Johnson v. Spokane to Sandpoint, LLC*, 176 Wash. App. 453, 460, 309 P.3d 528, 533 (2013); *Boyce v. West*, 71 Wash. App. 657, 665-66, 862 P.2d 592, 597 (1993); *Conradt v. Four Star Promotions*, 45 Wash. App. 847, 852, 728 P.2d 617, 621 (1986).

[6] *See Id.* (citing CP at 41-43 (S.B. Rep. on S.B. 5009, 64th Leg., Reg. Sess. (Wash. 2015) (report dated Jan. 26, 2015)).

reverse the Court of Appeals' decision as to plaintiff's claim under the CPA. That claim should be subject to the same value/damage limitation as plaintiff's other claims.

No provision in the CPA precludes contractual limitations on value or damages. No decision from this Court has ever held a mere limitation on value or damages is somehow unenforceable when applied to a CPA claim.

Nonetheless, the Court of Appeals held that applying the value/damage limitation provisions to plaintiff's CPA claim would be against public policy. The only case law cited by the Court of Appeals in support of its holding on plaintiff's CPA claim was this Court's decision in *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 161 P.3d 1016 (2007). *Dix* does not apply here because it involved a fundamentally different type of contract provision: class action waivers/forum selection clauses that would completely destroy an entire class of claims, thus leaving a multitude of named plaintiffs without a remedy.

Such is not the case here. The contractual limitations on value/damages do not deprive plaintiff (much less an entire class of plaintiffs) of an adequate forum, nor do they limit his damages to some inconsequential amount not worth pursuing. The only limitation is that plaintiff is not entitled to pursue damages above the value limit that he

agreed to on the front-end of the transaction. Those limits should apply. Therefore, *if* the Court accepts review, then Iron Gate requests the Court reverse the Court of Appeals as to plaintiff's CPA claim.

V. CONCLUSION

Plaintiff has not established that any of the criteria in RAP 13.4(b) apply in this case. There is no conflict between the lower Court's decision and any decision of this Court or the Court of Appeals. Plaintiff's arguments based on the Self-Storage Act fail based on the plain language and intent of the statute. Iron Gate respectfully requests that review be denied.

RESPECTFULLY SUBMITTED this 11th day of August, 2017.

DAVIS ROTHWELL
EARLE & XÓCHIHUA, PC

s/ Christopher M. Parker
Paul R. Xóchihua, WSBA #18729
Christopher M. Parker, WSBA #48561
Attorneys for Respondents

DECLARATION OF SERVICE

I, Rayna L. Keller hereby declare under penalty of perjury under the laws of the State of Washington that on this date I sent a copy of RESPONDENTS' ANSWER TO PETITION FOR REVIEW to all counsel of record as follows:

Via email
Mr. James L. Sellers, WSBA #4779 Attorney at Law P.O. Box 61535 Vancouver, WA 98666 Telephone: 360-695-0464 Fax: 360-695-0466
Counsel for Larry D. Riley

DATED at Portland, Oregon, on this 11th day of August, 2017.

s/ Rayna L. Keller
Rayna L. Keller

DAVIS ROTHWELL EARLE & XOCHIHUA PC

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