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 BRIEF

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B. Table of Cases and Authorities

C. Assignments of Error.

(1) The Trial Court erred in applying RCW 63.14 so as to operate to negate either the Retail Installment Sales Contract and/or the subsequent additional collateral security interest of the Suburban.

(2) The Trial Court erred in ruling that there were no material issues of fact relating to Defendant/Appellant's alleged conversion of a vehicle.

(3) The Trial Court erred in basing its decision on the pre-*Hangman Ridge v. SAFECO* decision of *Sherwood v. Bellevue Dodge, 35 Wn App 741 (1983)* which conflicts with subsequent decisions; ie, that a "wrongful repossession" is a per se violation of the Consumer Protection Act and a misapplication of RCW 46.70.101.

(4) The Trial Court erred in its computation of attorney's fees which were not supported by sworn testimony.

(5) The Trial Court erred in refusing to require arbitration under a contractual arbitration clause, and upon reversal this matter should be required to go to arbitration under that contractual clause.

D. Statement of the Case.

This matter involves a motor vehicle transaction relating to the purchase of a 2003 GMC Sonoma truck from Parkland Auto Center by Lisa Saili on May 9, 2011. As part of that transaction, Ms. Saili executed a promissory note for $500.00 and granted as "additional collateral" her and her husband's interest in a 2002 GMC Suburban by executing and delivering to Parkland Auto Center the title to said vehicle. CP 108-109.

When Ms. Saili "paid" the promissory note, she gave Parkland Auto Center an NSF check. Parkland Auto Center demanded that she make that check good and advised her that should she fail to do so, they would repossess the 2003 GMC Sonoma and retain the 2002 GMC Suburban. Ms. Saili did not make good on the NSF check and Parkland Auto Center repossessed the 2003 GMC Sonoma and took possession of the 2002 GMC Suburban. CP 108-110

The Sailis then brought an action in Pierce County Superior Court on June 10, 2011 alleging a violation of RCW 63.14 (Retail Installment Sales Contract Act), Wrongful Repossession, and Violation of RCW 46.70.180 and WAC 308-66-152. Parkland Auto Center filed an answer denying the allegations. CP 2-12. The Sailis filed a Motion for Summary Judgment scheduled to be heard on February 10, 2012. CP 256. Parkland Auto Center, after taking the deposition of Mrs. Saili, filed a Motion to Compel Arbitration dated January 20, 2012. CP 35-64. The Hon. Stephanie Arend denied that motion on February 3, 2012, and granted in part and denied in part the Sailis' Motion for Summary Judgment on February 10, 2012; entering her written order on March 2, 2012. CP 261-262, 304-305. Parkland Auto Center filed a Motion for Reconsideration on February 21, 2012 and the Sailis filed a Motion for Reconsideration and for an Order Returning the Vehicle (2002 GMC Suburban) on February 13, 2012. CP 267-282.

The Hon. Stephanie Arend, hearing both Motions on Reconsideration, entered an order granting the Sailis' Motions and denying Parkland Auto Center's Motion on March

2, 2012 wherein she granted summary judgment on the claims brought by the Sailis and ordered Parkland Auto Center to return the vehicle (2002 GMC Suburban) reserving only the issue of damages for trial. Parkland Auto Center returned the vehicle on or about March 2, 2012. CP 302-303.

Trial was held on October 1, 2012 without a jury on the issue of damages only. The Hon. Stephanie Arend found actual damages in the amount of $1,230.00 and trebled that amount to $3,690.00 but entered a judgment on November 2, 2012 of $4,692.00 and then offsetting it by $613.47 owed by the Sailis to Parkland Auto Center. The Court then entered findings of fact, conclusions of law its judgment on November 2, 2013 together with $280.00 in taxable costs and $38,840.00 in attorney's fees. CP 376-377, 397

E. Statement of Facts

1. Undisputed Facts

The following material facts are undisputed:

The Sailis executed a Retail Installment Sales Contract that contains the required disclosures under the Federal Truth in Lending Act, but which does not contain any reference to the 2002 GMC Suburban. CP 127, 174-175.

The Sailis executed documents designed to transfer title of their 2002 GMC Suburban to Parkland Auto Center. The Sailis executed a Power of Attorney. CP 129, 181. They executed a Certificate of Fact acknowledging that the 2002 GMC Suburban was given as "additional collateral" on the loan for the 2003 GMC Sonoma. CP 129, 182. They executed an Authorization for Payoff on the balance they owed on the 2002 GMC Suburban and understood that

Parkland Auto Center would be paying off the amount that the Sailis' owed on that vehicle so as to transfer title of same to Parkland Auto Center. CP 129-130, 183. Parkland Auto Center paid off the Sailis' underlying loan on the 2002 GMC Suburban and obtained title to that vehicle as both the registered and legal owner of same. CP 184, 391.

The Sailis understood that due to their poor credit history (two prior repossessions and twelve accounts in collection) that it was reasonable for Parkland Auto Center to require additional collateral as part of the terms of the contract. CP 128-129. Mrs. Saili also admitted that if no dispute had arisen between her and Parkland Auto Center, all the terms and conditions, including the collateralization of the 2002 GMC Suburban, would have been the same and what she intended to do. CP 130.

The Sailis were to pay $500.00 as required by the promissory note by May 18, 2011. CP 130. Mrs. Saili gave Parkland Auto Center a $500.00 check on May 18, 2011, but it was NSF. CP 131, 187. Mrs. Saili admitted that Parkland Auto Center attempted to resolve the nsf check with her without repossession by having her make the check good. CP 132. Mrs. Saili admitted that Parkland Auto Center specifically told her to take care of the nsf check or that it would repossess the 2003 GMC Sonoma and take possession of the 2002 GMC Suburban. CP 132..

Parkland Auto Center retained the 2002 GMC Suburban (did not liquidate it) and has, at this time, complied with Judge Arend's March 2, 2012 order to return the vehicle to the Sailis. CP 325.

As part of the original contractual agreement, the parties agreed to arbitrate any dispute arising as part of the contract. CP 119, 121, 124, 127, 128, 165, 178.

2. Disputed Facts.

The following material facts are in dispute.

Sailis alleged that Reliable Credit declined to accept the Retail Installment Sales Contract thus negating that contract. Parkland Auto Center's Lonn Ostrem testified that in fact Reliable Credit did accept the loan through what is known as a "Book of Business" (where the dealership unconditionally guaranties the loan). Parkland Auto Center reacquired the contract pursuant to that guaranty. CP 109.

Sailis alleged that the promissory note, after the nsf payment by Mrs. Saili, was "paid" by the execution of a second promissory note where payment was not due until June 20, 2011; thus, Mrs. Saili was not in "default". Lonn Ostrem testified that the second promissory note was not a substitution for the first note nor a substituted payment for the nsf check, but instead an attempt to assist Mrs. Saili in securing her own financing so as to buy the 2003 GMC Sonoma out of repossession and to repurchase the collaterlaized 2002 GMC Suburban. CP 110.

F. Argument

1. The Trial Court erred re RCW 63.14

The trial court's granting of the Sailis' Motion for Summary Judgment and Motion for Reconsideration was based on an erroneous application of RCW 63.14.020.

Sailis argued that RCW 63.14.020 (requirement that all terms be contained within a single document) nullified the contract because the 2002 GMC Suburban, as additional collateral, was not referenced in that contract notwithstanding the admission that the Sailis intended that vehicle to be additional collateral and executed the necessary documents to transfer the title to Parkland Auto Center, and the undisputed fact that Parkland Auto Center paid off the underlying balance owed by the Sailis on the 2002 GMC Suburban. There are three reasons why the Trial Court erred in accepting the Saili's arguments.

(1) RCW 63.14.151 operates as a matter of law to exempt those Retail Installment Sales Contracts that comply with the Federal Truth in Lending Act disclosure requirements from RCW 63.14.020. It is not disputed that the Retail Installment Sales Contract executed by the Sailis complied with those disclosure requirements.

(2) Even if the court disregarded RCW 63.14.151, the consequence of a violation of RCW 63.14.020 is not a nullification of the contract but simply the denial of the right to enforce certain collection costs (interest, penalties, attorney's fees). RCW 63.14.180; see also *Kenworthy v. Bolin, 17 Wn App 650, 655 (1977 – note, while Kenworthy court applied RCW 63.14.180 to the issues of that case, Kenworthy predates the amendment in RCW 64.13.151 which was enacted in 1981 and therefore is not precedent beyond the application of RCW 63.14.180).* As such, negating the contract and its subsequent collateralization of the Suburban would exceed the application of the statute.

The Sailis argued that Reliable Credit sent them a declination letter and this

negated the contract because of that declination. However, Lonn Ostrem testified that Reliable Credit in fact accepted the contract based on the "book of business" (dealership's unconditional guaranty) and that the declination letter was in error. This conflict in testimony creates a material issue of fact as to whether or not the underlying Retail Installment Sales Contract was in fact negated. This issue is further confused by the Trial Court basing its damage decision solely on the additional collateral security interest and not on the Retail Installment Sales Contract; ie, the Trial Court allowed for the repossession of the Sonoma under the Retail Installment Sales Contract, but found that the repossession of the Suburban, as the additional collateral, to be the injury upon which damages were based thus indicating that it was not negating the Retail Installment Sales Contract.

(3) Using RCW 63.14.020 to negate the collateralization of the Suburban makes no sense because it was "additional collateral" for the underlying loan which was not negated under the statute. As such, if the underlying loan is not negated, then the Retail Installment Sales Contract continues to be enforceable. The court would then, logically, have to apply the statute to the parties' agreement to provide a security interest in the Suburban as additional collateral. Although this was not addressed by the Trial Court nor considered, even if the court applied the statute to the security agreement for the Suburban, the most the statute would operate to do is negate collection costs, not the security interest itself.

A security interest is an expression of intent of the parties, *regardless of its form*,

to create a security interest in personal property. *Freeborn v. Seattle Trust, 94 Wn 2d 336, 341 (1980).* In the present case, the Sailis granted a security interest in the 2002 GMC Suburban by expressing same in a Certificate of Fact which was filed with the Department of Licensing, and by granting to Parkland Auto Center lawful title to that vehicle. RCW 62A.9-102(73) defines "Security Interest" as "... means an agreement that creates or provides for security interest". The trial court erred in presuming that such an agreement is subject to specific language as that found in a Retail Installment Sales Contract. In fact, a security interest is simply an agreement that expresses the parties' intent to create a security interest. The Sailis admitted that they intended to give a security interest in their 2002 GMC Suburban as "additional collateral" and executed the necessary documents to accomplish that intent. However, even if there were conflicting testimony of such intent, it would raise a material issue of fact that should not be decided on summary judgment.

2. There were material issues of fact re the issue of conversion

Initially, it should be noted that you can't "convert" that to which you have lawful title. When parties transfer their ownership in a motor vehicle pursuant to RCW 46.12.101, the party to whom the title is transferred becomes the owner of the vehicle. If you have lawful title to a vehicle, then you can't convert it.

However, whether a title provides for lawful possession or not, such is a question of fact for a jury. *Smith v. Dahlquist, 176 Wash. 84, 88-90 (1934).* In the present case,

Parkland Auto had a properly executed title by the Sailis which the Sailis themselves admit they executed with the intent to transfer title for the purposes of additional collateral for the loan on the Sonoma. As such, it is a question of fact whether or not the parties' intent had effectively transferred the title to Parkland Auto.

3. ***Sherwood v. Bellevue Dodge* is inconsistent with *Hangman Ridge***

The Sailis argued that the 1983 case of *Sherwood v. Bellevue Dodge, 35 Wn App 741 (1983)* which found that a "wrongful repossession" constituted a per se violation of the Consumer Protection Act should be applied. However, *Sherwood* conflicts with subsequent caselaw addressing the issue of what is a "per se" violation of the Act.

The trial court founded its ruling on a violation of the Consumer Protection Act based on the holding in *Sherwood v. Bellevue Dodge, 35 Wn App 741 (1983)* where the Court held that the statement in RCW 46.70.101 (Department of Licensing Director's Enforcement provisions) created a statutory "per se" finding of public interest for the purposes of "wrongful repossession" under RCW 62A.9A-609. The *Sherwood* case stands alone in making such a finding and predates the landmark decision of our Supreme Court in *Hangman Ridge v. SAFECO, 105 Wn 2d 778 (1986).*

Hangman Ridge v. SAFECO, supra, 791, gave as an example of a statute that indicates a legislative pronouncement of a per se public interest that of RCW 46.70.005. However, said statute references Title 46.70 and does not reference RCW 62A.9A-609. The *Sherwood v. Bellevue Dodge, supra,* case sought to create a judicial per se violation of the repossession statutes (RCW 62A.9A-609) by bootstrapping it to RCW 46.70.

However, this flies in the face of all judicial decisions since *Sherwood* which have explicitly rejected judicial formulations of per se violations of the Consumer Protection Act that do not contain explicit statutory language that a violation of that statute is a violation of the Consumer Protection Act. This is clear from the legislature's modification of RCW 46.70 to include RCW 46.70.310 after the *Hangman* decision.

The Court in *Sherwood* sought to bootstrap repossession issues into RCW 46.70 by citing RCW 46.70.101; which is the statute that governs how the Department of Licensing may sanction or even deprive a dealership of its license for certain violations. Said statute does not create any individual rights and explicitly states in its opening sentence: "The director may by order deny, suspend or revoke the license of any vehicle dealer ...." and then goes on to outline specific issues. There is nothing in this statute that empowers individuals to take such action. This clearly shows that the Court in *Sherwood* was engaging in a judicial per se test rather than a specific legislative pronouncement of such a violation being a violation of the Consumer Protection Act. To render a decision based on the Plaintiff's suggested analysis would be to ignore the subsequent caselaw that all require an explicit statement by the legislature and the reasoning for such a requirement. See *Hangman Ridge, supra, at p. 791 citing Haner v. Quincy Farms ("unless there is a specific legislative declaration of public interest, the public interest requirement ... is not per se satisfied"), Eastlake v. Hess, 102 Wn 2d 30, 51 (1984) cited as controlling in Michael v. Mosquera-Lacy, 165 Wn 2d 595, 604-605 (2009 "There must be shown a real and substantial potential for repetition as opposed to a hypothetical*

possibility of an isolated unfair or deceptive act being repeated."), and Rouse v. Glascom Builders, 101 Wn 2d 127, 134-135 (1984 – a single act or transaction does not provide for sufficient potential for repetition.)

Furthermore, even if the court upholds the *Sherwood* per se test, it still requires a "wrongful repossession". As discussed earlier in this brief, there are material issues of fact as to whether or not the repossession of the Suburban was wrongful or not.

4. The Trial Court erred in computing attorney's fees

The Trial Court awarded attorney's fees under its finding of a violation of the Consumer Protection Act. However, the argued time and hourly rate upon which that award was based was not provided under any declaration or affidavit.

A trial court is to consider evidence upon which to support an award of attorney's fees that is based on affidavit. *See Collins v. Clark Co. Fire District No. 5, 155 Wn App 48, 100 (2010).* Failure to submit an affidavit that contains sufficient explanation for a basis on the reasonableness of fees requires reversal of the fee award. *Animal Welfare Society v. U.W., 54 Wn App 180, 186 (1989).*

Additionally, should this Court reverse the Trial Court's summary judgment finding a violation of the Consumer Protection Act, then the fees awarded under that Act should also be reversed.

5. The Trial Court erred in not requiring Arbitration

Prior to the Summary Judgment hearing and subsequent Motions for Reconsideration, Parkland Auto Center moved the court for an order compelling

arbitration under the contractual agreement between the parties.

The action filed by the Sailis was filed in June of 2011. Both parties entered into written discovery and Parkland Auto Center wanted to take the deposition of Ms. Saili. That deposition was delayed until January 3, 2012. In that deposition, Ms. Saili admitted to executing the arbitration agreement.

The Trial Court denied Parkland Auto Center's motion to compel arbitration on February 3, 2012. There are 3 reasons why that denial was in err. And should this Court reverse the Trial Court, Parkland Auto Center requests that the Trial Court be directed to require this matter be arbitrated per the contractual agreement.

(1) Washington has a strong public policy in enforcing contractual arbitration clauses. "There is a strong public policy in Washington State favoring arbitration of disputes." *Perez v. MidCentury Insurance, 85 Wn App 760, 765 (1997).* Courts are to enforce contractual arbitration clauses as written. *Stein v. Geonerco, Inc. 105 Wn App 41, 49-50 (2001), Electrical Workers v. PUD 1, 40 Wn App 61, 63 (1985).*

RCW 7.04A.060(1) provides "An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract."

(2) Parkland Auto Center did not waive its right to arbitrate. In *LWSD v. Mobile Modules, 28 Wn App 59 (1980)*, the Court of Appeals reversed the trial court's finding of "waiver" of an arbitration clause and compelled arbitration. The Court of

Appeals held that agreements to arbitrate are valid, supported by public policy, and enforceable. *LWSD supra, at p. 61.* The Court also held that a "waiver" of an arbitration clause requires a showing of a voluntary and intentional relinquishment of a known right and such waiver is a power exclusive to the party relinquishing the right to demand arbitration. *LWSD supra, at p. 61.*

In *LWSD* the Court examined the three month delay in bringing a motion to compel arbitration and held that such was not a 'waiver, and that a delay is insufficient to establish waiver without more. *LWSD supra, at p. 64.* And the Court explicitly held that the time elapse due to the conduct of one party was not evidence of waiver of the arbitration clause. *LWSD supra, at p. 63.*

Furthermore, RCW 7.04A.040(3) states in pertinent part "The parties to an agreement to arbitrate may not waive or vary the requirements of this section ...."

Although parties may waive an agreement to arbitration under RCW 7.04A.040(1), it is subject to subsection (3); ie, if one party asks for arbitration, then no waiver has occurred.

In the present case, Parkland Auto Center had to wait until after taking Ms. Saili's deposition testimony so as to insure that spurious denials would not be raised as to the agreement itself. As shown in Ms. Saili's testimony in her deposition CP 127, there was initially a claim by Ms. Saili that her signature had been forged to the Supplemental Disclosure and Agreement CP 178 which she later recanted. Ultimately, Ms. Saili admitted having signed and initialed both Exhibits 19 and 29 to her deposition

which are the agreements to arbitrate. CP 124, 127, 165, 178

(3) The arbitration clause was not "unconscionable". In *McKee v. AT&T, 164 Wn 2d 372 (2008)*, the Supreme Court refused to enforce an arbitration clause based on substantive unconscionability but declined to rule on procedural unconscionability. The Court held several areas of the arbitration agreement to be substantively unconscionable. A class action waiver, where the matter involves small dollar amounts which makes the action uneconomical to pursue individually, would be unconscionable. *McKee supra, at p. 396-397.* A confidentiality requirement would make the agreement unconscionable. *McKee supra, at p. 398.* A lessening of the statute of limitations would not be necessarily unconscionable unless the shortening of the time frame was unreasonable. *McKee supra, at p. 399.* And the prohibition of attorney's fees where AT&T would be entitled to them but the consumer would not to be against public policy and therefore unconscionable. *McKee supra, at p. 400.* Finally, the Court held that a limitation on punitive damages was conscionable and not a basis for refusing to enforce the arbitration agreement. *McKee supra, at p. 401.*

In the present case, the circumstances relating to the class action waiver is moot because this is not a class action and the relief sought is not so insignificant as to render the case uneconomical. There is no confidentiality clause, no lessening of the statute of limitations nor an attorney's fee clause that would conflict with Washington's public policy. As such, there is no basis for a finding of substantive unconsionability.

In *Alder v. Fred Lind Manor, 153 Wn 2d 331 (2004)* the Supreme Court examined procedural unconscionability. The Court rejected the argument that an adhesion contract

is unconscionable procedurally. *Alder supra at p. 348.* The Court also ruled that the real issue is whether or not the individual had a reasonable opportunity to read the contract. *Alder supra, at pp. 349-350.*

In the present case, Ms. Saili had the opportunity of reading both the Vehicle Buyer's Order and the Supplemental Disclosure and Agreement. This is not only evidenced by her signing and initially the documents, but by the fact that in a previous purchase from defendant five days earlier, Ms. Saili had signed the same documents for a different purchase. CP 119, 121, 124, 127-128.

G. Conclusion

Because there are material issues of fact, the Trial Court erred in its application of RCW 63.14, the Trial Court misapplied *Sherwood* and the Consumer Protection Act, the Trial Court erred in computing attorney's fees, and the Trial Court erred in not requiring the parties to go to arbitration, the judgment should be reversed and this case remanded to the Trial Court with the direction that the case be arbitrated pursuant to the contract provisions.

Respectfully submitted this 27th day of March, 2013.

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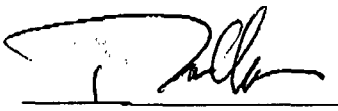
CERTIFICATE OF SERVICE

Frederick H. Ockerman certifies that on March 27, 2013, he caused the foregoing Appellant's Brief 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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