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NO. 66469-7-I

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

DIRK M. MAYBERRY AND DIRK M. MAYBERRY, INC.,

a Washington corporation,

Petitioner(s),

v.

ERIC FRASER,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA MIDDAUGH

BRIEF OF PETITIONER (Appellant)

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**ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR
REVIEW**

A. Assignments of Error

1. The trial court erred in clearing title to the plaintiff
2. The trial court erred in awarding \$39,653.37 in fees in favor of the plaintiff for violations of the Consumer Protection Act, as well as costs of \$561.37.

B. Issues relating to the Assignment of Error.

1. Under Washington's Consumer Protection Act (CPA), did the petitioner engage in unfair or deceptive acts in the conduct of a trade or commerce when he purchased an inhabitable home ravaged by a fire from a seller in need of money pursuant to a contract duly executed by both parties?
2. Did the court abuse its discretion when it awarded attorney fees under the CPA, when the plaintiff had proven no damages?
3. Did the contract fail for indefiniteness as claimed by the court?
4. Did the trial court abuse its discretion when it ruled the defendant lacked capacity to contract at the time of the contract using a preponderance of evidence standard using only the plaintiff's self-serving declarations of alcoholism and drug addiction?

5. Did the trial court abuse its discretion by awarding attorney fees against petitioner Dirk M. Mayberry when he was merely acting as an agent for the corporation Dirk M. Mayberry Inc.?

STATEMENT OF THE CASE

The subject property here is legally described as Lot 8, Block 21, West Green Lake Addition to the City of Seattle, according to the plat thereof recorded in Vol. 13 of 13 Plats, page 52, records of King County, Washington. (Ex. 8).

One petitioner, Dirk Mayberry (Mayberry), manages a rental property and invests in dilapidated properties to renovate and sell homes (Oct. 4 Tr. 16, l. 16-17). He manages about fifteen (15) properties (Oct. 4 Tr. 16, l. 24, 25). The other petitioner, Dirk M. Mayberry Inc., owns about six (6) properties (Oct. 4 Tr. P. 17, l. 6-12). Mayberry met the respondent Erica Fraser (Fraser) at her home while looking for investment properties. (Oct. 4 Tr. 21, l. 7-11). They subsequently met by surprise at the attorney's office of the respondent, who represented both parties in separate unrelated matters (Oct. 4 Tr. 21, l. 22 to 23). After meeting on several occasions to discuss the specifics of the purchase of Fraser's fire-ravaged home, (Oct. 4 Tr. 24, l.16 to 24, l. 1), Mr. Mayberry and Ms. Fraser entered into an agreement whereby Mayberry would purchase a

damaged home owned by Fraser on behalf of Dirk M. Mayberry Inc..

(Oct. 4 Tr. 25, l. 1-6) (Ex 7-8).

The purchase and sales agreement was negotiated over several months and finally signed on April 2, 2009. (Ex. 8, Oct. 4. Tr. 23, l. 11 to 24, l. 9). At trial, a version was entered that contained the latest version but was missing an addendum. (Oct. 5 Tr. 47, l. 8-21). The parties each gave the court their version of what the addendum consisted of. (Oct. 5 Tr. 47, l. 22 to 48, l. 6).

In the court's order following trial, the court ruled the contract as invalid because it was ambiguous and not followed by the defendants in the following respects:

- a. The contract said the seller would get a note for \$2000.00 earnest money and the parties testified that the seller received a cashier's check for \$1000.00 as earnest money.
- b. The contract provided that the closing agent would be a "qualified closing agent of Buyer's choice or between parties if no escrow can be found to close in time" (closing date was April 30, 2009). The court found that no attempt was made to find a closing agent and the deal was closed on the same day the seller signed, which was 28 days before the stated closing date.

- c. The contract provided that the seller was to receive “approximately \$50,000.00 less liens or encumbrances and the buyer would “take over” the first mortgage. However buyer acknowledged at trial that he was to pay the first and second mortgage so the contract is unclear what liens or encumbrances” were to be deducted from the seller’s payment. And as stated above, it is clear the defendant had no intention of paying the mortgage according to its terms.
- d. The contract says that the seller was to pay a certain amount as a down payment, which appears to be \$15,000.00 (it is difficult to read), but this was never done.
- e. The parties did talk about an addendum referred to in the contract, but the addendum cannot be found and the parties disagree as to its terms. The terms cannot be established by a preponderance of the evidence because both parties were vague as to their recollection of the specific terms of the addendum. (CP 152-153).

After the trial, the plaintiff found the latest addendum and moved for reconsideration and/or relief from the order on the basis of the newly found addendum. (CP 122-136). The introduction of the addendum was not objected to by the plaintiff.

The addendum was apparently allowed in without objection but the court did not change its ruling with respect to the validity of the contract. (CP 152-153).

Under the terms of the contract with addendum, in exchange for a total of \$150,000.00 minus the outstanding liens (Ex. 8), Mr. Mayberry purchased the property on April 2, 2009. (CP 139) Under the terms of the contract, Mayberry was to pay \$15,000.00 down minus the amount of the arrears \$9915.35 and excise tax of \$2770.65. Of the remaining, Mr. Mayberry agreed to pay Ms. Fraser \$500.00 per month (Ex 8, CP 139) while he made repairs to the building which was uninhabitable due to the fire which occurred in October 2008. (Oct. 4 Tr. 66, l. 6-10). Then, once the building was either sold or refinanced, Ms. Fraser would receive the balance due less any advances. (Ex. 8, CP 139).

Mayberry also arranged for her belongings to be put into storage. (Oct. 4 Tr. 44, l. 18, to 47, l. 18). This obligation was part of a separate oral agreement (Oct. 4 Tr. 62, l. 21). Both parties' testimony as to this is largely consistent.

During the span of her marriage, the respondent Erica Fraser and her former husband acquired and possessed several properties. (Oct. 4 Tr. 74, l. 12-16; 117, l. 4-14). In addition, the respondent was familiar with properties being foreclosed as she had had several foreclosures prior to

initiating this lawsuit. (Depo. of Erica Fraser, Exhibit 1, pg. 76, 12-20).
The respondent never represented to Mr. Mayberry that the home was in danger of foreclosure, rather the plaintiff initially indicated that the payments were all paid up. (Oct. 4 Tr. 30, 11-9.) She also wanted to sell quickly in order to avoid detection from DSHS so that the proceeds of the sale would not be garnished to pay back child support to her mother. (Oct. 4 Tr. 43, l. 22 to p. 44, l. 17).

Ms. Fraser apparently had regrets over the transaction and filed a lawsuit alleging fraud by way of an alleged foreclosure rescue scam shortly after the contract was consummated. (CP 1-6). The trial court ruled in favor of the Respondent, finding that the petitioner had violated RCW 19.86.020 of the Consumer Protection Act (CPA). The trial court cleared title to the contract to the plaintiff under the theory that the contract was void. (CP 148-156).

STANDARD OF REVIEW

The question of whether particular actions gave rise to a violation of the Consumer Protection Act (CPA) is reviewable as a question of law. **Svensen v. Stock**, 143 Wash.2d 546, 553 (2001).

RAP 2.5(a) is phrased to allow the court the discretion to refuse to hear arguments raised for the first time on appeal. Washington courts have

allowed issues to be considered for the first time on appeal when fundamental justice so requires. **State v. Card**, 48 Wash.App. 781, 784 (1987).

SUMMARY OF THE ARGUMENT

RCW 19.86.20 of the Consumer Protection Act (CPA) was the basis for the award of attorney fees. The statute states that, “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” The seminal case of **Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Company**, 105 Wash.2d 778 set forth five elements that a private plaintiff must establish to prevail under a private CPA action.

The petitioners contend that the plaintiff failed to prove at least three elements.

In the case at hand, the trial court incorrectly granted judgment for the respondent because the facts of the underlying transaction between the petitioner and the respondent do not show that the petitioner violated the Consumer Protections Act (CPA). There were no injuries, and thus no causation. There were no deceptive practices, and this transaction was essentially a private transaction in which there was no public interest involved.

The court also voided the purchase and sales agreement in this case, because the respondent's condition was such that she lacked the capacity to contract. The court also claimed that the agreement was unenforceable on the grounds of indefiniteness or ambiguity.

The petitioner argues that the standards for voiding a contract because of lack of capacity to contract are tough to meet and the respondent's actions and own words demonstrate she did not meet this rigorous standard for voiding the contract.

Finally, the court claimed that attorney fees should be awarded against Dirk M. Mayberry. However the only evidence before this court is that Dirk M. Mayberry was an agent of Dirk M. Mayberry Inc. and therefore could not be held liable for the misdeeds of the corporation.

In sum, the petitioners respectfully ask this court to reverse the judgment of the King County Superior Court based upon the court's error on the following issues: (1) in quieting title in favor of the Respondent to the property; (2) in finding that the Petitioner's actions violated RCW 19.86 Consumer Protection Act; (3) in finding the contract executed by the Petitioner and the Respondent was ambiguous and not followed by the Petitioner; and (4) for awarding costs to the Respondent in the amount of \$561.37 and attorney's fees in the amount of \$39, 653.37. To note, the court correctly found that because the Respondent did not suffer any

actual damages to justify the assessment of a civil penalty under the Consumer Protection Act (CPA) RCW 19.86.

ARGUMENT

1. THE TRIAL COURT INCORRECTLY FOUND THAT MAYBERRY VIOLATED THE CPA BECAUSE FRASER DID NOT SUCCESSFULLY PROVE ALL FIVE ELEMENTS OF A PRIVATE CPA ACTION.

To prevail in a private CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. **Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.**, 105 Wn.2d 778, 784, 719 P.2d 531 (1986).

First, a plaintiff must prove an unfair or deceptive act or practice. A plaintiff need not show that the act in question was intended to deceive, but that the alleged act had the capacity to deceive a substantial portion of the public. **Id** at 785.

Under the second element, a private plaintiff must establish that the act or practice complained of occurred in the conduct of trade or commerce. **Id**. The Legislature has defined trade or commerce broadly to include “the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.” **Id**. These first

two elements may also be established by showing a per se unfair trade practice. A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated. **Id.**

Third, the CPA has been interpreted to require a public interest showing. If the transaction was essentially a consumer transaction (see e.g. **Haner v. Quincy Farm Chems., Inc.**, 97 Wash.2d 753 (1982) (plaintiff farmer purchased defective wheat seed); **Lidstrand v. Silvercrest Indus.**, 28 Wash.App. 358 (1981) (plaintiff purchased defective mobile home); **Testo v. Russ Dunmire Oldsmobile, Inc.**, 16 Wash.App. 39 (1976) (plaintiff purchased defective used automobile) the trier of fact may consider the following relevant factors: (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; (3) were repeated acts committed prior to the act involving plaintiff; (4) is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff; (5) and if the act complained of involved a single transaction, were many consumers affected or likely to be affected by it.

If the transaction was essentially a private dispute (see e.g. **Short v. Demopolis**, 103 Wash.2d 52 (attorney-client); **Salois v. Mutual of**

Omaha Ins. Co., 90 Wash.2d 355 (insurer-insured); **McRae v. Bolstad**, 101 Wash.2d 161 (1984) (realtor-property purchaser); **Bowers v. Transamerica Title Ins. Co.**, 100 Wash.2d 581 (1983) (escrow closing agent-client)), relevant factors indicating public interest include: were the alleged acts committed in the course of the defendant's business; did defendant advertise to the public in general; did defendant actively solicit this particular plaintiff, indicating potential solicitation of others; and did the plaintiff and defendant occupy unequal bargaining positions. The factors detailed above are not dispositive, and it is not necessary that all be present.

Alternatively, the public interest element may be satisfied per se. This method requires a showing that a statute has been violated which contains a specific legislative declaration of public interest impact.

Hangman's Ridge supra. at 791.

The fourth element of a private CPA action requires a showing that the plaintiff was injured in her "business or property." **Id.** The injury involved does not need to be great, but it must be established.

The fifth element is causation. There must be a causal link between the unfair or deceptive acts and the injury suffered by the plaintiff.

Here, the first element of the CPA has not been met. The record does not reflect the trial court's determination that Mayberry's actions

were unfair or deceptive. Mayberry agreed to take over the first mortgage, and took Fraser at her word when she stated that the existing mortgage had been pre-paid \$20,000.00 - \$30,000.00. This “trust” on the party of Mayberry does not indicate an unfair or deceptive practice. If anything, it suggests that Mayberry relies on the false statements of another to his detriment and that in the future, he should ensure the accuracy of the statements by any parties he plans on doing business with.

The court’s finding that the drafted documents called for a closing date of April 30, 2009 are no longer valid because the addendum indicates that title would be transferred without an escrow agent because the parties agreed an agent would be unavailable, so the closing occurred immediately for the benefit of both parties.

The court made note that Dirk Mayberry made a representation that he was acting in the mutual interest of both of the parties rather than just that of the defendants. However, there is no suggestion that he claimed to be Ms. Fraser’s agent, and the fact is the agreement, when looked at in its entirety including the addendum, had benefits for both parties. Furthermore, the respondent has not shown any injuries due to this alleged misrepresentation.

Also, Mr. Mayberry has shown some evidence that the check he made for \$2700.00 was made good by the Department of Revenue who

took unclaimed funds from another Mayberry account to pay the \$2700.00 on June 8, 2010. (CP 137).

In addition, Fraser has not shown that the alleged act had the capacity to deceive a substantial portion of the public. Again here, Mr. Mayberry relied on the representations of Fraser to his detriment. Had he performed a diligent search on the status of the mortgage, he may have found that the mortgage was in arrears, and the contract could have accounted for this fact. However, given Fraser's urgent need for money and the deal at hand, Mayberry took Fraser's statements as truths. This is not a deceptive act that has the capacity to deceive a substantial portion of the public and the record accurately reflects this notion.

Because Fraser has not proven the first of the five elements for a private action under the CPA, this should prove fatal to her claim. However, the petitioner would like to proceed outlining how the respondent has failed to show other elements of a private CPA action.

The trial court is correct in finding that the second element of a CPA action would probably apply as the parties were involved in a transaction for the sale of land, and this would likely fall under the broad definition of commerce.

But in the third element, the trial court was incorrect in finding that Fraser had shown that the public interest was affected because Mayberry

solicited the plaintiff's business and that he does this kind of solicitation on the behalf of himself and other investors and his corporation.

The trial court did not assess this transaction correctly and placed weight on only two factors when no one factor is dispositive.

This transaction is more like a private dispute than that of a consumer transaction. Mayberry was an investor in real property and Fraser was looking to sell her property for profit. This transaction was between two professionals looking to benefit from a mutual bargain. Neither party was buying a defective product as is the trend in Washington case law that has found a consumer transaction. As such, the factors that are relevant here are as follows:

1. Were the alleged acts committed in the course of the defendant's business?
2. Did defendant advertise to the public in general?
3. Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others?
4. Did the plaintiff and defendant occupy unequal bargaining positions? See **Hangman Ridge**, at 791.

Here, the Respondent cannot show that the Mayberry advertised to the public in general and that the parties occupied unequal bargaining positions.

In addition, the parties did not occupy unequal bargaining positions. Fraser is accustomed to real estate transactions, as she and her ex-husband owned several properties which she had experience managing. The respondent conveniently relies on her alcoholism and drug addiction at times when it benefits her. These ailments are indeed severe afflictions. However Fraser should not be allowed to continue to trick this Court that she did not occupy an equal bargaining position based upon her ingestion of alcohol. Instead, Fraser's real estate experience she acquired when buying and selling properties with her husband a decade and a half ago indicate that she knew at the very least what she was getting into buying and signing a simple agreement to sell a fire-damaged home in exchange for compensation.

One of the things the court must take notice is that Dirk M. Mayberry is not the same as Dirk M. Mayberry Inc. As argued above, there has been no showing that Dirk M. Mayberry was not acting in any other capacity than as an ordinary agent and therefore could not be held liable for the actions of the principle. There has been no showing of a pattern of a generalized course of conduct of this particular transaction with Dirk M. Mayberry Inc. There have been no repeated acts involving the plaintiff with Dirk M. Mayberry Inc. There has been no showing that there were any other consumers other than the defendant that was affected

by this isolated transaction with Dirk M. Mayberry Inc. There has been no showing there is a potential for repetition of the actions of Dirk M. Mayberry Inc. involving the plaintiff. There is no evidence that Dirk M. Mayberry advertises this particular kind of transaction to the public.

Thus, the trial court is incorrect that Fraser has shown that this transaction affected the public interest and therefore, her claim under the CPA should fail on this ground as well.

Next, Fraser cannot show that the transaction at issue here caused her an injury. The court has already ruled that there were no actual injuries proven by the Plaintiff to sustain any award, let alone a treble damage award. The Court record accurately finds no actual damage to the plaintiff. Plaintiff's attorney, in his motion for reconsideration, also correctly acknowledges that there is no basis for awarding a civil penalty under the CPA.

In addition, the Plaintiff did not suffer any injury to her property required to support a treble damage penalty under RCW 19.86.090. Plaintiff's counsel relies upon **Stephens v. Omni Insurance Co. and Credit Control Service**, 138 Wa.App. 151 (2007), to argue his point that the plaintiff suffered an injury to property because of inconvenience and deprivation of the use and enjoyment of the property at issue in this matter. This case is not applicable. Here, the plaintiff did not suffer any

inconvenience or deprivation of the use and enjoyment of her property on account of the defendant. The plaintiff was already inconvenienced and deprived of the use and enjoyment of the subject property because the property was severely damaged by a fire prior to any meeting between the plaintiff and the defendant. The plaintiff has admitted the building was uninhabitable after the fire. She has provided no expert or even lay testimony that would back up her assertion that this heavily damaged house could be remodeled successfully in two months.

Q: Now um, after you signed this transaction could you have moved back in the house stood you ground or was it still destroyed from the fire?

A: Um, the damage from the fire was pretty extensive but it would not had taken that much work to put it back together. I mean it would - would not have taken six months. It would have been like (pause) maybe two months. And I couldn't have lived in the property. No, it was uninhabitable.

Q: And - and did you have an insurance claim for the fire damage?

A: Absolutely, absolutely did.

Q: And was that denied?

A: It was denied. (CP 88, l. 3-14)

The trial court is incorrect in finding that the benefits to Erica Fraser were illusory. As a result of this transaction, she was able to get her home in a marketable condition so that she would be able to receive far more than the land minus costs of demolition of the existing house.

Finally, Fraser cannot show that an unfair or deceptive practice cause her injury. As stated directly above, Fraser did not suffer an injury because any purported injury was not proximately caused by Mayberry's actions. The trial court unfairly and incorrectly looked to Mayberry's criminal convictions to show conformity on this occasion. The parties agreed that no escrow was needed due to Fraser's urgent need for money. Mayberry is not Fraser's agent and holds no fiduciary duty to inform her of any of her rights. This transaction was between two individuals, both possessing the level of real estate knowledge needed to execute a contract. The prior acts of the petitioner should not be allowed to color the court's view of his actions here, and the record is clear that Fraser did not successfully prove a private action under the CPA to justify the trial court's finding of quiet title and its grant of reasonable attorney's fees.

2. THE PURCHASE AND SALE AGREEMENT DOES NOT FAIL ON THE BASIS OF AMBIGUITY OR INDEFINITENESS.

As noted in the court findings the contract was ambiguous because of failure of the parties to produce the addendum. The defendants were

able to locate the addendum which is attached to the declaration of Dirk M. Mayberry. See C.P. 137-141. The following should be observed by the court.

a. With respect to the \$1000 at the time of the contract it had been learned that the entire amount in arrears on the first mortgage was \$9915.35 and it was deducted from the \$15,000.00 as contemplated under the agreement. The excise tax was also deducted and it was agreed that the remaining would be paid at the time of the second mortgage which was at that time estimated to be in 2011.

b. The court expressed concern that the original contract had a preprinted clause with a typewritten clause modification that indicated that Ms. Fraser would have an opportunity to get an escrow agent. However, both parties acknowledge that the contract went through various drafts. In the addendum which includes the latest draft, both parties agreed that “no title insurance will be purchased due to the expedient nature of closing the transaction” in typewritten form, which explains why the deal was closed prior to the April 30, 2009.

c. The court expressed concern over how Ms. Fraser was to obtain approximately

\$50,000.00 and the court stated that it was unclear what liens or encumbrances were to be deducted from the seller's payment. However, the reason the exact amount of the payment was not known at the time was because the amount of the second mortgage was not known. However the method of calculation was known. Obviously, the amount of the second mortgage was to be deducted from the \$150,000 purchase price as well as the remainder from the first mortgage. When Mr. Mayberry testified that it was his responsibility, he was acknowledging that it would have to come out of the whole purchase price. The contract does not fail for indefiniteness. Courts will not read ambiguity into a contract when a reading of the contract as a whole resolves the ambiguity. Whether the contract is ambiguous is a matter of law. **McGary v. Westlake Investors**, 99 Wn. 2d 280 (1983).

d. The court expressed concern that the seller never received a down payment of \$15,000.00. However, the addendum in its typewritten form makes it clear that any outstanding arrearages would be deducted from the down payment. The handwritten modification calculates the arrearages at the time of the signing at \$9,915.35.

Since the addendum has been found, the objections of the court as to the enforceability of the contract have now been met. Thus, there is no basis for quieting title to the plaintiff on the basis of a void contract.

3. THE COURT ERRED IN ITS FINDING THAT THE CONTRACT SHOULD BE VOIDED BECAUSE OF THE LACK OF CAPACITY DUE TO DRUG ADDICTION OR ALCOHOLISM.

The court entered a finding that the plaintiff was not lucid and coherent at the time she executed the sale documents with the defendant on April 2, 2009. The court merely states that the plaintiff's testimony is more credible on this issue, implying that the appropriate standard is preponderance of evidence. That is not the law in Washington. A party lacks capacity to contract if she is without sufficient reason to understand the nature, terms and effect of the contract in question. **Page v. Prudential insurance Co.** 12 Wn. 2d 101, 108 (1942). A party to a contract is presumed capable at the time of the transaction. i.e. possessed of sufficient reasoning ability to comprehend the nature, terms and effect of the agreement. This presumption can only be overcome by clear, cogent and convincing evidence. **Johnson v. Perry**, 20 Wn.App 696 (978). The plaintiffs have not met their burden. As stated in **Page** supra:

... mere mental weakness falling short of incapacity to appreciate the business in hand will not invalidate a contract; physical condition not adversely affecting mental competence is immaterial, and neither age, sickness, extreme distress, nor debility of body will affect the capacity to make a contract or a conveyance, if

sufficient intelligence remains to understand the transaction.
'Were a person possesses sufficient mental capacity to understand the nature of the transaction and is left to exercise his own free will, his contract will not be invalidated because he was of a less degree of intelligence than his co-contractor, because he was fearful or worried; because he was eccentric or entertained peculiar beliefs or because he was aged or both aged and mentally weak, or insane;...

In addition, **Page** states:

'The test of mental capacity to contract is whether the person possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he is engaged... On the other hand, to avoid a contract it is not sufficient to show merely that the party was of unsound mind or insane when it was made, but it must also be shown that this unsoundness or insanity was of such a character that he had no reasonable perception or understanding of the nature and terms of the contract. The extent or degree of intellect generally is not in issue, but merely the mental capacity to know the nature and terms of the contract. **Page v. Prudential Life Ins. Co. Of Am.** 12 Wn.2d 101, 108 (1942) quoting from 17 C.J.S. 483, §133.

17 C.J.S. goes on to say that in "applying this rule, however, it must be remembered that the contractual capacity is a question of fact to be determined at the time the transaction occurred." 17 C.J.S. 483, §133.

Here, the respondent has not met her burden of proof in this regard. Her own testimony indicates that her problem was not one of capacity, but one of not owning up to the agreement she had made. In her testimony, Erica Fraser described what her understanding of the contract was:

Q: How do you know what he owed you?

A: Well, in one of the Purchase and Sale Agreements, the original down payment was to be \$15,000 and then he crossed - he crossed it out and we wrote so many different financial scenarios; it was my understanding that when we did the Purchase and Sale Agreement, that it would go through a you know, the appropriate process of - of escrow and closing, and there was you know, a time period that that took that he was to give me a down payment of \$15,000. Or \$10,000. Yeah, that was the agreement and I was to receive \$500.00 month until the property was rehabbed and then the balance of the note was to be paid when he sold the property.

Q: Did you think he owed you money until prior to the closing of the deal?

A: No. No. He just had been giving me - I would have no money and he would just give me money , you know, when I saw him I would you know would ask if I could have an ad - you know, some cash and he would give it to me..

Q: Well, I'm trying to understand. You said you didn't think the deal closed and that it was going to wait and go through escrow but then you were saying you didn't have any money because he wasn't paying you what he owed you. So it's kind of confusing to me.

A: Well, I - it was my understanding that I would receive a down payment, like a good you know, a -(pause) you know, a down payment or earnest money and that the balance would be paid when the clo - when the house closed on.

Q: When did you think he owed you the money?

A: When the deed was transferred.

Q: But to your knowledge the deed was never transferred, right?

A: No, I did not - I did not know that that had happened.

Q: So how could you think he owed you money if the deed was never transferred? And you didn't owe him money until the deed was transferred?

A: That's the way it was written up and that's the way I understood it. (Oct. 4 Tr. 118, l. 7-119, l. 17)

As can be seen from the above testimony, her dispute with Mayberry did not stem from lack of capacity to contract, but from a failure to own up to the addendum, where she had agreed to have the \$15,000 reduced because of her failure to notify Mayberry that her payments on the first mortgage were behind. Here we only have the self-serving testimony of the plaintiff, who is a self-admitted cocaine user and alcoholic, and who now claims she was too drunk to know what she was signing. Yet the respondent admits that she could drive her car from her home to the Rainier District in Seattle where she would be served at a restaurant a distance of five miles. (Oct 4 Tr. 73, l. 7-15) (CP 137). Then she would drive her car to the Notary's office, then to the QFC and back twice (approximately two miles distance each time), and then presumably back home (Oct. 4 Tr. 75, l. 10-25) (CP 137). Despite having the wherewithal to function a motor vehicle, the respondent claims at the same time to being so drunk she didn't even know what she signed.

The respondent also admits she was served at a commercial restaurant which is required by law not to serve the plaintiff drinks once

she is clearly intoxicated. (CP 137). Interestingly, the plaintiff can remember how many drinks she had but cannot remember if she signed the documents. According to her own testimony she drove to the store twice, made copies, and returned, but somehow didn't have the capacity sign a simple contract. Her testimony is hardly the kind of clear and convincing evidence that the law requires to show that she lacked capacity to know what she was doing.

4. THE COURT SHOULD NOT HAVE AWARDED DAMAGES AGAINST DIRK M. MAYBERRY WHO WAS ACTING AS AN AGENT FOR DIRK M. MAYBERRY INC. BECAUSE THE DOCTRINE OF PIERCING THE CORPORATE VEIL WAS NOT MET.

The court made a finding that Dirk M. Mayberry was acting on his own behalf and on behalf of the corporation Dirk M. Mayberry, Inc. because he was paid by commission for the work that he did acquiring and selling property for investors. Neither of these facts, by themselves, is enough under Washington law to establish liability for the agent who is acting on behalf of a principal. Generally, an agent is not liable for acts he has taken in his representative capacity. **Yuan v. Chow**, 96 Wn. App. 909, 913-14, 982 P.2d 647 (1999). In Washington, in order to reach Dirk M. Mayberry, an officer, who is acting on behalf of the corporation, it is necessary to pierce the corporate veil. Piercing the corporate veil is an

equitable remedy imposed to rectify an abuse of the corporate privilege. **Truckweld Equip. Co. v. Olson**, 26 Wn. App.638, 643, 618 P.2d 1017 (1980). In general, a corporation is considered a separate entity, even if it is owned by a single shareholder. **Id.** at 644. To pierce the corporate veil, two separate, essential factors must be established. 'First, the corporate form must be intentionally used to violate or evade a duty.' **Meisel v. M & N Modern Hydraulic Press Co.**, 97 Wn.2d 403, 410, 645 P.2d 689 (1982). Second, the fact finder must establish that disregarding the corporate veil is necessary and required to prevent an unjustified loss to the injured party. **Id.**

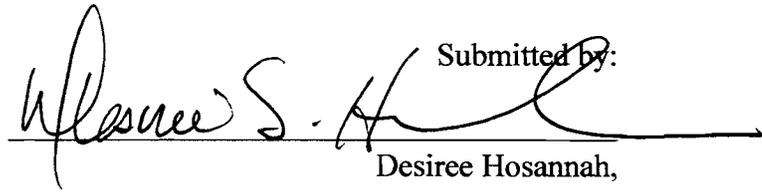
With regard to the first element, the plaintiff has not established the necessary elements. The record before this court regarding Dirk M. Mayberry Inc. is incomplete. For example, no certificate of formation, L.L.C. agreement, business minutes, or any other records showing Dirk M. Mayberry Inc.'s authorization to Dirk M. Mayberry, or lack thereof, was before the court. It was precisely this lack of information that prevented the court of making a finding that the corporate veil was pierced in **Dickens v. Alliance Analytical Laboratories, LLC**, 111 P.3d 889, 127 Wash.App. 433 (Wash.App.Div.3 05/10/2005). The court's finding that Mr. Mayberry was paid on a commission basis or may have himself been

involved in other real estate ventures is simply not enough to establish liability under Washington law.

CONCLUSION

For the reasons given in this brief, the petitioners respectfully request that this court reverse the decision of the trial court to quiet title in favor of the plaintiff and the award of attorney fees and costs to her. The petitioners specifically request that the court quiet title in favor of the petitioners and award them their costs.

Dated this ____ day of August, 2011.

Submitted by:

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