

68509-1

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NO. 68509-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION 1

MEGAN FELSKE,

Appellant,

v.

PERFORMANCE JEEP-EAGLE, INC., et ano,

Respondents.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Eric Lucas

APPELLANT'S OPENING BRIEF

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1. INTRODUCTION

Megan Felske and her boyfriend James stopped in at the Performance Jeep-Eagle lot in the evening of October 1, 2007. James wanted to buy a 2008 Nissan Titan truck but he had not yet begun work at a new job and he had several collection actions on his credit profile. The Performance salesman told the two that James would not qualify for a loan on his own, and he persuaded Megan Felske to "lend James her credit" by cosigning on the Titan loan. He also talked her into buying a new Pathfinder for herself. She was the sole signer on the loan for the Pathfinder.

Felske told the salesman she averaged \$820 a month in gross income and that in her best month she had made \$1,440 because the tips were good. The salesman wrote up a credit application stating that Felske made \$1,440 a month and she signed it. The loan payments on the Titan and Pathfinder were \$847 and \$700 a month respectively, for a total of \$1,547. Before submitting the credit application to the lenders, and without Felske's knowledge, Performance changed her stated income to \$3,000 a month.

Felske discovered the alteration of the credit application a

year after the sale, when she asked Performance for copies of the loan papers because James had defaulted on it. She filed suit against Performance alleging two claims, common law fraud and a violation of the Consumer Protection Act.

2. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

A. The trial court erred in dismissing appellant's Consumer Protection Act ("CPA") claim on summary judgment because defendant Performance had not raised or argued the claim in its moving papers.

B. The trial court erred when it considered the declaration of counsel submitted with Performance's reply brief, because the declaration supported an issue Performance had not raised in its initial motion and because it was a narrative by counsel describing deposition testimony rather than the testimony itself. CP 11-13.

3. STATEMENT OF THE CASE

Defendant Performance filed a Motion for Judgment on the Pleadings and Motion for Summary Judgment with which it introduced only one piece of evidence, the sales agreement for the

Titan truck signed by the plaintiff. CP 18-22. The execution of this contract had not been contested by either party.

Performance asked the court to dismiss both claims in its motion but it addressed only the fraud claim. Its single line of argument was that any misrepresentation in the credit application was made to the banks rather than to Felske; she lacked standing because she was not the party defrauded and the alleged alteration would not support a common law fraud claim. CP 26 – 28. In the only reference the motion made to the CPA claim Performance asked the court to dismiss it because it was based on the alleged fraud. CP 29.

In her response Felske did not contest dismissal of the common law fraud claim. She argued that the CPA claim had not been addressed by Performance and it was not dependent on the fraud claim. She applied the elements of a CPA claim, defined in Hangman Ridge v. Safeco Title, 105 Wn.2d 778, 719 P.2d 531(1986), to facts drawn from the complaint. Performance had not challenged these facts in its motion. CP 15-17.

Then in its reply brief Performance addressed the CPA claim for the first time. It denied that it had falsified the credit application and supported the denial with a declaration from

counsel. This declaration described deposition testimony but did not introduce the testimony itself. CP 12-13.

At oral argument the trial court asked plaintiff's counsel why he had not introduced verified facts with the response. Counsel said that in its motion Performance had not challenged the plaintiff's ability to prove any element of the CPA claim or any fact relevant to the claim, and the facts recited in the response had been drawn from the complaint only to demonstrate that common law fraud was not an element of the CPA claim. The judge seemed to have misunderstood counsel's argument to be that the moving papers gave inadequate notice that dismissal of both claims was being requested; he pointed out to counsel that the title of the motion made it clear Performance was requesting dismissal of the entire case.

4. ARGUMENT

Performance did not raise the CPA claim in its motion for summary judgment.

Megan Felske made two distinct and independent claims in her complaint, common law fraud and a violation of the Consumer Protection Act. CP 39-40. Performance filed a Motion for Judgment on the Pleadings and Motion for Summary Judgment in which it

asked the Court to dismiss both claims, but it argued only the fraud claim. CP 26-29. It did not attack the CPA claim because it thought that claim was dependant on the fraud claim.

In the Statement of Facts section of its motion Performance listed paragraphs 16 through 21 of the complaint, all of which pertain to the fraud claim. It did not discuss Paragraphs 22 through 28 of the complaint, which relate to the CPA claim. CP 24. In its Authority and Argument section of the motion Performance walked through the nine elements of common law fraud to show that any falsifying of the credit application could not support a claim of fraud. It didn't discuss any of the elements of a CPA claim. CP 24-29.

Performance ended its motion with a conclusory statement that shows why it did not address the CPA claim:

... the claims for which she now seeks relief have to do with fraud and violations of the Consumer Protection Act (based on the alleged fraud). As demonstrated above, these claims are groundless.

CP 29.

The CPA claim was not based on common law fraud but on an allegation that Performance had engaged in unfair or deceptive acts by which it induced Felske to undertake loans it knew she could not repay. Performance filed its motion after interrogatories

had been exchanged and depositions taken, and after five banks had responded to subpoenas for documents. The parties had developed a large amount of documentary and testimonial evidence, but Performance did not challenge Felske's ability to prove it had engaged in unfair and deceptive acts to get her to sign for loans it knew she could not repay. The most compelling allegation in the complaint was the alteration of the credit application after Felske had signed it, which was done to induce the banks to make the loans. In its motion Performance acknowledged the allegation but did not challenge it:

Even if the falsification alleged by Plaintiff were supported by any evidence, she still lacks standing to pursue a claim of fraud, as she would not have been the party in interest.

CP 27. In fact the motion did not challenge Felske's ability to prove any of the facts alleged in the complaint: that she had told them her highest monthly income had been \$1,440; the credit application she signed listed her income at \$1,440; the monthly payments for the two vehicles they sold her that night totaled \$1,547; and to persuade her to sign the two contracts Performance undertook unfair and deceptive acts including the alteration of the credit application. CP 38-39.

In a summary judgment motion the moving party must clearly state in its opening papers those issues upon which summary judgment is sought.

In an environmental law case this Court reversed the summary judgment dismissal of a spot zoning claim because the claim had not been raised in the initial motion. Serles v. City of Kirkland, 159 Wn.App. 616, 246 P.3d 822 (2011). Davidson Serles had made several claims, most of which involved plans and regulations promulgated by Kirkland under the State Environmental Policy Act ("SEPA"). But one claim was constitutional, a spot zoning claim. The trial court found that it lacked subject matter jurisdiction to hear any of the claims because they could properly be raised only before the Growth Management Hearings Board. It dismissed them all. The appellate court affirmed the dismissal of those claims based on plans promulgated under SEPA, but it held that the spot zoning claim had been improperly dismissed because "the moving parties failed to timely raise the spot zoning issue in the summary judgment proceeding." Id. at 619. It held the moving party must raise the issues on which it seeks summary judgment, and the nonmoving party had not put the spot zoning issue before the court simply by addressing it in its response:

The City and Touchstone contend that the spot zoning claim was adequately raised so as to be an appropriate basis for summary judgment because Davidson raised it in its responsive memorandum and at oral argument. The parties have not submitted a transcript of the hearing for our review on appeal. Davidson's responsive memorandum raises the issue *only to emphasize that the claim was not a subject of the present motion for summary judgment*. Thus, the City's contention that the spot zoning claim was adequately raised is without support.

Id. at footnote 15 (emphasis added).

In our case Felske made a prima facie case for the CPA claim in her response only to show Performance had not raised it simply by arguing the fraud claim. She raised the alleged alteration of the credit application in applying the Hangman Ridge elements to the facts alleged in the complaint. None of these facts had been challenged in Performance's motion. The CPA claim was not before the trial court:

In sum, it is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought. If the moving party fails to do so, it may either strike and refile its motion or raise the new issues in another hearing at a later date.

Gladys M. White v. Kent Med. Ctr., Inc., 61 Wn.App. 163, 168, 810

P.2d 4 (1991).

Fraud is not a necessary element of a CPA claim.

In its motion Performance relied on an erroneous assumption that the fraud claim was an essential element of the CPA claim. It did not discuss the elements the Supreme Court has listed as necessary to prove a violation of Washington's Consumer Protection Act:

... a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.

Hangman Ridge at 780.

The statutory language of the CPA does not define the term "unfair or deceptive" but it lists sources to which Washington courts should look for guidance in construing its provisions, including the Federal Trade Commission. RCW 19.86.920. The Washington Appellate Court has described the criteria used by the FTC to decide whether an act is unfair:

The federal statute dealing with matters similar to those involved in the Consumer Protection Act is section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, which also prohibits unfair practices. To determine whether a practice or act is unfair, the Federal Trade Commission has established the following three criteria, which have been cited with approval by federal courts: "(1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has

been established by statutes, the common law or otherwise--whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other business men)."

Blake v. Federal Way Cycle Center, 40 Wn.App. 302, 310, 698

P.2d 578. Felske cannot shoehorn the misrepresentation in the credit application into a common law fraud claim. But she can prove at trial that the sales tactics of Performance fall squarely within "the penumbra of some common-law, statutory, or other established concept of unfairness", because making a false statement to influence an institution insured by the FDIC to make a loan violates federal criminal law. 18 U.S.C. § 1014. She can show unethical and unscrupulous acts and statements by Performance occurring in trade or commerce and affecting the public interest. She can show its actions caused substantial injury to herself and the bank that made the loan. It was error to dismiss the CPA claim because in its moving papers Performance never challenged her ability to make these showings.

In its reply brief Performance for the first time attacked one of the elements in the CPA claim.

In White this Court reversed summary judgment in a case where the moving party raised a dispositive issue in its reply rather than in the initial motion. Gladys White filed a personal injury complaint alleging that the Kent Medical Center and its doctors negligently failed to conduct appropriate tests or refer her to appropriate specialists. The Medical Center moved for dismissal on summary judgment. It argued that White lacked admissible expert testimony regarding the standard of care applicable to the defendants. White responded by offering excerpts from depositions to establish the standard of care. White at 166.

The Medical Center then filed a reply in which it argued for the first time that White had not shown causation. It argued that White had brought in the issue of proximate cause when she supported her response with deposition excerpts that included discussion of causation. The trial court granted summary judgment to the Medical Center, ruling that White had not set forth specific facts with respect to the proximate cause issue. Ibid.

The appellate court reversed because the issue of causation had not been before the trial court at the summary judgment

hearing:

Moreover, nothing in CR 56(c), which governs proceedings on a motion for summary judgment, permits the party seeking summary judgment to raise issues at any time other than in its motion and opening memorandum.

Id. at 168. In our case Performance attacked one of the elements in the CPA claim for the first time in its reply brief, the “unfair or deceptive act or practice” prong. The falsifying of the credit application is the most persuasive indicia Felske has adduced that Performance engaged in unfair or deceptive acts, because it is documentary evidence corroborating her testimony. It places the actions of Performance squarely within “some common-law, statutory, or other established concept of unfairness”, because it violates a specific federal statute. And it shows Performance knew she would not be able to repay the loans. She was unable to respond to the attack because it was made in the reply brief.

In its reply Performance cited to deposition testimony about documentary evidence concerning the credit application. CP 8, footnote 2. But rather than introducing the deposition testimony itself counsel described it, and then he authenticated his discussion with his own declaration. Counsel put his own construction on the testimony and the construction was misleading. In fact documents

received from Performance through discovery buttressed Felske's allegation that it had falsified the credit application, and subpoena responses from the banks to which Performance shopped the loans corroborated it. But none of this material was properly before the trial court because Performance had not raised it in its motion.

Challenging the allegation for the first time in its reply was wrong:

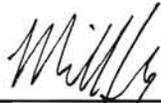
Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond”.

White at 168.

5. CONCLUSION

Megan Felske can prove at trial that Performance, with callous indifference to the damage it would cause her and the lending banks, violated the Washington Consumer Protection Act prohibition against unfair or deceptive acts in commerce that affect the public interest. She can show Performance induced her to undertake loan payments that exceeded her monthly income through misrepresentations, and induced the banks to make the loans by submitting falsified documents. The dismissal of the CPA claim was erroneous because these issues were not before the trial court at summary judgment.

Dated May 30, 2012



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NO. 68509-1-1

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DECLARATION OF SERVICE OF OPENING BRIEF
OF APPELLANT MEGAN FELSKE

I certify that on May 30, 2012, I personally delivered a copy of the
DESIGNATION OF CLERK'S PAPERS to the office of

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Dated May 30, 2012



Michael Healy, WSBA #33756