

NO. 40525-3-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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ADAIR HOMES, INC.,

Plaintiff/Respondent

v.

KASEY BUTLER,

Defendant/Appellant

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE ROGER A. BENNETT

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REPLY BRIEF

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FILED  
COURT OF APPEALS  
DIVISION II  
10 OCT -6 PM 1:20  
STATE OF WASHINGTON  
BY   
DEPUTY

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## INTRODUCTION

This Reply Brief will address the contentions made by Adair Homes, Inc. (Adair) in its brief. Any matter not specifically addressed in this brief was sufficiently covered in the Brief of Appellant.

## ARGUMENT

### I. Adair Committed Unfair or Deceptive Acts.

#### a. Introduction.

Adair contends that it did not commit any unfair or deceptive act because nothing it did was material; because it had no duty to disclose anything; and because any act of its employees did not have the capacity to deceive a substantial portion of the public. Respondent Adair Homes, Inc.'s Brief, p. 15-16. Its analysis is flawed as will be discussed below.

#### b. Adair's Representations and Failures to Disclose Were Material.

Through Jeffrey Potts, Adair represented to Mr. Butler that a thirty-year fixed rate loan would be available to him after construction was completed. Mr. Butler was never told that he would have to qualify anew for such a loan. (CP 148; 165) Mr. Potts also told Mr. Butler that no payments on the construction loan would be required while construction

was ongoing. (CP 160) No one ever disclosed to Mr. Butler the existence of the guarantee agreement between Peter March and Pacific Continental Bank (PCB). Adair claims that the representation and the failure to disclose were not material. The uncontroverted evidence shows that Adair is simply wrong.

Adair bases its argument on its contention that Mr. Butler was indeed granted a loan based upon “his own credit worthiness and the viability of his project,” as Mr. Butler was led to believe. The facts show that this is not true. PCB was willing to loan money to Mr. Butler only because Mr. Marsh had entered into the guarantee agreement with PCB. This fact is clearly demonstrated by the provisions of the agreement. As it states:

**Inducement.** All of the Loan Obligations entered into by Bank with Adair Financial’s customers are secured with collateral often consisting of marginal equity. In order to induce Bank to make such loans, Marsh has agreed to provide additional collateral to Bank and grant Bank a security interest in such additional collateral pursuant to this Agreement.

(CP 228) Mr. Butler’s undisputed testimony is that if he would have known of this arrangement and specifically the fact that PCB considered transactions with Adair’s customers to be so risky as to require this agreement, he would not have entered into the

transaction. There can be no doubt that failure to disclose was material.

Mr. Butler also desired to have a fixed rate loan after the term of the construction loan had expired. Mr. Potts told him he would have this financing. No one told him that he would have to requalify for a loan. Mr. Potts also told Mr. Butler that he would not have to make regular payments on the construction loan while construction was pending. As it turned out, payments were required. Had Mr. Butler also known these facts, he would not have entered into the transaction. (CP 148) These representations and failure to disclose were also material.

Adair's misrepresentations and concealment concerning financing was obviously material to Mr. Butler. Adair's argument to the contrary fails.

c. Adair Was Obligated to Disclose This Information.

Adair states that it had no obligation to disclose the guarantee agreement to Mr. Butler because of the absence of a "special relationship." (Respondent's Brief, pps. 18-19) Adair's duty to disclose, however, inheres in elements of the Consumer Protection Act. The failure to reveal something of material importance amounts to an unfair or deceptive act under the terms of RCW 19.86. *Indoor*

*Billboard/Washington, Inc. v. Integra Telecom of Washington*, 162 Wn.2d 59, 74-75, 170 P.3d 10 (2007); *Griffith v. Centex Real Estate Corp.*, 93 Wn.App. 202, 969 P.2d 486 (1998); *Robinson v. Avis Rent A Car Systems, Inc.*, 106 Wn.App. 104, 116, 22 P.3d 818 (2001).

d. The Misrepresentations and Failures to Disclose Had the Capacity to Deceive a Substantial Portion of the Public.

Adair then claims that the misrepresentations made by Mr. Potts and the failure to disclose the arrangement between Mr. March and PCB did not have the capacity to deceive a substantial portion of the public. Nothing could be further from the truth.

Adair employs scripts for its employees to use in interacting with customers. In these scripts, Adair never told any customer about the contract between Mr. Marsh and PCB. Anything done in a routine sales presentation has the capacity to deceive a substantial portion of the public. *Potter v. Wilbur-Ellis Co.*, 62 Wn.App 318, 327-28, 814 P.2d 670 (1991). More of Adair's customers at its Woodland office secured financing with PCB than with any other lender between 2003 and 2005. The fact that Adair has scripts for its employees to use and the number of its customers that obtained financing with PCB shows that there is no doubt the a capacity to deceive a substantial portion of the public exists here.

e. Mr. Butler's Testimony Concerning Statements of Jeffrey Potts Must Be Credited.

Mr. Butler believed that he was qualified and would receive a thirty (30) year fixed rate loan when construction was completed. He received this information from Jeffrey Potts, Adair's salesperson. (CP 165) Adair has not produced any evidence to the contrary. Mr. Butler's statement must be credited for that reason.

When confronted with Mr. Butler's assertions, Adair was required to present competent evidence by affidavit or otherwise to create a genuine issue of material fact concerning what Mr. Potts told Mr. Butler. It cannot rely on its assertions or its pleadings. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-7, 770 P.2d 182 (1989); *Building Industry Association of Washington v. McCarthy*, 152 Wn.App. 720, 735, 218 P.3d 196 (2009). Adair presented no evidence to controvert Mr. Butler's testimony about his conversations with Mr. Potts. As a result, there is no genuine issue of any material fact on that issue.

Adair also argues that Mr. Butler's testimony is not credible. That is not an argument that Adair can advance at summary judgment. When a court considers such a motion, it does not make credibility determinations. *Herron v. KING Broadcasting Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989). More to the point, an issue of credibility is

present only if the opposing party comes forward with evidence that contradicts or impeaches evidence on a material issue. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 628, 818 P.2d 1056 (1991); *Laguna v. Washington State Department of Transportation*, 146 Wn.App. 260, 266, 192 P.3d 374 (2008). In our case, no credibility determination arises because Adair has submitted no evidence to contradict Mr. Butler's testimony about his discussions with Mr. Potts.

II. The Public Interest Requirement Is Satisfied.

In *Hangman Ridge Training Stables, Inc., v. Safeco Title Insurance Co.*, 105 Wn.2d 778, 790-91, 719 P.2d 531 (1986), the Court set out the factors that should be considered to see whether the public interest requirement of a Consumer Protection Act claim has been satisfied. It gave two sets of factors based on whether the dispute was a "consumer transaction" or a "private dispute." It noted that no one specific factor was dispositive and that the critical issue is potential for repetition. The factors are set out in Appellant's Brief at page 31.

First of all, Adair contends that its business with Mr. Butler must be considered a "private transaction" notwithstanding the fact that it conceives itself as a "volume builder" and that it engages in extensive advertising. In *Hangman Ridge Training Stables, Inc. v. Safeco Title*

*Insurance Co.*, *supra*, 105 Wn.2d at 790, the Court stated that a transaction involving the purchase of a mobile home was a “consumer transaction.” Adair has not even attempted to distinguish its business from that of mobile home sales for this purpose—both businesses provide housing to consumers. It is also important that another volume builder conceded the presence of the public interest requirement in *Griffith v. Centex Real Estate Corp.* *supra*. Clearly, the public interest requirement should be evaluated by using the factors applicable to “consumer transactions.”

The public interest requirement is also met if the transaction is considered a private dispute. The first factor—whether the acts occurred in Adair’s business—is clearly satisfied. The second factor—whether Adair advertises to the general public—is also present. This advertising includes references to financing that can be obtained. The third factor is whether Adair solicited Mr. Butler thereby indicating potential solicitation of others. Adair makes much of the fact that Mr. Butler was referred to Adair by an associate. That makes no difference. The key aspect of this factor is the potential solicitation of others. That factor is present because of Adair’s advertising which includes advertising related to financing. The final factor is whether the parties occupied unequal bargaining positions. This factor is satisfied as well. Adair utilizes a routinized program and

preprinted contract form. It does not deviate. Mr. Butler was approached on a “take it or leave it” basis without room for negotiation. The only equality of bargaining position that Mr. Butler had was his refusal to accept Adair’s program.

As the Court noted in *Hangman Ridge Training Stables, Inc., v. Safeco Title Insurance Co., supra*, the key issue in the public interest requirement is the potential for repetition. That is clearly and obviously present based on facts that are undisputed. Adair advertises extensively. Its advertising includes the availability of financing. Adair uses pre-established “scripts” in its interactions with its customers. Ninety of 211 of Adair’s customers at its Woodland office between 2003 and 2006 secured financing through PCB. (CP 151, 318) Adair specifically guaranteed loans for nineteen of its customers including Mr. Butler and posted money from its credit line for that purpose. (CP 250) Finally, none of Adair’s customers were told of PCB’s agreement with Mr. Marsh. These facts demonstrate that the potential for repetition is obvious.

The potential for repetition is also established in Mr. Potts’ failure to coach Mr. Butler adequately through the process. Adair personnel specifically noted that Mr. Potts had fallen short in this area on several different occasions. (CP 379) Mr. Butler was not alone. There was actual repetition if not the potential for repetition.

III. Mr. Butler Was Injured.

Mr. Butler lost money as a result of his involvement with Adair. He purchased land that he otherwise would not have bought and he paid money from his own funds for interest on loans and for construction related expenses. He is now exposed to a judgment on the loans from PCB. Notwithstanding these uncontroverted facts, Adair argues that Mr. Butler was not injured. Its argument must be rejected.

Injury is sufficient even if it is slight and even if no monetary damages can be proven. If a claimant loses money as a result of the improper conduct, however, the injury requirement is satisfied. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735,740, 733 P.2d 208 (1987); *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 742 P.2d 142 (1990). Since Mr. Butler clearly lost money, the element of injury is present.

IV. The Element of Causation Is Satisfied.

In this case, Adair failed to disclose its arrangement with PCB. Mr. Potts represented that no monthly payments on the construction loan would be required. He also stated that Mr. Butler would have a fixed loan after the term of a construction loan had ended without the necessity of requalifying for financing. Adair indicates that there is no demonstration

of proximate cause between these misrepresentations and Mr. Butler's injuries. It is simply wrong.

When a person alleges damages under the Consumer Protection Act and claims that there has been an affirmative misrepresentation of facts, that claimant must also show some causal link between the misrepresentation and the injury. Reliance on an affirmative misrepresentation may establish this causal link. It is not the exclusive method, however. Payment of a deceptive invoice may also be sufficient to establish the causal connection. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, supra*. As Mr. Butler stated, he relief on what Mr. Potts had to say. The element of causation is satisfied.

Mr. Butler was not told about the arrangement between Mr. March and PCB. When the deceptive act consists of failure to disclose, proof of reliance is not necessary to establish causation. That is the rule because it is virtually impossible to prove reliance in cases alleging nondisclosure of material facts. *Schnall v. AT&T Wireless Services, Inc.*, 139 Wn.App. 280, 291, 161 P.3d 395 (2007), reversed on other grounds, 168 Wn.2d 125, 225 P.3d 929 (2010), quoting from *Morris v. International Yogurt Co.*, 107 Wn.2d 314, 328, 729 P.2d 33 (1986). While not specifically holding to this effect, the Supreme Court has expressed agreement with this notion.

As it stated in *Panag v. Farmers Insurance Company of Washington*, 166

Wn.2d 27, 59, *fn.* 15, 204 P.3d 885 (2009):

It is less clear whether this court rejected (the) position that proof of reliance is always necessary to establish causation. Depending on the deceptive practice at issue and the relationship between the parties, the plaintiff may need to prove reliance to establish causation. . . . Most courts have concluded a private right of action under state consumer protection law does not necessarily require proof of reliance, consistently with legislative intent to ease the burden ordinarily applicable in cases of fraud. See, e.g., *Sanders v. Francis*, 277 Or. 593, 561 P.2d 1003 (1977), (proof of reliance necessary in claim alleging claim of false advertising but no necessary where deceptive act involves material omission... *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 745 (1995) (“while the statute does not require proof of justifiable reliance, a plaintiff seeking compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual, although not necessarily pecuniary, harm”).

(Emphasis added) Nonetheless, Mr. Butler has clearly stated that he would not have become involved in the transaction had he known that his venture was so risky that his lender required a guaranty by Mr. Marsh, an undertaking not disclosed to him. Causation is clearly present.

Finally Adair argues that the parol evidence rule somehow eliminates a finding of causation. This argument makes no sense. The parol evidence rule does not preclude admission of evidence tending to show fraud or other illegality in connection with a written contract.

Tegland *Evidence Law and Practice*, 5C Wash.Prac. § 1200.17 (2007)

Adair's contention must be rejected.

V. Mr. Butler's Consumer Protection Claim Based on Matters within the Construction Process Is Not Subject to Arbitration.

a. Introduction.

Adair continues to defend the trial court's determination that Mr. Butler's Consumer Protection Act claims relating to the construction process were subject to arbitration. The arguments Adair makes in this regard lack merit.

b. The Arbitration Provision Is Unconscionable.

The arbitration clause in Adair's contract prohibits attorneys from appearing in arbitration proceedings. This provision gives Adair an unfair advantage over its customers in any arbitration proceeding. Adair is a volume builder. It uses a routinized program and a preprinted contract form. It can be expected to be quite familiar with its construction processes, the terms of its contract, and construct law generally. By contrast, its customers are consumers who can be expected to have a limited knowledge in the area. They may well need to utilize the services of an attorney—especially one well versed in construction issues to combat the claims and defenses that Adair may employ. The provision forecloses Adair's customers from using that resource. Prohibiting the use

of an attorney also denies Adair's customers access to legal knowledge that an attorney may possess. This would include, but not be limited to, knowledge of the rule that any ambiguity in Adair's contract must be construed against it; that Adair's customers may have rights under the Consumer Protection Act; and that Adair's personnel can be forced to produce documents and submit to depositions during the course of arbitration proceedings. Furthermore, an attorney is a trained advocate who can effectively present his or her client's case to an arbitrator. Adair obviously does not want that to occur.

Adair alleges that the arbitration clause is not unconscionable because neither side can utilize the services of an attorney. That explanation does not hold water. Adair obviously believes that the prohibition of attorneys in arbitration proceedings was in its best interest. It has concluded that its foregoing of counsel is a small and acceptable price to pay to eliminate the possibility that one of its customers would engage an attorney in an arbitration proceeding.

Throughout our country's history, the attorney has functioned to level the playing field between the large corporation or institution on the one hand and the less well heeled individual on the other. Adair obviously wants to eliminate this salutary effect by forcing its customers into an arbitration proceeding where they are inherently at a

disadvantage. The provision prohibiting use of attorneys is clearly unconscionable.

c. Adair Waived Mediation and Arbitration.

Adair claims that it cannot be held to have waived mediation and arbitration because it had no knowledge that Mr. Butler was making claims related to the construction process prior to his response to its summary judgment motion. That argument is belied by the facts.

Adair's first learned that Mr. Butler had concerns about the construction process in June of 2008. Its attorney had written a demand letter to Mr. Butler. His attorney responded by referring to the arbitration and mediation provisions of the contract and by suggesting that the parties engage in mediation. (CP 394) In September of 2008, Adair's attorney stated that no mediation would occur because Adair was not suing on the construction contract. (CP 395) Apparently, Adair did not consider the possibility that Mr. Butler might wish to make claims concerning the construction process.

Suit was filed in this matter in September of 2008. Mr. Butler then propounded Interrogatories and Requests for Production. Adair did not give full and complete answers or furnish all the documents that were requested. (CP 439-51) Nonetheless, it moved for summary judgment on January 5, 2009. (CP 52-53) Mr. Butler responded with a

motion to continue the summary judgment hearing and a Motion for CR 37 Relief to compel Adair to respond to interrogatories and produce documents. Both were filed on January 6, 2009. (CP 431-51) In the Motion to Continue, Mr. Butler gave a brief synopsis of the claims he intended to make. Among other things, he stated:

Construction of the home became difficult because Adair personnel did not accurately advise Mr. Butler of the problems he would encounter with excavation of the site. They also did not advise him of construction practices that held up work on the project. These problems caused expenditure of more than the estimate Adair had given for the work Mr. Butler was to complete.

(CP 433) He also made it clear that his Consumer Protection Act claim would relate to issues within the construction process. As he stated:

. . . Mr. Butler has made a claim against Adair under the Consumer Protection Act, RCW 19.86. To prevail, he must show an unfair or deceptive practice done in the course of a trade or business causing him damage and affecting the public interest. . . Adair's incorrect excavation estimate especially after its representatives viewed the site can amount to such a violation. *Eastlake Construction v. Hess*, 102 Wn.2d 30 (1984). . .

(CP 437) Mr. Butler also requested copies of all arbitration demands. (CP 443-44) Obviously, arbitration demands would be related to the construction process.

Adair understood that Mr. Butler was making a claim relating to the construction process. In its response to the motion to compel, it noted that Mr. Butler would have to arbitrate any claims related to the construction of a home. (CP 463) In response to the motion to continue, it stated:

Defendant correctly asserts that any claims arising as a result of (the construction) agreement must be mediated and arbitrated. Thus, any claim by defendant against Adair Homes relating to the construction of defendant's home may not be brought in this venue and the "investigation" of such a claim is not a valid reason for delaying the hearing on Adair Home's Motion for Summary Judgment.

(CP 469)

Despite Adair's clear knowledge that Mr. Butler intended to pursue a Consumer Protection Act claim regarding construction practices, it failed to seek mediation or move for arbitration. Rather, it propounded interrogatories and requests for production to Mr. Butler. (CP 395) It took Mr. Butler's deposition. (CP 326-62) It moved for summary judgment to dismiss all aspects of Mr. Butler's Consumer Protection Act claim. (CP 52-54) Waiver in this case is obvious.

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CONCLUSION

The trial court erred in granting Adair's motion for summary judgment dismissing Mr. Butler's Consumer Protection Act claim. Consequently, and for reasons stated in Appellant's Brief, it erred in entering the General Judgment and the Supplemental Judgment. The unrefuted facts show that Mr. Butler is entitled to relief under the Consumer Protection Act. The matter should be remanded to the trial court for a determination of his damages. Mr. Butler should also be awarded his attorney's fees.

RESPECTFULLY SUBMITTED this 4 day of Oct.,

2010.

  
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