

No. 40821-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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IDENTITY

RONALD GARNER and MARILYN GARNER, husband and wife,

Appellants,

v.

THE ESTATE OF JOLYN HAMILTON,

Respondent.

APPELLANTS' REPLY BRIEF

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As the Appellants Ronald and Marilyn Garner (hereafter referred to as “the Garners”) noted in their initial brief, Appellate Courts review findings of fact “under a substantial evidence standard.” *Pardee v. Jolly*, 163 Wash.2d 558, 566, 182 P.3d 967 (2008). “Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted.” *Cingular Wireless, L.L. C. v. Thurston County*, 131 Wash.App. 756, 768, 129 P.3d 300 (2006). In the end “[a] trial court’s findings of fact must justify its conclusions of law.” *Hegwine v. Longview Fibre Co.*, 162 Wash.2d 340, 353, 172 P.3d 688 (2007).

The Garners demonstrated in their brief that the Trial Court’s Findings of Fact are not supported by substantial evidence, and indeed that not even the evidence most favorable to Respondent The Estate of Hamilton (hereafter referred to as “Hamilton”) - the evidence introduced by Hamilton itself - could support the Trial Court’s Findings. Rather than defend the Trial Court’s decision by citing to specific facts in the record that support the Trial Court’s findings, Hamilton instead repeatedly asserts that the Trial Court’s findings were in fact erroneous. Hamilton then goes on to substitute its own version of the facts for those of the Trial Court, arguing that the Trial Court’s findings should be revised in its favor.

Following the filing of its Brief, Hamilton withdrew its own cross-appeal, which has thus been dismissed. Yet Hamilton has not filed a revised brief or withdrawn its arguments that the Trial Court erred. Because Hamilton has not identified any portion of the record that supports the Trial Court's disputed findings, and because the clear evidence in the record actually establishes that the disputed findings were made in error, this Court should reverse those portions of the Trial Court's Findings of Fact, Conclusions of Law and Judgment that are at issue in the Garners' appeal.

A. The net amount of accounts receivable due to the Garners, as reflected in the summary provided at trial by Gary Hamilton, was \$53,992.11.

The trial court found that the parties agreed at trial that the net accounts receivable at closing due to the Garners was \$41,025.00. (Finding of Fact 10 at CP 44) However, there is no support in the record for this finding.

In its brief, Hamilton acknowledges that there was no testimony or other evidence of an agreement that the accounts receivable were \$41,025.00. Instead, Hamilton states in its brief that "[Gary] Hamilton testified that he offered \$41,000.00 and that it was his understanding that Garner had agreed to accept that amount. (March 31st RP 9) [Ron] Garner also testified that he

would have taken that amount. (March 31st RP 9)” These statements, however, are wholly, breathtakingly false.

Reviewing the Report of Proceedings for March 31st, Gary Hamilton was under direct examination by his attorney. At no time during his testimony, either at page 9 or elsewhere, did Mr. Hamilton ever state that he offered to pay any amount, much less \$41,000.00. Instead, at page 4, lines 22-25, he was asked by counsel whether he at some point after closing went “through and rerun the numbers that you thought reflected a more adequate depiction of what you thought the accounts receivable were?” At page 5 he stated that he had and went on to explain that he prepared Trial Exhibit 39 to calculate what he believed the accounts receivable to actually be, while at the same time noting out that he did not believe he actually owed the amount he calculated the number to be.

Q. So at that point, you believed that \$41,675.49 was owed?

A. No. I believed that was the true number that should have been at the bottom of that tape and on the e-mail.

March 31st RP 5, lines 15-17.

At page 9, lines 9-12 of his testimony, Mr. Hamilton testified that Mr. Garner called him and offered to accept \$41,000.00 if it was paid immediately, but nowhere does he testify that he agreed to

pay the \$41,000.00 Mr. Garner offered to accept, much less that he paid it immediately as required by Mr. Garner's offer. Nor did Mr. Garner, despite the claim in Hamilton's brief, testify at all on March 31st, much less "testified that he would have taken that amount" at RP 9. Mr. Hamilton's testimony that Mr. Garner made the offer most certainly does not constitute testimony by Mr. Garner as Hamilton inexplicably alleges in its brief.

Following the outright falsehoods referenced above, Hamilton devotes the entire remaining portion of this section of its brief to arguing that the amount of accounts receivable actually owed by Hamilton to Garner was "not concretely established". Hamilton concludes by asserting that, far from the Trial Court being correct that the parties agreed at trial the amount was \$41,025.00, the actual amount should actually be a negative balance of \$45,774.92, which amount should be credited to Hamilton. (Hamilton Brief, page 15) Hamilton has subsequently withdrawn its cross-appeal, yet has filed no revised brief attempting to uphold the Trial Court's findings.

Despite Hamilton's misstatements of fact and rather bizarre arguments, the facts are very simple. The Garners complaint sought \$67,840.06 as the net accounts receivable due after closing

under the parties' purchase and sale agreement. (CP 1-2, 17-19)
Mr. Garner testified at trial that this was the net amount due after crediting an additional unanticipated overdraft and some monies owed to Garner Trucking by the Garners' separate company, Quality Hay. (March 29th RP 28-30)

As Hamilton acknowledges in its brief, Mr. Hamilton presented an alternative figure of \$41,675.49 at trial in Exhibit 39, which was the result of his handwritten calculations made to account for problems he noticed after closing. (March 31st RP 4-5)
Mr. Hamilton's testimony on cross examination demonstrated, however, and Hamilton does not at all dispute in its brief, that the last line item deduction contained in Ex. 39, in the amount of \$12,316.62, was a double deduction of certain accounts payable from page 2 of the Leadsheet Grouping (pages 2 and 3 of Ex. 39) listed as "O/O Reserve" items, which had already been deducted by CPA Robin Nichols prior to closing.

Crediting back that improper deduction, the evidence most favorable to Hamilton – that submitted by Hamilton through Mr. Hamilton - shows that the net accounts receivable owed to the Garners should have been \$53,992.11. This Court should therefore reverse the Trial Court's Finding of Fact 10 that the

amount of accounts receivable owed by Hamilton to Garner was only \$41,025.00, which is not supported by any evidence in the record, and hold that the correct amount owed by Hamilton was \$53,992.11.

B. The net unaccounted overdraft in the Company's checking account at closing was \$13,245.96, not the \$54,000.00 found by the trial court.

The trial court found at Finding of Fact 11 that Hamilton had presented evidence that there was an overdraft in the Company's checking account after closing in the amount of \$97,000.00. The trial court went on to find that the parties had accounted for \$43,000.00 of that overdraft, leaving an unaccounted for overdraft of \$54,000.00. (Finding of Fact 11 at CP 44)

Rather than point to evidence supporting the Trial Court's finding, Hamilton again substitutes its own figures, stating that the amount the parties had accounted for in Exhibit 15 was actually \$40,674.00, not \$43,000.00 as the Trial Court found. Hamilton then goes on to acknowledge that Mr. Hamilton, in determining the amount of accounts receivable actually due (Exhibit 39 discussed in the prior section above) also deducted an overdraft of \$43,079.01 from the accounts receivable due.

Thus, just as Garner asserted in its brief, \$84,746.52 in overdrafts was accounted for by the parties, either prior to closing or in Mr. Hamilton's Exhibit 39 accounting. Hamilton asserts, however, that while the Trial Court's factual findings were "somewhat inaccurate" (Hamilton Brief, page 16) they should nonetheless be upheld, because it asserts that the Trial Court properly "concluded" that the \$43,079.01 overdraft check played no role in the \$97,000.00 overdraft at closing.

Hamilton points to no Conclusion of Law making this "conclusion", precisely because there is no such conclusion. Nor does either Mr. Hamilton's testimony or the bank records contained in Trial Exhibit 42 provide any factual support for Hamilton's suppositions.

Mr. Hamilton did testify at trial that the checking account was overdrawn by \$97,000.00 at closing. His attorney then specifically asked "what was that \$97,000.00 attributable to?" Mr. Hamilton answered that "Part of it was money that Ron had written myself (sic) checks to. Part of it was the \$40,000.00 shown on the balance sheet that it was over. (March 31st RP 58, lines 16-19) Thus Mr. Hamilton himself at trial acknowledged that part of the overdraft had been accounted for by the parties prior to closing, and part of the

overdraft was caused by the checks Mr. Garner had written to himself – the checks totaling \$43,079.01 that Mr. Garner wrote to himself.

And while Mr. Hamilton claimed in his testimony that there were growing overdrafts that ultimately came to \$150,000.00 or more, the July 2006 bank statement included in Exhibit 42 shows that the minimum balance in the account in the month of July was an overdraft of only \$2,059.73. Hamilton's own documentary evidence thus contradicted Mr. Hamilton's bald claims of massive overdrafts. There was never an actual overdraft at the bank, the overdrafts instead being on paper, reflected in the check register as checks were written.

The \$43,079.01 check that Mr. Garner wrote to himself was dated June 30, 2006. It was reflected in the check register at the time of closing on July 19, 2006, though the parties had failed to account for the check in the Exhibit 15 accounting prepared by CPA Robin Nichols prior to closing. Mr. Garner discovered the mistake, and thus deducted the additional overdraft in determining the net accounts receivable sought in his complaint - \$67,840.06. (CP 1-2, 17-19, March 29th RP 28-30)

And, as discussed in the previous section, Mr. Hamilton also discovered the mistake and accounted for it in his Exhibit 39 revisions to Ms. Nichols' accounting, in which he determined that the net accounts receivable due to the Garners was only \$41,675.49 (though, as discussed in the previous section, the correct figure was actually \$53,992.11).

So it is clear that the parties initially accounted for an anticipated overdraft of \$40,674.00 in Exhibit 15, and both parties accounted for the subsequent overdraft of \$43,079.01 in their calculations as to the net accounts receivable due to the Garners. The parties thus accounted for \$83,754.04 of the overdraft, and that accounting was used to calculate the amount of accounts receivable owed to the Garners as discussed in the preceding section. The net unaccounted for overdraft was therefore actually only \$13,245.96 (\$97,000.00 - \$83,754.04), not the \$54,000.00 found by the trial court and awarded to Hamilton.

C. Hamilton failed to prove damages, or to mitigate its claimed damages, related to Trucks 201 and 251 and should not have been awarded any damages for those trucks.

In their brief, the Garners noted that Mr. Hamilton claimed that he was unaware prior to closing that the Company had purchased Trucks 201 and 251. However, Mr. Hamilton also

acknowledged at trial that he never complained about these two trucks to Mr. Garner at any time after closing. (March 31st RP 111-113, 118-119) The Garners thus asserted that Hamilton failed to mitigate its damages, and further that it ratified and accepted the trucks by remaining silent and accepting the benefits of the trucks.

In response, Hamilton does not claim that Mr. Hamilton made any complaint regarding the trucks, or even that he made any effort to either return the trucks or to sell them. Instead, it points to Mr. Hamilton's testimony that the cross collateralization of the trucks prevented them from being sold, though at no time did Mr. Hamilton claim that he made absolutely any effort to sell or refinance the trucks.

But again, the record shows that shortly after closing, Mr. Hamilton complained about a host of issues he believed he had discovered after closing. Exs. 4 and 6. His complaints were quite detailed, even addressing such minor issues as a \$289.19 printer and a fax number, yet at no time did Mr. Hamilton ever even mention Trucks 201 or 251, much less complain about them. Instead, for either 29 months after closing as the Trial Court found, or 16 months as Hamilton now asserts in its brief, Hamilton kept the trucks and made payments on them, using them in its business and

raising no complaint about them.

The undisputed testimony at trial was that, had Mr. Hamilton not wanted the trucks, Mr. Garner had other parties interested in them and could have arranged to transfer the trucks to other trucking companies owned by friends of his. (March 29th RP 59) A party simply cannot accept the benefit provided by an asset – in this case two trucks - for over two years without complaint and then change its mind and seek damages for all payments made on the asset during the intervening years. Even if Hamilton did not ratify its purchase of the two trucks by its actions, it certainly cannot be entitled to damages based on the number of months it decided to make payments on them, as that simply is not a basis for determining damages. Nor is Hamilton entitled to any damages when it made no effort whatsoever to mitigate those damages.

There is no basis for the Trial Court's award of damages against the Garners related to the two trucks, the Trial Court's decision must be reversed and the judgment vacated.

D. **The evidence at trial conclusively demonstrated that Hamilton was, despite its initial claims to the contrary, aware of the leases for trailers 5517, 5518, 5521 and 5522 prior to closing.**

Hamilton claimed at trial, as it does again in its brief, that had Mr. Hamilton known that trailers 5517, 5518, 5521 and 5522 were

TRAC leased, he would not have purchased the company. (Respondent's Brief, page 23, March 31st RP 51) In support of this contention, Mr. Hamilton claimed that, although Exhibit A to the Purchase and Sale Agreement (Ex. 14.6(A)) clearly listed trailers 5517, 5518, 5521 and 5522 as TRAC leased equipment, that exhibit was not available at closing. (March 31st RP 29, 36-38)

However, as the Garners noted in their Appellate Brief, on cross examination Mr. Hamilton acknowledged that he and his wife had reviewed and initialed an equipment list provided to him by his lender, Wachovia, prior to closing. (March 31, 2010 RP 113-115, Ex. 14.26) That equipment list specifically listed these trailers as being on TRAC leases. Thus, Hamilton's claims that Exhibit A to the Purchase and Sale Agreement was not at closing are irrelevant, as Hamilton's own testimony on cross examination contradicts his claim not to have been aware of the TRAC leases prior to closing.

Rather than address this fatal flaw in Hamilton's claim, Hamilton simply rehashes its arguments that Exhibit A to the Purchase and Sale Agreement was not available at closing. Hamilton makes no attempt to respond to the actual issues raised in the Garners' appeal, much less explain how Hamilton could actually have been unaware of the TRAC leases after having

specifically reviewed and initialed a list showing those TRAC leases that was provided to Mr. Hamilton by his own bank at closing.

It does not matter whether Mr. Hamilton saw a particular piece of paper prior to closing. Instead, the issue is whether Mr. Hamilton knew of the TRAC leases prior to closing. Mr. Hamilton acknowledges that prior to closing he reviewed and initialed an equipment list listing these four trailers as being TRAC leased.

Hamilton was thus clearly aware prior to closing that the trailers were TRAC leased. As it elected to close with that knowledge, it cannot claim damages related to those trailers.

CONCLUSION

The trial court erred in finding that the net amount of accounts receivable due to the Garners was \$41,025.00, as the actual amount reflected in the summary provided by Gary Hamilton at trial was \$53,992.11. The trial court also erred in finding that the net unaccounted overdraft in Garner Trucking's checking account at closing was \$54,000.00, as the actual figure as testified by both Mr. Hamilton and Mr. Garner was \$13,245.96.

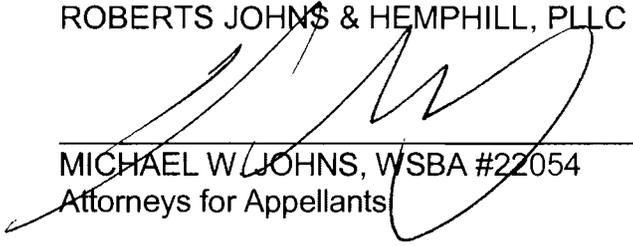
The trial court further erred in finding that Hamilton proved damages of \$34,233.00 for Truck 201 and \$30,912.00 for Truck 251, damages of \$21,288.00 for Trailers 5517 and 5518 and

damages of \$31,504.00 for Trailers 5521 and 5522, and by failing to determine that Hamilton had failed to mitigate its claimed damages.

Correcting the errors reflected above, the net judgment awarded to Hamilton in the amount of \$72,567.93 should be vacated and this matter should be remanded to the trial court for entry of a net judgment in the amount of \$68,178.22 in favor of the Garners.

Respectfully submitted this 7th day December, 2010.

ROBERTS JOHNS & HEMPHILL, PLLC



MICHAEL W. JOHNS, WSBA #22054
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing APPELLANTS' REPLY BRIEF on the following individuals in the manner indicated:

Kristina A. Driessen
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(X) Via Hand Delivery (ABC Legal Messengers)

SIGNED this 7th day of December, 2010, at Gig Harbor, Washington.


KRISTINE R. PYLE

BY _____
10/11/10 10:07 AM
STEN...
10/11/10 10:07 AM