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COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION II

NO. 44473-9-II

FRANK HENSLEY and MARLYCE HANSEN, Appellants

v.

HERITOR, INC., *et. al.*, Respondents

BRIEF OF APPELLANTS

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INTRODUCTION

Ripplewood is a community of approximately 104 lots in southwest Mason county, not far from Elma. The plaintiffs own six of the lots. There is a community water system. Defendant Miller Utilities owns the well and an interest in the water system. Defendant Heritor claims ownership of the water system. The water system serves only 19 of the lots. Approximately 85 lots, including the lots owned by the plaintiffs, have no water service.

Water systems are regulated by the Washington Department of Health. The water system does not meet Department of Health requirements. Consequently, for twelve years, the Department of Health has prohibited additional connections to the system. Defendants Miller Utilities and Heritor cannot lawfully supply water to the lots owned by the plaintiffs. As a result, the value of each of the plaintiffs' six lots is \$5,000 less than it would be if water service was available. The plaintiffs seek damages for the defendants' failure to make water service available and ask that the damages be trebled to the extent permitted by the Consumer Protection Act. At trial, after the plaintiffs rested, the court dismissed the case.

ASSIGNMENTS OF ERROR

1. The trial court erred in adopting Finding of Fact No. 1. The plaintiffs

showed that the defendants breached duties under both state law and the plat to provide water service to their six lots. The findings of fact make no mention of the duty under state law. Even if no duty existed under the plat, the separate duty under state law remains.

2. The trial court erred in adopting Finding of Fact No. 2. Plaintiff Hensley testified that he wants to sell the lots and that the lack of water service has resulted in a substantial diminution in the value of the lots. That the plaintiffs want to assure that water service is available to their successors in interest does not defeat their claim.

3. The trial court erred in adopting Finding of Fact No. 3. The plaintiffs proffered ample evidence to support their claim under the Consumer Protection Act.

4. The trial court erred by dismissing the case.

STANDARD OF REVIEW

In granting a CR 41(b)(3) motion to dismiss, a trial court may either weigh the evidence and make a factual determination that the plaintiff failed to come forth with credible evidence of a prima facie case, or may view the evidence in the light most favorable to the plaintiff and rule, as a matter of law, that the plaintiff failed to establish a *prima facie* case. *Dependency of*

Schermer, 161 Wn.2d 927, 169 P.3d 452 (2007)(citing *N. Fiorito Co. v. State*, 69 Wn.2d 616, 618 - 619, 419 P.2d 586 (1966)).

When the trial court acts as a fact finder, appellate review is limited to whether substantial evidence supports the trial court's findings and whether the findings support its conclusion of law. *Id.* at 440 (citing *Nelson Constr. Co. of Ferndale, Inc., v. Port of Bremerton*, 20 Wn. App. 321, 582 P.2d 511, review denied, 91 Wn.2d 1002 (1978)). The trial court entered findings of fact and conclusions of law (RP 145, CP 4 - 6). Consequently, the standard of review is whether substantial evidence supports the trial court's findings and whether the findings support its conclusion of law.

STATEMENT OF THE CASE

Procedural History

The case was tried November 6, 2012 before Judge Amber Findlay. On December 27, 2012, Judge Findlay entered an order that dismissed the case (RP page 145, CP 4 - 6).

Statement of Facts

The Ripplewood community is comprised of approximately 104 lots in southwest Mason county, not far from Elma (Exhibit 2). The plat of Ripplewood states in part as follows:

WATER SYSTEM

Seller agrees to install a water system upon sale of 50% of the lots, or within 2 years time for the use of Buyer and Buyer agrees to use said water system when it is installed and approved by the Public Health Department of the State of Washington.

(Id.).

There is a community water system with a well; defendant Miller Utilities owns the lot where the well is located and an interest in the water system (RP page 2 lines 1 - 5 and Exhibit 4). Defendant George Miller is the owner, president and sole corporate officer of Miller Utilities (RP page 3 lines 1 - 3 and Exhibit 5). Defendant Heritor claims ownership of the water system (RP page 2 lines 21 - 24). Defendant Tiffany owns Heritor, and is the sole corporate officer (RP page 3 lines 3 - 5 and Exhibit 8).

Water systems are regulated by the Washington Department of Health (RP page 124 lines 3 - 7, page 125 line 3 - page 126 line 9 and Exhibit 13). The water system does not meet Department of Health requirements (*Id.*). The water system currently serves 19 customers (RP page 116 lines 7 - 9). Because the system does not meet Department of Health requirements, the department prohibits any additional connections to the system (RP page 127 lines 7 - 19 and Exhibit 13).

The plaintiffs, Frank Hensley and his wife Marlyce Hansen, own six lots in Ripplewood (RP page 15 lines 11 - 24 and Exhibit 1). Hensley and Hansen do not have water to their lots and water is not available (RP page 29 lines 22 - 25). Hensley and Hansen have attempted to sell the lots (RP page 20 lines 11 - 18). When the plaintiffs learned that water service was not available and informed prospective buyers of that fact, interest in the lots ceased (RP page 103 line 21 - page 104 line 21). As a result of the Department of Health prohibition on additional connections, should Hensley and Hansen sell the lots, water service will not be available for the purchaser (RP page 125 line 3 - page 126 line 9 and Exhibit 13). Consequently, each of the six lots Hensley and Hansen own is worth \$5,000 less than it would be if water service was available (RP page 50 lines 1 - 18 and Exhibit 9). That the plaintiffs do not intend to develop the lots themselves, and therefore do not need water service for their own use is immaterial.

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ARGUMENT

THE EVIDENCE DOES NOT SUPPORT THE FINDINGS OF FACT AND THE FINDINGS OF FACT DO NOT AFFORD A BASIS TO DISMISS THE CASE

I. DEFENDANTS MILLER UTILITIES AND HERITOR ARE BREACHING THE DUTY TO MAKE WATER SERVICE AVAILABLE TO THE LOTS

A. The Duty Imposed By Statute and Administrative Rule

Chapter 70.119A RCW governs public water systems. The Washington State Department of Health regulates water systems under Chapter 70.119A RCW. RCW 70.119A.020(12) defines a public water system as:

“Public water system” means any system, excluding a system serving only one single-family residence and a system with four or fewer connections all of which serve residences on the same farm, providing water for human consumption through pipes or other constructed conveyances, **including any collection, treatment, storage or distribution facilities under control of the purveyor and used primarily in connection with the system; and collection or pretreatment storage facilities not under control of the purveyor but primarily used in connection with the system, including:**

(a) Any collection, treatment, storage, and distribution facilities under control of the purveyor and used primarily in connection with such system; and

(b) Any collection or pretreatment storage facilities not under control of the purveyor which are primarily used in

connection with such system (emphasis supplied).

The water system is a public water system under RCW 70.119A.020 (12). Under RCW 70.119A.020(13) a “purveyor” includes any company or person that owns or operates a public water system. Under RCW 70.119A.020(12), the entire water system, including the well, is subject to Department of Health rules, whether it is under the control of the purveyor or the control of another party. RCW 70.119A.060(1) provides that:

To assure safe and reliable public drinking water and to protect the public health:

(a) Public water systems shall comply with all applicable federal, state, and local rules.

WAC 246-290-420(1) provides that:

All public water systems shall provide an adequate quantity and quality of water in a reliable manner at all times consistent with the requirements of this chapter.

(emphasis supplied).

Under WAC 246-290-420(1), the owners of every component of the water system, including the well, have a duty to supply an adequate quantity and quality of water. The duty exists as a matter of law and does not arise only upon a request for service or payment of a fee. The failure to maintain the water system in compliance with Department of Health requirements

violates WAC 246-290-420(1).

B. The Duty Imposed By The Plat

A plat that contains a covenant to furnish water places an equitable burden or servitude on both the well water and the water system for the benefit of all subsequent lot purchasers. *Brown v. Charlton*, 90 Wn.2d 362, 366, 583 P.2d 1188 (1978). A purchaser of a water system with notice, actual or constructive, of the burden on that system, takes subject to that burden. *Id.* (citing *Quist v. Empire Water Co.*, 269 P. 533 (Calif. 1928), *Henrici v. South Feather Land & Water Co.*, 170 P. 1135 (Calif. 1918) and *Stanislaus Water Co. v. Bachman*, 93 P. 858 (Calif. 1908)). Operation of the water system is evidence of knowledge of the covenant *Id.* at 367.

A servitude in a recorded plat imparts to purchasers of the water system constructive notice of the duty to supply water to the lot owners *Id.* at 367. Lot owners acquire "a right of service". *Id.* (citing *Coulter v. Sausalito Bay Water Co.*, 10 P.2d 780 (Calif. 1932)). The burden of the servitude falls upon the owner of the water system, and lot owners may look to the owner of the system for satisfaction of the servitude. *Id.* at 368. The plat of Ripplewood states in part as follows:

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WATER SYSTEM

Seller agrees to install a water system upon sale of 50% of the lots, or within 2 years time for the use of Buyer and Buyer agrees to use said water system when it is installed and approved by the Public Health Department of the State of Washington.

The servitude in the plat creates a “right of service” and imposes upon the owners of the water system a duty to make water service available to every lot in the plat. That the plaintiffs wish to assure that water is available to their successors in interest is immaterial.

II. THE FAILURE TO MAKE WATER SERVICE AVAILABLE VIOLATES THE CONSUMER PROTECTION ACT

RCW 19.86.020 provides that:

“Unfair ... or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RCW 19.86.090 provides that:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020 ... may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both....

RCW 19.86.090 affords a cause of action when property is harmed by acts or practices that violate RCW 19.86.020 and allows the court to award treble damages up to \$25,000.

A. The Claims Are Not Barred By Brown

The plaintiffs are aware that in *Brown*, the Supreme Court held that failure to supply water in a similar circumstance did not violate the Consumer Protection Act because in RCW 80.04.010, “the legislature has determined that certain small-scale water providers are not subject to public interest regulation.” *Brown*, 90 Wn.2d at 368. However, RCW 80.04.010 was subsequently amended and no longer bars recourse under the Consumer Protection Act.

B. The Hangman Ridge Test Is Met

To prevail on a claim under the Consumer Protection Act a plaintiff must prove: (1) an unfair or deceptive act or practice that; (2) occurred in trade or commerce; (3) impacts the public interest, (4) causes injury to plaintiff in his or her business or property, and (5) the injury is causally linked to the unfair or deceptive act. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602, 200 P.3d 695 (2009) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)).

1. The Acts Or Practices Are Unfair

An act or practice is unfair for purposes of the Consumer Protection Act which:

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.

Magney v. Lincoln Mut. Sav. Bank, 34 Wn. App. 45, 57, 659 P.2d 537, rev. den. 99 Wn.2d 1023 (1983). Also considered is whether the act or practice “causes substantial injury to consumers.” *Id.* (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5, 31 L. Ed.2d 170, 92 S. Ct. 898, 905 (1972)). The failure to comply with Chapter 70.119A RCW and WAC 246-290-420(1), breach of the duty to supply water created by the servitude and depriving the plaintiffs of their “right of service” under *Brown* are unfair acts or practices.

2. The Acts Or Practices Occurred In Trade Or Commerce

RCW 19.86.010(2) provides that trade and commerce include the sale of assets or services. The business of a water purveyor is trade or commerce.

3. The Act Or Practice Has Impact Upon The Public Interest

A private plaintiff must show that the lawsuit serves the public interest. *Michael*, 165 Wn.2d at 605. There must be a likelihood or a real or substantial potential that others will be injured in the same way. *Id.* Protracted conduct impacts the public interest. *Burton v. Ascol*, 105 Wn.2d 344, 350, 715 P.2d 110 (1986)(citing *Eastlake Constr. Co. v. Hess*, 102

Wn.2d 30, 686 P.2d 465 (1985)).

In *Ethridge v. Hwang*, 105 Wn. App. 447, 451 - 452, 20 P.3d 958 (2001), a mobile home park landlord had a pattern and practice of refusing to permit assignment of tenants' rental agreements, denying applications for tenancy and refusing to approve sales of mobile homes in the mobile home park on idiosyncratic, frivolous, unreasonable, and unlawful grounds. The landlord argued that it was an isolated, private transaction that did not affect the public interest. *Id.* at 458. The Court of Appeals held that the conduct had impact upon the public interest. *Id.* Impact upon the owners of 85 unserved Ripplewood lots constitutes impact upon the public interest.

4. The Act Or Practice Caused Injury To The Plaintiffs' Property

Damages are available under the Consumer Protection Act when plaintiff's "property interest or money is diminished because of the unlawful conduct" *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 57, 204 P.3d 885 (2009)(citing *Mason v. Mortgage America, Inc.*, 114 Wn.2d 843, 854 (1990)). Injury and causation are established if the plaintiff loses money because of the unfair act or practice. *Edmonds v. Scott Real Estate*, 87 Wn. App. 834, 848, 942 P.2d 1072 (1997)(citing *Mason*, 114 Wn.2d at 854).

Lost profits and loss of appreciation in the value of real property are

compensable under the Consumer Protection Act. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 47, 948 P.2d 816(1997)(Talmadge dissenting) citing *Sign-O-Lite Signs v. DeLaurenti Florists*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992), review denied, 120 Wn.2d 1002 (1992) and *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983).¹ Lots that have water service are worth \$5,000 more than the lots that have no water service (RP page 50 lines 1 - 18 and Exhibit 9). Each of the appellants' six lots is worth \$5,000 less than it would be worth if water service was available (*Id.*). This loss in value is a direct result of the respondents' acts and practices.

III. DEFENDANTS GEORGE MILLER AND NOELE TIFFANY ARE LIABLE

A. Actual Damages

A company owner or officer is liable for any act or omission by the company if he directed that it occur, participated in it, cooperated in it, allowed it to occur, or ratified it. *Messenger v. Frye*, 176 Wash. 291, 295 and 298, 28 P.2d 1023 (1934). The owner or officer ratifies an act or omission when, having knowledge of the act or omission, fails to correct it. *Id.* at 298. The owner or officer is also liable for any act or omission if he exercises such

¹ The *Sign-o-Lite* analysis of the claim for lost profits was cited with approval in *Panag*, 166 Wn.2d at 60.

close control, management and direction over the company and its activities that he had to know what was occurring. *Johnson v. Harrigan-Peach Dev. Co.*, 79 Wn.2d 745, 753 - 754, 489 P.2d 923 (1971). In these circumstances, both the owner or officer and the company are liable. *Grayson v. Nordic Construction Co.*, 92 Wn.2d 548, 553 - 554, 599 P.2d 1271 (1979).

In *Harrigan-Peach Dev. Co.*, a company made false and fraudulent representations while selling recreational lots. *Harrigan-Peach*, 79 Wn. 2d at 748 - 749. The representations were made by the corporate officers and directors, with their knowledge or consent, or under circumstances where they were charged, as a matter of law, with knowing what was occurring. *Id.* at 747 - 748. The owners and corporate officers knew that the promised improvements were not being made. *Id.* at 751. The Supreme Court affirmed judgments against the corporate owners and officers for the difference between the actual value of the lots as sold and their value with all of the promised improvements and features. *Id.* at 749 - 750. The court noted that although defendant Harrigan was president and a director of the company, he took no steps to provide money for improvements promised by the company. *Id.* at 751.

George Miller, the owner, president and sole corporate officer of

Miller Utilities, admits that he is aware of the situation with the water system (RP page 116 lines 18 - 20). Mr. Miller had to know that the water system does not meet the Department of Health requirements. As owner, president and sole corporate officer of Heritor, Inc., respondent Noele Tiffany had to know that the water system does not meet Department of Health requirements. For years, respondents George Miller and Noele Tiffany allowed and approved the failure to comply with the Department of Health requirements, allowed and approved the failure to fulfill the duty under the servitude to supply water, and allowed and approved the denial of the lot owners' "right of service".

Respondents George Miller and Noele Tiffany exercise every bit of the control exercised by the corporate officers in *Harrigan-Peach* and *Grayson*, and are individually liable for the damages suffered by the plaintiffs.

B. The Consumer Protection Act

In *State v. Ralph Williams North West Chrysler Plymouth, Inc.*, 87Wn.2d 298, 322, 553 P.2d 423 (1976) the trial court found Mr. Williams, the owner of the corporation, liable for the unfair and deceptive acts and practices of the corporation. The Supreme Court affirmed, stating:

The record supports the trial court finding that Williams was personally responsible for many of the unlawful acts and practices of North West.

Appellant Williams' liability is individual, not joint or cumulative. If a corporate officer participates in the wrongful conduct, or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties. *See Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn.2d 745, 489 P.2d 923 (1971). Corporate officers cannot use the corporate form to shield themselves from individual liability. *Johnson v. Harrigan-Peach Land Dev. Co.*, *supra* at 752.

Id.

In Grayson, 92 Wn.2d at 551, a construction company failed to complete a construction project because it did not have the money to do so. Arnold Bergstrom was the president, general manager, director and majority stockholder. *Id.* at 549 - 550. The trial court pierced the corporate veil and entered judgment against Mr. Bergstrom *Id.* at 553. The Supreme Court held that there was no basis for the trial court to pierce the corporate veil, but nonetheless upheld the judgment against Mr. Bergstrom for violation of the Consumer Protection Act stating:

Although the trial court improperly pierced Nordic's corporate veil on the alter ego theory, we nonetheless find that personal liability was properly imposed on Bergstrom under the rule enunciated in *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553, P.2d 423 (1976). If a corporate officer participates in wrongful conduct or with knowledge approves of the conduct, then the officer, as well as

the corporation, is liable for the penalties. *State v. Ralph Williams' North West Chrysler Plymouth, Inc., supra; Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn.2d 745, 489 P.2d 923 (1971). In *Ralph Williams*, this court considered a deceptive practice in violation of the Consumer Protection Act to be a type of wrongful conduct which justified imposing personal liability on a participating corporate officer.

Id. at 553-554. As in *Grayson*, defendants George Miller and Noele Tiffany are personally liable under the Consumer Protection Act.

CONCLUSION

Plaintiffs respectfully request that the Court reverse the trial court and remand the case for further proceedings.

DATED: December 16, 2013.

Respectfully submitted,

Gusa Law Office



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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FRANK M. HENSLEY and MARLYCE]
HANSEN, husband and wife,]

Appellants,]

No. 44473-9-II

DECLARATION OF MAILING

vs.]

HERITOR, INC., *et al.*,]

Respondents.]

I am an attorney for the Appellants. On December 16, 2013, I deposited into the United States mail, a properly stamped and addressed envelope containing copies of the Appellants' Brief and the Verbatim report of proceedings, as well as a computer disc of the report to Laurason T. Hunt, P.O. Box 65246, Port Ludlow, Washington 98365.

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Dated: December 16, 2013 at Olympia, Washington



Michael G. Gusa
Attorney for Appellants
WSBA No. 24059