

FILED

APR 16 2012

CLERK OF COURT
COURT OF APPEALS
STATE OF WASHINGTON
BY _____

No. 301451

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

John T. Sanna,

Appellant,

v.

Ben Veenhuizen, et. al.,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

The trial court judge abused its discretion when the Appellant was denied an award of attorney's fees and costs after he prevailed in a Consumer Protection Action (CPA) claim against the Respondents.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of November 15, 2011, denying the plaintiff's motion for attorney's fees and costs.

A. Issues Pertaining to Assignments of Error

1. The Appellant was the prevailing party in his action against the Respondent under the Consumer Protection Act, RCW 19.86.090 and therefore entitled to an award of attorney's fees.

III. STATEMENT OF THE CASE

This matter began as a trial for damages based on the Automotive Repair Act ("ARA") RCW 46.71 et. seq. and supplemental violations of the Consumer Protection Act ("CPA"), RCW 19.86 et. seq. (CP 67). The Veenhuizens owned and operated an automotive repair shop, they had possession of the Appellant's truck and snow plow in order to perform repairs. (CP 68 ¶ 3.1) (CP 72 ¶ 3.38). The Veenhuizens failed to provide written estimates for the repairs to they performed on Appellant's truck. These written estimates were statutorily required by the ARA, when they are not provided an automotive repair shop is barred from putting a lien on

the vehicle. (CP 91), (RP vol. 2 256:1 – 256:10). The Appellant continuously tried to contact the Veenhuizens via e-mail and telephone calls to reclaim his property. His many voice messages and e-mails were ignored. (CP 76 ¶ 3.57). After the Veenhuizens refused to respond to the Appellant and failed to return his snow plow and truck, they illegally placed a lien on the Appellant's truck and foreclosed upon it. (CP 78 ¶ 3.1), (CP 91).

In an attempt to reclaim his property the Appellant sought mediation through the attorney general's office. The mediation failed and the Appellant was forced to commence pro se litigation by filing a writ of replevin and later begin the action underlying this appeal. (CP 78 ¶ 3.68), (CP 78 ¶ 3.73). (RP vol. 1 70:12-28:14). After obtaining counsel, a two day trial was held. The jury found that the Veenhuizens violated the ARA and the CPA (CP 91). The jury also found that the lien placed on the Appellant's vehicle was illegal and that it was illegally foreclosed. (CP 91). The Respondents were ordered to return the vehicle and snowplow to the Appellant, the jury valued the vehicle and snowplow at \$1500.00. (CP 91). No monetary damages were awarded in addition to the \$1500.00 value placed on the vehicle. (CP 91).

After the trial ended the Appellant moved for attorney's fees, costs and treble damages. (CP 2) On July 12, 2011 a hearing on the Appellant's

motion took place in Superior Court. Appellant's motion for costs and attorney's fees was based on the jury's finding that the Respondent violated the CPA. (CP 4) The Appellant's motion for attorney's fees was denied based on the judge's view that the jury did not award any monetary damages at trial. (RP vol. 2 296 20:23).

IV. SUMMARY OF THE ARGUMENT

In the Notice of Appeal the Appellant indicated that he would appeal the denial of the motion for treble damages and the frivolousness of the claims asserted against Clay Veenhuizen. The Appellant has chosen to abandon these two issues and focus the appeal on the trial court's denial of the motion for attorney's fees and costs.

The trial court found that the Veenhuizens violated the CPA; there is no issue on appeal as to whether or not the CPA was violated. RCW 19.86.90 and the case law interpreting it state that a violation of the CPA entitles a consumer to an award of attorney's fees and costs. The presiding judge in the trial court denied the Appellant's motion for attorney's fees based on a lack of monetary damages.

Whether or not the jury awarded monetary damages is irrelevant. Case law has clearly stated that a CPA violation, even without an award of monetary damages entitles a consumer to an award of attorney's fees and costs. The Court has based the award of attorney's fees and costs in CPA

cases lacking actual damages upon the inconvenience suffered by the consumer. The Court has found consumers are inconvenienced from the deprivation of their property and the fact that they are required to take legal action to defend themselves and their property.

V. ARGUMENT

A. Request for Attorney fees

Pursuant to RAP 18.1(b), the Appellant respectfully requests attorneys' fees. The CPA, 19.86.090 is the applicable law underlying this case that allows for an award of attorney fees:

“Any person....may bring a civil action in superior court to enjoin further violations to recover the actual damages sustained by him, or both together with the costs of the suit, including a reasonable attorney's fee.”

Wash. Rev. Code § 19.86.090 (2008).

B. Standard of Review

The jury's decision on the amount of attorney's fees and costs must be reviewed on an abuse of discretion standard. *Allard v. First Interstate Bank of Washington*, 112 Wash. 145, 148, 768 P.2d 998 (1989).

C. A violation of the CPA entitles a consumer to an award of attorney's fees and costs, regardless of an award for monetary damages.

The trial court found that the Veenhuizens conduct violated the CPA. (CP 91). The remedies available for such a violation are laid out in RCW 19.86.090:

“Any person....may bring a civil action in superior court to enjoin further violations to recover the actual damages sustained by him, or both together with the costs of the suit, including a reasonable attorney’s fee.”

Wash. Rev. Code § 19.86.090 (2008).

The jury verdict form clearly indicates that the Veenhuizens violated the CPA. (CP 91). The Supreme Court laid out what has been referred to in subsequent cases as the *Hangman Ridge* test: “to prevail in a private CPA action and therefore be entitled to attorney’s fees, 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 Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 780, 719 P.2d 531, 533 (1986). The Supreme Court held “a successful private plaintiff is entitled to attorney’s fees under RCW 19.86.090. A successful plaintiff is one who establishes all five elements of a private CPA action.” *Id* at 795. There is no dispute as to whether or not the Veehuizens violated the CPA or whether the violation met the five requisite elements. The jury found that the CPA was violated. (CP 91). The CPA along with cases

interpreting it unmistakably indicate that an attorney's fee award is required in private CPA actions when there is a violation of the CPA.

D. The Trial Court abused its discretion when it denied the Appellant's motion for attorney's fees and costs because failure to show actual monetary damages is not a bar to recovery of attorney's fees and costs.

A violation of the CPA provides an award for attorney's fees. The trial court abused its discretion by denying the Appellant its statutory right to attorney's fees. The Court has repeatedly found that lack of actual monetary damages in a CPA violation case does not bar a consumer from an award of attorney's fees under the CPA.

In *Mason v. Mortgage Am.* purchases of real property prevailed in a CPA action, the trial court ordered conveyance of the property back to them along with actual monetary damages. *Mason v. Mortgage Am., Inc.*, 114 Wash. 2d 842, 854-55, 792 P.2d 142, 149 (1990). The Supreme Court found that the award for actual monetary damages was not necessary to allow for recovery of attorney's fees and costs. "Even absent the harm compensated by the trial court's award of actual monetary damages, the purchasers sustained an injury which satisfies the fourth element of the *Hangman Ridge* test so as to permit recovery of attorneys' fees and costs under the Consumer Protection Act." *Mason v. Mortgage Am., Inc.*, 114 Wash. 2d 842, 854-55, 792 P.2d 142, 149 (1990). "The loss of title to the

purchasers' real property was obviously an 'injury to property' within the purvey of the Consumer Protection Act. Therefore, notwithstanding the actual damage award, the purchasers would have been entitled to reasonable attorneys' fees and costs under the Consumer Protection Act." *Id* at 855.

Awarding attorney's fees and costs in CPA cases, even absent actual monetary damage is a well-founded principal in Washington. "A recovery for the costs of the suit is not dependent on issuance of an injunction or the recovery of actual damages." *St. Paul Fire & Marine Ins. Co. v. Updegrave*, 33 Wash. App. 653, 660, 656 P.2d 1130, 1134 (Ct. App. 1983). In *St. Paul Fire*, a division III appeals case, the Court based much of its decision on *Tallmadge*, a division I appeals case. *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wash. App. 90, 93-94, 605 P.2d 1275, 1278 (Ct. App. 1979). *Id.*

In *Tallmadge* the consumer purchased a vehicle that was advertised as brand new and later learned that the vehicle had been damaged and refurbished to appear brand new. *Id* at 93-94. The court found this deception to be a violation of the CPA, and although no actual damages were awarded an attorney's fee award was still allowed. *Id* at 93-94. The "record indicates that he suffered injuries for purposes of the Consumer Protection Act in that he was inconvenienced, deprived of the use and

enjoyment of his property, and received an automobile with defects needing repair. The trial judge did not err in awarding attorney's fees." *Id* at 93-94.

In *St. Paul Fire*, the Court used the same rationale to award attorney's fees. In *St. Paul Fire* an insurance company violated the CPA when it overcharged a consumer and attempted to change the premium amounts at an inappropriate time. *St. Paul* 33 Wash. App. at 654. The court justified its award of attorney's fees under the CPA because the consumer was inconvenienced when he was forced to defend himself against a lawsuit from the insurance company. Also the consumer in *St. Paul* was forced to prosecute a counterclaim to establish the company's CPA violations. *St. Paul* 33 Wash. App. at 659.

The Appellant's injury in this case entitling him to attorney's fees and costs is comparable to all of the above cited cases. Mr. Sanna lost title to his property when the Veenhuizens foreclosed on the lien they placed against it as in the *Mason* case. *See Mason* 114 Wash. 2d at 854-55. The *Mason* case found this loss enough to allow the consumer an attorney's fee award.

Not only was the Appellant deprived of the use and enjoyment of his vehicle and snow plow for the time the Veenhuizens kept it, as analogous to the *Tallmadge* case, he was forced to seek legal aid for the return of his

property. *See Tallmadge* 25 Wash. App. at 93. In *St. Paul Fire* the insurance company sued the consumer and the consumer was forced to “defend an action which is premised upon unfair and deceptive acts.” *See St. Paul* 33 Wash. App. at 659. Mr. Sanna was in a similar position; an illegal lien was placed upon his property and then foreclosed upon. The jury verdict form clearly indicates that the lien was illegally imposed and illegally foreclosed upon. (CP 91). Mr. Sanna was forced to defend himself against this illegal foreclosure, analogous to the consumer in the *St. Paul Fire* case. In an attempt to reclaim his property Mr. Sanna was compelled to attempt mediation through the attorney general’s office, commence pro se litigation by filing a writ of replevin and later begin the action underlying this appeal. (CP 78 ¶ 3.68), (CP 78 ¶ 3.73), (RP vol. 1 70:12-28:14).

Mr. Sanna’s right to attorney’s fees and costs is undeniable when compared *St. Paul Fire, Tallmadge* and *Mason*. He was denied the use and enjoyment of his property and forced to fight against an illegally imposed lien upon his property. The Court in *St. Paul* held that when a consumer is forced to defend himself in such a way their damages include “the consumer’s inconvenience, financial considerations such as loss of time in helping prepare the case, actual time spent in court, and litigation costs for attorney’s fees.” *See St. Paul* 33 Wash. App. at 659. The inconvenience

Mr. Sanna suffered throughout the litigation process is undeniable; he is therefore entitled to an award of costs and attorney's fees.

E. The perceived inconsistencies regarding a conversion claim in the jury verdict form can only be reconciled if interpreted as an award for alternative damages.

The jury verdict form instructed the Veenhuizens to return the truck as well as the snow plow to Mr. Sanna. (CP 91). The perceived inconsistency appears when the jury indicated that the Veenhuizen's were not liable for conversion, yet valued the property converted at \$1500.00. (CP 91).

The only possible way to reconcile this perceived inconsistency is to view it as alternative damages. Had the truck and snow plow been unavailable to be returned to Mr. Sanna, the jury intended that he receive the value of the items.

VI. CONCLUSION

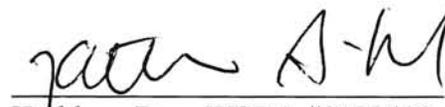
The trial court judge abused its discretion when he refused to award attorney's fees to the Appellant. The CPA entitles an aggrieved consumer an award of attorney's fees and costs when the consumer is the prevailing party. It is undisputed that Mr. Sanna prevailed at trial in his CPA action. The trial courts basis for denying attorney's fees is unfounded in law. Several Washington Supreme Court and Appellate court decisions have declared that a violation of the CPA, even absent an award of monetary

damages allow for an attorney's fee award. Mr. Sanna's struggle to regain his property through legal action coupled with his loss of use and enjoyment of that property is adequate to permit him an award of attorney's fees and costs under the CPA.

RESPECTFULLY SUBMITTED, this 16th day of April, 2012.

UNIVERSITY LEGAL ASSISTANCE


Alan L. McNeil, WSBA #7930
Attorney for Appellants


Kathleen Box, WSBA #9123403
Legal Intern for Appellants

VII. APPENDIX

1. RCW 19.86.090 Civil action for damages — Treble damages authorized — Action by governmental entities.

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefore in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

No. 301451

**COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON**

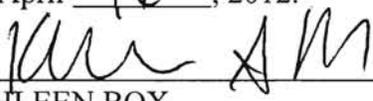
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| JOHN T. SANNA, |) | DECLARATION |
| |) | OF MAILING |
| Appellant, |) | |
| |) | |
| v. |) | |
| |) | |
| BEN VEENHUIZEN, ET AL., |) | |
| |) | |
| Respondent. |) | |

Declaration of Mailing

I, KATHLEEN BOX, declare that I am a citizen of the United States and not a party to this action; that on the 16 day of April, 2012, I mailed a full, true and correct copy of the foregoing: BRIEF OF THE APPELLANT by depositing in the United States Mail with sufficient postage, addressed to: Mr. Glenn Slate, Attorney at Law, 358 East Birch Avenue, Suite 201, Colville, WA 99114

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Spokane, Washington on April 16, 2012.



KATHLEEN BOX