

FILED

JUN 21 2012

COURT OF APPEALS
DIVISION III
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.

REPLY BRIEF OF APPELLANT

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I. REVIEW OF PERTINENT FACTS

At trial, the plaintiff (hereafter “Appellant”) prevailed in his Consumer Protection Act (CPA) claim. It is unequivocally indicated on the jury verdict form that the defendants (hereafter “Respondent”) violated the CPA, CP 91. Following the trial, the Respondent did not file a motion to set aside the jury verdict. The Findings of Fact and Conclusions of Law entered in the court order, regarding the Plaintiff’s Motion for Attorney’s Fees, indicate the Appellant did not prevail in his CPA claim at trial. CP 56.

II. ARGUMENT

A. The Plaintiff Prevailed at Trial under the Consumer Protection Act.

The Respondent argues the Appellant did not prevail on the CPA claim because there was no injury. The Respondent correctly acknowledges injury is necessary to establish a CPA violation in order to claim attorney’s fees. Wash. Rev. Code § 19.86.090 (2008); *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 854-55, 792 P.2d 142, 149 (1990). However, the *Mason* court indicates that the harm need not be in the form of monetary damages, but that other types of nonquantifiable harm will suffice. *Id.* Even a plaintiff being deprived of the use of his property is

enough to establish an injury under the CPA. *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn.App. 290, 298, 38 P.3d 1024, 1029 (2002).

At trial, the jury found the Respondent violated the CPA. The Respondent was ordered to return the snow plow and truck, thus demonstrating the Appellant was injured by not having his property. The fact that the Appellant sustained a cognizable injury under the CPA was decided by the jury at trial. CP 91. Washington State Rules of Civil Procedure require a motion to set aside the jury verdict; otherwise the trial court judge is bound by the jury's decision. WA Sup. Ct. R. 59. In the case at hand, the validity of the CPA violation was never contested following the jury verdict. The trial court judge was not permitted to disregard the jury verdict in his Findings of Fact and Conclusions of Law entered following the Appellant's motion for attorney's fees.

The Respondent incorrectly states the Appellant did not challenge the findings of fact that there was not a violation of the CPA. On appeal, the Appellant must "designate the decision or part of the decision which the party wants reviewed." RAP 5.3(a)(3). The Rules of Appellate Procedure should be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a), *see also Steve v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629, 633 (1995) ("In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the

brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of case or issue.”).

Throughout the entire Brief of the Appellant, it references the Appellant as the prevailing party on the CPA claim. The CPA violation is referred to multiple times in consideration of attorney’s fees. The violation of the CPA claim and the Appellant being the prevailing party is a clear issue throughout the Brief of the Appellant. Therefore, the findings of fact involving whether or not the Appellant prevailed under the CPA were adequately challenged.

B. It is an Abuse of Discretion by the Trial Judge not to Award Attorney’s Fees if the Provision Violated Provides Relief of Attorney’s Fees.

The standard of review for an award of attorney’s fees is “abuse of discretion.” *Ermine v. City of Spokane*, 143 Wn.2d 636, 650, 23 P.3d 492, 499 (2001). “A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons, which include errors of law.” *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn. 2d 11, 216 P.3d 1007 (2009). “A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong

legal standard.” *In re Guardianship of Lamb*, 173 Wn.2d 173, 189, 265 P.3d 876, 885 (2011).

If the provision violated provides relief of attorney’s fees, then the plaintiff is entitled to attorney’s fees. *Webb v. Ray*, 38 Wn.App. 675, 679, 688 P.2d 534, 537 (1984). A successful plaintiff under the CPA is entitled to an award of attorney’s fees. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531, 533 (1986); *Mason*, 114 Wn.2d at 855, 792 P.2d at 149. The trial court only has discretion as to the amount of the attorney’s fee award, not whether or not the award exists. *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 304, 553 P.2d 423, 429 (1976).

In the case at hand, the trial judge should have awarded attorney’s fees. The judge decided not to award attorney’s fees because his order stated the CPA was not violated. However, the jury found the CPA was violated, which is evidenced on the jury verdict form. Hence, the decision to not award attorney’s fees was decided on untenable grounds and manifestly unreasonable, because the record reflected a violation of the CPA. *See Noble*, 167 Wn.2d at 18, 216 P.3d at 1010; CP 91. Therefore, the appellant should be awarded attorney’s fees because the trial judge abused his discretion.

C. The Trial Court's Final Judgment is Appealable.

When considering whether an appeal is frivolous, the court must consider:

(1) a civil appellant's right to appeal under RAP 2.2, (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid merit that there was no reasonable possibility of reversal.

Streater v. White, 26 Wn.App. 430, 435, 613 P.2d 187, 191 (1980); e.g. *Delany v. Canning*, 84 Wn.App. 498, 929 P.2d 475 (Div. III 1997).

The Rules of Appellate Procedure provide a right to appeal final orders. RAP 2.2. The award of attorney's fees is an appealable final order. *Donworth & Todd v. Benton County*, 103 Wash. 382, 384, 174 P. 441, 442 (1918).

The Respondents argue the Appellant has pointed to no "factual findings of the trial court or of the jury," indicating that he is the prevailing party in the CPA claim. Repeatedly, the Appellant has referred to the jury verdict form stating the Respondent violated the CPA. In the Assignments of Error, the Appellant clearly indicated the Appellant is the prevailing party in the CPA claims and entitled to an attorney's fee award. The jury verdict form, showing CPA violation is enough evidence to argue the Appellant is the prevailing party. Considering the record as a whole, it

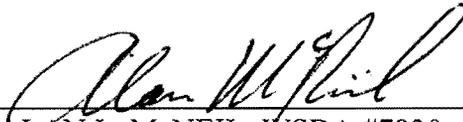
is clear the trial court's final judgment is appealable. The trial court ignoring the jury verdict and not awarding attorney's fees should be reversed; therefore the appeal is not frivolous.

VI. CONCLUSION

The trial court judge abused his discretion when he refused to award attorney's fees to the Appellant. The Appellant was the prevailing party in his CPA claim at trial. The CPA entitles an aggrieved consumer to be awarded attorney's fees and costs when the consumer is the prevailing party. Therefore, the Appellant should be awarded attorney's fees for the trial of the CPA claim and for this appeal under RAP 18.1(b).

RESPECTFULLY SUBMITTED this 21st, day of June 2012.

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