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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 306348-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FRANCES CLARK and SHANNON HOERNER-CLARK,
husband and wife,

Appellants,

v.

JR'S QUALITY CARS, INC., VIROJ "LEE" RITDECHA,
Salesperson, and CAPITOL INDEMNITY CORP.,

Respondents.

CAPITOL'S **Respondent's Brief**

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I. ISSUE ON REVIEW

Does a common law breach of contract, absent a specific finding that a motor vehicle dealer committed a violation of Washington's Motor Vehicle Dealer Act, trigger liability under Capitol's surety bond?

II. STATEMENT OF THE CASE

Capitol issued a Vehicle Dealer Bond on behalf of JR's Quality Cars, Inc., pursuant to Washington Motor Vehicle Dealer Act (the "Act"), RCW 46.70. *CP 56*. A simple reading of the Bond shows that liability is triggered **only** by violations of RCW 46.70. *Id.* This reading is consistent with RCW 46.70.070(1), which states that liability under the bond shall be conditioned on violations of "this chapter." *Id.* Put simply, the only way Plaintiffs could trigger liability on Capitol's surety bond was if this Court found that JR's Quality Cars committed a specific violation of RCW 46.70. *Id.*

On November 7, 2008, Plaintiffs filed a Summons and Complaint against JR's Quality Cars in the Superior Court of Washington, County of Spokane. *CP 57*. Plaintiffs alleged the following causes of action in their Complaint: (1) Violation of RCW 46.70.180; (2) Breach of Contract; (3) Violation of the Truth in Lending Act; and (4) Violation of the Consumer Protection Act. *Id.* Plaintiffs' claims were dismissed at trial by the Honorable Judge Harld D. Clarke in a Memorandum Decision dated

August 13, 2009. *Id.* On September 25, 2009, Judge Clarke entered Findings of Fact and Conclusions of Law, along with a final judgment, dismissing Plaintiffs claims. *Id.* Plaintiffs moved for reconsideration on October 5, 2008, arguing that JR's Quality Cars violated RCW 46.70.180(4), which Judge Clarke denied on November 19, 2009. *Id.*

Plaintiffs filed a Notice of Appeal on December 7, 2009, claiming (1) that JR's Quality Cars violated the anti-bushing statute, RCW 46.70.180(4), and (2) that JR's Quality Cars breached the first purchase and sale agreement. *CP 57.* These were the only two issues raised on appeal, the former being the only claim that could trigger liability under Capitol's bond. *Id.* At no point did the Plaintiffs raise any other violations of RCW 46.70. *Id.*

On July 28, 2011, the Washington State Court of Appeals, Division III, issued an Unpublished Opinion. *CP 58.* Addressing Plaintiffs' assignment of error regarding RCW 46.70.180(4), the Court found that "[t]here was no violation of the bushing statute." *Id.* Addressing Plaintiffs' assignment of error on the breach of contract claim, the Court of Appeals reversed and remanded for entry of judgment holding that the first contract was breached because there was no consideration for the second contract. *Id.* On September 26, 2011, the Court of Appeal issued its Mandate. *Id.*

As can be seen, the clerk's letter stated that the cause was mandated to the superior court "for further proceedings in accordance with the attached copy of the Opinion." *CP 58*. The Court of Appeals did not grant the trial court any authority to conduct additional fact finding with regard to Plaintiffs' claim that JR's Quality Cars violated RCW 46.70. *Id.* In fact, the Court of Appeals dismissed the only violation of the Motor Vehicle Dealer Act raised on appeal. *Id.* Accordingly, the trial court did not have the authority to consider or hear argument regarding claims that were not preserved on appeal or remanded to the Trial Court. *Id.*

Moreover, the Court of Appeals' decision that Capitol's bond was not liable was further reflected in the Court's Order finding that was Capitol was not responsible for Plaintiff's attorney's fees and costs on appeal because Capitol was the prevailing party. *CP 58-59*.

Nevertheless, Plaintiffs' argued on remand that Capitol's bond should be liable for a whole host of reasons which were not raised on appeal or at trial. *CP 59*. Essentially, Plaintiffs argued that the bond could be liable for the motor vehicle dealer's breach of contract or insolvency. *Id.* Incredibly, neither of these arguments were raised on appeal or at trial. *Id.* Defendant Capitol moved to dismiss Plaintiffs' claims on remand because they were not properly before the trial court. *Id.*

On remand, the Judge Harold D. Clarke, III, granted Defendant Capitol's Motion to Dismiss and dismissed Plaintiffs' claims against it. *CP 59*. The trial court's memorandum decision stated as follows: "This Court is constrained to follow the directions of the Court of Appeals as to the entry of further relief." With that principal in mind, the trial court granted Capitol's Motion to Dismiss. *Id.* On February 6, 2012, Plaintiffs' filed a Notice of Appeal. Plaintiffs' assigned error to the trial court's decision to dismiss Capitol. *CP 72-78*.

III. ARGUMENT

1. Capitol's bond is only liable for specific violations of the RCW 46.70.

Generally, a surety's liability is determined by the terms of the bond. *Joint Administrative Board v. Fallon*, 89 Wn.2d 90, 569 P.2d 1144(1977). The terms of the bond state very clearly that liability under the bond is conditioned on JR's Quality Cars' compliance with RCW 46.70. Moreover, liability on a statutory bond cannot be expanded beyond the terms and provisions of the statute under which it was issued. Edward G. Gallagher, *The Law of Suretyship* 263-64 (2000). The language of the bond is consistent with RCW 46.70.070(1), which states that liability under the bond shall be conditioned on violations of "this chapter," i.e., RCW 46.70. In other words, the bond does not cover acts or practices not specifically enumerated in the Act.

RCW 46.70.180 unambiguously states the limited circumstances under which a claimant is to have recourse against the bond. Accordingly, unless Plaintiffs can show that JR's Quality Cars committed a specific violation listed in RCW 46.70.180, Capitol's bond is not liable.

Here, neither the Trial Court nor Court of Appeals found that JR's Quality Cars committed a specific violation of RCW 46.70.180. As such, there is nothing to trigger liability under the terms of Capitol's surety bond, *which requires that there be a specific violation of the Act.* Plaintiffs' claim fails for this reason.

2. The Act does not provide relief for any common law breach of contract, absent a specific violation of RCW 46.70.180.

Plaintiffs argue that any common law breach of contract claim triggers liability under Capitol's Vehicle Dealer Bond. This is an inaccurate and overly simplistic reading of the statute. While it is certainly true that, in some instances, a breach of contract may give rise to a violation of RCW 46.70 (and thus a claim against the bond), it is only where the breach of contract is accompanied by one of the enumerated unlawful practices in RCW 46.70.180. To date, there has been no finding by the Trial Court or the Court of Appeals that JR's Quality Cars committed a violation of the Act. On this basis, alone, Plaintiffs' appeal fails.

Nonetheless, Plaintiff urges this Court to reach the legal conclusion that any common law breach of contract constitutes a violation of the Act and, thus, a claim against the bond. Toward that end, Plaintiffs rely entirely on misplaced and unsupported public policy arguments. It is a well-settled rule of statutory construction that so long as the statute is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy. *Delong v. Parmelee*, 157 Wn.App. 119, 146, 236 P.3d 936 (2010). But that is precisely what Plaintiffs urge this Court to do – that is, Plaintiffs ask this Court to expand the Act’s coverage beyond its plain language simply because they suffered damages. However, as can be seen from the plain language of RCW 46.70.070, the surety bond only covers damages arising out of specific violations of “this chapter.” It does not cover damages in the general sense, nor should it. The legislature recognized this limitation.

Plaintiffs want to amend the statute to provide coverage under the unique circumstances of their claim, but this plea is more properly directed at the legislature. Although this might produce harsh results in some instances, Plaintiffs (and the Court) cannot impose their will to circumvent the legislative process and add language favorable to the unique circumstances of their case. Such a result would be an abuse of the legislative and judicial process.

3. RCW 46.70.180 does not list “breach of contract” as a violation of the Act.

Notably, RCW 46.70.180 omits “breach of contract” as a unlawful practice giving rise to a violation of the Act. This omission is significant, and dispositive, because the Act specifically enumerates each and every violation in RCW 46.70.180. Nevertheless, Plaintiffs ask this Court to insert “breach of contract” among the many violations listed in RCW 46.70.180. Washington law does not allow this.

For good reason, the court may not add words where the legislature has chosen to exclude them. *In re Estate of Blessing*, 160 Wn.App. 847, 851, 248 P.3d 1107 (2011). But that is exactly what Plaintiffs ask this Court to do. Plaintiffs want new language added to the statutory scheme in order to provide coverage under the unique circumstances of their claim. This Court should not entertain Plaintiffs’ emotional plea to add language that is conspicuously absent from the Act. This plea is more properly directed at the legislature, not the courts.

4. There was no finding that JR’s Quality Cars engaged in false, deceptive, misleading, or dishonest practices that would trigger liability under the bond.

Plaintiffs concede that breach of contract is not an enumerated violation of the Act that would give rise to recovery against the surety bond. In order to side-step this obstacle, Plaintiffs make the conclusory statement that JR’s Quality Cars engaged in false, deceptive, and

misleading conduct, which constitutes a violation of RCW 46.70.180(2)(a)(i). However, as can be seen from the Trial Court's Findings of Fact and Conclusions of Law there was no finding that JR's Quality Cars engaged in unfair, deceptive, or dishonest practices. CP 1-5. Moreover, these findings were sustained on appeal. Instead, the Court of Appeals merely found that "there was no consideration for the second contract." Again, lack of consideration is not tantamount to false, deceptive, or misleading conduct absent a specific finding in that regard.

Try as they might, Plaintiffs cannot bootstrap their common law breach of contract claim into a specific violation of RCW 46.70. Plaintiffs' erroneously conclude that false, deceptive, and misleading conduct always accompanies a breach of contract – that is, Plaintiffs argue that a breach of contract and false, deceptive, and misleading conduct are not mutually exclusive. By that logic, every breach of contract would necessarily give rise to a per se consumer protection act violation. Washington law does not support Plaintiffs' flawed legal analysis as it would lead to absurd results.

5. Plaintiffs' failure to prove that JR's Quality Cars engaged in false, deceptive, or misleading conduct is an improper reason to expand the scope of RCW 46.70 to include common law breach of contract.

Plaintiffs urge this Court to include breach of contract among the many violations of RCW 46.70 because they believe the Act, as currently constructed, is incapable of protecting unsophisticated consumers against dishonest and deceptive practices. On the contrary, the Act does protect consumers against conduct which is false, deceptive, or misleading. See RCW 46.70.180(2)(a)(i). However, Washington civil law requires that Plaintiffs prove such conduct by a preponderance of the evidence. Where, as here, Plaintiffs fail to meet this burden of proof, the Trial Court properly found that no violation of the Act occurred. It therefore follows that the bond is not liable. Simply because Plaintiffs were unable demonstrate the proof necessary to justify a finding that JR's Quality Cars violated RCW 46.70, does not warrant amending the statute to meet the unique circumstances of Plaintiffs' claim.

But beyond that, “[i]t is the role of the legislature, not the judiciary, to balance public policy interests and enact law.” *Northwest Animal Rights Network v. State*, 158 Wash.App. 237, 245, P.3d 891 (2010). Indeed, it is the function of the legislature to determine whether a breach of contract should qualify as a specific violation of RCW 46.70.

Plaintiffs having sustained damages does not justify a departure from the plain language of the Act. Moreover, this request is beyond the authority and ability of the courts.

6. Surety bonds are not intended to protect against any and all losses and Washington Courts are cognizant of these statutory limitations.

Plaintiffs argue that the surety bond does not provide sufficient protection to consumers. However, Washington courts and the legislature are fully aware of the limited amount of protection that surety bonds provide to consumers. By way of example, as the Court in *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, makes clear, if the legislature wanted to provide consumers with greater protection in actions against contractors and their bonds, it could have done so. 159 Wn.2d 292, 304, 149 P.3d 666 (2006). *Ondeo* is supportive of the conclusion that the legislature was fully cognizant of the fact that the surety bond would not always afford claimants complete relief:

The legislative history of the statute also reflects the legislative committees' understanding that the bonding statute could not completely insure against loss.

Id. In other words, the legislature and Washington courts are well aware that, in many instances, a surety bond will not fully compensate a harmed consumer. If the legislature intended the bond to afford greater relief in motor vehicle dealer bond claims, it could simply include breach of

contract as a violation of RCW 46.70. However, until the legislature amends the statute to include breach of contract as a violation, a breach of contract, absent a specific finding of a violation of RCW 46.70, will not support a claim against the bond.

7. Capitol is entitled to an award attorney's fees and costs on appeal.

Under RAP 14.2, this Court may award costs to the prevailing party on appeal. Furthermore, pursuant to RAP 18.1, this Court may award reasonable attorney's fees or expenses on review. Capitol is legally entitled to attorney's fees pursuant to RCW 4.84.250 and RCW 4.84.290 if it is the prevailing party on appeal because this is an action for damages of \$10,000 or less. Accordingly, Capitol respectfully requests an award of its attorney's fees and expenses incurred on this Appeal.

IV. CONCLUSION

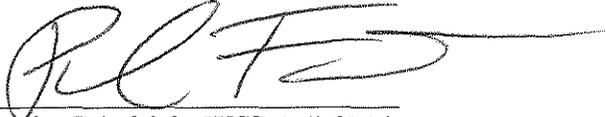
Plaintiffs ask this Court to add nonexistent language to the statutory scheme of RCW 46.70 in order to support the unique circumstances of their case. If the legislature wanted surety bonds to cover any breach of contract involving a motor vehicle dealer, it could have stated so. It chose not to in this particular instance, and Plaintiffs cannot change this unmistakable fact by urging the Court to insert language that is conspicuously absent from the Act.

While the statute and the bond will not always protect all consumers, we must assume the legislature was cognizant of this limitation. And although the statutory language might produce harsh results in some instances, Plaintiffs cannot impose their will to circumvent the legislative process and add language favorable to the unique circumstances of their case.

For the above reasons, the Court should affirm the Trial Court's Order and Memorandum Decision dismissing Plaintiffs' claims against Defendant Capitol Indemnity Company's surety bond.

DATED this 25 day of July, 2012.

YUSEN & FRIEDRICH

By 

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DECLARATION OF SERVICE

Vanessa Stoneburner declares:

On July 25, 2012, I sent a copy of the foregoing document by Federal Express overnight, with proper postage affixed, to:

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

EXECUTED THIS 25 day of July, 2012, at

Seattle, Washington.


Vanessa Stoneburner