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Court of Appeals
Division III
State of Washington
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No. 37471-8

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

PAUL LEWIS,

Appellant,

v.

VERNICE ZANCO AND FRED ZANCO, d.b.a. ZANCO PROPERTIES,
and UNIVERSITY SOUTH AND EAST, LLC,

Respondents.

RESPONDENTS' ANSWER TO APPELLANT'S BRIEF

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I.

STATEMENT OF ISSUES

Appellees, Vernice Zanco, Fred Zanco and University South & East, LLC (hereinafter “ZANCO”) are satisfied with the Assignment of Errors and Issues pertaining thereto in Brief of Appellant (cited as “BA” hereinafter) at pages 4-5 except to note that Appellant Lewis’ reference to the regulatory fine “which is specifically reserved for government agency enforcement under RCW 43.44.110(5)” (BA 4) was not adopted by the Legislature until July 1, 2019. Laws of 2019, Chapter 455, Section 1. The alleged unlawful imposition of the \$200.00 fine was charged in the Deposit Disposition and Property Condition Report issued August 4, 2016. (CP 53-54). The fine provision was in the prior version of RCW 43.44.110(4), see Laws of 1995, Chapter 369, Section 34, and Laws of 2006, Chapter 25, Section 35 (recodifying RCW 48.48.140 as RCW 43.44.110), which provided,

(4) Any owner or tenant failing to comply with this section shall be punished by a fine of not more than two hundred dollars.

Error is assigned to the trial court’s finding that assessment of a \$200.00 fine “is within the purview of the state fire department”

(CP 80) because the prior version of RCW 43.44.110 (2006) was silent as to who could impose a fine. The current statute gives enforcement power to fire department officials. RCW 43.44.110(5)(b) (2019), which as indicated above did not go into effect until August 1, 2019, well after all actions complained of had already transpired.

Error was also assigned to Findings 13 and 14 because there is no evidence in the record supporting them but, rather they are allegations in Mr. Lewis' unverified Amended Complaint not support by oath or affirmation. (CP 5, 80).

II.

STATEMENT OF THE CASE

Zanco is satisfied with Lewis' Statement of the Case (BA 5-10) except as follows: There is no evidence in the record that referred Zanco's claim for money against Lewis to a third-party debt collector, nor is there any evidence in the record that debt collection efforts threatened to undermine Mr. Lewis' continuing housing assistance. (BA 7). These allegations are not supported by oath or affirmation. Mr. Lewis cites to CP 5, which is his unverified First

Amended Complaint. (CP 1-8) and only contains allegations. Further, the last paragraph of the Statement of the Case (BA 9-10) is not a fair statement of the facts and procedure and is, rather, argument without citation of the record.

III.

STANDARD OF REVIEW

Statutory interpretation is reviewed de novo. *Dept. of Ecology v. Campbell & Gwinn, LLC.*, 146 Wn.2d 1, 9 (2002). The objective is to ascertain and give effect to intent of the legislature. *Id.*

IV.

ARGUMENT

Mr. Lewis brought a single cause of action for violation of the Consumer Protection Act (hereinafter “CPA”). Mr. Lewis chose to not bring any cause of action under the Residential Landlord-Tenant Act (hereinafter “RLTA”), although, as will be demonstrated, he had several potential causes of action and remedies.

A. VIOLATION OF RESIDENTIAL LANDLORD TENANT ACT DOES NOT CONSTITUTE VIOLATION OF CONSUMER PROTECTION ACT

Residential landlord-tenant problems are within exclusive purview of Residential Landlord-Tenant Act of 1973, RCW 59.18.010. et seq., and violations of that Act do not also constitute violations of the CPA. RCW 19.86.010 et seq. This is governed by the holding in *State v. Schwab*, 103 Wn.2d 542, 545 (1985) where the court held that “[r]esidential landlord-tenant problems are within the express purview of the Residential Landlord Tenant Act of 1973, RCW 59.18 ... and do not [] constitute violations of the Consumer Protection Act. RCW 19.86.” The court gave three reasons why the RLTA precludes a CPA claim by a residential tenant.

First, nothing in the legislative history of the CPA “suggests that it was ever intended by the Legislature to be applied to the rental of residential housing.” *Schwab*, 103 Wn.2d at 549.

Second, the RLTA spells out in great detail and “delineate[s] specific rights, duties and remedies of both the landlord and tenants” which the court refused to expand “by interpretation so as to include a Consumer Protection Act cause of action.” *Id.*, 551 (Footnote and citation omitted).

And third, the Legislature in 1973 considered but rejected an amendment to the RLTA that would have provided that an RLTA

violation should be construed for the purposes of application of the CPA to constitute an unfair or deceptive or an unfair method of competition in the conduct of trade or commerce. *Id.*, 551-52.

Therefore, the court in *Schwab* “perceive[d] the intent of the legislature to have been that residential landlord-tenant problems not be included within the Consumer Protection Act, either directly through that act or indirectly through means of the Residential Landlord Act of 1973, RCW 59.18, and the per se doctrine.” *Id.*, 553 (Footnote and citation omitted).

The issue here, the rights and duties of the parties under RCW 43.44.110, is expressly provided for in the RLTA by incorporation. Duties of the tenant include the maintenance of smoke detection devices as required by RCW 43.44.110. RCW 59.18.130(7) provides that the duties of the tenant shall include,

(7) Maintain the smoke detection devise in accordance with the manufacturer’s recommendations, including the replacement of batteries when required for the proper operation of the smoke detection devise, as required in RCW 43.44.110(3).

Mr. Lewis terminated his residency on July 29, 2016. On August 4, 2016, Defendants sent a Deposit Disposition and Property Condition Report claiming the \$200.00 deposit and demanding an

additional \$494.50 for damages from Mr. Lewis. Among the charges was \$200.00 for “Smoke/CO detector – smoke not working”. (CP 54).

Mr. Lewis by letter dated August 18, 2016, disputed not only the \$200.00 smoke detector charge but all the damages charged in the Deposit Disposition and Property Condition Report. (CP 53-54, 56-57). Clearly, all of these charges arise from transactions that involve landlord-tenant problems that arise from the tenancy.

RCW 59.18.050 grants express jurisdiction to the district and superior courts from any claim arising from a transaction subject to the RLTA as follows:

The district or superior courts of this state may exercise jurisdiction over any landlord or tenant with respect to any conduct in this state governed by this chapter or with respect to any claim arising from a transaction subject to this chapter within the respective jurisdictions of the district or superior courts as provided in Article IV, section 6 of the Constitution of the state of Washington.

Mr. Lewis’s Amended Complaint cites to RCW 59.18.050 to support jurisdiction of the trial court. (CP 3).

Ms. Zanco submits that Mr. Lewis has at least four causes of action he can bring on his claim that he was subjected an alleged illegal administrative fine resulting from the \$200.00 charge for the

smoke detector that was not working when he terminated his tenancy. First, under RCW 59.18.130(7). Second, an action under RCW 59.18.280 for return of his \$200.00 security deposit. Third, an action under RCW 59.18.230(3) for Zanco using a rental agreement known by Zanco to be prohibited. And fourth, an action under the multiple provisions of the lease agreement documents that govern the imposition of a \$200.00 fine for a smoke detector that is not maintained. RCW 59.18.140.

Each potential cause of action is discussed in turn.

B. MR. LEWIS CAN MAKE A CLAIM UNDER RCW.18.130(7).

RCW 59.18.130(7) requires tenants to maintain smoke detectors per RCW 43.44.110. Here, Zanco charged Mr. Lewis in the Deposit Disposition and Property Condition Report \$200.00 because his smoke detector was not working when he moved out. (CP 53-54). Certainly, this is a “claim arising from a transaction subject to” the RLTA giving the trial court jurisdiction over the dispute. RCW 59.18.050. Mr. Lewis has the ability to sue for the return of the \$200.00 under RLTA. This cause of action is in the express purview of the RTLA and precludes a cause of action under the CPA. *Schwab*, 103 Wn.2d at 553-55.

Whether the \$200.00 charged in an illegal “fine” or not has not yet been determined.

A fine is a remedy that can be chosen by the legislature. *State v. Ralph Williams Northwest Chrysler Plymouth, Inc.*, 82 Wn.2d 263, 269 (1973). A fine is punitive. “Punitive damages are not compensation for injury. Instead they are private fines.” *Electrical Workers v. Faust*, 442 U.S. 42, 48 (1979). The CPA action brought by Mr. Lewis under RCW 19.86 for treble damage is for a penalty or private fine.

“The general rule [] is that a statutory obligation to pay an amount beyond compensation-to submit to more than simple redress of the wrong done; to pay not merely in respect of the deserts of the injured person but as punishment for the wrong done-is a penalty.” *Noble v. Martin*, 191 Wash. 39, 59 (1937).

In *Nordling v. Johnston*, 205 Or. 315, 283 P.2d 994 (1955) the Oregon Supreme Court enforced a statutory penalty for failure of an employer to timely pay fallers and buckers of timber. The court held private parties may enforce a penalty favorably citing the *Noble v. Martin* decision and decisions from other jurisdictions stating, “[a]n accepted definition of a statutory penalty is that it is one which

an individual is allowed to recover against a wrongdoer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damages done.” *Nordling*, 205 Or. at 324, 283 P.2d at 998.

“A civil penalty is primarily intended to coax compliance with the law and deter future violations.” *v. Shoreline Hearings Bd.*, 149 Wn.App. 444, 460 (2009) citing *Friends of Earth v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 185-86 (2000) (which noted “the interdependence of the availability and the imposition” of the penalty; “a threat [to impose a penalty] has no deterrent value unless it is credible that it will be carried out ... an actual award of civil penalties does in fact bring with it a significant guarantee of deterrence over and above what is achieved by a mere prospect of such penalties.”).

A landlord has strong interest in maintaining smoke detection devices to ensure the safety of other tenants and his or her investment.

However, a determination of whether the \$200.00 charge is an illegal “fine” or not is really not necessary for the disposition of this case. Rather, the inquiry is whether this case is a landlord-

tenant “problem” that arises out of that relationship so the jurisdiction under the CPA is precluded. *Schwab*, 103 Wn.2d at 553-55

C. ACTION FOR RETURN OF \$200.00 DEPOSIT UNDER RCW 59.18.280

RCW 59.18.280 requires a landlord to give a vacated tenant a specific statement of damages and any deposit refund within 21 days of the termination of tenancy.

Mr. Lewis argues that, “[b]ecause Zanco alleged damages of \$494.90 over the \$200.00 disputed fine for an inoperable smoke detector, there would be no refund due to Mr. Lewis, even if the \$200.00 fine were excluded. (CP 53). Consequently, RCW 59.18.280 does not provide Mr. Lewis with a remedy to dispute and recapture Zanco’s wrongfully imposed \$200.00 regulatory fine. See RCW 59.18.180.” (BA 22) (footnote omitted). This ignores that Mr. Lewis maintains he should be returned his full \$200.00 deposit and owes no damages whatsoever. (CP 56-57). An action for return of the deposit would determine, what, if any damages Mr. Lewis owes to Zanco and whether the deposit was rightfully retained by Zanco.

Moreover, Mr. Lewis’ Amended Complaint frames his claim by asserting “[t]his is an action to recover tenants’ deposit trust

monies withheld or otherwise demanded by the Defendants as a ‘fine’ imposed against the tenants whose some detection devises allegedly had dead batteries, missing batteries or other operational deficiencies.” Amended Complaint at ¶ 1.1. (CP 1-2). This describes an action for the return of tenant’s deposit under RCW 59.18.280 that had been held in a trust account.

Mr. Lewis alleges that “RCW 59.18.280 does not permit landlords to withhold tenants’ deposit trust monies as ‘fines’ for allegedly deficient smoke detectors.” Amended Complaint at ¶ 4.9 (CP 4).

It is disingenuous to argue RCW 59.18.280 does not provide a cause of action and a remedy. RCW 59.18.280 allows a tenant for up to two times the amount of deposit not refunded when due and a reasonable attorneys fee.

D. MR. LEWIS CAN MAKE A CLAIM UNDER RCW 59.18.230(3)

RCW 59.18.230(3) states, in relevant part,

If a landlord deliberately uses a rental agreement containing provisions known by him or her to be prohibited, the tenant may recover actual damages sustained by him or her, statutory damages not to exceed five hundred dollars, costs of suit, and reasonable attorneys' fees.

Mr. Lewis' Amended Complaint alleges that when Mr. Lewis continued his protests for withholding his deposit, Zanco responded on two separate occasions that "Zanco Properties is fully within their [sic] rights to charge you \$200.00 for the smoke detector not being functional." Amended Complaint at ¶s 4.15 and 4.16. (CP5). If well founded, imposing an illegal administrative fee would be using a lease provision in a prohibited way.

While the Legislature set a high bar for tenants to recover under RCW 59.18.230(3), this is a remedy provided. The Legislature set the rules. *Schwab*, 103 Wn.2d at 551, recognized tenants who are renting in violation of RCW 59.18.230(3) have right of action against the landlord.

E. MR. LEWIS HAS THE ABILITY TO ASSERT AN RLTA CLAIM UNDER HIS LEASE

RCW 59.18.140 provides tenant duties as follows,

The tenant shall conform to all reasonable obligations or restrictions, whether denominated by the landlord as rules, rental agreement, rent, or otherwise, concerning the use, occupation, and maintenance of his or her dwelling unit, appurtenances thereto, and the property of which the dwelling unit is a part if such obligations and restrictions are not in violation of any of the terms of this chapter and are not otherwise contrary to law, and if such obligations and restrictions are brought to the

attention of the tenant at the time of his or her initial occupancy of the dwelling unit **and thus become part of the rental agreement.**

(Emphasis added).

The lease documents in this case provides that Mr. Lewis was “required by law to abide by all the given requirements of the lease agreement and rules of occupancy (RCW 59.18.140).” (CP 34). From the inception of the tenancy it is the tenant’s duty to maintain the smoke detectors in the unit. RCW 59.18.130(7). “If smoke detectors are not maintained or are dismantled, the Resident could be held liable for a fine up to \$200.00 per RCW 59.18.130(7) and RCW 43.44.110.” (CP 34). Any violation of these rules “shall constitute a substantial and material breach of the lease agreement and...may give rise to damages against” the tenant. (CP 34) (emphasis added). “Tenant shall clean and restore the premises to its initial condition, except ordinary wear, upon termination of the tenancy and vacation of the premises.” (CP 32). The Property Condition Report goes through in detail listing damages totaling \$699.90, including \$200.00 for “smoke [detector] not working.” (CP 54). These are the tenant’s obligations Zanco claimed Mr. Lewis failed to conform to resulting in the \$699.90 in damages. Mr. Lewis would have a cause of action

under RCW 59.18.140 disputing this and asking a court to determine he performed all of his obligations. If Mr. Lewis prevailed in such an action he would be entitled to a reasonable attorney's fee. (CP 33). See RCW 4.84.330 (Reciprocal reasonable attorney fees).

“It is axiomatic that the rights and obligations of the parties to a contract are defined by the provisions of that document.” *Idigo Real Estate Services, Inc., v. Wadsworth*, 169 Wn.App. 412, 421-22 (2012) (greater protection provided by lease addendum and by federal law were property considered as limitations to unlawful detainer statute).

**F. THE CPA IS NOT A VEHICLE FOR RECOVERY
IN THIS CASE**

Mr. Lewis quotes from *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 49 (2009), that “the Legislature intended to provide sufficient flexibility to reach unfair or deceptive conduct that inventively evades regulation” to justify this court from departing from the *Schwag* holding (BA 15).

Panag held that debt collection activities that are not regulated by the Collection Agency Act, chapter 19.16 RCW may constitute unfair and deceptive practices under the broader CPA. *Id.*,

at 54-55. *Panag* distinguished *Schwab*, which held that landlord-tenant disputes are not covered by the CPA, stating,

This is not a case where the legislature clearly did not intend for the CPA to apply, as in *State v. Schwab*, 103 Wn.2d 542, 693 P.2d 108 (1985). In *Schwab*, this court declined to allow CPA actions based on violations of the Residential Landlord-Tenant Act of 1973 (RLTA), chapter 59.18 RCW. This court considered it inappropriate to extend the CPA to landlord-tenant disputes in view of the detailed nature of RLTA, which includes an array of specific remedies. Moreover, the legislature expressly rejected a proposal to define RLTA violations as per se violations of the CPA. *Schwab*, 103 Wn.2d at 552 (the "Senate was well aware of the effect of what it was doing when it turned down the amendment extending the [CPA] to violations of the [RLTA]"). Unlike in *Schwab*, there is no evidence of legislative intent to foreclose CPA claims predicated on allegations of deceptive collection of insurance subrogation claims.

Id., at 55, note 12. The *Schwab* decision has continued vitality. *Schwab* held,

Neither the statutory direction to liberally construe the Consumer Protection Act nor the right to resort to remedies "otherwise provided by law" as expressed in the Residential Landlord-Tenant Act of 1973, justify the judicial extension of a remedy at odds with a clearly demonstrated legislative intent to the contrary.

103 Wn.2d at 553 (footnote omitted).

Here, Mr. Lewis has causes of action and potential remedies under the RLTA that he has not asserted.

V.

ARGUMENT AS TO ASSIGNMENTS OF ERROR

Zanco objects to the trial court's Findings 13 and 14 which state,

13. Thereafter, Lewis' debt to landlord was sent to collections. See Amended Complaint at 4.17.
14. Because Defendants' third-party collection action threatened Mr. Lewis' continuing housing assistance program support, he capitulated to Defendants' demand for a revised payment of \$510.00 under protest. See Amended Complaint at 4.18.

(CP 80). These Findings are not supported by evidence in the record but come from allegations in Mr. Lewis' unverified Amended Complaint at ¶'s 4.17 and 4.18. (CP 5). They are mere allegations not supported by oath or affirmation. Findings must be based in substantial evidence in the record. *Hutchenson Cancer Research Center v. Holman*, 107 Wn.2d 693, 716 (1987).

Zanco believes Findings 13 and 14 would not be dispositive of any issue in this appeal even if supported by oath or affirmation.

If Mr. Lewis can prove Zanco imposed a \$200.00 fine for not maintaining his smoke detector under RCW 59.18.130(7), the dispositive issue is whether he has a cause of action under the RLTA.

Second, error is assigned to the trial court's order that says "[t]he Court also finds that the assessment of a \$200.00 fine under RCW 43.44, et seq., is within the purview of the state fire department." The ability of fire departments to impose the \$200.00 fine did not exist until August 1, 2019. See RCW 43.44.110(5) as adopted in Laws of 2019, Chapter 455, Section 1. The operative facts here concluded in 2016. At that time 43.44.110 was silent as to who could impose a fine. RCW 43.44.110(4) (2006).

VI.

CONCLUSION

The Order of the Superior Court (CP 77-81) should be affirmed. Mr. Lewis' sole claim in the unverified Amended Complaint is a CPA cause of action, which is precluded by the RLTA.

RESPECTFULLY SUBMITTED this 21st day of August 2020.

WALDO, SCHWEDA & MONTGOMERY, P.S.
By:/s/ PETER S. SCHWEDA, WSBA #7494
Attorney for Respondent, Zanco

VII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 21, 2020, I caused to be served a true and correct copy of the foregoing Respondents' Answer Appellant's Brief on the following named person(s) via Court of Appeal E-Serve Portal:

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