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No. 66469-7-I

COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

DIRK M. MAYBERRY  
INC. AND DIRK M.  
MAYBERRY,

Appellants.

vs.

ERICA FRASER,

Respondent.

NO. 09-2-16471-1 SEA

2011 SEP 25 PM 1:20  
COURT OF APPEALS  
DIVISION I  
SEATTLE, WASHINGTON

BRIEF OF RESPONDENT



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## I. STATEMENT OF THE CASE

### A. Introduction

The Appellant’s statement of the case presents a charitable picture of Dirk Mayberry and was largely disputed by Erica Fraser, the Respondent. The Court described the over-all conduct of Mr. Mayberry as “egregious and reprehensible.”

**B. Counter Statement of the Case**

Ms. Fraser is a forty-six year old woman who has a history of alcohol and drug abuse. R.P. p. 73 (Vol. 1). Fifteen years ago she was a married woman, with three children, and jointly owned many income properties with her husband including the property that is the subject of this case. Since that time, she has divorced, struggled with “mental disability,” has been recovering from alcohol and drug abuse and has lost custody of her three children. As a result of these personal problems, in late 2008, she only had a few properties left to her name and in 2009, only the home on 88th Street North in Seattle. R.P. p. 69 – 72 (Vol. 1).

To help her with her real estate matters, Ms. Fraser employed Seattle lawyer Jason Anderson. Sometime in the summer of 2008, Mr. Anderson introduced Ms. Fraser to Mr. Mayberry, another client of his and who Anderson had defended in several fraud cases. Mr. Anderson introduced the two so that Mr. Mayberry might be able to help Ms. Fraser with

her financial problems. R.P. p. 70 (Vol. 1).

During the summer of 2008, Ms. Fraser was residing in a cottage located on Sandpoint Way, Seattle, but was planning on moving into her last remaining home located at 928 N. 88th Street, Seattle. Ms. Fraser had given notice of vacating the cottage effective October 30, 2008, and was transitioning to her only remaining property. The last night that she slept there was the evening before the fire, October 5, 2008. *Id.* On October 6, 2008, the 928 N. 88th Street house was substantially damaged by a fire, which was ruled an accident by the fire department and was caused by faulty wiring. R.P. p. 70 – 72 (Vol. 1).

Ms. Fraser had told Mr. Mayberry that she did not need his assistance and did not think about him until he called her again just after the home at 928 N. 88th Street, in Seattle, had burned down. After the fire she was able to use the cottage in the Sand Point area for a few more weeks as her tenancy was not up until the end of October.

On October 27, 2008, the small cottage on Sandpoint

Way also caught fire. Together with this fire and the 928 N. 88th Street home damage, Ms. Fraser became homeless, although she received some insurance money from SAFECO for temporary living expenses. Mr. Mayberry then contacted her again and said he would meet her with a proposal to buy her house which would give her enough money to live on and to provide a place for her to live in another property he owned. At that time she was unable to keep a regular job and was receiving general assistance of about \$300 per month, which was not enough for her to live on. R.P. p. 87 (Vol. 1), so she contacted Mr. Mayberry.

In early April, Mr. Mayberry told her to meet him at a restaurant, where she waited for a long time. He then called her and told her to meet him at the Northgate Red Robin. He offered to put her up in a house in Skyway rent free. When she got there he immediately bought her several alcoholic drinks, until she was “pretty well intoxicated.” R.P. p. 73 (Vol. 1).

Mr. Mayberry got Ms. Fraser to sign a Purchase and Sale

Agreement. Exhibit 8. Ms. Fraser contends that she could not understand the terms as he kept making changes after she had signed. She did not remember signing a Warranty Deed which he apparently got and recorded. Exhibit 7. No escrow company was used. The Purchase and Sale Agreement had numerous alterations and is difficult to read. The document is also riddled with crossed out dates with various other dates written in above it. Exhibit 8. A Statutory Warranty Deed in favor of Mr. Mayberry was recorded on April 3, 2009. Ms. Fraser remembers being taken to “an old man who was a notary,” where she put her thumb print in a book because she did not have identification. R.P. p. 75 (Vol. 1).

According to Ms. Fraser’s testimony, Mr. Mayberry then took all of the items from the home and told her they were “going to the dump.” In April 2009, an associate of Mr. Mayberry’s, Dennis Elliot, “participated in moving all of the contents of the house over to the storage facility.” R.P. p. 80 – 81 (Vol. 1).

Mr. Mayberry was in possession of Ms. Fraser's personal property and then obtained a restraining order against Ms. Fraser and her friend, Mr. McCluskey. R.P. p. 90 (Vol. 1). Mr. Mayberry made no payments on the original mortgage and the property was close to foreclosure at the time of trial.

After a two day bench trial the court ruled in Ms. Fraser's favor on the Consumer Protection Act claim, restored her property, and awarded attorney fees and costs to her but dismissed Ms. Fraser's claim for violation of the Distressed Property Act, RCW 61.34. This appeal followed.

## II. ARGUMENT

### A. The Trial Court Properly Found That The Purchase and Sale Agreement was Unenforceable

Here, Mr. Mayberry himself recorded a Warranty Deed before the ink was dry on the Purchase and Sale Agreement. The Respondent did not receive any of her "bargain" but lost her equity in the home. The Purchase and Sale Agreement, by its terms, required an escrow closing under the facts as proved.

The Court found that the contract was “ambiguous,” “not followed” and essential terms could not be determined. Findings p. 5, paragraph 3. The Court also found that Ms. Fraser was “not lucid and coherent at the time she executed the sale documents with the Appellant on April 2, 2009.” Findings No. 4.

In order for a Purchase and Sale Agreement to be enforced, the contract must be complete, free from ambiguity, and must make the precise actions to be done ascertainable by a Court. *Kruse v. Hemp*. 121 Wn. 2d 715 (1993). Here the Purchase and Sale Agreement was essentially incomprehensible. Moreover, Mr. Mayberry did not make the payments to Ms. Fraser as outlined in the contract or follow the terms. There is substantial evidence in the record that Ms. Fraser did not ever understand what the terms were.

**B. The Appellants Have Also Violated the Washington Consumer Protection Act**

The mastermind of this classic foreclosure “rescue” was

Appellant Dirk Mayberry (acting as a corporation, Dirk Mayberry, Inc.), a convicted felon who served 42 months in federal prison for real estate fraud in the 1990's. (*See, In re the Matter of the Denial of the Real Estate License Application of Dirk Martin Mayberry*, No. 94 - 040, 3 (Wa. St. DOL 1995), Exhibit 41. He was denied his real estate license thereafter because of his dishonesty and has since been involved in over 150 lawsuits relating to his efforts of acquiring properties from vulnerable people. Exhibit 50. He acts *sub rosa*, not having any property in his name, claims he has no income, no home, yet he controls many properties and/or real estate loans with his girlfriend, Bridget Baldwin. R.P. p. 17 – 20 (Vol. 1). Recently, Mr. Mayberry has been found to have been engaging in several foreclosure rescues and held in contempt, judgments entered, and findings of deceptive acts entered against him. (*See, Brown v. Mayberry*, No. 06-2-20888-9 (2009) Exhibit 44) (order vacating dismissal of case, judgment summary and order confirming arbitration award), and *In re Guardianship of Wells*,

150 Wn. App. 491, 208 P. 3d 1126 (Div. 1 2009); (Exhibits 41-43).

Generally, to prove a violation of the Consumer Protection Act, a plaintiff must establish the elements set forth in *Hangman Ridge v. Safeco*, 105 Wn. 2d 778 (1986).

In *Hangman Ridge, supra*, the Supreme Court identified five elements, all statutorily based, that a plaintiff must prove in order to prevail in a private CPA action: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) which affects the public interest, (4) injury to the plaintiff in his or her business or property, and (5) causation.

**1. An Unfair or Deceptive Act or Practice.**

Mr. Mayberry contends that the first element, unfair or deceptive conduct, has not been proved. The Court characterized the conduct of Mr. Mayberry as “egregious and reprehensible,” Conclusion of Law No. 10, and the evidence presented to the Court amply supports that Ms. Fraser was deceived into transferring her property to Mr. Mayberry, while

destitute, while not “lucid” or “coherent,” for no money, other than about \$1,400 she received to lure her into the transaction, clear evidence of unfairness. Moreover, Ms. Fraser was unemployed and broke, suffering from drug and alcohol abuse, and homeless.

**2. Occurring in Trade or Commerce.**

As to the second element under *Hangman Ridge* (trade or commerce) the Appellants concede that the Court was correct. Appellant’s Brief at p. 13.

**3. Which Affects the Public Interest.**

As to the third element, affecting the public interest, there is abundant evidence to support the Court’s findings and conclusions. First, Mr. Mayberry’s main business is defrauding people and the IRS. He served four years in Federal prison for mortgage fraud because of 20 felony convictions. *See*, Sup. Des. CP Exhibit 41. In exhibit 41, the Washington Department of Licensing denied Mr. Mayberry a Real Estate license because of his propensity for dishonesty. More recently, he has

defrauded elderly persons which were considered by this Court. *See, Guardianship of Louise Wells*, Supp. Des. Exhibit 43 and affirmed by this Court (No. 60801-1-I, March 2, 2009). He is actively obtaining properties from other people, for example in *Wells* case, *Id.* This transaction was part of Mr. Mayberry's business.

**4. Injury to the Plaintiff in His or Her Business or Property.**

As to the fourth element, injury or damage, the Appellant contends that Ms. Fraser suffered no damages. This is false. She lost her home which was ordered by the Trial Court to be returned to her. This is a classic case of an unfair and deceptive acts which violates the Consumer Protection Act.

**5. Causation.**

Finally, it should be noted that the CPA is to be liberally interpreted. RCW 19.86.920. Conversely, exclusions from the CPA should be narrowly construed. *Edmonds v. John L. Scott*, 942 P. 2d 1072 (1997). It is no disputed that Mr. Mayberry caused Ms. Fraser to lose her home.

**C. Both Mr. Mayberry and Mayberry, Inc. are Liable for the Relief Awarded**

The Appellants' argue that Dirk Mayberry, who directly participated at every step of this transaction, is somehow not liable because he was wearing a corporate hat. This is contrary to well-settled Washington law.

The case of *State v. Ralph Williams*, 87 Wn. 2d 298 (1976) is squarely on point. There, the Court held at page 318:

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.

In *Johnson, Id.*, the Court explained the rule in more detail:

Incorporation does not in law shield the actor from the legal consequences of his own tort. Where individuals carry on a business or enterprise by means of a corporate structure but in such relationship to the corporation that

it can be said as a matter of fact that the acts of the corporation are the acts of the individuals and vice versa, then the same conclusion should be reached as a matter of law, i.e., that the acts of the corporation are in law as well as fact the acts of the individuals and vice versa. *See, Annot.*, 152 A.L.R. 696 (1944). This court has adopted that principle in other contexts but nevertheless so as to make it the law of this jurisdiction.

Here, Mr. Mayberry was the only person besides Ms.

Fraser who was involved in the transaction. There is no need to “pierce the corporate veil” Mr. Mayberry is liable because of his own actions.

Because the property was put into the name of Dirk Mayberry, Inc. the corporation was a proper and necessary party to the action to recover the property.

**D. The Plaintiff is Entitled to Reasonable Attorney Fees and Costs Notwithstanding That the Court Did Not Award Monetary Damages**

*Mason v. Mortgage America*, 114 Wn 2d. 842, 854 – 55

(1990) is squarely on point:

In *Nordstrom Inc. v. Tampourlos*, 107

Wash. 2d. 735, 733 P. 2d 208 (1987), we distinguished between the terms “injury” and “damages” and held that “[t]his distinction makes it clear that no monetary damages need to be proven, and that non-quantifiable injuries, such as loss of goodwill would suffice for this element of the Hangman Ridge test.” The fact that the Act allows for injunctive relief bolsters the conclusion that injury without specific monetary damages will suffice. A loss of use of property which is causally related to an unfair or deceptive act or practice is sufficient injury to constitute the fourth element of a Consumer Protections Act violation.

....

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 attorney’s fees and costs under the Consumer Protection Act. The trial court ordered the lender to convey the purchasers’ real estate back to them. The appropriateness of that order is not challenged. 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 attorney’s fees and costs under the Consumer Protection Act.

**E. The Respondent is Entitled to Reasonable Attorney Fees and Costs For the Appeal**

If successful, the Respondent is entitled to recover her reasonable attorney fees (cost of suit and appeal) and costs under RCW 19.86.090. If a violation is proved, the award of fees and costs is mandated.

**III. CONCLUSION**

The Trial Court properly found the Appellant to have engaged in acts of deception and unfairness. Ample evidence supports the Court's findings and the judgment should be affirmed with an award of additional attorney fees for this appeal.

Respectfully submitted this 23<sup>rd</sup> day of September, 2011.



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