

68509-1

68509-1

No. 68509-1-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

MEGAN FELSKE, Appellant,

v.

PERFORMANCE JEEP-EAGLE, INC., et ano, Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Eric Lucas

RESPONDENTS' BRIEF

Michael G. Sanders
Davies Pearson, P.C.
Attorneys for Performance Jeep-Eagle, Inc.,
et ano, as Respondents

920 Fawcett Avenue
P.O. Box 1657
Tacoma, WA 98401
(253) 620-1500
WSBA #33881

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JUN 27 AM 10:04

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Response to Appellant’s Assignments of Error/Issues Pertaining Thereto.....	2
III.	Statement of the Case.....	3
IV.	Summary of Argument.....	4
V.	Argument.....	6
	Standard of Review.....	6
	1. The Clerk’s Papers speak for themselves, and establish that Respondents moved for Summary Judgment as to Appellant’s entire case, explicitly including her claim of Violation of the Consumer Protection Act.....	7
	2(a). Appellant has failed to perfect her right to appeal the purported consideration by the trial court of the declaration submitted in reply to her opposition to Respondents’ Motion for Summary Judgment.....	10
	2(b). Appellant has failed to show how consideration of the items in the declaration would have been error.....	11
	2(c). Appellant’s failure to identify a genuine issue of material fact in opposition to Respondents’ Motion for Summary Judgment was the sole basis for dismissal of her lawsuit.....	13
VI.	Conclusion.....	14

TABLE OF AUTHORITIES

Table of Cases

Allemeier v. Univ. of Wash.
42 Wn. App. 465, 472, 712 P.2d 306 (Div. 1, 1985).....8, 10

Christensen v. Grant County Hosp. Dist. 1
152 Wn.2d 299, 305, 96 P.3d 957 (2004).....6

Leland v. Frogge
71 Wn.2d 197, 200-201, 427 P.2d 724 (1967).....13

Meissner v. Simpson Timber Co.
69 Wn.2d 949, 421 P.2d 674 (1966).....13

Reed v. Streib
65 Wn.2d 700, 399 P.2d 338 (1965).....13

Sherman v. State
128 Wn.2d 164, 183, 905 P.2d 355 (1995).....6

White v. Kent Med. Ctr., Inc.
61 Wn. App 163, 168, 810 P.2d 4 (Div. 1, 1991).....10

Wagg v. Estate of Dunham
146 Wn.2d 63, 67, 42 P.3d 968 (2002).....6

Wilson v. Steinbach
98 Wn.2d 434, 437, 656 P.2d 1030 (1982).....6

Statutes

RCW 19.86.....1

Regulations and Rules

CR 56(c).....6

RAP 2.5(a).....10

I. Introduction

Megan Felske appeals from an Order on Summary Judgment dismissing her lawsuit against Performance Jeep-Eagle and Universal Underwriters Insurance Company. The lawsuit claimed that Performance Jeep-Eagle was liable for fraud and for violation of the Washington Consumer Protection Act (*RCW 19.86, et seq.*). The Superior Court for Snohomish County (Hon. Eric Lucas presiding) determined that Ms. Felske had produced insufficient evidence at the time of hearing to raise a genuine issue of material fact, such that dismissal with prejudice was appropriate as a matter of law.

II. Response to Appellant's Assignments of Error

1. The Clerk's Papers speak for themselves, and establish that Respondents moved for Summary Judgment as to Appellant's entire case, explicitly including her claim of Violation of the Consumer Protection Act.
- 2(a). Appellant has failed to perfect her right to appeal the purported consideration by the trial court of the declaration submitted in reply to her opposition to Respondents' Motion for Summary Judgment.
- 2(b). Appellant has failed to show how consideration of the items in the declaration would have been error.
- 2(c). Appellant's failure to identify a genuine issue of material fact in opposition to Respondents' Motion for Summary Judgment was the sole basis for dismissal of her lawsuit.

III. Statement of the Case

Megan Felske and James Moehring purchased two vehicles on the evening of October 1, 2007. One of the purchases was unwound very shortly thereafter. The underlying lawsuit in this case concerns only the purchase and sale of a 2008 Nissan Titan pickup truck.

Ms. Felske filled out a credit application in the course of the purchase, but alleged later on that Performance Jeep-Eagle, Inc. (“Performance”) modified her reported monthly income without her knowledge in order to make her application more attractive to a finance company.

Ms. Felske ultimately filed suit against Performance, alleging Fraud and violation of Washington’s Consumer Protection Act. Performance filed a combined motion for judgment on the pleadings and motion for summary judgment as to all claims, the result of which was dismissal of Ms. Felske’s claims with prejudice. The trial court concluded that Ms. Felske had failed to present a genuine issue of material fact that would rebut Performance’s contention that her claims were deficient and/or lacked evidence to support them. In fact, Ms. Felske failed to offer any testimony or evidence of any kind in response to Performance’s motion, instead relying upon unsworn factual allegations and argument.

IV. Summary of Argument

Performance's motion clearly and repeatedly states that dismissal of all claims—including the Consumer Protection Act claim—by Ms. Felske was the relief sought thereby. Ms. Felske demonstrated that she was on notice of this, as her response to the motion addressed the reasons why she felt that the motion should be denied as to the Consumer Protection Act claim. Ms. Felske did not attempt to defend the Fraud claim in her response to the motion, and instead devoted the entirety of her response to propping up the Consumer Protection Act claim. Her claim to this Court that she was not properly notified of Performance's intent to seek dismissal of the only claim she attempted to defend is therefore untenable.

Performance maintains that even if Ms. Felske's unsworn factual allegations had been properly presented in response to Performance's motion, the outcome would have been the same as to both claims. As to Fraud, Ms. Felske failed to respond to Performance's motion for dismissal, and has assigned no error to the trial court's dismissal of same.

As to the Consumer Protection Act claim, Ms. Felske was required to show that an unfair or deceptive act or practice engaged in by Performance resulted in injury to her. Ms. Felske has never offered any indication that she was injured by the events that she claimed took place. Injury was the sole element of the Consumer Protection Act claim that Performance challenged in its motion. Ms. Felske has never denied that she read and understood the Retail Installment Sale Contract, including the

monthly installment obligation. Ms. Felske knowingly and willingly took on a payment obligation for a sum certain in order to purchase a new vehicle. The process of obtaining approval from a lender was necessary to enable Ms. Felske to get the contract that she bargained for with Performance. Taken in the light most favorable to Ms. Felske, nothing of what she alleged in her Complaint concerning the credit application legitimizes her Consumer Protection Act claim, as she has not and cannot demonstrate resulting injury.

The declaration offered by Performance in reply to Ms. Felske's opposition brief was explicit in stating that it was only offered to meet and overcome the unsworn allegations made in Ms. Felske's opposition to Performance's motion. The declaration went on to explain that the offering of same was meant only to address very serious, albeit unattested, allegations that Ms. Felske was making in a public forum. It was felt that some properly authenticated rebuttal was prudent. Also, to the extent that the trial court may have considered Ms. Felske's unsworn allegations, the declaration was offered in the interest of candor to the court. Nothing in the declaration was improper, nor was any part of it objected to by Ms. Felske or her attorney at the hearing or before. Nevertheless, even if there had been a timely objection, *and* the contents of the declaration were considered inadmissible, any resulting error would still have been harmless. Ms. Felske's claims were dismissed because she failed to produce any testimony or evidence that would create a genuine issue of material fact showing that dismissal was not appropriate.

V. **Argument**

Standard of Review

In reviewing an order of summary judgment, the Court of Appeals should engage in the same inquiry as the trial court. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). “All facts and reasonable inferences therefrom are viewed in the light most favorable to the nonmoving party; all questions of law are reviewed de novo.” *Id.*

Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *CR 56(c); Christensen v. Grant County Hosp. Dist. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). The Court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Wagg v. Estate of Dunham*, 146 Wn.2d 63, 67, 42 P.3d 968 (2002); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

1. The Clerk's Papers speak for themselves, and establish that Respondents moved for Summary Judgment as to Appellant's entire case, explicitly including her claim of Violation of the Consumer Protection Act.

Ms. Felske has assigned error to the trial court's decision to dismiss her Consumer Protection Act claim, stating that the issue was not raised in Performance's moving papers. See, e.g., *Br. of Appellant*, pp. 4-8. Ms. Felske also offered her account of a discussion that took place between her counsel and the trial court at the hearing on Performance's motion. *Id.* at 4. Ms. Felske made it clear in her Statement of Arrangements on file in this matter that she did not wish for the verbatim report of proceedings to be submitted with this appeal. Performance respectfully requests that this Court decline to consider Ms. Felske's account of what took place at the hearing. "The party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue." *Allemeier v. Univ. of Wash.*, 42 Wn. App. 465, 472, 712 P.2d 306 (Div. 1, 1985); review denied at *Allemeier v. UW*, 105 Wn.2d 1014 (1986).

Ms. Felske made two claims in the underlying lawsuit: Fraud and violation of the Consumer Protection Act. CP 36-40. By her admission, Ms. Felske never attempted to defend her Fraud claim in the face of Performance's motion for judgment on the pleadings, and motion for summary judgment. *Br. of Appellant*, p. 3. She did, however, submit an opposition brief which was solely devoted to defending the Consumer Protection Act claim. CP 14-17. Ms. Felske's concerns regarding the potential dismissal of her Consumer Protection Act claim were founded,

as Performance argued in its moving papers that she “[Could not] demonstrate that she was injured in any way by the facts that she has claimed in support of her claims.” CP 28. Performance also specifically identified the lack of injury as its challenge to Ms. Felske’s Consumer Protection Act claim in its statement of issues (“2. Whether Plaintiff’s fraud and Consumer Protection Act claims must fail for want of damages/standing.”) CP 26. As Ms. Felske acknowledges, injury is an element that must be proved in order to sustain a Consumer Protection Act claim. See, e.g., *Br. of Appellant*, p. 10.

Performance made no secret of its intention to seek dismissal of Ms. Felske’s Consumer Protection Act claim from the outset. CP 23, 28-29. Further, it was explicit in seeking dismissal of the claim because Ms. Felske could not demonstrate the prima facie element of injury. CP 28. Ms. Felske failed to submit anything beyond a short memorandum in opposition to the motion. CP 14-17. Ms. Felske never offered any testimony or evidence of any injury that was proximately caused by any alleged unfair practice. In fact, even the unsworn allegations made by her attorney in the opposition memorandum failed to suggest any injury or causation. *Id.* Instead, it simply stated that “After returning the truck because she could not afford the monthly payments Megan Felske now has a deficiency debt of \$17,798 with Wells Fargo Dealer Services.” CP 17.

Ms. Felske has never denied that she was presented with the Retail Installment Sale Contract for the 2008 Nissan Titan pickup truck at issue.

She has never denied that she signed the agreement, that it was filled out entirely, and that the terms of sale (including the installment amount and the number of monthly installments) were provided to her before she signed. CP 21-22. Ms. Felske's attorney simply offered up as an unsworn factual allegation that his client now has a deficiency debt with Wells Fargo Dealer Services because she failed to make the payments that she promised to make. Even if counsel's naked assertion could be properly considered, it fails to demonstrate a genuine issue of material fact as to the question of whether Ms. Felske was injured by a credit application that she claims was altered in order to enable her to buy the pickup truck on terms that she bargained for. Ms. Felske was clearly willing to undertake the financial obligation. She has provided no authority to suggest that the basis upon which a lender honors her request for a loan has any bearing on whether she should be excused from a bargain that she struck with full knowledge of the terms.

Performance's underlying motion for summary judgment is clear on its face. Dismissal of all claims was sought, and the basis for same was explicit. As Performance's initial moving papers made plain, Fraud was improperly pled, and Ms. Felske could demonstrate no injury as required in order to proceed with her Consumer Protection Act claim. In the face of these challenges, Ms. Felske submitted no testimony, evidence, or argument that could create a genuine issue of material fact. The trial court, therefore, did not err in granting Performance's motion. This Court should likewise affirm.

2(a). Appellant has failed to perfect her right to appeal the purported consideration by the trial court of the declaration submitted in reply to her opposition to Respondents' Motion for Summary Judgment.

Ms. Felske assigns error to the trial court for what she claims was Performance's raising of an issue for the first time in its reply memorandum. The issue that Ms. Felske claims was raised for the first time is that of injury. As noted previously, Performance did challenge the prima facie element of injury in its moving papers. Ms. Felske's insistence that Performance did not is baffling, as it is easily contradicted by CP 23, 26, 28, and 29.

Nevertheless, even if one were to concede that the issue had not been raised by Performance at the outset, Ms. Felske failed to object to the submission of the reply declaration at issue at any time prior to or during the hearing on Performance's motion for summary judgment. This is inconsistent with the procedural history of the case upon which Ms. Felske's error is predicated. In *White v. Kent Med. Ctr., Inc.*, the Court noted that Ms. White submitted a written objection to the defendants' identification of new issues in its reply prior to the hearing on motion for summary judgment. *White*, 61 Wn. App 163, 168, 810 P.2d 4 (Div. 1, 1991). In contrast, Ms. Felske failed to raise any such objection before or during the hearing on Performance's motion. As indicated previously, the burden is on Ms. Felske to perfect the record for review, and she has failed to show that this assignment of error is properly before the Court. See *Allemeier*, 42 Wn. App. at 472; see also *RAP 2.5(a)*.

2(b). Appellant has failed to show how consideration of the items in the declaration would have been error.

The reply declaration at issue (CP 11-13) was by its own terms offered only to “[M]eet and overcome the unsworn factual assertions in Plaintiff’s response, as they purport to accuse Defendants of serious wrongdoing.” CP 12. There was no attempt made to “attack one of the elements in the CPA claim for the first time.” *Br. of Appellant*, p. 12. Tellingly, Ms. Felske offers this assertion without providing a citation to anything in the Clerk’s Papers that suggests Performance ever attempted to “attack the unfair or deceptive act or practice prong.” *Id.* In more than one instance, including in the reply, Performance made it clear that it was not challenging Ms. Felske’s assertion of an unfair practice as a matter of law. See, e.g., CP 8 [FN 1] (“Defendants offer this information [responding to the allegation of falsification] not because it is felt to be of value in determining the outcome of the present motion, but in order that Plaintiff’s public allegations of serious wrongdoing by Defendants are properly met.”), and CP 28 (“Accepting all of the facts alleged by Plaintiff in the light most favorable to her, she lacks any basis to claim a resulting injury to her.”). Performance operated under the assumption that Ms. Felske would simply swear that the credit application was modified, and that her word alone would create an issue of material fact.

Performance instead challenged the injury element, as Ms. Felske had no way of offering a genuine issue of fact in that regard. The motion makes clear that Performance’s motion regarding the Consumer Protection Act claim was rooted solely in the absence of damages.

Ms. Felske goes on to argue that the factual items contained in the reply declaration concerning events that took place during Ms. Felske's deposition were incorrect. *Br. of Appellant*, p. 12. The purpose of this argument is less than clear, but to the extent that an alternate version of the facts is being argued for the first time in Ms. Felske's appellate brief, without support in the record, Performance asks that this Court decline to consider same.

2(c). Appellant's failure to identify a genuine issue of material fact in opposition to Respondents' Motion for Summary Judgment was the sole basis for dismissal of her lawsuit.

This Court, like the trial court before it, has been given nothing by Ms. Felske to suggest that dismissal of her lawsuit was inappropriate. In the final analysis, Ms. Felske failed to raise a genuine issue of material fact in response to Performance's motion that would demonstrate that Performance should not obtain the relief requested. Performance clearly identified the scope of relief that it was seeking, and supported its request with testimony and evidence. Ms. Felske offered nothing but unsworn allegations and argument in response. The Clerk's Papers before this Court are clear in establishing this. The law pertaining to motions for summary judgment is equally clear: "A party may not rest on formal pleadings, but must affirmatively present the factual evidence upon which he relies." *Leland v. Frogge*, 71 Wn.2d 197, 200-201, 427 P.2d 724 (1967); citing *Reed v. Streib*, 65 Wn.2d 700, 399 P.2d 338 (1965); *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 421 P.2d 674 (1966).

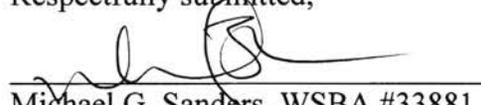
The trial court did not err in determining that no genuine issue of material fact was offered in response to Performance's motion. Its decision to dismiss the lawsuit with prejudice should therefore stand.

VI. Conclusion

Based on the foregoing reasons, Respondents respectfully request that the Order Granting Summary Judgment in this matter be affirmed.

June 26, 2012

Respectfully submitted,

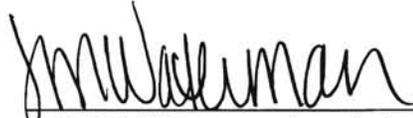
A handwritten signature in black ink, appearing to read "Michael G. Sanders", is written over a horizontal line.

Michael G. Sanders, WSBA #33881
Davies Pearson, P.C.
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2012, I caused to be served a copy of the foregoing **BRIEF OF RESPONDENT** on the following persons by Legal Messenger at the following addresses:

Michael Healy
Law Office of Mike Healy
420 Bell Street
Edmonds, WA 98020



Jody M. Waterman, Legal Assistant

~~FILED~~
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JUN 27 AM 10:04