COURT OF APPEALS No. 47778-5 - II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CEDAR COURT APARTMENTS, LLC,
a Washington Limited Liability Company

Respondent/Plaintiff

v.

GUSTAVO & MARIA COLORADO,
husband & wife, and the marital community composed thereof,

Appellant/Defendant

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Cedar Court's main argument and overall appellate theme is rooted upon a false understanding of Washington law. Cedar Court insists that this appeal should be affirmed because the Colorados have no direct proof that any Cedar Court employees or agents caused this fire. However, direct evidence of negligence is simply not the standard in Washington. Instead, "[v]erdicts in either civil or criminal cases, however, may be based entirely upon circumstantial evidence." State v. Long, 44 Wn.2d 255, 259, 266 P.2d 797, 799 (1954). Just as importantly, circumstantial evidence can be inferred from common sense and practical experience. A concise explanation of this deductive jurisprudential principle was supplied by the Washington Supreme Court many years ago:

> A verdict will not be set aside unless the court can say, as a matter of law, that there is neither evidence nor reasonable inference from the evidence to support the verdict. The evidence must be viewed in the light most favorable to the party against whom the motion is made. All competent evidence favorable to the party who obtained the verdict must be taken as true, **and that party must be given the benefit of every favorable inference which reasonably may be drawn from the evidence.** If there is substantial evidence to support the verdict, it must stand. **Substantial evidence is that character of evidence which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.**

Arnold v. Sanstol, 43 Wn.2d 94, 98, 260 P.2d 327, 329 (1953) (emphasis added).

The test to determine the sufficiency of evidence necessary to support a jury verdict is almost as old as Washington's legal system itself. There can be no reasonable argument about the applicable law in this case. However, Cedar Court's entire argument is nothing more than an attempt to persuade this Court that the *"weight"* of the evidence is not sufficient to support the jury's finding in favor of the Colorados. To advance this argument, Cedar Court ignores numerous facts, and the reasonable inferences derived by those facts, to insist that JNOV was appropriate. The record reveals otherwise.

II. LEGAL ANALYSIS

A. Cedar Court's Analysis is Flawed Because the Record is Abundant with Inferences and Circumstantial Evidence Sufficient to Establish That Cedar Court's Agents or Employees Entered the Colorado's Apartment and Started the Fire.

Courts will sparingly overturn a jury verdict. Valente v. Bailey, 74 Wn.2d 857, 447 P.2d 589 (1968). Appellate courts will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. Phelps v. Wescott, 68 Wn.2d 11, 410 P.2d 611 (1966). The credibility of witnesses and the weight to be given the evidence are matters within the province of the jury and if an appellate court is convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the

verdict rendered. Burke v. Pepsi-Cola Bottling Co., 64 Wn.2d 244, 391 P.2d 194 (1964).

At Page 6 of its Brief, Cedar Court states: "The motion was properly granted due to the total absence of any evidence that any representative of Cedar Court accessed the apartment on the day of the fire." Id. First, this argument is rooted in the assumption that direct evidence is required to prove negligence, which is obviously erroneous. Second and most importantly, this statement is unequivocally and categorically false. In her trial testimony, Deanna Hanshew admitted that she testified in her deposition as follows: "On behalf of Cedar Court there was clearly someone in the apartment." (RP 273). Impeached as she was at trial, Ms. Hanshew agreed that a Cedar Court representative was inside of the Colorado's apartment on the day of the fire – February 21, 2013. (RP 271-273; Hanshew Deposition at p. 53; Ex. 49)

It is important to note that Ms. Hanshew was chosen to act as the CR 30(b)(6) representative and therefore corporate representative of Defendant Cedar Court at trial and at deposition. It is further important to recognize that Ms. Hanshew's testimony directly contradicted her own prior testimony on direct examination. Ms. Hanshew's testimony also contradicted Tammy Wheat's testimony and the representations of Cedar Court's own attorney made during opening and closing statements. Both the trial court and this appellate court must "defer to the fact finder on

issues of conflicting testimony, witness credibility, and persuasiveness of the evidence." State v. Emery, 161 Wn. App. 172, 199-200, 253 P.3d 413, 428 (2011), aff'd, 174 Wn.2d 741, 278 P.3d 653 (2012).

In its appellate brief, Cedar Court illogically contends that the Colorados "did not dispute the testimony of the Fire Investigator as to the cause of the fire." See Cedar Court's Brief at 6-7. This argument is symbolic of Cedar Court's entire brief and appellate argument because both the Colorados and Cedar Court ***stipulated*** that causation was not an issue for the jury to determine at trial. No one disputes what the cause of the fire was, but rather who more likely started the fire.

Cedar Court further attempts to confuse this Court by stating that Lt. Kenneth Hanson "was not made aware of anyone other than the Colorado family being in the apartment on the day of the fire." See Cedar Court's Brief at p. 7. However, the record is clear that Lt. Hanson was only told by "somebody else" that no one else had been in the Colorados' apartment on the day of the fire." (RP 146). Lt. Hanson confirmed that the identity of that "somebody else" was none other than Cedar Court's apartment manager, Tammy Wheat. (RP 147). As stated in the Colorados' opening appellate brief, Tammy Wheat's credibility was called into question throughout this trial and was a central theme of the Colorados' case.

It is also important to remember that Lt. Hanson testified at trial that he was informed that both the New Life Carpet cleaner and the Cedar Court maintenance man, Alex, had possession of the key to enter the Colorado's apartment on the day of the fire. While he was told by Tammy Wheat that neither of them entered the Colorados' apartment on the day of the fire, Lt. Hanson admitted that he did not interview Alex or any employees of New Life Carpet Cleaners. (RP 146-48).

While Cedar Court insists there is no circumstantial evidence of negligence, the record shows that Cedar Court made a tactical decision not to call Alex or anyone from New Life to testify at trial. Cedar Court's choice is suspicious for obvious reasons, and the jury is permitted to infer that this decision was made because this testimony would not be helpful towards Cedar Court. "The inference that witnesses available to a party would have testified adversely to such party arises only where, under all circumstances of the case, such unexplained failure to call witnesses creates a *suspicion* that there has been a willful attempt to withhold competent testimony." Williams v. Kingston Inn, 58 Wn. App. 348, 356, 792 P.2d 1282 (1990) (quoting 5 K. Tegland, Wash.Prac., *Evidence* § 85, at 247 (1989) (quoting State v. Baker, 56 Wn.2d 846, 859, 355 P.2d 806 (1960) (emphasis in original)).

Cedar Court further contends that Lt. Hanson's testimony supports the trial court's decision to grant JNOV. However, a close analysis of Lt.

Hanson's testimony actually shows that his opinions support the Colorados' theory of the case. First, Lt. Hanson testified that it was his opinion that the fire probably started between 4:00 and 4:30 PM. Lt. Hanson's testimony completely coincides with Gustavo Colorado's testimony that he asked the New Life Carpet person to "hurry up" and clean the carpets so he, his wife and his daughter could finally return to their apartment for the evening. (RP 203, 213; RP 189). A reasonable inference from this testimony is that the New Life Carpet cleaner entered the Colorados' apartment shortly after this conversation occurred. Another reasonable inference is that the New Life Carpet cleaner would have moved boxes around during this process and placed one of them on top of the stove. This is an especially reasonable inference, given that Mr. and Mrs. Colorado both testified that they did not leave anything flammable on top of the stove. (RP 398). This is also a reasonable inference given that Mr. Colorado testified that he did not smell smoke when he briefly checked on his apartment around 4:00 PM. (RP 162, 190-91, 212).

Another piece of circumstantial evidence that Cedar Court refuses to acknowledge is that Lt. Hanson himself testified, without objection, that he was concerned about the appearance of "spoliation of evidence." During trial, Tammy Wheat was forced to admit that Cedar Court deliberately disposed of the stove even though she knew that the stove had malfunctioned and was determined by Lt. Hansen to be the source of the

fire. (RP 363-65). Obviously, the jury is free to infer that Cedar Court's act of disposing the stove in this matter was suspicious and intentional.

Overall, Cedar Court would have this Court believe that it is virtually impossible to sustain a jury verdict based upon circumstantial evidence, except in rare cases. However, a quick review of Washington case law shows the complete opposite to be true. For example, even in aggravated murder and death penalty cases, Washington's courts of appeal have repeatedly stated that criminal verdicts requiring proof beyond a reasonable doubt can be based on inferences deduced from circumstantial evidence. See e.g., State v. Hummel, 165 Wn. App. 749, 766-68, 266 P.3d 269, 278-79 (2012). In State v. Pirtle, the Washington Supreme Court reiterated a well-established and analogous evidentiary rule in criminal law that, "premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial." State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245, 255 (1995). Other analogous examples of the sufficiency of inferences drawn from circumstantial evidence in criminal cases are abundant in Washington criminal jurisprudence. See e.g., State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995); State v. Bowman, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984) (the State need not produce the actual weapon to prove that a defendant was armed during the commission of an offense). State v. Fry, 39 Wn.2d 8, 11–13, 16, 234 P.2d

531 (1951) (in manslaughter case, corpus delicti satisfied by circumstantial evidence of fact of death and testimony connecting defendant to the crime).

Overall, Cedar Court's artificially narrow interpretation of circumstantial evidence cannot support the trial court's granting of JNOV. In short, Cedar Court's argument is nothing more than self-serving rhetoric designed to affirm the trial court's JNOV order – even at the stake of abandoning virtually all academic and jurisprudential honesty.

B. Cedar Court's Analysis of the Landlord Tenant Act and Other Ancillary Legal Theories is Superfluous and Irrelevant.

Cedar Court devotes considerable attention and volume to matters that are not at issue on appeal. At its core, this appeal is simply whether there is sufficient evidence to sustain the jury's verdict in favor of Gustavo and Maria Colorado. In contrast, Cedar Court offers at least 10 pages of appellate briefing that is akin to legal red herrings. The actual trial had very little to do with: (1) breach of the rental agreement; (2) latent defect theory; or (3) the Residential Landlord Tenant Act. These legal principles are not truly before the Court on the Colorados' appeal in regards to the trial court's granting of JNOV.

C. Attorney's Fees on Appeal

The Colorados object to Cedar Court's request for attorney's fees on appeal. First, Cedar Court did not file a cross-appeal with this Court in regards to the trial court's decision not to award either party its attorney's

fees under the Lease at issue in this case. While it is true that Paragraph 8 of the February 13, 2013 Lease provides for attorney's fees, Cedar Court simply did not file a cross-appeal in this case and therefore waived their right to seek such affirmative relief.

"Under the Rules of Appellate Procedure (RAP) 5.1(d), a notice of a cross appeal is essential if the respondent seeks affirmative relief as distinguished from the urging of additional grounds for affirmance." Phillips Bldg. Co., Inc. v. An, 81 Wn. App. 696, 915 P.2d 1146 (1996) (citing Nord v. Phipps, 18 Wn. App. 262, 266 n. 3, 566 P.2d 1294, *review denied,* 89 Wn.2d 1014 (1977); see also Orland and Tegland, 3 Wash. Prac. 49 (1991).

In contrast to Cedar Court, Plaintiffs Gustavo and Maria Colorado did file a Notice of Appeal with this Court. The Colorados have affirmatively sought appellate review in regards to the trial court's granting of JNOV, and the trial court's concomitant ruling denying attorney's fees. At the post-trial hearing, the trial court declined to award attorney's fees to either the Colorados or Cedar Court because the trial court ruled that neither party was a true "prevailing party" under Washington law.

The Colorados are entitled to attorney's fees on appeal, and also as a substantially prevailing party for defeating Cedar Court's negligence and breach of contract claims. The Colorados assert that they are entitled to attorney's fees pursuant to Paragraph 8 of the Lease signed by all parties

to this lawsuit. These issues are appropriately delegated to the trial court on remand.

It is also important to note that both sets of parties, and their respective attorneys, stipulated on the record that the Lease was bilateral with respect to the attorney's fees provision. (RP 240-242). Further, under RCW 4.84.330, the Lease must be considered to be a bilateral contract with respect to attorney's fees as a matter of statutory interpretation and public policy. See generally Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 489, 200 P.3d 683, 686-87 (2009).

III. CONCLUSIONS

This Court should reverse the trial court's order granting JNOV. There is sufficient circumstantial evidence to support the jury's verdict determining that Cedar Court probably caused the fire in this case.

Respectfully submitted this 31st day of May 2016.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 31st day of May 2016 a true and correct copy of the foregoing *Appellants' Reply Brief*, was served upon the following parties and their counsel of record in the manner indicated below:

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