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NO. 66469-7-I

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION ONE

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

a Washington corporation,

Petitioner(s),

v.

ERIC FRASER,

Respondent.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA MIDDAUGH

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

INTRODUCTION.....1

THE APPELLEE'S COUNTERSTATEMENT OF THE CASE.....1

REBUTTAL TO RESPONSE ARGUMENT..... . 1

1. THE CONTRACT IS ENFORCEABLE.....1

2. THE APPELLANTS DID NOT VIOLATE THE WASHINGTON CONUMER PROTECTION ACT, NOR HAS MS FRASER SHOWN DAMAGES UNDER IT.....3

CONCLUSION.....6

TABLE OF AUTHORITIES

WASHINGTON CASES

Page

Dickens v. Alliance Analytical Laboratories, LLC
127 Wn.App. 433, 11 P.3d 889, (2005).....19

ESCA Corp. v. KPMG Peat Marwick,
86 Wn.App. 628 (1997),
aff'd 135 Wn.2d 820 (1998).....5

Hemisphere, Inc. v. Everett Plywood Corp.,
7 Wn.App. 232 (1972) 3

Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Company,
105 Wn.2d 778 (1986) 5, 7, 8, 11

McGary v. Westlake Investors 99 Wn. 2d 280 (1983)..... ..2

McWhorther v. Bush, 7 Wash.App. 831 (1972).....5

Page v. Prudential insurance Co.,
12 Wn. 2d 101 (1942).....2

INTRODUCTION

In her response, the Ms. Fraser has largely ignored the arguments of the appellant-defendants, and instead resorted to denigrating the character of Dirk M. Mayberry in an attempt to persuade the court to ignore established law. The court should resist this effort because, as shown below, the law favors the appellants.

THE APPELLEE'S COUNTERSTATEMENT OF THE CASE

The appellee has recited her versions of the facts of the case and asks the court to adopt them as its own. There should be no need to recite the differences because both sides have already given their versions to the court in their briefing. The court did not make those findings for the most part. If the court feels that any part of the findings proposed by Ms. Fraser are required in order to deny the appeal, then the court should remand back to see if the court would adopt those necessary findings.

Otherwise it should address the appeal on the findings as issued.

As will be shown below, the differences in the version of what occurred does not affect what the decision of the court should be, which should be to reverse on appeal.

REBUTTAL TO RESPONSE ARGUMENT

1. THE CONTRACT IS ENFORCIBLE

Ms. Fraser has presented essentially two reasons why the contract is unenforceable. First she states that the contract was "incomprehensible". In this regard she also complains that payments were not made as outlined in the contract, or that its terms were followed.

The appellant has produced the contract and denies that it is ambiguous. Courts will not read ambiguity into a contract when a reading of the contract as a whole resolves the ambiguity. Whether a contract is ambiguous is a question of law. **McGary v. Westlake Investors** 99 Wn.2d

280. While there may have been some cross-outs and changes, a reading of the contract demonstrates what its terms were. The appellants have not addressed what the ambiguity even is other than to call it incomprehensible.

The appellee-plaintiff also argues that the court's finding that she was not "lucid and coherent", is also enough to void the contract. This argument does not adequately address the case cited by the appellant-defendant for the test of capacity. The test, as stated in the opening brief, was that she did not understand the nature and the terms of the contract. **Page v. Prudential insurance Co.** 12 Wn. 2d 101, 108 (1942). The defendants cannot explain how she was so intoxicated that she could not understand the nature and terms of the contract, yet still testify what she thought the contract meant at the time. She can't have it both ways.

Finally, she complains that Mr. Mayberry did not make the payments as scheduled. While

that may be grounds for declaring a breach of contract, she has presented no authority that states that is enough to invalidate the contract. In this regard, the court should take notice that the appellee-plaintiff invited any breach by breaching the contract herself first by repudiating it and bringing suit. Repudiation discharges the injured party's duties and gives rise to a claim of damages for total breach. **Hemisphere, Inc. v. Everett Plywood Corp.**, 7 Wn. App. 232 (1972)

2. THE APPELLANTS DID NOT VIOLATE THE WASHINGTON CONSUMER PROTECTION ACT, NOR HAS MS. FRASER SHOWN DAMAGES UNDER IT.

Ms. Fraser claims that an unfair or deceptive practice was shown because she transferred her property for no money. This ignores the plain language of the contract that states that she was to be paid $50,000. It is simply not true the only consideration was the $1400 in advance money.

She claims the contract was unfair because she was unemployed, broke, suffering from drug

and alcohol abuse and homeless. None of these factors, by themselves, make a contract unfair and she cites to no authority that any of these factors make a contract unfair.

She claims that previous lawsuits and time Mr. Mayberry spent time in jail for, somehow converted this essentially private action into a public one. She cites no principle or authority to support this theory and the court should not imply one. She alleges that Mr. Mayberry was "in the business of defrauding the public and the IRS". This is an unproven allegation that was never made into a finding fact by the court. She has not shown that this transaction was related in any way to his losses of prior litigation.

Ms. Fraser infers that damages have been proven because Mayberry cause her to lose her home. This ignores the reality that Ms. Fraser's use of the property as a home was lost long before Mr. Mayberry came onto the scene. The house stopped

becoming a home, when it caught on fire and became unlivable. What was lost was a burned out hulk that was in danger of being foreclosed on, in which there was no insurance money available for making repairs, because the appellee illegally rewired the electricity so it could be "borrowed" from her neighbor.

The appellee-plaintiff produced absolutely no evidence of any action that she could have taken that was better than the deal she negotiated with Mayberry. By her own admission she was a drug addicted alcoholic who most likely had no credit rating that could perform any kind of rescue plan on her soon to be foreclosed on home. The plan as envisioned by the contract, would allow her to sell the house, make a tidy profit and that it could possibly be used to compromise down her burgeoning child support debt.

Without an alternate plan to compare it to and without showing some kind of rescue plan she

was capable of pull off on her own without Mr. Mayberry assistance, any attempt to demonstrate or calculate damages is sure speculation.

With the evidence before the court, it could very well be that instead of preventing damages, her lawsuit is simply an attempt to gain a windfall profit at the expense of Dirk M. Mayberry Inc., who has now invested heavily in the building in terms of the remodel it organized.

A trial court must enter findings showing the basis and method of its computation of damages. **McWhorther v. Bush**, 7 Wash. App. 831, 833, 502 P.2d 1224 (1972).

"[E]vidence or proof of damages must be established by a reasonable basis and must not subject the trier of fact to mere speculation or conjecture." **ESCA Corp. v. KPMG Peat Marwick**, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997), aff'd, 135 Wn.2d 820, 959 P.2d 651 (1998).

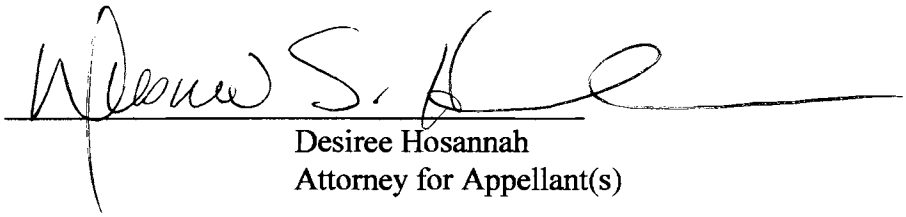
Subjective, self-serving characterizations are insufficient to establish damages. **Id.**

Here the appellee-plaintiff has provided nothing but self serving characterizations in her attempt to demonstrate that the courts finding that she has not proven damages is incorrect. She possessed a burned out house in danger of foreclosure, while at the same time, had heavy child support debts that would wipe out any remaining equity at no discount. She has not shown any other alternative was available to her that would put her in a better financial condition than that.

CONCLUSION

For the reasons given in this brief, the petitioners respectfully request that this court reverse the decision of the trial court to quiet title in favor of the plaintiff and the award of attorney fees and costs to her. The petitioners specifically request that the court quiet title in favor of the petitioners and award them their costs.

Dated this 15th day of November, 2011.



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