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I. ASSIGNMENTS OF ERROR

1.1 Assignments of Error.

1. The trial court erred when it entered the Judgment Summary Against Albert Rosellini, Jr. dated February 28, 2013. CP 393-395.

2. The trial court erred when it entered the Judgment Summary Against Vicki Rosellini dated February 28, 2013. CP 396-398.

3. The trial court erred when it did not grant Appellants' Motion for Reconsideration. CP 316-325.

4. The trial court erred when it entered Findings of Fact Nos. 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 in the Amended Findings of Fact and Conclusions of Law.¹

1.2 **Issues Pertaining to Assignments of Error.**

1. Whether there is substantial evidence in the record to support the challenged Findings of Fact?

2. Whether the trial court properly determined that the corporate form of Fortune Oil Co., ("Fortune Oil") should be

¹ All challenged Findings of Fact are Reproduced at Appendix A.

disregarded and its shareholders should be liable for Fortune Oil's obligations to Kim?

3. Whether the trial court properly determined that Albert Rosellini is personally liable to Kim because he transferred Fortune Oil assets?

4. Whether Albert Rosellini is liable to Kim under the Washington Consumer Protect Act ("CPA") based on the confession of judgment against Fortune Oil?

5. Whether the court properly awarded attorneys fees to Kim pursuant to the CPA?

6. Whether the court properly entered judgment in favor of a non-party?

II. STATEMENT OF FACTS

2.1 Procedural History.

In April 2010 Kim filed an action in District Court in Seattle against Fortune Oil, the Rosellinis and others to collect the unpaid obligation from Fortune Oil. Exhibit 5. The amended complaint alleged, among other things, a violation of the Washington Consumer Protection Act.

The parties to the lawsuit subsequently entered into a settlement pursuant to which the Rosellinis were dismissed without

prejudice from the lawsuit and Fortune Oil agreed to a confession of judgment. Exhibit 8. The confession signed on behalf of Fortune Oil states “[t]his consent and confession of Judgment arises out of Defendant’s breach of Shell Branded Retail Contract . . .”

Kim subsequently filed this action. This matter was tried to the court on December 27 and 31, 2012. The evidence considered by the court consisted of the testimony of Joon Kim, the deposition transcript of Albert Rosellini Jr. and documentary exhibits admitted into evidence.

Immediately upon conclusion of the trial² the court entered Findings of Fact and Conclusions of Law. CP 273-281. The court signed and filed the document on December 31, 2013, although it was mistakenly dated January 31, 2012.

Kim subsequently filed a Motion for Entry of Judgments and for Award of Attorney’s Fees and Costs. CP 287-288. The Rosellinis filed a Response to Motion for Entry of Judgment objecting to the proposed form of judgment, the application for award of attorney’s fees, certain costs and that it provided for

² Contrary to CR 51(c).

judgment in favor of a non-party, Kim's attorney, Karl Park. CP 393-395. The Rosellinis also filed a Motion for Reconsideration. CP 316-325. The court entered an order requiring Kim to respond to the motion for reconsideration (CP 326-327) which Kim submitted on February 4, 2013. CP 328-386. The court also received the Rosellinis' Reply in Support of Motion for Reconsideration (CP 387-392) and a Submission of Supplemental Authority. (CP 476)

On February 28, 2013 the court issued Amended Findings of Fact and Conclusions of Law (CP 399-407) and judgments against Albert Rosellini, Jr. (CP 393-395) and his wife, Vicki Rosellini (CP 396-398). Those judgments are challenged on this appeal.

2.2 Fortune Oil, Inc.

Formed in 1995, Fortune Oil was in the business of distributing gasoline which it purchased from large oil companies to retail gas stations like P.D.Q. Deli Mart pursuant to written supply contracts between Fortune Oil and the gas station. The contract between Kim and Fortune Oil was admitted as Exhibit 1 at trial. The credit card transactions by which the gas station customers purchased fuel were processed by the large oil company, which

Fortune Oil's account. In return, Fortune Oil would credit the amount received on the account the gas station had with Fortune Oil. CP 65-66.

In addition to supplying the gas stations with product, Fortune Oil facilitated the "branding" of the gas stations. With respect to most gasoline stations, when a contract is signed to provide gasoline to the station there are also branding costs that go along with servicing a new station. It often involves putting in new canopies, new signage, painting the station or bringing it up to oil company standards. In this case the oil company was Shell. Typically the large oil company advances a substantial portion of the money to accomplish those upgrades. The money is then paid back to the oil company over a long-term, based on the number of gallons of fuel purchased by the retail gas station. If the contract goes through its full term, at the time of the expiration of the contract there is no remaining obligation to the oil company. Exhibit 7.

Typically, the contract with the oil company provides that in the event of a default the oil company can accelerate the entire amount due. When two of Fortune Oil's customers failed to make their payments for substantial deliveries of fuel it caused a cash

flow problem and Fortune Oil was not able to pay the amounts due to the oil companies. One after another the oil companies that supplied Fortune Oil placed the company in default. Fortune had already experienced losses due to the downturn of the retail petroleum industry. With the sudden cash flow issues on top of its losses, Fortune had to close its doors. *Id.* When Fortune Oil ceased operations it owed \$32,076.20 to Kim, but had no funds with which to pay the obligation.

The only assets Fortune Oil had remaining were the supply contracts it had with the retail gas stations. These were sold to the large oil companies. However, the sale proceeds were never received by Fortune Oil because they were retained by the buyers to reduce the company's outstanding obligations to the oil companies which purchased the contracts. CP 74-78.

III. ARGUMENT

3.1 It was error for the trial court to disregard the corporate shield and hold the Rosellinis personally liable to Kim.

It is not clear from the trial court's Amended Findings of Fact and Conclusions of Law (CP 399-407) on what basis the court determined that the corporate shield for Fortune Oil should be disregarded. However, it appears that the court concluded that the

corporate veil should be pierced because the Rosellinis commingled their assets with those of the corporation and did not maintain records of any transactions between the company and themselves.

The corporate records of Fortune Oil are sparse. Albert Rosellini testified that he kept few, if any, record of any of the financial transactions between himself and Fortune Oil, and between Fortune Oil, Fortune Company and Ferndale Gas.

Finding of Fact No. 7.

In the bylaws of Fortune Oil, the Treasurer is required to keep all financial records. Despite its bylaws, neither Fortune Oil nor Albert Rosellini kept financial records of all transactions.

Finding of Fact No. 8.

Albert Rosellini transferred money between Fortune Oil and the Fortune Company, Inc. depending on his assessment of the needs of each company

Findings of Fact No. 9

From the beginning, Albert Rosellini considered Fortune Oil as his personal company and failed to keep complete corporate and financial records. Albert Rosellini made numerous draws and deposits to Fortune Oil and Fortune Company. There were no adequate records, whether for the corporation or for his own, of the numerous draws and deposits. In the federal tax returns and on the accounting ledgers, the transfers from Fortune Oil to the Rosellinis are listed as "shareholder loans". The Rosellinis freely commingled their bank accounts with Fortune Oil and Fortune Company's bank accounts to the degree that moneys were deposited and withdrawn from the company

accounts and the personal accounts without any record whatsoever.

Finding of Fact No. 10.

Again, Albert Rosellini has no document to support such loans and receivables or whether the loans were ever paid back to Fortune Oil.

Finding of Fact No. 11.

Again, there is no record of any loan from Fortune or to the other companies owned by the Rosellinis.

Finding of Fact No. 12.

The Rosellinis have no record to support what happened to the loans and the money owed by his companies to Fortune Oil. The Rosellinis simply commingled their personal assets with Fortune Oil and Fortune Company without regard for record keeping.

Finding of Fact No. 13.

Fortune Oil, through Albert Rosellini, granted a credit to Ferndale Gas in the form of gasoline deliveries in amount excess of \$500,000 without any payment or security received. Again, there was no record of corporation authority from Fortune Oil or Ferndale Gas.

Finding of Fact No. 15.

Again, Albert Rosellini could not account for the money received from WSCO, not to mention the other sales.

Finding of Fact No. 16.

By December 2006, Fortune Oil ceased to do business. Despite such inactivity, the Rosellinis booked Vicki Rosellini's revenues from the consulting work as revenues of

Fortune Oil in 2007 and 2008 to offset the prior tax loss credit of Fortune Oil, even though Vicki Rosellini did not do any work for Fortune Oil and received no compensation from Fortune Oil at all. This again shows that the Rosellinis willingly commingled their assets and revenues as Fortune Oil's and vice versa.

Finding of Fact No. 17.

The Court finds that the Rosellinis commingled their personal assets with that of Fortune Oil and Fortune Company.

Finding of Fact No. 19.

The Rosellinis and Fortune Oil functioned as one entity, and it is impossible to regard them as separate entities.

Finding of Fact No. 21.

By commingling the assets of Fortune Oil and by abusing corporate form, the Rosellinis intentionally used Fortune Oil to evade Fortune Oil and their duties to creditors, including Plaintiff Kim.

Finding of Fact No. 23.

These findings by the court are not supported by substantial evidence in the record. "A trial court's findings of fact are reviewed for substantial evidence. (citation omitted). Substantial evidence to support a finding of fact exists where there is sufficient evidence in the record 'to persuade a rational, fair-minded person of the truth of the finding'". Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 353, 172 P.3d 688 (2007). The court's repeated finding that Fortune Oil

did not keep records of its transactions is directly contradicted by the evidence before the court. In his deposition Mr. Rosellini testified that the company used the QuickBooks accounting program to track the company's transactions. CP 123-129. Exhibit 23 is a printout of one of the QuickBooks accounts and shows that each financial transaction was recorded by the company. Thus when, for instance, Mr. Rosellini took a draw from the company it was recorded in the QuickBooks program. One such transaction is reflected on page 6 of the exhibit with a date of February 6, 2002. Similarly, if Mr. Rosellini decided to loan the company money it would be recorded, as the January 31, 2002 entry appears at that same page of the exhibit as well as on page 178 which shows a loan to the company of \$91,560.83.

At trial Kim argued that Mr. Rosellini testified that, in fact, no records of financial transactions were maintained by the company. See Plaintiff's Response to Motion for Reconsideration, CP 333-334 in which Mr. Rosellini acknowledged that no "corporate records" were created when financial transactions occurred. It is clear, however, in the context of the prior portions of Mr. Rosellini's deposition that Kim's attorney and Mr. Rosellini were distinguishing corporate recordkeeping from financial recordkeeping. CP 56-62.

The fact is, as incontrovertibly demonstrated by trial Exhibit 23 (CP 282, Fortune Oil Accounting ledgers), the company did maintain records of its financial transactions.

It is not surprising that resolutions and meeting minutes were not generated each time a transaction took place. In a company wholly owned by a husband and wife that would not be out of the ordinary. The evidence showed that Fortune Oil maintained all corporate records required to maintain its corporate existence and the corporate shield. CP 56-58, 60-62.

The court's finding that the Rosellinis "freely commingled their bank accounts" with those of the company have absolutely no basis in the evidence. Similarly, the following findings that certain documents do not exist are without basis in the evidence:

Again, Albert Rosellini has no document to support such loans and receivables or whether the loans were ever paid back to Fortune Oil.

Finding of Fact No. 11.

Again, there is no record of any loan from Fortune Oil to the other companies owned by the Rosellinis.

Finding of Fact No. 12

Fortune Oil never attempted to collect the amount due from Ferndale Gas, nor kept any record of the transactions.

Finding of Fact No. 15.

There was no evidence that such documentation did not exist. As Mr. Rosellini explained at his deposition, he did not personally use the QuickBooks program. The bookkeeper for the company recorded the transactions in QuickBooks. CP 124. Mr. Rosellini also did not prepare the company's tax returns. A professional CPA was engaged by the company to perform that task. CP 62; Exhibits 17, 18 and 19. The fact that Mr. Rosellini personally could not explain the entries in the tax returns is not evidence that a proper explanation does not exist.

It is well established in Washington that the purpose of a corporation is to limit liability and the corporate form will not be disregarded simply because a corporation cannot meet its obligations. Meisel v. Modern Hydraulic Press Company, 97 Wn. 2d 403, 645 P.2d 689 (1982).

In Meisel, the Washington Supreme Court set forth the test for disregard of the corporate entity: "*The corporate entity is disregarded and liability assessed against shareholders in the corporation when the corporation has been intentionally used to violate or evade a duty owed to another.*" Id. at 409. In Meisel, the plaintiff was injured by a machine manufactured by a dissolved

corporation. The Meisel Court held that the plaintiff could not recover against a new corporation which later leased the same assets or against the owners of the two corporations. The Court said that abuse of the corporate form must involve some fraud or misrepresentation that actually harms the party seeking relief. The Court did not find that the dissolution of the corporation involved any fraud that harmed the plaintiff stating that “[Harm alone does not create corporate misconduct.” Id. at 410, 411. Here, Kim failed to establish that the closing of Fortune Oil and its failure to pay Kim involved fraud or misrepresentation that harmed him. Fortune Oil had more debts than assets. Fortune Company received nothing from Fortune Oil’s closure and the Rosellinis put their own funds in to cover many of the debts. CP 74-76.

In Norhawk Investments v. Subway Sandwich Shops, 61 Wn. App. 395, 811 P.2d 221 (1991), the Court held that the corporate veil would not be disregarded in the case of two corporations that were run by the same officers. The Court held that even though property and interests of the two corporations had been comingled, there was no evidence that the corporations were intended to function as one or that regarding them as separate would consummate any fraud upon others. Id. at 224.

Thus, even if the Rosellinis had commingled their assets with the company the evidence fails to establish the requirements for piercing the corporate veil because the corporate shield will be respected unless it: 1) "has been intentionally used to violate or evade a duty"; and 2) the "wrongful corporate activities must actually harm the party seeking relief." Norhawk v. Subway, 61 Wn. App 395, 398-9, 811 P.2d 22 (1991). "Intentional misconduct must be the cause of the harm." Id. at 399.

The mere fact of commingling does not establish abuse:

If duty were to arise from abuse of the corporate form alone, the second part of the first element, "to avoid a duty owed," would be redundant. Duty would always be created by an abuse of the corporate form such as commingling of the corporate interests. But the law requires a showing of both disregard of the corporate form and that the disregard was done to avoid a duty owed to another.

Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 926, 982 P.2d 131 (1999). Additionally, the misuse of the corporate form must be the proximate cause of the plaintiffs' loss. In Morgan v. Burks, 93 Wn.2d 580, 611 P.2d 751 (1980) the court considered a case where there was evidence both of commingling and fraudulent transfers made in an attempt to keep assets out of a creditor's reach. However, the court found that since the transfers had been

invalidated, no harm actually had come to the plaintiff because of the abuse of the corporate form.

In this case there is no evidence connecting any commingling and Kim's loss. There is no evidence of even a single fraudulent transfer. There is no evidence of misrepresentation, deceit or manipulation of the corporate form that could have impacted Kim. Even if the attempt to take advantage of Fortune Oil's tax losses by booking Vicki Rosellini's income on the Fortune Oil Tax return as suggested by the Rosellini's CPA was deemed wrongful, it does not support disregard because it had absolutely no impact on whether Kim would be paid.

In Truckweld Equipment v. Olson, 26 Wn. App. 638, 618 P.2d 1017 (1980), the Court refused to find personal liability of a corporate officer when the corporation could not pay its debts. Citing Morgan v. Burks, 93 Wn.2d 580, 611 P.2d 751 (1980), the Court said: "*Typically, the injustice which dictates a piercing of the corporate veil is one involving fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit and the creditor's detriment.*" Id. at 645. No evidence produced at trial supports disregard of the corporate form.

3.2 The court erred in holding Albert Rosellini personally liable because of transfers contrary to RCW 23B.06.400.

In Finding of Fact 20 and 22 the court found:

Fortune Oil, through the action of Albert Rosellini, transferred over \$2,000,000 in cash or credit to the Rosellinis, Fortune Company, and Ferndale Gas in 2006, while knowing that creditors to Fortune Oil will not be paid.

Because of these transfers of Fortune Oil's assets to the Rosellinis, and Ferndale Gas, Fortune Oil has no asset to pay its creditors, including Plaintiff Kim.

There is no substantial evidence supporting these findings.

The court did not identify any distributions to the Rosellinis that were in violation of RCW 23B.06.400 or the dates of any such distributions. The evidence does not show a single payment of “cash” or “credit” to the Rosellinis in 2006. Review of Exhibit 23 confirms that no payments to the Rosellinis had been made by Fortune Oil for more than two years when the company closed its doors.

The court's findings regarding the unexplained entries on the company's tax returns do not support the conclusion that the Rosellinis received \$2,000,000 from Fortune Oil in 2006. No witness qualified to interpret the tax returns testified at trial. It would be pure conjecture whether the references in the returns

were correct, or whether they reflect corrections to prior erroneous information, or what they even mean. It would be nothing more than speculation to conclude that these returns show Fortune Oil made distributions of \$2,000,000 to the Rosellinis. However, conjecture is not a substitute for substantial evidence of a fact. See Cook v. Cook, 80 Wn.2d 642, 497 P.2d 584 (1972).

Finding of Fact 16 provides:

In 2006 and 2007, the major assets of Fortune Oil, the gasoline supply contracts with various gas stations, were sold to numerous wholesale companies, including WSCO Petroleum Corp ("WSCO"). The sale of WSCO alone was valued \$286,500. Again, Albert Rosellini could not account for the money received from WSCO, not to mention the other sales.

The finding is correct that Fortune Oil sold WSCO a number of dealer contracts. However, the evidence does not support the assertion that Albert Rosellini didn't know where the proceeds went. As Mr. Rosellini testified at his deposition, there were no proceeds from the sales because Fortune Oil was in debt to WSCO and the other purchasers. Consequently, any net proceeds were retained by buyers to apply toward Fortune's debt. CP 74, 77-78. In addition, review of Exhibit 23 does not reflect any large payments to Fortune Oil subsequent to the sale of the contracts. There is

absolutely no evidence that the Rosellinis received any money from the sale of the contracts.

Finally, Finding of Fact 15 does not support the conclusion that the Rosellinis took distributions contrary to RCW 23B.06.400. Firstly, the finding is not supported by substantial evidence. There was no evidence that the Ferndale Truck Stop was granted a credit of \$500,000. Rather, the company ran up a large bill quickly and then didn't pay. CP 115. There is also no evidence that Fortune Oil never attempted to collect the debt or that it kept no records of the transaction. CP 121. More importantly, it was the failure of the Ferndale Truck Stop that was largely responsible for putting Fortune Oil in a default position with the oil companies. It was after Ferndale Truck Stop ran up a big bill, not before, that Fortune Oil found itself unable to pay its creditors. CP 114-115. There is no contrary evidence in the record.

A trial court's findings must be supported by substantial evidence and those findings must support the court's conclusions of law. Hegwine v. Longview Fibre, supra. Here the evidence does not support the findings and the findings do not support the conclusion that the Roselinnis took distributions in violation of the statute.

3.3 The Court erred in holding that Albert Rosellini was personally liable under the Washington consumer Protection Act.

The trial court ruled that albert Rosellini is liable to pay Kim's attorneys fees pursuant to RCW 19.86 et seq. The basis for the court's ruling is set forth in Conclusion of Law No. 4:

4) The Complaint in District Court alleged a violation of the Consumer Protection Act. The Confession of Judgment by FORTUNE OIL COMPANY, INC. in the District Court was a general confession of judgment to the Complaint. It was signed by Albert Rosellini, President. Therefore, FORTUNE OIL COMPANY, INC. confessed to judgment against it for all claims, including violation of the Consumer Protect Act. Albert Rosellini, Jr. was the only officer and shareholder active in the corporation. Therefore, he participated and directed the acts of the corporation and is personally liable for the violations of the Consumer Protection Act which the corporation confessed to having committed. Under RCW 19.86 et seq. Plaintiff is awarded attorney's fees and costs.

This ruling is in error. First, the confession of judgment against Fortune Oil was not a "general confession" to all allegations in the complaint. As required by RCW 4.60.060 the confession signed by Mr. Rosellini on behalf of Fortune Oil contained a statement describing "the facts out of which the indebtedness arose . . ." RCW 4.60.060(2). The statement in the confession here reads:

This consent and confession of Judgment arises out of Defendant's breach of Shell Branded Retailer Contract ("Contract") dated October 7, 1996, which is incorporated herein by reference, entered by and between Defendant Fortune Oil Company, Inc. and

Sung Bok No and Joon Deuk No, subsequently assigned to Plaintiffs Joon Bum Kim and P.D.Q. Incorporated, and Defendant's failure to pay the credit card sales proceeds to Plaintiffs.

Exhibit 8 (emphasis added). Nothing in the statement references the Washington Consumer Protection Act or sets forth any facts which could support a claim for a violation of the Act. Thus, there is no basis for the trial court's holding that Fortune Oil is liable under the Act. Since the sole basis relied upon by the court to find Mr. Rosellini liable for attorney's fees is derivative of the erroneous premise that the confession of judgment rendered Fortune Oil liable under the Act, the judgment that Mr. Rosellini is liable under the Act must be reversed. And, since the only grounds the court found to award attorneys fees against Mr. Rosellini was liability under the Act, the judgment for attorneys fees must be reversed.

3.4 Fortune Oil was not a fiduciary.

The trial court's Finding of Fact No. 3 reads in part:

Fortune Oil had a fiduciary relationship with Plaintiffs and had a duty to make the funds available to Plaintiffs, as Fortune Oil did not own the funds and was only temporarily holding the funds for the benefit of Kim and similar accounts. Fortune Oil owed fiduciary duty to Kim and other gas stations owners who purchased gasoline from Fortune Oil with respect to the credit card accounts.

CP 400. Although denominated a finding of fact, the determination that Fortune Oil stood in a fiduciary relationship to Kim and "other

gas station owners” was an erroneous conclusion of law. First, all claims by Kim against Fortune Oil were resolved by entry of the judgment on confession. Any other claims by Kim against Fortune Oil are barred by the doctrine of res judicata.

More importantly, Fortune Oil was not a fiduciary to Kim or other gas station customers. The confession of judgment specifies that Fortune Oil’s liability is based on breach of the Shell Branded Retailer Contract. Under what was previously called the economic loss rule and is now called the independent duty doctrine, the rights of parties to a contract are limited to the terms of their agreement absent a duty that arises independent of the contractual relationship. Eastwood v. Horse Harbor Foundation, 170 Wn.2d 380, 241 P.3d 1256 (2010).

In sum, the economic loss rule does not bar recovery in tort when the defendant’s alleged misconduct implicates a tort duty that arises independently of the term of the contract. In some circumstances, a plaintiff’s alleged harm is nothing more than a contractual breach or a difference in the profits, revenue, or costs that the plaintiff had expected from a business enterprise. In other circumstances, however, the harm is simultaneously the result of the defendant breaching an independent and concurrent tort duty. Thus, while the harm can be described as an economic loss, it is more than that: it is an injury remediable in tort. The test is not simply whether an injury is an economic loss arising independently of the

contract. The court defines the duty of care and the risks of harm falling within the duty's scope.

At 393 - 394.

In this case the court concluded that Fortune Oil had a fiduciary duty to Kim to essentially perform the terms of the contract. The duty to pay over to Kim the net credit card receipts arises only from the terms of the contract itself. Consequently, Fortune Oil cannot be liable on a tort claim such as breach of fiduciary duty to recover its economic losses.

There was also no evidence produced at trial supporting the conclusion that Fortune Oil had a fiduciary duty to Kim. A fiduciary relationship exists where one party justifiably believes that the fiduciary will place the welfare of the party ahead of that of the fiduciary.

Fiduciary relationships include those historically regarded as fiduciary, and also may arise in circumstances in which "any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former." Liebergesell v. Evans, 93 Wn.2d 881, 890-91, 613 P.2d 1170 (1980). In general, "[a] fiduciary relationship imparts a position of peculiar confidence placed by one individual in another. A fiduciary is a person with a duty to act primarily for the benefit of another."

Denison State Bank v. Madeira, 230 Kan. 684, 230 Kan. 815, 640 P.2d 1235, 1242 (1982). "The facts

and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party.”

Goodyear Tire v. Whiteman Tire, 86 Wn. App. 732, 741-2, 935 P.2d 628 (1997); see also, Micro Enhance v. Coopers & Lybrand, 110 Wn. App. 412, 40 P.3d 1206 (2002).

In the Goodyear case the plaintiff Whiteman Tire had a dealership contract with Goodyear. When Whiteman Tire failed it claimed that, although Goodyear had not breached the dealership agreement, it should be responsible for Whiteman’s losses because Goodyear had acted contrary to Whiteman’s interests. The Court of Appeals concluded that since Goodyear “was primarily interested in promoting Goodyear,” rather than protecting Whiteman’s interests, a fiduciary duty did not exist. “The existence of conflicting profit incentives between a manufacturer and a dealer is at odds with a fiduciary relationship.” Id at 743.

The same is true in this case. Fortune Oil and Kim did business with each other, but neither undertook to put the other party’s welfare ahead of their own. Consequently, no duty beyond the contractual terms existed and it was error for the court to hold that Fortune Oil had breached a fiduciary duty.

A recent decision by the Washington Supreme Court involved a bank depositor who, relying upon erroneous statements by bank representatives, was damaged when the bank went into receivership. Annechino v. Worthy, 175 Wn.2d 630 (2012). The plaintiffs contended that individual bank officers and employees owed them a quasi-fiduciary duty. The Court observed that:

Generally, participants in a business transaction deal at arm's length; it has been said that an individual has no particular duty to disclose facts nor any particular right to rely on the statements of the party with whom he contracts at arm's length. Liebergessel v. Evans, 93 Wn.2d 881, 889, 613, P.2d 1170 (1980). Transactions between a depositor and a bank usually fall into this category.

Id at 636. Thus, even though a bank is holding money belonging, not to the bank, but to the depositor, a fiduciary relationship does not arise. It was error for the court to find the existence of a fiduciary duty based on the theory that Fortune Oil did not own the funds received from the oil company and it was only holding the funds for Kim.

In Annechino the issue of whether the bank was liable as a fiduciary was not before the Court. The Court did address whether an officer of a corporation could be personally liable if a corporation had breached a fiduciary duty.

Assuming arguendo, that the bank owed the Annechinos a fiduciary duty, Washington law does not support extending liability to individual bank officers in this case. The cases where we have found officers personally liable for the torts of corporations involved officers who either knowingly committed wrongful acts or directed others to do so knowing the wrongful nature of the requested acts. See Dodson v. Econ. Equip. Co., 188 Wash. 340, 343, 62 P.2d 708 (1936) (president and general manager directly participated in conversion of property); Johnson v. Harrigan-Peach Land Dev. Co., 79 Wn.2d 745, 753, 489 P.2d 923 (1971) (officers participated in fraudulent acts and maintained close control); State v. Ralph Williams' Nw. Chrysler Plymouth, Inc., 87 Wn.2d 298, 322, 553 P.2d 423 (1976) (officer was personally responsible for many of the company's unlawful acts in violation of the Consumer Protection Act, chapter 19.86 RCW); Grayson v. Nordic Constr Co., 92 Wn.2d 548, 551, 554, 599 P.2d 1271 (1979) (officer drafted and directed the mailing of a brochure that contained deceptive advertising in violation of the Consumer Protection Act).

Id at 637.

In the present case no evidence was presented that Albert Rosellini personally committed an intentionally wrongful act. Thus, even if Fortune Oil was a fiduciary, Mr. Rosellini cannot be found personally liable.

3.5 It was error to grant judgment in favor of Karl Park.

Over objection that judgment should not be entered in favor of Kim's attorney, not a party to the action³, the court entered

³ See Defendant's Response to Motion for Entry of Judgment. CP 298-300, p. 2, ln. 15.

judgments in favor of Mr. Park. The judgment against Al Rosellini reads:

*. . . the court hereby orders that the **Plaintiffs Joon B. Kim, P.D.Q Incorporated** and their attorney **Karl Y. Park** are awarded judgment against **Defendant Albert Rosellini, Jr., aka Albert Rosellini**, in the total amount of **\$124,963.07 (as of January 14, 2013)**,*

CP 394. It was error to award judgment in favor of a non-party.

3.6 The Court's attorney fees award was in error.

Attorneys fees were awarded based solely on the Consumer Protect Act. The application for an award of attorneys fees by Kim failed to segregate the fees related to the CPA claim as required. See Smith v. Behr, 113 Wn. App 306, 54 P.3d 665 (2002). This is particularly significant in this case because the only proof the court relied upon to find liability under the Act was the allegations in the District Court complaint and the confession of Judgment. Thus the fees incurred to establish that Fortune Oil had violated the Act were minimal.

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IV. CONCLUSION

For the reasons outlined above the decision of the trial court should be reversed and the case be remanded with directions that the claims against Appellants be dismissed.

DATED this 25th day of October, 2013.

Respectfully submitted,



Randy Barnard
WSBA No. 8382
Attorneys for Appellants

APPENDIX

Findings of Fact Nos. 3, 4, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18,
19, 20, 21, 22, 23, and 24

See Attached.

11
12 3) Based on the Gasoline Contract, Fortune Oil supplied gasoline to Kim and
13 PDQ from 2001 to October of 2006. All credit card purchases of gasoline by customers
14 at PDQ were handled by Shell, and the credit card purchase amounts are then credited
15 to Fortune Oil on behalf of Kim. Fortune Oil then credits the sales amounts (less
16 handing fees) to Kim. The credit card sales generated by Kim are then deducted from
17 the amount owed by Kim to Fortune Oil for any gasoline it delivered to PDQ. Any
18 amount in excess of the invoice for the gasoline delivered to PDQ is then required to be
19 paid by Fortune Oil to Kim, based on the Gasoline Contract. Fortune Oil had a fiduciary
20 relation with Plaintiffs and had a duty to make the funds available to Plaintiffs, as
21 Fortune Oil did not own the funds and was only temporarily holding the funds for the
22 benefit of Kim and similar accounts. Fortune Oil owed fiduciary duty to Kim and other

1 gas stations owners who purchased gasoline from Fortune Oil with respect to the credit
2 card accounts.

3 4) By October 9, 2006, Kim had a positive balance of approximately \$32,076.20
4 with Fortune Oil. Fortune Oil thereafter ceased its gasoline wholesale business and
5 despite numerous demands from Kim, has failed to pay the balance amount to Kim.
6 Fortune Oil similarly refused to pay other gas station owners, using the similar tactic.

1 7) Albert Rosellini or Albert Rosellini and Vicki Rosellini (collectively "Rosellinis")
2 are the sole shareholders and owners of Fortune Oil. The evidence was unclear as to
3 whether Vicki Rosellini actually owned any stock in Fortune Oil. Albert Rosellini is the
4 President, Secretary, Treasurer and the Chairman of the Board of Directors of Fortune
5 Oil. Vicki Rosellini is the Vice President. There is no evidence that Vicki Rosellini
6 participated in the management of Fortune Oil, other than depositing money into the
7 company account and getting benefit, as part of the marital community, of the funds
8 taken from the accounts of Fortune Oil. The corporate records of Fortune Oil are
9 sparse. Albert Rosellini testified that he kept few, if any, record of any of the financial
10 transactions between himself and Fortune Oil, and between Fortune Oil, Fortune
11 Company and Ferndale Gas.

12 8) In the bylaws of Fortune Oil, the Treasurer is required to keep all financial
13 records. Despite its bylaws, neither Fortune Oil nor Albert Rosellini kept financial
14 records of all transactions.

15 9) The Rosellinis also own the Fortune Company, Inc., a real estate brokerage
16 company. Albert Rosellini is a license real estate broker since 1983. Vicki Rosellini is a
17 business consultant for amount five years prior to 2006. Albert Rosellini transferred
18 money between Fortune Oil and the Fortune Company, Inc. depending on his
19 assessment of the needs of each company.
20

21 10) From the beginning, Albert Rosellini considered Fortune Oil as his personal
22 company and failed to keep complete corporate and financial records. Albert Rosellini

1 | made numerous draws and deposits to Fortune Oil and Fortune Company. There were
2 | no adequate records, whether for the corporation or for his own, of the numerous draws
3 | and deposits. In the federal tax returns and on the accounting ledgers, the transfers
4 | from Fortune Oil to the Rosellinis are listed as "shareholder loans". The Rosellinis freely
5 | commingled their bank accounts with Fortune Oil and Fortune Company's bank
6 | accounts to the degree that moneys were deposited and withdrawn from the company
7 | accounts and the personal accounts without any record whatsoever.

8 | 11) In the federal tax returns, Fortune Oil listed \$552,000 as the amount it
9 | loaned to its shareholders in the beginning of 2005. By the end of 2005, the amount
10 | was reduced to zero. When asked if the amount was paid back to Fortune Oil by the
11 | Rosellinis, Albert Rosellini stated that he doesn't know whether he paid back or not. At
12 | the end of 2005, the tax returns show that the loans to shareholders were increased to
13 | \$644,100. Even assuming that the loans to the shareholders were re-characterized as
14 | the "other assets", there is still an outstanding balance of \$644,100 in loans from
15 | Fortune Oil to the Rosellinis at the end of 2005. In the similar fashion, the intercompany
16 | receivable was increased from \$563,414 from the beginning of 2005 to \$655,305 at the
17 | end of 2005. Again, Albert Rosellini has no document to support such loans and
18 | receivables or whether the loans were ever paid back to Fortune Oil.

19 | 12) In 2006, Fortune Oil's intercompany receivable changed from \$655,305 to
20 | \$1,142,208. Again, there is no record of any loan from Fortune Oil to the other
21 | companies owned by the Rosellinis.
22 |

1 13) Similarly, in 2007, the Fortune Oil's intercompany receivable changed from
2 \$1,142,208 to zero, and the obligations disappeared from the record without explanation.
3 Moreover, Fortune Oil lists "Due from the Fortune Company" in the amount \$228,414,
4 on its tax returns. The Rosellinis have no record to support what happened to the loans
5 and the money owed by his companies to Fortune Oil. The Rosellinis simply
6 commingled their personal assets with Fortune Oil and Fortune Company without
7 regard for record keeping.

8 14) In 2008, Fortune Oil, on the tax returns, had \$117,000 in cash and \$95,936
9 in loans to shareholders. It also listed \$117,000 in "Other Assets", and no loans from its
10 shareholder.

11 15) The Rosellinis also had a limited liability company which owned a gas station
12 called Ferndale Gas Station, LLC ("Ferndale Gas"). Fortune Oil, through Albert
13 Rosellini, granted a credit to Ferndale Gas in the form of gasoline deliveries in amount
14 excess of \$500,000 without any payment or security received. Again, there was no
15 record of corporation authority from Fortune Oil or Ferndale Gas. Fortune Oil never
16 attempted to collect the amount due from Ferndale Gas, nor kept any record of the
17 transactions. As a result of such large credit from Fortune Oil to Ferndale Gas, Fortune
18 Oil suffered losses in excess of \$500,000.

19 16) In 2006 and 2007, the major assets of Fortune Oil, the gasoline supply
20 contracts with various gas stations, were sold to numerous wholesale companies,
21 including WSCO Petroleum Corp ("WSCO"). The sale to WSCO alone was valued
22

1 \$286,500. Again, Albert Rosellini could not account for the money received from
2 WSCO, not to mention the other sales.

3 17) By December 2006, Fortune Oil ceased to do business. Despite such
4 inactivity, the Rosellinis booked Vicki Rosellini's revenues from her consulting work as
5 revenues of Fortune Oil in 2007 and 2008 to offset the prior tax loss credit of Fortune Oil,
6 even though Vicki Rosellini did not do any work for Fortune Oil and received no
7 compensation from Fortune Oil at all. This again shows that the Rosellinis willingly
8 commingled their assets and revenues as Fortune Oil's and vice versa.

9
10 18) Fortune used similar methods to evade obligations to other gas station
11 owners, resulting in judgments against Fortune Oil.

12 19) The Court finds that the Rosellinis commingled their personal assets with
13 that of Fortune Oil and Fortune Company.

14 20) Fortune Oil, through the action of Albert Rosellini, transferred over
15 \$2,000,000 in cash or credit to the Rosellinis, Fortune Company, and Ferndale Gas in
16 2006, while knowing that creditors to Fortune Oil will not be paid.

17
18 21) The Rosellinis and Fortune Oil functioned as one entity, and
19 it is impossible to regard them as separate entities.

20 22) Because of these transfers of Fortune Oil's assets to the Rosellinis, and
21 Ferndale Gas, Fortune Oil has no asset to pay its creditors, including Plaintiff Kim.

22 23) By commingling the assets of Fortune Oil and by abusing corporate

1 | form, the Rosellinis intentionally used Fortune Oil to evade Fortune Oil and their duties
2 | to creditors, including Plaintiff Kim.

3 | 24) But for the commingling of assets of Fortune Oil with that of the Rosellinis,
4 | there would have been adequate funds to pay the creditors of Fortune Oil, including
5 | Kim.