

71037-1

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NO. 71037-1-I

WASHINGTON STATE COURT OF APPEALS
DIVISION I

MERLE PINNEY and AMANDA PINNEY,
and the marital community composed thereof,

Appellants,

vs.

BELFOR USA GROUP, INC., dba BELFOR RESTORATION and/or
BELFOR PROPERTY RESTORATION, a foreign corporation;
ROBERT GALL and JANE DOE GALL, and the marital community
composed thereof; and JERRY MARTIN and JANE DOE MARTIN,
and the marital community composed thereof,

Respondents.

APPEAL FROM THE
SUPERIOR COURT FOR SNOHOMISH COUNTY
THE HONORABLE MILLIE M. JUDGE

APPELLANTS' REPLY BRIEF

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAR 12 PM 12:00

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL ADMISSIONS BY BELFOR..... 2

III. FACTUAL ERRORS BY BELFOR..... 3

IV. BELFOR'S FAILURE TO TIMELY ASSERT ERROR..... 6

V. CONCLUSION 8

I. INTRODUCTION

Belfor¹ argues in its brief that the Pinneys' separate lawsuits against American Family and Belfor involve "the same facts, the same issues and effectively the same parties..." See Respondents' brief at page 1. This is the same conclusory claim that was made by Belfor in the trial court and it cannot survive the scrutiny of an analysis of the facts of the case. Belfor itself hedges its argument (claiming the two entities are "*effectively* the same parties"), thus admitting the fatal weakness of the Respondents' argument: there is *no authority* to support an agency relationship between the two entities. Similarly, the facts supporting the claims in the two suits are different and the the issues are different. Indeed, they are distinctly different

Belfor also claims error for the first time, with the trial court's determination that the Pinney's satisfied the *prima facie* elements of a CPA claim by Belfor. But for the court's grossly simplified application of *res judicata*, the case should have therefore proceeded to trial for a determination on the merits. Since Belfor failed to timely assert any error by the trial court, Belfor's arguments

¹ As in the appellants' opening brief, the term "Belfor" refers to all of the respondents collectively.

regarding the CPA must therefore be disregarded. The Court of Appeals should therefore reverse the trial court's summary judgment and remand this case for trial.

II. FACTUAL ADMISSIONS BY BELFOR

Belfor admits that the Pinneys chose Belfor as their contractor to perform restoration services after their house by damaged, by signing a Work Authorization *with Belfor*. See Respondents' brief at page 2. American Family was not a party to the Authorization and American Family was not referenced anywhere in the Authorization. The only two parties to the Authorization were the Pinneys and Belfor----evidence that American Family and Belfor were separate entities and treated as separate entities.

Belfor admits that it was specifically excluded in the release provided to American Family by the Pinneys. See page 3 of Respondent's brief. American Family would not have accepted such a release if Belfor was truly an agent of any kind of American Family.

Belfor admits that the "only claims" brought against it by the Pinneys in the trial court, were for violations of the Consumer Protection Act. They arise solely from a dispute with a contractor

and its failure to deliver what it promised. This is sharply different from the kinds of claims asserted by the Pinneys against American Family, which grow out of a quasi-fiduciary relationship between an insurer and its insured. And the specific causes of action alleged against American Family are substantially different than those alleged against Belfor, all as described in the Pinney's opening brief.

III. FACTUAL ERRORS BY BELFOR

Belfor claims on page 2 of its brief that American Family "retained" the dry cleaners that attempted to restore the Pinney's textile goods. There is no evidence to support this claim and Belfor cites none.²

At page 6 of its brief, Belfor claims that "[t]he Pinneys *chose* to proceed against American Family and not against Belfor. . . the Pinneys are not entitled to two bites at the same apple." This assertion assumes that the Pinneys believed they had causes of action against American Family and Belfor and made a conscious decision not to sue Belfor. This is false. *The Pinneys did not choose anything.* They filed a complaint against America Family

² The respondents apparently cite CP 506 for the claim that American Family "retained" the dry cleaners. However, 506 is page 3 of Belfor's motion for summary judgment in the trial court and does not include or cite to any issue involving the retaining of the dry cleaner.

because they believed it was the *only* suit that could have been brought to recover their damages following the failed restoration of their home, based on what they knew at the time.

Further, the Pinneys reached this determination only after conducting a factual and legal investigation of the facts of their case and the causes of action available to them. Had the Pinneys believed that they had an adequate factual basis to assert one or more causes of action against Belfor when they filed suit against American Family, they certainly would have done so. Only *after* the deadline to amend the complaint in the American Family suit passed, did the Pinneys obtain discovery which revealed that it was Belfor's guarantee, and Belfor's alone, which was breached. American Family denies that it had anything to do with the guarantee.

It is not enough for Belfor to claim that it *could* have been named in the Pinneys' earlier suit against American Family. Belfor's burden in this appeal is to prove that the plaintiffs had a sufficient factual and legal basis to do so, after an appropriate CR 11 investigation. This evidence does not exist anywhere in the record and it is another, essential missing link in Belfor's analysis.

Befor also claims that: "American Family and Belfor were in privity because Belfor acted as American Family's agent in carrying out the smoke remediation and restoration." See pages 7-8 of Respondents' brief. This claim is factually and legally false. American Family did *not* have a duty to carry out smoke remediation and restoration. American Family's duty to the Pinneys was merely to *indemnify* them for the expense of the remediation and restoration. It was Belfor's job, *and Belfor's alone*, to actually carry out the work.

This *presumed* agency relationship claimed by Belfor, is the *only* "evidence" Belfor provides the court to support its claim that there is a complete identity of the parties sued as defendants in both suits brought by the Pinneys. This is not enough. Belfor has simply failed to present any admissible facts to support its conclusory claim that there is sufficient identity of the parties to be treated as one and the same, for purposes of claim preclusion. Indeed, both companies are entirely separate corporate entities. There is *no evidence* that they share the same personnel, management, income or operations.

It is true that the Pinneys themselves attempted to persuade the court in the American Family action that Belfor was an agent for

American States----*after* they discovered evidence that supported a cause of action against Belfor and *after* it was too late to amend the complaint. And in *dicta*, the federal court suggested that was an agency relationship between Belfor and American Family. See Respondents' brief at page 8 and CP 433.

But the federal court *failed* to reach that express ruling on this point. If it had, it would have permitted the Pinneys to proceed with a claim against American Family on the basis of Belfor's admission that it breached its guarantee to the Pinneys. This, the federal court declined to do.

This is truly a Catch 22 for the Pinneys---the federal court would *not* permit the Pinneys to recover against Belfor on their argument that it was an agent of American Family. Then Belfor urges the trial court in Snohomish County to dismiss the suit against it, on their argument that they are an agent of American Family. This is a fundamental deprivation of the Pinney's right to have their day in court and it is not fair.

IV. BELFOR'S FAILURE TO TIMELY ASSERT ERROR

The defendants purportedly assign error to two trial court rulings, the second of which claims that "the Pinneys cannot establish a CPA violation as a matter of law." See "Assignments

of Error” at page 5 of Respondent’s brief. This is improper argument and must be disregarded because the Respondents failed to follow the Rules of Appellate Procedure.

RAP 5.1 (d) provides:

(d) Cross Review. Cross review means review initiated by a party already a respondent in an appeal or a discretionary review. A party seeking cross review must file a notice of appeal or a notice for discretionary review within the time allowed by rule 5.2(f).

RAP 5.2(f) provides: “A respondent seeking cross review must file a notice of appeal or a notice for discretionary review within the time allowed by rule 5.2(f).”³ This, Belfor failed to do. The court’s determination that the Pinney’s presented valid claims against Belfor under the CPA, therefore cannot be challenged at this stage of the proceedings.

Belfor simply failed to file any cross-appeal concerning the trial court’s finding that the plaintiffs satisfied the *prima facie* elements of a cause of action under the Consumer Protection Act. The defendants’ arguments that the trial court finding in this respect must therefore be disregarded.

³ The longest period cited in the rule for initiating review, is 30 days.

V. CONCLUSION

For all of the foregoing reasons, the Pinneys respectfully request that the Court of Appeals reverse the summary judgment granted the Respondents in the trial court, and remand the case for trial.

RESPECTFULLY SUBMITTED this 9th day of May, 2014.



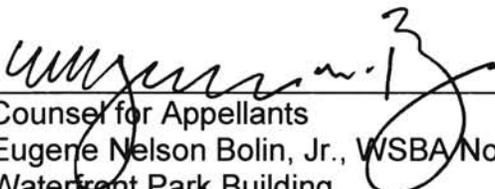
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I emailed a true copy of appellants' motion for an extension of time to counsel for respondents at the following addresses:

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