NO. 40525-3-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ADAIR HOMES, INC.,

Plaintiff/Respondent

v.

KASEY BUTLER,

Defendant/Appellant

APPEAL FROM THE SUPERIOR COURT

HONORABLE ROGER A. BENNETT

APPELLANT'S AMENDED BRIEF

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ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

Assignment of Error No. 1: The trial court erred by granting plaintiff's motion for summary judgment seeking dismissal of Mr. Butler's counterclaim.

Assignment of Error No. 2: The trial court erred by entering Judgment for plaintiff.

Assignment of Error No. 3: The trial court erred by entering the Supplement Judgment.

First Issue Presented: Did Mr. Butler show that he was entitled to relief under the Consumer Protection Act?

Second Issue Presented: Should the trial court have entered any judgment in favor of Adair Homes, Inc. without resolving Mr. Butler's claim for damages under the Consumer Protection Act?

STATEMENT OF THE CASE

I. Adair Homes, Inc. and Its Program.

The Adair Home-Ownership Alliance is a grouping of several companies all of which are wholly owned by Peter Marsh and his spouse. Two of the companies are Adair Homes, Inc. (Adair) and Adair Financial Services, LLC (AFS). Adair builds houses. AFS is a mortgage broker. AFS assists Adair's customers in securing financing for their transactions

with Adair. AFS and Adair have adjacent offices in the same building in Vancouver. (CP 150; CP 186-87; CP 190; CP 196)

Adair has sales offices throughout the Pacific Northwest. These are located in Olympia, Washington; Woodland, Washington; Kennewick, Washington; Aloha, Oregon; Creswell, Oregon; Medford, Oregon; Lincoln City, Oregon; Bend, Oregon; and Caldwell, Idaho. (CP 188) Adair advertises extensively. It maintains an Internet website where prospective customers can learn of its program. The website includes information on mortgage broker services offered by AFS. (CP 297-302)

Adair's program differs from that of most home builders. It requires that customers obtain all permits and do site preparation to include excavation and driveway placement. The customer must also obtain temporary water and power permits. After the customer completes site preparation, Adair builds the house from the foundation up. The customer must paint the inside and outside of the house and arrange for utility hookups. (CP 189)

Some of Adair's customers plan to and do live in the houses they build. Other customers may intend to sell the house hopefully at a profit or utilize it as a rental property. Adair refers to these latter customers as "investors." (CP 192)

Adair is a volume builder. Its construction program is routinized. It also uses pre-established "scripts" in its interactions with its customers. (CP 191, 193)

II. Adair's Arrangement with Pacific Continental Bank.

Pacific Continental Bank (PCB) is a banking institution with offices in Eugene, Oregon, and Beaverton, Oregon. In 2003, PCB and Mr. Marsh entered into an agreement that stated the terms for PCB's providing financing to Adair's customers. (CP 227-32) The parties made the arrangement to meet PCB's concerns regarding the "potential incomplete state of the collateral securing their loans, i.e., if a customer did not complete their portion of the project resulting in an incomplete house that could not be easily liquidated." (CP 138-39) The language of the agreement confirms this intention. As it states:

> **Inducement**. All of the Loan Obligations entered into by Bank with Adair Financial's customers are secured with collateral often consisting of marginal equity. In order to induce Bank to make such loans, Marsh has agreed to provide additional collateral to Bank and grant Bank a security interest in such additional collateral pursuant to this Agreement.

(CP 228)[1]

[1] The term "Loan Obligations" refers to the financing provided to Adair's customers. The recitals to the Agreement indicate that these obligations are secured by deeds of trust encumbering the land on which the house is built. (CP 227)

The Agreement required Mr. Marsh to deposit the sum of $500,000.00 in an account at PCB. PCB received a security interest in that account and would have sole access to that account. If any loan made to a PCB customer went into default, PCB would give Mr. Marsh the right to cure that default. If he did not do so within thirty (30) days, PCB could set off the amounts in default against the $500,000 on deposit. Mr. Marsh would then be required to replenish that account with "sufficient funds" to bring the account balance to the amount in existence at the time PCB exercised its set off rights. Mr. Marsh also agreed to guarantee 20% of all loans made to Adair customers. However, the guarantee obligation could only be satisfied from the funds in the deposit account together with the funds necessary to replenish that account. (CP 228-29) The Agreement also made reference to "PCB/Adair Interim Construction Guidelines." These discuss, among other things, the credit score an Adair customer must have in order to secure a loan through PCB and the required "loan to value ratio" — the amount PCB would loan as a percentage of the property's appraised value. (CP 231-32)

While Adair does work with lenders other than PCB, it does not have an agreement with any of them comparable or similar to its agreement with PCB. (CP 152, 319-20)

Mr. Butler sought to review Adair files to determine how many of Adair's customers obtained financing through PCB. The trial court allowed reviewed of 211 closed files of customers that had contacted Adair's Woodland, Washington, office between 2003 and 2006. Some of these customers completed their project without obtaining financing. Others initially contacted Adair but did not follow through with their project. Still others secured financing through lenders other than PCB. PCB provided loans to ninety (90) of the 211 customers excluding Mr. Butler. (CP 151, 318)

III. Kasey Butler's Background.

Kasey Butler was 22 years of age in 2005. He graduated from high school. He attended Clark College but did not obtain any degree. (CP 154)

Mr. Butler had become licensed as a real estate salesperson by January of 2005. (CP 155) Prior to the spring of 2005, he had never done any real estate investing. He had never purchased a property intending to develop it for any reason. He had also never had his own construction company prior to the spring of 2005. (CP 158-59)

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IV. Mr. Butler's Transaction With Adair.

a. Initial Contact.

Darius Roberts was one of Mr. Butler's real estate clients in early 2005. Mr. Roberts had also been working with Adair as an "investor" customer. Mr. Roberts interested Mr. Butler in Adair's program. (CP 158-159)

Mr. Butler then went to Adair's Woodland office. He met Jeffrey Potts at Adair's office. During the first visit, Mr. Potts told Mr. Butler that financing might be available. He advised Mr. Butler that no payments would be required on any loan while construction was proceeding. (CP 160)

b. Mr. Butler is Initially Rejected for Financing.

Mr. Butler signed a Pre-Qualification Worksheet at Adair's Woodland office on May 22, 2005, for the purpose of securing financing. He gave it to Mr. Potts either by fax or in person. (CP 160, 162, 233-35) On May 27, 2005, AFS wrote to Mr. Butler advising him that he did not qualify for a loan. The letter suggested that Mr. Butler make payments on certain of his obligations to improve his credit score. (CP 236)

c. Mr. Butler Locates a Lot.

Mr. Butler did not abandon the project. He located a lot in La Center, Washington. The lot was at the top of a hill. Mr. Butler wanted

to know if Adair could successfully build a house on this location. He asked Mr. Potts to come to the site for that purpose. Mr. Potts complied. His doing so was part of Adair's normal practice. It considers these types of site visits to be sales tools. Mr. Potts went to the site and met with Mr. Butler and the excavators that Mr. Butler had consulted. He advised Mr. Butler that Adair could successfully build a house on the lot. (CP 161, 164, 166-67, 177)

On June 15, 2005, Mr. Butler entered into an agreement to purchase the lot in question together with an adjoining lot for the purchase price of $162,000.00. (CP 205-8)

d. Mr. Butler Secures Financing and Contracts with Adair.

AFS continued to monitor Mr. Butler's credit worthiness. On July 12, 2005, it accessed an automated system referred to as "Loan Prospector" to determine whether Mr. Butler's loan could be sold on the secondary market. The system was advised that Mr. Butler was seeking a loan of $209,500.00 as a "regular refinance" with an interest rate of 6.5% per annum. It stated that the loan was eligible for resale but placed the loan in the "caution" category and stated that "investment quality is unlikely." It categorized the loan as "high risk" and indicated that it would require mortgage insurance to be approved. (CP 203-4, 237-40)

On the same day, AFS wrote to Mr. Butler advising that he now qualified for a "no-income/no-asset" thirty year loan at a fixed interest rate of 6.5% per annum. The letter stated that the maximum loan to value ratio would 89.32% and the minimum appraised value would have to be $235,000.00. Mr. Potts told Mr. Butler that he had now been approved for a loan because his credit scores had improved. (CP 175, 479-80)

On July 13, 2005, Mr. Butler signed a number of documents at the Adair office in Woodland. These were a Uniform Residential Loan Application seeking a loan in the amount of $209,900.00 with a fixed interest rate of 6.25% for 30 year; a Good Faith Estimate for a construction financing loan in the amount of $200,000.00 together with a Truth in Lending Disclosure Statement indicating that the principal balance would be due in twelve months but also containing a legend that stated "Rate/term: 7.750%/360 months; a Good Faith Estimate for a no-income/no-asset loan at 6.25% for thirty years along with a Proof in Lending Disclosure Statement. (CP 209-18)

The documents Mr. Butler signed also stated that he was going to use the house as his primary residence. Mr. Potts told him to complete the forms in this fashion. Mr. Potts also told him that a thirty

year fixed rate loan would be available for him when the construction was complete. (CP 165)

Up to this time, Mr. Potts was the only Adair person with whom Mr. Butler had interacted. There had been no contact between Mr. Butler and any representative of AFS. Mr. Potts was the only person employed by any Adair company with whom Mr. Butler had spoken about financing issues. (CP 163, 167-68)

There is no evidence that any attempt was made to place Mr. Butler's loan with any other lender than PCB. (CP 150)

e. Mr. Butler Contracts With Adair and Purchases the Property.

On July 29, 2005, Mr. Butler signed a contract with Adair for the construction of the house. The contract stated a construction price of the house at $102,631.00. It set out items that were Mr. Butler's responsibility and put the price for these at $57,554.00. Mr. Potts calculated the sums for the items that were the owner's responsibility. (CP 166, 222-26) The agreement also contained a comprehensive dispute resolution procedure that required mediation and then arbitration of all disputes. The precise terms of the dispute resolution procedure will be set out below.

Mr. Butler purchased the property in La Center on August 16, 2005. He signed a Promissory Note to PCB in the amount of $312,300.00 on the same day. The Note provided for variable interest with an initial rate of 8.25% per annum. It required monthly interest payments. All sums for interest and principal were due in one year. Mr. Butler also executed a Deed of Trust to secure that Promissory Note. (CP 62-63, 65-77)

Mr. Butler shortly sold one of the two lots he had purchased. The net sale proceeds were paid over to PCB effectively reducing the principal of the loan to sum slightly less than $215,000.00. (CP 98, 146)

f. Mr. Butler Makes Loan Payments.

Contrary to what Mr. Potts represented, Mr. Butler was required to make interest payments on the PCB loan. He paid these from his own funds. The amount of the payments varied because the interest rate varied. (CP 147)

g. Mr. Butler Encounters Construction Problems.

Mr. Potts prepared a drawing of where the house would be located. (CP 169, 246) The City of La Center did not approve the location. Mr. Butler had to obtain a boundary line adjustment. The problem also required additional excavation of the site leading to

considerable delay. (CP 169-70) The City of La Center ultimately approved the boundary line adjustment and a variance to setback requirements on November 22, 2005. It approved the construction plans on December 9. 2005. (CP 310-17) Interest was accruing on Mr. Butler's loan while he dealt with these delays.

Before Adair will begin construction, it must approve an owner's site work. (CP 177) Mr. Butler believed that the lot was ready for Adair to begin construction by March of 2006 because Mr. Potts had approved the work. (CP 147)

Adair sent Eric Sundby, its construction superintendent, to inspect the property. Mr. Sundby believed that the site had not been adequately excavated. He was concerned about the driveway to the house specifically. He required Mr. Butler to perform further excavation further delaying the commencement of construction. (CP 178-79) This, of course, caused further delays.

h. The Second Loan.

The construction difficulties Mr. Butler was having caused expenses to rise beyond what had been anticipated. He needed additional funds to complete the project. (CP 171)

Adair personnel discussed loaning Mr. Butler an additional sum of money to meet his expenses. Any additional financing, however,

would put Mr. Butler outside of PCB's lending requirements. PCB required its loans to be no more than 85% of the appraised value of the property. The additional debt would put the percentage at greater than 85%. (CP 254)

Before it would make the second loan, PCB required Adair to commit $14,350.00 of the sums that Adair had on account at PCB to this loan. Scott Madsen of AFS suggested to Dick Howard, Adair's Chief Financial Officer, that the money be committed. Mr. Howard then wrote to PCB authorizing the charge. (CP 251-52) In his letter, Mr. Howard stated that "if PCB does take a charge against a credit line for the above referenced loan, PCB will assign the loan to (Adair)." (CP 252) There is no evidence that anyone informed Mr. Butler of these arrangements or discussions.

In May of 2006, Mr. Butler signed another Promissory Note to PCB in the amount of $30,000.00. It provided for variable interest with the initial rate being 9.75% per annum. It also required monthly interest payments. All interest and principal was due by November 16, 2006. He also executed a Second Deed of Trust to secure this loan. (CP 78-91) Adair ultimately committed $9,400.00 to this loan. (CP 250)

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i. Mr. Butler Cannot Obtain "Takeout" Financing.

The house was ultimately completed. By the fall of 2006, the first loan was due. Mr. Butler asked for the "takeout" loan he believed he had been promised by Mr. Potts. PCB would not make the loan. AFS told Mr. Butler that he should try to get financing from a "hard money lender."[2] Mr. Butler did not want to pursue that course. Mr. Madsen of AFS reacted by saying, "This guy is an asshole. Let him sink." (CP 257-59)

Mr. Butler could not find a solution to his problem. He abandoned the project and the premises by the end of 2006. By that time, everything was completed with the exception of hooking up the sewer main. That step would cost $10,000.00 that Mr. Butler did not have. (CP 147, 172, 259)

j. Adair Purchases the Loans.

Mr. Butler was in default on his loans by early 2007. PCB and AFS discussed how to resolve the matter. One alternative was assigning the loan to Adair or AFS. They also considered having PCB handle the matter "in (its) style" that likely would have involved non-judicial foreclosure proceedings. (CP 260-268)

[2] The term "hard money lender" refers to a person who loans money on terms more onerous than would be charged by a regular commercial lender.

Ultimately, AFS paid virtually all of the funds due on Mr. Butler's loans. Apparently by agreement, PCB assigned the notes and Deeds of Trust to Adair, not AFS. (CP 92-135, 306)

k. Adair's Subsequent Actions.

Adair did not immediately commence foreclosure proceedings. It did work on the premises, which, for undisclosed reasons, was not finished until October of 2007. (CP 180-84, 287-96) Mr. Madsen of AFS and Mr. Sundby worked together on this effort. (CP 287, 290)

Adair did not initiate any foreclosure proceedings immediately after completing this work. It did have the property appraised in November of 2007. The appraised value was $263,000.00. (CP 269-86) By 2009, the value had decreased substantially. (CP 148) The assessed value had dropped to $224,900. (CP 322)

l. Adair's Concerns about Mr. Potts.

By March of 2006, and before Adair had begun construction on Mr. Butler's house, Adair personnel had expressed concern about Mr. Potts' performance in his role as home planner. That noted that he been unable to coach customer toward the successful completion of site preparation. It was also stated that "Mr. Potts believes that it is not his responsibility to care for his customers if they come up against a roadblock." (CP 379) A number of the projects of concern

involved steep driveways. Mr. Butler's project was one of these. (CP 178-79; 379)

V. Mr. Butler's Lack of Knowledge.

Prior to the commencement of this action, Mr. Butler had no knowledge of the agreement between Mr. Marsh and PCB. He also did not know of PCB's lending requirements and the fact that he apparently did not qualify. He did not know that Adair had been required to commit monies to support May of 2006 loan of $30,000.00. To the contrary, he believed that the loans were made to him based on his own personal credentials and the project in question. He also did not know that, under the terms of the 2003 agreement, that Adair was backing him in ways that were not disclosed. Based on Mr. Potts' representations, Mr. Butler believed that "takeout" financing was not assured. No one had told him that he would not get the "takeout" loan if he failed to maintain a high credit score, used his credit card for expenses related to construction, and entered into other transaction. (CP 148, 173-75)

Had Mr. Butler known all of the facts, he would not have entered into any transaction with Adair or with PCB. He would also not have purchased the property in La Center. (CP 148, 173-75)

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VI. Course of Proceedings.

Adair first made demand on Mr. Butler in a letter from its attorney dated June 3, 2008. Mr. Butler responded through counsel, referred to the arbitration and mediation provisions of the contract that prohibit participation of counsel, and observed that neither attorney should be involved in the matter. Adair's attorney did not respond, and no mediation was held. (CP 394)

The attorneys for the parties again exchanged correspondence in September of 2008. Adair's attorney indicated that there would be no mediation because Adair did not intend to make any claims under the construction contract. (CP 395)

Adair filed suit to collect on the notes and to foreclose the deeds of trust judicially. (CP 1-45) Mr. Butler answered and stated a counterclaim under the Consumer Protection Act. (CP 46-48) Both sides propounded written discovery requests to include interrogatories and requests for production of documents. (CP 395) Adair deposed Mr. Butler. (CP 326-62) It moved for summary judgment on its foreclosure claim. It also sought to dismiss Mr. Butler's counterclaim in the same motion. (CP 52-54)

In Plaintiff's Summary Judgment Reply Brief, Adair argued that Mr. Butler's allegations concerning construction and excavation of the

premises were subject to arbitration. (CP 509) This was the first time that Adair had raised that issue. Mr. Butler responded with a Supplemental Memorandum addressing the issue. (CP 581-87)

The trial court initially ruled in Adair's favor. (CP 380-84) Mr. Butler moved for reconsideration. (CP 385-98) The trial court denied Mr. Butler's motion. (CP 399) It then entered an order on Adair's summary judgment motion and a judgment in Adair's favor. (CP 400-408) Mr. Butler appealed. (CP 409-18) Meanwhile, Adair moved for an award of attorney's fees. On June 17, 2010, the trial court entered a supplemental judgment in Adair's favor for attorney's fees and costs. (CP 601-2)

ARGUMENT

Assignment of Error No. 1: The trial court erred by granting plaintiff's motion for summary judgment seeking dismissal of Mr. Butler's counterclaim.

I. Standard of Review.

The trial court decided the matter on a summary judgment motion. An appellate court reviews the grant or denial of such a motion *de novo* and engages in the same inquiry as the trial court. Summary judgment is appropriate only when the moving party demonstrates that there is no genuine issue of material fact. All factual questions and inference from

the facts that are presented must be resolved against the moving party and in favor of the non-moving party. Summary judgment should be granted only when reasonable persons can reach only one conclusion on the facts that are presented. *Overton v. Consolidated Insurance Company,* 145 Wn.2d 417, 429, 38 P.3d 322 (2002); *Vallandigham v. Clover Park School District,* 154 WN.2d 16, 26, 109 P.3d 805 (2005); *Clark County Public Utility District v. State of Washington Department of Revenue,* 153 Wn.App. 737, 746-47, 222 P.3d 1232 (2009).

A court's review of a motion for summary judgment is not limited to determining whether or not the motion should be granted in favor of the moving party. A court may grant summary judgment to the non-moving party when the undisputed facts show that the non-moving party is entitled to summary relief. *Impecoven v. Department of Revenue,* 120 Wn.2d 357, 365, 841 P.2d 752 (1992).

As will be shown below, the facts demonstrate that Adair is clearly guilty of a violation of RCW 19.86, Washington's Consumer Protection Act.

II. Elements of a Consumer Protection Act Claim.

Claims under Washington's Consumer Protection Act are based on RCW 19.86.020. That statute reads as follows:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

A person injured in his or her business or property by virtue of a violation of RCW 19.86.020 is entitled to recover the damages he or she sustains together with an award of attorney's fees and discretionary trebling of damages. As the statute states in pertinent part:

> Any person who is injured in his or her business or property by a violation of RCW 19.86.020. . . may bring a civil action in the superior court. . .to recover the actual damages sustained by him or her, or both, together with the costs of suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages in an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed $10,000.00. . .

The Supreme Court has formulated the five elements of a Consumer Protect Act claim based upon these two statutes. These are the following:

1. An unfair or deceptive act;
2. Occurring in the course trade or commerce;
3. Impact on the public interest;
4. Injury to plaintiff in his or her property; and
5. Causation.

Hangman Ridge Training Stables, Inc., v. Safeco Title Insurance Company, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). As will be discussed below, the facts show that each of these elements is satisfied. At very least, Mr. Butler has raised a genuine issue of material fact concerning each of these elements.

III. Adair is Guilty of Unfair and Deceptive Acts.

a. Definition of Unfair or Deceptive Act.

An unfair or deceptive act does not require proof of an actual intent to deceive or that any actual deception occurred. It is necessary only to show that the act had the capacity to deceive a substantial portion of the public. The purpose of the "capacity-to-deceive" test is to deter deceptive conduct before injury occurs. *Hangman Ridge Training Stables, Inc., v. Safeco Title Insurance Company, supra,* 105 Wn.2d at 785.

The known failure to reveal something of material importance is a deceptive act under the terms of RCW 19.86. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington,* 162 Wn.2d 59, 74-75, 170 P.3d 10 (2007). The transaction here involves the purchase and construction of a residence. The failure to disclose material facts in such transactions amounts to an unfair or deceptive practice. *Griffith v.*

Centex Real Estate Corp, 93 Wn.App. 202, 214-15, 969 P.2d 486 (1998); *Carlile v. Harbour Homes, Inc.,* 147 Wn.App. 193, 194 P.3d 280 (2008).

b. Matters Concerning Financing.

i. Introduction.

Providing incorrect information about the availability or terms of financing is an unfair or deceptive practice. In *State v. Ralph Williams Northwest Chrysler Plymouth, Inc.,* 87 Wn.2d 298, 308 fn 6, 553 P.2d 423 (1976), the Court ruled that an auto dealer's misrepresentation that lending banks required credit insurance amounted to an unfair or deceptive practice. It also held that a contractor's misrepresentation concerning the availability of financing for home repairs was an unfair or deceptive act in *Grayson v. Nordic Construction, Inc.,* 92 Wn.2d 548, 599 P.2d 1271 (1979). And in *Henery v. Robinson,* 67 Wn.App. 277, 834 P.2d 1091 (1992), the Court indicated that a statement made by a mobile home dealer concerning the amount required for a down payment would have been unfair or deceptive if it had been more widely disseminated.

Adair misrepresented or concealed several matters concerning financing. These are detailed below.

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ii. Adair Did Not Disclose the Agreement with PCB.

In 2003, Peter Marsh entered into an agreement with PCB. Under the terms of the agreement Adair was required to deposit with PCB. PCB could draw upon this money if an Adair customer defaulted on a loan that PCB had made. Mr. Marsh also personally guaranteed 20% of each loan. As the agreement states, these terms were necessary in order to induce PCB to loan money to Adair's customers.

Adair's agreement with PCB creates the inference that PCB was Adair's lender of last resort. That conclusion follows from the fact that Adair had no similar agreement with any other lender.

None of this was disclosed to Mr. Butler. He was led to believe that the sole inducement for PCB to loan him money was the quality of his project and his own credit worthiness. He was also not advised that PCB believed that making a loan to him was sufficiently risky as to require a guarantor. No one advised him that the guarantor was Adair's principal, Mr. Marsh, a person who Mr. Butler had never met and never knew existed.

iii. Payments during Construction.

Mr. Potts told Mr. Butler that he would not have to make any loan payments while his house was under construction. This

turned out to be false. PCB required him to make monthly interest payments on the loan. He made these from his own personal funds.

iv. Availability of a "Takeout" Loan.

Mr. Potts told Mr. Butler that he was assured of receiving a "takeout" loan once the house was built. This was seemingly confirmed by the only loan application Mr. Butler ever signed. It sought a loan for a thirty (30) year term with a fixed interest rate of 6.25% per annum. Mr. Potts did not tell Mr. Butler that he would have to re-qualify for a "takeout" loan or that he had to maintain some level of credit worthiness during the construction process.

Mr. Potts' statements proved not to be true. When it came time for Mr. Butler to obtain a "takeout" loan in the fall of 2006, PCB was not willing to assist him. AFS personnel would not help him either. One referred to him as an "asshole," and said, "Let him sink."

v. Adair's Commitment for the Second Loan.

No one advised Mr. Butler that PCB required Adair to commit $9,400.00 of the deposit account that PCB held before PCB would make the second loan. He was also not told that this was necessary because the additional loan would put him over the loan-to-value ratios that PCB required. No one let him know that Adair and PCB had agreed

that the loan would be assigned to Adair if Mr. Butler defaulted. This latter commitment by Adair amounted to its guarantee of the loan.

vi. The Misrepresentations or Concealments Concerning Financing Were Material.

Mr. Butler believed that he was being offered financing based upon his own credit worthiness and the viability of his project. In point of fact, the lender who was making loans believed, generally, that loans to Adair customers were inherently risky and would not have made any loans to Adair customers without assurance given by Adair and Mr. Marsh. Unbeknownst to Mr. Butler, Adair essentially guaranteed his performance on the second loan. Mr. Butler would not have entered into the transaction with Adair or purchased the property in La Center had he known of these facts.

vii. Adair Cannot Defend by Asserting That the Acts Were Those of AFS.

Mr. Potts misrepresented terms and conditions of financing Mr. Butler would receive. AFS contributed by providing documents suggesting that Mr. Butler would receive or had received a thirty year loan with a fixed rate of 6.25% per annum. No one advised Mr. Butler that he would have to qualify for a "take out loan." No one at AFS would assist him in obtaining such a loan. Scott Madsen, AFS' broker, was clearly involved in the second loan Mr. Butler received from PCB.

Adair may attempt to escape responsibility by claiming that the acts concerning financing were the responsibility of AFS. This argument cannot succeed.

Adair and AFS are closely connected. Peter Marsh is the principal of both. Mr. Marsh is the manager of AFS. The two companies have offices next door to each other in the same office building in Vancouver. AFS advertises on the Adair website. A close working relationship is quite understandable. Adair customers often need financing for their projects and AFS arranges for that financing.

Adair and AFS worked closely with each other on matters concerning the transaction with Mr. Butler. AFS was involved in Mr. Butler's first loan. Mr. Potts was the intermediary between Mr. Butler and AFS. The two companies were also involved in the second loan. Both Mr. Madsen from AFS and Mr. Howard, Adair's Chief Financial Officer, corresponded with PCB on the loan. Interestingly, when difficulties with Mr. Potts' performance became apparent to Adair personnel, Mr. Madsen of AFS was included in the e-mail discussion. AFS paid PCB for the assignment of the loans to Adair. Mr. Madsen of AFS and Mr. Sundby of Adair then worked together to finish the project. As Mr. Sundby stated, "I serve at the pleasure of AFS!" (CP 287)

A company cannot defend a counterclaim on the basis that the defendant is seeking relief for acts committed by a sister company of the plaintiff. That was the thrust of *J.I. Case Credit Corp. v. Stark*, 64 Wn.2d 370, 392 P.2d 250 (1964). In that case, J.I. Case Company sold the defendant a combine and gave a warranty. J.I. Case Credit Corp. financed the defendant's purchase of the machinery. The combine never functioned correctly. J.I. Case Credit Corp. ultimately sued to foreclose the chattel mortgage it had obtained in connection with the purchase. Defendant raised the manufacturer's breach of warranty as a defense. J.I. Case Credit Corp. replied by arguing that it was a holder in due course and not subject to whatever warranty claims the defendant might have against J.I. Case Company. The Court noted that the two companies had common officers and employees; that J.I. Case Credit Corp. was a wholly owned subsidiary of J.I. Case Company; and that J.I. Credit Corp. existed to handle retail financing for J.I. Case Company. It stated that when two companies are so related that it is clear that they function as one, "to regard them as separate would aid the consummation of a fraud or wrong on others." 64 Wn.2d at 475. It denied holder in due course status to J.I. Case Credit Corp. and order rescission of the transaction.

Our case is no different. Adair and AFS are closely related. Mr. Marsh is the principal of both. The two companies work together on transactions for many Adair customers and did so in our case. AFS secures lending for Adair's customers just as J.I. Credit Corp. existed to handle financing for J.I. Case Company. Adair and AFS cannot be regarded as separate because doing so would allow Adair to escape its liability under the Consumer Protection Act.

c. Matters Concerning the Construction Process.

As part of the sales process, Mr. Potts went to the lot Mr. Butler was going to purchase and told him that the project was "doable." Mr. Potts then prepared a drawing for the footprint of the house and formulated a budget for the site work that Mr. Butler was to accomplish. Mr. Potts later approved the excavation work that Mr. Butler completed.

The City of La Center rejected the configuration that Mr. Potts had drawn. It required Mr. Butler to ask for and obtain a boundary line adjustment. Adair ultimately rejected the excavation work that Mr. Butler did. The budget Mr. Potts formulated proved to be inadequate due, at least in part, to Mr. Potts' representations concerning the feasibility and sufficiency of excavation.

According to internal e-mails, Mr. Potts' shortcomings in this area were not isolated occurrences. Mr. Potts had failed to assist other

customers the proper excavation of their sites. Adair personnel had specifically noted his failure in sites involving steep driveway access.

A contractor commits an unfair or deceptive act under the terms of RCW 19.86.020 when it makes false representations during the sales process. These can include giving estimates with which the contractor cannot comply or giving dates of completion of work that the contractor cannot meet. *Eastlake Construction v. Hess*, 102 Wn.2d 30, 51, 686 P.2d 465 (1984); *Keyes v. Bollinger,* 31 Wn.App. 286, 291, 640 P.2d 1077 (1982). Mr. Potts' representation concerning ease of excavation in the context of its program is just such a representation. It too amounts to an unfair or deceptive act.

d. Adair is Responsible for Mr. Potts' Actions.

Jeffrey Potts was Adair's salesman and its employee. Mr. Butler met with him on a number of occasions at Adair's facility in Woodland. Mr. Potts was the source of all of Mr. Butler's information concerning financing as well as other aspects of the transaction. Adair is responsible for his conduct under the doctrine of respondent superior for that reason. It cannot escape this responsibility by claiming, somehow, that Mr. Potts violated its directions in some way. An employer is liable for the acts of its employee within the scope of the latter's employment notwithstanding such acts are done in violation of rules, orders, or

instructions of the employer. *Smith v. Leber,* 34 Wn.2d 611, 623, 209 P.2d 247 (1949); *Rahman v. State,* 150 Wn.App. 345, 351-52, 208 P.3d 566 (2009). Adair also invested Mr. Potts with at least apparent authority by placing him in its facility and allowing him to interact with customers. *Walker v. Pacific Mobile Homes,* 68 Wn.2d 347, 413 P.2d 3 (1966).

e. Actions after Assignment.

A party in Adair's position can seek judicial or non-judicial foreclosure of a deed of trust. If a party opts for judicial foreclosure, the property will be sold according to law. RCW 61.12.090. If the proceeds of the sale do not satisfy the judgment against the debtor, the creditor is entitled to a judgment for the deficiency. RCW 61.12.070. By contrast, if a party opts for non-judicial foreclosure, there can be no deficiency judgment. RCW 61.24.100(1).

The Deeds of Trust and Promissory Notes were assigned to Adair in February of 2007. If it had promptly foreclosed non-judicially, it would have obtained property with a value of $263,000.00 according to its November 2007 appraisal.

For reasons it does not explain, Adair delayed until June of 2008 before it made any demand on Mr. Butler. It did not file suit until September of 2008. By that time, the real estate market in Clark County had plummeted and the property was less valuable. The assessed value

had dropped to $224,900. Adair's delay would necessarily serve to increase Mr. Butler's exposure to a deficiency judgment.

f. Conclusion.

The evidence shows that Adair committed an unfair or deceptive practice in a trade or business. It failed to advise Mr. Butler of material matters concerning the loans made to him by PCB. Its employee, Mr. Potts, did not advise him correctly in connection with the site preparation process. Adair delayed for no apparent reason in foreclosing on the property. The trial court should have granted summary judgment in Mr. Butler's favor as to this element. At very least a genuine issue of material fact exists to preclude summary judgment in favor of Adair.

IV. Adair's Actions Occurred in the Course of Trade or Commerce.

For the purposes of the Consumer Protection Act, the term "trade or commerce" is construed broadly. *Hangman Ridge Training Stables, Inc., v. Safeco Title Insurance Company, supra*, 105 Wn.2d at 785. It includes the sale of assets or services or any commerce directly or indirectly affecting the people of the State of Washington. RCW 19.86.010(2). Adair's activities unquestionably amount to trade or commerce under that definition. This element of Mr. Butler's Consumer Protection Act claim should be uncontested.

V. Public Interest Requirement.

The Supreme Court has set out two tests to determine whether the public interest requirement has been met. For consumer transactions, the following factors govern:

1. Were the alleged acts committed in the course of defendant's business?

2. Are the acts part of a pattern or generalized course of conduct?

3. Were repeated acts committed prior to the act involving plaintiff?

4. Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff?

5. If the act of plaintiff involved a single transaction, were many consumers affected or likely to be affected by it?

For private disputes, the questions are:

1. Were the alleged acts made in the course of defendant's business?

2. Did the defendant advertise to the public in general?

3. Did defendant actively solicit this particular plaintiff indicating potential solicitation of others?

4. Did the plaintiff and defendant occupy unequal bargaining positions?

No one factor is dispositive. The critical issue is potential for repetition. *Hangman Ridge Training Stables, Inc., v. Safeco Title Insurance Company,*

supra, 105 Wn.2d at 778, 790-91. It is not necessary to show that other members of the public were injured in the same way as the plaintiff if the potential for repetition exists. *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn.App. 553, 825 P.2d 714 (1992). Under the circumstances of this case, reasonable people could only conclude that the public interest requirement has been satisfied. Adair has certainly not demonstrated to the contrary.

Our case is best viewed as a consumer transaction. The Supreme Court defined that term by example in *Hangman Ridge Training Stables, Inc., v. Safeco Title Insurance Company, supra,* 105 Wn.2d at 790. It listed cases in which the plaintiff had purchased an item from a seller in the business of selling the item. One of these cases involved the purchase of housing—a mobile home—and one concerned a farmer's purchase of seed. *Haner v. Quincy Farm Chemicals, Inc.,* 97 Wn.2d 753, 649 P.2d 828 (1982); *Lidstrand v. Silvercrest Industries,* 28 Wn.App. 359, 623 P.2d 710 (1981) Mr. Butler entered into a transaction to build a home with a company that is in the business of building homes. Our case is therefore akin to the relationships the Supreme Court described as "essentially consumer transactions" in *Hangman Ridge Training Stables, Inc., v. Safeco Title Insurance Company, supra.* Therefore, the public interest

requirement should be evaluated on the test formulated for consumer transactions.

Under the test for consumer transactions, it is clear that the public interest requirement is satisfied. The unfair or deceptive acts were clearly committed in the course of Adair's business. The unfair or deceptive acts concerning financing were part of a pattern or generalized course of conduct and involved repeated acts. The financing was premised on a 2003 agreement between PCB and Peter Marsh that was never disclosed to any Adair customer. Between 2003 and 2006, when Mr. Butler first entered into a contract with Adair, ninety other Adair customers received financing from PCB at only one of Adair's nine sales outlets. At some point during 2006 and 2007, PCB had required Adair to commit $2,263,800.00 for a total of nineteen of Adair customers, including Mr. Butler, for this "credit line backup program." (CP 250) Not only was there potential for repetition of the nondisclosure of the arrangements between PCB and Adair; the repetition had occurred.

The potential for repetition also existed for the construction related problems engendered by Mr. Potts' representations concerning feasibility of construction and his estimates concerning the amount necessary to complete the customer's duties. Adair acknowledges that site visits a home planner such as Mr. Potts makes to evaluate feasibility are part of

the sales process. It also assumes the duty to help its customers get through the site preparation process. Adair itself recognized that Mr. Potts was not doing well at this task and was, in fact, denying any responsibility to assist customers get through a "road block." Adair personnel identified eight customers other than Mr. Butler where Mr. Potts had fallen short. (CP 379) Clearly, Mr. Potts' failures amounted to a generalized course of conduct that affected other customers than Mr. Butler. The potential for repetition existed in this area as well.

There is also potential for repetition in Adair's delay in foreclosing. The decline of real estate values in 2007-8 increased defaults on construction loans in general.[3] Adair customers would not be any exception. Adair's commitment to pay Mr. Butler's second loan to PCB on condition that PCB assign the loan to Adair indicates that the parties envision assigning of loans — and Adair's collection of those loans — was a general practice.

In the final analysis, Adair admits to being a volume builder that does things in a routinized manner. It follows "scripts" in its interactions

[3] The Court may take judicial notice of this fact because it is not subject to serious dispute. ER 201(b). Judicial notice may be taken at any stage of the proceeding including on appeal. ER 201(f); *C.L.E.A.N v. State,* 130 Wn.2d 782, 809-10, 928 P.2d 1054 (1996).

with its customers. The potential for repetition necessary to make out the public interest requirement follows from those factors if nothing else.

This element of Mr. Butler's Consumer Protection Act counterclaim should also be uncontested. At very least, sufficient facts support this element so deny summary judgment to Adair.

VI. Mr. Butler Suffered Injury.

In the context of a Consumer Protection Act claim, the concept of "injury" is not the same as the concept of "damages." Any injury is sufficient even if it is slight and even if no monetary damages can be proven. If the claimant loses money as a result of the improper conduct, however, the injury requirement is satisfied. *Nordstrom,Inc. v. Tampourlos,* 107 Wn.2d 735,740, 733 P.2d 208 (1987); *Mason v. Mortgage America, Inc.,* 114 Wn.2d 842, 854, 742 P.2d 142 (1990). In *Sign-O-Lite Signs, Inc., v. Delaurenti Florists, Inc., supra,* the injury requirement was made out by the claimant having to take time away from her business in order to address matters with the party guilty of the unfair or deceptive act.

Mr. Butler has clearly been injured. He devoted his time and effort to the home construction project. He purchased land that he otherwise would not have bought. He paid money from his own funds for interest on

loans and for construction related expenses. These included the additional excavation expenses he incurred because Mr. Potts did not advise him about excavation. He now faces the specter of a deficiency judgment on Adair's mortgage foreclosure claim. He would have incurred none of these expenses had Adair personnel let him know the true facts concerning financing and the feasibility of construction on his site. Had Adair not tarried in seeking to enforcement, he would not be subject to a deficiency judgment.

Once again, the presence of the element of injury should be obvious here. Clearly, Mr. Butler has raised a genuine issue of material fact on this element.

VII. The Causation Element Is Satisfied.

The element of causation is satisfied if the injured person relies on a misrepresentation. It is also satisfied if the injured person loses money as a result of the wrongful conduct. *Edmonds v. John L. Scott Real Estate, Inc.,* 87 Wn.App. 834, 847, 942 P.2d 1072 (1997). Our case involves issues of non-disclosure of issues regarding financing. In such cases, the causation element does not require an injured party to prove that he or she would not have entered into the transaction had he known the true facts. *Schnall v. AT&T Wireless Services, Inc.,* 139 Wn.App. 280, 291-92, 161

P.3d 280 (1997), reversed on other grounds, 168 Wn.2d 125, 225 P.2d 929 (2010).

As indicated, Mr. Butler lost money on this transaction and is facing a deficiency judgment on the Adair's judicial foreclosure claim. This sufficiently proves causation. Once again, a genuine issue of material fact exists.

VIII. The Trial Court's Decision Was Incorrect.

a. Matters Concerning Financing.

i. Introduction.

The trial court believed that Mr. Butler had not shown a genuine issue of material fact as to whether Mr. Potts' misrepresentation of the terms of loans constituted an unfair or deceptive act. It stated that what Mr. Potts had represented was at odds with the terms of the promissory note that Mr. Butler signed and that allowing a claim on that basis would violate the parol evidence rule. (CP 383) It ruled that Mr. Butler had not satisfied the causation element as to Adair's concealment of its arrangement with PCB because it regarded as insufficient Mr. Butler's statement that he would not have entered into the transaction had he known the true facts. (CP 383-84) Both conclusions misapprehended the law.

ii. Mr. Potts' Misrepresentations.

Mr. Potts' misrepresentations concerning financing amounted to an unfair or deceptive act regardless of what the final financing terms were.

A party who misrepresents any aspect of financing is guilty of an unfair or deceptive practice even when the loan the customer receives is different from the representations made. That is precisely what occurred in *Grayson v. Nordic Construction, Inc., supra.* The contractor in that case sent out mailers indicating that financing was available. The trial court found that it did not have the "capabilities to finance jobs" as implied by the mailers. 92 Wn.2d at 551. The Court held that this activity amounted to an unfair or deceptive act even though the parties had entered into a different financing arrangement. Also, in *Henery v. Robinson, supra,* the mobile home dealer misrepresented what a lender might require for a down payment. The purchasers ultimately bought the home on terms that were different than what had initially been represented. The Court ruled that the misrepresentation did not amount to an unfair or deceptive act only because it was an isolated communication not having the capacity to deceive a substantial portion of the public.

The trial court's conclusion ignores the recognition that Mr. Potts' misrepresentations amount to "bait and switch" tactics. In

the context of product sales, that has been defined as advertising the product at a low price which the seller never intends to fulfill in order to draw customers to the store to buy higher priced merchandise. *City of Yakima v. Esqueda,* 26 Wn.App. 350, 612 P.2d 821 (1980) "Bait and switch" tactics have longed been condemned under cases interpreting the Federal Trade Commission Act. See, e.g. *All-State Industries of North Carolina, Inc., v. F.T.C.,* 423 F.2d 423 (4th Cir. 1970). In considering whether an act is unfair or deceptive for the purpose of the consumer Protection Act, Washington Courts consider decisions interpreting the Federal Trade Commission Act. These decisions provide guidance but not binding. RCW 19.86.920; *Panag v. Farmers Insurance Company of Washington,* 166 Wn.2d 27, 47, 204 P.3d 885 (2009). There is no good reason for Washington not to follow the federal cases and declare "bait and switch" tactics to amount to unfair and deceptive acts. Doing so would be consistent with the legislature's prohibiting mortgage brokers from engaging in the practice. RCW 19.146.0201(7).

iii. Concealment of Arrangements with PCB.

As noted above, a party is not required to prove reliance when the unfair or deceptive act amounts to concealment. *Schnall v. AT&T Wireless Services, supra.* For that reason, the trial court's ruling was simply wrong.

Even if reliance was required, the only way for a party to prove reliance is by his or her own statement that he or she did in fact rely. Mr. Butler gave that testimony in his declaration. He stated that if he had known the true facts, he would not have entered into the transaction. Mr. Butler's statement therefore creates a genuine issue of material fact.

b. Matters Relating to Construction Issues.

i. Introduction.

The trial court refused to consider any issues regarding Mr. Potts' actions related to construction. It concluded that these claims were subject to the alternative dispute provisions of the contract. (CP 383) In that regard, the contract provided as follows in pertinent part:

> 15. **DISPUTE RESOLUTION:** The Owner and Adair realize that disagreements may arise in the course of contracting for the construction of a structure which the parties may be unable to settle between themselves. If this happens, the Parties agree to settle all disagreements in an efficient, timely and fair manner at minimal or no cost. To accomplish this, the Parties agree to the following system of Dispute Resolution, which shall apply to all disagreements arising at any time and in any way relating to the construction or this Contract:

(a) **Decision by Inspector:** All work performed and materials provided on the property will be inspected by Government Agencies with the appropriate jurisdiction and it is agreed that their decisions, within the scope and limits of their responsibilities will be final and binding upon the Parties.

(b) **Mediation/Arbitration:** If a dispute (or any part of a dispute) is not resolved through the inspection process described in "(a)" above, the Parties agree to meet with an unbiased Mediator, with a working knowledge of residential construction, to be named by Construction Arbitration Services, Inc. ("CAS"), in an effort to resolve the mediation. If mediation fails to resolve this dispute, it will immediately proceed to arbitration with the Mediator serving as the Arbitrator. Should CAS decline to designate a Mediator/Arbitrator, the Parties shall jointly and promptly select an individual with a professional (engineer, architect, contractor) with working knowledge of residential construction to serve as Arbitrator, to arbitrate the dispute. The Arbitrator so selected may attempt to mediate the dispute prior to commencing formal arbitration.

(c) **Parties, Notice, Binding Effect & Fees:** To the extent permitted by law, the parties agree to not being represented by counsel or others in the Dispute Resolution process and to limit participation to themselves, provided that others with specific knowledge and involvement to the facts or issues relevant to the dispute may be present and provide testimony upon the advance written approval of the Mediator/Arbitrator. . .The application of

> this system of Mediation/Arbitration is mandatory. . .Judgment on an Award may be entered in any Court of competent jurisdiction.

(Emphasis added) (CP 222) The trial court's decision was incorrect because the arbitration decision is unconscionable and because Adair waived the alternative dispute resolution provisions of the contract.

ii. The Arbitration Provision Is Unconscionable.

An arbitration provision will not be enforced if it is substantively unconscionable. A term is unconscionable if it is one-side or overly harsh. For example, in *McKee v. AT&T Corporation,* 164 Wn.2d 372, 395-402, 191 P.3d 845 (2008), the Court held substantively unconscionable and unenforceable a provision that waived class action relief; unreasonably shortened the statute of limitations; limited attorney's fees; and required all arbitration proceedings to be confidential.

The arbitration provision in this case is substantively unconscionable because it prohibits an Adair customer from engaging an attorney. Adair does not want its customers to have the benefit of the advice and assistance of a trained advocate in general and a person who might have construction expertise in particular. Adair personnel are obviously experienced in construction matters in general and Adair's methods in particular. Its customers likely do not have to same

experience or knowledge. Adair obviously inserted this provision to prevent any dispute from being resolved on a level playing field.

Counsel has not located any case nationally in which an arbitration agreement has contained a comparable clause. Interestingly, one case has been located where the arbitration provision specifically allowed a litigant to be represented by counsel of his or her own choosing. *Magi XXI, Inc., v. Stato Della Citta Del Vaticano,* 2008 W.L. 3895915 (E.D.N.Y. 2008). California requires such a provision by statute in some circumstances. California Education Code §89542.5(a)(3) Tennessee's uninsured motorist statute states that an insured is entitled to be represented by an attorney of his or her own choosing in proceedings to resolve such claims. T.C.A. 56-7-1206

The provision also violates the public policy allowing anyone to be represented by an attorney of that person's choosing inherent in RPC 5.6. That rule prohibits attorneys from participating in any agreement or settlement agreement that prohibits an attorney from practicing. It is designed to allow a civil litigant the right to representation by the lawyer of his or her choosing. Restatement (Third) *Law Governing Lawyers,* §13, comment b; *Koehler v. Wales,* 16 Wn.App. 304, 308, 556 P.2d 233 (1976)

The arbitration provision is therefore not enforceable because it is unconscionable. The trial court erred by ruling that questions concerning construction would have to be referred to arbitration.

iii. Adair Waived Arbitration.

Alternative dispute provisions in a contract may be waived by conduct inconsistent with any other intent except to waive. *Lake Washington School District v. Mobile Modules Northwest, Inc.*, 28 Wn.App. 59, 621 P.2d 791 (1981); *B & D Leasing Co. v. Ager*, 50 Wn.App. 299, 748 P.2d 652 (1988). The intent to waive follows from a party's electing to litigate instead of arbitrate, for example. *Otis Housing Association, Inc. v. Ha,* 165 Wn.2d 582, 588, 201 P.3d 309 (2009). In the case of *Ives v. Ramsden,* 142 Wn.App. 369, 174 P.3d 1231 (2008), a securities broker waived his right to arbitration by answering the complaint without asserting any desire to arbitrate; engaging in extensive discovery; deposing witnesses; answering interrogatories; and preparing for trial.

A party can also waive mediation provisions of an alternative dispute resolution clause. For example, in *Harting v. Barton,* 101 Wn.App. 954, 6 P.3d 91 (2000), the parties entered into a lease of the Hartings' farm with an option to purchase. The agreement contained a

provision requiring mediation of disputes "except in the case of emergency." When disagreements arose, plaintiff sued. Mr. Barton counterclaimed for specific performance or damages and later moved for summary judgment. On appeal, Mr. Barton argued that the trial court lacked subject matter jurisdiction because of the mediation provision. The Court did not agree. It further held that he had waived the mediation provision by not demanding mediation; by filing the counterclaim; and by moving for summary judgment. 101 Wn.App. at 95-96.

Adair first made demand on Mr. Butler in June of 2008. Mr. Butler responded by suggesting that mediation was appropriate. Adair did not respond. In September of 2008, Adair specifically stated that the contract between Mr. Butler and Adair was not applicable to the present dispute and it had no intention of mediating. After Mr. Butler made his Consumer Protection Act counterclaim, Adair answered without indicating that the matter would be subject to arbitration or mediation. It then propounded interrogatories and requests for production; deposed Mr. Butler, and moved for summary judgment seeking to dismiss his Consumer Protection Act counterclaim. By its conduct, Adair clearly waived the arbitration and mediation provisions of the contract.

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iv. Conclusion.

For the reasons stated, the trial court's conclusion that all issues related to construction would have to be referred to arbitration was incorrect.

Assignment of Error No. 2: The Court erred by entering Judgment for plaintiff.

Assignment of Error No. 3: The trial court erred by entering the Supplement Judgment.

IX. The Trial Court Should Not Have Entered the Judgment or the Supplemental Judgment.

The General Judgment the trial court entered dismissed Mr. Butler's Consumer Protection Act counterclaim. As the preceding discussion demonstrates, it should not have done so. The entry of the General Judgment amounts to error for that reason. The trial court should also not have granted judgment in favor of Adair on its judicial foreclosure claim or entered the Supplemental Judgment allowing attorney's fees to Adair. Rather, it should have engaged in additional proceedings to determine damages suffered by both parties and then offset the two claims. *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn.App. 665, 694, 82 P.3d 1199 (2004); *Fluor*

Enterprises, Inc. v. Walter Construction, Ltd., 141 Wn.App. 761, 767, 172 P.3d 378 (2004). Adair is entitled to an award of attorney's fees on its mortgage foreclosure claim. Mr. Butler is entitled to an award of attorney's fees on his Consumer Protection Act claim. The trial court should have offset the two awards. *Marassi v. Lau,* 71 Wn.App. 912, 859 P.2d 605 (1993). For these reasons, the trial court's entry of the General Judgment and its grant of the Supplemental Judgment were both error.[4]

CONCLUSION

The trial court erred by summarily dismissing Mr. Butler's Consumer Protection Act counterclaim and rendering judgment against him due to that dismissal. Mr. Butler clearly demonstrated that he was entitled to relief under the Consumer Protection Act. At very least, he raised a genuine issue of material fact on each element of his claim. For those reasons, the Order Granting Summary Judgment, the General Judgment, and the Supplemental Judgment must be reversed, and the matter should be remanded to the trial court to determine Mr. Butler's damages.

[4] Mr. Butler does not dispute that Adair is entitled to an award of attorney's fees limited to what was reasonably expended in pursuing its mortgage foreclosure claim. Mr. Butler also does not dispute the amount of attorney's fees and costs the trial court awarded in the Supplemental Judgment.

STATEMENT REQUIRED BY RAP 18.1(A)

Mr. Butler seeks attorney's fees on appeal. His entitlement is based on RCW 19.86.090, set out on page 19 above. He is entitled to attorney's fees on appeal because he has established a right to relief under the Consumer Protection Act. A person who successfully counterclaims on the basis of the Consumer Protection Act is entitled to fees on appeal. *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., supra.*

DATED this 28 day of _____, 2010.

BEN SHAFTON, WSB #6280
Of Attorneys for Kasey Butler

APPENDIX

RCW 61.12.070 50

RCW 61.12.090 51

RCW 61.24.100(1) 52

West's Revised Code of Washington Annotated Currentness
Title 61. Mortgages, Deeds of Trust, and Real Estate Contracts (Refs & Annos)
Chapter 61.12. Foreclosure of Real Estate Mortgages and Personal Property Liens (Refs & Annos)

61.12.070. Decree to direct deficiency--Waiver in complaint

When there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court shall direct in the decree of foreclosure that the balance due on the mortgage, and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor: PROVIDED, HOWEVER, That in all cases where the mortgagee or other owner of such mortgage has expressly waived any right to a deficiency judgment in the complaint, as provided by RCW 6.23.020, there shall be no such judgment for deficiency, and the remedy of the mortgagee or other owner of the mortgage shall be confined to the sale of the property mortgaged.

CREDIT(S)

[1961 c 196 § 4; Code 1881 § 612; 1877 p 127 § 617; 1869 p 146 § 566; 1854 p 208 § 411; RRS § 1119.]

West's Revised Code of Washington Annotated Currentness
Title 61. Mortgages, Deeds of Trust, and Real Estate Contracts (Refs & Annos)
Chapter 61.12. Foreclosure of Real Estate Mortgages and Personal Property Liens (Refs & Annos)
61.12.090. Execution on decree--Procedure

A decree of foreclosure of mortgage or other lien may be enforced by execution as an ordinary judgment or decree for the payment of money. The execution shall contain a description of the property described in the decree. The sheriff shall endorse upon the execution the time when he receives it, and he shall thereupon forthwith proceed to sell such property, or so much thereof as may be necessary to satisfy the judgment, interest and costs upon giving the notice prescribed in RCW 6.21.030.

CREDIT(S)

[1988 c 231 § 36; 1899 c 53 § 1; RRS § 1121. Cf. Code 1881 § 613; 1869 p 146 § 567; 1854 p 208 § 412.]

West's Revised Code of Washington Annotated Currentness
Title 61. Mortgages, Deeds of Trust, and Real Estate Contracts (Refs & Annos)
Chapter 61.24. Deeds of Trust (Refs & Annos)

61.24.100. Deficiency judgments--Foreclosure--Trustee's sale--Application of chapter

(1) Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust.

NO. 40525-3-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ADAIR HOMES, INC.,

Plaintiff/Respondent

v.

KASEY BUTLER,

Defendant/Appellant

APPEAL FROM THE SUPERIOR COURT

HONORABLE ROGER A. BENNETT

AFFIDAVIT OF MAILING

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10 JUN 30 PM 12: 11
STATE OF WASHINGTON
BY _____ DEPUTY

STATE OF WASHINGTON)
) ss.
County of Clark)

THE UNDERSIGNED, being first duly sworn, does hereby depose and state:

1. My name is LORRIE VAUGHN. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On June 28, 2010, I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the Appellant's Amended Brief to the following person(s):

Mr. William Fig
Sussman Shank
1000 SW Broadway, Suite 1400
Portland, OR 97205-3089

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED this 28th day of June, 2010.

Lorrie Vaughn
LORRIE VAUGHN

SIGNED AND SWORN to before me this 28 day of June, 2010.

NOTARY PUBLIC FOR WASHINGTON
My appointment expires: 9·1·2011