

NO. 44745-2II

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATEWIDE GENERAL INSURANCE AGENCY
and MARCEL MATAR,

Appellants,

v.

MIKE KREIDLER, Insurance Commissioner, and
CASCADE NATIONAL INSURANCE COMPANY,

Respondents.

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

Statewide is a victim of fraud carried out by individuals associated with Cascade. Cascade coerced Statewide into signing a \$230,000.00 Promissory Note at the end of 2003. CP 616. Cascade took \$272,763.20 from a premium trust account in January 2004 and did not credit Statewide for Cascade's receipt of those funds. CP 726-728, CP 750-752, and CP 826-827. Cascade stole \$205,893.38 in November 2004 and now the Receiver is apparently either ignoring that theft or somehow blaming Statewide. CP 756. All in all, Cascade received approximately \$900,000.00 between February 1999 and March 2005 that Cascade was not entitled to—all at the expense of Statewide. CP 444-455.

Adding insult to injury, the Receiver argues that Statewide was obligated to continue servicing Cascade's insurance policies after the Receiver was appointed without Statewide having any ability to receive appropriate payments of past money earned so that Statewide could pay its operating expenses. Statewide did not profit from the collapse of Cascade. Statewide simply received the money it had earned and used that money to pay overhead for as long as Statewide could stay afloat. Statewide all the while notified Cascade and/or the Receiver of the funds that Statewide deposited and withdrew. CP 394, CP 449, CP 468, and CP 826-827.

Further, the money Statewide received was never an asset of

Cascade and/or the Receivership, and, therefore, it was appropriate for Statewide to use such funds to pay operating expenses. CP 444-455. It should be noted that the operating expenses incurred to service existing policies were distinct from the additional and significant expenses Statewide paid in reliance on the contract Statewide entered into with Cascade in October 2004, the purpose of which was to increase the volume of Cascade's insurance policies that Statewide was authorized to sell. Statewide was damaged when Cascade's legal and financial problems prevented Statewide from expanding as the October 2004 Agreement contemplated. Statewide filed proofs of claim related to additional expenses incurred in reliance on the October 2004 contract, but Statewide was denied recovery of the expenditures. CP 201-203, CP 260-261, and CP 265-275.

The Receiver cannot have it both ways—*i.e.*, if, even after the Receiver was appointed, Statewide was still obligated to honor its January and/or May 2004 contract(s) with Cascade in regards to servicing Cascade's policies and collecting premiums, then Statewide was also entitled to follow the January and/or May 2004 contract(s) in regards to balancing the accounts by receiving money Statewide had earned. It would have been completely inequitable to force Statewide to live up to portions of the contract requiring Statewide to perform work, but not allow

Statewide to receive appropriate compensation for past and ongoing services rendered.

Additionally, if the Receiver's argument is accepted that the January 2004 Agreement nullified all prior agreements, then it necessarily follows that any prior personal guarantees were nullified. Therefore, there was no enforceable personal guarantee in effect during the months of January, February, March, and April 2004—this is what Mr. Matar means when he points out that he never signed a personal guarantee until May 2004. The evidence before the Court supports Mr. Matar's defense that there was no consideration for him signing the personal guarantee in May 2004, as his alleged agreement to the terms of that guarantee did not provide any benefit to Mr. Matar or Statewide. CP 15 and CP 635. The evidence also supports Mr. Matar's defense that he was induced into signing documents by threats and empty promises. CP 467, CP 541, and CP 616.

The bottom line is that over \$900,000.00 that is the subject of the Receiver's claim against Statewide never belonged to Cascade, and, thus, that money was not an asset of the Receivership. CP 444-455. At the very least, Statewide had a secured interest in the funds up to the amount that Cascade had previously overdrawn. Either way, the money Statewide withdrew properly belonged to Statewide and was properly used to pay

Statewide's operating expenses. Of course, this all effectively becomes a moot point to some extent once the Court reverses and remands on the issues concerning the alleged personal guarantee, because Statewide is out of business and the Receiver has no enforcement mechanism against Mr. Matar without the personal guarantee.

A. Statewide's Earnings are not Assets of Cascade

Statewide was the insurance agent that sold Cascade's policies to individuals. In addition to being Cascade's insureds, these individuals were Statewide's clients. Statewide was always entitled to compensation for the services Statewide provided to its clients and Statewide was always entitled to compensation for the work Statewide did for Cascade. Statewide's fees for compensation were never assets of Cascade and must not be treated as such.

Money paid to Statewide by Statewide's clients, which money was deposited into a premium trust account, would never have existed without Statewide's work. Statewide separately accounted for the portion of this money that was owed to Statewide. The timing of Statewide's withdrawal of the money Statewide was owed for its services makes no difference since this money always belonged to Statewide and to no other entity.

Moreover, the premium trust account from which the Receiver accuses Statewide of withdrawing prior earnings in 2005 was not

exclusively controlled by Cascade. CP 463-466. The account Cascade had exclusive control over was closed in November 2004 after Cascade depleted the funds in that account. CP 756. The account existing during the months of April – December 2005, which is the time period on which the Receiver focuses, was a joint account.

A parallel may be drawn to bankruptcy law where assets in a joint account are exempt from liquidation where a third-party joint account holder other than the debtor can prove money in the joint account belongs to that third party. 11 U.S.C. §541(d). Here, Statewide demonstrated, through its accountant and the financial reporting Statewide continuously submitted to Cascade and/or the Receiver, that the money Statewide withdrew from the joint premium trust account belonged to Statewide.

Statewide was not estopped from receiving compensation for its work merely because the compensation was withdrawn from a joint account several months after the compensation was earned. The method of determining exact compensation figures was devised so that money earned in a given month was not likely to be paid until some time in the future. CP 444-455. There was no reason for this method of payment determination to change once the Receivership came into effect. Just as the Receiver expected Statewide to continue servicing Cascade's policies pursuant to the January and/or May 2004 contract(s), Statewide expected

to receive compensation for its past and ongoing services as calculated pursuant to the same agreement(s).

Statewide was not a creditor in regards to the fees Statewide had earned. Statewide's fees never belonged to Cascade and were not an asset of Cascade that could be transferred to the Receivership. The fact that Statewide withdrew fees in 2005 that Statewide had earned in prior years is immaterial—this money was earned by Statewide, was separately accounted for, and was not an asset of Cascade.

B. There are no Discrepancies in the Accountings

The accountings by Statewide's expert and the Receiver's expert are relatively consistent despite the different conclusions that each party reached by breaking the same numbers down in different ways. The Receiver cannot dispute that if the entire relationship between Statewide and Cascade is considered, the amount of money Statewide received is nearly equal to the amount of money Statewide earned. The approximately \$900,000.00 gap between the parties' bottom lines is not due to arithmetic, the difference is due to analytical line drawing. CP 444-455, CP 667-675, CP 755-758, and CP 829-853.

Statewide's primary dispute with the Receiver's accounting is the Receiver's decision to analyze the relationship between Statewide and Cascade in a vacuum by only looking at deposits and withdrawals between

April and December 2005. Statewide's secondary dispute is the Receiver's decision to use unfavorable ratios to perform calculations, which ratios were unilaterally implemented in May 2004.

But to reiterate, there are no discrepancies in the accountings—the only disputes have to do with the methods used by the Receiver to manipulate the numbers. Obviously, the financial experts for both parties are capable of doing math. The math reveals that there is no discrepancy in Statewide's accounting of the money it received in compensation. And there is no dispute that money Statewide was paid, including withdrawals taken in 2005, is equivalent to the money Statewide earned between 1999 and 2005.

Statewide kept appropriate records and all the while submitted reports to Cascade and/or the Receiver. This was a completely transparent process, which the Receiver allowed to occur. At the end of the day, Statewide has merely been compensated for its work. Statewide has not received money it did not earn.

C. The Personal Guarantee is Void

1. Evidence of a Disputed Fact was Part of the Trial Court's Record

Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the

affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). An appellate court reviews a grant or denial of summary judgment *de novo*. *Green v. American Pharmaceutical Co.*, 136 Wn. 2d 87, 94, 960 P.2d 912 (1998).

On review of an order granting or denying summary judgment, the appellate court will only consider issues and evidence called to the attention of the trial court. RAP 9.12. “The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.” *Id.* Based on RAP 9.12, evidence is called to the attention of the trial court when it is designated by the court as part of the record the court relied upon in ruling on a motion for summary judgment. There is no requirement that an issue be the subject of written or oral argument before it can be considered on appeal—and, in fact, argument is not evidence.

Here, the Court expressly noted that part of the evidence it considered when ruling on the Receiver’s Motion for Summary Judgment were declarations and exhibits submitted by Marcel Matar and Mr. Matar’s attorney. CP 961. These declarations included deposition testimony and documentary evidence supporting Mr. Matar’s defense that

he was fraudulently induced to sign the personal guarantee and/or that the guarantee is void for lack of consideration. CP 467, CP 541, and CP 616. The Trial Court Judge even mentioned in his written opinion that “it is plausible that the 2004 Agreement was altered, either mistakenly or deliberately...” CP 934.

However, the Judge opined that the fraud was irrelevant even though the Judge recognized the possibility of fraud. The Judge’s opinion in that regard focused only on the financial calculations as developed by the parties’ experts. The Judge did not consider the impact of fraud on the personal guarantee signed by Mr. Matar in May 2004. The Judge erred in failing to consider this issue—he had an obligation to consider it since there was evidence in the record before the Trial Court.

It would be completely inequitable and unjust for a judgment of over \$900,000.00 to be enforced against an individual because the Judge did not ask questions during oral argument on the Receiver’s Motion for Summary Judgment about the implications of fraud on the personal guarantee. And while Mr. Matar could have highlighted this issue more, it would be incorrect to say that this issue was not “called to the attention of the trial court” since the record the Trial Court relied on included evidence supporting Mr. Matar on this issue. Even if Mr. Matar never responded to the Receiver’s Motion for Summary Judgment and/or did not participate in

oral argument, the Trial Court cannot rubber stamp a motion for summary judgment. The Trial Court Judge is obligated to review all of the evidence and consider all of the issues raised by the evidence—courts have even been known to make decisions based on the court’s independent legal analysis even when the basis for the court’s ruling was not a basis argued for by any of the parties involved.

Mr. Matar has not offered any evidence on appeal that was not already in the pleadings and record filed with the Trial Court. This is not an issue based on new evidence that was never before the Trial Court. This Court is obligated to make a decision based on the evidence. And, if appropriate, this Court can make a decision based on a legal analysis of the evidence that is different than the analysis expressed by the parties in argument. The Trial Court Judge erred in failing to consider the impact of fraud on the May 2004 personal guarantee. But the failure to consider that issue is largely irrelevant in this *de novo* review. The real question is whether there are issues of fact that preclude summary judgment against Mr. Matar. The answer is yes, there are issues of fact precluding summary judgment.

Disputes over the validity of contracts based on alleged fraud are not appropriate for summary judgment because they depend on an understanding of surrounding circumstances and credibility of witnesses—

generally, whether there has been mutual assent to an agreement is a question of fact. *See Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530, 269 P.3d 1038 (2011).

The Trial Court also failed to consider whether there was consideration for the May 2004 personal guarantee. The Court only focused on changes to the underlying agreement and the financial impact. The Court reasoned that any discrepancies in the numbers should have been identified by Statewide long ago. But here again, issues concerning the validity of the personal guarantee due to lack of consideration were missed by the Trial Court due to the Court's singular focus on the battle of the experts.

Taken in a light most favorable to Mr. Matar, the evidence in the record before the Court now, and which was before the Trial Court, is that there was no personal guarantee in effect between January and April 2004. When Mr. Matar signed a personal guarantee in May 2004, there was no corresponding benefit conferred to Mr. Matar or Statewide. Agents of Cascade have testified that they do not recall why a new agreement was sent to Mr. Matar for his signature. CP 65. Mr. Matar has testified that he was told his signatures were needed to correct errors—Mr. Matar was not told he was agreeing to new terms that were detrimental to his business and perhaps himself personally. CP 467 and CP 541.

There was no reason for Mr. Matar to sign the May 2004 Amended Agreement, including the personal guarantee. If he did not sign, Statewide and Cascade would have continued to operate pursuant to the January 2004 Agreement. Signing different documents in May 2004 did not confer any additional benefit—there was no consideration. However, Mr. Matar’s signature on the documents in May 2004 is consistent with Cascade’s pattern of fraud and coercion.

At a minimum, there are issues of fact concerning the May 2004 Agreement that preclude summary judgment. It was error for the Trial Court to grant summary judgment after having recognized the potential of fraud perpetrated by Cascade. And it was error for the Trial Court to overlook the May 2004 agreement’s lack of consideration.

2. RAP 2.5(a)(2)

When the Receiver moved for summary judgment at the Trial Court level, the parties focused on the disputed accounting figures as discussed by the parties’ competing experts. Lost in the battle of experts was the fact that, due to the way the pleadings had been styled, a judgment against Statewide also meant a judgment against Marcel Matar. The enforceability of a personal guarantee signed by Mr. Matar in May 2004 was never proven, but a judgment against Mr. Matar was collateral damage as a result of the judgment being entered against Statewide. CP

960-973.

The Receiver argues that the Receiver should not have to prove the personal guarantee signed by Mr. Matar in May 2004 was valid because this issue was not briefed at the Trial Court level. As discussed above, whether the issue was briefed is irrelevant as long as there was evidence in the record supporting Mr. Matar's defense. But even if the Court were to decide that this is a new issue, a party may raise "failure to establish facts upon which relief can be granted" as an error for the first time in the appellate court. RAP 2.5(a)(2).

The Receiver alleged in its Adversary Claim that Mr. Matar signed a personal guarantee in May 2004 and is therefore required to pay funds owed by Statewide if Statewide could not pay. CP 15-19. Statewide and Mr. Matar admitted in their Answer that the guarantee was signed, but denied it was enforceable. CP 105-108. As previously mentioned, this case did not go to trial and was decided on summary judgment without examining the enforceability of the May 2004 guarantee. CP 960-973. But the fact that the Trial Court did not examine the issue does not give the Receiver a free pass from having to prove a case against Mr. Matar—especially since Mr. Matar has consistently denied the enforceability of the personal guarantee and there was evidence in the record supporting Mr. Matar's argument that the personal guarantee is invalid.

The Receiver has failed to establish that consideration existed for the May 2004 Agreement, which is an essential element of the Receiver's claim against Mr. Matar. All the Receiver can do is show that a personal guarantee was signed, but there is no evidence of consideration. Cascade's agents have testified they do not remember why new documents were signed in May 2004. Mr. Matar's testimony suggests he was induced to sign documents through fraud and coercion. The May 2004 Agreement clearly did not benefit Statewide or Mr. Matar. The Receiver's failure to establish an essential element of the claim against Mr. Matar is grounds to reverse the Trial Court's order and remand for further proceedings.

II. CONCLUSION

Summary judgment was not proper—particularly against Mr. Matar. There are, at the very least, issues of fact that warrant this case being remanded to the Trial Court for further proceedings.

RESPECTFULLY SUBMITTED this 1st day of November, 2013.

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PROOF OF SERVICE

I certify that I caused to be served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of November, 2013, at Olympia, Washington.

Pamela R. Armagost
Pamela R. Armagost