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Case No. 68833-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KATHRYN MUELLER,

Respondent,

v.

HAURY'S AUTO BODY, INC.,

Appellant.

BRIEF OF RESPONDENT

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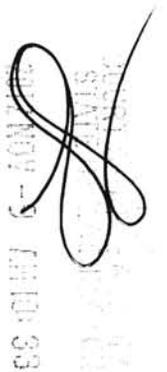


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I. STATEMENT OF THE CASE

In June 2006, Kathryn Mueller (“Mueller”) took her 320i BMW to Haury’s Auto Body (“Haury’s”) and spoke to Jeffrey Butler (Butler”). RP 3/21 43:17-25. Butler was the president of Haury’s. RP 3/22 144:20-21. Butler told Mueller that the BMW had “a lousy paint job” and that the shop which had done the work had used “garbage paint.” RP 3/21 44:5-8. Butler told Mueller he could “feel the rust” under the paint job. RP 3/21 43:12-14. Mueller told Butler that she wanted the “car to look as new as possible” and that “the core issue was to have the rust removed.” RP 3/21 43:18-21. She wanted all of the “paint removed from the body” so that all of the “rust could be exposed.” RP 3/21 43:22-25; 44:1-6. Mueller also told Butler that she wanted “the engine removed so all of the paint, everything could be removed so you could expose the rust . . .” RP 3/21 45:1-8. Mueller told Butler that she wanted “all of the rust removed.” RP 3/21 90:12-13. She also wanted “all new parts on that car.” RP 3/21 45:9-12.

Butler told her it would cost \$16,000 to restore the BMW to the “factory” condition that she wanted. RP 3/21 46:3-9; 46:19-21. Mueller did not leave the car with Haury’s at that time because Butler wanted her to have a “forensic investigator,” Mark Olson, look at the previous paint job and prepare a report. RP 3/21 47:2-14.

Mueller went back to Haury’s in the second week of October 2006 and spoke again to Butler. RP 3/21 47:16-23. She repeated the instructions for the work she wanted done as well as her expectations for how she wanted the car to look. She paid a \$3,000 deposit. RP 3/21 48:1-4. Haury’s asked Mueller to sign two pre-printed Haury’s documents on October 9, 2006, a “Repair Authorization” and a “Payment for Services Agreement/Receipt.” Plaintiff’s Exhibits 3 and 4.¹ Mueller did not request a written estimate because she trusted Butler and did not think it was necessary. RP 3/21 51:6-9. She did,

¹ These exhibits were admitted without objection from Haury’s. RP 3/21 49:6; 49:20. Haury’s counsel also questioned Butler about Plaintiff’s Exhibit No. 3 in his direct examination. RP 3/23 15:19-25; 18:16-25.

however, want to be informed if repairs would exceed \$16,000 and checked the box on Plaintiff's Exhibit 3 which stated: "Proceed with repairs , but contact me if the price will exceed \$16,000." Mueller's initials appear next to the \$16,000 figure. RP 3/21 51:10-21.

Butler testified that on October 9, 2006 Mueller also signed "Haury's standard repair contract authorization for service." RP 3/22 155: 24-25. Defendant's Exhibit 102 was admitted without objection. Defendant's Exhibit 102 also contained a second page which was slightly different from the first page, as it had the following language: "Proceed with repairs, but contact me if the price will exceed \$16,000," followed by Mueller's initials. Butler testified that he made the handwritten notes that are the third page of Defendant's Exhibit 102² as he walked around Mueller's BMW and came up with a total estimate of \$16,000. RP 3/22 153: 22-25. After Butler

² Identical to Plaintiff's Exhibit 12. One of the listed items was "strip exterior complete." Another was "door jambs, trunk/hood inner, trunk compartment."

gave her the estimate, the second page of Defendant's Exhibit 102, including the additional language regarding the \$16,000, was initialed by Mueller. RP 3/22 158:1-11. Butler understood that Mueller wanted to be notified if the repairs would exceed \$16,000. RP 3/23 37:11-16.

On November 3, 2006, Mueller went back to Haury's to drop off a \$7,000 check that had been requested by Butler. RP 3/21 54:15-25. Butler told Mueller that there were additional problems with the vehicle, including a "gaping hole in the left fender that – and two Brillo pads or green and yellow sponges that had been stuffed in that hole." RP 3/21 55:1-13. He told Mueller that it would be necessary to replace the quarter panels, the rocker panels, the new fender and perform some additional work. Butler gave her a new estimate of \$21,541.22. RP 3/22 162:24-25; 163:1-9. Butler asked her to sign the new estimate.³ RP 3/22 164:1-8. Mueller agreed to the new estimate of \$21,541.22 and gave Butler a check for \$7,000.

³ Plaintiff's Exhibit 9.

RP 3/21 56:16-25; 57:1-16; Plaintiff's Exhibit 9. Line C 134 of Plaintiff's Exhibit 9 indicates that Haury's will "Strip exterior paint to the metal."

In April 2007, Butler asked Mueller for an additional \$5,000 and she went to Haury's on April 18, 2007. She paid the \$5,000 and was given an additional "estimate" that was identical to the estimate of November 3, 2006. The amount, \$21,541.22, was unchanged. RP 3/21 60:9-25; 61: 1-4; Plaintiff's Exhibit 16.

Haury's never gave Mueller any new or revised written estimate after the April 18, 2007 estimate of \$21,541.22. RP 3/21 62:8-12; 3/26 5:1-6. Haury's never gave Mueller any new or revised oral estimate regarding the repairs. RP 3/23 42:10-25; 43:1-25; 44:1-2. In August 2009, The BMW was still not finished. RP 3/22 137:24-25; 138:1.

In January 2010, Mueller first learned that Haury's was demanding that she pay an additional \$7,915.43 over and above the last estimate of \$21,541.22, before the BMW would be

released to her. RP 3/21 62:12-25; 63:1-17; Plaintiff's Exhibit 5. Mueller paid the additional funds under protest and took possession of the vehicle. RP 3/21 64:11-25; 65:1-17; Plaintiff's Exhibit 15.

II. ARGUMENT

2.1 Introduction.

Following a three and one-half day bench trial, with six witnesses, including two experts, the Honorable Monica Benton ruled that Haury's had breached its contract to restore the body of Mueller's 320i BMW to rust-free condition, as promised. The trial court awarded \$10,000 in damages for breach of contract, representing the cost to bring the vehicle to the promised condition. The trial court also ruled that Haury's had violated the Automotive Repair Act ("ARA") by charging \$7,915.17 more than it had told Mueller the restoration would cost. The trial court trebled those damages pursuant to the Consumer Protection Act ("CPA") and awarded attorney's fees

and costs. On appeal, Haury's asks this Court to reverse the damage awards and the award of attorney's fees and costs.⁴

2.2 There was Substantial Evidence to Support the Trial Court's Conclusion of Law that "Haury's Breached Its Contract With Mueller to Restore the Vehicle to Rust-Free Condition."⁵

Haury's did not challenge the trial court's factual findings, thus they are verities on appeal. Tae T. Choi v. Sung, 154 Wn.App. 303, 225 P.2d 425 (2010). Significantly, Haury's did not challenge the factual finding that Mueller told Mr. Butler that she wanted "rust removed and all paint restored from the body of the car, including all door jams, under the hood and in the trunk." **CP, 1089, ¶ 1.3.** Haury's did not challenge the factual finding that Mueller "agreed to the removal of the paint to expose the rust, remove the engine, all new parts including new rubber side moldings and chrome

⁴ Appellant's Brief, p. 33.

⁵ Assignment of Error No. 1 regarding Conclusions of Law, ¶ 2.2. **CP 1094:**

surrounds.” CP 1089, ¶ 1.3. Haury’s Auto Body did not challenge the factual finding that “Mr. Butler told Mueller that Haury’s could restore the BMW, that rust or corrosion would be removed.” CP 1089, ¶ 1.4. Haury’s Auto Body did not challenge the factual finding that “significant rust and corrosion remained on the vehicle.” CP 1091, ¶ 1.15.

Haury’s challenges only the trial court’s conclusion of law that Haury’s agreed to restore the vehicle to a rust free condition and breached that agreement.⁶ However, there was substantial evidence that the president of Haury’s, Butler, was asked to and agreed to remove all rust and corrosion from the body of the vehicle.

Haury’s only argument on appeal is that the documents signed by Mueller, Plaintiff’s Exhibits 3 and 4, do not contain a representation that all rust would be removed, and thus, it cannot be part of the contract between the parties.⁷ However,

⁶ Appellant’s Brief, p. 18.

⁷ Appellant’s Brief, pp. 18 – 21.

the trial court's consideration of parol evidence regarding the agreement between the parties was proper and the determination that Haury's was in breach of the agreement was without error.⁸

In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement, but also from viewing the contract as a whole, the subject matter and objective of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties. Scott Galvanizing Inc. v. N.W. EnviroServices, Inc. 120 Wn.2d 573, 844 P.2d 428 (1993), *citing*, Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990).

In Adler v. Fred Lind Manor, 153 Wn.2d 331, 103 P.3d 773 (2004), applying the "context rule," the Court held that parol evidence was properly considered to establish that an

⁸ Indeed, Haury's failed to object to the admission of any of this evidence. RP 3/21 32:3-15; 44:6-25; 45:1-25; 46:1-25;48:1-25; 55:1-13. Thus, the argument was not preserved for appeal. State v. Reano, 67 Wn.2d 768, 409 P.2d 853 (1966).

arbitration provision was intended to be applied bilaterally rather than unilaterally, as urged by the plaintiff. The Court looked at the parties' statements and conduct, as well as the agreement, to make its finding regarding the intent of the agreement.

It is also well established that in cases where a contract is missing essential terms, it is only "partially integrated" and the terms not included in the writing may be proved by extrinsic evidence. Emrich v. Connell, 105 Wn.2d 551, 716 P.2d 863 (1986), *citing*, Buyken v. Ernter, 33 Wn.2d 334, 205 P.2d 628 (1949). *See also* Bassan v. Investment Exch., 83 Wn.2d 922, 932, 524 P.2d 233 (1974), *citing*, In re Estate of Garrity, 22 Wn.2d 391, 156 P.2d 217 (1945).

Here, the documents that were signed by Mueller and Butler on October 9, 2006, were Haury's "boilerplate" documents that all customers were asked to sign⁹. The scope of the work that is to be done by Haury's is not described

⁹ Plaintiff's Exhibits 3 and 4.

anywhere in the two documents. Plaintiff's Exhibit 3 does indicate that the work by Haury's Auto Body will be done in a "professional, high quality manner," but does not actually describe what is to be done. It also indicates that Haury's Auto Body is to "proceed with repairs," but to contact Mueller if "the price will exceed \$16,000." Plaintiff's Exhibit 4 provides that Mueller will pay for all services provided, but does not state what the "services" are.

Thus, parol evidence was properly admitted to establish the scope of work that Haury's was to provide for this restoration. Without parol evidence, the two documents are meaningless as to the scope of work. Here, the oral testimony described in the Statement of the Case, above, and Plaintiff's Exhibits 12 and 16 established that removal of all rust and corrosion was important to Mueller, that this was conveyed to Butler and that Butler agreed to strip the vehicle "to the metal," removing all rust and corrosion.

When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the finding support the trial court's conclusions of law. Keever & Assocs., Inc. v. Randall, 129 Wn.App. 733, 737, 119 P.2d 926 (2005). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). On appeal, the evidence is viewed in the light most favorable to the prevailing party and the appellate court defers to the trial court regarding witness credibility and conflicting testimony. Weyerhauser v. Tacoma-Pierce County Health Dep't, 123 Wn.App. 59, 65, 96 P.3d 460 (2004).

As the Court said in Quinn v. Cherry Auto Plaza, 153 Wn.App. 710, 717, 225 P.2d 266 (2009): "*There was conflicting evidence in this case. The trial judge weighed that*

conflicting evidence and chose which of it to believe. That is the end of the story.” Id. at 717.

Here, the finding that Haury’s agreed to remove all rust and corrosion from the vehicle and breached its contract to do so was supported by substantial evidence. The trial court should be affirmed.

2.3 Haury’s Did not Preserve Its Second Assignment of Error for Review.

Haury’s alleges that the trial court should have made a factual finding whether CP 10¹⁰ or Plaintiff’s Exhibit 3 was the document executed by Mueller.¹¹ However, Haury’s did not raise this issue at trial. An appellate court will not consider a theory which was not passed upon by the trial court and is presented for the first time on appeal. Lake Air v. Duffy, 42 Wn.2d 478, 256 P.2d 301 (1953); Matsko v. Dally, 49 Wn.2d 370, 301 P.2d 1074 (1956).

¹⁰ This document was not admitted as a separate exhibit at trial, but was attached to the Complaint.

¹¹ Appellant’s Brief, pp. 15 -18.

In Lake Air v. Duffy, *supra*, the Court held that an assignment of error had not been preserved for appeal because the issue had not been brought to the attention of the trial court.

The Court said:

This assignment of error appears to us to be an afterthought. The record shows that the present contention was not presented to the trial court during the course of trial. It will therefore, not be considered here for the first time. It is the rule that the trial court must be afforded an opportunity to rule correctly upon a matter before it can be presented to us by way of appeal.

Id. at 482.

Here, at no time during the trial of this matter, did Haury's raise the issue that the Court should decide whether CP 10 or Plaintiff's Exhibit 3 was the correct document signed by Mueller. Even in Haury's Motion for Reconsideration, Haury's failed to present this issue to the trial court. **CP 1155 – 1172.** It should not be considered for the first time on appeal.

And, not only did Haury's fail to object to the Court's consideration of both versions of the "Repair Authorization," Haury's counsel offered both versions, along with Butler's

handwritten notes from the same day, October 9, 2006,¹² and asked Butler to explain them. Butler was questioned by his counsel about the two documents:

Q. I'm asking you to describe why they are not identical, and the context in which they appear to be a little different?

A. Okay, the Bates stamp 31 is just – has the I don't want a written estimate box checked and Bates stamp 32 has an amendment to it where it says proceed with repairs but contact me if the price exceeds 16,000. So it was amended and –

Q. On the same day?

A. I would imagine yes.

Q. It's signed the same day?

A. Yes. I believe – again, I don't know that I witnessed this happen, but I believe that we did the

¹² Defendant's Exhibit 102.

estimate, she signed the document, it seems like she amended it.

Q. Okay. In any event, you gave her an estimate of \$16,000.

A. Yes.

RP 3/22 157:21-25; 158:1-13.

Accordingly, because Haury's failed to object to the Court's consideration of both documents and failed to request, at any time, that the "[T]rial court determine, as a threshold matter, which contract was executed by the parties,"¹³ this assignment of error was not preserved for appeal.

Moreover, there was substantial evidence from Mueller and Butler that Plaintiff's Exhibit 3 was signed and initialed by Mueller and that Butler was aware that she wanted to be notified if repairs would exceed \$16,000. The Court's factual finding 1.6 that the two documents, Plaintiff's Exhibits 3 and 4,

¹³ Appellant's Brief, pp. 16 -17.

constituted the written agreement between the parties should not be disturbed.

2.4 The Issue of Whether Mueller was Overcharged in Violation of the Automotive Repair Act was Adequately Pled and Also Tried Without Objection.

Haury's alleges in assignment of error number two that Mueller "never pled an ARA violation based upon overcharging."¹⁴ The trial court's ruling that Haury's had overcharged Mueller by \$7,915.34, in violation of the ARA should be affirmed, as discussed below.

2.4.1 Mueller Pled that She had Been Overcharged.

Pleadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted. Lightner v. Balow, 59 Wn.2d 856, 370 P.2d 982 (1962). A complaint must state the nature of a plaintiff's claims and the legal theories upon which the claims rest. Molloy v. City of Bellevue, 71 Wn.App. 382, 859 P.2d 613

¹⁴ Appellant's Brief, p. 25.

(1993). Pleadings are to be liberally construed; their purpose is to facilitate a proper decision on the merits, not to erect formal and burdensome impediments to the litigation process. If a complaint states facts entitling the plaintiff to some relief, it is immaterial by what name the action is called. State v. Adams, 107 Wn.2d 611, 732 P.2d 149 (1987).

Here, the Complaint, **CP 1-25**, set forth all of the facts regarding Mueller's transactions with Haury's. In paragraph 2.8, Mueller described how she had no idea, until she hired an attorney, that Haury's was going to charge her \$29,456.65 for the restoration of the BMW. According to the Complaint, she paid the additional funds "under protest." **CP 4, Ins. 5 -12.**

Mueller claimed that Haury's had breached its contract with her to restore the vehicle to "factory condition" and by charging her for parts and labor not provided. **CP 5, Ins. 4 -13.**

Mueller alleged that Haury's had violated the ARA and the CPA and asked for "damages in an amount to be proven at trial." Mueller asked for treble damages for each violation of

the CPA. **CP 6 – 8.** These pleadings were sufficient to put Haury's on notice regarding Mueller's claims.

2.4.2 The Issue of Overcharging was Tried by Agreement of the Parties.

When a claim is argued by both parties and ruled on by the trial court it should be treated as if raised in the pleadings. Riechelt v. Johns-Manville Corp., 107 Wn.2d 761, 733 P.2d 530. In Reichlet v. Johns-Manville Corp., *supra*, the Court held that a claim of negligence that was not pled, but was argued and ruled upon by the trial court, should have been deemed part of the pleadings. The Court ruled that it was error for the court of appeals to dismiss it on the basis that it was inadequately plead. Id. at 766.

Discussing CR 15(b) the Court said:

CR 15(b) is designed to avoid the "tyranny of formalism" that characterized former practice. Where evidence raising issues beyond the scope of the pleadings is admitted without objection, the pleadings will be deemed amended to conform to the proof.

Id. at 766.

Here, the issue of overcharging in violation of the ARA was presented, argued and ruled upon at trial. Haury's did not object to any of the testimony regarding the overcharging by Haury's. Indeed in his cross-examination of Mueller, Haury's counsel questioned Mueller about the "overcharging." RP 3/21 92:15-25; 93:1-25; 94:1-8; 98:6-21. And in his direct examination of Butler he questioned him extensively about Mueller's claim that Haury's had overcharged her in the amount of \$7,915.34. RP 3/23 21:22-35; 22:1-25; 23:1-25; 24:1-25; 25:1-25; 26:1-25; 27:1-25; 28:15-25; 29:1-25; 30:1-21. Then, in the Motion for Reconsideration,¹⁵ Haury's counsel again argued that Haury's had not overcharged Mueller. **CP 1158 -1161; 1163 -1166.**

Accordingly, the Court can find that the "overcharging in violation of the ARA" was adequately pled, or in the alternative, that it was tried by agreement of the parties. At no

¹⁵ CP 1155 -1172.

time did Haury's object to the evidence or testimony of "overcharging" in violation of the ARA. The trial court's finding that Mueller was overcharged by \$7,915.34 in violation of the ARA, and thus, the CPA, should be affirmed.

2.5 The Trial Court's Award of Damages for Violations of the Automotive Repair Act Should not Be Disturbed.

Haury's challenges the trial court's award of damages for violations of the ARA in the amount of \$7,915.34.¹⁶ However, Haury's did not challenge the Court's finding of fact 1.7 that "[T]he amount Ms. Mueller was charged without her authorization is \$7,915.34 (\$29,456.65 - \$21,541.22)." **CP 1091**. Thus, this finding of fact is a verity on appeal. Tae T. Choi v. Sung, 154 Wn. App. 303, 225 P.2d 425 (2010).

The amount of damages is a matter to be fixed within the judgment of the fact finder. Razor v. Retail Credit Co., 87 Wn.2d 516, 554 P.2d 1041 (1976). A trier of fact has discretion

¹⁶ Appellant's Brief, pp. 28 -33.

to award damages which are within the range of relevant evidence. Cultum v. Heritage House Realtors, Inc., 103 Wn.2d 623, 694 P.2d 630 (1985). Mathematical certainty is not required, and a fact finder has discretion to award damages that are within the range of competent evidence in the record. Mason v. Mortgage America, Inc., 114 Wn.2d 842, 792 P.2d 142 (1990). An appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice. Sherwood v. Bellevue Dodge, 35 Wn.App. 741, 669 P.2d 1258 (1983). None of those reasons apply here.

Here, the trial court calculated the damages for overcharging, \$7,915.34, and trebled it, but did not award damages for the parts charged for, but not supplied, \$2,224.76.¹⁷ **CP 1094 – 1095.** The damage award was

¹⁷ The trial court also reduced the award of damages for breach of contract from the requested \$17,721.32 to \$10,000. **CP 1088-1095; RP 3/22 71:16-19; Plaintiff's Exhibit 1.**

supported by substantial evidence and was in the discretion of the trial court.

Moreover, the trial court properly concluded that the statutory defenses contained in RCW 46.71.035 and RCW 46.71.070 had not been proved by a preponderance of the evidence because “[C]onduct demonstrating that charges were reasonable, necessary and justifiable are not present where there is no documentary evidence, work orders, for example, to explain the differences from the last agreed upon estimate and the final bill.” **CP 1095.**

The trial court’s award of damages for overcharging in the amount of \$7,915.34 was proved by substantial evidence and should not be disturbed. Likewise, the determination that Haury’s violated RCW 46.71.045(2), (3) and (7)(c) was proper. As a violation of the ARA is a per se violation of the CPA, the trebling of damages was also proper.

2.6 The Trial Court Properly Awarded Attorney's Fees for Breach of Contract and for Violations of the Consumer Protection Act.¹⁸

The trial court awarded attorney's fees and costs pursuant to the CPA and for breach of contract. **CP 1095; CP 1246-1248.** The trial court found that Plaintiff's Exhibits 3 and 4 constituted the written contract between the parties. **CP 1090, ¶ 1.6.** Because Plaintiff's Exhibit 4, the "Payment for Services Agreement/Receipt" contains a unilateral attorney's fees provision, the Court awarded attorney's fees to Mueller, as the prevailing party. See RCW 4.84.340.

Haury's now makes the incredible argument that if Haury's had sued Mueller for nonpayment under Plaintiff's Exhibit 4 that Haury's would be entitled to an attorney's fee award upon prevailing. However, if Mueller sued Haury's for breach of the contract to repair her vehicle, Plaintiff's Exhibit 3,

¹⁸ Appellant challenges only the award of attorney's fees for breach of contract. Appellant's Brief, pp. 22 – 25.

that she is not entitled to a fee award because Plaintiff's Exhibit 3 has no attorney fee provision.¹⁹

These two documents cannot be read separate and independently as Haury's suggests.²⁰ When several documents are executed in the same transaction, they should be construed together. Maxwell's Elec. v. Hegeman-Harris, 18 Wn.App 358, 567 P.2d 1149 (1977). Instruments which are part of the same transaction, relate to the same subject matter, and are executed at the same time, should be read and construed together, even though they do not refer to one another. Turner v. Wexler, 14 Wn.App. 143, 538 P.2d 877 (1975).

In Turner v. Wexler, *supra*, the Court construed documents together which formed the contract between the parties. It was significant that one document could not stand alone without reference to the other, thus the multiple documents created an "entire" contract. The Court awarded

¹⁹ Appellant's Brief, pp. 22 -23.

²⁰ Appellant's Brief, pp. 23 -25.

attorney's fees even though only one of the documents contained an attorney fee provision. Id. at 148.

Here, the Court properly awarded attorney's fees to Mueller based upon the "Payment for Services Agreement/Receipt" because without the "Repair Authorization," there would be nothing to pay for. The trial court properly found that the two documents created an entire, not severable, contract.

Haury's reliance upon Saletic v. Stamnes, 51 Wn.2d 696, 321 P.2d 547 (1958) is misplaced. In that case, the Court held that a contract was not severable where "[T]he whole of the respondents' promise went to the whole of appellants' promise." Id. at 700. Under those circumstances, the Court held that the promises were bilateral and incapable of division.

The trial court's award of attorneys' fees and costs should be affirmed.

III. ATTORNEYS' FEES AND COSTS ON APPEAL

The trial court awarded attorney's fees and costs pursuant to the contract between the parties and the Consumer Protection Act. **CP 1095, ¶ 2.5.** Pursuant to RAP 18.1, attorney's fees and costs should also be awarded on appeal.

DATED this 15th day of November, 2012.

Respectfully submitted,



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Attorneys for Respondent

PROOF OF SERVICE

I, Carla Smith, declare that I am a person over eighteen years of age, competent to be a witness and not a party to the above-entitled and enumerated cause.

On November 8, 2012 I caused to be served via legal messenger, original and one copy this Brief of Respondent herein addressed to:

Court of Appeals Division I
One Union Square
600 University Street
Seattle, WA 98101

On November 8, 2012, I caused to be served via legal messenger service true and correct copies of Brief of Respondent herein addressed to counsel for Appellant at:

Sarah Stephens Visbeek
Michael P. Hooks
Forsberg & Umlauf
901 Fifth Avenue, Suite 1400
Seattle, WA 98164

On November 8, 2012, I caused to be served via US Mail true and correct copies of Brief of Respondent herein addressed to counsel for Appellant at:

D. Michael Tomkins
14300 Greenwood Ave N, Suite A
Seattle, WA 98133-6872

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Bellevue this 8 day of November, 2012.



Carla Smith