

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

VILA PACE-KNAPP,	)	No. 59321-8-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
DICK PELASCINI and CECILIA	)	UNPUBLISHED
PELASCINI, husband and wife and their	)	
marital community; WINDERMERE	)	FILED: <u>March 17, 2008</u>
REAL ESTATE/BELLEVUE	)	
COMMONS, INC.; THOMAS BOBOTH;	)	
and PACIFIC SHORELINE	)	
MORTGAGE, INC.,	)	
	)	
Appellants.	)	
	)	
	)	

Cox, J. — A plaintiff claiming a violation of the Consumer Protection Act (CPA) must establish (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his or her business or property, and (5) causation.<sup>1</sup> Here, the trial judge’s unchallenged findings of fact support its conclusion that Dick and Cecilia Pelascini, Thomas Boboth, and Pacific Shoreline Mortgage, Inc. (collectively, “the Pelascinis”) violated the act. However, the trial court’s determination that Vila Pace-Knapp was entitled to rescission for fraud in the inducement of a sale of her property cannot be sustained. We affirm in part, reverse in part, and remand for a

---

<sup>1</sup> Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

determination of damages and attorney fees under the CPA.

Pace-Knapp owned and resided in her home in Bellevue for many years. In early 2001, she became delinquent in making payments on the loan that was secured by her property. In June 2001, she received written notices of default and foreclosure indicating that her home would be sold at a trustee's sale in the near future. She attempted to avoid foreclosure by filing for bankruptcy three times, but the bankruptcy court dismissed all of her petitions. The bankruptcy filings delayed the scheduled trustee's sale from June to October 2001. In the final order of dismissal, the bankruptcy court prohibited her from filing additional petitions.

Around the time of the initial foreclosure notices, Pelascini and Boboth individually approached Pace-Knapp at her home. She did not know either of them, but they were aware of the pending foreclosure proceedings. They offered to work together to help her "save her home." Each gave her a business card showing that they were, respectively, a broker at a real estate company and the president of a mortgage company. They visited her many times over the next few weeks and continually offered to help her. They never stated they wanted either to buy her house or to help her by offering her a loan. Throughout this period, she declined their offers of help.

The evening before the final rescheduled trustee's sale, Pace-Knapp went to Pelascini's real estate office and signed several documents: a purchase and sale agreement for her home, a residential lease agreement, and an option to

purchase the property from the Pelascinis in two years. Although they were plainly labeled as such, she did not read any portion of the documents, including the titles. When Pace-Knapp signed further documents at the closing agent's office, she first realized she had sold her house to the Pelascinis. Nevertheless, she proceeded with the sale. As a result of this transaction, the trustee's sale did not proceed.

She lived in the house under lease agreements with the Pelascinis for two and a half years, during which time she paid rent to the new owners. She was evicted when the Pelascinis declined to renew her lease a third time.

Shortly thereafter, she commenced this action, alleging unconscionability, fraud, CPA violations, and intentional infliction of emotional distress. She sought relief from the sale and/or damages as well as attorney fees.

At a bench trial, the trial court found that defendants' representations led Pace-Knapp to reasonably believe they were planning a refinance of her home loan. The trial court also found her competent to enter into the contracts that she signed. Nevertheless, the trial court decided that the Pelascinis were liable for fraud in the inducement and CPA violations. It ordered rescission of the contract and attorney fees and costs under the CPA. It appears that the Pelascinis moved for reconsideration, which the trial court denied.

The Pelascinis appeal.

### **CONSUMER PROTECTION ACT**

The Pelascinis argue that the trial court erred in concluding that they violated the Consumer Protection Act. Based on the unchallenged findings of fact and the relevant law, we disagree.

The elements of a private CPA claim are:

(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation.<sup>[2]</sup>

We liberally construe the CPA to serve its beneficial purposes of protecting the public and fostering fair and honest competition.<sup>3</sup>

The Pelascinis do not challenge any of the trial court's findings of fact. Therefore, they are verities on appeal.<sup>4</sup> We review issues of law de novo.<sup>5</sup> We draw reasonable inferences from the facts in favor of the trial court's determination.<sup>6</sup>

*Unfair or Deceptive Practice*

Citing no case law, the Pelascinis argue that they did not engage in an unfair or deceptive practice. We disagree.

An act is unfair or deceptive if it had the capacity to deceive a substantial portion of the public.<sup>7</sup> Proof of intent to deceive is not required.<sup>8</sup> For example, a defendant engages in an unfair or deceptive practice if he or she sells a house

---

<sup>2</sup> Hangman Ridge, 105 Wn.2d at 780.

<sup>3</sup> RCW 19.86.920.

<sup>4</sup> Perry v. Costco Wholesale, Inc., 123 Wn. App. 783, 792, 98 P.3d 1264 (2004).

<sup>5</sup> Id.

<sup>6</sup> Henry v. Bitar, 102 Wn. App. 137, 142, 5 P.3d 1277 (2000).

<sup>7</sup> Hangman Ridge, 105 Wn.2d at 785.

<sup>8</sup> Id.

with prior knowledge of a defect and fails to disclose that defect to the buyer.<sup>9</sup>

When the facts are not in dispute, we determine whether a practice was unfair or deceptive under the CPA as an issue of law.<sup>10</sup>

The Pelascinis' argument rests on the false premise that they "did help plaintiff save her house." The trial court found that Pace-Knapp reasonably interpreted the Pelascinis' promises to mean that they would refinance her home, which means she would continue to own it. Taking the unchallenged findings as true, we conclude that the Pelascinis deceived Pace-Knapp when they promised her that they would help her "save" her home and implied that they would refinance her loan. Simply stated, the point is that they saved her home for themselves so that they would not have to bid at the rescheduled trustee's sale. They did not help her save her home for her, as suggested. The Pelascinis' practice of preying on this and other vulnerable home owners on the eve of foreclosure is the type of practice likely to deceive future distressed owners in the same manner.

*In the Course of Trade or Commerce*

The Pelascinis do not dispute that they were acting in the course of trade or commerce. Yet they argue that such a finding is incompatible with the trial court's finding that Pace-Knapp thought they were acting as altruists — *not* in the course of their trade. In fact, the CPA applies to "every person who conducts

---

<sup>9</sup> Burbo v. Harley C. Douglass, Inc., 125 Wn. App. 684, 700, 106 P.3d 258, review denied, 155 Wn.2d 1026 (2005).

<sup>10</sup> Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc., 162 Wn.2d 59, 84, 170 P.3d 10, 22 (2007).

unfair or deceptive acts or practices in *any* trade or commerce.”<sup>11</sup> And “[r]eal estate sales clearly constitute ‘trade’ or ‘commerce’ for purposes of [the CPA].”<sup>12</sup> Thus, it is clear from the facts of this case that the Pelascinis were acting in the course of trade or commerce by purchasing real estate. The fact that they hid their commercial intent from Pace-Knapp does not contradict this finding.

*Impact on the Public Interest*

The Pelascinis also argue that their actions did not have an impact on the public interest. We again disagree.

Plaintiffs must show an impact on the public interest from a private transaction based on an analysis of the following non-exclusive factors:

- (1) Were the alleged acts committed in the course of defendant’s business?
- (2) Did defendant advertise to the public in general?
- (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? [and]
- (4) Did plaintiff and defendant occupy unequal bargaining positions?<sup>13</sup>

For example, in Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., this court determined that a public interest impact existed when a sign company solicited a store owner and deceptively convinced the owner to sign an agreement that required the owner to pay substantially more for a sign than she had orally agreed.<sup>14</sup> This court held that there was a public interest impact because the company acted within the course of its business, actively solicited

---

<sup>11</sup> Hangman Ridge, 105 Wn.2d at 785 (quoting Short v. Demopolis, 103 Wn.2d 52, 61, 691 P.2d 163 (1984)).

<sup>12</sup> Edmonds v. John L. Scott Real Estate, Inc., 87 Wn. App. 834, 846, 942 P.2d 1072 (1997).

<sup>13</sup> Hangman Ridge, 105 Wn.2d at 790-91.

<sup>14</sup> 64 Wn. App. 553, 825 P.2d 714 (1992).

the store owner, and routinely solicits other business.<sup>15</sup>

Similarly here, the trial court found that Pelascini and Boboth habitually work together to buy houses on the eve of foreclosure and that they did so in this case. They actively solicited Pace-Knapp by approaching her at home a number of times, offering to help her, and essentially harassing her until she relented and accepted their offer to “help.” The court found that although Pace-Knapp was able to contract, they are real estate professionals, while she “is an unsophisticated homeowner whose ability to reason clearly during this period was obviously impaired.”<sup>16</sup> Finally, although the trial court did not make a finding that Pelascini and Boboth advertise to the public, the court concluded that this type of transaction has an adverse effect on the public interest because it has the potential for repetition and evidence in this case showed that Pelascini and Boboth have “engaged in this approach before.”<sup>17</sup>

Given these unchallenged factual findings, we conclude that Pace-Knapp satisfied the public interest element. Pelascini and Boboth are likely to repeat this approach and have done so in the past. Such a business practice impacts the public interest by targeting and harming vulnerable individuals.

*Injury / Damages / Attorney Fees Below*

The Pelascinis argue that Pace-Knapp was not injured by the transaction

---

<sup>15</sup> *Id.* at 562-63.

<sup>16</sup> Clerk’s Papers at 247 (Finding of Fact 14).

<sup>17</sup> Clerk’s Papers at 250-51 (Conclusion of Law 5). Although this statement was contained in a conclusion of law, the portion regarding Appellants’ past practice is a finding of fact.

and that she has the burden to prove “actual damages.” They also argue that attorney fees were inappropriate because the court did not award damages under the act. Identical arguments were rejected by the supreme court in Mason v. Mortgage America, Inc.,<sup>18</sup> and we reject them here.

In Mason, as in this case, the trial court had ordered rescission of the contract in question and also found a violation of the CPA. The supreme court reiterated that injury and damages under the CPA are distinct. The loss of title to real property is “obviously” an injury under the CPA because it is a diminution of money or property.<sup>19</sup> Because each element of a CPA claim, including injury, was met in that case, the supreme court held that attorney fees and costs were appropriate, even though there were no money damages in light of the rescission.<sup>20</sup>

Here, Pace-Knapp was injured because she lost the equity in her home. There are, potentially, other damages to which she is entitled as well. Accordingly, attorney fees were proper because each element of the CPA was met.

#### *Causation*

Again citing no case law, the Pelascinis argue that Pace-Knapp did not prove causation because her own acts caused her alleged injury. We disagree.

The issue of causation under the CPA is an issue of fact for the trial

---

<sup>18</sup> 114 Wn.2d 842, 792 P.2d 142 (1990).

<sup>19</sup> Id. at 854-55.

<sup>20</sup> Id. at 855.

<sup>21</sup> Indoor Billboard, 162 Wn.2d at 84.



court.<sup>21</sup> But the Pelascinis do not challenge any of the trial court's findings of fact on appeal. The trial court found that Pace-Knapp was induced through fraud into selling her home and concluded that their actions were the cause of her injury.

The Pelascinis' only possible challenge with regard to this element, then, is whether the trial court applied the proper law. Nothing in the record suggests that it did not.<sup>22</sup> We will not presume otherwise.

### **CONTRACT RESCISSION**

The Pelascinis raise several arguments regarding Pace-Knapp's claim of fraud in the inducement and the trial court's chosen remedy of rescission. We conclude that the remedy of rescission was not appropriate under the facts and law that control this case.

#### *Fraud: Misrepresentation of Fact*

The Pelascinis argue that the trial court erred in concluding that they made a misrepresentation of existing fact. We agree and hold that the trial court's findings of fact do not support its conclusion of fraud.

To prevail on a claim of fraud, the plaintiff must prove with clear, cogent, and convincing evidence that the defendant made a material misrepresentation of *existing fact*.<sup>23</sup> Fraud in the inducement is fraud that induces the transaction

---

<sup>21</sup> Indoor Billboard, 162 Wn.2d at 84.

<sup>22</sup> Neither the trial court briefs nor the prior dispositive motions were made part of the record on appeal.

<sup>23</sup> The nine elements of fraud are: (1) a representation of existing fact, (2) that is material, (3) and false, (4) the speaker knows of its falsity, (5) intent to induce another to act, (6) ignorance of its falsity by the listener, (7) the latter's

by misrepresentation of “motivating factors such as value, usefulness, age, or other characteristic of the property.”<sup>24</sup> Misrepresentations include “half-truths calculated to deceive,”<sup>25</sup> and inferences from the words used.<sup>26</sup> A promise of future performance is not a representation of existing fact.<sup>27</sup>

Here, the trial court specifically found that the Pelascinis had not made a misrepresentation of existing fact, but rather that the misrepresentations “were in the nature of intentions.”<sup>28</sup> Yet the court concluded that all elements of fraud in the inducement were met in part because Pace-Knapp relied on them to “do as they promised.”<sup>29</sup> This was an error of law because promises of future performance are not representations of existing fact. Thus, there is no basis to conclude that fraud in the inducement exists here. Absent fraud, there is no basis for the remedy of rescission.

#### *Waiver*

Even if Pace-Knapp had proven the elements of fraud in the inducement, case law is clear that she waived her right to the remedy of rescission by her delay in bringing this action.

---

reliance on the truth of the representation, (8) her right to rely on it, and (9) consequent damage. Pedersen v. Bibioff, 64 Wn. App. 710, 723 n.10, 828 P.2d 1113 (1992).

<sup>24</sup> Id. at 722.

<sup>25</sup> Ikeda v. Curtis, 43 Wn.2d 449, 460, 261 P.2d 684 (1953); see also id. (“A representation literally true is actionable if used to create an impression substantially false.”).

<sup>26</sup> Restatement (Second) of Contracts § 159 (1981).

<sup>27</sup> West Coast, Inc. v. Snohomish County, 112 Wn. App. 200, 206, 48 P.3d 997 (2002).

<sup>28</sup> Clerk’s Papers at 249 (Conclusion of Law 3).

<sup>29</sup> Clerk’s Papers at 250 (Conclusion of Law 4).

Even where a person has been defrauded, he or she may waive the right to seek rescission, or in certain circumstances, damages.<sup>30</sup>

Generally, a person wishing to avoid a contract has the choice either to continue performing under the contract and sue for damages or to promptly seek to rescind the contract.<sup>31</sup> One who opts to rescind a contract for fraud “must act promptly after its discovery” in order to preserve the right to sue for rescission.<sup>32</sup> If a party claiming to have been defrauded affirms the contract by entering into new “arrangements or engagements concerning the subject matter of the contract” after discovering the fraud, he has waived his right to sue for rescission.<sup>33</sup> Waiving the right to sue for rescission merely by affirming the contract or delaying to seek rescission, however, does not necessarily bar the right to sue for damages.<sup>34</sup>

For example, in Johnson v. Brado, the purchasers of a home discovered after the sale that the house was not connected to the sewer, contrary to the seller’s previous promises.<sup>35</sup> The buyers moved into the home and rejected the seller’s offer to pay for septic repair. The purchasers sued the seller approximately one year later. The court held that the buyers had waived their right to rescind the contract by moving into the house and affirming the

---

<sup>30</sup> Owen v. Matz, 68 Wn.2d 374, 376-77, 413 P.2d 368 (1966).

<sup>31</sup> Salter v. Heiser, 39 Wn.2d 826, 831, 239 P.2d 327 (1951); Johnson v. Brado, 56 Wn. App. 163, 165-66, 783 P.2d 92 (1989) (citing Weinstein v. Sprecher, 2 Wn. App. 325, 330, 467 P.2d 890 (1970)).

<sup>32</sup> Weitzman v. Bergstrom, 75 Wn.2d 693, 697, 453 P.2d 860 (1969).

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> 56 Wn. App. 163, 783 P.2d 92 (1989).

contract.<sup>36</sup> But they had not waived their right to sue for damages because no unequivocal act evinced their intention to do so.<sup>37</sup>

Here, Pace-Knapp waived the right to rescission by remaining in her house for more than two years and signing two lease agreements after she discovered that the Pelascinis purchased her property. Rescission was not an appropriate remedy after Pace-Knapp affirmed the agreement and allowed sufficient time to pass before attempting to repudiate it.

Because we hold that Pace-Knapp did not prove the elements of fraud and that the remedy of rescission was not available to her, we need not address the Pelascinis' additional arguments related to fraud.

#### **ATTORNEY FEES**

Citing to Sign-O-Lite Signs, Pace-Knapp seeks attorney fees as the substantially prevailing party on appeal under the CPA.<sup>38</sup> She is entitled to such an award, both at trial and on appeal. We remand to the trial court to determine the amount of the fee award.<sup>39</sup>

We affirm the judgment to the extent of the CPA award and remand for the determination of damages and the amount of attorney fees on appeal. We reverse the fraud in the inducement determination.

---

<sup>36</sup> Id. at 167.

<sup>37</sup> Id.

<sup>38</sup> 64 Wn. App. at 568.

<sup>39</sup> See RAP 18.1(i).

Cox, J.

WE CONCUR:

Appelwick, G.

Grosse, J.