R McBride

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

V&E MEDICAL IMAGING SERVICES, INC.,

Plaintiff,

v.

MARK DeCOURSEY and CAROL DeCOURSEY,

Respondents,

v.

PAUL STICKNEY, PAUL H. STICKNEY REAL ESTATE SERVICES, INC., and WINDERMERE REAL ESTATE, S.C.A., INC.,

Appellants.

NO. 85563-3

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

1. Identity of Moving Party

Thomas Ruebel and Diane Ruebel ("the Ruebels") and Eddie Bloor and Eva Bloor ("the Bloors") (collectively "the amici") ask for the relief designated in Part 2.

2. Statement of Relief Sought

Leave of the Court to submit an amici curiae brief pursuant to RAP 13.4(h).

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3. Facts Relevant to Motion

The petitioners filed a petition for review on January 20, 2011, seeking review of the decision of the Court of Appeals. The amici seek leave to file an amici brief.

4. Grounds for Relief and Argument

The Ruebels and the Bloors seek leave of the Court to submit an amici curiae brief pursuant to RAP 13.4(h). RAP 13.4(h) requires submission of an amici curiae brief not later than 60 days from the date the petition for review was filed. The amici brief is timely.

Both the Ruebels and the Bloors are familiar with the petitioners' litigation strategies and arguments, having prevailed in costly and time-consuming lawsuits against Windermere and its agents involving violations of the Consumer Protection Act ("CPA") and breach of fiduciary duty. Their prior experience vividly demonstrates that there are no legal issues involved in this case warranting review by this Court. The Ruebels and Bloors will present a needed perspective on the case and help illuminate the well-settled policies and legal precedent militating against review. This Court should grant leave to submit the attached amici curiae brief.

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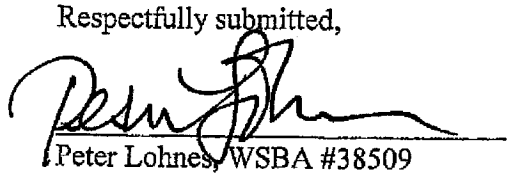
DATED this 21st day of March, 2011.

Respectfully submitted,



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

DATED: March 21, 2011 at Tukwila, Washington.

Christine Jones
Talmadge/Fitzpatrick

No. 85563-3

SUPREME COURT
OF THE STATE OF WASHINGTON

V&E MEDICAL IMAGING SERVICES, INC.,

Plaintiff,

v.

MARK DeCOURSEY and CAROL DeCOURSEY,

Defendants/Third-Party Plaintiffs/Respondents,

v.

PAUL STICKNEY, PAUL H. STICKNEY REAL ESTATE SERVICES, INC., and WINDERMERE REAL ESTATE, S.C.A., INC.,

Third-Party Defendants/Appellants.

BRIEF OF AMICI CURIAE THE RUEBELS AND THE BLOORS

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A. IDENTITY/INTEREST OF AMICUS CURIAE

Thomas Ruebel and Diane Ruebel ("the Ruebels") and Eddie Bloor and Eva Bloor ("the Bloors") (collectively "the amici") are sadly familiar with Windermere Real Estate, Inc. ("Windermere") and its scorched-earth litigation tactics. Like the respondents Mark DeCoursey and Carol DeCoursey ("the DeCourseys"), the amici prevailed in costly and time-consuming lawsuits against Windermere and its agents involving violations of the Consumer Protection Act ("CPA") and breach of fiduciary duty.[1] The amici have an interest in this case because their disputes with Windermere affect the public interest where others, like the DeCourseys, have been or will be injured in the same fashion they were. *Hangman Ridge Training Stables v. Safeco title Ins. Co.*, 105 Wn.2d 778, 790, 719 P.2d 531 (1986).

The Ruebels purchased a home which had undergone an incomplete remodel. After the sale closed, they discovered that Windermere had failed to disclose that building permits for the remodel had been suspended and the incomplete work was deemed not remediable. Ultimately, it proved less costly for the Ruebels to demolish the home and build a new house than to complete the remodel. The Ruebels sued

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[1] The amici will refer to appellants Paul Stickney and Windermere collectively as "Windermere."

Windermere, and a jury found in their favor on negligence, breach of fiduciary duty, and violation of the CPA. As in the present case, Windermere moved unsuccessfully for judgment as a matter of law to set aside the jury verdict. The Court of Appeals held that substantial evidence supported the jury's findings that Windermere, by failing to disclose information of material importance, engaged in unfair and deceptive acts that violated the CPA. *Ruebel v. Camano Island Realty, Inc.*, 2007 WL 2823285.

The Bloors successfully sued Windermere and its agent for failing to disclose that the home they purchased had been used to manufacture methamphetamine. The home was so heavily contaminated that the Bloors were forced to abandon it, leaving all their personal belongings behind. As in the present case, the Windermere agent wore two hats: in addition to representing both buyer and seller, he was co-owner of the property management company handling rental of the home the Bloors purchased. The Court of Appeals upheld the trial court, holding that substantial evidence supported findings of failure to disclose and violations of the CPA.[2] *Bloor v. Fritz*, 143 Wn. App. 718, 180 P.3d 805 (2008).

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[2] The Court held that the trial court's sole error was in awarding the Bloors damages beyond those necessary to restore them to their pre-contract position. The Court

The amici prevailed against "steadfast denial...of responsibility," "persistent resistance" to acknowledging liability, and the considerable resources Windermere was willing to expend fighting its clients' claims. *Id.* at 749-50, 752. Their experience is that Windermere breaches its duty to its clients and subsequently litigates against them to the hilt. The DeCourseys' case closely mirrors those of the amici and reveals the same pattern of breach of duty followed by adamant resistance. The amici, like the DeCourseys, depended on the CPA to protect them from the depredations of a large multi-state corporation. Windermere, in turn, fruitlessly seeks any bolt-hole through which it might escape the strictures of the CPA. The amici believe that Windermere's present petition is calculated less to gain review than to punitively impose further costs and delay on the DeCourseys.

B. STATEMENT OF THE CASE

The amici will rely on the detailed recitation of the facts laid out in the Court of Appeals' opinion.

C. ARGUMENT

Nothing in Windermere's petition presents an issue warranting review by this Court under RAP 13.4(b). Its feather-weight arguments address settled issues of law supported in every instance by substantial

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of Appeals in the present case cited to *Bloor* in its discussion of attorney fees. Opinion at 14. This Court will find strong echoes of the present case in the *Bloor* opinion.

evidence. As it did with the amici, Windermere is attempting to attack the Court's findings of substantial evidence and to undermine the provisions of the CPA. The Court of Appeals' meticulous analysis fully and correctly dispatched all of Windermere's arguments. This Court should cast a jaundiced eye on Windermere's rehash of its arguments, and should not accept review.

1. Substantial Evidence Supports the Jury's Finding that Windermere Was the Cause in Fact of the DeCourseys' Construction Damages

As it did in the amicus cases, Windermere argues that there was insufficient evidence to find it was the cause in fact of the plaintiffs' injuries. Its argument here is, if anything, even weaker than in those cases. Windermere relies solely on *Smith v. Preston Gates,* 135 Wn. App. 859, 147 P.3d 600 (2006) to support its argument that Stickney was not the cause in fact of the DeCoursey's injuries. Petition at 14-16. Windermere does not recognize the glaring distinction between that case and the DeCourseys': *Smith* was decided on summary judgment. In *Smith*, the Court held that the plaintiff, as the non-moving party, could not rely on mere speculation but must assert specific facts to defeat summary judgment. *Id.* at 863, *citing Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

The present case was not decided on summary judgment, but was tried before a jury. Cause in fact is a question for the jury. *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). The Court of Appeals rightly held the jury was entitled to believe the DeCourseys would not have hired [redacted] and [redacted] based on "concrete evidence of a possible better outcome" as detailed in the opinion. Opinion at 5, 6. Windermere's reliance on a case involving the entirely different standard employed in summary judgment is unavailing.

2. Stickney Was the Legal Cause of the DeCourseys' Construction Damages

Unlike factual causation, which is based on a physical connection between an act and an injury, legal cause is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. *Id.* at 478-79. A determination of legal liability depends upon mixed considerations of logic, common sense, justice, policy, and precedent. *Id.* at 479.

The issue in *Schooley* was whether a vendor who sells alcohol to a minor who subsequently furnishes the alcohol to another minor can be

held liable for foreseeable alcohol related injuries arising from the initial sale of alcohol. *Id.* at 474. The Court recognized that duty and legal causation are intertwined. *Id.* at 479. Unremarkably, it held that a court should not conclude that the existence of a duty automatically satisfies the requirement of legal causation. *Id.*

Windermere argues that the Court of Appeals "disregarded" the *Schooley* court's admonition on conflating duty and legal causation. Petition at 16. The Court did no such thing. Rather, after detailing the consequences of Stickney's failure to disclose and discussing the policy foundations of the duty owed by agents to their clients, the Court held that the "mixed considerations of logic, common sense, justice, policy, and precedent" weigh in favor of holding that Stickney's wrongful action was a legal cause of the DeCourseys' injuries. Opinion at 7.

The Court's holding is entirely correct and reflects well-established law. Real estate brokers and their agents owe their clients the duties of undivided loyalty, good faith and full disclosure. *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, 73 Wn.2d 225, 229, 437 P.2d 897 (1968). Where an agent has a conflict of interest, there is an inherent risk that the agent's objectivity may be distorted, and the client should be aware of potential bias inherent in any recommendations or suggestions the agent makes. *Id.* at 230. The broker and agent must scrupulously avoid

representing any interest antagonistic to that of the principal, and avoid any self-dealing without the explicit and fully informed consent of the principal. *Id.* at 231. The policy underlying the duty of disclosure is intended to insure the undivided loyalty of the agent and to assure a client that he may rely upon the fidelity of his agent. *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658, 663, 648 P.2d 875 (1982).

Given the strong policy considerations in favor of enforcing Windermere's duties of undivided loyalty, good faith and full disclosure, Windermere's actions were not "too remote or insubstantial to impose liability." Opinion at 6, *quoting Hartley v. State,* 103 Wn.2d 768, 781, 698 P.2d 77 (1985). The Court in no way carelessly found causation based simply on the existence of a duty.

Windermere argues erroneously that under *Schooley*, the question of legal causation turns primarily on foreseeability and alleges that the Court of Appeals ignored the issue of foreseeability. Petition at 16. Windermere offers a single conclusory statement averring that "Construction defects were not a foreseeable consequence of Stickney's failure to disclose his relationship with [redacted]" Petition at 16.

But foreseeability is generally a question of fact for the jury. *McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 358, 961 P.2d 952 (1998). Windermere cannot baldly state that the defects were not

foreseeable and hope thereby to evade liability. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Palmer v. Jensen*, 81 Wn. App. 148, 153, 913 P.2d 413 (1996), *remanded on other grounds*, 132 Wn.2d 193, 937 P.2d 597 (1997).

The *Schooley* court analyzed foreseeability and legal causation separately. *Schooley*, 134 Wn.2d at 477, 478-83. It did not hold that legal causation turns primarily on foreseeability. And, contrary to Windermere's assertion, the Court of Appeals here did tackle the issue of foreseeability head-on. Opinion at 7. It held that whether the negligence of [redacted] and [redacted] was a reasonably foreseeable intervening cause was a question of fact for the jury to decide.[3] *Id., citing Schooley*, 134 Wn.2d at 482. Windermere's argument that legal causation is premised on foreseeability, and its assertion that the Court of Appeals ignored the question of foreseeability are without foundation.

3. Substantial Evidence Supports the Jury's Findings of Public Impact Under the CPA

Again echoing the amicus cases, Windermere attempts to finagle its way around the CPA. Windermere argues that the Court of Appeals opinion negates the CPA requirement of active solicitation. Petition at 17.

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[3] The Court held that in finding for the DeCourseys, the jury plainly determined that [redacted]s and [redacted] negligence was reasonably foreseeable, and there was ample evidence presented from which the jury could make such a determination. *Id.*

Windermere latches on to a single element of the *Hangman Ridge* test - whether Windermere and Stickney actively solicited the DeCourseys – and argues that because the DeCourseys were "referred" to Stickney by a church member, the CPA claim fails. It is Windermere's argument that fails.

When a private dispute is the basis of the CPA claim, four factors indicate whether the public interest is affected:

> (1) whether the alleged acts were committed in the course of defendant's business; (2) whether the defendant advertised to the public in general; (3) whether the defendant actively solicited this particular plaintiff, indicating potential solicitation of others; (4) whether the plaintiff and defendant have unequal bargaining positions.

Michael v. Mosquera-Lacy, 165 Wn.2d 595, 605, 200 P.3d 695 (2009) (*citing Hangman Ridge*, 105 Wn.2d at 791). Critically, none of the four factors are dispositive and not all of them need to be present. *Id.* Nevertheless, Windermere insists the DeCourseys must show that Stickney actively solicited them. Petition at 17. Windermere would transform a non-dispositive factor which need not be present into a mandatory requirement which the Court of Appeals has somehow "negated." This, despite the Court of Appeals' explicit statement that all

four *Hangman* factors need not be established.[4] The individual *Hangman Ridge* factors should not be read in isolation so as to render absurd conclusions. *Ambach v. French*, 167 Wn.2d 167, 178, 216 P.3d 405 (2009).[5] Windermere's insistence that the CPA claim fails because Stickney did not "actively solicit" the DeCourseys would render the non-exclusiveness of the *Hangman* factors absurd.

The Court of Appeals correctly held that substantial evidence was presented by which a jury could find that all the elements of the DeCourseys' CPA claim were proved. Opinion at 9.

D. CONCLUSION

Windermere owed the amici and the DeCourseys duties of undivided loyalty, good faith and full disclosure. After breaching those duties, Windermere chose to litigate vociferously every step of the way. Its petition for review is of a piece with its history of obstinate resistance. Nothing in Windermere's petition warrants review under RAP 13.4(b). This Court should deny review.

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[4] The *Bloor* Court found that the agent did not actively solicit the clients but, noting that no single factor is dispositive under *Hangman*, held that the trial court did not err in finding the agent's conduct violated the CPA. *Bloor*, 143 Wn. App. at 737.

[5] Windermere cites *Ambach* for the proposition that there can be no CPA claim where the plaintiff fails to submit evidence that the wrongful act was advertised or marketed. Petition at 18. Unsurprisingly, Windermere misconstrues the holding in that case where a surgery patient failed to state a cognizable CPA claim by attempting to disguise her personal injuries as sounding in business or property, and failed to allege the truly public nature of her doctor's actions. *Ambach*, 167 Wn.2d at 177-78.

DATED this ___ day of March, 2011.

Respectfully submitted,

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