STATE OF IDAHO)
County of BONNER)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

RICKIE A. VOORHIES, ET UX,)
)
Plaintiffs,)
)
vs.)
)
NORTH IDAHO GROUP, LLC dba CENTURY 21 ON THE LAKE, NORTH IDAHO GROUP, LLC, dba CENTURY 21 ON THE LAKE, ARROWHEAD RANCH WATER COMPANY, MICHAEL D. BENNETT, and the Estate of ROBERT VERNON HILL,)
Defendants.)

Case No. **S CV 2008 993**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT ARROWHEAD RANCH WATER COMPANY'S AND DEFENDANT MICHAEL D. BENNETT'S MOTION TO RECONSIDER

Attorneys:

For the Plaintiff - Todd M. Reed
For Defendants Arrowhead Ranch Water Co. and Michael D. Bennett - Susan P. Weeks

I. PROCEDURAL HISTORY AND BACKGROUND.

This matter is before the Court on a Motion for Reconsideration of this Court's ruling on July 26, 2010, denying defendants' motion for summary judgment on the plaintiffs Consumer Protection Act (CPA) claim. Summary Judgment had been brought by Defendants Arrowhead Ranch Water Company (ARWC) and Michael D. Bennett (Bennett) (collectively "defendants"). This Court previously set forth the facts of the case in its July 26, 2010, Memorandum Decision and Order:

> Plaintiffs Rickie and Linda Voorhies (Voorhies) purchased property located at 2807 Cocolalla Loop Road in Cocolalla, Idaho, on December 7, 2007. Voorhies claim ARWC and Bennett breached their contract (the Water Service Agreement); misrepresented to the Voorhies, and

violated the Idaho Consumer Protection Act. Complaint, pp. 4-9. Voorhies claim the property was listed by defendant North Idaho Group, LLC d/b/a "Century 21 on the Lake" (Century 21) as being part of a community water system, but Voorhies were never informed to whom to pay the monthly water fee. The Complaint does not specify how Voorhies learned it was ARWC which needed to be paid. However, the Complaint states:

> On or about March 21, 2008, since Plaintiffs had not received any information and after determining that it was ARROWHEAD that needed to be paid, they sent a letter to them paying the fee of Thirty-five Dollars ($35.00) per month for a total of One Hundred Five Dollars ($105.00) being due for the months of December, January and February.

Complaint, p. 3, ¶ X. The check was returned by ARWC or Bennett's agent and after return of the check, Voorhies were informed the water contract with the prior owner of the property, Robert Vernon Hill, had been cancelled and Voorhies would need to pay a $16,000.00 "hook-up fee". *Id.,* p. 4, ¶ XII. Voorhies filed their Complaint on June 13, 2008, claiming misrepresentation by Century 21 and the Estate of Robert Vernon Hill and breach of contract and violation of the Consumer Protection Act by ARWC and Bennett.

On June 23, 2009, Judge Charles Hosack entered a temporary retraining order prohibiting ARWC and/or Bennett from not delivering water to the residence at 2807 Cocolalla Loop Road, inter alia. On July 2, 2009, the Court entered a preliminary injunction upon stipulation by the parties prohibiting ARWC and Bennett from not delivering water to the residence and again restraining ARWC and Bennett from harassing or intimidating the Voorhies, and requiring the Voorhies to maintain monthly payments and keep the $500.00 bond with the Bonner County Clerk until further order of the Court. This matter is currently set for a three-day jury trial commencing August 16, 2010.

Bennett and ARWC filed their Memorandum in Support of Motion for Summary Judgment back on September 4, 2009. At the time the motion for summary judgment was filed on September 4, 2009, a three-day jury trial was scheduled for November 2, 2009. Accordingly, filing of the motion for summary judgment on September 4, 2009, was untimely, according to this Court's Scheduling Order Order filed July 17, 2009. On September 17, 2009, Voorhies filed their Objection to Motion for Summary Judgment. On September 29, 2009, Judge Hosack filed an Order to Continue Motion for Summary Judgment and Trial based on the "stipulation from the parties." There is no "stipulation" in the Court file. On October 6, 2009, this Court scheduled the trial for March 29, 2010. Voorhies filed their Memorandum in Opposition to Motion for Summary Judgment on November 27, 2010. On December 1, 2009, Bennett and ARWC finally filed an Amended Notice of Hearing, scheduling their summary judgment motion for January 27, 2009 [2010]. That hearing was vacated by the Court because, upon Judge

> Hosack's retirement, all his cases were assigned to District Judge Ben Simpson, who disqualified himself on this matter. The undersigned was reassigned to this case. On March 29, 2010, this Court entered another scheduling order, continuing the trial in this matter until August 16, 2010. Bennett and AWRC filed their Reply Memorandum in Support of Renewed Motion for Summary Judgment on June 10, 2010. Hearing on the Motion for Summary Judgment was held on July 26, 2010.

Memorandum Decision and Order: 1) Granting Plaintiffs' Motion to Strike, and 2) Granting in Part and Denying in Part Defendant Arrowhead Ranch Water Company's and Defendant Michael D. Bennett's Motion for Summary Judgment, pp. 1-3. Defendants filed their motion for reconsideration (or in the alternative, motion for clarification) and the accompanying motion to shorten time on July 29, 2010. Plaintiff filed an "Objection to Motion for Reconsideration/Motion for Clarification" on August 3, 2010. On August 19, 2010, defendants filed their "Reply Memorandum in Support of Moton for Reconsideration of Idaho Consumer Protection Act and in Support of Clarification." Oral argument was held on September 1, 2010.

II. STANDARD OF REVIEW.

As the Court entered no final order, plaintiffs' motion is apparently brought under I.R.C.P. 11(a)(2)(B), which states "a motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14)days after the entry of the final judgment." A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks,* 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros,* 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006).

III. ANALYSIS.

Defendants argue "because there is no privity of contract between plaintiffs and

defendants, their Consumer Protection Act cause of action fails." Memorandum in Support of Motion for Reconsideration, pp 2-3. In short, defendants argue plaintiffs' third cause of action under the Idaho Consumer Protection Act should be dismissed because (1) there is not a consumer transaction between plaintiffs and defendants other than the relationship compelled by this litigation; and (2) plaintiffs have failed to actually identify conduct that violates the Act or [administrative] rules. *Id.,* p. 5. Plaintiffs object and correctly point out that "…Defendants are bringing up new issues in opposition to the Consumer Protection Act that were never addressed at the time of Summary Judgment." Objection to Motion for Reconsideration/Motion for Clarification, p. 2. Indeed, in their motion for summary judgment defendants simply argued there was no contract. Memorandum in Support of Motion for Summary Judgment, p. 5. That was it. In defendants' Reply Memorandum in Support of Renewed Motion for Summary Judgment, defendants only discussed third party beneficiary law. Reply Memorandum in Support of Renewed Motion for Summary Judgment, pp. 1-8. At oral argument on September 1, 2010, defendants' counsel described their CPA argument on summary judgment as "truncated." This is an understatement. These issues were not only not "addressed" by defendants (as pointed out by plaintiffs), these issues were never *raised* at any time by defendants on summary judgment. Thus, this is not properly a motion to reconsider, since defendants ask this Court to consider completely new arguments. For that reason alone, defendants' Motion for Reconsideration must be denied.

It is only because this case is rapidly headed to trial on October 18, 2010, that this Court will discuss the merits of these new issues raised by defendants.

Defendants argue there must have been a completed transaction between the parties for the CPA to have been violated. Memorandum in Support of Motion for

Reconsideration, p. 6, citing *Haskin v. Glass,* 102 Idaho 785, 640 P.2d 1186 (Ct.App. 1982). In the absence of a contract between the parties, defendants argue there can be no violation of the CPA. *Id.*

This Court has previously determined:

> The Consumer Protection Act's (CPA) purpose is to "protect both consumers and businesses against unfair methods of competition and unfair and deceptive practices in the conduct of trade or commerce and to provide efficient and economical procedures to secure such protection." I.C. § 48-601. The Act should be construed liberally. *Id.* Real property clearly falls within the definition of "goods" in the act. *Fenn v. Noah,* 142 Idaho 775, 780, 133 P.3d 1240, 1245 (2006); I.C. § 48-602(6). In *Fenn,* involving a buyer's suit against a predecessor in interest to the seller resulting from a survey not matching the fence lines, the Supreme Court upheld summary judgment in favor of the seller's predecessor in interest, Noah, where Fenn failed to raise any genuine issue of material facts as to whether Noah's representations were unfair or deceptive under the Act. *Id.* The Court found Noah's incorrect metes and bounds description was not misrepresentation because under Idaho law, Fenn would take title to the property described in the deed, not what he believed he possessed. *Id.* The Court also found Noah was not acting in the conduct of trade or commerce in discussing a survey and extending an offer to Fenn. 142 Idaho 775, 780-81, 133 P.3d 1240, 1245-46.
>
> Here, Voorhies argue the fact of the sale, not a contract existing between Voorhies and ARWC/Bennett, is the critical fact. Memorandum in Opposition to Motion for Summary Judgment, p. 5, citing *Western Acceptance Corp. v. Jones,* 117 Idaho 399, 788 P.2d 214 (1999). In this respect, ARWC/Bennett only state there is no contract between these parties and "Bennett never represented there was one, so it cannot be said he engaged in an act or practice that was misleading, false, or deceptive to the Voorhies." Memorandum in Support of Motion for Summary Judgment, p. 5. In their Reply Memorandum in Support of Renewed Motion for Summary Judgment, ARWC/Bennett do not even address the CPA violation.
>
> The CPA violation alleged by Voorhies in the Complaint does not appear to relate to the direct failure of ARWC/Bennett to provide them water (in theory, as at this time a preliminary injunction is requiring water be provided to Voorhies), but rather to the demand of over $16,000 in a "rehook-up" fee. Complaint, p. 8, ¶ XXXV. For this reason, there need be no contract between the parties in order for the CPA to apply. The acts or practices deemed unlawful under the CPA are those "in the conduct of any trade or commerce" in I.C. § 48-603 *et seq.* The terms "trade" and commerce" are defined in the CPA as "the advertising, offering for sale, sale, or distribution of any goods or

> services, directly or indirectly affecting the people of this state." *Western Acceptance,* 117 Idaho 399, 401, 788 P.2d 214, 216, quoting I.C. § 48-602(2). Presumably, here Voorhies seek redress under subsection (18), by engaging in "any unconscionable method, act or practice in the conduct of trade or commerce…" In determining whether an act or practice was unconscionable, the Court must evaluate: whether the alleged violator knowingly took advantage of a consumer unable to protect his interests because of a physical infirmity, ignorance, illiteracy, inability to understand the language, etc.; whether the violator knew at the time of the transaction the price sought grossly exceeded the price of similar goods or services (although price alone is insufficient to prove an unconscionable method, act, or practice); whether the alleged violator knowingly induced the consumer to enter into an agreement excessively one-sided in favor of the alleged violator; and whether the sales conduct/pattern of sales conduct would outrage or offend the public conscience. I.C. § 48-603C.
>
> Voorhies have submitted the affidavit of Charles Charlebois (Charlebois) to survive summary judgment on this issue. Charlebois states he is also supplied water by Bennett, but never entered into a water service agreement with Bennett, and had been told by Bennett: "…that the old contract that went with the original purchaser of the property would remain, since it ran with the land. He also stated at that time that when I wanted to sell my property that the new owner would have to execute and agreement with him." Affidavit of Charles Charlesbois in Opposition of Motion for Summary Judgment, p. 2.
>
> Because no contract need be in place for a violation of the CPA to occur, and because Voorhies have at least raised the question of whether ARWC/Bennett knowingly engaged in unconscionable practices, methods, or acts, this Court finds summary judgment in favor of defendants on the CPA claim to be improper at this time.

Memorandum Decision and Order: 1) Granting Plaintiffs' Motion to Strike, and 2) Granting in Part and Denying in Part Defendant Arrowhead Ranch Water Company's and Defendant Michael D. Bennett's Motion for Summary Judgment, pp. 10-12. As previously noted, the Act itself is applicable to the, "advertising, offering for sale, selling, leasing, renting, collecting debts arising out of the sale or lease of goods or services or distributing of goods or services, either to or from locations within the state of Idaho, or directly or indirectly affecting the people of this state." I.C. § 48-602(2). This Court finds that by simply offering for sale or lease its services with regard to providing water service (or, conversely, defendants threatening to shut off water service if plaintiffs fail

to pay the $16,000.00 “re-hook-up fee), defendants fall within the purview of the CPA. As previously stated by this Court: The acts or practices deemed unlawful under the CPA are those “in the conduct of any trade or commerce” in I.C. § 48-603 *et seq.* The terms “trade” and commerce” are defined in the CPA as “the advertising, offering for sale, sale, or distribution of any goods or services, directly or indirectly affecting the people of this state.” *Western Acceptance,* 117 Idaho 399, 401, 788 P.2d 214, 216, quoting I.C. § 48-602(2).

Defendants’ argument that *Haskin* requires a completed transaction is misplaced. *Haskin* is readily distinguishable from the one before the Court. *Haskin* involved a tenant’s counterclaim to a landlord’s unlawful detainer action and the question of whether the CPA applies to a contemplated (as opposed to completed transaction) when there is no contract between the parties. 102 Idaho 785, 786-787, 640 P.2d 1186, 1187-88. The Idaho Court of Appeals held I.C. § 48-608(1) requires a claim under the Idaho CPA to be based upon a contract, not a mere contemplated transaction. However, I.C. § 48-608 is inapplicable here. Idaho Code § 48-608 deals with losses from purchases or leases. Plaintiffs have not alleged that they purchased or leased goods or services and thereafter suffered an ascertainable loss.

Haskin is limited to its facts, and to its interpretation of I.C. § 48-608(1), the portion of the CPA that deals with “Loss from purchase or lease.” That is a specific provision of the CPA that deals with specific situations. Idaho Code § 48-603B deals with “unfair tax return preparation practices.” To argue (as defendants argue) that plaintiffs are precluded from the CPA protection because there is no purchase or lease in the present case, when plaintiff alleges “unreasonable methods, acts or practices” under I.C. § 48-603C, is the equivalent of arguing a person cannot be found to have

violated I.C. § 48-603B dealing with unfair tax return practices because those tax return practices do not amount to a purchase or a lease under I.C. § 48-608(1). *Haskin* is limited to specific facts and I.C. § 48-606 is limited to specific fact situations.

Defendants argue their actions were not unconscionable because its actions were not those identified in I.C. § 48-603C(2). Defendants state they were not taking advantage of a consumer unable to protect his interest due to physical infirmity, ignorance, illiteracy, inability to understand the language, or other similar factor. Memorandum in Support of Motion for Reconsideration, p. 4. "Plaintiffs clearly are not claiming a physical or intellectual disability." *Id.* Defendants state I.C. § 48-603C(2)(b) is inapplicable because no transaction between the parties was in fact entered into and the subsection involves the alleged violator knowing "at the time the consumer transaction was entered into" that the price requested grossly exceeded the price for similar goods or services. Defendants make the same argument with respect to I.C. § 48-603C(2)(c); because no transaction was entered into, it cannot be said that the "transaction…was excessively one-sided in favor of the alleged violator." Finally, defendants claim there has been no conduct identified which would outrage or offend the public conscience within the meaning of I.C. § 48-603C(2)(d). Defendants argue: "Plaintiffs are not required to enter into a contract with Defendants; neither are they entitled unilaterally to dictate the terms of such an agreement." Memorandum in Support of Motion for Reconsideration, p. 4. [Defendants briefly argue there has been no argument raised by plaintiffs that any conduct of theirs violates the Idaho Administrative Procedure Act rules regarding the CPA. *Id.,* pp. 4-5. As the IDAPA provisions at issue go into more depth than the statutory language of the CPA, this Court's determination that summary judgment must be denied as to the plaintiffs' CPA

claims would also extend to any IDAPA 04.02.01 *et seq.* provisions had they been raised by plaintiffs].

Despite defendants reiterating the contrary, the question of whether the offer for services by defendants would outrage or offend the public remains. By its very terms, under I.C. § 48-603C(2)(d), the Court must take into consideration whether the sales conduct would outrage or offend the public conscience. Given the instant facts as developed up to this point, there is simply no requirement that a plaintiff be required to enter into a sales transaction or be entitled to unilaterally dictate the terms of an agreement for the CPA to apply.

Idaho Code § 48-603C deals with "unconscionable methods, acts or practices", "in the conduct of any trade or commerce" which "violates the provision of this chapter whether it occurs before, during or after the conduct of the trade or commerce." *Haskin* is an "after" case. In the present case, plaintiffs allege "before" or "during" conduct by defendants. Idaho Code § 48-603 covers all three types of conduct. Plaintiffs allege defendants have "violate[d] the provision[s] of this chapter" under the language of I.C. § 48-603C, by "engaging in any act or practice which is otherwise misleading, false, or deceptive to the consumer" (under I.C. § 48-603(17)) and/or by "engaging in any unconscionable method, act or practice in the conduct of trade or commerce, as provided in section 48-603C, Idaho Code…" (under I.C. § 48-603(18)). Complaint, p. 8, ¶ XXXV.

Again, plaintiffs have submitted the affidavit of Charles Charlebois (Charlebois) to survive summary judgment on this issue. Charlebois' testimony is that he is also supplied water by Bennett, but never entered into a water service agreement with him, and had been told, "that the old contract that went with the original purchaser of the

property would remain, since it ran with the land. He also states at that time that when I wanted to sell my property that the new owner would have to execute an agreement with him." Affidavit of Charles Charlebois in Opposition of Motion for Summary Judgment, p. 2. As discussed *supra,* no contract need be in place for a violation of the CPA to occur, and because plaintiffs have at least raised the question of whether ARWC/Bennett knowingly engaged in unconscionable practices, methods, or acts, summary judgment in favor of defendants on the CPA claim remains improper at this time. For purposes of clarification as sought by defendants, the remaining disputed issue of fact is whether defendants acted to offend or outrage the public conscience in light of its offering for lease water services for an arguably arbitrary and excessive amount.

Defendants at oral argument on September 1, 2010, and in their "Reply Memorandum in Support of Motion for Reconsideration of Idaho Consumer Protection Act and in Support of Clarification", cite *White v. Mock,* 140 Idaho 882, 104 P.3d 356 (2004). Defendants' argument is as follows:

> Along these same lines [that I.C. § 48-608(2) "is limited to <u>actual</u> purchases of goods or services, and did not encompass contemplated purchases"], when the appellate courts next visited the ruling of *Haskins v. Glass, supra*, in the case of *White v. Mock,* 140 Idaho 882, 104 P.3d 356 (2004), the Idaho supreme Court recognized the *Haskins case* held that the Act was inapplicable to a transaction that was merely contemplated.

Reply Memorandum in Support of Motion for Reconsideration of Idaho Consumer Protection Act and in Support of Clarification, p. 3. (emphasis in original). While the Idaho Supreme Court in *Mock* noted *Haskin* "held that the Act was inapplicable to a transaction that was merely contemplated" (140 Idaho 882, 890, 104 P.3d 356, 364), a "contemplated" transaction was not even an issue in *Mock*. What defendants omit is the following pertinent language of the Idaho Supreme Court in *Mock*:

> The purpose of the Idaho Consumer Protection Act is "to protect both consumers and businesses against unfair methods of competition and unfair and deceptive practices in the conduct of trade or commerce, and to provide efficient and economical procedures to secure such protection. It is the intention of the legislature that this chapter be remedial and so construed." I.C. § 48-601. Idaho Code § 48-603, which contains a knowledge requirement, provides an enumeration of unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce that the legislature declared to be unlawful. I.C. § 48-603C also declares any unconscionable method, act or practice in the trade or commerce to be a violation of the Idaho Consumer Protection Act whether it occurs before, during, or after the conduct of the trade or commerce. White alleged in his complaint that the Mocks' failure to disclose the true, defective condition of the property and the making of false affirmative statements violated Sections 603 and 603C of the Act.

140 Idaho 882, 890, 104 P.3d 356, 364

V. CONCLUSION AND ORDER.

For the reasons stated above, this Court denies defendants' Motion to Reconsider.

IT IS HEREBY ORDERED defendant ARWC/Bennett's Motion to Reconsider is DENIED. The trial remains as scheduled.

Entered this 1st day of September, 2010.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of September, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Todd M. Reed	208-263-4438	Susan Weeks/Cynthia K. C. Meyer	664-1684

_____
Jeanne Clausen, Deputy Clerk