

FILED: February 15, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

TYRONE CRUZE, SR.
and JACQUELINE CRUZE,
Trustees of The Tyrone Cruze, Sr. and Jacqueline Cruze Family Trust Agreement
Dated March 6, 1987;
and CALIFORNIA NATIONAL BANK
CUSTODIAN FBO TYRONE CRUZE IRA ACCT CCT0300
AND CUSTODIAN FBO JACQUELINE CRUZE IRA ACCT CCJ0150,
Plaintiffs-Appellants,

v.

MARTIN L. HUDLER,
an individual;
and CHARLES R. MARKLEY,
an individual,
Defendants-Respondents,

and

COVENANT PARTNERS, LLC,
a Nevada limited liability company,
Defendant.

Clackamas County Circuit Court
CV08090688

A145179

Robert D. Herndon, Judge.

On respondent Charles R. Markley's petition for reconsideration filed December 6, 2011,
and appellants' response to petition for reconsideration filed December 13, 2011.
Opinion filed November 23, 2011. 246 Or App 649, 267 P3d 176.

Jeffrey W. Hansen, Joseph A. Rohner IV, and Smith, Freed & Eberhard, P.C., for
petition.

Steven L. Naito, and Tarlow Naito & Summers, LLP, for response.

Before Schuman, Presiding Judge, and Brewer, Chief Judge, and Wollheim, Judge.

SCHUMAN, P. J.

Reconsideration allowed; former opinion modified and adhered to as modified.

1 SCHUMAN, P. J.

2 Defendant Markley petitions us to reconsider our decision in [Cruze v.](#)
3 [Hudler](#), 246 Or App 649, 267 P3d 176 (2011), in which we reversed the trial court's grant
4 of summary judgment in his favor. The majority of his petition either mischaracterizes
5 aspects of our opinion or simply reargues issues that were raised in the briefs and decided
6 adversely to him, and we decline to reconsider those issues. ORAP 6.25(1)(e) (petitions
7 for reconsideration "addressing legal issues already argued in the parties' briefs and
8 addressed by the Court of Appeals are disfavored"). We allow the petition, however, to
9 address two contentions.

10 First, defendant argues that he "submitted substantial briefing on the legal
11 question of whether [plaintiffs] had the right to rely, which is an essential element of
12 common-law fraud," and that this court "did not consider these arguments in its ruling."
13 Suffice it to say that, in reversing the grant of summary judgment on plaintiffs' fraud
14 claim, we considered and rejected without discussion defendant's argument regarding
15 plaintiffs' right to rely on the alleged misrepresentation. We now make explicit that
16 implicit aspect of our decision.

17 Second, defendant contends that we stated a fact in the opinion that is not
18 supported by evidence in the summary judgment record--namely, that, "[w]hile at
19 plaintiffs' home, Hudler spoke with Markley by phone and made changes to the operating
20 agreement." *Cruze*, 246 Or App at 653. According to defendant, Tyrone Cruze actually
21 testified that he was "assuming" that Hudler communicated with Markley, but did not in

1 fact know whether he was on the phone with Markley or had communicated at all with
2 him while at the Cruzes' home.

3 In any event, that particular fact--whether Hudler and Markley had
4 continued to communicate about the Covenant Agreement while at the Cruzes' home--
5 was not material to our analysis. The relevant facts, as we explained in our analysis of
6 the fraud claim, were "that Markley directly or indirectly owned or managed Bridgeport,
7 Covenant, and various other entities with Hudler; that Markley had actual knowledge that
8 Hudler was stealing from people in order to keep their joint business ventures afloat; and
9 that Markley drafted an agreement that contained a material misrepresentation at the
10 same time that Covenant was coming under pressure to repay its obligations * * *." *Id.* at
11 659. Based on those facts, we held:

12 "[A] reasonable trier of fact could find that Markley knew that his various
13 ventures with Hudler were in dire need of cash; that he prepared the draft of
14 the Covenant Agreement knowing that it was part of an ongoing scheme to
15 keep their businesses afloat; and that he participated in the scheme by
16 preparing the agreement with reckless disregard of the falsity of the
17 representation in the hopes that plaintiffs would agree to invest in
18 Covenant."

19 *Id.* at 659-60.

20 There was evidence in the summary judgment record that Markley drafted
21 the Covenant Agreement that was subsequently finalized at the Cruzes' home, and that
22 Markley's draft contained essentially the same misrepresentation in Section 2.1.2 that
23 appeared in the finalized draft. *Id.* at 660 n 2. Regardless of whether Markley and
24 Hudler subsequently communicated at the Cruzes' home while the agreement was

1 finalized, a reasonable factfinder could infer from Markley's involvement that he
2 "participated in the scheme by preparing the agreement with reckless disregard of the
3 falsity of the representation in the hopes that plaintiffs would agree to invest in
4 Covenant." *Id.* at 660.

5 Because it was not material to our analysis, we need not resolve on
6 reconsideration what inferences can be drawn from the summary judgment record about
7 whether and how Markley communicated with Hudler while the agreement was being
8 finalized at the Cruzes' home. Instead, to avoid misstating the evidence in the summary
9 judgment record, we simply delete the sentence in question¹ and adhere to the opinion as
10 modified.

11 Reconsideration allowed; former opinion modified and adhered to as
12 modified.

¹ That sentence, once again, is as follows: "While at plaintiffs' home, Hudler spoke with Markley by phone and made changes to the operating agreement." 246 Or App at 653.