IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FRANCIS CLARK and SHANNON HOERNER-CLARK, husband and wife,	)	**No. 28657-6-III**
	)	**Division Three**
Appellants,	)	
v.	)	
JR'S QUALITY CARS, INC.; CAPITOL INDEMNITY CORPORATION,	)	**UNPUBLISHED OPINION**
Respondents,	)	
RUSS EDWARDS AND ASSOCIATES, INC.; VIROJ "LEE" RITDECHA, Salesperson,	)	
Defendants.	)	

Kulik, C.J. — In October 2007, Frances Clark and Shannon Hoerner-Clark (Clarks) bought a 2002 Chrysler Sebring from JR'S Quality Cars, Inc., (JR'S). A few months later, the Clarks had problems with the Sebring and went to JR'S to purchase another vehicle. On March 6, 2008, the Clarks signed a written sales contract for a truck

that provided for a gross trade-in allowance for the Sebring of $4,500, less a payoff due from JR'S in the amount of $4,300. Immediately after signing the contract, JR'S changed its mind and advised the Clarks that JR'S would not be paying off the balance due on the Sebring loan. The Clarks left JR'S. Seven days later, the Clarks came back to JR'S and signed a second contract for the purchase of the truck. This contract did not include the provision that JR'S would pay off the Sebring loan.

The Clarks sought relief alleging breach of contract and a violation of chapter 19.86 RCW, the Consumer Protection Act (CPA). The trial court dismissed both claims. On appeal, the Clarks contend the second contract is invalid because it constitutes a per se violation of the bushing statute, RCW 46.70.180(4) and RCW 46.70.310, and lacks consideration and unambiguous mutual intent.

We conclude that the bushing statute does not apply and that there was no consideration for the second contract. We, therefore, reverse and remand for entry of judgment in favor of the Clarks.

FACTS

In October 2007, the Clarks purchased a 2002 Chrysler Sebring from JR'S. This purchase was financed by American General Finance Company (AGF). In February 2008, the Sebring experienced mechanical problems that appeared to be engine failure.

On March 6, 2008, the Clarks went to JR'S to purchase another vehicle. The Clarks met with Lee Ritdecha and agreed to buy a 1995 Chevrolet truck for the amount of $6,996.73. The Clarks and JR'S signed a written contract that provided a gross trade-in allowance for the Sebring of $4,500, less a payoff due from JR'S in the amount of $4,300. The net trade-in was $200.

The Clarks testified that immediately after signing the contract, they were advised by Mr. Ritdecha that JR'S would not be paying the balance of the Sebring loan to AGF. There were no follow-up conversations or negotiations. The Clarks left JR'S knowing that JR'S would not be paying off the debt owed to AGF.

The Clarks returned to JR'S on March 13 and proceeded with the purchase of the truck. The Clarks signed the contract and took delivery of the truck. When AGF was unwilling to finance the truck, the Clarks made arrangements through Peoples' Credit.

The Clarks' testimony and AGF's records show that the Clarks had a number of contacts with AGF from January 2008 to March 2008. On January 23, 2008, Ms. Clark asked for the payoff amount on the Sebring, good to the end of the month, indicating they were trading in the vehicle with JR'S. On February 25, the Clarks indicated to AGF that they would refinance with them. On February 27, the Clarks advised AGF that they were looking to trade their vehicle and wanted assistance with the financing.

Despite being informed that the March 13 contract contained no term or condition requiring JR'S to pay off the underlying loan on the Sebring, Mr. Clark signed the second contract. On March 18, the Clarks advised AGF that the Sebring's engine was bad, that JR'S offered only a $200 trade-in for the vehicle, and that they wanted to fulfill their obligation on the Sebring loan and to combine the loans so that they would only have one payment.

JR'S claimed the Clarks did not make the $1,000 down payment on the truck, but the trial court found that they did.

The Clarks filed this action, claiming breach of contract and a violation of the CPA. JR'S counterclaimed for $1,000. The trial court dismissed the Clarks' claims and JR'S counterclaim. The Clarks moved for reconsideration and submitted a memorandum as to the application of the bushing statute. The trial court denied the motion for reconsideration. This appeal follows.

ANALYSIS

This court reviews a trial court's denial of a motion for reconsideration for an abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008) (quoting *Kleyer v. Harborview Med. Ctr.*, 76 Wn. App. 542, 545, 887 P.2d 468 (1995)). A trial court abuses its discretion if its decision is manifestly unreasonable or

rests on untenable grounds or reasons. *Id.*

Unchallenged findings are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review the trial court's conclusions of law to determine if they are supported by the findings of fact. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007). A finding of fact that is mislabeled as a conclusion of law is reviewed as a finding of fact. *State v. Ross*, 141 Wn.2d 304, 309, 4 P.3d 130 (2000).

Washington's Bushing Statute. The main controversy here is whether Washington's bushing statute applies. It is unlawful for a car dealer to engage in "bushing," which is defined as:

> (4) To commit, allow, or ratify any act of "bushing" which is defined as follows: Entering into a written contract, written purchase order or agreement, retail installment sales agreement, note and security agreement, or written lease agreement, hereinafter collectively referred to as contract or lease, signed by the prospective buyer or lessee of a vehicle, which:
>
> (a) *Is subject to any conditions or the dealer's or his or her authorized representative's future acceptance, and the dealer fails or refuses within four calendar days, exclusive of Saturday, Sunday, or legal holiday, and prior to any further negotiations with said buyer or lessee to inform the buyer or lessee either: (i)* That the dealer unconditionally accepts the contract or lease, having satisfied, removed, or waived all conditions to acceptance or performance, including, but not limited to, financing, assignment, or lease approval; *or (ii)* that the dealer rejects the contract or lease, thereby automatically voiding the contract or lease, as long as such voiding does not negate commercially reasonable contract or lease provisions pertaining to the return of the subject vehicle and any

> physical damage, excessive mileage after the demand for return of the vehicle, and attorneys' fees authorized by law, and tenders the refund of the initial payment or security made or given by the buyer or lessee, including, but not limited to, any down payment, and tenders return of the trade-in vehicle, key, other trade-in, or certificate of title to a trade-in. Tender may be conditioned on return of the subject vehicle if previously delivered to the buyer or lessee.

RCW 46.70.180 (emphasis added).

The Clarks argue that JR'S engaged in an unlawful act of bushing by signing the March 6 purchase order and then changing its terms and replacing the order with the final purchase order on March 13. This argument mischaracterizes the transaction.

On March 6, both parties signed a contract for the sale of the truck. Under the terms of the contract, JR'S assumed the obligation of paying off the 2002 Sebring. Significantly, RCW 46.70.180(4)(a) applies *only* when the contract requires the dealer's future acceptance. Nothing in the March 13 contract allowed the dealer to accept the signed first contract at a later date.

Plouse v. Bud Clary of Yakima, Inc., 128 Wn. App. 644, 116 P.3d 1039 (2005) is instructive. Daryl Plouse argued that the bushing statute applied because the vehicle sale was contingent upon financing. Under the terms of the purchase order, the dealer did not have to perform until a lender had approved financing. The purchase order also stated in bold language that, "'This order *shall not* become binding *until accepted by dealer* or his

authorized representative.'" *Id.* at 648. The court concluded that the signed purchase order was not subject to the dealer's future acceptance because the dealer did not have the option to accept or deny once financing was approved. *Id.* at 648-49. In other words, the dealer entered into a binding contract by signing the purchase order. *Id.* at 649.

The bushing statute applies when a sale is subject to the dealer's future acceptance. But the Clarks do not argue that the language of the first contract established that it was subject to the dealer's future acceptance. Instead, the Clarks assert that the signing of the second contract on March 13 took place seven days after the first contract and that during the interim, JR'S changed a key term of the contract. In the Clarks' view, a major change from the initial contract—coupled with the dealer's failure to inform the Clarks of its acceptance within four business days—constituted bushing.

But this is not how the sales transaction occurred. First, the Clarks and JR'S signed the initial contract on March 6. This contract contains no language indicating that it was subject to the dealer's future acceptance. Second, almost immediately, the dealer changed the first contract and refused to pay off the Sebring. Third, on March 13, the parties signed a second contract dealing with the same subject but obligating the Clarks to pay off the Sebring loan. In short, the bushing statute was not triggered by the first contract because that agreement was not subject to JR'S future

acceptance. The fact that the parties changed a key term of the agreement and signed a second contract did not affect the terms of the first contract.

Because the bushing statute does not apply, we need not address many of the Clarks' arguments. For example, if RCW 46.70.180(4) applies, the dealer must accept and sign the final contract or void the transaction within four business days. To void the transaction, the dealer must (1) tell the buyer that the contract is rejected and (2) tender the refund of any initial payment of security including items such as the trade–in vehicle, key, or certificate of title. RCW 46.70.180(4)(a). The Clarks contend that JR'S failed to reject or sign the March 6 contract within four days. They also contend that the saleman's repudiation of the contract was not sufficient for purposes of RCW 46.70.180(4)(a). These arguments are based on RCW 46.70.180(4)(a), which does not apply here. Significantly, the Clarks do not challenge any of the court's findings.

Relying on *Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 603, 612-13, 141 P.3d 652 (2006), which applied the bushing statute, the Clarks maintain that JR'S failed to unwind the agreement within the statutory period before renegotiating a new contract with different terms. The Clarks point out that the salesman repudiated only one term of the contract. In the Clarks' view, this alone did not unwind the entire sales contract. This argument is unpersuasive because the bushing statute is not applicable.

There was no violation of the bushing statute.

The court's unchallenged findings are that the parties made one agreement on March 6, 2008, which JR'S then refused to perform, leading to the second contract under which a $4,300 loan payoff burden was shifted to the Clarks while all other rights and duties remained the same.

Ordinarily, it is the party who wants to enforce the second of two agreements and avoid its obligation under the first who must argue that the second was intended as a modification. How, otherwise, can the party avoid the first contract? But to avoid the first and establish a modification means bearing the significant burden of demonstrating the parties' mutual unambiguous intent to change their bargain, a meeting of the minds, and new consideration. *Wagner v. Wagner*, 95 Wn.2d 94, 103, 621 P.2d 1279 (1980). In this case, it was the Clarks who invoked the *Wagner* line of cases in the trial court in order to demonstrate this onerous showing that they rightly assumed JR'S could not make.

But JR'S turned the table on the Clarks. Instead of arguing that the parties had agreed to modify the first contract, it admitted it had simply reneged. It then pointed to an unrelated body of case law dealing with how two *valid* contracts dealing with the same subject matter are to be interpreted—case law that includes *Durand v. HIMC Corp.*, 151

Wn. App. 818, 214 P.3d 189 (2009), *review denied*, 168 Wn.2d 1020 (2010) and *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 111 P.3d 1192 (2005). JR'S argued, correctly, that these cases do not speak of a requirement of new consideration and hold that, in the event of inconsistent terms, the second contract controls.

Confusing matters further, JR'S then suggested that this case necessarily presents either a *Wagner* modification—in which case new consideration is required, but *the Clarks* must prove a mutual intent to modify—or a *Durand* second contract, in which no new consideration is required. Needless to say, the Clarks cannot prove that there was a mutual intent to modify; they have always taken the opposite position.

Durand and *Flower* have no application to this case. The Clarks' theory is that there was no consideration for the second contract. This is a threshold issue to determining whether the second contract was a valid contract. We do not engage in the *Durand/Flower* interpretation without first finding, or having the parties agree, that the two contracts requiring interpretation are both valid and operative.

And the Clarks do not have the burden of proving a mutual intent to modify the contract where they have never contended that there was an agreed modification. In citing the modification cases, they simply assumed—mistakenly, in retrospect—that JR'S would rely on those cases and sought to demonstrate why JR'S would not be able to make

the required showing.

Setting aside JR'S flawed argument and the Clarks' unnecessary response to it, this case should be resolved on the basis of the well-settled principle that performance of a legal duty that is neither doubtful nor the subject of honest dispute is not consideration. Restatement (Second) of Contracts § 73 & cmt. c, illus. 4 (1981) (where a party repudiates his contract and secures an additional fee to resume work, his resumption of work is not consideration for the promise of an additional fee); *Boardman v. Dorsett*, 38 Wn. App. 338, 341, 685 P.2d 615 (1984) (summary judgment for contract price was appropriate despite alleged second agreement permitting holdback, since performance of an agreement to do that which one is already obliged to do does not constitute consideration); *Rosellini v. Banchero*, 83 Wn.2d 268, 273, 517 P.2d 955 (1974) (a second agreement between two parties is not supported by consideration if one party is burdened by an additional obligation while the other simply performs what was promised in the original contract).

We reverse and remand for entry of judgment in favor of the Clarks on their breach of contract claim on the grounds that the undisputed facts establish that there was

no consideration for the second contract.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

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Sweeney, J. Siddoway, J.