

COLORADO COURT OF APPEALS
STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203
(303) 861-1111

Appeal from the District Court for Denver County,
Colorado

Trial Judge: The Honorable William D. Robbins
Parties Initiating the Appeal: COLORADO COFFEE
BEAN, LLC; DOUBLE R COFFEE, LLC; MLT
TAYLOR, LLC; PEAK JAVA COMPANY; JKF, LLC;
CZ-DM, INC.; JKKR, LLC; PEAK MOUNTAIN
COFFEE, INC.; KING SOOPERS JM, INC.; and, ABC
SALES INC.

Trial Court Case Number: 2006CV4514

Appellant:

COLORADO COFFEE BEAN, LLC, a Colorado
limited liability company; DOUBLE R COFFEE, LLC,
a Colorado limited liability company; MLT TAYLOR,
LLC, a Colorado limited liability company, PEAK
JAVA COMPANY, a Colorado corporation; JKF, LLC,
a Colorado limited liability company; CZ-DM, INC., a
Colorado corporation; JKKR, LLC, a Colorado limited
liability company; PEAK MOUNTAIN COFFEE, INC.,
a Colorado corporation; KING SOOPERS JM, INC., a
Colorado corporation; and, ABC SALES INC., a
Colorado corporation

Appellee:

PEABERRY COFFEE, INC., a Colorado corporation;
PEABERRY COFFEE FRANCHISE, INC., a Colorado
corporation; WILLIAM I. TOINTON; JAMES T. ORR;
and PERKINS COIE, LLP, a Washington Limited
Liability Partnership.

▲ COURT USE ONLY ▲

Case Number:

Div.:

Ctrm: 7

NOTICE OF APPEAL

The Appellants, Colorado Coffee Bean, LLC, Double R. Coffee, LLC, MLT Taylor, LLC, Peak Java Company, JKF, LLC, CZ-DM, Inc., JKKR, LLC, Peak Mountain Coffee, Inc., King Soopers JM, Inc., and ABC Sales, Inc., by and through their attorneys, Podoll & Podoll, P.C., submit

the following Notice of Appeal:

DESCRIPTION OF THE NATURE OF THE CASE

A. Statement of the Nature of the Controversy.

The ten Plaintiffs were sold Peaberry Coffee franchises by Defendants William Tointon (Tointon) and James Orr (Orr). Tointon formed Defendant Peaberry Coffee, Inc. (PCI) in 1990. He operated PCI through 2002 without recording a single profitable year. During this period of time, PCI lost almost a million dollars a year. PCI's debts were paid annually by Tointon's wealthy father. Many of the Peaberry retail stores, historically, had performed poorly. Most would have lost substantial money if they had to pay the debt service and royalties of a franchise store.

In 2002, PCI formed a subsidiary, Peaberry Coffee Franchise, Inc. (PCFI), to sell franchises. PCI and Tointon hired Defendant Perkins Coie, LLP (Perkins Coie) to advise them in initiating their franchise system. Perkins Coie prepared franchise disclosure documents that failed to disclose material facts regarding the adverse financial history of PCI and Peaberry retail stores. Peaberry began to sell franchises in early 2003. Orr was hired in October 2003 to redesign procedures to sell the franchises.

Orr's sales procedures combined dissemination of published material containing false statements about PCI's profitability and site selection expertise, and false oral representations about the profitability of PCI and its stores. Tointon and Orr actively and intentionally concealed the true material facts about PCI's adverse financial history and its retail stores. The concealed facts were withheld with the intent that Plaintiffs purchase their franchises ignorant of the true facts.

Peaberry advertised its franchises for sale to the public through the internet and newspaper advertising. A prospect responding to an advertisement would be sent the franchise disclosure document prepared by Perkins Coie that omitted material financial facts. A recently published newspaper article that proclaimed Peaberry was profitable was included in the initial mailing, or was provided to prospective franchisees during the sales process. The representation of profitability in the article was false. Peaberry had never been profitable. In addition, during sales meetings, Tointon, Orr and PCI/PCFI President, Fred Nielsen, made oral representations of profitability to franchisees.

Each of the Plaintiffs purchased their franchise in reliance on the false impression of profitability that Peaberry created. The franchise stores lost considerable money. They performed in a manner consistent with Tointon's unprofitable Peaberry stores. Shortly after Plaintiffs opened their stores, Tointon sold 13 of the 18 company-owned Peaberry retail stores to industry giant, Starbucks.

The trial court found Defendants actively and intentionally concealed material facts from Plaintiffs relating to PCI's financial history and the performance of the Peaberry retail stores. The trial court found Plaintiffs had no knowledge of the concealed facts. The trial court found the material facts were concealed with the intent that Plaintiffs purchase their franchises ignorant of the true facts. However, the trial court refused to award damages, finding that exculpatory provisions, which did not mention or relate to omissions, precluded a finding of reasonable reliance. The trial court also dismissed the misrepresentation claims based upon the disclaimers which resulted from the fraud.

The trial court also dismissed Plaintiffs' claim under the Colorado Consumer Protection Act (CCPA) based solely upon its conclusion that Plaintiffs' evidence failed to satisfy the public impact element of a CCPA claim. Peaberry's internet and newspaper advertising was published to the public. It created the potential that other consumers would be victimized by Peaberry's intentional fraudulent scheme.

Based upon the trial court's specific findings of fraudulent concealment, Plaintiffs are entitled to recover damages to redress the fraud and consumer fraud perpetrated by the Peaberry Defendants. The trial court's findings establish the Defendants' liability. This case must be remanded for further trial proceedings to determine Plaintiffs' damages, and to determine Perkins Coie's liability for its complicity in the fraud and consumer fraud.

B. The Judgments and Orders Being Appealed are:

1. The trial court's January 13, 2009, Final Judgment, entering judgment in favor of the Peaberry Defendants and Defendant Perkins Coie on Plaintiffs' claims for relief; and entering judgment in favor of PCFI and against certain Plaintiffs on PCFI's counterclaims;
2. The trial court's January 6, 2009, Findings of Fact and Conclusions of Law finding in favor of the Defendants on Plaintiffs' claims for Fraudulent Misrepresentation, Fraudulent Concealment/Nondisclosure, Negligent Misrepresentation and Alter Ego; and in favor of Defendant PCFI on Plaintiffs' claims for Breach of Contract, and Violation of the Implied Covenant of Good Faith and Fair Dealing;
3. The trial court's September 11, 2008, Order Regarding Defendants' Motion to Dismiss Plaintiffs' Claims, dismissing Plaintiffs' claims for Violation of the Colorado Consumer Protection Act, and Civil Conspiracy;
4. The trial court's June 19, 2008, Order Denying Plaintiffs' Motion to Vacate Stay of Proceedings Against Perkins Coie, LLP;

5. The trial court's June 17, 2008, Order Denying Plaintiffs' Motion for Order Requiring In Camera Review of All Documents Withheld on Claim of Privilege.
6. The trial court's June 4, 2008, Order Granting Perkins Coie's Motion to Strike Plaintiff's Demand for a Jury Trial, and Joinder in Defendants' May 4, 2007 Motion to Strike Demand for a Jury Trial;
7. The trial court's June 3, 2008, Order Denying Plaintiffs' Motion to Reconsider the court's June 22, 2007, Order Striking Jury Trial;
8. The trial court's May 21, 2008, oral ruling granting Perkins Coie, LLP's Motion to Stay Proceedings Against the Firm;
9. The trial court's May 6, 2008, Order Denying Plaintiffs' Motion for Determination of a Question of Law pursuant to C.R.C.P. 56(h); and
10. The trial court's June 22, 2007, Order Granting Defendants' Motion to Strike Plaintiffs' Demand for a Jury Trial;

C. Whether the Judgment or Order Resolved all Issues Pending Before the Trial Court, Including Attorney Fees and Costs.

The trial court's Findings of Fact and Conclusions of Law, dated January 6, 2009 and Final Order of Judgment, dated January 13, 2009, resolved all issues pending before the court, except motions for attorney fees and costs.

D. Whether the Judgment Was Made Final for Purposes of Appeal Pursuant to C.R.C.P. 54(b).

Yes. The judgment was made final by the court's January 13, 2009, Final Judgment.

E. The Date the Judgment or Order Was Entered.

The court's Findings of Fact and Conclusions of Law was signed on December 31, 2008, and was served upon the parties on January 6, 2009, via Lexis-Nexis File and Serve. The court's Final Judgment was signed on January 13, 2009, and served on the parties that same day via Lexis-Nexis File and Serve.

F. Whether There Were Any Extensions Granted to File any Motions for Post-Trial Relief.

No.

G. The Date any Motion for Post-Trial Relief Was Filed.

Not applicable.

H. The Date Any Motion for Post-Trial Relief Was Denied or Deemed Denied Under C.R.C.P. 59(j).

Not applicable.

I. Whether There Were Any Extensions Granted to File Any Notice of Appeal.

No.

ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL

1. Whether the trial court erred in ruling that exculpatory provisions defeat a claim based upon reckless or intentional tortious conduct.
2. Whether the trial court erred in ruling that a contract induced by fraudulent concealment is effective to preclude claims based on the concealment.
3. Whether the trial court erred in ruling that Plaintiffs could not rely on the fraudulent omissions which the court found Defendants had a duty to disclose.
4. Whether the trial court erred in ruling that exculpatory provisions which do not refer to omissions can disclaim liability for fraudulent omissions.
5. Whether the trial court erred in ruling that exculpatory provisions in a contract induced by fraudulent representations are effective to preclude reliance upon the fraudulent misrepresentations.
6. Whether the trial court erred in concluding that exculpatory provisions which do not refer to the profitability of PCI, can disclaim liability for fraudulent representations and omissions pertaining to the profitability of PCI.

7. Whether the trial court erred in concluding that the exculpatory provisions were specific enough to support a finding that Plaintiffs could not have reasonably relied on Peaberry's financial history and the performance of Peaberry retail stores.
8. Whether the trial court erred in ruling that exculpatory provisions were representations made by Plaintiffs to Defendants.
9. Whether the trial court erred in ruling that a finding of fraudulent intent requires an intent to deceive.
10. Whether the trial court erred in ruling that Plaintiffs elected to rescind their contracts, as opposed to suing for damages, where there was no final judgment, Plaintiffs did not recover their losses, and Defendants did not detrimentally change their position based on an understanding that the contract had been rescinded.
11. Whether the trial court erred in dismissing Plaintiffs' Colorado Consumer Protection Act ("CCPA") claim after the close of Plaintiffs' evidence.
12. Whether Defendants' advertising the sale of franchises, through the internet and through widespread newspaper advertisements, satisfied the public impact element of a CCPA claim.
13. Whether the trial court's express findings of active intentional concealment of material facts relating to Peaberry's financial history and the performance of its stores, with the intent that Plaintiffs purchase their franchises ignorant of the true facts, supports a finding that the Peaberry Defendants engaged in a deceptive trade practice pursuant to C.R.S., § 6-1-105(1)(u).
14. Whether the trial court erred in striking Plaintiffs' jury demand against the Peaberry Defendants based upon a jury waiver provision buried on the thirty-third page of the franchise agreement at the end of a section headed "Governing Law/Consent to Venue and Jurisdiction."
15. Whether the trial court erred in striking Plaintiffs' jury demand against Defendant Perkins Coie, which was not a party to the agreement containing the purported jury waiver.
16. Whether the trial court erred in dismissing the civil conspiracy claim against the Peaberry Defendants and their lawyers Perkins Coie.

17. Whether the trial court erred in dismissing the aiding and abetting claims against Defendant Perkins Coie.
18. Whether the trial court erred in dismissing the negligent misrepresentation claim against Defendant Perkins Coie, without the benefit of a trial or specific findings.
19. Whether the trial court erred in ruling that Plaintiffs waived the contractual requirement that Peaberry provide written site selection guidelines without a finding that Plaintiffs had full knowledge of all of the material facts.
20. Whether the trial court erred in ruling that PCFI had not breached its contract by failing to provide written site selection guidelines.
21. Whether the trial court erred in staying litigation of Plaintiffs' claims against Perkins Coie until after a trial of Plaintiffs' claims against Peaberry, but allowing Perkins Coie to participate as a party at trial.

TRANSCRIPTS NEEDED ON APPEAL

1. The trial transcript in this matter. The trial testimony was transcribed contemporaneously by a certified court reporter, jointly retained by all parties. A final transcript of the trial proceedings has already been prepared.
2. A transcript of the May 21, 2008, Status Conference during which the trial court granted Defendant Perkins Coie, LLP's Motion to Stay Proceedings is needed and is necessary to resolve the issues raised in this appeal. This Status Conference lasted approximately one hour, and the approximate length of the transcript is expected to be under 50 pages.
3. No additional transcript of any evidence taken before the trial court is necessary to resolve the issues raised on appeal.

PRE-ARGUMENT CONFERENCE

The Appellants do not request a pre-argument conference.

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APPENDIX

The following Orders are attached hereto:

1. The trial court's January 13, 2009, Final Judgment;
2. The trial court's January 6, 2009, Findings of Fact and Conclusions of Law;
3. The trial court's September 11, 2008, Order Regarding Defendant's Motion to Dismiss;
4. The trial court's June 19, 2008, Order Denying Plaintiffs' Motion to Vacate Stay of Proceedings Against Perkins Coie, LLP;
5. The trial court's June 17, 2008, Order Denying Plaintiffs' Motion for Order Requiring In Camera Review of All Documents Withheld on Claim of Privilege;
6. The trial court's June 4, 2008, Order Granting Perkins Coie's Motion to Strike Plaintiffs' Demand for a Jury Trial;
7. The trial court's June 3, 2008, Order Denying Plaintiffs' Motion to Reconsider the Court's June 22, 2007, Order Striking Jury Trial;
8. The trial court's May 6, 2008, Order Denying Plaintiffs' Motion for Determination of a Question of Law pursuant to C.R.C.P. 56(h); and
9. The trial court's June 22, 2007, Order Granting Defendants' Motion to Strike Plaintiffs' Demand for a Jury Trial;

The Plaintiffs will supplement this Appendix with a transcript of the May 21, 2008, Status Conference as soon as the same is obtained.

Dated this 19th January, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOTICE OF APPEAL** was served via method indicated below, on this 19th day of January, 2009, addressed to:

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