Dpty of App Fritz

No. 35740-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

EDDIE BLOOR and EVA BLOOR, husband and wife, Respondents, v. ROBERT A. FRITZ and CHARMAINE A. FRITZ, and the marital community comprised thereof; LANCE MILLER, a single person; LAM MANAGEMENT, INC., a Washington corporation, dba ALLEN & ASSOCIATES PROPERTY MANAGEMENT; LC REALTY, INC., a Washington corporation dba WINDERMERE REAL ESTATE/ALLEN & ASSOCIATES; Appellants, and COWLITZ COUNTY, a political subdivision of the State of Washington, Defendant.	)	Lewis County Circuit Court Case No. 05 2 00628 3

REPLY BRIEF OF APPELLANTS FRITZ

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INTRODUCTION

In response to the Opening Brief filed by Appellants Robert and Charmaine Fritz ("the Fritzes"), Respondents Eddie and Eva Bloor ("the Bloors") argue that the judgment of the trial court should be affirmed; however, analysis of the court's findings and conclusions reveals multiple legal errors that must be corrected. Although the Fritzes Opening Brief thoroughly analyzed the errors, there are two critical issues that merit further discussion in this Reply Brief. First, there is no factual or legal support for an award of money damages against Mr. & Mrs. Fritz. Second, there is no authority for the award of attorney fees on a joint and several basis, without segregating the fees according to the legal grounds on which such fees are based. The other issues raised in this appeal have been adequately addressed in the Appellants' Brief and do not require further discussion in this Reply.

A. ALL ERRORS AND ISSUES HAVE BEEN PRESERVED

In their Brief, the Bloors argue that several issues, arguments, or assignments of error have either not been preserved or have been abandoned. For the reasons discussed below, all issues raised by the

Fritzes have been properly preserved and should be addressed by this Court.

1. **The Legal Basis for the Negligent Misrepresentation Claim was Challenged at the Trial Court**

At pages 30 through 33 of Respondents' Brief, the Bloors claim that the economic loss rule was not raised at the trial court level and should not be considered on appeal. In making this argument, the Bloors cite to RAP 2.5, which provides that "[t]he appellate court *may* refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a) (emphasis added). In determining whether an issue was raised before the trial court, the appellate court will evaluate whether the issue was "essentially argu[ed]" below. *State v. Wilson*, 108 Wn. App. 774, 778, 31 P.3d 43, 46 (2001). In other words, the appellate court should determine whether the basic issue was brought before the trial court or whether it was ignored by the party who is raising the issue on appeal. A party does not have to make the same precise arguments on appeal as were made before the trial court and there is no requirement for a party to cite "relevant Washington case law." *Wilson v. Horsley*, 137 Wn. 2d 500, 508, 974 P.2d 316, 321 (1999). Finally, as noted by the Supreme Court in

Wilson and by the language highlighted in the rule, application of the rule is discretionary and the appellate court may consider even those errors not raised below.

In their Brief, the Bloors fail to acknowledge that counsel for the Fritzes challenged the legal validity of the negligent misrepresentation claim when a motion to dismiss was made to the court. In making the motion to the court, counsel for the Fritzes argued as follows:

> In terms of the negligent misrepresentation claim against both of them, in order to have a negligent misrepresentation in the state of Washington you have to have a special relationship. There's no evidence of a special relationship between buyer and seller. In fact, that's frequently cited as the type of relationship that is not a special relationship and instead an arm's length transaction. Without a special relationship a claim for negligent misrepresentation cannot stand.

RP 1014-5. By stating that there was no special relationship between the parties, the economic loss rule was implicitly raised. There is a well-recognized exception to the economic loss rule where there is a special relationship between the parties, such that an independent, fiduciary duty exists. Although no Washington cases could be found to precisely address this point, there is an ample body of law from other jurisdictions. *See, e.g., Commerce Bancorp, Inc. v. BK International Insurance Brokers, Ltd.*,

490 F. Supp. 2d 556 (D.N.J. 2007); *Onita Pacific Corp. v. Trustees of Bronson*, 315 Or. 149, 843 P.2d 890 (1992); *The Conveyor Company v. Sunsource Technology Services, Inc.*, 398 F. Supp. 2d 992 (N.D. Iowa 2005); *Perfumeria Ultra, S.A. de C.V. v. Miami Customs Service, Inc.*, 231 F. Supp. 2d 1218 (S.D. Fla. 2002). In the *Alejandre* opinion, the Washington Supreme Court stated that it was following the "overwhelming weight of authority from other jurisdictions." *Alejandre v. Bull*, 159 Wn. 2d 674, 688, 153 P.3d 864, 871 (2007).

It should also be noted that in discussing "special relationships" and the economic loss rule, it is well-settled that parties to an "arm's length transaction" do not have a special relationship. *See, e.g., Valley Forge Convention and Visitors Bureau v. Visitor's Services, Inc.*, 28 F. Supp. 2d 947 (E.D. Pa. 1998). Whether characterized as proving an exception to the economic loss rule or establishing an element, Washington law requires a plaintiff to prove the existence of a special duty in order to recover economic losses based on a claim of negligent misrepresentation. *See Van Dinter v. Orr*, 157 Wn. 2d 329, 334, 138 P.3d 608, 610 (2006).

Although counsel for the Fritzes did not use the phrase "economic loss rule" or cite to relevant case law, the challenge to the validity of the negligent misrepresentation claim and argument against application of the "special relationship" exception preserved this issue for appeal. Accordingly, the Court of Appeals should address this issue.

2. **All Assignments of Error Were Argued in the Opening Brief**

On page 1 of Respondents' Brief, the Bloors argue that the Fritzes did not present argument on Assignments of Error 9, 10, and 11 and that those Assignments of Error have been abandoned. These Assignments of Error relate to Findings of Fact concerning the alleged financial consequences claimed by the Bloors, including reduction in credit scores and resultant damages. Argument on these issues and the insufficiency of a causal connection between the conduct of the Fritzes and the decision by the Bloors not to pay their lawful debts was provided in the Appellants' Brief at pages 21 through 25. These Assignments of Error have been fully argued and were not abandoned.

3. Monetary Damages were Awarded Based on a Tort Theory and Not a Contract Theory

At page 33 of their Brief, the Bloors state that "the Fritzes argued that rescission and damages are inconsistent remedies, *arguments which they have not argued in their appeal brief and should be deemed abandoned*." (Emphasis in original). The Bloors claim is confusing because the trial court apparently concurred with the Fritzes' argument and the clear weight of authority that when rescission is ordered as a remedy for breach of contract, consequential and other monetary damages are not available. On the record, the trial court explicitly addressed the question of whether money damages were awarded based on tort or contract theory and made the following statement:

> I don't see the damages that [the Bloors] are claiming here as being an affirmance of the contract which has now been rescinded, and that is the general proposition that I get from reading the cases that are submitted by both sides here. They are not trying to get the benefit of the contract. They are trying to recover the consequences of the tort of the misrepresentation here. At least that's the way I interpreted it, that's the way I found it, and that's the way it's going to remain.

RP 1527-8. Thus, the court awarded rescission as the remedy on the Bloors contract claim and money damages as a remedy for the tort claim. (As stated above, *Alejandre v. Bull, supra*, provides damages should not have been awarded for the tort claim either.)

4. **Matters Outside the Record Should be Disregarded by This Court**

In footnotes 3, 6, 9, 10, and 11, the Bloors claim that although the property was purchased and the Bloors debt was extinguished, the rescission judgment somehow was not fully satisfied. There is no trial court record of these claims and the allegations are irrelevant and beyond the scope of review for this case. Where matters are raised that are outside of the record, appellate courts will not consider them. *See Weems v. North Franklin School District*, 109 Wn. App. 767, 779, 37 P.3d 354, 360 (2002). Accordingly, the Bloors claims should be disregarded.

B. THERE IS NO LEGAL AUTHORITY TO SUPPORT THE AWARD OF CONSEQUENTIAL DAMAGES

As noted above, the trial court awarded money damages to the Bloors based on the consequences of the tort of negligent misrepresentation. RP 1528. These damages are specified in footnote 4 of

the Bloors' Brief. Because the economic loss rule precludes recovery of damages for negligent misrepresentation and because there is no evidence to support any other tort, the award of money damages against the Fritzes must be reversed. *Alejandre v. Bull, supra.*

1. **The Economic Loss Rule Precludes Recovery**

As discussed in the Fritzes' Opening Brief, the economic loss rule applies to bar tort recovery when economic losses result from a contractual relationship between the parties. As discussed by the Supreme Court in *Alejandre*, "unless there is some recognized exception to the economic loss rule that applies," a negligence claim "cannot stand." *Alejandre*, 159 Wn. 2d at 685, 153 P.3d at 870. The only recognized exception is where there is a "special relationship" between the parties that creates an independent tort duty. Because this was an arm's length transaction, this exception does not apply.

The Bloors argue that the economic loss rule does not apply because their damages were not "economic losses." Economic losses are distinguished from personal injuries or property damage. *Alejandre* at 684, 153 P.3d at 869. In this case, the Bloors were awarded damages based on financial consequences that resulted from their lack of access to

their home, including the inability to recover personal property, and damages for emotional distress. The conduct of the Fritzes did not cause any physical injuries to the Bloors and did not cause any physical damage to the Bloors property. The crux of the Bloors' claims are that they would not have purchased the property if they had known that implements of a meth lab were discovered outside the residence and that they suffered financial consequences from their subsequent inability to use the property. Because there is no finding that the Fritzes caused physical damage to the Bloors property, it is clear that the Bloors sustained purely economic losses. Accordingly, based on *Alejandre* and Washington law, the award of damages based on negligent misrepresentation must be reversed.

2. **The Evidence Does not Support the Tort of Fraudulent Concealment**

Because the Bloors' negligent misrepresentation claim is barred by the economic loss rule, they have made an alternative claim that tort damages should be awarded based on alleged fraudulent concealment. Because there is no finding that the Fritzes had actual knowledge of meth contamination at the property, this claim must fail.

In their Brief, the Bloors correctly state the elements of a fraudulent concealment claim, as stated in the case of *Atherton Condominium Apartment Owners Ass'n v. Blume Development Co.*, 115 Wn. 2d 506, 524, 799 P.2d 250, 261 (1990). With respect to the element that the vendor of the property must have knowledge of the concealed defect, Washington law requires that the vendor must have "actual, subjective knowledge of the defect." *See Sloan v. Thompson*, 128 Wn. App. 776, 787, 115 P.3d 1009, 1014 (2005).

In this case, the claimed concealed defect was meth contamination of the property. Based on the findings of the trial court, the Bloors state, on page 39 of their Brief, that the meth contamination was dangerous to the health and safety of the occupants. However, there is no evidence that the Fritzes had "actual, subjective knowledge" of meth contamination at the property. Rather, the record clearly proves that meth contamination was not discovered until the Bloors conducted testing. FF XXXIII, XXXIV. On page 39 of their Brief, the Bloors state that "[t]he Fritzes knew of the prior meth manufacturing activity." It is not claimed that the Fritzes knew that the property was contaminated. Thus, because meth contamination is the only concealed defect upon which a claim could be

made and because there is no evidence that the Fritzes had "actual, subjective knowledge" of such contamination, the Bloors alternative theory of recovery is unsubstantiated.

Because there is no viable tort theory of recovery against the Fritzes, the award of money damages must be reversed.

C. THE AWARD OF ATTORNEY FEES MUST BE REVERSED

The trial court made the award of attorney fees a joint and several liability of the Fritz and realtor defendants, despite the different legal bases for the award and different claims. CP 45. Because there is no legal authority for a joint and several award of attorney fees and because the trial court did not individually apportion fees, its award must be reversed.

There is simply no legal authority for a joint and several award of attorney fees. Even where the underlying liability is joint and several and the authority for an award of fees is identical, as between the different defendants, a separate award is to be made. *See Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 145-6, 144 P.3d 1185, 1206 (2006). Additionally, as required by *Kastanis*, where attorney fees are allowed with respect to work done on unsuccessful claims, the trial court must make an express finding that the successful and unsuccessful claims are

inseparable. *Katanis v. Educational Employees Credit Union*, 122 Wn. 2d 483, 502, 859 P.2d 26, 36 (1994). Here, no such finding was made. Accordingly, the Fritzes should only be required to pay those attorney fees that are associated with the contract claim made against them.

Thus, the joint and several attorney fee award should be reversed and the trial court should be directed to determine the amount of attorney fees that are directly related to the contract claim.

CONCLUSION

The judgment in favor of Plaintiffs should be reversed for the reasons identified in the Fritzes' Opening Brief, as well as those discussed above. Additionally, the Fritzes are entitled to an award of their attorney fees.

DATED this 2nd day of October, 2007.

LEHNER & RODRIGUES PC

By _____
Michael A. Lehner, WSB #14189
Of Attorneys for Appellants Fritz

CERTIFICATE OF SERVICE

I hereby certify that the original and 1 copy of **REPLY BRIEF OF APPELLANTS FRITZ** was filed with the State Court Administrator on October 2, 2007, by depositing the same in the United States mail in Portland, Oregon, enclosed in a sealed envelope with first-class postage thereon fully prepaid and addressed as follows:

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I hereby certify that I served a true copy of the foregoing **REPLY BRIEF OF APPELLANTS FRITZ** on:

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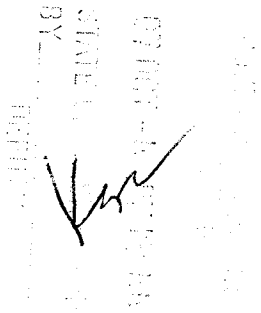

[√] by causing a full, true and correct copy thereof to be **MAILED** in a sealed, postage-paid enveloped, addressed as shown above, which is the last-known address for the party's office, and deposited with the U.S. Postal Service at Portland, Oregon, on the date set forth below;

DATED this 2nd day of October, 2007.

LEHNER & RODRIGUES PC

By _____
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