68067-6

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No. 68067-6-I

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION I

SHANE and AMY WATTS,

Respondents,

v.

MARY DUNPHY and MARK DUNPHY,

Appellants.

REPLY BRIEF OF APPELLANTS

Matthew F. Davis WSBA #20939
DEMCO LAW FIRM, P.S.
5224 Wilson Avenue South, Suite 200
Seattle, WA 98118
(206)203-6000

ORIGINAL

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I. INTRODUCTION

The Watts' Response Brief tells a very different story than the established facts in this case. This was a trial to the court, and Judge Lum made Findings of Fact at the end of the case. The "facts" in this case are those found by Judge Lum, not the things that witnesses said during trial. Judge Lum may or may not have believed the things that the witnesses said in testimony, which is why "the absence of a finding of fact is to be interpreted as a finding against" the party with the burden of proof. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wash. 2d 514, 524, 22 P.3d 795, 800 (2001). Unless adopted by Judge Lum in his findings or the admission of a party, trial testimony has no place in this appeal.

Judge Lum found that "the Watts did receive the Homeowner's Association meeting minutes and had the opportunity to read them, and in fact did read them enough to comment on the parking situation." CP 66 at ¶ u. Those minutes discuss the very problems that are at issue in this case. The question here is whether that finding bars a claim for matters identified in the meeting minutes.

Judge Lum concluded as a matter of law that that minutes were insufficient to put the Watts on notice of the defects: "Although the words 'defect', 'envelope studies', 'investigation', and 'defect attorney' were mentioned several times, there is no context or explanation for the brief

references buried in a maze of other irrelevant information." CP 68 at ¶ 3.4(5).

If accepted, Judge Lum's reasoning would add a whole new layer to misrepresentation and concealment cases. Every plaintiff could escape summary judgment by asserting that notice of the defect lacked sufficient "context." The objective legal standard of buyer diligence would be replaced by a subjective standard for each buyer. First time buyers would have one standard, and experienced buyers another. This court should reaffirm the objective standard established by countless cases and rever the trial court's decision.

II. RESPONSE TO RESPONDENTS' ISSUES

1. Whether the Watts received and read the minutes was a question of fact, but whether the minutes put the Watts on notice of the defects was question of law once it was established that the Watts received and read them.
2. The trial court did err when it found as a matter of law that the meeting minutes were insufficient to put the Watts on notice of the defects referenced in the minutes.
3. The Watts' right to rely was intrinsically tied to their diligence, and the Watt's lack of diligence bars their claims.

III. FACTUAL BACKGROUND

As set forth above, the Watts' reliance on trial testimony is improper and should be disregarded. The Dunphys move the Court to strike all references to the trial testimony. RAP 17.4(d). If, however, the Court does consider the trial testimony, it should be fully informed.

The Watts claim that they were inexperienced buyers. However, they were represented by Jean Letellier, who has been a real estate broker since 1997. RP (10/17/11) at 22. Letellier was familiar with the Resale Certificate, which she called "kind of an elaborate Form 17." RP (10/17/11) at 25. Letellier included an addendum in the purchase and sale agreement giving the Watts a separate contingency to inspect the homeowner minutes and told the Watts that they were important. RP (10/17/11) at 45.

The Watts claim that if they had asked the Board President, Craig Cleaver, what the major problems were, he would have told them "landscaping and parking, NOT the inspection." Response Brief at 7. They then claim that: "The only person who really, beyond question, understood the magnitude of the problem was Mary Dunphy." *Id.* The Watts cite no portion of the record for either assertion because these assertions are completely made up.

The Watts claim that the meeting minutes are not notice because: "They are not flagged or otherwise identified as inspections." Response Brief at 9. That is false. The minutes were the subject of a separate inspection contingency that the Watts' own agent inserted into the agreement.

> Q. If we look at the second page on paragraph 11 under Condominium/Cooperative/PUD/Homeowner's Association/Private Maintenance Associations Meeting Minutes," the agreement says that if it's for the purchase of a condominium, then it's subject to, "the seller shall provide buyer notice with a copy of the following documents that are available from the association, and number one, the minutes of the prior two years meetings; two, the minutes of the prior six months meetings of the association board; and three, financial statements."
>
> The minutes say "These documents shall be provided with the Condominium Resale Certificate or within five days." It gave them a contingency of five days to terminate the transaction if they were unhappy, right?
>
> A. Yes.
>
> Q. So, you would have explained this provision to the Watts when they made their offer?
>
> A. Yes.
>
> Q. And Coldwell Banker Bain considers the buyers obtaining the meeting minutes from both the association and the board so important that even though the resale certificate always requires it, they put it in their own addendum, right?]
>
> A. Yes.
>
> Q. Did you emphasize to the Watts how important that was?
>
> A. I believe I would have.

RP (10/17/11) at 44-45 (Letellier testimony)

The Watts argue that the minutes did not put them on notice because "The Minutes Had Mentions of Inspections Buried in A Sea of Other Problems." Response Brief at 16 (as in original). They make it sound as if they would have had to pore through boxes of documents to find the references to the defects. In truth, as they admit, the minutes "consist of 33 pages, covering July 2006 through December 2007," and "[t]here are 25 pages of minutes in the relevant period." Brief of Respondent at 10-11. It would be quite a feat to "bury" references to defects in 33 pages of documents.

Finally the Watts disregard their own trial testimony regarding the minutes, which is about the only part of the trial testimony with any significance in this appeal. The Watts cannot deny their admissions in trial testimony, and that testimony makes it abundantly clear that if the Watts had exercised any diligence at all, the meeting minutes would have put them on notice of the defects.

Q. If we turn to October, 2006, page 7, there are two sentences. One says "The owners and board are showing their frustration with overdue projects." It's sort of stand alone in the middle. Do you see that?
A. Yes.
Q. Four lines down from that, "Concerns about the moisture barrier under siding." Do you see that?
A. Yes.
Q. Now, if Mary Dunphy had put in Form 17 that an inspector had concerns about the moisture barrier under the siding of her unit, would that have put you on notice?
A. Yes; because she would have made a note about it.
Q. But, the meeting minutes saying that there were concerns

about the moisture barrier under siding wouldn't cause you concern?

A. Because the general homeowner meeting minutes is not really specific. If it's noted on hers, it would have been called to our attention.

Q. If you would turn to page 11, which is the February 13th special meeting?

A. Okay.

Q. This talks about the envelope study and Mark Cress, in paragraph two, "Mark Cress presented his findings with photo of the property which included siding, moisture barrier," and then in paragraph five it says "David Onsager (another attorney) at Stafford Frie Law Firm was mentioned as another option." None of this would have given you any concerns about this study and lawyers being involved?

A. I am not quite sure what the envelope study was.

Q. If, in fact, if you had read the minutes and wanted to know what an envelope study was, you could have simply called the property manager, right?

A. If I wanted to know what it was, yeah.

Q. And that would be a prudent thing to do if it's mentioned in the meeting minute, wouldn't it?

A. I would think so.

Q. And then if we quickly take a look at the July minutes, on page 23, of the July 12, 2007 minutes, and paragraph that stands alone in the middle, it says:

"Bill from Corke Amento, inspectors for envelope inspection, came in at $9,350."

Then it says:

"David Onsager, defect attorney, has billed us $1,792 for 5.6 hours of work."

Do you see that?

A. Yes.

Q. If you read that, that would you have put you on notice that there was a defect attorney?

A. I know he is a defect attorney. I can't really speculate to what I have would done back then. I know a lot more now. We were first time homeowners.

Transcript (10/18/11) at 322-24 (Amy Watts).

Q. Is it fair to say that if you had read the minutes with reasonable diligence, that you would have understood that there were concerns about the moisture barrier and that there were studies being done that concerned it?

A. If I had read the minutes, I think it's fair to say that I would be aware that there were issues about all kinds of things.

Q. That would include the moisture barrier, and you would have known that the study was undergoing, and they were waiting for the report, right?
A. I suppose so. I would add that I didn't really understand what a moisture barrier was at the time.

Transcript (10/18/11) at 335-36 (Shane Watts). The Watts had the meeting minutes. They had a special contractual contingency for their review and approval of the minutes. Discovering the defects did not require extraordinary diligence; it required only reading the documents that they had in hand.

IV. LEGAL ANALYSIS

A. Standard of Review.

According to the Watts, whether the minutes put them on notice of the defects is a question of fact and can only be reviewed for substantial evidence. Respondent's Brief at 13. If that were true then numerous Washington cases were wrongly decided.

In *Alejandre v. Bull*, 159 Wash. 2d 674, 679, 153 P.3d 864, 866 (2007), for example, the Supreme Court held as a matter of law that the buyer was on notice of septic system defects because "[t]he bill stated on it that the septic system's back baffle could not be inspected."

In *Jackowski v. Borchelt*, 151 Wash. App. 1, 8, 17-18, 209 P.3d 514, 517 (2009) *aff'd*, 174 Wash. 2d 720, 278 P.3d 1100 (2012), the Court held as a matter of law that that a buyer who received a letter stating that

landslide hazard areas were present on a property could not bring a claim over landslides.

In *Williams v. Joslin*, 65 Wash. 2d 696, 698, 399 P.2d 308, 309 (1965), the buyer of a motel obtained a judgment against the seller of a motel for oral misrepresentations of the income from the property. The Supreme Court reversed because the buyer was given documents contradicting those representations.

> However, we think the appellants are correct in their contention that the evidence did not support a finding that the respondent relied upon the representation. The rule is that such reliance must be reasonable under the circumstances, that is, a party may not be heard to say that he relied upon a representation when he had no right to do so. *Puget Sound Nat. Bank v. McMahon*, 53 Wash.2d 51, 330 P.2d 559. We said in that case, quoting from 23 Am.Jur. 948:
>
> > "The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him."
>
> The parties to this action dealt at arms length; the appellant asked to be shown the record of receipts and was shown them, and they revealed that the oral representation was false. Since the evidence of the actual receipts was before the respondent, he had no right to rely upon any oral representation that contradicted it.

Id. at 698. Here, since the actual meeting minutes were before the Watts, and since the Watts actually read them, they had no right to rely on any contrary to statements or beliefs.

In *Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, 51 Wash. App. 209, 215, 752 P.2d 1353, 1356 (1988), the Court held that where a buyer uncovered some evidence of water leaks, it was on notice of all leaks that a diligent investigation would uncover as a matter of law.

The flaw in the Watts' argument is their failure to distinguish between actual notice and constructive notice. As a general rule in just about every context, the adequacy of notice is a mixed question of law and fact that the Court of Appeals reviews *de novo*. *Speelman v. Bellingham/Whatcom County Hous. Authorities*, 167 Wash. App. 624, 630, 273 P.3d 1035, 1039 (2012) ("The adequacy of notice is a mixed question of law and fact, which we review de novo.") (notice of termination of Section 8 housing).

What information the Watts had was a question of fact. If the trial court's determination in that regard were disputed, it would be reviewed for substantial evidence. *Dickson v. Kates*, 132 Wash. App. 724, 736, 133 P.3d 498, 504 (2006). The trial court's determination of what information the Watts actually had is not disputed.

Whether the facts as found by the trial court gave the plaintiff constructive notice of a defect or fact is the legal part of the mixed question and is reviewed *de novo*.

> The Bank's contention is only partly true, and the cited cases do not support its position. Glidden refers only briefly, without discussion or citation of authority, to "the questions of fact." 111 Wash.2d at 350, 685 P.2d 1074. *Miebach* refers to the issue as involving a mixed question of law and fact. 102 Wash.2d at 175, 685 P.2d 1074. Analysis of these and other cases reveals that what the purchaser knew is, indeed, a question of fact, but the legal significance of what he knew is a question of law. *See e.g., Field v. Copping, Agnew & Scales,* 65 Wash. 359, 118 P. 329 (1911) (finding that appellant did not know of a possessor's claim an erroneous conclusion of law in view of the physical facts).

Peoples Nat. Bank of Washington v. Birney's Enterprises, Inc., 54 Wash. App. 668, 674, 775 P.2d 466, 469 (1989).

The question presented here is no different from that in *Jackowski*, *Alejandre*, *Williams* and *Dalarna*. In light of what the Watts actually knew (the meeting minutes), are they deemed as a matter of law to have constructive notice of the defects at issue in this case?

> That notice "'need not be actual, nor amount to full knowledge ...'". *Miebach*, 102 Wash.2d at 175, 685 P.2d 1074 (quoting *Daly v. Rizzutto*, 59 Wash. 62, 65, 109 P. 276 (1910)).
>
> > "It is a well-settled rule that where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question, the purchaser will be held chargeable with knowledge thereof and will not be heard to say that he did not actually know of them. In other words, knowledge of facts sufficient to

> excite inquiry is constructive notice of all that the inquiry would have disclosed."
>
> (Citation omitted.) *Miebach,* 102 Wash.2d at 175–76, 685 P.2d 1074 (quoting *Peterson v. Weist*, 48 Wash. 339, 341, 93 P. 519 (1908)). *See also Mahon v. Haas*, 2 Wash.App. 560, 468 P.2d 713 (1970) (a successor-in-interest to an owner of a servient estate takes the estate subject to the easement if the successor has actual, constructive, or implied notice of the easement).

Kirk v. Tomulty, 66 Wash. App. 231, 239-40, 831 P.2d 792, 797 (1992). When courts discuss a "rule" under which the buyer is "held chargeable" with knowledge, it is discussing a rule of law, which this Court reviews *de novo*.

B. *Alejandre* Is Controlling and Indistinguishable.

The Watts claim that *Alejandre* is distinguishable from this case because:

> The buyer had been told earlier the septic system had had a problem. The homeowner had the septic system inspected, for that home specifically. The buyer was provided records of a septic tank report that said their tank could not be inspected. But it was just one home, theirs; it was one septic tank, belonging to their home; they knew there was a potential problem with their home alone.

These claims simply are not true or relevant.

First, the seller in *Alejandre* did not disclose problems with the septic system. She said that "'Walt Johnson Jr. replaced broken line between house and septic tank,' and she answered 'no' to the inquiry

whether there were any defects in operation of the septic system." *Alejandre v. Bull*, 159 Wash. 2d 674, 679, 153 P.3d 864, 866 (2007). The seller in *Alejandre* expressly represented in the Disclosure Statement that the septic system had no defects. In truth, before the seller listed the home, another septic inspector told her "that the drain fields were not working and that she needed to connect to the city's sewer system." *Id.* at 680. In other words, the seller in *Alejandre* flatly lied in the Disclosure Statement.

The Watts next say that the buyer in *Alejandre* had the septic system inspected. Not true. The system was pumped by the seller, and the pumping "bill stated on it that the septic system's back baffle could not be inspected but there was '[n]o obvious malfunction of the system at time of work done.'" *Id.* at 678, 679.

The Watts mischaracterize the statement on the bill as saying that "their tank could not be inspected." That is not what it said. It said only that the back baffles could not be inspected, but it also said that the system appeared to be working. *Id.* In addition, the appraiser stated that the system performed its intended function. *Id.* at 680. The buyer in *Alejandre* had nothing even remotely approaching the homeowner meeting minutes that the Watts had.

Finally, the Watts make some distinction that *Alejandre* concerned a single family home, while this case concerns a condominium. That is a distinction without a difference. Both sales were subject to the same Disclosure Statement requirement. RCW 64.06.020.

C. Judge Lum Erred.

There are many kinds of errors made by trial courts, and just as many different reactions to them. In this case, Judge Lum knew that the Dunphys considered the meeting minutes to be a legal defense to the claim, and he knew that any decision against the Dunphys would be appealed. To his great credit, he did not hedge his ruling or omit a finding about whether the Watts read the minutes. He disagreed with the Dunphys about the legal consequence of the meeting minutes, but he preserved the issue for appeal and framed it as clearly as he could.

Judge Lum's reaction was understandable, if legally incorrect. He found that Mary Dunphy concealed and/or misrepresented the condition of the property. Many, if not most, people would think that sufficient to award the Watts compensation. But finding that Dunphy concealed or misrepresented the property is no more a basis to rule for the Watts than it was in *Alejandre*, where the seller misrepresented the septic system.

Under Washington law, it simply is not enough to show that the seller was dishonest. The buyers also must prove, as an element of their

claim, that they were entitled to rely on the misrepresentation or could not have discovered the concealed defect. As the Court said in *Alejandre*:

> However, the fraudulent concealment claim fails because, as the trial court ruled, the Alejandres failed to present sufficient evidence to support the claim. Under *Obde*, 56 Wash.2d 449, 353 P.2d 672, and similar cases, the vendor's duty to speak arises (1) where the residential dwelling has a concealed defect; (2) the vendor has knowledge of the defect; (3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect is unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser. *Atherton*, 115 Wash.2d at 524, 799 P.2d 250. **The Alejandres failed to meet their burden of showing that the defect in the septic system would not have been discovered through a reasonably diligent inspection**. . . . .
>
> Next, insofar as the Alejandres have asserted common law fraud theories, they have failed to present sufficient evidence of the nine elements of fraud. *See Williams v. Joslin*, 65 Wash.2d 696, 697, 399 P.2d 308 (1965). In particular, they have failed to present sufficient evidence as to the right to rely on the allegedly fraudulent representations about the condition of the septic service. The "right to rely" element of fraud is intrinsically linked to the duty of the one to whom the representations are made to exercise diligence with regard to those representations. Id. at 698, 399 P.2d 308; *Puget Sound Nat'l Bank v. McMahon*, 53 Wash.2d 51, 54, 330 P.2d 559 (1958). As explained, the Alejandres were on notice that the septic system had not been completely inspected but failed to conduct any further investigation and indeed, accepted the findings of an incomplete inspection report. Having failed to exercise the diligence required, **they were unable to present sufficient evidence of a right to rely on the allegedly fraudulent representations**

Alejandre, 159 Wash. 2d at 689-990 (emphasis added).

Like many trial court judges, Judge Lum effectively treated the question of constructive notice from the meeting minutes as an affirmative defense on which the seller would have the burden of proof. But the right to rely and inability to discover the defects are not affirmative defenses; they are elements of the claim that the plaintiff must prove by clear, cogent and convincing evidence.

Because actual knowledge is the factual component of notice, Judge Lum's decision could only be challenged in that respect for lack of substantial evidence. The Dunphys have accepted Judge Lum's factual findings and are not disputing his findings with regard to actual knowledge.

However, Judge Lum's determination regarding constructive knowledge is a question of law. This Court reviews that determination *de novo* under the standards set forth in *Alejandre* and other cases. It bears pointing out that *Alejandre* was an appeal from a dismissal in a jury trial at the close of the plaintiff's case. The standard for granting a motion to dismiss a jury trial under CR 50 is "when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Sing v. John L. Scott, Inc.*, 134 Wash.2d 24, 29, 948 P.2d 816 (1997). It arguably is the most deferential standard of

review in the law. *Alejandre* affirmed a CR 50 dismissal in a case where the seller lied about her septic system because the bill for pumping the septic system said that the back baffles could not be inspected. Under that standard, this is not a close case.

V. CONCLUSION

One of this Court's most important functions is to enforce the law even when the outcome may be unpopular or unsatisfying. This is where convicted criminals come to seek their freedom based on what others call a "technicality." It is where the jury instruction about all parties being equal before the law comes to life. It is where litigants can get their day in court when they don't think they did at the trial level.

Under Washington law, "[t]he 'right to rely' element of fraud is intrinsically linked to the duty of the one to whom the representations are made to exercise diligence with regard to those representations." *Alejandre*, 158 Wash.2d at 690. No matter how sympathetic they make themselves appear, the Watts did not exercise the diligence required of them before they can prove fraud or fraudulent concealment. Because they cannot prove their case, this Court should reverse and remand for entry of an order dismissing their claim.

Lastly, the Court should award Dunphy attorney fees under the purchase and sale agreement. Attorney fees on appeal should be determined by the trial court. RAP 18.1(i).

DATED this 18th day of February, 2013.

DEMCO LAW FIRM, P.S.

Matthew F. Davis, WSBA No. 20939
Attorneys for appellant

DECLARATION OF SERVICE

I, Linda Fierro, state: On February 19, 2013, I caused to be delivered by ABC Legal Messengers appellants' REPLY BRIEF OF APPELLANTS for delivery on February 20, 2013 to the Court of Appeals Division I and to

CRAIG JONATHAN HANSEN
HANSEN LAW GROUP, P.S.
12000 NE 8TH, STE. 202
BELLEVUE, WA 98005-3193

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 19th day of February, 2013 at Seattle, Washington.

Linda Fierro

Linda Fierro