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No. 642448

COURT OF APPEALS
DIVISION I
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JAMES H. JACKSON and C.R. HENDRICK,
a marital community,

Plaintiff-Appellants,

v

TRENCHLESS CONSTRUCTION SERVICES, L.L.C., a Washington
Limited Liability Company, and QPS, INC., a Washington Corporation
doing business as "QUALITY PLUMBING",

Defendants-Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Michael Trickey)

RESPONDENTS' *AMENDED* SUPPLEMENTAL BRIEF
REGARDING *BORISH V. RUSSELL*

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I. INTRODUCTION

Respondents owe no duty to Appellants. No matter how Appellants seek to describe their claim, the only way they can conjure any duty owed by Respondents to Appellants individually is under a contract theory of recovery. The Economic Loss Rule (“ELR”) and the principles of contract law prohibit appellants from obtaining tort damages in a contract theory of recovery. *Borish v. Russell* does not affect the application of the ELR under the facts of this case.

II. ARGUMENT

A. The ELR Maintains Essential Boundaries between Tort and Contract Law

Appellants’ misapplication of one sentence in *Borish v. Russell* 2010 WL 1756699 (2010) to the facts of the present case effectively annihilates the boundaries between tort and contract law. The Washington Supreme Court in *Alejandro v. Bull*, 159 Wn.2d 674 (2007) carefully chronicled the development of the ELR, and explained the purpose and importance of the rule in relation to public policy and the preservation of contract law.

The ELR holds parties to their contract remedies when a loss potentially implicates both tort and contract relief. *Id.* It is well-established that tort law is not intended to compensate parties for losses suffered as a result of a breach of contract. *Id.* at 682. The *Alejandro* court

explained that tort law is concerned with the obligations imposed by law, rather than by bargain; while contract law carries out an “expectation-bargain protection policy” that protects expectation interests, and provides an appropriate set of rules when an individual bargains for a product of particular quality or for a particular use. *Id.* at 682.

The ELR is a bright line distinction between remedies offered in contract and tort to maintain essential boundaries of tort and contract law. *Id.* This ensures that the allocation of risk and the determination of potential future liability are based on what the parties bargained for in the contract. *Id.* If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. *Id.* at 683.

Furthermore, Washington law follows the sound principle that when parties’ difficulties arise directly from a contractual relationship, the resulting litigation concerning those difficulties is one in contract no matter what words the plaintiff may wish to use to describe it. *Id.* at 683.

B. Appellants Should Not be Allowed to Circumvent the Economic Loss Rule

The purpose of the ELR is clear: to uphold the most cherished virtue of contract law – the power of the parties to allocate the risks of their own transactions. *Alejandre, supra*, at 688.

It is at odds with the pillars of contract law to require that Respondents become guarantors to future-purchasers not party to the contract with the previous homeowner. If this were the case, Respondents could contract to limit liability for defects with the original homeowner and then find itself liable for the same defects to a future purchaser with whom they had absolutely no contact. *See Stuart v. Coldwell Banker Comm'l Group, Inc.*, 109 Wn.2d 406, 421 P.2d 1284 (1987). The Washington Supreme Court in *Stuart* refused to allow negligent construction claims for precisely this reason.

The *Alejandre* concurrence underscores this point: “[o]ne way we have prevented the death of contract is through the economic loss rule. It prevents one party to a contract from rewriting the damage provisions after a breach by styling the case in tort.” *Id.* at 694. Appellants are likewise prevented from asserting liability by styling the case in tort and then defining their duty based on contract.

Respondents contracted with the prior homeowner to allocate risk and determine potential future liability based on the parties’ bargained for exchange. Appellants had every opportunity to do the same in the purchase and sale of their home. The ELR and the tenets of contract law limit contractual remedies in cases like this. The decision in *Borish* does not obliterate these underlying principles.

C. *Borish v. Russell* has no Application

In *Borish v. Russell* there was no contract defining the duties of the parties. *Borish v. Russell*, 2010 WL 1756699 (2010). Here, there *is* a clear and valid contract – Trenchless’s duty of performance was governed by a contract with the prior homeowner. If it was breached, the prior homeowner had a remedy. Trenchless had no additional legal duty to Appellants.

Furthermore, the statement Appellants pluck from *Borish* does not constitute precedent. *See Webster v. Fall*, 206 U.S. 507, 511 (1925) (questions which lurk in the record, but are neither brought to a court’s attention nor ruled upon are not considered to have been decided so as to constitute precedent). *Borish* is not dispositive of the issue before the court because there is no discussion of the legal theory at issue in the present case.¹ The Division Two Court of Appeals decision in *Borish v. Russell* does not undermine the principles of contract law or dispose of the ELR. In fact, the *Borish* decision adheres to the wisdom set for in *Alejandre* by honoring the bright line boundary between contract and tort.

The idea that privity of contract is required for application of the ELR is flatly rejected in *Berschauer/Phillips v. Seattle School Dist.*, 124

¹ In fact, the issue we face today has been certified by the U.S. Court of Appeals for the Ninth Circuit to the Washington State Supreme Court. *See Affiliated FM Insurance Co. v. LTK Consulting Services Inc.*, No. 82738-9, Wash. (decision pending oral argument heard on October 20, 2009) (on certified question from the U.S. Court of Appeals for the Ninth Circuit, Case No. 07-35696).

Wn.2d 816 (1994). The court in *Berschauer* explicitly held that the ELR applies to plaintiffs who are not in privity with the defendant, but who seek economic damages from an alleged breach of contract between the defendant and a third party. Washington law holds that the ELR bars claims in tort where the defendant's duty of performance arises solely from a contract, and the plaintiff claims economic injury from inadequate performance under the contract. *Id.* Just like *Berschauer*, the ELR here bars Appellant's tort action against Respondents.

Unlike the valid negligent misrepresentation claim put forth in *Borish*, Appellants claim for negligent construction is not a recognized cause of action in Washington. *Stuart v. Coldwell Banker*, 109 Wn.2d 406 (1987). The *Borish* plaintiffs sought tort damages arising out of a negligent representation claim, where there was no contract defining the duties of the defendant; no such tort damages exist in our case. Here, Respondents had no duties independent of their contract with the prior homeowner and they have failed to articulate any other duty owed that was breached. Any damages asserted clearly fall on the contract side of the line as an amount of economic disappointment. Tort law is not intended to compensate parties for losses suffered by an alleged breach of contract. *Alejandre, supra*, at 682.

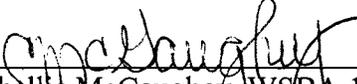
As a matter of public policy, tort remedies should not be used to fill gaps in commercial relationships so as to interfere with the freedom to contract. Absence of privity of contract between Appellants and Respondents is not a reason to abandon the ELR. In fact, it is a reason to embrace it. Appellants had ample opportunity to allocate risk in their purchase and sale agreement, but failed to do so. Respondents should not be punished for Appellants' buyers' remorse, failure to exercise due diligence, seek remedies through the prior seller or acknowledge the 100 year storm wreaking havoc on many.

II. CONCLUSION

Borish does not affect the application of the ELR under the facts of this case. No matter how Appellants seek to describe their claim, they are incapable of articulating a claim in tort. There was no duty owed plaintiff. Respondents assumed duties under its contract with the prior homeowner. The ELR and the principles of contract law prohibit appellants from obtaining tort damages in a contract theory of recovery.

DATED this 9th day of July, 2010.

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