

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 MAR -5 A 10: 41

BY RONALD R. CARY ET AL.

CLERK *bjh*

DO 37596-6-II

No.: 81520-8

SUPREME COURT
OF THE STATE OF WASHINGTON

RICHARD and PENNY
BORISH,

Appellants

v.

KEITH R. and JODI T.
OLSON; and KRISTY M.
RUSSELL and JOHN DOE,

Respondents;
and

JOHN L. SCOTT, INC.;
KIMBERLY GARTLAND
and JOHN DOE
GARTLAND; STEPHEN
BONO and JANE DOE
BONO; and JIM O'BRIEN,
and JANE DOE O'BRIEN,

Defendants

No. 81520-8

Ct of Appeals No. 375966

Sup Ct No. 06-2-04562-4

REPLY BRIEF OF APPELLANTS RICHARD AND PENNY BORISH

Matthew F. Davis, WSBA 20939
Demco Law Firm
5224 Wilson Ave. S., Suite 200
Seattle, WA 98118
206-203-6000

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

I. INTRODUCTION1

II. LEGAL ANALYSIS.....1

A. Reply to Olson1

B. Reply to Russell.....3

1. The Standard of Review is *de Novo*4

2. The Motion for Direct Review Should Be Granted.....5

3. The Court Should Reject New Arguments on Appeal.....6

a. Russell’s Intention to Guide the Borishes7

b. Negligence in Obtaining or Communicating
Information7

c. Reasonable Reliance Information7

d. Proximate Cause7

4. The Borishes Had No Contract With Russell8

5. The Jury Verdict for the Olsons is Irrelevant
to the Claims Against Russell9

III. CONCLUSION9

TABLE OF AUTHORITIES

STATE CASES

Alejandre v. Bull, 159 Wn.2d 674, 686, 153 P.3d 864 (2007).....1, 2, 3, 5, 6

Allen v. Asbestos Corp., Ltd., 138 Wn.App. 564, 157 P.3d 406.....8

Carlile v. Harbour Homes, Inc., 147 Wash. App. 193, 194 P.3d
2804, 5

ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 959 P.2d
6513

Hisle v. Todd Pacific Shipyards Corp., 151 Wn.2d 853, 93 P.3d
1082, 4, 9

Lawyers Title Insurance Corp. v. Baik, 147 Wn.2d 536, 55 P.3d
6192

Phinney v. Hubbard, 2 Wash.Terr. 369, 8 P. 5335

Schaaf v. Highfield, 127 Wn.2d 17, 896 P.2d 665.....5, 7, 9

Weber v. Associated Surgeons, P.S., 146 Wn.App. 62, 189 P.3d
8178

Wilson Court Ltd. Partnership v. Tony Maroni's, Inc., 134 Wash.
2d 692, 952 P.2d 5904, 6

STATE STATUTES

RCW Chapter 4.22.....3

I. INTRODUCTION

The briefs of respondents Olson and Russell are neither responsive nor helpful. Neither brief offers an argument to reconcile *Alejandre v. Bell*, 159 Wn. 2d 674, 153 P.3d 864, with countless cases recognizing a claim for economic loss resulting from negligent misrepresentation or even addresses the substance of this appeal.

II. LEGAL ANALYSIS

A. Reply to Olson

The Olsons make only two arguments: first, that the trial court's decision was consistent with *Alejandre*, and second, that the jury's rejection of a fraud claim bars a claim for negligent misrepresentation. The first argument is certainly true. This appeal plainly asks this Court to reverse its holding in *Alejandre*. Aside from asserting that "[t]he analysis in *Alejandre* is sound and need not be reiterated here" (Olsons' Brief at page 5), the Olsons do not even attempt to address the merits of the appeal.

The Olsons further argue that the jury verdict in their favor on the fraud and fraudulent concealment claims bars any claims for negligent misrepresentation. As a preliminary matter, there can be no question that the jury's findings are binding on the Borishes under the doctrine of *res judicata*, but only with respect to the same "subject matter, cause of

action, people and parties.” *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 866, 93 P.3d 108, 115 (2004). The party asserting *res judicata* bears the burden of proof. *Id.* at 865.

Here, the trial court dismissed the claim for negligent misrepresentation and permitted the claim for fraud to go to trial. They are not the same claim. The only effort that the Olsons make to argue for sameness is their assertion that: “Justifiable reliance is an essential element of both fraud and negligent misrepresentation claims.” Olsons’ Brief at page 8. That statement is both incorrect and beside the point.

The Olsons cite *Alejandre* as authority that justifiable reliance is an element of both fraud and negligent misrepresentation, but do not refer to any particular portion of the opinion. The *Alejandre* court did not discuss justifiable reliance as an element of negligent misrepresentation. Instead, the Court held that, as an element of fraud or fraudulent concealment, the plaintiff must establish a right to rely in the representation, which means that the plaintiff had exercised diligence with regard to the representations. *Id.* at 690.

For negligent misrepresentation claims, the question instead is whether the reliance was reasonable under the circumstances. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619, 624 (2002). Moreover, the plaintiff’s reliance for a negligent misrepresentation claim

is subject to comparative fault under RCW Chapter 4.22. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 830, 959 P.2d 651, 655 (1998).

In short, the jury found that the Borishes did not have the right to rely on unidentified misrepresentations knowingly made by the Olsons. CP 570. That finding has no bearing on the question whether the Borishes justifiably relied on false statements that the Olsons made negligently. It therefore is not surprising that the Olsons offer no authority whatsoever for *res judicata*.

B. Reply to Russell.

While the Olsons' brief makes no substantive arguments, Russell's brief tries to raise every conceivable issue, often contradicting itself. In the span of two pages, Russell argues both that "the economic loss rule precludes any recovery under a negligent misrepresentation theory" (Russell's Brief at 16) and that "*Alejandre* does not explicitly or implicitly overrule negligent misrepresentation case law." Both of these statements cannot be true. Russell argues that the jury's verdict must be given great weight, but fails to acknowledge that the jury was not presented with any of the claims or evidence against her. Russell's Brief at 13-14. Most importantly, Russell makes no effort to explain or justify the *Alejandre* decision except by citing *Alejandre* itself.

1. The Standard of Review is *de Novo*.

It is not entirely clear what Russell intends with her arguments concerning the standard of review in this case. The standard of review for summary judgment is *de novo*. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wash.2d 692, 698, 952 P.2d 590 (1998).

With regard to RAP 4.2, this Court has already heard briefing on the grounds for direct review and instructed the parties to brief this appeal to this Court. The fact that Division One of the Court of Appeals has not relied on *Alejandre* to bar claims for fraud speaks for itself in terms of both conflict with prior law and the importance of the issue raised in this appeal. *Carlile v. Harbour Homes, Inc.*, 147 Wash.App. 193, 194 P.3d 280 (2008).

With regard to deference for the jury verdict, Russell was not a party at the trial, the jury heard no evidence about the claim against Russell, and the theories at trial were completely different. The jury's verdict on a different claim against a different party has no bearing on the appeal of Russell's summary judgment. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 866, 93 P.3d 108, 115 (2004).

2. The Motion for Direct Review Should Be Granted.

In *Schaaf v. Highfield*, 127 Wn.2d 17, 22, 896 P.2d 665, 668 (1995), this Court recognized a negligent misrepresentation claim against an appraiser. *Alejandre* silently overrules that case.

Since at least 1885, Washington courts have recognized a claim for economic damages resulting from fraud. See *Phinney v. Hubbard*, 2 Wash.Terr. 369, 375, 8 P. 533, 535 (1885). Simply applying the plain language of *Alejandre*, Division One has now held that “there is no reason here to exempt an intentional misrepresentation claim from the general exclusion of tort-based claims under the rationale of the economic loss rule.” *Carlile v. Harbour Homes, Inc.*, 147 Wn.App. 193, 205, 194 P.3d 280, 286 (2008). Unless a claim for personal injury or property damage resulting from fraud or negligent misrepresentation could be concocted, those claims no longer exist.

Courts will next be confronted with arguments that the economic loss rule precludes claims for economic damages from professional malpractice, and the sweeping holding in *Alejandre* permits no exceptions. Whether or not the change in the law is harmful, it is deep and extensive. Nothing in *Alejandre* suggests that the Court anticipated these effects.

It is true that *Alejandre* is only two years old, but if this Court is to change the course of the law or even to clarify and reaffirm it, the time to

do so is now. One need only read the decisions following *Alejandre* to see that the courts of appeal already are struggling with *Alejandre* and producing inconsistent interpretations.

3. The Court Should Reject New Arguments on Appeal.

It is, of course, true that this Court may affirm the trial court's decision on any ground that was presented to the trial court, but the issue must have been fairly raised below. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590, 594 (1998). However, that ground must have been raised in the trial court. RAP 2.5(a).

Russell argues that the record does not contain evidence of all six elements of negligent misrepresentation, but omits the fact that the Borishes were never required to present such evidence. As Russell acknowledges, she filed a motion for summary judgment on January 4, 2007 (CP 798-825), a motion to exclude a witness on January 23, 2007 (CP 965-74), a subsequent summary judgment motion on damages that is not part of the record, and a joinder in a motion for summary judgment under *Alejandre*. As Russell knows, none of these motions raised the three arguments she now makes in her brief.

a. Russell's Intention to Guide the Borishes

Russell first argues that she had no intention of guiding the Borishes. The closest argument to the trial court is Russell's argument in her September 7, 2006 motion for summary judgment that she owed no legal duty to the Borishes. CP 621-23. That argument in turn was based on an interpretation of *Schaaf v. Highfield*, 127 Wn.2d 17, 896 P.2d 665, 668 (1995), an argument that is not made in this appeal.

b. Negligence in Obtaining or Communicating Information.

Russell never argued the question of her negligence below. She did brief her claim that the house was not a manufactured home, but that motion was stricken before any response was due because Russell was dismissed under *Alejandre*.

c. Reasonable Reliance.

Reasonable reliance was briefed in a number of contexts, but Russell has not demonstrated in her brief why this Court should rule, as a matter of law, that the Borish's reliance was not reasonable.

d. Proximate Cause.

Russell did argue damages to the trial court, but only in the context of the proper measure of damages under the Restatement. The Borishes

agreed that the measure of damages for negligent misrepresentation is the pecuniary loss, which is one of the primary issues in this appeal.

Russell never even purports to meet her initial burden on summary judgment to establish the absence of a material fact. *Allen v. Asbestos Corp., Ltd.*, 138 Wn.App. 564, 570, 157 P.3d 406, 408 (2007). Instead, she would have this Court require the Borishes to prove something that they were never required to prove below: “There is nothing in the record to show that the Borishes can establish, under the clear, cogent and convincing standard, all six elements of the negligent misrepresentation cause of action.” Russell’s Brief at 26. Russell has the burden to offer evidence and authority for her arguments on appeal, and her failure to do so is fatal. *See Weber v. Associated Surgeons, P.S.*, 146 Wn.App. 62, 189 P.3d 817 (2008); RAP 10.3(a)(5).

4. The Borishes Had No Contract With Russell.

Russell argues that the economic loss precludes the Borish’s claim because her appraisal contains a disclaimer of liability. Implicit in her argument is the silent assumption that a disclaimer in an appraisal is equivalent to a negotiated contractual limitation of liability.

In fact, the Borishes had no contractual relationship with Russell. They had no opportunity to negotiate for any risk of loss. Washington has permitted a negligent misrepresentation claim in the absence of privity

(*Schaaf v. Highfield*, 127 Wn.2d 17, 23, 896 P.2d 665 (1995)), but this is why the Court should require contractual privity for the economic loss rule to apply. Brief of Appellant at 27-28. In dismissing Russell, the trial court recognized a contractual defense to a tort claim when the parties had no contract.

5. The Jury Verdict for the Olsons Is Irrelevant to the Claims Against Russell.

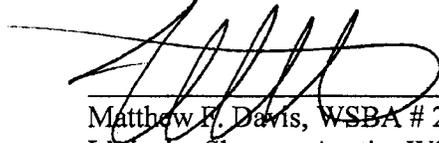
Like Olson, Russell seeks refuge in the jury's rejection of the fraud claim. Unlike Olson, Russell was not a party to the trial. No evidence was presented at the trial concerning the claims against her. The jury's determination on a different claim against a different party has no bearing on this appeal. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 866, 93 P.3d 108, 115 (2004)

III. CONCLUSION

This appeal presents a pressing legal question of state-wide importance. In some cases, it makes sense to wait for lower courts to work out the limits of a new Supreme Court decision, but questions about *Alejandro* affect too many people far too significantly to simply wait and see what happens. This Court should either reverse or reaffirm and clarify the economic loss rule.

Respectfully submitted and dated this 6th day of March, 2009.

DEMCO LAW FIRM, P.S.



Matthew F. Davis, WSBA # 20939

L'Nayim Shuman-Austin, WSBA # 30505

Attorneys for Appellants

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

DECLARATION OF SERVICE

2009 MAR 06 A 10:41

I, Ellen Krachunis, state:

BY RONALD R. GARDNER

On this day I caused to be delivered by e-mail to the ~~Washington~~ State
Supreme Court at supreme@courts.wa.gov and via email and regular mail
to:

Douglas S. Tingvall - RE-LAW@comcast.net
Attorney at Law
8310 154th Avenue SE
Newcastle, WA 98059-9964

And via regular mail to:

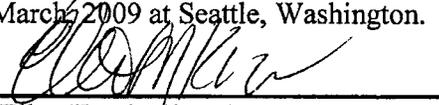
Michelle A. Corsi
Lee Smart, P.S., Inc.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929

A copy of the following documents:

Reply Brief of Appellants Richard and Penny Borish

Declarant is a resident of the State of Washington and over the age
of eighteen (18) years. I certify under penalty of perjury under the laws of
the State of Washington that the foregoing is true and correct.

Dated this 6th day of March, 2009 at Seattle, Washington.


Ellen Krachunis

ORIGINAL FILED AS
ATTACHMENT TO EMAIL