

No. 40455-9 II

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

PAUL EISENHARDT and ELIZABETH CHANEY EISENHARDT,
as Trustees of the 1995 Eisenhardt Living Trust

Respondent/Cross-Appellant

v.

MARILYN J. BAXTER, a single woman

Appellant/Cross-Appellant

COURT OF APPEALS
STATE OF WASHINGTON
JORDAN K. FOSTER
BY _____
MAY 10 2011

APPEAL FROM THE SUPERIOR COURT FOR JEFFERSON
COUNTY
STATE OF WASHINGTON
THE HONORABLE CRADDOCK VERSER

SURREPLY OF RESPONDENT/CROSS APPELLANT

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COMES NOW Respondents and Cross-Appellants Paul Eisenhardt and Elizabeth Chaney Eisenhardt, as Trustees of the 1995 Eisenhardt Living Trust, by and through its attorneys of record, MAHER AHRENS FOSTER SHILLITO PLLC, and Kelly DeLaat-Maher and Jordan K. Foster, and submits Respondents/Cross-Appellants' surreply and Reply to Cross-Respondents as follows:

I. RESTATEMENT/CLARIFICATION OF THE CASE

Respondent/Cross Appellants Paul Eisenhardt and Elizabeth Chaney Eisenhardt, as Trustees of the 1995 Eisenhardt Living Trust ("Eisenhardt") substantially rely on its statement of the case in its original briefing, though some further clarification is needed after the filing of Appellant Marilyn Baxter's Reply brief and Cross-Respondents' Response to the Eisenhardts' Cross-Appeal. (Cross Respondents are Defendants Lee and Laila Corbin; Bobbie Nutter; Teresa Goldsmith; New Olympic Enterprises d/b/a John L Scott Port Townsend; Gooding, O'Hara & Mackie, P.S.; Jim Fox; Valerie Schindler; and Hood Canal Real Estate, Inc., d/b/a Windermere Hood Canal).¹

Some clarification of the misstatements made in Defendant Baxter's reply brief are necessary. For example, Defendant Baxter asserts

¹ Cross-Respondents will be referred to either as "the remaining defendants" or simply "defendants," to be differentiated from defendant Marilyn Baxter, who will be referred to either by her name, or "defendant Baxter."

that the Eisenhardts were advised by meeting minutes of various unresolved “defects,” thereby putting them on notice of the severely deficient condition of the building. The Eisenhardts reviewed the minutes received, and nothing therein advised them that issues had not either been repaired, or were in fact an issue to begin with. CP 410-412, 416-417.

Indeed, Defendant Baxter’s interpretation of the minutes to this court is questionable. For example, she states that the minutes received identify unresolved defects such as the need for recaulking (CP 336, August 29, 2007 Association meeting minutes) and replacement of flashing (CP 329, December 18, 2007 meeting minutes). Review of the August 29, 2007 minutes reveal that the portion referring to recaulking actually states as follows:

Lee is concerned about water intrusion. Jonathan stated that when the windows in the stairwell were repaired, insulation and wall board were replaced and the windows were recaulked.

CP 336. Similarly, the December 18, 2007 meeting minutes actually state as follows:

Hammerworks was notified of the problem, came to see it, and state they will correct the problem with the flashing. . .

CP 329. Thus, the minutes provided reveal correction of problems, not ongoing difficulty associated with correction of specific items identified in the Jobe report. Comparison of the minutes provided to the Eisenhardts

and the Jobe Report documents significant undisclosed building-related issues and defects, despite defendant Baxter's statement to the contrary. See Chart, CP 416-417. Further, nothing explains the issue of when faced with a direct question by the Eisenhardts as to whether any additional problems with the building existed, defendant Baxter failed to identify the multitude of issues identified in the warranty claim filed as a result of a Board motion introduced by defendant Baxter and not disclosed to the Eisenhardts.

Defendant Baxter also misstates that the Eisenhardts admit they received all minutes but the February 9, 2008 board meeting minutes, pointing to page 7 of the Eisenhardts' brief. The Eisenhardts' brief actually states that it was only through discovery after institution of litigation that they discovered they had not received complete minutes, including key board meeting minutes, of which the February 9, 2008 minutes were but one. See p. 7 of Respondent's Brief. CP 111, 211, 410. The Eisenhardts also consistently point to omission of any minutes in their package that contained the reference to "Jobe," although defendant Baxter makes light of this curious and unexplained omission. CP 111, 211, 410.

Simply stated, Defendant Baxter now attempts to twist and misstate the undisputed facts that were clearly presented to the trial court. The arguments she now makes were not supported by the evidence

presented to the trial court, and do not now constitute material issues of fact sufficient to overcome summary judgment. They are offered simply to provide the appearance of disputed material issues of fact. ²

II. ARGUMENT

A. THE TRIAL COURT DID NOT PROPERLY DISMISS THE EISENHARDTS' CLAIMS AGAINST THE REMAINING DEFENDANTS

The remaining defendants argue that the Eisenhardts are not entitled to any additional damages as the court ordered their requested remedy of rescission. The defendants' arguments are misplaced. The Eisenhardts are entitled to additional relief from the remaining defendants, and the matter should be remanded against those defendants for trial.

The remaining defendants' argument focuses on the Eisenhardts' request for relief located at the end of their complaint. The prayer for relief is as follows:

1. That the court award a judgment of rescission, restoring the parties to their original position, with all purchase monies repaid by Defendants to Plaintiffs.
2. That the court award monetary damages associated with the rescission, including loan and escrow fees incurred by Plaintiffs toward purchase of the property,

² In further response to defendant Baxter's appeal, it should be noted that the Supreme Court recently issued a decision confirming that the economic loss rule does not apply to claims for fraudulent concealment. See *Eastwood v. Horse Harbor Foundation, Inc.* --- P.3d ---, 2010 WL 4351986 (November 4, 2010).

costs to relocate, lost wages, etc., in an amount to be proven at trial.

3. That in the alternative, the court award monetary damages in favor of Plaintiffs for the causes of action indicated herein, plus interest at the judgment rate from the date of the closing of the transaction through to judgment, and thereafter until collected.

4. That the court award interest on the monetary sums recovered at the judgment rate.

5. That the court award reasonable attorney's fees and legal costs pursuant to the Purchase and Sale Agreement.

6. That the court award such other and further relief as the court deems just and equitable in the premises.

7. For the right to amend Plaintiffs' pleadings upon further information and belief.

CP 50. (Emphasis added). Notwithstanding defendants' argument, it is also evident that the Eisenhardts brought claims against the remaining defendants that were independent of a request for rescission. Specifically, the Eisenhardts alleged violation of the Consumer Protection Act against each of the real estate agents and their brokers as follows:

COUNT VIII – CONSUMER PROTECTION ACT - FOX, SCHINDLER, HOOD CANAL WINDERMERE, NUTTER, GOLDSMITH, AND PORT TOWNSEND JOHN L. SCOTT

4.24 Plaintiffs reallege and incorporate herein the preceding paragraphs of this pleading as though set forth in full herein.

4.25 The acts, omissions and representations of Fox, and vicariously Schindler and Hood Canal Windermere, as well as Nutter, and vicariously Goldsmith and Port Townsend John L. Scott, are in violation of RCW 18.86.030, which constitute a per se violation of RCW 19.86 *et. seq.*

CP 49.

Defendants rely on *In re Marriage of Hughes*, 128 Wn.App. 650, 658, 116 P.3d 1042 (2005) in support of their argument that the Eisenhardts may not claim damages in addition to the court's judgment granting rescission. Reliance on *Hughes* is misplaced. In that case, a wife obtained a default judgment for a decree of dissolution that differed greatly from her petition. *Id.* at 652. The court vacated the decree, in reliance upon CR 54(c). *Id.* at 658. CR 54(c) specifically states that a judgment by default shall not be different in kind from or exceed the amount that is prayed for in the demand for judgment. The rule goes on to state as follows:

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

CR 54(c). Unlike the parties in *Hughes*, the Eisenhardts did not obtain a default judgment that differed from the relief requested in the Complaint, nor are they asking for relief from the additional defendants that is different than that requested in their Complaint.

Indeed, the Eisenhardts' Second Amended Complaint specifically puts the remaining defendants on notice that they were asking for damages from those defendants, regardless of a request for rescission. CP 38-83. Washington is a notice pleading state. The primary intention of pleadings is to give the Court and the opponent notice of the general nature of the claims asserted. *Dumas vs. Gagner*, 137 Wn. 2d 268, 971 P.2d 17 (1999). Under CR 8(a), the only requirement for a Complaint or other claim of relief (counter-claim, cross-claim or third-party claim) is that it must contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief claimed. The rule adds that relief in the alternative, or of several different types, may be demanded. *15a Wash. Prac., Pleadings 16*. It is well settled that a party may allege inconsistent theories of liability. CR 8(e)(2); *Port of Seattle v. Lexington Ins. Co.*, 111 Wn.App. 901, 919, 48 P.3d 334 (2002). Thus, the Eisenhardts are not bound to the mere words of their pleading, as the purpose of events post-Complaint and Answer are to ascertain all facts and further to find the issues toward trial.

The defendants argue that the Eisenhardts received precisely what they requested in their Complaint and in their summary judgment motion. Again, the defendants are in error. The motion for Summary Judgment was brought only against defendant Baxter. CP 84-107. The motion did

not ask for relief against any of the remaining defendants, and thus did not address any claims for relief against those defendants. Further, as stated above, the Second Amended Complaint did allege additional damages against the remaining defendants, including the CPA claims that exist independently of any rescission. CP 38-83.

The purpose of rescission is to return the parties to the position they would be in had the contract not occurred. “Rescission means to abrogate or annul and requires the court to fashion a remedy to restore the parties to the relative positions they would have occupied if no contract had ever been made.” *Busch v. Nervik*, 38 Wn.App. 541, 547, 687 P.2d 872 (1984). However, election of rescission against defendant Baxter does not affect independent claims against the remaining defendants, who were not direct parties to the Eisenhardts’ contract with defendant Baxter. “[T]he doctrine of election of remedies cannot be applied between one of the parties to a contract and a third person, a stranger thereto, since it is applicable only to the parties to the contract. 20 C. J. 18.” *Godefroy v. Reilly*, 146 Wn. 257, 264, 262 P. 639 (1928); see also *Wolarich v. Van Kirk*, 36 Wn.2d 212, 216, 217 P.2d 319 (1950). Further, a plaintiff may assert claims against two defendants for one injury suffered as a result of the defendants’ different negligent acts. *Douglas v. Freeman*, 117 Wash.2d 242, 253, 814 P.2d 1160 (1991).

Despite the remaining defendants' contention that rescission bars any claims against them, more recent case law does indeed support the Eisenhardts' position. *Bloor v. Fritz*, 143 Wn.App. 718, 180 P.3d 805 (2008) is directly on point. The trial court's ruling in *Bloor v. Fritz*, which was affirmed by the appellate court on appeal, was as follows:

The Bloors sued the Fritzes, Miller, LAM Management, LC Realty, and Cowlitz County. After a bench trial, the trial court ruled for the Bloors, awarding them damages jointly and severally against all the defendants for emotional distress, loss of personal property, loss of income, loss of use of the property, and damage to the Bloors' credit. It also awarded the Bloors \$10,000 as punitive damages and \$13,907.30 for attorney fees against Miller and LC Realty under the Act. It ordered the contract between the Bloors and the Fritzes rescinded, requiring the Fritzes to pay the Bloors' lender the purchase price, accrued interest, late charges, and foreclosure fees, and the Bloors to return the property to the Fritzes. Finally, the trial court awarded the Bloors \$18,975.55 in expenses against the Fritzes and, applying a 1.2 multiplier, \$125,335.25 in attorney fees against the Fritzes, Miller, and LC Realty; it awarded the Bloors their statutory costs against all defendants.

Id. at 727. The decision in that case followed a bench trial, at which all remaining parties participated. *Id.* Following that trial, the court determined that Fritz was to pay the costs directly associated with the rescission (repayment of purchase price, interest, etc.), while the remaining defendants were jointly and severally liable for the remaining damages, including loss of use of the property, loss of income, and emotional distress. *Id.* The real estate agent in that case appealed the

court's decision, as did the seller. The appellate court affirmed the trial court's judgment.

Here, unlike *Bloor*, the trial court has not heard any evidence against the remaining defendants, who are responsible and liable for expenses paid by the Eisenhardts that are not directly associated with the purchase price, including but not limited to damages under the Consumer Protection Act. Although not specifically stated in *Bloor*, it is evident that the court considered, contemplated, and affirmed the liability of a third party for money damages in a fraudulent concealment case where rescission was also awarded. As such, the trial court erred in dismissing the remaining defendants here without considering any evidence against them, or even a motion by any party for judgment or dismissal against those defendants.

Bloor supports the Eisenhardts' position that those defendants remain jointly and severally liable for a host of damages, despite the award of rescission against defendant Baxter. Similarly, in *Jackowski*, the appellate court determined that the trial court erred in dismissing the plaintiff's claim for rescission, and also erred in dismissing the real estate companies and their agents. *Jackowski v. Borschelt*, 151 Wn.App. 1, 13-16, 226 P.3d 514 (2009), review granted 168 Wn.2d 1001, 226 P.3d 780 (2010). As in both *Bloor* and *Jackowski*, the determination of liability for

the remaining defendants should be remanded, as should the determination of damages, which should include at a minimum any and all damages not directly associated with the purchase price of the condominium (purchase price and interest).

B. THE REMAINING DEFENDANTS ARE LIABLE FOR ANY AND ALL DAMAGES NOT RELATED TO THE PURCHASE PRICE

Defendants argue that the Eisenhardts cannot recover any additional damages from them, as they have been “made whole” by the court’s judgment against defendant Baxter. As outlined above, the remaining defendants are liable for, at a minimum, any and all damage amounts not strictly associated with the purchase price. See *Bloor v. Fritz*, 143 Wn.App. 718, 180 P.3d 805 (2008). This includes damages already included in the judgment against defendant Baxter, as well as damages under the Consumer Protection Act, relocation expenses, loss of income, and the like.

The defendants further state that the doctrine of election of remedies is premised on the belief that a plaintiff should not recover twice for the same wrong. Cross-Respondents’ Brief, p. 12. The Eisenhardts do not seek recovery of double damages as alleged by the remaining defendants, but rather only seek to be made whole by the rescission with

defendant Baxter, and recovery of any and all additional damages from the remaining parties for which they are jointly and severally liable.

An election of rescission does not prevent a party from seeking damages against third parties not a party to that contract.

The concept of election of remedies is a rule of narrow scope, having the sole purpose of preventing double redress for a single wrong. *Barber v. Rochester*, 52 Wn.2d 691, 328 P.2d 711 (1958). Our cases make it clear that three elements must be present before a party will be held bound by an election of remedies. Two or more remedies must exist at the time of the election; the remedies must be repugnant and inconsistent with each other; and the party to be bound must have chosen one of them. *McKown v. Driver*, 54 Wash.2d 46, 337 P.2d 1068 (1959); *In re Estate of Wilson*, 50 Wash.2d 840, 315 P.2d 287 (1957); *Barber v. Rochester*, *Supra*; *Willis T. Batcheller, Inc. v. Welden Constr. Co.*, 9 Wash.2d 392, 115 P.2d 696 (1941); *Lord v. Wapato Irrigation Co.*, 81 Wash. 561, 583, 142 P. 1172 (1914).

Lange v. Town of Woodway, 79 Wn.2d 45, 49, 483 P.2d 116 (1971). The Eisenhardts' claims for damages against the remaining defendants are not repugnant to the claim for rescission against defendant Baxter, as required under the rule for election of remedies. Indeed, what the Eisenhardts seek is similar to what was awarded in *Bloor v. Fritz*, *supra*, which was affirmed by this court.

The remaining defendants finally argue that the Eisenhardts cannot recover under the Consumer Protection Act, as they cannot satisfy the five elements required, specifically proximately caused damages, since they

have been made “whole” by rescission. As stated above, they have not been made whole, despite the award of rescission and additional damages to them against defendant Baxter. Defendants remain jointly and severally liable for additional damages. Further, the CPA uses the term “injury” instead of “damages” which demonstrates that no monetary damages need be proven. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987); see also, RCW 19.86.090.

Additionally, as a general rule and as a matter of legislative intent, neither the CPA nor case law require privity of contract in order to bring a CPA claim alleging an unfair or deceptive act or practice. And on numerous occasions, our courts have rejected the argument that a contractual relationship must exist to sue under the CPA for an unfair or deceptive act or practice. *Holiday Resort Community Ass'n v. Echo Lake Associates, LLC*, 134 Wn.App. 210, 219-220, 135 P.3d 499, 504 (2006). The Legislature also states that the CPA “shall be liberally construed that its beneficial purposes may be served.” *Id.* at 220. The CPA is “a carefully drafted attempt to bring within its reaches every person who conducts unfair or deceptive acts or practices in any trade or commerce.” *Id.*; citing to *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984)). The case has not been tried against the remaining defendants, as they were summarily dismissed without consideration of any evidence against them.

Their conduct falls under the CPA, and to dismiss claims under the CPA without consideration of the evidence against the defendants constitutes error, and should be remanded for trial.

III. CONCLUSION

Based on the foregoing, the Eisenhardts request that Defendant Baxter's appeal be denied, that the court affirm the trial court's decision on Summary Judgment against her, and that their causes of action against the remaining defendants be remanded for trial and a determination of damages.

RESPECTFULLY SUBMITTED this 30 day of November, 2010.

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CERTIFICATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on this 30th day of November, 2010, I caused to be delivered a true and correct copy of the foregoing Surreply of Respondent/Cross Appellant to the following via U.S. mail, postage prepaid, and via e-mail transmission:

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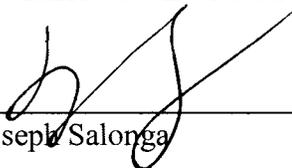
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DATED this 30th day of November, 2010.

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