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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Appeals No. 358615

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

WILLIAM BRADLEY WILLARD, JR., a single man, Corazon Johnson, a single woman, and COBRA REAL ESTATE, LLC, a Washington Limited Liability Company,

Appellants,

vs.

BENJAMIN ADDINK and JADA ADDINK, husband and wife and the marital community composed thereof, HEAVENLY ROCK PFF a Private Fund Foundation established in the Netherlands Antilles, WHITESTONE LAND MANAGEMENT, LLC, a Washington Limited Liability Company, JOE HORGAN, individually and d/b/a ASSIST 2 SELL HOME REALTY, STANLEY ADDINK and SHARON ADDINK, husband and wife and the marital community composed therefore, THOMAS LILLY and NANCY LILLY, husband and wife and the marital community composed thereof,

Respondents.

PETITIONERS' REPLY BRIEF

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V. Argument

5.1 Application of the Statute of Limitation under R.C.W. 4.16.080(4).

5.1.1 Addink mischaracterizes R.C.W. 4.16.080.

Addink claims that Willard seeks to “extend” the statute of limitations based on the “discovery rule”. (Addink brief pg 12). R.C.W. 4.16.080 (4) specifically states that the three year period does not accrue until the discovery by the aggrieved party of the facts that constitute the fraud. In other words, the discovery rule defines when a cause of action accrues, it is not an extension of the three year period.

5.1.2 Addink claims that Willard states that Willard did not know the tax parcel id number of the Enterprise Ridge parcel in issue so that the parcel number could be matched up to the deed. (Addink Brief III. B. 2. (a). page 13).

First, this claim does not appear at Appellants’ Brief at page 33 as Addink claims, and counsel was not able to find this referenced language.

Addink misstates Willards’ argument in any event. Whether Willard had the tax id number or not is not the question. The question is whether the legal description in the Statutory Warrant Deed, on its face, would give a reasonable person, Willard, some clue that he was not

getting the property that was shown to him by Addink, and therefore impose on him the duty to make further inquiry. See *Young v. Savidge*, 155 Wn.App. 806, 824, ¶ 31 (Div. II, 2010).

5.1.3 Addink claims that Willard should have discovered they were not getting the Enterprise Ridge parcel they were shown by Addink, because they had the ability to get a land survey. (Addink Brief III. B. 2. (b), page 13)

Addink argues that during the tour of Enterprise Ridge, Willard had no specific parcel in mind to take in trade. (Addink Brief page 14). However, subsequent to the initial tour, Addink and Willard engaged in a series of emails that specifically identified the parcel to be traded as the one “by the log home” being built next to the parcel to be traded, which is also the parcel the parties stood on and talked about how it could be developed. (CP 213, 214, 224, 239, 241). On July 19, 2009, Willard requested specific information about the Enterprise Ridge parcel. (CP 215) On July 22, 2009, Addink provide a response. Regarding the Enterprise Ridge parcel, he indicated that a well for water would be needed, that there was power to the lot, and that septic perk has been approved. (CP 215) These representations are accurate for parcel 1512040, the parcel that Willard walked.(CP 215) They are not accurate for the parcel Addink actually transferred to Willard, parcel 1512030. (CP

215, 262). Further there was a fence that separated the Parcel Willard was shown from the adjacent Parcels to the West. (CP 212).

There was no reason for Willard to get a survey because he had sufficient information to know what Parcel he was getting in trade; “the one by the log home”, which was the one they walked talked about how it could be developed.

Addink argues that since there were no survey markers marking the boundary lines of Parcel 040 in the Enterprise Ridge development, that Willard had a duty to conduct a land survey to identify the parcel prior to closing the Trade Agreement.

Regarding the scope of Willards’ obligation of due diligence in general, and whether they met their due diligence requirement, it is helpful to review an analogous case. In *Lawson v. Vernon*, 38 Wash. 422, 431-32, 80 P. 559, 563 (1905), the seller took the buyer to the property to show the buyer the property for sale. The property was overgrown with no visible survey markers to delineate the property lines. The Seller showed the Buyer the wrong property. The Buyer sued the Seller for fraud and sought damages for the difference in value between the properties. The Seller defended the action stating that Buyers failed to employ the means readily accessible to them by which they could have avoided

entering onto the wrong land (buying the wrong land). The court ruled that:

“Here the false representation was as to a material matter entirely without the knowledge of the respondents (Seller). As it was shown that the ground had been left to overgrow with brush and trees, and that the stakes of the original survey were destroyed, it was hardly possible for the respondents (Buyer) to locate the lots; hence they must out of necessity rely on the representations of some one. Because they chose to rely on the representations of the Seller, the Seller cannot be heard to assert as a means of escaping liability for making such representations that the Buyer should have gone to some one less reckless in their statements.”

Lawson, at 432.

In the present case, there were no street signs or survey markers delineating any parcels when the Plaintiffs were shown Parcel 1512040 at Enterprise Ridge. (CP 212). Plaintiffs were never even shown parcel 1512030, which is contiguous to 1512040, but which lacks the improvements that 1512040 have. Further, 1512030 is mostly on a severe slope that cannot support tennis courts, a swimming pool and large house envisioned by Ben and Stan Addink, and would be extremely difficult to build on as stated by Bruce Jolicour, Plaintiff's real estate expert. (CP 218).

Since there were no survey stakes, it was hardly possible for Willard to identify the Parcel, hence they must out of necessity rely on the

representations of some one. Because they chose to rely on the representations of the Seller, Ben Addink, then Ben Addink cannot be heard to assert as a means of escaping liability for making such representations that the Buyer should have gone to some one less reckless in their statements. In other words, under these circumstances, Willard were entitled to rely on the representations of Addink and were not required to do more.

Further, Willards' due diligence obligation does not extend to getting real property surveyed. In *Dixon v. MacGillivray*, 29 Wash. 2d 30, 35, 185 P.2d 109, 112 (1947), the Court ruled that one who indicates to a purchaser that the land sold has a certain area, when, as a matter of fact, the area is less than represented, is responsible to the purchaser in damages. The Court reasoned in that case that any investigation made by respondents with reference to the boundaries of the lots would not have disclosed anything in the absence of a survey, which respondents were not obligated to have made, in view of appellants' representation that the property consisted of specific lots as stated.

In the present case, defendants Ben and Stan Addink took Willard to a specific parcel, showed them specific improvements on the parcel, and Ben Addink, on several occasions, made reference to the Parcel as the one "located by the log home being built", which described Parcel

1512040, not Parcel 1512030. Further, there were no survey markers to delineate the land. However, there was a fence that Willard used as a reference located along the West side of Parcel 1512040 that he used for orientation as to the 20 acre parcel being represented. Under the circumstances, Plaintiffs had a right to rely on the representations of Ben and Stan Addink and was not required to get a survey.

The practical effect of Addink's argument would impose a duty on all Buyers to get a survey in all transactions to make sure that the property they are purchasing is the same property matching what they were shown by a Seller.

To conclude, Willard had no reason to get a survey because there were no facts brought to his attention that would give him some reason to suspect that he was not getting the property Addink specifically identified to them during the tour, and in subsequent emails, identified as the one by the log home being built.

5.1.4 Addink claims that Willards' claim that the Enterprise Ridge parcel they received could not be sub-divided, that a well wasn't possible and there was no power is not supported by the evidence. (Addink Brief III.B. 2. (c).

Addink claims that there is no evidence in the record to support Willards' position that the claims made by Addink that the Enterprise Ridge property can be sub-divided, that the property would need a well,

and that there was power to the property is false. Willard provided evidence in the form of his references to the record found at CP 215, which is Willard's Declaration in Response to Motion for Summary Judgment. Addink simply states that he believes the representations to be true, but does not offer any evidence that they are, in fact, true. In short, we have a factual dispute, and the Court considers evidence in the light most favorable to the nonmoving party when determining a summary judgment motion. *Keck v. Collins*, 184 Wn.2d 370, ¶ 29, (2015).

5.1.5 Addink claims that Willards' were put on constructive notice that Addink's misrepresentations as to the value of property he was conveying and that he was conveying a different parcel than what he had shown Willard, when the Statutory Warranty Deed was recorded conveying Enterprise Ridge Parcel 030 to Willard. (Addink Brief III.B. 2. (c) pages 15-19).

Willard has fully outlined the correct application of the *Shepard* case and other related cases on the application of the discovery rule, and therefore, won't repeat it here. See Appellant's Brief 5.3.3, pages 30 -35.

Addink argues that by the mere recording of the Statutory Warranty Deed, which had a legal description describing the property being conveyed, equates to constructive notice to Willard, that they did not get the property they were shown by Addink, and that the values of the properties were not as represented by Addink.

Addink misses a critical evaluation required by *Shepard*; the document that is a “public record” must disclose the falsity of Addink’s representations. Here, the Statutory Warranty Deed simply has a legal description on it. A reasonable person, such as Willard, would not know by simply looking at a legal description, that it is not the description of the property shown to him by Addink. Further, the Deed has no information in it with regard to value. Thus, the Deed does not put a Willard on notice that Addink’s representations as to the value of the property was false, or that he was getting a property different than promised by Addink. Therefore, the Deed in and of itself, cannot be constructive notice.

To conclude, the statute of limitations began to run when Willard went to the Enterprise Ridge parcel and saw that someone had surveyed the property that he purchased. That was on May 28, 2012. He filed his Complaint within 3 years of that date.

5.2 Addink claims the Trade Agreement itself precludes any reasonable reliance by Willard to support fraud and misrepresentation claims. (Addink Brief III. B. 3., page 19).

Addink seeks to rely on the language in the Trade Agreement, paragraph 2.5, to support their theory that Willard waived his right to rely on the false representations made by Addink. (Addink Brief, page 19). As Addink states, waiver is a voluntary relinquishment of a known right. *Wagner v. Wagner*, 95 Wash.2d 94, 102, 621 P.2d 1279

(1980). Waiver is an equitable doctrine. *Weitzman v. Begstrom*, 75 Wash.2d 693,699, 453 P.2d 860,864 (1969). Its purpose is to facilitate the doing of equity, not the perpetration of fraud. *Id.* It is necessary to show that the party who it is claimed to have waived a right, did so intentionally and with full knowledge of his rights, *id.*, and with knowledge of the facts. *Vinneau v. Goede*, 50 Wash.2d 39, 41, 309 P.2d 376, 377 (1957).

Regarding the value of the Addink properties, Addink voluntarily undertook an effort to obtain property value information specifically for Willards' use in deciding whether to enter the Trade Agreement.

On June 26 2009, Addink sent Willard an email stating that he, Addink, was "getting an appraiser to assess the high and the low range of comparable properties current asking price to give some clarity on the trade values" of his Ridgeview Estates and Enterprise Ridge properties. (CP 214 , 250)

On June 26, 2009, Willard sent an email to Addink stating that he wants the results of the appraisal as well as any property tax statement in order to determine the fairness of the trade. (CP 214, 252)

On July 7, 2009, Addink sent Willard an email stating that he spent \$1,700 to get a market assessment of the properties he wanted to

trade for me to “determine if you want to do the trade.” (CP 214) He further states that Willard can use the market assessment to determine if he wants to do the trade. (CP 214) Addink states that he believes the total value of the properties he has offered to trade would come in at between 1.6 million and 2.4 million. (CP 214, 254.)

On July 8, 2009, Willard sent Addink an email stating that he appreciated his efforts to get a market assessment/appraisal for his properties. (CP 215)

On July 15, 2009, Willard expressed to Addink of his frustration in not getting the information from Addink’s appraiser. On July 16, 2009, Addink responds stating that he is chasing the appraiser down and will “try to get his assessment finished for you”. (CP 215, 260). On July 22, 2009, Addink faxed Willard a letter prepared by Kevin Hildebrandt, a Real Estate Appraiser that outlined values for the Addink property. (CP 215, 264).

Addink, a close personal friend of Willards, cannot undertake to provide Willard with valuations on one hand, while Willard is thousands of miles away on Saba, with the specific intent that he rely on the valuation, and then hide behind a contract provision to shield him from the fraud.

Addink argues that Willard “waived” their right to claim of fraud, but as argued in Willard’s Appellant Brief, Willard cannot waive a right to pursue a fraud claim when the basis of the fraud is not known. (citation omitted, see Appellant’s Brief paragraph 5.4 pages 35-38).

5.3 Addink claims Willard has no basis to claim damage to personal property that Addink was to pack and ship to Willard.(Addink Brief III. C. 3., page 25).

Willard has outlined their argument regarding Addink’s duty to pack and ship Willards’ property in their Appellants’ Brief. Regarding the issue of Willard’s cause of action for conversion, Addink denies that they they have any of Willards’ property as listed in Exhibit B to the Trade Agreement. Willard asserts that not all of the property on Exhibit B was shipped by Addink. Willard asserts Addink still has possession of the personal property not shipped. Since Addink denies this, there is a genuine issue of material fact in dispute, which precludes summary judgment on this issue.

5.4 Addink claims the Court properly awarded Addink attorney’s fees but erred in not awarding Addink costs. (Addink Brief III. D. page 28).

5.4.1 Addink is not entitled to attorney’s fees when Willards’ contract claims and tort claims do not share a common core of facts required to prove each claim.

Addink claims that they are entitled to attorney's fees on the allegation that Willards' breach of contract claims, and fraud, negligent misrepresentation, breach of fiduciary duty and negligence claims have a common core of facts. Each of the cases cited by Addink in support of this theory are distinguishable from the present case.

Addink cites *Lakoda, Inc. v. OMH Proscreen USA, Inc.*, No. 32616-1-III, 195 Wash. App. 1061 (Sept 8, 2016) (unpublished opinion), *rev. denied*, 388 P.3d 495 (2017) In *Lakoda*, Lakoda, Inc. sued OMH for breach of contract for violating the terms of a nondisclosure agreement by disclosing confidential information, and for violating the Washington Uniform Trade Secrets Act under RCW 10.108, which allows for the award of attorney's fees. In that case, the same facts needed to establish the breach of contract claim were the same facts needed to establish a violation of the Washington Uniform Trade Secrets Act. Therefore, the two causes of action had the same core facts and attorney's fees for both theories were appropriate. *Lakota* at 14.

Addink cites *Chuong Van Pham v Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007), but this case does not even deal with a claim of breach of contract and tort claims.

Addink further cites *Stieneke v. Russi*, 145 Wash.App. 544, 190 P.3d 60 (2008). In that case, a Seller signed a Seller's Disclosure Statement stating there were no issues with the roof. Seller also made oral representations to the Buyer that he had no issues with the roof. After the sale, the roof leaked and Buyer sued for breach of contract based on the Seller's Disclosure Statement stating that there were no leaks, and fraud, negligent misrepresentation and fraudulent concealment.

The court ruled that the attorney's fees were properly awarded because the fact the roof leaked was a common core set of facts that pertained to both the breach of contract claim and the tort claims.

In the present case, Willard alleged two breach of contract claims. First, they alleged that Addink breached the contract when he converted Lot 31 into an airspace condominium prior to conveying the Lot to Willard; a post-closing act. (CP 14). Addink was obligated to convey the Lot under the Trade Agreement if Willard was not able to sell his lots acquired in the Ridgeview Estates development within a year of the date of closing. (CP 14). This was a post-closing obligation, and facts involved in this breach of contract claim are unrelated, separate and distinct, from the facts required to prove fraud, misrepresentation, and conspiracy, involving conveying a property

different than represented and misrepresenting the values of the Addink properties.

Willard's second cause of action for breach of contract is based on Addinks failure to facilitate packing and shipping all of Willards property listed in the contract. Again, the issue of Addink's post-closing obligations under the contract to ship Willards property has separate and distinct facts at play than Willards claim of fraud, misrepresentation, and conspiracy.

To conclude, since the facts required to establish Willards claims of breach of contract do not share a "common core of facts" involved in establishing the tort claims of fraud, misrepresentation and conspiracy, the attorney's fee provision in the contract is not available to Addink on the tort claims.

Addink further tries to tie the contract and tort claims plead by Willard together by citing *Kammerer v. Western Gear Corp*, 27 Wash.App. 512, 526, (1980), in which the court stated "a claim that the defendant fraudulently induced plaintiffs to enter into a contract which the defendant had no intention of performing, together with a clam that the defendant breached the contract, involves a single wrong or injury." *Kammerer* at 526. However, Addink does not state the entire ruling.

The Court went on to say that “ [if] there is some separate basis for the fraud and breach of contract claims, plaintiff may recover on both.” *Id.*

In the present case, Willard has not plead a breach of contract cause of action for Addinks conveying the wrong property or misrepresenting the values of the Addink property. Willards’ sole theories of recovery for this behavior are grounded in the tort claims. Willards contract claims and tort claims seek recovery for different injuries.

Finally, Addink cites footnote 6 in the case of *Alejandre v. Bull*, 159 Wn.2d 674, 690, n. 6 (2007). The entire pertinent part of the footnote reads as follows:

Other courts recognize a limited exception to the economic loss rule for fraudulent misrepresentation claims that are independent of the underlying contract (sometimes referred to as fraud in the inducement) but only where the misrepresentations are extraneous to the contract itself and do not concern the quality or characteristics of the subject matter of the contract or relate to the offending party’s expected performance of the contract. *See, e.g., Huron Tool & Eng’g Co. v. Precision Consulting Servs., Inc.*, 209 Mich.App. 365, 532 N.W.2d 541 (1995) (leading case); *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 884–87 (8th Cir.2000); *Rich Prods.*, 66 F.Supp.2d at 977; *Indem. Ins. Co. v. Am. Aviation, Inc.*, 891 So.2d 532, 537 (Fla.2004). We need not address the question whether any or all fraudulent representation claims should be foreclosed by the economic loss rule because we resolve the Alejandres’ fraudulent representation claims on other grounds.

This footnote quotes Court rulings in other states and is purely *dicta* as the Court clearly states that they need not address the subject matter in the footnote give their ruling in the case. This footnote is directed to a discussion about the application of the economic loss rule, and is not focused on the issue of attorney's fees being awarded. Thus, it has no value in resolving the attorney's fees issue in the case at bar.

5.4.2 The Court did not err in denying Addink an award of their costs.

Addink contends that the court erred by not awarding costs. However, Addink has not made an assignment of error, and has not provided any authority to support its claim. The Court ruled in its Order Awarding Defendants Attorney's Fees entered on June 26, 2018, and specifically in paragraph 10, that the costs Addink incurred were not necessary in order to achieve dismissal. (CP 570) The Court's ruling is supported by R.C.W. 4.84.010, which outlines costs that may be awarded to a prevailing party. Other than deposition costs, the costs outlined in Addink's accounting do not fall under those itemized in the statute. Further, Addink sought recovery for costs of depositions, which accounts for most of the costs sought. Under R.C.W. 4.84.010(7), costs for depositions are recoverable "[t]o the extent that the court or

arbitrator finds that it was necessary to achieve the successful result . . . [and] provided, that the expense of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.”

In the present case, the Court ruled that most of the work Addink did was not necessary to the outcome of the case, and specifically that the costs incurred were not necessary for the outcome of the case. Therefore, the costs were properly denied. Addink offers no argument as to why this finding is in error.

VI. Conclusion

6.1 Willard requests the Court of Appeals to reverse the Trial Court’s grant of Summary Judgment and remand the case back to the Trial Court for trial on the merits.

6.2 Willard requests the Court of Appeals to reverse the Trial

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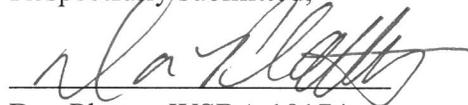
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Court's grant of attorney's fees to Addink, to affirm the Court's denial of costs, and to deny the request for attorney's fees on appeal.

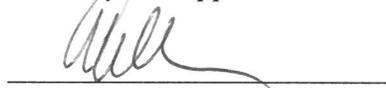
Dated this 18th date of September, 2018.

Respectfully submitted,



Dan Platter, WSBA 19174

Attorney for Appellants.



Antoni H. Froehling, WSBA 8271

Attorney for Appellants.

CERTIFICATION OF SERVICE

I hereby certify that on the 18 day of September, 2018, at Puyallup Washington, I deposited in the United States Mail by first class mail and/or placed with Legal Messengers a copy of the document to which this certificate is attached for delivery to Paul Arthur Spencer, Counsel of record for Respondents at the address of 929 108th Ave. NE Suite 1200, Bellevue WA 98004-4787.

A handwritten signature in black ink, appearing to read "Dan Platter", written over a horizontal line.

Dan Platter, WSBA 19174
Attorney for Appellants