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No. 61419-3-I

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

ROBERT CARLILE, et ux, et al,

Appellants,

v.

HARBOUR HOMES, INC. f/k/a GEONERCO, INC., a Washington
corporation,

Respondent.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Harbour Homes' Brief of Respondent ("Response Brief") largely follows the arguments it made at Summary Judgment, which were anticipated in the Appellants' Opening Brief. Accordingly, this Reply will address only those arguments which vary from previous briefing, or require additional comment.

II. REPLY TO RESPONDENT'S STATEMENT OF FACTS

At pages 3-4 of its Response, Harbour Homes states that Judge Allendorfer dismissed the Subsequent Purchasers' claims based upon (1) lack of privity and (2) because the assignments were not obtained until after the sale of the homes by the original homeowners. In actuality, the Order does not state the Court's reasons for the dismissal. CP 62-64.

At page 4, footnote 2, Harbour Homes argues that because only one exemplar assignment was produced, the claims of the remaining nine plaintiffs should be dismissed for failure of proof. Yet, Harbour Homes also chose to produce an "exemplar" copy of the purchase and sale agreements, rather than all ten. CP 126, 161-165. In addition, Ms. Pierce's Declaration establishes that all the subsequent homeowners obtained similar assignments from the original homeowners. CP 99 ¶ 4.

At page 4, footnote 3, Harbour Homes states that “[d]espite several requests from Harbour Homes’ counsel,” a copy of the Assignment of Claims was not produced. For support, Harbour Homes cites its Summary Judgment Motion. In fact, the only evidence in the record on this issue is Ms. Pierce’s statement that neither side had served written discovery or conducted depositions as of the date of the motion. CP 99.

Finally, Harbour Homes states that the homeowners made “numerous and unsubstantiated allegations regarding alleged construction defects” at Bluegrass Meadows, which Harbour Homes claims are false. Response Brief at 4. In support of their opposition to summary judgment, the homeowners submitted the Declaration of Mark Jobe, their forensic building expert, which listed the results of his preliminary investigation, including intrusive testing conducted on four properties. CP 85-93. As a result of this investigation, numerous construction defects were identified in the building envelopes and elsewhere. CP 86-87. No countervailing declarations were filed. Accordingly, Harbour Homes’ arguments contesting the validity of Mr. Jobe’s findings are without support in the record.

III. REPLY

- A. **Harbour Homes has no authority to support its central contention that claims for construction defects may not be assigned as a matter of law.**

As set forth in Section B (2) of Appellants' Opening Brief, causes of action may be assigned freely in Washington. The test for assignability is whether the claim would survive to the personal representative of the assignor upon death. *Cooper v. Runnels*, 48 Wn.2d 108, 110, 291 P.2d 657 (1955). By statute, all claims survive in Washington except claims for pain and suffering, and emotional damages. RCW 4.20.046(1); *Woody's Olympia Lumber, Inc. v. Roney*, 9 Wn. App. 626, 633, 513 P.2d 849 (1973). Harbour Homes cites no case law which would take the claims in this case out of this rule.

1. Existing case law does not preclude the assignment of construction defect claims.

Harbour Homes first argues that construction defect claims may only be asserted by the first purchaser of a home, because the claim is "personal" as between the builder and the owner. In support, it refers to what it represents is 40 years of unbroken jurisprudence. Yet, not one case that it cites in this "unbroken line" deals with the issue of assignment, nor do the cited cases identify construction defect claims as unassignable "personal" claims, as Harbour Homes asserts.

For example, Harbour Homes relies upon *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 418-21, 745 P.2d 1284 (1987) to support its assertion that construction defect claims are “personal” and may not be assigned. The decision in *Stuart*, however, does not address the issue of assignment, nor is there any discussion of “personal” claims. When a legal theory is not discussed in a decision, the decision cannot be cited as controlling authority. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). This is precisely what Harbour Homes has attempted to do with *Stuart* and the other warranty of habitability decisions it cites.

Harbour Homes also argues that assignment is the legal equivalent of a claim for negligent construction, “exactly what the *Stuart* Court sought to avoid.”¹ It is no such thing. An assignment neither expands, nor varies the contractual undertaking originally assumed by the contractor/developer. *Morse Electro Prods. Corp. v. Beneficial Indus. Loan Co.*, 90 Wn.2d 195, 198, 579 P.2d 1341 (1978) (an assignee stands in the shoes of the assignor); *Puget Sound Nat'l Bank v. Dep't of Revenue*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994) (an assignee has all rights of the assignor). Moreover, in *Berschauer/Phillips*, the Supreme

¹ Response Brief at 9.

Court expressly approved the assignment of breach of contract claims arising from a construction project, even though it dismissed the negligence claims. 124 Wn.2d at 828. Accordingly, the assignment of a breach of contract or breach of warranty claim is not to be confused with a claim for negligent construction, nor is it to be analyzed as one.

2. The claims in this case are not “personal” claims which cannot be assigned as a matter of law.

At several points in its Response, Harbour Homes argues that claims for breach of the implied warranty of habitability and breach of contract are “personal” claims which cannot be assigned. As noted above, no case has been cited which expressly holds that construction defect claims are “personal” and cannot be assigned. This issue was also briefed at length in the Appellant’s Opening Brief and will not be repeated here. However, Harbour Homes makes the additional argument in its Response that the sale of a new home to its first intended occupant involves “a relation of personal confidence” which cannot be assigned.² For support, it cites *R.B. Robbins v. Hunts Food & Indus., Inc.*, 64 Wn.2d 289, 294, 391 P.2d 713 (1964).

Robbins has no relevance to the present dispute. The issue in *Robbins* was whether an executory sales contract making one party the exclusive sale agent of the other could be assigned. The Court noted that

² Response Brief at 10.

while contracts generally may be assigned, there is an exception when the contract involves a relation of “personal confidence or personal service.” 64 Wn.2d at 294. Nonetheless, the Court ruled the contract was assignable as there was no evidence it was based upon “the business and financial skill, judgment and credit” of the assignor. *Id.* at 296.

In this case, the contracts at issue are purchase and sale agreements for the sale of new homes. They are not executory contracts, there is no relation of confidence, and no personal services are required. Moreover, the assignments at issue provide for the assignment of claims, not contracts. CP 101. Accordingly, the exception noted in *Robbins* has no application here.

3. The Assignments executed by the original homeowners are valid.

As set forth in more detail in the Appellants’ Opening Brief, the Assignment of Claims form meets the requisites of a valid assignment. “No particular words of art are required.” *Amende v. Town of Morton*, 40 Wn.2d 104, 106, 241 P.2d 445 (1952) (citing 2 Williston on Contracts 1220, § 424). Any language showing an intent by the owner to transfer and invest the cause of action in the assignee is sufficient. *Id.*

The form provides for the assignment of “all claims arising out of tort, contract, statute or any other source, all causes of action, demands,

and all rights to sue [Harbour Homes].” CP 101. The Assignments are in writing; the subject matter is clearly identified; the assignors’ intent is evident, and ownership of the claims is relinquished to the assignee. CP 101. In addition, three original homeowners acknowledged their assignments by declaration. CP 77-78, 81-82, 94-95.

The assignments also acknowledge the receipt of valuable consideration. Although Harbour Homes asserts that additional evidence of consideration is needed, no authority is cited to indicate that the acknowledgement of valuable consideration is not in itself sufficient. Indeed, assignments may occur by a variety of means, only some of which require the exchange of valuable consideration. *See generally*, 6A CJS Assignments § 4 (1975) (“An assignee is one to whom any right or property is assigned, whether by sale, gift, legacy, transfer, or cession”). In addition, Harbour Homes did not properly raise this issue in its Motion for Summary Judgment. It is only mentioned in a footnote, there was no argument, and no case law was cited which holds that the recitation of valuable consideration is inadequate. CP 173.

Finally, as set forth in the Appellants’ Opening Brief, there is no requirement in RCW 4.08.080 that an assignment be supported by the payment of money. RCW 4.08.080 allows a party, such as a collection agency, to sue to collect a debt “for the payment of money” in its own

name even though the assignor retains an interest in the debt. This creates a limited statutory exception to the common law rule that an assignor must relinquish all his or her rights for an assignment to be valid. *See e.g. Amende*, 40 Wn.2d at 106 (an agreement which reserves a claim to the original owner is not a valid assignment). Harbour Homes' argument that the statute requires the payment of monetary consideration is based upon a clear misreading of the statute, and should be rejected.

4. There is no public policy preventing the assignment of construction defect claims.

Harbour Homes' response to the public policy discussion in Section B(4)(c) of the Appellants' Opening Brief misses the point.³ The homeowners are not trying to reverse the established law of the State of Washington by reference to the law of other states. As set forth at length in this Reply and in the Opening Brief, there is no case law in Washington which precludes the assignment of construction defect claims; accordingly, there is no established public policy to reverse.

The homeowners simply pointed out that a broad public policy against assignment of warranty of habitability claims cannot be inferred since the existing law in Washington relating to condominiums and the law of the majority of other states relating to the warranty of habitability or its equivalent extend warranty protection to subsequent purchasers for

³ See Opening Brief at 21-23; Response Brief at 12-13.

a period of years.⁴ Given this backdrop—and the complete absence of any case authority supporting Harbour Homes’ assertion that assignment is against public policy—Harbour Homes’ public policy arguments should be rejected, and the assignments should be recognized as valid.

B. There is no requirement that the original purchasers be the title holders of record at the time the assignments were executed.

Harbour Homes’ Response raises two new arguments in its Response which should be rejected.

First, Harbour Homes argues that the assignments were ineffective because the assignors did not have “a present interest in the homes” at the time of the assignments.⁵ For support, it cites *AAA Cabinets & Millwork, Inc. v. Accredited Sur. & Cas. Co., Inc.*, 132 Wn. App. 202, 208, 130 P.3d 887 (2006), and *West v. Inter-Financial, Inc.*, 139 P.3d 1059 (Utah App. 2006).⁶ Neither of these decisions requires that a plaintiff have a present interest in real property to assert a construction defect claim. Causes of action are personal, not real property. *Mueller v. Rupp*, 52 Wn. App. 445, 450-51, 761 P.2d 62 (1988). They need not be transferred with the real property, nor is there

⁴ See RCW 64.34.445(6) and cases cited in Opening Brief at 22-23.

⁵ Response Brief at 15.

⁶ Both cases are discussed in the Opening Brief at 25-26.

any requirement that an assignor own both the real property and the claim at the time of assignment.

As set forth in the Jobe Declaration, the construction defects date from the original construction by Harbour Homes. CP 86-88 [¶ 8]. Accordingly, the injury and the right to sue existed while the original homeowners owned the homes, and thereafter when the claims were assigned. No authority has been cited to the contrary.

Second, Harbour Homes argues the original homeowners suffered no damage because they received “full market value” for their homes. There is no evidence in the record to support this assertion, and it is in conflict with the standard measure of damages in a construction defect case. As set forth in the Appellants’ Opening Brief,⁷ the measure of damages in a construction defect case is the cost of repair. *Eastlake Construction Company, Inc. v. Hess*, 102 Wn.2d 30, 45-48, 686 P.2d 465 (1984). Alternatively, the defendant may prove the repair is unfeasible. If it is successful, the measure of damages is the difference between the value of the home as represented, and value as constructed. *Id.* Under either measure, the original homeowners held the right to sue for damages arising from the defects Harbour Homes built into their homes

⁷ Opening Brief at 25-27.

until they relinquished those claims by assignment.⁸ *AAA Cabinets*, 132 Wn. App. at 208 (the assignee acquires whatever rights the assignor had prior to assignment).

C. Harbour Homes committed unfair and deceptive acts in the course of its trade or business which caused damage to homeowners and their assignors.

The subsequent homeowners hold valid claims against Harbour Homes under the Washington Consumer Protection Act as assignees of the original homeowners, and in their own right. Although Harbour Homes argues there is no evidence of unfair or deceptive acts or of causation, the facts and law are to the contrary.

1. Harbour Homes engaged in deceptive acts and practices in the conduct of its trade or business.

Harbour Homes again makes the argument that its omissions were the negligent provision of a service and not a deceptive act or practice under the CPA. As discussed in the Appellants' Opening Brief, this assertion is based upon *Ramos v. Arnold*, 141 Wn. App. 11, 169 P.3d 482 (2007), a case involving an appraisal report, which has no relevance to the present dispute. Existing Washington law holds that a

⁸ Harbour Homes' argument would also lead to absurd results. For example, if an original homeowner discovered the defects, effected repairs and sold the house, it would lose its claim for damages under Harbour Homes' theory simply because it was no longer on title. Ownership of the real property is not a prerequisite to filing suit, nor is it a requirement of assignment.

contractor/developer's activities fall within the express definition of trade or commerce in RCW 19.86.010. *Eastlake v. Hess*, 102 Wn.2d at 49-50; *see also, Fisher v. World-Wide Trophy Outfitters, Ltd.*, 15 Wn. App. 742, 748, 551 P.2d 1398 (1976) (misleading statements directed to the general public constitute unfair or deceptive acts or practices within the meaning of RCW 19.86.020); *Griffith v. Centrex Real Estate Corp.*, 93 Wn. App. 202, 214-15, 969 P.2d 486 (1998) (the failure to disclose known defects is a deceptive act or practice under the CPA). Moreover, Harbour Homes entered into purchase and sale agreements with the original homeowners, not construction or service contracts. Nowhere in these preprinted agreements does it indicate Harbour Homes was providing a "service" as opposed to selling a home. CP 126; CP 161-65.

Based upon the record at Summary Judgment and on appeal, it is undisputed that construction defects existed at Bluegrass Meadows from the time of original construction, and that the existence of these defects was not disclosed to the original homeowners or to the general public in Harbour Homes' advertising materials. To the contrary, Harbour Homes' marketing materials emphasized that its homes were built to the highest standards of quality and workmanship; representations which stand in sharp contrast to the actual condition of the homes. CP 103-107;

CP 86-88. The disparity between what was advertised and what was delivered is a deceptive act or practice under the CPA.

2. Causation is established by the original homeowners' reliance upon Harbour Homes' representations of quality.

Harbour Homes argues that the CPA claims are defective because the homeowners failed to establish "but for" causation. However, the record includes the declarations of three original homeowners who assigned their claims. These declarations establish that the homeowners relied upon Harbour Homes' representations "of highest quality and workmanship," and that the homeowners would not have purchased the homes if they did not believe these representations. CP 77-78, 81-82, 94-95. The Declaration of Mark Jobe establishes that the homes suffered from significant defects which "stem from and are the result of the original construction." CP 86-88. This creates the necessary causal link, or "but for" causation between the deceptive acts or practices (misleading statements, and the failure to disclose made in trade or commerce) and the injury suffered by the original homeowners (ownership of a defective home).

Similarly, the subsequent homeowners can establish a causal link between their injury and Harbour Homes' failure to disclose. Disclosure by Harbour Homes to the original homeowners would have required

repair of the defects or disclosure by the original owners at the time of sale. RCW 64.05, *et. seq.* Either way, the subsequent owners would not have unknowingly purchased defective homes with latent defects “but for” Harbour Homes’ failure to disclose. Thus Harbour Homes’ failure to disclose put in motion a causal chain, which in direct sequence, unbroken by any new or independent cause, resulted in injury to the subsequent homeowners. WPI 15.01; *see also Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 83-85, 170 P.3d 10 (2007) (causation established if plaintiffs can show injury would not have occurred but for the deceptive acts). Dismissal of the CPA claim at summary judgment was therefore in error.

D. The economic loss rule does not bar claims of intentional misrepresentation or fraud or claims for negligent misrepresentation when the parties are not in privity.

1. The assigned claims for intentional misrepresentation⁹ are not barred by the economic loss rule.

As discussed in Appellants’ Opening Brief, no Washington appellate decision applies the economic loss rule to intentional misrepresentation claims. In *Atherton Condominium Apt. Owners Ass’n v. Blume*, 115 Wn.2d 506, 799 P.2d 250 (1990), the Supreme Court held

⁹ The homeowners concede that the assigned claims for negligent misrepresentation fail under the holding in *Alejandre v. Bull*, 159 Wn.2d 674, 688-89, 153 P.3d 864, (2007), and did not argue otherwise in their Opening Brief.

it was error to dismiss a fraudulent inducement claim based upon the failure to disclose the existence of construction defects, known to the developer. Citing *Atherton*, the Court in *Alejandre*, declined to apply the economic loss rule to a fraudulent inducement claim and a common law fraud claim, instead addressing each claim on its merits. *Alejandre*, 159 Wn.2d at 689-91. Division 2 reached a similar result in *Glenn v. Russi*, ___ Wn. App. ___, WL 2582977 (July 1, 2008), wherein it dismissed the negligent misrepresentation claim, but affirmed a fraudulent inducement and fraud claim, remanding only for a determination whether the evidence met the clear, cogent and convincing standard. Accordingly, the economic loss rule does not require dismissal of intentional fraud claims as argued by Harbour Homes.¹⁰

2. The economic loss rule does not apply to the subsequent purchasers' direct claims for negligent misrepresentation.

Harbour Homes argues that the subsequent purchasers' claims for negligent misrepresentation held in their own right should be dismissed under the economic loss rule notwithstanding the lack of contractual privity between Harbour Homes and the subsequent purchasers. For support, it cites *dicta* in a concurring opinion by Justice Chambers in

¹⁰ The homeowner's intentional misrepresentation claims are set forth in the Second Amended Complaint at CP 43-45.

Alejandre,¹¹ and *Berschauer/Phillips*. Neither decision compels application of the economic loss rule under the facts of this case.

Alejandre involved two parties who contracted for the purchase and sale of a home. Accordingly, any discussion of what might occur in the absence of privity is pure *dicta*. Moreover, the majority opinion expressly limits the rule to contractual relationships.

The purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies . . .

Alejandre, 159 Wn.2d at 683 (emphasis added). Accordingly, the footnote in the concurring opinion is not controlling authority for the proposition that privity is not required.

Berschauer/Phillips, 124 Wn.2d 816, provides at most, a limited exception to this rule. *Berschauer/Phillips* involved a large construction project for the renovation and construction of an elementary school. There were construction delays, and the general contractor sued the owner, the Seattle School District, for breach of contract. The general contractor also sued in tort the architect and engineer, with whom it did not contract, for the project delays. The district and the contractor settled their claims and the district's claims against the architect and engineer

¹¹ 159 Wn.2d at 696 n.2 (J. Chambers, concurring)

were assigned to the contractor. The contractor then amended its complaint to sue the architect and engineer on both the assigned claims and its own tort claims.

The Supreme Court expressly approved the assignment of the district's contractual claims, but dismissed both the district's and the contractor's tort claims against the architect and engineer.

We hold that when parties have contracted to protect against potential economic liability, as is the case in the construction industry, contract principles override the tort principles in § 522 [Restatement (2d) of Torts] and, thus, purely economic damages are not recoverable.

124 Wn.2d at 828. Consequently, while the economic loss rule was applied to preclude tort claims between parties not in privity, this only occurred within the context of a large construction project involving complex contractual relationships. These contracts allocated the risks attendant to each party's participation in the project. The contractor could have pursued its contract claims against the district for delays caused by the district's architect, or it could have contracted for a separate remedy for these delays. Within this context, the Supreme Court refused to allow the contractor to pursue tort remedies, as contract remedies were still available to it.

Berschauer/Phillips cannot be read to hold that the economic loss rule prevents all claims for negligent misrepresentation where there is no

privity between the parties. To the contrary, the Supreme Court has ruled that lack of privity is not a defense to a claim under § 522 of the Restatement (2d) of Torts. *Schaaf v. Highfield*, 127 Wn.2d 17, 26, 896 P.2d 665 (1995); *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 162-63, 744 P.2d 1032 (1987). Moreover, the decision in *Alejandre* limits the application of the rule to “where a contractual relationship exists.” 159 Wn.2d 674. The subsequent homeowners were not part of a system of contracts between parties to the original construction, and they had no opportunity to allocate or address the risks to which Harbour Homes’ negligent misrepresentations and failure to disclose exposed them. Had Harbour Homes disclosed the construction defects in the homes at Bluegrass Meadows, the subsequent purchasers would not have purchased homes with substantial latent defects. As a contractual remedy was precluded by Harbour Homes’ failure to disclose and its negligent representations of quality, it is fully appropriate that a remedy exist in tort.

3. There is no grounds for judicial estoppel.

At pages 33 and 34 of its Response, Harbour Homes argues that the homeowners’ direct claims are barred by the doctrine of judicial estoppel because earlier the homeowners represented they held assigned claims. Nowhere else in its briefing does Harbour Homes seem confused

by the distinction between direct and assigned claims. Moreover, a complete reading of Section D(2)(b) of the Opening Brief demonstrates that the distinction is maintained. For example, citation is made to the Second Amended Complaint at CP 197-98 “for the subsequent owners’ allegation of direct claims.” There is no basis for this argument.

4. Harbour Homes’ reliance argument was not raised in a timely fashion below, and may not be resurrected on appeal.

At page 37 of its Response, Harbour Homes again attempts to argue that the homeowners failed to present evidence of reliance on Harbour Homes’ negligent misrepresentations and failure to disclose. However, as the trial court ruled, and as Harbour Homes admits in footnote no. 4, Harbour Homes challenged this issue as a matter of law; not based upon a failure of proof. See also CP 175-77. Accordingly, the subsequent homeowners were not required to present evidence of reliance at summary judgment, Harbour Homes was not allowed to argue there was a failure of proof regarding reliance below, and it should not be allowed to argue it here.

- E. Harbour Homes is not entitled to recover its fees and costs on appeal on the grounds that the appeal is frivolous.**

Harbour Homes’ request for fees based upon a frivolous appeal should be denied. Even if Harbour Homes were to prevail on appeal, there can be no question that the homeowners have a good faith basis for

seeking an appeal of the summary judgment dismissing their claims. They hold facially valid assignments of the original homeowner's claims. No case law has been cited which holds that these assigned claims may not be pursued. Indeed, the general rule in Washington allows assignment. Similarly, there is no case law which prevents homeowners from pursuing direct claims under §522 of the Restatement (2d) of Torts. This request is without basis and should be denied.

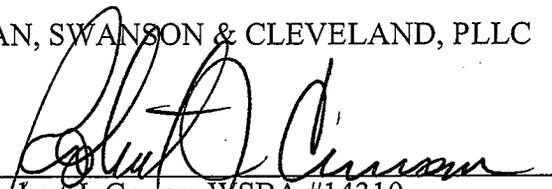
IV. CONCLUSION

For the reasons stated above, and as set forth in the Opening Brief, this Court should reverse the Order Granting Plaintiff's Motion for Summary Judgment, and remand for trial.

RESPECTFULLY SUBMITTED this 28th day of July, 2008.

RYAN, SWANSON & CLEVELAND, PLLC

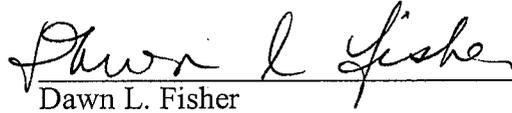
By


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DECLARATION OF SERVICE

I declare that on the 28th day of July, 2008, I caused to be served the foregoing document on counsel for Respondent, as noted, at the following address:

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Dated: July 28, 2008

Place: Seattle, WA

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