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SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

Cause No. 23384-7-III

MIKE G. VAN DINTER AND SHERYL ANN VAN DINTER,
husband and wife,

Appellants,

v.

JOSEPH M. ORR AND LORI L. ORR, husband and wife, each
individually and the martial community; FIRST AMERICAN
TITLE COMPANY OF SPOKANE, a Washington corporation;
FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign
corporation; FIRST AMERICAN CORPORATION,
a foreign corporation,

Respondents.

**VAN DINTER'S REPLY TO THE
ORR'S ANSWER**

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I. ASSIGNMENTS OF ERROR/ISSUES ON REVIEW

Did the Court of Appeals correctly hold that genuine issues of material fact exist with regards to the Van Dinter's negligent misrepresentation cause of action?

II. STATEMENT OF THE CASE

A. Undisputed Facts Relevant For Review.

The relevant facts in this case are undisputed. Prior to January 22, 2003, Joseph and Lori Orr ("Orrs") owned the property located at 8700 East Sprague Avenue, Spokane, Washington ("*Property*"). (C.P. 119–20). On November 16, 1999, the Spokane County Board of County Commissioners adopted an ordinance that called for the construction of sewer and street improvements benefiting the Property. (C.P. 90). In order to pay for the improvements, the ordinance also set a Capital Facility Rate ("CFR") to be assessed against each benefited parcel. (C.P. 90). In 2001, the sewer construction and street improvements benefiting the Property were completed. (C.P. 23-24; 86; and 141). The Orrs began attempts to sell the Property. In doing so, the Property was advertised as having all utilities including sewer. (C.P. 141).

Based on the representations by the Orrs and their agents, Mike Van Dinter and Sheryl Ann Van Dinter ("Van Dinters") purchased the Property on approximately January 23, 2003. (C.P. 22-23). In order to complete the transaction, the Orrs provided the Van Dinters a statutory warranty deed. (C.P. 23; C.P. 122). The statutory warranty deed, by law, warranted against all known and unknown encumbrances. (C.P. 9-11). The Orrs did not indicate, at any time, to the Van Dinters or their agents that any amounts were due and owing on the Property for the sewer construction or that the Property was encumbered in any way. (C.P. 23, 120).

In order to purchase the Property, the Van Dinters obtained financing from AmericanWest Bank. (C.P. 23). In turn, AmericanWest Bank obtained title insurance from First American Title Company of Spokane through First American Title Insurance Company and First American Corporation (collectively "First American"). (C.P. 23). The policy obtained by AmericanWest Bank insured against any encumbrances on the title of the property, against liens, or against assessments for street improvements. Id.

After the sale of the Property, it was discovered that in 1999 Spokane County had assessed the CFR against the Property for the sewer improvements which was perfected in 2001 when the construction was completed. (C.P. 23). Subsequent to the purchase, Spokane County sought payment of this encumbrance from the Van Dinters. (C.P. 23). AmericanWest Bank filed a formal notice of claim with First American because of the encumbrance. (C.P. 96). First American denied this claim. AmericanWest assigned its claims against First American under the title insurance policy to the Van Dinters in order to protect its interest. (C.P. 40–41).

B. Procedural History.

As a result of the Orrs and First American's refusal to honor their commitments, the Van Dinters commenced this suit to obtain payment of the encumbrance. (C.P. 3-11). The Van Dinters sought relief against the Orrs for breach of their statutory warranty deed and negligent misrepresentation of material facts in connection with the sale. (C.P. 3–11). The Van Dinters also sought relief against First American for breach of the title insurance policy. (C.P. 3–11). After First American and the Orrs answered, the Van Dinters moved

for summary judgment against First American. (C.P. 64–66; C.P. 54–63). In turn, First American cross-moved for summary judgment. (C.P. 67–80). On July 26, 2004, the Orrs moved for summary judgment on the Van Dinters' causes of action for breach of statutory warranty deed and negligent misrepresentation. (C.P. 107–118). The Van Dinters then moved for summary judgment against the Orrs on their cause of action for breach of statutory warranty deed. (C.P. 156–163). On August 20, 2004, the trial court heard argument on these motions. (C.P. 194). The trial court granted the Orrs' motion for summary judgment and First American's cross-motion for summary judgment. Both the Van Dinters' motions for summary judgment were denied. (C.P. 200–211). Appeal was then initiated. (C.P. 212–226).

On July 28, 2005, the Court of Appeals correctly held that genuine issues of material fact exist with regard to Van Dinters cause of action for negligent misrepresentation. However, the Court of Appeals ignored Washington law by holding that an undisclosed CFR does not constitute an encumbrance.

III. ARGUMENT

A. The Court Of Appeals Correctly Reversed The Trial Court.

The Court of Appeals was correct when it held that questions of material fact exist as to the Van Dinters' negligent misrepresentation cause of action. In Washington, negligent misrepresentation occurs when:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 826, 959 P.2d 651 (1998) citing Restatement (Second) of Torts § 552(1) (1977)(emphasis added).

Issues of negligence and proximate cause are questions of fact for the jury and are not usually susceptible to summary judgment. Ruff v. King County, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). See also Blumenshein v. Voelker, 124 Wn. App. 129, 136, 100 P.3d 344 (2004). Summary judgment should only be granted "if, from all

the evidence, reasonable persons could reach but one conclusion".
Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). Even where the evidentiary facts are undisputed, summary judgment is not proper if reasonable minds could draw different conclusions from those facts. Preston v. Duncan, 55 Wn.2d 678, 681-682, 349 P.2d 605 (1960).

Here, a review of the record and the decision of the Court of Appeals illustrates that numerous questions of fact exist with regard to the Van Dinters' negligent misrepresentation cause of action. These facts can only be determined by a jury. Thus, the Court of Appeals was correct when it reversed the Trial Court's grant of summary judgment on this issue and this part of its decision should be affirmed.

B. Questions of Fact Exist As To The First Element Of Negligent Misrepresentation.

The first element of a negligent misrepresentation claim is that the defendant made a negligent misrepresentation. See ESCA Corp., 135 Wn.2d at 826. Here, The Van Dinters presented specific facts supporting their allegation of negligent misrepresentation. (C.P. 23; C.P. 141). The Orrs represented that no amounts were

owed as to the property and that no encumbrances existed. (C.P. 29). The Orrs also represented the property had sewer - "*UTILITIES: public sewer, water & gas.*" (C.P. 141). Notably, the Orrs did not advertise that sewer was merely "available" as they argue in their Response Brief.

Whether the Van Dinters knew of the CFR is clearly a question of fact. The Orrs argue that the Court of Appeals should be reversed because it based its decision on the fact that the Van Dinters were unaware of the sewer construction. In addition, the Orrs argue that there is no evidence that they were aware of the CFR. prior to the sale, thus, they were not required to disclose what they did not know.

These arguments are wholly without merit. First, the Court of Appeals did find that the Van Dinters were unaware of the sewer construction as the Orrs would have this Court believe. What the Court of Appeals correctly found was that the Orrs did not tell the Van Dinters that the sewer was recently constructed. This is undisputed.

Second, as the Court of Appeals correctly held, the question of whether the Orrs knew or should have known that the CFR existed is a question of fact. The Orrs actually conceded they were required to disclose the CFR prior to the sale of the Property. (C.P. 94 – *"This charge will need to be disclosed by the owner when you are preparing to sell the property"*). Yet, the Orrs undoubtedly failed to disclose the CFR.

The Van Dinters are entitled to all reasonable inferences from the facts view in the light most favorable to them. See Magula v. Benton Franklin Title Co., Inc., 131 Wn.2d 171, 182, 930 P.2d 307 (1997). The Spokane County Ordinance that created the CFR. was enacted in 1999. (C.P. 90). It is a reasonable inference that the cost of County's sewer project that was completed in 2001 would have been sent via mail to the Orrs. (C.P. 23-24; 86; and 141). Thus, it is a reasonable inference that the Orrs knew of the CFR. Thus, the Court of Appeals was correct when it held that questions of fact exist as to the first element.

C. **Questions of Fact Exist As To The Second And Third Elements Of Negligent Misrepresentation.**

The second and third elements of negligent misrepresentation require that the Plaintiff justifiably rely on the misrepresentation which causes the party harm. See ESCA Corp., 135 Wn.2d at 826. Upon Summary Judgment, all facts must be viewed in the light most favorable to the Van Dinters and they must be given all reasonable inferences there from. See Magula, 131 Wn.2d at 182.

The Orrs present to this Court the same silted argument that was presented below. Namely, that the Van Dinters have not shown that they saw the advertisement prior to the sale, thus, there can be no justifiable reliance. This argument was rejected by the Court of Appeals and is no more persuasive today.

Here, the very fact the Van Dinters purchased the property supports the conclusion and/or inference that they relied upon the Orrs' representations. The Van Dinters are entitled to this inference. See Magula, 131 Wn.2d at 182. As testified to by Mike Van Dinter, the property was advertised as having sewer and the Orrs did not disclose that any amounts were owed for the sewer. (C.P. 23). It is undisputed these representations were false since the Orrs had failed

to pay the CFR. (C.P. 23). Even more remarkable was that the Orrs did not even disclose the fact the CFR. would need to be paid. (C.P. 141).

The only reasonable inference from the record is that the Van Dinters justifiably relied on the Property advertisement and the warranty deed when they purchased the Property. (C.P. 141; C.P. 122; C.P. 6). This has caused them harm because now the Van Dinters are wrongfully forced to shoulder the burden of paying the CFR. (C.P. 23). Consequently, the Court of Appeals was correct when it held that questions of fact exist as to the second and third elements. Therefore, this Court should affirm the Court of Appeals with regards to the Van Dinters negligent misrepresentation cause of action.

IV. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

An insured is entitled to attorney fees incurred as a result of the insurance company's wrongful refusal to pay a covered claim. Olympic Steamship Co., Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991). Moreover, the insurance policy provided that First American would pay attorney fees as a result of

defending the title. (C.P. 45). Here, the Van Dinters were forced to bring suit against First American with regard to First American's obligations. First American failed to pay a covered claim. Thus, under Olympic Steamship and the insurance policy, the Van Dinters request this Court grant their motion for attorney fees at both the Trial Court level, at the Court of Appeals and on review in this Court. This motion is made pursuant to RAP 18.1(b).

V. CONCLUSION

Pursuant to the foregoing, the Court of Appeals' Decision with regards to the Van Dinter's negligent misrepresentation cause of action should be affirmed.

DATED this 5th day of October, 2005.

DUNN & BLACK, P.S.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of October, 2005, I caused to be served a true and correct copy of the foregoing document to the following:

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