

X
FILED
SEP 20 2005
CLERK OF SUPREME COURT
STATE OF WASHINGTON
[Signature]

No. 77635-1

RECEIVED
SEP 20 10:13
CLERK OF SUPREME COURT
STATE OF WASHINGTON

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 marital 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.

**RESPONSE BRIEF OF RESPONDENTS, JOSEPH M. ORR AND
LORI L. ORR, HUSBAND AND WIFE, TO APPELLANTS'
PETITION FOR REVIEW TO WASHINGTON
SUPREME COURT**

Stephen F. Backman, WSBA # 6870
Backman & Blumel, P.S.
4407 N. Division, Suite 900
Spokane, Washington 99207
(509) 487-1651
Attorney for Respondents Orr

ORIGINAL

TABLE OF CONTENTS

I.	IDENTITY OF RESPONDENTS.....	1
II.	COURT OF APPEALS DECISION	1
III.	ASSIGNMENT OF ERROR	1
	1. Did The Court Of Appeals Err When It Determined That The Orrs May Have Negligently Misrepresented The Existence Of The CFR By Not Disclosing It?	1
	2. Did The Court of Appeals Err When It Determined That The Van Dinters Were Unaware That The Sewer Was Recently Constructed, Raising A Question Of Fact?	2
IV.	STATEMENT OF THE CASE	2
	A. Facts Relevant For Review	2
	B. Procedural History	3
V.	ARGUMENTS FOR DENYING REVIEW	4
	A. Van Dinters' Request For Review Should Be Denied	4
	1. The Court Of Appeals Decision Is Correct When It Determines That The CFR Is Not An Encumbrance Against The Property	4

2. The Court Of Appeals Decision Does Not Involve An Issue Of Substantial Public Interest That Needs To Be Reviewed By The Washington Supreme Court	4
B. The Spokane County CFR Is Not An Encumbrance	5
C. The Arguments To Uphold The Decision Concerning The Van Dinters' Claims Against First American Title	9
VI. VAN DINTERS' RAP 18.1 MOTION FOR ATTORNEY'S FEES AND COSTS	10
VII. THE ORRS' REQUEST FOR REVIEW	10
1. Did The Court Of Appeals Err When It Determined The Orrs May Have Negligently Misrepresented The Existence Of the CFR By Not Disclosing It?	10
2. Did The Court Of Appeals Err When It Determined That The Van Dinters Were Unaware That The Sewer Was Recently Constructed, Raising A Question of Fact?	13
VIII. CONCLUSION	13

APPENDIX

1. Mike G. Van Dinter, et ux, v. Joseph M. Orr, et ux., et al, No. 23384-7-III, Slip op. (Wash. App. Div. III. July 28, 2005).
2. RCW 39.46.150
3. RCW 36.89.040
4. RCW 36.89.110
5. RCW 36.89.080
6. RCW 36.89.090
7. RCW 36.89.100
8. RCW 36.94.150

TABLE OF AUTHORITIES

<i>Barrie v. Hosts of America</i> , 94 Wn.2d 640, 618 P.2d 96 (1980)	12
<i>Cowiche Basin Partnership v. Mayer</i> , 40 Wn. App. 223, 228, 698 P.2d 567 (1985) quoting from <i>Hebb v. Severson</i> , 32 Wn. 2d 159 (1948)	7
<i>ESCA Corp. v. KPMG Peat Marwick</i> , 135 Wn.2d 820, 959 P.2d 651 (1998)	12
<i>Flajole v. Schulze</i> , 80 Wn. 483, 141 P.1026 (1914)	8
<i>Green v. Tidball</i> , 26 Wn. 338, 67 P.84 (1901)	8
<i>Hebb v. Severson</i> , 32 Wn.2d 159 (1948)	7
<i>Knowles v. Temple</i> , 49 Wash. 595, 96 P.1 (1908)	8
<i>Lawyers Title Ins. Corp. v. Baik</i> , 147 Wn. 2d 536, 55 P.3d 619 (2002).....	10
<i>Richland School District v. Mabton School District</i> , 111 Wn. App. 377, 45 P.3d 580 (2002).....	10
<i>Teter v. Clark County</i> , 104 Wn.2d 227, 704 P.2d 1171 (1985)	6, 7

STATUTES

RCW 39.46.150	3,5
RCW 36.89.040	6
RCW 36.89.090	7
RCW 36.89.110	6, 7
RCW 36.89.100	6
RCW 36.89.080	7
RCW 36.94.150	7

OTHER AUTHORITIES

RAP 18.1	10
----------------	----

Joseph M. Orr and Lori L. Orr, husband and wife (“Orrs”), by and through their counsel, Stephen F. Backman of Backman & Blumel, P.S., submit the following response to the Petition for Review of Mike and Sheryl Van Dinter (“Van Dinters”).

I. IDENTITY OF RESPONDENTS

Respondents, Joseph M. Orr and Lori L. Orr, husband and wife, ask the Court to deny Appellants’ request for review of that portion of the Decision of the Court of Appeals, Division III, designated in Appellants’ Petition for Review and request the Court review that portion of the Court of Appeals, Division III Decision, designated in Section II of this Response.

II. COURT OF APPEALS DECISION

Respondents Orr seek review of that portion of the Court of Appeals, Division III Decision filed July 28, 2005 in Mike G. Van Dinter, et ux, v. Joseph M. Orr, et ux, et al., Appellate Cause No. 23384-7-III, in which the Court of Appeals overturned the Trial Court’s dismissal of Appellants claim of Negligent Misrepresentation against Respondents Orr.

III. ASSIGNMENT OF ERROR

1. Did The Court Of Appeals Err When It Determined That The Orrs May Have Negligently Misrepresented The Existence Of The CFR By Not Disclosing It?

2. Did The Court Of Appeals Err When It Determined That The Van Dinters Were Unaware That The Sewer Was Recently Constructed, Raising A Question Of Fact?

IV. STATEMENT OF THE CASE

A. Facts Relevant For Review:

On or about January 22, 2003, Joseph and Lori Orr sold vacant property located at 8700 E. Sprague Ave, Spokane Valley, Washington to the Van Dinters. (C.P. 22-25). Although the property was advertised as having water, sewer and power adjacent to the property, the Van Dinters have never stated they saw this advertisement prior to the purchase and have never stated as fact that they relied upon this representation when making their decision to purchase. (C.P. 22-25). The Van Dinters did state in one of their Declarations in Support of their Motion for Summary Judgment that they were familiar with the area around the property and were aware that sewers had been installed. (C.P. 22-25).

Prior to the sale, the Orrs had not received any notice that a fee for the installation of the sewer adjacent to their Sprague Ave. property was due and/or payable, what the amount of any such fee would be or that failure to pay any such fee could result in a lien or encumbrance on their property. (C.P. 119-122).

The method chosen by Spokane County to finance the sewer installation adjacent to the property on Sprague Avenue was by issuing revenue bonds whose repayment was to be made by increasing the sewer fees to the properties. (C.P. 81-94). The Capital Facilities Rate (CFR) was the amount of this repayment fee. (C.P. 81-94). The CFR is merely an additional charge added to the monthly sewer bill for the property. RCW 39.46.150.

In a letter from Spokane County dated April 30, 2003, three months after the purchase, the County finally provided a specific amount each property would be charged monthly to repay the revenue bonds. (C.P. 81-94). However, the letter even states in bold letters: “**This account summary is not a bill**”. (Emphasis in original).

B. Procedural History:

The first paragraph of Petitioner’s Procedural History is accurate and the Respondents Orr adopt it herein. However, the second paragraph has nothing to do with the procedural history of this case and is merely legal argument, editorializing and surplusage.

V. ARGUMENTS FOR DENYING REVIEW

A. Van Dinters' Request For Review Should Be Denied.

1. The Court Of Appeals Decision Is Correct When It Determines That The CFR Is Not An Encumbrance Against The Property.

The Van Dinters' whole argument is based upon a misinterpretation or misunderstanding of the statutory process Spokane County used to finance the installation of the sewers which led to the creation of the CFR. Just as they did before Judge Cozza and the Court of Appeals, Division III, the Van Dinters rely upon cases involving a different financing method than that used by Spokane County in this case, creation of local improvement districts, and they use cases which were later disavowed by the Washington Supreme Court in support of their argument. The Van Dinters offer nothing new in support of their request for review but merely rehash the same argument and cite the same cases which do not apply to the financing method used by Spokane County. The Van Dinters' Petition for Review should be denied.

2. The Court Of Appeals Decision Does Not Involve An Issue Of Substantial Public Interest That Needs To Be Reviewed By The Washington Supreme Court.

But for the fact that the Van Dinters have misunderstood the ramifications of the financing method chosen by Spokane County to finance

the installation of the sewers, and have tried to argue inapplicable law to support their misunderstanding, this case offers nothing new to the body of law and does not raise any issues of substantial public interest.

B. The Spokane County CFR Is Not An Encumbrance.

Simply put, if Spokane County had chosen to create a local improvement district to install these sewers, the statutory scheme for that process would have created a lien against the property for the costs of the installation, which should have been disclosed by the Orrs. RCW 35.50 et seq. However, Spokane County chose not to use this method of financing and did not create a local improvement district.

The financing method Spokane County chose to finance installation of these sewers was through a different statutory scheme and the issuance of revenue bonds. RCW 39.46.150. (C.P. 81-94). The statute allowing the revenue bond financing also provides for creating a charge on sewer bills for repayment of the revenue bonds. RCW 39.46.150. The statute providing for this financing method does not create a lien for repayment of these fees and Spokane County, the issuing agency for the revenue bonds, states these charges are not a lien. (C.P. 81-94).

The CFR charge is simply an addition to the sewer bill for the property benefitted. (C.P. 81-94). It does not encumber the property any more than a monthly charge for water or electricity encumbers the property.

Spokane County itself, the local governmental agency imposing the fee, recognizes that the CFR charge is not a lien against the property but simply a portion of the sewer bill for the property. (C.P. 81-94). In fact, Spokane County Public Utilities Web Site specifically states: "This CFR is not an assessment and will not show up in a title search." (C.P. 81-94). Spokane County's own Ordinance states: "The 'capital facilities rate' or 'CFR' is that portion of the monthly sewer charges for property within an individual sewer project that is attributable to the costs of acquiring, constructing and installing the system of sewerage." (Emphasis added). (C.P. 81-94). A similar statutory method of financing local improvements is set out in RCW 36.89 et seq., allowing counties to provide services for the control of storm and surface water. This statutory scheme allows a county several methods of financing these services. Issuance of general obligation bonds under RCW 36.89.040, Creation of a local improvement district and charging special assessments under RCW 36.89.110, issuance of revenue bonds under RCW 36.89.100, or adoption of a resolution fixing rates and

charges for furnishing services, to those served or receiving benefits under RCW 36.89.080.

This Court, in Teter v. Clark County, 104 Wn.2d 227, 704 P.2d 1171 (1985), recognized that under the various financing methods allowed under RCW 36.89 et seq., only the creation of a local improvement district creates a lien against the properties benefitted. Both the financing method chosen in Teter and that chosen by Spokane County in this case, impose a fee on the parties benefitted to pay for the services provided. In the case of Teter, the Supreme Court recognized that the charges imposed by Clark County are not special assessments, stating: "Clearly, the County did not proceed under the special assessment section, RCW 36.89.110". Teter, at 232. The same is true in this case, Spokane County did not proceed under the RCW 35.50 statutory scheme and did not create a lien against the properties benefitted.

Just as with 36.89 RCW, the only time a sewer charge can become a right to or interest in real property is if the charges are not paid in a timely fashion. RCW 36.94.150; RCW 36.89.090. Then and only then, the delinquent charges may become a lien against the property under this statutory procedure. There is no allegations in this case that the CFR charges were delinquent or even due and payable, when the Orrs sold the property.

All parties agree “The term encumbrance has an established legal meaning, i.e., ‘any right to or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant. . . .” Cowiche Basin Partnership v. Mayer, 40 Wa. App. 223, 228, 698 P.2d 567 (1985), quoting from Hebb v. Severson, 32 Wn.2d 159 (1948). The Court of Appeals was correct in its decision when it stated: “Nothing in the record suggests the CFR grants any right to or interest in the property to the County. Furthermore, nothing suggests the sewer diminished the property’s value.” (Court of Appeals Decision, page 4). The Van Dinters have provided this Court with nothing which contradicts the Court of Appeals reasoning.

The cases cited by the Van Dinters in support of their argument are inapplicable because they all date from the early 1900's when the use of revenue bonds to finance public works projects was not a process available to governmental agencies to finance projects such as the sewer improvements in this case. The main case relied upon by the Van Dinters, Green v. Tidball, 26 Wash. 338, 67 P. 84 (1901), was later disavowed by the very Judge who wrote that opinion in Knowles v. Temple, 49 Wash. 595, 96 P. 1 (1908), holding that the facts of Green were peculiar and ruling that the “rule itself is open to serious objection”. Knowles at 597-98. Another later case, Flajole

v. Schulze, 80 Wash. 483, 141 P. 1026 (1914), stated when discussing the Green opinion: “Such language, joined in by the Judge who wrote the opinion in *Green v. Tidball*, can be read in only one way, and that is that the Court no longer regarded *Green v. Tidball* as authoritative”. Flajole at 485. Finally, the Knowles Court at 598 stated: “The doctrine that the mere inchoate right to levy a tax or assessment constitutes an incumbrance cannot be accepted as one of general principal.” Even were these cases cited by the Van Dinters not disfavored in later opinions, the facts do not fit this case. They each address situations wherein the County created a local improvement district to make the improvements. That is simply not the situation here and therefore these cases do not apply to this case.

As a matter of law, the Orrs were entitled to Summary Judgment and this Court should uphold the decision of Judge Cozza and the Court of Appeals, Division III.

C. The Arguments To Uphold The Decision Concerning The Van Dinters’ Claims Against First American Title.

These arguments by the Van Dinters apply to their claims against First American Title and will not be addressed by the Orrs.

**VI. VAN DINTERS' RAP 18.1 MOTION FOR
ATTORNEY'S FEE AND COSTS**

The Van Dinters' request for attorney's fees and costs only applies to its claims against First American Title and will not be addressed by the Orrs.

VII. THE ORRS' REQUEST FOR REVIEW

1. Did The Court Of Appeals Err When It Determined The Orrs May Have Negligently Misrepresented The Existence Of The CFR By Not Disclosing It?

A negligent misrepresentation claim is comprised of three elements:

1) a party negligently misrepresents a fact or omits to disclose a relevant fact;
2) the other party relies upon this misrepresentation and is thereby harmed;
and 3) the other parties reliance is justified. Lawyers Title Ins. Corp. v. Baik, 147 Wn. 2d 536, 55 P.3d 619 (2002); Richland School District v. Mabton School District, 111 Wn. App. 377, 45 P.3d 580 (2002), review denied 148 Wn.2d 1002 (2003).

In its opinion, the Court of Appeals states as fact that the Orrs did not tell the Van Dinters the sewers were recently constructed and then concludes whether the Van Dinters knew of the existence of the CFR was a question of fact. (Court of Appeals Decision, page 5). First, the Van Dinters admitted that they were aware of the recent installation of the sewers along Sprague

Ave. (C.P. 22-25). Thus, there was no need to disclose this information to the Van Dinters. Secondly, there is no evidence that the Orrs were aware of the CFR at the time of the sale, therefore, they could not be required to disclose what they did not know. The Van Dinters have not alleged and the record fails to support any omission on the part of the Orrs. As argued above, the Van Dinters cannot show that any CFR charge was due and owing when the property was sold. The first actual Notice of a specific charge against the property in question was not given by Spokane County until April 2003, three months after the sale, and this notice specifically stated it was not a bill. (C.P. 81-94). Finally, this was not an argument made by the Van Dinters to the Court of Appeals or the Trial Court.

The Van Dinters' allegation in support of their claim for negligent misrepresentation is that the Orrs caused an advertisement to be distributed that represented the property had utilities: public sewer, water and gas. (C.P. 131-142). The Orrs admit their agent made this alleged statement in the advertisement and that said statement is true. The Van Dinters do not provide this Court with any proof that this statement is untrue, that public water, sewer and gas were not available to the property. They also fail to provide this Court with proof they saw this advertisement prior to the

purchase. (C.P. 22-25). Further, the Van Dinters knew the property had sewer available by their own statement, prior to the purchase. (C.P. 22-25).

As stated above, the information the Van Dinters allege was misrepresented, that the property had: “UTILITIES: Public Sewer, Water & Gas”, is true and the Van Dinters do not provide any proof disputing this. Thus, this was not a misrepresentation. Further, an allegation of negligent misrepresentation requires the party to have justifiably relied upon the false representation before it is actionable. ESCA Corp v. KPMG Peat Marwick, 135 Wn.2d 820, 959 P.2d 651(1998). The Van Dinters never allege they saw the advertisement or relied upon it prior to the purchase and finally, the Van Dinters admit they knew sewers had just been installed in the area. Thus, the Van Dinters have not proven any reliance upon the advertisement, much less justifiable reliance.

While the issue of negligence is not usually susceptible to summary judgment, in this case, the Van Dinters have failed to allege a misrepresentation which they justifiably relied upon was ever made. The questions of fact relied upon by the Court of Appeals in overturning the Trial Court are not supported by the record. A summary judgment motion is properly granted only if, from of the evidence, reasonable men could reach

but one conclusion. Barrie v. Hosts of America, 94 Wn.2d 640, 618 P.2d 96 (1980). Such was the case here. The Court of Appeals decision should be reversed and the Trial Court's decision dismissing the Van Dinters' negligent misrepresentation claim should be reinstated.

2. Did The Court Of Appeals Err When It Determined That The Van Dinters Were Unaware That The Sewer Was Recently Constructed, Raising A Question Of Fact?

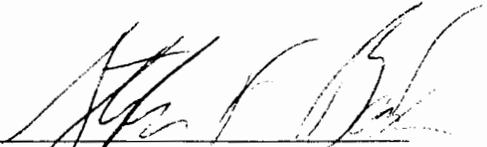
The Court of Appeals based its decision to overturn the Trial Court's dismissal of the Van Dinters' negligent misrepresentation claim against the Orrs in part, on the assumption that the Van Dinters were unaware that the sewers were recently constructed. This is not supported by the record before the Court. In fact, the Van Dinters have admitted they were aware that the sewers had been recently installed. (C.P. 22-25). Thus, the reasoning for the Court of Appeals decision to overturn the Trial Court's dismissal is based upon a false assumption and should itself be reversed.

VIII. CONCLUSION

For the reasons stated above, this Court should deny the Van Dinters' Petition for Review, grant the Orrs' Request for Review and reverse the Court of Appeals, Division III Decision, and reinstate the dismissal of the Van Dinters' negligent misrepresentation claim.

Respectfully submitted this 19 day of September, 2005.

BACKMAN & BLUMEL, P.S.

By: 

STEPHEN F. BACKMAN

WSBA # 6870

Attorney for Respondents

CERTIFICATE OF SERVICE

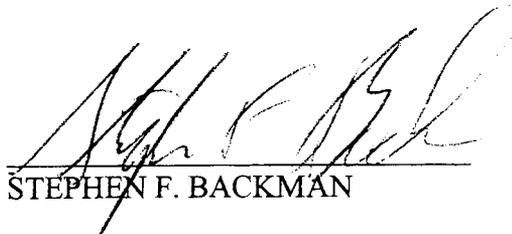
I HEREBY CERTIFY that on the 20 day of September, 2005,
I caused to be served a true and correct copy of hte foregoing document to the
following:

HAND DELIVERY
 U.S. MAIL
 OVERNIGHT MAIL
 FAX TRANSMISSION

Kevin W. Roberts
Nicholas D. Kovarik
Dunn & Black, P.S.
10 North Post, Suite 200
Spokane, WA 99201

HAND DELIVERY
 U.S. MAIL
 OVERNIGHT MAIL
 FAX TRANSMISSION

John D. Munding
Crumb & Munding, P.S.
1950 Bank of America Bldg.
601 W. Riverside
Spokane, WA 99201


STEPHEN F. BACKMAN

FILED

JUL 28 2005

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

**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 marital 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.)

No. 23384-7-III

**Division Three
Panel Two**

UNPUBLISHED OPINION

KATO, C.J.—The Van Dinters bought property from the Orrs. After the sale, Spokane County sent the Van Dinters a bill for sewer construction. Believing the property already had sewer, they sued the Orrs for breach of statutory warranty deed and negligent misrepresentation. They also sued First American Title Company for breach of the title insurance policy. The court

No. 23384-7-III
Van Dinter v. Orr

granted summary judgment dismissal of all claims. We affirm in part and reverse in part.

Joseph and Lori Orr owned vacant property located at 8700 East Sprague Avenue in Spokane, Washington. On November 16, 1999, the Spokane County Commissioners adopted an ordinance calling for sewer construction and other street improvements that would benefit property. In order to pay for the improvements, the County set a Capital Facilities Rate (CFR) to be assessed against each benefited parcel. The project was completed in 2001.

The Orrs later listed the property for sale, indicating the property had sewer. On January 23, 2003, Mike and Sheryl Ann Van Dinter bought the property. The Orrs gave the Van Dinters a statutory warranty deed. At no time did the Orrs indicate any amount was owed for the costs of sewer construction.

In order to buy the property, the Van Dinters got a loan from AmericanWest Bank, which obtained title insurance for the property from First American Title Company. This policy insured against any encumbrances on the property. The Van Dinters also had a title insurance policy with First American.

In 2003, Spokane County sent the Van Dinters a letter indicating a CFR existed for sewer construction. The County sought payment from them.

The Van Dinters and AmericanWest filed a claim with First American because of this encumbrance. The claim was denied. AmericanWest then assigned its claim against First American to the Van Dinters.

The Van Dinters sued the Orrs for breach of statutory warranty deed and negligent misrepresentation and sued First American for breach of the title insurance policy. All parties moved for summary judgment. The court granted summary judgment to the Orrs and First American. The Van Dinters appeal.

In reviewing an order of summary judgment, we engage in the same inquiry as the trial court and consider the evidence and all reasonable inferences from it in favor of the nonmoving party. *Bishop v. Jefferson Title Co.*, 107 Wn. App. 833, 840-41, 28 P.3d 802 (2001), *review denied*, 145 Wn.2d 1025 (2002). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 841. The Orrs sold the property to the Van Dinters and gave them a statutory warranty deed, which covenants against both known and unknown title defects. *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 162, 951 P.2d 817, *review denied*, 136 Wn.2d 1015 (1998). A grantor conveying land by a statutory warranty deed makes several covenants against title defects, but the only covenant at issue here is the promise that the title was free of encumbrances. *Id.*

No. 23384-7-III
Van Dinter v. Orr

The Van Dinters argue the CFR was an encumbrance on the property and thus should have been disclosed. An encumbrance is “any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant.” *Robinson v. Khan*, 89 Wn. App. 418, 421, 948 P.2d 1347 (1998) (quoting *Merlin v. Rodine*, 32 Wn.2d 757, 760, 203 P.2d 683 (1949)).

In 1999, Spokane County adopted a Sewer Construction Program using a CFR to fund this project. According to the Spokane County Code, a CFR is “that portion of the monthly sewer charges for property within an individual sewer project that is attributable to the costs of acquiring, constructing and installing the system of sewerage.” Spokane County Code 8.03.1135. The County gets a lien on the property for any delinquent amounts due. Spokane County Code 8.03.9040. The County indicates “the CFR charge is not an assessment and will not show up in a title search.” Clerk’s Papers at 94.

Nothing in the record suggests the CFR grants any right to or interest in the property to the County. Furthermore, nothing suggests the sewer diminished the property’s value. The Van Dinters argue the purchase price included the sewer’s value and they now have to pay again for that same value. Although they may have paid too much for the property, they show no decrease in the land’s value. The CFR is thus not an encumbrance. The Orrs did not breach the

No. 23384-7-III
Van Dinter v. Orr

statutory warranty deed. The court properly granted summary judgment on this claim.

The Van Dinters also pleaded negligent misrepresentation. In analyzing a negligent misrepresentation claim, we ask if (1) the defendant made a negligent misrepresentation; (2) a party relied on the misrepresentation causing the party harm; and (3) the party was justified in relying on the misrepresentation. See *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002); *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998).

The Van Dinters assert the Orrs negligently misrepresented in advertisements that the property was connected to sewer. But the property did have sewer. There was no misrepresentation.

The Orrs may, however, have negligently misrepresented the existence of the CFR by not disclosing it. Washington has adopted *Restatement (Second) of Torts* § 551 (1977), which permits a claim for negligent misrepresentation if the plaintiff establishes a duty to disclose or to provide accurate information. *Richland Sch. Dist. v. Mabton Sch. Dist.*, 111 Wn. App. 377, 385, 45 P.3d 580 (2002), *review denied*, 148 Wn.2d 1002 (2003). Liability can exist for failure to disclose. *Id.*

The Orrs did not tell the Van Dinters the sewer was recently constructed. Whether the Van Dinters knew of the CFR's existence is a question of fact. The

No. 23384-7-III
Van Dinter v. Orr

information on the Spokane County Web site indicates a seller should disclose a CFR to a buyer. As to the first element, a question of fact exists.

As to the second element, the Van Dinters claim they relied on the fact the property was connected to sewer in making their purchasing decision. This assertion also raises a question of fact.

As to the third element, whether a party justifiably relied upon a misrepresentation is also an issue of fact. *Alejandro v. Bull*, 123 Wn. App. 611, 625-26, 98 P.3d 844 (2004), *review granted*, (Wash. June 1, 2005, No. 762741). When the evidence is viewed in a light most favorable to the Van Dinters, questions of fact exist that must be resolved by a trial. The court erred by summarily dismissing this claim.

The Van Dinters further contest the court's order granting summary judgment in favor of First American. They sued First American, claiming it breached the title insurance policy. We construe title insurance policies by applying the general rules applicable to all contracts. *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 941 (1994). Any ambiguities are construed against the insurer in favor of coverage. The policy must be interpreted as an average person seeking insurance would. *Shotwell v. Transamerica Title Ins. Co.*, 91 Wn.2d 161, 167, 588 P.2d 208 (1978). An ambiguity exists if language in the

No. 23384-7-III
Van Dinter v. Orr

policy lends itself to more than one reasonable interpretation. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997).

On the assigned claim, the Van Dinters assert that First American breached the title insurance policy issued to AmericanWest because it insured against loss or damage for any defect in or lien or encumbrance on the title. But First American contends there are no damages and a breach of contract claim thus cannot be sustained. Damages are an essential element of a breach of contract claim. *See, e.g., NW Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712-13, 899 P.2d 6 (1995). There is no showing AmericanWest suffered a loss of its priority on the title. There are no damages, which is fatal to the claim for breach of contract.

The Van Dinters further argue First American breached the title insurance policy issued to them because the CFR is an encumbrance. They did not plead breach of the insurance contract in their complaint. This argument is raised for the first time on appeal. We need not consider it. RAP 2.5(a). Moreover, the CFR is not an encumbrance. The court properly granted First American's motion for summary judgment.

The Van Dinters seek attorney fees against First American. But they did not prevail on this claim and are therefore not entitled to an award of fees.

No. 23384-7-III
Van Dinter v. Orr

Claiming the Van Dinters' action was frivolous, the Orrs and First American also request attorney fees. An appeal is frivolous if it is so totally devoid of merit there is no reasonable possibility of reversal. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 109-10, 74 P.3d 692 (2003). But the appeal is clearly not so devoid of merit that an award of fees is proper.

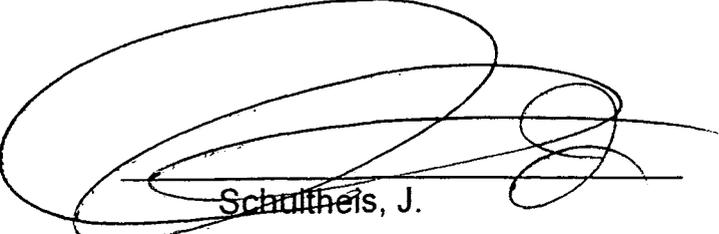
The summary dismissal of the negligent misrepresentation claim against the Orrs is reversed. The judgment of the trial court is affirmed in all other respects.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

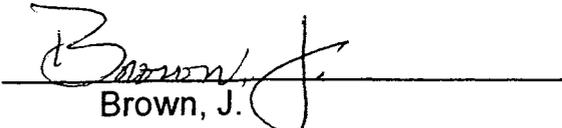


Kato, C.J.

WE CONCUR:



Schultheis, J.



Brown, J.

RCW 39.46.150

Revenue bonds -- Alternative method of issuance -- Limitations.

(1) Any local government authorized to issue revenue bonds may issue revenue bonds under this section and RCW 39.46.160 . If a local government chooses to issue revenue bonds under this section and RCW 39.46.160 , the issue shall be subject to the limitations and restrictions of these sections. The authority to issue revenue bonds under this section and RCW 39.46.160 is supplementary and in addition to any authority otherwise existing. The maximum term of any revenue bonds shall be forty years unless another statute authorizing the local government to issue revenue bonds provides for a different maximum term, in which event the local government may issue revenue bonds only with terms not in excess of such different maximum term.

(2) The governing body of a local government issuing revenue bonds shall create a special fund or funds, or use an existing special fund or funds, exclusively from which, along with reserve funds which may be created by the governing body, the principal and interest on such revenue bonds shall be payable. These reserve funds include those authorized to be created by RCW 39.46.160 .

Subject to the limitations contained in this section, the governing body of a local government may provide such covenants as it may deem necessary to secure the payment of the principal of and interest on revenue bonds, and premium on revenue bonds, if any. Such covenants may include, but are not limited to, depositing certain revenues into a special fund or funds as provided in subsection (3) of this section; establishing, maintaining, and collecting fees, rates, charges, tariffs, or rentals, on facilities and services, the income of which is pledged for the payment of such bonds; operating, maintaining, managing, accounting, and auditing the local government; appointing trustees, depositaries, and paying agents; and any and all matters of like or different character, which affect the security or protection of the revenue bonds.

APPENDIX 2

(3) The governing body may obligate the local government to set aside and pay into a special fund or funds created under subsection (2) of this section a proportion or a fixed amount of the revenues from the following: (a) The public improvements, projects, or facilities that are financed by the revenue bonds; or (b) the public utility or system, or an addition or extension to the public utility or system, where the improvements, projects, or facilities financed by the revenue bonds are a portion of the public utility or system; or (c) all the revenues of the local government; or (d) any other money legally available for such purposes. As used in this subsection, the term "revenues" includes the operating revenues of a local government that result from fees, rates, charges, tariffs, or rentals imposed upon the use or availability or benefit from projects, facilities, or utilities owned or operated by the local government and from related services provided by the local government and other revenues legally available to be pledged to secure the revenue bonds.

The proportion or fixed amount of revenue so obligated shall be a lien and charge against these revenues, subject only to maintenance and operating expenses. The governing body shall have due regard for the cost of maintenance and operation of the public utility, system, improvement, project, facility, addition, or extension that generates revenues obligated to be placed into the special fund or funds from which the revenue bonds are payable, and shall not set aside into the special fund or funds a greater amount or proportion of the revenues that in its judgment will be available over and above such cost of maintenance and operation and the proportion or fixed amount, if any, of the revenue so previously pledged. Other revenues, including tax revenues, lawfully available for maintenance or operation of revenue generating facilities may be used for maintenance and operation purposes even though the facilities are acquired, constructed, expanded, replaced, or repaired with moneys arising from the sale of revenue bonds. However, the use of these other revenues for maintenance and operation purposes shall not be deemed to directly or indirectly guarantee the revenue bonds or create a general obligation. The obligation to maintain and impose fees, rates, charges, tariffs, or rentals at levels sufficient to finance maintenance and operations shall remain if the other revenues available for such purposes diminish or cease.

The governing body may also provide that revenue bonds payable out of the same source or sources of revenue may later be issued on a parity with any revenue bonds being issued and sold.

(4) A revenue bond issued by a local government shall not constitute an obligation of the state, either general or special, nor a general obligation of the local government issuing the bond, but is a special obligation of the local government issuing the bond, and the interest and principal on the bond shall only be payable from the special fund or funds established pursuant to subsection (2) of this section, the revenues lawfully pledged to the special fund or funds, and any lawfully created reserve funds. The owner of a revenue bond shall not have any claim for the payment thereof against the local government arising from the revenue bond except for payment from the special fund or funds, the revenues lawfully pledged to the special fund or funds, and any lawfully created reserve funds. The owner of a revenue bond issued by a local government shall not have any claim against the state arising from the revenue bond. Tax revenues shall not be used directly or indirectly to secure or guarantee the payment of the principal of or interest on revenue bonds.

[(5)] The substance of the limitations included in this subsection shall be plainly printed, written, engraved, or reproduced on: (a) Each revenue bond that is a physical instrument; (b) the official notice of sale; and (c) each official statement associated with the bonds.

(6) The authority to create a fund shall include the authority to create accounts within a fund.

(7) Local governments issuing revenue bonds, payable from revenues derived from projects, facilities, or utilities, shall covenant to maintain and keep these projects, facilities, or utilities in proper operating condition for their useful life.

[1986 c 168 § 1.]

NOTES:

Funds for reserve purposes may be included in issue amount: RCW 39.44.140 .

RCW 36.89.040

Issuance of general obligation bonds -- Proposition submitted to voters.

To carry out the purposes of this chapter counties shall have the power to issue general obligation bonds within the limitations now or hereafter prescribed by the Constitution and laws of this state. Such general obligation bonds shall be issued and sold as provided in chapter 39.46 RCW.

The question of issuance of bonds for any undertaking which relates to a number of different highways or parts thereof, whether situated wholly or partly within the limits of any city or town within the county, and whether such bonds are intended to supply the whole expenditure or to participate therein, may be submitted to the voters of the county as a single proposition. If the county legislative authority in submitting a proposition relating to different highways or parts thereof declare that such proposition has for its object the furtherance and accomplishment of the construction of a system of connected public highways within such county and constitutes a single purpose, such declaration shall be presumed to be correct and upon the issuance of the bonds the presumption shall become conclusive.

The question of the issuance of bonds for any undertaking which relates to a number of different open spaces, park, recreation and community facilities, whether situated wholly or partly within the limits of any city or town within the county, and whether such bonds are intended to supply the whole expenditure or to participate therein may be submitted to the voters as a single proposition. If the county legislative authority in submitting a proposition relating to different open spaces, park, recreation and community facilities declare that such proposition has for its object the furtherance, accomplishment or preservation of an open space, park, recreation and community facilities system available to, and for the benefit of, all the residents of such county and constitutes a single purpose, such declaration shall be presumed to be correct and upon the issuance of the bonds the presumption shall become conclusive.

The question of the issuance of bonds for any undertaking which relates to a number of different public health and safety facilities, whether situated wholly or partly within the limits of any city or town within the county, and whether such bonds are intended to supply the whole expenditure or to participate therein may be submitted to the voters as a single proposition. If the county legislative authority in submitting a proposition relating to different public health and safety facilities declare that such proposition has for its object the furtherance or accomplishment of a system of public health and safety facilities for the benefit of all the residents of such county and constitutes a single purpose, such declaration shall be presumed to be correct and upon the issuance of the bonds the presumption shall become conclusive.

The question of the issuance of bonds for any undertaking which relates to a number of different storm water control facilities, whether situated wholly or partly within the limits of any city or town within the county, and whether such bonds are intended to supply the whole expenditure or to participate therein may be submitted to the voters as a single proposition. If the county legislative authority in submitting a proposition relating to different storm water control facilities declares that such proposition has for its object the furtherance, accomplishment or preservation of a storm water control facilities system for the benefit of all the residents of such county and constitutes a single purpose, such declaration shall be presumed to be correct and upon the issuance of the bonds the presumption shall become conclusive.

Elections shall be held as provided in RCW 39.36.050 .

[1984 c 186 § 34; 1983 c 167 § 99; 1970 ex.s. c 30 § 4; 1967 c 109 § 4.]

NOTES:

Purpose -- 1984 c 186: See note following RCW 39.46.110 .

Liberal construction -- Severability -- 1983 c 167: See RCW 39.46.010 and note following.

RCW 36.89.110

**Storm water control facilities -- Utility local improvement districts --
Assessments.**

A county may create utility local improvement districts for the purpose of levying and collecting special assessments on property specially benefited by one or more storm water control facilities. The provisions of RCW 36.94.220 through 36.94.300 concerning the formation of utility local improvement districts and the fixing, levying, collecting and enforcing of special assessments apply to utility local improvement districts authorized by this section.

[1981 c 313 § 21.]

NOTES:

Severability -- 1981 c 313: See note following RCW 36.94.020 .

RCW 36.89.080

Storm water control facilities -- Rates and charges -- Limitations -- Use.

(1) Subject to subsections (2) and (3) of this section, any county legislative authority may provide by resolution for revenues by fixing rates and charges for the furnishing of service to those served or receiving benefits or to be served or to receive benefits from any storm water control facility or contributing to an increase of surface water runoff. In fixing rates and charges, the county legislative authority may in its discretion consider:

- (a) Services furnished or to be furnished;
- (b) Benefits received or to be received;
- (c) The character and use of land or its water runoff characteristics;
- (d) The nonprofit public benefit status, as defined in RCW 24.03.490 , of the land user;
- (e) Income level of persons served or provided benefits under this chapter, including senior citizens and disabled persons; or
- (f) Any other matters which present a reasonable difference as a ground for distinction.

(2) The rate a county may charge under this section for storm water control facilities shall be reduced by a minimum of ten percent for any new or remodeled commercial building that utilizes a permissive rainwater harvesting system. Rainwater harvesting systems shall be properly sized to utilize the available roof surface of the building. The jurisdiction shall consider rate reductions in excess of ten percent dependent upon the amount of rainwater harvested.

(3) Rates and charges authorized under this section may not be imposed on lands taxed as forest land under chapter 84.33 RCW or as timber land under chapter 84.34 RCW.

(4) The service charges and rates collected shall be deposited in a special fund or funds in the county treasury to be used only for the purpose of paying all or any part of the cost and expense of maintaining and operating storm water control facilities, all or any part of the cost and expense of planning, designing, establishing, acquiring, developing, constructing and improving any of such facilities, or to pay or secure the payment of all or any portion of any issue of general obligation or revenue bonds issued for such purpose.

[2003 c 394 § 3; 1998 c 74 § 1; 1995 c 124 § 1; 1970 ex.s. c 30 § 7.]

NOTES:

Sewerage, water, and drainage systems: Chapter 36.94 RCW.

RCW 36.89.090

Storm water control facilities -- Lien for delinquent charges.

The county shall have a lien for delinquent service charges, including interest thereon, against any property against which they were levied for storm water control facilities, which lien shall be superior to all other liens and encumbrances except general taxes and local and special assessments. Such lien shall be effective and shall be enforced and foreclosed in the same manner as provided for sewerage liens of cities and towns by RCW 35.67.200 through 35.67.290 : PROVIDED, That a county may, by resolution or ordinance, adopt all or any part of the alternative interest rate, lien, and foreclosure procedures as set forth in RCW 36.89.092 through 36.89.094 or by RCW 36.94.150 .

[1991 c 36 § 1; 1987 c 241 § 1; 1970 ex.s. c 30 § 8.]

RCW 36.89.100

Storm water control facilities -- Revenue bonds.

(1) Any county legislative authority may authorize the issuance of revenue bonds to finance any storm water control facility. Such bonds may be issued by the county legislative authority in the same manner as prescribed in RCW 36.67.510 through 36.67.570 . Such bonds may be in any form, including bearer bonds or registered bonds as provided in RCW 39.46.030 .

Each revenue bond shall state on its face that it is payable from a special fund, naming such fund and the resolution creating the fund.

Revenue bond principal, interest, and all other related necessary expenses shall be payable only out of the appropriate special fund or funds. Revenue bonds shall be payable from the revenues of the storm water control facility being financed by the bonds, a system of these facilities and, if so provided, from special assessments, installments thereof, and interest and penalties thereon, levied in one or more utility local improvement districts authorized by *this 1981 act.

(2) Notwithstanding subsection (1) of this section, such bonds may be issued and sold in accordance with chapter 39.46 RCW.

[1983 c 167 § 100; 1981 c 313 § 20; 1970 ex.s. c 30 § 9.]

NOTES:

***Reviser's note:** For codification of "this 1981 act" [1981 c 313], see Codification Tables, Volume 0.

Liberal construction -- Severability -- 1983 c 167: See RCW 39.46.010 and note following.

Severability -- 1981 c 313: See note following RCW 36.94.020 .

RCW 36.94.150

Lien for delinquent charges.

All counties operating a system of sewerage and/or water shall have a lien for delinquent connection charges and charges for the availability of sewerage and/or water service, together with interest fixed by resolution at eight percent per annum from the date due until paid. Penalties of not more than ten percent of the amount due may be imposed in case of failure to pay the charges at times fixed by resolution. The lien shall be for all charges, interest, and penalties and shall attach to the premises to which the services were available. The lien shall be superior to all other liens and encumbrances, except general taxes and local and special assessments of the county.

The county department established in RCW 36.94.120 shall certify periodically the delinquencies to the auditor of the county at which time the lien shall attach.

Upon the expiration of sixty days after the attachment of the lien, the county may bring suit in foreclosure by civil action in the superior court of the county where the property is located. Costs associated with the foreclosure of the lien, including but not limited to advertising, title report, and personnel costs, shall be added to the lien upon filing of the foreclosure action. In addition to the costs and disbursements provided by statute, the court may allow the county a reasonable attorney's fee. The lien shall be foreclosed in the same manner as the foreclosure of real property tax liens.

[1997 c 393 § 9; 1975 1st ex.s. c 188 § 3; 1967 c 72 § 15.]

NOTES:

Severability -- 1975 1st ex.s. c 188: See RCW 36.94.921 .