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Supreme Court No. 836604
Court of Appeals No. 36944-3-II BY RONALD R. CARPENTER

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CLERK

TIMOTHY JACKOWSKI AND ERI TAKASE,

Appellants,

vs.

DAVID BORCHELT, et ux., et al.

Respondents

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STATE OF WASHINGTON

JACKOWSKIS' RESPONSE TO AMICUS CURIAE MEMORANDUM
IN SUPPORT OF HAWKINS POE, INC.'S PETITION FOR REVIEW

Jon E. Cushman
Ben D. Cushman
Stephanie M.R. Bird
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

360-534-9183

Attorneys for Appellants

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I. INTRODUCTION

Come now the Jackowskis and in response to the Amicus Memorandum submitted by Washington Realtors in support of Hawkins Poe, Inc.'s petition for review, offer the below arguments. The Court of Appeals ruled correctly that the realtors could not escape liability under Alejandro vs. Bull, 159 Wn. 2d 674 (2007), and the reading of that case, and the economic loss rule urged by Amicus and Petitioner is incorrect. No review is needed.

II. ARGUMENT

A. History of the economic loss rule

The economic loss rule was never meant to extinguish the duties at issue in this case, or the remedies available for breach of those duties. The duties at issue here are those attendant to the professional relationship a licensed real estate professional has under statute and common law. They are found in the case law, and in RCW 18.86. A breach of such professional duties gives rise to a malpractice action, which partakes of both tort and contract law theories. Economic losses are a foreseeable consequence of the breach of such duties, and such losses are recoverable in such a malpractice action.

Further, the economic loss rule was not meant to extinguish the “benefit of the bargain” as the measure for recovery of foreseeable damages arising from breach of contract. If Alejandre vs. Bull, 159 Wn. 2d 674 (2007) required that all remedies for all possible damages arising from a breach of contract be set forth with particularity in the contract as a remedy for breach of contract, that case would abrogate the benefit of the bargain rule, and that was never the intent. Foreseeability of damages is the corner stone of the benefit of the bargain and should remain so.

In 1987, in what has ever since been claimed, incorrectly, to have been full scale retreat from Berg v. General Motors, 87 Wn. 2d 854 (1976), this Court started a line of cases trying to establish a bright line between tort and contract. Stuart v. Coldwell Banker, 109 Wn. 2d 406 (1987). However, in an effort to define the long sought after bright line, the Holy Grail of the economic loss rule, the law inevitably invites defendants to go too far in claiming protection. Thus, under Alejandre vs. Bull, 159 Wn. 2d 674 (2007), defendants invite courts to re-write the parties’ contract to eliminate remedies not explicitly set forth in the contract, and in doing so to abrogate the benefit of the bargain rule. The economic loss rule was never intended to abrogate the benefit of the bargain measure of damages.

What ever happened to the time honored limitation of foreseeability in establishing the benefit of the bargain remedy, found in Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854). What had worked throughout the common law for 150 years and was judiciously applied in Berg v. General Motors, sub silentio, through citations to a long line of Washington cases, has now been reduced to a requirement that a specific remedy be found in the writing, and a form writing at that, imposed upon consumers by the form intensive Multiple Listing Service (MLS) used in the real estate industry.

Further, the insurance industry seeks to avoid coverage by claiming that if a contract exists, only contract duties are at stake, and since a breach of contract is not an occurrence, no coverage exists. The bright line which supposedly would encourage contracting parties to allocate all risk through contract instead works to cut off the classic measure of damages, foreseeable losses consequent to breach, and to deprived insured defendants of coverage, and defense, and plaintiffs of a source of recovery.

Are remedies based upon duties imposed by law, which are imported into every contract, abrogated? What of the duty of good faith and fair dealing? Where is it found in the MLS forms? It isn't. There are many duties implied in every contract. Must a remedy for breach be stated for each?

As to licensed realtor liability, RCW 18.85 ceased to be a source of duties that would support a private right of action in Woodhouse v. Re/Max 75 Wn. App. 312 (1994). But the legislature stepped in after Woodhouse v. Re/Max to make sure that even though the courts denied a private remedy under RCW 18.85, the Legislature resuscitated such rights under RCW 18.86. Amicus makes the curiously absurd argument that because the Legislature also said at RCW 18.86.031 that a violation of a licensee's duties under RCW 18.86.030 was **also** a violation of RCW 18.85.230, that the Legislature intended to import the limitation the courts had imposed on private remedies for breach on RCW 18.85.230 into RCW 18.86, the very statute created to insure the existence of private remedies.

Obviously what the legislature was doing in RCW 18.86.031 was arming the Director of Licensing with the power to enforce the duties impose on licensees under RCW 18.86.030 via the enforcement provisions found in RCW 18.85.230, not the other way around! Not only did the legislature articulate the duties owed by licensees to their clients, for breach of which a private right of action would lie, but the legislature made sure that existing duties at law based upon common law were not lost, except to the extent they were specifically abrogated by the statute. RCW 18.86.110.

There are many sources of duties in the world, and it is particularly unrealistic to expect consumers of residential real estate being purchased to occupy as a home, not purchased as speculative ventures, to avail themselves of attorneys to re-write the MLS forms, to insert remedies for the breach of duties created by statute, or found at common law. The legislature was equally clear in passing 18.86, that by enumerating specific duties at RCW 18.86.030, 040, 050, and 060, it was not abrogating duties and remedies that existed at common law. RCW 18.86.110.

Stuart v. Coldwell Banker, supra, a **construction** case, did indeed state that there was no such cause of action as negligent construction. In the context of **construction**, that case did not seek to extend the warranty of habitability, or the right to recover under any implied warranty theory, such as to allow a recovery for the costs of repair to a defective product, such as the decks, unless the defect caused life threatening dangers to the occupants, and unless those occupants could show the necessary privity with the builder vendor, and show timely suit, under the discovery rule. Stuart v. Coldwell Banker thus left the parties in the chain of contract in the construction industry to their existing remedies, and did not create a new cause of action for negligent construction.

Stuart v. Coldwell Banker, in making the distinction between tort and contract, focused upon the distinction drawn between “internal deterioration” and “physical injury”. Tort law redressed injury from causes which public policy considerations suggested were so dangerous as to require a remedy in tort for physical harm, while contract remedies focused on expectation interests. The parties were left to their contract remedies. Recovery ultimately turned upon the issue of whether or not the defective decks were dangerous, and therefore implicated the implied warranty of habitability, still a contract remedy, or whether they were simply a part of the product in need of repair, without making the premises unsafe to inhabit, in which case there would be no implied warranty and no other contract remedy. If all that was at stake was the “quality desired by the buyers”, the matter was left to contract. There was “no injury beyond the affected areas themselves, and no damage beyond the costs of repair.”

Under Stuart if there was injury beyond the affected areas, and damage beyond the costs of repair, a tort remedy might be available. The Court fretted with the implications of making builder vendors liable to remote purchasers for disappointed expectations, when all that was at stake was the costs of something indistinguishable from routine maintenance.

Here the entire value of the property has been lost to a catastrophic event that immediately imperiled the life and limb of the owners, and destroyed not only their land, that moved, but their house that moved with it. There was clearly property damage, and there is no “cost of repair” even possible. The loss is total, to both land and improvements.

Atherton Condo Assoc. v. Blume et al, 115 Wn 2d 506 (1990) next applied the holding in Stuart v. Coldwell Banker, supra, that there was no negligent construction claim in this state. Atherton, a construction case, did so after finding that the defective fire walls, although not yet having caused property damage, did imperil habitability, and that no actual damage was needed to make a warranty of habitability claim. Hence, there was a contract claim under the implied warranty of habitability. Atherton allowed a fraudulent concealment claim based upon knowledge (not intent). Atherton held that an architect not in privity would not be liable to the subsequent condo owners for economic losses, even if he had been negligent in design. There was no evidence the architect had been negligent in design, or that he was even aware his design had not been followed. The owners cited “no authority that Washington recognizes a cause of action in tort by third parties seeking economic loss damages for negligent design against an architect.”

But as to “negligent construction”, the Atherton court noted that “owners have cited no evidence of personal or physical injury resulting from the manner in which” the condos were built. Hence there could be no tort remedy. Query: does a catastrophic landslide, which destroys the land and the house, and renders the entire premises of no value, and immediately unsafe to occupy, implicate tort law as to the possible liability of a seller, or a realtor, who actually knew of the history of such slides on this very property, and adjacent properties, and did not disclose it, putting the buyers in the physical peril they ultimately suffered? If the realtor does not know enough to advise the buyer one way or another, does not the statutory duty to refer the buyer to a qualified professional apply?

The economic loss doctrine is next visited in Berschauer Phillips v. Seattle School District, et al, 124 Wn 2d 816 (1994), yet another construction case. There this Court fully articulated the holding suggested in Atherton, where no authority had been presented on the subject, that a design professional would not be liable to a third party (in Atherton the owners, in Berschauer the general contractor) for economic losses. Berschauer Phillips expanded the reasoning begun in Stuart and implied in Atherton regarding using the contract to allocate risk of economic loss.

In Berschauer Phillips all that was at stake were delay damages. There had been no property damage, and no catastrophic event. The Court said that to expose design professionals to third party tort claims for economic losses would defeat their expectations set forth in their own contracts which perhaps attempted to limit such liability. Berschauer Phillips was in privity with the school district, not the designers. Hence in the absence of privity of contract, Berschauer Phillips had no claim against the designers for economic losses.

The Court emphasized the ability of a sophisticated contractor to “negotiate” a remedy. Perhaps the Court overlooked the fact that a general contractor is absolutely prohibited from any form of negotiation when bidding upon a public work. Hanson Excavation vs. Cowlitz County, 28 Wn. App. 123, 125, 126, 622 P. 2d 1285 (1981). None the less, in pursuit of the Holy Grail, the Court left the parties to negotiate allocation of risk, a negotiation which is illegal as a matter of law to even attempt.

The Court next rejected Berschauer Phillips efforts to assert claims against the third party designers under the Restatement (Second) of Torts, §522. But the Court rejected that effort because there was no claim of “physical harm”.

The third holding in Berschauer Phillips which is of some interest here was the Court upholding the assignment to Berschauer Phillips of the school district's claims against its designers, with whom the district had privity. An owner impliedly warrants the adequacy and sufficiency of plans and specifications it provides to a contractor. If the owner breaches that implied warranty and is sued by the contractor, the owner has a claim for design errors over against its designer with whom it is in privity. That claim is based upon the professional relationship between the owner and the designer hired by the owner to provide the plans and specifications which the owner in turn warrants, by implication, as adequate and sufficient, in its contract with its contractor. That claim is a claim for first party liability based upon malpractice.

Here, the realtor is seeking to avoid first party liability to its client. In Berschauer Phillips, where the district assigned its claims for first party liability against its designers to Berschauer Phillips, and those assigned claims were allowed by this Court, what were those claims the district had against its designers, with whom it was in privity, if they were not malpractice claims, which are a tort/contract hybrid? If such claims may be brought by assignment, surely they can be brought by the first party.

Here, not only are the realtors trying to escape first party liability based upon the tort portion of the tort/contract hybrid, which is malpractice, but they are trying to avoid liability based upon implied duties that inhere in their contract, which arise out of statute or common law. Implied duties are no stranger to contract law. In every construction contract there are implied warranties: 1) that the owner will not hinder or delay the contractor; Edwards Contracting v. Port of Tacoma, 83 Wn.2d 7, 13, 514 P.2d 1381 (1973); 2) that the owner will keep the work in a state of forwardness that will allow the contractor to complete the work within specified time; Byrne v. Bellingham Consol. Sch. Dist., 7 Wn.2d 20, 31-32, 108 P.2d 791 (1941); 3) that the plans and specifications will be workable sufficient for constructing the project; Ericksen v. Edmonds Sch. Dist., 13 Wn.2d 398, 408, 125 P.2d 275 (1946); Armstrong Const. v. Thompson, 64 Wn.2d 191, 196, 390 P.2d 976 (1964); 4) that when plans and specifications are provided and a time is specified for completion that the contractor will be able to complete the project timely as designed; Seattle v. Dyad Constr., 17 Wn. App. 501, 517, 565 P.2d 423 (1977); and 5) a covenant of good faith and fair dealing from the owner and its representatives to the general contractor; Bignold v. King County, 65 Wn.2d 817, 824, 399 P.2d 611 (1965).

The realtors would have no duties implied in their contract. They would insist that Alejandro vs. Bull requires that a specific remedy be set forth for any particular breach. Surely Alejandro vs. Bull did not abrogate implied duties, or the benefit of the bargain rule.

In Alejandro vs. Bull, supra, this Court closed the circle, and took the language espoused in Berschauer Phillips regarding the salutary effect of leaving parties free to allocate risk through contract by negotiation, and imposed it on a consumer, not just a “sophisticated” general contractor. The Court said one of the ways to allocate risk was through procuring insurance. And this gets to the elephant in the corner of the living room. Insurance never covers breach of contract. If parties in contract only have breach of contract claims, there is no insurance which will ever apply.

The insurance industry stands to gain the most through the imposition of the economic loss rule to the extension argued by the realtors from Alejandro vs. Bull. This will not simply injure a claiming plaintiff, who seeks a recovery in tort so as to implicate his defendant’s insurance policy, it will also injure defendants, who thought they were insured, only to find that the existence of their contract, under the realtor’s reading of Alejandro, denied them both defense and indemnity from their insurance company.

The policy implications are staggering, but this was exactly the proposition urged upon the Court of Appeals by the realtor's counsel. When asked if Alejandro vs. Bull meant there was no longer any remedy in professional malpractice, counsel said "yes". The Court of Appeals wisely rejected that argument.

This implicit exception to the economic loss rule for professional malpractice claims preserves Washington's body of professional malpractice law. Professional malpractice cases necessarily walk the line between tort and contract. A medical malpractice case from the first half of the twentieth century thoughtfully discusses the inquiry that a court engages in:

When an act complained of is a breach of specific terms of the contract, without any reference to the legal duties imposed by law upon the relationship created thereby, the action is in contract, but where there is a contract for services which places the parties in such a relation to each other that, in attempting to perform the promised service, a duty imposed by law as a result of the contractual relationship between the parties is violated through an act which incidentally prevents the performance of the contract, then the gravamen of the action is a breach of the legal duty, and not of the contract itself, and in such case allegations of the latter are considered mere inducement, showing the relationship which furnishes the right of action for the tort, but not the basis of recovery for it, and in such cases the remedy is an action ex delicto.

Yeager v. Dunnavan, 26 Wn.2d 559, 562, 174 P.2d 755 (1946),
quoting Compton v. Evans, 200 Wash. 125, 132, 93 P.2d 341 (1939).

The plaintiff and the defendant in professional malpractice cases are usually in a contractual relationship. Frequently, the damages in a professional malpractice case are only capable of being expressed in monetary terms. For example, in a legal malpractice case, unless the underlying action is a criminal action, the damages the client suffers as a result of the attorney's malpractice are only monetary. *See, e.g., Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992).

Malpractice must survive as a hybrid of tort and breach of contract, and the benefit of the bargain rule must survive to allow a plaintiff to seek foreseeable damages for breach, not simply seek remedies explicitly recited in the contract.

B. Application of the economic loss rule to the facts of this case.

Every economic loss rule case requires the absence of property damage or personal injury. Here there was both. The real estate was rendered worthless, and the Jackowki's suffered emotional distress from being in their house that dark February night when their bank and their house moved and their house became forever thereafter uninhabitable. The loss was sudden and catastrophic. Jackowski's were in privity with Hawkins Poe, as well as Borchelts, all be it under separate contracts. Tort and contract both apply.

C. Application of recent, so called “contrary authority”, to the facts of this case.

Amicus cites to Carlson v. Sharp, 99 Wn. App. 324 (1999) for the proposition that an engineer can’t be liable for economic losses. That case is completely inapposite. It involves a situation like Berschauer Phillips where the plaintiff were not in privity with the engineer they were suing. Jackowski’s are in privity with Hawkins Poe.

However, the court in Carlson does probe an interesting question: does the “sudden and dangerous” test apply, or does the “evaluative approach” apply. Here there was certainly a sudden and dangerous catastrophic event which destroyed every the Jackowkis owned, and if that test was applied they would get their tort remedies clearly.

Even if the evaluative approach is applied, the nature of the defect (an inherently dangerous slope), the type of risk (a catastrophic loss of a house), and the manner in which the injury arose (seller and realtor failed to disclose the risks, or advise petitioner to seek expert advice) suggests a tort remedy as well.

Since there are duties implied at law, from common law, and from statute, and since the relationship between Jackowkis and their realtor was a professional relationship regulated by statute, the claim is malpractice.

Finally, and fundamentally, Amicus fails to recognize, as has Hawkins Poe, that the contract at issue in this case with the contingency provisions was between the buyer and the seller. Jackowki's bought from Borchelts, and the two of them had a purchase and sale agreement. That agreement may have had various MLS form contingencies like the forms in Alejandro vs. Bull, but those are not at issue in the realtor/buyer relationship, which is ruled expressly by RCW 18.86.

Why the realtor thinks they can piggy back on the remedies provided to, or limitations imposed upon, one party or the other to the RSPA is never explained. They are not a party, and can't insist upon a remedy to a contract to which they are a stranger. They do have a professional relationship with Jackowski's, and their duties are set forth at RCW 18.86, and found in the common law.

III. Conclusion

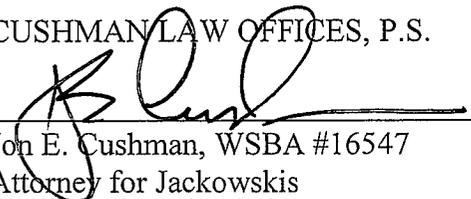
Here there was a contractual relationship between Jackowskis and the realtor, Hawkins Poe, and the duties implied in that relationship are set forth in statute at RCW 18.86, and found at common law. Those duties were breached, and Jackowski's have a claim for all reasonably foreseeable damages caused by that breach.

Further, the economic loss rule did not abrogate professional malpractice. Real estate brokerage and sales is heavily regulated, and there are private causes of action for breach of statutory duties and common law duties, neither of which were extinguished by the economic loss rule.

The economic loss rule should not apply at all in a situation such as this where there is a catastrophic loss, and even if it did apply, the type of limitation of remedy implied by Alejandro vs. Bull, where some sort of explicit remedy must be set forth, is not applicable. Foreseeability of harm for breach is enough to implicate consequential damages. It has worked for 150 years, since Hadley v. Baxendale.

Respectfully Submitted this 17 day of November, 2009.

CUSHMAN LAW OFFICES, P.S.



Jon E. Cushman, WSBA #16547
Attorney for Jackowskis

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BY RONALD R. CARPENTER

I certify, under penalty of perjury under the laws of the State of Washington, that on **November 17, 2009**, I caused to be served a true copy of the foregoing by the method indicated below, and addressed to each of the following:

Melanie A. Leary
Demco Law Firm, P.S.
5224 Wilson Ave. S.
Suite 200
Seattle, WA 98118

U.S. Mail, Postage Prepaid
 Legal Messenger
 Overnight Mail
 Facsimile

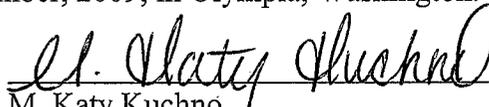
Robert W. Johnson
P.O. Box 1400
Shelton, WA 98584

U.S. Mail, Postage Prepaid
 Legal Messenger
 Overnight Mail
 Facsimile

Jeffrey P. Downer
Lee Smart P.S., Inc.
1800 One Convention Pl.
701 Pike Street
Seattle, WA 98101

U.S. Mail, Postage Prepaid
 Legal Messenger
 Overnight Mail
 Facsimile

Signed this 17th day of November, 2009, in Olympia, Washington.


M. Katy Kuchno
Legal Assistant