1999

Dorann Mitchell v. Jesse Christensen and Betty Christensen : Reply Brief

Utah Court of Appeals

George E. Harris, Jr.; Callister, Nebeker & McCullough; Attorney for Appellee.
Scott B. Mitchell; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

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DORANN MITCHELL, Plaintiff/Appellant, vs. JESSE CHRISTENSEN and BETTY CHRISTENSEN, Defendants/Appellees.	* * * * * * * * * * * * *	**APPELLANT'S REPLY BRIEF** Case No. 990321-CA Priority 15

* * * *

PLAINTIFF'S APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL DISTRICT COURT, THE HONORABLE DENNIS M. FUCHS PRESIDING

* * * *

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ARGUMENT

I. Adoption of defendants' idea of "reasonable inspection" would render it virtually impossible to bring a cause of action for fraudulent nondisclosure.

There is no dispute that: (1) plaintiff inspected the swimming pool herself and hired a professional inspection company to inspect the pool for her; (2) the leaks at issue in this case were not visible and were in fact not discovered either by plaintiff or by her inspection company; and (3) the inspection report prepared by the inspection company was limited:

> Our review is limited to above ground or visible items only. It is an operational inspection of the accessible equipment and components and is therefore limited in scope. **If concerned**, client is advised to have a licensed pool company perform an in-depth review and/or service.

(R.107)(emphasis added).

The dispute in this case is over whether (in spite of the fact that there was no reason for her to be concerned) it was reasonable for plaintiff not to have an in-depth review of the pool by a licensed pool company. According to defendants, it was not. Defendants would have this Court determine when a buyer has exercised reasonable care in inspecting property as follows:

> "A buyer can decide the extent to which he will inspect the property. A buyer could choose not to even look at the property, or could choose to have all aspects of the property inspected. It is the buyer's choice; the buyer decides the level of risk that is acceptable to him. The seller is not a guarantor of all aspects of the home..."

Brief of Appellee at page 7.

Essentially, what defendants are asking this Court to accept is the proposition that unless the buyer performs an in-depth inspection of every aspect of the home, then, by definition, the

buyer has failed to exercise unreasonable care. That is not, as defendants suggest, the rule of law recognized by the *Maack*[1] court, nor any other court of which plaintiff is aware. And for good reason: it is difficult to conceive of a defective condition which could not be discovered by an in-depth inspection. The formula suggested by defendants would all but eliminate the cause of action for fraudulent nondisclosure, leaving the buyer to beware.

Termite damage could easily be discovered by a professional termite inspector. Nonetheless, in *Horsch v. Terminix Intern. Co.*, 865 P.2d 1044, 1048-49 (Kan. App. 1993), a case cited with approval by this Court in *Maack*, the court held that termite damage was a material defect which the seller would be required to disclose.

Similarly, the *Restatement (Second) of Torts*, section 551 provides the following illustrations of cases warranting the imposition of liability for fraudulent nondisclosure notwithstanding the fact that the defective condition could be discovered by an in-depth inspection:

> 3. A sells to B a dwelling house, without disclosing to B the fact that the house is riddled with termites. This is a fact basic to the transaction [which must be disclosed].
>
> ....
>
> 9. A sells B a dwelling house, without disclosing the fact that drain tile under the house is so constructed that at periodic intervals water accumulates under the house. A knows that B is not aware of this fact, that he could not

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[1]*Maack v. Resource Design & Const., Inc.*, 875 P.2d 570 (Utah App. 1994).

> discover it by an **ordinary inspection**, and that he would not make the purchase if he knew it. A knows also that B regards him as an honest and fair man and one who would disclose any such fact if he knew it. A is subject to liability to B for his pecuniary loss in an action for deceit.

(Emphasis added). Finally, comment *1* to section 551 provides the following example of a case where there is liability for nondisclosure:

> ...a seller who knows that his cattle are infected with tick fever or contagious abortion is not free to unload them on the buyer and take his money, when he knows that the buyer is unaware of the fact, could not easily discover it, would not dream of entering into a bargain if he knew and is relying upon seller's good faith and common honesty to disclose any such fact if it is true.

Restatement (Second) of Torts, section 551, comment *1*.

Under each of the above sets of facts, the buyer would clearly be able to discover the defective condition by an in-depth inspection of the property and, in defendants' view, failing to do so would have no claim for fraudulent nondisclosure against the seller. As the cited authorities indicate, however, that is not the law. There is no question that termite damage could be discovered by a professional termite inspector. Nevertheless, the Kansas court in *Horsch* held that termite damage was a material fact which the seller would be required to disclose. 865 P.2d 1044, 1048-49. Similarly, there is no question that defectively constructed drain tile could be discovered by an "in-depth" inspection. Illustration 9 to section 551, however, finds liability where the defective construction could not be discovered by an "ordinary inspection." Finally, the fact that cattle are diseased could certainly be

discovered by a veterinarian's inspection. Again, however, comment *1* to section 551 states that the seller is "not free to unload them on the buyer and take his money."

In the case at bar, it is undisputed that the swimming pool leaks at issue could have been discovered by an in-depth inspection by a licensed pool company. They were not, however, visible and they were not discovered by plaintiff's personal inspections of the pool nor by her professional inspection company. Defendants, on the other hand, were well aware of the leaks and could have easily disclosed their existence.

II. The doctrine Of caveat emptor is not applicable to this case.

Defendants' discussion of the doctrine of caveat emptor is superfluous. Defendants are either entitled to summary judgment in connection with plaintiff's fraudulent concealment/fraudulent nondisclosure claim, or they are not. If they are, that is the end of the case. There is no reason to then go on and apply the doctrine of caveat emptor. On the other hand, if this Court determines that defendants owed plaintiff a duty to disclose the known defective condition of the swimming pool, caveat emptor is simply not an available defense. See *Maack, supra*, 875 P.2d at 579 (a duty to disclose exists in a vendor-vendee transaction where a defect is not discoverable by reasonable care).

CONCLUSION

Plaintiff respectfully submits that she satisfied her duty to exercise reasonable care in inspecting the swimming pool. Accordingly, plaintiff requests that the trial court's Order

Granting Motion for Summary Judgment be reversed and that this case be remanded to the trial court for a trial on the merits.

DATED this 9th day of December, 1999.

Scott B. Mitchell
Attorney for Appellants

MAILING CERTIFICATE

Undersigned certifies that two copies of the foregoing were mailed this 9th day of December, 1999, via first class U.S. Mail, postage prepaid, to the following:

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