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Steven and Suzanne West v. Inter-Financial Inc., Badi Mahmood : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STEVEN AND SUZANNE WEST, **Plaintiffs, Appellants** **v.** **INTER-FINANCIAL, INC., BADI MAHMOOD** **Defendants, Appellees.**	**REPLY BRIEF OF APPELLANTS** **Case No.: 20050195-CA**

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE THIRD DISTRICT COURT

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ARGUMENT

Appellees' response to Appellants' contention that Hermansen v. Tasulis, 48 P.3d 235 (Utah 2002) is the controlling authority in this case is to simply admit the fact that "the Supreme Court has recognized an exception to the economic loss rule when the defendant owes an independent duty to the plaintiff." Appellees' Brief at 4 (citing Hermansen).

Appellees continue to mischaracterize Appellants' assertions in this case. Appellants do not contend that "real estate appraisers owe the public an independent duty of care by virtue of the Uniform Standards of Professional Appraisal Practice." Appellees' Brief at 4, 5. Rather, Appellants' contention is that real estate appraisers are analogous to real estate agents. Under Hermansen, this means they owe an independent duty, not to the public in general, but to the Appellants specifically because (1) they are numbered among the persons who rely upon the accuracy of an appraisal and (2) the standards of their profession and common law duties imposed by the court create that independent duty. As the Supreme Court stated in Hermansen: when or if

> the information is given in the capacity of one in the business of supplying such information, that care and diligence should be exercised which is compatible with the particular business or profession involved. Those who deal with such persons do so because of the advantages which they expect to derive from this special competence. The law, therefore, may well predicate on such a relationship, the duty of care to insure the accuracy and validity of the information.

Id. at 241, citing Christenson v. Commonwealth Land Title Ins. Co., 666 P.2d 302 (Utah1983) (quoting 1F. Harper & F. James, The Law of Torts, §7.6 at 546 (1956)). Furthermore, the court added:

> Specific to the duties of a real estate agent to those persons to whom the agent owes no fiduciary duty, we stated in *Dugan v. Jones* that "[t]hough not occupying a fiduciary relationship with prospective purchasers, a real estate agent hired by the vendor is expected to be honest, ethical, and competent and is answerable at law for his or her statutory duty to the public." 615 P.2d 1239, 1248 (Utah 1980). We apply this reasoning and hold that Terena as the real estate agent owed a duty, independent of any implied or express contracts, to be "honest, ethical, and competent" in her relationship with the Hermansens, although she and Tasulis were hired by the vendor.

Id. at 241.

Similarly, Appellees' claim that "Utah law is clear that rules of conduct governing licensed professionals do not give rise to duties which can be enforced in tort actions." Appellees' Brief at 5. That conclusory statement is in clear and stark contract with the Hermansen decision that a real estate agent hired by the vendor is expected to be honest, ethical and competent and is answerable at law for his or her statutory duty to the public. In Hermansen, the real estate agent was a licensed professional. Appellees are licensed professionals. Rules of conduct include being honest, ethical and competent, and specifically under Appellees' professional standards appraisers cannot – "commit a substantial error of omission or commission that significantly affects an appraisal." Appellants' Brief at 10. Appellees clearly breached those duties and Hermansen expressly grants Appellants the right to seek recovery for breach of those duties under tort law.

Appellees' reliance on decisions from other jurisdictions is equally misplaced. The Provident Bank v. O'Brien, 2000 WL 1210873 (Va Cir. Ct.) simply supports the proposition established in Fennell v. Green, 77 P.3d 339 (Utah App. 2003), which is Appellees' lead case. Even the Fennell court recognized that Hermansen was distinguishable from other cases involving the application of the economic loss rule since ". . . in *Hermansen* the defendants had an independent duty to plaintiffs as real estate professionals." Fennell at 344.

Furthermore, real estate appraisers, like agents, are real estate professionals. Those common law duties applicable to real estate agents are equally applicable to real estate appraisers. Even if the Uniform Standards of Professional Appraisal Practice does not create an independent duty for professional appraisers, all of the cases already cited by Appellants in their Brief, including Schaaf v. Highfield, 896 P.2d 665 (Wash. 1995), Stotlar v. Hester, 582 P.2d 403 (N.M. 1978), cert. denied 92 N.M. 180, 585 P.2d 324 (1978), Larsen v. United Federal Savings and Loan Assoc. of Des Moines, 300 N.W. 2d 281 (Iowa 1981) as well as 3 Restatement of Torts (Second) § 552 (1977), stand for the proposition that common law supports an independent duty for professional appraisers. Even The Provident Bank decision states that the finding of an independent common law duty between the parties could provide an exception to the economic loss doctrine. The Provident Bank at 3. Rather than repeat the arguments already set out in Appellants' Brief, Appellants submit that their Brief on pages 10 - 14 provides sufficient legal

support for their argument that Appellees owe a duty of care to Appellants and those similarly situated.

Finally, Appellees cite the Schaaf decision in support of the proposition that "[t]he liability of a real estate appraiser . . . extends only to those involved in the transaction that triggered the appraisal report . . ." Appellees' Brief at 6. It would have been helpful if the Appellees had completed the rest of the sentence, which states: "including, but not necessarily limited to, the buyer and the seller. We leave defining the precise scope of the appraiser's duty of care to a factual determination by a future trial court." (emphasis added). Schaaf at 670. The Schaaf court had already concluded that "a third party in Washington may state a claim for negligent misrepresentation against a real estate appraiser pursuant to Restatement (Second) of Torts § 552." Id. at 670.

Appellees then suggest that Appellants were "complete strangers" to the "transaction" which triggered the appraisal report. The undisputed facts of this case negate such a conclusion.

It is clear that Appellants were among the limited group of persons for whom the appraisal was generated. Appellees knew that Appellants were involved in the purchase of the seller's home. The seller informed Appellees of the transfer of the appraisal to Appellants, and Appellants paid $150.00 for the appraisal. The transfer of, and consideration for, the appraisal extends the transaction beyond the initial relationship between the seller and the Appellee-Appraisers in the case and includes the Appellants.

CONCLUSION

Appellants have stated a prima facie case for negligent misrepresentation and breach of contract. The economic loss rule is inapplicable in this case since Appellees are licensed professionals with an independent duty to the Appellants to perform the appraisal in a professional manner consistent with their own professional standards and common law. Appellees breached those professional standards and applicable law and Appellants must be granted the opportunity to present their case for damages to the trier of fact.

Respectfully submitted this 26th day of October, 2005.

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CERTIFICATE OF MAILING

I hereby certify that on this the 26th day of October, 2005, I mailed a true and correct copy of the above **Reply Brief of Appellants**, postage pre-paid, to the following:

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