

IN THE COURT OF APPEALS OF IOWA

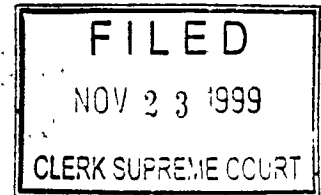
No. 1999-282 (9-512) / 98-2050

Filed November 23, 1999

LISA A. DETERMAN,
Plaintiff-Appellant,

vs.

JAMES H. JOHNSON and DIANE V. JOHNSON,
Defendants-Appellees.



Appeal from the Iowa District Court for Cerro Gordo County, Paul W. Riffel,
Judge.

Lisa Determan appeals the district court's judgment entry, following a jury trial, awarding her only a portion of the damages she claimed in her action against the defendants for negligent home construction. **AFFIRMED.**

~~Randall E. Nielsen~~ of Pappajohn, Shriver, Eide & Nicholas, P.C., Mason City,
for appellant.

David L. Riley of Yagla, McCoy & Riley, P.L.C., Waterloo, for appellees.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

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HUTTINK, P.J.***I. Background Facts and Proceedings.***

This case concerns James and Diane Johnson's liability for structural and other defects in a residential property they built in 1990 and sold to Lisa Determan and her former husband in 1992. After an architect attributed Determan's initial observation of a sagging roof and cracked walls to substandard workmanship and building code violations, Determan sued the Johnsons for the resulting damages. Determan's theories of Johnson's liability recited in her petition filed August 30, 1992, included fraudulent misrepresentation, implied warranty, negligence, equitable estoppel, and promissory estoppel.

Following the conclusion of all of the evidence at trial, the district court sustained Johnson's motion for directed verdicts on Determan's negligence, estoppel, implied warranty, and fraudulent misrepresentation claims concerning the construction and sale of the house. Determan's fraudulent misrepresentation claim concerning the property's septic system was the only theory of liability submitted for the jury's consideration.

The jury returned a verdict awarding Determan \$8800 in damages under this theory. Determan's motions for a new trial on her negligence and remaining fraudulent representation theories were denied, and judgment was entered in accordance with the jury's verdict. After judgment was entered, Determan caused a

~~general execution to issue~~ resulting in the levy on sufficient funds from the Johnsons' bank accounts to satisfy the judgment.

On appeal Determan contends the district court erred in failing to grant a new trial on issues of the Johnsons' negligence and/or negligence *per se* in the construction of the house. She also contends the district court erred in failing to grant a new trial on the issue of the Johnsons' fraudulent misrepresentation concerning the construction and sale of the house.

Johnsons have not cross-appealed. They argue Determan's execution on and resulting satisfaction of the judgment against them precludes Determan's appeal on other issues. They alternatively argue the district court's judgment should be affirmed.

II. Standard of Review.

Our review is for corrections of errors at law. Iowa R. App. P. 4.

III. Determan's Waiver of Right to Appeal.

A party who accepts the benefit of a judgment may not ordinarily appeal from that judgment. *Adams by Adams v. Johnson*, 445 N.W.2d 422, 434 (Iowa App. 1989). In *Wederath v. Brant*, 319 N.W.2d 306, 310 (Iowa 1982), the supreme court noted the strict application of the waiver rule has been relaxed in favor of a rule requiring a more substantial showing of a voluntary and knowing waiver of the right to appeal. In the absence of other evidence, we hold Determan's execution on the underlying

~~judgment~~ without more evidence, was not a knowing and voluntary waiver of her right to appeal.

IV. The Merits.

In its ruling on Determan's motion for a new trial the court stated:

Upon further review the Court finds that the record was insufficient to generate issues for the jury on Plaintiff's claims of fraudulent nondisclosure and negligence concerning the alleged structural defects in the residence.

With respect to Plaintiff's fraud claim, the record does not reflect that Defendants knew or had reason to know that the dwelling did not comply with the Mason City Building Code. The Defendants obtained all of the necessary permits during construction and city officials performed the required inspections. The construction passed inspection and ultimately a certificate of occupancy was issued for the premises. Additionally, the record reflects that the defects which became known after Plaintiff purchased the property were latent in nature and Defendants neither knew nor could have reasonably known of their existence before conveying the property to the Plaintiff.

With respect to Plaintiff's negligence claim, the fact that the residence may be in noncompliance with the building code does not in and of itself establish that the Defendants breached any duty toward the Plaintiff. The Defendants built the house for themselves and occupied the residence for a period of time before selling it to the Plaintiff. The relationship between the Defendants and the Plaintiff is governed by the contract for the sale and purchase of the residence in which the Plaintiff agreed to purchase the property in its existing condition. The Defendants did not represent to the Plaintiff in the contract that the residence was in compliance with the building code. The alleged defects which cause the residence to be in noncompliance with the code do not make the Defendants liable to the Plaintiff under the theory of negligence *per se*. The alleged defects could subject the Defendants to liability to the Plaintiff under the theory of fraudulent nondisclosure if Defendants were aware of the defects and knew that the Plaintiff was unaware of the defects and could not discover them by ordinary inspection and would not make the purchase if she knew of the defects. However, as previously noted, the evidence was insufficient to generate a jury question on the claim of fraudulent nondisclosure.

~~A. Negligence.~~

When drawing the line between tort and contract claims we consider factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. *American Fire and Cas. Co., v. Ford Motor*, 588 N.W.2d 437, 439 (Iowa 1999). If the harm done was a foreseeable result from a failure of the product to work properly, then the harm done falls on the contract side. In addition, if the loss relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown or nonaccidental cause, the remedy lies in contract. *Nelson v. Todd's Ltd.*, 426 N.W.2d 120, 125 (Iowa 1988).

However, if the harm results from "a sudden or dangerous occurrence, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect," then the harm done falls on the tort side. *Id.* In essence, defects of suitability and quality are redressed through contract actions and safety hazards through tort actions. *American Fire and Cas. Co.*, 588 N.W.2d at 439. Thus, the general doctrine prohibits tort recovery for purely economic losses, consigning such claims to contract law. *Id.*

We, like the district court, find the distinction between contract and tort liability is dispositive. Determan's damages were purely economic. These economic losses stem from disappointed expectations concerning the condition and quality of the house she purchased. Determan has not suffered any personal injury or property damage resulting from a tortious event. See *Flom v. Stahly*, 569 N.W.2d 135, 141

~~(Iowa 1997)~~ To hold otherwise would permit recovery in tort for claims sounding in contract. *Fry v. Mount*, 554 N.W.2d 263, 266 (Iowa 1996). The trial court did not err by refusing to submit Determan's negligence theories or denying her motion for a new trial.

B. Fraudulent Misrepresentation.

The elements of fraudulent misrepresentation include:

1. That the defendant made a representation to the plaintiff or to the plaintiff as a member of a class of persons;
2. The representation was false;
3. The representation was material;
4. The defendant knew the representation was false;
5. The defendant intended to deceive plaintiff as one of a class of persons;
6. The plaintiff acted in reliance on the truth of the representation and was justified in relying on the representation;
7. The representation was a proximate cause of plaintiff's damage;
8. The amount of damage.

Beeck v. Kapalis, 302 N.W.2d 90, 94 (Iowa 1981).

The purchase agreement signed by the Determans provides:

BUYERS acknowledge that they have made a satisfactory inspection of the property and are purchasing the property in its existing condition.

...

~~The~~ **BROKER**, its agents, employees, and associates make no representations or warranties as to the physical or mechanical condition of the property, size, value, future value or income potential.

The record also indicates the Johnsons were not present for either of the Determans' inspections of the home. The Determans and the Johnsons did not meet until the closing. There is no evidence Johnsons made any representations concerning

the structure or condition of the home. We, like the district court, conclude Determan failed to present sufficient evidence to support submission of this theory to the jury.

The judgment of the district court is affirmed.

AFFIRMED.