
NO. A08-1482

State of Minnesota
In Court of Appeals

Kathleen J. Bryan,

Appellant,

vs.

Deonarine Kissoon and Kathleen Kissoon,

Respondents.

REPLY BRIEF OF APPELLANT KATHLEEN J. BRYAN

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I. ISSUES OF MISREPRESENTATION AND RELIANCE

Respondents contend that the trial court erred in denying their motion for summary judgment on the issues of misrepresentation and reliance. They argue that disclosure of the storm damage to the home was adequate as a matter of law, and that Appellant's contention that she would have acted differently had she known of the fire defies common sense. Stating that "water is water," Respondents urge the Court that Appellant could not reasonably have thought that water from storm damage might differ from water from fire suppression. They contend that Appellant's assertion that, had she known of the fire she would have insisted on a full water-intrusion inspection rather than the routine pre-purchase inspection, is incredible as a matter of law.

But, Respondents' saying so does not make it so. Again, take our one hundred people off the streets of St. Paul. This time ask each whether he/she would have a different mental picture of how much water entered a home if told (1) that there had been storm and hail damage causing water to enter the home, or (2) that firemen had hosed water through a hole in the peak of the roof of the home to extinguish a fire. Can it be said that all of them would respond identically that they would have no different mental picture? Reasonable jurors might very well have the same mental picture that Appellant asserts would have caused her to act differently had she known of the fire. Reasonable jurors might also wonder why Respondent Kathleen Kissoon, a lawyer trained and experienced in the nuances of word use, would choose not to use the word "fire" in the disclosure form if she

truly thought it would not ring some unwelcome bell in the minds of prospective purchasers.

The trial court properly recognized that this is a case in which credibility determinations by the trier of fact, and the parsing of inferences to be drawn from the raw facts, is particularly important. These issues cannot be appropriately decided on a summary basis.

II. APPLICATION OF OUT-OF-POCKET RULE

Appellant and Respondents agree that Minnesota courts will apply the out-of-pocket rule flexibly where its strict application would prevent a wronged party from recovering all damages proximately flowing from the wrongdoing. The parties disagree on whether, on the facts of this case, the damages claimed by Appellant were proximate to Respondent's failure to disclose.

Respondents view the necessary proximate flow only in terms of the relationship of the alleged nondisclosure to the water intrusion damages now claimed by Appellant. Since there is no evidence that any remaining water intrusion damages were the result of the fire, they conclude that the necessary proximity is absent.

But this ignores the point made in *Lewis*, that the proximate nexus can be the deprivation of a claimant's opportunity to protect himself from loss. In *Lewis*, the strict application of the out-of-pocket rule would have resulted in damages limited to return of the annuity premium, that being the only amount that the widow was truly "out-of-pocket." But, had the widow known that there was no

life policy before her husband either died or became uninsurable, she could have protected herself by buying one (and presumably cancelling the annuity policy). Based upon her having been deprived by the misrepresentation of this opportunity, she was awarded what would have been the proceeds of a life policy. See *Lewis v. Citizen's Agency of Madelia, Inc.*, 235 N.W.2d 831, 835 (Minn. 1975).

This is precisely the point of Appellant's claimed damages in the instant case. Assuming the trier of fact believes that the failure to disclose the fire was material and that Appellant relied thereon, Appellant lost her opportunity to discover the defects in the home by insisting on a full water-intrusion inspection. It is that loss of opportunity that proximately flowed from the failure to disclose.

Respectfully submitted,

Date: 1/2/09

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CERTIFICATE OF COMPLIANCE WITH RULE 132.01

The undersigned certifies that the within Reply Brief of Appellant is typed in a Times New Roman 13 point font, and contains 676 words according to the word counter of the Microsoft Word 2003 word processing software used to prepare it.



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