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Blackmore v. Re/Max Tri-Cities, LLC Appellant's Reply Brief Dckt. 36189

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IN THE SUPREME COURT OF THE STATE OF IDAHO

Rich and Renee Blackmore, husband and wife, both individually, and in their capacity as natural parents and guardians ad litem of Rich Blackmore, a **minor child**,

Plaintiffs/Appellants,

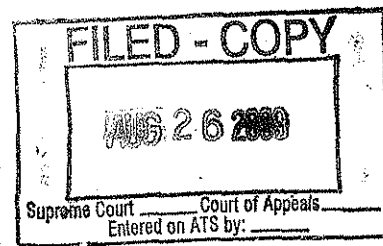
v.

RE/MAX Tri-Cities, L.L.C., Sue Mio, individually, and Brad Thompson, individually,

Defendants/Respondents.

Supreme Court # 36189-2009

APPELLANTS' REPLY BRIEF



APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF PAYETTE

HONORABLE GORDON W. PETRIE, PRESIDING DISTRICT JUDGE

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II. TABLE OF CASES AND AUTHORITIES

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III. ARGUMENT IN REPLY

A. Introduction.

Appellants Rich and Renee Blackmore, individually and on behalf of their **minor child**, Rich Blackmore, lodged their opening brief in this matter on June 12, 2009. By way of their initial briefing, the Blackmores set forth the argument that the order of Summary Judgment below was erroneously granted and that their Motion for Reconsideration below was erroneously denied, as there existed (and still exist) genuine issues of material fact with respect to their claims for negligence against Respondents Re/Max Tri-Cities, L.L.C., Sue Mio, and Brad Thompson. The Blackmores thus asked this Court to reverse the order of Summary Judgment, and to remand this case so that a jury may resolve the issues of material fact.

Respondents have since submitted their brief in response to the Blackmores' position on appeal. Respondents first contend that they did not violate any duties owed to the Blackmores under the "The Idaho Real Estate Brokerage Representation Act" (hereinafter "IBRA"). Idaho Code § 54-2082, *et seq.* Respondents next contend that IBRA abrogated all common law tort duties which might otherwise apply to real estate transactions like the one here. Respondents further argue that, even if they did owe some duty to the Blackmores, no error was made in summary judgment, as the Blackmores failed to establish any genuine issues of material fact in the evidence presented to the district court.

Before addressing these legal issues, the Blackmores first wish to start by dispensing with a few preliminary matters. Along these lines, the Blackmores note how Respondents frequently refer to the Real Estate Purchase and Sale Agreement between the Blackmores and Rhineharts and the "As Is" language contained therein, as somehow being dispositive of the legal duties the Respondents owed to the Blackmores. It must be pointed out however that the language form

the purchase and sale agreement controlled the contractual relationship between buyers (Blackmores) and sellers (Rhineharts), but not the relationship between the Blackmores and their real estate agents and brokers (Respondents). Suffice it to say, the duties owed between the Respondents and the Blackmores as set forth in IBRA are “mandatory” and may not be “waived or abrogated, either unilaterally or by agreement.” See Idaho Code § 54-2087(8). Similarly, the Respondents make repeated references to the EPA standards governing municipal water systems. Yet, the Respondents recognize the “EPA had not promulgated standards for domestic wells” at the time of closing. See Respondents’ Brief, p. 14. This case involves a domestic well. So in reality the EPA standards mean nothing here. On a final preliminary note, the Blackmores take strong exception to the representation by Respondents that: “It is undisputed that, at the time the Blackmores’ purchased the Rhinehart property, the domestic well produced water that was safe for human consumption.” See Respondents’ Brief, pp. 13-14. What is clear from the record is the Blackmores’ son suffers from a condition relating to the presence of dangerous levels of Arsenic in the drinking water. R., Vol. 1, p. 12.

After having dispensed with the preliminaries, The Blackmores now take the opportunity to reply to the substantive issues raised by the Respondents.

B. Duty.

1. Nothing in Idaho Law Precludes the Simultaneous Existence of Duties Arising from The Idaho Real Estate Brokerage Representation Act and from the Common Law.

The Blackmores submit, as they did below, that the duties owed to them by the Respondents can be and are grounded not only in Idaho Code § 54-2087, but also in the common law of negligence under *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980). Respondents maintain that IBRA abolished common law tort duties owed to clients by real estate

professionals. Respondents' Brief, pp. 24-25. For the reasons set forth below, the Respondents' argument is inconsistent with Idaho law speaking to the existence of separate duties arising from separate sources.

The cases and authority cited by Respondents to support their argument that common law duties were abrogated by Idaho Code § 54-2094 simply do not extend as far as Respondents have argued they do. Respondents correctly note that the Blackmores have chosen not to argue on appeal that Respondents owed and breached "fiduciary duties" to the Blackmores. Idaho Code § 54-2094 ("Representation not fiduciary in nature") is fairly clear on that issue, which is why it is not now on appeal. However, Respondents have attempted to expand the reach of that Code section to also abrogate the common law duty of reasonable care. The plain meaning of the Code does no such thing. Instead, the Code very clearly "abrogate[s] the common law of *agency* as it applies to regulated real estate transactions" I.C. § 54-2094 (emphasis added). The Code does not however, explicitly or implicitly, say anything relative to its effect on the common law of *negligence*, which is the issue at hand in this appeal. Additionally, the Code states that "the duties and obligations owed to a represented client in a regulated real estate transaction are not fiduciary in nature and are not subject to equitable remedies for breach of fiduciary duty." *Id.* In other words, according to Idaho Code, a plaintiff cannot bring an action against a real estate brokerage for breach of fiduciary duty. Again, the Code says nothing of one's ability to bring an action for breach of common law duties. The existence of those duties is not limited by this section of the Code; instead, only the nature of those duties (i.e. fiduciary or not) is clarified.

Neither does the case law cited by Respondents expand the plain reading of this straightforward statutory language. *Taylor v. Maile*, 142 Idaho 253, 127 P.3d 156 (2005), for

example, speaks only to whether the plaintiffs in that action could maintain a cause of action for breach of an “assumed fiduciary duty”:

The Taylors are not able to make a claim against Mr. Maile under count two for breach of an assumed fiduciary duty because there was no allegation of an assumed duty. In any event, the Legislature has essentially inoculated real estate brokers against such claims by virtue of Idaho Code § 54-2094.”

Taylor, 142 Idaho at 262. The object of the Court’s reference to “such claims” in that context applied only to the plaintiffs’ claims for breach of *fiduciary* duty, as there was no prior discussion involving common law or statutory duties in the context of that statement. Accordingly, and quite contrary to Respondents’ assertion, *Taylor* has no effect on common law claims.

Respondents acknowledge in their brief that the district court failed to recognize the difference between the statutory duties and the common law duties owed to the Blackmores: “The district court dismissed those [common law] claims as the record failed to establish Mr. Thompson breached any statutory duties owed to the Blackmores.” Respondents’ Brief, p. 24. This acknowledgement demonstrates the error of the district court’s overly broad and sweeping dismissal of Appellants’ claims, as Respondents’ own cited authority demonstrates that duties founded in statute and duties founded in common law can and do exist independently and simultaneously, even where a contractual relationship may exist between the parties: “It can also be said that if a cause of action for breach of a duty based on a contractual promise could also be maintained without the contract by virtue of a *statutory or common law duty*, then the action is founded upon tort, not contract.” *Sumpter v. Holland Realty, Inc.*, 140 Idaho 349, 354, 93 P.3d 680, 685 (2004). *See also Udy v. Custer County*, 136 Idaho 386, 34 P.3d 1069 (2001) (analyzing the possible existence of several asserted bases for the existence of a legal duty, but not finding

that a common law duty did not exist simply because a statute was on point); *Hudson v. Cobbs*, 118 Idaho 474, 518, 797 P.2d 1322, 1366 (1990) (“[A]n action in tort requires a showing that there is a breach of duty imposed by *common law or statute*.” (emphasis added)). Just as the *Udy* court analyzed statutory and common law claims of negligence separately, so too should have the district court in this action. It was reversible error not to.

2. The Blackmores’ Complaint was Pled Sufficiently to Maintain Causes of Action for both Common Law and Statutory Negligence.

Respondents have argued that the Blackmores’ allegations were all grounded in the relationship governed by Idaho Code § 54-2087, such that any argument for common law negligence outside the scope of statutory negligence would be inapplicable. Respondents’ Brief, p. 24. However, the allegations in the Blackmores’ Verified Complaint were not pled with any limiting specificity that would now cabin them into negligence claims regarding only the statutory duties provided for in Idaho Code § 54-2087. Labeled rather generically as “Negligence,” and without specific citation to the duties identified in I.C. § 54-2087, the Blackmores’ claim against Respondents was sufficiently and broadly pled to put Respondents on notice for breaches of any and all duties that they owed or might have owed to the Blackmores. R., Vol. 1, p. 16; Cf. I.R.C.P. 8(a)(1) (general rules of notice pleading).

3. Respondents had Statutory Duties of Reasonable Skill and Care.

It is agreed by all that Respondents had a statutory duty to exercise reasonable skill and care. *See* Idaho Code § 54-2087(2). The district court concluded however that with respect to the duty to exercise reasonable skill and care, the Respondents were entirely insulated by Idaho Code § 54-2087(7). R., Vol. 2., p. 306. Respondents have reasserted this argument on appeal. *See generally*, Respondent’s Brief. Idaho Code § 54-2087(7) provides: “Unless otherwise agreed to in writing, a brokerage and its licensees owe no duty to a client to conduct an independent

inspection of the property . . .” (emphasis added). From this statutory provision, Respondents’ claim that since the Blackmores’ request for a full scale water panel test was not reduced to writing, it was not enforceable. This argument may have some appeal when viewed in the general sense. However, when viewed under the specific facts of this case, its general appeal washes away.

Here, Respondents not only agreed to conduct a full panel water test, but also told the Blackmores it had been completed and reported the results to the Blackmores by explaining everything with the well water was fine. Thus, it may be that Respondents did not have a duty to test the water in the first instance, but once done, it most definitely had the duty to provide the Blackmores with an accurate and complete account of the type of test performed and the results obtained. Clearly here it was not communicated to the Blackmores that a coliform only test was performed, rather than the full scale water panel test requested by them. As such, the results reported to the Blackmores about how the water was fine was misleading to the Blackmores because the Blackmores were not notified that the scope of the water test was for coliform only. Under these circumstances, the Respondents should not be able to hide behind Idaho Code § 54-2087(7), especially when considering it was the Respondents’ obligation to advise the Blackmores in the first instance that it believed any duty on its part to conduct a water test must be placed into written form. Therefore, the district court misapplied Idaho Code § 54-2087(7), and the Respondents now ask this Court to do the same.

Moreover, it must be further argued that the request for a full panel water test does not necessarily fall within the statutory definition of “an independent inspection of the property”, like the Respondents wish us all to presume. Here, the request by the Blackmores went to the quality of the water in the well not the mechanical operation of the well itself. Interestingly, the

Respondents argued elsewhere that the language from the purchase and sale agreement referring to “well inspection” meant only the mechanical operation of the well. If that is the case, then an “independent inspection of the property” should carry the same meaning. Accordingly, the request for a full panel water test did not need to be reduced to writing as it does not fall under the definition of an “independent inspection of the property” contemplated by Idaho Code § 54-2087(7).

4. Respondents had Common Law Duties of Reasonable Skill and Care.

Even if this Court does not find that Respondents owed duties to the Blackmores through Idaho Code § 54-2087, the Court is not precluded from separately evaluating whether any duties existed at common law. *See Rife*, 127 Idaho at 846. By failing to recognize these common law duties as separate and distinct from any contractual or statutory duties (R., Vol. 2, p. 308), a difference that was argued to the district court by the Blackmores (R., Vol. 2, pp. 209-210), the district court erred in its determination that no duty between the parties existed.

As argued to the district court, Respondents owed a general duty of reasonable care to the Blackmores to “use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury.” *Alegria*, 101 Idaho at 619. Nothing in the relationship or the situation between Respondents and the Blackmores abrogated or otherwise nullified this general duty of care. Again, the District Court did not give proper analysis to this issue, either in its decision on Summary Judgment (R., Vol. 2, p. 308) or in its decision on the Blackmores’ Motion for Reconsideration (R., Vol. 2, pp. 376-378). Because Respondents were obligated at common law to exercise reasonable skill and care in their dealings with the Blackmores, summary judgment was inappropriate unless Respondents met their burden to show that no genuine issue of material

fact existed relative to any alleged breach of those duties. As argued in the following section, Respondents did not meet that burden.

C. Breach.

1. Whether Respondents Breached Their Duties is a Question of Fact not Appropriately Decided by the Court on Summary Judgment.

Having established that the district court erred in its finding that no duty was owed by Respondents to the Blackmores, this brief will now turn to the question of whether such error warrants reversal. As argued briefly above, once a legal duty has been confirmed, the question of whether that duty has been breached is a question of fact for the jury. *Rife*, 127 Idaho at 846. In order to withstand summary judgment, then, the Blackmores needed to show that there exist genuine issues of material fact as to whether Respondents breached their duties to the Blackmores. *See Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 108 P.3d 392 (2005). Furthermore, “[t]he burden of proving the absence of material facts is upon the moving party.” *Id.* at 250. Because much of the evidence submitted by the Blackmores below went unchallenged, genuine issues of material fact still exist as to whether Respondents breached, at a bare minimum, their statutory and common law duties to exercise reasonable care.

2. The Unchallenged Allegations in the Blackmores’ Verified Complaint Create Genuine Issues of Material Fact Appropriate for a Jury.

Respondents have attempted to avoid the implications that come with the fact that they failed to adequately address the Blackmores’ Verified Complaint during the proceedings on Summary Judgment by arguing that the case at bar is barred by the non-existence of any duty owed to the Blackmores. Respondents’ Brief, p. 30. The Verified Complaint, however, indicates that Rich Blackmore made an express request to Respondent Thompson to have a full panel water test performed on the property. R., Vol. 1, p. 12. Respondents should not be able to

shield themselves with Idaho Code § 54-2087(7), which indicates that all extra-statutory duties must be memorialized in writing, when their failure to reduce to writing the Blackmores' request for a full-scale water test could itself be considered a breach of I.C. § 54-2087(2) (duty to exercise reasonable skill and care). On this duty, considering the allegations in the Verified Complaint went undisputed in the proceedings below, there certainly exists a genuine issue of material fact.

The Blackmores, during oral argument on Respondents' Motion for Summary Judgment, very explicitly brought these issues to the attention of the District Court:

And so what I would like to do, Your Honor, is frankly highlight those facts upon which we rely in defeat of these motions. And, Your Honor, I would say at the outset of that, that **all of these facts upon which we rely are really set forth in the complaint which is verified by Mr. Blackmore.**

....

And, Your Honor, of course **the facts in the complaint under the rules and the standards involved in summary judgment require that all of those facts be shed in the light most favorable to us**, and the inferences that can be drawn from those facts are shed in the light most favorable to us.

And **it is those facts that we rely on** that really were not discussed much by Re-Max, if at all. I think there was a reference or two discussed about this request for a full water panel test to be done. But not much was said, Your Honor, and those are the facts that if Re-Max really wanted to anchor its motion for summary judgment that they should accept as true, that they should shed in the light most reasonable and favorable to us, and all of the inferences that can be drawn from those facts to us.

They didn't discuss those facts, so they weren't shed in the light favorable to us.

So I do have to go back and clean up some of the facts upon which we truly rely here.

And the first one and the main one, Your Honor, is that after Mr. Thompson on behalf of Re-Max got involved in this transaction, **there was an expressed request made from the Blackmores that Mr. Thompson would see to the conduct of a full panel water test.** *That's pled in the complaint straightforward in the paragraphs relating to the common facts.*

The response that the Blackmores received from Mr. Thompson is also in the complaint, Your Honor.

And Mr. Thompson told the Blackmores, **Okay, I will see to it and we will have a full panel water test completed,** and it will be done before closing.

Tr., pp. 37:12-18, 38:8 – 39:14 (emphasis added). The fact that the district court, both in its rulings on Summary Judgment and on Reconsideration, failed to give proper weight to the Verified Complaint (as more than mere allegations of a pleading), reveals the heart of the error that ultimately resulted in erroneous decisions at both Summary Judgment and on Reconsideration.


IV. CONCLUSION

The reality of this appeal is that the district court's order granting Summary Judgment, though somewhat obscured in the thirty-four page decision, was based on a finding that no duties were owed by Respondents to the Blackmores. For that reason, this reply brief has remained focused entirely on the first two of the fundamental elements of a negligence action in the state of Idaho - Duty and Breach. The question of whether the district court erred in striking affidavits submitted by the Blackmores becomes moot upon this Court's determination that duties were owed by Respondents to the Blackmores, and that the district court's justification for granting Summary Judgment was reversible error. Accordingly, the Blackmores will rely on the arguments and evidence previously submitted on the stricken affidavits.

For all the foregoing reasons, Appellants Blackmores respectfully maintain their request of this Court to reverse the District Court's order granting Summary Judgment in favor of Respondents ReMax Tri-Cities, L.L.C., Brad Thompson, and Sue Mio.

DATED this 26 day of August, 2009.

JOHNSON & MONTELEONE, L.L.P.



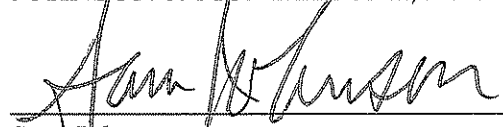
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