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IN THE SUPREME COURT OF THE STATE OF IDAHO

WILLIAM SHAWN GOODSPEED, and SHELLEE BETH GOODSPEED,	)	
Plaintiffs/Respondents,	)	Docket No. 38829-2011
vs.	)	Jefferson County Case: CV-2009-15
ROBERT D. SHIPPEN and JORJA D. SHIPPEN,	)	
Defendants/Appellants.	)	

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Jefferson County
Honorable Gregory S. Anderson, District Judge, Presiding

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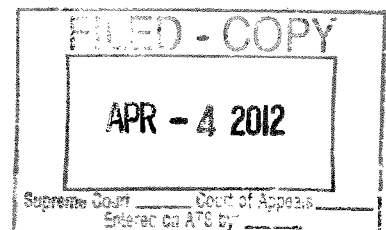

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GENERAL ISSUES ON APPEAL

1. **Did the Court err by granting a new trial on the issue of "breach of implied warranty of habitability" which set aside the jury verdict on this isolated count in the Plaintiffs' Third Amended Complaint?**

2. **Did the District Court err in granting a new trial on the basis of stating that the jury should have been instructed regarding disclaimer of the implied warranty of habitability, and that Plaintiffs were entitled to a new trial on their breach of implied warranty of habitability claim?**

3. **Attorneys' fees and costs should be awarded to Appellants at trial and on appeal.**

STANDARD OF REVIEW

Only "where prejudicial errors of law have occurred" has the district court "a duty to grant a new trial under Rule 59(a)(7), even though the verdict is supported by substantial and competent evidence." *Rockefeller v. Grabow*, 136 Idaho 637, 645, 39 P.3d 577, 585 (2001). But whether to grant a motion for judgment notwithstanding the verdict (JNOV) "is purely a question of law." *Quick v. Crane,* 111 Idaho 759, 764, 727 P,2d 1187, 1192 (1986). Therefore, the factual determinations of the jury should not be questioned. The party moving for JNOV "admits the truth of all adverse evidence and all inferences that can be drawn legitimately from it." *Leavit v. Swain,* 133 Idaho 624, 628, 991 P.2d 349, 353 (1999). The court must determine whether there is substantial evidence upon which a jury *could* have found for the non-moving party. *Id.* (emphasis added). The court **may not** reweigh the evidence or consider the credibility of the witnesses and will not grant JNOV unless it finds that there could have been **but one** conclusion as to the verdict reasonable minds could have reached and the jury failed to reach it. *Id.* (emphasis added). Conflicting circumstantial evidence is enough to withstand a motion for JNOV.

OVERVIEW

1. Jury verdicts should be given special weight and not second-guessed by a trial court.
2. The facts support the jury verdict on all counts including habitability.
3. The plaintiffs, buyers, have resided in the house since the purchase. The house has never been non-habitable.
4. The leaching system had no problems for the first year and during the time the seller was allowed to inspect such system.
5. The plaintiffs/respondents failed to winterize or properly maintain the pump. The pump line to the leach area may have been cut by the plaintiffs during installation of sprinklers.
6. The respondents never proved to the jury any breach of warranty of habitability. Furthermore, the respondents presumed a sub water problem but never proved causation. The jury had sufficient facts to rule for the appellants and did so.
7. The respondents drafted the contract provided to the appellants. Further, the respondents' realtor had thirty (30) years of service and explained the contract to the respondents. The respondents understood the contract provided to sellers.
8. The respondents initialed each page of the contract and indicated the contract was understood.
9. The UCC definition of conspicuous is not applicable to the standard for home

sales. It may be useful for analogy and the UCC notes thereto.

10. **The lower court <u>held in abeyance</u> fees for the appellants until this court ruled. Fees should have been granted since appellants prevailed on all counts with the jury. Fees should be granted to appellants for this appeal.**

<u>ARGUMENT</u>

1. Jury verdicts are to be respected.

The right of trial by jury is of ancient origin, characterized by Blackstone as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy" (Bk. 3, p. 379); See: *Dimick v. Schiedt*, 293 U.S. 474 (1935). With few exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. *Id.* Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any curtailment of the right to a jury trial should be scrutinized with the utmost care. *Id.* Compare: *Patton* v. *United States*, 281 U.S. 276, 312 (1930).

Thomas Jefferson stated that he considered "trial by jury [to be] the greatest anchor ever yet devised by humankind for holding a government to the principles of its constitution." Thomas Jefferson, 1792 (quoted by Judge William G. Young Speech at the Florida State Bar's Annual Convention in Orlando, June 28, 2007). Indeed, the seventh amendment to the United States Constitution guarantees a litigant the right to a jury trial. U.S. CONST. Amend. VII. This was important initially due to English oppression of American colonists causing the framers of

the Constitution to place great importance on the right to a jury trial which has continued on until today. See: *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (reasoning that right to jury trial is of such historical importance that courts strictly should scrutinize any infringement of that right). In analyzing the right to a jury trial, Blackstone asserted that the concept of a civil jury trial was one of the most glorious concepts of the English law. 3 W. Blackstone, Commentaries at 1340 (1898). The preference for jury trials was so embedded in early American jurisprudence that Alexander Hamilton even proposed that in order to protect the "sanctity" of the jury trial, juries, instead of judges, should review civil jury verdicts that parties appealed. See: *The Federalist No. 81 and 83.* See also: *Galloway v. United States*, 319 U.S. 372, 397-98 (1943) (Black, J., dissenting) (analyzing Alexander Hamilton's view of civil jury trial).

Of course, it is true that administrative procedures occasionally prevent juries from resolving disputes but despite conflicting with the seventh amendment's guarantee to a jury trial, such procedures have withstood constitutional challenges. See: *Baltimore & Carolina Line v. Redman,* 295 U.S. 654, 659-61 (1935) (determining that judgment notwithstanding verdict did not violate party's right to jury trial); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 321-22 (1902) (ascertaining that summary judgment did not detract from party's right to jury trial); *Walker v. New Mexico & S. Pac. R.R.*, 165 U.S. 593, 598 (1897) (holding that special verdict did not violate defendant's right to jury trial). However, in *Redman* (supra), the United States Supreme Court recognized that courts should only grant a judgment notwithstanding the verdict if, as a matter of law, the jury bases the verdict on insufficient evidence. *Id.* For reasons that shall be set forth below, Appellants submit to this Court that the trial court did in fact err in granting a

judgment notwithstanding the verdict and ordering a new trial because the jury's decision was based on sufficient evidence and there were no unanswered questions of law upon which to base its JNOV or order for a new trial.

2. Actual knowledge trumps the need for disclaimer to be "conspicuous."

At trial, the jury ruled in favor of the defendants/appellants on all issues (including a finding of no liability with regard to any breach of the implied warranty of habitability). Whether or not the verdict was based on a finding that the implied warranty of habitability was validly disclaimed, or that the warranty was simply not breached is unknown. It is uncontested, however, that the language contained within that agreement regarding any disclaimer of the implied warranty of habitability was not typed in an alternate font, in bold, caps, italics, or otherwise written in such a way that it would be stylistically distinguishable from the other typesetting contained near it on the page. Respondents submit to this Court that such style is required to make the language "conspicuous" and that such conspicuity is required in order for the disclaimer to be valid. Accordingly, Respondents assert the trial court's refusal to give instruction to the jury to invalidate any disclaimer which failed to meet the requirements of conspicuity was error. The trial court ultimately granted a judgment notwithstanding the verdict on such a basis and ordered a new trial, however the trial court (and Respondents) failed to understand that conspicuity is not necessary to disclaim warranties in all cases.

A. The UCC can apply to this case by analogy despite not being for the sale of goods.

The Court will notice that many of the cases in support of Appellants' position that are to follow hereafter are based on the UCC which is usually applied to the sale of goods and Appellants are well aware that this case is not based on the sale of goods. But the UCC need not *only* be applied to the sale of goods. See: *Clements Farms, Inc. v. Ben Fish & Son,* 814 P. 2d 917 (Idaho, 1991). Indeed, Idaho courts have applied UCC provisions by analogy to a variety of transactions other than sales, such as to leases, bailments and loans. *Id.* See also: *All-States Leasing Co. v. Bass, 96 Idaho 873, 538 P.2d 1177 (1975)* (applying the UCC to a lease and specifically expressed its disagreement with decisions in a few other states, where courts have refused to extend Code warranties to non-sale transactions without express legislative authorization. Compare: *R & W Leasing v. Mosher*, 195 Mont. 285, 636 P.2d 832, 835 (1981); *Baker v. Promark Products West, Inc.*, 692 S.W.2d 844, 846 (Tenn. 1985)).

Further, this Court has previously acknowledged criticism of decisions from other states that construe the applicability of the UCC too narrowly on the basis that by so doing, the intent of the UCC's drafters is violated. *Clements Farms, Inc. v. Ben Fish & Son,* 814 P. 2d 936. See also: UCC section 1-102, which states that the Code should "be liberally construed and applied to promote its underlying purposes and policies." Compare: Special Project, Article Two Warranties in Commercial Transactions: An Update, 72 Cornell L. Rev. 1159 (1987).

In *All-States Leasing*, this Court stated that one purpose of applying UCC warranties by analogy is that "implied warranties can be extended to many transactions which could not be defined as sales but which are so like other cases where warranties are implied that they should be treated similarly." 96 Idaho at 878, 538 P.2d at 1182 (quoting Farnsworth, *Implied Warranties*

of Quality in Non-Sales Cases, 57 Colum. L. Rev. 653 (1957)). In another non-sale-of-goods case, this Court noted that "reasoning by analogy does not require us to apply Article 2 in toto ...; rather we need apply only those provisions which are sufficiently analogous." *Glenn Dick Equipment Co. v. Galey Construction, Inc.,* 97 Idaho 216, 222, 541 P.2d 1184, 1190 (1975). This Court continued: "We will look to the commercial setting in which the problem arises and ... use Article 2 as a premise for reasoning only when the case involves the same considerations that gave rise to the Code provisions and an analogy is not rebutted by additional antithetical circumstances." *Id.* at 222, 541 P.2d at 1190 (quoting Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning,* 65 Colum. L. Rev. 880, 888 (1965)).

B. Actual knowledge trumps the need for disclaimer to be "conspicuous."

U.C.C. 2-316(2) states that in order to exclude or modify implied warranties, or any part thereof, the language must mention the warranty (whether merchantability, fitness for a particular purpose, or in this case, habitability), and if there is a writing, it must be conspicuous. "Conspicuousness" is a term of art under the code, and is defined in Section 1-201(10) as follows:

> A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color. But in a telegram any stated term is 'conspicuous.' Whether a term or clause is conspicuous or not is for decision by the court."

The official UCC comment to this definition states that the term means to be "attention-calling...[b]ut the test is whether attention can reasonably be expected to be called to it." And the

reason for this requirement of conspicuity is found under the comment number one to UCC 2-316 which states that the Section is intended to allow exclusion of implied warranties only by conspicuous language "or other circumstances which ***protect the buyer from surprise***." (emphasis added). There are numerous cases illustrating what such "other circumstances" might look like. In *U. S. Fibres v. Proctor & Schwartz*, 509 F.2d 1043 (CA 6 1975), the court found exclusionary language in standard size type effective where the caption "LIABILITY CLAUSE" was in bold type and the evidence indicated buyer had reviewed the exclusion. *Smith v. Sharpensteen*, 521 P.2d 394 (Okl.1974), likewise held effective a disclaimer in inconspicuous print relying on its title of "**No Warranty**" and buyer's having been required to read it. (Emphasis original). But the common thread in these cases was articulated in *Tennessee-Carolina Transport v. Strick*, 283 N.C. 423, 196 S.E.2d 711 (1973), that ***a disclaimer should not be declared inoperative for inconspicuousness without inquiring whether the buyer was protected from surprise*** by factors bearing upon matters other than the physical appearance of the clause itself, e. g., actual awareness of a disclaimer running between non-consumer parties of substantially equal bargaining power. See also: *Williams v. College Dodge*, 11 U.C.C. Rep. Serv. (Mich. Dist. Ct., 1972) (emphasis added). See also: Section 2-316 by virtue of "other circumstances which protect the buyer from surprise." Cf. U.C.C. 2-316, Comment 1. In short, common sense must prevail, as it did in the case of *Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364, 372 (Dist. Court, ED Mich, 1977) where the court found that "actual awareness and apparent endorsement of the provisions obviates any need for conspicuousness in order to prevent surprise." See also: *Cate v. Dover Corp.*, 790 SW 2d 559,

562 (Texas, 1990) (stating that: "a disclaimer contained in text undistinguished in typeface, size or color within a form purporting to grant a warranty is not conspicuous, and is unenforceable ***unless*** the buyer has actual knowledge of the disclaimer." (Emphasis added).

The key fact on appeal is that it was Respondents, NOT Appellants who drafted the purchase and sales agreement.[1] Of course, the document was not personally drafted by Respondents as it was a form approved by the Idaho Association of Realtors, however, the Restatement of Contracts imputes "drafter" status to any party "who supplies the words or from whom a writing otherwise proceeds." Restatement (Second) of Contracts § 206. Furthermore, it is well settled law in Idaho that contract language is construed most strongly against the party who prepares the contract. *Werry v. Phillips Petroleum Co.*, 97 Idaho 130, 540 P.2d 792 (1975); *Dale's Service Co., Inc. v. Jones*, 96 Idaho 662, 534 P.2d 1102 (1975); *Dunford v. United of Omaha*, 95 Idaho 282, 506 P.2d 1355 (1973); *Big Butte Ranch, Inc. v. Grasmick*, 91 Idaho 6, 415 P.2d 48 (1966).

As Respondents have based their entire appeal largely on the lack of conspicuousness of the warranty disclaimer – they should not prevail because, as stated above, there is no need for a disclaimer to be conspicuous when Respondents already knew of its existence. Indeed, it is disingenuous for Respondents to claim surprise by (or lack of any knowledge of) any provision of a self-authored contract! Because Respondents had either actual knowledge, or shall be imputed knowledge (constructive), they cannot evade equity, justice, or general notions of

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1 See: Tr., p. 56, ll. 21-25; p. 57, ll. 1-8 (stating that Respondents' real estate agent, NOT Appellants or their agent, prepared the contract); Tr., p. 15, ll 21-25; p. 16, l. 1 (stating that Respondents signed the purchases and sales agreement and then conveyed it to the seller).

fairness on a mere technicality regarding specific type settings or fonts.

Besides the fact that Respondents drafted the agreement (containing the warranty disclaimer), they also had their own agent, practicing real estate more than 30 years, to guide them through the real estate transaction. Testimony at trial demonstrated clearly that Respondents' agent was a professional real estate agent having been licensed for over 30 years.[2] Respondents' agent knew and understood the contents of the purchase and sales agreement (including the disclaimer provision) and was ready and able to explain that provision, among others, to Respondents.[3] And Respondents' agent did in fact explain the contract to them.[4] That fact, coupled with the Respondents' testimony at trial that he read the contract, understood it,[5] and initialed each page of the contract,[6] allows for the inference to be drawn that if Respondents failed to ask their real estate agent about the provision disclaiming the implied warranty of inhabitability, it is because they already understood it. And, the Court can make such an inference as it is a question of fact presumably determined by the jury at trial, and according to the case of *Leavit v. Swain*, 133 Idaho 624, 628, 991 P.2d 349, 353 (1999) all reasonable inferences must be drawn in favor of the party opposing JNOV.[7]

3. Respondents failed to demonstrate breach of warranty.

Even if the implied warranty of inhabitability was not validly disclaimed, there are a

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2 Tr., p. 109, ll.22-23.

3 Tr., p. 125, ll. 18-25; P. 126-129.

4 Tr., p. 58, ll. 8-10.

5 Tr., p. 66, l. 25 – p. 67, L. 1 (stating: "Q: And you understood the language of the contract; Correct? A: Yes").

6 Tr., p. 57, ll. 24, 25 – p. 58, ll. 1-3.

7 Stating that the party moving for JNOV "admits the truth of all the adverse evidence and all inferences that can be drawn legitimately from it."

number of additional inquiries that should have been analyzed prior to the trial court entering judgment notwithstanding the verdict and order of new trial: 1) Did Respondents even demonstrate that the home was not habitable? 2) Was there actually any breach? 3) Did Respondents prove causation?

First, Respondents did not demonstrate that the premises were ever rendered uninhabitable. Instead, trial testimony was very clear to the contrary. Respondents testified that they never moved out of the home and it is still used as their primary residence. Furthermore, the trial testimony was clear that only a small percentage of the overall home was affected by the alleged water damage, but there was no evidence offered to indicate that the damages to the basement made the rest of the home non-habitable due to any health concerns, or for any other reason. Besides, the implied warranty of habitability does not impose upon the builder an obligation to deliver a perfect house. *Bethlahmy v. Bechtel*, 91, Idaho 55, 68, 415 P. 2d 698, 711 (1966). "No house is built without defects, and defects susceptible of remedy ordinarily would not warrant rescission." *Id.* Instead, only major defects which render the house unfit for habitation which are not readily remediable entitle the buyer to relief. *Id.* In the case at hand, Appellants installed a leaching system that remedied any sub-water issues that may have arisen. Such action, proving to be "readily remediable" prevents Respondents ability to seek relief. As will be noted, *infra*, the leaching system worked to eliminate any sub-water issues for over a year until the actions of Respondents themselves caused that system to fail resulting in the damages alleged in this case.

Second, Respondents, as Plaintiffs, had the duty to prove a breach of any implied

warranty of habitability and failed to do so. In an action for breach of an implied warranty, the buyer has the burden of establishing the breach by a preponderance of the evidence. *Dickerson v. Mountain View Equipment Co.*, 109 Idaho 711, 716, 710 P.2d 621, 626 (Ct.App. 1985). And such a question is for the trier of fact. *Martineau v. Walker*, 97 Idaho 246, 542 P.2d 1165 (1975). As a factual, not legal, issue - the trial court should not have granted a judgment notwithstanding the verdict or ordered a new trial. These questions of breach were within the domain of the jury to decide and the verdict should not have been displaced. According to *Leavit*, the applicable standard for JNOV is whether there is substantial evidence upon which the jury *could* have found for the non-moving party. *Leavit v. Swain*, 133 Idaho 624, 628, 991 P.2d 349, 353 (1999). Such a standard is quite low and was met by Appellants as discussed herein.

Third, even if Respondents factually met the threshold for the jury to find a breach, there was complete failure to establish causation which prevents Respondents from prevailing at trial. Respondents failed to produce testimony at trial proving that the flooding was due to sub-water at all. Instead, Respondents relied on the fact that sub-water issues are common in Jefferson County. It is just as likely that the source of the flooding was the result of an unattended water hose, a nearby farmer's canal, or any other act of nature but it cannot be assumed to be caused by sub-water without a factual showing by Respondents/Plaintiffs at trial. And even if the sub-water was the culprit, neither can we assume that Respondents were not responsible for misuse, neglect, or damage to the equipment that was installed to guard against sub-water problems.

In fact, there is evidence within the trial record offered by Appellants of an alternate explanation for the cause of the basement flooding; that Respondents may have accidently cut

the water line to the leaching system when putting in their sprinkler system, which explanation is reasonable because there were no sub-water problems for over a year after the sale until such time as Respondents began landscaping and refused Appellants access to the premises. If this were the case, the leaching system would have failed as a result of Respondents' actions resulting in the flooding damages alleged in this case.[8]

CONCLUSION

The controlling distinction between the duty of the court and that of the jury is that the former is the duty to determine the law and the latter to determine the facts. See: *Dimick v. Schiedt*, 293 U.S. 474 (1935). The trial court erred in this case by granting a new trial on the issue of habitability (and disclaimer thereof) perceiving it to be an issue of law where no legal issue actually existed. The trial court failed to recognize that Respondents had actual notice of the provision disclaiming the warranty of habitability by virtue of the fact that, among other things, it was Respondents who drafted the purchase and sales agreement containing said disclaimer. Therefore, the disclaimer was not required to be printed in a conspicuous way. Accordingly, the trial court's initial refusal to give any jury instruction requiring that the font be "conspicuous" was correct and the subsequent JNOV/new trial order was therefore an error.

While Respondents correctly point out that jury instructions are generally questions of law, only *prejudicial errors of law* require the district court to grant a new trial under Rule 59(a)(7). See: *Rockefeller v. Grabow (cited above).* Without conceding that Appellants had any

8 Tr., pp. 278, ll. 1-25; 279, ll. 1-2.

duty to Respondents regarding any implied warranty of habitability, because such were effectively disclaimed, Appellants vehemently assert that even if such a duty existed, it was not breached – therefore, any legal ruling by the trial court to omit a certain jury instruction was not prejudicial. There was sufficient evidence presented at trial by Appellants that was not based on the previous point of law. Therefore, the same verdict most likely would have been reached even if the refused instruction had been given by the trial court.

Furthermore, there was no breach of the implied warranty of habitability because Respondents failed to prove at trial that the home was rendered uninhabitable or that the alleged damages were caused by Appellants on account of the alleged breach. Those are questions of fact which the jury decided in favor of Appellants. Additionally, there was sufficient and substantial evidence within the record to justify and uphold the jury's verdict especially in light of the low preponderance standard governing jury verdicts. Finally, all reasonable inferences must be drawn in favor of the party not moving for JNOV bolsters the case against JNOV and a new trial. Under the facts and circumstances of the case articulated herein, the trial court had no basis in law to derogate the jury's decision; and, it should not have disturbed the verdict.

As previously argued in Appellant's initial brief, Appellants prevailed at trial and are entitled to fees and costs at that level (which was held in abeyance by the trial court). Likewise, appellants should prevail before this Court, further fees and costs should be granted to Appellants on appeal as well.

DATED this 3rd day of April, 2012.

Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of April, 2012 true and correct copies of the foregoing were delivered to the following persons(s) by:

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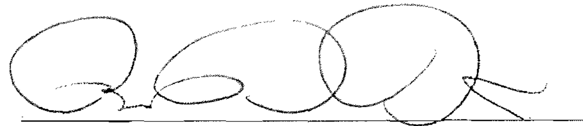

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