11-3-2017

Petrus Fam. Trust Dated May 1, 1991 v. Kirk Appellant's Reply Brief Dckt. 44784

IN THE SUPREME COURT OF THE STATE OF IDAHO

PETRUS FAMILY TRUST DATED MAY 1, 1991 and EDMOND A. PETRUS, JR., individually and as Co-Trustee of the Petrus Family Trust dated May 1, 1991, Plaintiffs/Appellants/Cross-Respondents v. CHRIS KIRK d/b/a KIRK ENTERPRISES, Defendant/Respondent/Cross-Appellant	SUPREME COURT DOCKET NO. 0044784-2017 Valley County District Court Case No. 2014-71-C

APPELLANTS' REPLY BRIEF / CROSS-RESPONDENTS' BRIEF

Appeal from the District Court of the Fourth Judicial District for Valley County
Honorable Judge Jason D. Scott, Presiding

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I.

SUMMARY

In his opening brief, Petrus (the homeowner/plaintiff) explained that the summary judgment granted on his cause of action against Kirk (the remote builder/defendant) for breach of the implied warranty of habitability must be reversed. Petrus explained that the district court misconstrued case law from this Court—primarily *Salmon Rivers Sportsman Camps v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975) ("*Salmon Rivers*"), and *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987) ("*Tusch*")—and erred by misapplying the statute of limitations that governs actions arising in contract to a claim that actually arises in *tort*.

Kirk responded with a collection of disjointed arguments: that, indeed, as the district court concluded, the cause of action arises in *contract*, not in tort (taking a very different read of *Salmon River* and *Tusch* than did Petrus); that, even if the cause of action arises in tort, Petrus's claim is barred by the economic loss rule; that Petrus failed to comply with certain statutory prerequisites to filing suit; that, in his contract with Gentry-Boyd (the seller), Petrus *waived* his claim against Kirk; and that policy reasons argue against Petrus's appeal. Kirk's brief also advanced his own cross-appeal argument that the district court abused its discretion in awarding him less in attorneys' fees than he requested.

Petrus replies that Kirk's principal argument neglects the clear implications of both *Salmon River* and *Tusch*: namely, that a remote home buyer has a direct cause of action against the builder even without privity of contract between them; and that, where a claim exists that is not based on privity, it *must* arise in tort. Otherwise, Petrus rejects Kirk's additional arguments wholesale as being beyond the scope of this appeal (as none were briefed or ruled upon in the district court), and rejects each, individually, as inapplicable to this case (for reasons explained in the Discussion section, below). Finally, Petrus explains the full context of the attorneys' fees award against him, and concludes that the district court's ruling in that context was based on very clear reasoning and was certainly *not* an abuse of discretion.

II.

STATEMENT OF FACTS: REPRISED

In his opening brief, Petrus set forth the few salient facts necessary to address the single legal issue presented by his appeal: namely, the date he purchased his home from Gentry-Boyd (April of 2012), the date he discovered the construction defects attributable to Kirk (October of 2013), the date he filed his lawsuit against Kirk (March of 2014), the nature of his claim (as relevant here, only breach of the implied warranty of habitability), and the basis of the district court's ruling granting summary judgment (the contract statute of limitations). AOB, pp. 9-10.

Kirk's Respondent's Brief presents what he calls "some additional facts [that] may assist the court." RB, p. 4. The "facts" represented, however, all concern the underlying merits of Petrus's claim (reciting, for instance, that the prior owner, Gentry-Boyd "never experienced water problems with the house," that Kirk "denied responsibility for the door problems," and that Kirk inspected the home but "witnessed no problems with the French doors"). RB, pp. 4-5. Kirk also asserts as fact that Kirk's first inspection of the home revealed that, "at some point after construction was completed, the home had been severely altered and damaged." RB, pp. 5-6.

Those assertions are all disputed; but, more to the point, they have no relevance whatsoever to the discrete legal issue presented by this appeal. Accordingly, Petrus declines to engage with reference to the contrary evidence in the record, and proceeds, instead, directly to a review of the only relevant inquiry here (namely, whether the cause of action for breach of the implied warranty of habitability is a contract claim or a *tort* claim).

III.

DISCUSSION

A. Breach of the Implied Warranty of Habitability Is a *Tort.*

In his opening brief, Petrus explained the history of implied warranties in the jurisprudence in the United States generally (as summarized by Dean Prosser), and in the jurisprudence of Idaho specifically (as illustrated primarily

by three cases from this Court: *Tomita v. Johnson*, 49 Idaho 643, 200 P. 395 (1930) ("*Tomita*"); *Salmon Rivers, supra,* 97 Idaho 348, 544 P.2d 306 (1975) ("*Salmon Rivers*"); and *Tusch, supra,* 113 Idaho 37, 740 P.2d 1022 (1987) ("*Tusch*"). AOB, pp. 18-30. Petrus also examined persuasive authority from other jurisdictions that supports his position. See AOB, pp. 30-33 (including, for instance, reference to *Richman v. Watel*, 565 S.W.2d 101 (Tex. 1978) ["the breach of the implied warranty of fitness arising from the construction and sale of a new house is considered to be a tort rather than contract concept," and the statute of limitations on that claim "commences on the breach of the implied warranty when the buyer discovers or should discover the injury."]).

Kirk's response neglects altogether the evolution of the relevant Idaho case law from *Tomita* (holding that a cause of action for breach of the implied warranty does not accrue until the claim is first "ascertained by the purchaser"), to *Salmon Rivers* (holding that a claim *must* arise in tort if there is no privity of contract between the parties), to *Tusch* (holding that "subsequent purchasers of residential dwellings, who suffer purely economic losses from latent defects . . . may maintain an action against the builder . . . of the dwelling based upon the implied warranty of habitability despite the fact that no privity of contract exists between the two."). Instead, Kirk relies repeatedly (and almost exclusively) on the district court's analysis, and on the district court's "inferences" drawn from this Court's decision in *Tusch* (which, in this Court, on a pure issue of law are all ultimately irrelevant). Indeed, Kirk

offers *no response* to the central logic of Petrus's position (as elucidated above).

Petrus stands by that argument here. The cause of action by a homeowner against a remote seller is recognized in Idaho (*Tusch*). Since there is no privity in that situation, the claim must arise in tort (*Salmon Rivers*). And the statute of limitations on the tort claim does not accrue until it has been (or should have been) ascertained (*Tomita*). And, thus properly understood, it is inescapable that the district court erred in ruling otherwise.

B. <u>The Economic Loss Rule Is Not Germane to this Appeal.</u>

Having largely ignored the specific legal issue presented by this appeal, Kirk focuses instead on a gratuitous comment by the district court in a footnote to its ruling that, "if the claim sounded in tort," it "would be barred by the 'economic loss rule' in any event." R. Vol. 1, pp. 979, 1073-1074. But in support of the district court's ruling, Kirk's response does little except state the rule (which Petrus, of course, acknowledges), and then summarily declare that "Petrus's damages all add up to economic loss" (an assertion that was never argued in Kirk's motion for summary judgment, and so was never even disputed by Petrus). RB, p. 13.

Petrus's opening brief anticipated this strawman argument, but also knocked it down with a series of reasons why the rule does not apply—or at least *might not* apply—to this case. Kirk does not respond to any of those

points, but they bear repeating here because they are compelling, and because they belie Kirk's superficial conclusion that "Petrus cannot escape application of the economic loss rule if the Court finds that his claim for breach of the implied warranty of habitability sounds in tort." RB, p. 14.

First, the district court's conclusion and Kirk's present argument both conflict directly with this Court's decision in *Tusch*, which held specifically that "subsequent purchasers of residential dwellings, who suffer purely economic losses from latent defects manifesting themselves within a reasonable time, *may maintain an action against the builder* . . . ." *Tusch*, 113 Idaho at 50-51 (italics added). After all, to reframe and paraphrase the Court's rhetorical question as the conclusion its ruling supports, the common law should not deny a subsequent purchaser a remedy against the builder merely because there is no privity of contract, and because the damages happen to be purely economic, when it was the conduct of the builder which created the latent defect in the first place. *Id.* at 51.

Second, Kirk does not dispute that his motion for summary judgment never even suggested the economic loss rule, never summarized what the evidence was on the subject of Petrus's damages, and never argued how the rule might (or might *not*) apply to this case. Now, on appeal, Kirk points to several snippets of deposition testimony from Petrus on the subject of damages that happened to be part of the record, but none of this was called out or relevant to the issue framed by Kirk's motion for summary judgment (and

so was never challenged or supplemented by Petrus with contrary or additional evidence). Even the evidence on this point cited by Kirk makes clear that the state of discovery on the issue of Petrus's damages was not complete and not yet exhaustive. R. Vol. 1, pp. 301-303.

Third, and most importantly, Petrus's opening brief explained that the economic loss rule is not *absolute*. AOB, pp. 33-36. For instance, it does not apply where there is a "special relationship" between the parties, that is, "where the relationship . . . is such that it would be equitable to impose such a duty" (like here, where Kirk, a builder, is a "professional" who "holds [himself] out to the public as having expertise regarding a specialized function"). *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 300, 108 P.3d 996, 1000 (2005) ("*Blahd*"). Similarly, the Court in *Blahd* recognized that the rule does not apply in any "unique circumstances requiring a different allocation of risk." *Id.* at 302 (citing *Just's Inc. v. Arrington Construction Co.*, 99 Idaho 462, 470, 583 P.2d 997, 1005 (1978)). And, most to the point here, the rule does not apply where, like here, the economic loss is parasitic to property damage or personal injury (a point that Petrus never had the opportunity to present evidence on in this district court).

Finally, Petrus invites the Court to revisit Justice Bistline's opinion in *Tusch*, which recognized that Idaho has long been moving in the direction of providing more protection for consumers who suffer economic loss, and which suggested that the majority opinion ultimately required recognition of a

new cause of action. With that recognition, the Court should also rule that the economic loss rule simply does not apply to a claim like Petrus's because, whatever specific damages Petrus proves to have, the most common form of damages in this *type* of case would be, specifically, the economic damages caused by the underlying negligent construction, and those are precisely what that cause of action was designed to remedy.

C. Kirk's Additional Arguments Are Not Persuasive.

Kirk's Respondent's Brief presents three additional arguments why the summary judgment in his favor should be affirmed: because Petrus supposedly failed to comply with statutory prerequisites to filing suit, because Kirk is supposedly a beneficiary of the waiver provision in the purchase contract between Petrus and Gentry-Boyd, and because policy reasons supposedly favor Kirk's position.

Petrus replies generally that those arguments were all advanced below, and that none of them were considered or ruled upon by the district court (as Kirk acknowledges, at RB, p. 14). That is probably because Kirk's arguments in the district court depended on disputed facts (for instance, whether Petrus provided Kirk sufficient opportunity to inspect and repair), which made the issues unsuitable for summary judgment, and makes them even more unsuitable for initial factual review and resolution by this Court, on appeal. See R. Vol. 1, pp. 828-830.

Otherwise, Kirk's "failure to comply" argument is that "the filing of suit claiming excessive damage outside the scope of [Petrus's] notice letter, prior to allowing Kirk a second opportunity to inspect the Home, violated the statutory prerequisites and should result in [a] bar to suit against Kirk." RB, p. 15. That argument is not persuasive, since the law is clear that the notice prescribed by Idaho's Notice of Opportunity to Repair Act (I.C. § 6-2503) only requires that written notice "state that the claimant asserts a construction defect claim against the construction professional and . . . describe the claim in reasonable detail sufficient to determine the general nature of the defect." *Id.* See also *Mendenhall v. Aldaus*, 146 Idaho 434, 436, 196 P.3d 352, 354 (2008) (holding that the phrase "reasonable detail" is satisfied when a claimant provides a builder with enough information to identify the general nature and location of the defect). Petrus's detailed and specific claim easily satisfied that low standard here, and at least raised a question of fact that could not be resolved by summary judgment (and all the more cannot now be resolved by this Court). R. Vol. 1, p. 829 [¶ 23]; pp. 870-873.

Kirk's "waiver" argument is also not persuasive, since the disclaimer Kirk points to as the source of his position is not enforceable *at all* under the authority of *Goodspeed v. Shippen*, 154 Idaho 866, 303 P.3d 225 (2013) (examining an *identical* disclaimer clause, but rejecting it as insufficient absent evidence of *actual knowledge* and *intent* by the buyer). Here, as in *Goodspeed,* questions of fact exist on those points, and on whether the clause

in question is sufficiently *conspicuous* to be enforceable. Again, those are factual issues which the district court was not prepared to resolve by summary judgment, and which cannot be resolved in the first instance by this Court.

Finally, Kirk suggests just one policy reason why summary judgment should be affirmed, namely "that modern homebuilders [should] not be held accountable on their projects forever, or even for a decade." RB, p. 18. As support, Kirk observes that this case involves "a house built on the lake in McCall," where "winters are harsh," with "lots of snow and perfect conditions for forming ice." RB, p. 18. Petrus acknowledges Kirk's points that "Mother Nature provides challenges"; but the "harsh winter environment" Kirk alludes to is actually one more reason why unsophisticated buyers need to be protected from negligent, cost-cutting contractors, who can easily construct a home that will weather a *few* winters, but will predictably prove to be defective after the relatively short statutory period provided by the statutes of limitations for breach of oral contract (four years) and written contract (five years).

In sum, Kirk's additional issues all turn on questions of fact and judgment calls about competing public policies. They should not distract this Court from the single, compelling legal issue presented by this appeal, that is, dealing with the fundamental nature of a claim for breach of the implied warranty of habitability.

IV.

RESPONSE RE: CROSS APPEAL

A. The Facts.

After summary judgment was granted, Kirk filed a motion seeking an award of about $145,000 in attorneys' fees and about $4,500 in costs. R. Vol. 1, p. 1025. Kirk's claim to attorneys' fees was based on both Idaho Code section 12-120(3) (providing for an award of attorneys' fees to the prevailing party in "any commercial transaction"), and section 12-121 (providing for an award of attorneys' fees when a case was "brought, pursued, or defended frivolously, unreasonably, or without foundation").

Petrus filed objections to Kirk's motion, conceding that Kirk was entitled to his claimed costs, but explaining that Kirk was *not* entitled to an award of attorneys' fees because his (Petrus's) claims did not "arise from a commercial transaction," and were not brought frivolously. R. Vol. 1, pp. 1076-1087. Kirk filed reply papers in support of his motion, arguing again that the case did involve a "commercial transaction," and again that "none of the claims brought by Petrus against Kirk were legitimately brought or pursued." R. Vol. 1, pp. 1142-1146. Thereafter, the district court filed its Order, awarding Kirk $4,578.72 in costs (as essentially stipulated), denying Kirk's claim for fees under section 12-120(3) (in short, because "there was no transaction between Kirk and Petrus," R. Vol. 1, p. 1152), and awarding Kirk $10,000 in attorneys' fees under section 12-121 (because Petrus originally

filed what the district court considered to be a frivolous conspiracy to defraud claim). R. Vol. 1, pp. 1165-1156.

B. Kirk's Appeal on the Attorneys' Fees Issue.

Kirk filed a cross-appeal from the district court's order awarding costs and attorneys' fees. R. Vol. 1, p. 1177.

In the Cross-Appellant's portion of his combined brief, Kirk did *not* argue that the district court erred in denying his motion under section 12-120(3) (and so Petrus does not address that aspect of the ruling further here). Instead, Kirk's single argument was simply that the district court's award of fees to Kirk amounted to "less than seven percent of the total fees incurred," which, he says, "no exercise of reason" can support. RB, pp. 20-21.

Kirk concedes this is an issue reviewed under the abuse of discretion standard, and accurately recites that the inquiry on appeal is simply whether the district court "correctly perceived the issue as one of discretion," whether it "acted within the boundaries of its discretion," and whether it "reached its decision by an exercise of reason." RB, p. 8, citing *Nguyen v. Bui*, 146 Idaho 187, 193, 11 P.3d 1107, 1113 (Ct. App. 2008).

C. Discussion.

First, the district court obviously understood that the issue presented by Kirk's request under section 12-121 was "one of discretion." Its Order recites the proper statutory standard—whether an action was "brought, pursued, or

defended frivolously, unreasonably, or without foundation"—and then recites specifically: "Whether that is the case is a discretionary determination." R. Vol. 1, p. 1153, citing *Idaho Military Historical Society v. Maslen*, 156 Idaho 624, 631-632, 329 P.3d 1072, 1079-1080 (2014).

The second and third questions—whether the district court "acted within the boundaries of its discretion," and "reached its decision by an exercise of reason"—are easily answered with reference to the district court's detailed, six-page order. There, it recited a thorough chronology of the case from its inception, through Kirk's deletion of his negligence claim in his amended complaint, Kirk's motion for summary judgment, Petrus's concession to summary judgment on his conspiracy-to-defraud claim, and the ultimate entry of judgment in favor of Kirk on Petrus's remaining breach of the implied warranty claim. R. Vol. 1, pp. 1150-1156. The district court then concluded that Petrus's short-lived negligence claim did not warrant an award of fees because, even assuming it was frivolous, "the record doesn't show that Kirk was ever served with process or ever appeared in the action before the first amended complaint [which did not include a negligence claim] was filed." R. Vol. 1, p. 1153-1154. Moreover, the district court declined to award fees for Petrus's claim for breach of the implied warranty because, while it was "decidedly weaker than Kirk's position," it "wasn't frivolous."

Otherwise, the district court concluded that Petrus's claim for conspiracy to defraud *was* frivolous ("borders on preposterous"), and awarded fees with reference to it in an amount "that approximates the amount by which Kirk's attorneys' fees were increased as a result of Petrus's pursuit of the [single frivolous claim]." R. Vol. 1, p. 1155. In reaching that amount, the district court acknowledged that "a precise apportionment isn't possible," that it had reviewed Kirk's itemization of his attorneys' fees and "other pertinent portions of the record," and that it "arrived at [a solution] that is reasonable in its judgment." R. Vol. 1, p. 1155. Specifically, it considered that "almost all of the work that was necessary to defend against the conspiracy to defraud claim [was also] necessary to defend against the implied warranty claim," and that "most of the work [on discovery issues] pertained to both claims indivisibly or to the implied warranty claim in particular." R. Vol. 1, p. 1155. On that basis, the district court concluded: "In an exercise of its discretion, the Court apportions $10,000 of Kirk's attorneys' fees to the frivolous conspiracy-to-defraud claim." R. Vol. 1, p. 1155.

The district court also justified its exercise of discretion on the fact that Kirk could have sought summary judgment "much earlier in the course of litigation and obviated the need to litigate that claim any further." R. Vol. 1, p. 1155. Finally, the district court concluded it would be "inequitable to make a six-figure award of attorneys' fees when an early statue-of-limitations

challenge to Petrus's plainly stronger claim might have nipped the litigation in the bud by leaving Petrus with only a pie-in-the-sky conspiracy-to-defend claim." R. Vol. 1, p. 1156.

The law in this respect is clear. An award of attorneys' fees is, in the first instance, "within the discretion of the trial court; and, on appeal, the party claiming error with respect to a trial court order on fees bears the burden of demonstrating the trial court abused its discretion. *Brady v. City of Homedale*, 130 Idaho 569, 573, 944 P.2d 704, 708 (1997). Kirk has not met that test here.

In sum, the district court understood that this issue involved its exercise of discretion, and its ruling supports the conclusion that it "acted within the boundaries of its discretion," and "reached its decision by an exercise of reason." There was no abuse of discretion here, and the district court's ruling in this respect should be *affirmed*.

D. <u>Kirk's Request for Attorneys' Fees Must Be Denied.</u>

Kirk includes a final argument in is brief that he should be awarded attorneys' fees on appeal because, he believes Petrus pursued this appeal "with no hope of prevailing," did not present a good-faith argument," and attempted "simply an attempt to drag out the inevitable and force Kirk to incur more fees." RB, p. 22.

Kirk is wrong. First, he is wrong to even *suggest* that Petrus has "no hope of prevailing." On the contrary, Petrus sincerely believes his analysis of

the relevant case law supports his position, and is confident this Court, on due consideration of the authority presented, will agree, and will reverse the summary judgment entered against him. However, even if this Court *disagrees* with his position, Petrus submits that *this is the way the common law develops*. Responsible attorneys make reasoned arguments to trial courts, courts of appeal, and Supreme Courts explaining why—based on the evolution of case law or developing ideas of social policy—the law should evolve in the direction suggested. That, *at a minimum*, is what Petrus has done here; that is, brought to this Court's attention an issue that it has not considered directly in three decades. That can hardly be deemed to be frivolous or deserving of an award of attorneys' fees on appeal to Kirk.

Moreover, the law is clear that, even if Kirk prevails on Petrus's appeal, if he does not also prevail on his cross-appeal, he cannot be deemed to be the "prevailing party" for purposes of an award of attorneys' fees on appeal. *KEB Enterprises, L.P. v. Smedley,* 140 Idaho 746, 755, 101 P.3d 690, 699 (2004). Here, Petrus believes that Kirk cannot possibly prevail on his cross-appeal—given the forgiving abuse of discretion standard and the trial court's careful consideration and rejection of all the points raised by Kirk—and that he, therefore, cannot be awarded his attorneys' fees on appeal.

V.

CONCLUSION

For all of the reasons stated here and in his opening brief, Petrus reiterates his essential position, that the district court erred as a matter of law in ruling that his claim for breach of the implied warranty of habitability was governed by the statute that controls actions on a contract, rather than those that control actions on a tort. In that respect, Petrus also reiterates his prayer that the district court's ruling granting summary judgment be reversed, and the matter remanded for further proceedings on the merits.

Otherwise, the district court's order awarding Kirk $10,000 was an appropriate exercise of discretion, and should be *affirmed*.

Dated: October 13, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2017, I served true and correct copies of the foregoing **APPELLANTS' REPLY BRIEF / CROSS-RESPONDENTS' BRIEF** upon each of the following individuals in the manner indicated below:

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