

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFRI DAVIS and DEBBIE DAVIS,

Plaintiffs/Appellants,

vs.

DONALD McCANLIES, CHARLES TUMA,
and JOHNSON HOUSE COMPANY,

Defendants/Respondents.

Supreme Court No: 46721-2019

Bonner County No. CV-09-18-0672

Appeal from the District Court of the First Judicial District
Of the State of Idaho, in and for the County of Bonner

Honorable Barbara A. Buchanan, Presiding

APPELLANTS' REPLY BRIEF

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1. **The Davises relied upon Tuma's misrepresentation of the access to their home. This fact alone creates a material question of fact as to whether or not the Davises failed to exercise due diligence when they did not open the e-mail with the survey more than two months after they had purchased their home.**

Tuma argues that nothing in the record could lead a reasonable jury to conclude that the Davises exercised due diligence in this case. It is undisputed that the Davises relied upon Tuma's misrepresentations regarding the access to their home and when that occurs, it is for the jury to determine if the Davises failed to exercise due diligence.

Hall v. Forsloff, 124 Idaho 771, 864 P.2d 609 (1993) involved a question of the exercise of due diligence. In that case, Hall had purchased a business from Forsloff and then filed suit for breach of contract. Hall lost that case and entered into a Novation Agreement to pay certain debts that Forsloff had guaranteed when he owned the company in question. Hall then sued Forsloff again alleging that the Forsloff had misrepresented the financial condition of the company and that Hall could not have discovered this misrepresentation until after the judgment was entered in the first case. On summary judgment, the Trial Court concluded Hall could have discovered the misrepresentation because Hall had been running the business for 10 months and the "...Novation Agreement, to which the plaintiff was a party, expressly incorporated documents describing the financial status of the business, including balance sheets and income statements" Id at 610-611, 772-773. The Supreme Court reversed.

Given Hall's access to these documents, the Trial Court determined that Hall had failed to "allege facts in the record which would show that the status and outstanding obligations of the business were different from the representations contained in the documents incorporated in the novation." However, the Trial Court did not have the advantage of our *Kawai Farms* opinion at the time of its decision. In *Kawai Farms*, relying on our prior decision in *Gerlach v. Schultz*, 72 Idaho 507, 244 P.2d 1095 (1952), we held that an individual's reliance on another's fraudulent representations can affect the question as to whether a proper investigation was conducted, and therefore can raise more than one conclusion as to

whether the fraud could have been discovered through reasonable diligence. We hold that to be the situation here.

Hall v. Forsloff, 124 Idaho 771, 774–75, 864 P.2d 609, 612–13 (1993).

In Hall, the person claiming that he had exercised due diligence had been running the business for ten months and had total access to all the financial records. You would think that someone running a business should have a pretty good idea of what is in the financial records. Nevertheless, the fact that he alleged he relied upon Forsloffs misrepresentations was enough to get the issue of whether Hall exercised due diligence in front of a jury. Here, we are dealing with lay persons who were inexperienced in real estate and were relying entirely on their real estate agent. (R. Vol. 1, P 202, ¶ 20). That reliance is enough to create a question of fact as to whether or not they exercised due diligence, as do all the other facts in the record.

It is undisputed that the Davises used Gray Wolf Road to access their home for the two months prior to being sent the survey in an e-mail. It is also undisputed that the e-mail itself has nothing in it that would lead any person to conclude that anything was amiss. The body of the e-mail only says “Let me know if you need anything else. Thank you-“ (R. Vol. 1, p. 112). Lastly, it is a question of fact as to whether the Davises should have caught the problem even if they had opened the attached survey.

The Davises have argued and readily admit that the survey plainly shows that the easement for Gray Wolf Road does not reach the Davis property – if you are a surveyor, a perhaps a title examiner or an attorney who practices real estate law. Whether a lay person would have figured that out is a question of fact for the jury. Even if the jury concluded that a lay person could figure that out, the jury could still conclude that the Davises had no reason to think there was a problem since the road clearly provided access to their home and no one had prevented them from using it or even suggested they could not.

This case involves a jury trial. (R. Vol 1, p. 17). The Davises relied upon Tuma's misrepresentation of the access to their home and given that reliance, and the other facts of this case, a material question of fact existed as to whether or not the Davises failed to exercise due diligence and summary judgment should not have been granted.

2. **The District Court did not rule on anything other than when the statute of limitations commenced in this case and there is nothing else for this Court to review.**

Tuma argues that this Court can uphold the District Court on the alternative grounds that the Davises did provide evidence that Tuma knew he was misrepresenting the access to their home. Tuma is asking this court to pass on a question of fact that the District Court did not even consider, and it is not proper. This Court can reach the same conclusion on an issue as a Trial Court, but for different reasons, but cannot review decisions that the Trial Court never made.

Tuma cites *Nampa & Meridian Irr. Dist. v. Mussell*, 139 Idaho 28, 72 P.3d 868, (2003) for the proposition that this Court can uphold the District Court on the alternative grounds that Tuma did not have the necessary intent for a fraud case. *Nampa* involved an irrigation district suing one of its customers for damaging a canal. The District Court concluded that Idaho Code § 55-310 allowed the District to recover damages. On appeal, the Supreme Court declined to rule on the I.C. § 55-310 issue because the District Court had found that the Defendant had damaged the canal and that was interference with an easement which allowed for an award of damages. The Supreme Court reached the same conclusion on the issue of the availability of damages, but for a different reason.

For example, Tuma seems to concede that Idaho Code § 55-811 cannot be used to shield Tum from this suit. Assuming, *arguendo*, it could, the District Court had ruled it could not, this Court could conclude that it was an error to grant summary judgment on the due diligence issue,

but could uphold the District Court by ruling that the Davises had constructive knowledge based on Idaho Code § 55-811.

The only issue the District Court ruled on in this case was when the Davises had actual or constructive knowledge and this Court should not consider any other issue.

We note that although Wells Fargo raised the issue of standing during the trial court proceedings it was never ruled on by the district court. “To raise an issue on appeal, the record must contain an adverse ruling to form the basis for assignment of error....” *State v. Hoyle*, 140 Idaho 679, 687 99 P.3d 1069, 1077 (2004) (citation omitted) (quotation marks omitted). *Houpt v. Wells Fargo Bank, Nat. Ass'n*, 160 Idaho 181, 186, 370 P.3d 384, 389 (2016), *reh'g denied* (Mar. 10, 2016).

- 3. Tuma may have made an honest mistake about the access, but he was most certainly aware that he was neither a lawyer, surveyor or title examiner and had no business making representations about anything in the recorded documents pertaining to this property.**

Tuma argues that his honest mistake shields him from a claim of misrepresentation. An honest mistake does not shield a person from a claim for fraud. Furthermore, Tuma may have made an honest mistake, but he certainly knew he was not qualified to review title documents and make representations about the contents of those documents.

As stated above, the Court should not consider the issue of Tuma’s intent in making the misrepresentation because the District Court did not rule on that issue. But if the Court does consider the issue, an honest mistake does not shield a person from liability for misrepresentation for fraud.

Although a misrepresentation is made through mistake of the facts as they actually exist, when such misrepresentation is made by one whose duty it is to know the facts and who represents himself as possessing all the facts with reference to the matter, the misrepresentation is in law equally as fraudulent and actionable as if it had been knowingly made.

Doe v. Boy Scouts of Am., 159 Idaho 103, 107, 356 P.3d 1049, 1053

(2015) citing *Hillock v. Idaho Title & Trust Co.* 22 Idaho 440, 126 P.2d 612 (1912)(emphasis supplied).

Furthermore, it would appear that the “due diligence” rule plays a role in whether Tuma’s honest mistake shield’s him from liability.

It will seldom happen, however, that a case is rested upon the mere fact of falsity in the statement; usually the circumstances under which it was made, the opportunity of the person making it to know the truth, and other facts bearing upon the scienter, appear from the evidence, as is the case in most of the decisions cited by appellants.

Boise Ass'n of Credit Men v. U.S. Fire Ins. Co., 44 Idaho 249, 256 P. 523, 528 (1927) (emphasis supplied).

Here, Tuma knew he was not a lawyer, a surveyor or a title examiner. In the proper exercise of due diligence, if he was going to advise the Davises on the access to their home, he should have taken the information to a professional trained to examine surveys and title documents. Had he done so, he would have known that his representation about the access to the home was wrong and none of this would have occurred.

Tuma’s intent is not before the Court, but he represented to the Davises that he had reviewed the documents and that Gray Wolf Road was the access to their home. Whether or not he intentionally tried to deceive the Davises is not relevant to a claim for misrepresentation.

4. **This action never would have been instituted if the Davises' had not signed the Brokerage Representation Agreement, so this dispute clearly arises out of that Agreement.**

Tuma argues that the Davises are not entitled to an award of attorney's fees on appeal because the Davises did not sue Tuma for breach of the Brokerage Representation Agreement. This argument fails because the Davises did sue Tuma for breach of the Agreement and this dispute could not have existed but for the existence of the Brokerage Representation Agreement.

Tuma argues that the Davises did not sue Tuma for breach of the Brokerage Representation Agreement. The Davises' complaint alleges that they entered into a Brokerage Representation Agreement with Tuma. (R. Vol. 1, p 14, ¶81.) The complaint also cites Idaho Code § 54-2087 which specifies the duties owed to a client. (Id at ¶84). The complaint then alleges that Tuma failed to carry out those duties and the duties imposed by the Brokerage Representation Agreement. (Id at ¶88). The Davises did allege a breach of the Brokerage Representation Agreement, the District Court just failed to make any ruling on that allegation because the heading "breach of Brokerage Representation Agreement" was not in the complaint.

Furthermore, the Davises would not have needed to plead or prove that the Brokerage Representation Agreement was breached to be entitled to attorney's fees. "It is of no consequence that the underlying contractual obligation is unenforceable. A prevailing party may recover attorney fees even though no liability under a contract was established or where no contract was, in fact, ever formed." *Allied Bail Bonds, Inc. v. Cty. of Kootenai*, 151 Idaho 405, 414, 258 P.3d 340, 349 (2011) citing *Garner v. Bartschi*, 139 Idaho at 439, 80 P.3d at 1040 (quoting *Hilbert v. Hough*, 132 Idaho 203, 207, 969 P.2d 836, 840 (Ct.App.1998)).

No argument exists that this case did not arise out of the Brokerage Representation Agreement. Tuma would not have been engaging in any of the conduct for which he was sued if

the Davises had not signed that agreement. This dispute arises out of the Brokerage Representation Agreement and the Davises are entitled to their attorney's fees on appeal.

5. The Davises' argument that the District Court abused its discretion when it denied the Motion to Amend the Complaint is supported by argument.

Tuma argues that the Davises failed to lay out the standard of review for an abuse of discretion decision by the Trial Court. Tuma also points out that failing to lay out the standard is not fatal, providing some argument is made explaining what the Trial Court did wrong. The Davises did just that when they argued that it was an abuse of discretion to not consider the contents of the proposed Amended Complaint when ruling on whether the amendment would be futile.

In their opening brief, the Davises' argue that a decision to allow an amendment is reviewed for an abuse of discretion and that it is not an abuse of discretion to deny a Motion to Amend if the proposed new claims are time barred. The Davises then argue that the District Court abused its discretion because it did not consider the claim in the proposed Amended Complaint.

The Davises may have failed to lay out the total abuse of discretion standard, but they did argue that the District Court abused its discretion because it denied the Motion to Amend on the grounds that the claims in the original Complaint were time barred. This is a well taken argument that more than adequately explains the error the Trial Court made and why.

6. Any ruling by the District Court that the Motion for Relief from the Pre-Trial Order was denied was *dicta* as the District Court considered the Motion to Amend on the merits and then ruled.

Tuma argues that the Davises were required to appeal the denial of the Motion for Relief from the Pre-Trial Order. This is incorrect because the District Court denied the Motion for Relief based solely on the denial of the Motion to Amend so that issue is subsumed in the appeal

of the denial of the Motion to Amend. Furthermore, the District Court granted the Motion for Relief when it considered the Motion to Amend on the merits, therefore, any ruling on the Motion for Relief was *dicta*.

As Tuma points out, the standard of review for a denial of a Motion for Relief from the Pre-Trial Order and a denial of a Motion to Amend are different as the Trial Court's considerations are different. The District Court made no findings related to the Motion for Relief and only denied it because of the prior ruling on the Motion to Amend – not for any reason related to “good cause” as is required to rule on a Motion for Relief from the Pre-Trial Order. Since the denial of the Motion for Relief was on the sole grounds that the Motion to Amend the Complaint was denied, the issue of the Motion for Relief is subsumed in the appeal of the denial of the Motion to Amend and should be considered on appeal. I.A.R. § 35(a)(4). The District Court made no ruling on the Motion for Relief from the Pre-Trial Order for this Court to review and she effectively granted the motion by considering the Motion to Amend on the merits.

If the District Court had denied the Motion for Relief from the Pre-Trial Order because no showing of good cause had been shown, there was no need to evaluate the Motion to Amend on the merits. By ruling on the Motion to Amend on the merits, and failing to make any findings related to the Motion for Relief from the Pretrial Order, the District Court effectively granted the Motion for Relief from the Pre-Trial Order and any ruling related to that motion was *dicta* as it was unnecessary to the determination of the case.

While the parties apparently did discuss this issue in arguments before the District Court, that issue was not raised by the pleadings or the summary judgment motion, and accordingly the District Court's summary judgment discussing that issue was *dicta* and unnecessary to decide the issues which were raised by the pleadings and by the motion for summary judgment.

*Jerome Cty. By & Through Bd. of
Comm'rs for Jerome Cty., State of*

Idaho v. Holloway, 118 Idaho 681,
685, 799 P.2d 969, 973 (1990).

The Davis's were not required to appeal the denial of their Motion for Relief from the Pre-Trial Order. The District Court did not evaluate that motion effectively and granted it by considering the Motion to Amend on the merits so any denial of that motion was *dicta* and did not need to be appealed.

DATED this 30th day of August, 2019



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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2019, I served a true and correct copy of foregoing APPELLANTS' REPLY BRIEF by the method indicated below, and addressed to the following:

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