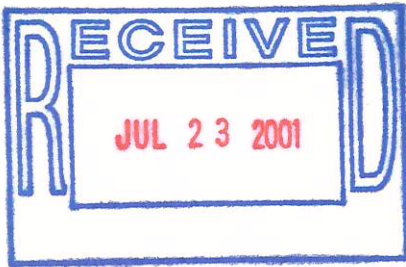


Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.



ENTRY ORDER

VT. SUPREME COURT  
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2000-228

JUL 20 2001

JULY TERM, 2001

Lorne Lavine

v.

William and Doris Koch

}  
}  
}  
}  
}  
}  
}

APPEALED FROM:

Chittenden Superior Court

DOCKET NO. S0852-98 CnC

Trial Judge: Matthew I. Katz

In the above-entitled cause, the Clerk will enter:

Defendants William and Doris Koch appeal from a superior court judgment in favor of plaintiff Lorne Lavine. Defendants contend: (1) the trial court's questioning of witnesses was excessive and produced a novel theory of liability, which deprived defendants of a fair trial; and (2) the award of attorney's fees under the purchase and sale agreement was erroneous. We agree with defendants' second contention, and therefore affirm in part, and reverse in part.

In 1998, plaintiff filed this action against defendants for breach of contract, negligent misrepresentation, and violation of the consumer fraud act in connection with plaintiff's purchase of defendants' residence in the Town of Richmond. At the conclusion of the bench trial, the court issued a written decision in favor of plaintiff. As found by the trial court, the essential facts were as follows.

In October 1996, plaintiff purchased defendants' home for \$230,000. Defendant William Koch had helped to design the house, which was built in 1985. Defendants did not report any major repairs during the ten years in which they resided in the house, although in 1995 they had a well drilled and installed on the site, which involved the drillers removing some trim board from the house and replacing it with new wood. In connection with the sale, defendants completed a property information report in which they indicated no problems with the house structure or components. Plaintiff's home inspection report indicated some rotting in the deck and at two corners of the house, which it estimated would require \$1500 to repair. Plaintiff used the report to obtain a \$500 reduction in the purchase price.

Following the purchase, plaintiff hired experienced carpenters, the Reed brothers, to repair the deck. Upon removing the deck, the Reeds discovered that many of the studs, the floor joists, and the sill around the foundation had rotted, and required extensive repairs. The Reeds also noted that

some of the trim around the base of the house was relatively new and had not rotted, despite the fact that it was immediately adjacent to the thoroughly rotted sill. The new trim had been attached with long nails only at the top, the only place where they would hold. The Reeds concluded that the rot had been uncovered and the trim board had been replaced relatively recently, by someone who had observed and understood that there had been rotting. Defendants acknowledged that the trim board had been replaced by the well driller, and the court noted from William Koch's testimony that he had been "quite attentive" to what the driller was doing. In this regard, the court further observed that it was unlikely a well driller would have made carpentry repairs of supplying and installing new trim boards without informing the owners that the work was necessary because the old ones had rotted. The Reeds also uncovered at the southeast corner of the house an unusual pressure-treated post and cross-pieces supporting a badly rotting header under a pair of sliding glass doors. The court concluded that this "jury rigged repair" was likely to have been done with the knowledge of the homeowners.

The court inferred from the foregoing evidence that defendants knew of the substantial rot problems within the framing of the house when they sold it in 1996, and that they failed to disclose this hidden defect to plaintiff. The court awarded plaintiff damages of \$41,000 for the cost of repairs. In response to a subsequent motion to alter or amend, the court reduced the award to \$36,500. The court also granted plaintiff's motion for attorney's fees, awarding fees of \$10,000. This appeal followed.

Defendants first contend that they were denied a fair and impartial fact-finder because the trial court engaged in excessive questioning of certain witnesses, resulting in the court's reliance on a novel "theory" in support of plaintiff's case. See Auger v. Auger, 149 Vt. 559, 561 (1988) (trial judge may interrogate witnesses but must remain judicious and maintain courtroom atmosphere free from suspicion of partiality). They note that the court questioned both defendants extensively about their dealings with certain real estate brokers, disclosing that they had originally listed the home with one broker for \$305,000, that it had not sold for several months, that they had changed brokers and relisted the property for substantially less (\$234,500), and that the house sold very quickly thereafter. Defendants explained, in response to the court's questioning, that they had decided to reduce the price for a quick sale in order to relocate closer to a grandson attending college in Michigan.

The court noted these facts in its decision, and observed that defendants' knowledge of the rotted housing structure helped to explain their willingness to accept the substantial price reduction. Contrary to defendants' claim, however, the court did not develop or rely on a new "theory" in support of plaintiff's case. As noted, the court inferred that defendants knew of the rotted structure based on the Reeds' testimony, which it found credible, that the rot had been uncovered recently, that efforts had been made to shore up the structure and cover-up the rot, and that defendants reasonably must have been aware of these facts, and failed to disclose them. This was the essence of the court's finding of liability. Accordingly, the case is entirely distinguishable from Auger, where the court not only took over control of the presentation of evidence, but prematurely terminated the defendant's examination of a key witness, and announced its "inclination" in favor of the plaintiff early in the trial, thereby defeating the appearance of impartiality. Id. at 563-64; cf. Burdett v. Miller, 957 F.2d 1375, 1380 (7th Cir. 1992) (court erred in entirely altering the nature of the enterprise underlying plaintiff's theory of liability under federal racketeering statute). Accordingly,

we conclude that the record does not support defendants' claim that they were denied a fair and impartial trial.

Defendants also contend the court erred in awarding plaintiff attorney's fees under the provisions of the purchase and sale agreement. The agreement provided, in pertinent part, that "[i]n the event legal action is instituted arising out of a breach of this contract, the prevailing party shall be entitled to reasonable attorney's fees and court costs." Although plaintiff's complaint alleged a number of legal theories, including breach of contract, the court premised liability upon defendants' negligent failure to disclose the rotted condition of the housing structure. The attorney's fee provision contemplates an award of attorney's fees for the prevailing party in a breach of contract claim, not for the tort of negligent misrepresentation. Ianelli v. Standish, 156 Vt. 386 (1991), on which plaintiff relies, is distinguishable. There, the Court upheld an award of attorney's fees in a tort action where the purchase and sales contract broadly provided for such fees in any action "instituted by either party to enforce the terms of this agreement, or arising out of the execution of this agreement." Id. at 388. The scope of the agreement here was more narrowly confined to breach of contract claims. Accordingly, we conclude the court erred in awarding attorney's fees under the agreement.

The award of attorney's fees is reversed. In all other respects, the judgment is affirmed.

BY THE COURT:

  
\_\_\_\_\_  
John A. Dooley, Associate Justice

  
\_\_\_\_\_  
James L. Morse, Associate Justice

  
\_\_\_\_\_  
Marilyn S. Skoglund, Associate Justice