

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 23-0131

ALLEN MUNRO & LINDA MUNRO,

Plaintiffs/Appellees,

v.

JOHN MUNRO,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

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I. THE APPELLEES HAVE NOT DISPUTED THAT THEY FAILED TO PROPERLY PLEAD FRAUD OR CONSTRUCTIVE FRAUD WITH SPECIFICITY, AND THEIR CITATION TO *GONZALES* IS NOT RELEVANT.

In their Answer brief, the Appellees alleged that the Appellant was put on notice of their fraud claims, and therefore it was unnecessary for the Appellees to comply with the enhanced pleading requirements of Rule 9(b). Appellees cited *Gonzales v. Walchuk*, 2002 MT 262, in support of their contention, but this case is not relevant. In *Gonzales*, the Plaintiff was not making a claim for fraud, but rather attempting to avoid an affirmative defense. *Gonzales*, 2002 MT 262, ¶ 17.

Therefore, it was unnecessary for Gonzales to comply with the enhanced pleading requirements. In this case, the undisputed evidence shows that the Appellees failed to properly allege a claim for fraud or constructive fraud, which requires pleading nine elements for fraud and eight elements for constructive fraud. *Geraldine v. MMIA*, 2008 MT 411, ¶ 28. Therefore, since the pleadings are deficient from the outset, the jury award for constructive fraud should be vacated.

II. THE APPELLEES HAVE NOT DISPUTED THAT THEIR SOLE BREACH OF DUTY IDENTIFIED IN THEIR CONSTRUCTIVE FRAUD CLAIM IS FOR BREACH OF CONTRACT, WHICH IS INSUFFICIENT AS A STANDALONE TORT CLAIM

As a general rule, when a party's claim is based solely upon a breach of the specific terms of an agreement, the action sounds in contract. There must be active negligence or misfeasance to support an independent tort claim. *Garden City Floral Co.*, 126 Mont. at 543, 255 P.2d at 356 (citations omitted) ("There must be some

breach of duty distinct from breach of contract.").

In their Answer, the Appellees allege that it is the jury's role to determine compensatory damages, and this is accurate. The jury determined that the Appellees were owed compensatory damages for breach of contract. But the Appellees did not identify a breach of any legal duty by the Appellant outside of the breach of contract in their claim for constructive fraud. Therefore, their claim for constructive fraud fails as a matter of law. The breach of contract award fully compensated the Appellees for breach of contract. The Appellees received two bites at the same apple, which is legally impermissible.

III. THE APPELLEES URGE THIS COURT NOT TO CONSIDER ISSUES NOT RAISED AT TRIAL OR ABANDONED BY APPELLANT OR HIS COUNSEL, BUT PRECEDENT ALLOWS THIS COURT TO DO SO.

The general rule is that issues brought before this Court for the first time on appeal will not be considered. However, this Court "reserves to itself the power to examine constitutional issues that involve broad public concerns to avoid future litigation on a point of law." Even if an issue is raised for the first time on appeal this Court can hear the issue "if the alleged . . . error affects the substantial rights of a litigant." *Cottrill v. Cottrill Sodding Serv.* (1987), 229 Mont 40, 42, 744 P.2d 895, 896.

Other precedent issued from this Court provides further rationale for departing from the general rule in certain circumstances. In *Kudrna v. Comet Corp.*

(1977), 175 Mont. 29, 572 P.2d 183, this court considered an issue that was not raised at trial, noting that by doing so it did not repudiate the requirement that timely and specific objections be raised at trial. This Court observed that "[i]f the court were limited to the arguments and reasoning of counsel in its decisions of cases, to the exclusion of its own observations, many cases would lead us far from what we understand to be the true object of the court." *Kudrna*, 175 Mont. at 51, 572 P.2d at 195. This Court also stated that "[w]here resort to the record is necessary, the case will be determined by the record, and in such a case the court will not regard itself as bound down to the conceptions of counsel on either side as to the nature of the controlling facts." *Kudrna*, 175 Mont. at 51, 572 P.2d at 195 (quoting *Cleveland, Cinc., Chic. & St. Louis Ry. Co. v. Moore* (Ind. 1908), 84 N.E. 540, 540). This Court's review is not necessarily restricted by trial counsel's failure to preserve a specification of error for appeal. *State v. Carter*, 2005 MT 87, ¶ 14, 326 Mont. 427, 114 P.3d 1001.

In this case, the Appellees are generally correct that trial counsel failed to make or follow through with arguments at the trial level that they are advancing on appeal. However, if this Court does not overturn the jury's verdict, it would result in substantial prejudice to the Appellant that would lead to a result far from the true object of this Court. The contract in this case involved an illegal and unconscionable rate of interest. The claim for constructive fraud was improperly pled and duplicative of the claim for breach of contract. Allowing the jury's verdict

to stand would compound a series of legal errors for a case that should never have gone to trial.

RESPECTFULLY SUBMITTED this 14th day of September, 2023.

/S/ MICHAEL C. DOGGETT
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 991, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

BY: /S/MICHAEL C. DOGGETT

Michael Doggett

CERTIFICATE OF SERVICE

I, Michael Connor Doggett, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 09-14-2023:

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