

ESSAY QUESTION NO. 5

Answer this question in booklet No. 5

After 10 years of spending winters in Arizona and summers in Alaska, Bartleby decided to sell his single family home located in an established Alaska subdivision and move to Arizona.

In late summer Allison viewed the property. On her visit Allison noticed a small diameter pipe running above ground for a short distance from the house toward a neighboring property before disappearing underground. When Allison asked Bartleby about the pipe Bartleby stated that it was a water line connected to a community well. Ultimately Allison decided to purchase the property because she liked the numerous mature birch trees which reminded her of her childhood home.

Allison closed on the purchase only after obtaining a land survey to mark the property lines, careful review of a title report and verification of the existence of a recorded easement allowing the water line to cross her neighbor's property to the community well, and review of a brief written disclosure statement in which Bartleby disclosed a prior water leak in the basement and occasional low water pressure.

Allison enjoyed the brilliant autumn foliage until one morning when she saw that her other neighbor Duane had cut many of her birch trees on her side of the clearly marked property line to make room for his new RV parking pad. Distressed, Allison attempted to draw a relaxing bath only to discover that the recent cold snap had frozen the above-ground water line and water was now seeping into her basement through cracks in the foundation. During the course of the repair Allison's contractor uncovered evidence of recent repairs to cracks in the foundation and evidence of prior freeze-ups of the water line.

1. Discuss any statutory claims that Allison can bring against Bartleby and her statutory remedies associated with those claims. Do not discuss any common law causes of action Allison may have.
2. Discuss any statutory claims that Allison can bring against Duane and her statutory remedies associated with those claims. Do not discuss any common law causes of action Allison may have.

GRADERS' GUIDE

***** QUESTION NO. 5 *****

SUBJECT: REAL PROPERTY

The question asks examinees to limit their analysis to Allison's statutory-based claims against Bartleby and Duane. The facts support two claims: (1) a claim against Bartleby based upon Alaska's Disclosures in Residential Real Property Transfers Statute, AS 34.70.010 et seq. and (2) a claim against Duane based upon Alaska's Trespass by Cutting or Injuring Trees or Shrubs Statute, AS 09.45.730. No points are intended for a discussion of the common law relating to easements, fraud, misrepresentation or trespass.

1. Alaska's Disclosures in Residential Real Property Transfers Statute, AS 34.70.010 et seq. (70 points)

Allison may have a claim against Bartleby based upon Alaska's Disclosures in Residential Real Property Transfers Statute which requires sellers of residential real property to make a written disclosure to buyers. The statute provides in relevant part:

"Before the transferee of an interest in residential real property makes a written offer, the transferor shall deliver by mail or in person a completed written disclosure statement in the form established under AS 34.70.050. . . ."

AS 34.70.050 provides that the Alaska Real Estate Commission prescribes the form of the written disclosure required. A current version of the disclosure form is available at <http://www.commerce.state.ak.us/occ/pub/rec4229.pdf> (Rev. 7/08). Examinees are not expected to know the precise content of the disclosure form; however, examinees should be aware of a statutory duty to disclose defects, malfunctions and structural conditions including major repairs. Further, examinees should be aware of the statutory remedies for non-compliance.

Under AS 34.70.030 seller/transferor liability may be avoided: "A transferor is not liable for a defect or other condition in the real property interest being transferred if the transferor discloses the existence of the defect or condition in the disclosure statement." AS 34.70.030.

Further, AS 34.70.090 prescribes the remedies available for non-compliance:

- (a) A transfer that is subject to this chapter is not invalidated solely because a person fails to comply with this chapter.
- (b) A person who negligently violates this chapter or fails to perform a duty required by this chapter is liable to the transferee for the amount of the actual damages suffered by the transferee as a result of the violation or failure.

(c) A person who willfully violates this chapter or fails to perform a duty required by this chapter is liable to the transferee for up to three times the actual damages suffered by the transferee as a result of the violation or failure.

(d) In addition to the damages allowed under (b) or (c) of this section, a court may also award the transferee costs and attorney fees to the extent allowed under the rules of court.

Water Line

Allison may have a claim against Bartleby for failing to disclose a prior freeze-up of the water line. While the facts are silent as to any disclosure by Bartleby specific to a prior freeze-up of the water line, Bartleby did disclose in writing that the home experienced occasional low water pressure and a prior leak in the basement.

However, absent a willful or negligent failure to disclose a prior freeze-up, Bartleby's representation that occasional low water pressure was the only problem with the water line may not be actionable under the statute even if he made an innocent misrepresentation of the condition of the water line. In Amyot v. Luchini, the Alaska Supreme Court held that a claim for innocent misrepresentation of a property condition, as recognized in Cousineau v. Walker, 613 P.2d 608 (Alaska 1980), did not survive the enactment of AS 34.70:

Similarly, the requirement that sellers make disclosures "in good faith," AS 34.70.060, indicates that the legislature intended no liability to attach for an inaccurate statement on the disclosure form if made in good faith.

932 P.2d 244, 247 (Alaska 1997).

While AS 34.70.060 requires that the disclosures made must be made in good faith, it does not define the term. In Amyot the Court looked to residential landlord and tenant relations where the legislature defined good faith as "honesty in fact in the conduct of the transaction concerned" and in the adverse possession context where good faith is defined as "an honest and reasonable belief." See id. (quoting AS 34.03.360(5)) and Ault v. State, 688 P.2d 951, 956 (Alaska 1984).

Thus if Bartleby held an honest and reasonable belief that the water line had not previously frozen, then Bartleby's representation that occasional low water pressure was the only problem with the water line was made in good faith and not actionable under AS 34.70. There are no facts to suggest that Bartleby had actual knowledge of prior freeze-ups. Bartleby spent winters outside Alaska

during the time when the water line was at greatest risk of freezing completely. It is possible that Bartleby believed that the occasional low water pressure was due to the community well arrangement or the small diameter of the pipe. Thus, Bartleby has a strong argument that his disclosures with regard to the water pressure and prior basement leak were made in good faith and without knowledge of any prior freeze-ups. Therefore, the condition of the water line is an innocent misrepresentation that is not actionable under the statute.

Foundation

Allison has a claim that Bartleby intentionally or at least negligently failed to disclose the foundation repairs. The facts state that Bartleby disclosed a prior leak in the basement but did not specifically disclose the recent foundation repairs. Here the question is whether Bartleby's disclosure of the prior leak is sufficient to notify Allison of the foundation repairs.

The facts suggest that while Bartleby may have disclosed the prior leak in good faith, his disclosure may have been incomplete or ambiguous. In Beaux v. Jacob, the buyer argued that the seller's disclosure that "[s]ump pumps must be maintained and used" to prevent water infiltration into the basement was ambiguous because there was only one sump pump permanently installed and the other pump was a portable pump that the sellers used on occasion. 30 P.3d 90, 94-95 (Alaska 2001). The Alaska Supreme Court affirmed liability based upon ambiguity of the disclosure and held that the seller must act as a reasonably prudent person in preparing the disclosure statement so as to avoid ambiguities in informing potential buyers of known defects. Id.

Bartleby only disclosed a prior leak in the basement, yet Allison's contractor discovered evidence of recent repairs to cracks in the foundation. Thus, Bartleby's disclosure of a prior leak was probably ambiguous with regard to the cracked foundation. Since Bartleby owned the home for 10 years prior to the sale, it is probable that he had knowledge of the cracks because the repairs were recent. Moreover, Allison discovered the water leaking through the cracks in the foundation. Therefore, it is more likely than not that the court would find that Bartleby failed to act as a reasonably prudent person in disclosing the prior leak so as to give Allison notice of the foundation cracks and repair.

Remedies

Should Allison prevail on her claim of negligent failure to disclose either the prior freeze-up of the water line or the repairs to the foundation, she is entitled to her actual damages plus costs and attorney fees. AS 34.70.090(b) and (d). Allison's actual damages are measured by the "cost of putting the property in the condition that would bring it in conformity with the value of the property as it was represented." Beaux, 30 P.3d at 97 (quoting Carpenter v. Donohoe, 388

P.2d 399, 401 (Colo.1964)). If Allison were able to prove that Bartleby willfully failed to disclose a prior freeze-up or the foundation repair Allison is entitled to treble her actual damages. See AS 34.70.090(c). However, even if Allison were able to prove a willful failure to disclose, rescission of the purchase is not available to Allison based solely upon non-compliance with the statute. AS 34.70.090(a)

2. Alaska’s Trespass by Cutting or Injuring Trees or Shrubs Statute, AS 09.45.730. (30 points)

No points are intended for a discussion of common law trespass. Allison has a claim against Duane under AS 09.45.730, which provides:

A person who without lawful authority cuts down, girdles, or otherwise injures or removes a tree, timber, or a shrub on (1) the land of another person or on the street or highway in front of a person's house, or (2) a village or municipal lot, or cultivated grounds, or the commons or public land of a village or municipality, or (3) the street or highway in front of land described in (2) of this section, is liable to the owner of that land, or to the village or municipality for treble the amount of damages that may be assessed in a civil action. However, if the trespass was unintentional or involuntary, or the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or that of the person in whose service or by whose direction the act was done, or where the timber was taken from unenclosed woodland for the purpose of repairing a public highway or bridge on or adjoining the land, only actual damages may be recovered.

Thus, absent facts in support of an unintentional or involuntary trespass or facts to suggest that Duane had probable cause to believe that Allison’s land was his or that he had her authority to cut, Allison may recover treble damages.

Here the facts support a claim for treble damages. The facts state that the property line is clearly marked by Allison’s recent survey, which supports an intentional trespass. The cutting, on the other hand, does not necessarily support intentional trespass as it is possible to unintentionally trespass but then intentionally cut. The Alaska Supreme Court in Matanuska Electric Assoc., Inc. v Weissler, held that “probable cause” within the meaning of AS 09.45.730 means an “honest and reasonable belief.” 723 P.2d 600, 608 (Alaska 1986). Thus, where a defendant honestly and reasonably believes that authority exists to cut the trees, a plaintiff recovers only single damages. Id.

There are no facts to support that Duane had an honest and reasonable belief that he may cut Allison’s trees. Here the facts suggest Dave cut the trees for

his own benefit – to make room for his new RV parking pad. Further, Allison was distressed when she discovered that Duane had cut her trees, which suggests that she had not given authority to Duane. Thus, the court is unlikely to find that Duane had an honest and reasonable belief that he may cut trees on Allison's side of the clearly marked property line. Therefore, Allison may recover treble damages.

Examinees may include a discussion of the appropriate measure of damages. The statute allows for an award of "damages that may be assessed in a civil action." AS 09.45.730. A plaintiff who has been injured by an invasion of his land not totally destroying its value may elect as damages either the loss in value or reasonable restoration costs. G & A Contractors, Inc. v Alaska Greenhouses, Inc., 517 P.2d 1379, 1385 (Alaska 1974). If the plaintiff elects diminution in value, the damage measure is the difference between the value of the land before the injury and its value after the injury. Id. at 1386. If the restoration costs are vastly disproportionate to the diminution in value, the restoration measure of damages is inappropriate unless there is a "reason personal to the owner" for restoring the original condition. Anderson v. Edwards, 625 P.2d 282, 288-89 (Alaska 1981). The Court found that the plaintiff in G & A Contractors had a "reason personal" justifying reasonable restoration damages because its use of the damaged property as "a showplace in connection with its nursery business" was a purpose "peculiar" to the plaintiff. Id. at 288. Similarly, in Osborne v. Hurst, 947 P.2d 1356, 1360 (Alaska 1997), the Court remanded for determination of the plaintiffs' reasons personal by the jury on a record that the plaintiffs intended to recreate and retire to a heavily wooded lot outside of Homer, Alaska. However, there are practical limits to the remedy. Such reasons personal must be objectively reasonable and restoration costs exceeding diminished market value may be awarded only to the extent such added costs are objectively reasonable in light of the "reason personal" and in light of the diminution in value. Id.

Here Allison is entitled by AS 09.45.730 to at least three times her actual damages that may be assessed in a civil action. At a minimum Allison's damages are measured by the diminution in value of her property. However, the facts suggest that she purchased the property in part because the mature birch trees reminded her of her childhood home. Allison may argue that this reason is a "reason personal" in support of her claim for restoration damages which may exceed the diminution in value depending upon the number and size of the trees to be restored.