

CONCURRING AND DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY

DECIDED: OCTOBER 17, 2007

The limited grant of allocatur in this case asks the Court to consider two issues:

1) Did the Superior Court misapply the law of election of remedies and therefore incorrectly hold that the trial court misapplied the law when it held that the Plaintiffs were not entitled to rescission because they had effectively affirmed the contract?

2) Did the Superior Court err in holding that proof of fraud alone, without more, is sufficient for a court to award treble damages under the UTPCPL?

For the following reasons, I concur with the Majority's analysis of the first issue, but respectfully dissent as to the analysis of the second.

As to the first issue, the majority holds that the Superior Court erred in upsetting the trial court's holding that Appellee purchasers had failed to meet the requirements of rescission due to a failure to take prompt action in seeking the remedy. I agree. I write separately to emphasize that the inquiries as to whether a plaintiff has elected to pursue a certain remedy and whether, in light of all of the evidence, the plaintiff is indeed entitled to that remedy are distinct. On this note, I believe that the concept of election of remedies is only obliquely implicated in this case and that in resolving this issue, the Court need look only to whether the trial court erred in finding that Appellee purchasers were not entitled to restitution.

The Superior Court focused its analysis entirely on an election of remedies rationale. It stated: "The trial court based its decision to deny rescission on the grounds that Appellants' original complaint affirmed the contract, thereby precluding rescission." Schwartz v. Rockey, No. 2036 WDA 2004, slip op. (Pa.Super. January 31, 2006) at 14. The court further stated: "Under the circumstances of this case, we conclude that the trial court erred in barring any consideration of rescission and restitution on the grounds that Appellants were seeking inconsistent remedies." Id. at 16.

The Superior Court's opinion makes it clear that it viewed the trial court's denial of rescission and restitution as indicative of that court's position that by filing the initial complaint for damages, the plaintiffs had conclusively elected that remedy, thus barring any consideration of whether rescission and restitution were warranted. Holding that "the trial court's opinion demonstrates confusion over the law governing election of remedies and the timing of when an election must be made," the Superior Court reversed and remanded for the trial court to again consider the propriety of equitable remedies. While it may be accurate that the mere filing of a complaint does not necessarily serve to conclusively elect a remedy, this issue is beyond the purview of this appeal. The trial court did not, as the Superior Court believed, base its decision on election of remedies grounds.

Contrary to the Superior Court's assertions, the trial court did not foreclose consideration of rescission because of an inconsistent election of remedy. Rather, the trial court specifically considered the merits of the plaintiffs' case for such a remedy, but found that they had failed to satisfy the requirements for rescission. The court stated:

The Plaintiffs were aware of the water damage and problem with water penetration in the basement almost two years prior to filing the Original Complaint. Furthermore, the Plaintiffs' Original Complaint did not seek rescission but only damages on the grounds of fraud and misrepresentation. This Court finds the amount of time that passed between the Plaintiffs becoming aware of the water damage and the time before they filed their Original Complaint couple with the fact that Plaintiffs did not seek rescission until amending their Original Complaint, the Plaintiffs have waived their right to seek rescission and are only afforded monetary damages.¹

¹ While the issue is not before the Court, I am puzzled by the trial court's decision to award damages as an alternative to rescission and restitution. I believe that this does violate the doctrine of election of remedies, as well as law of the case. When the original complaint was amended to seek a claim in equity, that was the remedy elected by the plaintiffs. Further, the decision of the trial court to permit amendment was law of the case. The trial court's decision to seemingly undo the election of an equitable remedy in order to award monetary damages is questionable at very best. However, as this particular issue is (continued...)

Schwartz v. Rockey, No. 2000-5705, slip op. (C.P. Washington June 30, 2004). While the court peripherally mentioned the doctrine of election of remedies in its legal conclusions, it based its decision not to permit rescission not on grounds of election, but rather on the requirement that a party seeking rescission has a duty to act promptly so that the parties may be returned as closely as possible to their original positions. This is a substantive requirement of a claim for rescission. Fichera v. Gording, 227 A.2d 642, 643-44 (Pa. 1967). I agree with the majority, therefore, that the Superior Court failed to take into account the full rationale of the trial court's denial of rescission and that its reversal and remand were misplaced. I would make abundantly clear, then, that this Court's decision is premised entirely upon the trial court's decision as to the merits of the claim for rescission and not upon grounds of election of remedies.

As to the second issue, the majority holds that a court's discretion to award treble damages under the Unfair Trade Practices and Consumer Protection Law should not be constrained by the common-law requirements associated with the award of punitive damages. I respectfully dissent.

First, I disagree with the majority's statutory construction analysis. It purports to rest its decision on the plain language of the statute, but also considers that "it seems reasonably likely that the Legislature wished to enhance the impact of monetary awards under the statute to deter wrongful trade practices affecting the public at large." Majority Slip Opinion at 20. As a matter of statutory construction, these statements are contradictory. The Statutory Construction Act mandates that "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. §1921(b). Only if the plain language of a statute is

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beyond the limited grant of allocatur and was neither raised nor argued by the parties below, it is beyond our ability to address.

not explicit may a court undertake an analysis of extraneous considerations to determine the intent of the Legislature. Thus, as the majority purports to decide this case under the plain language of the statute, it is improper for it also to consider extrinsic factors in determining the legislative intent underlying the treble damage provisions of the UTPCPL.

The Unfair Trade Practices and Consumer Protection Law states in pertinent part: (a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action, to recover actual damages or one hundred dollars (\$100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars (\$100), and may provide such additional relief as it deems necessary or proper.

73 P.S. §201-9.2(a). The majority concludes that the statute does not require a court to adhere to traditional principles of punitive damages when determining whether to award treble damages. I disagree.

It is well established that “statutes are not presumed to make changes in the rules and principles of the common law or prior existing law beyond what is expressly declared in their provisions.” Carrozza v. Greenbaum, 916 A.2d 553, 566 (Pa. 2007) (quoting Commonwealth v. Miller, 364 A.2d 886, 887 (Pa. 1976)). Thus, the Court will be reluctant to disturb established legal principles without express direction from the Legislature. Carrozza, 916 A.2d at 565-66.

While this Court has never expressly stated such, treble damages are essentially punitive in nature. This is well recognized by the lower courts of this Commonwealth. See Johnson v. Hyundai Motor America, 698 A.2d 631, 639 (Pa.Super. 1997) (“It is undisputed that the imposition of exemplary or treble damages is essentially punitive in nature.”); Skurnowicz v. Lucci, 798 A.2d 788, 796 (Pa.Super. 1997) (“the UTPCPL gives the trial court discretion to award treble damages, which are punitive in nature.”). I believe that the case law regarding the nature of punitive damages is well reasoned and evidences the

common-law principle applied in Pennsylvania. The plain language of the statute does not expressly alter this principle. Thus, absent such express direction from the Legislature to the contrary, I believe that the UTPCPL was intended to preserve the requirement that an award of treble damages be predicated upon a punitive damage analysis. Therefore, I respectfully dissent.