

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2003-399

SEPTEMBER TERM, 2004

	}	APPEALED FROM:
	}	
Wesley J. Bailey	}	Orleans Superior Court
	}	
v.	}	DOCKET NO. 329-11-00 Osecv
	}	
Edward D. Halpin	}	Trial Judge: Walter M. Morris, Jr.
	}	
	}	

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

Plaintiff sold defendant a camp in Newport, Vermont, and later filed this foreclosure action. Defendant counterclaimed, alleging breach of contract and various tort claims based on plaintiff' s misrepresentations about the property' s condition. Plaintiff appeals the jury's verdict in defendant's favor on the counterclaims. Defendant cross appeals the court' s denial of his motion for attorney's fees. We affirm the judgment on defendant' s counterclaims, but we reverse and remand the issue of attorney' s fees because defendant has a contractual right to them.

We give the jury's verdict deference on appeal by viewing the evidence in the light most favorable to it without considering any contrary or modifying evidence. Foster v. Bittersweet Experience, Inc., 173 Vt. 617, 617 (2002) (mem.). In light of that standard, the facts are as follows. Plaintiff and defendant entered into a purchase and sale agreement relating to a winterized cottage near Lake Memphremagog in Newport in 1998. Before the closing on September 25, 1998, the parties entered into an addendum agreement in which plaintiff promised to "make certain that the plumbing and furnace are in working order before September 25, 1998." The closing went forward as scheduled and defendant took possession of the cottage.

Shortly after taking possession, defendant discovered a variety of problems with the premises. The plumbing would not drain properly, electric fuses would burn out continually, the roof leaked, the furnace leaked carbon monoxide into the home, and the water main to the house would freeze in cold weather. Defendant later learned that wastewater drained from the cottage through a pipe that emptied into a pile of rocks just outside the house. The cottage lacked a working septic system and it was not connected to the City of Newport's sewage system.

Confronted with the dysfunctional plumbing, plaintiff eventually agreed to pay for the cost of installing city water and sewer to the property at an estimated cost of \$2,491.38. When other problems with the cottage were not repaired as defendant desired, he began putting the mortgage payment due plaintiff into escrow with his attorney. In return, plaintiff filed the present action in November 2000 seeking to foreclose on the mortgage. Defendant answered the foreclosure complaint and advanced several counterclaims. Defendant charged that plaintiff breached his promise in the addendum agreement to make sure the furnace and plumbing were in working order by closing. Defendant also claimed that plaintiff fraudulently represented the property as year-round residence and misrepresented its condition.

The contract and tort claims were tried by jury and the foreclosure was reserved for the court' s determination. Plaintiff accepted the jury instructions, as well as the special verdict form separating defendant' s claims in to nine counts. After deliberating, the jury returned verdicts in favor of defendant on all of his claims. It awarded him \$4500 in compensatory damages and \$6500 in punitive damages. Defendant moved for an award of attorney' s fees and costs on grounds that

the default provision in the purchase and sale agreement provided for the fees in the event of a contract breach. The court denied the motion, and later denied defendant's motion to amend based on the same grounds. Plaintiff took the present appeal, and defendant cross appealed on the issue of attorney's fees.

Before turning to the merits of the parties' claims on appeal, we first address defendant's request that we dismiss plaintiff's claims for inadequate briefing. We agree that plaintiff's brief falls far short of the standards we have established in the appellate rules. See V.R.A.P. 28 (setting forth requirements for briefs in the Supreme Court). The brief contains few record citations, scant explanation of what happened at trial, no discussion of how the claims on appeal were preserved at trial, and no standard of review. See V.R.A.P. 28(a) (appellant's brief "shall" contain a statement on the subject of litigation, the facts of the case and proceedings below, the specific claims of error accompanied by appropriate record citations, and argument explaining how the issues were presented to the trial court, and the applicable standard of review). Notwithstanding the poor briefing, we understand plaintiff to raise four claims: (1) the verdicts were not specific enough in light of the facts and the standard of proof on defendant's claims; (2) the record lacked sufficient evidence to prove that plaintiff had knowledge of the defects in the property and intentionally misrepresented them to defendant; (3) the evidence was insufficient to prove that defendant justifiably relied on plaintiff's misrepresentations; and (4) in the absence of actual fraud, the court may not award punitive damages. We decline to dismiss plaintiff's appeal, and address each argument in turn.

Plaintiff's first claim relates to the special verdicts. Plaintiff argues that the verdicts had to be more specific because defendant's claims required varying levels of proof and had mutually exclusive elements. Plaintiff agreed to the special verdict form, however, and never requested that the court require the jury to provide more specificity on their findings than was required by the form. At oral argument, plaintiff's counsel conceded that though she agreed to the special verdict forms at trial, hindsight shows that the forms erroneously allowed the jury to render conflicting verdicts, and therefore a new trial is warranted. Notwithstanding plaintiff's hindsight view of the forms, the failure to object to them at trial waived any appellate claim of error arising from their use at trial pursuant to plaintiff's agreement. Cf. Wentworth v. Fletcher Allen Health Care, 171 Vt. 614, 619-20 (2000) (mem.) (explaining that one party should not suffer consequences of opposing party's strategic choices at trial).

Plaintiff's second and third arguments can be addressed together. Plaintiff argues that the jury erred by implicitly finding that he had actual knowledge of the defects in the property, that he intentionally misled defendant about them, and that defendant justifiably relied upon plaintiff's misrepresentations. He claims the jury did not have enough evidence before it to make those findings. Plaintiff has not preserved these claims for our review. A party seeking reversal of a jury verdict due to an alleged insufficiency of evidence must preserve the argument by raising it at trial through a motion for judgment as a matter of law under Rule 50. V.R.C.P. 50; Hill-Martin Corp. v. Alling, 137 Vt. 432, 433 (1979). Preservation further requires that the motion be renewed when the evidence closes. Id.; V.R.C.P. 50(b). Plaintiff argues that he made the requisite motion "before the jury verdict," which the record shows is correct. Plaintiff did not renew the motion, however, at the close of all the evidence. Therefore, plaintiff waived any argument on appeal that the evidence was insufficient to support defendant's claims. Palmisano v. Townsend, 136 Vt. 372, 375 (1978).

For similar reasons, we decline to address plaintiff's argument that the jury's award of punitive damages was error. Plaintiff objected to the instruction on punitive damages on grounds that the record lacked evidence of his ability to pay a punitive damages award. On appeal, plaintiff contests the award on different grounds, namely that punitive damages requires proof of wilful and wanton conduct. We do not attribute error to the trial court for reasons that were not brought to the court's attention first. Morais v. Yee, 162 Vt. 366, 372 (1994). Plaintiff waived his challenge to the punitive damages award by not bringing the argument he raises here to the trial court for consideration.

Defendant cross appeals the court's denial of his motion for attorney's fees. Defendant claims that he has a contractual right to the fees, citing the default provision in the purchase and sale agreement. That provision allows the prevailing party in a breach of contract action to recover reasonable attorney's fees. Defendant contends that in light of the jury's verdict that plaintiff breached the addendum agreement, the default provision of the purchase and sale contract was triggered. Defendant's argument has merit. When a collateral agreement to a contract for the sale of property survives the closing, a breach of the agreement will give rise to a claim for attorney's fees if the purchase and sale agreement allows for such fees. Wyatt v. Palmer, 165 Vt. 600, 602 (1996). Thus, once the jury determined that plaintiff breached the parties' agreement, defendant was entitled to attorney's fees as a matter of law. The trial court erred by determining

otherwise, and we therefore reverse and remand for further proceedings on this issue.

The judgment is affirmed in all respects except for the matter of attorney's fees, which is reversed and remanded for a determination of the reasonable fees due defendant for plaintiff's breach of the addendum agreement.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned