COURT OF APPEALS, DIVISION THREE, STATE OF WASHINGTON

BAHRAM KHALIGHI,	)	**No. 28077-2-III**
	)	
Respondent,	)	
	)	
v.	)	
	)	
FRED HARVEY and JANE DOE HARVEY, individually and on behalf of the marital community, d/b/a HARVEY CONSTRUCTION and/or FRED HARVEY CONSTRUCTION,	)	**Division Three**
	)	
Appellants,	)	
	)	
and	)	
	)	
DEVELOPERS SURETY AND INDEMNITY COMPANY,	)	
	)	
Defendant.	)	**UNPUBLISHED OPINION**

Korsmo, J.—A builder challenges the damages awarded a home purchaser for construction defects. He contends that a portion of the damages award was not supported

by the verdict and that he was not given formal opportunity to cure the problems. We conclude that the evidence supported the damage award and that the evidence does not establish that the purchaser was required to provide notice and opportunity to cure before commencing litigation. The judgment is affirmed.

FACTS

Bahram Khalighi, a United States Air Force pilot, purchased a new house from Fred Harvey. Khalighi first saw an advertisement for a house that Harvey was constructing in Spokane. The two men met; Mr. Harvey accepted Mr. Khalighi's offer to purchase the house for $505,000. The parties signed a real estate purchase and sale agreement (REPSA) on October 11, 2005.

The house was on a steep hillside. It consisted of two stories and an attached elevated garage. Mr. Harvey hired a civil engineer to design the garage. The engineer provided three potential designs. Mr. Harvey rejected the proposals and requested that a wooden floor be included in order to reduce costs. The engineer presented a design with a wooden floor. Mr. Harvey accepted the design and built the garage to the engineer's specifications. He painted the garage floor grey. Contrary to building codes, the garage was not sloped.

Mr. Khalighi visited the construction site regularly during late 2005. He requested

numerous changes to the house. Mr. Harvey agreed to the changes and the purchase price eventually totaled $590,652.95. Mr. Khalighi was then deployed overseas in late January 2006.

The engineer informed Mr. Harvey that the garage had a 5,000 pound load limit and advised him that the load limit should be prominently displayed. Mr. Harvey posted a sign on March 30, 2006, but did not otherwise convey the information to Mr. Khalighi. Mr. Khalighi returned from his overseas posting late in the spring and entered the completed house on June 1, 2006. He immediately noticed a damp, musty odor. He also felt the garage floor move when he jumped on it. He saw problems with the drainage system and observed that water had accumulated beneath the house. He detailed his concerns about the drainage in an e-mail to a real estate agent, Mr. Richard, on June 5, 2006. The agent passed the e-mail on to Mr. Harvey.

Mr. Khalighi had another general contractor, Mike Murphy, examine the premises. He noted four areas of concern: (1) he had never seen a garage floor made of plywood, let alone a floor that had deflection;[1] (2) the deck had not been properly flashed; (3) the front driveway had sunk three to four inches; most significantly, (4) the lack of drainage meant that rainwater ran into the crawlspace and under the footings of the house.

[1] Deflection meant that a person could bounce on the floor.

Mr. Khalighi and Mr. Harvey discussed the problems with two different mediators. The mediations failed to resolve the problems. Mr. Khalighi hired structural and geotechnical engineers who uncovered additional problems: the drainage was improper, the footings had not been properly poured, and the garage was dead level rather than sloped.

Mr. Khalighi filed suit on December 15, 2006. The action alleged breach of contract, fraudulent concealment, negligent misrepresentation, and violation of the Consumer Protection Act (CPA), chapter 19.86 RCW. The case ultimately proceeded to bench trial November 17-18, 2008.

Evidence at trial included a bid from Mr. Murphy to repair the problems identified by the engineers. The bid totaled $104,370 in labor and materials, and an additional 25 percent contingency ($26,000) to address unforeseen problems that might be uncovered during repair work. Mr. Murphy explained that he would not undertake the repair job without the contingency because it was not possible to know the entire extent of the necessary repairs. Mr. Khalighi also presented expert testimony about stigma damages. The expert estimated a stigma loss of $148,000 calculated on 25 percent of the purchase price.[2] The parties presented written closing arguments to the court.

[2] Mr. Harvey's defense presented expert testimony that the costs of repairs would be $13,474.44 and the stigma damage would be $38,150.

A memorandum opinion issued January 22, 2009. The court found for the plaintiff on all causes of action. The court awarded $130,000 in remediation damages, $147,500 in stigma damages, and treble damages under the CPA of $10,000. The court also awarded attorney fees of $135,893 and costs of $650.86.

Mr. Harvey moved for judgment as a matter of law or for a new trial. He argued that the damage awards were not supported by the evidence and resulted from passion or prejudice. The trial court denied the motion. Mr. Harvey then appealed to this court.

ANALYSIS

This appeal presents two challenges to a portion of the damages award for repair costs; we will treat those matters as one. We will then address Mr. Harvey's argument that Mr. Khalighi failed to comply with statutory notice requirements.

Repair Damages Award

Mr. Harvey argues that the $26,000 contingency component of the repairs damages was improperly awarded. He contends that the trial court erred in denying his CR 50 motion to set that portion of the judgment aside and his CR 59(a) motion to vacate the award and grant a new trial.

Mr. Khalighi argues that CR 50 does not apply to bench trials. We agree. The express language of the opening sentence of the rule limits application to jury trial cases:

"If, during a trial by jury. . . ." CR 50(a)(1). Similarly, CR 50(a)(2) requires the motion to be made before the case is submitted to the jury.[3] CR 50 is an express grant of authority for a trial judge to remove an issue from jury consideration by determining that the evidence was legally insufficient. There is no need for comparable authority in a bench trial since the judge will consider the sufficiency of the evidence in the course of reaching a decision. Striking the issue as the court was about to consider the whole case would serve no purpose. For these reasons, we agree with respondent that the CR 50 motion was not proper.

It also is of no moment in this case. Mr. Harvey raised the same challenge in the CR 59(a) motion, so his argument is properly before this court. Mr. Harvey sought a new trial pursuant to CR 59(a)(5), which provides that a verdict may be vacated and a new trial granted where the damages are "so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice." This court will review a trial court's decision to grant or deny relief under CR 59(a) for abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

[3] CR 50(b) and CR 50(c) both also mention the jury. No provision of CR 50 suggests it is applicable to nonjury trials.

Mr. Harvey argues that the $26,000 contingency requirement is speculative because there is no guarantee that any additional problems will be discovered by Mr. Murphy during his repair efforts. While it was uncertain whether additional repairs would be needed, Mr. Murphy testified that he would not undertake the work without the contingency payment. To use Mr. Murphy, Mr. Khalighi had to pay that sum in addition to the other expenses detailed in the bid. The cost of the repairs was the damage incurred by Mr. Khalighi. That cost was the $130,000 Mr. Murphy bid. Whether or not there were additional repairs to come, Mr. Khalighi was still responsible for the contingency sum. The damage was not speculative.

The trial court had a choice of competing bids. It accepted Mr. Murphy's bid as the actual measure of the needed repairs. His testimony provided the evidentiary basis for the award. *Wash. Beef, Inc. v. Yakima County*, 143 Wn. App. 165, 168, 177 P.3d 162 (2008) (competing expert testimony provided substantial evidence for judge to choose from at bench trial). Because there was an evidentiary basis for the contested award, we cannot say that the judgment was the "result of passion or prejudice." The trial court properly denied the CR 59(a)(5) motion.

Whatever uncertainty the scope of repairs, there was no uncertainty in the amount that had to be paid. The trial court had an evidentiary basis for its decision. There was

no error.

Statutory Opportunity to Cure

Mr. Harvey also argues that Mr. Khalighi did not comply with the notice and opportunity to cure requirements of RCW 64.50.020 before filing suit. In response, Mr. Khalighi argues that Mr. Harvey did not comply with the statute either. The evidence does not establish that Mr. Harvey gave Mr. Khalighi notice of the prelitigation cure procedure; therefore, Mr. Khalighi was not required to first give Mr. Harvey opportunity to cure the problem.

RCW 64.50.020(1) requires a homeowner to first provide written notice to the builder and an opportunity to cure the problems at least 45 days before commencing suit. The builder must respond within 21 days. RCW 64.50.020(2). Various formalities are required for both the notice and the answer. The remaining subsections of the statute provide opportunities for resolving the dispute. If an action is commenced without the notice and opportunity, it is subject to dismissal without prejudice. RCW 64.50.020(6).

RCW 64.50.050(1) requires the builder to give notice to the purchaser of the existence of the statutory notice and opportunity to cure requirements. The notice is to be provided in substantially the form stated by RCW 64.50.050(2). If the notice is not provided, the purchaser is not precluded from bringing suit. RCW 64.50.050(3).

These statutes were authoritatively construed in *Lakemont Ridge Homeowners*

Ass'n v. Lakemont Ridge Limited Partnership, 156 Wn.2d 696, 131 P.3d 905 (2006). There the court determined that a builder could not assert the statutory notice bar of subsection .020 without first having complied with the notice requirements of subsection .050. *Id.* at 703. The decision reversed the Court of Appeals' opinion[4] in the same case that had enforced the purchaser's prelitigation notice requirement even though the builder had not given the statutory notice. 156 Wn.2d at 698.

This issue was not raised in the pleadings filed in this case and no evidence was presented at trial about the notice requirements.[5] The issue did not arise until the defense closing argument was submitted. The trial court did not address the argument in its ruling and made no findings concerning the topic. On this record, there is no evidence that Mr. Harvey gave the required notice to Mr. Khalighi, so there was no requirement that the purchaser give formal opportunity for the builder to correct the defects. *Lakemont Ridge, supra.* We therefore need not consider whether the mediation and other communications about building defects constituted substantial compliance with the owner's prelitigation notice obligations.

The failure of Mr. Harvey to give the required notice to Mr. Khalighi prevents the

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[4] *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. P'ship*, 125 Wn. App. 71, 104 P.3d 22 (2005).

[5] The REPSA, admitted at trial as Ex. 1, does not contain the statutory notice. If appellant conveyed the information required by RCW 64.50.050(2), it would have to be in some document that is not part of the appellate record.

appellant from now claiming this action was improperly brought.

Attorney Fees

The trial court awarded attorney fees to Mr. Khalighi under both the REPSA and the CPA. He also requests attorney fees for this appeal. This court can award attorney fees when there is a contractual or statutory basis for doing so. RAP 18.1(a). As prevailing party, we award Mr. Khalighi his attorney fees under the REPSA contract and the CPA subject to compliance with RAP 18.1(d).

The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.