CASE NO. 85229-9-I

THE SUPREME COURT

FOR THE STATE OF WASHINGTON

Robert S. Apgood, individually and as Trustee for Robert S. and Nancy B Apgood Living Trust

v.

Roger A. Plautz and Linda Plautz, James S. Glenn and Jane Doe Glenn, and Legacy Home Inspections LLC

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Robert S. Apgood, individually and as Trustee for Robert S. Apgood and Nancy B. Apgood Living Trust ("Apgood"), the Appellant in *Apgood v. Plautz, et al.*, Court of Appeals Div. I Case Number 85229-9 I, and the Plaintiff in *Apgood v. Plautz, et al.,* Snohomish County Superior Court Case No. 21-2-05991-31.

II. COURT OF APPEALS DECISION

The Court of Appeals decision requested for review is *Apgood v. Plautz, et al.*, Court of Appeals Div. I Case Number 85229-9 I, filed on March 18, 2024. Specifically, Apgood seeks review of the Court of Appeals Division I decision to affirm dismissal of Apgood's claims against Plautz. Apgood does not seek review of the decision affirming dismissal of claims against Glenn or Legacy.

The effect of this Court of Appeals decision is to effectively legalize and/or sanction fraud by sellers in residential real estate transactions.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Court of Appeals decision in applying the equitable doctrine of waiver as a bar to Apgood's claim for fraudulent inducement of a real estate contract contradicts decisions of the Supreme Court expressly ruling that the doctrine should not perpetrate fraud.

2. Whether the Court of Appeals decision barring reliance upon RCW 64.06.020 disclosures is in direct conflict with other Courts of Appeals published decisions affirming reliance upon the same disclosures.

3. Whether the Court of Appeals decision involves an issue of substantial public interest when application of the doctrine of waiver would render RCW 64.06.020 disclosures meaningless whenever buyer inspections are waived and such waivers are more common place with private equity firms entering the market.

IV. STATEMENT OF THE CASE

A. Relevant Facts.[1]

In January 2018, Robert Apgood, a United States citizen then temporarily located in England, discovered a real estate for sale listing for a residence located at 5829 Silvana Terrace Road, Stanwood, Washington (hereafter "5829 House"). Apgood contacted sellers Roger A. Plautz and Linda Plautz via a Real Estate agent. Located in England, it was impractical for Apgood to fly back to Washington to inspect/review every potential purchase. Houses were selling quickly, and frequently sold before he could physically travel to Washington. As such, he relied heavily on his son and his Real Estate agent to make visual inspections and report their findings. Clerk's Papers (CP) 233-34.

[1] Apgood does not seek discretionary review over the Court of Appeals Division I's ruling regarding Glenn or Legacy Home Inspections. Thus, facts specific to those claims and issues are not included here.

In furtherance and in advance of the sale of the property, Apgood was provided copies of a number of documents related to the 5829 House, including statutorily mandated disclosure Form 17 Seller Disclosure Statement ("Form 17"). To further those mandatory disclosures, Plautz also supplied Apgood with a house inspection report drafted by Glenn and Legacy Home Inspections, LLC. (CP 234, 256-61).

On Form 17, executed on February 25, 2018, Plautz expressly represented and averred that the roof had not leaked in the previous 5 years. The Legacy Inspection Report supported this contention. CP 240.

Based in large part upon the representations in Form 17, Apgood made an offer for the purchase of the 5829 House. Absent these representations, Apgood would not have purchased the home. CP 243. The Purchase and Sale Agreement was dated May 17, 2018. As an addendum to the purchase and sale agreement, Apgood waived obtaining his own building

inspection, and stated that he had not relied upon any representations by the seller in waiving the inspection.

This provision is part of the Inspection Addendum to Purchase and Sale Agreement, signed on May 17, 2018 (3 months after Form 17 was signed by Plautz). CP 190, 258. Noticeably absent is a waiver of any RCW 64.06 required disclosures (Form 17)[2] and the inspection waiver provision ONLY references representations of the seller to enter the addendum, *not the underlying contract previously signed.*

In the Spring of 2021, Apgood discovered the roof to be leaking. Subsequently, Apgood discovered evidence that the roof had been leaking in the 5 years preceding his purchase of the 5829 House and that Plautz knew it was leaking. Thus,

[2] RCW 64.06 establishes required disclosures by the seller of real property. These disclosures are *only* waived upon an express waiver of the seller disclosure statement. There is no such waiver here, and Plautz in fact provided the seller disclosure statement. Plautz just lied on it.

Plautz made material misrepresentations on Form 17. CP 91-93, 235-37, 253-56, 270-79.

B. Procedural History.

Apgood filed suit against Plautz alleging Fraud in the Inducement of the Purchase and Sale Agreement due to the misrepresentations on Form 17. CP 217-31.

On January 25, 2023, Plautz filed the motion for summary judgment arguing that Apgood's claims are barred by the independent duty doctrine. CP 318.

On March 16, 2023, the Superior Court entered an Order granting Plautz's motion for summary judgment, expressly stating that Apgood's claims against Plautz were barred by the independent duty doctrine.[3]

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[3] In its Order, the Superior Court couched the doctrine as the "economic loss rule," however the Washington State Supreme Court has made clear on several occasions that the rule is now referred to as the "independent duty doctrine." *Elcon Constr., Inc. v. E. Wash.Univ.,* 174 Wn.2d 157, 165, 273 P.3d 693 (2012);

Apgood timely appealed. The Court of Appeals did not reach the issue of the whether the independent duty doctrine barred Apgood's claim for Fraud in the Inducement. Rather, the Court of Appeals determined that the doctrine of waiver barred Apgood's claim due to his waiver of inspection.

This petition for discretionary review follows.

V. ARGUMENT

RAP 13.4(b) allows for discretionary review to be granted in four instances:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

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Eastwood v. Horse Harbor Found, Inc., 170 Wn.2d 380, 241 P.3d 1256 (2010). It will be referred to herein as the independent duty doctrine.

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should accept review pursuant to RAP 13.4(b)(1) and (4) because (a) the decision of the Court of Appeals to apply the doctrine of waiver as a bar to a claim of fraud contradicts longstanding rulings of the Supreme Court regarding equitable principles of the doctrine; (b) the decision of the Court of Appeals is in contradiction with a published decision of the Court of Appeals; and (c) there is a clear issue of substantial public interest which should be determined by the Supreme Court.

A. The Court of Appeals Decision.

The Court of Appeals determined Apgood's claim against Plautz for fraudulent inducement of the real estate contract (Plautz lied on Form 17 about roof leaks) was barred by the

doctrine of waiver solely due to the waiver of inspection provision as addendum to the purchase and sale agreement.

The Court of Appeals stated Apgood asserted reliance upon Form 17 in the decision to enter into the purchase and sale agreement *and* in the decision to waiver further inspections. The former is true and key to this petition: Apgood relied upon statements of the seller in Form 17 in his determination to enter into an agreement to purchase the house.

However, the latter is not true. Nowhere does Apgood assert or argue reliance upon Form 17 in deciding to waive inspection.[4] Rather, Apgood asserts the inspection waiver is irrelevant in the analysis because the seller lied on statutorily mandated disclosures, Apgood did not waive the statutory disclosures, and Apgood agreed to waive inspection *after and separate from* his decision to purchase the home.

[4] It is unclear why or how the Court of Appeals got this wrong.

The Court of Appeals determined that an inspection waiver in an addendum to a real estate purchase agreement waives not only inspection but also *any* reliance on statutorily mandated disclosures (RCW 64.06.020) in a decision to purchase the property.

Further, the Court of Appeals determined that while receipt of the information required by RCW 64.06.020 is mandatory absent an express waiver to not receive, there is no right to rely on this same information regardless that receipt was not expressly waived. According to the Court of Appeals, since Apgood received Form 17, RCW 64.06.020 was satisfied and he had no right to rely on that information.

(Quite curious a party must receive mandatory disclosures but does not have the right to rely upon such disclosures. It raises the question: what is the point of mandatory disclosures if there is no corresponding right to rely upon them?)

The Court of Appeals decision also indicates that the inspection addendum is deemed a part of the contract and the

contract constituted the entire understanding between the parties, and superseded all prior understandings and representations. However, Apgood's fraudulent inducement claim was premised upon intentional misrepresentations in Form 17, which is expressly and unequivocally *not* a part of a real estate contract. RCW 64.06.020(3).

Form 17 is a statutorily separate disclosure statement pursuant to RCW 64.06.020(3). Waiver of the statutory disclosures is valid when such waiver is *expressly* made. RCW 64.06.010(7); RCW 64.06.020(1). Thus, misrepresentations could not have been resolved by the purchase and sale agreement or its addendums.

The effect of the Court of Appeals decision is chilling and contradicts clear prior rulings. In short, the decision means that when there is a waiver of inspection (common enough to be a preprinted boilerplate form) a seller cannot be held accountable for intentional misrepresentations or fraud for lying on Form 17 statutorily mandated disclosures. A seller could simply refuse to

sell to someone who did not waive inspection, thus having absolute free reign to lie on Form 17 without a vehicle to be held to account. This threat to Washington byers will only grow as inspection waiver is a growing trend.

B. The Court of Appeals' Decision Contradicts Decisions by the Supreme Court.

The Court of Appeals' decision extends the doctrine of waiver well past where it has previously reached by permitting material intentional misrepresentations (lies) in contract negotiations based upon a waiver provision. There is NO case, either at the Court of Appeals or Supreme Court which bars claims of fraud based upon contractual waiver and/or the doctrine of waiver.

To establish fraud the following must be established: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's

ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff. *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996).

Buyers of residential real estate have a right to rely upon representations made in Form 17, mandated by RCW 64.06.020. *Jackowski v. Borchelt*, 174 Wn.2d 720, 738, 278 P.3d 1100 (2012).

The Court of Appeals decision here waives this right pursuant to the doctrine of waiver. Such application violates the clearly established tenants of the doctrine of waiver set by the Supreme Court.

Generally, the doctrine of waiver may apply to all rights or privileges to which a person is legally entitled and is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. Waiver may result from an express agreement or be inferred from circumstances indicating an intent to waive. The

one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such right, advantage, or benefit. *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954).

However, and quite important here, waiver is an equitable doctrine with purpose to facilitate equity and NOT the perpetration of fraud. *Weitzman v. Bergstrom*, 75 Wn.2d 693, 699, 453 P.2d 860 (1969). Specifically, this Court stated:

> It should be remembered that waiver is an equitable doctrine. Its purpose is to facilitate the doing of equity, not the perpetration of fraud.

Id.

In *Weitzman,* the seller of a vending machine business misrepresented the profitability of the business during negotiations for the purchase of the business. *Id.* at 694. The parties negotiated a new agreement 14 months later to account for the discovered lower profits. *Id.* at 695. Ultimately, the buyer stopped making payments on the purchase and the seller attempted to foreclose on the loan. *Id.* at 696.

In defense to the attempted foreclosure, the buyer asserted the seller's fraud as inducement to the original contract. This Court recognized that normally a party having a claim of fraud will assert the claim in negotiations with the defrauding party in a subsequently negotiated contract which will make concessions due to the fraud and thus waives fraud. *Id.* at 699. However, when the new contract perpetuates the fraud, the doctrine of waiver should not be applied. The doctrine of waiver must be applied to promote justice, not thwart justice. *Id.* at 700.

The Court of Appeals decision here directly conflicts with this Court's clear instruction that the doctrine of waiver must not be applied when it perpetuates a fraud and thus thwarts justice. Plautz committed fraud on the Form 17 Disclosure by intentionally misrepresenting the roof had not leaked in the previous five years.

Application of the doctrine of waiver barring a claim of fraud due to inspection waiver thwarts justice, and perpetuates fraud rather than promoting justice. It is the wrongful application

of the equitable doctrine in contradiction with this Court's clear directive. Accordingly, this Court should grant this petition for discretionary review.

C. The Court of Appeals' Decision Contradicts Published Decisions by Courts of Appeal.

The Court of Appeals decisions conflicts with a published decision by Court of Appeals Division II.

In *Stieneke v. Russi,* 145 Wn. App. 544, 190 P.3d 60 (2008), the Court of Appeals addressed a fact pattern and legal claim strikingly similar to the instant matter. There, appellants experienced a leaky roof in a home purchased from respondents who misrepresented the status of the roof on disclosures forms (Form 17) signed prior to the closing. *Id.* at 551. On Form 17, the seller stated that the roof had not leaked. The buyers did obtain their own inspection on the property but forewent (waived) a roof inspection based upon the representations of the sellers. *Id.* at 552-54.

The Court of Appeals expressly determined that the buyers had a right to rely upon the statement of the sellers that the roof had not leaked. Specifically, the Court stated:

> Here, Troy Russi made assertions regarding the roof's history. The Stienekes relied on those representations in limiting their roof inspection. Additionally, Cypher's testimony was that a reasonable property examination would not have uncovered what Russi affirmatively misrepresented. This evidence supports the trial court's finding that the defect was not readily apparent from a property inspection, that the Stienekes had a right to rely on those representations, and that their reliance was justifiable under the circumstances.

Id. at 564-65.

In the instant matter, the Court of Appeals' decision means that Apgood had no right to rely on the statements of Plautz regarding the state of the roof. These decisions are in contradiction with each other.

D. There is An Issue of Substantial Public Importance that Should Be Determined By the Supreme Court.

The Court of Appeals decision incorrectly applied an equitable doctrine in a manner which perpetrates fraud.

The Court of Appeals decision renders receipt of mandatory disclosures pursuant to RCW 64.06.020 completely meaningless when a buyer waives inspection. While the statute requires express waiver to alleviate the obligation of receipt of the disclosures, the decision states that even without such express waiver a buyer does not have the right to rely upon the content of the disclosures. If one had no right in relying upon the content, there simply is no point in mandating the receipt of the disclosures.

The Court of Appeals decision is an unprecedented ruling, finding fraud to be barred by the doctrine of waiver. Reliance upon *Cox v. O'Brien,* 150 Wn. App. 24, 206 P.3d 682 (2009) is misplaced. There, the Court found negligence misrepresentation claims (which are not fraud) are barred by the doctrine of waiver.

Extending this determination to fraud only serves to perpetuate fraud, which has never before been done.

This Court has been historically protective of fraud claims, protecting the victims of fraud in permitting their claims to move forward. In the context of the independent duty doctrine, this Court has expressly stated that the lower courts (trial courts and Courts of Appeal) are NOT permitted to bar fraud claims pursuant to the independent duty doctrine unless the Supreme Court expressly says so. *Eastwood,* 170 Wn.2d at 417. This is clearly to protect the victims of fraud. Such protection is also necessary under the doctrine of waiver.

The Court of Appeals decision threatens to harm the citizens of the State of Washington. As of now, if a buyer waives inspection, the buyer is also waiving any claims of fraud against the seller for any intentional misrepresentations on Form 17 (legislatively mandated disclosures to protect the buyers of residential real estate). Therefore, fraud claims in all property

purchases where inspections are waived are barred. This involves a *huge* public interest.

For the last several years, there has been a growing nationwide trend for purchasers of residential real estate to waive inspections.[5] Now, a Washington Court of Appeal has ruled that fraud claims are not available to buyers who have waived inspection. This unknown and unanticipated bar of fraud claims affects a growing number of home buyers in the State of Washington.

This trend is being furthered by private equity firms. Private equity firms have become increasingly involved in the purchase of residential homes. In fact, in 2023, 44% of all single-family homes in the country were purchased by private equity firms.[6] Private equity firms can dominate the market by making

[5] https://www.wsj.com/articles/buying-a-first-home-costs-more-than-you-think-especially-now-11643970604
[6] https://medium.com/@chrisjeffrieshomelessromantic/report-44-of-all-single-family-home-purchases-were-by-private-equity-firms-in-2023-0c0ff591a701

cash offers with waiver of inspections. Private citizens can only compete with the equity firms if they also waive inspections.

A private equity firm is much more likely able to endure costs of repair for issues undetected due to no inspection and which the seller misrepresented on requisite disclosures. If fraud claims are barred upon waiver of inspection, the individual consumer is placed at a distinct and unfair disadvantage to the private equity firms. The Court of Appeals decision actually furthers the private equity firm takeover of the residential real estate market, something that should scare us all.

With an increasing number of home buyers waiving inspection, the buyers should be protected against fraud. The Court of Appeals ruling here leaves buyers exposed and unprotected. It is of significant public interest.

VI. CONCLUSION

Lying on statutory mandatory disclosures in a residential real estate transaction is fraud. Period. For the first time ever,

the Court of Appeals has determined that the doctrine of waiver bars a fraud claim. This cannot be and is in direct contradiction with the Supreme Court's clear statement that equitable doctrines should not be used to perpetrate fraud. Even where inspections have been waived and property is accepted as is, buyers should be able to rely upon the integrity of required disclosures. Sellers should not be permitted a pass on accountability for their lies just because a buyer has waived inspection without expressly waiving mandatory disclosures.

This unprecedented extension of the doctrine of waiver threatens all home buyers in the State of Washington and contradicts clear Washington Supreme Court precedent in protecting the victims of fraud.

For these reasons, it is respectfully requested that the Court grant discretionary review of the Court of Appeals decision.

I certify that this brief is in 14-point Times New Roman font and contains 3,236 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(a), (b) and (c).

Dated this 16th day of April 2024.

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APPENDIX – Court of Appeals Decision

FILED
3/18/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT S. APGOOD, individually and as Trustee for the ROBERT S. AND NANCY B. APGOOD LIVING TRUST, Appellants, v. ROGER A. PLAUTZ AND LINDA S. PLAUTZ, individually and the marital community composed thereof; JAMES S. GLENN AND JANE DOE GLENN, individually and the marital community composed thereof; and LEGACY HOME INSPECTIONS LLC, a Washington Limited Liability Company, Respondents.	No. 85229-9-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — Robert Apgood purchased a home from Roger and Linda Plautz, which Apgood claims had a leaky roof. He appeals the summary judgment dismissal of his suit against the Plautzes and their home inspector, arguing that the trial court improperly applied the independent duty doctrine to his claims against the former and erred by considering the latter's motion at all. Because Apgood's claims against the Plautzes are barred by waiver and the home inspector owed him no legal duty, we affirm.

I. BACKGROUND

In August 2017, the Plautzes listed their home in Stanwood for sale. In February 2018, the Plautzes retained James S. Glenn and Legacy Home Inspections LLC (collectively Legacy) to inspect the property and issue a report. The report noted that the roof "appears to be a 40 year single ply type material" and "appears to be more than 20 years old," but said nothing more substantively about the roof's condition and nothing about water damage.

On May 17, 2018, Apgood and the Plautzes executed a residential real estate purchase and sale agreement (PSA) and an "Inspection Addendum to Purchase and Sale Agreement." The latter expressly provided that it was "part of" the former. In the addendum, Apgood initialed the following waiver clause:

> WAIVER OF INSPECTION. Buyer has been advised to obtain a building . . . inspection, and to condition the closing of this Agreement on the results of such inspections[,] but Buyer elects to waive the right and buy the Property in its present condition. Buyer acknowledges that the decision to waive Buyer's inspection options was based on Buyer's personal inspection and Buyer has not relied on representations by Seller, Listing Broker or Selling Broker.

The PSA also contained the following integration clause:

> This Agreement constitutes the entire understanding between the parties and supersedes all prior or contemporaneous understandings and representations. No modification of the Agreement shall be effective unless agreed in writing and signed by Buyer and Seller. . . .

The sale closed on July 2, 2018.

Before the parties signed the PSA, the Plautzes' real estate agent provided Apgood with a copy of Legacy's inspection report. The Plautzes also provided Apgood with a seller disclosure statement (Form 17), which the Plautzes signed on February 25,

2018. On Form 17, the Plautzes checked the box labeled "NO" in response to the following question: "Has the roof leaked within the last 5 years?"

After purchasing the home, Apgood observed signs of water damage in the living room. In 2021, Apgood contacted a roofing company to obtain an estimate and bid. The roofer observed significant damage to the roof and informed Apgood that he needed a complete roof replacement. During the demolition process, the roofer found evidence of leakage and water damage. The roofer testified that he would have expected to see this damage referenced in Legacy's report.

In December 2021, Apgood sued the Plautzes and Legacy. Apgood alleged fraud in the inducement and negligence against the Plautzes based on their alleged failure to disclose the leaky roof and water damage. He also alleged negligence against Legacy for "failing to perform the inspection thoroughly and completely."

On January 25, 2023, the Plautzes moved for summary judgment on Apgood's claims against them. On February 27, 2023, Legacy responded to the Plautzes' motion and asked the court to "grant the Plautzes' [m]otion . . . and additionally grant dismissal as to Glenn/Legacy as the other Defendants in this action." On March 16, 2023, after hearing oral argument from the parties, the trial court entered an order dismissing Apgood's claims against the Plautzes because Apgood "knowingly and voluntarily waived his right to inspect the property and his claims are barred by the Economic Loss Rule." On March 24, 2023, the trial court entered a supplemental final order dismissing Apgood's claim against Legacy because, among other reasons, Legacy owed him no duty. The trial court later awarded fees and costs to the Plautzes based on the purchase and sale agreement.

Apgood timely appeals.

II. ANALYSIS

A. Standard of Review

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). We view the facts and all reasonable inferences in the light most favorable to the nonmoving party. Id. "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Visser v. Craig, 139 Wn. App. 152, 157, 159 P.3d 453 (2007) (quoting CR 56(c)). "We may affirm a trial court's decision on a motion for summary judgment on any ground supported by the record." Port of Anacortes v. Frontier Indus., Inc., 9 Wn. App. 2d 885, 892, 447 P.3d 215 (2019).

B. Plautz Dismissal

Apgood argues that the trial court erred in dismissing his fraud claim[1] on the basis of the former economic loss rule, now known as the independent duty doctrine. See Alejandre v. Bull, 159 Wn.2d 674, 681, 153 P.3d 864 (2007) (limiting recovery to contract remedies when a loss potentially implicates contract and tort relief). He points out that our Supreme Court has "repeatedly recognized a fraud claim to be outside the doctrine's scope," even in the real property context. Elcon Const., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 166, 273 P.3d 965 (2012).

[1] Apgood does not appeal dismissal of his negligence claim against the Plautzes.

However, we need not reach this issue because we agree with the Plautzes that Apgood's claims are barred by waiver. "The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled. A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." McLain v. Kent Sch. Dist. No. 415, 178 Wn. App. 366, 378, 314 P.3d 366 (2013) (quoting Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960 (1954)). An express waiver is governed by its own terms. Matter of Estate of Petelle, 195 Wn.2d 661, 665, 462 P.3d 848 (2020). "Ordinarily, statutory interests can be waived." Id. at 668.

Apgood asserts that he relied on the Plautzes' misrepresentations contained in Form 17 and the Legacy report in his decision to enter the PSA and in his decision to waive further inspections. He contends that the Plautzes fraudulently induced him into those decisions. But in the PSA, Apgood unequivocally elected to waive his right to condition the closing of the sale on the results of his own independent inspections, choosing instead to purchase the property "in its present condition." Apgood also expressly agreed that he "ha[d] not relied on representations by Seller, Listing Broker or Selling Broker" in deciding to waive his inspection options. And Apgood further agreed that his agreement with the Plautzes, captured in the PSA and addendum, "supersedes all prior . . . representations." Apgood's decision to intentionally and voluntarily waive his right to rely on any prior representations by the Plautzes is fatal to his fraud claim. See Cox v. O'Brien, 150 Wn. App. 24, 35, 206 P.3d 682 (2009) (plaintiffs assumed risk of structural defects by expressly waiving structural inspection); see also Jackowski v.

Borchelt, 174 Wn.2d 720, 738, 278 P.3d 1100 (2012) (to prove a fraud claim, plaintiffs must establish that they "had a right to rely on the representation" at issue).

In reply, Apgood asserts that the doctrine of waiver does not bar his claim because the seller disclosures required by RCW 64.06.020, captured in Form 17, "can only be waived when the buyer expressly waives the receipt of the seller disclosure statement," citing RCW 64.06.010(7). Apgood misunderstands RCW 64.06.010(7). That provision says nothing about a buyer's ability to waive the representations made in Form 17; rather it simply states that a seller must provide Form 17 unless the buyer expressly waives receipt. Here, Apgood did not waive his right to receive, and in fact Apgood did receive, Form 17. What matters for this case is that he then chose to expressly waive his right to rely on "all prior . . . representations."

Apgood further asserts that the inspection waiver is irrelevant to the claims he brings because the addendum is a "post-contract attachment" that was separate and "after" the PSA, which he was fraudulently induced to enter into by the misrepresentations in Form 17. But, first, the addendum expressly provided that it was "part of" the PSA and together "constitute[d] the entire understanding between the parties." Second, again, that agreement was backwards looking, and expressly "supersede[d] all prior or contemporaneous understandings and representations." Finally, Apgood's attempts to distinguish the authority above and vague allusions to violation of "public policy" are also unavailing.

For these reasons, the trial court did not err in dismissing Apgood's fraud claim against the Plautzes on the basis of waiver.

C. Legacy Dismissal

Apgood does not substantively challenge the trial court's order dismissing his negligence claim against Legacy on summary judgment. Instead, he argues that the order should be vacated on procedural grounds. [2]

Apgood acknowledges that a nonmoving party may obtain summary judgment under certain circumstances. See, e.g. Impecoven v. Dept. of Revenue, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (ordering entry of summary judgment in favor of the nonmoving party where the facts were not in dispute). But Apgood contends that such relief is unwarranted here because Legacy ignored the "clear protocols" of CR 56, which requires a motion to be filed and served at least 28 days prior to the hearing date. Here, it is undisputed that Legacy filed its request for summary judgment dismissal via its response to the Plautzes' motion for summary judgment less than 28 days before the hearing. Apgood further contends that summary judgment was procedurally improper because his claims against the Plautzes are legally and factually distinct from his claim against Legacy.

We agree with Legacy that summary judgment was proper because, among other reasons, the undisputed facts established that Legacy owed no duty to Apgood as a matter of law.

The purpose of summary judgment is to "avoid a useless trial." Regelbrugge v. State, 7 Wn. App. 2d 29, 37, 432 P.3d 859 (2018) (citing Preston v. Duncan, 55 Wn.2d

[2] Apgood argues that the issue raises a question of law that should be reviewed under the typical de novo summary judgment standard of review. Legacy contends that Apgood's claim is purely procedural and thus should be reviewed for abuse of discretion. See Sprague v. Sysco Corp., 97 Wn. App. 169, 171-172, 982 P.2d 1202 (1999) ("[d]ecisions regarding application of civil rules are reviewed for an abuse of discretion."). The result is the same under either standard.

678, 681, 349 P.2d 605 (1960)). "To prevail on a negligence claim, a plaintiff 'must show (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the proximate cause of the injury.'" Ehrhart v. King County, 195 Wn.2d 388, 396, 460 P.3d 612 (2020) (quoting N.L. v. Bethel Sch. Dist., 186 Wn.2d 422, 429, 378 P.3d 162 (2016)). The "[e]xistence of a duty is a question of law." Vargas v. Inland Wash., LLC, 194 Wn.2d 720, 730, 452 P.3d 1205 (2019) (quoting Hertog ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)).

Here, the undisputed evidence showed Legacy had no duty to Apgood as a matter of law. The Plautzes and Legacy signed a "Pre-inspection Agreement," which states in pertinent part, "The inspection and report are performed and prepared for the sole, confidential and exclusive use and possession of the client." The final report is entitled "CONFIDENTIAL INSPECTION REPORT PREPARED FOR: Roger Plautz" and expressly specified that "[t]his report is the exclusive property of the Inspection Company and the client whose name appears herewith, and its use by any unauthorized persons is prohibited." It is undisputed that Apgood was not Legacy's client, did not receive the inspection report from Legacy, and had no contact with Legacy before the lawsuit commenced. See WAC 308-408C-020(3) (requiring the inspector to "discharge his or her duties with integrity and fidelity to the client"); WAC 308-408C-020(10) (prohibiting inspectors from disclosing information contained in the inspection report "without client approval or as required by law"). Apgood otherwise adduces no facts creating a fact issue of the existence of any duty, instead focusing on Legacy's alleged failings as an inspector and the relationship between Legacy and Plautz, which is inconsequential in the absence

of duty to Apgood. These facts are sufficient to affirm summary judgment dismissal of Legacy.

Apgood also argues that he was deprived of an opportunity to respond and conduct discovery as to Legacy. That should give us pause. See In re Estate of Toland, 180 Wn.2d 836, 853, 329 P.3d 878 (2014) (noting that when a reviewing court concludes that summary judgment should be granted in favor of the nonmoving party, the opposing party will often be deprived of an opportunity to respond). But Apgood was fairly apprised of Legacy's motion at least 11 days before the summary judgment hearing and filed a surreply that simply did not address the purely legal issue whether Legacy owed him a duty. Apgood, thus, had a "full and fair opportunity to ventilate the issues involved in the motion" and chose not to. In re Rothery, 143 F.3d 546, 549 (9th Cir. 1998) (analyzing the federal counterpart to CR 56, and holding that a court may grant summary judgment without notice in such circumstances).[3]

The trial court did not err in granting summary judgment to Legacy.

D. Attorney Fees

The Plautzes and Apgood both request attorney fees on appeal pursuant to the PSA, which provides that "if Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys' fees and expenses." RAP 18.1 permits recovery of reasonable attorney fees or expenses if applicable law grants that right. We award reasonable fees and costs on appeal to the Plautzes as the prevailing party, subject to their compliance with RAP 18.1(d).

[3] When a state civil rule follows the federal rule, decisions interpreting the federal rule are persuasive authority. State v. Land, 121 Wn.2d 494, 497-99, 851 P.2d 678 (1993).

III. CONCLUSION

Affirmed.

Díaz, J.

WE CONCUR:

Chung, J.

Coburn, J.

DECLARATION OF SERVICE

I hereby certify that on April 16, 2024, a copy of the foregoing ***Document*** and this ***Declaration of Service*** were served on the parties below as noted:

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I certify under penalty of perjury of the law of the State of Washington that the foregoing is true and correct.

Signed this 16th day of April, 2024 at Tacoma, WA

*Elizabeth Chaves*_
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FREEMAN LAW FIRM, INC.

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