68067-6

68067-6

NO. 68067-6-I

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION I

SHANE AND AMY WATTS,

Respondents,

v.

MARY DUNPHY AND MARK DUNPHY

Appellants

BRIEF OF RESPONDENT

Craig Jonathan Hansen
Hansen Law Group PS
12000 NE 8th ST. Ste 202
Bellevue WA 98005
V: 425-709-6762
Email: jhansen@hansenlaw.com

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR.....2

III. ISSUES PERTAINING TO ASSIGNMENTS 2

IV. FACTUAL BACKGROUND - REPLY 3

Mary Dunphy Had Special Knowledge 4
The HOA Board, Other Than Cleaver and Dunphy.
Had Little Knowledge 5
The HOA Minutes Are Not Notice Under Alejandre....9

V. ARGUMENT 13

The Insufficiency Of The Minutes Is A
Question of Fact 13
The Watts Were Inexperienced Home Buyers 15
The Minutes Had Mentions of Inspections Buried
In A Sea Of Other Problems.....16
The Court Must Find, If The Watts had Conducted
A Reasonable Inquiry, They Would Have Found
The Problem 18
Any "Notice" Contained in the HOA Minutes is
Factually Distinguished From *Alejandre*.....23
The Watts Had a Right to Rely on Dunphy's
Represenations; The Court Was Right to Find Fraud ..23

CONCLUSION.....24

TABLE OF AUTHORITIES

STATUTES

RCW 63.34.425 9

CASE LAW

Alejandre v. Bull
159 Wn2 d 674, 153 P.3d 864 (2007).....1, 17, 18, 22, 24

Recreational Equipment, Inc. v. World Wrapps Northwest, Inc. 165 Wash.App. 553, 266 P.3d 924
(Wash.App. Div. 1, 2011).....13

George E. Lumber Co. v. Holden,
45 Wn.2d 237, 273 P.2d 786 (1954).....13, 14

Albice v. Premier Mortg. Services of Washington, Inc.
157 Wash.App. 912, 239 P.3d 1148, 1157
(Wash.App. Div. 2, 2010).....14, 15

Miebach v. Colasurdo, 102 Wash.2d 170,
685 P.2d 1074 (1984).....15

Paganelli v. Swendson, 50 Wash.2d 309, 311 P.2d 676.....19

Tjosevig v. Butler, 180 Wash. 151, 38 P.2d 1022 (1934) ...19

Gold Creek North Ltd. Partnership v. Gold Creek Umbrella Ass'n 143 Wash.App. 191,
177 P.3d 201, 207 (Wash.App. Div. 2, 2008).....19

I. INTRODUCTION

While the Watts generally agree with the introduction and history of the case, as outlined by the Appellants, the Appellants misstate the question in this appeal.

Dunphys argue that there is only one question, whether the HOA Minutes, considered only by themselves, as a matter of law put the Watts on notice under *Alejandre v. Bull*, 159 Wn. 2d 675, 153 P.3rd 864 (2007).

We argue that this is not a "singular" question. A question of whether statements in a set of HOA Minutes is sufficient notice, under *Alejandre*, to bar the Watts from recovering, is a finding of fact, and must be analyzed in the factual context of the case. It is not possible to simply look at the text of a set of minutes and decide, based almost entirely on hindsight, as a matter of law, without knowing anything more, whether the Minutes were sufficient notice to bar the Watts from recovering.

Judge Lum found that the facts in this case were substantially different from the facts in *Alejandre*, and found as a fact that they were insufficient to give the Watts notice. His ruling was completely appropriate, supported by the trial record, and should be upheld.

II. REPLY - ASSIGNMENTS OF ERROR

1. The trial court did not err when it made the Finding of Fact that the HOA minutes were insufficient to put the Watts on notice. CP 77 at ¶ v.

2. The trial court did not err when it concluded as a matter of law that the HOA minutes did not put the Watts on inquiry notice of the defects. CP 79 at ¶ 3.4(5).

3. The trial court did not err when it concluded the Watts had proven by clear, cogent and convincing evidence that the Watts had the right to rely on Mary Dunphy's representations.

III. REPLY - ISSUES

1. Substantial evidence existed to support the trial court's finding as to the insufficiency of the HOA minutes.

2. There was substantial evidence to support the trial court's finding of fact that the HOA Minutes were intrinsically different from a homeowner's inspection, and thus did not put the Watts on inquiry notice.

3. The trial court's findings as to the Minutes was a Finding of Fact, not a Conclusion of Law. CP 77 at ¶ v.

III. FACTUAL BACKGROUND REPLY

For the most part, the Dunphy's factual recitation is accurate. However, it leaves out critical pieces of the context.

The Watts were first time home buyers. RP at 28. They had never owned a house or condo before and had little knowledge of possible condo problems. They got no help in reading the Minutes from their agent, Jean LeTellier. LeTellier had no memory of the Resale Certificate packet or going over it with the Watts. RP at 35, 48. Ms. Letellier also testified that the Form 17 is typically the only way - besides an inspection - for a buyer to know what is wrong with a house. RP at 23-24. She was not familiar with problems with condo conversion projects, RP at 52, and could not have warned the Watts of potential problems. They did not know what a Public Offering Statement (POS) was. RP at 308.

Dunphy argues that the mention of an "envelope study" was enough to put the Watts on inquiry notice. The term "Envelope Studies" is not common knowledge. Ms. LeTellier, an experienced realtor, did not know what an envelope study was. RP at 31-32. Mary Dunphy, a realtor experienced in condo conversions, testified that she had to learn about an "envelope study" herself from Suhrco. RP at 405. If experienced realtors did not know what an "envelope study" was, it is unlikely a first time homebuyer would recognize it as a red flag.

Mary Dunphy Had Special Knowledge of Defects From The Beginning. Mary Dunphy was a trained realtor. All of her experience was in condo conversions - like the Kirkland Village complex. RP at 348-352, 377. She had experience in condo conversion problems, RP at 352. The Watts knew she was a realtor and trusted she knew what she was talking about when she gave them both Form17's. Dunphy was integrally involved in the inspection process for the complex, from the beginning. RP at 11. She coordinated and was the Board's representative for the October 2006 inspection. RP at 388-389. She had concerns about the water resistant barrier (WRB) at that time. RP at 388-389.

She knew what a Public Offering Statement (POS) was. RP at 351. She and Craig Cleaver (HOA President) were on the May 4 walkthrough with Corke Amento inspectors. RP at 414-415. No other Board members were present. She saw all the problems with missing WRB, and knew that had to be disclosed. RP at 384, 387.

She also testified that the property manager - not the seller - put the Resale Certificate packet together. RP at 369-370. She testified that a resale certificate (and HOA minutes) do not substitute for a Form 17. RP at 372. She testified that a seller - Dunphy - has no responsibility to check for HOA minutes in the Certificate. RP at 371. Dunphy never reviewed or

read the HOA minutes before the lawsuit was filed. RP at 379. She was the one that left the Resale Certificate on the counter at the condo for the Watts to find. RP at 368.

Dunphy knew she had a duty to disclose defects. RP at 353, 354, 356-357, 361-362, 366. Her duty to disclose extended to problems with the rest of the complex that she knew. RP at 387. She saw her unit was missing the WRB. RP at 413. She testified - after being confronted with her earlier testimony - that she was at the May 4 walkthrough. RP at 414. She knew they were substantial. RP at 422. Three experienced realtors testified: Jean Lettelier; Mary Dunphy, and Jeffrey Stegelman, RP at 253. **All three testified that the defects had to be disclosed**.

The HOA Board, other than Mary Dunphy and Craig Cleaver, knew little about the inspections.

The HOA Minutes were informal. There is no statutory requirement that they provide any notice to prospective buyers. They are obviously not Form 17's. The Board prepared and kept them informally. RP at 59-60.

The inspections, overall, were not treated as major problems (other than being expensive) by the Board, prior to the final Corke Amento report (which came in after the Watts sale closed). The results of the October

inspection did not concern Craig Cleaver unduly. RP at 63-65. Suhrco was not on board in October 2006. RP at 105.Suhrco did not even have a copy of the October report. RP at 80. The bulk of the evidence is that the Board - except for Dunphy - never thought the October 2006 inspection, in and of itself, was especially concerning. They would likely have told that to the Watts, had they asked anyone on the Board.

In the spring of 2007, the Board decided to do a more detailed inspection based on the recommendation of Suhrco, the new property manager, to compare the Public Offering Statement (POS) to reality. RP 64-65; RP at 393, 403. It was a prudent thing for the Board to do. RP at 64. They talked to a defects attorney (David Onsager) but did not hire him. RP at 68. Suhrco had suggested the envelope study or intrusive study as a routine thing to do when taking over a conversion condominium project. RP at 107. They had recommended this as a normal part of the transition. RP at 107. As of July 2007, Surhco probably didn't have a copy of any of the reports to date. RP at 80-81. If the Watts had asked Suhrco about the inspections, that is what they would have been told. A routine transition inspection, RP at 78, is hardly a red flag for major defects.

On May 4, 2007, Cleaver and Dunphy walked through the complex with David Onsager and Corke Amento inspectors. RP at 73-76 118.

Cleaver testified that there were some issues pointed out. RP at 118. He recalls there was an understanding that there were problems but not very specific. RP at 121-122. He testified the major problems he was concerned with in May-July 2007 were landscaping and parking. RP at 136. If the Watts had asked him what the major problems were, in July 2007, the evidence is that he would have told them landscaping and parking, NOT the inspection.

The only person who really, beyond question, understood the magnitude of the problem was Mary Dunphy - who the trial court found was lying to hide the problem. Asking Dunphy would have been pointless.

There was a Board meeting on May 8, 2007; but Cleaver discussed the walkthrough inspection results only in generalities. RP at 75.

Cleaver got the draft report on July 10, 2007. RP at 84-85. He did not share it with anyone on the Board or the property manager (Suhrco). RP at 84-85. If the Watts had asked Suhrco or the Board for the inspection, they could not have given it to them. The only persons who had any real idea of the inspection results were Craig Cleaver and Mary Dunphy.

The Watts could not have gotten the report from Corke Amento. Corke Amento was not releasing it until they got paid. RP at 88. Cleaver

did not get the final report from Corke Amento until September 2007 - after the Watts sale closed. RP at 81.

The Inspection showed major problems that were very apparent to the people walking through. Mark Cress was the engineer in charge of the inspection for Corke Amento. When they performed the inspection, they found major problems. RP at 159; Trial Exhibit 9. At the May 4 walk-through, with Mary Dunphy there, they pointed out damage and talked about the legal issues. RP at 161-162. Cress estimated 70% of the buildings had missing or improperly installed WRB. RP at 168, 171-172. He was very clear that the problems he had pointed out, and that Mary Dunphy had seen, were significant problems. RP at 174, 197, 198-199.

Cress also testified, twice, that a reasonable homeowner's inspection would not have found the problems. RP at 169-170; 179.

The Watts were careful buyers. They read the materials they had. They had a home inspector inspect the condo. The home inspector, as routine matter, does not pull off siding unless he is warned to do so. RP at 34. A home inspector does not inspect the rest of the complex. RP at 34. They do not as a matter of course go back and ask for other inspections of the complex. RP at 34-35. Unless he was warned of possible problems, there was no reason for their inspector to look for other problems with the

complex, and no way for the Watts to know WRB was missing off of their unit.

The testimony was that home buyers rely on the Form 17 to warn them of problems with a home. RP 23-24. Mary Dunphy agreed she had a duty to fill it out correctly. She agreed it was for the buyers' use. She agreed that a buyer had no other way to know about defects in the home. RP at 413. She agreed that was the only way buyers had to know about defects in a home. Dunphy knew there was no WRB on her unit, RP at 413, and purposely hid the fact.

The HOA Minutes Are Not Notice Under Alejandre.

The Minutes are required to be provided to the buyer of a condominium by statute. RCW 64.34.425 requires them to be provided, along with other material from the HOA, as part of a resale certificate, prior to closing. They are NOT required to be provided by the seller. They are not flagged or otherwise identified as inspections. See RCW 64.35.425. They are merely part of a packet of documents.

There is no statutory or case law requirement that they contain any information at all about defects in the complex; they are merely HOA Board Minutes. There is no Washington case law that holds HOA Minutes are intended to put buyers on notice. They have nothing to do with and are

not related to a seller's duty to disclose defects. Mary Dunphy had no right or basis to rely on them to disclose defects to the Watts.

The HOA Minutes here were created and treated casually. Mary Dunphy never created the minutes. RP at 379. She had no specific memory of reading the minutes, proofing them, or reviewing them, prior to selling her unit. RP at 379. She did not even know where they were kept. RP at 380. She didn't know what was in them. RP at 379. There is **no** evidence that any Board member, other than Craig Cleaver, actually knew what was in their own minutes.

The HOA Minutes at Trial Exhibit 3 consist of 33 pages, covering July 2006 through December 2007. See Exhibit 3. The relevant time period - July 2006-July 2007 - is 25 pages. They are filled with informal records of problems and issues and what was discussed during HOA meetings. This is for a 64 unit condominium project.

The majority of the things discussed at Board meetings were not defects. Craig Cleaver testified the meetings were taken up with complaints, RP at 103; landscaping and water feature issues, RP at 104, bookkeeping, RP at 104; and complaints from drama queens. RP at 103.

An analysis of the HOA minutes shows as follows:

There are 25 pages of minutes in the relevant period. Trial Ex. 3. These cover 10 months. Each month has between two and four pages. The Minutes are not designed as inspection reports; they are not required or intended to be formal notification to a prospective buyer of anything. The Board dealt with them that way: they were casually done; rarely read by even the Board members, and once done simply stored away and not looked at.

There is a plethora of problems and issues in each set of minutes, which reflect what the Board was dealing with that month. None of them are ranked or identified as more or less serious.

For example, the December 2006 Minutes, Ex.3, Page 8, discuss outdoor issues; painting not being done until spring; vinyl siding not being pulled off until the rain was more cooperative; power washing delayed because of cracks in sidewalls; landscaping problems; tops of carports needed cleaning; contract expiration date; trash bin problems; rental cap votes; problems with the management company; transition audits; and warranties. Perhaps half of the items were problems the Board was dealing with: some of them may have been major; some minor; it is self-evident that there is no easy way to separate the minor problems from the major.

Some problems appear over and over again: parking spaces, power and lights, landscaping. Parking issues are mentioned in 10 of 10 Minutes. Trial Exhibit 3. Landscaping issues of one kind or another appear in 9 of 10 Minutes. Trial Exhibit 3. Any reasonable reader would conclude the major problems the HOA had, based on the amount of time and energy expended on them, were parking and landscaping. Inspections and studies are far down the list.

It is true that inspections like "Envelope Study" is mentioned in February 7 Minutes. However, Cleaver himself testified he understood it was a routine part of the transition process from the developer to the HOA. Jean LeTellier, the Watts' realtor, testified that she did not know what it meant. RP at 31-32. It is located in the same notes as the ones that talk about someone's board position and retaining a California CPA to audit the books. Ex. 3, page 11. It is only in hindsight, knowing what the Envelope Study was, and what it showed, that the term is a red flag.

V. ARGUMENT

The initial question is whether the court's finding that the meeting minutes were insufficient to put the Watts on notice is a Finding of Fact or a Conclusion of Law.

The insufficiency of the Minutes is a question of fact. If this is a fact, then the Dunphys are arguing to the wrong court. Challenged findings of fact are reviewed under a substantial evidence standard, which requires that there be sufficient evidence in the record to persuade a reasonable person that a finding of fact is true. If substantial evidence supports a finding of fact, an appellate court should not substitute its judgment for that of the trial court. *Recreational Equipment, Inc. v. World Wrapps Northwest, Inc.* 165 Wash.App. 553, 558-559, 266 P.3d 924, 927 (Wash.App. Div. 1, 2011). **Whether the evidence is sufficient to puts the Watts on inquiry notice is a question of fact.**

The Dunphys argue that since they are not disputing the essential facts, the standard of review is de novo. This misreads *George E. Lumber Co. v. Holden*, 45 Wn.2d 237, 245, 273 P.2d 786 (1954). There the court stated that the trial court is not required to regard to every item of evidence; entering only ultimate findings of fact is sufficient. However, findings of fact which are really conclusions of law will be treated as conclusions of law and will stand if there are other findings of fact sufficient to support the conclusion. *George E. Lumber Co. v. Holden* at 245. In this case, we argue that even if the "insufficiency" is not a fact,

there is more than enough other evidence to support the conclusion of insufficiency.

An appellant cannot simply state a Finding of Fact is undisputed; therefore claim it is really is a Conclusion of Law; and therefore the standard of review is de novo. The very disputing that it is a Finding of Fact means that it is disputed.

The question here is whether the HOA Minutes were sufficient to put the Watts on notice of potential problems. This is not a black and white issue, as Appellants argue. It depends on what kind of purchasers the Watts were; what the "notice" actually consisted of; and whether, even if it was sufficient, a reasonable inquiry would have shown the problem. Here the court found against the Dunphys on all parts. These findings are clearly facts.

First, The Watts Were Inexperienced Home Buyers. In determining whether a purchaser was put on inquiry notice, the courts give substantial weight to the purchaser's experience. The court in *Albice v. Premier Mortg. Services of Washington, Inc.*, stated:

> We give substantial weight to a purchaser's real estate investment experience when determining whether a purchaser had inquiry notice. *Compare Steward,* 51 Wash.App. at 513, 754 P.2d 150 (noting that the bona fide purchasers had little real estate investing experience at the time of the sale) and *Miebach v. Colasurdo,* 102 Wash.2d

> 170, 176, 685 P.2d 1074 (1984) (holding that the purchaser with 23 years of investment experience was not a bona fide purchaser). See *Albice v. Premier Mortg. Services of Washington, Inc.* 157 Wash.App. 912, 929-930, 239 P.3d 1148, 1157 (Wash.App. Div. 2,2010).

In this case, the Watts were first time home buyers. RP at 28. They had no experience in purchasing real estate, or condos in particular. They were unfamiliar with HOA Board meetings or the problems condo conversions face. RP at 303-312; 321-324; also Shane Watts' testimony, RP at 322-336. They also put a good deal of faith in what Mary Dunphy disclosed: they knew she was a realtor and trusted she knew what she was talking about. RP at 284. They testified that had they read the Minutes, they would not have known enough to pick out the real red flags from all the other issues and problems the Minutes showed. RP at 303-312; 321-324; also Shane Watts testimony, RP at 322-336.They had never read HOA minutes before. RP at 305.

They were at Dunphy's mercy, and she intentionally misled them. She had even left helpful handwritten notes for them on the Form 17. RP at 300; Trial Exhibit 16, page 3. They felt if anyone knew about problems, she would know about them.

They exercised a reasonable amount of diligence. They went through the Form 17 line by line, and nothing in it was a red flag. RP at

286-289. They did not recall getting the minutes. They did testify if they had seen them, they would not have known there were problems with the WRB. RP at 303-312; 321-324; also Shane Watts' testimony, RP at 322-336. They got a homeowner's inspection. Everyone - Mark Cress, RP at 169-170, Jean LeTellier, RP at 34, even Mary Dunphy, RP at 413-414 - agreed the Watt's homeowner's inspection would **not** have shown the problems with the complex or the missing WRB on her unit.

Second, The Minutes Had Mentions Of Inspections Buried in A Sea Of Other Problems. A look at the Minutes show while the words "inspection", "defect attorney", etc. are in the minutes, there is no context or details to indicate that these items were any more serious than the other items.

For example, take the June 2007 Minutes. Trial Exhibit 3, page 15. June was a month after the inspection. If the results were a huge problem for the Board at this time, one would expect to see a lot of discussion about it. Instead, there are only four lines, Ex 3, page 20, out of three pages of minutes. Ex. 3, pages 19-21.

Because there was no prioritization in the Minutes, the Watts would have had to inquire as to everything. They had to ask what the landscaping problems were, and, because landscaping is mentioned in

every meeting, ask to see the actual problem areas. (In June landscaping was a huge issue; it took up almost 25% of the Minutes.). Again, they needed to go into the parking problems; was that going to cause a problem? There were a host of minor issues as well. But from the space devoted to it in the Minutes, the envelope study and possible assessment were NOT major problems.

And this was for just one month worth of Minutes. They would have had to do the same thing, for all nine months; and do it within a couple of days, or they waived their inspection contingency. (It is true that they would have figured out quickly if "parking" was really a problem; but they would only know that if they investigated.) That is far more than can reasonably be asked of a normally prudent buyer.

This is entirely different from the notice in *Alejandre*, where the buyer had specific notice of a specific problem, noted on an inspection form, that was specifically about the buyer's prospective home. Alejandre, at the very least, had in her possession something that related directly - and only - to her house. It was not a few "bullet points" in a long list of "bullet points", none of which were specifically about her house, and none of which she had any warning to watch out for.

The *Alejandre* court imposed a limit on what investigation is required. *Alejandre* noted that the septic system was shallow and easily accessible. The court does not require a buyer to spend unreasonable amounts of time and money following up on every possible hint of a problem.

The purpose of the Minutes is also relevant. A Form 17 is designed to provide information about problems to potential buyers. Like any prudent buyer, the Watts went through it carefully. Unlike a Form17, the Minutes are informal records of meetings. Nothing helps a buyer filter out the noise in the Minutes. That is what the trial court found. The trial court was correct in finding intermittent mention of inspections, defects, etc., are not sufficient to put the Watts on notice.

Third, the court must find that if the Watts had conducted a reasonable inquiry, they would have found the problem. In this case, the weight of the evidence is that they would NOT have found the problems.

A circumstance that should lead a person to inquire provides notice only of what a reasonable inquiry would reveal. *Paganelli v. Swendson,* 50 Wash.2d at 309, 311 P.2d 676 (citing *Tjosevig v. Butler,* 180 Wash. 151, 159, 38 P.2d 1022 (1934)). See *Gold Creek North Ltd. Partnership v.*

Gold Creek Umbrella Ass'n, 143 Wash.App. 191, 203, 177 P.3d 201, 207 (Wash.App. Div. 2, 2008).

Inquiring about problems, in a condominium sale, where the seller is purposely misleading a buyer, is fundamentally different from the buyer's ability to inquire in *Alejandre.* There, the buyer could easily gain access to the septic system.

Here, the Watts could not have gotten an envelope study of their own done. The envelope study cost the HOA many thousands of dollars. See Corke Amento Billing at Ex. 2. No HOA is going to agree to let a unit buyer take the siding off all of the buildings, even if they had wanted to and had the resources. That is not a "reasonable inquiry". They had to be able to get enough knowledge of what the inspection showed, to know the specific problems, so that they knew the risk.

The critical event is the May 4, 2007 walk through. Prior to that, but anyone asking about the inspection would have been told it was to compare the POS to reality; a normal thing for a Board to do. RP at 64. That would not have been a red flag. It is on May 4 that the full extent of the damage became apparent - to the people at the walk-through.

Who, then, could the Watts have asked about the inspection results?

They could not ask Terry Hughes, the Suhrco property manager. Hughes (and Suhrco) were not managing the HOA in October 2006, Ex. 3, page 7, and did not even have copies of any of the inspections (October 2006 or May 2007) to show the Watts, at the time they would have asked. RP at 64. Neither Cress, Cleaver, or Dunphy testified anyone from Suhrco, including Terry Hughes, walked through with them, when Cress pointed out the problems. RP at 160-161. The Corke Amento billing does not list anyone from Suhrco. Ex. 2, page 13. There is no evidence that anyone from Suhrco walked through the complex with the Board on May 4, 2007. The most Suhcro could have told the Watts was that the envelope study was to compare the POS to reality, and that they did not have the results. RP at 64; 140. That is not a disclosure of the extent of the actual problems; it is not an actual inspection of a septic system.

The Watts could not ask Dunphy: it is undisputed that she had lied on both her Forms 17, and had no intention of telling them the truth.

They could not ask Mark Cress. He did not work for the HOA. RP at 140. Corke Amento would not have sent them the report: the final report was not done, and it had to be paid for before they released it to the HOA anyway. RP at 88, 131. Corke Amento would not have given it to a total stranger, or discussed it with them.

They could not have asked David Onsager. The HOA had not hired Onsager and never discussed the lawsuit with him. RP at 137. If the Watts had asked Cleaver about Onsager, presumably that's what he would have told them. And it is hard to believe Hughes or Cleaver would have discussed with the Watts what they talked about with a lawyer.

The Watts could not get any details from the other Board members either. They knew next to nothing. They had not been at the May 4 walk through. RP at 73. Cleaver testified the "Board" at the walkthrough was just him and Mary Dunphy. RP at 73; Exhibit 2 at page 13. The inspection was discussed with the Board at the May 8 meeting, Ex. 3, page 17; but Cleaver told them about the inspection only in generalities. RP at 75. Cleaver did not share the draft report with anyone on the Board. RP at 85, 87. It was not discussed in the June meeting; they were waiting for the final report. Ex. 3, page 20. There is strong evidence the rest of the Board did not know the inspection results. To find as a fact that the Board could or would have told the Watts about the extent of the problems is speculation, and a court may not base findings on speculation.

The Watts could have asked Craig Cleaver. But Cleaver was holding the inspection results very, very close to his vest. The HOA did not have the draft report. RP at 79, 81 He spent all of about three minutes

looking at the draft report. RP at 85. He did not even tell the Board about the draft report, RP at 85; it is unlikely in the extreme he would have told total strangers, like the Watts. It is also unlikely he would have bothered to even talk to them; he had no duty to talk to them at all, and he was working 100 hours a week at Microsoft, RP at 121. The evidence and all reasonable inferences derived from the evidence is that he would not have told them of the problems.

Craig Cleaver characterized the inspection, as far his planning was concerned, a normal part of the transition. RP at 64. He testified that in the walkthrough on May 4, he wanted to get an idea of the work, RP at 74, but mostly they talked in generalities. RP at 75. There were things they needed to look at, RP at 74; but in terms of his concerns as the HOA President at that time (May-July 2007), he was much more worried at the time about parking and landscaping. RP at 136. Telling the Watts about the parking and landscaping would not have been a red flag for the inspection results.

The only person the Watts could have talked to, who had knowledge of the results, was Cleaver. But this is a critical difference between *Alejandre* and this case. In *Alejandre* the buyer could have inspected the septic system. They did not have to figure out which septic system to inspect; they did not have to hope the septic system called them

back, or answered their email. To define a "reasonably prudent investigation" as meaning a buyer has to make someone talk to them, who has no duty to them and does not know them, is not reasonable.

Had the Watts actually, somehow, keyed in on the various "inspection" mentions, it is more than clear, from the evidence, that they would NOT have been able to find out about the problems. There is **no** evidence that they had any real way to get the inspection results. This is a factual finding.

Any "notice" contained in the HOA Minutes is factually distinguished from the notice in *Alejandre*. In *Alejandre*, again, there was one home. The buyer had been told earlier the septic system had had a problem. The homeowner had the septic system inspected, for that home specifically. The buyer was provided records of a septic tank report that said their tank could not be inspected. But it was just one home, theirs; it was one septic tank, belonging to their home; they knew there was potential problem with their home alone.

In this case, the Minutes did not mention at all the severity of the problem or the inspection results. It was not sufficient just to say there had been inspections, because the Watts had no access to the results, and

without the results they did not know of the problems. This is clearly a fact.

The Watts had a right to reply on Dunphy's false Form 17; the court was right to find fraud.

As an initial matter, the Dunphys cite no case or statute for the proposition that the Watts had no right to rely on Dunphy's Form 17. That is, after all, what the form is for.

Dunphys do argue that the right to rely is tied to the Watts' diligence regarding the information they had; and they did not exercise reasonable diligence. That is simply factually incorrect.

Again, the factual situation here is substantially different than in *Alejandre*. The entire *Alejandre* analysis involves disclosure of defects, *by the seller,* either by the Form 17 or by giving them a copy of the septic system report, to the buyer. Nothing in *Alejandre* requires a buyer to investigate information from other sources NOT provided by the seller.

The HOA Minutes are provided by the HOA, not the seller. They are not maintained or produced by the seller. They have no relationship to the seller's requirement to disclose defects. Mary Dunphy has no right to rely on the Minutes to disclose what she purposely lied about.

CONCLUSION

The Watts were diligent in inspecting their home, based on the two false Forms 17 Dunphy had provided. Nothing in the Minutes put them on inquiry notice. There was nothing else they could have done, even assuming they had asked.

The Watts had a right to rely on Dunphy's disclosures. She purposely lied to them. They exercised all the diligence they could or that the court can expect. *Alejandre* does not require a buyer to find a needle in a haystack - when the seller has purposely hidden the fact the needle even exists.

The court should award attorney fees. The trial court awarded attorney fees to the Watts as the prevailing party, and under the purchase and sale agreement. We would ask the appellate court to award the Watts their fees for this appeal.

DATED this 4 day of February 2013.

CRAIG JONATHAN HANSEN
WSB 24060
Attorney for Appellee/Respondent

Hansen Law Group, PS
12000 NE 8th St. Ste 202
Bellevue, WA 98007
Email: jhansen@hansenlaw.com
Voice: 425.709.6762