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SUPREME COURT  
STATE OF WASHINGTON  
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BY SUSAN L. CARLSON  
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97881-6

NO. 78166-9

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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DONNA WOODCOCK, a single person,

Appellant/Cross-Respondent,

v.

CATHERINE CONOVER (ne JENKINS), and MIKE CONOVER, and  
the marital community comprised thereof; WINSTON McCLANAHAN  
and JAKE DOE McCLANAHAN and the marital community comprised  
thereof; "JOHN DOE"; and SHERRY VOELKER-HORNSBY, all  
Washington residents,

Respondents/Cross-Appellants

Unpublished Opinion Filed September 9, 2019

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**PETITION FOR REVIEW**

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**A. IDENTITY OF PETITIONER**

Petitioner Donna Woodcock purchased a residence in West Seattle from Catherine Jenkins (n/k/a Catherine Conover) in the Fall of 2016.

**B. COURT OF APPEALS DECISION**

Petitioner seeks review of a decision by Division I of the Court of Appeals: *Woodcock v. Conover*, No. 78166-9-I; unpublished decision filed September 9, 2019, motion to publish denied on October 23, 2019. A copy of the decision is included in the Appendix, A.

**C. ISSUES PRESENTED FOR REVIEW**

1. Whether a seller of real estate who commits intentional misrepresentation during the disclosure/Form 17 process is absolved of liability to the purchaser who was ignorant of the defect concealed by the seller, and acted reasonably in performing her due diligence?

2. When no claim is made pursuant to a real estate purchase and sale agreement in a tort suit brought by a real estate purchaser against the seller, is the attorney's fee clause in the purchase and sale agreement triggered?

**D. STATEMENT OF THE CASE**

**1. Introduction.**

Petitioner seeks review of a Court of Appeals decision which extends existing authority from this Court to a point this Court likely never

intended. This case squarely presents the question whether a seller of real estate which intentionally subverts the disclosure and Form 17 process with either explicit misrepresentations or intentional under representations is excused when later those acts are shown to conceal material defects in the property being sold. Review is being sought under RAP 13.4(b)(4).

*Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), a case decided by this Court and which largely concerned abandonment of the economic loss rule in certain settings, is now being interpreted to allow sellers to mislead or, worse, fabricate, and suffer no consequence. Indeed, having been harmed by undisclosed plumbing defects, the purchaser plaintiff is now subject to an enormous fee burden which stems from the trial court, and the Court of Appeals, ‘inferring’ that even in the presence of manifest misconduct by the seller, the *buyer* should suffer all loss, including the cost of the legal contest itself. If, indeed, the Form 17/seller disclosure process in Washington has reached this condition in Washington State, its highest court should explicitly say so. The effect of the Court of Appeals ruling is to, essentially, excuse actual misrepresentation during a disclosure process built to facilitate the opposite. Review is being sought under RAP 13.4.(b)(1).

## 2. Background Facts

Donna Woodcock set out to purchase a new “used” home at 4220 Chilberg, in West Seattle in Fall, 2016 (“Chilberg house”) from defendant Jenkins n/k/a Conover. The Form 17 disclosure supplied to buyer stated sellers “don’t know” whether the house had sewer problems. CP 1107-1111; CP 1151-1156. This was false.

Ms. Woodcock read the Form 17. CP 1714. It never mentioned (a) that Ms. Jenkins *actually knew* of the dysfunctional sewer under her home; (b) that a recent video taken by the seller’s realtor’s vendor (PipePixs) confirmed the presence of a dysfunctional side sewer; (c) that seller had a structural inspection report from “North by West” inspection service which identified and discussed serious problems with the home’s plumbing system; (d) that the sewer pipes were no longer connected to the municipal sewer system; or (e) that the property had a material defect a buyer should know about.

Buyer presented strong evidence that the foregoing occurred. *See* CP 1032-1039 (Declaration of plumber Chris Gemmer); CP 1041-1046 (Declaration of second plumber Julius Neal); CP 1131-1144 (North by West Home Inspection Report, concealed); CP 1145-1149 (Unmarked Seller’s Disclosure Statement); CP 1151-1156 (Seller’s Disclosure Statement marked by Mike Conover) (A color copy of this exhibit is

attached hereto in the Appendix, B); CP 1055-1056 (Declaration of Linda Lee, neighbor of Catherine Jenkins; CP 1711-1732 (Declaration of Donna Woodcock, with exhibits).

It is inarguable that seller knew the foregoing facts, and withheld them. The highly informative “North by West” structural home inspection report was not disclosed, but a pest report was. Form 17 required disclosure of the “North by West” report in response to question 4 \*G. on the Form 17 (Was a structural pest or “whole house” inspection done?) Seller answered “yes.” But then seller made no reference to the “North by West” report and instead referenced an essentially meaningless “Maintenance Contract with Centennial Pest Control.” This omission was significant.

The PipePixs video and the North by West reports, entirely concealed from buyer, were highly revelatory. The video report stated:

Separation of the main DWV pipe has occurred in the crawl space and is leaking water causing erosion of the soil.

CP 1131-1144.

At page 12 of the North by West report, the “Crawlspace” is addressed. CP1142. The severed bathroom plumbing pipe was described as causing leakage of the bathroom plumbing and extensive erosion of the underlying soil floor. Plumber Neal found these defects when he worked



on the plumbing problems Ms. Woodcock discovered after sale closed. CP 1042, ¶¶ 4, 5.

The costs Ms. Woodcock incurred to make the sewer operable evidence the sewer system's disrepair when Ms. Jenkins sold the house. After closing, Ms. Woodcock spent over \$15,000 to clean under her home and fix her ailing plumbing system. CP 1719. Her plumber described the work he needed to do in order to repair the situation:

(10) Based upon my considerable experience as a professional plumber, it was obvious to me that the sewer backup problem under Ms. Woodcock's home was a serious and longstanding problem. The clay sewer pipes under the house clearly had been plugged for a long time, causing water to back up and out of the pipe at one or more locations east and uphill of the blockage.

(11) Based on my considerable experience as a professional plumber, it was also obvious to me that *someone recently had tried to make minor repairs to fix or hide the plumbing problem. The toilet paper, sewage, and mounds of dirt in the crawl space near the plugged pipes and eroded ditch indicated to me that efforts to fix or hid (sic) the problem were relatively recent, even though the sewer drainage problem was long-standing.* (Emphasis added).

CP 1045-1046.

Another plumber Ms. Woodcock engaged, Julius Neal, directly testified that there was evidence of a coverup of prior, failed, attempts to fix the broken plumbing system. CP 1045.

Seller's pre-sale concealment efforts even continued after the sale closed. Following closing, on November 22, 2016, Mr. Conover went to the property---uninvited by the new owner---and "inspected" for an alleged water intrusion problem under the house in the crawl space. CP 1101. He testified that he did not look at the failed sewer connection while beneath the house his wife no longer owned. He said he was there at the request of Ms. Jenkins' realtor, Winston McClanahan. CP 1101-1102. He visited without the knowledge or consent of the home's new owner, Donna Woodcock.

On December 3, 2016, the electrician Donna Woodcock hired to work on the house before she moved in, Ronnie Helms, called her. Mr. Helms told her there was a plumber under the house. Mr. Helms wanted the work space to himself and asked Ms. Woodcock to remove 'her' plumber. Only Ms. Woodcock had hired no plumber; indeed, she didn't yet know she needed a plumber. Mr. Helms reported that a man came out from the crawl space, covered in dirt, and stated that he was there fix a plumbing leak "for the seller." CP 1051-1052.

None of this made any sense to Ms. Woodcock. She was unaware of any "plumbing" problems under the house. She had not hired a plumber. CP 1718. She was informed by seller's agent that the worker was there to deal with a "water" problem. *Id.* Ms. Woodcock got no

explanation for what anyone was doing at her house whom she had not hired. *Id.*

In March 2017, Ms. Woodcock became concerned that heavy Spring rain coming off the steep hillside behind her home might enter the crawl space. Her particular worry was that her furnace was located in the crawl space. The threat of water near her furnace worried her. CP 1717. She went into the crawl space for the first time since closing and found a pool of sewage sludge near the front (west) side of the crawl space. Also present was a pile of toilet paper and waste directly beneath the location of the toilet above. CP 1717. She also found a light and two shovels that had been left behind. CP 1717, 1731, 1732. These tools did not belong to her, or anyone she had hired.

Another plumber buyer hired after closing, Chris Gemmer of Rescue Rooter, testified that efforts to conceal sewer/plumbing defects had been made:

(7) ...(I)t was obvious that the sewer line problems at 4220 Chilberg Avenue SW that I observed (and that Ms. Woodcock needed to repair) started long before Ms. Woodcock's purchase of the home. It was also obvious from the conditions of the plugged pipes, the piecemeal attempts to repair sections of the sewer line, the raw sewage in the crawl space and raw sewage in the exterior soil between the foundation and the street that the previous owner of the house (i.e. the seller) must have experienced sewer backups and other sewer problems long before she sold the home to Ms. Woodcock.

CP 1032-1039.

Both plumbers describe finding the same after sale oddities beneath the home: a sewer made up of different sizes of pipes, not sealed; a sewer made up of cracked, clay pipes; a sewer filled with roots and mud. Their testimony explains the observation that if fluid was introduced into the piping system it would immediately back up and, before the point of backup, it would leak raw sewage into the crawl space beneath the house.

Strong circumstantial evidence supports buyer's claim that seller knew of these plumbing defects. Ms. Conover's neighbor, Linda Lee, stated:

...She (Ms. Jenkins) said she had raw sewage in her crawl space because the sewer pipes under her home were plugged and had backed up. I reminded Ms. Jenkins that we had similar problems a few years ago and had to invest thousands of dollars to fix our sewer system. I recall discussing the fact that our home, like Ms. Jenkins' home, was over 100 years-old, and that our sewer pipes had been plugged with dirt and roots for years. ***Ms. Jenkins said she had a buyer for her house and raw sewage in her crawl space.***

I don't recall the precise date this conversation with Ms. Jenkins occurred, but I recall that it occurred after the "for sale" sign was erected and before it was taken down. I recall that Ms. Jenkins said she had a buyer, but it was my impression that the sale had not yet closed.

Based on my conversation with Ms. Jenkins, it was my impression that Ms. Jenkins was aware that her house had

serious sewer problems, including raw sewage in the crawl space...

CP 1055-1056 (Emphasis added).

## E. ARGUMENT

### 1. **The Trial Court Erred When It Inferred Buyer Failed to Act Reasonably in These Circumstances, Which Is a Factual Determination Not Allowed on Summary Judgment.**

“Reasonable reliance” is typically a fact question. *Federal Home Loan Bank of Seattle v. Barclay’s Capital, Inc.*, 1 Wash.App. 2d. 551, 406 P. 3d 686 (2017); *Morgan v. Irving*, 8 Wash. App. 354, 356, 506 P. 2d 316 (1973). Moreover, “reasonableness” determinations can arise in many contexts, and such inquiries are almost always fact questions. *See, e.g., Owen v. Burlington Northern & Santa Fe R.R. Co.*, 153 Wn. 2d 780, 108 P.3d 1220 (2005) (reasonably safe roadway); *Lamon v. McDonnell Douglas Corp.*, 91 Wash. 2d 345, 588 P. 2d 1346 (1979) (reasonable expectations of the ordinary consumer); *Hawkins v. Empress Healthcare Management, LLC*, 193 Wash. App. 84, 100, 371 P. 3d 84 (2016) (reasonable reliance in intentional misrepresentation/fraud case); *M. H. v. Corporation of Catholic Archbishop of Seattle*, 162 Wash. App. 183, 252 P. 3d 914 (2011) (reasonable foreseeability of harm); *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wash. App. 760, 767, 145 P. 3d 1253 (2006) (reasonable notice of contract termination).

In its long recitation of facts in its opinion, the Court of Appeals strove to support its improper conclusion that courts may ‘infer’ what amount of buyer knowledge excuses seller misrepresentations or failures to disclose.

This unsupported extension of Washington law lies at the heart of the present request for review. If deceptive Washington sellers of real estate are to have their explicit disclosure obligations offloaded by law, the consuming public deserves to hear that from this Court.

**2. The Present Result Is An Improper Extension of *Alejandre v. Bull*, 159 Wash.2d 674, 153 P.3d 864 (2007).**

A perhaps unintended consequence of the holding in *Alejandre v. Bull*, 159 Wn. 2d 674, 153 P. 3d 864 (2007), is that some readers, including the Court of Appeals, believe the case allows frank misrepresentation by sellers to be excused based upon buyer conduct. If this policy is to stand as law in Washington, a more explicit statement that that is so is required. To be fair, *Alejandre* principally concerned much more complex policy issues addressing the junction between what are tort, and what are contract, claims and remedies. *Alejandre* was a significant statement of law in that arena, but its result is now providing cover for sellers who say too little of what they know to unsuspecting buyers.

Buyer here established each of the elements of a fraudulent

concealment claim required by *Alejandre*: a “duty to speak” is required of a seller where: (1) the residential dwelling has a concealed defect; (2) the vendor has knowledge of the defect; (3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect was unknown by the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser. *Id.* at 689; *cited with approval in Steineke v. Russo*, 145 Wash. App. 544, 560, 190 P. 3d 60 (2008). Failure to disclose a material fact where there is a duty to disclose is fraudulent. *Steineke*, at 560. *See also McRae v. Bolstad*, 32 Wash. App. 173, 177, 646 P. 2d 771 (1982), *aff’d*, 101 Wn. 2d 161, 676 P. 2d 496 (1984).

The contest here has concerned only elements (4) and (5). The existing decisional law requires the “careful, reasonable inspection” in element (5) only if the buyer first had some indicia of the defect. Ms. Woodcock had no such knowledge.

Below, the Conovers claimed notice of a bad sewer was provided since there were other, unrelated, problems discovered underneath the house. They relied upon a cryptic picture of a disorganized mess in the crawl space which Ms. Woodcock forwarded to her realtor the day before closing, almost two months after the inspection period had closed. CP 858-862; 972.

Ms. Woodcock never knew what seller almost certainly knew: that a concealed sewer problem lay beneath the first floor which ultimately cost \$15,000.00 to repair.

Ms. Woodcock is excused from seeking and finding defects which are not apparent, as this Court held in *Atherton v. Blume*, 115 Wn. 2d 506, 525, 799 P. 2d 250 (1990):

Although a fraudulent concealment claim may exist even though the purchaser makes no inquiries which would lead him to ascertain the concealed defect, ***in those situations where a purchaser discovers evidence of a defect***, the purchaser is obligated to inquire further. Simply stated, fraudulent concealment does not extend to those situations where the defect is apparent.

115 Wn. 2d at 525, *cited with approval* in *Steineke, supra*, at 561 (emphasis added).

*Atherton* was extended further in *Olmstead v. Miller*, 72 Wash. App. 169, 863 P. 2d 1355 (1993), where a seller disclosed drainage problems on his land, and “clarified” that disclosure by claiming that visible drain ditches dealt with the presence of excess water. In upholding a damages award at trial, the Court concluded there was substantial evidence known drainage problems had been incompletely disclosed, and it upheld a judgment for the purchasers. *Id.* at 178-180. When comparing these facts to Ms. Jenkins/Conover disclosing more of the known defects on the property to her neighbor Ms. Lee than to the prospective purchaser



of her property it reveals the failing of the rulings to date. Sellers claiming “don’t know” as to explicitly known plumbing and sewage defects on the Form 17 was just as or more misleading than Miller’s “partial” disclosure of the nature of the water problems their land experienced.

The Conovers rely on *Alejandre v. Bull*, 159 Wn. 2d 674, 153 P. 3d 864 (2007) and it is the scant discussion in the case concerning what this Court meant by a “reasonable investigation” which prompts this petition. Reliance by the prior courts on *Alejandre* is particularly puzzling since the plaintiff in *Alejandre* did have knowledge of defects before choosing not to investigate further. In *Alejandre*, the plaintiffs had, in hand, a “report” that essentially informed them of a need to have a further inspection. The buyer specifically insisted on the right to have a septic inspection, with the right to walk away from the deal based on what it showed.

The other case heavily relied upon by the Conovers is *Steineke v. Russo, supra*. The case dealt with water damage inside the walls of the home, caused by previous roof leakage. It was decided in 2008, after *Alejandre* and after *Atherton, supra*. *Steineke* reaffirmed that “further investigation” by a buyer claiming fraudulent concealment is only required where a purchaser has discovered some evidence of a defect. 145 Wash. App. 544, 561, citing *Atherton v. Blume*, 115 Wn. 2d at 525. See also, *Douglas v. Visser*, 173 Wash. App. 823, 830-831, 295 P. 3d 800

(2013)(“When a buyer is on notice of a defect, it must make further inquiries of the seller.”); *and see Sloan v. Thompson*, 128 Wash. App. 776, 789, 115 P. 3d 1009 (2005) (“...Only in situations where a purchaser discovers evidence of the defect, and thus the defect is apparent, is the purchaser required to inquire further.”). The record in this case shows no awareness by Ms. Woodcock regarding a possible defective sewer. The sellers knew what she did not.

“Generally, in a misrepresentation case, where there is a positive, distinct, and definite representation, the representee has no duty to investigate the truth of the matter.” *Rummer v. Throop*, 38 Wn. 2d 624, 633, 231 P. 2d 313 (1951). According to the Restatement (Second) Torts, Sec. 541A, comment *a*, a representee has the right to rely on a positive statement of fact unless its falsity is obvious to his senses, or he has reason to know of facts which then make his reliance unreasonable. The extent to which a party must verify the truth of a representation depends on the circumstances of the case. *Skagit State Bank v. Rasmussen*, 109 Wn. 2d 377, 384, 745 P. 2d 37 (1987). And, whether “reliance” is reasonable is for the jury to decide. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn. 2d 536, 551-554, 55 P. 3d 619 (2002).

**3. When Tort Claims Are Presented Outside the Provisions of a Purchase and Sale Agreement, It Is Error to Rely Upon the PSA In Making An Attorney's Fee Award.**

As the complaint clearly shows, this case was not brought under the PSA. It was brought as a tort case for conduct which, plaintiff alleged, constituted torts. As alleged by plaintiff, Form 17 (which is explicitly and by its terms not a part of the PSA) misrepresentations and non disclosures are actionable as tort claims. In that setting, the fee provisions of the PSA are not applicable, just as the trial court ruled. The trial court correctly decided that point, and the Court of Appeals did not.

That an agreement such as the Residential Real Estate Purchase and Sale Agreement in this case is the background for the relationship and claims is insufficient, in and of itself, to trigger the fee provision. *See Burns v. McClinton*, 135 Wn.App. 285, 311, 143 P.3d 630, 641 (2006). Whether a claim that is not “on the contract” triggers the contract fee provision depends on the specific language of the fee provision. The fee provision in this case provides that the prevailing party is entitled to fees when one party sues the other “concerning this Agreement.” The provision is narrower than the provisions at issue in *Alejandre v. Bull*, 159 Wn.2d. 674, 691-92, 153 P.2d 864 (2007) and *Hudson v. Condon*, 101 Wn.App. 866, 877, 6 P.3d 615 (2000) which provided for fees in an action “related to” the transaction or partnership.

The Conovers cite to *Steineke v. Russi*, 145 Wn.App. 544, 190 P.3d 60 (2008) for the proposition that they are entitled to fees pursuant to the Purchase and Sale Agreement. *Steineke* does not support the Conovers' position since the discussion of attorneys' fees in *Steineke* is quite cursory, and is *dicta*, *Steineke*, 145 Wn.App. at 471. ("Because we remand for the trial court to determine whether the required level of proof was met regarding the Steinekes' fraud claims, the prevailing party is not yet determined. Thus, we do not address this issue.").

The Conovers also relied upon the unpublished case of *Woodmansee v. Peterson*, 160 Wn.App. 1024, 2011 WL 2279035, at \*16 (2011) claiming it should be considered persuasive authority. However, *Woodmansee* was improperly cited in violation of GR 14.1 because it was decided before March 1, 2013. Moreover, it is not persuasive; rather, it is distinguishable in that the *Woodmansee* court noted that "the claims here arose from Peterson's wrongful actions during the execution of the PSA and 'concerned' the agreement under the language of the attorney fee provision. The lawsuit does not address any issues separate from the PSA." That is not the situation here.

Because the lawsuit did not "concern the agreement," the Conovers were not entitled to attorney fees and costs. If, as the Court of Appeals decided, *any post sale legal action* between seller and buyer triggers the

fee provisions of the PSA, it would profit litigants throughout the State to have clear guidance that that is the law. Instead, here, a complaint crafted carefully to avoid claims which stem from the PSA was still considered eligible for fee award treatment.

Ms. Woodcock alleges that that decision by the Court of Appeals was, as well, error. Given the importance and economic significance of broadening the reach of cases and claims eligible for fee treatment, much greater clarity from this Court concerning which of the courts below properly addressed this issue is warranted.

#### **F. CONCLUSION**

The Court of Appeals decision in this case is at odds with, and is an ill considered extension of *Alejandre*. Many Washington citizens are impacted by home sales gone bad and the lack of clarity regarding what sellers must do in order to properly disclose speaks to the need to accept review and make the law in this area much more clear. The public impact of the present state of the law is well illustrated by the journey Ms. Woodcock has taken, and the policy implications of making Form 17 disclosures a meaningless exercise (which is one implication of the Court of Appeals decision) are clear to any reader.

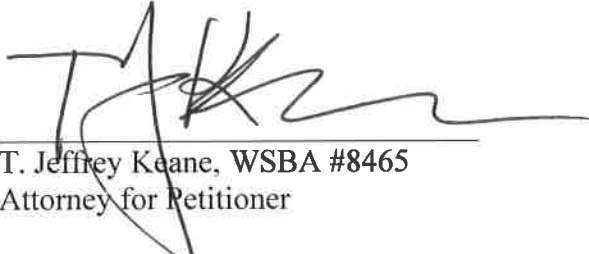
In addition, if crafting a lawsuit to explicitly avoid breach of contract claims results in the imposition of fee awards obtainable only

under the contract, that too requires explicit treatment and clarification by this Court.

For the reasons stated Ms. Woodcock urges the Supreme Court to accept her petition for review.

Submitted this 21<sup>st</sup> day of November, 2019.

KEANE LAW OFFICES



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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below a copy of Appellant/Cross Petition for Review, was served via the Court of Appeals filing portal, to the following:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 21<sup>st</sup> day of November, 2019.

  
Donna M. Pucel

## APPENDIX

- A. Court of Appeals Opinion in *Woodcock v. Conover*, No. 78166-9-I
- B. Color copy of Seller's Disclosure Statement



**A**

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DONNA WOODCOCK, a single person,	)	No. 78166-9-I
	)	(consolidated with Nos.
Appellant/Cross Respondent,	)	78561-3 & 78562-1)
	)	
v.	)	
	)	
CATHERINE CONOVER (née JENKINS)	)	DIVISION ONE
and MIKE CONOVER, and the marital	)	
community comprised thereof; and	)	
SHERRY VOELKER-HORNSBY, all	)	
Washington residents,	)	
	)	
Respondents/Cross Appellants,	)	UNPUBLISHED OPINION
	)	
WINSTON MCCLANAHAN and "JANE	)	
DOE" MCCLANAHAN, and the martial	)	
community comprised thereof; and "JOHN	)	
DOE," all Washington residents,	)	
	)	
Defendants.	)	FILED: September 9, 2019
	)	

ANDRUS, J. — Donna Woodcock challenges the summary judgment dismissal of her claims against Catherine and Mike Conover, from whom she purchased a home, and her claims against Sherry Voelker-Hornsby, her real estate agent in the transaction. Catherine<sup>1</sup> cross-appeals the denial of her motion for attorney fees under the real estate purchase and sale agreement (REPSA). Sherry cross-appeals the denial of her motion for fees and costs under CR 11. We

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<sup>1</sup> We refer to the parties by their first names for convenience only. By doing so, we mean no disrespect.

reverse and remand for an award of attorney fees to Catherine, but otherwise affirm the trial court's rulings.

### FACTS

In 2016, Donna hired Sherry as her real estate agent to assist in purchasing Catherine's 113-year-old home in West Seattle. Donna understood the home was a "fixer-upper." She described the home's many problems:

The retaining walls in the backyard were ready to cave in because the wood was rotting. The concrete below the wood wall was also leaning towards the back of the house. The walkway was slanted so the water was going under the house. The house needed all new electrical wiring in addition to putting the outside wires in PVC, installing the meter into a box and replacing the mast. [A] [g]utter was crushed because the wood wall behind the house was too high and the weight of the dirt pushed that wall against the house. There were over grown [sic] trees in the front yard that made a mess of the street and parked cars in addition to interfering with the wires coming from the street. One of the trees was about a foot from the house, it was top heavy and was a safety hazard due to high winds in that area. The stairs in the backyard were not up to code.

During negotiations for the purchase, Donna received Catherine's "Seller Disclosure Statement, Form 17." Catherine stated in the Form 17 that the house was served by a public sewer system and connected to the city's sewer main. In response to the question asking about any defects in the plumbing system, Catherine responded "Don't know." She similarly responded that she did not know of any other "existing material defects affecting the property that a prospective buyer should know about." The Form 17 advised Donna to obtain and pay for an expert, including a plumber, to inspect the property to identify a more comprehensive list of possible defects.

As part of the purchase offer, Donna executed an acknowledgement in the Form 17, in which she stated she understood she had "a duty to pay diligent

attention to any material defects that are known to [her] or can be known to [her] by utilizing diligent attention and observation." She further acknowledged that the disclosures in the Form 17 were "not intended to be a part of the written agreement between [Catherine and her]."

Donna and Catherine signed the REPSA on September 23, 2016. The agreement, like the Form 17, "urged [Donna] to use due diligence to inspect the Property to [her] satisfaction and to retain inspectors qualified to identify the presence of defective materials and evaluate the condition of the Property as there may be defects that may only be revealed by careful inspection."

In a separate inspection addendum to the REPSA, the parties agreed the sale was conditioned on Donna's subjective satisfaction with inspections of the property. One of the contemplated inspections explicitly identified was "an inspection of the sewer system," including "a sewer line video inspection and assessment." The addendum set up two inspection periods—the "Initial Inspection Period," during which Donna had six days to conduct whatever inspections she deemed appropriate; and an "Additional Inspections" period, during which Donna had an additional day to investigate the home's condition in the event an inspector recommended "further evaluation of any item by a specialist."

Under an optional clauses addendum, Catherine represented "[t]o the best of [her] knowledge," the property was connected to a public sewer main. Under that same addendum, Donna had the right to reinspect the property within five days of the closing date of November 22, 2016, to determine if any system—including the plumbing system—had become inoperative or had malfunctioned

since the Initial Inspection Period. Donna also had the right to require Catherine to repair or replace any malfunctioning system.

Sherry testified that she recommended that Donna obtain both a structural and sewer inspection. Sherry suggested that both inspections could be set for September 27, 2016. Donna, however, told Sherry that she did not want a sewer inspection until after she had reviewed the results of the structural inspection. Donna testified she made this decision because she was not sure she wanted to buy the house—it was old, sat on stilts, needed a new roof, had landscaping issues, and had water flowing underneath the crawl space.

Sherry reached out to Catherine's real estate agent to schedule a sewer inspection for the day after the structural inspection. According to Sherry, Donna then told her not to hire a sewer inspector, even after Sherry offered to reduce her commission by the \$250 it would cost to have this inspection completed.

Donna testified that she wanted a sewer inspection because of her concerns about the house's age, but she did not recall Sherry scheduling this inspection. She admitted telling Sherry to hold off until after the structural inspection. But by the time she received the structural inspection report, more than six days had passed, and Sherry told her "it was too late to have the inspection" because the inspection period had lapsed. This conversation occurred, to the best of Donna's recollection, on September 30, 2016. Donna testified that Sherry then said that a sewer inspection was probably not necessary because Catherine's boyfriend, Mike,<sup>2</sup> was a plumber.

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<sup>2</sup> Catherine and Mike were engaged at the time of the purchase and had married before Donna filed the lawsuit.

But Catherine presented evidence through an email in which Donna explained why she decided to forgo a sewer inspection: "The inspector didn't notice anything strange with the plumbing because everything from the inside of the house seemed to be working properly so I didn't feel that I needed to do a sewer inspection also." Donna admitted it was she, and not Sherry, who chose to skip the sewer inspection.

As a result of the structural inspection, Donna requested and Catherine agreed to repair a number of items, including moving soil away from particle board and plywood paneling on the home, trimming vegetation, repairing a kitchen window, repairing a rusted gas shut off valve, repairing duct work in the crawl space, having a licensed contractor evaluate and repair posts and footings in the crawl space, installing vapor barriers between concrete pier blocks and wood posts in the crawl space, installing junction box cover plates, fixing loose wiring in the crawl space, replacing the inoperable kitchen exhaust fan, updating kitchen electrical and lighting outlets, and replacing broken outlets in the living room.

The day before closing, Donna visited the house for a final walkthrough to verify that Catherine had completed these negotiated repairs. Donna looked under the crawl space and saw "a moisture problem" and "wet sand." She took photos and sent them to Sherry and her loan officer, Scott Rongey. Rongey indicated that if the agreed-upon repairs had not been completed, and closing had to be postponed, the parties would need to execute an addendum to the REPSA. He further indicated that Donna's loan rate lock expired later that week, and he would have to verify that the bank would extend the loan rate if the parties pushed out the closing date. He noted that since the work to be done by the seller was not

called for in the bank's appraisal, it would not jeopardize the loan, "[a]lthough the picture of the crawl space does not look good." Rongey subsequently confirmed that he could extend Donna's rate lock until the following Monday if she wanted to extend the closing date. Nevertheless, Donna emailed both Rongey and Sherry to "proceed with the closing tomorrow, I will deal with the problems when I move in." Sherry testified that Donna took this step without speaking with her about other options for investigating the crawl space condition. Donna closed on the home as scheduled, on November 22, 2016.

Shortly after closing, in December 2016, an electrician working in Donna's house called her to complain that a plumber was under her house and interfering with his work. The electrician told her that he saw a man covered in mud and wearing plumber's overalls come out from under the crawl space. Donna, who had not hired a plumber, called Sherry to ask why someone would be under the house. Donna knew that there were several items Catherine was still in the process of fixing, including securing a beam underneath the house and installing a vapor barrier. Donna learned that Mike had been there either to complete an item remaining on the repair list or to verify that the work had been done.

Mike, however, testified that he visited the home because he had received a report of water intrusion in the crawl space. According to Mike, he told Donna's electrician why he was there, then entered the crawl space with a flashlight and found a couple of shovels that did not belong to him. He saw no evidence of a leak.

A few days later, Donna noticed a stream of what she thought was rainwater flowing into the crawl space from behind her house. She called a landscaper to

look at the retaining wall in her backyard because she thought the water was coming from behind that wall. The landscaper confirmed that rainwater was flowing onto her land from an adjacent greenbelt. The landscaper cleaned out and replaced some gutters, dug out dirt behind the retaining wall and filled it with drain rock, and installed a plastic vapor barrier to stop rainwater from flowing into the crawl space.

In March 2017, Donna noticed a plugged downspout and became concerned that the overflowing rainwater was dripping through her patio and onto her furnace, located in the crawl space. Donna went into the crawl space to investigate and found brown, frothy-looking water containing toilet paper and feces on the ground underneath her bathroom. Donna saw what she described as "trenching" and an electric work light and tools, items she thought Mike had left behind in December 2016.

A plumber found that the three-inch plastic drain pipe running from the toilet was set loosely in a four-inch clay pipe with no gasket to seal the joint between the two pipes. He trenched approximately 15 feet to uncover the side sewer and found pieces of newer PVC pipe loosely connected to pieces of older clay pipe. He found several locations where the diameter of the PVC replacement pipe mismatched the existing, cracked four-inch clay pipe. He also found dirt and tree roots obstructing the sewer pipe. These downstream obstructions caused sewage to back up and leak through the unsealed joints in the pipes. According to Donna, the plumber also told her that while he was digging in the dirt, he saw lime, a substance often used to cover up the smell of raw sewage. The plumber advised Donna she needed to replace the entire length of sewer pipe.



Donna hired Rescue Rooter to repair the sewer system. Rescue Rooter was unable to get a camera through all of the pipes because they were full of dirt and roots. A Rescue Rooter representative testified that he saw "piecemeal" connections between newer plastic pipes and deteriorated clay pipes. He identified a two-foot section of the sewer line between the house and the city's main sewer line that was not connected at either end, allowing roots, dirt, and debris to enter and plug the pipes. According to Donna, a Rescue Rooter representative said that this sewer problem would have existed for some time and that Catherine must have known about it. Rescue Rooter replaced or lined the existing pipe, creating a new and watertight connection to the city sewer main.

Donna presented evidence that Catherine was aware of plumbing problems that she did not disclose on the Form 17. In June 2016, in preparation for listing the home, Catherine hired North by West Inspections, LLC (NBWI) to inspect the home. NBWI reported that the tub drained slowly and that the drain waste vent in the crawl space had separated or had been severed, was leaking, and was causing soil erosion. It recommended further evaluation by a licensed plumber. According to Sherry, neither Catherine nor her real estate agent provided Donna with NBWI's inspection report. Mike testified that he hired one of his former employees, a licensed plumber, to repair the pipe. Catherine stated, in discovery responses, that before listing her home for sale, a plumber repaired the severed drain waste vent pipe by connecting the pipe to the drain line from her kitchen sink, toilet, shower, and bathroom lavatory.

Also in discovery, Catherine reported having a sewer backup in 2004, shortly after she bought the house, and having a tree root removed from her sewer

line. She denied having any other problems with the sewer line thereafter. But in July 2016, also before listing the house, Catherine hired a company, PipePix, to conduct a video scope of the sewer line. Catherine testified that she never saw the video and assumed her real estate agent had made it available to prospective buyers. According to Donna's plumbing expert, Chris Gemmer, the PipePix scope revealed that the sewer line was plugged with roots and toilet paper. He was also able to observe badly offset pipes and pipes filling up with water, indicating the sewer line was clogged.

Donna sued Catherine and Mike, alleging fraudulent concealment, fraudulent misrepresentation, and conspiracy to commit fraud. She sued Sherry for professional negligence.<sup>3</sup> The trial court dismissed Donna's claims on summary judgment. It denied Catherine's request for attorney fees under the REPSA and denied Sherry's request for CR 11 sanctions against Donna's counsel. All parties appeal.

#### ANALYSIS

A. Donna's failure to conduct a sewer inspection precludes her claim of fraudulent concealment.

Donna seeks reinstatement of her fraudulent concealment claim, arguing she had no duty to conduct a sewer inspection. We review the order granting summary judgment de novo, engaging in the same inquiry as the trial court. Beal Bank, SSB v. Sarich, 161 Wn.2d 544, 547, 167 P.3d 555 (2007). Dismissal of the fraudulent concealment claim is appropriate only if there are no genuine issues of

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<sup>3</sup> Donna also asserted a claim against Sherry under Washington's Consumer Protection Act, chapter 19.86 RCW, but agreed to the dismissal of that claim. Thus, it is not on appeal.

material fact, entitling Catherine and Mike to judgment as a matter of law. Jackowski v. Borchelt, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012); see also CR 56(c). Summary judgment is appropriate if a plaintiff fails to make a showing sufficient to establish the existence of an element essential to a claim; failure of proof on an essential element renders all other facts immaterial. Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990); Woody v. Stapp, 146 Wn. App. 16, 21, 189 P.3d 807 (2008).

To establish a claim of fraudulent concealment, Donna must show (1) that the house had a concealed defect, (2) that Catherine knew of the defect, (3) that the defect presented a danger to Donna's property, health, or life, (4) that Donna did not know about the defect, and (5) that a "careful, reasonable inspection" by Donna would not have disclosed the defect. Douglas v. Visser, 173 Wn. App. 823, 833, 295 P.3d 800 (2013). Donna bears the burden of showing all five elements by clear, cogent, and convincing evidence. Stieneke v. Russi, 145 Wn. App. 544, 560-61, 190 P.3d 60 (2008). Parties disputed only the fifth element at summary judgment.

We agree with the trial court that Donna cannot prove that the sewer defects would not have been discovered during a pre-purchase sewer inspection. Donna argues that the reasonableness of her decision to forgo a pre-purchase sewer inspection presents an issue of fact for the jury. But the inquiry in a fraudulent concealment claim is not whether Donna acted reasonably; the issue is whether a reasonable inspection would have uncovered the alleged defect. See Alejandre v. Bull, 159 Wn.2d 674, 690, 153 P.3d 864 (2007) (homebuyers failed to meet burden of showing that defect would not have been discovered through a reasonably

diligent inspection); Atherton, 115 Wn.2d at 525 (alleged violations were not apparent and would not have been revealed through a reasonably careful inspection); Stieneke, 145 Wn. App. at 561-62 (history of roof leaks would only be apparent after a multi-day, invasive inspection costing approximately \$10,000.00).

The undisputed evidence shows that a reasonable, low-cost sewer inspection would have revealed the sewer defect. Donna's own expert, Chris Gemmer, testified that he conducted a video camera inspection of the sewer pipes in March 2017 and discovered the pipes were in such bad condition that Donna had to replace nearly all of them.

Donna relies on Sloan v. Thompson, 128 Wn. App. 776, 115 P.3d 1009 (2005), to argue that she had no duty to conduct a sewer inspection because she had no notice of the possibility of a defective sewer. But Sloan is clearly distinguishable. In that case, after two earthquakes damaged a home Sloan purchased from Thompson, Sloan discovered structural defects in the foundation and framing, defects in the plumbing and electrical systems, and a non-functioning septic drain field. Id. at 782. Thompson had personally built, plumbed, and wired the house and had the septic system installed without a permit. Id.

Sloan sued, alleging fraudulent concealment. Id. The trial court found for Thompson at trial because Sloan had not conducted an inspection of the house before purchasing it. Id. at 783. This court reversed, holding that "a fraudulent concealment claim may exist even though the purchaser makes no inquiries which would lead him to ascertain the concealed defect." Id. at 789 (quoting Atherton, 115 Wn.2d at 525). But Sloan clearly dealt with defects that would "not have been noticeable to a trained eye." Id. at 789-91. This court noted that "undisputed expert

testimony established that a careful, reasonable inspection would not have disclosed the defect[s]." Id. at 791.

This case is more analogous to Alejandro v. Bull, in which our Supreme Court affirmed the dismissal of a fraudulent concealment claim against the seller of a home with a defective septic system. 159 Wn.2d at 678, 689-90. In that case, the buyer accepted the septic system even though an inspection report disclosed that the inspection was incomplete because a back baffle had not been inspected. Id. at 690. This part of the septic system was relatively shallow and easily accessible for inspection. Id. Because a careful examination would have led to the discovery of the defective baffle and to further investigation, the buyer's fraudulent concealment claim failed. Id. at 689-90.

In this case, the REPSA advised Donna to hire an inspector to determine if there were any problems with the plumbing system. The inspection addendum gave her six days to conduct an initial inspection and an additional day for a specialist to conduct a more in-depth investigation if necessary. The optional clauses addendum gave Donna the right to conduct an inspection within five days of closing to verify that no defects had developed with the plumbing system, and Donna had the right to demand that Catherine repair any malfunctioning system discovered during that final walk-through.

Donna was aware her structural inspector had looked at the crawl space during his inspection. But she knew this inspector was not going to inspect the sewer. And she also had notice of possible plumbing defects before the sale closed. When she was in the crawl space the day before the scheduled closing, she took photos of the "wet sand" she discovered and testified that the condition

she found then looked similar to the conditions she found in the crawl space in March 2017. Donna clearly became aware of some water problem in the crawl space under the home before the sale became final. Where there is some indication of the defect, purchasers are required to make further inquiries. Douglas, 173 Wn. App. at 832; Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp., 51 Wn. App. 209, 215, 752 P.2d 1353 (1988). Donna emailed her photos to Sherry and her loan officer, and they discussed the possibility of pushing the closing date to make further inquiries. Donna, however, chose not to do so and instructed Sherry to proceed with the closing. Donna's argument that the moisture problems did not necessarily indicate a sewer problem is unavailing. See Miebach v. Colasurdo, 102 Wn.2d 170, 176, 685 P.2d 1074 (1984) ("[K]nowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed.").

Furthermore, Donna knew she should have a sewer scope done because the house was so old. Sherry recommended that Donna undertake this inspection simultaneously with the structural inspection, but Donna intentionally chose to reject this recommendation. Donna did not ask Catherine for more time to conduct the sewer scope, either after the expiration of the Initial Inspection Period or when she discovered water in the crawl space immediately before closing. When Donna hired a plumber to investigate her sewer pipes, he was able to quickly discover the defects in the system. Under these undisputed facts, Donna cannot establish that a careful, reasonable inspection would not have uncovered the sewer defect. We affirm the dismissal of her fraudulent concealment claim.

B. Donna presented no evidence that she relied on any representations in the Form 17.

Next, Donna seeks reinstatement of her fraudulent misrepresentation claim, arguing that Catherine's statement on the Form 17 that the side sewer was connected to the city sewer was false.

To establish fraudulent misrepresentation, Donna must prove (1) Catherine made a representation of an existing fact, (2) the representation was material to the transaction, (3) the representation was false, (4) Catherine knew the representation was false, (5) Catherine intended that Donna rely on the false representation, (6) Donna was ignorant of its falsity, (7) Donna relied on the false representation, (8) Donna had a right to rely on the representation, and (9) Donna suffered damages in reliance on the false representation. Steineke, 145 Wn. App. at 563. Donna must prove every element by clear, cogent, and convincing evidence. Id. On summary judgment, Catherine contended, and the trial court concluded, that Donna failed to establish the seventh (actual reliance) and eighth elements (right to rely).

Generally, "[a] party to whom a positive, distinct and definite representation has been made is entitled to rely on that representation and need not make further inquiry concerning the particular facts involved." Douglas Nw., Inc. v. Bill O'Brien & Sons Constr., Inc., 64 Wn. App. 661, 679, 828 P.2d 565 (1992). Purchasers of property generally have a right to rely on a seller's written representations. Jackowski, 174 Wn.2d at 738 (purchaser had right to rely on representation in Form 17 that property did not contain fill material); see also McRae v. Bolstad, 32 Wn. App. 173, 177, 646 P.2d 771 (1982). But reliance on a fraudulent

misrepresentation must be reasonable under the circumstances. Williams v. Joslin, 65 Wn.2d 696, 698, 399 P.2d 308 (1965). While justifiable reliance is normally a question of fact, summary judgment is appropriate if reasonable minds could reach but one conclusion. Cornerstone Equip. Leasing, Inc. v. MacLeod, 159 Wn. App. 899, 905, 247 P.3d 790 (2011).

On appeal, Donna argues that Catherine, in the Form 17, misrepresented that the house was "connected" to the city sewer main. She contends the evidence establishes that Catherine knew that this connection had been severed by deteriorated, misaligned, or blocked sewer pipes. Even if a jury were to accept this evidence as true, however, there remains a lack of evidence that Donna reasonably relied on the "connection" misrepresentation. First, when Donna was asked on which representations she relied in the Form 17, the only statements she identified were in section 3, paragraphs E and F. Paragraph E provided:

Are all plumbing fixtures, including laundry drain, connected to the sewer/on-site sewage system?

YES

And paragraph F provided:

Have there been any changes or repairs to the on-site sewage system?

YES

As to paragraph E, Donna acknowledged that Catherine also indicated, in section 5, paragraph A of the same form, that she did not know if the plumbing system had any defects. Donna recognized this statement was a "red flag" to her that "there might be some issues with this plumbing." As a result, Donna testified she wanted to have a sewer inspection performed and knew it was important to do so because of the age of the house. "The 'right to rely' element of fraud is intrinsically linked to the duty of the one to whom the representations are made to



exercise due diligence with regard to those representations.” Alejandre, 159 Wn.2d at 690. Given Donna’s admission that she knew there could be issues and yet chose not to conduct a sewer inspection, she failed to present evidence that she had a right to rely on the representation in paragraph E.

Even if Donna had a right to rely, she stated she did not actually rely on any statement in the Form 17. She stated in an email that she decided to forgo the sewer inspection because she did not feel it was necessary. She later testified that she relied on Sherry’s comment that the sewer line should be “fine because the seller’s husband is a plumber.” No reasonable jury could find from this undisputed evidence that, in deciding to forgo the sewer inspection, Donna relied on Catherine’s representation that all of the plumbing fixtures were connected to the city sewer.

As to paragraph F, that question by its terms related only to properties with an on-site sewage system. It is undisputed that Catherine’s home was not served by a septic system but was instead served by a public sewer system. Even if Donna had interpreted this question to apply to Catherine’s home, Catherine disclosed that there had been “changes or repairs” made to the system. This disclosure does not meet Douglas Northwest’s requirement of a “positive, distinct and definite representation” of a specific condition or lack of defect. Catherine made no representation as to what specific changes or repairs had been made to the sewer, and Donna did not request more details. Thus, no jury could find that she justifiably relied on any representation in paragraph F in making this

purchase.<sup>4</sup> For these reasons, the trial court did not err in dismissing Donna's fraudulent misrepresentation claim.

C. Without proof of fraud, Donna cannot establish a conspiracy to commit fraud.

Donna next contends the trial court erred in dismissing her conspiracy claim. Donna alleges that Catherine conspired with her husband and her real estate agent to hide the sewer defects.

A civil conspiracy is a combination of two or more persons agreeing to commit an unlawful act—in this case, fraud. O'Brien v. Larson, 11 Wn. App. 52, 55, 521 P.2d 228 (1974); see also Woody, 146 Wn. App. at 22. There must be evidence that a tortious act was committed in carrying out the alleged conspiracy. See RESTATEMENT (SECOND) OF TORTS § 876 cmt. b (AM. LAW INST. 1966). Because Donna had insufficient evidence to establish that Catherine engaged in fraud, she could not establish that Catherine conspired with others to commit fraud. The trial court did not err in dismissing this claim.

D. Donna failed to present evidence that Sherry breached the standard of care applicable to real estate agents or that she proximately caused Donna's damages.

Lastly, Donna contends Sherry committed professional malpractice by violating RCW 18.86.050(1)(c). This statute provides that real estate agents must advise clients "to seek expert advice on matters relating to the transaction that are

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<sup>4</sup> Donna argues that upholding the trial court's decision will lead to sellers feigning ignorance of material defects, rendering the Form 17 at best, useless, and at worst, misleading and counterproductive. But Donna did not raise this argument below. An argument not made to the trial court, especially on a summary judgment motion, will not be considered for the first time on appeal. RAP 9.12; see also Vernon v. Acres Allvest, LLC, 183 Wn. App. 422, 436, 333 P.3d 534 (2014). We will thus not address it here.

beyond the agent's expertise." But Donna had no evidence to establish Sherry breached this statutory provision.

Donna alleged below that Sherry failed to recommend a sewer inspection. There is no evidence to support this allegation. Sherry testified she told Donna she should obtain a sewer inspection and produced an email in which she asked Catherine's real estate agent if she could schedule the inspection on September 28, 2016.

Donna's deposition testimony further undermines her claim that Sherry failed to recommend a sewer inspection. On the first day of her deposition, October 12, 2017, Donna initially testified that Sherry did not recommend a sewer inspection. But during the second day of her deposition on November 20, 2017, Donna admitted that she and Sherry discussed getting a sewer inspection:

Q: You don't know what you're alleging in this case against [Sherry]?

A: I discussed several times the sewer inspection. I didn't know that she had scheduled an appointment to have one done, so I – whether she failed or not, I – I didn't have one done, so she – she may have failed me by not pushing harder to have one done.

Q: Your testimony is that [Sherry] never talked to you about trying to get a sewer inspection; is that correct?

A: Not during this time, no, I don't recall her scheduling an appointment for a sewer inspection.

...

Q: Did you ever send [Sherry] an e-mail asking her why do I not have a sewer inspection?

A: I don't recall sending her an e-mail like that.

Q: Do you ever remember having a telephone call like that with her?

A: We may have had a phone conversation about it.

Q: What do you mean you may have? Did you or did you not, do you recall or do you not recall?

A: I know I talked to [Sherry] about getting the sewer inspection done and I didn't want to have one done until I saw the structural inspection.

....

Q: Okay. This e-mail exchange with [Sherry], trying to set a sewer inspection is also on September 28th, correct?

A: Yes, I saw that.

Q: So what were you waiting for?

A: To go through the [structural] inspection report.

In light of this admission, no reasonable jury could conclude from this evidence that Sherry breached RCW 18.86.050 by failing to advise Donna to obtain a sewer inspection.

On appeal, Donna contends that despite her admitted conversations with Sherry about the advisability of a sewer inspection, Sherry did not document her advice or Donna's refusal to take this advice. But Donna cites no authority for the proposition that a real estate broker breaches the standard of care by failing to document either her advice to a client or a client's refusal to follow that advice, particularly when the client admits she refused to do so.

Even if documentation were required to meet a standard of care, Donna was advised in writing in the Form 17 to obtain expert advice regarding the home:

The following are disclosures made by seller and are not the representations of any real estate licensee or other party. . . .

For a more comprehensive examination of the specific condition of this property you are advised to obtain and pay for the services of

qualified experts to inspect the property, which may include, without limitation, . . . plumbers, . . . .

And when Donna signed the Form 17, she acknowledged the following:

Buyer hereby acknowledges receipt of a copy of this disclosure statement and acknowledges that the disclosures made herein are those of the seller only, and not of any real estate licensee or other party.

Donna was also advised in writing in the REPSA that Sherry, identified as the "Selling Broker," lacked the expertise to identify defects in the home:

Brokers do not have the expertise to identify or assess defective products, materials, or conditions. Buyer is urged to use due diligence to inspect the Property to Buyer's satisfaction and to retain inspectors qualified to identify the presence of defective materials and evaluate the condition of the Property as there may be defects that may only be revealed by careful inspection.

Donna was adequately advised that she needed to inspect the home to identify any defects, and her argument that Sherry failed to document their inspection discussions is insufficient to revive her professional malpractice claim.

Donna next argues that Sherry breached the standard of care by telling her that a sewer inspection probably was not necessary because Mike was a plumber. But Donna admits that this statement, if made, occurred after Donna had already allowed the six-day Initial Inspection Period to lapse. She testified that "[Sherry] advised me that we didn't need such an inspection because 'the seller's boyfriend was a plumber.' That was after the inspection period." To demonstrate that a real estate broker's breach of the standard of care was the proximate cause of the plaintiff's injury, the plaintiff must demonstrate both cause in fact and legal causation. Beauregard v. Riley, \_\_\_ Wn. App. 2d \_\_\_, 443 P.3d 827, 831 (2019). Cause in fact is established by showing that "but for" the defendant's breach, the

plaintiff's alleged injury would not have occurred. Id. Because Donna waited until after the inspection period lapsed to discuss scheduling the sewer scope, she cannot establish that Sherry's comment on the necessity of having this inspection completed was the "but for" cause of her damages.

Indeed, when asked why she did not request more time to conduct a sewer inspection, Donna simply answered, "I don't know why I didn't ask that." Had Donna followed Sherry's advice and paid for simultaneous structural and sewer inspections, Donna would have discovered the problems she encountered months later. This record does not create a genuine issue of material fact on either breach of the standard of care or proximate cause. Thus, the trial court did not err in dismissing Donna's malpractice claim against Sherry.

E. The trial court erred in denying Catherine's motion for attorney fees.

On her cross-appeal, Catherine contends the trial court erred in denying her motion for attorney fees under the REPSA. We agree.

Whether a party is entitled to attorney fees is an issue of law reviewed de novo. Boguch v. Landover Corp., 153 Wn. App. 595, 615, 224 P.3d 795 (2009). If an action in tort is "based on a contract" containing an attorney fee provision, the prevailing party is entitled to attorney fees. Brown v. Johnson, 109 Wn. App. 56, 58, 34 P.3d 1233 (2001). An action is "on a contract" if the action arose out of the contract, and if the contract is central to the dispute. Id.

Paragraph "q" of the REPSA provided:

[I]f Buyer or Seller institutes suit against the other concerning this Agreement[,], the prevailing party is entitled to reasonable attorneys' fees and expenses.

The trial court denied Catherine's request for fees, concluding that Donna's tort claims did not "concern the agreement." The trial court reasoned that the phrase "concerning this Agreement" was narrower than provisions allowing for fees in disputes "related to" an agreement, and expressly distinguished Alejandre and Hudson v. Condon, 101 Wn. App. 866, 6 P.3d 615 (2000).

We see no distinction, however, between the phrase "concerning this agreement" and "relating to this agreement." "Concern" is defined as "to relate or refer to." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 470 (2002). The provision here is just as broad as the provision in Alejandre, in which the Supreme Court awarded attorney fees, 159 Wn.2d at 691-92, and the provision in Hudson, in which Division Three of this court awarded attorney fees, 101 Wn. App. at 877-78.

Moreover, Brown is dispositive of the issue. In that case, the purchase and sale agreement provided (as here) that "[i]f Buyer [or] Seller . . . institutes suit concerning this Agreement, . . . the prevailing party is entitled to . . . a reasonable attorney's fee." 109 Wn. App. at 59. This court remanded for an award of attorney fees because Brown's misrepresentation claims arose out of the agreement to sell Johnson's home to Brown. Id. at 59-60; see also Douglas, 173 Wn. App. at 835 (citing to Brown and awarding attorney fees to sellers because the action in tort was based on a contract containing an attorney fee provision).

As in Brown, Donna's claims of misrepresentation arose out of the REPSA because Catherine's defenses to liability focused on Donna's right to inspect the home under the inspection addendum and Donna's decision to forgo the inspection she was contractually entitled to undertake. See Edmonds v. John L. Scott Real

Estate, Inc., 87 Wn. App. 834, 855-56, 942 P.2d 1072 (1997) (buyer's breach of fiduciary duty claim arose out of earnest money agreement because defense to claim rested on language of that agreement).

The REPSA was similarly central to the dispute between Donna and Catherine. The due diligence requirement of paragraph "x" of the REPSA's general terms, the inspection provision in the financing addendum, the pre-closing reinspection provision in the optional clauses addendum, and the inspection protocol in the inspection addendum, were all relevant to analyzing Donna's fraud claims.

Finally, we note that Donna's misrepresentation claim was based on a statement in the Form 17 that the home was "connected" to the public sewer. Yet, this same representation is contained in the REPSA. Paragraph 5 of the optional clauses addendum provided that "[t]o the best of Seller's knowledge, Seller represents that the Property is connected to a: . . . public sewer main; . . . ." Although the Form 17 did not become a part of the REPSA, the representation regarding the connection to the sewer main explicitly did because it appears in the optional clauses addendum.

For these reasons, we conclude the trial court erred in denying Catherine's motion for an award of attorney fees under paragraph "q" of the REPSA.

F. The trial court did not abuse its discretion in denying Sherry's motion for CR 11 sanctions.

Finally, Sherry appeals the trial court's order denying her request for fees and costs under CR 11. She contends that once Donna was deposed on October 12, 2017, it was clear that any claim that Sherry failed to advise Donna to obtain a



sewer inspection was factually unfounded and thus frivolous. Sherry contends Donna's decision to file a second amended complaint, after the deposition occurred, was sanctionable under CR 11.

We review a decision on CR 11 sanctions for an abuse of discretion, asking whether the trial court's decision was manifestly unreasonable or based on untenable grounds. MacDonald v. Korum Ford, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996). A trial court may award fees under CR 11 against an attorney or a party for filing a pleading that is not grounded in fact or warranted by law or is filed in bad faith for an improper purpose. Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co., 151 Wn. App. 195, 207, 211 P.3d 430 (2009). Because CR 11 sanctions have a potentially chilling effect, the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. Id. at 208. Just because a case is factually weak and an order for summary judgment is affirmed, "does not mean that the case was entirely groundless or advanced for an improper purpose." Id.

The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). CR 11 sanctions may not be awarded unless a trial court finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim. Id. at 220. The reasonableness of the inquiry is evaluated under an objective standard. Id. Thus, the courts should not employ the "wisdom of hindsight" to evaluate a CR 11 claim. Id.

We find no abuse of discretion in denying Sherry's motion for CR 11 sanctions. Donna alleged in her second amended complaint, filed on December

13, 2017, that Sherry was negligent in failing to recommend that a sewer inspection be conducted before the purchase and that Sherry was negligent in recommending against a sewer inspection. These allegations were based on testimony Donna provided on two days of deposition, October 12, 2017, and November 20, 2017. As indicated above, Donna testified in the October 12 deposition that Sherry did not recommend a sewer inspection. That testimony changed on November 20, 2017, when she stated that Sherry had initially recommended this inspection, but Donna wanted to wait until after she saw the results of the structural inspection, and that by the time she received that report, the inspection period had lapsed.

First, when Donna filed her second amended complaint, Sherry had not yet been deposed. It is understandable for an attorney to choose to wait to evaluate the factual strength of a claim until both parties to a particular conversation have been deposed.

Second, in opposing Sherry's CR 11 motion, Donna argued her claim was based on a "later discussion, after the close of the inspection period, where [Sherry] advised that a sewer inspection was not needed." Sherry argued in reply that Donna's reliance on such a comment was not credible given that she "could have requested the [sewer] inspection even up until closing but directed closing regardless." Given Sherry's argument, counsel argued that Sherry's comment dissuaded Donna from requesting an inspection after the inspection period had lapsed. Although we conclude that Donna's claim was appropriately dismissed on summary judgment, we understand why the trial court did not deem the claim to be completely baseless. The trial court did not abuse its discretion in denying Sherry's CR 11 motion.

We affirm the dismissal of Donna's claims against Catherine and Mike Conover and against Sherry Voelker-Hornsby. We affirm the denial of Sherry's CR 11 motion. We reverse the order denying Catherine's motion for attorney fees and remand for further proceedings consistent with this opinion.

Catherine, as prevailing party in this court, is entitled to an award of attorney fees and costs in this appeal, subject to compliance with RAP 18.1. Because neither Donna nor Sherry have prevailed on their claims, we deny their requests for attorney fees and costs on appeal.

WE CONCUR:

Mann, ACJ

Andrus, J.

Leach, J.

**B**

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**SELLER DISCLOSURE STATEMENT  
IMPROVED PROPERTY**

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**SELLER:** Jenkins, Catherine A

To be used in transfers of improved residential real property, including residential dwellings up to four units, new construction, condominiums not subject to a public offering statement, certain timeshares, and manufactured and mobile homes. See RCW Chapter 64.06 for further information.

**INSTRUCTIONS TO THE SELLER**

Please complete the following form. Do not leave any spaces blank. If the question clearly does not apply to the property check "NA." If the answer is "yes" to any asterisked (\*) item(s), please explain on attached sheets. Please refer to the line number(s) of the question(s) when you provide your explanation(s). For your protection you must date and initial each page of this disclosure statement and each attachment. Delivery of the disclosure statement must occur not later than five (5) business days, unless otherwise agreed, after mutual acceptance of a written purchase and sale agreement between Buyer and Seller.

**NOTICE TO THE BUYER**

THE FOLLOWING DISCLOSURES ARE MADE BY THE SELLER ABOUT THE CONDITION OF THE PROPERTY LOCATED AT 4220 Chilberg Ave SW, CITY Seattle

STATE WA, ZIP 98116, COUNTY King (THE PROPERTY) OR AS LEGALLY DESCRIBED ON THE ATTACHED EXHIBIT A.

SELLER MAKES THE FOLLOWING DISCLOSURES OF EXISTING MATERIAL FACTS OR MATERIAL DEFECTS TO BUYER BASED ON SELLER'S ACTUAL KNOWLEDGE OF THE PROPERTY AT THE TIME SELLER COMPLETES THIS DISCLOSURE STATEMENT. UNLESS YOU AND SELLER OTHERWISE AGREE IN WRITING, YOU HAVE THREE (3) BUSINESS DAYS FROM THE DAY SELLER OR SELLER'S AGENT DELIVERS THIS DISCLOSURE STATEMENT TO YOU TO RESCIND THE AGREEMENT BY DELIVERING A SEPARATELY SIGNED WRITTEN STATEMENT OF RESCISSION TO SELLER OR SELLER'S AGENT. IF THE SELLER DOES NOT GIVE YOU A COMPLETED DISCLOSURE STATEMENT, THEN YOU MAY WAIVE THE RIGHT TO RESCIND PRIOR TO OR AFTER THE TIME YOU ENTER INTO A PURCHASE AND SALE AGREEMENT.

THE FOLLOWING ARE DISCLOSURES MADE BY SELLER AND ARE NOT THE REPRESENTATIONS OF ANY REAL ESTATE LICENSEE OR OTHER PARTY. THIS INFORMATION IS FOR DISCLOSURE ONLY AND IS NOT INTENDED TO BE A PART OF ANY WRITTEN AGREEMENT BETWEEN BUYER AND SELLER.

FOR A MORE COMPREHENSIVE EXAMINATION OF THE SPECIFIC CONDITION OF THIS PROPERTY YOU ARE ADVISED TO OBTAIN AND PAY FOR THE SERVICES OF QUALIFIED EXPERTS TO INSPECT THE PROPERTY, WHICH MAY INCLUDE, WITHOUT LIMITATION, ARCHITECTS, ENGINEERS, LAND SURVEYORS, PLUMBERS, ELECTRICIANS, ROOFERS, BUILDING INSPECTORS, ON-SITE WASTEWATER TREATMENT INSPECTORS, OR STRUCTURAL PEST INSPECTORS. THE PROSPECTIVE BUYER AND SELLER MAY WISH TO OBTAIN PROFESSIONAL ADVICE OR INSPECTIONS OF THE PROPERTY OR TO PROVIDE APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN THEM WITH RESPECT TO ANY ADVICE, INSPECTION, DEFECTS OR WARRANTIES.

SELLER  IS /  IS NOT OCCUPYING THE PROPERTY.

**I. SELLER'S DISCLOSURES:**

\*If you answer "Yes" to a question with an asterisk (\*), please explain your answer and attach documents, if available and not otherwise publicly recorded. If necessary, use an attached sheet.

**1. TITLE**

- |  | YES                                 | NO                                  | DONT<br>KNOW             | NA                       |
|--|-------------------------------------|-------------------------------------|--------------------------|--------------------------|
| A. Do you have legal authority to sell the property? If no, please explain. ....   | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> | <input type="checkbox"/> |
| *B. Is title to the property subject to any of the following?  |                                     |                                     |                          |                          |
| (1) First right of refusal .....   | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (2) Option .....   | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (3) Lease or rental agreement .....  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (4) Life estate? .....   | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| *C. Are there any encroachments, boundary agreements, or boundary disputes? .....  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| *D. Is there a private road or easement agreement for access to the property? .....                                      | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| *E. Are there any rights-of-way, easements, or access limitations that may affect the Buyer's use of the property? ..... | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| *F. Are there any written agreements for joint maintenance of an easement or right-of-way? .....                         | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| *G. Is there any study, survey project, or notice that would adversely affect the property? .....                        | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| *H. Are there any pending or existing assessments against the property? .....  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

CJ 8/14/14  
SELLER'S INITIALS Date

SELLER'S INITIALS Date

Exhibit 2A  
Witness M. Conder  
Date 8-3-17  
Buell Realtime Reporting  
(206) 287-3466

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- |  | YES                      | NO                                  | DONT<br>KNOW             | N/A                      |                      |
|--|--------------------------|-------------------------------------|--------------------------|--------------------------|----------------------|
| *I. Are there any zoning violations, nonconforming uses, or any unusual restrictions on the property that would affect future construction or remodeling? .....  | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 52<br>53<br>54<br>55 |
| *J. Is there a boundary survey for the property? .....   | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 56                   |
| *K. Are there any covenants, conditions, or restrictions recorded against the property? .....  | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 57                   |
| PLEASE NOTE: Covenants, conditions, and restrictions which purport to forbid or restrict the conveyance, encumbrance, occupancy, or lease of real property to individuals based on race, creed, color, sex, national origin, familial status, or disability are void, unenforceable, and illegal. RCW 49.60.224. |                          |                                     |                          |                          | 58<br>59<br>60<br>61 |

**2. WATER**

**A. Household Water**

- |   |                                     |                                     |                                     |                                     |                            |
|---|-------------------------------------|-------------------------------------|-------------------------------------|-------------------------------------|----------------------------|
| (1) The source of water for the property is: <input checked="" type="checkbox"/> Private or publicly owned water system<br><input type="checkbox"/> Private well serving only the subject property <input type="checkbox"/> Other water system<br>*If shared, are there any written agreements? ..... | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | 62<br>63<br>64<br>65<br>66 |
| *(2) Is there an easement (recorded or unrecorded) for access to and/or maintenance of the water source? .....  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/>            | 67<br>68                   |
| *(3) Are there any problems or repairs needed? .....  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/>            | 69                         |
| (4) During your ownership, has the source provided an adequate year-round supply of potable water? ..<br>If no, please explain: _____   | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            | 70<br>71                   |
| *(5) Are there any water treatment systems for the property? .....  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/>            | 72<br>73                   |
| *(6) Are there any water rights for the property associated with its domestic water supply, such as a water right permit, certificate, or claim? .....  | <input type="checkbox"/>            | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | 74<br>75                   |
| (a) If yes, has the water right permit, certificate, or claim been assigned, transferred, or changed? ..  | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | 76                         |
| *(b) If yes, has all or any portion of the water right not been used for five or more successive years? ..  | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | 77                         |
| *(7) Are there any defects in the operation of the water system (e.g. pipes, tank, pump, etc.)? .....   | <input type="checkbox"/>            | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | 78                         |

**B. Irrigation Water**

- |  |                          |                          |                          |                                     |                |
|--|--------------------------|--------------------------|--------------------------|-------------------------------------|----------------|
| (1) Are there any irrigation water rights for the property, such as a water right permit, certificate, or claim? .....   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 79<br>80<br>81 |
| *(a) If yes, has all or any portion of the water right not been used for five or more successive years? .....  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 82             |
| *(b) If so, is the certificate available? (If yes, please attach a copy.) .....  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 83             |
| *(c) If so, has the water right permit, certificate, or claim been assigned, transferred, or changed? ..   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 84<br>85       |
| *(2) Does the property receive irrigation water from a ditch company, irrigation district, or other entity? ..<br>If so, please identify the entity that supplies water to the property: _____ | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 86<br>87<br>88 |

**C. Outdoor Sprinkler System**

- |   |                          |                                     |                          |                                     |          |
|---|--------------------------|-------------------------------------|--------------------------|-------------------------------------|----------|
| (1) Is there an outdoor sprinkler system for the property? .....          | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            | 89<br>90 |
| *(2) If yes, are there any defects in the system? .....                   | <input type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 91       |
| *(3) If yes, is the sprinkler system connected to irrigation water? ..... | <input type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 92       |

**3. SEWER/ON-SITE SEWAGE SYSTEM**

**A. The property is served by:**

- Public sewer system  On-site sewage system (including pipes, tanks, drainfields, and all other component parts)  
 Other disposal system

Please describe: \_\_\_\_\_

SELLER'S INITIALS

Date

SELLER'S INITIALS

Date

*ij* 8/19/16

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	YES	NO	DON'T KNOW	NA	98
B. If public sewer system service is available to the property, is the house connected to the sewer main?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	99
If no, please explain: _____					100
C. Is the property subject to any sewage system fees or charges in addition to those covered in your regularly billed sewer or on-site sewage system maintenance service?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	102
D. If the property is connected to an on-site sewage system:					103
*(1) Was a permit issued for its construction and was it approved by the local health department or district following its construction?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	104
(2) When was it last pumped? _____					106
*(3) Are there any defects in the operation of the on-site sewage system?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	107
(4) When was it last inspected? _____				<input checked="" type="checkbox"/>	108
By whom: _____				<input checked="" type="checkbox"/>	109
(5) For how many bedrooms was the on-site sewage system approved? _____ bedrooms			<input type="checkbox"/>	<input checked="" type="checkbox"/>	110
E. Are all plumbing fixtures, including laundry drain, connected to the sewer/on-site sewage system?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	111
If no, please explain: _____					112
F. Have there been any changes or repairs to the on-site sewage system?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	113
G. Is the on-site sewage system, including the drainfield, located entirely within the boundaries of the property?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	114
If no, please explain: _____					115
H. Does the on-site sewage system require monitoring and maintenance services more frequently than once a year?.....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	116
					117
					118
					119
					120

NOTICE: IF THIS RESIDENTIAL REAL PROPERTY DISCLOSURE IS BEING COMPLETED FOR NEW CONSTRUCTION WHICH HAS NEVER BEEN OCCUPIED, SELLER IS NOT REQUIRED TO COMPLETE THE QUESTIONS LISTED IN ITEM 4 (STRUCTURAL) OR ITEM 5 (SYSTEMS AND FIXTURES).

4. STRUCTURAL

*A. Has the roof leaked within the last 5 years?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	121
*B. Has the basement flooded or leaked?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	122
*C. Have there been any conversions, additions or remodeling?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	123
*(1) If yes, were all building permits obtained?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	124
*(2) If yes, were all final inspections obtained?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	125
D. Do you know the age of the house?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	126
If yes, year of original construction: _____					127
*E. Has there been any settling, slippage, or siding of the property or its improvements?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	128
*F. Are there any defects with the following: (If yes, please check applicable items and explain)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	129
<input type="checkbox"/> Foundations	<input type="checkbox"/> Decks	<input type="checkbox"/> Exterior Walls			130
<input type="checkbox"/> Chimneys	<input type="checkbox"/> Interior Walls	<input type="checkbox"/> Fire Alarms			131
<input type="checkbox"/> Doors	<input type="checkbox"/> Windows	<input type="checkbox"/> Patio			132
<input type="checkbox"/> Ceilings	<input type="checkbox"/> Slab Floors	<input type="checkbox"/> Driveways			133
<input type="checkbox"/> Pools	<input type="checkbox"/> Hot Tub	<input type="checkbox"/> Sauna			134
<input type="checkbox"/> Sidewalks	<input type="checkbox"/> Outbuildings	<input type="checkbox"/> Fireplaces			135
<input type="checkbox"/> Garage Floors	<input type="checkbox"/> Walkways	<input type="checkbox"/> Siding			136
<input type="checkbox"/> Wood Stoves	<input type="checkbox"/> Elevators	<input type="checkbox"/> Incline Elevators			137
<input type="checkbox"/> Stairway Chair Lifts	<input type="checkbox"/> Wheelchair Lifts	<input type="checkbox"/> Other _____			138
					139
					140
					141
*G. Was a structural pest or "whole house" inspection done?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	142
If yes, when and by whom was the inspection completed?					143
<u>MAINTENANCE CONTRACT WITH CENTINAL PEST CONTROL</u>					144
H. During your ownership, has the property had any wood destroying organism or pest infestation?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	145
I. Is the attic insulated?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	146
J. Is the basement insulated?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	147

SELLER'S INITIALS \_\_\_\_\_ Date \_\_\_\_\_ SELLER'S INITIALS \_\_\_\_\_ Date \_\_\_\_\_

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**5. SYSTEMS AND FIXTURES**

	YES	NO	DONT KNOW	N/A	148
A. If any of the following systems or fixtures are included with the transfer, are there any defects? If yes, please explain: _____					149
Electrical system, including wiring, switches, outlets, and service .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	151
Plumbing system, including pipes, faucets, fixtures, and toilets .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	152
Hot water tank .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	153
Garbage disposal .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	154
Appliances .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	155
Sump pump .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	156
Heating and cooling systems .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	157
Security system: <input type="checkbox"/> Owned <input type="checkbox"/> Leased .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	158
Other .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	159

B. If any of the following fixtures or property is included with the transfer, are they leased? (If yes, please attach copy of lease.)					161
Security System: _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	162
Tanks (type): _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	163
Satellite dish: _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	164
Other: _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	165

C. Are any of the following kinds of wood burning appliances present at the property?					166
(1) Woodstove? .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	167
(2) Fireplace insert? .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	168
(3) Pellet stove? .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	169
(4) Fireplace? .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	170

If yes, are all of the (1) woodstoves or (2) fireplace inserts certified by the U.S. Environmental Protection Agency as clean burning appliances to improve air quality and public health? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	171
Protection Agency as clean burning appliances to improve air quality and public health? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	172

D. Is the property located within a city, county, or district or within a department of natural resources fire protection zone that provides fire protection services? .....	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	173
E. Is the property equipped with carbon monoxide alarms? (Note: Pursuant to RCW 19.27.530, Seller must equip the residence with carbon monoxide alarms as required by the state building code.) .....	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	174
F. Is the property equipped with smoke alarms? .....	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	175

**6. HOMEOWNERS' ASSOCIATION/COMMON INTERESTS**

A. Is there a Homeowners' Association? Name of Association and contact information for an officer, director, employee, or other authorized agent, if any, who may provide the association's financial statements, minutes, bylaws, filing policy, and other information that is not publicly available: _____	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	176
B. Are there regular periodic assessments? \$ _____ per <input type="checkbox"/> month <input type="checkbox"/> year <input type="checkbox"/> Other: _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	177
C. Are there any pending special assessments? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	178
D. Are there any shared "common areas" or any joint maintenance agreements (facilities such as walls, fences, landscaping, pools, tennis courts, walkways, or other areas co-owned in undivided interest with others)? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	179

**7. ENVIRONMENTAL**

A. Have there been any flooding, standing water, or drainage problems on the property that affect the property or access to the property? .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	180
B. Does any part of the property contain fill dirt, waste, or other fill material? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	181
C. Is there any material damage to the property from fire, wind, floods, beach movements, earthquake, expansive soils, or landslides? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	182
(1) Are there any shorelines, wetlands, floodplains, or critical areas on the property? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	183
E. Are there any substances, materials, or products in or on the property that may be environmental concerns, such as asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, or contaminated soil or water? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	184
F. Has the property been used for commercial or industrial purposes? .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	185

CP 8/19/14  
SELLER'S INITIALS \_\_\_\_\_ Date \_\_\_\_\_  
SELLER'S INITIALS \_\_\_\_\_ Date \_\_\_\_\_



SELLER DISCLOSURE STATEMENT  
IMPROVED PROPERTY

(Continued)

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Northwest Multiple Listing Service  
ALL RIGHTS RESERVED

	YES	NO	DON'T KNOW	NA	
*G. Is there any soil or groundwater contamination?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	202 203 204
*H. Are there transmission poles or other electrical utility equipment installed, maintained, or buried on the property that do not provide utility service to the structures on the property?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	205 206 208
*I. Has the property been used as a legal or illegal dumping site?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	207
*J. Has the property been used as an illegal drug manufacturing site?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	208 209
*K. Are there any radio towers in the area that cause interference with cellular telephone reception?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	210
<b>8. LEAD BASED PAINT</b> (Applicable if the house was built before 1978).					210
A. Presence of lead-based paint and/or lead-based paint hazards (check one below):					211
<input type="checkbox"/> Known lead-based paint and/or lead-based paint hazards are present in the housing (explain).					212 213
<input checked="" type="checkbox"/> Seller has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.					214
B. Records and reports available to the Seller (check one below):					215
<input type="checkbox"/> Seller has provided the purchaser with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below).					216 217 218
<input checked="" type="checkbox"/> Seller has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.					219
<b>9. MANUFACTURED AND MOBILE HOMES</b>					220
If the property includes a manufactured or mobile home.					221
*A. Did you make any alterations to the home?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	222
If yes, please describe the alterations:					223
*B. Did any previous owner make any alterations to the home?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	224
*C. If alterations were made, were permits or variances for these alterations obtained?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	225
<b>10. FULL DISCLOSURE BY SELLERS</b>					226
A. Other conditions or defects:					227
*Are there any other existing material defects affecting the property that a prospective buyer should know about?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	228 229
B. Verification					230
The foregoing answers and attached explanations (if any) are complete and correct to the best of Seller's knowledge and Seller has received a copy hereof. Seller agrees to defend, indemnify and hold real estate licensees harmless from and against any and all claims that the above information is inaccurate. Seller authorizes real estate licensees, if any, to deliver a copy of this disclosure statement to other real estate licensees and all prospective buyers of the property.					231 232 233 234
<i>Cathy Jenkins</i> 8/19/16					235
Seller				Date	236

If the answer is "Yes" to any asterisked (\*) items, please explain below (use additional sheets if necessary). Please refer to the line number(s) of the question(s).

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**SELLER DISCLOSURE STATEMENT  
IMPROVED PROPERTY**  
(Continued)

**II. NOTICES TO THE BUYER**

**1. SEX OFFENDER REGISTRATION**

INFORMATION REGARDING REGISTERED SEX OFFENDERS MAY BE OBTAINED FROM LOCAL LAW ENFORCEMENT AGENCIES. THIS NOTICE IS INTENDED ONLY TO INFORM YOU OF WHERE TO OBTAIN THIS INFORMATION AND IS NOT AN INDICATION OF THE PRESENCE OF REGISTERED SEX OFFENDERS.

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**2. PROXIMITY TO FARMING**

THIS NOTICE IS TO INFORM YOU THAT THE REAL PROPERTY YOU ARE CONSIDERING FOR PURCHASE MAY LIE IN CLOSE PROXIMITY TO A FARM. THE OPERATION OF A FARM INVOLVES USUAL AND CUSTOMARY AGRICULTURAL PRACTICES, WHICH ARE PROTECTED UNDER RCW 7.48.305, THE WASHINGTON RIGHT TO FARM ACT.

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**III. BUYER'S ACKNOWLEDGEMENT**

**1. BUYER HEREBY ACKNOWLEDGES THAT:**

- A. Buyer has a duty to pay diligent attention to any material defects that are known to Buyer or can be known to Buyer by utilizing diligent attention and observation.
- B. The disclosures set forth in this statement and in any amendments to this statement are made only by the Seller and not by any real estate licensee or other party.
- C. Buyer acknowledges that, pursuant to RCW 64.06.050(2), real estate licensees are not liable for inaccurate information provided by Seller, except to the extent that real estate licensees know of such inaccurate information.
- D. This information is for disclosure only and is not intended to be a part of the written agreement between the Buyer and Seller.
- E. Buyer (which term includes all persons signing the "Buyer's acceptance" portion of this disclosure statement below) has received a copy of this Disclosure Statement (including attachments, if any) bearing Seller's signature(s).
- F. If the house was built prior to 1978, Buyer acknowledges receipt of the pamphlet *Protect Your Family From Lead in Your Home*.

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DISCLOSURES CONTAINED IN THIS DISCLOSURE STATEMENT ARE PROVIDED BY SELLER BASED ON SELLER'S ACTUAL KNOWLEDGE OF THE PROPERTY AT THE TIME SELLER COMPLETES THIS DISCLOSURE. UNLESS BUYER AND SELLER OTHERWISE AGREE IN WRITING, BUYER SHALL HAVE THREE (3) BUSINESS DAYS FROM THE DAY SELLER OR SELLER'S AGENT DELIVERS THIS DISCLOSURE STATEMENT TO RESCIND THE AGREEMENT BY DELIVERING A SEPARATELY SIGNED WRITTEN STATEMENT OF RESCISSION TO SELLER OR SELLER'S AGENT. YOU MAY WAIVE THE RIGHT TO RESCIND PRIOR TO OR AFTER THE TIME YOU ENTER INTO A SALE AGREEMENT.

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BUYER HEREBY ACKNOWLEDGES RECEIPT OF A COPY OF THIS DISCLOSURE STATEMENT AND ACKNOWLEDGES THAT THE DISCLOSURES MADE HEREIN ARE THOSE OF THE SELLER ONLY, AND NOT OF ANY REAL ESTATE LICENSEE OR OTHER PARTY

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Buyer \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_

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**2. BUYER'S WAIVER OF RIGHT TO REVOKE OFFER**

Buyer has read and reviewed the Seller's responses to this Seller Disclosure Statement. Buyer approves this statement and waives Buyer's right to revoke Buyer's offer based on this disclosure.

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Buyer \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_

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**3. BUYER'S WAIVER OF RIGHT TO RECEIVE COMPLETED SELLER DISCLOSURE STATEMENT**

Buyer has been advised of Buyer's right to receive a completed Seller Disclosure Statement. Buyer waives that right. However, if the answer to any of the questions in the section entitled "Environmental" would be "yes," Buyer may not waive the receipt of the "Environmental" section of the Seller Disclosure Statement.

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Buyer \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_

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SELLER'S INITIALS gj Date 8/19/10

SELLER'S INITIALS \_\_\_\_\_ Date \_\_\_\_\_

# KEANE LAW OFFICES

November 21, 2019 - 4:57 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 78166-9  
**Appellate Court Case Title:** Donna Woodcock, App/Cross-Resp v. Catherine Conover, et al., Resps/Apps

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