SUPREME COURT NO. 89828-6
COURT OF APPEALS NO. 68067-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SHANE and AMY WATTS.,

Respondents,

v.

MARY P. DUNPHY and MARK L. DUNPHY,

Petitioners.

ON APPEAL FROM THE COURT OF APPEALS, DIVISION ONE

PETITION FOR REVIEW

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I. INTRODUCTION

In February 2013, a mere five days after appellants' Reply Brief was filed with the Court of Appeals in this matter, Division One issued a published opinion in an eerily similar case. *Douglas v. Visser*, 173 Wn. App. 823, 829, 295 P.3d 800, 803 (2013) is one of those extraordinary decisions that should not be so exceptional.

In *Douglas*, a real estate broker purchased a house to fix up and rent. But it soon became apparent that the house needed more work than could be justified, and the broker put the house up for sale. As it turned out, the house has serious systemic rot. The broker went to great effort to conceal the rot from the purchasers. The buyer's inspector noted only two small areas of rot and essentially told the buyers not to worry about it. The buyers asked no questions about the rot and closed. After closing, they learned that the house had so much rot that it had to be destroyed and rebuilt from scratch.

The buyers sued the seller for fraud and fraudulent concealment, and they won handily in a bench trial. The broker-seller appealed in the face of indisputable evidence of fraud. The court of appeals published a decision brimming with outrage at the broker, but reversing the trial court's decision. As angry as the court was by the broker's conduct, it still was bound to follow and apply the law.

The law is clear that a buyer who is on notice of a defect has a duty to inquire. The *Douglas* court refused to overlook the law or to make its own finding that inquiry would have been fruitless. Left with no other

principled choice, it ruled for the fraudulent seller and even awarded him attorney fees.

Faced with a legally identical but far less egregious set of facts, the panel in this case took a very different approach. Instead of following the established law of inquiry notice, the court adopted the very arguments that Washington courts have rejected. The court effectively rewrote the inquiry notice rule out of existence to reach the decision that it wanted.

The court's decision in this case makes for a far more satisfying read than *Douglas*, but it does so at the cost of following the law. It is exactly the kind of case envisioned by RAP 13.4(b)(2) where a court of appeals decision flatly contradicts established precedent. This court should grant review and reverse the court of appeals.

II. PETITION

A. IDENTITY OF PETITIONERS

Mary Dunphy and Mark Dunphy, defendants and appellants below, ask this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISIONS

Petitioners seek review by this Court of the unpublished opinion of the Court of Appeals dated August 23, 2013 ("Opinion I), the Order denying motion for reconsideration and/or to publish dated December 23, 2013, and the substitute unpublished opinion of the Court of Appeals dated December 23, 2013 ("Opinion II). A copy of Opinion I is in the Appendix at pages A-1 to A-23 A copy of the order denying

reconsideration is in the Appendix at page A-24. A copy of Opinion II is in the Appendix at pages A-25 to A-47.

C. ISSUES PRESENTED FOR REVIEW

The issues presented for review are the following:

(1) Whether a buyer's duty to inquire is triggered by any evidence of a defect or only by "prepurchase notice of a defect involving the specific property purchased;" and

(2) Whether the determination if a purchaser of real property is on inquiry notice of a defect for purposes of fraud and fraudulent concealment is a question of law or a question of fact.

D. STATEMENT OF THE CASE

This is an appeal from a bench trial. The trial court's Findings of Fact are not challenged. As a result, review of this case is "limited to determining if the findings of fact are supported by substantial evidence and if the findings of fact support the conclusions of law." *Douglas v. Visser*, 173 Wn. App. 823, 829, 295 P.3d 800, 803 (2013). [Un]challenged findings of fact become verities on appeal (*Humphrey Indus., Ltd. v. Clay St. Associates, LLC*, 176 Wn.2d 662, 675, 295 P.3d 231, 237 (2013)), and "the absence of a finding of fact is to be interpreted as a finding against" the party with the burden of proof (*Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795, 800 (2001)).

1. Factual Summary.

Dunphy purchased a Kirkland conversion condominium in 2006. CP 64. Mary Dunphy was elected to the board of the initial homeowners association. CP 64.

The association learned from an inspection report ordered by Mary Dunphy that some of the buildings in the complex were missing weather resistant barrier (WRB) under the siding. CP 64. The report states that there was no existing damage as a result, but that the buildings could be vulnerable to damage in the future. CP 64 at ¶ 2.2(c). The board decided to investigate further in connection with the review of the property it was conducting of the conversion. CP 64 at ¶ 2.2(e).

In June 2007, Dunphy purchased a home and placed the condominium for sale. CP 65 at ¶2.2(n). The Watts offered to purchase the unit in July 2007. CP 65 at ¶ 2.2(o). Dunphy provided Watts with a Disclosure Statement about the property. Trial Exhibit 16; CP 65 at ¶2.2(q). In the disclosure, Dunphy answered "Don't Know" to the question " Is there any study, survey project, or notice that would adversely affect the property?" Dunphy also answered "No" to the question whether there were other defects. *Id.* The trial court found that these statements were knowingly false. *Id.*

The trial court made an interesting finding about the "defect" in this case.

> There was no evidence that there was any defect in siding itself, but there was a substantial question whether the lack of vapor barrier or moisture barrier was a defect. There were clearly notices, studies, and oral reports well known

> to Ms. Dunphy that the moisture barrier did not exist, and that future damage was likely if something was not done. The fact no damage might ever occur, or that the whole fix might be paid by the developer, does not mean that there was no defect.

CP 65-66 at ¶ 2.2(r).

The Watts had a routine buyer inspection of the property and were not advised of the lack of WRB. CP 65 at ¶ p. The trial court found the inspection reasonable and diligent. CP 65 at ¶ 2.2(p).

In addition to their inspection report, the Watts also received a Resale Certificate for the unit. CP 66 at ¶ 2.2(u). Attached to the resale certificate were 25 pages of minutes from the homeowner association meetings. CP 66 at ¶¶ 2.2(u), (v).

This appeal is about those meeting minutes. It would be fair to say that the meeting minutes are the entire appeal, For that reason, excerpts are attached in the Appendix at pages A-48 to A-62 .

The Minutes are important because Watts received them and read them. This was perhaps the most hotly contested factual issue at trial, and to Judge Lum's great credit, he made a specific factual finding.

> Though testimony was conflicting, the court finds the Watts did receive the Homeowners Association meeting minutes and had the opportunity to read them, and in fact did read them enough to comment on the parking situation.

CP 66 at ¶ 2.2(u). Judge Lum then concluded that the information in the meeting minutes was insufficient to put the Watts on notice of major problems with the WRB. CP 68 at ¶ 5.

The court of appeals noted that the minutes contain many references to the WRB issue. "It is true the meeting excerpts mention

'inspection,' 'envelope inspection,' 'invasive inspection,' 'intrusive study,' 'report,' and 'defect.'" The court of appeals actually did a pretty good job of summarizing the relevant references in the minutes.

> The October 16, 2006 meeting minutes mention "[c]oncerns about the moisture barrier under siding." Ex. 3 at 7. The December 12, 2006 meeting minutes state, "Vinyl siding is held off until the rain is more cooperative, so large portions can be pulled back to insure no damage underneath." Ex. 3 at 8.
>
> The February 13, 2007 meeting minutes contain the following notations:
>
> > 1. Envelop[e] Study was discussed by Mark Cress; an overview of the independent inspection report by Darrell Hays was commented by Mark.
> > 2. Mark Cress presented his findings with photo of the property which included siding, moisture barrier.
> > 3. Discussed options on how to proceed depending on what the POS states about envelop[e] study. Two options are proposed: 1. Intrusive Investigation or 2. Envelop[e] Study
> > 4. Envelop[e] study was the recommendation
> > 5. David Onsager (another attorney) at Stafford Frie Law Firm was mentioned as another option.
> > ...
>
> Ex. 3 at 11.
>
> The March 13, 2007 meeting minutes include the notation, "Update on inspection. Deferred until next meeting, no response from Mark W. of Corke–Amento." Ex. 3 at 12. The minutes also note, "Inspection—find a second company." Ex. 3 at 14.
>
> The April 10, 2007 meeting minutes include the notation, "Craig/Terry spoke to Corke Amento and we are moving ahead with the envelope/invasive inspection. Center [B]ay wanted to use their inspector, Craig declined that offer, but accepted the offer for Center [B]ay to pay 50% of the cost." Ex. 3 at 15.
>
> The May 8, 2007 meeting minutes include the following notation:

2) Discussion of Intrusive Study
a. Need David Onsager to weigh in on the moisture barrier and whether or not there is significant damage.
b. Waiting for results from Corke Amento and David Onsager
c. David Onsager will provide recommendation in the report
d. Terry to call David's assistant in order to get the date the report will be ready

Ex. 3 at 17.

On June 12, 2007, the Kirkland Village HOA held its annual meeting for all unit owners. Ex. 3 at 19. The meeting minutes include the notation, "Discussed envelope study and possible assessments. Informed that we are working with Center [B]ay and trying to resolve issues and working on not going into a legal battle." Ex. 3 at 20. The minutes also contain the following notation:

IV. New Business (8:19–8:24)
a. Inspection/Construction Defect
i. Corke Amento performing inspection
1. Currently waiting for report
ii. Asked owners to inform board of any [ ] defects or issues
iii. Timeline—depends on cooperation of builder

Ex. 3 at 20.

The July 12, 2007 meeting minutes include the following notation:

Bill from Corke Amento, inspectors for Envelope inspection came in at $9350.03 We are holding Center Bay to their offer to pay for half of this inspection. David Ansager defect Attorney has billed us 1792.00 for 5.6 hours of work. Missing insulation is an issue the Board will be going after Center Bay for.

Opinion II at 6-7.

Despite receiving and reading these minutes, the Watts asked no questions of either Dunphy or the board. They closed the purchase of the condominium. The Board completed its investigation and sued the

developer. That case was settled for over a million dollars, but no work had been started at the time of trial. CP 66 at ¶ 2.2(q). The trial court found the cost of future repairs too speculative to include in a damage award. CP 66 at ¶ 2.2(q).

2. Procedural History

This case was filed on February 22, 2010 and tried to Judge Dean Lum of the King County Superior Court from October 17, 2011 to October 19, 2011. Judge Lum's Findings of Fact and Conclusions of Law were entered on November 23, 2011. CP 63-69. Dunphy timely appealed.

The Court of Appeals issued its Unpublished Opinion on August 26, 2013. After acknowledging "the well-settled rule that '[w]hen a buyer is on notice of a defect, it must make further inquiries of the seller'" (Opinion 1 at 19 quoting *Douglas*, 173 Wn.App. at 830), the court reformulated that rule as: "a buyer's failure to inquire further after prepurchase notice of a specific defect involving the specific property purchased defeats a fraudulent concealment claim." Opinion I at 21 (emphasis added).

In addition to reformulating the law of inquiry notice, the Court of Appeals also held that inquiry notice is a question of fact. Judge Lum concluded as a matter of law that the meeting minutes were insufficient to put Watts on notice, but the Court of Appeals stated that "[t]his ruling constitutes a finding of fact, not a conclusion of law." Opinion I at 17. The court cited no authority for the proposition that inquiry notice is a question of fact.

Dunphy filed a motion for reconsideration. Two full months passed before the court finally called for a response to the motion, and another month passed after that before the court of appeals denied the motion and issued a new opinion. The new opinion appears to be identical to the first except for a few sentences.

The substance of the Court's decision is in a few paragraphs on pages 17-18.

> **It is true the meeting minute excerpts mention "inspection," "envelope inspection," "invasive inspection," "moisture barrier," "intrusive study," "report," and "defect."** According to Dunphy, this notice triggered Watts's duty to inquire about the WRB problem. The court's unchallenged finding of fact states:
>
> > The Minutes contain a list of all the issues the Board dealt with. **In there, among the other issues, are mentions of inspections; envelope studies, Darrel Hay's report, etc.** The court looks at the minutes in the context of what the Watts knew at the time, not with the 20/20 hindsight at the time of trial. . . .
>
> The court also ruled that this information triggered no duty to inquire further:
>
> > But if the Watts had read the [HOA] meeting minutes, what would it have told them? **Although the words "defect," "envelope studies," ["]Investigation," and "defect attorney" were mentioned several times, there is no context or explanation for the brief references buried in a maze of other irrelevant information.** Only with the use of 20/20 hindsight and specialized knowledge can we pick out the significance of these words.
>
> Substantial evidence supports this finding of fact. **The meeting minutes provide no details or explanation about the nature and extent of the WRB defect and specific units affected. Review of the trial evidence** and meeting minutes establish substantial evidence to support

> the trial court's finding that the disputed meeting minute "words" were "brief references buried in a maze of other irrelevant information." For example, **HOA president Craig Cleaver described the October 16, 2006 meeting minutes as a "laundry list"** of issues affecting the condominium complex, including homeowners complaining about several things, especially parking and landscaping. **The record evidence shows** the HOA Board sought to gather information on all complaints and issues about the condominium complex in order to submit them to the developer for redress. **The WRB problem was merely one item in the developer "laundry list" during the condominium's conversion from developer owner to a homeowners association structure.** As Watts points out, these were simply "'bullet points' in a long list of 'bullet points,'" none of which specifically related to Dunphy's unit or any other unit. Resp't's Br. at 17. We conclude substantial evidence supports the trial court's findings of fact and the findings support its conclusion of law that no duty to inquire further flowed to Watts based solely on review of the HOA Board meeting minutes.

Opinion I at 17-18 (footnote omitted and emphasis added).

The court of appeals decision contains two fundamental holdings that are at issue here. First, the Court of Appeals held that for information to put a buyer on inquiry notice, it must include "details or explanation about the nature and extent" of the defect and specific property affected. Second the Court of Appeals held that whether certain information imparts inquiry notice is a question of fact, not a question of law.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth four grounds for review by this Court. The court of appeals opinion is in conflict with multiple decisions of this court and the courts of appeals. RAP 13.4(b)(1), (2).

1. The Court of Appeals Applied the Wrong Standard for Inquiry Notice.

To reach its decision, the court of appeals ignored established law of inquiry notice and formulated a new rule. That decision is in conflict with the following cases.

Douglas v. Visser

In *Douglas v. Visser*, a real estate broker (Visser) purchased a house to renovate and rent. *Douglas*, 173 Wash.App. at 825. He quickly discovered that it required more work than anticipated, and he put the property up for sale. *Id.* The house had rot so severe that screws could not be installed. *Id.* at 828. The Douglases, who were Canadian citizens looking for a second home, made an offer to purchase the home. *Id.* at 825.

Visser actively concealed the rot from the Douglases, telling his worker to cover it with trim and caulking. *Id.* at 828-29. Douglas had the property inspected and received a report that identified two small areas of rot but downplayed their significance.

> Dennis Flaherty performed a prepurchase inspection for the Douglases. He discovered a small area of rot and decay near the roof line, and caulking that suggested a previous roof leak in the area. Beneath the home, he found an area of rotted sill plate that sat below the section of water damaged exterior siding. A portion of sill adjacent to the rotted section had recently been replaced. Floor joists adjacent to the rotted area had been sistered. In his inspection report, he noted that those areas did not pose a structural threat, but should be repaired if the condition degraded rapidly.

Id. at 826. The Douglases did not investigate the rot or inquire of Visser about it. *Id.*

After closing, the full extent of the rot revealed itself. The Douglases sued Visser for fraud and fraudulent concealment, and they prevailed in a bench trial.

> The trial court found that the Vissers discovered significant wood rot to the sill plate and rim joist, as well as to the floor joists. It determined that, instead of correcting the defects, the Vissers made superficial repairs and concealed the damage. It ruled in favor of the Douglases on all claims.

Id. at 829. Visser appealed, arguing that the Douglases' claim was barred by their failure to investigate after obtaining evidence of rot in the house.

The court of appeals made no secret of its outrage at Visser's conduct, calling it "egregious" and "reprehensible." *Id.* at 833, 834. However, the *Douglas* court still applied the law to the facts of the case and found itself obligated to reverse.

> Nonetheless, the law retains a duty on a buyer to beware, to inspect, and to question. We caution that the Douglases did not have a duty to perform exhaustive invasive inspection, or endlessly assail the Vissers with further questions. They merely had to make further inquiries after discovering rot or at trial show that further inquiry would have been fruitless. The only evidence of when the Douglases first learned of rot in the house is the report issued after Flaherty conducted his prepurchase inspection. Despite that discovery, on top of the Vissers' previous evasive and incomplete answers and the Vissers' on-going failure to provide their own prepurchase inspection report, either of which should have caused concern and further inquiry, there is no evidence that the Douglases made any inquiries whatsoever after the inspection. They obtained no finding from the trial court that further inquiry would have been fruitless.

Id. at 834-35.

The Douglases made the same argument that the Watts make in this case, namely that the mention of mold in their inspection report was

insufficient to impart inquiry notice. Opinion II at 18 ("The buyers argued that the area of rot their inspector discovered was not unusual and they had no knowledge that 50 to 70 percent of the sill plate and rim joist were destroyed."). As the court of appeals in this case itself acknowledged, *Douglas* "rejected that argument. Citing Dalarna, we stated the well-settled rule that '[w]hen a buyer is on notice of a defect, it must make further inquiries of the seller.'" Opinion II at 18-19.

The Watts received and read meeting minutes discussing the WRB problem. The references to rot in the Douglas inspection report were no less "buried" in the inspection report than the references to WRB were in the meeting minutes received by the Watts. The court of appeals here accepted the very argument that it rejected in *Douglas*.

Dalarna

Douglas was based largely on *Puget Sound Service Corp. v. Dalarna Management Corp.*, 51 Wash.App. 209, 215, 752 P.2d 1353, 1356 (1988), in which Division One tackled precisely the question of how much notice is required to excite inquiry. The court of appeals cites *Dalarna* throughout its opinion, but contradicts the holding in that case.

In Dalarna, the purchaser of an apartment building had an inspection that revealed "evidence of water penetration, including stains, cracked plaster, and loose tiles." *Dalarna*, 51 Wn.App. at 211. As in Douglas, the report downplayed the significance of the problem: "These leaks are not serious but should be controlled by additional caulking

outside and repainting and/or replastering inside." *Id.* As in *Douglas* and this case, the buyer made no inquiries and failed to investigate.

The buyer sued the seller for fraud and opposed summary judgment by arguing that the systemic water problems were so different from the minor, isolated problems identified in the report that it had no duty to inquire. *Id.* at 214. The *Dalarna* court acknowledged the appeal of that argument, but also recognized that adopting it would mean no rule at all.

> Puget Sound's argument that the extent of the problem can constitute a separate defect has a certain appeal. However, under the facts presented, this theory would require an improper extension of the doctrine of constructive fraud. Thus far, **constructive fraud has been limited to situations where no evidence of the defect is apparent.** As it presently exists, the law in Washington balances the harshness of the former rule of caveat emptor with the equally undesirable alternative of the courts standing in loco parentis to parties transacting business. *See Sorrell,* 6 Wash.App. at 223, 710 P.2d 809.

Id. at 214-215 (emphasis added).

Dalarna set forth a clear, bright-line rule for concealment cases. A buyer must inquire or prove that doing so would be fruitless if it obtains "some evidence" of a defect. *Id.* at 215. As this court has pointed out, the buyer must prove that as an element of its claim. *Alejandre v. Bull*, 159 Wn.2d 674, 689-90, 153 P.3d 864, 872 (2007) ("The Alejandres failed to meet their burden of showing that the defect in the septic system would not have been discovered through a reasonably diligent inspection.").

The court of appeals acknowledged that the Watts received "some evidence" of the WRB problem because it quotes that evidence for the

better part of a page. It also acknowledges *Dalarna* as the relevant authority but then proceeds to ignore its holding.

Jackowski v. Borchelt

The court of appeals also justifies its decision with the Court of Appeals decision in *Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 514 (2009), *aff'd* 174 Wash.2d 720, 278 P.3d 1100 (2012). In *Jackowski*, the seller of a waterfront home first answered "no" to the questions in the disclosure statement about defects, and later amended the form to refer to "Dept. of Community Development letter attached regarding restoration bond of $4,400." *Id.* at 7-8. The terms "Landslide Hazard Areas" and "Aquatic Management Areas" were circled in that document. *Id.* at 8 n.1.

The property was damaged in a landslide that may or may not have had anything to do with its designation. The court's disposition of the issue was short and succinct. "Here, as we discussed above, the Jackowskis had knowledge of the landslide hazard area and, thus, reliance on the Form 17 disclosure could not be reasonable." *Id.* at 17-18. The court did not concern itself with whether circling a few words would give notice, or whether the landslide area designation was related to the actual landslide. The buyer was on notice of a landslide risk and failed to inquire further at his peril.

Alejandre v. Bull

Before *Douglas* was decided, Dunphy relied primarily on this Court's decision in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864, 872 (2007). In *Alejandre*, the owner of a home decided to sell it after being

told that the septic system "drain fields were not working and that she needed to connect to the city's sewer system." *Id.* at 680. Yet, in her disclosure statement, she said that there were no defects with the septic system. *Id.* at 679.

The septic system was pumped for the sale, and the "bill stated on it that the septic system's back baffle could not be inspected but there was '[n]o obvious malfunction of the system at time of work done.'" *Id.* at 679. The appraiser also inspected the property and concluded that " the septic system 'Performs Intended Function' and stated that 'everything drains OK.'" *Id.* at 679.

Weeks after closing, the system failed. *Id.*at 680. The buyer sued the seller for fraud, and the case went to a jury trial. The trial court dismissed the Alejandres' claims as a matter of law after they rested their case at trial. *Id.* at 677.

This Court affirmed the dismissal of the negligent misrepresentation claim under the former economic loss rule. *Id.* at 689. It affirmed the dismissal of the fraud and fraudulent concealment claims because the buyer was on notice that the septic system could not be fully inspected.

> The "right to rely" element of fraud is intrinsically linked to the duty of the one to whom the representations are made to exercise diligence with regard to those representations. *Id.* at 698, 399 P.2d 308; *Puget Sound Nat'l Bank v. McMahon,* 53 Wash.2d 51, 54, 330 P.2d 559 (1958). As explained, the Alejandres were on notice that the septic system had not been completely inspected but failed to conduct any further investigation and indeed, accepted the findings of an incomplete inspection report. Having failed to exercise the diligence required, they were unable to present sufficient

> evidence of a right to rely on the allegedly fraudulent representations.

Id. at 690.

This court ruled, as a matter of law, that the statement that the back baffle could not be inspected required further inquiry despite the accompanying statement that the system was working and despite the appraiser's assessment that the system performed its intended function. The buyer had some evidence of a problem and was required to inquire. By failing to inquire at all, the buyer necessarily did not meet that duty.

The New Rule Announced Below

To reach its decision, the court of appeals rewrote the rule set forth in these cases. It abandoned the standard of "some evidence" of the defect and required much, much more.

> ***Douglas, Dalarna.*** **and *Jackowski* stand for the unremarkable proposition that a buyer's failure to inquire further after prepurchase notice of a specific defect involving the specific property purchased defeats a fraudulent concealment claim.**

Opinion II at 21 (emphasis added). If the duty to inquire arose only after notice of a "specific defect" involving "specific property," then *Douglas*, *Dalarna*, *Jackowski*, and, for that matter, *Alejandre* were all wrongly decided. All of those cases rejected the buyers' argument that the notice they received was not "specific" enough. The court of appeals decision in this case is wrong, and this Court should grant review.

2. Inquiry Notice Is Not a Question of Fact.

The law in Washington has long been that "what the purchaser knew is, indeed, a question of fact, but the legal significance of what he knew is

a question of law." P*eoples Nat. Bank of Washington v. Birney's Enterprises, Inc.*, 54 Wn. App. 668, 674, 775 P.2d 466, 469 (1989); *Levien v. Fiala*, 79 Wash.App. 294, 299, 902 P.2d 170, 173 (1995).

With regard to inquiry notice, the factual question is whether the buyer received "some evidence" of the defect. *Puget Sound Service Corp. v. Dalarna Management Corp.*, 51 Wash.App. 209, 215, 752 P.2d 1353, 1356 (1988). The receipt of any evidence of the defect triggers a duty to inquire.

Here, the factual question was resolved by the trial court when it found that the Watts received and read the meeting minutes. As the court of appeals itself acknowledged, those minutes contain some evidence of the WRB problems. In fact the minutes contain extensive references to the problem, to hiring attorneys and to assessments to pay for repairs.

Judge Lum properly treated the legal significance of the meeting minutes as a question of law, but the court of appeals held that it was a "mistakenly labeled as a conclusion of law." Opinion II at 17. The court of appeals then reviewed that "finding of fact" for substantial evidence and summarily affirmed it.

> Substantial evidence supports this finding of fact. The meeting minutes provide no details or explanation about the nature and extent of the WRB defect and specific units affected. Review of the trial evidence and meeting minutes establish substantial evidence to support the trial court's finding that the disputed meeting minute "words" were "brief references buried in a maze of other irrelevant information."

Opinion II at 17. None of the cases cited by the court of appeals used the substantial evidence standard to determine inquiry notice.

In *Douglas*, the seller argued that substantial evidence did not support the trial court's finding that the buyer did a reasonable inspection, but the court declined to reach the issue: "We need not decide whether that constitutes substantial evidence to support a finding that he conducted a reasonable inspection, because the inspection did, in fact, provide notice of the defect." *Douglas v. Visser*, 173 Wn. App. 823, 832, 295 P.3d 800, 804 (2013). The inspection provided notice as a matter of law, not as a matter of fact.

In *Alejandre*, this court ruled that "The trial court correctly determined, as to the Alejandres' fraudulent conveyance and fraudulent representation theories, that Ms. Bull was entitled to judgment as a matter of law under CR 50 because the Alejandres failed to present sufficient evidence in support of these theories." *Alejandre*, 159 Wn.2d at 691. The *Alejandre* court never analyzed the record for substantial evidence.

The term "substantial evidence" does not even appear in *Dalarna* or *Jackowski*. Like *Alejandre*, those decisions plainly treat the question of inquiry notice as one of law, not of fact.

Once the legal significance of information known to the buyer becomes a question of fact, the rule disappears altogether. Juries would called upon to decide not only what the buyer knew, but also whether a duty arose from that information. Such a system would violate the fundamental rule that that the existence of a duty is a question of law for the court, not a question of fact for the jury. *Degel v. Majestic Mobile*

Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728, 731 (1996) ("The threshold determination of whether a duty exists is a question of law.").

F. CONCLUSION

The court of appeals decided the result that it wanted and tried to make the law reach that result. But the law does not go where the court of appeals wanted it to. Appellate courts are supposed to follow the law where it leads, not produce satisfying results. This court should grant review because the court of appeals decision contradicts established law, and should reverse the court of appeals. As in *Douglas*, this court should reverse the verdict for the plaintiff and remand for entry of judgment for the defendant.

DATED this 21st day of January, 2014.

DAVIS LEARY LLC

By /s/
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APPENDIX

Unpublished Opinion, August 26, 2013	A-1
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DECLARATION OF SERVICE

I, Matthew Davis, state: On January 21, 2014, I caused to be delivered by Washington Legal Messengers appellants Petition for Review to the Court of Appeals Division I and to

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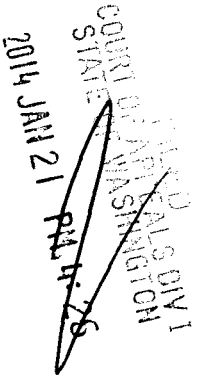
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of January, 2014 at Seattle, Washington.

Matthew F. Davis



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHANE and AMY WATTS, Respondents, v. MARY P. DUNPHY and MARK L. DUNPHY, Appellants.	)	NO. 68067-6-I DIVISION ONE UNPUBLISHED OPINION FILED: August 26, 2013

LAU, J. — Generally, a home buyer's duty to inquire further of a seller about a home's defect arises upon notice of the defect. Mary Dunphy, an experienced real estate agent, sold her condominium unit to Shane Watts. Dunphy knew her unit's lack of weather resistant barrier (WRB) made it vulnerable to water leaks and damage. She intentionally lied about it on the form 17 disclosure statement.[1] As part of the sale documents, Watts reviewed homeowners' association Board meeting minutes that mentioned "inspections," "envelope studies," a "defect attorney," and other issues but made no mention of particular defects, Dunphy's unit, or any other individual unit. Watts

[1] The trial court found Dunphy "lied" about the defect.

discovered the defect after the sale closed and sued Dunphy. The trial court found Dunphy liable for fraudulent concealment and fraud. Because the meeting minutes triggered no duty flowing to Watts to inquire further under these circumstances, we affirm and award Watts attorney fees and costs under the purchase and sale agreement.

FACTS

The trial court's factual findings are undisputed. In 2006, Mary Dunphy purchased a condominium unit at 13020 102nd Lane Northeast #3, in Kirkland, Washington. On July 27, 2006, Dunphy became vice president of the Kirkland Village Homeowners' Association (HOA).

In October 2006, Dunphy arranged for Darrel Hay to inspect the buildings in Kirkland Village. Hay checked three buildings and found that all three lacked tar paper or weather resistant barrier (WRB). Hay opined that the lack of WRB was problematic because it made the buildings vulnerable to water leaks and damage. He noted no specific damage. Hay gave his report to Dunphy, who read it.

Dunphy attended all HOA Board meetings—some of which were held in her home—through May 2007. In February 2007, the Board asked construction inspection firm Corke Amento Inc. (Corke) to prepare a presentation regarding Kirkland Village. During its February 2007 meeting, the Board heard Corke's presentation and discussed Hay's report.

Based on the information it received, the Board decided to further pursue its ongoing disputes with Kirkland Village's developer, Center Bay. The Board hired a new property manager, Suhrco Management, which recommended a thorough inspection of

the complex so that the Board could give Center Bay a list of problems that needed to be fixed. The lack of WRB was one of the issues to consider.

In March 2007, Corke prepared a "Scope of Limited Investigation" showing its plan for inspecting the complex. Among other things, the plan showed that Dunphy's unit would have its siding removed. The proposal was circulated among the Board members, and Dunphy read it.

In April 2007, the Board hired Corke to inspect the complex. This decision was discussed and approved by all Board members, including Dunphy. Lack of WRB was among the problems Corke was hired to investigate. The inspection began on May 1, 2007. Corke removed siding on the majority of the complex buildings, and 75 percent of the buildings either lacked WRB altogether or had incorrectly installed WRB. Removal of siding on Dunphy's unit revealed that it lacked WRB. Dunphy saw that her unit lacked WRB.

On May 4, 2007, Corke (including Corke's lead engineer Mark Cress and president Steven Amento), defects attorney David Onsager (hired by the Board to recommend legal action against Center Bay), Board president Craig Cleaver, and Dunphy met to walk through the Kirkland Village complex and view the buildings. Some portions of the buildings still had siding removed, so that the Board and its attorney could see what was underneath the siding. The walk through revealed that the majority of the buildings lacked WRB. Dunphy witnessed the lack of WRB. To summarize, Dunphy—as a member of the Board who participated in the walk through—was aware of significant material problems with the missing WRB under the siding on the buildings throughout the complex, including her own unit. Dunphy was also aware that Corke

would soon produce a written report that, when given to the Board, would have to be disclosed to potential buyers.

The next month (June 2007), Dunphy and her husband purchased a single family home in Juanita for $473,000. Dunphy needed cash to close the sale. The only way for her to close the sale and move was to sell her Kirkland Village unit at full market value. Buyer Shane Watts signed a purchase and sale agreement for Dunphy's unit, providing for attorney fees to the prevailing party in case of a dispute involving the agreement. As part of the agreement, Dunphy completed a seller's disclosure statement (form 17), as required under chapter 64.06 RCW. Around July 23, 2007, the parties agreed that Watts would purchase the unit for $273,000.

Watts hired a home inspector to inspect the unit. The inspector did not look under the siding or inspect any other buildings in the complex. The inspection did not reveal the missing WRB on Dunphy's unit or the problems with the buildings in the rest of the complex. The evidence was uncontroverted that a normal, routine home inspection of a condominium would not have revealed any of the problems in the complex or the missing WRB in Dunphy's unit. The trial court found that Watts did a reasonably diligent inspection of the property.

Dunphy filled out two form 17s on July 9 and 25.[2] In the July 25 form 17, in response to question 4(F), "Are there any defects with the following: . . . Siding . . . Interior Walls . . . Exterior Walls . . . Other", Dunphy answered, "No." This

[2] The trial court found that Watts had the right to rely on Dunphy's disclosures on form 17, that Dunphy had a duty to fill out form 17 completely and correctly, and that the July 25 form 17 controlled with respect to disclosures.

was a lie. Dunphy knew about the missing or incorrectly installed WRB in multiple buildings in the complex—including her own unit—but she represented that there were no defects in the siding or external and internal walls. No evidence indicated any defect in the siding itself, but a substantial question existed regarding whether the lack of vapor barrier or moisture barrier was a defect. Notices, studies, and oral reports well known to Dunphy indicated the moisture barrier did not exist and that future damage was likely if the problem went untreated.

Also in the July 25 form 17, in response to question 10(A) "Are there any other existing material defects affecting the property that a prospective buyer should know about?", Dunphy answered, "Don't know." This was also a lie. Dunphy was well aware of the Corke inspection and the problems pointed out during the May 2007 walk through. Dunphy's misstatements were intentional. Dunphy intended to mislead Watts to ensure the condominium sale closed for full price in a timely manner.[3]

Dunphy arranged for property manager Suhrco to produce a resale certificate and a series of required documents. These documents included a copy of the HOA Board's meeting minutes for the past 6 to 12 months.[4] Watts received the minutes and read them enough to comment on the parking situation. The minutes contain a list of the issues the Board addressed in its monthly meetings. Included among those issues

[3] As the trial court later found in granting partial summary judgment in Watts's favor, Dunphy also lied regarding whether any study, survey project, or notice existed that would adversely affect the property. We address the partial summary judgment order below.

[4] It is undisputed that the meeting minutes consist of 33 pages. Watts received 25 pages (through July 2007) covering numerous issues.

are mentions of inspections, envelope studies, Hay's report, and other items. The meeting minutes were admitted at trial as exhibit 3.

The October 16, 2006 meeting minutes mention "[c]oncerns about the moisture barrier under siding." Ex. 3 at 7. The December 12, 2006 meeting minutes state, "Vinyl siding is held off until the rain is more cooperative, so large portions can be pulled back to insure no damage underneath." Ex. 3 at 8.

The February 13, 2007 meeting minutes contain the following notations:

1. Envelop[e] Study was discussed by Mark Cress; an overview of the independent inspection report by Darrell Hays was commented by Mark.
2. Mark Cress presented his findings with photo of the property which included siding, moisture barrier.
3. Discussed options on how to proceed depending on what the POS states about envelop[e] study. Two options are proposed: 1. Intrusive Investigation or 2. Envelop[e] Study
4. Envelop[e] study was the recommendation
5. David Onsager (another attorney) at Stafford Frie Law Firm was mentioned as another option.

. . . .

Ex. 3 at 11.

The March 13, 2007 meeting minutes include the notation, "Update on inspection. Deferred until next meeting, no response from Mark W. of Corke-Amento." Ex. 3 at 12. The minutes also note, "Inspection—find a second company." Ex. 3 at 14.

The April 10, 2007 meeting minutes include the notation, "Craig/Terry spoke to Corke Amento and we are moving ahead with the envelope/invasive inspection. Center [B]ay wanted to use their inspector, Craig declined that offer, but accepted the offer for Center [B]ay to pay 50% of the cost." Ex. 3 at 15.

The May 8, 2007 meeting minutes include the following notation:

2) Discussion of Intrusive Study
   a. Need David Onsager to weigh in on the moisture barrier and whether or not there is significant damage.
   b. Waiting for results from Corke Amento and David Onsager
   c. David Onsager will provide recommendation in the report
   d. Terry to call David's assistant in order to get the date the report will be ready

Ex. 3 at 17.

On June 12, 2007, the Kirkland Village HOA held its annual meeting for all unit owners. Ex. 3 at 19. The meeting minutes include the notation, "Discussed envelope study and possible assessments. Informed that we are working with Center [B]ay and trying to resolve issues and working on not going into a legal battle." Ex. 3 at 20. The minutes also contain the following notation:

IV. New Business (8:19–8:24)
   a. Inspection/Construction Defect
      i. Corke Amento performing inspection
         1. Currently waiting for report
      ii. Asked owners to inform board of any [] defects or issues
      iii. Timeline—depends on cooperation of builder

Ex. 3 at 20.

The July 12, 2007 meeting minutes include the following notation:

Bill from Corke Amento, inspectors for Envelope inspection came in at $9350.03
We are holding Center Bay to their offer to pay for half of this inspection.
David Ansager defect Attorney has billed us 1792.00 for 5.6 hours of work.
Missing insulation is an issue the Board will be going after Center Bay for.

Ex. 3 at 23.

After the sale closed,[5] Watts discovered the condominium's lack of WRB. Watts sued Dunphy for damages in February 2010, alleging breach of warranties, negligent

[5] Although the trial court made no findings on this issue, the bench trial testimony indicates that the sale closed on August 20, 2007. The testimony also indicates that the

misrepresentation, intentional misrepresentation, and breach of duty of good faith. Watts amended his complaint in July 2010, voluntarily dismissing the negligent misrepresentation claim but adding claims for breach of contract, fraudulent concealment, and fraud.

The HOA sued Center Bay, and that lawsuit settled for a little over a million dollars. The HOA also has a bankruptcy court claim against Center Bay's owner that was pending at the time Watts and Dunphy went to trial. The HOA has collected approximately $1.3 million. At the time of trial, no repairs had begun and no plan existed for when repairs would start. Some testimony addressed the repair cost, but "there was no definite plan on what would be done; how much it would cost." The court found the future possible repairs too speculative to use in determining the effect on the current value of Watts's unit. The court found that the "current value of the unit, by clear, cogent, and convincing evidence, is $132,000." The court also found that without damage, "the condominium would have been worth a minimum of $170,000," meaning damages were $38,000.

In December 2010, Watts moved for partial summary judgment, requesting the court to find that Dunphy committed fraudulent concealment and fraud in selling the condominium to Watts.[6] In February 2011, the court granted in part Watts's motion

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HOA Board did not receive Corke's final report regarding the missing or defective WRB until September 2007.

[6] Regarding fraudulent concealment, Watts argued that (1) the condominium had a concealed defect, (2) Dunphy knew about the defect, (3) the defect presented a danger to the purchaser's property, health or life, (4) the defect was unknown to the purchaser, and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser. Regarding fraud, Watts claimed that (1) Dunphy represented that

for partial summary judgment in making the following finding of fact: "1. The court finds that when on the Form 17 dated July 25, 2007, Mary Dunphy answered Question No 1.(G), 'Is there any study, survey project, or notice that would adversely affect the property,' as 'Don't know,' this was a false statement."[7]

During the bench trial, Dunphy argued that the meeting minutes put Watts on inquiry notice of the condominium's lack of WRB, thus triggering Watts's duty to inquire further. The court disagreed and found Dunphy liable for fraudulent concealment and fraud. In its conclusions of law, ¶ 3.4(5), the court stated:

> Additionally, [Dunphy's] argument is that the HOA meeting minutes in and of themselves [were] sufficient to put [Watts] on notice and that they had no right to rely on the Form 17 representations and their own Homeowner's inspection report.
>
> But if the Watts had read the [HOA] meeting minutes, what would it have told them? Although the words "defect," "envelope studies," "Investigation," and "defect attorney" were mentioned several times, there is no context or explanation for the brief references buried in a maze of other irrelevant information. Only with the use of 20/20 hindsight and specialized knowledge can we pick out the significance of these words.
>
> The court does not find persuasive the argument that meeting minutes alone are sufficient to give Mary Dunphy the same level of knowledge that we are imputing to the Watts. Although the Watts had the minutes, Ms. Dunphy not only had the minutes for her review, but actually attended all the HOA meetings, except for possibly the June meeting. She was also the Vice President of the Board, and therefore had the opportunity and could reasonably understand what was in those Minutes. She actually lived through them. She experienced it. She was there, and she was present for at least part of the walk through inspection in May 2007. She was aware that the complex did not have a vapor or water

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there were no defects, among other material facts, (2) the defects were material, (3) Dunphy's answers were false, (4) Dunphy knew her answers were false, (5) Dunphy intended Watts to rely on her false answers, (6) Watts did not know Dunphy's answers were false, (7) Watts relied on the false answers, (8) Watts had a right to so rely, and (9) Watts suffered severe damages.

[7] Dunphy does not appeal the trial court's grant of partial summary judgment, and she agrees on appeal that she lied on the form 17.

> resistant barrier; and was aware that the engineer and a defect attorney was present on the walk through.
>
> Much has been made of the fact that the engineer only made factual comments and did not offer any conclusions. But that is beside the point. Mary Dunphy knew that a defect attorney and an engineer were looking at several issues in the complex, including the lack of a vapor resistant barrier; and that part of the reason that Ms. Dunphy knew the investigation was going on, was to go [to] the developer and seek to have the developer pay for any cost required to fix the problem. Ms. Dunphy also knew the report would be completed soon, and once the report was done it would have to be disclosed.

The court entered judgment against Dunphy and awarded Watts $38,000 in damages and over $55,000 in attorney fees and costs. Dunphy appeals.

ANALYSIS

Standard of Review

Following a bench trial, we review factual findings for substantial evidence and legal conclusions de novo, determining whether the findings support the conclusions.[8] Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

> The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. First, we must determine if the trial court's findings of fact were supported by substantial evidence in the record. If so, we must next decide whether those findings of fact support the trial court's conclusions of law.

Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). If the trial court mislabels a factual finding or legal conclusion, we consider it for what it really is. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the declared premise." Douglas v. Visser, 173 Wn. App. 823, 829, 295 P.3d 800 (2013). In

[8] Dunphy's reliance on Speelman v. Bellingham/Whatcom County Housing Authorities, 167 Wn. App. 624, 273 P.3d 1035 (2012), is misplaced. Speelman involves due process notice requirements. Dunphy also cites bona fide purchaser doctrine applicable to real estate transactions but fails to explain why those cases control.

determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party. Bland v. Mentor, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). We defer to the trial court's assessment of witness credibility and evidence weight. In re Welfare of Sego, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973). Unchallenged findings of facts are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

Fraudulent Concealment

On a claim for fraudulent concealment, the seller's duty to speak arises

> 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 is unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser.

Alejandre v. Bull, 159 Wn.2d 674, 689, 153 P.3d 864 (2007). Failure to disclose a material fact where there is a duty to disclose is fraudulent. Stieneke v. Russi, 145 Wn. App. 544, 560, 190 P.3d 60 (2008). The plaintiff must establish each element of fraudulent concealment by clear, cogent, and convincing evidence. Stieneke, 145 Wn. App. at 561.

The parties dispute the fourth requirement—that the defect is unknown to the buyer. Dunphy contends certain HOA Board meeting minute excerpts triggered Watts's duty to inquire about the condominium's latent WRB defects. Watts responds that the meeting minutes' intermittent mention of inspections and defects "buried in a sea of other problems" is insufficient to trigger a duty to inquire. Resp't's Br. at 16 (capitalization omitted). Watts also contends that these minutes provided no specific notice about a specific problem to their specific condominium unit.

Our Supreme Court discussed a buyer's duty to inquire further in the fraudulent concealment context:

> 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.

Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wn.2d 506, 525, 799 P.2d 250 (1990) (citations omitted); see also Douglas, 173 Wn. App. at 830 ("When a buyer is on notice of a defect, it must make further inquiries of the seller"); Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp., 51 Wn. App. 209, 214-15, 752 P.2d 1353 (1988) (same; if the buyer fails to inquire, he cannot later argue that he knew nothing about the extent of the problem).

Dunphy claims, "This is one of those rare appeals that can be decided entirely on the basis of a single recent Supreme Court case, Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007)."[9] Appellant's Br. at 14. Dunphy argues that under Alejandre, the meeting minutes constitute constructive notice of the condominium defect. Watts responds that any "notice" contained in the meeting minutes is factually distinguishable from the notice in Alejandre.

In Alejandre, defendant Mary Bull owned a single family residence that was served by a septic system. Alejandre, 159 Wn.2d at 678. The year before she put the house up for sale, she noticed soggy ground over the septic system. Alejandre, 159 Wn.2d at 678. She hired William Duncan of Gary's Septic Tank Service to pump the septic tank and also hired Walt Johnson Septic Service to empty the tank and repair a

[9] Dunphy's opening brief relies exclusively on Alejandre.

broken pipe leading from the tank to the drain field. Alejandre, 159 Wn.2d at 678. Bull also applied for a connection to the city sewer, but abandoned the idea after learning she would have to pay a $5,000 hook-up fee. Alejandre, 159 Wn.2d at 678.

Bull placed her home on the market in June 2000. Alejandre, 159 Wn.2d at 678. In September 2001, Bull and Arturo and Norma Alejandre entered into an agreement for the sale of Bull's home to the Alejandres. Alejandre, 159 Wn.2d at 678. The agreement required Bull to pump the septic tank before closing and conditioned the sale on a septic system inspection. Alejandre, 159 Wn.2d at 678.

As provided for in the agreement, Walt's Septic Tank Service pumped the tank and sent the Alejandres a copy of the bill. Alejandre, 159 Wn.2d at 679. The bill stated, "[T]he septic system's back baffle could not be inspected but there was '[n]o obvious malfunction of the system at time of work done." Alejandre, 159 Wn.2d at 679 (second alteration in original) (quoting Ex. 6). Bull gave the Alejandres a seller's disclosure statement indicating that the house had a septic tank system that was last pumped and inspected in fall 2000 and that "'Walt Johnson Jr. replaced broken line between house and septic tank . . . .'" Alejandre, 159 Wn.2d at 679 (quoting Exhibit 5). Bull answered "no" to the inquiry whether there were any defects in the septic system's operation. Alejandre, 159 Wn.2d at 679.

A month after the sale closed, the Alejandres smelled an odor inside the home and heard water gurgling. Alejandre, 159 Wn.2d at 680. They also noticed a foul odor outside the home and believed it came from the ground around the septic tank, which they said was soggy. Alejandre, 159 Wn.2d at 680. By chance, they hired William Duncan of Gary's Septic Tank Service—the same person who pumped the system for

Bull in 2000. Alejandre, 159 Wn.2d at 680. Duncan told the Alejandres that he could pump the tank, but he could not fix the underlying problem because the drain fields were not working. Alejandre, 159 Wn.2d at 680. He also informed them that he previously told Bull that the drain fields were not working and that she should connect to the city's sewer system. Alejandre, 159 Wn.2d at 680.

The Alejandres hired another company to connect to the city sewer system. Alejandre, 159 Wn.2d at 680. During this work, the company found that the baffle to the outlet side of the septic system was missing, thus allowing sludge from the septic tank to enter and plug the drain field. Alejandre, 159 Wn.2d at 680.

The Alejandres sued Bull for fraud and misrepresentation, claiming costs and damages totaling nearly $30,000. Alejandre, 159 Wn.2d at 680. After they rested their case, Bull moved for judgment as a matter of law. Alejandre, 159 Wn.2d at 680. The trial court granted the motion, ruling that the economic loss rule barred the Alejandres' claims and that they failed to present sufficient evidence supporting their claims. Alejandre, 159 Wn.2d at 680. We reversed, holding that the Alejandres presented sufficient evidence to warrant the jury's consideration. Alejandre, 159 Wn.2d at 680-81.

Our Supreme Court reversed. Although Alejandre is better known for its economic loss rule discussion—which is not relevant here—the court also affirmed the trial court's decision to dismiss the Alejandres' fraudulent concealment and fraud claims. Regarding fraudulent concealment, the issue in Alejandre concerned element five—whether the buyers had shown that the defect in the septic system would not have been discovered through a reasonably diligent inspection. Alejandre, 159 Wn.2d at 689-90. Our Supreme Court concluded they had not met their burden:

> The Alejandres failed to meet their burden of showing that the defect in the septic system would not have been discovered through a reasonably diligent inspection. In fact, the Alejandres accepted the septic system even though the inspection report from Walt's Septic Tank Service disclosed, on its face, that the inspection was incomplete because the back baffle had not been inspected. The testimony at trial showed that this part of the septic system was relatively shallow and easily accessible for inspection. A careful examination would have led to discovery of the defective baffle and to further investigation.

Alejandre, 159 Wn.2d at 689-90.

Alejandre is not controlling based on the facts of this case.[10] Our Supreme Court faulted the buyers for failing to conduct a reasonably diligent prepurchase inspection of their home's septic system in the face of an obvious, incomplete inspection report that revealed no inspection of the back baffle. As the court observed, a reasonably diligent and careful inspection of the septic system would have revealed the defective baffle that was easily accessible for inspection.

The present case involves no dispute over whether Watts undertook a reasonably diligent prepurchase inspection of their condominium unit. Watts hired a home inspector to conduct a prepurchase inspection of the condominium unit. That

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[10] From the opinion, it appears the Alejandres did not hire their own home inspector or septic system inspector. Instead, they relied on the report prepared by the seller's septic tank service provider as well as a property inspection report—required by the lending bank—that indicated the septic system "'Performs Intended Function'" and stated that "'everything drains OK.'" Alejandre, 159 Wn.2d at 680. The earnest money agreement required the seller to pump the tank before closing.

> As provided in the earnest money agreement, a septic tank service (Walt's Septic Tank Service) pumped the tank, and the Alejandres received a copy of the bill. The bill stated on it that the septic system's back baffle could not be inspected but there was "[n]o obvious malfunction of the system at time of work done."

Alejandre, 159 Wn.2d at 679. (quoting Ex. 6). As noted above, Watts hired and relied on their home inspector's report as to the condition of their condominium unit.

inspection revealed nothing to indicate the condominium's lack of WRB such as exterior water damage. The court's unchallenged findings state:

> The Watts had a home inspection done by a home inspector. The inspection did not look under the siding, or inspect the rest of the complex. The inspection did not disclose any of the missing WRB on the Dunphy unit, or the missing [WRB] or the problems with the buildings in the rest of the complex. The evidence was uncontroverted that a normal, routine home inspection of a condominium would not have uncovered any of the problems in the complex or the missing WRB in the Dunphy unit. The court finds the Watts did a reasonably diligent inspection of the property.

Unlike the present case, the buyers in Alejandre had prepurchase notice of an incomplete inspection. They relied on an obvious, incomplete septic system report that revealed the back baffle had not been inspected.

Also, the Alejandres' prepurchase notice about the incomplete inspection involved the specific property they purchased. In the present case, Dunphy relies exclusively on 33 pages[11] of meeting minutes to argue that Watts should have inquired further after reviewing the minutes. To make this point, Dunphy relies on seven select meeting minute excerpts quoted above. Even when viewed in complete context, no mention or reference to WRB problems associated with Watts's condominium unit appears in any of the meeting minutes. And there is no information identifying which of the 64 units or 12 buildings are affected by the WRB problem.[12]

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[11] We question whether Watts received the monthly meeting minutes from August to December 2007 because the record shows they received the meeting minutes at the end of July 2007, when they purchased the unit.

[12] The undisputed facts show the Kirkland Village Condominiums complex consists of 12 buildings with each building comprised of 3 to 7 individual townhome style units. Watts's unit is one of 7 in the 13020 building. Most of the units, including Watts's, are two stories high. A trial court is not required to make findings on stipulated or undisputed matters. Swanson v. May, 40 Wn. App. 148, 158, 697 P.2d 1013 (1985).

It is true the meeting minute excerpts mention "inspection," "envelope inspection," "invasive inspection," "moisture barrier," "intrusive study," "report," and "defect." According to Dunphy, this notice triggered Watts's duty to inquire about the WRB problem. The court's unchallenged finding of fact states:

> The Minutes contain a list of all the issues the Board dealt with. In there, among the other issues, are mentions of inspections; envelope studies, Darrel Hay's report, etc. The court looks at the minutes in the context of what the Watts knew at the time, not with the 20/20 hindsight at the time of trial. . . .

The court also ruled that this information triggered no duty to inquire further:

> But if the Watts had read the [HOA] meeting minutes, what would it have told them? Although the words "defect," "envelope studies," ["]Investigation," and "defect attorney" were mentioned several times, there is no context or explanation for the brief references buried in a maze of other irrelevant information. Only with the use of 20/20 hindsight and specialized knowledge can we pick out the significance of these words.[13]

This ruling constitutes a finding of fact, not a conclusion of law. See Sweeting, 107 Wn.2d at 394 (if the trial court mislabels a factual finding or legal conclusion, we consider it for what it really is). Substantial evidence supports this finding of fact. The meeting minutes provide no details or explanation about the nature and extent of the WRB defect and specific units affected. Review of the trial evidence and meeting minutes establish substantial evidence to support the trial court's finding that the disputed meeting minute "words" were "brief references buried in a maze of other irrelevant information." For example, HOA president Craig Cleaver described the

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[13] The ruling appears under the heading "Conclusions of Law" in the court's written findings of fact and conclusions of law. Dunphy assigns error to this "conclusion of law": "The trial court erred when it concluded as a matter of law that the meeting minutes did not put the Watts on inquiry notice of the defects in the condominium project." Appellant's Br. at 2.

October 16, 2006 meeting minutes as a "laundry list" of issues affecting the condominium complex, including homeowners complaining about several things, especially parking and landscaping. The record evidence shows the HOA Board sought to gather information on all complaints and issues about the condominium complex in order to submit them to the developer for redress. The WRB problem was merely one item in the developer "laundry list" during the condominium's conversion from developer owner to a homeowners association structure. As Watts points out, these were simply "'bullet points' in a long list of 'bullet points,'" none of which specifically related to Dunphy's unit or any other unit. Resp't's Br. at 17. We conclude substantial evidence supports the trial court's findings of fact and the findings support its conclusion of law that no duty to inquire further flowed to Watts based solely on review of the HOA Board meeting minutes.

Dunphy also relies on other cases to support her duty to inquire claim. None of those cases control for the reasons discussed above. Those cases involve buyers with prepurchase notice of a particular obvious defect affecting the specific property purchased. In Douglas,[14] the buyers' inspector identified an area of rot and decay near the roof line and caulking suggestive of a prior roof leak. He found an area of rotted sill plate below the section of water-damaged exterior siding. A portion of sill adjacent to the rotted section had recently been replaced and floor joists near the rotted area had been sistered. Douglas, 173 Wn. App. at 831-32. The buyers argued that the area of rot their inspector discovered was not unusual and they had no knowledge that 50 to 70 percent of the sill plate and rim joist were destroyed. We rejected that argument. Citing

[14] We decided Douglas after the close of appellate briefing.

Dalarna, we stated the well-settled rule that "[w]hen a buyer is on notice of a defect, it must make further inquiries of the seller." Douglas, 173 Wn. App. at 830. We reasoned:

> The Douglases and their inspector were on notice of the defect and had a duty to make further inquiries. The Douglases argue that "they had no idea that 50 to 70% of the sill plate and rim joist were destroyed" and that the area of rot [their inspector] discovered was not unusual. That, however, is the precise argument we rejected in Dalarna. Once a buyer discovers evidence of a defect, they are on notice and have a duty to make further inquiries. They cannot succeed when the extent of the defect is greater than anticipated, even when it is magnitudes greater.

Douglas, 173 Wn. App. at 832.

We also noted that additional facts should have prompted the Douglases to inquire further:

> Despite [the discovery of rot], on top of the Vissers' previous evasive and incomplete answers and the Vissers' on-going failure to provide their own prepurchase inspection report, either of which should have caused concern and further inquiry, there is no evidence that the Douglases made any inquiries whatsoever after the inspection.

Douglas, 173 Wn. App. at 834 (emphasis added).

In Dalarna, a buyer purchased an apartment building and later sued the seller for fraudulent concealment after discovering substantial water leakage problems. The buyer's inspector noted water stains and loose tiles. Despite this prepurchase notice of a water leak, the buyer closed on the sale. The buyer later discovered the water damage was more extensive. The buyer claimed that the seller concealed the extensive nature of the leak. Dalarna, 51 Wn. App. at 211-12. We held that due to the buyer's prepurchase knowledge of the water leak, its severity was readily ascertainable through further inquiries. Dalarna, 51 Wn. App. at 215.

In Jackowski v. Borchelt, 151 Wn. App. 1, 209 P.3d 514 (2009), the buyers purchased a waterfront home and later sued the sellers for fraud and fraudulent concealment when soil instability caused the house to slide. Before the sale, the sellers gave the buyers a form 17 disclosure statement that contained language referring the buyers to a Mason County Department of Community Development letter. Jackowski, 151 Wn. App. at 8. The letter indicated that the "'following critical areas are present on this property: . . . Landslide Hazard Areas.'" Jackowski, 151 Wn. App. at 8. The letter also referenced an existing geotechnical report conducted by a geologist. Jackowski, 151 Wn. App. at 8. The sellers faxed a copy of the letter to their real estate agent. Jackowski, 151 Wn. App. at 8. The fax included an addendum, provided by the geologist, that again referenced the geotechnical report. Jackowski, 151 Wn. App. at 8. The sellers' real estate agent then faxed the letter and addendum to the buyers' agent. Jackowski, 151 Wn. App. at 8. The buyers received and read the letter and addendum. Jackowski, 151 Wn. App. at 8. An addendum to the real estate purchase and sale agreement provided that the sale was contingent on the buyers' inspection—including, at the buyers' option, a soils/stability inspection. Jackowski, 151 Wn. App. at 8. The buyers conducted no soil stability investigation before the sale closed. Jackowski, 151 Wn. App. at 8.

Jackowski addressed two issues relevant here—whether a reasonable inspection would have disclosed the landslide risk (fraudulent concealment claim) and whether the buyers established they had a right to rely on the sellers' fraudulent representations (fraud claim). Jackowski, 151 Wn. App. at 17. The court affirmed summary judgment dismissal of those claims:

> Here, as we discussed above, the Jackowskis had prepurchase knowledge of the landslide hazard area and, thus, reliance on the Form 17 disclosure could not be reasonable. A reasonable inspection would have disclosed the landslide risk. The Jackowskis acknowledge that they had read the letter indicating that the property that they were contracting to buy was in a landslide hazard area. Tim Jackowski read documents before closing that referenced an existing geotechnical report. Tim Jackowski acknowledged that he made the sale contingent on his ability to hire professionals to conduct property inspections including soil and slope stability. Nevertheless, he failed to utilize the contingency to request such inspections. The trial court did not err by granting summary judgment on the Jackowskis' fraudulent concealment claims based on the landslide risk.

Jackowski, 151 Wn. App. at 17-18 (emphasis added).

Douglas, Dalarna, and Jackowski stand for the unremarkable proposition that a buyer's failure to inquire further after prepurchase notice of a specific defect involving the specific property purchased defeats a fraudulent concealment claim. These cases are not controlling. The undisputed facts and reasonable factual inferences support the conclusion that the meeting minutes triggered no duty flowing to Watts to make further inquiry.

Fraud

To succeed on a fraud claim, the plaintiff must establish by clear, cogent, and convincing evidence all nine elements of fraud:

> (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). The sole issue on appeal is element 8—whether Watts had a right to rely on Dunphy's form 17 disclosures.

As our Supreme Court noted in Williams v. Joslin, 65 Wn.2d 696, 698, 399 P.2d 308 (1965), "'The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him.'" (Quoting Puget Sound Nat'l Bank v. McMahon, 53 Wn.2d 51, 54, 330 P.2d 559 (1958)). A buyer who is on notice of a defect and has a duty to make further inquiry cannot justifiably rely on the seller's misrepresentations. Douglas, 173 Wn. App. at 834; see also Alejandre, 159 Wn.2d at 690 ("Having failed to exercise the diligence required, [the Alejandres] were unable to present sufficient evidence of a right to rely on the allegedly fraudulent representations.").

Dunphy's sole argument on appeal is that Watts failed to show he had a right to rely on Dunphy's representations because "[t]he Watts' right to rely on any representations made to them was tied to their diligence concerning the information they had."[15] Appellant's Br. at 20. As discussed above, the meeting minutes were insufficient to put Watts on inquiry notice of the latent defect. Watts had no duty to inquire further, and his reliance on Dunphy's form 17—a required disclosure form under chapter 64.06 RCW —was not unreasonable. Substantial evidence supports the trial court's findings and the findings support its conclusion that Dunphy was liable for fraud.

Attorney Fees

Dunphy and Watts each request attorney fees on appeal as the prevailing party under the purchase and sale agreement. In Washington, parties may recover attorney fees if allowed by statute, contract, or some well-recognized principle of equity.

[15] Dunphy does not challenge the trial court's conclusion that Watts met the other eight elements of fraud.

Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 525, 210 P.3d 318 (2009). Here, although no copy of the real estate purchase and sale agreement appears in the record on appeal, the parties agree—and the trial court found—that the purchase and sale agreement provides for an award of fees to the prevailing party in a dispute concerning the agreement. Because Watts is the prevailing party on appeal, he is entitled to attorney fees and costs conditioned on his compliance with RAP 18.1.

CONCLUSION

For the reasons discussed above, we affirm and award reasonable attorney fees and costs to Watts as the prevailing party conditioned on compliance with RAP 18.1.[16]

WE CONCUR:

Cox, J.

Becker, J.

[16] In her reply brief, Dunphy moved to strike certain references to trial testimony in Watts's response brief. The motion is denied under RAP 17.4(d) ("A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits. . . ."). In any event, this court is able to decide which portions of the record to consider even without such a motion.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHANE and AMY WATTS, Respondents, v. MARY P. DUNPHY and MARK L. DUNPHY, Appellants.	)	NO. 68067-6-I DIVISION ONE ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION AND/OR TO PUBLISH AND ORDER WITHDRAWING OPINION FILED AUGUST 26, 2013 AND SUBSTITUTING AMENDED OPINION

On August 26, 2013, this court filed its unpublished opinion in the above-entitled action. Appellants have moved for reconsideration and/or to publish the opinion. The panel has decided to deny the motion for reconsideration and/or to publish. The panel has also decided to withdraw the opinion filed August 26, 2013 and replace it with the amended opinion attached hereto.

IT IS HEREBY ORDERED that the appellants' motion for reconsideration and/or to publish is denied;

IT IS FURTHER ORDERED that the unpublished opinion of this court filed in the above-entitled action on August 26, 2013, be withdrawn and that the amended opinion be substituted in its place.

In all other respects, the appellant's motion to reconsider and/or to publish is denied.

DATED this 23rd day of December 2013.

FOR THE PANEL:

Judge

discovered the defect after the sale closed and sued Dunphy. The trial court found Dunphy liable for fraudulent concealment and fraud. Because the meeting minutes triggered no duty flowing to Watts to inquire further under these circumstances, we affirm and award Watts attorney fees and costs under the purchase and sale agreement.

FACTS

The trial court's factual findings are undisputed. In 2006, Mary Dunphy purchased a condominium unit at 13020 102nd Lane Northeast #3, in Kirkland, Washington. On July 27, 2006, Dunphy became vice president of the Kirkland Village Homeowners' Association (HOA).

In October 2006, Dunphy arranged for Darrel Hay to inspect the buildings in Kirkland Village. Hay checked three buildings and found that all three lacked tar paper or weather resistant barrier (WRB). Hay opined that the lack of WRB was problematic because it made the buildings vulnerable to water leaks and damage. He noted no specific damage. Hay gave his report to Dunphy, who read it.

Dunphy attended all HOA Board meetings—some of which were held in her home—through May 2007. In February 2007, the Board asked construction inspection firm Corke Amento Inc. (Corke) to prepare a presentation regarding Kirkland Village. During its February 2007 meeting, the Board heard Corke's presentation and discussed Hay's report.

Based on the information it received, the Board decided to further pursue its ongoing disputes with Kirkland Village's developer, Center Bay. The Board hired a new property manager, Suhrco Management, which recommended a thorough inspection of

the complex so that the Board could give Center Bay a list of problems that needed to be fixed. The lack of WRB was one of the issues to consider.

In March 2007, Corke prepared a "Scope of Limited Investigation" showing its plan for inspecting the complex. Among other things, the plan showed that Dunphy's unit would have its siding removed. The proposal was circulated among the Board members, and Dunphy read it.

In April 2007, the Board hired Corke to inspect the complex. This decision was discussed and approved by all Board members, including Dunphy. Lack of WRB was among the problems Corke was hired to investigate. The inspection began on May 1, 2007. Corke removed siding on the majority of the complex buildings, and 75 percent of the buildings either lacked WRB altogether or had incorrectly installed WRB. Removal of siding on Dunphy's unit revealed that it lacked WRB. Dunphy saw that her unit lacked WRB.

On May 4, 2007, Corke (including Corke's lead engineer Mark Cress and president Steven Amento), defects attorney David Onsager (hired by the Board to recommend legal action against Center Bay), Board president Craig Cleaver, and Dunphy met to walk through the Kirkland Village complex and view the buildings. Some portions of the buildings still had siding removed, so that the Board and its attorney could see what was underneath the siding. The walk through revealed that the majority of the buildings lacked WRB. Dunphy witnessed the lack of WRB. To summarize, Dunphy—as a member of the Board who participated in the walk through—was aware of significant material problems with the missing WRB under the siding on the buildings throughout the complex, including her own unit. Dunphy was also aware that Corke

would soon produce a written report that, when given to the Board, would have to be disclosed to potential buyers.

The next month (June 2007), Dunphy and her husband purchased a single family home in Juanita for $473,000. Dunphy needed cash to close the sale. The only way for her to close the sale and move was to sell her Kirkland Village unit at full market value. Buyer Shane Watts signed a purchase and sale agreement for Dunphy's unit, providing for attorney fees to the prevailing party in case of a dispute involving the agreement. As part of the agreement, Dunphy completed a seller's disclosure statement (form 17), as required under chapter 64.06 RCW. Around July 23, 2007, the parties agreed that Watts would purchase the unit for $273,000.

Watts hired a home inspector to inspect the unit. The inspector did not look under the siding or inspect any other buildings in the complex. The inspection did not reveal the missing WRB on Dunphy's unit or the problems with the buildings in the rest of the complex. The evidence was uncontroverted that a normal, routine home inspection of a condominium would not have revealed any of the problems in the complex or the missing WRB in Dunphy's unit. The trial court found that Watts did a reasonably diligent inspection of the property.

Dunphy filled out two form 17s on July 9 and 25.[2] In the July 25 form 17, in response to question 4(F), "Are there any defects with the following: . . . Siding . . . Interior Walls . . . Exterior Walls . . . Other", Dunphy answered, "No." This

[2] The trial court found that Watts had the right to rely on Dunphy's disclosures on form 17, that Dunphy had a duty to fill out form 17 completely and correctly, and that the July 25 form 17 controlled with respect to disclosures.

was a lie. Dunphy knew about the missing or incorrectly installed WRB in multiple buildings in the complex—including her own unit—but she represented that there were no defects in the siding or external and internal walls. No evidence indicated any defect in the siding itself, but a substantial question existed regarding whether the lack of vapor barrier or moisture barrier was a defect. Notices, studies, and oral reports well known to Dunphy indicated the moisture barrier did not exist and that future damage was likely if the problem went untreated.

Also in the July 25 form 17, in response to question 10(A) "Are there any other existing material defects affecting the property that a prospective buyer should know about?", Dunphy answered, "Don't know." This was also a lie. Dunphy was well aware of the Corke inspection and the problems pointed out during the May 2007 walk through. Dunphy's misstatements were intentional. Dunphy intended to mislead Watts to ensure the condominium sale closed for full price in a timely manner.[3]

Dunphy arranged for property manager Suhrco to produce a resale certificate and a series of required documents. These documents included a copy of the HOA Board's meeting minutes for the past 6 to 12 months.[4] Watts received the minutes and read them enough to comment on the parking situation. The minutes contain a list of the issues the Board addressed in its monthly meetings. Included among those issues

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[3] As the trial court later found in granting partial summary judgment in Watts's favor, Dunphy also lied regarding whether any study, survey project, or notice existed that would adversely affect the property. We address the partial summary judgment order below.

[4] It is undisputed that the meeting minutes consist of 33 pages. Watts received 25 pages (through July 2007) covering numerous issues.

are mentions of inspections, envelope studies, Hay's report, and other items. The meeting minutes were admitted at trial as exhibit 3.

The October 16, 2006 meeting minutes mention "[c]oncerns about the moisture barrier under siding." Ex. 3 at 7. The December 12, 2006 meeting minutes state, "Vinyl siding is held off until the rain is more cooperative, so large portions can be pulled back to insure no damage underneath." Ex. 3 at 8.

The February 13, 2007 meeting minutes contain the following notations:

1. Envelop[e] Study was discussed by Mark Cress; an overview of the independent inspection report by Darrell Hays was commented by Mark.
2. Mark Cress presented his findings with photo of the property which included siding, moisture barrier.
3. Discussed options on how to proceed depending on what the POS states about envelop[e] study. Two options are proposed: 1. Intrusive Investigation or 2. Envelop[e] Study
4. Envelop[e] study was the recommendation
5. David Onsager (another attorney) at Stafford Frie Law Firm was mentioned as another option.

. . . .

Ex. 3 at 11.

The March 13, 2007 meeting minutes include the notation, "Update on inspection. Deferred until next meeting, no response from Mark W. of Corke-Amento." Ex. 3 at 12. The minutes also note, "Inspection—find a second company." Ex. 3 at 14.

The April 10, 2007 meeting minutes include the notation, "Craig/Terry spoke to Corke Amento and we are moving ahead with the envelope/invasive inspection. Center [B]ay wanted to use their inspector, Craig declined that offer, but accepted the offer for Center [B]ay to pay 50% of the cost." Ex. 3 at 15.

The May 8, 2007 meeting minutes include the following notation:

2) Discussion of Intrusive Study
   a. Need David Onsager to weigh in on the moisture barrier and whether or not there is significant damage.
   b. Waiting for results from Corke Amento and David Onsager
   c. David Onsager will provide recommendation in the report
   d. Terry to call David's assistant in order to get the date the report will be ready

Ex. 3 at 17.

On June 12, 2007, the Kirkland Village HOA held its annual meeting for all unit owners. Ex. 3 at 19. The meeting minutes include the notation, "Discussed envelope study and possible assessments. Informed that we are working with Center [B]ay and trying to resolve issues and working on not going into a legal battle." Ex. 3 at 20. The minutes also contain the following notation:

IV. New Business (8:19–8:24)
   a. Inspection/Construction Defect
      i. Corke Amento performing inspection
         1. Currently waiting for report
      ii. Asked owners to inform board of any [] defects or issues
      iii. Timeline—depends on cooperation of builder

Ex. 3 at 20.

The July 12, 2007 meeting minutes include the following notation:

Bill from Corke Amento, inspectors for Envelope inspection came in at $9350.03
We are holding Center Bay to their offer to pay for half of this inspection.
David Ansager defect Attorney has billed us 1792.00 for 5.6 hours of work.
Missing insulation is an issue the Board will be going after Center Bay for.

Ex. 3 at 23.

After the sale closed,[5] Watts discovered the condominium's lack of WRB. Watts sued Dunphy for damages in February 2010, alleging breach of warranties, negligent

[5] Although the trial court made no findings on this issue, the bench trial testimony indicates that the sale closed on August 20, 2007. The testimony also indicates that the

misrepresentation, intentional misrepresentation, and breach of duty of good faith. Watts amended his complaint in July 2010, voluntarily dismissing the negligent misrepresentation claim but adding claims for breach of contract, fraudulent concealment, and fraud.

The HOA sued Center Bay, and that lawsuit settled for a little over a million dollars. The HOA also has a bankruptcy court claim against Center Bay's owner that was pending at the time Watts and Dunphy went to trial. The HOA has collected approximately $1.3 million. At the time of trial, no repairs had begun and no plan existed for when repairs would start. Some testimony addressed the repair cost, but "there was no definite plan on what would be done; how much it would cost." The court found the future possible repairs too speculative to use in determining the effect on the current value of Watts's unit. The court found that the "current value of the unit, by clear, cogent, and convincing evidence, is $132,000." The court also found that without damage, "the condominium would have been worth a minimum of $170,000," meaning damages were $38,000.

In December 2010, Watts moved for partial summary judgment, requesting the court to find that Dunphy committed fraudulent concealment and fraud in selling the condominium to Watts.[6] In February 2011, the court granted in part Watts's motion

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HOA Board did not receive Corke's final report regarding the missing or defective WRB until September 2007.

[6] Regarding fraudulent concealment, Watts argued that (1) the condominium had a concealed defect, (2) Dunphy knew about the defect, (3) the defect presented a danger to the purchaser's property, health or life, (4) the defect was unknown to the purchaser, and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser. Regarding fraud, Watts claimed that (1) Dunphy represented that

for partial summary judgment in making the following finding of fact: "1. The court finds that when on the Form 17 dated July 25, 2007, Mary Dunphy answered Question No 1.(G), 'Is there any study, survey project, or notice that would adversely affect the property,' as 'Don't know,' this was a false statement."[7]

During the bench trial, Dunphy argued that the meeting minutes put Watts on inquiry notice of the condominium's lack of WRB, thus triggering Watts's duty to inquire further. The court disagreed and found Dunphy liable for fraudulent concealment and fraud. In its conclusions of law, ¶ 3.4(5), the court stated:

> Additionally, [Dunphy's] argument is that the HOA meeting minutes in and of themselves [were] sufficient to put [Watts] on notice and that they had no right to rely on the Form 17 representations and their own Homeowner's inspection report.
>
> But if the Watts had read the [HOA] meeting minutes, what would it have told them? Although the words "defect," "envelope studies," "Investigation," and "defect attorney" were mentioned several times, there is no context or explanation for the brief references buried in a maze of other irrelevant information. Only with the use of 20/20 hindsight and specialized knowledge can we pick out the significance of these words.
>
> The court does not find persuasive the argument that meeting minutes alone are sufficient to give Mary Dunphy the same level of knowledge that we are imputing to the Watts. Although the Watts had the minutes, Ms. Dunphy not only had the minutes for her review, but actually attended all the HOA meetings, except for possibly the June meeting. She was also the Vice President of the Board, and therefore had the opportunity and could reasonably understand what was in those Minutes. She actually lived through them. She experienced it. She was there, and she was present for at least part of the walk through inspection in May 2007. She was aware that the complex did not have a vapor or water

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there were no defects, among other material facts, (2) the defects were material, (3) Dunphy's answers were false, (4) Dunphy knew her answers were false, (5) Dunphy intended Watts to rely on her false answers, (6) Watts did not know Dunphy's answers were false, (7) Watts relied on the false answers, (8) Watts had a right to so rely, and (9) Watts suffered severe damages.

[7] Dunphy does not appeal the trial court's grant of partial summary judgment, and she agrees on appeal that she lied on the form 17.

> resistant barrier; and was aware that the engineer and a defect attorney was present on the walk through.
>
> Much has been made of the fact that the engineer only made factual comments and did not offer any conclusions. But that is beside the point. Mary Dunphy knew that a defect attorney and an engineer were looking at several issues in the complex, including the lack of a vapor resistant barrier; and that part of the reason that Ms. Dunphy knew the investigation was going on, was to go [to] the developer and seek to have the developer pay for any cost required to fix the problem. Ms. Dunphy also knew the report would be completed soon, and once the report was done it would have to be disclosed.

The court entered judgment against Dunphy and awarded Watts $38,000 in damages and over $55,000 in attorney fees and costs. Dunphy appeals.

ANALYSIS

Standard of Review

Following a bench trial, we review factual findings for substantial evidence and legal conclusions de novo, determining whether the findings support the conclusions.[8] Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

> The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. First, we must determine if the trial court's findings of fact were supported by substantial evidence in the record. If so, we must next decide whether those findings of fact support the trial court's conclusions of law.

Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). If the trial court mislabels a factual finding or legal conclusion, we consider it for what it really is. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the declared premise." Douglas v. Visser, 173 Wn. App. 823, 829, 295 P.3d 800 (2013). In

[8] Dunphy's reliance on Speelman v. Bellingham/Whatcom County Housing Authorities, 167 Wn. App. 624, 273 P.3d 1035 (2012), is misplaced. Speelman involves due process notice requirements. Dunphy also relies on inapplicable bona fide purchaser case authority.

determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party. Bland v. Mentor, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). We defer to the trial court's assessment of witness credibility and evidence weight. In re Welfare of Sego, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973). Unchallenged findings of facts are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

Fraudulent Concealment

On a claim for fraudulent concealment, the seller's duty to speak arises

> 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 is unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser.

Alejandre v. Bull, 159 Wn.2d 674, 689, 153 P.3d 864 (2007). Failure to disclose a material fact where there is a duty to disclose is fraudulent. Stieneke v. Russi, 145 Wn. App. 544, 560, 190 P.3d 60 (2008). The plaintiff must establish each element of fraudulent concealment by clear, cogent, and convincing evidence. Stieneke, 145 Wn. App. at 561.

The parties dispute the fourth requirement—that the defect is unknown to the buyer. Dunphy contends certain HOA Board meeting minute excerpts triggered Watts's duty to inquire about the condominium's latent WRB defects. Watts responds that the meeting minutes' intermittent mention of inspections and defects "buried in a sea of other problems" is insufficient to trigger a duty to inquire. Resp't's Br. at 16 (capitalization omitted). Watts also contends that these minutes provided no specific notice about a specific problem to their specific condominium unit.

Our Supreme Court discussed a buyer's duty to inquire further in the fraudulent concealment context:

> 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.

Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wn.2d 506, 525, 799 P.2d 250 (1990) (citations omitted); see also Douglas, 173 Wn. App. at 830 ("When a buyer is on notice of a defect, it must make further inquiries of the seller"); Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp., 51 Wn. App. 209, 214-15, 752 P.2d 1353 (1988) (same; if the buyer fails to inquire, he cannot later argue that he knew nothing about the extent of the problem).

Dunphy claims, "This is one of those rare appeals that can be decided entirely on the basis of a single recent Supreme Court case, Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007)."[9] Appellant's Br. at 14. Dunphy argues that under Alejandre, the meeting minutes constitute constructive notice of the condominium defect. Watts responds that any "notice" contained in the meeting minutes is factually distinguishable from the notice in Alejandre.

In Alejandre, defendant Mary Bull owned a single family residence that was served by a septic system. Alejandre, 159 Wn.2d at 678. The year before she put the house up for sale, she noticed soggy ground over the septic system. Alejandre, 159 Wn.2d at 678. She hired William Duncan of Gary's Septic Tank Service to pump the septic tank and also hired Walt Johnson Septic Service to empty the tank and repair a

[9] Dunphy's opening brief relies exclusively on Alejandre.

broken pipe leading from the tank to the drain field. Alejandre, 159 Wn.2d at 678. Bull also applied for a connection to the city sewer, but abandoned the idea after learning she would have to pay a $5,000 hook-up fee. Alejandre, 159 Wn.2d at 678.

Bull placed her home on the market in June 2000. Alejandre, 159 Wn.2d at 678. In September 2001, Bull and Arturo and Norma Alejandre entered into an agreement for the sale of Bull's home to the Alejandres. Alejandre, 159 Wn.2d at 678. The agreement required Bull to pump the septic tank before closing and conditioned the sale on a septic system inspection. Alejandre, 159 Wn.2d at 678.

As provided for in the agreement, Walt's Septic Tank Service pumped the tank and sent the Alejandres a copy of the bill. Alejandre, 159 Wn.2d at 679. The bill stated, "[T]he septic system's back baffle could not be inspected but there was '[n]o obvious malfunction of the system at time of work done." Alejandre, 159 Wn.2d at 679 (second alteration in original) (quoting Ex. 6). Bull gave the Alejandres a seller's disclosure statement indicating that the house had a septic tank system that was last pumped and inspected in fall 2000 and that "'Walt Johnson Jr. replaced broken line between house and septic tank . . . .'" Alejandre, 159 Wn.2d at 679 (quoting Exhibit 5). Bull answered "no" to the inquiry whether there were any defects in the septic system's operation. Alejandre, 159 Wn.2d at 679.

A month after the sale closed, the Alejandres smelled an odor inside the home and heard water gurgling. Alejandre, 159 Wn.2d at 680. They also noticed a foul odor outside the home and believed it came from the ground around the septic tank, which they said was soggy. Alejandre, 159 Wn.2d at 680. By chance, they hired William Duncan of Gary's Septic Tank Service—the same person who pumped the system for

Bull in 2000. Alejandre, 159 Wn.2d at 680. Duncan told the Alejandres that he could pump the tank, but he could not fix the underlying problem because the drain fields were not working. Alejandre, 159 Wn.2d at 680. He also informed them that he previously told Bull that the drain fields were not working and that she should connect to the city's sewer system. Alejandre, 159 Wn.2d at 680.

The Alejandres hired another company to connect to the city sewer system. Alejandre, 159 Wn.2d at 680. During this work, the company found that the baffle to the outlet side of the septic system was missing, thus allowing sludge from the septic tank to enter and plug the drain field. Alejandre, 159 Wn.2d at 680.

The Alejandres sued Bull for fraud and misrepresentation, claiming costs and damages totaling nearly $30,000. Alejandre, 159 Wn.2d at 680. After they rested their case, Bull moved for judgment as a matter of law. Alejandre, 159 Wn.2d at 680. The trial court granted the motion, ruling that the economic loss rule barred the Alejandres' claims and that they failed to present sufficient evidence supporting their claims. Alejandre, 159 Wn.2d at 680. We reversed, holding that the Alejandres presented sufficient evidence to warrant the jury's consideration. Alejandre, 159 Wn.2d at 680-81.

Our Supreme Court reversed. Although Alejandre is better known for its economic loss rule discussion—which is not relevant here—the court also affirmed the trial court's decision to dismiss the Alejandres' fraudulent concealment and fraud claims. Regarding fraudulent concealment, the issue in Alejandre concerned element five—whether the buyers had shown that the defect in the septic system would not have been discovered through a reasonably diligent inspection. Alejandre, 159 Wn.2d at 689-90. Our Supreme Court concluded they had not met their burden:

> The Alejandres failed to meet their burden of showing that the defect in the septic system would not have been discovered through a reasonably diligent inspection. In fact, the Alejandres accepted the septic system even though the inspection report from Walt's Septic Tank Service disclosed, on its face, that the inspection was incomplete because the back baffle had not been inspected. The testimony at trial showed that this part of the septic system was relatively shallow and easily accessible for inspection. A careful examination would have led to discovery of the defective baffle and to further investigation.

Alejandre, 159 Wn.2d at 689-90.

Alejandre is not controlling based on the facts of this case.[10] Our Supreme Court faulted the buyers for failing to conduct a reasonably diligent prepurchase inspection of their home's septic system in the face of an obvious, incomplete inspection report that revealed no inspection of the back baffle. As the court observed, a reasonably diligent and careful inspection of the septic system would have revealed the defective baffle that was easily accessible for inspection.

The present case involves no dispute over whether Watts undertook a reasonably diligent prepurchase inspection of their condominium unit. Watts hired a home inspector to conduct a prepurchase inspection of the condominium unit. That

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[10] From the opinion, it appears the Alejandres did not hire their own home inspector or septic system inspector. Instead, they relied on the report prepared by the seller's septic tank service provider as well as a property inspection report—required by the lending bank—that indicated the septic system "'Performs Intended Function'" and stated that "'everything drains OK.'" Alejandre, 159 Wn.2d at 680. The earnest money agreement required the seller to pump the tank before closing.

> As provided in the earnest money agreement, a septic tank service (Walt's Septic Tank Service) pumped the tank, and the Alejandres received a copy of the bill. The bill stated on it that the septic system's back baffle could not be inspected but there was "[n]o obvious malfunction of the system at time of work done."

Alejandre, 159 Wn.2d at 679. (quoting Ex. 6). As noted above, Watts hired and relied on their home inspector's report as to the condition of their condominium unit.

inspection revealed nothing to indicate the condominium's lack of WRB such as exterior water damage. The court's unchallenged findings state:

> The Watts had a home inspection done by a home inspector. The inspection did not look under the siding, or inspect the rest of the complex. The inspection did not disclose any of the missing WRB on the Dunphy unit, or the missing [WRB] or the problems with the buildings in the rest of the complex. The evidence was uncontroverted that a normal, routine home inspection of a condominium would not have uncovered any of the problems in the complex or the missing WRB in the Dunphy unit. The court finds the Watts did a reasonably diligent inspection of the property.

Unlike the present case, the buyers in Alejandre had prepurchase notice of an incomplete inspection. They relied on an obvious, incomplete septic system report that revealed the back baffle had not been inspected.

Also, the Alejandres' prepurchase notice about the incomplete inspection involved the specific property they purchased. In the present case, Dunphy relies exclusively on 33 pages[11] of meeting minutes to argue that Watts should have inquired further after reviewing the minutes. To make this point, Dunphy relies on seven select meeting minute excerpts quoted above. Even when viewed in complete context, no mention or reference to WRB problems associated with Watts's condominium unit appears in any of the meeting minutes. And there is no information identifying which of the 64 units or 12 buildings are affected by the WRB problem.[12]

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[11] We question whether Watts received the monthly meeting minutes from August to December 2007 because the record shows they received the meeting minutes at the end of July 2007, when they purchased the unit.

[12] The undisputed facts show the Kirkland Village Condominiums complex consists of 12 buildings with each building comprised of 3 to 7 individual townhome style units. Watts's unit is one of 7 in the 13020 building. Most of the units, including Watts's, are two stories high. A trial court is not required to make findings on stipulated or undisputed matters. Swanson v. May, 40 Wn. App. 148, 158, 697 P.2d 1013 (1985).

It is true the meeting minute excerpts mention "inspection," "envelope inspection," "invasive inspection," "moisture barrier," "intrusive study," "report," and "defect." According to Dunphy, this notice triggered Watts's duty to inquire about the WRB problem. The court's unchallenged finding of fact states:

> The Minutes contain a list of all the issues the Board dealt with. In there, among the other issues, are mentions of inspections; envelope studies, Darrel Hay's report, etc. The court looks at the minutes in the context of what the Watts knew at the time, not with the 20/20 hindsight at the time of trial. . . .

The court also made the following finding of fact which it mistakenly labeled as a conclusion of law:[13]

> But if the Watts had read the [HOA] meeting minutes, what would it have told them? Although the words "defect," "envelope studies," ["]Investigation," and "defect attorney" were mentioned several times, there is no context or explanation for the brief references buried in a maze of other irrelevant information.

Substantial evidence supports this finding of fact. The meeting minutes provide no details or explanation about the nature and extent of the WRB defect and specific units affected. Review of the trial evidence and meeting minutes establish substantial evidence to support the trial court's finding that the disputed meeting minute "words" were "brief references buried in a maze of other irrelevant information." For example,

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[13] This finding appears under the heading "conclusions of law" in the written findings of fact and conclusions of law. It is well settled that the labels used by the trial court to distinguish findings versus conclusions are not controlling. We will consider legal conclusions and factual findings for what they are even though they may be mislabeled as a finding or a conclusion. Kane v. Klos, 50 Wn.2d 778, 788, 314 P.2d 672 (1957) (findings of fact are not made such by label or by commingling conclusions of law with findings of fact); Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (if the trial court mislabels a finding or legal conclusion, we consider it for what it really is). Here, the trial court commingled its factual findings and conclusions of law. But we treat them for what they are. Dunphy assigns error to this factual finding as an erroneous "conclusion of law."

HOA president Craig Cleaver described the October 16, 2006 meeting minutes as a "laundry list" of issues affecting the condominium complex, including homeowners complaining about several things, especially parking and landscaping. The record evidence shows the HOA Board sought to gather information on all complaints and issues about the condominium complex in order to submit them to the developer for redress. The WRB problem was merely one item in the developer "laundry list" during the condominium's conversion from developer owner to a homeowners association structure. As Watts points out, these were simply "'bullet points' in a long list of 'bullet points,'" none of which specifically related to Dunphy's unit or any other unit. Resp't's Br. at 17. We conclude substantial evidence supports the trial court's findings of fact and the findings support its conclusion of law that no duty to inquire further flowed to Watts based solely on review of the HOA Board meeting minutes.

Dunphy also relies on other cases to support her duty to inquire claim. None of those cases control for the reasons discussed above. Those cases involve buyers with prepurchase notice of a particular obvious defect affecting the specific property purchased. In Douglas,[14] the buyers' inspector identified an area of rot and decay near the roof line and caulking suggestive of a prior roof leak. He found an area of rotted sill plate below the section of water-damaged exterior siding. A portion of sill adjacent to the rotted section had recently been replaced and floor joists near the rotted area had been sistered. Douglas, 173 Wn. App. at 831-32. The buyers argued that the area of rot their inspector discovered was not unusual and they had no knowledge that 50 to 70 percent of the sill plate and rim joist were destroyed. We rejected that argument. Citing

[14] We decided Douglas after the close of appellate briefing.

Dalarna, we stated the well-settled rule that "[w]hen a buyer is on notice of a defect, it must make further inquiries of the seller." Douglas, 173 Wn. App. at 830. We reasoned:

> The Douglases and their inspector were on notice of the defect and had a duty to make further inquiries. The Douglases argue that "they had no idea that 50 to 70% of the sill plate and rim joist were destroyed" and that the area of rot [their inspector] discovered was not unusual. That, however, is the precise argument we rejected in Dalarna. Once a buyer discovers evidence of a defect, they are on notice and have a duty to make further inquiries. They cannot succeed when the extent of the defect is greater than anticipated, even when it is magnitudes greater.

Douglas, 173 Wn. App. at 832.

We also noted that additional facts should have prompted the Douglases to inquire further:

> Despite [the discovery of rot], on top of the Vissers' previous evasive and incomplete answers and the Vissers' on-going failure to provide their own prepurchase inspection report, either of which should have caused concern and further inquiry, there is no evidence that the Douglases made any inquiries whatsoever after the inspection.

Douglas, 173 Wn. App. at 834 (emphasis added).

In Dalarna, a buyer purchased an apartment building and later sued the seller for fraudulent concealment after discovering substantial water leakage problems. The buyer's inspector noted water stains and loose tiles. Despite this prepurchase notice of a water leak, the buyer closed on the sale. The buyer later discovered the water damage was more extensive. The buyer claimed that the seller concealed the extensive nature of the leak. Dalarna, 51 Wn. App. at 211-12. We held that due to the buyer's prepurchase knowledge of the water leak, its severity was readily ascertainable through further inquiries. Dalarna, 51 Wn. App. at 215.

In Jackowski v. Borchelt, 151 Wn. App. 1, 209 P.3d 514 (2009), the buyers purchased a waterfront home and later sued the sellers for fraud and fraudulent concealment when soil instability caused the house to slide. Before the sale, the sellers gave the buyers a form 17 disclosure statement that contained language referring the buyers to a Mason County Department of Community Development letter. Jackowski, 151 Wn. App. at 8. The letter indicated that the "'following critical areas are present on this property: . . . Landslide Hazard Areas.'" Jackowski, 151 Wn. App. at 8. The letter also referenced an existing geotechnical report conducted by a geologist. Jackowski, 151 Wn. App. at 8. The sellers faxed a copy of the letter to their real estate agent. Jackowski, 151 Wn. App. at 8. The fax included an addendum, provided by the geologist, that again referenced the geotechnical report. Jackowski, 151 Wn. App. at 8. The sellers' real estate agent then faxed the letter and addendum to the buyers' agent. Jackowski, 151 Wn. App. at 8. The buyers received and read the letter and addendum. Jackowski, 151 Wn. App. at 8. An addendum to the real estate purchase and sale agreement provided that the sale was contingent on the buyers' inspection—including, at the buyers' option, a soils/stability inspection. Jackowski, 151 Wn. App. at 8. The buyers conducted no soil stability investigation before the sale closed. Jackowski, 151 Wn. App. at 8.

Jackowski addressed two issues relevant here—whether a reasonable inspection would have disclosed the landslide risk (fraudulent concealment claim) and whether the buyers established they had a right to rely on the sellers' fraudulent representations (fraud claim). Jackowski, 151 Wn. App. at 17. The court affirmed summary judgment dismissal of those claims:

> Here, as we discussed above, the Jackowskis had prepurchase knowledge of the landslide hazard area and, thus, reliance on the Form 17 disclosure could not be reasonable. A reasonable inspection would have disclosed the landslide risk. The Jackowskis acknowledge that they had read the letter indicating that the property that they were contracting to buy was in a landslide hazard area. Tim Jackowski read documents before closing that referenced an existing geotechnical report. Tim Jackowski acknowledged that he made the sale contingent on his ability to hire professionals to conduct property inspections including soil and slope stability. Nevertheless, he failed to utilize the contingency to request such inspections. The trial court did not err by granting summary judgment on the Jackowskis' fraudulent concealment claims based on the landslide risk.

Jackowski, 151 Wn. App. at 17-18 (emphasis added).

Douglas, Dalarna, and Jackowski stand for the unremarkable proposition that a buyer's failure to inquire further after prepurchase notice of a specific defect involving the specific property purchased defeats a fraudulent concealment claim. These cases are not controlling. The undisputed facts and reasonable factual inferences support the conclusion that the meeting minutes triggered no duty flowing to Watts to make further inquiry.

Fraud

To succeed on a fraud claim, the plaintiff must establish by clear, cogent, and convincing evidence all nine elements of fraud:

> (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). The sole issue on appeal is element 8—whether Watts had a right to rely on Dunphy's form 17 disclosures.

As our Supreme Court noted in Williams v. Joslin, 65 Wn.2d 696, 698, 399 P.2d 308 (1965), "'The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him.'" (Quoting Puget Sound Nat'l Bank v. McMahon, 53 Wn.2d 51, 54, 330 P.2d 559 (1958)). A buyer who is on notice of a defect and has a duty to make further inquiry cannot justifiably rely on the seller's misrepresentations. Douglas, 173 Wn. App. at 834; see also Alejandre, 159 Wn.2d at 690 ("Having failed to exercise the diligence required, [the Alejandres] were unable to present sufficient evidence of a right to rely on the allegedly fraudulent representations.").

Dunphy's sole argument on appeal is that Watts failed to show he had a right to rely on Dunphy's representations because "[t]he Watts' right to rely on any representations made to them was tied to their diligence concerning the information they had."[15] Appellant's Br. at 20. As discussed above, the meeting minutes were insufficient to put Watts on inquiry notice of the latent defect. Watts had no duty to inquire further, and his reliance on Dunphy's form 17—a required disclosure form under chapter 64.06 RCW —was not unreasonable. Substantial evidence supports the trial court's findings and the findings support its conclusion that Dunphy was liable for fraud.

Attorney Fees

Dunphy and Watts each request attorney fees on appeal as the prevailing party under the purchase and sale agreement. In Washington, parties may recover attorney fees if allowed by statute, contract, or some well-recognized principle of equity.

[15] Dunphy does not challenge the trial court's conclusion that Watts met the other eight elements of fraud.

Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 525, 210 P.3d 318 (2009). Here, although no copy of the real estate purchase and sale agreement appears in the record on appeal, the parties agree—and the trial court found—that the purchase and sale agreement provides for an award of fees to the prevailing party in a dispute concerning the agreement. Because Watts is the prevailing party on appeal, he is entitled to attorney fees and costs conditioned on his compliance with RAP 18.1.

CONCLUSION

For the reasons discussed above, we affirm and award reasonable attorney fees and costs to Watts as the prevailing party conditioned on compliance with RAP 18.1.[16]

WE CONCUR:

Cox, J.

Becker, J.

[16] In her reply brief, Dunphy moved to strike certain references to trial testimony in Watts's response brief. The motion is denied under RAP 17.4(d) ("A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits. . . ."). In any event, this court is able to decide which portions of the record to consider even without such a motion.

Meeting Date: 2/13/07
HOA Meeting call to start at 7:10pm by the President
Present: Craig Clever, Mary Dunphy, Lisa Robberson, Mark Cress, John Coe, Terry Hughes

"Special Meeting"

1. Envelop Study was discussed by Mark Cress; an overview of the independent inspection report by Darrell Hays was commented by Mark.
2. Mark Cress presented his findings with photo of the property which included siding, moisture barrier.
3. Discussed options on how to proceed depending on what the POS states about envelop study. Two options are proposed: 1. Intrusive Investigation or 2. Envelop Study
4. Envelop study was the recommendation
5. David Onsager (another attorney) at Stafford Frie Law Firm was mentioned as another option.
6. John Coe will put together a firewall amendment to address sensitive matter with Tammy's board position and conflict with her being an employee of Center Bay as we move forward with the envelop study.
7. Survey map / plan needed to use for the amendment to the POS on parking
8. Mary to contact Title company to get updated Warranty Deeds for Kirkland Village for any additional recordings and send information to John Coe
9. Discussed retaining a California CPA auditing firm to complete an audit of the Kirkland Village books. A local CPA quoted a price of $3000 to do the audit, but the fee did not include travel expenses.
10. Mary to contact her CPA friend with other options
11. Lisa and John Coe will work on the Rental Restrictions
12. Terry Hughes is assigned to get landscaping budget from Center Bay

Meeting adjourned at 9:14pm

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KIRKLAND VILLAGE MEETING NOTES 3/13/07 7:10pm

Attendance:

Craig Cleaver	Mary Dunphy
Lisa Robberson	Tammy Dickinson
Bryan Balsley	Terry Hughes

Review of Agenda

0) Review/ adopt minutes from last meeting.
Deferred until next meeting.

1) Update on rental cap. Packet passed out to all board members. Packet also included rental adjustments. Review of categories 1,2 and 3.

11.3 talking about rentals

11.3.1.4 adds .25 cents for copies, Lisa recommends also adding an administrative fee. Owner is responsible for giving renter copy of P.O.S., rules and regs, Terry-will obtain a hard copy of rules and regs. That can request and state that they have to adopt by the rules and regs. Administrative fee is voted and all members agree to $40.00 charge.

Rental cap voting ballot- some worries that may have to redo, due to process taking so long.

11.3.1.9 rental fee. Put into rules and regulations a community deposit. Typical deposits $200 -$300. All charges to owner.
Lisa is also concerned how to enforce, but page 10 covers how to. If not paid, Lien can be put on property.
Approval for rental cap to be approved for next meeting. Board is to review and report any changes to Lisa by March 27th via email.

2) Review 7-1 cable issue. He did have permission, but still did not follow the guidelines. Homeowners do not always read paperwork properly or comprehend how to respond with the documents. Terry will make up form being revised. Terry recommends that he contacts Comcast.

3)Update on inspection. Deferred until next meeting, no response from Mark W. of Corke-Amento.

4) Update on grounds keeper role- Tammy's son Brandon was hired on to do grounds maintenance 3 hours per week. Craig approved hire and for standard hours. Email Terry with any additional items if above 4 hours each job. Payroll is 2 times a month. It was decided that Brandon will report to Tammy for payroll sign off. It was discussed that he

does every other day. All board members will have access to Brandon per his phone for any issues that arise. Tammy will email the board with his number.

Call City of Kirkland for street sign repair.

5) Other issues- Parking stickers. People with more than 2 cars need to find a way to obtain space. Colin Sternberg volunteered to lead a parking committee for unused spaces. It was agreed that if a homeowners of 3 bedrooms wants to rent or lend their reserved parking permit to another homeowner, they can do so, but must report to the board which unit they are ceding their space to and respective vehicle info. Three bedroom reserved parking needs to have a parking sticker and parking hanger. There are 64 covered spaces, 22 reserved spaces 28 open spaces. Cars need to be operable and current tabs 11.6 in P.O.S. Towing company is Mac towing. Should do a courtesy posting before towing.

Auditing is expensive. Terry can recommend a company? Discussed whether auditor needs to be in California or can paperwork be sent to Washington. Terry will find out if that is possible. Tammy mentioned that the other property did it that way. It may help cut down on the cost if it can be done this way.

Landscaping. Bill wanted Craig to talk to Pepo with Creative Brothers, but he said declined as Bill had stated he was the point person for Center Bay. $100 landscaping may need to be trimmed to defer $ to cost of audit and 'envelope' inspection; pending action till the board gets true costs for both 'Inspection' and 'Audit.

Heather from Suhrco has questions on budget whether the dues were lowered because of no management/maintenance fees. Terry and Tammy will go over together.

General meeting- Are we ready? There is nothing in documents stating that we have to have a quarterly meeting. Open meeting will be semi annual. Board decided on June and January.1 The first meeting by the 1st quarter of the year. General meeting will be at 6:30 for board and 7:30-8:30 for open discussion. First meeting will be June 12th.

Mary recommends that we do a yahoo group or google group. You can post email that are beneficial, post important information and anyone can have access to it. It has been decided that Bryan will set up.

Delinquencies- Only 1 delinquent past 60 days. 9-1. Tammy will pull ledger from old company to see what charges are for and pass along to Terry. She thinks it is pet and late fees.

Lisa asked about the gutters, it is unsightly on the roof of building 1 as you drive into the community. Cotton will be falling soon. Terry will get a couple more bids together.

Action items list for next meeting: Terry will send out.
Last meeting notes- Mary and Lisa will do by the 27th.

Inspection- find a second company
Grounds-Tammy and Terry
Yahoo google- Bryan and Mary
Craig- Parking
Heather- Originals
Craig- respond to people about meeting

Meeting adjourned at 8:51

Meeting Date: 4/10/07
HOA Meeting call to order 7:17pm by the President
Present: Craig Cleaver, Mary Dunphy, Lisa Robberson, Tammy Dickinson, Terry Hughes
Absent: Bryan Balsley

(Typed from Tammy's notes by Craig)

1. No Owner Forum – no attendance
2. Craig read/reviewed Feb/March meeting minutes and they were adopoted
    a. Craig will forward to Judith (Suhrco) for binder
3. Financial report: (Terry) $110, 216.78, operating & reserves
    a. Report of delinquencies was given (redacted)
4. Review of Action Items:
    a. Gutter bids complete
    b. No soft copy of 'Rules' identified, Terry going to see what she can find; Craig to work on KVC version.
    c. Craig/Terry spoke to Corke Amento and we are moving ahead with the envelope/invasive inspection. Centerbay wanted to use their inspector, Craig declined that offer, but accepted the offer for Centerbay to pay 50% of the cost.
    d. Landscaping
        i. Centerbay $100k budget original breakout, $80k water features, $20k landscaping.
    e. Unit 7-1 exterior cable – they attempted to cover, Suhrco to send note to have them "tidy" it up more.
    f. Rental Cap – Lisa sent changes to John Coe for update. Reviewed ballot to go out. The amendment is sent out with the ballot USPS.
        i. Send Ballot prior to June Annual Meeting so everyone has time to read; John Coe to attend meeting to answer questions.
    g. Parking – should be separate issue from rental cap
        i. Original exhibit says 'assigned' parking, but none issued via Appendix B; problem is where spaces are not assigned. There are 64 covered reserved but KVC is shy 14 if every unit had two vehicles per allowance. The 3BR spaces "reserved unassigned" to be determined by board....
5. Google site – Mary to investigate
6. Flyer boxes for meeting notes – Craig to handle.
7. Year 1 Board Elections: Determined Lisa and Bryan's seats would be the ones up for election based on a 1 year term as outlined on POS with the other three seats up the following year.
    a. Note: This was changed to Tammy's seat based on her resignation, Lisa's remained a 2 year term
8. Annual Meeting: 14 days before annual meeting, Suhrco will send notice along with Board nomination form and voting proxy.
    a. Terry will handle chair rental for meeting

9. Asphalt Repair: The moving company that caused the damage is paying for repair, Benjamin Asphalt, which will take 4-6 hours doing ½ at a time so entrance remains accessible.
10. Gutter Cleaning:
    a. Roof King $1995 – declined
    b. Roof Tech – Time & Materials, estimate $2000, we will go with them pending clarification of proposal
    c. Glass --- (can't read) - $2150 – declined
11. Cats: Tabby has been around outside, does this belong to someone?
    a. Should we put up a notice?
    b. Should we call animal control?
12. Rules & Regs:
    a. Should we add language about flooring details
        i. Hardwood...need to check on this
    b. Blinds
        i. All white facing external?

Meeting adjourned at 8:43pm

Kirkland HOA Board Meeting
May 8, 2007

7:15pm Meeting called to order

In Attendance: Craig Cleaver, Mary Dunphy, Lisa Robberson and Terry Hughes of Suhrco

1) Delinquency Report
    a. Delinquencies come in around the 13th/14th of the month.
    b. Judith at Suhrco to email delinquency report on the 15th of the month to the Board
2) Discussion of Intrusive Study
    a. Need David Onsager to weigh in on the moisture barrier and whether or not there is significant damage.
    b. Waiting for results from Corke Amento and David Onsager
    c. David Onsager will provide recommendation in the report
    d. Terry to call David's assistant in order to get the date the report will be ready
3) Transitional Audit
    a. Terry has left several messages for Andrew McAllister (Auditor/CPA)
        i. Terry to place another call this week
4) Asphalt Repair
    a. Benjamin Asphalt to start on repair on May 15th
    b. Being paid by moving company that did the damage
5) Roof Cleaning & Leaf Removal
    a. Rooftech to start cleaning next week
6) Damage to Owners Sliding Glass Door
    a. Horizon Glass to repair this week
    b. Condo Commercial (landscaper) will pay for the repair bill
7) Landscaping
    a. Scheduled to start with base plan on the 15th of May
        i. Around doors and natural barrier
    b. Patio's would be additional work
    c. Still waiting for response from Bill with regards to the budget
    d. If response not received by May 15th, have John Coe (lawyer) deliver letter
8) 7-1 Cable Cord Exposure
    a. Sent letter to owner
9) Rental Cap
    a. John Coe provided letter
    b. Craig read letter to the board
    c. Craig made one change to letter to include straw pole vote
    d. Terry to make corrections
    e. Contact will be Terry Hughes at Suhrco

f. Terry to send letter, amendment, ballot and self-addressed stamped envelope
g. Deadline for owner's to return – June 30th

10) Board Members
a. Elect 2 new positions for 1 year terms at bi-annual meeting on June 12th
b. Positions vacated by Tammy Dickinson and Bryan Balsley

11) Rules & Regulations
a. Add amendments for the insurance policy
i. i.e. deductible, hardwood floors, hot water heater water damage
b. Discuss in general meeting on June 12th

12) General Meeting Agenda on June 12th
a. Parking
i. In process of changing rules and regulations
b. Landscaping
c. Rental Cap – John Coe
i. Terry to talk to John Coe about availability for general meeting
d. Intrusive Study/Investigation
e. Forum for the owners (20 minutes)
f. Management Change
g. Election of Board Members
h. Terry to send package
i. Proxy
ii. Agenda
iii. Nomination Forms
iv. Provide map of new location
i. Assign time period to each segment
i. Try to keep meeting at 2 hours
j. Sign up sheet with relative % of ownership

8:30pm Meeting adjourned

Kirkland Village Annual Association Meeting
June 12, 2007

I. Waited for quorum (16 people)
   a. Started Informal meeting at 7:24pm
   b. Rental Cap – John Coe (7:24pm – 8:02)
      i. Explanation of Rental Cap Amendment
         1. Benefits
            a. Insurance
            b. Financing
            c. Association to finance repairs
         2. Chose 25% rental cap (total rentals)
         3. Grandfather the 12 units currently renting
         4. 90% of owners have to approve along with those currently leasing and 51% of mortgagees approval
         5. Run through of actual amendment
         6. Balloting is due June 30th – requires 90%
         7. Voting on the amendment will be in August

II. Call to Order
   a. Officially called meeting to order 8:02
   b. Approval of Agenda
      i. Granted
   c. Introduction of new Property Manager and why (8:04 – 8:11)
      i. Why
         1. Lack of action on Centerbay
            a. Landscaping
            b. Siding washing and replacement not taking care of timely
            c. Failed to perform requirements timely
      ii. Hired Suhrco
         1. Performance of envelope study based on recommendation of Suhrco that Centerbay never informed us of it
         2. Taking steps forward to make corrections going forward
         3. Terry informed of assistant – Judith for other contact opportunity
         4. kirklandvillage@hotmail.com alias

III. Financial Report (8:11 – 8:19)
   a. Year to Date
      i. Switching to calendar year versus fiscal year
   b. Calendar Year Budget
      i. Operating account $78k
      ii. Maintenance reserve account $28k
      iii. Most properties have a reserve level much higher

Side note: Derek Wampler (Unit 6-6) volunteered to help create a website to post information for the association on a website (for example: posting financials)

Discussed envelope study and possible assessments. Informed that we are working with Centerbay and trying to resolve issues and working on not going into a legal battle.

IV. New Business (8:19 – 8:24)
- a. Inspection/Construction Defect
  - i. Corke Amento performing inspection
    1. Currently waiting for report
  - ii. Asked owners to inform board of any of defects or issues
  - iii. Timeline – depends on cooperation of builder
- b. Landscaping (8:24 – 8:36)
  - i. Started on June 11, 2007
  - ii. Master plan from Centerbay shown to unit owners
  - iii. Board voted no on water features and instead decided to invest in other landscaping
  - iv. Owner concerned with replanting – Craig explained fill-in
    1. Trying to create natural barriers
    2. Contractual obligated to replace any items that do not survive
  - v. If there are plantings on your own it will be up to owner on whether to keep those plantings
  - vi. Owner asked about sprinkling system
    1. Do we have control?
    2. Are we conserving?
    3. Craig to research if on timers or how we can control – follow up with landscaping company
  - vii. Completion
    1. Start to end – 3 months
    2. Crew size will vary
    3. Craig meeting with Bill regarding landscaping
  - viii. Changes requested by Craig
    1. Will be considered based on budget
- c. Grounds keeper
  - i. Current one is not currently keeping up with committed time
  - ii. Possibly looking for new grounds keeper
    1. Pat offered to post job description

V. Old Business
- a. Parking (8:41 – 8:50)
  - i. Still an issue
  - ii. Head in only
  - iii. Guests park off-site
  - iv. Every owner must offered 2
  - v. Reserved must have hanging tag plus sticker
    1. Unassigned reserved spot

vi. We will send out a reminder of parking rules
vii. Can only act on parking problems if board is informed
viii. Area is shy 13 spaces if everyone has two cars

b. Rules and Regulation (8:50 -
i. Add parking issues to rules and regulations
ii. Quiet times
iii. Speed limit
iv. Other rules will be added to protect ownership
v. Loud music
vi. Pets – dogs
vii. Parking – purchasing spots not a formal methodology
1. Will ask John Coe the rules on allowing them being sold

VI. Elections (9:00 – 9:03)
a. Two Board Positions
i. Pat Hunter
ii. Nancy Barille
b. Motion made to accept nominations, seconded and approved unanimously

VII. Owner Forum
a. Issues with ice in the winter and possible lawsuits due to injury
i. De-icer issued through out community to be distributed
b. Work out emergency plan within community
c. Leaves causes problems
i. Board will check maintenance schedule
d. Audit of books of Centerbay
i. To look at contracts for maintenance
ii. Will consider changing contract
e. Will work on putting together a plan on when things need to be taken care of
f. Cannot get additional recycling bins

VIII. Adjournment
a. Meeting adjourned at 9:13

Meeting minutes
Kirkland Village Homeowner's Assoc
July 12th 2007

Meeting called to order 7:18 PM
Owner form issues:
2 homeowners present, Josh and Derrick
Reminder, Homeowners are invited to attend meetings during the HO forum, to discuss issues but will be asked to leave when business portion of the meeting is called by the Board.

Rental cap agreement
Still looking for 20 owners to vote. 2 owners have voted No. We will have to flip them to get our 98% quorum.
Josh has agreed to knock on doors to ask for votes.
Craig will supply him with necessary info to target owners that have not yet voted.

Approval of May minutes
(April, May, June)
all approved

Financial reports
e-mailed from Shurco to Board members before each monthly meeting.
Craig and Lisa were e-mailed May statements they will review.

Management report
Review of Action items:

Transition Audit, still gathering info from California office, including tracking of all dollars paid into association at closing of units.
Current timeframe for full Audit , mid January
Delinquency report: Julie from Shurco will update and send report before HOA meetings. complete
Revised parking notices: Craig will update and distribute
Inquiry to Janet regarding report from Mark Cress. Complete
Mail Rental amendment. Complete
Confirm John Coe for next 6-12 meeting. Complete
Mail annual meeting notice. Complete
Maps from Craig to Raj. Complete

Bill from Corke Amento, inspectors for Envelope inspection came in at $9350.03
We are holding Center Bay to their offer to pay for half of this inspection.
David Ansager defect Attorney has bille dus 1792.00 for 5.6 hours of work.
Missing insulation is an issue the Board will be going after Center bay for.

Old Business
Audit:action item list
Rental Cap (see above)
Rental owners to be called

Website
The fabulous Derrick Wampler has offered to re do our web site

Landscaping
Creative Brothers landscaping company is currently working on the door areas. The new plants are guaranteed for a full year. Any dead will be replaced. Drains at front doors have been moved and downspouts have been connected to under ground drain system.
More to come.....

New Business
We have hired a new groundskeeper, Tevis Mahoney. Craig will locate an appropriate crawl space for supplies for Tevis.
Note: Crawl spaces are community property, and as such will be inspected by Craig for old locks that will be removed and replaced with new locks. We will keep supplies such as de-icer and other emergency supplies in these spaces.
Terry will check for buckets for de-icer.
Parking:
Three bedroom units are allowed a second reserved but uncovered parking space. Rear view mirror permits are issued to unit owners. These should not be loaned, traded or sold to owners of two bedroom units.
Also note, permits are to be transferred from owner to owner in case of unit sale, and should be retrieved from renters at the end of the lease.
Craig will issue a parking reminder this month.
Vandalism
We need to stay on top of this as a community. Letters to neighbor violators will be sent out by Shurco.

→ Resignation of Mary:
We will miss her, thanks for helping us get our start!
→ Mary is selling her unit and resigning from the board. As per the bylaws, the board can appointment a replacement.
Derrick Wampler is nominated seconded and approved, and he accepts!
Board meeting date is set for the second Monday of the month.

Meeting adjourned at 9:02 PM