No. 318885

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

PEGGY MONTGOMERY, and DWIGHT MONTOMGERY, and LISA MONTGOMERY, husband and wife, Appellants,
v.

GLEN L. ENGELHARD, and JANE DOE ENGELHARD, and their martial community, Respondents,
and

WILLIAM M. ADAMS, JANE DOE ADAMS, and their marital community; and TB ADAMS REALTY, LLC, a Washington real estate firm, Defendants

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OPENING BRIEF OF APPELLANTS

Honorable Carrie L. Runge, J.
Benton County Superior Court No. 12-2-00030-9

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I. INTRODUCTION

In 2003, appellant Peggy Montgomery bought a home in Richland, Washington, to live in with her son, appellant Dwight Montgomery, daughter-in-law, appellant Lisa Montgomery, and granddaughter. Montgomery bought the home from defendant/respondent Glen Engelhard, a real estate developer and licensed real estate professional, who built the home as part of a sequential build and sell business plan. As with the commercial properties he develops, Engelhard hired a contractor, whom he had worked with on a commercial property, to help construct the building/house, and Engelhard saved money and created other advantages by directly paying all subcontractors and material vendors.

In October 2010, the home became uninhabitable due to mold growth. The Montgomery family moved into a hotel at first and then into a rental home. They have lived in the rental since. Upon investigation, the Montgomery family learned that there is no vapor barrier in the home's foundation to prevent ground water infiltration. The lack of a vapor barrier caused significant and sustained water intrusion into the home and mold growth, and

caused damage to the structure, damage to personal property in the home, and physical injuries to the Montgomery family.

The Montgomery family's primary claim against Engelhard is for breach of the implied warranty of habitability. Despite evidence that Engelhard had a sequential build and sell business plan and built the home for sale, that Engelhard is a real estate developer of both commercial and residential property, and that Engelhard was regularly engaged in building generally through the development of real estate and specifically by hiring subcontractors, directing workers on site, and paying all the subcontractors and vendors during construction of the home just as he does with development of commercial real estate, the trial court dismissed the implied warranty of habitability claim on summary judgment.

The Montgomery family appeals because there are material questions of fact a jury should decide as to whether Engelhard was regularly engaged in building, whether Engelhard had the home built for personal use or for sale, and whether the home Engelhard sold to Montgomery as the first buyer-occupants was a "new house" under the circumstances. The Montgomery family asks the Court of Appeals to reverse and remand, and to give them their day in court.

I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in entering its August 8, 2013, Order Granting Partial Summary Judgment to Defendant Engelhard.

2. The trial court erred in entering its August 8, 2013, Order on Motion for Reconsideration.

B. Issues Pertaining to Assignments of Error

1. Does hiring a licensed contractor during construction allow a builder-vendor to avoid the implied warranty of habitability adopted by *House v. Thornton*, 76 Wn.2d 428, 457 P.2d 199 (1969)? (Assignment of Error 1 and 2)

2. Is there a material question of fact as to whether Engelhard was regularly engaged in building, where Engelhard is a real estate developer by profession, had a sequential build and sell business plan, and was involved in the construction of the home by hiring subcontractors, paying all the subcontractors and material vendors just as he does with development of commercial properties, and by directing workers on the site? (Assignment of Error 1 and 2)

3. Is there a material question of fact as to whether Engelhard had the home built for personal use or sale where Engelhard kept his condominium on the same golf course, had a sequential build and sell business plan in which he began construction of the next home before selling the home at issue to Montgomery, and he lived in or received mail at the Montgomery home for two years in order to obtain a tax benefit before selling the home to Montgomery? (Assignment of Error 1 and 2)

4. Is there a material question of fact as to whether the home was a "new house" where Montgomery was the first buyer-occupants of the home, Engelhard had a sequential build and sell business plan, and Engelhard lived in or received mail at the home for two years to obtain a tax benefit? (Assignment of Error 1 and 2)

II. STATEMENT OF THE CASE

A. Procedural Statement of the Case

Peggy Montgomery, Dwight Montgomery, and Lisa Montgomery (referred to as "Montgomery family") brought a lawsuit against Mr. Engelhard (referred to as "Engelhard") and other defendants in Benton County Superior Court, Cause No. 12-2-00030-9. CP 1-10. Engelhard moved for summary judgment dismissal. CP 18-37. The trial court heard oral argument on June

28, 2013. Noting that "frankly, I've gone back and forth on this case," the trial court took the matter under advisement. RP 33, at lines 9-10; CP 480. The trial court issued a letter ruling dated July 2, 2013, filed July 9, 2013, and received by the Montgomery family's counsel on July 12, 2013. CP 481-483, 485 at line 8.

The trial court entered an Order Granting Partial Summary Judgment to Defendant Engelhard on August 12, 2013. CP 508-510. The Montgomery family's claims for breach of contract/implied warranty of habitability, breach of real estate professional duties, and negligent construction were dismissed with prejudice. CP 509, lines 8-11. Engelhard's motion was denied as to the Montgomery family's claims for fraudulent concealment and violation of the Consumer Protection Act, RCW 19.86. CP 509, lines 12-15.

The Montgomery family moved for reconsideration and reinstatement of their primary claim for breach of contract/implied warranty of habitability. CP 484-489. The trial court denied the motion for reconsideration. CP 511-512. The Montgomery family voluntarily dismissed, without prejudice, their claims for fraudulent concealment and violation of the Consumer Protection Act so that they could immediately appeal the trial court's dismissal of their

primary claim for breach of contract/implied warranty of habitability. CP 506-507.

B. Factual Statement of the Case

i. Engelhard is a real estate developer and was a licensed real estate professional.

Before building the Montgomery home, Engelhard was involved in the development of commercial buildings and fixing up and selling residential homes. Specifically, Engelhard developed a property for Smith Barney, a Sylvan Learning strip mall, and a Quiznos property before building the Montgomery home. CP 428-429. Engelhard also purchased two houses, had a contractor friend fix them up, and then sold the fixed up houses, splitting the profit with his contractor friend. CP 433.

After building the Montgomery home, Engelhard developed a residential subdivision called Country View Estates in a partnership with various builders. CP 424 ("[W]e built the Country View Estates .... It was the first subdivision I was ever involved in, so.") Engelhard also built and sold a home at 464 Anthony Drive in Richland, Washington. CP 430. This was consistent with the sequential build and sell plan that he described to Dwight Montgomery while playing golf. CP 463-464. As with the

Montgomery home, Engelhard bought an empty lot at 464 Anthony Drive, hired the same contractor for construction, paid all the subcontractors and material vendors directly, used entry in the Parade of Homes to get discounts from material vendors, and lived in the home for two years to obtain a tax benefit before selling the home. CP 430, 436, 443; *see also* CP 459-460.

In both his commercial and residential development projects, Engelhard hired contractors for the construction but paid all the subcontractors and material vendors directly. CP 443-444, 460. Specifically, Engelhard testified that he paid the expenses directly "instead of running them through [the general contractor's] books" because "it saves on insurance for the builder and it saves, I don't know, bookkeeping time for him, and something else ... I do that with the commercial buildings we do too quite often, primarily to prevent mechanics' liens and so forth." CP 443-444. Mr. Schmidt, who was president of the general contractor, testified that while both he and Engelhard hired subcontractors and purchased materials for the construction of the Montgomery home, "Mr. Engelhard paid all of the subcontractors and material suppliers." CP 460. Engelhard testified that the contractor would bring him the bills monthly, and Engelhard would pay the bills directly. CP 443.

Engelhard was engaged in the building of the Montgomery home by doing more than just hiring subcontractors and paying expenses directly to avoid running the expenses through the general contractor's books. *See* CP 459-460. In addition to Engelhard's involvement in the home building project as described by the general contractor, Engelhard admitted to directing workers on the site. CP 434 ("Like if I wanted to change a wall or something like that, instead of going to [the general contractor], I would just ask [the framers] if they would do it, and they would.").

Engelhard was a licensed real estate professional. CP 439. He met the general contractor with whom he built the Montgomery home while working as a real estate agent selling homes that the contractor had built. CP 425-426. Engelhard had also hired the same contractor for development of commercial property before he built the Montgomery home. CP 429. Engelhard was still a licensed real estate professional at the time he sold the home to Peggy Montgomery. *See* CP 438-440.

ii. Montgomery was the first purchaser of the home.

It is undisputed that Engelhard purchased a vacant lot and developed it by building the Montgomery home on it. CP 19. It is undisputed that Peggy Montgomery is the first and only purchaser

of the home Engelhard built on the vacant lot at 625 Meadows Drive in Richland, Washington. While maintaining his condominium on the fourth fairway on the Meadow Springs golf course, Engelhard either lived in or received his mail at the Montgomery home in order to receive a tax advantage when selling the home. *See* CP 463. The Purchase and Sale Agreement between Engelhard and Peggy Montgomery is dated April 30, 2002. CP 66. As a wedding gift to Dwight and Lisa Montgomery, Engelhard allowed them to move into the home in approximately May 2002 before the sale to Dwight's mother Peggy Montgomery closed. CP 451. After the sale closed, Peggy Montgomery lived in the home with her son, daughter-in-law, and granddaughter until it became uninhabitable in 2010. CP 94.

iii. Due to defects in the foundation, the home is uninhabitable.

The Montgomery home borders wetlands. CP 40. However, there is no vapor barrier in the home's foundation to prevent ground water infiltration into the home. CP 381-419. The lack of a vapor barrier caused significant and sustained water intrusion into the home and mold growth. *Id.* The water intrusion and mold growth caused damage to the structure, personal property in the home,

and physical injuries to the Montgomery family. *Id.* In October 2010, the home became uninhabitable, and the Montgomery family moved out of the home and into a hotel. After living in the hotel for approximately a month, the Montgomery family moved into a rental home, where they continue to live to this date.

III. SUMMARY OF ARGUMENT

The Montgomery family claimed that Engelhard breached the implied warranty of habitability recognized in Washington since *House v. Thornton*, 76 Wn.2d 428, 457 P.2d 199 (1969). Engelhard alleges he was not a vendor-builder and the home was built for personal occupancy, not sale. He therefore argued that the implied warranty of habitability did not apply. CP 26-29.

The trial court improperly granted summary judgment on the implied warranty of habitability claim based upon disputed factual findings that Engelhard was not a vendor-builder and that the house was not new when it was sold to the first buyer Peggy Montgomery. CP 482. The Montgomery family presented evidence from which a jury could find that Engelhard was a vendor-builder and that the home was built for sale, as part of a sequential build and sell business plan, rather than personal occupancy. The Montgomery family also presented evidence from which a jury

could find the home was new at the time of sale to Montgomery, the first buyer, because Engelhard resided in the home for the commercial purpose of obtaining a tax benefit before selling it. If a jury decides these disputed facts in the Montgomery family's favor, the implied warranty of habitability applies.

Under the facts presented, this case is easily distinguishable from *Klos v. Gockel*, 87 Wn.2d 567, 554 P.2d 1349 (1976) and *Frickel v. Sunnyside Enterprises, Inc.*, 106 Wn.2d 714, 725 P.2d 422 (1986), on which the trial court relied. Both *Klos* and *Frickle* recognize the importance of facts to the analysis. Because material facts are in dispute, it was error for the trial court to rule as a matter of law that Engelhard could not be held liable for breach of the implied warranty of habitability.

IV. ARGUMENT

A. The standard of review is de novo.

Although summary judgments are intended to avoid unnecessary trials, courts have zealously protected litigants' right to trial on all legitimately contested issues. Summary judgment is only appropriate if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. CR 56(c);

Mutual of Enumclaw Ins. Co. v. Jerome, 122 Wn.2d 157, 160, 856 P.2d 1095 (1993).

A genuine issue of fact exists and precludes summary judgment when reasonable minds could reach different factual conclusions after considering the evidence. *See Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 256-57, 616 P.2d 644 (1980). Even where evidentiary facts are not in dispute, summary judgment is not appropriate if "different inferences may be drawn therefrom as to ultimate facts" such as intent, knowledge, good faith, negligence, and any other issue in dispute. *Preston v. Duncan*, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960). Thus, summary judgment is improper even if the basic facts are not in dispute if those facts are reasonably subject to conflicting inferences. *Coffel v. Clallam County*, 58 Wn. App. 517, 520, 794 P.2d 513 (1990).

It is not enough to show an absence of disputed facts, the movant must also demonstrate that those facts entitle the movant to judgment in its favor and as a matter of law. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975), citing CR 56(c). The court must construe all facts and reasonable inferences in the light

most favorable to the party opposing summary judgment. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P2d 400 (1999).

On appeal, the appellate court decides the case on a *de novo* basis, engaging in the same analysis as the trial court. *See, e.g., Roger Crane & Assocs. v. Felice*, 74 Wn. App. 769, 875 P.2d 705 (1994). Both the law and the facts will be reconsidered by the appellate court. *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990). Any findings of fact entered by the trial court will be considered superfluous and will be disregarded by the appellate court. *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 878 P.2d 483 (1994).

B. There is no exception in Washington that allows a vendor-builder to avoid the implied warranty of habitability by hiring a contractor to construct the home.

The Washington Supreme Court first adopted the implied warranty of habitability in *House v. Thornton*: "when a vendor-builder sells a new house to its first intended occupant, he impliedly warrants that the foundations supporting it are firm and secure and that the house is structurally safe for the buyer's intended purpose of living in it." *House*, 76 Wn.2d at 436. The implied warranty of habitability applies to the sale of a new house to protect the first buyer-occupants of the home against the risk of fundamental

defects in the structure of the home. *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 416, 745 P.2d 1284 (1987).

In adopting the rule, the *House* court noted that the defendants who built and sold the house, "even though exercising reasonable care to construct a sound building" "were less innocent and more culpable than the wholly innocent and unsuspecting buyer" because the defendants who built and sold the house "had by far the better opportunity to examine the stability of the site and to determine the kind of foundation to install." *House*, 76 Wn.2d at 435-436.

Washington courts have not been anxious to extend the implied warranty of habitability to subsequent purchasers or for mere defects in workmanship. *Stuart*, 109 Wn.2d at 416-417. However, no case has been found in Washington in which it was held that one must be a contractor in order to be a builder-vendor for the purposes of the implied warranty of habitability. CP 487. Perhaps no such case has been found because the court would first need to overrule *House* to the extent it applied the implied warranty of habitability against a real estate professional, who hired

a contractor to construct a home on a lot bought by the real estate professional.

In the seminal case of *House v. Thornton*, the Washington Supreme Court referred to defendant Headley as "builder-vendor" and "vendor-builder," and the court affirmed the trial court's judgment in favor of the home purchasers against defendant Headley by adopting the implied warranty of habitability. *House*, 76 Wn.2d at 432, 435-436. Defendant Headley in *House* was a real estate broker, who bought a lot and arranged for a contractor to build a home on the lot. *Id.* at 429. Just as defendant Headley was a builder-vendor in *House* based upon his actions of (a) hiring a contractor to construct a home on a lot Headley bought and (b) selling the home to the plaintiff purchasers, Engelhard is a builder-vendor in this case based upon his actions of (a) hiring a contractor and subcontractors to construct a home on a lot Engelhard bought and (b) selling the home to Montgomery.

House v. Thornton has not been overruled. Thus, it was an error for the trial court below to rule, as a matter of law, that the implied warranty of habitability was not applicable based upon the claim that Engelhard could not be a vendor-builder because he hired a contractor to construct the home that he sold to

Montgomery. CP 482. It was also an error for the trial court to deny the Montgomery family's motion for reconsideration on these grounds. CP 486-487, and 511-512.

C. Whether Engelhard was regularly engaged in building is a material question of fact for the jury to decide at trial.

Courts following *House* have clarified the scope of the implied warranty of habitability. In *Klos v. Gockel*, the court recognized an exception to the implied warranty of habitability if the builder-vendor built the home for personal use rather than sale. The *Klos* court looked at opinions by courts around the country and noted that "[t]he essence of the implied warranty of ... habitability requires that the vendor-builder be a person regularly engaged in building, so that the sale is commercial rather than casual or personal in nature." *Klos*, 87 Wn.2d at 570 (emphasis added). Thus, the question of whether the implied warranty of habitability applies to a builder-vendor has two components: (1) is the person regularly engaged in building; and (2) is the sale commercial or personal? Both are material questions of fact for a jury to decide in this case.

Our state supreme court has not defined what it means to be "regularly engaged in building" for purpose of the implied warranty

of habitability.[1] Thus, we can turn to the ordinary meaning of the words from English dictionary definitions for guidance as to what the Washington State Supreme Court meant by "regularly engaged in building." *Cf. The Boeing Co. v. Aetna Casualty & Surety Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990) (use dictionary to determine ordinary meaning of undefined terms in insurance contract); *Garrison v. Washington State Nursing Board*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976) (use dictionary to determine ordinary meaning of undefined terms in statute).

"Regularly" is an adverb that means at regular times or intervals; according to plan; custom; usually; ordinarily. "Engaged" is a verb that means to busy or to occupy oneself or become involved. And "building" is a noun meaning the act, business or practice of constructing houses, office buildings, etc.

In light of the factual context of *House*, 76 Wn.2d 428, 457 P.2d 199 (1969), which has not been overruled, the terms "regularly

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[1] The *Klos* court reached its holding that the implied warranty of habitability was not applicable to the widow Gockel on two grounds: (1) nothing in widow Gockel's conduct should have created a belief by the purchasers that the sale was commercial; and (2) the house was habitable at all times. *Klos*, 87 Wn.2d at 571. The *Klos* opinion did not reach the issue of whether the widow Gockel was "regularly engaged in building" but noted that her "past building experience is relevant to the issue of whether [she] can be deemed a professional builder." *Klos*, 87 Wn.2d at 568-569.

engaged in building" are not narrowly defined by our courts to exclude a real estate professional, who hires a contractor to construct a home on a lot that he owns.

There is sufficient evidence from which a jury could find Engelhard is a person who was "regularly engaged in building." Generally, Engelhard's profession is real estate. He is a developer of real estate, both commercial and residential; and he was also a licensed real estate professional at the time he built and sold the Montgomery home. Engelhard was not retired at the time he built the Montgomery home as part of his sequential build and sell plan. Engelhard's real estate development projects include the construction of commercial and residential buildings on lots Engelhard purchased. Thus, Engelhard is a person who ordinarily was occupied or involved in the business of constructing office buildings and houses based upon his professional occupation as a developer of real estate.

More specifically, Engelhard was ordinarily involved in the business of constructing the Montgomery home. CP 460 ("Mr. Engelhard was very involved in the project."). Engelhard and the contractor built the home together, sometimes with Engelhard on site and sometimes with the contractor on site. CP 459 ("Mr.

Engelhard and I built two residential homes together."); CP 460 ("Sometimes I was on site at the project, and sometimes Mr. Engelhard was on site at the project."). Both Engelhard and the contractor hired subcontractors and material vendors, but Engelhard paid all contractors and vendors directly. CP 460. Engelhard directed the workers on site without going through the contractor. CP 434 ("[I]f I wanted to change a wall or something like that, instead of going to Bruce, I would just ask them if they would do it, and they would."). There is ample evidence from which a jury could conclude that Engelhard was "regularly engaged in building," as those words are ordinarily understood and in light of the *House* precedent and factual context.

D. Whether Engelhard had the home built for personal use or for sale is a material question of fact for the jury to decide at trial.

On this issue, both parties directed the trial court to *Klos v. Gockel* and *Frickel v. Sunnyside Enterprises, Inc.* In both cases, the Washington State Supreme Court held the implied warranty of habitability was not applicable because, among other things, the builder-vendor in each case did not build for purpose of sale. *Klos*, 87 Wn.2d at 571; *Frickel*, 106 Wn.2d at 719. Both cases are distinguishable from the facts in this case. More importantly, the

distinguishing facts in this case are sufficient that a jury could find Engelhard built the Montgomery home for the purpose of sale as part of his sequential build and sell business plan.

In analyzing whether the widow Gockel was liable for breach of the implied warranty of habitability, the *Klos* court first looked at the facts to determine if the sale was commercial or personal. *Klos*, 87 Wn.2d at 570. It was noted that "the house itself was small and built primarily to suit [the widow Gockel's] personal needs and tastes, as opposed to one built for speculation." *Klos*, 87 Wn.2d at 569. The widow Gockel did not originally contemplate selling the house, but after being injured by two falls on the stairs, she decided to sell and build a house for herself on one level. *Id.* Based upon these facts, the *Klos* court concluded "that there was nothing in [widow Gockel's] conduct that should have created any sort of belief by [the house purchasers] that this was a commercial sale." *Klos*, 87 Wn.2d at 571.

Additionally, the *Klos* court noted that whether the house was a "new house" when sold because the widow Gockel had lived in it for a year before the sale is a question of fact. *Klos*, 87 Wn.2d at 571. However, the *Klos* court did not reach the issue because the trial court had not reached it and because there were other

grounds for its opinion. *Id.* Finally, the *Klos* court held the implied warranty of habitability was not applicable because the house was habitable at all times, the purchasers never moved out, and they were still living in the house at the time of trial. *Id.*

In contrast, in this case, a jury could find that Engelhard built the Montgomery home for the purpose of sale. Engelhard told Dwight Montgomery while golfing that he was building the home with the intent to sell it as part of a sequential build and sell plan. CP 463-464. Engelhard kept his condominium on the same golf course as the Montgomery home. CP 431. Before selling the Montgomery home, Engelhard had purchased the next lot and begun to build the next home in his sequential build and sell plan. CP 464, 430, 460. Engelhard built the home with high end materials so that it could be publicized in the Parade of Homes and he could get a better selling price, and Engelhard listed and marketed the home for sale himself, including advertising the home in *Homes and Land.* CP 426, 438-440, 464. Engelhard lived in the home or received his mail there as part of a plan to receive a tax benefit before selling, instead of an intention to live in the home indefinitely that was disrupted by personal injuries. Thus, unlike the widow Gockel's conduct in *Klos*, there is sufficient evidence for a

reasonable jury to find Engelhard's conduct in this case supports the Montgomery family's belief that this was a commercial sale.

Moreover, while the house in *Klos* remained habitable, it is undisputed that the Montgomery home in this case has been uninhabitable for years. CP 365. Unlike the purchasers in *Klos*, the Montgomery family moved out of the home in October 2010, first living in a hotel and then a rental. CP 418. The damage in the *Klos* case was not to the foundation and did not affect habitability. In this case, the foundation is defective and the Montgomery family home became uninhabitable as a result. CP 381-419. Engelhard did not dispute this element in the trial court. CP 368, at n.1.

The facts of this case are also distinguishable from those in *Frickel*. In *Frickel*, it was uncontested that the apartment complex was not built for the purpose of sale. *Frickel*, 106 Wn.2d at 715. The builder-vendor had built the apartment complex with the intent to own and operate it as the builder-vendor had done with other properties. *Id.* The property at issue was not even on the market and had never been placed on the market. *Id.* The sale occurred because the purchasers made an unsolicited offer. *Id.* The *Frickel* court noted these "facts are important." *Id.* The Frickel court then

held the implied warranty of habitability did not apply to these facts. *Frickel*, 106 Wn.2d at 718-719.

In this case, there is sufficient evidence from which a jury could find Engelhard built the Montgomery home for the purpose of sale. He told Dwight Montgomery about his sequential build and sell plan; he purchased the 464 Anthony Drive lot and began building the next home in his plan before selling the Montgomery home; he kept his condominium on the golf course; he built a large home with high end appliances that he advertised in *Homes and Land*; and he actively marketed the home for sale after receiving a tax benefit. CP 426, 431, 439-440, 443, 459-460, 462-464.

The facts in the *Klos* and *Frickel* cases on which those courts determined that the implied warranty of habitability was not applicable do not exist in this case. Rather, the evidence in this case demonstrates how a jury could find Engelhard built the Montgomery home for the purpose of sale.

E. Whether the home Engelhard sold to Montgomery was a "new house" is a material question of fact for the jury to decide at trial.

The implied warranty of habitability applies to the sale of new houses. Whether a house is a "new house" or not "is a question of fact." *Klos*, 87 Wn.2d at 571. "The passage of time can always

operate to cancel liability, but just how much time need pass varies with each case." *Id.* If a builder-vendor creates an intervening tenancy for the primary purpose of promoting the sale of the property, the tenancy does not operate to cancel the implied warranty of habitability liability. *Id.* citing *Casavant v. Campopiano*, 114 R.I. 24, 327 A.2d 831 (1974).

In this case, it is undisputed that Peggy Montgomery was the first buyer of the home at 625 Meadows Drive that Engelhard built. Engelhard acknowledged that "I did know that if you lived there for two years there was tax benefits with regards to not having to pay." CP 444; *see also* CP 442 ("Q. Are you aware that there's a tax benefit to living in a home for two years before selling it? A. Absolutely."). He also resided in the next home of his sequential build and sell plan for two years as well. CP 430. While the home was being built, Engelhard told Dwight Montgomery about his plan to build a series of homes, live in them or at least get his mail there for two years, and then sell the homes for a profit based upon savings from his involvement in the construction and the tax advantages of claiming the home as his primary residence for two years. CP 463-464.

The Purchase and Sale Agreement between Engelhard and Peggy Montgomery was dated April 30, 2002. CP 66. However, the sale did not close until July 2003. Engelhard allowed Dwight and Lisa Montgomery to live in the home from approximately May 2002 until it closed as a wedding gift and for the purpose of promoting the sale of the home to Dwight's mother, Peggy Montgomery. Based upon these facts, a jury could find Engelhard created the intervening tenancy for the commercial purposes of selling the home after obtaining a tax benefit, and that Peggy Montgomery purchased a new house from Engelhard.

Additionally, it is undisputed that the intervening tenancy did not cause the defects in the foundation. The lack of a vapor barrier is a latent defect that existed from the time of construction. Engelhard admits an inspection at the time of sale would not have revealed the lack of a vapor barrier in the foundation. *See* CP 441. Therefore, the policy rationale, which cancels liability if an intervening tenancy exists but was not created by the builder-vendor for commercial purposes, is not applicable in this case.

In *House*, the court explained the rationale for imposing the implied warranty of habitability liability on a builder-vendor when he sells a new house to its first buyer intending to occupy the home by

borrowing an idea from equity. *House*, 76 Wn.2d at 435. Even though the builder-vendor may have exercised reasonable care, the builder-vendor was in a better position than the first buyer to determine the kind of foundation to install, and the builder-vendor made the harm possible. *Id.* Therefore, the *House* court recognized that the builder-vendor was less innocent and more culpable than the first buyer who intended to live in the home. *Id.* at 436.

In this case, Engelhard residing in the home to obtain a tax advantage and allowing Dwight and Lisa Montgomery to move into the home before the sale of the home to Dwight's mother, Peggy Montgomery, was finalized does not undermine the rationale or alter the analysis. Like the real estate professional Headley in *House*, Engelhard, as the vendor-builder, was in a better position than the first buyer, Peggy Montgomery, to determine the kind of foundation to install, and thus, Engelhard made the harm from the defective foundation possible.

F. Request for reasonable attorney's fees and costs on appeal pursuant to the Purchase and Sale Agreement.

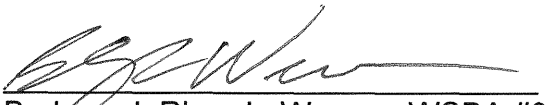
Pursuant to section 16 of the Purchase and Sale Agreement between Engelhard and Peggy Montgomery, the prevailing party is

entitled "to reasonable attorney's fees and costs (including those for appeals)." CP 68. This dispute regards the implied warranty of habitability arising from the sale of the home pursuant to the Purchase and Sale Agreement. Accordingly, Peggy Montgomery requests an award of reasonable attorney's fees and costs on appeal.

V. CONCLUSION

For the above reasons, the Montgomery family asks the Court of Appeals to reverse the orders granting summary judgment and denying reconsideration, to remand for further proceedings consistent with its opinion, and to award Peggy Montgomery her reasonable attorneys' fees and costs on appeal.

RESPECTFULLY SUBMITTED this 21st day of January, 2014.



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DECLARATION OF SERVICE

The undersigned hereby declares I am over the age of 18 and under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in a manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

Counsel for Respondent John W. Rankin Reed McClure 1215 Fourth Ave. Suite 1700 Seattle, WA 98161 Counsel for Respondent Pamela A. Okano Reed McClure 1215 Fourth Ave. Suite 1700 Seattle, WA 98161 Counsel for Appellants Kyle Olive Olive Bearb & Grelish, PLLC 1218 Third Ave. Suite 1000 Seattle, WA 98101	[X] E-Mail [X] U.S. Mail [ ] Electronic Filing [ ] Legal Messenger [ ] FedEx

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

Tiffany Watson