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No 684469-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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DIANA YVONNE LILLA,

Appellant,

vs.

JOHN PATRICK BULLINGER,

Respondent.

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APPELLANT LILLA'S REPLY BRIEF

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I. Summary of Reply

*1.1 Bullinger Has Conflated (i) Damage to and Repair of Stack 1 Decks, and (ii) the Building-Wide Water Damage Discovered After the Sale Closed.*

Appellee Bullinger has completely conflated two sets of distinct and separate events: (1) Lilla's discovery of significant problems relating to her Deck (and her actions taken, statements made, and knowledge acquired in the course of dealing with that discovery, and during the subsequent repairs to her deck and the other decks in "Stack 1"), and (2) the extensive water intrusion problems identified by Charter Construction when, on August 2009, it released the results of its envelope inspection.

A comparison of two arguments in Bullinger's brief well illustrates this conflation. First, Bullinger argues in his brief (as to the trial court):

Appellant Lilla was personally in charge of her condominium Association's investigation of and planned repairs to the extensive water intrusion defects that are the subject of this suit. She personally directed the scope of work and supervised the experts that the Association hired to investigate these defects.

*See* Appellee Bullinger's Brief ("Bullinger Br.") at p. 3.

Bullinger also acknowledges, however, Lilla's far more limited role in any water damage remediation matters:

In response to the [HOA's] delay [in dealing with the repair of Lilla's deck], Lilla personally took charge of the responsibility to

investigate and determine the scope of repairs necessary to the decks [sic] in the Unit 31 and the units occupying the floors directly above and below Unit 31.

*See* Bullinger Br. at p. 10.

The blurring of these two sets of events is likely what led to Judge Canova's adverse verdict, and Lilla will not allow Bullinger to similarly hornswoggle *this* court. For example, Bullinger points this Court to an e-mail that Lilla wrote, wherein Lilla complains that her deck needs repair, failing which she is unable to sell her unit: "No Marketability without fire sale" and related comments. *See* Bullinger's Response at page 4, Trial Exhibit 9. But Trial Exhibit 9 is an e-mail from October 2008, and in fact contains the subject line "Stack 1 Repairs." This Court should recall that Stack 1 was completely fixed, in its entirety, prior to Lilla listing her condo for sale. *See* RP at 666 (Bullinger's testimony), 394-395 (Morris Testimony). Lilla is not merely "re-litigating" the facts when she demonstrates to *this* court that Bullinger did not proffer any evidence to support the first line of argument; indeed, the parties agree that Stack 1 was completely fixed before Lilla listed her unit for sale.

Bullinger's contention that Lilla has failed to assign error to the factual findings with sufficient precision so as to preserve review of those findings for substantial evidence is without merit. Multiple elements are common to each of Bullinger's discrete claims (Fraudulent

Misrepresentation, Negligent Misrepresentation, and Fraudulent Concealment). Accordingly, Lilla chose to disclose her challenges to findings of fact by addressing them in the associated issues pertaining to the assignments of error; this is a permissible method, under RAP 10.3(g), to challenge findings of fact.

But even accepting the trial court's findings of fact in their entirety, Bullinger's own testimony demonstrates beyond peradventure that the information he claims Lilla failed to disclose was either available to him *or in fact known by him*. Bullinger's response brief is completely silent on the languid, lackadaisical approach taken by Bullinger when he failed to make further inquiry after several circumstances warranting such follow up. Bullinger relied on the Form 17 Seller Disclosure *to the exclusion of multiple, contrary factors* that should have compelled him to make follow up inquiry. Bullinger bore the burden of proving, by a heightened standard of proof, that his reliance was reasonable. He failed to make such a showing below, and failed to even argue the matter in his Response brief.

To the extent that the relative disparity in the parties' sophistication is relevant to whether Bullinger's reliance was reasonable, surely this Court should consider the facts that (i) Bullinger was by his profession a particularly knowledgeable and sophisticated buyer familiar

with the MLS forms he used to submit his offer, (*see, e.g.*, RP at 620), and (ii) Bullinger was represented by and had access to attorneys at Foster Pepper (where he worked) from the inception of this transaction (RP at 619-620, 635, 647 and 649).

***1.2 There was a Complete Failure of Proof / Absence of Evidence on Elements Bullinger was Required to Prove***

It is true that findings of fact will not be disturbed if supported by substantial evidence in the record. Here, there was no evidence or testimony of any kind — a complete failure of proof and a complete absence of evidence or testimony — to support at least two of the elements of claims that Bullinger had the burden to prove. In particular, there was an absence of evidence or testimony (and nothing from which inferences could be drawn) proving (i) that Bullinger’s reliance on the Form 17 was reasonable, or (ii) that Lilla knew that Bullinger was ignorant of the omitted facts. Logically, where there is an *absence* of any evidence on an element that Bullinger bore the burden of proving, it was incumbent upon him to point to something in the record constituting ‘substantial evidence’ to support the judge’s finding.

Throughout Bullinger’s Response, to support his factual contentions in his arguments, he repeatedly cites to the Judge’s findings of fact. But the trial judge’s findings of fact do not constitute “evidence” or

testimony to which this court can look to determine whether substantial evidence in the record exists. Such an exercise would be circular.

***1.3 Bullinger's Negligent Misrepresentation Claim is Untenable Because it is Based Entirely on an Alleged Omission***

Bullinger has not responded to Lilla's argument that an omission alone cannot support a claim for negligent misrepresentation, and accordingly the judgment, to the extent based on a claimed negligent misrepresentation, must be reversed.

***1.4 Bullinger's Fraudulent Concealment Claim is Untenable Because there was a Complete Absence of Evidence that An Allegedly Defective Condition Presented a Danger to Health, Life, or Property***

A claim for Fraudulent Concealment requires, *inter alia*, proof that the defect complained of presents a danger to the property, health, or life of the purchaser. *See, e.g., Stieneke v. Russi*, 145 Wn.App. 544, 559, 190 P.3d 60 (2008), *Alejandre v. Bull*, 159 Wn.2d 674, 689, 153 P.3d 864 (2007), *Obde v. Schlemeyer*, 56 Wn.2d 449, 353 P.2d 672 (1960), and *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 524, 799 P.2d 250 (1990) .

Bullinger has made no claim that any defects existed which presented a danger to his health or life. As to whether any defects presented a danger to his property, *Stieneke v. Russi*, *supra*, 145 Wn.App.

at 559 made clear that the “property” (for the purposes of establishing this element) must be property *other* than the property containing the purportedly concealed defect. Given the complete absence of evidence (indeed the absence of even an allegation by Bullinger) that any concealed ‘defect’ presented a danger to his property beyond the allegedly water-damaged property of the condominium structure itself, Bullinger’s claim fails as a matter of law. The judgment against Lilla, to the extent it is premised on fraudulent concealment, must be reversed.

II. **Lilla Has Properly Challenged the Court’s Factual Findings and Assigned Error to them; She Has Preserved Her Ability to Seek Review of those Factual Findings.**

Bullinger’s contention that all of Judge Canova’s Findings of Fact are verities on appeal is incorrect; Ms. Lilla has amply preserved her ability to challenge the Findings of Fact at issue. First, it is axiomatic that a conclusion of law will be treated as such, even if it is denominated a finding of fact, and vice versa. *See, e.g., Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002).

2.1 *Lilla has Specifically Presented the Court with Argument as to Why Specific Findings of the Trial Court are Not Supported by the Evidence, and has Cited to the Record; She has Preserved her Right to Have those Findings Reviewed*

Rather than cite the applicable RAP, Bullinger instead relies on three cases: *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994), *State v.*

*Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997), and *Robel v. Roundup*, 148 Wn.2d 35, 59 P.3d 611 (2002). *Hill* and *Stenson* were criminal cases involving review of Findings of Fact made after pretrial suppression hearings and turn largely on factors applicable only in the criminal context.

In the third case cited by Bullinger, *Robel v. Roundup*, an employer (Fred Meyer) appealed a trial court's Findings and Conclusions following a trial on Plaintiff's discrimination/wrongful termination lawsuit. Fred Meyer challenged all of the trial court's conclusions of law, but did not challenge any of the trial court's findings of fact. *Robel v. Roundup*, *supra*, 148 Wn.2d 35, at 42. One of the findings of fact made by the trial court in *Robel* (Finding #63) was that certain specific profanity-laden phrases were leveled against the plaintiff/employee, that they were leveled by her co-workers, and that they were actionably defamatory rather than non-actionable statements of opinion. The Washington Supreme Court confirmed that the Court of Appeals correctly rejected the trial court's findings of fact, notwithstanding the lack of specific assignments of error. Thus, even the one applicable case cited by Bullinger does not support his contention that none of Judge Canova's findings of fact are subject to appellate review because they are not challenged with sufficient specificity.

The reason why appellate courts require specific assignments of error was well stated in *Estate of Lint vs. Lint*:

It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument...the rule recognizes that in most cases, there is more than one version of the facts. If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.

*Estate of Lint vs. Lint*, 135 Wn.2d 518, 531-532, 957 P.2d 755 (1998).

Lilla has presented specific arguments directed to specific findings, and has amply cited to the record in support of her arguments. Lilla has not asked this court to “comb the record” to “construct arguments” for her.

**2.2 *Lilla Complied with RAP 10.3(g) in that She Has Clearly Disclosed the Claimed Errors in the Associated Issues Pertaining Thereto***

RAP 10.3(g) provides that appellate courts will review only claimed errors included in an assignment or error “*or clearly disclosed in the associated issue pertaining thereto.*” See RAP 10.3(g) [emphasis added]. Many of Judge Canova’s Findings of Fact were merely rote recitations of the statutory/legal elements pertinent to his conclusions of law. Finding of Fact № 12 well illustrates the justification for how Lilla

has gone about specifically assigning error; in Finding of Fact № 12, Judge Canova made the ‘finding of fact’ that:

[Bullinger’s property inspector] revealed no problems with water intrusion or any other information which should have put Bullinger on inquiry notice of water intrusion problems. Similarly, Bullinger engaged in a diligent lay inspection of the property and discovered nothing that did or should have revealed water intrusion problems or put Bullinger on inquiry notice of such problems.

*See* Finding of Fact #12, CP at 1186

Lilla assigned error to Judge Canova’s determination that Lilla was liable for Negligent Misrepresentation (Assignment of Error № 1, Brief of Appellant at p. 6), for Fraudulent Concealment (Assignment of Error № 2, *id.*), and for Intentional Misrepresentation/fraud (Assignment of Error № 3, *id.*). Common to all three of these claims is the requirement that the claimant did not know, and did not have reason to know, of the conditions that were purportedly not disclosed. The issues specifically pertaining to these assignments of error were set forth by Lilla in her opening brief, and as pertinent to Finding № 12 (which Lilla cites only as a representative example) are covered specifically in Issue 3(iii) (*See* Appellant’s Brief at p. 8) and in Issue 7(i) and (iii) (Brief of Appellant at p.9-10), in her argument at §3(vi) at p. 26-27 and p. 37. Lilla has specifically challenged Judge Canova’s findings of fact with sufficient specificity to enable review by this Court. Lilla’s compliance with RAP 10.3(a)(4) cures any

failure to strictly adhere to RAP 10.3(g). Lilla chose to challenge the trial court's factual findings in the manner she did because of the extensive overlap in the elements of each of Bullinger's claims.

**III. The Trial Judge Did not Meaningfully Address the Core Issue of Whether Bullinger was on Inquiry Notice of the Very Defects that are the Subject of his Complaint.**

**3.1 *The Trial Judge's Finding of Fact № 12 Contains the Only Reference to Inquiry Notice, and No Facts Support that Finding***

The Trial Court's Finding of Fact № 12 (CP at 1186) contains only a fleeting and perfunctory reference to whether Bullinger had inquiry notice of the water damage he now complains of:

Bullinger retained a professional property inspector who revealed no problems with water intrusion or any other information which should have put Bullinger on inquiry notice of water intrusion problems. Similarly, Bullinger engaged in a diligent lay inspection of the property, and discovered nothing that did or should have revealed water intrusion problems or put Bullinger on inquiry notice of such problems.

Finding of Fact № 12, CP 1186.

Bullinger's property inspector clearly *did* reveal problems and "other information" which should have put Bullinger on inquiry notice of water intrusion problems, such as identifying siding that had been removed from the building (which had been removed in the course of Charter's envelope inspection). *See RP at 636-638; see also* Trial Exhibit 63 at 6. Lilla is not merely asking this court to re-weigh credibility

determinations or the weight to be given to evidence; rather, Lilla has demonstrated that no substantial evidence supports the trial judge's rote recitation that inquiry notice was lacking — and indeed Lilla has identified the precise items that this Court should hold, as a matter of law, gave rise to a duty of Bullinger to make further inquiry.

Bullinger *knew* that the Form 17 disclosure was based only on a seller's *actual* knowledge (RP at 625-626) and *knew* that there might be major defects of which Lilla was not aware (RP 626). Nevertheless, when his inspector advised him in an emphasized portion of the inspection report to inquire of the HOA about why siding had been taken off part of the building, Bullinger declined to follow that advice, and made no inquiries of anyone. (RP at 636).

The Parties agree that the *results* of the Charter Construction envelope inspection were not released by Charter until August 28, 2009 — well after the closing of the sale had taken place. *See, e.g., RP 657-661.* Bullinger's claim at trial was only that Lilla failed to disclose the *fact* that an envelope study was pending, not that she knew of or failed to disclose the *results* of that study. *Id.*

A common element to each of Bullinger's claims (for Intentional Misrepresentation,<sup>1</sup> Negligent Misrepresentation,<sup>2</sup> and Fraudulent Concealment<sup>3</sup>) is ignorance of the misrepresented or concealed fact or condition. The Trial Court did not address the fact that Bullinger knew the PRCA lacked a reserve study but was in the process of obtaining one (*see, e.g., RP at 649-653, Trial Exhibit 65*)(Appendix 3 to Lilla's Opening Brief). This omission by the trial court is critical, given that any Reserve Study includes, as a component of the study, an inspection of the building's envelope. RCW 64.34.382. Logically, 'the greater includes the lesser.' Thus, knowledge that the HOA is in the process of obtaining a

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<sup>1</sup> The elements of intentional misrepresentation (fraud) are (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 the representation; and (9) damages suffered by the plaintiff. *Carlile v. Harbour Homes, Inc.*, 147 Wn.App. 193, 205, 194 P.3d 280 (2008)

<sup>2</sup> The elements of negligent misrepresentation are (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. *Bloor v. Fritz*, 143 Wn.App. 718, 734, 180 P.3d 805 (2008).

<sup>3</sup> The elements of fraudulent concealment are (1) a concealed defect in a residential building; (2) knowledge by the seller of the defect; (3) a defect that is dangerous to the property, health, or life of the purchaser; (4) the purchaser does not know of the defect; (5) a careful, reasonable inspection on the part of the purchaser would not disclose the defect; and (6) the defect substantially affects adversely the value of the property or operates to materially impair or defeat the purpose of the transaction. *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 524, 799 P.2d 250 (1990).

reserve study is *necessarily* knowledge that the HOA will be engaging in an envelope inspection, because an envelope inspection is an included part of a reserve study. The gravamen of Bullinger's claim is that Lilla knew, but failed to disclose, the fact that an envelope inspection was underway, *not* that she knew what the results of that inspection were. See RP 657.

Q : You don't have any reason to think Ms. Lilla knew the results of the envelope study at any time before the closing of the sale, do you?

A : Results?

Q : The results of the envelope study.

A : No, she didn't know the results.

Q : Your complaint is that she knew of the fact that an envelope study was occurring, not what the results would be, right?

A : Yes.

RP at 657.

Lilla presented this argument, along with supporting evidence, to the trial court, but the court never even gave passing attention to this core — and dispositive — issue.

Nor did Bullinger testify or present any evidence to support (or give rise to an inference) that Lilla knew of Bullinger's ignorance of the pending envelope study:

Q : ...your position in this lawsuit is that you didn't know that an envelope study was occurring at the time that you were pursuing the purchase of the unit, Unit 31, right?

A : Yes, in part.

Q : Do you have any basis for thinking Ms. Lilla knew of your ignorance of that fact?

A : Yes.

Q : It's just the fact that she didn't tell you, right?

A : Yes.

RP at 664-665.

To be clear, Lilla does *not* contend in this appeal that the trial court considered and rejected her arguments; rather the trial court simply failed to consider such evidence. Bullinger never countered Lilla's evidence or argument(s) on this issue, and resolution of this issue is dispositive.

The Trial Court likewise failed to enter any findings or conclusions addressing the fact that Bullinger was told during an open house before he made his offer that Lilla's Unit 31 suffered water damage. Bullinger had *actual knowledge of prior water damage*:

Q : When you first visited -- or during a visit of the subject property at an open house, isn't it true that you were told that the decks had been repaired?

A : Yeah. Yes.

Q : Did you make any inquiry as to which decks were repaired, what the nature of the repairs were?

A : Yes.

Q : Let's start -- that was compound. So you did make an inquiry?

A : I asked what the -- she said that the work on the decks had been completed. I said, "What work?" And she said, "There was some water damage, and it's all been fixed.

Q : Okay. And who told you that?

A : The woman who was showing the house at the open house.

Q : As far as you know, that was a listing agent?

A : I don't know who she was.

Q : Somebody on Ms. Lilla's behalf? She was there for a showing of the property?

A : Yeah. Yes.

Q : When you heard that there had been water intrusion, did you make any inquiry as to what the nature of the water intrusion was?

A : No

*See* RP at 642-643.

Bullinger's inspector recommended that Bullinger review the prior meeting minutes, presumably to get a sense of what repairs might be upcoming. RP 634-635, RP 662-663. The book that Bullinger testified he read prior to making his offer also advised buyers to look at meeting minutes. *RP at 622-623, Trial Exhibit 61.* Bullinger insisted several times, when asked whether he read the meeting minutes (which in turn would have revealed the very information he complains was not given to him before the sale) that he did not know he could request them. *See, e.g., RP at 634-635, 662-663.* Bullinger never asked his attorneys nor his agent nor anyone else whether he could obtain the minutes, and in any event never requested them. *See* RP at 634-635. Had Bullinger requested meeting minutes, he would have received information about the reserve study, the pending envelope inspection and need to investigate whether there was other water intrusion beyond

what had been repaired as part of the Stack 1 repair project. *See* RP at 663, Trial Exhibit 46 (i.e., the April 27, 2009 meeting minutes, which Bullinger acknowledges would have been available on the date he made his offer).<sup>4</sup> A reasonable person being told by multiple sources to review the minutes of the HOA meetings would have concluded that they were available (or would at least then ask whether they were).

The trial judge did not even address Bullinger's actual notice of these facts, any one of which required further inquiry by a reasonable buyer. Bullinger displayed precisely the "languid approach to buying [his] home" that the Court considered in the recent case of *Austin v. Ettl*, \_\_\_\_\_ Wn.App. \_\_\_\_\_ 286 P.3d 85 (Div. II, October 2012).

The judge failed to address any of the facts that, as a matter of law, put Bullinger on actual notice of past water intrusion damage and should have given rise to the same inferences that Bullinger argued gave Lilla actual notice of deficiencies in the building.

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<sup>4</sup> The April 27, 2009 board meeting minutes discuss a presentation by Charter Construction, including Charter's proposal to complete "an intrusion study." Exhibit 46 would have also revealed to Bullinger the proposed cost for the "intrusion study." Finally, that exhibit contained a reference that two bids having been received by the property manager and delivered to the board, one for \$356,534.00 and one for \$693,327.00. Neither party at trial could discern what the 'bids' covered or why they were discussed in April 2009. But the important point is that had Bullinger requested a copy of the meeting minutes, as was his right, he would have been immediately put on notice that two bids (albeit widely divergent) had been received that related to construction work being considered.

Lilla emphatically argued that Bullinger was on inquiry notice but failed to inquire, thus precluding his claims against Lilla. It has long been the rule that “a person who has notice of facts that are sufficient to put him or her upon inquiry notice is deemed to have notice of all facts that reasonable inquiry would disclose.” *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 581, 146 P.3d 423 (2006), quoting *Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998) and *Hawkes v. Hoffman*, 56 Wn. 120, 126, 105 P. 156 (1909).

It should also be noted that Bullinger’s own expert confirmed that typical for Seattle structures, the Southwest corner of a building (Stack 1 is in the SW Corner) is the corner exposed to the elements. *See* RP at 316. Lilla’s knowledge that her deck had damage (which was then fixed) does not necessarily give rise to an inference that all other parts of the building are in similar condition.

**IV. Even as of the Trial Date, the “Reclad Project” Had Not Yet Been Approved by the HOA to Proceed, and Insurance Claims Were Pending. Awarding Damages was Entirely Speculative and Conjectural**

The trial court did not address the fact that even as of the trial date (or indeed as of the date of the follow-up hearing on the issue of damages), the homeowners had not yet even decided whether to proceed with the “reclad” project. *See* RP at 685-686. The matter had not even

been put to the owners to approve or reject the project. *Id.* Even if the project proceeded, the cost of the project was possibly subject to being covered in full or in part by insurance claims that were still pending as of the trial date. *See RP at 686-687.* This is crucially important because the improvements being made to the building were not going to be taken by Bullinger, they were to be undertaken by an association of which Bullinger was a member. Bullinger's suit was to compensate him if he were called upon to pay a special assessment; his suit was not for the actual or expected cost of repairs he would be engaging in. *See Plaintiff's Complaint, CP at 1-3.*

Putting aside whether Lilla knew of the possibility of future repairs, Division II of this Court has stated that a seller has no duty to disclose potential costs of proposed encumbrances. *See Austin v. Ettl*, \_\_\_\_ Wn.App. \_\_\_\_ 286 P.3d 85 (2012).

In the case of *Van Dinter v. Orr*, 157 Wn.2d 329, 331, 138 P.3d 608 (2006), the Supreme Court addressed whether a seller of unimproved real property "had a duty to disclose whether a capital facilities rate could be imposed upon the property if developed." In 2001, the sellers in *Van Dinter* "listed their vacant land for sale, noting that the land had a sewer system available." *Van Dinter*, 157 Wn.2d at 331, 138 P.3d 608. The sellers in that case did not disclose that to use the county's sewer system,

building owners were required to pay a monthly capital facilities rate surcharge in addition to the sewer bill. The buyers in *Van Dinter* purchased the vacant land and began constructing an automobile dealership on it. *Van Dinter*, 157 Wn.2d at 331, 138 P.3d 608. After the buyers connected their building to the county's sewer system, the “county issued a sewer inspection report” and shortly thereafter, the first monthly sewer bill including the monthly capital facilities rate. *Van Dinter*, 157 Wn.2d at 331, 138 P.3d 608. The buyers sued the sellers, arguing that the sellers negligently misrepresented the property by “failing to disclose that the property was encumbered by the capital facilities rate.” *Van Dinter*, 157 Wn.2d at 332, 138 P.3d 608.

In dismissing the buyer’s negligent misrepresentation claim in *Van Dinter*, the court explained:

The duty to disclose in a business transaction arises if imposed by a fiduciary relationship or other similar relationship of trust or confidence or if necessary to prevent a partial or ambiguous statement of facts from being misleading. *Colonial Imports v. Carlton Nw., Inc.*, 121 Wn.2d [726,] 731, 853 P.2d 913 [(1993)]. In *Colonial Imports*, this court endorsed the notion that the duty arises when the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other; or where, by the lack of business experience of one of the parties, the other takes advantage of the situation by remaining silent. *Id.* at 732 [853 P.2d 913].

The *Van Dinter* court put heavy emphasis on the fact that the buyers in that case admitted that they knew the sewer system had been

recently constructed, and hence could have and should have inquired further. According to the *Van Dinter* court, the buyers could easily have discovered that if they were to develop the property, a capital facilities rate would apply depending on the type of development. *Van Dinter, supra*, 157 Wn.2d at 334, 138 P.3d 608.

Likewise, Bullinger, knowing that Stack 1 had recently been repaired after suffering water intrusion, could have easily inquired further whether other decks in the structure had also been repaired.

V. **Bullinger Alleges Only an Omission in Lilla’s Form 17. An Omission Alone Cannot Constitute a Negligent Misrepresentation.**

In her opening brief, Lilla pointed out the well established rule that “[a]n omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation.” *Austin v. Ettl*, \_\_\_ Wn.App. \_\_\_ 286 P.3d 85 (2012), *citing Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007). Bullinger has not responded in any way to this point.

The only allegedly actionable communication or representation of any kind at issue in this case is Lilla’s communication(s) contained in the Form 17 disclosure. RP at 653. There were no affirmative representations, even according to Bullinger’s theory of this case. At best, even according to Bullinger, there was a failure to disclose

notwithstanding a duty to speak. Such would not support a negligent misrepresentation claim as a matter of law.

**VI. A Reasonable Seller would Have No Reason to Look Beyond the Face of the Form 17 to Determine the Scope of Her Disclosure Obligations. The Form 17 Itself Specified that Lilla Only Needed to Disclose Facts and Defects About Unit 31**

Bullinger pays scant attention to the fact that the Form 17 itself contains instructions to the Seller, and the Form 17 clearly makes the “Property” regarding which the Seller is making disclosures a defined term. The Form 17 itself defines the “Property” as Unit 31, and Unit 31 was the property regarding which Ms. Lilla made her disclosures.

Bullinger asserts that a “huge gap” in the seller disclosure requirement would be left if Lilla’s position were to be adopted. *See* Bullinger Brief at p. 7. But Bullinger has completely ignored the fact that RCW 64.34.425 is the provision that the Legislature enacted to provide for disclosure of defects in the common areas. Lilla’s disclosures regarding any defects in her unit via the Form 17 (pursuant to RCW 64.06.020) and the HOA’s disclosures regarding any defects in the common areas via the Resale Certificate (pursuant to RCW 64.34.425) work together seamlessly to provide buyers with full disclosure. Here, even assuming that the existence of a pending envelope study (i) constitutes a “material fact or defect” to be disclosed, and (ii) was not disclosed in fact with the

statement that a reserve study was being undertaken, Lilla's limitation of her disclosure to 31 was reasonable.

In short, Ms. Lilla's duty was to disclose material facts and material defects regarding Unit 31, and she complied with that duty. If this Court concludes that a condominium seller has the obligation to disclose *potential* issues affecting the common areas, then Lilla's failure to make such a disclosure was at worst negligent.

**VII. Bullinger Fails to Identify What, Precisely, Lilla Should Have Disclosed.**

At the very bottom of this case is the reality that the Charter Construction envelope study *results* were released shortly after the sale to Bullinger closed. The issues identified in that report no doubt disappointed Bullinger. Accepting his testimony as true, the results also apparently surprised Bullinger. But Bullinger - and the trial court - ignored the fact that the results of the Charter Construction Study were not known until August 28, 2009, after closing. The *fact* that the study was occurring is not a "material defect" in unit 31 that Lilla had the obligation to disclose. The only "issues" of which Lilla was aware were the common sense inferences and assumptions that could be drawn when a lay person considers the condition of a condominium built in 1985 that has never been subject to a major rehabilitation.

In the Pacific Northwest, that often means water has intruded into a building. But *whether* intrusion had occurred (other than in the Southwest facing Stack 1, the complete repair of which had been completed by the time Lilla listed her condo), and the *extent* of any such intrusion, were not facts known to Lilla. Bullinger knew that he was buying into an old building that had never had a reserve study and knew that there was a risk of paying an assessment to cover the costs of fixing common area problems. *See* RP at 650-653. Washington law clearly does not contemplate a buyer such as Bullinger coming back and suing the Seller under these circumstances.

#### **VIII. Conclusion**

The verdict in this case was an absolute injustice that Ms. Lilla is respectfully requesting be corrected by this Court. Ms. Lilla requests that this Court Reverse the trial court and find as a matter of law that Bullinger's Negligent Misrepresentation, Intentional Misrepresentation, and Fraudulent Concealment Claims all fail as a matter of law for want of actual reliance or reasonable reliance, because Bullinger had actual or constructive notice of the issues he complains of. Further, Bullinger failed to prove the fact of damages, which not only defeats the money judgment, but causes Bullinger's underlying claims to fail. There was an absence of any evidence that any claimed defect presented any danger to health , life

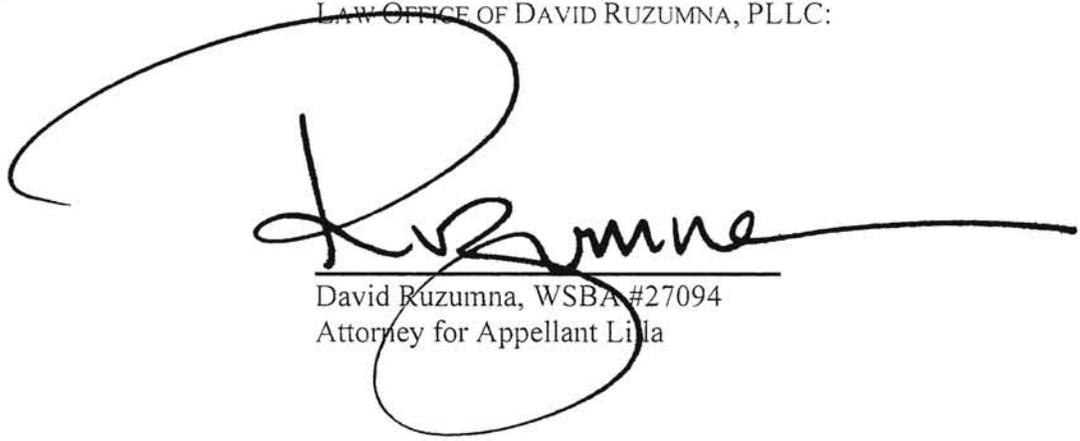
or property, and Bullinger's fraudulent concealment claim should be dismissed for want of evidence on a required element. Finally, Bullinger failed to prove any breach of contract, and none was found. The judge's award of attorneys' fees was accordingly improper, even if the judgment is affirmed in other respects. Lilla is entitled to her attorneys' fees as the prevailing party on the contract claim

Ms. Lilla respectfully requests that the Court reverse the decision below and remand with instructions to the trial court to dismiss Bullinger's Claims. Further, Lilla is entitled to an award of attorneys' fees, the amount of which can be determined by subsequent affidavit of her counsel upon further order of this court.

Finally, Lilla respectfully requests oral argument in this matter.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of January, 2013.

LAW OFFICE OF DAVID RUZUMNA, PLLC:

A large, stylized handwritten signature in black ink, appearing to read 'Ruzumna', is written over a horizontal line. The signature is highly cursive and loops around the line.

David Ruzumna, WSBA #27094  
Attorney for Appellant Lilla