

No. 35352-1-II

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

TERESA MCCORMICK, Appellant,

and

TERRY ESTVOLD and KAY ESTVOLD, Respondents.

BRIEF OF APPELLANT

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Assignments of Error

1. The trial court erred in granting Defendants' Motion for Summary Judgment by order dated July 28, 2006, and specifically in finding that there were no material facts in dispute and that Defendants were entitled to judgment as a matter of law.

2. The trial court erred in denying Plaintiff's Motion for Reconsideration by order dated August 25, 2006.

3. The trial court erred in awarding attorney's fees to Defendants in its order dated July 28, 2006, and the judgment dated August 25, 2006, and specifically in finding Defendants to be the prevailing party under the parties' contract for their defense of Plaintiff's tort claims.

Issues Pertaining to Assignments of Error

1. Is summary judgment to dismiss a claim of negligent misrepresentation appropriate when there are disputed issues of material fact as to whether the sellers of real property were negligent in obtaining or communicating information regarding the condition of the property to the purchaser? (Assignments of Error 1 and 2)

2. Is summary judgment to dismiss a claim of negligent misrepresentation appropriate when the sellers of real property relied upon the statements of an unlicensed contractor when representing to the purchaser that certain defects had been repaired, without having taken any action to verify the accuracy of those statements and in the absence of any evidence regarding the contractor's experience? (Assignments of Error 1 and 2)

3. Is summary judgment to dismiss a claim of negligent misrepresentation appropriate when expert testimony establishes that the defect existed at the time of the sale, and a jury could reasonably infer from the sellers' prior experience that the sellers should have known of the defect? (Assignments of Error 1 and 2)

4. Is summary judgment to dismiss a claim of fraud or fraudulent concealment appropriate when there are disputed issues of material fact as to whether the sellers of real property had actual

knowledge of a defect and failed to disclose the defect to the purchaser?

(Assignments of Error 1 and 2)

5. Is summary judgment to dismiss a claim of fraud or fraudulent concealment appropriate when circumstantial evidence indicates that the sellers of real property or their agents were aware of and failed to disclose the extent of a defect in the home, contradicting the sellers' own testimony that they did not have actual knowledge, where the circumstantial evidence includes testimony that someone had taken measures to provide structural support to rotting wood and had replaced sheets of plywood? (Assignments of Error 1 and 2)

6. When a purchaser brings tort claims for negligent misrepresentation, fraud, and fraudulent concealment against the seller of real property, based on the sellers' oral statements and the representations in a Real Property Transfer Disclosure Statement and without reference to any clause of the contract, are attorney's fees recoverable by the prevailing party pursuant to the contract? (Assignment of Error 3)

STATEMENT OF FACTS

The Appellant and Plaintiff below, Teresa McCormick, alleges that the Respondents and Defendants below, Terry and Kay Estvold, failed to disclose material defects in a home Ms. McCormick purchased from the Estvolds in 2003.

The Estvolds' Ownership

In September 1991, the Estvolds purchased the property located at 12018 Nyanza Road, SW, Lakewood, WA 98499. CP 367. Throughout their ownership, the Estvolds experienced several issues with the home. CP 367-40. In 1992, they discovered a defect with one of the two chimneys, and the original builder of the home returned to complete a resurfacing of the chimney. CP 367. At some point, the seal between panes of glass on the skylight in the master bedroom failed and was replaced. CP 55.

The Estvolds noticed that during and after heavy rains the gutters would overflow, and they had to clean the roof and gutters on a regular basis. CP 342. In fact, their neighbor, Mr. Gonzalez, saw Mr. Estvold on his roof several times. CP 294. Also during and after a heavy rain, the Estvolds noticed that water pooled against the foundation of the home, which they did not take any steps to remedy. CP 356. Further, the Estvolds seasonally found algae or mildew along the back side of the

house or alongside the chimney, which Mr. Estvold cleaned with a mild bleach solution. CP 350.

The Estvolds' Attempt to Remedy Mold

In February 2002, the Estvolds discovered mold in an upstairs office. CP 340. There was a six to eight inch long area of light gray mold, and down another couple of feet there was about an inch long section of mold. *Id.* The Estvolds attempted to remedy the mold by cleaning it off with diluted bleach. *Id.* Several weeks later the mold returned in the same location. *Id.*

In March 2002, the Estvolds hired Bennett Technical Services to remediate the mold problem. CP 121, 345-46. Bobby Dean Couch, with Bennett Technical Services, told Mr. Estvold that a leak was discovered near the master bath and bedroom. CP 341-43. He discovered a separate leak due to flashing problems with the chimney on the Gonzalez side of the home, which probably caused the mold in the office. *Id.* Further, Mr. Couch told Mr. Estvold that mold was discovered in the attic. *Id.*

The invoice provided by the Estvolds describes the work done by Bennett Technical Services as follows:

Chimney flashing replacement, Removal and replacement of water damaged top plate material (2x4) around chimney area inside of the home. Addition of three roof vents and two thermostat controlled air exchange fans. Removal and

replacement of leaking roof shingles and replacement of water damaged roof sheathing.

CP 324. The Estvolds also produced a letter from Bennett Technical Services, stating that the attic had “poor ventilation causing a light surface mold to adhere to the roof sheathing of the home.” CP 325. The letter confirms that three roof vents and two thermostat controlled air exchange ventilation fans were installed. *Id.* After the alleged repairs, Mr. Estvold painted the area in the office where the mold had been. CP 147.

Although Bennett Technical Services was not licensed, the Estvolds claim that they relied on the statements of Mr. Couch. CP 346, 404-08, 668-75. In fact, the Estvolds admit that they did nothing to verify whether Bennett Technical Services did any of the work stated on the invoice, nor did they confirm whether the mold had actually been remediated. CP 344.

The Sale to Ms. McCormick

The following year, the Estvolds put their home up for sale. Prior to listing the home, the sellers used a mild bleach solution to clean algae and mildew in the home. CP 350. Ms. McCormick first saw the home in April or May 2003. CP 163. After noting an apparent cosmetic defect with the siding, Mrs. Estvold explained that the entire house had LP siding, and that the Estvolds had submitted a claim on the back of the

house. CP 166. She also told Ms. McCormick that Ms. McCormick would have a claim for the other three sides of the home. *Id.* Ms. McCormick inquired about apparent water spotting in the office, and the Estvolds asserted that the defect had been remedied and provided the invoice and letter from Bennett Technical Services CP 163-64.

In addition, the sellers also provided a Real Property Transfer Disclosure Statement which was dated January 20, 2003. CP 172. On page two of the disclosure statement at number 4A, the Estvolds marked “yes” to questions on whether the roof had leaked and been repaired. CP 414. On page three at number 4E, they indicated that they knew of defects with the chimney that were “cosmetic,” and that there were defects with the LP siding. CP 415. On page four at number 7A, they marked “no” to a question on whether there were any standing water or drainage problems on the property. CP 416. The also marked “no” to a question on whether there were any other material defects affecting the property or its value that a prospective buyer should know about. *Id.*

Finally, on page five the Estvolds made notes referring to their earlier answers on the form. CP 417. In regards to number 4E, they indicated that there was “cosmetic” bubbling of the stucco on the inside of the north chimney which had been checked for moisture by Bennett

Laboratories and sealed. *Id.* The Estvolds also wrote a note in regards to number 5E, which is actually a question about appliances, and stated:

Light mold problem in attic—treated in March '02 by Bennett Laboratories. Roof flashing repaired. Vents and two humidity sensitive fans installed. Top layer of insulation replaced. Copy of work and cost attached.

Id. When Ms. McCormick inquired about the leaks and mold problem, the Estvolds assured her it had been repaired. CP 164, 420.

On May 11, 2003, Ms. McCormick signed a purchase and sale agreement for the home. CP 171, 450-53. Scott DeSchryver of Lighthouse Home Inspections inspected the home on May 14, 2003. CP 194. Mr. DeSchryver was given a copy of the Bennett Technical Services invoice to aid in his inspection. CP 57, 174. He noted that one ventilation fan did not function and there was a displaced vapor barrier in the crawl space. CP 283, 460. He did not report on the ventilation in the master bath. CP 463. In regards to the water staining in the office, Mr. DeSchryver relied on the sellers' representation that "corrective measures had been taken" and stated that the sellers had not noted any new problems. CP 467. In reliance upon the sellers' representations, Ms. McCormick agreed to go through with the sale, which closed on June 24, 2003.¹ CP 327.

¹ The parties signed an inspection addendum requiring the issues identified in DeSchryver's report be addressed. CP 260. The sellers hired an individual who was not

Ms. McCormick Discovers Significant Defects

Ms. McCormick quickly began to discover evidence that the sellers had not disclosed everything about the home she had purchased. When the fall arrived, approximately five months after moving in, and the area experienced heavy rains, Ms. McCormick began to notice water pooling around the home. CP 420. In fact, water pooled one inch deep on the back porch against the home. CP 177. In addition, when Ms. McCormick called the manufacturer in regards to the LP siding claim, she was told that it would not be worth a claim due to the age of the home and the fact that it had not been painted. CP 167-68.

Even more significant defects were soon found. In November 2003, Ms. McCormick discovered leaks, wet spots, and mold in an upstairs closet and bedroom, and a board with dry rot in the attic. CP 351, 420. Ms. McCormick immediately relayed this to Mrs. Estvold. CP 351. The defects resulting from the extensive mold and water damage, none of which had been disclosed prior to the sale, led Ms. McCormick to refer to the home as “the house from hell.” CP 338.

Several professionals confirmed the major defects Ms. McCormick had discovered. In late January 2004, Lighthouse Home Inspections

a licensed pest exterminator to complete the repairs. CP 200, 265. The vapor barrier, however, was still displaced at the time of Dr. Suomi’s investigation. CP 284.

inspected the home again. CP 202, 284. On this visit, Mr. DeSchryver discovered a water leak, rot, and wood ants in the attic. CP 203-04. He commented that the conditions in the attic were “terrible.” *Id.* Mr. DeSchryver also indicated that the issue was probably a long-standing one, but had had been covered by insulation on his first visit to the home. *Id.* In a report dated March 2004, a roofing contractor identified mold, fungus damage, and inadequate repairs, and indicated that the fans apparently installed by Bennett Technical Services actually pulled more moisture into the attic. CP 430-33.

Daniel Suomi of the Department of Agriculture also inspected the interior, exterior, attic, and crawl space of the home. CP 283. According to Dr. Suomi’s written report, he found numerous defects, including water stains and rot fungus in the second story office; microbial activity, possibly mildew, in the second story closet; rot fungus damage/moisture ant activity in the south portion of the attic; soft spots in the roof near the chimney, presumably due to water intrusion or rot fungus damage; and rippled effects in the north chimney chase, also presumably due to water intrusion or rot fungus damage. CP 284. Dr. Suomi supplied pictures taken at the time of his inspection. CP 287-91.

Gregory Heck, a certified Dryvit eifs inspector, inspected the home on June 10, 2004. CP 390. Upon inspecting the property and specifically

the chimneys, he determined the existence of a number of defects causing serious deterioration. CP 391. Specifically, caulking was missing in areas and the kick-out flashings and roof and wall were improperly installed, causing water to penetrate and remain inside of the chimney space and resulting in mold, mildew, and general rot. CP 391-92. He also noted numerous cracks and damage due to swelling of the gypsum board, in addition to general deterioration. CP 391.

It was Mr. Heck's professional opinion that these conditions had caused the chimney to fail and recommended extensive repair. *Id.* He stated that the work by Bennett Technical Services to the top plates of the chimney in 2002 was below code standards. *Id.* In fact, he opined that the work "was so poorly done, if done at all; it caused even further damage to the chimneys and likely increased the amount of water flowing into the chimney space." *Id.* Mr. Heck stated that the conditions were present in 2002 and 2003 at the time of the sale to Ms. McCormick. CP 392.

On June 10, 2004, the home was also inspected by George Dusty Rhodes III, a building inspector for the City of Lakewood. CP 497. He described the moist condition of the chimney, noting that he was able to push his finger through the exterior of the chimneys due to the moisture-laden siding gypsum board. *Id.* He stated his opinion that the condition

had been present for some time, probably for more than a year. CP 497-98.

Mr. Rhodes visited the property again on June 30, 2004, to inspect the progress of the repairs. CP 497. He discovered evidence of water penetration and an ant infestation on one wall. *Id.* The top plate of the interior wall was damaged due to improper chimney flashing installation, allowing water to run into the siding and causing rapid deterioration. *Id.* The interior framing of the chimneys was wet with moisture, and there were visible signs of mold on the underside of the roof and roofing material. CP 497-98.

According to Mr. Rhodes, the chimney siding was constructed of exterior gypsum, but there was no other coating to seal the gypsum as would be required under the code. CP 498. He stated that the structure should never have received a permit. *Id.* Further, the damage he witnessed was severe enough to require demolition of the chimneys and replacement and remediation work. *Id.* He opined that it was likely that such conditions existed for more than one year, due to the extent and sheer volume of the areas of mold and mildew. *Id.*

Jason Waits assisted Ms. McCormick in demolishing the two chimneys and replacing plywood on the roof. CP 676. While working in the attic, Mr. Waits noticed a couple of locations inside the chimney where

specially cut pieces of wood had been placed over rotten wood, as if to support the rotten wood. CP 677. He noted that the specially cut wood was not original to the home and had been put in place after the original framing had begun to rot. *Id.* Mr. Waits observed three separate locations where specially cut wood pieces had obviously been placed over rotten wood. *Id.* Mr. Waits also observed a great deal of water damage and mold throughout the chimneys. *Id.*

In regards to the roof, Mr. Waits helped to remove molded plywood, which generally looked to have never been replaced or cleaned. *Id.* One piece near the master bathroom fan, however, did appear to have been replaced as it was a lighter color than the others. *Id.* Ms. McCormick located a date stamp on that particular piece of wood, dated 2002. *Id.* After working at the McCormick home, Mr. Waits broke out in a severe rash and had an allergic reaction to what he believed was mold. *Id.* He went to the emergency room at a local medical facility where he was treated for the rash. *Id.*

In addition to the significant costs to repair the structural damage to home and clean the extensive mold, Ms. McCormick has also experienced severe medical problems resulting from the mold and moisture caused by the undisclosed defects.

Based upon the sellers' failure to disclose the defects, Ms. McCormick filed a complaint in Pierce County Superior Court on March 16, 2006. CP 1. The suit alleges negligent misrepresentation, fraud, fraudulent concealment, and breach of contract. *Id.* Various depositions were taken, and on July 28, 2006, the Court granted the sellers' Motion for Summary Judgment and awarded attorney fees against Ms. McCormick. CP 680-82, 823-25. Ms. McCormick filed a Motion for Reconsideration, which was denied on August 25, 2006. CP 821-22. Ms. McCormick timely filed this appeal on September 21, 2006. CP 826-27.

ARGUMENT

Summary judgment in this matter must be reversed because there are genuine issues of material fact and because the trial court misapplied the law. Summary judgment is reviewed de novo. *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 127 P.3d 5 (2005). A summary judgment motion may be granted under CR 56(c) only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue concerning any material fact, and the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The court must consider all facts submitted and all reasonable inferences from the facts must be considered in the light most favorable to the nonmoving party. *Id.* at 437. Further, the court has a duty to “search the record and independently determine whether or not a genuine issue of material fact exists.” David D. Swartling, *Washington Civil Procedure Deskbook*, § 56.6(6)(a), at 56-29 (Wash. St. Bar Assoc. 2d ed. 2002) (citing 10B Wright, Miller & Kane, *federal Practice and Procedure civil* 3d § 2740 (1998 & Supp. 2001); *Gerrard v. Craig*, 67 Wn. App. 394, 836 P.2d 837 (1992), *reversed on other grounds*, 122 Wn.2d 288 (1993)).

Summary judgment in this matter was improper because there were genuine issues of material fact regarding Ms. McCormick’s claims.

The sellers' negligently communicated to Ms. McCormick that the alleged repairs had been adequate, by relying upon the opinion of an unlicensed contractor and failing to verify that the repairs had been done. Ms. McCormick's lay and expert witnesses suggest that the sellers had actual knowledge of the defects. Ms. McCormick justifiably relied on the sellers' statements and made sufficient inquiries of the seller to satisfy her burden. The trial court's decision must be reversed.

A. The Sellers Negligently Represented that the Defects Had Been Repaired, Having Taken No Action to Verify the Opinion of an Unlicensed Contractor.

The trial court erred in dismissing Ms. McCormick's claim for negligent misrepresentation. Negligent misrepresentation requires proof that: (1) the defendant supplied false information that he knew or should have known would guide the plaintiff in the transaction, (2) the defendant was *negligent in obtaining or communicating* the false information, and (3) the plaintiff justifiably relied on the false information to her detriment. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002) (emphasis added); *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826-28, 959 P.2d 651 (1998); *Alejandre v. Bull*, 123 Wn. App. 611, 623, 98 P.3d 844 (2004); Restatement (Second) of Torts § 552 (1977). The sellers are liable to Ms. McCormick in this case because they falsely represented that repairs had been made, they did not exercise reasonable

care in obtaining or communicating the information regarding their claim, and Ms. McCormick justifiably relied on the representation.

1. *The Sellers Incorrectly Represented that the Repairs Were Adequate.*

The sellers made both oral and written misrepresentations about the property. Negligent misrepresentation may involve either written or oral statements. *Lyll v. DeYoung*, 42 Wn. App. 252, 258, 711 P.2d 356 (1986) (finding liability for both written and oral misrepresentations regarding water supply). Further, it can be proven through parol evidence, even in cases involving a contractual integration clause. *Gronlund v. Andersson*, 38 Wn.2d 60, 63-64, 227 P.2d 741 (1951).

Summary judgment was inappropriate to dismiss Ms. McCormick's claim because there are disputed issues of material fact. Construing the facts in Ms. McCormick's favor, the sellers orally represented not only that they had hired Bennett Technical Services, but they affirmatively asserted that it had adequately repaired the leaks and cause of the mold. CP 164, 174, 190, 214-15, 420. In addition to this oral representation, the sellers indicated on the disclosure form that they had experienced a mold problem and bubbling on the chimney and hired Bennett to remedy it, thereby at least implying that the problem had in fact been remedied. CP 323. Ms. McCormick's experts unequivocally stated

that these representations were false. CP 391 (“kick-out flashings and roof and wall appeared to be improperly installed” ... “if work was done in 2002 on the subject property, particularly the top plates of the chimneys; such work was done to below code standards.”); CP 497. Ms. McCormick satisfied the first element, that the sellers conveyed false information to guide her in the transaction.

2. *The Sellers’ Information Regarding the Adequacy of the Repairs Was Negligently Obtained or Communicated.*

There were genuine issues of fact as to whether the sellers acted reasonably in communicating to Ms. McCormick that the repairs had been adequate. Actual knowledge or intent to deceive is *not* an element of a claim for negligent misrepresentation. *Lawyer’s Title*, 147 Wn.2d at 546-47; *Alejandre*, 123 Wn. App. at 625 (“In order to prevail on their negligent misrepresentation claim, [the buyers] need not prove that [the seller] knowingly deceived them.”). Further, evidence that a seller should have known of the defect is not necessary to prevail on the claim, but it is certainly one way to establish negligence in communicating information to the buyer.

Various factors indicate negligence in obtaining or communicating information, including lack of reasonable care in ascertaining facts, absence of skill and competence required by a particular business or

profession, or the manner of expression utilized by the defendant. *Brown v. Underwriters at Lloyd's*, 53 Wn.2d 142, 151, 332 P.2d 228 (1958) (quoting Prosser on Torts, (2d ed.) chapter 18, § 88, 536, 541). In *Brown*, for example, a seller's real estate broker was negligent in relating false information regarding the adequacy of the heating and cooling system to a potential buyer. *Id.* at 143, 154. Although the broker had relied on the seller's own representations regarding the heating and cooling system, the Court ultimately concluded that the broker's carelessness in not investigating the accuracy of this statement amounted to negligence. *Id.* at 153-54.

Whether a seller should have known of a particular defect is a question of fact. The plaintiff in *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co.* established that the contractor should have known of alleged defects in the construction based upon the testimony of expert witnesses who claimed that the defects were present and apparent. 125 Wn. App. 227, 235, 103 P.3d 1256 (2005).

The evidence in the record also raises issues of fact regarding the sellers' negligence in obtaining and conveying the information. Neither Bennett Technical Services nor Bobby Dean Couch was a licensed contractor in March 2002, nor is there any indication that they were ever licensed. CP 404-8. Bennett Laboratories, Inc. and Bennett Technical

Services were separate entities, and there is no support for the claim that Bennett Technical Services was a registered dba of Bennett Laboratories, Inc. CP 668-75. Mr. Estvold testified that Bennett Technical Services was “the construction arm” and Bennett Laboratories examined mold samples. CP 346. The invoices state that Bennett Technical Services, Inc. performed the work, and the sellers made the check out to that entity. CP 634-8. The sellers have submitted no evidence that either Bennett Technical Services or Couch had sufficient expertise to perform the work. Construing these facts in the light most favorable to Ms. McCormick, the sellers negligently hired an unlicensed and inexperienced contractor to perform the repairs on their home.

In addition, the sellers did absolutely nothing to verify that the repairs were adequate, or that they had even been performed, but merely “took Bennett at their word.” CP 344, 346. There is no evidence in the record that the sellers’ faith in Bennett Technical Services was justified. Indeed, the sellers never even glanced in the attic after completion of the alleged repairs to see what had been done. CP 344. Mr. Estvold cannot have relied on the fact that Bennett Laboratories was licensed, if he was aware of it at the time, because he testified that he believed the construction arm to be Bennett Technical Services. CP 346. The sellers paid over \$1,500 to repair conditions that they never verified. Under these

facts, a jury could certainly conclude that the sellers unjustifiably relied on Bennett's claim that the repairs were adequate, and were therefore negligent in communicating that information to Ms. McCormick.

The sellers' unjustified reliance upon the opinion of an unlicensed contractor is compounded in this case by the fact that the repairs were in fact negligently performed. Ms. McCormick's experts stated that the repairs were "below code standards" and "so poorly done, if done at all; it caused even further damage." CP 391. The chimney resurfacing and the other repairs were done without any permits having been obtained. CP 55; *see also* CP 498 (expert's opinion that the work was not up to code and would not have been approved). Had the sellers complied with their duty to obtain proper permits, city inspectors could have informed them of the defective conditions, if the sellers did not already know.

Furthermore, there is evidence in the record from which a jury could conclude that the sellers should have known of the existence of the leaks and mold even after the alleged repairs. Whether the sellers should have known is dependent on the reasonableness of their actions and the extent of the defect, and must therefore be decided by a jury. Jason Waits testified that someone had apparently tried to remedy some rotten wood in the attic. CP 677. Mr. Rhodes concluded, based on his inspection, that the faulty conditions in the attic had been present "for more than one

year.” CP 498. Mr. Heck testified that the mold, mildew, and rot “were present in 2002 and in 2003, when the subject property was sold to Ms. McCormick.” CP 392. Similar to *Kelsey Lane*, the testimony of Ms. McCormick’s experts regarding the extent of the defects would support a jury’s determination that the sellers should have known.

In addition, the sellers had already experienced one problem with mold for which they paid over \$1,500. They knew from their prior experience that mold could return even after it had been cleaned, CP 340, and they knew that there had been mold in the attic, CP 635. Under these circumstances, it was unreasonable for them not to check for mold or leaks. A jury could have concluded that a reasonable homeowner would have been aware of the problem, and that the Estvolds were negligent in not communicating what they should have known.²

3. *Ms. McCormick Justifiably Relied on the Sellers’ Misrepresentation.*

A party’s reliance is justified when it is reasonable under the circumstances. *Lawyers Title*, 147 Wn.2d at 545, 550-2 (evidence that

² The Estvolds will likely argue that they could not have known of the mold if it existed. Although Ms. McCormick’s inspector did not report on the home’s defective condition, it would not be unreasonable for a jury to find that the sellers should have known, having occupied the home during the rainy season, even if the inspection report is accurate and complete as of May 2003. Further, to the extent the inspection report conflicts with the opinions of Ms. McCormick’s experts, the facts must be construed in Ms. McCormick’s favor on summary judgment. It should be noted that Dr. Suomi evaluated only the aspects of the inspection report relating to wood destroying organisms and made no conclusions as to whether the defective conditions existed at the time of the sale. CP 281-86.

party relied on law firm's opinion letter sufficient to preclude summary judgment). "Whether a party justifiably relied upon a misrepresentation is an issue of fact." *ESCA Corp.*, 135 Wn.2d at 828. Similarly, if the reasonableness of an act is a question of fact, and if it is a material issue in resolving the litigation, a grant of summary judgment is improper. *E.g. Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974) (issues of fact regarding reasonableness of landowner's use); *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 871 P.2d 1106 (1994) (reasonableness of school supervision was question of fact preventing summary judgment).

As will be discussed in more detail in Section C, below, Ms. McCormick had no reason to disbelieve the sellers' representations, and her reliance on the statements was therefore justified. It would be inappropriate to grant summary judgment when the reasonableness of her reliance is inherently a question for the jury.

4. *Good Faith Is Not Relevant to Negligent Misrepresentation.*

It should be noted that the sellers' good faith, or lack thereof, is irrelevant to a claim for negligent misrepresentation. "When relied upon by the purchaser to his damage, false statements made to induce a sale, although innocently made and believed by the speaker to be true, are as actionable as if known to be false and with intent to deceive." *Brown v.*

Underwriters, 53 Wn.2d at 150 (citing several cases). The seller's intent is not an element of negligent misrepresentation, but only whether the party acted reasonably to verify the truth of his statements. This rule is based on the principle that it would be inequitable to visit damage and injury on the person relying on a misrepresentation and who was in no way to blame, rather than upon the person who was the cause of such damage or injury, even if they made the misrepresentation innocently. *Jacquot v. Farmers' Straw Gas Producer Co.*, 140 Wash. 482, 488, 249 P. 984 (1926).

Thus, the Court in *Tenant v. Lawton* held the defendant liable for negligent misrepresentation, rather than fraud, for innocently relating false information regarding approval of a septic tank design. 26 Wn. App. 701, 707-08, 615 P.2d 1305 (1980). Similarly, the sellers in *Lyll* were liable for negligently misrepresenting the adequacy of water supply for a home, although they acted in good faith. 42 Wn. App. at 258.

Based on the foregoing, there are material issues of fact related to each element of Ms. McCormick's claim for negligent misrepresentation. As such, summary judgment was inappropriate. Construing the facts in Ms. McCormick's favor, the record shows that the sellers hired an unlicensed contractor to remedy a mold problem and did nothing to verify if any work had been done. Rather than fixing the defect, the contractor

actually made the problem worse. Based upon their prior experience with recurring mold, a jury could have reasonably inferred that the sellers should have known of the existence of the defect. The sellers were therefore negligent in representing to Ms. McCormick that the source of the mold had been repaired and the summary judgment should be reversed.

B. Genuine Issues of Material Fact Regarding the Sellers' Actual Knowledge Precluded Summary Judgment Dismissing the Claims for Fraud and Fraudulent Concealment.

The trial court also erred in dismissing Ms. McCormick's claims for fraud and fraudulent concealment on summary judgment because whether the sellers had actual knowledge is an issue of fact for the jury. Fraud requires proof of nine elements: (1) representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; and (9) his consequent damage. *Swanson v. Solomon*, 50 Wn.2d 825, 828, 314 P.2d 655 (1957); *Alejandre*, 123 Wn. App. at 619.

Fraudulent concealment has similar elements: the seller knows of a concealed defect that is dangerous to the property, health, or life of the

buyer; a careful and reasonable inspection by the buyer would not disclose the defect; and the defect substantially and adversely affects the value of the property. *Sloan v. Thompson*, 128 Wn. App. 776, 784, 115 P.3d 1009 (2005). A plaintiff does not need to establish intent to conceal a defect, but merely knowledge of the defect. *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 523, 799 P.2d 250 (1990). Thus, a landlord was held liable for fraudulent concealment for failing to disclose a defect in the drainage system that prevented water from being carried away from the house during the rainy season. *Perkins v. Marsh*, 179 Wash. 362, 367, 37 P.2d 689 (1934).

1. *There Were Genuine Issues of Fact Regarding the Sellers' Knowledge of the Defects.*

The critical issue in this case for both fraud and fraudulent concealment is whether the sellers had knowledge. The sellers claimed that they did not know of the defective chimney and attic conditions, but the sellers' testimony is insufficient to justify summary judgment. Summary judgment should not be used to deprive a party of an opportunity to present the case to a jury. *See Cofer v. Pierce County*, 8 Wn. App. 258, 505 P.2d 476 (1973). In that vein, the US Supreme Court stated:

The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his

testimony to be submitted to the jury as a question of fact. ... It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing untrustworthiness of testimony.

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628-9, 88 L. Ed. 967, 64 S. Ct. 724 (1944).

In other words, when material facts are particularly within the knowledge of the moving party, a case should proceed to trial to allow the opposing party an opportunity to challenge the credibility of the witness and disprove the facts by cross examination and by the demeanor of the witness. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 429, 788 P.2d 1096 (1990); *Felsman v. Kessler*, 2 Wn. App. 493, 496-7, 468 P.2d 691 (1970). Thus, whether the sellers knew of the defect is an issue of fact for the jury regardless of their testimony to the contrary.

Further, a seller's actual knowledge can be proven by circumstantial evidence. *Sloan*, 128 Wn. App. at 787 (quoting *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 698, 106 P.3d 258 (2005)). This principle is significant in cases of fraud or misrepresentation, because it is unlikely that a seller would admit to attempting to defraud a purchaser, leaving potential plaintiffs to establish a case primarily through circumstantial evidence.

Summary judgment in *Burbo* was reversed because the circumstantial evidence could have persuaded a jury that the seller knew of the alleged defect. 125 Wn. App. at 699. There was evidence that the seller had experience in construction and that he was often present during construction. *Id.* These facts were sufficient to raise an issue of fact as to the seller's knowledge of the defect. *Id.* Expert testimony can also be used to establish a genuine issue of fact. *J.N.*, 74 Wn. App. at 61.

In light of the foregoing, genuine issues of fact exist as to whether the sellers were aware of and concealed a defect in the home when it was sold. The sellers were aware of water pooling against the foundation of the home, which they did not take any steps to remedy. CP 356. However, as in *Perkins*, the sellers here did not disclose that fact, and in fact affirmatively asserted that there were no drainage problems. CP 322, 356. Evidence in the record establishes that Ms. McCormick experienced a drainage problem. CP 177, 420. Thus, there was a clear misrepresentation by the sellers, and the matter should not have been resolved on summary judgment.

The sellers' disclosure was also fraudulent because it implied that there was only one leak and mold only in the attic. The sellers' notes on the disclosure form mentioned a "light mold problem in attic." CP 323. However, there were actually multiple leaks and defects, including the

defective chimney flashing that apparently caused the mold in the office, and a second leak near the master bathroom on the other side of the house. CP 341-42. Nothing on the disclosure form or the invoice from Bennett Technical Services specifies that there had been mold inside the home or that there were defects in multiple locations in the attic. It is undisputed that the sellers were aware of these defects, and summary judgment must be overturned.

Further, regarding the leaks and mold, Jason Waits testified that there were places in the attic where pieces of wood were specially cut and put in place to support rotten wood. CP 677. He also found a newer sheet of plywood with a stamped date of 2002 near the master bathroom fan. *Id.* This had apparently been replaced by Bennett Technical Services. CP 634 (referring to replacement of roof sheathing). Couch claims that they cleaned light surface mold in the attic, CP 626, but because the replacement plywood sheet had a different amount of mold than adjacent sheets, CP 677, a reasonable person could conclude that Bennett Technical Services did not treat the mold.³ This is supported by the previously-quoted statements of Ms. McCormick's experts regarding the poor quality of work performed by Bennett Technical Services.

³ In other words, if Bennett Technical Services had actually treated the mold as claimed, it would have grown evenly on both the replaced sheet and the adjacent sheets, resulting in a more even distribution when Waits was working in the attic.

Construing this evidence in Ms. McCormick's favor, it is apparent that Bennett Technical Services did not fix the leaks or treat the mold. Furthermore, at some point, someone operating under the sellers' direction took measures to support the rotting wood. Thus, the problem was more extensive than the sellers disclosed, the mold was not treated as claimed, and whoever did the repairs to provide additional support should have seen the extent of the mold and other defective conditions. The sellers' disclosure implies that there was one leak that had been repaired, when in actuality there were several significant defects with the chimney framing, flashing, and more. A jury could reasonably deduce that the sellers had actual knowledge of the defects from the circumstantial evidence presented.

2. *The Sellers' Knowledge Can Be Imputed from their Agent.*

Actual knowledge is not necessary for all claims of fraud or fraudulent concealment. A seller can be liable for fraud for statements made recklessly and carelessly. *Holland Furniture Co. v. Korth*, 43 Wn.2d 618, 623, 262 P.2d 772 (1953). Alternatively, the sellers' knowledge may be attributed from the knowledge of the sellers' agent. Generally, an agent's knowledge is attributed to the principal. *Busk v. Hoard*, 65 Wn.2d 126, 134, 396 P.2d 171 (1965). Based on this principle, a claim of usury was upheld against the lender in *Busk* due to the lender's

imputed knowledge of fees charged by the lender's agent. *Id.*; *see also Durias v. Boswell*, 58 Wn. App. 100, 791 P.2d 282 (1990). If the sellers' agents, including Bennett Technical Services, were aware of the defects, then the sellers themselves had the requisite knowledge to support a claim for fraud or fraudulent concealment.

The provisions of RCW 64.06.050 do not relieve the sellers' of responsibility for their agents' knowledge under these facts. Sellers are not liable for errors in a disclosure form

if the disclosure was based on information provided by public agencies, or by other persons providing information within the scope of their professional license or expertise, including, but not limited to, a report or opinion delivered by a land surveyor, title company, title insurance company, structural inspector, pest inspector, licensed engineer, or contractor.

RCW 64.06.050. However, because Bennett Technical Services was not a licensed contractor, as discussed previously, and because there was no evidence submitted that it had the necessary expertise, the statute does not apply to these sellers. The Estvolds should be responsible for the knowledge of their agents.

As discussed previously, there is evidence that either the sellers or someone acting under their direction took measures to support rotten wood in the attic, and therefore it can be reasonably inferred that someone knew of the extent of the defective conditions in the attic. Even if the sellers did

not perform the work themselves, they should still be responsible for the knowledge of their agent whom they hired to perform the work.

3. *Ms. McCormick's Allegations of Fraud Are Based on Reasonable Inferences from Specific Facts and Expert Testimony.*

Contrary to the sellers' argument on summary judgment, the foregoing conclusion is not mere speculation, and summary judgment was inappropriate. Speculative or argumentative assertions are insufficient to preclude summary judgment, but summary judgment cannot be granted when a jury could make reasonable inferences from disputed facts in support of the nonmoving party. *E.g. Zobrist v. Culp*, 18 Wn. App. 622, 637-8, 570 P.2d 147 (1977).

Zobrist involved the issue of whether a railroad right of way had been unused for a sufficient period to allow the landowner to quiet title to the land. Although it was undisputed that trains had not used the track in question for 17 months, the railroad's evidence of maintenance of track, although disputed, was held not speculative and sufficiently supported a reasonable inference that the track was used, thereby requiring reversal of summary judgment in the landowner's favor. *Id.* at 639.

In contrast, the mere fact that a plaintiff endured multiple surgeries was merely speculative evidence of alleged negligence insufficient to preclude summary judgment. *Vant Leven v. Kretzler*, 56 Wn. App. 349,

355, 783 P.2d 611 (1989). Similarly, an unspecific assertion that the payment in question was result of the party's efforts, based solely upon timing of the payment, was too speculative to rebut the documented communication that payment was received due to the insurance company's request, and summary judgment was affirmed. *Chen v. State Farm Mut. Auto. Ins. Co.*, 123 Wn. App. 150, 158, 94 P.3d 326 (2004).

Ms. McCormick's evidence included specific facts sufficient to oppose summary judgment. As mentioned, Mr. Waits testified that measures had been taken to support rotten wood in the attic and that a plywood sheet dated 2002 had less mold than other areas of the attic. Comparing one or both of these facts to the work invoice from Bennett Technical Services, a jury could reasonably infer that the sellers or their agents failed to disclose the extent of the defects. These facts are analogous to the evidence presented in *Zobrist*, and rise above the speculative assertions made in *Vant Leven* or *Chen*. Summary judgment should be reversed.

C. Ms. McCormick's Investigation Was Reasonable and Her Reliance Justified.

Ms. McCormick reasonably relied on both the sellers' assurances and her inspection report and did all that she was reasonably required to do based upon the information available to her at the time. In order to

overcome summary judgment on the claims of fraud and negligent misrepresentation, Ms. McCormick must present facts from which a jury could conclude that her reliance was reasonable under the circumstances. *Lawyers Title*, 147 Wn.2d at 545, 550-52. Similarly, fraudulent concealment requires that the buyer show that a careful and reasonable inspection would not have revealed the defect. *Sloan*, 128 Wn. App. at 784. A determination of whether Ms. McCormick acted reasonably must be made by the jury. *Lawyers Title*, 147 Wn.2d at 552.

A related issue is raised when a buyer sees evidence of a potential defect. Buyers are required to investigate potential defects when they are put on notice. *Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 752 P.2d 1353 (1988). However, the only investigation required is to seek further information from the seller: “We hold that where, as in this case, an actual inspection demonstrates some evidence of water penetration, *the buyer must make inquiries of the seller.*” *Id.* at 215 (emphasis added). The seller in *Dalarna* was not held liable because the buyer did nothing to inquire further of the seller as to the extent of the problem after seeing evidence of a defect. *Id.* Once that inquiry is made,

there is no authority requiring the buyer to hire experts and perform a full inspection to verify the sellers' statements.⁴

Furthermore, it would not be appropriate to decide such an issue on summary judgment under these facts because the reasonableness of a buyer's inquiry is an issue of fact. Where a misrepresentation has occurred, an allegation of contributory negligence and the degree of that negligence must be left for the jury. *See Lawyers Title*, 147 Wn.2d at 551.

[W]here a plaintiff reasonably reposes some trust in a misrepresentation and shows that that reliance proximately caused some damages, the automatic preclusion of a negligent misrepresentation claim on the grounds that the plaintiff could have done something more would be the sort of "harsh result" that the comparative fault statute sought to forestall in tort claims.

Id. Construing the evidence in Ms. McCormick's favor, the sellers made a negligent misrepresentation, and Ms. McCormick made a reasonable investigation of the minor issues that were disclosed. Whether Ms. McCormick's reliance was justified, and her investigation sufficient to satisfy her duty under *Dalarna*, is at least a question for the jury.

Under the circumstances, Ms. McCormick acted reasonably. She inquired about the leak and mold problem disclosed by the sellers and was told that Bennett Technical Services had repaired the defect. CP 164, 174,

⁴ *Atherton* cited *Dalarna*, but did not discuss whether the purchasers had notice. 115 Wn.2d at 525. The court in *Sloan* held that there were issues of fact as to whether the purchasers had sufficient notice of the alleged defects to shift the burden to the purchaser. 128 Wn. App. at 788-90.

190, 420. She was given the invoices from Bennett Technical Services as proof. Ms. McCormick hired a licensed inspector to inspect the home, including the allegedly fixed mold problem. The inspector also spoke with the sellers and relied on the invoices from Bennett Technical Services. CP 56-57, 172, 460, 467. The report did not disclose anything that a reasonable person should have followed up further on. Unlike the buyer in *Dalarna*, Ms. McCormick complied with her duty and asked the sellers about the water stains. CP 164, 174, 190, 420. The sellers cannot use *Dalarna* to shift responsibility to Ms. McCormick, especially if their response to Ms. McCormick's inquiry was intentionally or negligently misleading, as discussed above.

In this case, Ms. McCormick did more than was required under *Dalarna* by hiring an inspector to do an inspection of the home. There is no evidence in the record to suggest that Ms. McCormick had any reason not to rely on her expert's opinion at that point. Unlike the sellers' negligent hiring of Bennett Technical Services and Couch, Lighthouse was registered with the State of Washington and had been recommended by her real estate agent. No further inquiry was required. When the potential defect was disclosed, Ms. McCormick asked the sellers for more information and had her inspector verify the sellers' explanation. It does not matter for this appeal whether the inspection report failed to note the

mold because it was not apparent at that time of year or because the inspector intentionally or negligently failed to report it. In either case, Ms. McCormick justifiably relied on the report and on the sellers' assurances in response to her inquiry regarding the water stains.

D. The Sellers Were Not Entitled to Attorney's Fees for Defense of Ms. McCormick's Tort Claims.

Even if the trial court's determination of summary judgment is upheld, it improperly awarded attorney's fees to the sellers for their defense of Ms. McCormick's tort claims. Whether a party is entitled to attorney's fees is an issue of law which is reviewed de novo. *Keystone Masonry, Inc. v. Garco Const., Inc.*, 135 Wn. App. 927, 936, 147 P.3d 610 (2006). Generally, attorney's fees in Washington are not awarded absent a contract, statute, or recognized ground of equity. *E.g. Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993).

Attorney's fees are not generally awarded for tort claims, and the prevailing party in a suit that involves both tort and contract claims is not entitled to recover fees relating to the tort claims. *E.g. Pearson v. Schubach*, 52 Wn. App. 716, 723, 763 P.2d 834 (1988). Thus, *Pearson* directed the trial court to segregate the fees incurred for the plaintiff's claims of tortious interference with a business expectancy and conspiracy from the claims related to the contract action. *Id.* Similarly, the court in

Lincor Contractors, Ltd. v. Hyskell denied recovery of attorney's fees despite provisions in various related contracts because there was no action to enforce the terms of the contracts. 39 Wn. App. 317, 324, 692 P.2d 903 (1984).

This rule should also be applied to tort claims of misrepresentation against the seller of real property. In *Norris v. Church & Co., Inc.*, Division Two denied fees to homeowners in their suit against a builder for fraudulent concealment of construction defects, including various leaks. 115 Wn. App. 511, 517, 63 P.3d 153 (2002). Despite a provision in the parties' contract providing for attorney's fees, the homeowners "sued for fraud, not on the contract. Thus, they are not entitled to attorney fees." *Id.*

Division Three applied the reasoning of *Norris* to deny fees in a fraud action, stating: "Fraudulent concealment sounds in tort, not in contract. Therefore, the prevailing party would not be entitled to attorney fees." *Burbo*, 125 Wn. App. at 702. *Burbo* did allow fees for breach of the implied warranty of habitability, reasoning that it is an implied term of the contract. *Id.* at 701.

In contrast, Division One awarded fees for defense of a tort claim under a contract, stating that the tort action was "based on a contract containing an attorney fee provision." *Brown v. Johnson*, 109 Wn. App. 56, 58, 34 P.3d 1233 (2001). For the doctrine to apply, the action must

arise out of the contract and the contract must be “central to the dispute.” *Id.* Without clearly explaining the basis for its holding, the court stated that the purchaser’s claims arose out of the contract, and therefore awarded fees. *Id.* at 59. The decision notes that the alleged misrepresentation on the disclosure statement “was but one act among several acts and omissions by [the seller] culminating in the jury’s verdict for [the purchaser].” *Id.* at 59 n.5.

Division Three followed *Brown* in *Hill v. Cox*, but it also did not discuss why the test was satisfied. 110 Wn. App. 394, 411-12, 41 P.3d 495 (2002). The court effectively applied a “but for” test, stating that there would have been no suit but for the contract. *Id.* This reasoning applies the “arise out of the contract” prong stated in *Brown*, but ignores the “central to the dispute” language.

Ms. McCormick’s tort claims for fraud and negligent misrepresentation are separate from the parties’ contract. Even if this Court chooses to apply the rule of *Brown* rather than following the precedent established in *Norris*, the claims did not rise out of the contract. Ms. McCormick does not rely upon any of the terms of the contract, and the terms of the purchase and sale agreement are virtually irrelevant to Ms. McCormick’s suit. The sellers successfully dismissed the breach of contract claim because the disclosure statement is statutorily separate from

the purchase and sale agreement under RCW 64.06.020(3). Both parties' arguments are centered upon whether the disclosure that the leak and mold problem had been remedied was fraudulently or negligently made, not upon any provision of the purchase and sale agreement.

Thus, although a contract exists between the parties, the contract is not central to the elements of Ms. McCormick's tort claims, and the trial court erred in awarding attorney's fees to the sellers pursuant to the contract.⁵ Applying the rule of *Brown* here would allow fees to be recovered for any claim of misrepresentation against the seller of real property, which is clearly not the law in Washington.

Should the Court reject this argument, but reverse summary judgment for the reasons stated above, Ms. McCormick requests her fees on appeal in accordance with RAP 18.1 under the rule of *Brown* cited above.

CONCLUSION

Ms. McCormick presented significant evidence in opposition to summary judgment regarding the existence of moisture and mold in the attic and crawlspace, structurally unsound chimneys, leaky flashings, and rotting wood. Construing this evidence in the light most favorable to Ms.

⁵ Any fees incurred by the sellers attributable to Ms. McCormick's breach of contract claim were minuscule.

McCormick, there were genuine issues of material fact regarding each of her claims for negligent misrepresentation, fraud, and fraudulent concealment, precluding summary judgment.

Although the sellers disclosed a prior mold problem in the attic, they represented that the problem had been adequately repaired. In fact, the repairs only exacerbated the defect. The representation was negligent because the sellers unjustifiably relied on the opinion of an unlicensed contractor, having done nothing to verify whether the repairs had been completed.

There is clear evidence of the sellers' actual knowledge of the drainage problems and their failure to disclose. The sellers admit that they knew of mold inside the home and two separate significant defects in the attic (the chimney flashing and the leak near the master bathroom), neither of which were disclosed. Further, Ms. McCormick's witnesses testified of specific facts from which a jury could reasonably infer that the sellers knew of the defects in the attic and throughout the home, so summary judgment dismissing fraud and fraudulent concealment was also inappropriate.

Ms. McCormick had no reason to suspect the sellers had falsely represented the condition of the property. She acted reasonably in hiring an inspector to investigate what the sellers did disclose, but the sellers also

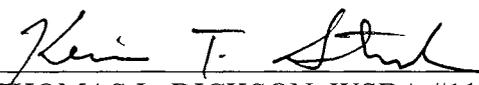
misled the inspector regarding the alleged repairs. For the purposes of summary judgment, Ms. McCormick's reliance and investigation was reasonable.

In the alternative, the trial court erred in awarding attorney's fees to the sellers for their defense of Ms. McCormick's tort claims. The issues regarding the sellers' misrepresentations did not depend in any way on the terms of the contract, and the trial court should not have awarded fees based on the contract.

For the foregoing reasons, Ms. McCormick respectfully requests that this Court reverse the trial court's grant of summary judgment and remand for trial. Ms. McCormick also asks that the award of attorney's fees be reversed.

Respectfully submitted this 5th day of February, 2007.

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Certificate of Service

I, the undersigned, hereby certify under penalty of perjury of the laws of the State of Washington that I caused the foregoing Brief of Appellant to be served upon:

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