

original

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

---

NO. 35505-1

---

PETER GLENN STIENEKE and  
CYNTHIA DIANNE STIENEKE, a marital community,

Respondents,

v.

TROY and RENEA RUSSI, a marital community,

Appellants,

and

STERLING GRIFFIN and JANE DOE GRIFFIN, a marital community;  
and KELLER WILLIAMS REALTY,

Defendants.

FILED  
COURT OF APPEALS  
DIVISION II  
07 JUL -3 PM 1:52  
STATE DEPUTY CLERK

---

BRIEF OF RESPONDENTS STIENEKE

---

Michael W. Gendler  
WSBA No. 8429  
GENDLER & MANN, LLP  
1424 Fourth Avenue, Suite 1015  
Seattle, WA 98101  
(206) 621-8868  
Attorneys for Respondents

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. RESTATEMENT OF THE ISSUES PRESENTED .....	3
III. COUNTERSTATEMENT OF THE CASE .....	4
A. <u>Facts of the Case</u> .....	4
B. <u>Proceedings Below</u> .....	12
IV. ARGUMENT IN SUPPORT OF TRIAL COURT JUDGMENT, AND IN OPPOSITION TO RUSSIS' APPEAL .....	19
A. <u>Standards of Appellate Review</u> .....	19
B. <u>Troy Russi Had Actual Knowledge of the History of Roof Leaks He Affirmatively Misrepresented and Failed to Disclose</u> .....	25
C. <u>Russis are Liable for Troy Russi's Fraudulent Concealment and Fraud</u> .....	31
D. <u>The Economic Loss Rule Does Not Help Russis</u> .....	43
E. <u>The Trial Court Acted Well Within Its Wide Discretion in Striking the Jury Demand in a Rescission Case</u> .....	45
F. <u>Russis Have Waived Any Challenge to the Grounds for Awarding Attorneys' Fees</u> .....	47

G.	<u>The Form 17 Disclosure Statement Was Signed by Both Sides and Became Part of the Parties' Agreement</u> .....	48
H.	<u>Stienekes Are Entitled to Fees on Appeal</u> .....	49
V.	CONCLUSION .....	49

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Alejandre v. Bull</u> , 159 Wn.2d 674, 153 P.3d 864 (2007) . . . . .	1, 2, 31, 35, 36, 39, 41-44
<u>Atherton Condominium Board v. Blume Dev. Co.</u> , 115 Wn.2d 506, 799 P.2d 250 (1990) . . . . .	2, 31, 35, 36, 40, 43, 44
<u>Auburn Mechanical, Inc. v. Lydig Construction, Inc.</u> , 89 Wn. App. 893, 951 P.2d 311 (1998) . . . . .	46
<u>Becker v. County of Pierce</u> , 126 Wn.2d 11, 890 P.2d 1055 (1995) . . . . .	24
<u>Brown v. Johnson</u> , 109 Wn. App. 56, 34 P.3d 1233 (2001) . . . . .	2-3, 27, 30, 47, 49
<u>Brown v. Safeway Stores, Inc.</u> , 94 Wn.2d 359, 617 P.2d 704 (1980) . . . . .	45
<u>Burnet v. Spokane Ambulance</u> , 131 Wn.2d 484, 933 P.2d 1036 (1997) . . . . .	20
<u>Dependency of K.R.</u> , 128 Wn. App. 129, 904 P.2d 1132 (1995) . . . . .	23
<u>Dewey v. Wentland</u> , 38 P.3d 402 (Wyo. 2002) . . . . .	40
<u>ESCA v. KPMG</u> , 86 Wn. App. 628, 939 P.2d 1228 (1997) . . . . .	34
<u>Hadley v. Cowan</u> , 60 Wn. App. 433, 804 P.2d 1271 (1991) . . . . .	20

<u>Hegwine v. Longview Fibre Co., Inc.</u> , 132 Wn. App. 546, 132 P.3d 789 (2006) (citations omitted), petition for review granted, 159 Wn.2d 1001, 153 P.3d 195 (2007) . . . .	19
<u>Hill v. Cox</u> , 110 Wn. App. 394, 41 P.3d 495 (2002) . . . . .	3, 17, 47, 49
<u>Hoel v. Rose</u> , 125 Wn. App. 14, 105 P.3d 395 (2004) . . . . .	39, 40
<u>Kirkpatrick v. DLI</u> , 48 Wn.2d 51, 290 P.2d 979 (1955) . . . . .	21
<u>LeMon v. Butler</u> , 112 Wn.2d 193, 770 P.2d 1027 (1989), <u>cert. denied</u> , 493 U.S. 814 (1989) . . . . .	21
<u>McRae v. Bolstad</u> , 32 Wn. App. 173, 646 P.2d 771 (1982), <u>affirmed</u> , 101 Wn.2d 161, 676 P.2d 496 (1984) . . . . .	31, 32, 34
<u>Northwest Collectors, Inc. v. Enders</u> , 74 Wn.2d 585, 446 P.2d 200 (1968) . . . . .	21
<u>Oates v. Taylor</u> , 31 Wn.2d 898, 199 P.2d 924 (1948) . . . . .	31
<u>Obde v. Schlemeyer</u> , 56 Wn.2d 449, 353 P.2d 672 (1960) . . . . .	31, 32, 34
<u>Olmsted v. Mulder</u> , 72 Wn. App. 169, 863 P.2d 1355 (1993) . . . . .	27, 49
<u>Ortblad v. State</u> , 85 Wn.2d 109, 530 P.2d 635 (1975) . . . . .	47
<u>Perry v. Continental Ins. Co.</u> , 178 Wash. 24, 33 P.2d 661 (1934) . . . . .	29

<u>Puget Sound Services Corp. v. Dalarna Management Corp.,</u> 51 Wn. App. 209, 752 P.2d 1358 (1988) .....	35
<u>Shaw v. O’Neill,</u> 45 Wash. 98, 88 P 111 (1906) .....	29, 32
<u>Skagit State Bank v. Rasmussen,</u> 109 Wn.2d 377, 745 P.2d 37 (1987) .....	29, 30
<u>Smith v. Shannon,</u> 100 Wn.2d 26, 666 P.2d 351 (1983) .....	23
<u>Sorrell v. Young,</u> 6 Wn. App. 220, 491 P.2d 1312 (1991) .....	32, 35
<u>State v. Johnson,</u> 119 Wn.2d 167, 829 P.2d 1082 (1992) .....	25
<u>Stiley v. Block,</u> 130 Wn.2d 486, 925 P.2d 194 (1996) .....	41
<u>Stuart v. Coldwell Banker Commercial Group, Inc.,</u> 109 Wn.2d 406, 745 P.2d 1284 (1987) .....	44
<u>Svendsen v. Stock,</u> 143 Wn.2d 546, 23 P.3d 455 (2001) .....	27, 49
<u>Tommy P. v. Board of County Commissioners of Spokane County,</u> 97 Wn.2d 385, 645 P.2d 697 (1982) .....	26
<u>Yakima County Fire Protection Dist. No. 12 v. City of Yakima,</u> 122 Wn.2d 371, 858 P.2d 245 (1993) .....	46
<u>Statutes</u>	<u>Page</u>
RCW 64.06.020 .....	26

RCW 64.06.030 .....	26
RCW 64.06.050 .....	29
RCW 64.06.050(1) .....	3, 23, 24, 26, 28, 30
RCW 64.06.070 .....	49

<u>Rules</u>	<u>Page</u>
RAP 2.5(a) .....	23
RAP 18.1(b) .....	49

<u>Other Authorities</u>	<u>Page</u>
37 C.J.S., <u>Fraud</u> , § 16a, p. 244 .....	32
Fifty-Third Washington State Legislature, Final Legislature Report SSB 6283, C 200 L 94 (1994) .....	26

## I. INTRODUCTION

The Russis' appeal should be rejected and the trial court affirmed because:

1. Russis' principal contention that Troy Russi is not responsible for knowing the contents of a document he signed and initialed on every page is contrary to bedrock Washington law charging parties with knowledge of legal documents they sign, the Russis rely on a statutory defense they did not assert at trial, they misread the statute, and the statute does not apply to Russi's oral misrepresentations.

2. The trial court's decision can and should be affirmed on the alternative grounds of fraudulent concealment and fraud, which are fully supported by the court's findings and by substantial evidence. This case is the opposite of Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007) on which Russis so heavily rely. In that case the seller disclosed that there had been septic repairs. Here the seller failed to disclose a history of roof leaks and repairs and also affirmatively withheld that history when asked by the buyers and buyers' inspector. In Alejandre, the defective condition would "easily" have been found. Here, Russis' own roof expert testified that he could not find any problem with the roof even after being informed where

leaks had occurred and with a day's work of disassembly. The further major disassembly and water testing he suggested would cost \$10,000 and go far beyond the scope of any "reasonable" inspection for a home purchase.

3. The economic loss rule does not help Russis because the rule does not apply to fraud and fraudulent concealment, and because Stienekes were awarded money for "property damage to property other than the defective product or property" which are not within the economic loss rule. Alejandro, 159 Wn.2d at 685, 689 (citing Atherton Condominium Board v. Blume Dev. Co., 115 Wn.2d 506, 799 P.2d 250 (1990) and other cases).

4. Russis' trial attorney told the court in closing argument that she had a "duty" to ask the court to impose any liability on negligence rather than intentional tort grounds. RP 1722. She later confirmed that she is insurance defense counsel. The Russis have invited the consequences of the decision they sought based on negligence.

5. Russis admit that a trial court has "wide discretion" to strike a jury demand where both equitable relief and damages are sought. They have identified no respect in which the court abused that discretion.

6. The Russis are liable for attorneys' fees because this is "an action in tort . . . based on a contract containing an attorney fee provision." Brown

v. Johnson, 109 Wn. App. 56, 58, 34 P.3d 1233 (2001); Hill v. Cox, 110 Wn. App. 394, 411-12, 41 P.3d 495 (2002). Russis do not address Brown, Hill, or any of the other cases cited by plaintiffs Stieneke below and by the court, and thus have waived any contention regarding the basis for fee liability.

## II. RESTATEMENT OF THE ISSUES PRESENTED

1. Is Troy Russi charged with actual knowledge of the Form 17 Disclosure Statement that he signed and initialed on each page?

2. Can Russis assert a statutory defense (RCW 64.06.050(1)) that they did not assert at trial, which does not apply to Troy Russi's liability for affirmative oral misrepresentations, and where the statute does not support their argument?

3. Should the judgment be affirmed on the alternative grounds of fraudulent concealment and fraud, where the findings and evidence support affirmance on these grounds and where Russis requested that the court base its decision on negligence rather than the intentional torts so that they would have insurance coverage?

4. Does the economic loss rule bar recovery for fraud or fraudulent concealment, or with respect to damage to property other than the cost of repairing the roof itself (i.e., the defective condition that was not disclosed)?

5. Have Russis failed to establish that the court abused its wide discretion in striking plaintiffs' jury demand, where the court correctly determined that the primary relief sought was equitable and where Russis' appeal does not identify any abuse of discretion?

6. Have Russis waived their appeal of the grounds for awarding attorneys' fees to Stienekes by failing to address the basis of the fee award as "an action in tort . . . based on a contract containing an attorney fee provision?"

7. Was the breach of contract determination correct, where the Form 17 Disclosure Statement was a writing signed by both sides which was executed after the purchase and sale agreement?

### III. COUNTERSTATEMENT OF THE CASE

#### A. Facts of the Case

Defendant Troy Russi "was never shy" about demanding that the contractor who installed the roof on his house come out to stop roof leaks over a three year span after the house was completed. RP 1027:11-15 (Mar. 30, 2006) (testimony of roofer Brian Hunter-Duschel). Yet Troy Russi not only falsely answered "no" to the Form 17 Disclosure Statement question, "Has the roof leaked?," he affirmatively lied to the Stienekes and to the

Stienekes' roof inspector when they asked Russi if he ever had any problems with the roof. RP 885:17 - 886:10 (Mar. 29) (testimony of Cindy Stieneke) (statements made by Troy Russi to Stienekes and inspector O'Brien on March 10, 2003); RP 1474:13-20, 1483-85 (Apr. 4) (testimony of Glenn Stieneke). On two separate occasions, Troy Russi unequivocally assured the Stienekes (and their home inspectors) that "there had never been any problems with the roof." Id.

The tile roof leaked when it was washed a few weeks after the purchase closed, and it continued to leak into the house interior during heavy rains thereafter. RP 1314, 1316-24 (Apr. 3); Exs. 248-62 (photographs of interior damage); RP 1506 (Apr. 4). The trial court awarded damages for repairs to the interior (walls and wood floor), in addition to the cost of replacing the leaking tile roof. CP 533 (Decision of the Court—Damages Only). This was the interior same area into which the roof leaked when Russi owned the house, and where he too had repaired walls and replaced wood flooring. RP 1062; Exs. 147 (Russis' photos).

On March 6, 2003, Stienekes made a written offer to purchase the Russi home in the Saratoga subdivision of Gig Harbor. Ex. 32. Troy Russi had bought the lot and then had the house built in about 1993-94. RP

1037:5-9 (Mar. 30). Troy Russi was the original owner and only resident (with his wife and children) until he sold the house to the Stienekes. After price negotiation as reflected in mark-up of the initial purchase offer, the parties reached agreement later that day. Exs. 32, 33. Defendant (but not appellant) Sterling Griffin was the agent in the deal. Griffin represented the buyers Stienekes. Exs. 32, 28. Russis did not want to use (or pay) an agent.

The Stienekes then hired Jim O'Brien to inspect the house, a house inspector recommended by agent Griffin. RP 881:7-8 (Mar. 29). O'Brien did his inspection a few days after the purchase and sale agreement, on March 10, 2003. RP 885-86 (Mar. 29); RP 1474-75 (Apr. 4). After he completed his inspection of the inside, Stienekes asked him about inspecting the roof. O'Brien responded that he did not do roof inspections. RP 1474:13-20 (Apr. 4). O'Brien provided a written inspection report to Stienekes. Ex. 37. There was no information in O'Brien's report identifying any interior water damage or suggesting that there might be any water intrusion or problems with the roof. Id. Russis make no contention that O'Brien's inspection was deficient, nor do they contend that there was any non-party negligence. The parties

agreed to extend the inspection contingency so that Stienekes could obtain a roof inspection. Ex. 38.<sup>1</sup>

Glenn Stieneke lined up a roofing contractor, Thompson Roofing, to inspect the roof on March 21, 2003. RP 1483:13-17 (Apr. 4). But it rained that day, and Thompson was not able to go onto the slippery roof for the inspection. RP 1483-84. Stienekes and Troy Russi were present. Id. The roof inspector asked Russi if he had any problems with the roof. Russi responded that there had never been any problems with the roof. RP 1485:1-4. This was the same statement he made 11 days earlier to Stienekes and inspector O'Brien.

On March 10, 2003, agent Griffin provided Russis' Form 17 Disclosure Statement to Stienekes. RP 887 (Mar. 29); Ex. 36. Troy Russi signed it in the space provided for seller's signature on page 3, and initialed each page. Ex. 36. Griffin asked both Stienekes to review and sign the Disclosure Statement, and asked Glenn Stieneke to initial each page. RP 888; RP 1473-74. Glenn initialed each page at the bottom right as requested

---

<sup>1</sup> However, agent Griffin did not write up the extension until after the original inspection contingency had expired. Ex. 38.

by agent Griffin. Ex. 36, pp. 1-3.<sup>2</sup> Both Glenn and Cindy Stieneke signed the Disclosure Statement. Ex. 36, p. 4.

Troy Russi claims that buyers' agent Griffin read the Form 17 questions to him, that he either did not hear correctly or Griffin did not read correctly the question, "Has the roof leaked?," and that Russi initialed each page and signed the Disclosure Statement without reading any of it. RP 1132:23 - 1133:8; RP 1161:5-10. Russi did not deny signing the Disclosure Statement, did not deny initialing each page of it, and did not deny that he knew that he was signing and initialing a legal document that was an important part of the process of selling his house to the Stienekes. RP 1134:10-16 (Mar. 30). Throughout the trial, a major theme of defense counsels' cross-examinations of the Stienekes was that signed legal documents are binding and that the person signing a document is responsible for knowing what they have signed. See, e.g., RP 1405-15 (Apr. 4).

The sale closed on April 25, 2003, and the Stienekes moved into the house. About a month later, they arranged for a company called Roof Therapy to clean the tile roof, which had a lot of moss. RP 1302:5-7 (Apr. 3). During the roof cleaning, water started coming into the ceiling and wall

---

<sup>2</sup> Glenn initialed in a space marked for the seller's initials, even though he was the buyer. Id.; RP 1473-74.

of the front entry to the house. RP 1303:3-10. Cynthia Stieneke told the worker to stop as soon as she saw the water, but it was too late to prevent damage to the interior. RP 1303-04; Exs. 247, 248 (photographs taken on May 28, 2003). Glenn Stieneke went to inform Troy Russi (who had moved just a block way) of the leak. RP 1495:24 - 1496:11-17 (Apr. 4). Russi told Glenn only that he previously had a raccoon on the roof. RP 1496. Russi did not mention any prior leaks or repairs. Id. Stienekes did what they could to protect the wall, floor, and items that they had in the entry. RP 1303-04 (Apr. 3).

Thereafter, the roof leaked when there was hard or long rain. RP 1314:14-19; RP 1316-27; CP 622 (Finding 21). Stienekes experienced water intrusion on October 8, 2003, on about October 17, 2003, in the fall of 2004, and "it continued anytime there was a heavy rain." Id.; RP 1325:13. The water continued to damage the ceiling, walls, and wood floor. Id.; Exs. 248-50 (photographs taken on Oct. 8, 2003 showing new water damage in front hallway); Exs. 251-57 (photos taken Oct. 20, 2003); Exs. 258-62 (photos taken after October, 2003 showing new, increased interior damage). After the rain on October 8, 2003, the water bubble on the hallway wall increased and moved down the wall to the hardwood floor. RP 1314-16; Exs.

248-50. After more rains later in October, the drywall cracked open and the path of water down the wall widened significantly. RP 1316-23; Exs. 251-57. Damage spread to another room, and to the baseboard and hardwood floor, causing them to warp, buckle, and split. RP 1319-23; Exs. 256-57. The damage spread and worsened in 2004. RP 1325-27; Exs. 258-62.

What Troy Russi told and failed to tell Stienekes (and their roof inspector) about the history of his roof was very different from the evidence of its actual history. Troy Russi testified that the roof leaked “one time, and one time only.” RP 1169:22-24 (Mar. 30). He claimed that the first and only leak was in 1997, about three years after the house was completed. RP 1061:1-17 (Mar. 30). The leak was in the same front hall entry way where Stienekes later experienced leaks. RP 1062-63; Ex. 147. Russi testified the roofing subcontractor (Bruce Hunter-Duschel) who had installed the roof for Russis’ general contractor came to the house in 1997, repaired the roof, and that it never again leaked. RP 1068-70.

However, that same roofing contractor was called by defendants Russi as a trial witness but gave very different evidence. RP 1019-34 (Mar. 30). In response to questions from Russis’ attorney, Mr. Hunter-Duschel testified:

Mr. Russi was never shy about calling if there was a roof leak.

RP 1027 (Mar. 30):13-14. Hunter-Duschel testified that “we had been out three, four times” in response to Russis’ complaints of roof leaks beginning about a year after the roof had been installed. RP 1022:21-22. Hunter-Duschel clarified that “this is several times,” and that he had to come back again “a year after the original reported leak.” RP 1023:4-8. See also RP 1022:21 (“this is what I would call the final act”). Trying to find and repair the leaks involved not only Hunter-Duschel, but also inspections by the roof tile manufacturer (Monier) and by insurance companies. RP 1022-23.

Not only were there leaks at multiple times, there were leaks in multiple places. RP 1029-30 (leaks after Hunter-Duschel repaired first leaks were “in a different area”). Hunter-Duschel’s responses to leaks and efforts to repair them spanned about three years. RP 1022:4-6 (first called out for a roof leak “roughly a year after installation”);<sup>3</sup> RP 1030-31 & Ex. 147 (Photo 6) (Hunter-Duschel’s work in Nov. 1997, elsewhere described by him as “the final act,” RP 1022:21). Subsequent interior repairs took Russis more than two years to complete. RP 1060-78; RP 827-53 (testimony of former neighbor Debbie Lord); CP 622 (Finding 20).

---

<sup>3</sup> This would have been about 1995. RP 1037:5-9 (Mar. 30).

B. Proceedings Below

Plaintiffs Stienekes' complaint alleged fraudulent concealment, fraud, and breach of contract by defendants Russi, professional negligence and other claims against their agent Griffin, and sought rescission of the sale against Russis and damages against both defendants. CP 1001-18. Summary judgment motions were denied. CP 216, 225, 219. Three weeks prior to the scheduled trial date,<sup>4</sup> agent Griffin moved to strike Stienekes' jury demand and Stienekes moved to amend their complaint to add a claim for negligent misrepresentation against Russis based on the same set of facts previously alleged. CP 228; CP \_\_\_\_\_. Russis did not oppose the motion to amend. RP 52 (Oct. 14, 2005). Russis' counsel later urged the court to determine liability based on negligence rather than fraudulent concealment and confirmed that an insurer is defending the Russis. RP 1722 (May 5, 2006) ("my duty to my client to suggest . . ." a ruling based on negligence); CP 826-99 (attaching redacted legal bills identifying Russis as "insured").

In his motion to strike the jury demand, Griffin argued that the case was primarily equitable in nature. Plaintiffs Stieneke and defendants Russi

---

<sup>4</sup> At that time trial was set for November 1, 2005. *Id.* The trial subsequently was "bumped" to March, 2006 because the assigned judge was multiple set for the November 1 trial date.

opposed the motion. CP 297-307 (Stieneke response); CP 280-91 (Russi response). Both acknowledged that plaintiffs' rescission claim is equitable, and that the court's decision was discretionary. Ibid.; CP 282, 286, 289 (Russis' response) (court has "wide discretion").

In granting the motion to strike, the court explained that it viewed the primary relief sought as the equitable rescission remedy. RP 65-67 (Oct. 14, 2005) (plaintiffs' complaint "first and foremost [seeks] the equitable remedy for rescission"). RP 65:1-2. The court correctly anticipated that fashioning a rescission remedy would require consideration of a variety of factors and circumstances that would have "a profound effect" on any damages remedy. RP 66:13-18.<sup>5</sup> Notwithstanding the court's observation that fashioning an equitable remedy may involve "a lot of sort of micro management in order to get people into what is a fair position," RP 66:15-18, the court made clear that such difficulty "is no reason not to let someone have a jury trial if they are entitled to one." RP 66:2-7.

Before issuing its ruling, the court afforded plaintiffs an opportunity to withdraw their rescission request. Id. at 65. After a recess, the Stienekes

---

<sup>5</sup> The court's forecast proved true. It awarded rescission, but after requesting post-trial briefing it issued a Decision on damages which set terms that the court knew would lead Stienekes to elect a damages remedy. CP 529-34; CP 535-36 (Sep. 14, 2006) (plaintiffs' election of remedies).

informed the court of their decision to retain the rescission claim. Id. The court then granted the motion to strike. Id. at 65-67. The court emphasized the importance of the right to jury and how seriously it considered that right in making its decision. RP 67 (“the jurors give us integrity;” “[people] question the wisdom of it, but I have never really seriously heard anybody question the integrity of that jury . . .”).

Trial began on March 20, 2006, and took nine court days of testimony.<sup>6</sup> On May 5, 2006, counsel gave their closing arguments and the court issued its decision. The court ruled in plaintiffs’ favor, but asked counsel for supplemental briefing on damages and the rescission remedy. RP 1784-86 (May 5).

In its thorough oral ruling, the court emphasized that there is “no dispute whatsoever” that Troy Russi signed the Form 17 Disclosure Statement and that the answer regarding prior roof leaks was inaccurate. RP 1772:5-8. The court explained that “a leaking roof is a fundamental part of the structure,” citing its experience in having “a number of leaky roof cases

---

<sup>6</sup> Trial was interrupted by the trial judge’s brief illness, and by a closure of the Tacoma Narrows Bridge which prevented the parties, court reporter, and witnesses from getting to court one day. This resulted in witnesses having to be heard out of order and some witnesses including two plaintiffs’ experts and one defense expert having to give their evidence by preservation deposition taken in the courtroom in the trial judge’s absence.

over the years.” RP 1773:11-13. Citing Russis’ attorney’s closing argument that the Stienekes are responsible for reading and knowing the contents of the legal documents they sign, the court held that this applied to Mr. Russi. RP 1783. The court also cited Troy Russi’s statements to the roof inspector, together with the inaccurate Form 17 Disclosure. RP 1776.

During closing argument, the court asked agent Griffin’s counsel, “Why don’t people just lie their back ends off in these things [Form 17 Disclosure Statements]?” RP 1738-13:14. The court explained it was “just making sure that the law here makes some kind of sense.” RP 1738:19-20. When Griffin’s attorney suggested that no buyer ever could have a right to rely on a false disclosure, the court asked, “So the answer is, you can lie all you want on this form, and it is not actionable. Is that what I’m hearing?” RP 1739:2-4. As this exchange foreshadowed, the court held that the integration clause in the prior purchase and sale agreement did not render Form 17 meaningless:

Absolutely, that would be, it seems to me, completely nonsensical and counter to the whole idea of the Form 17. If you know that you have an integration clause in a purchase and sale agreement that has already been executed but then you have a license to say anything that you want in Form 17, then you are not going to be responsible for it because

of the integration clause in the document that is already signed. That would stand the whole thing on its head. That makes no sense to me. I cannot believe that would be the state of law. I don't think that it is. I think that when Form 17 is executed, there is an understanding that that is going to be a part of the deal, if you will.

RP 1771:7-20. The court then cited that Form 17 creates a three-day right of rescission (that was not exercised here) that is "outside the four corners of" the purchase and sale agreement as further indication that the disclosure statement was intended to be part of the parties' agreement. RP 1771-72.<sup>7</sup>

The parties submitted their supplemental briefs. CP 434, 489, 459, 509. The court then issued a written Decision of the Court-Damages Only. CP 529-34 (Aug. 31, 2006). The court denied Stienekes any damages for loss of fair market value. CP 529-31. It found that they did have a right of rescission. CP 531. The court held that Stienekes were not entitled to any benefits from the purchase if they rescinded it, and therefore were not entitled to the benefit of any market appreciation. *Id.* The court also denied Stienekes any interest on the purchase money they had paid to Russis if Stienekes elected rescission. CP 532 & n.1.

---

<sup>7</sup> The court also explained why agent Griffin had breached his fiduciary duty to Stienekes and was liable. RP 1773-78.

After the court stated its assumption that Stienekes would elect money damages rather than rescission, CP 532-33,<sup>8</sup> it then determined the damage award required to compensate Stienekes for the defective roof and for the interior damage, adopting the testimony of plaintiffs' cost estimator with respect to the roof, and that of defendant's estimator with respect to replacing sheet rock and painting. CP 533. The total damages awarded were \$72,048.50. Id. The court found agent Griffin and sellers Russi jointly and severally liable for the damages, found plaintiffs without fault, and pursuant to defendants Russis' request for apportionment assigned Russis liability for 45 percent of the damage and the agent 55 percent. CP 533.

The court held that plaintiffs are entitled to reasonable attorneys' fees, citing and quoting Hill v. Cox, supra and cases cited therein. CP 534. The court entered findings of fact, conclusions of law, and judgment consistent with its oral decision and written damages decision. CP 617-30.

Stienekes moved for attorneys' fees and expenses. CP 631-41. See also CP 642-772 (declaration of plaintiffs' attorney with documentation); CP 773-80 (declaration of attorney Philip A. Talmadge in support of fee application); CP 908-33 (reply declaration). Russis submitted their

---

<sup>8</sup> Plaintiffs subsequently did file a notice of such election. CP 535-36.

opposition. CP 814-25. See also CP 826-99 (declaration attaching defense counsels' invoices), CP 792-808 (declaration of Russi attorney Shellie McGaughey), CP 809-13 (declaration of attorney James M. Beecher filed in opposition to amount of fees). Russis' expert attorney Beecher contended that the fee was excessive because proof of Russis' liability "seemed to be readily available and overwhelming." CP 810:24-25. See also CP 811-12 ("straightforward property damage claim" involving "clearly documented prior roof leaks"). While Russis complained about the time spent by plaintiffs' counsel, the billings they submitted establish that eight Russi attorneys devoted time which substantially exceeded the number of hours of plaintiffs' counsel. CP 826-99.<sup>9</sup>

As it did in all of its other rulings, the trial court did its own work and came up with its own answers. CP 948 (court's "Calculation of Fees/Costs Award" presented in its ruling and attached to its written fee order). The court determined reasonable hourly rates and the number of hours reasonably expended by counsel, and awarded \$174,578.90 in fees and costs. CP 940-47; CP 946 (listing amounts).

---

<sup>9</sup> Russis' attorneys devoted about 900 to 1,000 documented hours and advised the court that they did not submit all of their hours. This does not include the number of hours spent by counsel for agent Griffin, some of which was on different issues.

Russis have appealed. CP 951. Agent Griffin did not appeal, and has paid the judgment against him which has been satisfied.

#### IV. ARGUMENT IN SUPPORT OF TRIAL COURT JUDGMENT, AND IN OPPOSITION TO RUSSIS' APPEAL

##### A. Standards of Appellate Review

Appellants Russi acknowledge that a court's judgment after a bench trial is reviewed under the substantial evidence test. Russi Br. at 12-13. But they fail to appreciate the limited nature of that review and its deference to the trial court, and their appeal violates other fundamentals of appellate review. Review under the substantial evidence evidence is "limited," and the courts "view the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony." Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 546, 555-56, 132 P.3d 789 (2006) (citations omitted), petition for review granted, 159 Wn.2d 1001, 153 P.3d 195 (2007).

The trial judge, the sole judge of witness credibility, did not find the core of Troy Russi's testimony to be credible. The court found that Russi's roof had leaked "at various times," CP 622 (Finding 20), accepting roofer Hunter-Duschel's testimony that Russi was "never shy" about complaining about leaks which made Russi's sworn testimony (RP 1169) of a one-time

event not credible. RP 1027. The trial court found that Russi made oral misrepresentations to the Stienekes (and their inspectors) that he never had any problems with the roof, accepting the testimony of Glenn and Cindy Stieneke and rejecting Russi's denial. CP 620, 622 (Findings 13, 14, 22). Russi was thus found to be not credible and truthful with respect to the history of the roof, what he told the Stienekes, and in his sworn testimony.

The heart of Russis' appeal is their argument that Stienekes were not entitled to rely on Russis' misrepresentations as a matter of law. They barely acknowledge the oral misrepresentations. They admit that the reasonableness of the buyers' inspection "generally" is a fact issue. Russis Br. at 23.

Russis confuse the law and err in their argument that a judgment based on negligence "tacitly" acknowledges Russi's lack of knowledge of his own disclosure. Russis Br. at 15-16. The rule they cite about the absence of a finding applies against a party that did not prevail. A different rule applies here, that an appellate court will uphold the trial court's ruling:

. . . on the well-recognized basis that "on appeal," an order may be sustained on any basis supported by the record."

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997), quoting Hadley v. Cowan, 60 Wn. App. 433, 444, 804 P.2d 1271 (1991).

“An appellate court can sustain the trial court’s judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it.” LeMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989), cert. denied, 493 U.S. 814 (1989). See also Northwest Collectors, Inc. v. Enders, 74 Wn.2d 585, 595, 446 P.2d 200 (1968) (“the trial court can be sustained on any ground within the proof”); Kirkpatrick v. DLI, 48 Wn.2d 51, 53, 290 P.2d 979 (1955) (“where a judgment or order is correct, it will not be reversed because the court gave a wrong or insufficient reason for its rendition”).

As Russis concede (“tacitly”), the trial court did not find that Russi was unaware of his own false disclosure. The court did find that Troy Russi orally told the Stienekes that he had not had problems with the roof, that the Stienekes relied on the oral representation and on the Form 17 Disclosure Statement, and that Russi’s oral and written statements were false. CP 620, 622 (Findings 13, 14, 19). See also CP 622 (Findings 20-21) (describing the undisclosed roof leaks Russi experienced between 1994 and 1997, and interior repairs in 1999), CP 623 (Finding 24) (history of roof was material to transaction; misrepresentations pertained to condition that caused property damage and materially defeated purpose of agreement). The court found that

agent Griffin read the questions on Form 17 to Troy Russi and filled it out “according to Troy Russi’s oral answers to the questions.” CP 621 (Finding 17). The court acknowledged Troy Russi’s testimony that he misheard the question, “Has the roof leaked?,” but did not find that this testimony was correct and did not find that Russi was unaware of the oral answers he gave or the document that he signed. CP 621 (Finding 18); RP 1783.

As will be demonstrated below these findings together with substantial and ample evidence support the trial court’s judgment on the alternative grounds of fraudulent concealment and fraud. Russis are wrong in arguing that Stienekes had no right to rely on Troy Russi’s direct oral representations (made two times in the presence of inspectors) that there were no problems with the roof and upon his concealment of the history of roof leaks in the Form 17 Disclosure Statement. Russis misstate both the evidence and law in contending that Stienekes had a duty to rip open the roof after being told repeatedly that there never had been any problems with it, and that they would have discovered what Troy Russi concealed even though Russi’s own expert witness testified that he could not ascertain the source of the leak even after conducting an invasive investigation with knowledge that there had been a leak and where to look for it.

Russis' error in overlooking the rule that a judgment may be sustained on any grounds within the pleadings and proof is compounded by their affirmative request that the court base any decision against them on negligence rather than intentional grounds, so that they would have insurance coverage. Even so, Russis' appeal arguments invite the court to affirm the judgment on intentional tort grounds rather than the negligence grounds which they specifically requested. "Counsel cannot set up an error at trial and then complain of it on appeal." Dependency of K.R., 128 Wn. App. 129, 147, 904 P.2d 1132 (1995). Russis' arguments confuse the trial court having done them a favor by grounding the judgment in negligence with ruling in their favor, which the court did not do.

An appellant may not raise new issues not argued below. RAP 2.5(a); Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (parties are required to "inform the court acting as trier of fact of the rules of law they wish the court to apply"). Russis concede that they did not raise below the statute (RCW 64.06.050(1)) that they now rely upon as a defense to both contract and negligent misrepresentation claims. Russis Br. at 14-15, n.2. They argue that their failure is excused because "the statute affects whether

the plaintiff has the right to maintain the action.” Id. They are wrong, for at least two reasons.

First, RCW 64.06.050(1) defines the parameters or elements of liability, requiring actual knowledge of the undisclosed condition. It does not define or establish the cause of action. In contrast, the case cited by Russis involved a statutory time limit governing election contests, a scheme entirely defined by statute with respect to “the right and means to contest the results of an election.” Becker v. County of Pierce, 126 Wn.2d 11, 18-19, 890 P.2d 1055 (1995). Second, Russis did not raise the issue of actual knowledge that they now seek to raise on appeal, so this is not the case they portray of simply adding statutory support for an issue already raised. They did not argue at trial that Russi was not liable because he did not know the contents of his own signed Form 17 Disclosure Statement. To the contrary, they specifically requested that any decision against them be grounded in negligence if their other arguments (leak caused by pressure washer, Russi believed that leak had been repaired, etc.) were rejected.<sup>10</sup>

---

<sup>10</sup> As will be shown in our next argument, Section B below, the statute does not help Russis even if they are allowed to raise the new argument on appeal. First, they misread the statute which addresses actual knowledge of the undisclosed condition. Second, the statute does not shield Russis from liability for Troy Russi’s affirmative oral misrepresentations outside the Form 17 Disclosure Statement.

Appellate courts need not consider issues not adequately briefed and not supported by authority. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Several afflict this appeal. Russis argue in passing that the trial court erred in not granting their CR 41(b)(3) motion to dismiss, Russis Br. at 19-20, a motion filed at closing argument. CP 395. They fail to address the grounds on which the trial court awarded fees. See Section F, infra. They now argue that an advisory jury should have been empaneled, Russis Br. at 30-31, citing no case or rule requiring something they did not request below.

B. Troy Russi Had Actual Knowledge of the History of Roof Leaks He Affirmatively Misrepresented and Failed to Disclose

It is undisputed that Troy Russi had actual knowledge that the roof of his house leaked during his ownership. CP 622 (Finding 19). It also is undisputed that Russi did not disclose the history of roof leaks to Stienekes, in the Form 17 Disclosure Statement or otherwise. CP 620 (Findings 13 and 14), 621 (Findings 17 and 18).<sup>11</sup>

---

<sup>11</sup> Troy Russi denied making the oral misrepresentations found by the court, Russi Dep. at 66-67 (Oct. 11, 2005), but he did not claim ever to have disclosed the history of leaks or any other problems regarding the roof. [Russi's deposition was admitted as substantive evidence on Plaintiffs' offer, with both sides designating various testimony.]

RCW 64.06.050(1) provides no defense to Russis. First, they did not raise this defense in the trial court. See pp. 23-24, supra. Second, Russis misread the statute. The statute makes sellers potentially liable for failure to disclose or misrepresentation of conditions of which they have “actual knowledge.” It makes sense that a seller would not be liable for failing to disclose a condition about which the seller had no actual knowledge. It does not make sense to read the statute to allow the seller to disclaim “actual knowledge” of the contents of his or her own written disclosure statement.

Russis’ argument takes disavowal of responsibility to a new level. Russis’ new appellate argument violates the rule that the court’s first task in interpreting a statute is to “ascertain and give effect to the intent and purpose of the legislature, as expressed in the Act.” Tommy P. v. Board of County Commissioners of Spokane County, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). The intent of the requirement for a seller’s disclosure statement is to insure that buyers receive important information for such a major purchase. RCW 64.06.030 (providing time to buyer to exercise options after receipt of disclosure statement); RCW 64.06.020 (“seller’s duty” to deliver a completed disclosure statement); Fifty-Third Washington State Legislature, Final Legislature Report SSB 6283, C 200 L 94 (1994) (disclosure may be

“critical” to home purchase decision, which “for most individuals ... is the most significant and largest financial transaction in which they will ever participate”).<sup>12</sup> Washington courts have held sellers liable for non-disclosures or misrepresentations in the Form 17 Disclosure Statement. Svendsen v. Stock, 143 Wn.2d 546, 555-56, 23 P.3d 455 (2001); Brown v. Johnson, 109 Wn. App. 56, 34 P.3d 1233 (2001); Olmsted v. Mulder, 72 Wn. App. 169, 178-79, 863 P.2d 1355 (1993).

The trial court succinctly captured the statutory intent:

Why don't people just lie their back ends off  
on these things [Form 17 Disclosure  
Statements]?

RP 1738 (May 5). It does not “make sense” to require a disclosure but then immunize a seller who “lies their back end off.” Id. Such a regime would encourage every seller to lie, and undermine the statutory purposes to communicate useful information to the buyer and provide the buyer time to exercise options (including cancelling the deal) based on that information. When the agent’s lawyer persisted in arguing that sellers never are liable for misrepresentation, and even lying, in their Disclosure Statement, the court strongly signaled that it would reject the argument:

---

<sup>12</sup> The Legislature cited “structural leaks” as an example of this “critical” information. Id.

So the answer is, you can lie all you want on this form and it is not actionable. Is that what I'm hearing?

RP 1739:2-4 (May 5).

The trial court had it right. When RCW 64.06.050(1) speaks of the seller's actual knowledge "of the error, inaccuracy, or omission," the quoted words refer to the condition, not as Russis contend to the contents of their own Disclosure Statement. The second sentence of RCW 64.06.050(1), not considered by Russis, confirms this. Using the same three words, that sentence protects a seller against liability for "such error, inaccuracy or omission" if it was based on information provided by public agencies or licensed professionals. This can only refer to errors and lack of knowledge regarding the information, not as Russis contend purported lack of knowledge of the contents of the disclosure statement itself.

Third, Troy Russi is charged with knowledge of the contents of a formal legal document he signed (and initialed each page), notwithstanding his disavowal of knowledge of the contents of his own statement:

It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents

Skagit State Bank v. Rasmussen, 109 Wn.2d 377, 381, 745 P.2d 37 (1987), citing Perry v. Continental Ins. Co., 178 Wash. 24, 33 P.2d 661 (1934). “One cannot, in the absence of fraud, deceit or coercion be heard to repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand.” Id. Troy Russi’s signature on the Form 17 Disclosure Statement is the dispositive answer to his claim that he did not have “actual knowledge” of the contents of what he was signing. See also Shaw v. O’Neill, 45 Wash. 98, 104, 88 P 111 (1906) (“A party selling land or other property must be presumed to know whether the representations made by him are true or false”).

In contrast to Russis’ appeal arguments, Stienekes recognized the responsibilities and significance of signing a legal document. RP 1408:15-16 (testimony of Cynthia Stieneke) (Q: “That was not anything that you objected to, was it? A: I signed it.”) (emphasis added). So did the court, and indeed even Russis. RP 1783 (citing Russis’ counsel’s argument closing argument).

The legislature is presumed to know the law when it enacts statutes such as RCW 64.06.050, especially where the point is so important and basic:

The whole panoply of contract law rests on the principle that one is bound by the contract, which he voluntarily and knowingly signed.

Skagit State Bank v. Rasmussen, 109 Wn.2d at 381. Russis' argument that the statutory words "actual knowledge" refer to knowledge of the contents of Russis' own signed document rather than knowledge of the conditions he failed to disclose would upset the "whole panoply" of contract law which enables parties to rely on another party's signature. Russi's argument that his signature means nothing should be rejected.

Fourth, Russis' statutory argument neglects that they were held liable for Troy Russi's affirmative oral misrepresentations along with his nondisclosure of the roof leaks in Form 17. Indeed, Russis do not address in any of their arguments that the court held them liable for the oral misrepresentations. CP 620 (Findings 13, 14), CP 622 (Finding 22), CP 623 (Finding 24), CP 625 (Conclusion 2), 626 (Conclusions 5, 6). Even if RCW 64.06.050(1) allowed a seller to disavow knowledge of their own signed disclosure statement, Russi was liable for his two affirmative oral misrepresentations. The case is indistinguishable from Brown v. Johnson, 109 Wn. App. at 59, n.5. ("Johnson's contention that Brown's claim arises solely out of the disclosure statement is not accurate. ... Johnson's failure to disclose on the disclosure statement was but one act among several acts and omissions by Johnson").

C. Russis are Liable for Troy Russi's Fraudulent Concealment and Fraud

Although Russis do not directly acknowledge that the judgment can be affirmed on alternative grounds, they admit that a buyer can establish fraudulent concealment if there is “justifiable reliance” on the seller’s misrepresentation. Russis Br. at 24-26. Russi’s arguments ignore the trial court’s findings and conclusions which are supported by substantial evidence, affirmatively misstate the only evidence on which they rely, ignore the testimony of their own roofing expert, and misstate the law.

Fraudulent concealment is a species of fraud. The seller’s duty to speak arises where a house has a concealed defect known to the seller, unknown to purchaser, which presents danger to property, health, or life, and the defect would not be disclosed by a careful, reasonable inspection by the purchaser. Alejandre, 159 Wn.2d at 689, citing Obde v. Schlemeyer, 56 Wn.2d 449, 353 P.2d 672 (1960) and Atherton Condominium Board v. Blume Dev. Co., 115 Wn.2d at 524. “Failure to disclose a material fact, where there is a duty to disclose is fraudulent.” McRae v. Bolstad, 32 Wn. App. 173, 177, 646 P.2d 771 (1982), affirmed, 101 Wn.2d 161, 676 P.2d 496 (1984), citing Obde v. Schlemeyer, supra. See also Oates v. Taylor, 31 Wn.2d 898, 902-03, 199 P.2d 924 (1948) (“the concealment of a fact which

one is bound to disclose is an indirect representation that such fact does not exist, and constitutes fraud”), quoting 37 C.J.S., Fraud, § 16a, p. 244; Sorrell v. Young, 6 Wn. App. 220, 224, 491 P.2d 1312 (1991) (failure to disclose fill which was not apparent from “casual observation” is fraudulent).

Russis had a duty to disclose material defects which were not readily apparent to the buyers. Obde v. Schlemeyer, supra (termites); Sorrell v. Young, supra (fill); McRae v. Bolstad, 32 Wn. App. at 176-77. There is no intent element in fraudulent concealment, Shaw v. O’Neill, 45 Wash. at 103-04.

The trial court found all the elements of fraudulent concealment to be present and all of its findings are supported by substantial evidence. Troy Russi made two separate affirmative oral representations that he had not had any problems with the roof. CP 620 (Findings 13, 14); RP 1436:12-23 (Apr. 4). Russi failed to disclose the roof leak in response to Form 17 Disclosure Statement question 4A, “Has the roof leaked?” CP 621 (Findings 17, 18). Russi’s affirmative representations were false and his written disclosure statement was false. CP 622 (Findings 19-20, 22), CP 624 (Finding 29); RP 1019-34 (Mar. 30) (testimony of original roofer Hunter-Duschel describing series of leaks and repairs from 1994 through 1997). The leaky roof was a

condition that threatened and caused damage to property and materially defeated the purpose of the transaction. CP 623-24 (Findings 24, 30).

Stienekes relied on Troy Russi's oral statements that he had not had problems with the roof and on Russi's written statement in Form 17 that the roof had not leaked. CP 620 (Finding 14), CP 624 (Finding 31). The court found that Stienekes "reasonably and justifiably" relied on Troy Russi's written and oral representations and that "the history of roof leaks was not readily apparent from an inspection of the property." CP 624 (Finding 31); RP 467-69, 477-80, 492-93, 497-98 (Mar. 22) (testimony of defense roofing expert Cypher) (forensic roofing expert unable to find anything wrong with the roof, could not find source of leak, and estimated that it would take one to three days and cost \$10,000 to disassemble a larger area, do water testing, and perform follow-up disassembly, all with no assurances that source of leak would be found).

Consistent with these findings, the court concluded that Russi's oral representations were false, the Stienekes relied on the false information and had a right to rely on it, and their reliance was justified and reasonable under the circumstances, the history of the roof was material to the transaction, and the misrepresentations were a direct and proximate cause of the Stienekes'

damages. CP 625-26 (Conclusions 2, 4, 5, 6). In addition to finding actual and justifiable reliance, the court found as a matter of fact and made a conclusion that Stienekes were without fault. CP 624 (Finding 31) (Stienekes not careless, negligent, contributorily negligent or at fault with respect to the history of the roof, the roof leak, and the resulting damage), CP 627 (Conclusion 17) (plaintiffs were without fault). The finding of absence of contributory negligence supports the finding of justifiable reliance. ESCA v. KPMG, 86 Wn. App. 628, 634-35, 939 P.2d 1228 (1997).

The only element of fraudulent concealment (and fraud) contested in Russi's brief is justifiable reliance. Russis Br. at 22-27. Moreover, Russis do not purport to contest the factual basis of reliance. They argue only that "as a matter of law, the buyers could not have justifiably relied on any misrepresentations." Id. at 22 (emphasis added). However, Russis admit that justifiable reliance "generally . . . presents a question of fact for the fact finder," id. at 23, and their argument is a factual one based on a misstatement of the record. Id. at 25-26. They also misstate the law regarding the relationship between misrepresentations and duty to inspect. Id.

A buyer has a right to rely on the seller's representations. McRae v. Bolstad, 32 Wn. App. at 177; Obde v. Schlemeyer, 56 Wn.2d at 453 (liability

for fraudulent concealment of defects “not readily observable upon reasonable inspection”); Sorrell v. Young, 6 Wn. App. at 224 (liability for undisclosed fill not apparent from “casual observation”). Purchasers can recover for fraudulent concealment even where the purchaser “makes no inquiries.” Atherton v. Blume, 115 Wn.2d at 525; Puget Sound Services Corp. v. Dalarna Management Corp., 51 Wn. App. 209, 213, 752 P.2d 1358 (1988); Sorrell v. Young, 6 Wn. App. at 225.

The supreme court in Atherton explained the relationship between reliance on the seller’s representations (or silence) and the duty to inspect:

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

115 Wn.2d at 525 (citations omitted). Atherton was cited with approval by the supreme court in Alejandre for its formulation of fraudulent concealment elements (and also on the economic loss rule). 159 Wn.2d at 689.

These cases teach that a duty to “inquire further” is triggered by a defect being “apparent,” or a disclosure (or other information) putting the

buyer on notice. See Alejandro v. Bull, supra (disclosure of prior repairs to septic system triggered duty of further inspection). The question is whether a reasonable inspection would have discovered the undisclosed defect. Atherton; Alejandro. This is where Russi's appeal runs aground, factually and legally.

Russis twice cite the testimony of plaintiffs' expert Don Clapp for the proposition that an inspection would have revealed the history of roof leakage. Russis Br. at 25, 26 (citing Clapp Perpetuation Deposition at 117-18). They go so far as to state that this is "undisputed." Id. But this is not what Clapp testified, and Russis' citation simply does not support their assertion. Clapp testified that if he had been retained to conduct a buyer's house inspection including the roof prior to the purchase, Clapp would have asked to remove some roof tiles as part of that inspection. Clapp Preservation Dep. at 103, 117-18. Clapp did not testify that such an inspection would have identified a prior roof leak on this roof. Id. What Russis assert as "undisputed" is not even accurate.<sup>13</sup>

---

<sup>13</sup> The trial court did not rely on Clapp's testimony. RP 1780-81 (describing Clapp as "picky," "much to do about nothing"). Clapp also testified that he found evidence of moisture in the crawlspace, testimony not cited by Russi and therefore not relied upon by them to contend that a "reasonable" inspection would have identified the roof leaks. Clapp Preservation Dep. at 13, 16-17. It is not surprising that Russis do not rely on

The substantial and indeed compelling evidence which supports the court's finding that Stienekes inspected "reasonably" and justifiably relied on Russis' representations is the testimony of Russis' roof expert William Cypher. RP 423-519 (Mar. 22). Cypher has strong expert credentials including primary work as a registered commercial roof consultant, doing design review, inspections, forensic leak investigations, all supported by a personal history of work as a roof installer. RP 423-29. It is especially significant that when Cypher was retained to inspect this roof on January 10, 2005 he was informed that it had leaked into the front entry hallway. RP 431:20 - 432:2. Yet even though Cypher knew there had been a leak and knew exactly where to look for evidence of it, and even though there were no restrictions placed upon his invasive inspection which included roof disassembly, RP 489:5-8, Cypher was unable to find any cause of a leak and concluded that there was nothing wrong with the roof. RP 467-68, 497-98. See also Exs. 177-81 (photographs of Cypher's disassembly of portion of roof on January 10, 2005), RP 453-59 (testimony describing disassembly).

---

this evidence. Clapp testified that he drew "no conclusions" regarding the roof from what he saw in the crawlspace, and had no opinion as to a source of water intrusion in the crawlspace. Id. Defense witness Showalter testified that any water intrusion probably occurred in the winter during which the house was built, not after the roof was put on. RP 919.

Given the inability of defendants' experienced expert forensic roof witness to find the source of a leak with knowledge that it had occurred and exactly where to look for it, clear and cogent evidence supported the court's findings that Stienekes acted diligently and that further inspection would not have affected the outcome.

Moreover, Cypher was asked what further inspection he would need to undertake to try to identify the origin of the roof leak. RP 477-80, 492-93. Cypher testified that water testing would be necessary, he would have to disassemble a greater area of the roof, and then disassemble more if that amount of investigation was not successful. Id. He testified that this could be a two- to three-day job, with a cost of about \$10,000. RP 478-80. Not even Russis contend that a buyer with no knowledge that the roof has leaked or the location, indeed one who affirmatively has been told that there never have been problems with the roof, should demand that a seller agree to have the roof disassembled and also spend \$10,000 to do it. Such a scenario is as far from a "reasonable" inspection as is imaginable. If courts were to require prospective purchasers to disregard multiple representations that a problem did not exist and then demand expensive and invasive disassembly inspections, the impact on real estate transactions would be severe.

Nor do Alejandre v. Bull or Hoel v. Rose, 125 Wn. App. 14, 105 P.3d 395 (2004), the Washington cases cited by Russis, or their Wyoming case, support their extreme arguments against any buyer reliance on a seller's representations under any circumstances. Russis Br. at 25-27. In Alejandre, the seller had disclosed that the septic system had failed and been repaired. 159 Wn.2d at 679. Thus, Alejandre is the opposite of this case, where seller Russi affirmatively misrepresented and concealed a history of defects and repairs. In further sharp contrast, in Alejandre the area that would have revealed the defect was "easily accessible for inspection. A careful examination would have led to discovery of the defective baffle and to further investigation." 159 Wn.2d at 690. This is completely opposite from this case, where disassembly by an experienced forensic roofing expert who knew exactly where to look for a known problem did not identify anything wrong with the roof or the source of the prior leaks. Accordingly, consistent with Alejandre the conclusion here is that reasonable, careful, and diligent action would not have told the Stienekes what Russi affirmatively hid.

In Hoel v. Rose, the seller was not liable for misstating the property boundaries and size because prior to the sale the buyer had obtained an appraisal which showed that the seller's statement was wrong. Russis'

discussion of the case omits this key point. Russis Br. at 26. Unlike this case, the buyer in Hoel v. Rose had information in hand which brought the seller's misstatements into question and therefore triggered a duty of further inquiry. Similarly, the Wyoming case cited by Russis held that the buyer could not recover if he "blindly" relied upon a representation, "the falsity of which would be obvious to him upon a cursory examination or investigation." Dewey v. Wentland, 38 P.3d 402, 413 (Wyo. 2002) (emphasis added). The case is in line with Washington cases such as Atherton. A \$10,000 roof disassembly is not "a cursory examination or investigation." Determining the general age of a house is a much easier proposition than identifying roof leaks that the buyers have been told did not occur, as evidenced by defense expert Cypher's testimony that he could not find their source or any other problem with the roof even after full and detailed disclosure.

For similar reasons, Russis are liable for fraud as well as fraudulent concealment. The nine elements of fraud are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of speaker that representation be acted upon by the plaintiff; (6) plaintiff's ignorance of the falsity; (7) plaintiffs' reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and, (9) damages

suffered by the plaintiff. Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). As with fraudulent concealment, the only element argued by Russis on appeal is Stienekes' right to rely on Russis' affirmative misrepresentations. Russis argue that the trial court's findings of Troy Russi's oral misrepresentations and the Stienekes' reliance is "irrelevant." Russi Br. at 26. This is contrary to the very language they quote from Alejandre just two pages earlier, "the 'right to rely' element of fraud is intrinsically linked to the duty of the one to whom the representations are made to exercise diligence with regard to those representations." Russis Br. at 24, quoting Alejandre, 159 Wn.2d at 690 (emphasis added).

The major difference between fraud and fraudulent concealment is that there is no affirmative representation in a fraudulent concealment situation. Accordingly, in fraud, where there is an affirmative misrepresentation, the "right to rely" is "intrinsically linked" to diligence "with regard to those representations." The Alejandre court did not hold that a buyer must demand to tear apart the seller's property to determine whether the seller told the truth in stating unequivocally that there was no problem. The seller in Alejandre disclosed that there had been a problem and repairs, the affected area was "easily" accessible, and inspection of the easily

accessible area would have revealed the defect. Here, Russi affirmatively misrepresented that there had not been any problems, the Stienekes relied on his affirmative statements, and even had they chosen to disbelieve them and hired a highly qualified forensic roof expert such as Cypher they would not have uncovered what Russi affirmatively misrepresented.

As is true in Russis' arguments about fraudulent concealment, acceptance of their arguments on fraud could severely disrupt the real estate market. If purchasers learned that they could not rely on a seller's direct and unequivocal representation that a house component never experienced a problem, purchasers would be faced with a dilemma: either walk away from the transaction, or effectively accuse sellers of lying by requesting an invasive inspection of the very condition that the seller had just promised to be in good condition. Moreover, there is no end. The Stienekes not only would have had to spend up to \$10,000 for a roof disassembly and water testing, but would have had to do the same on virtually every other condition in the house.<sup>14</sup> As the Supreme Court held in Alejandre, the extent of any duty of

---

<sup>14</sup> In addition to the sheer expense, one has to consider whether Russis would have consented to the water testing later identified by their expert Cypher as necessary to determine whether and where there had been a leak. Had water testing identified a leak, the purchasers would have walked away and the sellers would have been left with interior water damage.

further inquiry relates to the representations made. Russis cite no case holding that a buyer does not have the “right to rely” on direct representations in the complete absence of any indication that the representations might be false. The trial court’s decision was in accord with Alejandre and with the evidence before it. Russis are liable for fraud as well as fraudulent concealment, and the trial court should be affirmed on those grounds.

D. The Economic Loss Rule Does Not Help Russis

In Alejandre, the Supreme Court reaffirmed that the economic loss rule does not apply to claims of fraudulent concealment or fraud, “Thus, under Atherton, the Alejandres’ fraudulent concealment claim is not precluded by the economic loss rule.” 159 Wn.2d at 689, citing Atherton, 115 Wn.2d at 523-27. Russis did address fraudulent concealment in their appellate brief. Russis Br. at 24-27. They made no argument for expansion of the economic loss rule to fraud and fraudulent concealment. Id.

A second reason why the economic loss rule does not help Russis is that the court here awarded damages for “property damage to property other than the defective product or property.” Alejandre, 159 Wn.2d at 685. Such damages (along with “physical harm”) are “distinguished from [the] economic losses” which are precluded by the economic loss rule. Id., citing

Atherton, supra and Stuart v. Coldwell Banker Commercial Group, Inc., 109 Wn.2d 406, 420-22, 745 P.2d 1284 (1987). The court's damages award here included costs and expenses for interior repairs to the front hallway (sheetrock and paint, flooring, storage and housing), of \$18,038. CP 533. These components of the damage award are for "property damage to property other than the defective product or property," and are not "economic losses" barred by the rule. Alejandre, 159 Wn.2d at 685.

In Alejandre, the only damage claimed was for repair of the failed septic system. 159 Wn.2d at 685. Accordingly, "purely economic damages are at issue." Id. The damages awarded here are not "purely" economic damages. At most, the portion of the damage award for replacement of Stienekes' roof is comparable to the failed septic system, i.e., this case involves a "failed" roof. The roof repair damages might then have been foreclosed under negligent misrepresentation, but those damages should be affirmed because the economic loss rule does not apply to fraud and fraudulent concealment. Regardless of the theory (or theories) on which the trial court's decision is affirmed, and even if the economic loss rule were to be applied here, damages for "injury to other property" [i.e., the interior repairs] must be affirmed.

E. The Trial Court Acted Well Within Its Wide Discretion in Striking the Jury Demand in a Rescission Case

Russis admit that the court had “wide discretion” to determine whether the action was primarily legal or equitable and identify no respect in which the court abused that discretion. Russis Br. at 28-31. They concede that the action was both equitable and legal. *Id.* at 29. They quote the governing factors, but do not explain how any were misapplied here. *Id.*, quoting Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 368, 617 P.2d 704 (1980). For example, Russis do not demonstrate that the court erred in determining that the “main issues” were “primarily” equitable (Brown factor #3). They do not even mention the trial court’s statements in granting the motion to strike explaining the complexities that would affect orderly determination of the issues (Brown factor #4). RP 65-67. They have not demonstrated that the equitable and legal issues are “easily separable” (Brown factor #5).

The trial court foresaw that fashioning equitable relief to put the parties in a fair position with rescission would affect the amount of money awarded. RP 65-67. While the court’s exercise of discretion was so far within proper bounds that it should be upheld in any event, that the court proved correct in hindsight should give this court added comfort in affirming.

The court first determined the scope of relief that would be part of the equitable rescission remedy. RP 529-32. Only then did it determine damages if rescission were not elected. RP 532-33. Russis have it backward in arguing that the “complexities” would need to be considered only after damages were determined. Russis’ Br. at 30. Russis also are wrong in contending that the case was one for damages only until the “remedy stage.” Id. The equitable remedy of rescission can be awarded without fault. See, e.g., Yakima County Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 390, 858 P.2d 245 (1993) (“even a material innocent misrepresentation can render a contract voidable”).

Russis argue that a jury should have been impaneled to hear the buyers’ damages case. Russis’ Br. at 30. They cite no authority for this proposition and did not request this in their opposition to the motion to strike below.<sup>15</sup> Russis also cite two cases and CR 39(c) to argue that the court “should” have used an advisory jury. Russis’ Br. at 30-31. Both the rule and cases provide that a court “may” use an advisory jury. Russis did not request

---

<sup>15</sup> Russis’ unsupported statement immediately follows their cite to Auburn Mechanical, Inc. v. Lydig Construction, Inc., 89 Wn. App. 893, 902, 951 P.2d 311 (1998), implying that the case supports the statement that follows. It does not. The Auburn Mechanical court held that there was a right to jury trial because “money damages is the only remedy sought here.” 89 Wn. App. at 902 (emphasis added).

an advisory jury. Even if they had, the decision to not use one was not reversible error, or any error at all.

F. Russis Have Waived Any Challenge to the Grounds for Awarding Attorneys' Fees

Russis argue that the “only potential ground” for the trial court’s fee award was the purchase and sale agreement. Russi Br. at 31. The actual basis of the fee order was that this was “an action in tort . . . based on a contract containing an attorney fee provision.” Brown v. Johnson, 109 Wn. App. at 58; Hill v. Cox, 110 Wn. App. at 411-12. The court held that “the agreement was central to the dispute in the sense described in Hill v. Cox.” CP 943 (fee order, Conclusion 1). See also CP 628 (Conclusion 19); CP 534 (quoting Hill). This case is indistinguishable from Brown, where fees were recoverable pursuant to the contract where seller’s failure to disclose on Form 17 “was but one act among several.” 109 Wn. App. at 59, n.5.

Russis did not address the trial court’s actual grounds for fees. They have waived any challenge to the grounds. Ortblad v. State, 85 Wn.2d 109, 111-12, 530 P.2d 635 (1975).<sup>16</sup>

---

<sup>16</sup> Russis have argued that fees should not be awarded against them if they prevail on appeal. That is the only argument they have preserved.

G. The Form 17 Disclosure Statement Was Signed by Both Sides and Became Part of the Parties' Agreement

Russis rely on the purchase and sale agreement's integration clause. Russis Br. at 18-19. But that provision did not preclude all modification; rather, it required contract modification to be signed by both sides. Ex. 32, ¶ n (“no modification ... shall be effective unless agreed in writing and signed by Buyer and Seller”) (emphasis added). The Form 17 Disclosure Statement was “in writing,” and was signed by both parties. Ex. 36. It became an agreement between the parties.

Russis claim that the court did not identify the “circumstances” that it cited in finding that the Disclosure Statement was an agreement between the parties. Russis Br. at 18. The court explained why it would be “nonsensical” to find that the parties intended the Disclosure Statement to have no meaning or effect. RP 1771. It cited the Disclosure Statement's provision for rescission within three days as confirmation of intent to modify the purchase and sale agreement, which had no such provision. RP 1771-72.

The trial court recognized that defendants contended that sellers “can lie all you want on this form, and it is not actionable.” RP 1738-39. The court concluded “that makes no sense,” and cannot “be the state of the law.” RP 1771. The court was correct. Russis cite no case for their argument that

a Form 17 Disclosure Statement concealment never can be actionable. The case law and statute is to the contrary. Svensen v. Stock, 143 Wn.2d at 555-56 (seller had “affirmative duty” to fill out Form 17 correctly; “fraudulent concealment verdict is not separable from the Form 17 violation”); Brown v. Johnson, 109 Wn. App. at 58-59; Olmsted v. Mulder, 72 Wn. App. at 178-79; RCW 64.06.070 (preserving buyers’ remedies, including “contract”).

H. Stienekes Are Entitled to Fees on Appeal

Stienekes are entitled to fees on appeal on the same basis as awarded after trial. Hill v. Cox and Brown v. Johnson, supra; CP 943. CP 628, CP 534. RAP 18.1(b) (requiring section of brief for request for fees on appeal).

V. CONCLUSION

The judgment should be affirmed, and Stienekes should be awarded fees on appeal.

Dated this 2nd day of July, 2007.

Respectfully submitted,

GENDLER & MANN, LLP

By: Kathleen George WSBA 36288  
for Michael W. Gendler  
WSBA No. 8429  
Attorneys for Respondents



I am the legal assistant for Gendler & Mann, LLP., attorneys for respondents Stieneke herein. On the date and in the manner indicated below,

I caused Brief of Respondents Stieneke to be served on:

Shellie McGaughey  
Gulliford, McGaughey & Dunlap,  
PLLC  
2135 112<sup>th</sup> Avenue N.E., Suite 100  
Bellevue, WA 98004  
(for Defendants Russis)

- By United States Mail
- By Legal Messenger
- By Facsimile
- By Federal Express/Express Mail
- By Hand Delivery

Michael S. Rogers  
Reed McClure  
Two Union Square  
601 Union Street, Suite 1500  
Seattle, WA 98101-1363

- By United States Mail
- By Legal Messenger
- By Facsimile
- By Federal Express/Express Mail

Matthew Taylor  
Jeffrey P. Downer  
Lee Smart Cook Martin &  
Patterson, P.S.  
1800 One Convention Place  
701 Pike Street  
Seattle, WA 98101-3929  
(for Defendants Sterling Griffin &  
Keller Williams Realty)

- By United States Mail
- By Legal Messenger
- By Facsimile
- By Federal Express/Express Mail
- By Hand Delivery

DATED this 2<sup>nd</sup> day of July, 2007, at Seattle,  
Washington.

  
SARAH GRANT

\\Stieneke(Den)\35505-1\Dec-srv