

No. 37194-4-II

COURT OF APPEALS, DIVISION II - OF THE  
STATE OF WASHINGTON

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TERRANCE COX and JULIE K. COX

*Appellants*

vs.

JAMES H. O'BRIEN, d/b/a O'BRIEN HOME  
INSPECTION SERVICES,

*Respondent*

DANNY D. DEMERS and MARY I. DEMERS,

*Respondents*

BRIEF OF RESPONDENTS

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## **I. INTRODUCTION**

This is a case with three principal actors, the seller of a residence, the buyer of the residence, and a certified pest inspector, Mr. O'Brien. Appellants Cox bought the home from Respondents DeMers in June 2000. Since the house was 23 years old, the contract of sale required a pest inspection. Mr. O'Brien issued a report certifying the absence of any infestation. Appellants were urged by their realtor to have a home inspection performed prior to purchase. They declined to have an inspection, because they would have had to bear the expense.

After moving in, Appellants discovered evidence that made them doubt O'Brien's report, and they hired their own pest inspector, who confirmed their suspicions. O'Brien attempted to rectify the problems, but Appellants were not satisfied and they commenced an action against him. Appellants did not sue DeMers. DeMers were brought into the action as Third Party Defendants by O'Brien, based on a claim of indemnification allegedly found in the limitation of liability portion of the pest inspection contract. Years later, Appellants asserted claims for material misrepresentation, fraud, and unjust enrichment directly against DeMers. Prior to that, Appellants settled with O'Brien for \$24,410.00, plus an assignment of any rights under the pest inspection contract.

The trial court dismissed all but one of Appellants' claims, based on the economic loss rule, and further held that the purported indemnity contract, if read as Appellants contend it should be, violated public policy and was, therefore, void. The case proceeded to trial on the remaining theory of unjust enrichment. The trial court found that there was no claim for unjust enrichment and entered an order in favor of Respondents DeMers.

Respondents contend that the limitation of liability contract, as it is written, does not require anyone to indemnify O'Brien for the Appellants' claims, and if it did, Appellants, who also signed the contract, would be equally liable to O'Brien. The Appellants' other claims are barred by the economic loss rule.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

No. 1. The trial court was correct in finding that the Appellants' tort claims were barred by the economic loss rule and by invalidating the purported indemnity clause as being against public policy.

No. 2. The trial court correctly refused to allow indemnity between Appellants and Respondents.

No.3. The trial court correctly dismissed this action on Respondents' CR 50 Motion. The facts of this case do not establish unjust enrichment.

4. The court should have dismissed all of Appellants' claims on Summary Judgment, based on the economic loss rule.

**III.  
ISSUES PRESENTED**

1. Are Appellants' tort claims, including unjust enrichment, barred by the economic loss rule?
2. Did the trial court correctly interpret the contract between O'Brien Home Inspection Services, DeMers, and Cox?
3. Does the purported indemnity agreement violate RCW 4.24.115 and public policy?
4. Is there a duty to defend under a contractual indemnity clause, which is not part of an insurance contract, prior to the plaintiff proving facts that fall within the coverage of the clause?
5. Does the doctrine of unjust enrichment apply in the sale of real estate pursuant to a contract?
6. Are Appellants entitled to attorney fees?

**IV.  
STATEMENT OF THE CASE**

This case arises from the sale of a home by Mr. and Mrs. DeMers to Mr. and Mrs. Cox in June 2000. The home in question, referred to as the “Rest Place” home, was built in 1977. (RP DeMers 5) DeMers lived there from 1977 to 1995. (RP DeMers 6) They initially attempted to sell the home, pricing it at \$219,000.00. (RP DeMers 6) The house did not sell, so they converted it to a rental property. (RP DeMers 7) It was rented for about five years, to several tenants, and then listed it for sale at \$169,500. (RP DeMers 18) Appellants’ claim against DeMers is basically a case of buyers’ remorse.

Appellants and the DeMers were friends, but DeMers were unaware of Appellants’ interest in the property until they had toured the home with their own realtor and presented an offer to purchase. (RP DeMers 17) There was negotiation on the price, and Appellants eventually bought the property for \$162,500.00. (RP Cox 10, ex. 2) Although the parties were friends, this was an arms-length transaction, with no special promises or warranties. (RP Cox 56) The home was sold through a real estate broker and there was a written contract of sale and the usual real estate documents executed by the seller and the buyer, including a Purchase and Sale Agreement (Ex. 2) and an Addendum (Ex 2). The

addendum contains an express waiver of a home inspection, signed by Appellants. (Ex. 2) There is no evidence in the record that DeMers misled Appellants, and it is admitted that there is no evidence of fraud. (RP Summ. Judg. 23)

Appellants were aware of the age and use of the home prior to purchase. (RP Cox 54-56) They had ample opportunity to inspect the home or to have it professionally inspected, but declined to do so. (RP Cox 50-51) Mrs. Cox testified, “We knew the home was a fixer-upper.” (RP Cox 55) DeMers, as the sellers, filled out a “Real Property Transfer Disclosure Statement” commonly called a Form 17. (Ex. 6) It contains the Plaintiffs’ signatures, showing they received the document. On page one, under the subheading “**NOTICE TO BUYER**” it states:

“For a more comprehensive examination of the specific condition of the property, you are advised to obtain and pay for the services of a qualified specialist to inspect the property on your behalf, for example architects, engineers, land surveyors, plumbers, electricians, roofers, building inspectors, or pest and dry rot inspectors.”

There is no evidence, and no claim that DeMers failed to disclose any known defect in the house that could not have been detected by a home inspection. (RP Cox 54)

Under the terms of the contract, the sellers paid for a roof inspection, a septic inspection, and a pest inspection. (RP Cox 48)

Appellants could have had a professional home inspection, at their expense, but chose to buy the home without an inspection. (RP 54-54) On June 19, 2000, Mr. and Mrs. Cox executed an "Addendum to the Purchase Sale Agreement," in which they expressly waived a home inspection. (RP Cox 50) This states: "Buyer has waived the right to get an inspection on the home." (Ex. 2) Mr. and Mrs. Cox took the home "as is." They also negotiated a very good price on the home.

DeMers hired O'Brien Home Inspection Services (O'Brien), a certified pest inspector, to comply with the terms of sale. While DeMers paid for the inspection, both sellers and buyers signed the O'Brien contract. (Ex. 7) O'Brien certified the home as being pest free, and the sale closed. At some point, well after they took possession of the home, Appellants became dissatisfied with O'Brien's work. They hired their own inspector, who found a number of problems. (RP Cox 58) Eventually, Appellants sued O'Brien, but they did not sue DeMers. (CP 1-7) One of the issues with Mr. O'Brien was that he failed to detect some hidden dry rot inside the walls of a sauna room, behind wood paneling. (RP Cox 58-59) Prior to Appellants bringing suit against O'Brien, O'Brien attempted to resolve this by demolishing and rebuilding the sunroom, at a cost of \$4,120. (RP Cox 59) Appellants sued O'Brien anyway. (CP 1-7) There is no evidence

that DeMers were aware of the concealed damage. In opening statement, Appellants' counsel stated that the claims against O'Brien had been settled for an additional \$20,000.00, plus the assignment of any rights of indemnity. (RP Cox 57-58)

DeMers were brought into the case by O'Brien as Third-Party Defendants. (CP 85) O'Brien asserted a right of indemnity under a provision of the contract which states:

#### LIMITATION OF LIABILITY

The above inspecting firm endeavors to perform its services in a professional manner consistent with the care and skill ordinarily exercised by similar pest control professionals. No warranty, express or implied other than that set forth herein, is made or intended by performing the work identified in this agreement. Should this firm, or its employees, be found to have been negligent in their performance of services, it is agreed that the maximum total recovery against us or our employees shall be limited to our fee for the services provided under this agreement.

In the event any person or company makes a claim for any alleged error, or other act arising out of **their** performance of professional services under this contract, **each signer** of the agreement agrees to defend and hold **us** harmless from any such claim, including reasonable attorney fees and costs incurred by us in defending against this claim.

ACCEPTANCE: This report is of no force and effect unless signed by the Seller and Purchaser and a copy is returned to the inspecting firm. We have read the report and inspection standards and understand all of the terms and conditions thereof, including the scope and limitations thereof and accept the same. [Emphasis supplied]

Even though this language clearly refers to claims by a third party, based on the third party's negligence, O'Brien contended that it would apply to DeMers and Cox. Essentially, O'Brien asserted that DeMers were to insure O'Brien, for O'Brien's own negligence and breach of contract. The pest control contract also contains a limitation of remedies clause, limiting any consequential damages to the cost of the inspection, which was \$125.00. (Ex. 7) DeMers contend that there is no right of indemnity and that, even if there were, the limit of any claim for indemnity would be \$125.00. Appellants' position is that the contract has a misprint, and that it really says something else. There is no evidence of a misprint; it's just a theory.

The trial court dismissed most of Appellants claims, by granting DeMers' Motion for Summary Judgment. (CP 119) Appellants' counsel admitted that there was no evidence to support the fraud claim. (RP Summ. Judg. 23) The court found that the remaining claims of material misrepresentation and negligent misrepresentation were barred by the economic loss rule. (RP Summ. Judge. 25, CP 119) The court held that the purported indemnity clause was equivocal and ambiguous; and even if it granted indemnity, such indemnity would be against public policy, and therefore void. (RP Summ. Judg. 28-29, CP 119)

The trial court then held that there were issues of fact regarding the unjust enrichment claim, and that claim should proceed to trial.

The case was tried, to the court, on the remaining claim of unjust enrichment. This claim is found in paragraphs 3 and 4 of the Answer and Counterclaim of Fourth-Party Defendants: (CP 90-92)

“3. Fourth Party Plaintiff’s [DeMers] sold property to Fourth Party Defendants [Cox] which contained defects not ascertainable upon visual inspection which defects significantly diminished the value of the property conveyed. As a result, Fourth Party Plaintiffs have been unjustly enriched by receiving compensation for the property sold above and beyond what it was worth.”

Appellants’ complaints about the home were based largely on conditions that could probably have been easily discovered by a layperson, such as loose bathroom tile, water stains on the floor or ceiling, or plants touching the building. (RP Cox 54) A certified home inspector would also have found these alleged defects. (RP Cox 54) Appellants admit that there was no evidence of fraud by DeMers or that they had, in any way, misled Appellants. Appellants also admit that DeMers satisfied their contractual obligations by hiring certified pest, roof, and septic tank inspectors. After hearing testimony, the trial court dismissed Appellants’ case on a CR 50 Motion. (CP 121) There was no unjust enrichment, and claims based on quasi-contract do not apply when there is an express contract.

At trial, the trial court excluded any evidence of DeMers' liability insurance. (RP DeMers 30) The testimony cited in Appellants' brief is part of an offer of proof. (RP DeMers 30) Respondents contend that the presence or absence of liability insurance is excluded pursuant to ER 411 and because it is irrelevant.

Respondents submit that Appellants' remedy for the allegedly faulty pest inspection was against O'Brien. O'Brien compensated appellants. All of Appellants' other claims are precluded by the economic loss rule, or are not supported by evidence, or fail to state a claim upon which relief may be granted. The decisions below should be affirmed.

## V.

### **SUMMARY OF ARGUMENT**

Appellants' claims fall into two basic categories: the tort and quasi-contract claims made against DeMers, and the claim of indemnity from the pest control contract. Since this case arises from a written real estate contract, all of Appellants' tort and quasi-contract claims are barred by the economic loss rule. Unjust enrichment, a quasi-contract claim, does not apply to cases with an express written contract.

Appellants' contractual indemnity claim relies on a theory that the contract has a misprint. There is no evidence to support this theory. The misprint theory is also an admission that the contract, as written,

grants no indemnity. Any indemnity provision would apply equally to Appellants and DeMers, since they both signed the contract. Appellants confuse the duty of an insurer with that of a party to a non-insurance contract. There are no facts in the record to support a duty to indemnify. Finally, the indemnity provision violates RCW 4.24.115 . Appellants are not entitled to attorney fees, because they did not prevail at trial de novo.

## VI.

### ARGUMENT

#### A. Appellants' tort claims are barred by the economic loss rule.

This is an action for economic damages arising from a written contract to purchase real estate. Appellants asserted claims that DeMers negligently or fraudulently failed to disclose defects in the home in question. These were tort claims, seeking economic damages, arising out of a real estate contract. This is not permitted by the economic loss rule. This rule restricts parties to a contract to contractual remedies for purely economic claims, regardless of how the claims are characterized by the plaintiff. *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*, 124 Wn.2d 816, 822, 881 P.2d 986 (1994). This rule is intended to maintain the “fundamental boundaries of tort and contract law.” *Berschauer/Phillips* at 826. In *Berschauer/Phillips*, a general

contractor tried to sue the architect, engineer and an inspector for economic losses based on construction delays. The claims alleged negligence, but were based on contractual claims. These claims were dismissed under the economic loss rule. A party to a contract is not permitted to obtain more than the benefit of the contractual bargain through tort claims for economic loss. *Alejandre v. Bull*, 159 Wn.2d 674, 683, 153 P.3d 864 (2007)

The economic loss rule was reaffirmed, and to some extent broadened, by the Supreme Court in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007). That case is exactly on point here. It dealt with claims by an unhappy homebuyer, who alleged that the home was sold with a defective septic system. The court held, at 684-685, that claims of negligent or fraudulent misrepresentation were specifically barred by the economic loss rule. This was true, even though the septic tank was not specifically dealt with in the contract. The Court held, at 688, that the rule applied if the subject of the complaint could have been included if the parties desired to do so, even if the contract was silent.

In accord with the overwhelming weight of authority from other jurisdictions, and under our decision in *Berschauer/Phillips*, the economic loss rule applies regardless of whether the specific risk of loss was allocated in the parties' contract.

The theory behind this reasoning is that omitting a subject may be a bargaining point in the contract. If an issue could have been included, the economic loss rule applies.

In this case, the buyers could have required a full home inspection, not just a pest inspection, and they chose not to exercise that option, signing an express waiver. This issue was dealt with in the contract and precludes any claim of negligent misrepresentation.

Appellants made a claim of fraudulent misrepresentation. Appellants admitted, during the hearing on summary judgment, that they had no evidence of fraud. This was also dealt with in the *Alejandro* case. The court addressed this at 872:

However, the fraudulent concealment claim fails because, as the trial court ruled, the Alejandres failed to present sufficient evidence to support the claim. Under *Obde*, 56 Wn.2d 449, and similar cases, the vendor's duty to speak arises (1) where the residential dwelling has a concealed defect; (2) the vendor has knowledge of the defect; (3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect is unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser. *Atherton*, 115 Wn.2d at 524. The Alejandres failed to meet their burden of showing that the defect in the septic system would not have been discovered through a reasonably diligent inspection. In fact, the Alejandres accepted the septic system even though the inspection report from Walt's Septic Tank Service disclosed, on its face, that the inspection was incomplete because the back baffle had not been inspected. The testimony at trial showed that this part of the septic system was relatively shallow and easily

accessible for inspection. A careful examination would have led to discovery of the defective baffle and to further investigation.

In this case, the express waiver of the home inspection eliminates any claim of fraudulent concealment, as a matter of law. Appellants were not unfamiliar with the home, and any defects they now claim could have easily been detected before the purchase, had they chose to look. The contract allocated this risk to Appellants.

**B. Contracts mean what they say.**

Appellants have made the somewhat unusual argument that the contract contains a typographical error and that the court should read this into the contract. There is not one iota of evidence to support this assertion. The presence of the same “misprint” in a similar contract militates against this argument. Contracts are interpreted based on what they say, not what a party wishes they would say. It is not the court’s job to rewrite the contract. Appellants’ argument that this contract, after the court rewrites it to their specifications, shifts the risk of a poor inspection to DeMers, rather than O’Brien, is absurd. The contract says what it says.

The Supreme Court has held that contracts are interpreted based on the wording found therein, rather than subjective intent. In *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 498, 115 P.3d

262 (2005), the Court reinforces the general rule of construction and the application of the parol evidence rule.

In *Berg*, we recognized the difficulties associated with interpreting contracts solely on the basis of the "plain meaning" of the words in the document. We said that the process of interpretation involves " 'one person giv[ing] a meaning to the symbols of expression used by another person.' " *Berg*, 115 Wn.2d at 663 (quoting 3 ARTHUR LINTON CORBIN, CONTRACTS s 532, at 2 (1960)).(fn9) We recognized that the meaning of a writing " 'can almost never be plain except in a context.' " *Id.* at 668 (quoting RESTATEMENT (SECOND) OF CONTRACTS s 212 cmt. b (1981)). We adopted the "context rule" and recognized that intent of the contracting parties cannot be interpreted without examining the context surrounding an instrument's execution. If relevant for determining mutual intent, extrinsic evidence may include (1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties. *Id.* at 667 (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn .2d 250, 254, 510 P.2d 221 (1973)). In *Berg*, we concluded that extrinsic evidence was admissible to aid in understanding the parties' intent with respect to the meaning of "gross rentals." *Id.* at 672

Unfortunately, there has been much confusion over the implications of *Berg*. In *Hollis*, we sought to clarify the meaning of *Berg*: Initially *Berg* was viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation. During the past eight years, the rule announced in *Berg* has been explained and refined by this court, resulting in a more consistent, predictable approach to contract interpretation in this state.

*Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 693, 974 P.2d 836 (1999) (citations omitted). Since *Berg*, we have explained that surrounding circumstances and other extrinsic evidence are to be used "to determine the meaning of specific words and terms used " and not to "show an intention independent of the instrument" or to "**vary, contradict or modify the written word.**" *Id.* at 695-96 (emphasis added). See also *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 571, 919 P.2d 594 (1996) (court's intention in adopting the "context rule" was not "to allow such evidence to be employed to emasculate the written expression of" the meaning of the contract's terms); *In re Marriage of Schweitzer*, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997) ("context rule" cannot be used to show intention independent of the instrument); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 60 P.3d 1245 (2003) (admissible extrinsic evidence does not include evidence of a party's unilateral or subjective intent as to contract's meaning).

Our holding in *Berg* may have been misunderstood as it implicates the admission of parol and extrinsic evidence. We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wn. App. 593, 602, 815 P.2d 284 (1991). We impute an intention corresponding to the reasonable meaning of the words used. *Lynott v. Nat' l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981). We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Universal/Land Constr. Co. v. City of Spokane*, 49 Wn. App. 634, 637, 745 P.2d 53 (1987). **We do not interpret what was intended to be**

**written but what was written.** *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944), cited with approval in *Berg*, 115 Wn.2d at 669. [Emphasis supplied]

Mr. and Mrs. Cox are asking this court to interpret the contract they way they think it should read, rather than “what was written.” The Supreme Court in *Hearst Publishing Company, Supra*, by holding “We do not interpret what was intended to be written but what was written,” makes it clear that re-writing the contract is not the court’s function.

Under the rules of contract interpretation, a court will resolve any ambiguity in a contract against the drafter of the contract. *Northern Pacific Ry. Co. v. Sunnyside Irrigation District*, 85 Wn.2d 920, 922, 540 P.2d 1387 (1975). The contract in this case is on a form drafted by O’Brien. This applies to indemnification clauses. Indemnification clauses are subject to the fundamental rules of contractual construction, which require “reasonable construction so as to carry out, rather than defeat, the purpose.” *Continental. Cas. Co. v. Municipality of Metro. Seattle*, 66 Wash.2d 831, 835, 405 P.2d 581 (1965). A duty to indemnify generally “arises when the plaintiff in the underlying action prevails on facts that fall within coverage.” *Knipschild v. C-J Recreation, Inc.*, 74 Wn. App. 212, 216, 872 P.2d 1102 (1994). In this case, Appellants have never proven

that O'Brien was negligent or breached the contract. There is no factual basis for a claim of indemnity.

The purported indemnity clause is not labeled as an indemnity clause. The language relied on by Appellant is found under the Limitation of Liability provision. A logical reading leads one to conclude that it is clearly meant to deal with claims by parties other than the signatories to the contract.

In the event any person or company makes a claim for any alleged error, or other act arising out of **their** performance of professional services under this contract, **each signer of the agreement** agrees to defend and hold **us** harmless from any such claim, including reasonable attorney fees and costs incurred by us in defending against this claim. [Emphasis supplied].

The word "their" refers to the person making the claim, not O'Brien. This purported indemnity clause also clearly applies to all persons who signed the contract. Since both DeMers and Cox signed the contract, the Coxes would be suing themselves, if the "misprint" theory were accepted. The clause must also be read in context. If the indemnity provision is valid, then the same is true for the limitation of liability.

Appellants have attempted to make an argument that the purported indemnity clause is intended to shift the risk of O'Brien's negligence or breach of contract to DeMers, because DeMers has liability insurance. The contract makes no mention of insurance. The trial court

also sustained DeMers objection to the issue of liability insurance. ER 411 excludes such evidence. This rule applies in contract and tort cases.

The rule states:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

The term “otherwise wrongfully” takes the rule outside the issue on negligence. Appellants cite no authority to show an exception to the general rule of exclusion.

The court must interpret the contract as written. This contract does not require Cox or DeMers to indemnify O’Brien, for O’Brien’s negligence. Appellants’ argument, that the court should rewrite the contract, is essentially an admission that the contract, as written, does not support their position. The trial court’s dismissal should be affirmed.

**C. The purported indemnity agreement is against public policy and violates RCW4.24.115.**

DeMers were brought into this case solely on the basis of the Appellants’ allegation that O’Brien’s performance of the contract was negligent. No one claims that DeMers or Cox negligently conducted a pest inspection. O’Brien claims that the people who hired him have a

duty to indemnify him from claims arising out of his own negligence.

Even if the contract could reasonably be read to mean this, such a provision would be voided by RCW 4.24.115. This statute states:

**Validity of agreement to indemnify against liability for negligence relative to construction, alteration, improvement, etc., of structure or improvement attached to real estate.**

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property:

(1) Caused by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable;

(2) Caused by or resulting from the concurrent negligence of (a) the indemnitee or the indemnitee's agents or employees, and (b) the indemnitor or the indemnitor's agents or employees, is valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor's immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after June 11, 1986.

In this case, we are dealing with real property. The statute is quite broad and includes maintenance of real property. This statute allows indemnity

only in cases of concurrent negligence, not the sole negligence of the party seeking indemnity. *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 747, 912 P.2d 472 (1996). Any contractual attempt to shift liability for O'Brien's negligence to DeMers would be rendered void by this statute.

Indemnity agreements that are designed to exculpate one party to a contract for its own negligence, at the expense of the non-negligent party, are not favored in Washington. *Dirk v. Amerco Marketing Company of Spokane*, 88 Wn.2d 607, 612, 565 P.2d 90 (1977). In order to be valid, the intent to subsidize a negligent person must be expressed in unequivocal terms. *Griffiths v. Henry Broderick, Inc.*, 27 Wn.2d 901, 182 P.2d 18, 175 A.L.R. 1 (1947). This contract is very unclear and the indemnity language is not conspicuous or labeled as an indemnity clause. O'Brien is attempting to shift its own negligence onto the people who hired O'Brien. Neither law nor contract allow such a result.

Finally, both Cox and DeMers signed the contract with O'Brien. If O'Brien's reading of the contract were to be accepted, it would have Cox indemnifying O'Brien for half of anything that they could prove in damages against O'Brien. The circular nature of such an argument shows the absurdity of O'Brien's allegations. One hires an independent certified inspector to insulate oneself from liability, not to assume greater liability.

Cox has cited a number of insurance cases regarding the duty to defend under an insurance contract. Those cases have no application to this case. Insurance contracts are different from pest inspection contracts. First, the relationship of the parties in this case is different from the relationship of a party to an insurance contract. An insurance company has a quasi-fiduciary duty to its insured. *Van Noy v. State Farm*, 142 Wn.2d 784, 16 P.3d 74 (2001). No such duty arises from hiring a pest control inspector. Second, there must be an indemnity agreement in operation, which applies to the person from whom the duty of defense is claimed, before any duty to defend arises. In this case, the limitation of liability provision does not create a duty for Cox or DeMers to defend and indemnify O'Brien for O'Brien's negligence.

Appellants' reliance on cases involving the duty of insurance companies to defend claims is misplaced. The rule regarding duty to defend in a non-insurance context is different than the rule in insurance cases. This is discussed in *Sollitt Corp. v. Chapman Plumbing*, 67 Wn. App. 468, 472, 836 P.2d 851 (1992). The Court rejected the rule that is applied in insurance cases, wherein the duty is based on the wording of the complaint.

However, in cases involving contracts, we do not always apply such a strict test. Rather, the duty to defend is determined by the facts known at the time of the tender of

defense. *Parks v. Western Wash. Fair Ass'n*, 15 Wn. App. 852, 855, 553 P.2d 459 (1976). "[T]he facts at the time of the tender of defense must demonstrate that liability would eventually fall upon the indemnitor, thereby placing it under a duty to defend." *Dixon v. Fiat-Roosevelt Motors, Inc.*, 8 Wn. App. 689, 694, 509 P.2d 86 (1973).

In this case, the only allegation of negligence that existed when the tender of defense was made was against O'Brien. There was no allegation that DeMers were negligent. Under any rational reading of the actual wording of the limitation of liability provision of the pest inspection contract, there was no duty for Cox and DeMers to indemnify or defend O'Brien for the claims alleged by Appellants. The only claims were based on O'Brien's negligence. Appellants were compensated by O'Brien, which ends the matter.

**D. There is no claim for unjust enrichment.**

Unjust enrichment is an equitable doctrine that prevents one person from gaining the services or goods of another without payment. It simply does not apply to a claim by a buyer of a home for a reduction in the purchase price. Cases involving unjust enrichment, or quantum meruit, usually involve one party who has benefited from the actions of another in an unjust way. This is discussed in *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576 (2007):

Restatement (Third) of Restitution explains that "[a] person who is unjustly enriched at the expense of another is liable

in restitution to the other." [Citations omitted]. Quasi contracts, or contracts implied by law, are founded on the equitable principle of unjust enrichment that one should not be "unjustly enriched at the expense of another." *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 165, 776 P.2d 681 (1989) (quoting *Milone & Ticcu, Inc. v. Bona Fide Builders, Inc.*, 49 Wn.2d 363, 367, 301 P.2d 759 (1956)). A person has been unjustly enriched when he has profited or enriched himself at the expense of another contrary to equity. *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 731-32, 741 P.2d 58 (1987).

Enrichment alone will not trigger the doctrine; the enrichment must be unjust under the circumstances and as between the two parties to the transaction. *Farwest*, 48 Wn. App. at 732. Three elements must be established for unjust enrichment: (1) there must be a benefit conferred on one party by another; (2) the party receiving the benefit must have an appreciation or knowledge of the benefit; and (3) the receiving party must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value. *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 159-60, 810 P.2d 12 (1991).

Unjust enrichment encompasses the doctrine of quantum meruit. *Bort v. Parker*, 110 Wn. App. 561, 580-81, 42 P.3d 980 (2002). Quantum meruit literally means as much as deserved and is a remedy for restitution for a reasonable amount of work or services. *Douglas Nw., Inc., v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 683, 828 P.2d 565 (1992); *Eaton v. Engelcke Mfg., Inc.*, 37 Wn. App. 677, 680, 681 P.2d 1312 (1984). Generally, a party relying on quantum meruit may recover the *reasonable value* of the benefit their services conferred upon the defendant. *Bort*, 110 Wn. App. at 580-81. Unjust enrichment and quantum meruit are related doctrines; the former is a broader concept that encompasses the latter.

In this case, none of the elements of unjust enrichment exist. First, Appellants did not confer a benefit on DeMers. They bought a house for market value. Second, DeMers made no warranty that the house, which was 23 years old, was perfect or problem free. There is no evidence that they misled Plaintiffs. Third, there are no unjust circumstances. This is a routine sale of residential real estate. Plaintiff's bought a house for a fair value. Appellants should not have been surprised that a house of this age, which had been used as a rental property for five years, may have needed some repairs and updating. There is no unjust enrichment.

The doctrine of unjust enrichment is a claim of quasi contract. Generally, a party to an express contract may not bring an action on an implied contract relating to the same matter. "A party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract." *Chandler v. Washington Toll Bridge Authority*, 17 Wash.2d 591, 604, 137 P.2d 97 (1943). The contract in this case allocates the risk regarding unknown defects, or defects that can be discovered on reasonable inspection, to the buyer.

The trial court correctly dismissed the unjust enrichment claim.

The facts of this case, involving a sale of real estate by contract, do not meet any of the elements of unjust enrichment. Unjust enrichment is not a method of re-negotiating a contract.

**E. Appellants are not entitled to attorney fees.**

MAR 7.3 awards fees and costs against a party who “appeals the award and fails to improve the party’s position on trial de novo.” In this case, DeMers appealed the arbitration award and improved its position. Appellants’ case was dismissed. If the case were tried again, the court would have to await the verdict to determine if MAR 7.3 applied. Appellants are not entitled to fees.

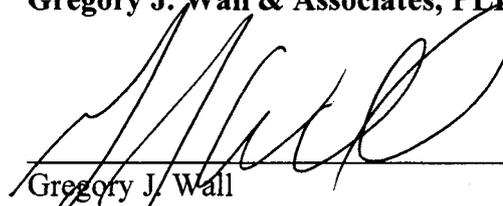
**VII.  
CONCLUSION**

This is a case in which a party selling a home complied with its obligations under the contract by hiring a certified pest inspector. They did not guarantee his work, nor does the pest control contract require them to do so. Appellants recognized that their remedy for the inspector’s breach of contract was against the inspector, and the inspector has compensated them. Appellants’ tort claims were barred by the economic loss rule. The argument that the limitation of liability section of the pest inspector’s contract somehow makes the person who hires the inspector the insurer of his negligence and breach of contract, is absurd and

unsupported by the plain language of the contract. Appellants have constructed a convoluted argument that such a duty exists, based upon the assertion that the contract has a misprint. There is no evidence in the record to support this outlandish assertion. Wishful thinking does not trump the plain language of the contract. Even if this theory were to be accepted, public policy and RCW 4.24.115 render such a contract void. The dismissal of this action against DeMers should be affirmed.

Respectfully Submitted this 18<sup>th</sup> day of July, 2008.

**Gregory J. Wall & Associates, PLLC**

A handwritten signature in black ink, appearing to read 'Gregory J. Wall', is written over a horizontal line. The signature is stylized and cursive.

Gregory J. Wall  
WSBA 8604  
Attorney for Respondents

## **APPENDIX**

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Protecting Health & Property

### WASHINGTON STATE PEST CONTROL ASSOCIATION Uniform Structural Wood Destroying Organism Inspection Report

Company Name O'Brien Home Inspection

Company Address 90 Raft Island, Gig Harbor, Wa 98335

Company Phone 253-549-3998 File/Case No. \_\_\_\_\_

Inspection Date 7-31-00 Time 10:00 Type of Building Single Family Residence

Address of Building Inspected 5202 RESTA BREMENTON 9834

Owner/Seller \_\_\_\_\_ Buyer \_\_\_\_\_

Structural Pest Inspector Name Jim O'Brien License # 38080

## FINAL REPORT

### Uniform Structural Wood Destroying Organism Inspection Report

At the time of this inspection, no visible evidence of active wood destroying organisms or conducive conditions were found in the subject structure.

This document is not intended to be a warranty of the subject structure in any manner. It is a written opinion of a qualified inspector based upon what was visible and evident at the time of inspection. Refer to inspection standards on reverse side.

Authorization Signature: Jim O'Brien This: Owner/Operator

**REMARKS:**

There were no WDOs (wood destroying organisms) or conducive conditions for WDOs found when inspection was performed.

#### LIMITATION OF LIABILITY

The above inspecting firm endeavors to perform its services in a professional manner consistent with the care and skill ordinarily exercised by similar pest control professionals. No warranty, express or implied, other than as set forth herein, is made or intended by performing the work identified in this agreement. Should this firm, or its employees, be found to have been negligent in their performance of services, it is agreed that the maximum total recovery against us or our employees shall be limited to our fee for the services provided under this agreement.

In the event any person or company makes a claim for any alleged error, omission, or other act arising out of their performance of professional services under this contract, each signer of this agreement agrees to defend and hold us harmless from any such claim, including reasonable attorney's fees and costs incurred by us in defending against the claim.

ACCEPTANCE: This report is of no force or effect unless signed by the Seller and Purchaser and a copy returned to the inspecting firm. We have read the report and inspection standards and understand all of the terms and conditions thereof, including the scope and limitations thereof and do accept the same:

Accepted by: [Signature] Date 7-31-00  
[Signature] Date 8/22/00



## WOOD DESTROYING ORGANISM INSPECTION STANDARDS of the WASHINGTON STATE PEST CONTROL ASSOCIATION

- I. WOOD DESTROYING ORGANISM INSPECTION REPORT.**  
A wood destroying organism inspection report is a written opinion of a qualified Washington State Licensed Structural Pest Control Inspector based upon what was visible and evident at the time of inspection. As such, the inspection report does not in any way represent or guarantee the structure to be free from wood destroying organisms or their damage, nor does it represent or guarantee that the total damage or infestation is limited to that detailed in this report.
- II. INSPECTION PROCEDURES.**  
The inspector shall make a thorough inspection of the subject structure to render an opinion of the visible evidence of wood destroying organisms, as well as, those conditions which are conducive to such wood destroying organisms.
- AREAS INSPECTED shall include:** Structure Exterior (that which is readily accessible, visible and physically, to an inspector at ground level); Structure Interior; Substructural Crawlspace(s); Garages, Carports, and Decks which are attached to the structure. (Deck inspection shall include: railings, wooden steps, and accessible wooden surface materials, as well as, deck substructures which are accessible (those with at least a 5" toe-to-joint clearance, or, in the case of elevated decks, those which can be safely reached using a 6" step ladder).)
- WOOD DESTROYING ORGANISMS shall include:** Subterranean Termites, Drywood Termites, Carpenter Ants, Wood Boring Beetles, and Wood Decay Fungus (rot).
- CONDUCTIVE CONDITIONS shall include, but not be limited to:**
- (a) **INADEQUATE CLEARANCES.** This shall normally exist where there is less than 18" clear space between the bottom of the floor joists and the unimproved ground area in any crawl area or portion thereof.
  - (b) **EARTH-WOOD CONTACT.** This condition exists where wood of the structure is in direct contact with the soil.
  - (c) **CELLULOSE DEBRIS.** Cellulose debris in the crawl area shall be considered any wood or wood by-product material that can be raised, or larger.
  - (d) **INADEQUATE VENTILATION.** Where there is detectable excessive moisture content in the wood of a substructure, and/or an active infestation of wood destroying organisms which can be attributed to the lack of sufficient ventilation in the substructure.
  - (e) **EXCESSIVE MOISTURE.** Any condition with the potential to enhance the moisture content of the wood such as: obvious plumbing or roof leaks; bare masonry, or standing and/or seasonal standing water in the crawl space.
- III. LIMITATIONS OF INSPECTIONS.**  
The inspecting firm shall not be held responsible by any party for any condition or consequence of wood destroying organisms which is beyond the scope of this inspection. The scope, defined in section II. INSPECTION PROCEDURES, is limited as follows:
- (a) **INACCESSIBLE AREAS.** Certain areas of a structure, which are inaccessible by their nature, may be subject to infestation of wood destroying organisms yet cannot be inspected without excavation, or unless physical obstructions are removed. Such areas include, but are not limited to: wall voids; spaces between joists; substructures concealed by subfloor insulation or which have inadequate clearance; floors beneath covering; attic floor; areas concealed by furniture, appliances, and/or personal possessions; and deck substructures with less than a 5-foot clearance.
  - (b) **ROOF SYSTEMS AND ATTIC AREAS.** The inspecting firm shall not be held responsible or assume liability in any manner concerning the condition of any portion of the roof area, including outside covering, soffits, eaves, rafter tails, fascia boards, barge rafters, gutters and inside eave spaces, their soundness and are visible and accessible from the ground. He/she may also make note of conditions of the gutters and downspouts that are contributing to moisture conditions in the substrate or at the exterior perimeter of the foundation. No opinion is rendered nor guarantee implied concerning the water-tight integrity of the roof or concerning the condition of future use of the roof coating system. Any comments made by the inspector regarding an obvious condition of (a) component(s) of the roof system or attic space(s) shall not imply an extension of scope of this inspection. It is recommended that if professional opinion or certifications are needed for these areas, that the interested parties contact a qualified, licensed roofing contractor.
  - (c) **SHEDS AND OUTBUILDINGS.** Sheds, garages, carports, decks, or other structures which are not attached to the main structure are excluded from this report unless specifically requested and noted. The inspecting firm reserves the right to charge additionally to inspect any unattached structures.
  - (d) **CARPENTER ANT DORMANCY.** Due to the natural habits of carpenter ants to go dormant during the winter months, carpenter ants may go undetected if this inspection was performed during their dormant season. We do not assume any responsibility for carpenter ant infestations that were not detected during their dormant season.
  - (e) **MAJOR ROT CONDITIONS.** In certain geographical areas of Washington State where wet climate is common, a large percentage of structures are subject to minor rot conditions. While such conditions are technically large infestations they may not substantially affect the quality, structural soundness or anticipated future life of the structure. Such conditions as spot areas on doors, window casings, and common weathering on siding, and non-supporting wooden members shall not be reported on inspection reports except at the discretion of the inspecting firm for purposes of clarification only.
  - (f) **STRUCTURAL ASSESSMENT.** While it may be possible for the pest inspector to note damaged materials, neither the inspector or the pest control firm is liable nor responsible in any way in determining the structural integrity of any insulated building materials. It is recommended that if professional opinions are needed in regards to this area that the interested party contact a qualified, licensed engineer or building contractor.
  - (g) **REQUIREMENTS OF OTHERS.** Inspection standards shall not be altered by any person, private or government agency or any given Structural Wood Destroying Organism inspection report.
- IV. REPORTS.**  
No report shall be issued by the inspecting firm unless a state licensed inspector from that firm has made a careful and thorough inspection of the structure in conformity with these standards. Reports shall be subject to II. LIMITATIONS OF INSPECTIONS.
- (a) **PRELIMINARY REPORTS.** Any report, whether pertaining to an initial or subsequent inspection, which discloses current visible evidence of wood destroying organisms or conducive conditions shall be considered a Preliminary Report only. As such, a Preliminary Report should not be relied upon for the closing of any real estate transaction and necessary steps should be taken to obtain a Final Report. In addition, Preliminary Reports shall contain inspection findings and shall recommend procedures necessary to obtain a Final Report. Preliminary Reports shall include a diagram to help identify locations of wood destroying organism infestations, infections, and/or conducive conditions.
  - (b) **FINAL REPORT.** A wood destroying organism inspection Final Report shall be issued when the inspecting firm performing the inspection has found no visible evidence of active wood destroying organisms or conducive conditions in the subject structure.
- V. WORK RECOMMENDATIONS AND TREATMENTS.**
- (a) **WARRANTIES.** No Final Report shall be issued unless those firms which contract to perform all or part of the work recommendations, warrant the quality of workmanship and the effectiveness of such work for a minimum period of one year from the date of completion. As used in these standards, the term "warranty" shall mean that, should the effectiveness of any work performed fail, the contracting firm shall correct the workmanship or perform additional treatments to eliminate infestations at no charge.
  - (b) **THIRD PARTY AGREEMENT.** Should the owner, purchaser, or other interested party elect to perform all or part of the work recommendations or to contract with a contractor other than the inspecting firm, the owner, buyer, or other interested party shall provide a written agreement certifying that either he and/or the contractor performing the work has completed the recommendations as specified in the inspection report and agree to assume full liability for, hold the inspecting firm harmless for any defects in the work performed (including but not limited to defects resulting from non-compliance with the Uniform Building Code (current revision)), and that all work is warranted for a minimum period of one year.
  - (c) **CONDITIONS REVEALED DURING PERFORMANCE OF RECOMMENDATIONS.** Should any wood destroying organism, damage, or conducive conditions be revealed during the performance of any recommendations, whether performed by the owner, the purchaser, a contractor, or any other party in addition to the inspecting firm, the inspecting firm must be notified of such conditions for the purpose of having a reasonable opportunity of re-inspection and determining any additional work recommendations before such conditions are covered. The owner, the purchaser, or any party undertaking the work shall be responsible for such notification. The inspecting firm, if notified as provided in this paragraph, shall perform an additional inspection to determine and document, at its discretion, any additional finding and/or recommendations that may be necessary to obtain a Final Report. Nothing contained herein shall prevent the inspecting firm from assessing additional charges for each additional inspection.



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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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

TERRANCE S. COX and JULIE K. COX,  
Husband and wife,

Appellants/Plaintiffs,

vs.

JAMES H. O'BRIEN, et us, et al.,  
Respondents/Defendants.

COURT OF APPEALS  
NO. 37194-4-II

SUPERIOR COURT  
NO. 01-2-03715-5

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 18th day of July 2008, she caused a copy  
of the following documents:

1. Brief of Respondents;
2. Certificate of Service

to be served on the parties listed below by the method(s) indicated:

Party/Counsel	Additional Information	Method of Service
William H. Broughton Broughton & Singleton, Inc., PS 9057 Washington Avenue NW Silverdale, WA 98383	<b>Counsel for Cox</b> WSBA #8858 Ph: 360-692-4888 Fax: 360-692-4987	<input checked="" type="checkbox"/> regular first-class U.S. Mail <input type="checkbox"/> personal delivery via FalCorp <input type="checkbox"/> Fed-Ex/overnight delivery <input type="checkbox"/> facsimile
Peter B. Klipstein Merrick, Hofstedt & Lindsey, P.S. 3101 Western Ave, Ste 200 Seattle, WA 98104	<b>Counsel for O'Brien</b> WSBA #26507 Ph: 206-682-0610 Fax: 206-467-2689	<input checked="" type="checkbox"/> regular first-class U.S. Mail <input type="checkbox"/> personal delivery via FalCorp <input type="checkbox"/> Fed-Ex/overnight delivery <input type="checkbox"/> facsimile

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

Dated at Port Orchard, Washington.

  
SANDRA RIVAS