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DIVISION II

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STATE OF WASHINGTON  
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No. 38981-9-II

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COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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Steven and Deborah Mattingly, husband and wife,  
Appellant,

v.

Palmer Ridge Homes, LLC, a Washington limited liability company,  
And Contractors Bonding and Insurance Company, Bond Account  
SG0213, a Washington corporation  
Respondent.

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BRIEF OF APPELLANT MATTINGLY

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Thomas L. Dickson, WSBA # 11802  
Kevin T. Steinacker, WSBA # 35475  
Shane L. Yelish, WSBA # 37838  
Attorney for Appellant  
Dickson Steinacker PS  
1401 Wells Fargo Plaza  
1201 Pacific Avenue  
Tacoma, WA 98402  
Telephone: 253-572-1000

**ORIGINAL**

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## **ASSIGNMENTS OF ERROR**

1. The trial court erred granting Palmer Ridge's Motion for Summary Judgment by order dated January 16, 2009, and specifically in finding that the 2-10 Home Buyer's Warranty prohibited the lawsuit.

2. The trial court erred in denying Plaintiff Mattingly's Motion for Reconsideration by order dated February 6, 2009.

3. The trial court erred in granting Palmer Ridge's Motion for Attorney Fees by Judgment dated February 13, 2009, and specifically in awarding Palmer Ridge its attorney fees and costs incurred.

4. The trial court erred in entering judgment dated February 13, 2009.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred in granting summary judgment in favor of Palmer Ridge when mutual modification is a question of fact and there was no consideration to support a claim that the 2-10 HBW modified the Construction Contract? (Assignments of Error 1 and 2)

2. Whether the trial court erred in granting summary judgment in favor of Palmer Ridge when mutual modification is a question of fact and the parties do not intend that the 2-10 HBW modified the Construction Contract? (Assignments of Error 1 and 2)

3. Whether the court erred in granting summary judgment in favor of Palmer Ridge when the 2-10 HBW failed to effectively disclaim the Construction Contract Express Warranties because purchase of the Mattingly Property closed prior to enrollment in the 2-10 HBW warranty program? (Assignments of Error 1 and 2)

4. Whether the court erred in granting summary judgment in favor of Palmer Ridge when the 2-10 HBW failed to effectively disclaim the Construction Contract Express Warranties because the terms of the 2-10 HBW were hidden in fine print? (Assignments of Error 1 and 2)

5. Whether the court erred in granting summary judgment in favor of Palmer Ridge when the 2-10 HBW failed to effectively disclaim the Construction Contract Express Warranties because Mattingly did not intend to disclaim these warranties? (Assignments of Error 1 and 2)

6. Whether the court erred in granting summary judgment in favor of Palmer Ridge when the 2-10 HBW failed to effectively disclaim the Construction Contract Express Warranties because the 2-10 HBW failed to set forth with particularity? (Assignments of Error 1 and 2)

7. Whether the court erred in granting summary judgment in favor of Palmer Ridge when the 2-10 HBW failed to effectively disclaim the implied the warranty of habitability? (Assignments of Error 1 and 2)

8. Whether the court erred in granting summary judgment in favor of Palmer Ridge when Palmer Ridge's motion for summary judgment did not cite to or rely upon the Construction Contract Limitation of Suit? (Assignments of Error 1 and 2)

9. Whether the court erred in granting summary judgment in favor of Palmer Ridge when the lawsuit was filed within the period provided in the Construction Contract Limitation of Suit? (Assignments of Error 1 and 2)

10. Whether the court erred in granting summary judgment in favor of Palmer Ridge when enforcement of the 2-10 HBW is against public policy because it required Mattingly to file suit and notify 2-10 HBW and Palmer Ridge within three weeks of occupying the home? (Assignments of Error 1 and 2)

11. Whether the trial court erred in granting attorney fees to Palmer Ridge? (Assignment 3 of Error 3)

## STATEMENT OF THE CASE

In late December 2005, Mattingly entered into a Residential Real Estate Purchase and Sale Agreement (“PSA”) to purchase from Palmer Ridge Homes LLC (“Palmer Ridge”) a five acre parcel of real property commonly known as 2901 342<sup>nd</sup> St. Ct. S., Roy, Pierce County, Washington (the “Property”). CP 120-21; 129. The PSA encompassed both acquisition of the Mattingly Property and construction by Palmer Ridge of a new single family home on the Mattingly Property for the agreed upon price of \$563,750.00 (the “Project”). CP 129. In early January of 2006, Palmer Ridge provided Mattingly with a contract for construction of the Project (the “Construction Contract”), which was executed by Mattingly on January 12, 2006. CP 121; 131-38.

The PSA required the closing of the transaction to occur within 120 days of Palmer Ridge obtaining a building permit. *Id.* The building permit was obtained on May 9, 2006. CP 140-42. The transaction closed May 18, 2006. CP 144-46.

### Construction Contract.

Palmer Ridge provided express warranties regarding quality of construction in the Construction Contract. Article 6 provides, in pertinent part, as follows:

6.1 All work shall be in accordance to the provision of the plans and specifications. All systems shall be in good working order.

6.2 All work shall be completed in a workman like manner, and shall comply with all applicable national, state and local building codes and laws.

CP 132 (the “Article 6 Warranties”). In addition to the Article 6 Warranties, Article 13 of the Construction Contract also requires Palmer Ridge warranty the project for one year from completion:

At the completion of the project, Contractor shall execute an instrument to Owner warranting the project for one year against defects in workmanship or materials utilized.

CP 134 (emphasis added) (the “Article 13 Warranty”). The Article 6 Warranties and the Article 13 Warranty are collectively referred to as the “Express Warranties.” The Construction Contract does not provide for, nor disclaim, any other warranties. CP 131-38.

Mattingly and Palmer Ridge also agreed in the Construction Contract to limit the period either party could initiate a lawsuit against one another. The Construction Contract provides as follows:

No legal action of any kind relating to the project, project performance or this contract shall be initiated by either party against the other party after one year beyond the completion of the project or cessation of work.

(the “Limitation of Suit”). CP 134 (emphasis added). As discussed in more detail below, the earliest Palmer Ridge completed or ceased work on

the Project was October 29, 2007. Accordingly, no legal action may be initiated after October 29, 2008.

2-10 Home Buyers Warranty.

On June 5, 2006, approximately three weeks after the purchase of the Mattingly Property closed, and almost one year before the home would be certified for occupancy by Pierce County, Palmer Ridge enrolled Mattingly in a warranty program with the 2-10 Home Buyers Warranty Company (the "2-10 HBW"). CP 148. Enrollment in the 2-10 HBW was in addition to the warranties provided for in the Construction Contract.

Prior to enrollment, Palmer Ridge did not provide Mattingly was an opportunity to review the terms of the 2-10 HBW or provide Mattingly with a Sample 2-10 HBW Booklet (the "Booklet"). CP 121-22; 150-81. The Booklet was not provided to Mattingly until after they were allowed to move into the home in May 2007. CP 122. Additionally, Mattingly never received a copy of the Certificate of Warranty Coverage from 2-10 HBW until after they retained counsel. CP 122.

The 2-10 HBW is not included in the Construction Contract or agreement between Mattingly and Palmer Ridge. In Article 1 of the Construction Contract, those documents which are part of the Construction

Documents are defined<sup>1</sup>. CP 131. The 2-10 Home Buyer's Warranty is not included within that definition. *Id.* Article 1 does limit the parties' agreement to the Contract Documents: "These contract documents represent the entire agreement of both parties and supersede any prior oral or written agreement." CP 131.

Furthermore, the terms of the 2-10 HBW do not appear in the Construction Contract. CP 131-38. In fact, differing terms which contradict and limit the provisions of the Construction Contract appear in the 2-10 HBW. *Compare* CP 132; 134 to CP 151; 154.

The 2-10 HBW warrants against defects in the builder's workmanship for one year from the Effective Date of Warranty, against defects in systems for two years from the Effective Date of Warranty, and against structural defects for ten years from the Effective Date of Warranty. CP 152-53. By its terms, the 2-10 HBW "Effective Date of Warranty is the earliest of [the] closing date, first title transfer, or the date [Mattingly] or anyone else first occupied the home if that was before closing." CP 151. The 2-10 HBW Company defined the Effective Date of Warranty as June 5, 2006. CP 106. It is unknown how this date was calculated. Mattingly and Palmer did execute the warranty enrollment

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<sup>1</sup> "The contract documents consist of this agreement, general conditions, construction documents, specifications, allowances, finish schedules, construction draw schedule, information disclosure statement, all addenda issued prior to execution of this agreement and all change orders or modifications issues and agreed to by both parties."

form on June 5, 2006, CP 277, but nowhere in the 2-10 HBW is the Effective Date of Warranty calculated based upon execution of the enrollment form.

The terms of the 2-10 HBW contradict the Construction Contract Express Warranties which Mattingly and Palmer Ridge agreed to. First, the 2-10 HBW modifies the date the Limitation of Suit commences and lapses. Additionally, the 2-10 HBW disclaims the Construction Contract Express Warranties. Finally, the 2-10 HBW disclaims all implied warranties afforded a new home purchaser.

Disclaimer of Warranties.

As mentioned, Palmer Ridge did not provide Mattingly a copy of the 2-10 HBW warranty booklet prior to enrollment in the warranty program, and Mattingly was therefore unaware that Section VII of the 2-10 HBW contains a waiver of implied warranties as follows:

WAIVER OF IMPLIED WARRANTIES\*\*. You have accepted the express Limited Warranty provided in this Warranty Booklet, and all other express or implied warranties, including any oral or written statements or representations made by Your Builder or any implied warranty of habitability, merchantability, or fitness, are hereby disclaimed by Your Builder ...

(the “2-10 Disclaimer”). CP 122; 154 (emphasis excluded). The same section of the 2-10 HBW also provides for an exclusive remedy, providing, in part:

EXCLUSIVE REMEDY AGREEMENT\*\*. Effective one year from the Effective Date of Warranty, You have waived the right to seek damages or other legal or equitable remedies from your Builder. ... Your only remedy in the event of a defect in or to Your Home or in or to the real property on which Your Home is situated is as provided to You under this express Limited Warranty.

*Id.* (emphasis excluded) (the “2-10 Exclusionary Clause”). Palmer Ridge did not even provide Mattingly a sample Booklet until after Mattingly was enrolled in the 2-10 HBW program and after they moved into the home. CP 121-22. Mattingly has never received any warranty booklet other than that with “sample” written across the pages. *Id.* Mr. Mattingly never intended to waive any warranties implied by law or the Construction Contract Express Warranties. CP 122.

Limitation of Suit.

The 2-10 Exclusionary Clause differs from the Construction Contract Limitation of Suit. CP 154. Based upon the calculation made by 2-10 HBW, the 2-10 Exclusionary Clause expired June 5, 2007,<sup>2</sup> and would prevent any suit against Palmer Ridge after that date. Pierce County Planning and Land Services (PALS) did not permit Mattingly to occupy the home until May 14, 2007. CP 140. Mattingly had

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<sup>2</sup> This date is confirmed first by the original certificate of warranty issued by the 2-10 HBW, CP 148, and then by the August 15, 2008 letter from 2-10 HBW representative Brittany Baxter. CP 106.

approximately three weeks to file suit against Palmer Ridge in order to comply with the 2-10 Exclusionary Clause.

Conversely, the Limitation of Suit in the Construction Contract limits the initiation of a lawsuit to one year from completion of construction or cessation of work. CP 134. Palmer Ridge and its subcontractors did not cease construction at the Project until sometime after October 29, 2007.

Substantial Completion of Home.

Once construction began, numerous delays and problems arose during the Project. Article 3 of the Construction Contract provides that construction is targeted to commence on March 1, 2006 and to be completed within 120-180 days. CP 131. Although Mattingly obtained financing on February 14, 2006, a certificate of occupancy was not issued PALS until May 14, 2007. CP 121.

On April 1, 2007, Mattingly and Palmer Ridge conducted a walk-through of the home for the pre-final inspection. CP 122. Palmer Ridge requested Mattingly execute a document titled Certificate of Substantial Completion which addressed implied warranties provided to Mattingly at paragraph 4, stating in part:

The owner understands that the duration of all **implied warranties** has been limited to one (1) year from the date of final payment or the date of occupancy, whichever

comes first. The owner understands that no warranties are being made by the contractor, except those in the written Limited Warranty provided by the contractor as part of the Contract Documents.

CP 183-84 (emphasis added). The Certificate of Substantial Completion failed to address any Construction Contract Express Warranties. *Id.*

The Certificate of Substantial Completion also provides for an Inspection Punch List (the “Punch List”) to be completed by the owner. CP 186-190. The Punch List did not have enough space to list all of the deficiencies in Palmer Ridge’s construction, so the parties agreed that Mattingly would create their own document and provide it to Palmer Ridge. CP 123; 195-97. The Certificate of Substantial Completion reflects this change at paragraph 6 and requires Palmer Ridge to complete or correct the work on the Punch List within ten days from the date the owner completes the list. CP 184.

The Punch List has two separate areas for the Palmer Ridge and the owner of the home to sign. CP 190. The first section, titled “First Inspection,” is to be signed when the walk-through is completed. The second section, titled “Final Inspection,” is to be signed when all the work is performed. The Final Inspection provides as follows:

Having re-inspected the project listed herein, the Owner has initialed all items from the initial inspection that needed to be completed. By signing below, the Owner agrees that

the project is in satisfactory condition, accepted as completed. . .”

CP 190.

After reviewing the construction work, Mattingly emailed Palmer Ridge on April 15, 2007 and expressed general concerns with the construction work. CP 195-97. Mattingly emailed the Punch List to Palmer Ridge the following day and identified many construction defects and incomplete construction. CP 194-97. Palmer reviewed the Punch List and responded via email, on April 17, 2007, agreeing to perform the work.

The April 17, 2007 email, in part, provides:

I have reviewed your list and agree with most of the items.

... I'll attend to what I think needs immediate attention. As far as most of the other cosmetic stuff, it is what it is.

... Steve – As you can tell, I'm very irritated with all of the items that you think need attention and of course, the mounting costs that I have been asked to bear because you are unhappy with this or that.

... I am not happy to see something like a few of the items you noted on this list like repairs to asphalt, concrete, etc. Just more costs to me....

... According to my bookkeeper, we are now paying out of our pocket, not from your loan or your pocket to complete your requested items and/or corrections that you apparently do not think cost money....

CP 199. The amendment to the Certificate of Substantial Completion required these items on the Punch List items to be remedied within 10 days, on or before April 26, 2007. CP 183-84.

Punch List Work.

Palmer Ridge failed to complete much of the Punch List work identified by Mattingly. CP 125-25; 227-38. Because the majority of the work was never completed, Mattingly never signed the Final Inspection document stating the construction was complete. CP 123; 195.

On May 14, 2007, although construction was not yet complete and much identified in the Punch List remained, PALS determined the home was safe to occupy and Mattingly was allowed to move into the house. CP 124. Once Mattingly moved into the home, the deficiencies in Palmer Ridge's construction became more evident. Mattingly and Palmer Ridge exchanged approximately fifty emails regarding the defects. CP 124-26. Despite Palmer Ridge's many promises to return to the Project and complete the construction, Palmer Ridge failed to complete and remedy much of the Punch List work. CP 126.

Of those fifty emails exchanged, in at least 13 of them Palmer Ridge discussed plans to return and complete the deficiencies identified in the Punch List. CP 125-26. Below is a summary of the contents of each of these 13 emails is contained in the Appendix at A-9.

Despite these assurances, Palmer Ridge failed to complete the majority, if not all, of the Punch List work. CP 125-26; 227-38. The following are portions of the construction which Palmer Ridge promised to complete but failed to complete:

Window adjustments and repairs
Adjust garage door
Deliver garage remotes
Troubleshoot Electrical issues
Flush Well System
Install cabinet rollouts
Remedy roof deformities
Complete drywall and interior touch-up painting
Strip and repaint front door
Complete adjustment of exterior doors
Complete paint of exterior doors and trim
Repair sheetrock and nailhead pops
Retexture ceiling to match
Repair shrinking caulking
Repair sheetrock damage from water intrusion

CP 126. These defects remain unfinished.

After Mattingly retained counsel, a claim was made to the 2-10 HBW under the warranty. In response to the claim, counsel for Mattingly received a letter stating as follows:

the effective date of your client's warranty with their builder was 06/05/2006. We regret to inform you that your clients' One Year Workmanship & Materials Coverage expired one year from this date.

CP 106-07.

On February 26, 2008, counsel for Mattingly sent a letter to counsel for Palmer Ridge providing Notice of Construction Defect as required by RCW 64.50.020. CP 109-11. Palmer Ridge exercised its right to inspect the Mattingly residence through a letter from counsel dated March 12, 2008. CP 113-14. Palmer Ridge requested the weeks of April 7<sup>th</sup> or 14<sup>th</sup> investigate home. *Id.* Though Mattingly consented to several days during the period requested, the site investigation did not occur until May 28, 2008.

On August 29, 2008, counsel for Palmer Ridge offered to perform inadequate repairs to the Mattingly residence. CP 118-19. Mattingly filed its complaint herein on October 16, 2008. CP 1-13. Mattingly's suit was dismissed on summary judgment based on the language of the 2-10 HBW. CP 307-08. Mattingly's subsequent motion for reconsideration was also denied. CP 402-03. Mattingly timely appealed.

### **ARGUMENT**

Summary judgment in this matter must be reversed because the facts presented establish genuine issues of material fact whether the 2-10 HBW effectively modified or disclaimed provisions of the Construction Contract and implied warranties and whether the Construction Contract Limitation of Suit barred this lawsuit. Appellate courts review a grant of summary judgment de novo, engaging in the same inquiry as the trial

court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). A summary judgment motion may be granted under CR 56(c) only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue concerning any material fact, and the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The court must consider all facts submitted, and all reasonable inferences from the facts must be considered in the light most favorable to the nonmoving party. *Id.* The burden is on the moving party to prove there is no genuine issue of fact which could influence the trial. *Hartley v. State*, 102 Wn.2d 768, 774, 698 P.2d 77 (1985). A question of fact may be determined as a matter of law only if reasonable minds could reach but one conclusion from the facts. *Id.* at 775.

Palmer Ridge warranted the construction will comply with plans and specifications, will be performed in a quality and workmanlike manner, and comply with all applicable building codes. CP 132. Palmer Ridge also warranted the Project against defects in workmanship or material for one year from completion or cessation of work in the Article 13 Warranty.

After Palmer Ridge abandoned work at the Project, a construction expert inspected the Project and learned, in addition to incomplete work,

that construction defects existed. Mattingly demanded Palmer Ridge honor the Construction Contract warranties. Palmer Ridge refused, relying upon the 2-10 Disclaimer and 2-10 Exclusionary Clause. Palmer Ridge's failure to honor the warranties in the Construction Contract breaches the contract entitling Mattingly to damages.

The trial court erred in granting Palmer Ridge's motion for summary judgment for the following reasons: (1) the 2-10 HBW fails to effectively modify the Construction Contract; (2) the 2-10 Disclaimer was not valid to disclaim the Construction Contract Express Warranties; (3) the 2-10 Disclaimer failed to validly disclaim the implied warranty of habitability; (4) Palmer Ridge did not meet its burden proving the Limitation of Suit barred this lawsuit in its moving papers; (5) the Limitation of Suit in the Construction Contract does not bar this lawsuit; and (6) the requirement for Mattingly to file a lawsuit three weeks after occupying the home is unreasonable and should not be enforced by the court.

In addition to granting Palmer Ridge's motion for summary judgment in error, the trial court again erred in its award of attorney fees to Palmer Ridge.

**I. The 2-10 HBW Did Not Effectively Modify the Construction Contract.**

The 2-10 HBW did not effectively modify the Construction Contract. Mutual modification of a contract by subsequent agreement of the parties arises out of the intention of the parties and requires a meeting of the minds. *Wagner v. Wagner*, 95 Wn.2d 94, 103, 621 P.2d 1279 (1980). For an effective modification, there must be consideration or a mutual change in obligations and rights separate from that of the original contract. *Id.* Whether a basic contract was intended to be modified by a separate document is a question of fact to be determined on the basis of whether a “reasonable person looking at the objective manifestations of the parties’ intent would find they had intended this obligation to be a part of the contract.” *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522-23, 826 P.2d 664 (1992) (emphasis added). Intent to mutually modify the agreement cannot be based on doubtful or ambiguous factors. *Wagner*, 95 Wn.2d at 103. A mutual modification must be proven by clear and convincing evidence. *Neilsen v. Northern Equity Corp.*, 47 Wn.2d 171, 176, 286 P.2d 1031 (1955); *Tonseth v. Serwold*, 22 Wn.2d 629, 644, 157 P.2d 333 (1945).

Palmer Ridge failed to even allege the legal requirements for modification of the Construction Contract, or provide any facts or

evidence that could support such a conclusion. Because a mutual modification must be proven by clear and convincing evidence, summary judgment should have been denied.

Additionally, Palmer Ridge's motion for summary judgment relies upon the 2-10 Exclusionary Clause<sup>3</sup> which is inconsistent with the Limitation of Suit. Palmer Ridge's failure to honor the Construction Contract Warranties breaches the contract entitling Mattingly to damages. The provisions of the 2-10 HBW are irrelevant to determining whether the Construction Contract was breached because the 2-10 HBW does not modify the Construction Contract.

A. There Was No Exchange of Consideration or Mutual Change In Obligations Between the Parties.

When taking the facts in the light most favorable to Mattingly, the mutual modification theory fails for lack of consideration. A subsequent agreement is not supported by consideration if one party is to perform some additional obligation while the other party is simply to perform that which he already promised to perform. *Rosellini v. Banchemo*, 83 Wn.2d 268, 273, 517 P.2d 955 (1974).

In *Rosellini*, the parties entered into a contract for a contractor to construct a building with a stated maximum cost of \$56,146. 83 Wn.2d at

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<sup>3</sup> "An exclusionary clause restricts the remedies available to one or both parties once a breach is established." *Shroeder*, 86 Wn.2d at 259.

269. After problems arose with the construction, the parties signed a second written agreement on October 17, 1969, lowering the maximum cost to \$52,000. *Id.* Assent to the October 17<sup>th</sup> agreement was not disputed by the parties. *Id.* After cost overruns mounted and the owner declined to pay more than \$52,000, the contractor recorded lien and filed a foreclosure suit. *Id.* In finding for the plaintiff, the court held the October 17<sup>th</sup> agreement unenforceable because it was unsupported by consideration. *Id.* at 273. The plaintiff had an antecedent duty to complete the building and the defendant had an antecedent duty to pay a maximum of \$56,146. *Id.* Under the later agreement, plaintiff had the same duty while defendant had a lesser duty. *Id.* No exchange in obligations occurred and no consideration exchanged. *Id.*

There was no modification of the Construction Contract by the 2-10 HBW because there was no consideration. After execution of the 2-10 HBW, Mattingly had the same duty to pay the same amount of money as stated in the Construction Contract. Palmer Ridge had a lessened duty in the form of disclaimed warranties and a different and shorter limitation of suit period.

For the same reasons expressed in *Rosellini*, the modification by the 2-10 HBW lacked consideration and is unenforceable, and the original terms of the Construction Contract control. Palmer Ridge is unable to

establish by clear and convincing evidence that an exchange of consideration or mutual change in obligation occurred sufficient to find a modification of the Construction Contract.

B. Mattingly Had No Intent to Modify the Construction Contract.

Mattingly did not intend for the 2-10 HBW to modify the Construction Contract. Whether a basic contract was intended to be modified by a separate document is a question of fact. *Swanson*, 118 Wn.2d at 522-23. The court must consider all facts submitted, and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party, Mattingly. *Wilson*, 98 Wn.2d at 437.

Mattingly did not intend to modify the original Construction Contract. He testified:

I was unaware that our enrollment in the 2-10 HBW would limit the warranties in the construction contract. I did not intend for the warranties we were provided to be limited in this way.

I did not intend for the 2-10 HBW to waive all express warranties provided for in the Construction Contract as well as any implied warranties provided in law. I did not want to, intend to, or believe that the warranties afforded to my wife and I by the Construction Contract were permitted to be modified or changed.

CP 122; 351-52.

To prove the 2-10 HBW modified the Construction Contract, Palmer Ridge must submit facts by which the only reasonable inference is that Mattingly intended to modify the Construction Contract. A trier of fact may infer from Mattingly's testimony that he did not intend to modify the Construction Contract, and this conclusion is supported by the fact that he was not provided with the Booklet prior to enrollment.

The question of mutual modification should not be decided on summary judgment because it is a question of fact. At a minimum, Mattingly's testimony creates an issue of fact which should have defeated Palmer Ridge' motion for summary judgment. The 2-10 Disclaimer and 2-10 Exclusionary Clause should not have been included in the court's consideration of summary judgment.

## **II. Invalid Disclaimer of the Construction Contract Express Warranties by the 2-10 HBW.**

The terms of the 2-10 HBW cannot be enforced against Mattingly because the 2-10 HBW does not effectively limit Mattingly's right to seek relief, nor disclaim the Construction Contract Express Warranties. "A disclaimer clause is a device used to exclude or limit the seller's warranties; it attempts to control the seller's liability by reducing the number of situations in which the seller can be in breach." *Schroeder v. Fageol Motors Inc.*, 86 Wn.2d 256, 259, 544 P.2d 20 (1975). A seller's

disclaimer must (1) be explicitly negotiated or bargained for and (2) set forth with particularity what is being disclaimed. *Berg v. Stromme*, 79 Wn.2d 184, 196, 484 P.2d 380 (1971); *Warner v. Design and Build Homes, Inc.*, 128 Wn. App. 34, 40, 114 P.3d 664 (2005)<sup>4</sup>. Disclaimers are not favored in the law. *Warner*, 128 Wn. App. at 40; *Rottinghaus v. Howell*, 35 Wn. App. 99, 103, 666 P.2d 899 (1983). The presumption leans against the party asserting the warranty was disclaimed, and that party has the burden to prove its legality. *Berg*, 79 Wn.2d at 194.

A. The Transaction Closed Before the Disclaimer Occurred.

Disclaimer of the Construction Contract Express Warranties by the 2-10 HBW is ineffective because Palmer Ridge enrolled Mattingly in the 2-10 HBW after purchase of the Mattingly Property closed and after the Construction Contract was agreed upon and executed. A disclaimer made after a sale is completed cannot be effective because it was not a part of the bargain between the parties. *Rottinghaus*, 35 Wn. App. at 103 (citing *Hartwig Farms Inc. v. Pacific Gamble Ronbinson Co.*, 28 Wn. App. 539, 543, 625 P.2d 171 (1981)).

Here, the Construction Contract containing the terms of construction and the Construction Contract Express Warranties was

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<sup>4</sup> The cited cases concern the Uniform Commercial Code. The UCC Article 2 provides guidance on disclaimer of warranties. *Olmsted v. Mulder*, 72 Wn. App. 169, 177, 863 P.2d 1355 (1994).

executed in January 2006. CP 131-138. The purchase of the Property closed on May 18, 2006. CP 144-46. The Project was not enrolled in the 2-10 HBW until June 5, 2006. CP 148. It is undisputed the Construction Contract was executed prior to enrollment in the 2-10 HBW and the PSA closed prior enrollment in the 2-10 HBW. Whether the Construction Contract, the PSA, or both, govern the Project, enrollment in the 2-10 HBW did not occur until June 5, 2006, after all transactions were completed. Under *Rottinghaus*, the 2-10 Disclaimer is unenforceable because it was not a part of the agreement between Mattingly and Palmer Ridge. The trial court erred in dismissing Mattingly's lawsuit based upon the provisions of the 2-10 HBW. Summary judgment should accordingly be reversed.

B. Mattingly Was Unaware of the Terms of the 2-10 HBW Because it was Hidden in Fine Print.

The 2-10 HBW cannot have disclaimed the parties' Construction Contract because the language was not bargained for. The "bargained for" requirement is applied:

to avoid giving effect to a seller's disclaimer of express or implied warranties where that disclaimer is in a contract prepared by the seller and contained in fine print or boilerplate. The seller has the burden of demonstrating that such a disclaimer was known to the buyer and bargained for before it will be considered valid and given effect.

*Olmsted*, 72 Wn. App. at 176-77 (citing *Lyall v. DeYoung*, 42 Wn. App. 252, 257, 711 P.2d 356 (1985) *review denied*, 105 Wn.2d 1009 (1986)).

In *Olmsted*, the “as is” clause was known to *Olmsted* and satisfied the “bargained for” requirement since *Olmsted* testified the provision was discussed with the real estate agent. *Id.* at 177.

In *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 693, 106 P.3d 258 (2005), the purchaser admitted seeing the disclaimer at issue. The court, however, reversed a grant of summary judgment and refused to enforce a disclaimer when it was “at least, debatable on the record whether [the home buyer] understood its implications.” *Id.*

Here, the 2-10 Disclaimer is hidden in a maze of fine print. The language is contained on page five of the 32-page Booklet. CP 154. Considering the manner in which the 2-10 HBW was imposed on *Mattingly*, the lack of an opportunity to review and agree to the terms, and the fact that the exclusive remedy is hidden in the middle of a 32-page document never provided to *Mattingly*, the disclaimer cannot be deemed to be “explicitly negotiated or bargained for.” Summary judgment should have been denied by the trial court.

C. Mattingly Did Not Intend to Disclaim the Warranties.

Palmer Ridge has the burden of demonstrating that the disclaimer was known to *Mattingly* and bargained for before it will be considered

valid and given effect. Mattingly testified he was not aware of the 2-10 Disclaimer, and did not intend to disclaim the Construction Contract Express Warranties or limit any express or implied warranties he had bargained for and was to receive. Mattingly testified as follows:

I was unaware that our enrollment in the 2-10 HBW would limit the warranties in the construction contract. I did not intend for the warranties we were provided to be limited in this way.

I did not intend for the 2-10 HBW to waive all express warranties provided for in the Construction Contract as well as any implied warranties provided in law. I did not want to, intend to, or believe that the warranties afforded to my wife and I by the Construction Contract were permitted to be modified or changed.

CP 122; 351-52.

Mattingly had previously negotiated for,<sup>5</sup> and agreed to be provided with, the extra protection of the Construction Contract Express Warranties. It is illogical that after negotiating the warranties Mattingly would agree to simply give those warranties away with no exchange of consideration or change in obligations. As the *Burbo* court reasoned, summary judgment was inappropriate because a trier of fact could find that Mattingly was unaware of the terms of the 2-10 or the consequences of enrollment therein. At a minimum, Mattingly's testimony raises a disputed issue of material fact pertaining to Mattingly's knowledge of the

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<sup>5</sup> Palmer Ridge acknowledged that Mattingly "extensively negotiated" the terms of the Construction Contract. CP 15.

terms of the warranty and its effect on Palmer Ridge's obligations after construction of the Project.

There is no evidence in the record that Mattingly was aware of the terms of the 2-10 HBW, that Palmer Ridge discussed the terms of the 2-10 HBW with Mattingly, or that Mattingly agreed to the disclaimers contained therein.<sup>6</sup> It is unknown whether the 2-10 Disclaimers are binding on Mattingly because the record lacks a copy of the signed 2-10 HBW enrollment form.

Taking the facts in the light most favorable to Mattingly, as required on summary judgment, Mattingly's testimony that he was not provided with a 2-10 HBW booklet at any time before occupying the home, and not until almost a year after enrollment in the 2-10 HBW, must be taken as true. Additionally, Mattingly's testimony that he was unaware the inconsistencies between the 2-10 HBW and Construction Contract must be taken as fact. This lack of knowledge on Mattingly's part precludes enforcement of the 2-10 HBW Disclaimer. Based upon this testimony, the "explicitly negotiated or bargained for" requirement cannot be met and Palmer Ridge is unable to meet their burden to prove the effectiveness of the disclaimer.<sup>7</sup> Because Palerm Ridge cannot prove the

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<sup>6</sup> The only copy of the 2-10 HBW booklet is clearly marked as a "SAMPLE." There is no evidence tying that sample booklet to the Mattingly transaction.

<sup>7</sup> *Stromme*, 79 Wn.2d at 194.

2-10 Disclaimer was “explicitly negotiated or bargained for,” the disclaimer is ineffective and summary judgment should have been denied.

D. The 2-10 HBW Fails to Set Forth with Particularity The Express Warranties Being Disclaimed.

The 2-10 HBW Disclaimer cannot be enforced because it is a blanket disclaimer of any and all express or implied warranties and does not set forth with particularity the Construction Contract Express Warranties being disclaimed. A clause fails to set forth with particularity the qualities and characteristics being disclaimed when the “clause is silent as to what is being disclaimed” and “does not expressly conflict with any printed clause.” *Olmsted*, 72 Wn. App at 177. Where an express warranty is created, a blanket disclaimer cannot fairly be read to disclaim the more specific express warranty because the disclaimer made no reference to the express warranties. *Id.* at 178; *see also Hartwig Farms*, 28 Wn. App. at 542; *Limited Flying Club, Inc. v. Wood*, 632 F.2d 51, 57 (8th Cir.1980) (applying UCC and ruling that where “as is” disclaimer did not address written express warranties, “as is” clause construed to disclaim only implied warranties, leaving express warranties intact).

In *Olmsted*, a real estate disclosure statement expressly warranted the septic and well systems, however, an addendum to the purchase and sale agreement included a statement that “the buyers accept the property

as-is.” 72 Wn. App. at 175. The court concluded that because the “as-is” clause was inconsistent with the express warranties relating to the sewer system and “is silent as to what is being disclaimed, it does not expressly conflict with any printed clause” of warranty already made and therefore failed to set forth with particularity the qualities and characteristics being disclaimed. *Id.*

Though *Olmsted* involved a real estate transaction not subject to the UCC, the court found the reasoning of UCC Article 2 regarding disclaimer of warranties persuasive and applied it by analogy. *Id.* at 177.

The court noted that RCW 62A.2-316(1) states:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (RCW 62A.2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

The court examined Official Comment 1 to this provision, shedding light on its purpose:

This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude “all warranties, express or implied.” It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.

Official Comment 1, RCW 62A.2-316.

Here, the Construction Contract warrants that all work will be done “in accordance to the provisions of the plans and specifications” and will be “completed in a workmanlike manner, and shall comply with all applicable national, state and local building codes and laws.” CP 132. Additionally, the Contractor warranted the construction work for one year from completion of the project or cessation of work. CP 134.

The 2-10 HBW fails to set forth with particularity that the Express Warranties are being disclaimed from the Construction Contract. The 2-10 HBW purports to waive “all other express or implied warranties, including any oral or written statements made by Your builder or any implied warranty of habitability, merchantability or fitness.” CP 154. No specific reference to any warranty, including the Article 6 Warranty, the Article 13 Warranty, or the Construction Contract, is made.

Like the “as-is” clause in *Olmsted*, the 2-10 Disclaimer does not expressly conflict with any printed clause and cannot fairly be read to disclaim these warranties. The particularity requirement is not met and the disclaimer provision did not effectively disclaim the express warranties.

### **III. Invalid Disclaimer of Implied Warranty of Habitability.**

The 2-10 HBW did not effectively disclaim the implied warranty of habitability. The implied warranty of habitability arises by implication from the sale transaction itself and is therefore, independent of the terms of the sales contract. *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987). A seller's disclaimer of the implied warranty must be (1) conspicuous, (2) known to the buyer, and (3) specifically bargained for. *Olmsted*, 72 Wn. App. at 176. In an action on the implied warranty, the seller must prove these elements.

The Construction Contract does not purport to disclaim the implied warranty of habitability. The 2-10 HBW is the only document which discusses the implied warranty of habitability. Even if the terms of the 2-10 HBW are binding on Mattingly, the 2-10 HBW's disclaimer of the implied warranty of habitability is ineffective.

A. Conspicuous.

For the same reasons discussed in Section II (B) above regarding the bargained for element and the 2-10 Disclaimer buried in a maze of fine print, the 2-10 Disclaimer is not conspicuous when it attempts to disclaim both express and implied warranties.

The 2-10 Disclaimer is contained on page five of the 32-page Booklet. CP 154. It is in the same size font as the rest of the 32 pages. Furthermore, Mattingly was not even provided the Booklet until almost

one year after enrollment in the 2-10 HBW. When a party is not provided an opportunity to review the language, such language should not be considered conspicuous.

B. Known to the Buyer.

Again, the 2-10 Disclaimer was not known to Mattingly. This is presented through the testimony of Mr. Mattingly that he was unaware that his enrollment would limit the warranties and did not believe the warranties would be modified or changed. CP 122. Palmer Ridge presented no evidence to contradict Mattingly's testimony. Palmer Ridge has the burden to prove the all three elements. More importantly, the trial court is required to take the facts in the light most favorable to Mattingly. When Palmer Ridge failed to offer any evidence to meet its burden, and Mattingly testifies he did not know the implied warranty of habitability would be disclaimed, the trial court should not have entered summary judgment.

C. Specifically Bargained For.

Finally, as discussed in Section II (A) above, whether the Construction Contract, the PSA, or both, govern the Project, enrollment in the 2-10 HBW did not occur until June 5, 2006, after all transactions were completed. The 2-10 Disclaimer is unenforceable because it was not a part of the agreement between Mattingly and Palmer Ridge.

Additionally, after the Construction Contract was executed, nothing more was bargained between the parties. The only reason Mattingly signed the 2-10 enrollment form was because Rick Palmer told him that the documentation was required for the warranty. CP 121. Palmer Ridge failed to inform Mattingly that enrollment would limit his redress or that Palmer Ridge was modifying the terms of the Construction Contract. When the Construction Contract does not address the implied warranty of habitability, this court should not permit Palmer Ridge to disclaim the implied warranty of habitability by enrolling Mattingly in the 2-10 HBW.

**IV. Palmer Ridge Failed to Meets Its Burden That it is Entitled to Judgment Barring Mattingly's Lawsuit Based Upon the Limitation of Suit in the Construction Contract.**

Palmer Ridge is prohibited from relying on the Article 13 Construction Contract Limitation of Suit when that provision was not argued in the moving papers of the motion for summary judgment. If the moving party does not meet its burden, summary judgment may not be entered, regardless of whether the opposing party has submitted responding materials. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). Only after the movant meets its burden of showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to demonstrate facts showing that

there is a genuine issue of material fact. *Id.* The movant may not present theories for summary judgment first raised in its rebuttal materials, thereby denying the non-moving party a fair opportunity to respond. *Truck Ins. Exch. of Farmers Ins. Group v. Century Indem. Co.*, 76 Wn. App. 527, 535-36, 887 P.2d 455 *review denied*, 127 Wn2d 1002 (1995) (error for trial court to grant summary judgment based on issue first raised in nonmoving party's reply brief).

Palmer Ridge's motion for summary judgment did not cite or explicitly argue the Limitation of Suit. CP 14-22. The Limitation of Suit was not argued by Palmer Ridge until the Reply brief, and only then in a footnote. CP 242. Defendant's failure to make specific reference to, and argument regarding, this provision precludes the trial court from entering summary judgment based on that provision.

The 2-10 HBW failed to effectively disclaim or modify the Construction Contract. Accordingly, even if the terms of the Construction Contract may affect the lawsuit filed by Mattingly, Palmer Ridge's failure to argue the provisions in its motion for summary judgment preclude summary judgment based thereon.

**V. In the Event Palmer Ridge Carried Its Burden, The Limitation of Suit Does Not Bar This Lawsuit.**

A. The Limitation of Suit Runs From Completion of Construction or Cessation of Work.

In the event this Court determines the Limitation of Suit was properly before the court, the Construction Contract does not bar Mattingly's lawsuit because the Limitation of Suit runs from completion of the contract or cessation of work. Palmer Ridge argued at summary judgment that Mattingly should have taken action within one year from substantial completion, or April 1, 2007. CP 17; 21. This argument lacks merit because none of the documents presented by Palmer Ridge measure any limitations period from substantial completion.<sup>8</sup>

The Limitation of Suit runs from the date of completion of construction, and not the date of substantial completion of construction. Case law in Washington clearly states that completion is not to be construed as substantial completion. Compare *Honeywell, Inc. v. Babcock*, 68 Wn.2d 239, 243-44, 412 P.2d 511 (1966) (incomplete punch list items means the project is not complete) with *1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 101 Wn. App. 923, 932, 6 P.3d 74 (2000) (substantial completion under RCW 4.16.310 occurs when a certificate of occupancy is issued and only "punch list" work items remain unfinished).

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<sup>8</sup> The Construction Contract's limitation on suits is measured from "completion of the project or cessation of work." CP 134. The Certificate of Substantial Completion limits warranties to one year from final payment or occupancy<sup>8</sup>. CP 184.

This difference is confirmed in Palmer Ridge's contract documents which create a distinction between substantial completion and completion. The Certificate of Substantial Completion sets the date construction is substantially complete as April 1, 2006. CP 183-84. On that date, the parties agreed as follows:

The Owner accepts the project as substantially complete and will assume full possession after said Inspection Check List is completed and full payment is received by Contractor.

CP 184. Comparing the Certificate of Substantial Completion language to the Final Inspection section of the Inspection Punch List, there is no doubt Palmer Ridge believes a difference exists between substantial completion and completion. The Final Inspection section provides:

Having re-inspected the project listed herein, the Owner has initialed all items from the initial inspection that needed to be completed. By signing below, the Owner agrees that the project is in satisfactory condition, accepted as completed. . .

CP 190. This document is intended to be signed after Palmer Ridge completed all the Punch List items. The re-inspection contemplated in the Final Inspection Punch List never occurred because Palmer Ridge failed to complete the work, and the "completion of construction" language therein was never signed by the parties. *Id.*

By its terms, the one year limitation of suit at Article 13 of the Construction Contract did not begin to run until construction of the home by Palmer Ridge and its subcontractors was completed or ceased. Case law recognizes a distinction between substantial completion and completion of construction, as do the documents drafted and provided by Palmer Ridge. The date of substantial completion is inconsequential to the Court's inquiry. It is the completion date which controls the Limitation of Suit period.

B. Mattingly Filed The Lawsuit Prior to Expiration of the Limitation of Suit.

The Construction Contract's Limitation of Suit does not bar Mattingly's lawsuit. Palmer Ridge and its subcontractors did not complete construction or cease work more than one year from the date Mattingly filed their complaint. Taking the facts in the light most favorable to Mattingly, to date the project has not been completed and the limitations period has not begun to run.

A general contractor is responsible to the owner for satisfactory and full completion of the construction contract. *Honeywell*, 68 Wn.2d 239. A general contractor who agrees to furnish all labor and materials necessary to construct a building cannot bring the contract to an end until all of the work is finished. *Id.*

The general contractor could not “bring to an end” the building contract until his subcontractors had finished their work. The general contractor was responsible to the owner for the satisfactory and full completion of the subcontractors’ work under the contract. The owner’s “punch list,” dated September 26, 1963, required further work to be performed under the contract.

... The general contractor’s work did not cease until the materials and work required by the contract had been furnished and completed.

*Id.* at 243-44. The court found the action was timely commenced and allowed the subcontractor to maintain its lawsuit.

The facts of this case are analogous to the facts of *Honeywell*. The Limitation of Suit runs from “completion of the project or cessation of work.” CP 134. Just like the contractor in *Honeywell*, Palmer Ridge could not cease work or complete the project until the Punch List items were complete. The Declaration of Mark Lawless, the construction expert retained by Mattingly, stated that the Punch List items were never completed and partially constitute the subject matter of this litigation. CP 227-238. Moreover, Palmer Ridge has acknowledged in numerous emails, most notably the July 26, 2007, October 28, 2007 and October 29, 2007 emails, that the Project remained incomplete and indicated that it would return to complete the Punch List items. CP 125-26; 206-226.

- i. *An Issue of Fact Exists Whether Palmer Ridge Ceased Work Or Completed the Project More Than One Year Before The Complaint Was Filed.*

Mattingly's complaint was filed within one year from the date Palmer Ridge ceased work on the project. The Limitation of Suit runs from "completion of the project or cessation of work." CP 134. As stated in *Honeywell, supra*, the general contractor's work does not cease until the materials and work required by the contract have been furnished and completed by both the general contractor and its subcontractors.

Palmer Ridge could not have completed construction of the Project until all Punch List items were finished. Many of the Punch List items are not completed today. CP 228-229. Mattingly has never believed that Palmer Ridge completed the construction of their home. CP 349.

Review of numerous emails between Mattingly and Palmer Ridge between June 11, 2007 and October 29, 2007 demonstrates that the Project remained incomplete as of October 29, 2007. A-9; CP 125-126; 206-226.<sup>9</sup> Palmer Ridge continually indicated that it would return to complete the Punch List items and defective construction. *Id.*

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<sup>9</sup> Email dated July 26, 2007 from Palmer Ridge: "If you want to actually finish this job and move forward, then try to focus on things that will be productive.... I will do whatever is necessary to gain completion as quickly as possible and get [the subcontractors] into finish." CP 126; 228-29.

A. Manner in Which Contract was Entered.

Regardless of when the 2-10 Exclusionary Clause expired, the limitation should not be enforced based upon the manner Mattingly was enrolled in the 2-10 HBW by Palmer Ridge. Mattingly was unaware of the terms of the 2-10 HBW and was not provided an opportunity to review the terms prior to enrollment. CP 121.

Palmer Ridge failed to provide the sample 2-10 HBW booklet to Mattingly before enrollment in the warranty program. Palmer Ridge also failed to explain to Mattingly that enrollment in the 2-10 would result in disclaimer of the express and implied warranties afforded to Mattingly. The manner in which Mattingly was enrolled in the 2-10 HBW is suspicious at best and Palmer Ridge should not be rewarded for such conduct.

B. Whether each party had a reasonable opportunity to understand the terms.

Mattingly signed the Construction Contract knowing the warranties and time limitations therein. Mattingly was *not* provided with knowledge of the terms of the 2-10 HBW or that he would be enrolled in a separate warranty program. The Construction Contract was executed on January 12, 2006. CP 135. The purchase of the Property closed May 18, 2006. The home was enrolled into the 2-10 HBW program on June 5,

2006. CP 106. The disclaimers in the sample warranty booklet were never described or explained to Mattingly by a representative of Palmer Ridge or the 2-10 HBW company, and Mattingly received no notice of them. CP 122. Mattingly did not know the 2-10 HBW differed from the terms of the Construction Contract had no reason to believe that the 2-10 HBW would limit his remedies or obligate him to notify a third-party company in addition to the builder. CP 121.

C. Whether the important terms were hidden in a maze of fine print.

The 2-10 Exclusionary Clause relied upon by Palmer Ridge is not conspicuous. The language is contained on page five of a 32-page sample warranty booklet. CP 154. Considering the manner in which the 2-10 HBW was imposed on Mattingly, the lack of an opportunity to review and agree to the terms, and the fact that the exclusive remedy is hidden in the middle of a 32-page document never provided to Mattingly, the remedy limitation cannot be enforced.

D. Enforcement of the 2-10 HBW is Against Public Policy.

The 2-10 Exclusionary Clause and 2-10 Disclaimer are against public policy and the court should not enforce them. Based upon the calculation made by the 2-10 HBW regarding Effective Date of Warranty, Mattingly's failure to notify the 2-10 HBW company and Palmer Ridge of

the warranty claims within three weeks from moving in to the home of all claims for construction defects or claims against Palmer Ridge related to the Project, Mattingly waived them.<sup>11</sup> Mattingly was provided three weeks from moving into the home to file a lawsuit. The result of the 2-10 Exclusionary Clause is inherently unreasonable.

The 2-10 HBW is being packaged to new homeowners as a protection against problems with construction by their contractor. What the homeowners are not being told is that the warranty strips them of far more rights than had they simply not accepted the warranty from the builder. A contractor should not be allowed to provide specific warranties regarding the quality of construction in a construction contract, and then, without the owner's knowledge and under the guise of added protection to the owner, disclaim these same warranties in boilerplate language of a subsequent document which the owner has no opportunity to review. *See Travis v. Wash. Horse Breeders Ass'n*, 111 Wn.2d 396, 404-05, 759 P.2d 418 (1988) (If an express warranty is created, "words purportedly disclaiming that warranty will have no effect, for the disclaiming language is inherently inconsistent.")

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<sup>11</sup> The Effective Date of Warranty was established by 2-10 HBW to be June 5, 2006, expiring June 5, 2007. CP 106. Mattingly was not permitted to occupy the home until May 14, 2007. CP 124; 140.

**VII. Mattingly is Entitled to Fees on Appeal Pursuant to RAP 18.1.**

Pursuant to RAP 18.1, Mattingly requests its attorneys' fees and costs incurred on appeal. For the reasons set forth at length above, as the prevailing party upon appeal before this Court, Mattingly has a contractual right to recover their attorneys' fees and costs of this action. *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989) (contractual provision for award of attorney fees at trial supports award of attorney fees on appeal); *Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 774, 750 P.2d 1290 (1988). Mattingly requests fees and costs on appeal.

Further, because summary judgment was improperly granted below, the trial court's award of attorney's fees and the subsequently entered judgment must be reversed.

**CONCLUSION**

The trial court should have denied Palmer Ridge's motion for summary judgment. Palmer Ridge provided express warranties pertaining to the quality of its construction. After Palmer Ridge abandoned work at the Project, Mattingly learned the construction work was incomplete and defective. Mattingly demanded Palmer Ridge honor the Construction Contract warranties and Palmer Ridge refused, relying upon the 2-10 Disclaimer and 2-10 Exclusionary Clause. Palmer Ridge's failure to

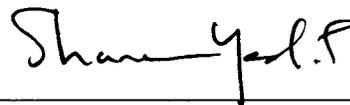
honor the warranties in the Construction Contract breaches the contract entitling Mattingly to damages.

The 2-10 HBW did not modify the Limitation of Suit. Moreover, the 2-10 Disclaimer ineffectively disclaimed the express warranties from Palmer Ridge and the implied warranty of habitability. The provisions of the Construction Contract control this dispute. The Limitation of Suit does not act to dismiss this lawsuit. The limitations period did not expire prior to filing of the suit. Also, Palmer Ridge failed to argue the Limitation of Suit provision at summary judgment and did not meet its burden.

For the foregoing reasons, Mattingly respectfully requests that this Court reverse the trial court's Order Granting Defendant' Motion For Summary Judgment dated January 16, 2009 dismissing the case, and the trial court's entry of the February 13, 2009 Judgment awarding Palmer Ridge attorneys' fees and the matter remanded for further proceedings. Mattingly also requests attorney's fees incurred during this appeal.

Respectfully submitted this 10<sup>th</sup> day of July, 2009.

DICKSON STEINACKER PS



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THOMAS L. DICKSON, WSBA #11802  
KEVIN T. STEINACKER, WSBA #35475  
SHANE L. YELISH, WSBA #37838  
Attorneys for Mattingly

**APPENDIX**

*Limited Flying Club, Inc. v. Wood*, 832 F.2d 51 (1980).....A-1

Summary of Emails between June 11, 2007 and October 29, 2007 . . . .A-9

**C**

United States Court of Appeals,  
Eighth Circuit.  
LIMITED FLYING CLUB, INC., an Iowa Corpora-  
tion, James E. Vining, Vernon H. Witt, and George C.  
Clausen, Appellees,  
v.  
Gerald O. WOOD and Eugene O. Wood, d/b/a Wood  
Aviation, Appellants.  
No. 79-2064.

Submitted June 12, 1980.  
Decided Sept. 16, 1980.

Diversity action was instituted for fraudulent misrepresentation and breach of express and implied warranties in connection with sale of a used airplane. The United States District Court for the Southern District of Iowa, William C. Stuart, Chief Judge, dismissed warranty counts but awarded compensatory and punitive damages for fraud, and defendants appealed. The Court of Appeals, Heaney, Circuit Judge, held that: (1) representations by seller that used airplane was a "good little airplane" and "airworthy" was insufficient to establish fraud under law of Iowa, and (2) seller expressly warranted airworthiness of used airplane under law of Iowa and, hence, was liable to buyers for damages arising from breach.

Reversed and remanded.

West Headnotes

**[1] Federal Courts 170B 853**

170B Federal Courts  
170BVIII Courts of Appeals  
170BVIII(K) Scope, Standards, and Extent  
170BVIII(K)5 Questions of Fact, Verdicts  
and Findings  
170Bk850 Clearly Erroneous Findings  
of Court or Jury in General  
170Bk853 k. Definite and Firm Con-  
viction of Mistake. Most Cited Cases  
A finding is clearly erroneous when, although there is  
evidence to support it, reviewing court on entire evi-  
dence is left with definite and firm conviction that a  
mistake has been committed. Fed.Rules Civ.Proc.  
Rule 52(a), 28 U.S.C.A.

**[2] Fraud 184 58(1)**

184 Fraud  
184II Actions  
184II(D) Evidence  
184k58 Weight and Sufficiency  
184k58(1) k. In General. Most Cited

Cases

A plaintiff in a fraud action at law in Iowa must estab-  
lish representation, falsity, materiality, scienter,  
intent to deceive, reliance, and resulting injury and  
damage by a preponderance of clear, satisfying and  
convincing evidence.

**[3] Fraud 184 13(2)**

184 Fraud  
184I Deception Constituting Fraud, and Liability  
Therefor  
184k8 Fraudulent Representations  
184k13 Falsity and Knowledge Thereof  
184k13(2) k. Knowledge of Defendant.

Most Cited Cases

**Fraud 184 13(3)**

184 Fraud  
184I Deception Constituting Fraud, and Liability  
Therefor  
184k8 Fraudulent Representations  
184k13 Falsity and Knowledge Thereof  
184k13(3) k. Statements Recklessly

Made; Negligent Misrepresentation. Most Cited Cases  
Scienter in context of fraud under law of Iowa requires  
a showing that false representations were made with  
knowledge that they were false; requirement may be  
met by showing that false representations were made  
in reckless disregard of their truth or falsity.

**[4] Fraud 184 13(2)**

184 Fraud  
184I Deception Constituting Fraud, and Liability  
Therefor  
184k8 Fraudulent Representations  
184k13 Falsity and Knowledge Thereof  
184k13(2) k. Knowledge of Defendant.

Most Cited Cases

**Fraud 184 13(3)**

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k8 Fraudulent Representations

184k13 Falsity and Knowledge Thereof

184k13(3) k. Statements Recklessly Made; Negligent Misrepresentation. Most Cited Cases  
Representations by seller that used airplane was a "good little airplane" and "airworthy" was insufficient to establish fraud under law of Iowa where seller told buyers on more than one occasion about airplane's previous crash landings and buyers were aware that repairs had been necessitated by those landings and, though seller's reliance on adequacy of repairs made by mechanics who had exhibited sufficient knowledge to meet qualifications and received a license was misguided, evidence did not show that seller had knowledge of defects or that his statements were made in reckless disregard of truth or falsity thereof and did not show that numerous major repairs went unreported in airplane's logbook.

[5] Sales 343 ↪262

343 Sales

343VI Warranties

343k259 Making and Requisites of Express Warranty

343k262 k. Reliance by Buyer on Statements. Most Cited Cases

Seller expressly warranted accuracy of airworthiness of used airplane under law of Iowa and, hence, was liable to buyers for damages arising from breach of that warranty where seller provided buyers with a logbook that set forth repair and inspection history of airplane and where buyers examined those entries and relied on certifications of airplane as airworthy so that those certifications formed part of basis of bargain as a description of goods which were similar to a description that might be provided by a blueprint. I.C.A. §§ 554.2313, 554.2313 comment.

[6] Sales 343 ↪261(1)

343 Sales

343VI Warranties

343k259 Making and Requisites of Express Warranty

343k261 Statements Constituting Warranty

343k261(1) k. In General. Most Cited

Cases

To create an express warranty of used airplane's airworthiness, there was no requirement under law of Iowa that seller have actual knowledge of airplane's airworthiness or lack of worthiness; his representation to buyers of plane as airworthy, based on description in logbook, created warranty. I.C.A. §§ 554.2313, 554.2313 comment.

[7] Sales 343 ↪267

343 Sales

343VI Warranties

343k265 Implied Warranty of Quality, Fitness, or Condition

343k267 k. Exclusion by Contract or Express Warranty or Refusal to Warrant. Most Cited Cases

Where seller presented logbook for used airplane to buyers for their inspection and went over its entries with them prior to time buyers signed the "as is" disclaimer and delivered the logbook with the airplane to buyers after the disclaimer was signed, and disclaimer itself made no reference to description of airplane contained in logbook, the "as is" clause operated under law of Iowa to disclaim all implied warranties, leaving the written express warranty of the logbook, including the warranty of airworthiness, intact. I.C.A. § 554.2316(1).

[8] Sales 343 ↪280

343 Sales

343VI Warranties

343k276 Construction and Operation

343k280 k. Conditions, Limitations, and Exceptions. Most Cited Cases

Words tending to limit or negate the seller's warranties must be construed under the law of Iowa as consistent with the warranties. I.C.A. § 554.2316(1).

[9] Evidence 157 ↪417(12)

157 Evidence

157XI Parol or Extrinsic Evidence Affecting Writings

157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument

157k417 Matters Not Included in Writing or for Which It Does Not Provide

157k417(12) k. Contracts of Sale. Most Cited Cases

Where the "as is" or "where is" clause was not a complete and exclusive statement of the terms of the agreement between parties in connection with sale of used airplane, the description of the airplane as set forth in the logbook was a consistent additional term and could be introduced under law of Iowa to explain the actual agreement between the parties. I.C.A. § 554.2316(1).

[10] Sales 343 ↪ 442(13)

343 Sales

343VIII Remedies of Buyer

343VIII(D) Actions and Counterclaims for Breach of Warranty

343k442 Damages

343k442(13) k. Use or Disposition of Goods and Necessity and Effect of Resale. Most Cited Cases

Sales 343 ↪ 445(1)

343 Sales

343VIII Remedies of Buyer

343VIII(D) Actions and Counterclaims for Breach of Warranty

343k443 Trial

343k445 Questions for Jury

343k445(1) k. In General. Most Cited

Cases

The measure of damages for breach of express warranty under law of Iowa in connection with the sale of used airplane required the trier of fact to determine whether seller offered to buy airplane back upon learning of its defects and, if so, for what price; if the trier of fact determined that such an offer was made, he was to determine whether the damages caused by the breach could have been mitigated by acceptance of that offer. I.C.A. § 554.2714(2, 3).

\*52 Richard C. Henry, Lansdale, Henry & Kneip, Tucson, Ariz., for appellants.

G. Wylie Pillers, III, Pillers, Pillers & Pillers, Clinton, Iowa, for appellees.

Before HEANEY and BRIGHT, Circuit Judges, and HUNGATE, District Judge.[FN\*]

FN\* The Honorable WILLIAM L. HUNGATE, United States District Judge, Eastern District of Missouri, sitting by designation.

HEANEY, Circuit Judge.

Limited Flying Club, Inc., and its three members brought this diversity action alleging fraudulent misrepresentation and breach of express and implied warranties in connection with the sale of a used airplane by Gerald and Eugene Wood. The case was tried to a magistrate,[FN1] sitting without a jury, who dismissed the warranty counts but awarded compensatory and punitive damages for fraud. The district court [FN2] adopted the magistrate's findings. We reverse and remand for consideration of damages in connection with the claim of breach of express warranty.

FN1. The Honorable Ronald E. Longstaff, United States Magistrate for the Southern District of Iowa.

FN2. The Honorable W. C. Stuart, Chief Judge, United States District Court for the Southern District of Iowa.

We summarize the facts in the light most favorable to the magistrate's findings. In the spring of 1973, Eugene Wood purchased a 1965 Mooney Mark IV airplane in Tucson, Arizona.[FN3] Prior to the purchase, the plane was involved in two forced "wheels up" landings. In the most recent, the plane's surface and structure were extensively damaged. The airplane was towed to a \*53 warehouse hangar operated by Wood at Ryan Field, an airport near Tucson. Eugene Wood then arranged for his son, Gerald, and George Mickelson, a mechanic licensed by the Federal Aviation Administration, to repair the aircraft.[FN4] Gerald and Mickelson inspected the damage to the airplane, planned the repairs and ordered the necessary parts. In May, 1973, Gerald attended aviation school and in June, he passed the FAA-required examination and received his Airframe and Powerplant (A & P) license authorizing him to make major aircraft repairs. Gerald and Mickelson removed the skins from the wings and belly of the plane and made repairs and replaced parts in many areas. Certain repairs and alterations were major, including the installation of an engine; the repair of a structural rim in the right wing; the repair and replacement of wing skins and inspection covers;

the replacement of belly fairings, a former assembly, a bulkhead, fairings, and a panel assembly; the replacement of belly skins, fuselage bottom skins and bulkheads; the replacement of landing gear linkage; the replacement of elevation linkage; and the installation of replacement retroacting links. These repairs were itemized in the airplane's logbook. Form 337, which is required by the FAA to be filed for each major repair, was filed only for the repair of the structural rim in the right wing.

FN3. Although Eugene Wood purchased the airplane, he held it jointly with his son, Gerald Wood.

FN4. George Mickelson died prior to the initiation of this lawsuit.

Mickelson, who held an Inspection Authorization (I.A.) license, approved and certified the airplane as airworthy in July, 1974. The airplane was again certified as airworthy in August, 1975, by David Ateah, who also held an I.A. license. Ateah was employed by Eugene Wood to inspect the airplane and was paid \$35 for the two and one-half to three-hour inspection. Eugene flew the plane frequently after its return to service in 1974, taking his family with him on some trips and flying for distances of up to 1,200 miles.

In late December of 1975, appellee James Vining was visiting Ryan Field and noticed the Mooney in Wood's hangar. He spoke with an unidentified person who told him the Mooney would be for sale. That person told Vining that the plane had previously been damaged in a belly landing. A few days later, Vining returned to the airfield and met Gerald Wood, who gave him the impression that the airplane was for sale and told Vining he should contact his father. Vining came back a few days later and met Eugene, who told him the plane might be for sale for approximately \$13,000. Eugene described the Mooney as a "nice little airplane" and "a good little airplane."

In early January, Vining returned to his home in Clinton, Iowa, and agreed with Vernon Witt and George Clausen to jointly purchase Wood's Mooney. Vining made a number of telephone calls to Wood, attempting to arrange the purchase. Eventually, the parties agreed that Vining would travel to Tucson to take possession of the airplane.

Vining and a pilot, Leo Cozzolino, arrived in Tucson on June 12, 1976. They visually inspected the airplane and Eugene showed them the logbook, reviewed its entries with them and discussed its two previous belly landings. Eugene suggested that Vining have the airplane inspected and certified before returning to Iowa; however, Vining was anxious to return home and stated his preference to have the inspection done there. Eugene then flew Cozzolino in the Mooney to Tucson International Airport, some fifteen to twenty miles away, to pick up a radio which was to be installed. Cozzolino flew the plane back to Ryan Field and the sale was completed; Vining paid Eugene \$14,200 for the airplane and Eugene delivered a Bill of Sale. At Eugene's request, Vining signed a typewritten document that stated as follows:

June 12, 1976

After inspection and trial flight, which have met with my approval, of Mooney N 7875 V, I have agreed to accept the aircraft on an "as is"- "where is" basis, for the amount previously agreed upon.

Cozzolino flew the airplane and Vining back to Clinton, Iowa, that day, with intermediate\*54 stops in Albuquerque, New Mexico, and Hutchinson, Kansas. During the next six weeks, the airplane was flown sixteen to eighteen hours and no problems arose.

The airplane was taken to Straley Flying Service in Clinton, Iowa, in August, 1976, for its annual inspection. The plane was grounded upon discovery of a number of major defects.

The plane was then flown by special ferry permit to Niederhauser Airways in Waterloo, the authorized Mooney dealer for the State of Iowa, where it was inspected and the following defects found:

1. Tunnel cover bent and ripped loose;
2. Wing skins improperly riveted and not fit flush (distorted-not predrilled and aligned);
3. Flap hinge ground out;
4. Right wing-skins improperly installed;
5. Center panel damaged;

6. Bottom side leading edge bent-also improper rivets, dents filled with putty and filler both main and center panel (illegal);
7. 1/4 to 3/8 slope in stabilizer;
8. Compression bend in tubing aft of firewall;
9. Illegal spliced stringers;
10. Damaged belly panel;
11. Defective truss illegally repaired at Station 33 (Exhibit 21);
12. Illegally repaired nose gear truss.

The plane was then flown, again by special ferry permit, to Kerrville, Texas, where it was inspected by Charles Dugosh, an expert in the construction of Mooney airplanes. He found many defects in the fuselage bottom, the wings, the fuselage, the nose gear truss and the stabilizer. Both Dugosh and Richard Carley, the mechanic who inspected the airplane in Iowa, testified that many of these defects would be observable on a normal annual inspection.

At some point after the defects were discovered, Vining telephoned Eugene and told him of the problems with the airplane. Eugene offered to buy the plane back. Vining testified that Eugene offered \$10,000, and Eugene testified that he offered another club member \$13,000. Vining rejected this offer and had the plane repaired at a cost of \$12,534.33.

The magistrate found that the plaintiffs had proven fraud by a preponderance of the evidence and awarded compensatory damages of \$12,534.33 (the cost of repairs) and punitive damages of \$15,000. The district court held that the magistrate had applied an incorrect burden of proof, and remanded the case to the magistrate to determine whether each element of the case had been proven by clear, satisfactory and convincing evidence. The magistrate subsequently found that this required burden of proof had been met and affirmed the damage award. The district court adopted the magistrate's memorandum as supplemented.

#### *I. Fraud*

[1] The Woods contend on appeal that the evidence does not support a finding of fraud. A finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed \* \* \*." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); see Fed.R.Civ.P. 52(a).

[2] The district court correctly determined that Iowa law controlled this diversity action. In order to recover on a fraud action at law in that state, "a plaintiff must establish each of the following elements by a preponderance of clear, satisfying and convincing evidence: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance, and (7) resulting injury and damage." B & B Asphalt Co., Inc. v. T. S. McShane Co., Inc., 242 N.W.2d 279, 284 (Iowa 1976); Grefe v. Ross, 231 N.W.2d 863, 864 (Iowa 1975).

[3] The Woods contend that the magistrate clearly erred in finding that the closely related elements of scienter and intent to deceive were proven. Scienter requires a showing that false representations were made with knowledge that they were false, \*55 although that requirement may be met by showing that false representations were made "in reckless disregard of their truth or falsity." B & B Asphalt Co., Inc. v. T. S. McShane Co., Inc., *supra*, 242 N.W.2d at 284; see Hall v. Wright 261 Iowa 758, 156 N.W.2d 661, 667-669 (1968). The magistrate found that scienter and intent to deceive were established by Eugene's representations that the airplane was a "good little airplane" and "airworthy" in light of Eugene's knowledge that the plane had been damaged in two belly landings, that numerous repairs had been made by an unqualified mechanic and that those repairs had not been reported in the airplane's logbook. He found that Eugene Wood "knew or should have known" that the airplane was not airworthy when delivered and that his erroneous statements were "made reprehensible by the degree of danger and risk to which the plaintiffs were exposed when defendants sold them an unairworthy aircraft without warning of its condition." He found that these circumstances made the misrepresentations reckless and therefore they constituted fraud.

[4] After carefully considering all the evidence pre-

sented to the magistrate, we must conclude that these findings are clearly erroneous. First, it is clear that Eugene told the buyers on more than one occasion about the airplane's previous crash landings and the buyers were aware that repairs had been necessitated by those landings. Second, the evidence does not support the magistrate's conclusion that Eugene should have known that the repairs to the airplane were improperly made. Mickelson, the mechanic, held an I.A. certificate from the FAA, which authorized him to not only repair airplanes but to inspect them and return them to service after the completion of repairs. The only testimony regarding Mickelson's reputation as a mechanic indicated that his reputation was very good and that he had many years experience in repairing and maintaining airplanes. Gerald, who worked with Mickelson in repairing the plane, performed no repairs to the Mooney prior to completing aviation school, passing his examination and receiving his A & P license in June, 1973. He had considerable experience in maintaining airplanes prior to receiving his A & P license. All the experts, including plaintiffs' experts, agreed that an A & P mechanic has the authority to perform any major repair to an airplane. Eugene Wood did not participate in the repairs, nor did he have the capacity to determine whether all the necessary repairs were made or whether those repairs that were made were proper, because he had no mechanical experience or background but knew planes only as a pilot.

Eugene's many flights in the airplane show that he relied on the adequacy of the repairs made by mechanics who had exhibited sufficient knowledge to meet FAA qualifications and receive a license. Although this reliance proved to be misguided, the evidence does not show that Eugene Wood had knowledge of the defects or that his statements were made in reckless disregard of the truth or falsity thereof. See B & B Asphalt Co., Inc. v. T. S. McShane Co., Inc., supra, 242 N.W.2d at 284.

The evidence also refutes the magistrate's finding that Gerald Wood made numerous major repairs that were not reported in the airplane's logbook. We have examined the logbook and have found in it nearly all of the repairs and parts replacements itemized by the magistrate as having been performed but not recorded in the log. To the extent that the finding of fraud was premised on the failure to record specific repairs in the airplane logbook, then, it is unsupported.

In his memorandum, the magistrate also emphasized the mechanics' failure to file Forms 337 with the FAA, as is required for each major repair. While the evidence supports his finding that the proper forms were not filed, this failure does not support the conclusion that Eugene Wood's representations about the condition of the airplane were fraudulent.

## II. Express Warranty

The magistrate concluded without discussion that no express warranty was present \*56 in this case. We disagree. The magistrate found and the evidence demonstrates that Eugene Wood showed Vining and Cozzolino the airplane logbook, including the certificates of airworthiness, and went over it with them. Vining testified that he relied on the logbook and certificates of airworthiness and it is clear that they became part of the basis of the bargain between the parties.

The law governing the creation of an express warranty is set forth in Iowa Code s 554.2313, which is identical to the Uniform Commercial Code provision:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

U.C.C. official comment 5 to that section provides that

“(a) description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them.”

[5] In this case, the seller provided the buyer with the logbook which set forth the repair and inspection history of the airplane. Vining and his pilot examined those entries and relied on the certifications of the airplane as airworthy. Those certifications consequently formed part of the basis of the bargain as a description of the goods, similar to a description that might be provided by a blueprint. Under these circumstances, Eugene expressly warranted the accuracy of that description—the airworthiness of the plane—and is liable for damages arising from the breach of that warranty. Accord, Miles v. Kavanaugh, 350 So.2d 1090 (Fla.App.1977).

[6] We reversed the magistrate's finding of fraudulent misrepresentation because the evidence did not demonstrate that Eugene represented the airplane's condition in reckless disregard of the truth or falsity of his representations. To create an express warranty of the plane's airworthiness, however, there is no requirement that Eugene have actual knowledge of the airplane's airworthiness or lack of airworthiness. His representation of the plane as airworthy, based on the description in the logbook, created the warranty.

[7][8][9] There remains, however, the question of the effect of the “as is”-“where is” disclaimer. It is fairly clear that such a provision operates to disclaim implied warranties. Iowa Code s 554.2316(3)(a). [FN5] The effect of such a disclaimer on express warranties, however, is less clear. The Iowa Code provides as follows:

FN5. That section provides:

(U)nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is”, “with all faults” or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty \* \* \*

Words or conduct relevant to the creation of an ex-

press warranty and words or conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 554.2202) negation or limitation is inoperative to the extent that such construction is unreasonable.  
Iowa Code s 554.2316(1).

Although the disclaimer does not explicitly address the affirmations contained in the logbook, it states in general terms that the \*57 buyer accepts the airplane “as is.” Because these words tend to limit or negate the seller's warranties, the Code requires that the provision be construed as consistent with the warranty, if such a construction is reasonable. That construction is reasonable under these facts. Eugene presented the logbook to Vining and Cozzolino for their inspection and went over its entries with them prior to the time Vining signed the “as is” disclaimer. Eugene delivered the logbook with the airplane to Vining after the disclaimer was signed. The disclaimer itself made no reference to the description of the airplane contained in the logbook. The “as is” clause, then, can fairly be read to disclaim all implied warranties, leaving the written express warranties of the logbook, including the warranty of airworthiness, intact.

The Code's provision on parol evidence does not preclude consideration of the express warranty. That section states:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Iowa Code s 554.2202.

The “as is”-“where is” clause was certainly not a “complete and exclusive statement of the terms of the agreement” between Eugene and Vining. The de-

scription of the airplane as set forth in the logbook is, as we have indicated, a consistent additional term and may be introduced to explain the actual agreement between the parties.

[10] We turn, finally, to the question of damages. We are unable to determine on the basis of this record the amount of damages recoverable for the breach of express warranty. The measure of damages for breach of warranty is set out in the Iowa Code as follows:

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

Iowa Code s 554.2714(2), (3).

It remains for the trier of fact to determine the amount of damages under this rule. We note, however, that he should determine whether Eugene offered to buy the airplane back upon learning of its defects and if so, for what price. If he determines that such an offer was made, he should determine whether the damages caused by the breach could have been mitigated by acceptance of that offer.

C.A.Iowa, 1980.

Limited Flying Club, Inc. v. Wood

632 F.2d 51, 29 UCC Rep.Serv. 1497

END OF DOCUMENT

<b>Date</b>	<b>Construction Repairs Addressed in Email</b>
6/11/2007	Adjustment of windows
6/11/2007	Attend to windows; adjust garage door and deliver remotes; touch up paint on interior and exterior; remedy electrical issues experienced; installation of window screens; remove roofing materials; installation of cabinet rollouts;
6/15/2007	Contractor has never had issues like this on any one house; We'll just work through to solve them.
7/25/2007	Flush well system; replaced roof - just a couple of inconsistencies left in the structure; need to schedule installation of gutters; drywall and interior paint touch-up; install attic insulation; stripping and repainting/staining the front door; finish exterior doors and trim; adjust patio door; adjustment of cabinet doors; install garage cabinet; installation of topsoil to level of drainfield area
7/26/2007	Flush well system; correct shingle runs in roof; add additional bracing to roof; adjustment of fascia boards; paint; installation of gutters; schedule drywall installation and repairs; repair sheetrock and nailhead pops; retexture ceiling; repaint ceiling; touch up areas affected by re-roofing job; paint heat pump top; correct siding issues prior to touchup paint; strip and repaint front door; install cabinet shelving; only items on the final punch list will be addressed.
10/30/2007	Cir-pump/Kitchen sink - call plumber to attend to those items; garage lights - call office to schedule time for sub to come out; Ceilings - recently had sub in to paint; Drywall - contractor and sub will visit today; new texture on ceilings; cabinet rollouts; repair and caulk stone column; remove and repair gutters; caulking; painting; adjust patio doors and towel rocks; repaired roof to remedy leaks;
8/31/2007	Drywall - did walk through yesterday. Will come back next week to fix; gutters fixed next week; top soil installed;
9/7/2007	Re-stain front door
9/10/2007	Ceilings - will be attended to next week; Drywall - plan on September 17 or 18
9/22/2007	Front door - paint over fiberglass without stripping, not stain
9/24/2007	Front door - paint over fiberglass without stripping, not stain;
10/28/2007	Water intrusion in fireplace alcove; drywall repairs; Roof repairs; replace windows;
10/29/2007	Drywall repairs; Roof repairs; replace windows;

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

STEVEN and DEBORAH  
MATTINGLY, husband and wife

Appellant

vs.

PALMER RIDGE HOMES, LLC, a  
Washington limited liability company;  
CONTRACTORS BONDING AND  
INSURANCE COMPANY, Bond  
Account Number SG0213, a Washington  
corporation.

Respondent.

No. 38981-9-II

CERTIFICATE OF  
SERVICE

I hereby certify that on this 10<sup>th</sup> day of July, 2009, I caused a true and correct copy of the Brief of Appellant Steven and Deborah Mattingly, to be served on the following in the manner indicated below:

*Via US Mail*  
Betsy A. Gillaspy  
Salmi & Gillaspy PLLC  
821 Kirkland Ave., Suite 200  
Kirkland, Washington 98033-6318

***Via US Mail***

Thomas F. Gallagher  
Law Offices of Watson & Gallagher  
2748 Milton Way, Suite 212  
Milton, Washington 98354-9379

I hereby certify that on this 10<sup>th</sup> day of July, 2009, I caused a true and correct original plus one copy of the Brief of Appellant Steven and Deborah Mattingly, to be served on the following in the manner indicated below:

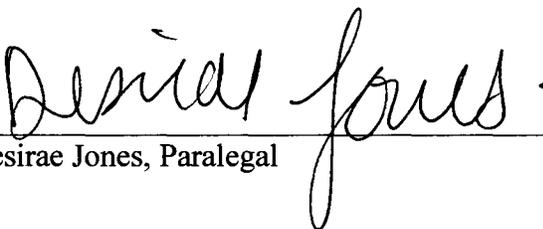
***Via US Mail***

Court of Appeals Division II  
950 Broadway  
Ste 300, MS TB-06  
Tacoma, Washington 98402-4454

DATED this 10<sup>th</sup> day of July, 2009.

Respectfully submitted,

DICKSON STEINACKER PS

  
\_\_\_\_\_  
Desirae Jones, Paralegal