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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY [Signature]
DEPUTY

No. 44430-5-II

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

SHELLY and JOHN DOE FOREST, Respondent

v.

ERIC and SUSIE KIM, a married couple;
Appellants
SUPERIOR COURT CASE NO. 09-2-00769-0

APPEAL FROM LEWIS COUNTY SUPERIOR COURT
THE HONORABLE NELSON E. HUNT

REPLY BRIEF OF APPELLANT

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pm 7/30/13

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I. ARGUMENT AND AUTHORITY

A. There is a Genuine Issue of Material Fact as to Whether the Respondent Fixed the Source of the Water Problem in the Crawl Space and Installed the Drain Properly.

Genuine issues of material fact are still in dispute in this case regarding whether the Respondent properly installed the drainage system and whether they addressed the water problem in the crawl space on the Appellants' property. The Declarations of Zdenka Trnka and Roddy Nolten stated the drainage system was not properly installed. (See Clerk's Papers 155-160 and 161-171). Also, in the declaration of Trent Lougheed, P.E., he also said that the drain was not functioning properly. See Clerk's Papers pp 85-90. When you consider the evidence in the light most favorable to the nonmoving party, see *Stansfield v Douglas County* 107 Wn App 1, 9,10, 27 P.3d 205 (2001); the Court should have denied the Respondent's motion and this Court should deny the Respondent's motion for summary judgment.

B. The Respondent Has Provided Undisputed Evidence of a Non-Functioning Drain System.

The Respondent has repeatedly stated that it is undisputed that she installed a drain system, however, the only thing that is undisputed is that the drain she installed is not a functioning drain. Mr. Lougheed, whom the

Respondent hired to review the video tape taken by the plumber she hired, admits that the drain is blocked and therefore not a functioning drain. He states: **“It is not possible to know exactly what caused the blockage from the video that I saw.”** (emphasis added).

See Clerk’s Papers pp 85-90. This is proof that the drain is not a functioning drain and Mr. Lougheed’s conclusion is the same conclusion reached in the declarations of Zdenka Trnka and Roddy Nolten. (See Clerk’s Papers pp 155-160 and pp 161-171). This was the whole basis of the Appellants action and the Respondents have provided evidence to support the Appellants’ initial allegation that there is not a functioning drain system on the subject property and therefore summary judgment on behalf of the Respondent is not appropriate in this case. In addition, the Respondent’s assertion that they installed a drain, skirts the inconvenient truth, that the drain they installed never functioned properly and was installed merely to give the false impression of a properly functioning drain. The Respondent further attempted to conceal this fact by trying to reduce the warranty period from four years to one year. The defective drain failed to resolve the issues; and the problems originally requiring a drain still remain.

C. Contract is Not Limited to the Addendum

The Respondent argues that only the terms of the addendum should

be looked at but it is clear that the addendum incorporates the terms of the initial Real Estate Sales and Purchase Agreement. The addendum only refers to items to be finished and not any thing else and it does not relieve the Respondent from constructing the home in a proper manner. See Clerk's Papers pp 178-188. The Respondent promised to repair the water problem found on the inspection report and she failed to do so thereby breaching her agreement set forth in the addendum as well as her obligation to build the property up to industry standards and according to current building codes and regulations as set forth in the initial contract. As a result the Respondent's breach of duties owed to the Appellants, the Appellants suffered damages. See Clerk's Papers pp 155-160 and pp 161-171 and pp 172-177.

D. The Addendum "Agreement" to Reduce the Warranty Period Was Not Supported by New Consideration and it was Therefore Unenforceable.

In the Addendum, the Respondent agreed to complete the drain system and address the water problem in the crawl space. See Clerk's Papers pp 178-188. Something she was already obligated to do under the contract to build the house and under the applicable building codes. Therefore, her "promise" to repair the drain and address the water in the

crawl space were promises she was already obligated to perform and thus not new promises at all. Therefore, any agreement purported to have been made in the Addendum based on the promise to resolve the drain system and the water problems in the crawl space was not enforceable and therefore did not alter the terms of the original agreement, nor did it alter the four year warranty in place on the property under the original agreement. Furthermore, it did not relieve the Respondent of her duty to properly install the drain and fix any drain problems noted in the crawl space and elsewhere. The Respondent can not point to any new consideration they offered in exchange for their attempt to alter the warranty period from a four year period to a one year period and that is because they did not offer such consideration and thus they were and are still obligated to repair the water problems at the subject property.

E. Breach of Contract/Implied Warranty

The Courts in Washington are familiar with the duties owed by a home builder/contractor. Most home buyers are neither contractors, nor experts in engineering. The builder is obligated to provide a residence which is free of defects that are obvious or not obvious to an expert because they are concealed and/or hidden underground.

As a matter of policy, Washington courts determined that:

[I]t seems apparent that a builder who puts a house on the market, brand-new and never occupied, has some responsibility to the ultimate buyer. The builder built the thing. It was intended to be sold to a buyer for occupancy by the buyer--not as an assemblage of concrete and pieces of wood, but as a residence. It is no different from the manufacturer of an automobile. The auto should run down the road without wheels falling off and new houses should provide habitation without foundations falling apart. This court and other courts have recognized this principle. See, e.g., *House v. Thornton*, 76 Wash.2d 428, 457 P.2d 199 (1969); *Yepsen v. Burgess*, 269 Or. 635, 525 P.2d 1019 (1974); *Tavares v. Horstman*, 542 P.2d 1275 (Wyo.1975); *Petersen v. Hubschman Constr. Co.*, 76 Ill.2d 31, 27 Ill.Dec. 746, 389 N.E.2d 1154 (1979); *Dixon v. Mountain City Constr. Co.*, 632 S.W.2d 538 (Tenn.1982). See, generally, Annot., Liability of Builder-Vendor or other Vendor of New Dwelling for Loss, Injury, or Damage Occasioned by Defective Condition Thereof, 25 A.L.R.3d 383 (1969) and cases cited therein. Thus, in *House v. Thornton, supra*, we held that the sale of a new house by a vendor-builder to the first intended occupant carries with it an implied warranty "that the foundations supporting it are firm and secure and that the house is structurally safe for the buyer's intended purpose of living in it." 76 Wash.2d at 436, 457 P.2d 199.

Frickel v. Sunnyside Enterprises, Inc., 106 Wn.2d 714, 717-718, 725 P.2d 422 (Wash. 1986).

In this case, the inspection stated that the foundation of the house was compromised and that the Respondent should consult a soil or drainage contractor to correct the problem. See Clerk Papers pp 189-204. However, the Respondent did not consult any one and she claimed that she

fixed the problem. See Clerk Papers pp 178-188 and Clerk Papers pp 29-84. It was determined by the engineers, including her own, that she did not correct the problems and that she fraudulently misled the Appellants into believing that she did. See Clerk Papers pp 161-171 and pp 155-160. Therefore, the Respondent breached the implied warranty she owed to the Appellants and the Court should deny the Respondent's motion for summary judgment.

The Respondent cites *Douglas v. Visser*, 173 Wn. App. 283, 295 P.3d 800 (2013), in support of the proposition that because the Appellants knew there was a water and/or drain problem they were not allowed to pursue damages against the Respondent. However, *Douglas* is clearly distinguishable from this case. In *Douglas*, the parties never had an agreement in place for the seller to fix the discovered defects in the house; whereas in this case, the parties agreed that the Respondent would fix the defects that were discovered and based on the evidence before this court, the Respondent did not do what she clearly agreed to do.

F. Fraud/Intentional Misrepresentation is Not Frivolous

To sustain a finding of common law fraud, the Court in most cases must make findings of fact as to each of the nine elements of fraud. *Howell v. Kraft*, 10 Wash. App. 266, 517 P.2d 203 (1973). Those

elements generally are: (1) a representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) his right to rely upon it, and (9) his consequent damage. See *Turner v. Enders*, 15 Wash .App. 875, 878, 552 P.2d 694 (1976). Also, if there was a duty to disclose information, a misrepresentation can result from subsequent non-disclosure. *Wilkinson v. Smith*, 31 Wn. App. 1, 6-7 639 P.2d 768 (1982). The Respondent told the Appellants that she fixed the drain and water problems and they relied on her statement. The Respondent knew the statement was false and the Appellants relied on the statement and were damaged and they had a duty to disclose this information to the Appellants. Furthermore the Respondent own expert confirms that she did not fix the drain system.

The Respondent claims that the existence of the drainage system can no longer be disputed. This is clearly not the case. The creation of a fake drainage system, one that does not function properly because it is blocked, is not the same as a functioning drainage system. Here the Respondents created/relied upon a false drainage system that was blocked and could not serve the purpose for which it was created. The

Declarations submitted by the Appellants all show that the Respondent did not properly install the drainage system. See Clerk Papers pp 161-171 and pp 155-160; and the Respondent's own video shows that the drain is inoperable. See Clerk's Papers pp 85-90. Thus, there are significant and genuine issues of material facts still in dispute regarding whether or not the Respondent installed a functioning drainage system and fixed the water problem in the crawl space. Summary judgment must be denied as a matter of law.

G. Negligent Misrepresentation

To prevail on a claim of negligent misrepresentation, a party must prove by clear, cogent, and convincing evidence six elements:

(1) That [the defendant] supplied information for the guidance of others in their business transactions that was false; and (2) That [the defendant] knew or should have known that the information was supplied to guide [the plaintiff] in business transactions; and (3) That [the defendant] was negligent in obtaining or communicating false information; and (4) That [the plaintiff] relied on the false information supplied by [the defendant]; and (5) That [the plaintiff's] reliance on the false information supplied by [the defendant] was *justified* (that is, that *reliance was reasonable under the surrounding circumstances*); and (6) That the false information was the proximate cause of damages to [the plaintiff]."

Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 545, 55 P.3d 619, (Wash. 2002)(*Citation omitted*).

The Respondent told the Appellants that she fixed the drain problems and they relied on her statement. The Respondent knew the statement was false and the Appellants relied on the statement and were damaged. It is obvious that the Respondent had a duty to disclose to the Appellants truthfully how she repaired the problem and she breached that duty. Thus, Respondent is not entitled to summary judgment based on the evidence in this case.

H. The Respondent Had an Independent Duty Outside the Terms of the Contract to Disclose What She did to Repair the Discovered Water and Drain Problems.

In Washington, with regard to the independent duty rule, the Courts have recognized that a duty to disclose in a business transaction arises if it is necessary to prevent a partial or ambiguous statement of facts from being misleading. *Colonial Imports v. Carlton Northwest, Inc.*, 121 Wn. 2d 726, 731, 853 P.2d 913 (1993). The Respondent was already on notice that there was water in the crawl space and she promised to fix the problem. She also was on notice that the drain system was incomplete because under the 14 items listed in the addendum dated March 26, 2006 the Respondent agreed to complete the drain system and address the water problem in the crawl space. See Clerk's Papers pp 178-188. This

imposed a duty on the Respondent that was outside the duty set forth in the original contract and thus created an independent duty on the Respondent to comply with an agreement that was in addition to the original terms of the purchase and sale agreement. The Respondent also had a duty to prevent any partial or ambiguous statements or actions from being misleading and she should have disclosed the work she did and how she addressed the drain and water systems and by not disclosing what she did to repair these problems, she breached her independent duty that was present outside the initial contract. Thus, the Appellants tort claim is not barred but supported by the Court's analysis of the independent duty rule in *Colonial Imports supra*.

I. None of the Appellants Claims Are Baseless or Without Factual Basis.

Civil Rule 11 deals with two types of filings: those lacking factual or legal basis (baseless filings), and those made for improper purposes. *Hicks v. Edwards*, 75 Wash.App. 156, 162, 876 P.2d 953 (1994), review denied, 125 Wash.2d 1015, 890 P.2d 20 (1995) (citing *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 217, 829 P.2d 1099 (1992)).

The purpose behind CR 11 "is to deter baseless filings, not filings which may have merit." *Bryant*, at 220. Accordingly, application of CR 11 requires "consideration of both CR 11's purpose of deterring baseless claims as well as the potential chilling effect CR 11 may have on those seeking to advance meritorious claims." *Bryant*, at 219. A trial court may not impose CR 11 sanctions for a baseless filing "unless it also finds that the attorney who signed and filed the [pleading, motion or legal memorandum] failed to conduct a reasonable inquiry into the factual and legal basis of the claims." *Bryant*, at 220. The court must use an objective standard, asking "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." *Bryant*, at 220; *Doe v. Spokane and Inland Empire Blood Bank*, 55 Wash. App. 106, 111, 780 P.2d 853 (1989). To avoid being swayed by the benefit of hindsight, the trial court should impose sanctions only when it is, " 'patently clear that a claim has absolutely no chance of success.' " *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir.1986) (quoting *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir.1985)), cert. denied, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Bryant*, at 220.

The Appellants and their counsel filed this action because there was a factual basis for the action. As stated above, three different individuals inspected the property at different times to show that there was a problem with the drain system. See Clerk Papers pp 161-171 and pp 155-160 and pp 189-204. It was also inspected by a contractor to determine what it would cost to repair the property. See Clerk Papers pp 172-177. So based on these reports, it shows that there was a factual basis to file this action and a factual basis to prevail in this action at trial.

The “drain system” is anything but a functioning drain system. The Respondents could just as easily placed two unconnected pieces of pipe in the ground and called the installation a “drain system.” It is no mystery to anyone in this litigation that the “drain system” was a complete failure as the blockage never allowed the “drain system” to function properly. Even the Respondent’s own Engineer determined that the “drain system” was not functioning like it should. To suggest that the “drain system” was defectively installed, but because it was “installed,” it effectively relieved the Respondents of any further obligations - makes a mockery of the legal system, which is designed to remedy defects such as this in litigation.

In addition, as set forth above the Independent Duty Rule actually supports the Respondent's claim. Therefore, because the Appellants suffered damage to their property, they felt, in good faith, and thus this action was not without a factual basis, was not filed with any improper motives and was not frivolous. It is impossible for a request for fairness to be frivolous. To suggest that the Appellants' request for fairness in this litigation is frivolous, is patently absurd.

J. Notice of Request for Sanctions.

The Defendant stated that they gave notice of their intention of requesting sanctions under CR 11 in September 2012. However, at that time, there was nothing that changed the facts under this case. It was not until the Defendant had the drain video taped in October 5, 2012, that "new evidence" was discovered. However, the video tape evidence was reviewed by the Appellants and discussed with the Appellants' expert and it was determined that the video was not conclusive evidence of a functioning drain system; which the Respondent's Engineer also agreed with. The Appellants were going to have the drain excavated and they in fact did have the drain inspected. However, this Court ruled on the Respondent's motion before the Appellants were able to have the drain inspected. The drain was partially excavated in January 2013 and it was

determined that the water problem was caused by a drain problem that allowed water to penetrate and pool in the crawl space and then flood into the Appellants' basement.

Thus, the Appellants were continuing to investigate whether or not the drain system was properly installed when this Court ruled on the Respondent's motion for summary judgment. Therefore, an award of sanctions in this case was an abuse of the trial Court's discretion.

K. The Appeal of Sanctions Against Appellant's Counsel is Properly Before this Court.

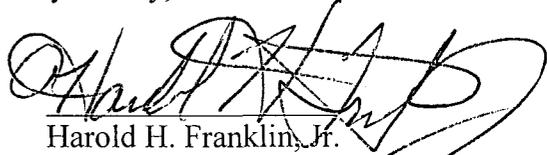
Counsel for the Appellants filed this appeal on January 17, 2013 and on the Notice of Appeal, counsel hand wrote that they were appealing the trial court's award of attorney's fees and CR 11 sanction against the Plaintiffs and their counsel Harold Franklin. See Notice of Appeal. Therefore, the appeal of the CR 11 sanctions against both the Appellants and their counsel is properly before this Court on appeal.

II. CONCLUSION

Given the above evidence and authority, the Appellants would ask this Court to consider all the evidence in the light most favorable to the Appellants and not the Respondent. There is undisputed evidence that the installed drainage system is not functioning and that the Respondent never

fixed the water problem in the crawl space. It is also clear that the Respondent provided no additional consideration to reduce the Appellants' warranty from four years to one year; and without that new consideration, the agreement to reduce the warranty term is unenforceable. Also, based on the record before this Court, it is clear that the Appellants investigated this incident, to determine if there was a factual basis for their claim. It is also clear that the Appellants did not bring this action for any improper purposes because there is no doubt that their property was damaged and the damage was caused by the drain system and water problems not addressed by the Respondent. Given all these reasons, sanctions under CR 11 are completely inappropriate and we would ask that the Court not impose them in this case and that this Court reverse the Trial Court's decision and deny the Respondent's motion for summary judgment and their motion for sanctions under CR 11 and attorney's fees and remand this case back to the Trial Court for further proceedings..

RESPECTFULLY SUBMITTED this 30th day of July, 2013.


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Respondent.)

NO. 44430-5-II

DECLARATION OF MAILING

I hereby declare under the penalty of perjury under the laws of the state of Washington that I
mailed postage prepaid, a true and correct copy of the Appellants' Reply Brief to:

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