

No. 50174-1-II

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

**KEN SCHUMM, a single person,
Appellant**

v.

**KENNETH SPILLER and MICHAEELEEN SPILLER,
individually and the marital community thereof.
Respondent**

APPELLANT'S BRIEF

**Allen T. Miller
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Appellant, Ken Schumm, by and through his attorney, Allen T. Miller of The Law Office of Allen T. Miller, PLLC, submits Appellant's Brief on appeal as follows:

I. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Respondents' Motion for Summary Judgement.
2. The trial court erred in denying the Appellant's Motion for Reconsideration.
3. The trial court erred in its determination that there were no issues of material fact regarding the Respondents' disclosure requirements under RCW 64.06.020, Form 17.

II. ISSUES PRESENTED

1. Whether the court erred in granting summary judgment to the Spillers when issues of material facts existed with respect to the obligations imposed upon the seller of real estate to disclose the presence of Mazama Pocket Gophers as "unusual restrictions on the property that would affect future construction or remodeling" under Section 1(G) of the Seller Disclosure Statement and "any material defects affecting the property that a prospective buyer should know about" under Section 10(A) of the Sellers Disclosure Statement as required by Form 17 and RCW 64.06.020.

2. Whether the court erred in denying Schumm's motion for reconsideration regarding a property owner's obligations to disclose the presence of Mazama Pocket Gophers on the Spillers' property pursuant to Form 17 and RCW 64.06.020.

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Ken Schumm is the owner of the real property located at 6908 Cate Farm Dr. SE, Olympia, Thurston County, Washington. Kenneth Spiller and Michaelleen Spiller are previous owners of the Schumm property. Schumm purchased the property from the Spillers on December 14, 2014.

CP 6 When the Spillers sold the property to Schumm in December 2014, the Spillers failed to disclose to Schumm the presence of Mazama Pocket Gophers, a “species of concern,” on the Spiller property. The Spillers also failed to disclose that federal and state wildlife officials had surveyed the Spiller property on September 19, 2013, and warned Mr. Spiller of the status of the pocket gophers at that time. During the sale negotiations, the Spillers failed to disclose that they were invited to join a conservation partnership with federal and state wildlife regarding the pocket gophers. *CP 134 and CP 148-151.*

The concern about the Mazama Pocket Gophers has had a long history in Thurston County. In 1996, the United States Department of the Interior Fish and Wildlife Listing and Recovery Division determined that the Mazama Pocket Gopher was a “species of concern”. They invited the Washington Department of Fish and Wildlife to participate with its efforts to reach out to property owners in Thurston County to inform them about the status of the Mazama pocket gopher and the need to engage in land use practices that conserve the species. *CP 148-151 and CP 253-254.*

On September 19, 2013, Washington Department of Fish and Wildlife (WDFW) Conservation Biologist Mary Linders and Brad Thompson of the United States Fish and Wildlife, conducted a site visit to the Spiller property at 6908 Cate Farm Drive SE, Olympia, Washington. Kenneth Spiller accompanied the WDFW team during the site visit on the property. *CP 149 and CP 254.*

During the September 19, 2013, site visit Mary Linders and Brad Thompson observed evidence that the Spiller’ property was occupied by Mazama Pocket Gophers. This evidence included mounds that are characteristic of the species, and a gopher carcass that Mr. Spiller had

trapped and killed on his property. The WDFW team informed Mr. Spiller at the site visit that trapping, killing, or removal of the pocket gophers was not allowed. CP 149 and CP 203.

During the September 19, 2013 visit, Mary Linders and Brad Thompson also discussed with the Spillers the various practices that allow landowners to co-exist with the pocket gophers. CP149 and CP 254.

In April 2014, effective on May 9, 2014, the United States Department of the Interior Department of Fish and Wildlife listed the Mazama Pocket Gopher as a “threatened species” under the Endangered Species Act (ESA), 16 USC 1531-1544. The U.S Fish and Wildlife Service has the authority to write special regulations for threatened species to either increase or decrease the ESA’s normal protections as long as those tailored regulations are necessary for the conservation of the species. Section 9 of the ESA and federal regulations pursuant to section (d) of the ESA prohibit “take” of an endangered or threatened species. The protections for a “threatened species” make it unlawful to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect the protected wildlife. This level of regulation protects a listed species before their populations drop to critical levels requiring an “endangered” listing and the associated higher level of protection and regulation of private and public activities. (50 CFR 17.3; 81 FR 66462.) CP 253-254.

Less than a year after the wildlife officials’ Sept 19, 2013 visit, the Spillers listed their property for sale. When Schumm offered to purchase the property, on August 26, 2014, Kenneth and Michaelen Spiller signed a Seller Disclosure Statement, Form 17, for the property located at 6908 Cate Farm Dr. SE, Olympia, Thurston County, Washington. Section 1 of the Disclosure Statement form required the Spillers to disclose whether there were any “unusual restrictions on the property that would affect future construction or remodeling.” The Spillers answered “No” in

total disregard of the instructions by wildlife officials during their September 19, 2013 visit. Section 1 (G) of the Disclosure Form states “Is there any study, survey project, or notice that would adversely affect the property?” In disregard of the comments by the wildlife officials during their September 19, 2013 visit, the Spillers answered “No.” Further, under section 10(A) of the Seller Disclosure Statement the Spillers were required to disclose any “existing material defects affecting the property that a prospective buyer should know about.” The Spillers answered “No” in disregard of the review of their property by federal and state wildlife officials and the information about a “conservation partnership” to protect the gopher. *CP 133-135.*

On December 14, 2014, Ken Schumm and Kenneth and Michaelleen Spiller entered into a Residential Real Estate Purchase and Sale Agreement for the purchase of the property located at 6908 Cate Farm Dr. SE, Olympia, Thurston County, Washington. *CP 134.*

On June 24, 2015, shortly after moving to the property, Ken Schumm filed a Residential Building Permit with the Thurston County Resource Stewardship Department to build a “Shop” on a portion of land on the Schumm property. *CP 134-135.*

On July 22, 2015, August 25, 2015, and October 7, 2015, the U.S. Fish and Wildlife Service biologists and Thurston County Planning staff conducted three site visits of the Schumm property, to conduct a 2015 Mazama Pocket Gopher Screening-Determination. The 2015 reports indicate that there were still Mazama Pocket Gophers present on the Schumm property. *CP 135.*

The Mazama Pocket Gophers that reside throughout the Schumm property are listed as a threatened species and under Federal protection. Therefore, on September 30, 2015, the Thurston Country Resource Stewardship Department issued a letter denying the approval of Ken Schumm’s application for the permit to build a shop on the Schumm property. *CP 135.*

The Mazama Pocket Gophers are creating a restriction on future construction and their presence were and are a material defect, which adversely affects the Schumm property. Under Title, I, Section 1 and Section 10(A) of Form 17, the Spillers were required to disclose the events of September 19, 2013 and the presence of Mazama Pocket Gophers to Schumm prior to the sale of the property to Schumm but the Spillers failed to do so. *CP 133-135.*

B. PROCEDURAL BACKGROUND:

On September 29, 2016, Mr. Schumm filed the complaint in this matter. *CP 5-8.* Mr. Schumm alleged that the Spillers failed to disclose a “material defect” as required by law in Form 17. Mr. Schumm also alleged that the Spillers failed to reveal that federal and state wildlife officials had surveyed the Spiller property, suggested a conservation plan to preserve the gopher, and warned Mr. Spiller that his visible trapping of the gopher was unlawful. Mr. Schumm alleged that the Spillers’ failure to disclose was misrepresentation or fraud and breach of contract in the sales transaction.

On December 5, 2016, Respondents filed their answer to the complaint denying any responsibilities regarding disclosure of the pocket gophers on Form 17. *CP 9-12.* On January 19, 2017, Respondents moved for Summary Judgment. *CP 109-121.* Appellant filed his response to Respondents’ motion for summary judgment on February 6, 2017. *CP 122-128.* Respondents filed their reply in support of their motion for summary judgment on February 10, 2017. *CP 186-195.* On February 17, 2017, the court granted Respondents’ motion for summary judgment and dismissed Schumm’s claims with prejudice. *CP 199-201.*

On February 27, 2017, Appellants moved for reconsideration of the court’s decision. *CP 202-207.* On March 6, 2017, the court denied Appellants’ motion for reconsideration. *CP 273.*

This appeal follows. *CP 274.*

IV. ARGUMENT

A. STANDARD OF REVIEW

Each assignment of error presents a question of law subject to de novo review. All questions of law are reviewed de novo. *City of Seattle v. State Dep't of Labor & Industries*, 136 Wn.2d 693, 697, 965 P.2d 619 (1998).

Under CR 56(c), Summary Judgment is granted only where there are no material issues of fact in dispute. The Respondents meet the following standard in order to prevail on their Motion for Summary Judgment:

“(c) The judgment sought shall be rendered forthwith if the pleadings, depositions, Answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

The moving party has the burden of showing that there are no genuine issues of fact. *Indoor Billboard/Wash., Inc v. Integra Telecon of Wash., Inc.* 162 Wn.2d 59, 70, 170 P.3d 10 (2007). All reasonable inferences are to be considered in the light most favorable to the non-moving party. CR 56(c), *Enterprise Leasing, Inc. v. Tacoma*, 139 Wn.2d 546, 551, 988 P.2d 961 (1999); *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.2d 522 (1993). On summary judgment, the moving party bears the initial burden of showing the absence of an issue of material fact. *Howell v. Spokane & Inland Empire Blodc Bank*, 117 Wn.2d 619, 818 P.2d 1056 (1991).

B. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

On review of an Order on Summary Judgment, the appellate court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1371 (1993).) As

specifically stated in *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993), in reviewing a summary judgment order, an appellate court evaluates the matter de novo. *Kruse*, at 22.

The inquiry in this matter involves whether or not a seller, in Respondents' position, would be required to disclose the presence of Mazama Pocket Gophers on the seller's property and the September 19, 2013 visit to the property by federal and state wildlife officials and their subsequent letter of instruction about restrictions on the property owner due to the presence of the Pocket Gopher. On August 26, 2014, Respondents signed Form 17 and failed to disclose the information about the Pocket Gophers.

The court's February 17, 2017 Order granting the Respondents' motion for summary judgment fails to identify its legal basis. The Order identifies the documents reviewed and that the court heard the arguments of counsel, but there is no indication of the legal basis of the court's decision. The verbatim Report of the Proceedings on the motion for summary judgment indicates that the trial court agreed with the Appellant that:

. . . the seller did know that there were pocket gophers and that they were listed as threatened at that moment in time. And I would even personally agree as an individual, not as a judicial officer, that if I were the seller, I would have disclosed this at this moment in time. (V Tr p6, li 21-p7,li3.)

The court went on to inquire the following:

. . .Is there any evidence in the record about what having a threatened species on the property meant for a property owner at that time?
(V Tr p 8, li 6-8.)

Appellant's counsel referred the court to the declaration of Brad Thompson and the letter of instruction that had been sent to the Respondents. (V Tr p8, li 9-10.) The September 19, 2013 letter from Thompson to the Respondents indicated that, during the September 19, 2013 visit to the Respondents' property, Respondents were instructed about the "kinds of practices

that allow landowners to co-exist with pocket gophers on their properties.” The letter also offered to provide more information “on entering into a conservation partnership with the U.S. Fish and Wildlife Service.” CP 151. Eleven months later, Respondents failed to disclose these events in Form 17. V. Tr P4, li 16 - P6, li 20. The Respondents had a duty to disclose these events to the Appellant as they have a significant adverse effect on property and severely restrict the manner in which the land may be used. “The Court also held that the sellers owed the buyers common law duties independent of the contract, and that the fraud and concealment claims against them should not have been dismissed.” *Jackowski v. Borchelt*, 174 Wn.2d 720, 278 P.3 1100 (2012). The concealment of the presence of Mazama pocket gophers on the property was a misrepresentation to the Appellant by the Respondents.

For some unstated reason, the court determined that the survey of Respondents’ property by state and federal wildlife officials was inconsequential and that the offer of a conservation partnership did not qualify as anything that Respondents needed to acknowledge on their Form 17 Disclosure form. The court’s order merely dismissed Appellant’s complaint with prejudice and without explanation. CP 199-201. Washington law requires that the Seller(s) provide a completed seller disclosure statement to the buyer(s). *Stieneke v. Russi*, 145 Wn. App. 544, 190 P. 3d 60 (2008). The disclosure of existing material defects, which have the potential to restrict land use or in any manner significantly adversely affect the property is a crucial component in allowing the buyer to make an informed decision on whether or not to purchase a property.

On an appeal, the appellate court must engage in the same inquiry as the trial court, “construing the facts and reasonable inferences in the manner most favorable to the nonmoving party to ascertain whether there is a genuine issue of material fact.” *Dumont v.*

City of Seattle, 148 Wn. App. 850, 860-861, 200 P.3d 764 (2009) (citing to *Sellestead v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 857, 851 P.2d 716 (1993)).

C. THE TRIAL COURT ERRED IN DENYING APPELLANT’S MOTION FOR RECONSIDERATON

The trial court erred when it concluded that issues of fact regarding the seller disclosure form and the Mazama pocket gopher’s presence on the property did not exist, *Svendsen v. Stock*, 143Wn.2d 546, 23 P.3d 455 (2001). The seller disclosure form was not filled out properly by the Respondents. Had the Mazama Pocket Gopher information been included, the Appellant would have been able to determine that the property did not meet his needs and would have then allowed the him to make an informed decision not to purchase the property.

On review of an Order denying a motion for reconsideration, the appellate court reviews a denial of a motion for reconsideration for an abuse of discretion. *Fishburn v. Pierce County Planning & Land Servs. Dept.*, 161 Wn. App. 452, 472, 250 P.3d 146 (2013). An abuse of discretion exists if no reasonable person would have taken the view that the trial court adopted, the trial court applied the wrong legal standard, or it relied on unsupported facts. *Id.* Where the trial court applies the wrong legal standard or improperly applies the correct legal standard, it abuses its discretion. *West v. Dept. of Licensing*, 182 Wn. App. 500, 516, 331 P.3d 72 (2014).

In this matter, the trial court’s March 6, 2017 Order denying the Motion for Reconsideration fails to identify the legal standard or facts relied upon. *CP 273*. The lack of any Findings of Fact or legal standards is an abuse of discretion. Findings must be made as to all material issues. *Daughtry v. Jet Aeration Co.* 91 Wn.2d 704, 707, 592 P.2d 631 (1979). The trial court must make findings sufficient to inform the Appellate Court what questions the trial court decided and the manner in which it did so. *Tacoma v. Fiberchen*,

Inc., 44 Wn. App 536, 541, 722 P.2d 1357 (1986.) The Motion for Reconsideration was decided without a hearing, therefore, there is no verbatim report to review.

D. THE TRIAL COURT ERRED IN ITS APPLICATION OF RCW 64.06.020

On review of a court's interpretation of a statute, the Appellate Court performs the same inquiry as the trial court. It does not appear that the trial court evaluated the interpretation of RCW 64.06.020 and the statutory obligations of the seller of property to adequately advise a potential purchaser of known defects related to the property. In September 2013, federal and state wildlife officials visited Respondents' property, advised Respondents of the presence of a species of concern, the Mazama Pocket Gopher, observed that Defendant Kenneth Spiller had trapped and killed a Mazama Pocket Gopher, and advised Spiller that the trapping and killing was unlawful. *CP 203*. Respondents were informed about the availability of a conservation partnership with federal Fish and Wildlife so that Respondents could co-exist with the gophers. *CP 148-151*.

Respondents' failure to disclose these issues regarding the pocket gophers on the Form 17 Disclosure Form belie the truth of the circumstances and Respondents' actual knowledge.

The Verbatim Transcript of the February 17, 2017, Summary Judgment hearing fails to include any consideration of the interpretation of the requirements of Form 17. (V Tr p 3-17.) There are clearly issues of fact raised, when filling out the Form 17 Disclosure Form, Respondents would simply ignore the September 19, 2013 visit of wildlife officials, the identification of the presence of a species of concern, and the follow up letter.

E. APPELLANT IS ENTITLED TO FEES ON APPEAL.

In the event that this case is remanded and reversed, pursuant to RAP 18.1, Appellant is entitled to Attorney's fees on appeal.

Section q. of the Residential Real Estate Purchase and Sale Agreement General Terms, signed by the Appellant and Respondents on December 14, 2014, states, “. . . if Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys’ fees and expenses.” *CP 21*. The Appellant is entitled to recovery of attorney’s fees and costs pursuant to RCW 4.84.330, which states:

“In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys’ fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys’ fees in addition to costs and necessary disbursements.”

V. CONCLUSION

Based upon the foregoing, the Appellant respectfully requests that this court reverse the Superior Court and vacate the judgment entered in favor of Respondents. Appellant requests remand to the trial court for a trial on the facts at issue regarding the failure to disclose the Respondents’ knowledge of the Mazama Pocket Gophers. Additionally, Appellant requests an award of attorney’s fees and costs on appeal.

DATED this 4 day of August 2017.

Respectfully submitted,

LAW OFFICE OF ALLEN T. MILLER, PLLC.

By: Allen T. Miller
Allen T. Miller, WSBA #12936
Attorney for Appellant

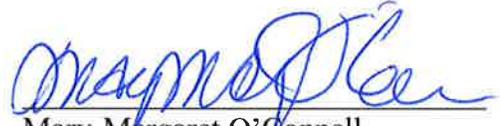
CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on this 4th day of August 2017, as follows:

Ben Cushman Cushman Law Offices, P.S. Olympia, WA 98501 bencushman@cushmanlaw.com	US Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt Requested <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> E-Mail Hand Deliver
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I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated this 4th day of August 2017, at Olympia, WA.



Mary-Margaret O'Connell
Paralegal to Allen T. Miller

THE LAW OFFICES OF ALLEN T. MILLER

August 04, 2017 - 3:10 PM

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