

No. 50174-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KEN SCHUMM,
Appellant

v.

KENNETH SPILLER and MICHAEELEEN SPILLER,
Respondents

APPELLANT'S REPLY BRIEF

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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 Reply Brief in this appeal as follows:

I. STATEMENT OF THE CASE AND FACTUAL

BACKGROUND

Respondent attempts to distort the facts of this matter. The requirements under RCW64.06.020 for the use of Form 17 for the purpose of disclosures to potential buyers is a very simple obligation and allows a potential buyer to weigh the wisdom of purchasing a property. Form 17 requires that the seller be honest in the seller's disclosure. Respondent was not honest in his disclosures.

The factual history of this matter shows that Appellant purchased property from the Respondent and the Respondent failed to inform Appellant of the inspections of Respondent's property by Thurston County and U.S. Fish and Wildlife officials. Respondent failed to disclose that the County and federal officials alerted Respondent to the presence of Mazama Pocket Gophers on Respondent's property and the obligations associated with the presence of the Pocket Gopher.

The seller of property is required under RCW 64.06.020 to provide relevant information to a potential buyer through a simple information form, commonly called Form 17. Respondent concealed the information

about the presence of the Pocket Gopher and the obligations associated with the presence of the Pocket Gopher. Government agents asking to inspect a person's property is not an everyday occurrence. The presence of the Pocket Gopher should have been revealed through Form 17.

Ken Schumm is the new owner of the real property located at 6908 Cate Farm Dr. SE, Olympia, Thurston County, Washington. Kenneth Spiller and Michaelleen Spiller are the 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 asked to inspect the Spiller property, 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*. Respondents fail to present any viable reasons why they failed to disclose the request for inspection, survey of their property, identification of the presence of the Pocket Gopher on their property, and instructions from the government inspectors.

The record shows that the concerns about the Mazama Pocket Gophers have 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 was present and 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. Schumm offered to purchase the property, on August 26, 2014. Kenneth and Michaelleen Spiller signed a Seller Disclosure Statement, Form 17, for the property located at 6908 Cate Farm Dr. SE, Olympia, Thurston County, Washington on August 26, 2014. 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*. It is unlikely that the Spillers simply had a lapse of memory regarding the Pocket Gopher issue.

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. 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*.

II. ASSIGNMENTS OF ERROR AND ISSUES

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.

3. Whether the 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.

III. ARGUMENT

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

The Respondent is ignoring that 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 is not complex. The issues 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 the decision's 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.

Without stating any legal basis, 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. The court did not acknowledge that 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). It is unlikely that Respondent simply forgot about the visit to his property by government

officials and subsequent letter of instruction. 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)). Respondent's dishonesty must not be condoned.

B. THE TRIAL COURT ERRED IN DENYING APPELLANT’S MOTION FOR RECONSIDERATION

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).

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, we do not know the court's legal standard supporting the trial court's March 6, 2017 Order. The 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. A verbal exchange during argument is not Findings of Fact. 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 and the lack of findings call's the court's denial of reconsideration into question.

C. 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. In this matter, 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.

The factual history is clear that 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.

D. APPELLANT DID NOT FILE AN UNTIMELY APPEAL

The appeal was timely filed in this matter. Respondent fails to acknowledge that Appellant properly requested an extension of time to file Appellant's opening brief pursuant to RAP 18.8(a) on June 29, 2017 and that on July 3, 2017 the extension of time was granted allowing Appellant's Opening Brief to be filed by August 4, 2017.

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.”

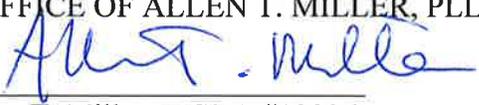
IV. CONCLUSION

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 16th day of October, 2017.

Respectfully submitted,

LAW OFFICE OF ALLEN T. MILLER, PLLC

By: 

Allen T. Miller, WSBA #12936

Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the date signed below, I caused the foregoing document to be electronically filed with this Court and served upon Respondents' attorney of record, as follows:

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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 16th day of October, 2017, at Olympia, WA.



Lisa Shannon
Paralegal to Allen T. Miller

THE LAW OFFICES OF ALLEN T. MILLER

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