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Division II
State of Washington
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No. 51331-5-II

**Court of Appeals, Div. II,
of the State of Washington**

JAMES N. FOTINOS,

Appellant,

v.

CRAIG J. KALICH and JULIET D. KALICH, Husband and Wife,
COLDWELL BANKER KLINE and ASSOCIATES, a Washington
Corporation, and LOREN HOWARD, an individual,

Respondents.

First Amended Brief of Appellant

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I. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in granting Defendants' 3 *Motions for Summary Judgment* without considering or striking the responsive pleadings filed by Plaintiff.
2. If this Court finds the responsive pleadings were rejected or stricken, the trial court erred in granting Defendants' 3 *Motions for Summary Judgment* after rejecting or striking the responsive pleadings filed by Plaintiff in an abuse of discretion.
3. The trial court erred in dismissing Plaintiff's claim for negligent misrepresentation against Defendants Craig and Juliet Kalich.
4. The trial court erred in denying Plaintiff's *Motion for Reconsideration*.

Issues Pertaining to Assignments of Error

1. Plaintiff's attorney filed responsive briefs and supporting affidavits at the hearing for 3 motions for summary judgment. The trial court allowed the responsive pleadings to be filed in his courtroom, and had the responsive pleadings in front of him during the hearing. Attorneys for 2 different defendants moved to strike the responsive pleadings. The trial court did not reject, strike, or consider the responsive pleadings, but ruled in favor of all Defendants to dismiss all of Plaintiff's claims. Did the trial court abuse his discretion by failing to make a ruling on the 2 motions to strike, by failing to make any decision of record to accept or reject the responsive pleadings,

and/or by failing to consider the responsive pleadings that had not been rejected or stricken – and were, therefore, part of the record? (Assignment of Error 1.)

2. During the hearing for the 3 motions for summary judgment, Plaintiff's attorney filed responsive briefs and supporting affidavits. The trial court took the filed documents as working copies, but did not consider them before making a decision against Plaintiffs. After the trial court had the responsive pleadings in front of him, he repeatedly said "no response has been filed," and similar comments. Although Plaintiff contends the trial court did not reject or strike Plaintiff's responsive pleadings from the record, this Court might consider the trial court's conduct as having been a rejection of Plaintiff's responsive pleadings. If that is the case:
 - a. The trial court repeated "Plaintiff has not filed any response", when Plaintiff had filed 33 pages of responsive pleadings. Was the trial court's implied decision to reject Plaintiff's responsive pleadings an abuse of discretion and based on untenable grounds when the trial court relied on unsupported fact that responsive pleadings had not been filed? (Assignment of Error 2.)
 - b. The trial court concluded he did not have any choice in his decision. However, the law gives the trial court authority and responsibility to make a discretionary decision to accept or reject responses and supporting affidavits filed before a decision is made on a summary judgment motions. Since the trial court applied the incorrect legal standard, was his decision based on

untenable grounds and an abuse of discretion? (Assignment of Error 2.)

c. Was the trial court's implied decision to reject Plaintiff's responsive pleadings manifestly unreasonable when the trial court had already decided a "human being" would have been accommodating to Plaintiff's attorney's hardship, and following the letter of the law resulted in an unjust outcome. (Assignment of Error 2.)

3. Mr. and Mrs. Kalich sold a house to Plaintiff knowing it had major flooding and pest infestation problems. The Kalichs prepared a RCW 64.06 *Seller Disclosure Statement* that included material misrepresentations, including denying any history of flooding or drainage problems on the property and denying the property had any pest infestations. Plaintiff's first cause of action of the *Complaint* is for Fraudulent Misrepresentation. The Kalich Defendants moved for summary judgment without raising any factual or legal arguments opposing the cause of action for Fraudulent Misrepresentation. Their motion was supported by 10 pages of argument against a cause of action for Fraudulent Concealment, which is not a cause of action in the complaint and has a completely different legal standard. Did the trial court error in granting summary judgment to dismiss Plaintiff's cause of action for Fraudulent Misrepresentation when his decision was a sanction against Plaintiff for failing to timely respond, even though Defendants had not supported their motion? (Assignment of Error 3.)

4. Plaintiff's attorney had a medical emergency involving his wife and unborn child that resulted in his inability to timely file Plaintiff's responsive pleadings. After Plaintiff's claims had all been dismissed, Plaintiff's attorney filed a *Motion for Reconsideration* to explain in greater detail all efforts to complete and file Plaintiff's responses and again provided all of Plaintiff's responsive pleadings for the court to consider. Defendants even replied to Plaintiff's responsive pleadings. Was the trial court's decision to deny Plaintiff's *Motion for Reconsideration* to hold Plaintiff to the letter of the filing rule an abuse of discretion when Plaintiff's attorney had provided a reasonable explanation for their delinquency and no reasonable person would have denied Plaintiff his day in court under the circumstances? (Assignment of Error 4.)

II. STATEMENT OF THE CASE

1. Mr. Fotinos has been substantially harmed by Defendants

Craig and Juliet Kalich owned a home with a particularly bad flooding problem that they had used as a rental for many years. (CP 507.) In the crawl space, a qualified inspector could observe widespread flood evidence from the entrance of the crawl space. (CP 533-546.) The evidence of flooding is imprinted on nearly all surfaces of the crawl space, including wide stripes of white mineral accumulation running along all concrete surfaces, and gradient discolorations like "water marks." (CP 533-534, 536-540.) At the entrance of the crawl space, an inspector would immediately see a bright white strip, with darker discoloration under it, in a straight and unbroken line about 5-6" from top to bottom along the foundational wall of

the entrance. (CP 533-534, 536-538.) Flooding discoloration forming a “water line” was also present on all wooden beams. (CP 534, 539-540.) These are major red flags that any inspector would have seen and warned a potential buyer about verbally and in writing. (CP 534.) Additionally, if an inspector entered the crawl space, he or she would observe evidence of major structural termite damage. (CP 534, 541-542.)

In March of 2015, the Kalichs prepared to sell the subject property. (CP 4, 131.) They had been using a sump pump to address the flooding problem, but removed it when the house was being shown to prospective buyers. (CP 4, 204, 233.) The Kalichs prepared a RCW 64.06 *Seller Disclosure Statement* that included material misrepresentations, including denying any history of flooding or drainage problems on the property and denying the property had any pest infestations. (CP 202-206.)

In May of 2015, Plaintiff James Fotinos was in his 70s, living in Oregon, and learned that Chehalis, Washington would be a nice place to live. (CP 502.) Mr. Fotinos hired Defendant Coldwell Banker Kline & Associates, and their agent Martha Hunt, to help him find a home in Chehalis. (CP 502.) Mr. Fotinos met with Ms. Hunt in Chehalis to look at the subject property. (CP 502.) On May 28, 2015, he entered into a Purchase and Sale Agreement with the Kalichs to purchase the property. (CP 184-200.)

As an elderly man in his 70s, Mr. Fotinos needed some assistance with reading the contracts and documents provided by Ms. Hunt. (CP 503.) Due to Mr. Fotinos’ poor vision, and because he still lived in Oregon, Ms.

Hunt arranged with the real estate agent selling Mr. Fotinos' Oregon residence, Shannon Rodgers (also with Coldwell Banker Kline & Associates), to email Ms. Rodgers documents so she could deliver and read them to Mr. Fotinos. (CP 503.)

The Purchase and Sale Agreement provides for an inspection period before closing. (CP 120.) At Mr. Fotinos' request, Ms. Hunt contacted Defendant Loren Howard of Ground Zero Home Inspection to inspect the property and prepare a report. (CP 44, 47-112.) Mr. Howard inspected the property and prepared an Inspection Report. (CP 44.) Mr. Howard emailed the Inspection Report to Ms. Hunt. (CP 44.) When she received the report, she read it and called Mr. Fotinos to say the property was in great shape. (CP 503.) Due to his poor vision, Mr. Fotinos asked Ms. Hunt to read the Report to him over the phone and point out all of the concerns raised in the report. (CP 503.) She agreed. As she read the report, Ms. Hunt skipped over important concerns, including 3 references that the exterior trim and crawl space drainage had "Evidence of moisture damage." (CP 503-506.)

Mr. Fotinos also spoke with Mr. Howard over the phone. (CP 44, 506.) Mr. Howard said the property was in good shape and there were no major concerns. (CP 506.) Mr. Howard did not inform Mr. Fotinos that the crawl space had wall-to-wall evidence of major flooding 6" up the foundation walls and on all support beams. In fact, the reference in the report to moisture damage seemed to be a reference to a plumbing leak that the Kalichs had already repaired. (CP 506.) Additionally, Mr. Howard's pest inspection report denied the existence of a termite infestation, which

he would not have seen unless he crawled into the crawl space. (CP 240.) Mr. Fotinos never received a copy of the inspection report. (CP 506.)

The sale of the property closed on June 30, 2015. (CP 502.) After residing in the property for a time, Mr. Fotinos discovered material defects and conditions of the property that were known and concealed by the Kalichs, which defects had been expressly denied by the Kalichs in the Sellers Disclosure Statement. (CP 507.) The primary problem was the flooding. (CP 533-546.)

When rain fell on the property after a dry summer in 2015, Mr. Fotinos discovered the crawl space floods with water, fails to drain, and has standing water. (CP 507.) The crawl space fills with 4" – 5" of water within 24 hours of rainfall. (CP 507.) Water continues to flow into Mr. Fotinos' yard from adjacent property owned by the Kalichs for 3 days after rainfall. (CP 507.)

In September of 2015, Mr. Fotinos contacted Cascade Valley Construction to inspect the flooding. (CP 533.) Thomas Yoney, a general contractor with 45 years' related experience, entered the crawl space of the subject property and immediately observed wall-to-wall evidence of substantial flood damage that would have been present for many years, and most certainly would have been observed by a competent property inspector in June 2015 when Loren Howard says he inspected the property. (CP 533.) Mr. Yoney also observed major structural termite damage that would have been active in June 2015, but was not reported by Mr. Howard. (CP 533-546.)

After attempting to contact the parties to address these major issues, Mr. Fotinos sought redress through the Court. (CP 3-15.) On November 3, 2016, Mr. Fotinos filed suit against Craig and Juliet Kalich for (1) Fraudulent Misrepresentation and (2) Breach of Contract; and against Coldwell Banker Kline & Associates for (3) Misrepresentation in Sale of Real Estate and (4) Violation of Consumer Protection Act; and against Loren Howard for (5) Negligence, and (6) Breach of Contract. (CP 3-15.)

2. Mr. Fotinos can prove his claims against Defendants

From January 2017 to July 2017, the parties conducted discovery, including interrogatories and document requests to and from all parties and the deposition of Mr. Fotinos. (CP 136.) In July 2017, Defendants filed and served 3 motions for summary judgment, a total of 66 pages, plus supporting declarations and exhibits. (CP 33-294, 300-413.)

In response, Mr. Fotinos and his construction expert, Thomas Yoney, prepared declarations, and Mr. Fotinos, through his attorney, prepared a separate response to each motion for summary judgment. (CP 475-508, 532-546.) A total of 33 pages of responsive pleadings, not including exhibits, were filed on behalf of Mr. Fotinos before the Court entered rulings on the motions for summary judgment. Mr. Fotinos' pleadings were not stricken from the record. (CP 475-508, 532-546.)

3. Plaintiff's attorney was unable to timely file responsive pleadings due to his substantial workload increase after a medical emergency.

Mr. Fotinos' attorney, Ryan Jacobsen, has a wife and 4 children. His youngest child was born on July 14, 2017. (CP 418, 525.) Mr. Jacobsen had planned to take paternity leave from July 14, 2017 to July 31, 2017. (CP 418, 525.) However, 3 weeks earlier, on June 22, 2017, his wife was admitted to St. Peter's Hospital's Family Birthing Center's triage unit due to heart and respiratory concerns with their unborn baby. (CP 525-526.) Over the next weeks, Mr. Jacobsen was in and out of the hospital, staying at St. Peter's Hospital a total of 5 days, and missed almost 3 weeks of work *before* his scheduled paternity leave. (CP 526.)

Due to the medical emergency, Mr. Jacobsen fell behind in his work on many other cases. (CP 526-527.) Upon returning to work in August 2017, he had overdue work to catch up on, plus the then-current work of early August, and the upcoming response deadlines for motions in several different cases, including the 3 motions for summary judgment in this matter. (CP 526.) He had a full schedule of appointments, overdue discovery work, guardianship reporting, scheduled hearings, and a lot of other work waiting for him upon his return. (CP 526.)

During the month of August, Mr. Jacobsen dedicated all of his time to working on his cases (overdue work, upcoming deadlines, etc.). (CP 526-527.) He worked more than would be considered healthy to protect his

clients. (CP 526-527.) And as a result of his efforts, he was able to protect all of his clients' interests in all but one case – this one. (CP 526-527.)

There is no question that Mr. Fotinos intended to respond to the 3 motions for summary judgment. (CP 475-508, 532-546.) When Mr. Jacobsen realized he would be unable to complete the responses to the 3 motions in time to be heard the following week, despite all his efforts, he brought a motion to shorten time and a motion to continue the 3 motion for summary judgment hearings scheduled for August 25, 2017. (CP 414-423.)

4. Judge Toynebee denied the continuance because Defendants would rather have untimely responses than change the hearing date.

On August 18, 2017, Judge Toynebee heard Plaintiff's motion to shorten time and motion for continuance. (08/18/17 RP 3.) Since all parties were present, the Court granted the motion to shorten time to hear the motion for a continuance of 3 motion for summary judgment hearings. (RP 3-4.)

Judge Toynebee asked Mr. Jacobsen if he filed a notice of unavailability, and Mr. Jacobsen explained that if he had filed a notice of unavailability, it would have only been for July 14 – 31, 2017 – not August. (08/18/17 RP 5-6.) Mr. Jacobsen informed the Court that upon returning to work, he became overwhelmed with his workload, and after seeing how much work would be needed to respond to all 3 motions, he realized he only

had time to respond to one of the parties' motions.¹ (08/18/17 RP 4; CP 418.) A continuance was necessary to avoid an unjust outcome. (CP 509-516.)

Counsel for each defendant responded the same: we complied with the rules to schedule the hearing - the motion to continue should be denied. (08/18/17 RP 5-11.) Two of the parties said they would be willing to accept a late-filed brief, as long as the hearing date was preserved. (08/18/17 RP 8, 11.)

Judge Toynee denied the motion for a continuance, and explained that Defendants had a duty to their client that conflicted with their desire to be "human beings":

"I'm very, very sympathetic to your position, and I think everyone in this room is sympathetic to your position. I think many of us have been in your position. But as cold as it may sound, this is the rough-and-tumble world of litigation, and as much as I think the lawyers representing the defendants would like to, **as human beings**, accommodate you, they have a **duty to their clients**, and I believe that they're adhering to their duty to their clients. **So I'm going to deny the motion.**" (08/18/17 RP 13. Emphasis added.)

Judge Toynee extended the response deadline to Tuesday, August 22, 2017, but he did not make a ruling that Plaintiff could not file responses untimely **"if that was the best he could do."** (08/18/17 RP 12.)

¹ At the hearing for the *Motion for Continuance*, Mr. Jacobsen did not inform Judge Toynee that his overwhelming workload and inability to complete the 3 MSJ responses was the result of a medical emergency. However, those facts were presented to Judge Lawler in the *Motion for Reconsideration* and supporting declaration. (CP 517-531.)

“I’m not, I guess, commenting on this necessarily to hold Judge Lawler, who is scheduled to hear this matter next week, to this, but it sounds like the defendants are just looking for a brief to be filed **as soon as it can be filed**.

I’m not going to make a ruling at this time that you’re unable to [file late], that you’ve missed the time line and the court won’t consider those, because it sounds like the parties want to get your client’s position and to move forward with the hearing.” (08/18/17 RP 12-13.)

5. Mr. Jacobsen did not have the ability or time to complete the responses any sooner.

Due to Mr. Jacobsen’s case work in different matters, and the size of the 3 motions for summary judgment (66 pages, plus exhibits and declarations), and notwithstanding his willingness and effort, the Court’s extension to file and serve responses by Tuesday, August 22, 2017 was not realistic for Mr. Jacobsen to meet. (CP 526.) Mr. Jacobsen explained:

“I tried to get the responses for Defendants’ motions for summary judgment completed and filed in time for the Court to review them. However, **without a continuance there was no way I could file anything but incomplete responses on Tuesday before the hearing**. When the responses were not completed, I didn’t leave work on Tuesday and stayed through the night and all the next day (Wednesday) to complete one of the responses and continue work on the others. And I completed the others on Thursday afternoon, with no time to file them before the Clerk’s office closed. I brought all of the completed responses to Court and filed them at the beginning of the hearing.” (CP 526.)

6. Judge Lawler allowed Plaintiff's responsive pleadings to be filed in his courtroom and did not strike them prior to making his decisions.

On August 25, 2017, counsel for each party attended the motion for summary judgment hearings. (08/25/17 RP 1-2.) Judge Lawler was aware that all parties had received Plaintiff's responsive pleadings. (08/25/17 RP 3-5, 7.) Judge Lawler allowed Mr. Jacobsen to file the responsive pleadings with the courtroom clerk. (08/25/17 RP 12.) They were given to Judge Lawler to review. (08/25/17 RP 12.)

The Court: Mr. Jacobsen?

[Mr. Jacobsen approached and handed the courtroom clerk Plaintiff's responsive pleadings. The clerk filed them and gave them to Judge Lawler.]

Mr. Jacobsen: This is for filing and the Judge's copy –

The Court: What?

Mr. Jacobsen: The judge's copies if you use those as the copies.

The Court: All right. (08/25/17 RP 12.)

Judge Lawler had the 33 pages of responsive pleadings, plus exhibits, on the bench in front of him for the duration of the hearing. (08/25/17 RP 12-18.)

While the filed responsive pleadings were in front of him, Judge Lawler spoke as though Mr. Fotinos had made no effort to respond to the motions for summary judgment at all: (08/25/17 RP 13-16.)

The Court: And now in this case you missed that deadline too and still nothing has been filed so --

Mr. Jacobsen: Yes, Your Honor. Well, actually, four pleadings have been filed and --

The Court: The ones that you just handed up.

Mr. Jacobsen: Exactly.

The Court: Okay.

[Mr. Jacobsen explained his efforts to complete the responses, then began to explain how the responses defeat the motions for summary judgment.]

The Court: Well, you know, I'm not going to get into that because how am I supposed to consider that because nothing was filed.

... On [motions for summary judgment] you're given weeks to respond and you knew that this one was coming. ... But you didn't respond to any of them.

Mr. Jacobsen: I responded to all of them.

The Court: Don't argue with me. Have a seat. I've heard enough. I'm going to grant the motions for summary judgment.

...

The Court: And so, you know, maybe there were some defenses to some of these things. I don't know. Nothing was filed. So I'm going to grant the motions for summary judgment. (CP 13-16. Emphasis added.)

Judge Lawler did not strike any of Plaintiff's responsive pleadings from the record prior to his decision. (08/25/17 RP 1-18.)

7. Judge Lawler dismissed a cause of action against Mr. and Mrs. Kalich for Fraudulent Misrepresentation without any basis.

Mr. and Mrs. Kalich, through their attorney, filed a motion for summary judgment to dismiss a Fraudulent Misrepresentation based on the factual and legal analysis of an incorrect cause of action: Fraudulent Concealment. (CP 307.)

Plaintiff filed a cause of action against Defendants Craig and Juliet Kalich for Fraudulent Misrepresentation – the first cause of action in the *Complaint*. (CP 9-10.) The *Complaint* sets forth the elements of fraudulent misrepresentation: (CP 9-10.)

4.2 Prior to Plaintiff entering into the Purchase and Sale Agreement, the property had material defects and conditions [...].

4.3 Seller Defendants affirmatively denied each defect and condition in writing in the Seller Disclosure Statement. Seller Defendants also intentionally withheld information that should have been disclosed to Plaintiff pursuant to RCW 64.06.

4.4 Seller Defendants' representations concerning the condition of the property were material to the purchase of the property, and material to the Purchase and Sale Agreement entered into by Plaintiff.

4.5 Seller Defendants' denials of the material defects and conditions were false representations. The defects and conditions alleged herein were present at the time Seller Defendants made such representations.

4.6 Seller Defendants knew the denials of the material defects and conditions were false, as they owned the property for three (3) years, could not have avoided

experiencing the defects and conditions during the rainy seasons, and tried to conceal the defects and conditions, as set forth above.

4.7 Seller Defendants intended Plaintiff to rely on the false representations to purchase the property. Seller Defendants intended to conceal the defects and conditions, and make false disclosures to potential buyers like Plaintiff.

4.8 Plaintiff did not know the representations were false. In fact, Plaintiff would not have purchased the property had he known of the actively concealed, latent, and material defects and conditions. Plaintiff relied on Seller Defendants' representations concerning the condition of the property. Plaintiff had the right to rely on Seller Defendants' representations about the condition of the property as he was the purchaser.

4.9 As a result of Seller Defendants' conduct, Plaintiff has incurred actual damages in an amount not less than \$70,025.25, damages for non-economic losses, incidental and consequential damages, and legal costs. Plaintiff seeks judgment against Defendants for such damages. (CP 9-10.)

The only reference in the Kalich motion for summary judgment to Plaintiff's first cause of action was to state the words "fraudulent misrepresentation" on the first page. (CP 300.) In the last paragraph, the cause is referred to as "the fraud claim." (CP 319.) All factual and legal arguments set forth as the basis for dismissal of "the fraud claim" (10 pages of their motion) are based on Mr. Fotinos not satisfying the elements of "Fraudulent Concealment:" (CP 307-316.)

2. Mr. Fotinos was on notice of the alleged defects and had a duty to utilize diligence to make further inquiries

and inspections, He did nothing to exercise diligence and his fraud claim is barred.

A claim for **fraudulent concealment** requires 1) there is a concealed defect in residential premises, (2) the seller had knowledge of the defect, (3) the defect is dangerous to the property, health or life of the purchaser, (4) the defect is unknown to the purchaser and a careful and reasonable inspection would not disclose the defect, and (5) the defect substantially affects the value of the property or operates to materially impair or defect the purpose of the transaction.

For **fraudulent concealment** to exist, the claimant must have made inquiries into known defects and when a claimant is on notice of a defect, they have a duty to make further inquiries. It is not enough that a seller makes an incorrect statement on a Form 17 disclosure. A buyer who is on notice of a defect cannot simply hurry their head in the sand without making further inquiries of the seller, and later seek relief by asserting the defect is worse than anticipated. (CP 307.)

On August 25, 2017, following the Court's ruling to grant the Kalichs' *Motion for Summary Judgment*, Mr. Jacobsen asked the Court to clarify if the cause of action for fraudulent misrepresentation would be dismissed: (08/25/17 RP 17-18.)

Mr. Jacobsen: For clarification?

The Court: Yes?

Mr. Jacobsen: The Kalich motion for summary judgment is asking to dismiss two causes of action and one of them [fraudulent concealment] is not in the complaint and one of the causes of action in the complaint [fraudulent misrepresentation] is not in their motion.

Mr. Unzelman: That's not correct. Our motion for summary judgment is to dismiss, it's asking to dismiss all the causes against us.

The Court: I'm granting the motion as requested. (RP 17-18.)

8. Judge Lawler denied Plaintiff's uncontested motion for reconsideration.

On September 5, 2017, Mr. Jacobsen filed the *Motion for Reconsideration* based on (a)(1) irregularity in the proceedings, (a)(7) the Court's decision is contrary to law, and (a)(9) substantial justice has not been done. (CP 517-524.) In his supporting declaration, Mr. Jacobsen provided further explanation about why he was unable to prepare responsive pleadings any sooner, which included details about the medical emergency in June and July 2017. (CP 525-531.)

The *Motion for Reconsideration* provided examples of how each motion for summary judgment was contrary to law, and again addressed the Kalichs' failure to make any argument of fact or law to support dismissal of a cause of action for Fraudulent Misrepresentation. (CP 520-524.)

A. Plaintiff's First Claim Against Kalichs is Fraudulent Misrepresentation

The Kalichs' Motion for Summary Judgment does not address Plaintiff's claim for Fraudulent Misrepresentation. The Kalichs have made a lengthy argument about Fraudulent Concealment, which is not a cause of action Plaintiff has claimed. Even if the Kalichs' motion were granted, the order could not dispose of the cause of action for Fraudulent Misrepresentation. (CP 521.)

On September 11, 2017, before any response to the motion for reconsideration was filed, Judge Lawler signed an order denying Plaintiff's motion for reconsideration. (CP 547.)

III. STANDARD OF REVIEW

1. Standard for Summary Judgment.

This Court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. *Faila*, 181 Wn.2d at 649. Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Morgan*, 166 Wn.2d at 533. The court views the facts in a light most favorable to the nonmoving party. *Faila*, 181 Wn.2d at 649.

A motion for summary judgment is to allow the trial court to determine whether or not there is any genuine issue of material fact pursuant to Civil Rule 56. There are many cases outlining criteria for granting or denying such a motion. The case of *Balise v. Underwood* outlines it succinctly:

"(1) the object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact.

(2) Summary judgments shall be granted only if the pleadings, affidavits, depositions or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.

(3) A material fact is one upon which the outcome of the litigation depends.

(4) In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue.

(5) The court, in ruling upon a motion for summary judgment, is permitted to pierce the formal allegations of facts in pleadings and grant relief by summary judgment, when it clearly appears, from uncontroverted facts set forth in the affidavits, depositions or admissions on file, that there are, as a matter of fact, no genuine issues.

(6) One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact, irrespective of whether he or his opponent, at the trial, would have the burden of proof on the issue concerned.

(7) In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorable to the nonmoving party and, when so considered, if reasonable men might reach different conclusions the motion should be denied." *Balise*, 62 Wn.2d at 198-199.

2. Standard for Motion for Reconsideration.

The standard of review for motions for reconsideration is that the Court of Appeals will review (1) a trial court's denial of a motion for reconsideration, and (2) the trial court's decision to consider new or additional evidence presented with the motion for reconsideration, to determine if the trial court's decisions were manifestly unreasonable or based on untenable grounds. *Martini*, 178 Wn.App. at 153, citing *Weyerhaeuser Co.*, 142 Wn.2d at 683 and *Chen*, 86 Wn. App. at 192.

3. Standard for Abuse of Discretion

An abuse of discretion occurs when a decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Mayer*, 156 Wn.2d at 680. A discretionary decision rests on untenable grounds or is based on untenable reasons if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. *Id.*

IV. ARGUMENT

1. The trial court erred in granting Defendants' Motions for Summary Judgment without considering or striking the responsive pleadings filed by Plaintiff.

Judge Lawler had to make a discretionary decision with regard to Plaintiff's responsive pleadings filed on August 25, 2017. (08/25/17 RP 16.) A trial court may accept affidavits any time prior to issuing its final order on summary judgment. *Felsman*, 2 Wn. App. at 498. Whether to accept or reject untimely filed affidavits lies within the trial court's discretion. *Brown*, 48 Wn. App. at 559 (citing *Jobe*, 37 Wn. App. 718). The pleadings were filed prior to the Court entering his decision. (08/25/17 RP 12.) Two parties asked for late-filed pleadings to be stricken. (08/25/17 RP 5, 8.)

A. Judge Lawler had a duty to make a discretionary decision regarding Plaintiff's responsive pleadings,

which remained a part of the Court's record when he granted the motions for summary judgment.

On August 25, 2017, at the summary judgment hearings, Judge Lawler had Plaintiff's filed responses and affidavits on the bench in front of him. (08/25/17 RP 12.) Additionally, the record also included several reply briefs filed by the Defendants. (08/25/17 RP 3; CP 424-473.) Counsel for Defendant Howard filed a motion to strike any late-filed responsive pleadings. (08/25/17 RP 5.) Counsel for Mr. and Mrs. Kalich verbally moved to strike Plaintiff's responsive pleadings. (08/25/17 RP 8.) Judge Lawler did not make any ruling to reject or strike Plaintiff's responsive pleadings from the record. (08/25/17 RP 1-18.) Therefore, Plaintiff's responsive pleadings were not stricken from the record when Judge Lawler made his decisions, and should be included in this Court's review de novo.

B. If Judge Lawler made a discretionary decision to strike Plaintiff's responses from the record, his decision rested on untenable grounds and was manifestly unreasonable.

If this Court finds Judge Lawler made a decision to strike Plaintiff's responsive pleadings from the record, then such decision rested on untenable grounds and was manifestly unreasonable.

i. Judge Lawler relied on unsupported facts in finding Plaintiff did not respond to the motions.

A discretionary decision rests on untenable grounds or is based on untenable reasons if the trial court relies on unsupported facts. *Mayer*, 156 Wn.2d at 680. Rather than recognizing that Plaintiff had filed responsive

pleadings and affidavits, Judge Lawler erroneously relied on the unsupported fact that Plaintiff “still” had not filed responses: (08/25/17 RP 13, 15.)

The Court: ... and *still* nothing has been filed ...

... nothing was filed.

... you didn't respond to any of them.

Mr. Jacobsen: I responded to all of them.

The Court: Don't argue with me. Have a seat. I've heard enough. I'm going to grant the motions for summary judgment. And I really don't have any choice in this matter. (08/25/17 RP 13, 15.)

Although Judge Lawler continued to misstate the filing status of Plaintiff's responses, Mr. Jacobsen was ordered not to correct the Court about the filed responsive pleadings sitting on the bench in front of him.

If Judge Lawler did strike Plaintiff's responsive pleadings from the record, then his decision relied on the unsupported fact that responses still had not been filed. Therefore, his decision to strike the responsive pleadings was based on untenable grounds, and was an abuse of discretion.

ii. Judge Lawler applied the wrong legal standard when he concluded he did not have any choice in his decision.

A discretionary decision rests on untenable grounds or is based on untenable reasons if the trial court applies the wrong legal standard. *Mayer*, 156 Wn.2d at 680. Judge Lawler did not exercise discretion when deciding

to accept or reject Plaintiff's responses and affidavits. (08/25/17 RP 16.) If his conduct is construed to have been to reject or strike Plaintiff's responsive pleadings and affidavits from the record, then his decision to do so was based on the incorrect standard of law – that he had no choice. (08/25/17 RP 16.)

The Court: I'm going to grant the motions for summary judgment. **And I really don't have any choice in this matter.**² The rules are very clear; and despite those rules, you were given additional time and still not give any response. (08/25/17 RP 16.)

Authority to accept or reject untimely filed affidavits lies within the trial court's discretion. *Brown*, 48 Wn. App. at 559. Therefore, Judge Lawler was incorrect when he said he had no choice. *Id.* Judge Lawler strictly applied a deadline without acknowledging his duty and authority to exercise discretion. (08/25/17 RP 15-16.)

Judge Lawler's improper standard resulted in an unjust outcome. As a result of an attorney's hardship, Mr. Fotinos' responses and affidavits were filed as soon as possible, but the trial court believed he did not have "any choice" to consider them, resulting in all of Mr. Fotinos' claims against

² Although the statement "I really don't have a choice in this matter" was in regard to granting the motions for summary judgment, if this Court construes Judge Lawler's failure to affirmatively accept, reject, or strike the responsive pleadings as a decision to reject or strike them, then Judge Lawler's provided legal standard should be construed to apply to his discretionary decision to accept or reject untimely filed responses and affidavits. (08/25/17 RP 16.)

all Defendants being dismissed by default, even on reconsideration³. (CP 509-516, 525-531; 08/25/17 RP 16.)

If Judge Lawler made a decision to reject or strike Plaintiff's responsive pleadings, then it was based on untenable grounds because he applied the wrong legal standard. Therefore, his decision was an abuse of discretion.

iii. Judge Lawler's decision to reject the responsive pleadings was manifestly unreasonable because a "human being" would have been accommodating if he or she did not have a duty to oppose them.

A discretionary decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. *Mayer*, 156 Wn.2d at 680. If Judge Lawler made a decision to reject or strike Plaintiff's responsive pleadings, then his decision was an abuse of discretion because no reasonable person would have dismissed all of Plaintiff's claims when responses and supporting affidavits had been filed prior to the decision and the lateness of filing was due to personal hardship in the life of Plaintiff's attorney.

A reasonable person would not dismiss Mr. Fotinos' claims after Mr. Jacobsen had tried to have the hearing continued due to personal

³ Judge Lawler had every opportunity on reconsideration to consider Mr. Jacobsen's medical emergency and resulting hardship, his documented efforts to file as soon as possible, and consider the responsive pleadings and the opposing parties' reply briefs. However, he denied reconsideration because he "had no choice in this matter." (CP 547.)

hardship, then worked to complete the responses, but was only capable of timely filing incomplete responses that would not have promoted Mr. Fotinos' interests. (08/25/17 RP 14.)

Mr. Jacobsen: So I've spent the last -- of the last 16 work days, I spent 12 of them dedicated to responding to essentially a 66-page motion for summary judgment, not including the exhibits, and in responding to a 66-page motion for summary judgment, I couldn't get it done in time. I tried. I really tried. I thought just a couple more days and I'll get it done.

Over the last week, I stayed at work overnight, didn't see my family to get all of this done. Tuesday night I slept at -- I didn't even sleep. I was at my office in the morning at 8 o'clock and I left work at 6 o'clock on Wednesday. That means it was impossible for me to get these responses done despite the amount of time given. It's a 66-page motion for summary judgment. And it should have been continued. (08/25/17 RP 14. Emphasis added.)

Judge Toyne believed that a reasonable person who was not motivated by a duty to oppose the late filing would have acted like a "human being" and accommodated Plaintiff:

"I'm very, very sympathetic to your position, and I think everyone in this room is sympathetic to your position. I think many of us have been in your position. But as cold as it may sound, this is the rough-and-tumble world of litigation, and as much as I think the lawyers representing the defendants would like to, **as human beings,** accommodate you, they have a **duty to their clients,** and I believe that they're adhering to their duty to their clients." (08/18/17 RP 13. Emphasis added.)

When Judge Toynebee said “as human beings,” he meant “reasonable persons capable of sympathizing.” (08/18/17 RP 13.) Judge Lawler did not have a duty to oppose Mr. Fotinos. With regard to discretionary decisions to accept late-filed responses and affidavits, Judge Lawler had a duty to make a decision as a human being – a reasonable person. *Mayer*, 156 Wn.2d at 680. If Judge Lawler made a decision that was not consistent with what a reasonable person would decide, his decision would be manifestly unreasonable:

The Court: Don’t argue with me. Have a seat. I’ve heard enough. I’m going to grant the motions for summary judgment. And I really don’t have any choice in this matter. The rules are very clear; and despite those rules, you were given additional time and *still* not give any response.

If Judge Lawler made a decision to reject or strike Plaintiff’s responsive pleadings, then it was manifestly unreasonable because he had a duty to make a decision like a reasonable person, and a human being would have been both sympathetic and accommodating. Therefore, his decision was an abuse of discretion.

2. Plaintiff’s cause of action for Fraudulent Misrepresentation could not have been dismissed when Defendants failed to raise any factual or legal arguments opposing it.

Plaintiff filed a cause of action against Defendants Craig and Juliet Kalich for Fraudulent Misrepresentation. (CP 9-10.) In their motion for summary judgment, the Kalichs had 10 pages of factual and legal argument

relevant to a cause of action for Fraudulent *Concealment*, which is wholly irrelevant to Plaintiff's cause of action for Fraudulent Misrepresentation. (CP 307-316.) In particular, a seller's duty to disclose truthful information arises for many reasons:

The duty to disclose arises (a) where there is a quasi-fiduciary relationship, (b) where a special relationship of confidence and trust had developed between the parties, (c) where a party relies on the specialized and superior knowledge of the other party, (d) **where a party has a statutory duty to disclose**, or (e) **where a seller knows a material fact that is not easily discoverable by the buyer**. *Van Dinter*, 157 Wn.2d at 334. (Emphasis added.) (See also CP 487.)

The Kalichs erroneously argued that they had no duty to disclose truthful information because, under *Alejandre v. Bull*'s analysis of Fraudulent Concealment, a seller would not have a duty to "speak" about a defect if the buyer could discover it through a reasonable inspection:

"[T]he **fraudulent concealment claim** fails because [...], **the vendor's duty to speak arises** where ... (5) **the defect would not be disclosed by a careful, reasonable inspection by the purchaser**. *Atherton*, 115 Wn.2d at 524. The Alejandres failed to meet their burden of showing that the defect in the septic system would not have been discovered through a reasonably diligent inspection. *Alejandre*, 159 Wn.2d at 689-90. (CP 487.)

The Kalichs' argument hinged on a common law duty. And RCW 64.06.020 creates a statutory duty, which the Kalichs cannot avoid by arguing Plaintiff was not diligent enough:

"(1) In a transaction for the sale of improved residential real property, the **seller shall ...**

deliver to the buyer a completed seller disclosure statement in the following format and that contains, at a minimum, the following information: [...]

“NOTICE TO THE BUYER

“THE FOLLOWING DISCLOSURES ARE MADE BY SELLER ABOUT THE CONDITION OF THE PROPERTY [...]

“SELLER MAKES THE FOLLOWING DISCLOSURES OF EXISTING MATERIAL FACTS OR MATERIAL DEFECTS TO BUYER BASED ON SELLER'S ACTUAL KNOWLEDGE OF THE PROPERTY AT THE TIME SELLER COMPLETES THIS DISCLOSURE STATEMENT.

“[...]

“9. FULL DISCLOSURE BY SELLERS

“B. Verification:

“The foregoing answers and attached explanations (if any) are **complete and correct to the best of my/our knowledge** and I/we have received a copy hereof. I/we authorize all of my/our real estate licensees, if any, to deliver a copy of this disclosure statement to other real estate licensees and all prospective buyers of the property.

DATE _____ SELLER
_____”

RCW 64.06.020. (See also CP 487-488.)

In reading the Kalichs' *Motion for Summary Judgment*, Judge Lawler failed to recognize Defendants' erroneous basis for dismissal of Plaintiff's claim for Fraudulent Misrepresentation. (08/25/17 RP 16-17.) Mr. Jacobsen informed Judge Lawler that dismissal of Fraudulent Misrepresentation was improper, both at the hearing on August 25, 2017 and in Plaintiff's *Motion for Reconsideration*. (08/25/17 RP 16-17; CP 520-521.) Regardless of the contents of the Kalichs' motions, Judge Lawler dismissed Plaintiff's Fraudulent Misrepresentation claim against them. (CP 509-516.)

Even when a party has completely failed to respond to a motion for summary judgment, the moving party is not entitled to summary judgment on the basis of the failure to respond:

Even though Rule 56(e) requires a non-moving party to set forth specific facts showing that there is a genuine issue for trial, it is well-settled that this does not mean that a moving party is automatically entitled to summary judgment if the opposing party does not respond. *Anchorage Assocs.*, 922 F.2d at 170.

Summary judgment cannot be granted as a sanction for failure to respond to a motion for summary judgment. *Dunlap*, 858 F.2d at 632. In our case, even when Judge Lawler was made aware of the improper dismissal of Plaintiff's cause of action for Fraudulent Misrepresentation at the summary judgment hearing and in the *Motion for Reconsideration*, he did not change his ruling because he had granted summary judgment on the basis of

Plaintiff's failure to respond, not because Defendants' motions were appropriate. (08/25/17 RP 16.)

3. Judge Lawler abused his discretion when he denied Plaintiff's *Motion for Reconsideration* and held Plaintiff to the letter of the filing rule when a reasonable explanation for the delinquency had been given.

On September 11, 2017, upon review of Plaintiff's *Motion for Reconsideration*, Judge Lawler had to make another discretionary decision with regard to Plaintiff's responsive pleadings. Whether to accept or reject untimely filed affidavits lies within the trial court's discretion. *Brown*, 48 Wn. App. at 559 (citing *Jobe*, 37 Wn. App. at 718).

“The decision to consider **new or additional evidence presented with a motion for reconsideration** is squarely within the trial court's discretion. In the context of summary judgment, unlike in a trial, there is **no prejudice** if the court considers additional facts on reconsideration. Generally, nothing in CR 59 prohibits the submission of new or additional materials on reconsideration. The trial court properly exercised its discretion when reviewing the new evidence Martini presented on reconsideration. Post suffered no prejudice from the trial court's consideration of the additional evidence because Post was previously aware of the evidence and of Martini's theory of Abson's cause of death. It was within the trial court's discretion to consider this additional evidence. Thus, we hold that the trial court's decision to review the new evidence was not manifestly unreasonable.” *Martini*, 178 Wn. App. at 162.

In our case, this Court must decide if it was manifestly unreasonable for Judge Lawler to *not* consider Plaintiff's responses and affidavits when presented with the *Motion for Reconsideration*, considering (1) Defendants

were aware of the evidence and arguments, (2) Defendants had already replied to Plaintiff's responses (CP 424-473), (3) Defendants would not be prejudiced if their motions for summary judgment were actually decided on their merits (*Martini*, 178 Wn. App. at 162), (4) Plaintiff was unfairly prejudiced when his claims were dismissed by default due to Mr. Jacobsen's medical emergency (CP 509-516), (5) Mr. Jacobsen made every effort to continue the hearing and file responsive pleadings as soon as possible, and did file responsive pleadings before Judge Lawler ruled on the motions for summary judgment, and (6) upholding Judge Lawler's decision would set an unhealthy precedent against public policy.

A. Judge Lawler was given additional information regarding Mr. Jacobsen's medical emergency.

When Mr. Jacobsen sought reconsideration, he provided additional information about his personal hardship, and included the details of his medical emergency involving his wife and then-unborn child, including medical documentation to prove the timing of events. (CP 525-531.) In his supporting declaration he stated:

On June 22, 2017, I received a phone call from my wife who was then 9 months pregnant. She was being admitted to St. Peter's Hospital's Family Birthing Center's triage unit due to heart and respiratory concerns with our unborn baby. See Exhibit "A" attached, Heart Monitor Chart. That night, I ran into and spoke with Mr. Allan Unzelman, counsel for Kalichs, while at the hospital.

During the next several weeks, I was in and out of the hospital, staying at St. Peter's Hospital a total of 5 days, and missed a lot of work just supporting my family at

home. After losing basically 3 weeks of work, I was thrown off schedule due to these unanticipated health complications with my wife and child. I missed some deadlines with other cases and put off a lot of work that I expected to complete before the baby was born. But I did what I had to do for my family.

Fortunately, my wife and I had a healthy baby girl (Julia Margaret Jacobsen) on July 14, 2017. Since my wife needed to stay in bed and we have 3 other children (ages 6, 3, and 2), I still took a couple weeks of paternity leave.

In early August 2017, I returned to work and received the 3 motions for summary judgment. Due to the complications surrounding my daughter's birth, I had overdue work from the 3 weeks preceding her birth that I had to deal with, plus my then-current work, plus my upcoming response deadlines for motions in several cases, including 3 motions for summary judgment in this matter. I had a full schedule of appointments, overdue discovery work, guardianship reporting, scheduled hearings, and a lot of other work waiting for me in my other cases.

I tried to get the responses for Defendants' motions for summary judgment completed and filed in time for the Court to review them. However, **without a continuance there was no way I could file anything but incomplete responses on Tuesday before the hearing.** When the responses were not completed, I didn't leave work on Tuesday and stayed through the night and all the next day (Wednesday) to complete one of the responses and continue work on the others. And I completed the others on Thursday afternoon, with no time to file them before the Clerk's office closed. I brought all of the completed responses to Court and filed them at the beginning of the hearing. *Decl. of R. Jacobsen in Supp. of Motion for Reconsideration*, pgs. 1-2. (CP 525-531.)

After the *Motion for Reconsideration* and supporting declaration were filed, and prior to Defendants filing a response, Judge Lawler again rejected Plaintiff's responsive pleadings, which were presented with the *Motion for Reconsideration*. (CP 475-508 and 532-546.) Since Judge Lawler denied Plaintiff's *Motion for Reconsideration* before any defendant responded, it appears he applied the same incorrect standard that he applied at the summary judgment hearing: "I really don't have any choice in this matter." (08/25/17 RP 16.)

After Mr. Jacobsen provided additional information explaining his medical emergency, ongoing hardship, and diligent effort to respond, a reasonable person would not have denied Plaintiff's *Motion for Reconsideration*, resulting in unjust prejudice against Plaintiff. Therefore, Judge Lawler's decisions to not accept Plaintiff's responsive pleadings for reconsideration, and to deny the motion for reconsideration, were manifestly unreasonable, and therefore abuses of discretion.

V. PLAINTIFF REQUESTS ATTORNEY FEES ON APPEAL

Plaintiff requests an award of costs and attorney fees on appeal, pursuant to RAP 18.1. Plaintiff is entitled to recover litigation costs and attorney fees under the contracts with Defendants. As to Mr. and Mrs. Kalich, the *Purchase and Sale Agreement* provides for litigation costs and attorney fees to be awarded to the prevailing party. (CP 187, ln. 162-165.) As to Coldwell Banker Kline and Associates, the *Realtor Agreement* provides for litigation costs and attorney fees to be awarded to the prevailing party. (See *Declaration in Support of Attorney Fees*, Exhibit "A") As to Mr.

Howard, if Mr. Howard complied with WAC § 308-408C-060 to provide a Pre-Inspection Agreement for services, then said agreement provides for litigation costs and attorney fees to be awarded to the prevailing party. But at the time of filing this brief, the record shows Loren Howard failed to comply with the law, in addition to his other duties to Plaintiff. (CP 478.)

VI. CONCLUSION

The Court should reverse the 3 orders granting summary judgment against Plaintiff, and direct the trial court to admit all of Plaintiff's responsive pleadings into the record to decide Defendants' motions for summary judgment on their merits. The Court should reverse the order denying reconsideration. The Court should award litigation costs and attorney fees in favor of Plaintiff against Defendants.

Respectfully submitted 13th day of February, 2018.

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CERTIFICATION

I, Kim Woolery, hereby certify under penalty of perjury of the laws of the State of Washington that I am a citizen of Thurston County, Washington, over age 18, and not a party herein. On the date written below, I served a copy of this document on the following persons, in the manner indicated:

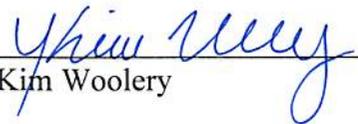
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Kim Woolery

JACOBSEN LAW OFFICE, P.S.

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