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

REDSTONE BLACK LAKE 1, L.P. and REDSTONE BLACK LAKE 2,
L.P., as successors in interest to Redstone Investments LLC,

Appellant,

v.

GF CAPITAL REAL ESTATE FUND-INVESTMENT I, LLC,

Respondent.

OPENING BRIEF OF APPELLANTS REDSTONE BLACK LAKE 1,
L.P. and REDSTONE BLACK LAKE 2, L.P., as successors in interest to
Redstone Investments LLC

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I. INTRODUCTION

This case is about a property owner who sold two office buildings without disclosing—and while actively concealing—that systemic water intrusion and mold growth had been occurring throughout the wall cavities of those buildings for years. The seller was Respondent GF Capital Real Estate Fund-Investment I, LLC (“GF Capital”); the buyer was Appellant Redstone Black Lake 1, L.P. and Redstone Black Lake 2, L.P. (collectively, “Redstone”). After discovering the hidden water intrusion and mold, Redstone brought claims against GF Capital for fraudulent concealment, negligent misrepresentation, and breach of warranty. The Superior Court dismissed those claims on summary judgment. The Superior Court then construed a contractual fee-shifting provision to award GF Capital attorney’s fees and costs for all three claims.

The Superior Court’s order dismissing Redstone’s claim for fraudulent concealment should be reversed because GF Capital cannot carry its burden to show the absence of any genuine issue whether the water intrusion and mold are concealed defects that GF Capital knew about prior to the sale, whether those defects impacted the condition and value of the properties, or whether those defects were unknown to Redstone despite having performed a reasonable inspection. The record is replete with evidence that GF Capital not only withheld material

information about the condition of the properties, but also affirmatively misrepresented the nature of that condition.

The Superior Court's order awarding attorney's fees to GF Capital for defending against Redstone's tort claims also should be reversed because Washington's contractual fee-shifting statute, RCW 4.84.330, does not entitle a prevailing party to recover fees for non-contractual claims. Unlike Redstone's breach of warranty claim, its claims for fraudulent concealment and negligent misrepresentation do not arise from the contract—they arise from independent common law duties.

II. ASSIGNMENTS OF ERROR

The Superior Court erred by granting GF Capital's motion for summary judgment on Redstone's claim for fraudulent concealment. The issue pertaining to this assignment of error is whether the factual record considered by the Superior Court contains genuine issues of material fact as to the elements of Redstone's fraudulent concealment claim.

The Superior Court erred by granting GF Capital's motion for attorney's fees and costs. The issue pertaining to this assignment of error is whether RCW 4.84.330 permits an award of attorney's fees pursuant to a contractual fee-shifting provision for tort claims that arise independently of the contract and are not brought to enforce its terms.

III. STATEMENT OF THE CASE

A. Factual Background

1. The Black Lake Properties, Brad McKinley, GF Capital, and James Taussig

The Black Lake Properties are three office buildings located at the intersection of Black Lake Boulevard Southwest and Fourth Avenue West in Olympia, Washington. CP 1529. Two of the properties (“Black Lake I and II”) are adjacent; the third (“Black Lake III”) is across the street. *Id.* Black Lake I and II are at issue in this dispute. Black Lake III is not.

Brad McKinley was the project manager during the construction of Black Lake I and II in the mid-1980s. CP 1401 (Deposition of Brad McKinley (“McKinley Dep.”) 16:9-12). He then became the property manager for all three Black Lake Properties, and remained in that role for nearly thirty years. CP 1401-02 (McKinley Dep. 16:13-17:1).

GF Capital, a real estate investment company, purchased the Black Lake Properties in 2004, CP 1401 (McKinley Dep. 16:20-22), and leased them to the Washington Department of Licensing (“DOL”) in 2008, CP 687. GF Capital retained McKinley as the property manager. CP 1915-27. The agreement between GF Capital and McKinley’s company, Sierra Property Management, LLC, required him to regularly inspect the properties, submit monthly written reports on their condition, and notify GF Capital of any significant problems “immediately.” CP 1917

(Property Management Agreement § 2.14).

As required, McKinley reported to GF Capital on a monthly basis. CP 1403, 1405 (McKinley Dep. 21:17-22:10, 23:3-14, 36:8-25). His reports included summaries of the expenses incurred at the properties along with corresponding invoices. CP 1405 (McKinley Dep. 33:20-36:25). His reports also described the reasons for repairs. *See, e.g.*, CP 1929-33 (operating expenses with repair items); CP 1935-2028 (invoices and purchase orders describing work performed).

James Taussig, the managing director of GF Capital, was McKinley's point of contact for most of the duration of agreement. CP 1401, 1403 (McKinley Dep. 13:20-25, 23:15-18). Whenever McKinley observed a problem that needed GF Capital's attention—such as “leaks,” “mold,” or “moisture on the interior of the drywall in the wall cavity”—he reported it to Taussig. CP 1403 (McKinley Dep. 24:7-23). Because of McKinley's regular reports, Taussig and GF Capital were thoroughly apprised on the condition of the Black Lake Properties.

2. GF Capital Knew About the Extensive History of Water Intrusion in Black Lake I and II.

Over the years, McKinley recorded numerous instances of water intrusion at Black Lake I and II, and reported these instances to GF Capital. CP 2044-49 (emails discussing “the pictures of the Black Lake

moisture problem”); CP 1408-09 (McKinley Dep. 56:14-59:4 (testimony re same)); CP 2055-57 (emails discussing “water intrusion that came in at ground level” and a “water leak above, most likely [from] the windows”); CP 1410 (McKinley Dep. 61:10-62:4) (testimony re same); CP 2059-66 (e-mailing invoices for water remediation); CP 1410 (McKinley Dep. 64:1-14) (testimony re same); CP 2030-34 (noting “water damage repairs” for “sheetrock, sills, window and flashing repairs, etc.”); CP 1406 (McKinley Dep. 38:14-39:4) (testimony re same).

Invoices from 2007, 2008, and 2009 reveal that McKinley repeatedly hired ServPro of Olympia, Inc. (“ServPro”) to remediate water damage to Black Lake I and II. CP 2093-2138. Among other things, ServPro found “[w]etness behind the she[e]t rock” in an office at Black Lake II that was “caused by window leaks.” CP 2134. Yet GF Capital generally limited ServPro to treating water damage to the floor and exterior of the interior walls, but not the wall cavity. CP 1377 (Deposition of Thomas Fitzgerald (“Fitzgerald Dep.”) 14:14-15:12). ServPro’s owner advised McKinley about damage to the wall cavity. CP 1379 (Fitzgerald Dep. 59:4-14). But McKinley ignored recommendations that would have required invasive construction work. *Id.* (58:18-59:14 (“Q: [W]hen would he not follow your recommendations? A: When it involved taking things apart. . . . Q: So, for instance, working inside wall cavities? A:

Exactly.”)).

McKinley also hired Rainshine Construction, Inc. (“Rainshine”) and Madsen Roofing, Inc. (“Madsen Roofing”) to repair leaks at Black Lake I and II. CP 2073-91 (invoices from Rainshine in 2007, 2009, 2011, 2012, and 2013); CP 1411-12 (McKinley Dep. 67:25-69:15) (testimony re same); CP 2144-51 (invoices from Madsen Roofing in 2012, 2013, and 2014); CP 1413-14 (McKinley Dep. 76:24-77:5, 77:19-79:6) (testimony re same). The owner of Rainshine, Steve Passero, testified that in his experience as a contractor, the “repetitiveness” of the leaks was “uncommon.” CP 1451 (Deposition of Stephen Passero (“Passero Dep.”) 19:3-13). He also testified that the repairs directed by GF Capital were “not a permanent solution.” *See, e.g.*, CP 1452 (Passero Dep. 29:17-20).

The water damage caused significant rot and decay. In one instance, Passero observed a metal panel fall off,¹ “exposing the rotten plywood” behind it. *Id.* (31:17-32:5). Yet in similar instances, Passero was *not* instructed to replace the damaged plywood, so he simply resealed the metal panel over it. *Id.* (32:6-18) (“Q: Did you ever resealed a panel knowing that the plywood beneath it had rotted? A: Yes. Q: And how many times did that happen? A: Often. Q: And why didn’t you repair

¹ These metal panels have been referred to as “mullions,” “break metal,” or “spandrels” in deposition testimony and exhibits. For ease of reference, Redstone will use the term “metal panels” in this brief.

the plywood behind it? A: Because I wasn't instructed to do so, even though I made Sierra Property Management [i.e., McKinley] aware of it."); CP 1453 (Passero Dep. 33:5-22).

McKinley recognized the severity of the water intrusion problem and recommended that GF Capital implement long-term solutions. CP 2071 (emphasizing there were "many failed window caulk joints on buildings 1 & 2 which have the potential for allowing water penetration into the wall cavities"); CP 1410-11 (McKinley Dep. 64:17-66:5) (testimony re same); CP 2142 (recommending that GF Capital re-caulk the exterior of Black Lake I and II because "there is water intrusion happening at old caulk joints"); CP 1412 (McKinley Dep. 71:24-72:11) (testimony re same). McKinley reiterated these concerns in October 2013. CP 1865; CP 1416-17 (McKinley Dep. 87:17-89:18).

GF Capital did not adopt McKinley's recommendations. CP 1416 (McKinley Dep. 88:21-23); CP 1484-85 (Taussig Dep. 69:15-76:7). Nor did GF Capital implement a preventative maintenance plan, such as measures to protect against leaks through the exterior walls or windows. CP 1482 (Taussig Dep. 55:7-23); CP 1404 (McKinley Dep. 31:6-12).

3. GF Capital Knew About the Mold Problem in Black Lake I and II.

McKinley discovered mold in Black Lake II at least as early as

April 2009. CP 2044-53 (photographs of mold growth); CP 1409 (McKinley Dep. 58:24-59:4) (testimony re photograph); CP 1483 (Taussig Dep. 59:1-20) (same); CP 1406 (McKinley Dep. 38:23-39:23) (discussing expenses associated with mold growth); CP 2154 (email regarding “the room that we had the water and mold problem in”).

In addition to the mold discovered at Black Lake II, GF Capital’s records show expenses in July 2011 to “[m]itigate old mold problem” found in the second floor lobby of Black Lake I. CP 2036; CP 1407 (McKinley Dep. 41:4-17) (testimony re same). McKinley did not take additional steps to determine the scope of the mold problem elsewhere in Black Lake I. CP 1407 (McKinley Dep. 41:18-42:4).

In 2013, GF Capital discovered more mold at Black Lake I, this time in vertically adjacent rooms. CP 2157 (McKinley informing Taussig “[w]e have a problem with mold . . . most likely due to a wall, roof or window leak”); CP 1415 (McKinley Dep. 81:12-23, 82:9-24) (testimony re same); CP 2162 (notifying Taussig that “more mold spores” had been discovered on the second floor); CP 1481 (Taussig Dep. 35:11-36:2).

GF Capital again failed to explore whether the mold had spread. CP 1415 (McKinley Dep. 83:6-84:20).²

² Although one assessment concluded that the mold had not diminished the air quality, air samples cannot establish whether mold exists within wall cavities. CP 1426 (Deposition of Gregg Middaugh 78:22-80:12); CP 1378 (Fitzgerald Dep. 38:11-13); CP 1336

Instead of meaningfully remediating the mold problem, GF Capital implemented cosmetic, impermanent repairs that covered up the problem and allowed it to grow worse. For example, GF Capital used humidifiers to dry affected areas, CP 1336 (Riordan Aff. ¶ 4), cleaned surfaces where leaks had been discovered, *id.*, and repaired only specific portions of affected sheetrock, CP 1406-07 (McKinley Dep. 39:5-39:23, 43:2-11). Critically, GF Capital did not determine whether mold was growing in adjacent areas of the building. *Id.* (40:13-41:1); CP 1481, 1486 (Taussig Dep. 35:21-24, 79:12-23). GF Capital's response to the mold problem was ineffective and improper. CP 1335-36 (Riordan Aff. ¶¶ 2-4); CP 14 (Affidavit of Rocco Romero ("Romero Aff.")) ¶ 15).

4. GF Capital Decides to Sell the Black Lake Properties.

In 2013, GF Capital hired a real estate broker, CBRE Group, Inc. ("CBRE"), to sell the Black Lake Properties.³ CP 1487 (Taussig Dep. 90:13-14); CP 1842-53 (Listing Agreement). Craig Wilson, a broker for CBRE, expected GF Capital to disclose everything it knew about the properties and discussed with GF Capital the importance of doing so.

(Affidavit of Frank Riordan ("Riordan Aff.") ¶ 6) ("Air quality control and moderating testing within a room is not conclusive evidence of the existence of mold within the wall cavities."). Moreover, that assessment was based only on samples collected in isolated areas. CP 2181-2200.

³ Along with the three Black Lake Properties, GF Capital decided to sell a property located in Bellingham, Washington. The Bellingham property is not at issue.

CP 1515 (Deposition of Craig Wilson (“Wilson Dep.”) 17:17-18:13). Under the listing agreement, GF Capital was required to disclose “toxic, hazardous or contaminated substances.” CP 1847 (Agreement § 6.6(a)). Mold is a toxic substance. CP 1515 (Wilson Dep. 18:17-19:11). It is also “material information for purposes of selling property.” *Id.* (20:5-7).

Taussig and McKinley were CBRE’s only contacts for learning about the properties. CP 1472, 1474 (Deposition of Steve Sutherland (“Sutherland Dep.”) 31:18-32:5, 37:3-15). CBRE prepared an offering memorandum based on their input. CP 1487 (Taussig Dep. 92:19-22); CP 1868-1908 (Offering Memorandum). In doing so, CBRE requested extensive information, including property condition reports. CP 1855; CP 1472-73 (Sutherland Dep. 32:13-33:1). But GF Capital did not disclose McKinley’s monthly reports regarding the condition of, and suggested upgrades to, the Black Lake Properties. Nor did McKinley or GF Capital disclose an accurate scope of necessary repairs. CP 1473-74 (Sutherland Dep. 33:12-36:7, 37:20-38:3).

Because of GF Capital’s nondisclosures, CBRE’s offering memorandum lacked any information about the extensive history of mold and water intrusion at Black Lake I and II or any other indication sufficient to notify prospective buyers of the need to “seriously examine” the metal panels, “replace and recaulk” them, and “seal the brick exterior.”

CP 1865 (McKinley's advice to Taussig less than three months before CBRE finalized the memorandum). And not a single one of the anticipated replacement/repair costs identified in the memorandum pertained to water intrusion at Black Lake I or II. CP 1878-79. Had GF Capital disclosed this information, CBRE would have included it in the offering memorandum. CP 1473 (Sutherland Dep. 36:5-7).

5. Redstone Purchases the Black Lake Properties.

In early 2014, Redstone representatives Ayaz Velji and Ali Nanji began exploring the prospect of purchasing the Black Lake Properties. They reviewed the offering memorandum and discussed the properties with CBRE. CP 1496 (Deposition of Ayaz Velji ("Velji Dep. 24:5-25:13); CP 1516 (Wilson Dep. 23:1-24:14). CBRE then led them on a walk-through. CP 1517 (Wilson Dep. 29:10-30:3). Along with CBRE, McKinley served as a point of contact for Redstone to obtain information about the properties. In March 2014, for example, Redstone e-mailed McKinley for reports of work completed on the windows, roofing, and exterior of the buildings. CP 2174-75.

Taussig, however, dictated the scope of information that McKinley was at liberty to provide. CP 2387 ("Any information requests should come through me please."). Similarly, when CBRE received inquiries from Redstone, it would forward them to Taussig. CP 1517 (Wilson Dep.

32:19-21). Taussig had the “final say” on the scope of information available to Redstone through CBRE. *Id.* (32:8-12).

CBRE was responsible for maintaining the list of information requested by Redstone and anything disclosed in response (the “due diligence list”). CP 1519 (Wilson Dep. 37:17-38:8). If Redstone requested information that Taussig found to be unavailable, CBRE would delete the request from the due diligence list and inform Redstone. CP 1520 (Wilson Dep. 45:17-47:1).

Through one such request, Redstone sought information about past and anticipated repairs to the “exterior” of Black Lake I and II. CP 2390. According to Craig Wilson, this and other requests from Redstone “absolutely” should have been honored by GF Capital. CP 1518 (Wilson Dep. 33:13-34:13). Yet in response to Redstone’s request, McKinley informed Wilson that “[t]here really has been no brick work done at Bellingham, and only minor repairs as needed at Black Lake. **I have no reports.**” CP 2393 (emphasis added); *see also* CP 1520 (Wilson Dep. 47:5-25).

McKinley’s statement was false. He ***did*** have reports with information about the brickwork and exterior, most recently in his “assessment” on the condition of the Black Lake Properties. *See, e.g.*, CP 1865 (proposing to “seal the brick exterior”). Taussig, who was

copied on the email from McKinley to Wilson, knew McKinley's statement was false, yet never corrected it. CP 2392.

In another due diligence inquiry, Redstone requested "all of the repair bills you have from 2012 to 2014." CP 2172. McKinley later acknowledged it is "reasonable" for a buyer to request repair bills as part of the due diligence process. CP 1420 (McKinley Dep. at 107:15-17). As discussed above, McKinley had prepared numerous expense reports; even if he no longer had the corresponding invoices, GF Capital certainly did. *See, e.g.*, CP 1931-33; *see also* CP 1420 (McKinley Dep. 107:21-108:6) (acknowledging he had expense reports). McKinley is "sure" he discussed Redstone's inquiry with Taussig. CP 1420 (McKinley Dep. 108:7-11).

Yet McKinley advised CBRE that "[t]his request would take days to complete." CP 1911. McKinley himself later admitted this statement was false. CP 1420-21 (McKinley Dep. 108:22-109:17) (Q: Now, in fact, it wouldn't have taken you days to pull up those monthly operating reports, would it? A: Probably not."). McKinley further admitted it would have been easy for GF Capital to collect and disclose the requested invoices. CP 1421 (McKinley Dep. 109:14-17) ("Q: But it wouldn't be difficult . . . for GF to pull those and provide those, would they? A: No."). Neither McKinley nor Taussig, who was copied on McKinley's response, ever disclosed the invoices.

In addition to submitting due diligence requests, Craig Wilson arranged an in-person meeting between McKinley and Redstone representatives, Ayaz Velji and Ali Nanji. The day before the meeting, Taussig spoke with McKinley to set the parameters for what he could disclose to Redstone: “I have just spent some time on the phone with James [Taussig], and have a clear understanding of exactly what he wants me to provide in terms of information and paper work in my meeting with Ay[a]z tomorrow.” CP 2165 (March 4, 2014 email from McKinley to Wilson).

The March 5 meeting between Redstone and McKinley lasted approximately two hours. CP 1499-1500 (Velji Dep. 36:11-37:21); CP 1430 (Deposition of Ali Nanji (“Nanji Dep.”) 30:14-31:6). Since Redstone had little or no experience with thin brick veneer siding, CP 1430 (Nanji Dep. 29:13-20); CP 1495, 1498 (Velji Dep. 12:3-6, 32:5-7), Velji and Nanji specifically asked McKinley “if there were any issues with the brick veneer at Black Lake 1 and 2,” CP 1500 (Velji Dep. 37:2-21). McKinley told them “there were none that he was aware of, and if any had come up, they had been fixed” *Id.* McKinley denied there had been any water ingress or intrusion issues, and “that if at any time there was anything, it was taken care of right away.” *Id.* (37:22-38:10). Velji and Nanji asked McKinley “if there were any major issues at all, and

he told [them] no, everything had been well maintained.” *Id.*; *see also id.* (39:8-13) (“He just told us that . . . if problems came up, he basically got it looked after or got the repair done.”). McKinley further denied that there had been any issues with caulking or failed seals. *Id.* (38:19-25).

The next day, McKinley sent an email to Taussig recapping his meeting with Redstone: in his own words, Redstone was “especially concerned about the exterior thin brick and window system at Black Lake 1 and 2. ***I think I got them comfortable with things*** however, and they left the meeting ***giving me the impression that they intend to move ahead with the purchase . . .***” CP 2395 (emphasis added). Nine days after the meeting, Redstone entered into a purchase and sale agreement (the “PSA”) with GF Capital to purchase the Black Lake Properties. CP 2261-2328.

6. Redstone’s Continued Due Diligence

Per the terms of the PSA, Redstone had until April 24, 2014, (the “Due Diligence Period”) to “make any and all inspections, investigations, tests and studies of the Property as Buyer elects to make or obtain.” CP 2262, 2269-70 (PSA § 6.1(b)).

a. GF Capital Refuses Redstone’s Requests for Additional Information.

The PSA did not restrict to whom or on what subjects Redstone was permitted to ask questions or request additional information.

Redstone agreed in the PSA that it had received “copies” of certain “due diligence materials,” but this provision neither prohibited Redstone from requesting additional information nor reduced GF Capital’s obligations to respond to such requests. CP 2272 (PSA § 7.1, referencing Exhibit H); CP 2319 (Exhibit H). Further, since due diligence materials had been prepared by CBRE based on the deficient information provided by GF Capital, the list was inherently incomplete. CP 1520 (Wilson Dep. 45:17-47:25).

GF Capital obstructed Redstone’s efforts to obtain additional information about the properties by invoking a false interpretation of the PSA. After reviewing a series of general ledgers, Redstone highlighted particular entries in those ledgers and requested information about the “scope of work” and invoices associated with the entries. CP 2366-79; CP 2368, 2372 (highlighting entries for Madsen Roofing and Rainshine); CP 1489 (Taussig Dep. 182:1-11). GF Capital rejected Redstone’s request, claiming it had no obligation to provide any information to Redstone beyond the list of “due diligence materials” identified in the PSA. CP 2378-79; CP 1489-90 (Taussig Dep. 184:8-20, 185:16-186:14).

b. Marx Okubo Conducts a Property Condition Assessment.

Redstone engaged Marx Okubo, a nationally renowned

architecture, engineering, and construction firm, to assess the condition of the Black Lake Properties. CP 12 (Romero Aff. ¶ 5). Performing property condition assessments comprises roughly fifty percent of Marx Okubo's Seattle office's business. CP 1383 (Deposition of Phillip C. Helms ("Helms Dep.") 8:9-23). Such assessments of a commercial property involve "non-destructive" testing of the structure, systems, and grounds in accordance with industry standards. CP 13 (Romero Aff. ¶ 9); CP 1767-92 (ASTM Standard E2018).

Prior to assessing the Black Lake Properties, Marx Okubo prepared a property condition questionnaire for GF Capital. CP 1824-40. The questionnaire sought evidence of problems with "leaks" in the exterior walls, CP 1831, "moisture intrusion" through the windows, *id.*, and "moisture intrusion" in the interior, CP 1834.

GF Capital refused to answer the questionnaire. CP 1824-40 (completing the "top portion" of the questionnaire, declining to complete the rest, and directing Redstone to GF Capital's "Due Diligence website" for remainder of information).

GF Capital also forbade Marx Okubo from discussing the condition of the Black Lake Properties with the DOL, which had been leasing the building since 2008. CP 2177 (Taussig advising CBRE "[t]here's no interview for a [property condition assessment]"); *id.* (CBRE

responding “I let them know there were to be NO tenant interviews”).

Marx Okubo proceeded with a non-invasive property condition assessment for each of the buildings.⁴ CP 1794-1813 (proposal); CP 1524-1663 (property condition assessment). If it had discovered a condition during the assessment that warranted destructive testing, Marx Okubo would have advised Redstone accordingly. CP 1384 (Helms Dep. 23:14-24:16). The assessment covered twenty percent of the buildings’ interior, which is common in the industry. *Id.* (24:17-25). As part of the inspection, Marx Okubo reviewed whether moisture had intruded into the buildings. CP 1385 (25:8-26:3). McKinley attended the inspection but was unwilling to discuss the maintenance history of the Black Lake Properties. CP 1385-86 (Helms Dep. 28:17-29:8, 30:14-22). The “more common experience” would have been for GF Capital make someone with knowledge about the properties available to Marx Okubo. CP 1385 (Helms Dep. 29:16-30:1) Lacking McKinley as a resource, having been forbidden to speak with the tenants, and having had their preliminary questionnaire rejected, Marx Okubo was left to perform an inspection limited “very simply” to “what we could see.” CP 1386 (Helms Dep. 30:17-22).

⁴ Marx Okubo’s assessment deviated from applicable ASTM standards in only two ministerial respects: (1) the assessment was not signed; and (2) the curriculum vitae of the assessors was not included. CP 1384 (Helms Dep. 22:16-23:5).

During the inspection, Marx Okubo identified some cracks (or “spalling”) in the exterior brick veneer, but no indication that water had intruded through those cracks into the interior. CP 1387, 1392 (Helms Dep. 38:18-39:12, 82:8-12); CP 1556. As Phillip Helms of Marx Okubo later explained, cracks in brick veneer do not pose a threat of moisture intrusion because the veneer is cosmetic and does not serve as a moisture barrier—that function is performed by the coating underneath. CP 1391 (Helms Dep. 75:10-76:17) (explaining that the “bricks are just a decorative finish surface” and that moisture ingress is not a concern “if the substrate is still all together”).

Similarly, Marx Okubo observed deteriorated sealant around the window frames and flashings, but this is not clear evidence of water intrusion. CP 1390 (Helms Dep. 59:21-60:10) (“I don’t see anywhere in our report where we found evidence of moisture stains on the inside of the window frames . . . or . . . evidence of moisture stains or deteriorations on the drywall around windows or near windows.”). While the metal panels appeared to have previously been repaired, there were no visual indications that the Black Lake Properties had sustained moisture intrusion. CP 1393 (90:17-91:1) (“We just couldn’t find it.”). Separately, Marx Okubo found minimal evidence of staining in the ceiling tiles. CP 1388 (46:14-19). Likely, this was because GF Capital had concealed

evidence of damage to the ceiling tiles by replacing them in the months preceding the inspection. CP 1418 (McKinley Dep. 93:10-94:3) (“Q: And why did you do that? A: To make the building more presentable. “).

Based on its assessment, the only repair items that Marx Okubo identified as affecting the exterior of Black Lake I and II were deferred maintenance tasks to be performed over the ensuing years. CP 1577-80.

c. Additional Inspections

Redstone’s financier, CitiBank, N.A., hired Adele Brandl of Partner Engineering and Science, Inc. (“Partner Engineering”), to inspect the Black Lake Properties. CP 1363 (Deposition of Adele Brandl (“Brandl Dep.”) 11:24-12:3). Brandl’s report found “[n]o obvious indications of water damage or mold growth” CP 1703 (Phase I Environmental Assessment § 6.3.5).

In addition to Marx Okubo, Redstone hired Don Henrickson of Applied Construction Systems, Inc. (“Applied Construction”) to evaluate the façade of Black Lake III, which had been constructed with a different exterior wall system than Black Lake I and II.⁵ CP 2332. During his inspection of Black Lake III, Henrickson conducted a brief walk-through of Black Lake I and II. CP 2330. He observed that Black Lake I and II “look to be in decent condition with some possible deferred maintenance

⁵ Black Lake III has an Exterior Insulation Finishing System (“EIFS”), whereas Black Lake I and II have thin brick veneer siding. CP 25-26.

needed.” *Id.* He suggested having the buildings recoated, but explained this as “more of a deferred maintenance issue than anything.” *Id.*

Redstone also commissioned Capitol Glass to estimate the cost of replacing the “window units” in the Black Lake Properties. The term, “window units” refers to the double-paned glass windows and the spacer bars that seal the panes together. CP 1458 (Deposition of Justin Perry (“Perry Dep.”) 8:12-18). Justin Perry performed the inspection, *id.* (8:23-25), and recommended replacing 291 “window units.” CP 1714; CP 1459 (Perry Dep. 11:11-13).

Critically, Perry explained that the risk associated with faulty window units is that “when they fail, wet moisture gets into—between the two panes of glass and fogs the windows up.” CP 1458 (Perry Dep. 8:16-18) (emphasis added); *see also* CP 1460 (Perry Dep. 13:12-18) (“Q: And when you talk about replacing failed units only, that means— A: Insulated glass unit. . . . Q: That had moisture in between them and it had fogged up? A: Yeah.”); CP 1452 (Passero Dep. 29:4-10) (testifying that “window unit” does not include “window flashing”). The purpose of replacing these window units was not to prevent moisture from intruding into the wall cavities. CP 1459 (Perry Dep. 9:4-6).

Separate from the window units, Perry noted the need to re-anchor some of the metal panels between the windows and to reapply the

caulking.⁶ CP 1714; *see also* CP 1460 (Perry Dep. 15:5-14). While Perry explained these repairs could reduce the risk of water intrusion, *id.* (15:15-16), he did not observe deterioration in the underlying plywood that would have suggested the need to implement those repairs immediately, CP 1461 (Perry Dep. 17:17-21). Rather, Perry’s proposed repairs were similar to the deferred maintenance items recommended by Marx Okubo. CP 14 (Romero Aff. ¶ 14).

In sum, four separate entities—Marx Okubo, Partner Engineering, Applied Construction, and Capitol Glass—inspected the Black Lake Properties during the due diligence period, yet none of them discovered the undisclosed, extensive history of water intrusion and mold at the Black Lake Properties.

7. Redstone and GF Capital Amend the PSA.

At the close of the due diligence period, Ayaz Velji of Redstone e-mailed CBRE to share what Redstone had learned about the Black Lake Properties and, based on that information, to request an amendment to the purchase price (hereinafter, the “Property Condition Email”). CP 2343-45. His request was based upon the condition of the “window units,” the HVAC systems, the pavement in the parking lots, the roof on Black Lake III, and the EIFS exterior system on Black Lake III. *Id.*

⁶ “Break metal” refers to the metal panels between the windows. *See supra* note 1.

In requesting a price reduction for the window units, Velji was relying on Capitol Glass’s concern about fog, not water intrusion. CP 2403 (Velji Dep. 146:3-10) (“I was only referring to what Capitol Glass had said as far as the glazing [i.e., glass window panes] and the seals were concerned . . .”).⁷ Because Redstone was unaware of—and GF Capitol had not disclosed—the extensive water intrusion or mold issues at Black Lake I and II, Velji did not request a purchase price reduction for those issues in the Property Condition Email.

GF Capital agreed to reduce the price; in exchange, Redstone agreed to release claims arising from the items discussed in the Property Condition Email. CP 2340-45 (PSA Amendment). Having finalized the transaction, Redstone took ownership of the Black Lake Properties.

8. Redstone Discovers Extensive Decay, Rot, and Mold in Black Lake I and II.

Two and a half years later, Redstone hired a contractor to install a new exterior door in Black Lake II—upon cutting an opening for the door, the contractor discovered mold, rot, and decay inside the wall cavity. CP 1454 (Passero Dep. 98:12-99:17); CP 1433 (Nanji Dep. 108:2-12).

Redstone and the DOL each hired consultants, JRS Engineering

⁷ Velji used the terms “window unit” and “window system” interchangeably in the Property Condition Email to describe this same scope of work. CP 2344 (estimating \$235,000 to “correct the failed units” and referring to this same expenditure as “window system”); CP 2403 (Velji Dep. 146:3-10); CP 1508 (Velji Dep. 147:6-25); CP 2411 (Nanji Dep. 75:22-76:9).

(“JRS”) and PBS Engineering and Environmental, Inc. (“PBS”), to determine the extent of the mold problem. Both consultants found systemic water intrusion and fungal growth in Black Lake II. CP 1736-58 (JRS Report); CP 2381-85 (PBS Report). JRS concluded that the predominant source of water intrusion was the exterior metal panels between the windows and the joints by which those panels are attached. CP 1747-50, 1757.

Repairing the hidden defects in Black Lake II forced the DOL to vacate the premises and consolidate its operations in Black Lake I. After repairs began, additional rot and decay were uncovered behind the brick and mortar exterior. CP 1438 (Deposition of James Newlin (“Newlin Dep.”) 25:9-26:10); CP 1763-65.

Redstone anticipates that similar issues exist in Black Lake I because it was constructed with the same exterior system as Black Lake II. CP 1745 (opining “that the general observations and recommendations made for Black Lake #2 can be assumed to apply for Black Lake #1). Redstone has begun planning for the remediation of Black Lake I, which will take place upon the completion of repairs at Black Lake II. CP 1511 (Velji Dep at 219:20-24); CP 2350-55 (estimate for cladding repairs). Including repair costs, tenant move-out expenses, foregone rental revenue, and engineering fees, Redstone anticipates at least \$6,230,614.83 in losses

as a result of GF Capital's failure to disclose defects at Black Lake I and

II. CP 812 (Answer to Interrogatory No. 13).

B. Procedural History

On March 13, 2017, Redstone filed a complaint against GF Capital in Thurston County Superior Court, alleging tort claims for fraudulent concealment and negligent misrepresentation, and a contract claim for breach of warranty.⁸ CP 1-6. GF Capital moved for summary judgment on all claims. CP 255. Redstone opposed the motion. CP 1147.

On April 20, 2018, the Superior Court granted GF Capital's motion.⁹ CP 1203-17. Pursuant to a fee-shifting provision in the PSA, the Superior Court awarded fees and costs to GF Capital for defending against all three claims. CP 1244. Redstone now appeals the dismissal of its fraudulent concealment claim and the award of fees and costs.

⁸ GF Capital filed counterclaims against Redstone for indemnification and award of costs, as well as a third-party complaint alleging the same claims against a separate entity, Redstone Investment, LLC.

⁹ Although the Superior Court's order did not resolve GF Capital's counterclaims or third-party complaint, the court later amended it under CR 54(b) to find no just reason for delaying the entry of final judgment on Redstone's claims. CP 2424-46. Thereafter, the parties together moved to dismiss the counterclaims and third-party complaint. CP 2447-50. The Superior Court granted the motions, thereby resolving all other claims in this matter. CP 2451-55.

IV. ARGUMENT

A. The Superior Court Erred by Granting GF Capital's Motion for Summary Judgment on Redstone's Claim for Fraudulent Concealment.

1. Standard of Review

The standard of review is de novo. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). Summary judgment is improper unless the moving party demonstrates there is “no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Save Our Scenic Area v. Skamania County*, 183 Wn.2d 455, 463, 352 P.3d 177 (2015). “[A] trial is absolutely necessary if there is a genuine issue as to any material fact.” *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

“A material fact is one that affects the outcome of the litigation.” *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). “In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party and, when so considered, if reasonable people might reach different conclusions, the motion should be denied.” *Jacobsen*, 89 Wn.2d at 108-09.

The “clear, cogent and convincing” evidentiary standard for fraud claims does not supplant the summary judgment standard. *Estate of*

Randmel v. Pounds, 38 Wn. App. 401, 405, 685 P.2d 638 (1984).

“[W]hile the court must keep in mind that the jury must base its decision on clear and convincing evidence, the evidence is still construed in the light most favorable to the nonmoving party and the motion is denied if the jury could find in favor of the nonmoving party.” *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989). Quoting the U.S. Supreme Court, the Washington State Supreme Court has explained this rationale as follows:

Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Id. at 768-69 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Thus, a claim for fraudulent concealment cannot be dismissed on summary judgment if—viewing the facts in the light most favorable to the nonmoving party, drawing all reasonable inferences in that party’s favor, and reserving all credibility determinations—a reasonable jury could find

sufficient evidence to support the claim.

2. Neither the PSA Nor the Amendment to the PSA Bars Redstone's Claim for Fraudulent Concealment.

a. The PSA

The PSA contains an “as-is” provision, which provides that the sale was made on an “AS IS,” “WHERE IS,” and “WITH ALL FAULTS” basis “WITHOUT REPRESENTATIONS AND WARRANTIES.”

CP 2272-73 (PSA § 8.2). In the same section, the PSA contains a release provision applicable to “any claim or cause of action it has, might have had or may have against [s]eller,” regardless of the underlying legal theory. *Id.*

The “as-is” provision does not preclude Redstone’s claim because an “as-is” clause cannot bar a claim for fraudulent concealment. *Sloan v. Thompson*, 128 Wn. App. 776, 790, 115 P.3d 1009 (2005). In *Sloan*, the Court of Appeals reversed a decision misapplying an “as-is” clause to dismiss a homebuyer’s fraudulent concealment claim. *Id.* “[T]he ‘as-is’ provision in the purchase contract does not immunize [the seller] from fraudulent concealment liability.” *Id.* Where applicable, an “as-is” clause can allocate the consequences of unknown defects to the buyer, but such clauses do not have this effect when the seller “*knew* about the defects” and fraudulently concealed material information about them from the

buyer. *Id.* As such, the “as-is” provision in the PSA cannot bar Redstone’s claim.

The release provision also does not preclude Redstone’s fraudulent concealment claim because a contractual release is ineffective where the release was procured through fraud. “At a minimum, if one party is to be held to release a claim for fraud in the execution of the release itself, the release should include a specific statement of exculpatory language referencing the fraud.” *Hawkins v. Empres Healthcare Mgmt., LLC*, 193 Wn. App. 84, 99, 371 P.3d 84 (2016) (quoting *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 371 (9th Cir. 2005)); *see also* *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851 (1992). Here, Redstone alleges that GF Capital fraudulently concealed material information “to induce Redstone to enter into a contract for the purchase of Black Lake 1 and 2.” CP 4 (Compl. ¶ 29). Because Section 8.2 does not include a “specific statement” insulating GF Capital against a claim that the PSA was procured through fraud, the release provision does not bar Redstone’s fraudulent concealment claim.

b. The PSA Amendment

In the PSA Amendment, Redstone agreed to release all claims “caused by, arising from, or relating to the matters identified in the Property Condition Email.” CP 2341 (PSA Amendment § 6).

The PSA Amendment does not bar Redstone’s claim for fraudulent concealment because the claim does not arise from the repair items “identified in the Property Condition Email.” CP 2341. In that email, Redstone sought a price reduction for the cost of replacing “window units” (or, referring to the same, “window systems”) in Black Lake I and II as estimated by Capitol Glass. CP 2403 (Velji Dep. 146:3-10). This meant replacing the double-paned glass panels to prevent fog from entering the space between the panels. CP 1458 (Perry Dep. 8:16-18); CP 1452 (Passero Dep. 29:4-10). Capitol Glass’s estimate did not include performing work to prevent moisture from intruding into the wall cavities. CP 1459 (Perry Dep. 9:4-6) (“Q: [I]s the moisture that’s in a failed unit, is that a concern getting into the building? A: No.”). Thus, *at the very least*, there are genuine issues of material fact concerning the scope of repairs referred to by the terms “window units” and “window systems” as used in the Property Condition Email and incorporated into the PSA Amendment. *See Berg v. Hudesman*, 115 Wn.2d 657, 667-71, 801 P.2d 222 (1990) (reversing summary judgment where issues of fact existed as to the meaning of contractual terms). For these reasons, the PSA Amendment cannot preclude Redstone’s claim for fraudulent concealment.

3. Each Element of Redstone’s Fraudulent Concealment Claim Raises Genuine Issues of Material Fact.

Five elements are required for a claim of fraudulent concealment: (1) a concealed defect; (2) that was known to the seller; (3) that was hazardous to the property; (4) that substantially reduced the value of the property; and (5) that was unknown to the purchaser and would not have been uncovered by a reasonable inspection. *Norris v. Church & Co.*, 115 Wn. App. 511, 514, 63 P.3d 153 (2002) (Division II) (reversing summary judgment on fraudulent concealment claim involving water intrusion caused by failure to properly seal exterior).¹⁰

a. The Water Intrusion and Mold in Black Lake I and II Were Concealed Defects.

Latent structural decay in a building constitutes a concealed defect. *See Howard v. Wash. Water Power Co.*, 75 Wash. 255, 260, 134 P. 927 (1913) (identifying examples of latent defects as “an original structural weakness, or decay”); *see also Stanfill v. Mountain*, 301 S.W.3d 179, 183 (Tenn. 2009) (identifying “mold contamination” as a defect in a claim for fraudulent concealment).

Here, the mold and water intrusion issues in Black Lake I and II

¹⁰ Where these elements are established, liability arises because the seller breached a “duty to disclose” material information to the buyer. *Obde v. Schlemeyer*, 56 Wn.2d 449, 452, 353 P.2d 672 (1960) (finding fraudulent concealment liability applicable to the vendor-purchaser relationship).

are concealed defects because they were confined to the interior of the wall cavity and went undiscovered until Redstone's contractor cut a hole in the wall. CP 1454 (Passero Dep. 98:12-99:2) (discovering "[r]otted framing, showing signs from years back, and mold on the interior framing and the backside of that exterior drywall"). GF Capital cannot demonstrate the absence of any genuine issue as to the first element of Redstone's claim.

b. GF Capital Knew About and Failed to Disclose the Water Intrusion and Mold.

Knowledge, not intent, is the state of mind necessary to establish a claim for fraudulent concealment. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 523, 799 P.2d 250 (1990) (reversing summary judgment on fraudulent concealment claim); *Sloan*, 128 Wn. App. at 787. Circumstantial evidence is sufficient to demonstrate knowledge. *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 698, 106 P.3d 258 (2005) (reversing summary judgment on fraudulent concealment claim involving water intrusion).

Ample evidence demonstrates that GF Capital was aware of, yet failed to disclose, the history of water intrusion and mold issues in Black Lake I and II. GF Capital's knowledge is clear from the monthly reports that McKinley sent to Taussig, invoices documenting repairs to address

these issues, photographs depicting moldy and rotting building materials, and GF Capital's own testimony. *See supra* §§ III.A.3 and III.A.4; *see, e.g.*, CP 1416-17 (McKinley Dep. 87:17-89:18) (testifying “we knew there were some problems with leaks”); CP 1481 (Taussig Dep. 35:11-14) (“Q: You would agree that prior to the sale of the Black Lake properties to Redstone, that you were aware of mold being discovered in areas of that property; is that correct? A: That is correct.”).

GF Capital cannot reasonably disclaim knowledge of the extensive water intrusion and mold issues by claiming it believed past repairs were sufficient. Expert testimony has established that those repairs were unreasonable and ineffective. CP 1335-36 (Riordan Aff. ¶¶ 2-4); CP 14 (Romero Aff. ¶ 15). In fact, GF Capital *knew* its repairs were insufficient—in assessing and preparing Black Lake I and II to be sold, McKinley proposed specific exterior repairs that were necessary to prevent water intrusion, yet GF Capital implemented none of them. CP 1416 (McKinley Dep. 88:21-23) (“Q: So, in response to this, what steps if any did GF Capital allow you to undertake? A: I don't think we did any of this.”). GF Capital cannot demonstrate the absence of any genuine issue as to the second element of Redstone's claim.

c. The Water Intrusion and Mold Impacted the Condition and Value of the Properties.

As to the third and fourth elements, it is indisputable that that the water intrusion and mold in Black Lake I and II significantly diminished the physical condition of the buildings and substantially reduced their value. The repairs necessitated by rotting plywood, mold, and decaying wallboard were so extensive that the DOL was forced to vacate Black Lake II. CP 2381. It is estimated that repairing Black Lake II will cost \$2,013,200, and repairing Black Lake I will cost \$1,000,000. CP 812. GF Capital cannot demonstrate the absence of any genuine issue as to the third or fourth element.

d. The Water Intrusion and Mold Were Unknown to Redstone Despite Having Performed a Reasonable Inspection.

Knowledge of the purchaser is assessed at the time of sale. *Norris*, 115 Wn. App. at 515. If a prospective buyer discovers evidence suggesting the possibility of a concealed defect, the buyer has a duty to make further inquiries of the seller. *Sloan*, 128 Wn. App. at 785. But “further inquiry is not necessary where it would have been fruitless.” *Douglas v. Visser*, 173 Wn. App. 823, 833, 295 P.3d 800 (2013); *see also Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 215, 752 P.2d 1353 (1988).

**(1) The Concealed Defects Were
Unknown to Redstone.**

The moisture intrusion and mold problems in Black Lake I and II were unknown to Redstone at the time of sale. CP 1433 (Nanji Dep. 108:2-12) (testifying that Redstone first learned of these issues in October 2016, two and a half years after taking ownership of the properties); CP 2404 (Velji Dep. 159:13-160:16) (“[H]ad we been made aware that there was mold that had been remediated inside these buildings, we would have never purchased these buildings.”).

These problems were unknown to Redstone because GF Capital misrepresented the condition of the properties, implemented repairs that concealed evidence of the problems, and withheld material information. When Redstone expressed concerns about the buildings’ exterior, McKinley “got them comfortable with things.” CP 2395. As Ayaz Velji testified in his deposition, he and Ali Nanji specifically asked McKinley whether there were any issues with the exterior or water intrusion. CP 1500 (Velji Dep. 37:5-38:10). McKinley denied that there had been. *Id.* In his own deposition, McKinley did not recall the specifics of his discussion with Velji and Nanji. *See generally* CP 1421-22. Because credibility inferences must be resolved in favor of the non-moving party, and because “fraud can be established by the direct testimony alone of an

interested party,” there are genuine issues whether GF Capital misrepresented the condition of Black Lake I and II in order to prevent Redstone from discovering the concealed defects. *Hughes v. Stusser*, 68 Wn.2d 707, 709, 415 P.2d 89 (1966).

Similarly, when Redstone requested documents that would have uncovered the extensive history of water intrusion and mold, GF Capital refused to provide that information. *See supra* § III.A.5-6. Likewise, GF Capital failed to disclose this information to CBRE, causing it to be omitted from the offering memorandum. *See supra* § III.A.4.

Further, GF Capital’s minimal efforts to address the water intrusion and mold problems had the effect of concealing them from discovery. *See Obde*, 56 Wn.2d at 453 (finding that termite infestation was “clearly latent” where “all superficial or surface evidence of the condition had been removed”). When GF Capital discovered mold, its practice was to replace the affected portion of sheetrock without investigating whether the mold had spread. CP 1406-07 (McKinley Dep. 38:14-39:23, 40:3-41:1). GF Capital implemented similarly superficial remedies such as using humidifiers to remove moisture or cleaning surfaces where leaks had been discovered. CP 1336 (Riordan Aff. ¶ 4). GF Capital also replaced stained ceiling tiles shortly before putting the properties up for sale. CP 1418 (McKinley Dep. 93:10-94:3) . Even after

learning that the plywood under the metal panels was rotting, GF Capital did not order meaningful repairs. CP 1452-53 (Passero Dep. 31:17-33:22). Rather, GF Capital’s solution was to re-secure the panels with new nails and caulking, leaving the plywood to rot underneath. *Id.* This and other similar methods concealed visible evidence of water intrusion and mold. *See, e.g.*, CP 1556 (Marx Okubo noting that “[n]o evidence of wall moisture was observed on the interior”).

To the extent Marx Okubo identified issues with the exterior, it regarded them as deferred maintenance items. *See supra* III.A.6.b; *see* CP 1577-80. And like Marx Okubo, neither Adele Brandl nor Don Henrickson discovered the concealed defects. *See supra* III.A.6.c. While Capitol Glass observed “[s]ome” deficient break metal, CP 1714, it did not observe any rot or decay in the plywood underneath that metal, CP 1461 (Perry Dep. 17:17-21). Moreover, Redstone has introduced expert testimony that Capitol Glass’s observation signaled only the same type of deferred maintenance suggested by Marx Okubo. *See* CP 14 (Romero Aff. ¶ 14). Further, McKinley had previously denied the occurrence of any water intrusion and assured Redstone that all repair and maintenance issues had been “taken care of right away.” CP 1500 (Velji Dep. 37:22-25).

(2) Further Inquiry Would Have Been Fruitless.

Even if these property inspections had suggested the existence of water intrusion or mold issues, Redstone did not have a duty to further inquire because such inquiries would have been “fruitless.” *Douglas*, 173 Wn. App. at 833. Prior to and throughout the due diligence period, GF Capital established a track record of misleading Redstone and refusing to honor its requests for information. When Redstone requested reports on exterior repairs, CP 2390, McKinley falsely claimed he had none, CP 2393. When Redstone requested invoices, CP 2172, he mischaracterized this request as untenable, CP 1911; CP 1420-21 (McKinley Dep. 108:22-109:17). When Marx Okubo submitted a property questionnaire, CP 1824-40, GF Capital refused to answer it, CP 1824-40. When Marx Okubo asked to interview the tenants, CP 2178, GF Capital forbade them from doing so, CP 2177. When Redstone requested the scope of work and invoices associated with general ledger entries, CP 2366-76, GF Capital denied the request based on a misreading of the PSA, CP 2378-79. Worst of all, when Redstone *did* make inquiries regarding the condition of the buildings’ exterior, CP 1500 (Velji Dep. 37:12-39:13), GF Capital deceptively denied the occurrence of any issues, *id.*; CP 2395. Plainly, this evidence is sufficient to raise a genuine issue

whether further inquiries would have been fruitless.

This is not a case where the purchaser identified evidence of a defect at the time of sale, failed to inquire further, and then later claimed to have been unaware as to the defect's extent. *See, e.g., Douglas*, 173 Wn. App. at 832. In *Douglas*, purchasers of a residential property identified rot and decay near the roofline, but made no further inquiries of the seller. *Id.* at 831-32. After the sale, the rot and decay turned out to be systemic, so they brought a claim for fraudulent concealment. *Id.* The Court of Appeals held their claim could not succeed because they had failed to further inquire about the defect and the trial court did not find that such inquiry would have been fruitless. *Id.* at 833-34. Similarly, in *Dalarna*, a buyer of a leaky apartment building claimed he had been constructively defrauded into purchasing the property, even though he admitted to having known about the leaks at the time of sale. 51 Wn. App. at 215. The Court of Appeals affirmed the dismissal of his claim because he did not make further inquiries about the extent of the leaks and there was "no evidence" that these inquiries would have been fruitless. *Id.* Among other evidentiary shortcomings, the buyer's representative had met with the seller's property manager, yet "[i]n his deposition, [the buyer] could not recall having asked [the property manager] about any defects or maintenance problems." *Id.* at 211.

Unlike *Douglas* and *Dalarna*, Redstone specifically inquired about the condition of the exterior at Black Lake I and II, only to be lied to by GF Capital’s property manager, and there is extensive evidence that any further inquiries would have been fruitless. Indeed, in *Douglas*, the Court of Appeals specified that “overt attempts to cover up” defects or “preinspection evasiveness may support an inference, *if not a conclusion*, that such inquiry would have been fruitless” 173 Wn. App. at 833 (emphasis added). The only reason the Court ruled against the buyers in *Douglas* was that “the trial court did not enter any such findings” after holding a trial on the merits. *Id.* Here, by contrast, the Superior Court did not hold a trial—it dismissed Redstone’s fraudulent concealment claim on summary judgment despite genuine issues whether Redstone made further inquiries or whether further inquiry would have been fruitless. *See id.* at 834 (“We caution that the [buyer does] not have a duty to perform exhaustive invasive inspection, or endlessly assail the [seller] with further questions. They merely had to make further inquiries . . . [or] show that further inquiry would have been fruitless.”).

This case is like *Sloan*, where the buyers were aware of extensive defects prior to sale, yet those problems were unrelated to the defect that later formed the basis of their fraudulent concealment claim, and the buyers had not discovered evidence of that defect prior to the sale. 128

Wn. App. at 789. The buyers knew of problems with the roof, plumbing, decks, electrical outlets, toilets, and water quality. *Id.* at 789-90. But when they discovered unrelated defects in the septic system and foundation, they prevailed before the Court of Appeals on their claim for fraudulent concealment. *Id.* at 791. Like the buyers in *Sloan*, Redstone knew about certain defects in the Black Lake Properties—so much so that it obtained a reduction to the purchase price—but those defects were unrelated to the concealed defects that eventually formed the basis for the instant claim.

This case is also similar to *Bullinger v. Lilla*, 180 Wn. App. 1013, 2014 WL 1286328 (2014) (unpublished),¹¹ where the Court of Appeals rejected a seller's contention that observations by a property inspector compelled a finding that the buyer had unreasonably failed to further inquire. *Id.* at *4-5. In *Bullinger*, the owner of a condominium unit became aware that the deck was rotting, and that the problem was attributable to systemic water intrusion that would require the entire building to be re-sided. *Id.* at *2. The homeowner's association commissioned an engineering study to assess the problem. *Id.* The owner, however, sold her unit without disclosing the water intrusion or pending study. *Id.* at *1. The buyer brought a claim for fraudulent

¹¹ Cited for persuasive value in accordance with GR 14.1(a).

concealment. According to the seller, the buyer had failed to further inquire when the property inspector observed “[m]issing pieces” on the building’s exterior and recommended that the buyer request meeting minutes from the homeowner’s association. *Id.* at *4. The Court of Appeals rejected the seller’s contention, holding that the inspector’s notes were not sufficient to establish that the buyer had unreasonably failed to further inquire. *Id.* at *5. Like the buyer in *Bullinger*, the reports from Redstone’s property inspectors did not compel the need to further inquire. As noted, the only issues with the exterior identified in those reports were deferred maintenance items. More importantly, to the extent those issues required Redstone to request additional information from GF Capital, there are genuine issues of material fact whether further inquiry would have been fruitless.

(3) Redstone Performed a Reasonable Inspection.

Lastly, Marx Okubo’s non-destructive inspection of Black Lake I and II was reasonable. CP 12-13 (Romero Aff. ¶¶ 5-7) (expert testimony providing evidence that the property condition assessment performed by Marx Okubo was reasonable). Industry standards established by ASTM International do not require the use of destructive or invasive testing when

performing an inspection of a commercial property. CP 13 (Romero Aff. ¶ 9); CP 1767-92 (ASTM Standard E2018).

Because there is reasonable evidence that the concealed water intrusion and mold defects were unknown to Redstone at the time of sale, that further inquiry would have been fruitless, and that Redstone performed a reasonable inspection of Black Lake I and II, GF Capital cannot demonstrate the absence of any genuine issue as to the fifth element of Redstone's claim.

B. The Superior Court Erred by Granting GF Capital's Motion for Attorney's Fees and Costs.

Without permitting oral argument, CP 1244, the Superior Court awarded attorney's fees and costs to GF Capital for defending against all three of Redstone's claims, CP 1348-52. The Superior Court erred by entering this award because such fees are recoverable only for claims arising from a contract, and Redstone's tort claims for fraudulent concealment and negligent misrepresentation do not arise from the PSA. Further, while GF Capital is entitled to fees for Redstone's contract claim for breach of warranty, it did not carry its burden to segregate those fees from the fees attributable to defending against the tort claims.

1. Standard of Review

The standard of review is de novo. *Little v. King*, 147 Wn. App.

883, 890, 198 P.3d 525 (2008) (“Whether a party is entitled to attorney fees is an issue of law that we review de novo.”).

2. The Contractual Fee-Shifting Provision in the PSA Does Not Entitle GF Capital to an Award of Fees for Defending Against Redstone’s Non-Contractual Claims.

The PSA contains a contractual fee-shifting provision:

[I]f any action be commenced . . . to enforce any of the provisions of this Agreement . . . then the unsuccessful party therein shall pay all costs incurred by the prevailing party therein, including reasonable attorneys’ fees and costs, court costs and reimbursements for any other expenses incurred in connection therewith

CP 2289 (PSA § 23.6). This language is consistent with Washington’s contractual fee-shifting statute, which limits attorney’s fees to those “incurred to enforce the provisions” of the contract. RCW 4.84.330.

Fees are not recoverable under RCW 4.84.330 for litigating a claim that is not a “claim on the contract.” *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615, 224 P.3d 795 (2009); *see also* 16 Wash. Prac., Tort Law and Practice § 6:16 (4th ed. Oct. 2017 Update) (“In awarding attorney’s fees pursuant to a contractual fee provision, a court cannot award fees for services that relate to the prosecution of a tort action that is asserted along with the contract claims.”). A claim is “on a contract” if it (1) arose out of the contract and (2) the contract is central to the claim. *Tradewell Grp., Inc. v. Mavis*, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993). To meet

these elements, a claim must involve “a breach of a specific term of the contract, without reference to the legal duties imposed by law on that relationship.” *G.W. Constr. Corp. v. Prof’l Serv. Indus., Inc.*, 70 Wn. App. 360, 364, 853 P.2d 484 (1993).

“If a party alleges breach of a duty imposed by an external source, such as a statute or the common law, the party does not bring an action on the contract, even if the duty would not exist in the absence of a contractual relationship.” *Boguch*, 153 Wn. App. at 615. Put differently, “[i]f the tortious breach of a duty, rather than a breach of a contract, gives rise to the cause of action, the claim is *not* properly characterized as breach of contract.” *Id.* at 616 (quoting *Owens v. Harrison*, 120 Wn. App. 909, 915, 86 P.3d 1266 (2004)).

Here, Redstone’s tort claims are not “on the contract” because they do not arise from any “provision” in the PSA—rather, they arise from GF Capital’s independent common law duties to not commit fraud and to act with reasonable care. *Jackowski v. Borchelt*, 174 Wn.2d 720, 738, 278 P.3d 1100 (2012) (“the duty to not commit fraud is independent of the contract”); *Donatelli v. D.R. Strong Consulting Eng’rs, Inc.*, 179 Wn.2d 84, 96, 312 P.3d 620 (2013) (identifying circumstance where the “duty to avoid negligent misrepresentation might arise independently of the contract”).

Division II of the Court of Appeals has held that a claim for fraudulent concealment is not a claim “on the contract” for purposes of awarding attorney’s fees. *Norris*, 115 Wn. App. at 517. In *Norris*, the Court reversed summary judgment on a fraudulent concealment claim because there were genuine issues whether the seller of a property had concealed water intrusion issues attributable to faulty window seals. *Id.* at 514-16. Having prevailed on appeal, the buyers requested attorney’s fees pursuant to a fee-shifting provision in their contract. *Id.* at 517. The Court denied their request because they had “sued for fraud, a tort, ***not on the contract.***” *Id.* (emphasis added). Division III has reached the same conclusion. *See Burbo*, 125 Wn. App. at 702 (denying fees for fraudulent concealment claim while separately awarding fees for warranty claim).

Similarly, in *Boguch*, the Court of Appeals denied fees to real estate brokers for defending against a former client’s negligence claim, even though the contract with that client contained a fee-shifting provision. *Id.* at 615-21. The client had hired the brokers to sell his waterfront property. *Id.* at 601. In listing it, the brokers used a photograph that inaccurately depicted the boundary lines. *Id.* at 601-02. The property generated minimal interest, languished on the market, and sold for a price lower than anticipated. *Id.* at 602. Contending that the erroneous listing diminished the value of the sale, the client filed claims

for common law negligence, statutory violations, and breach of contract. *Id.* at 603. The trial court dismissed the claims and awarded fees to the brokers based on a fee-shifting provision in the parties' contract. *Id.* at 606-07. The Court of Appeals held that the award of fees was improper because neither the common law claim nor the statutory claim arose from the contract—they arose from independent legal duties. *Id.* at 619.

Like the common law claim in *Boguch*, Redstone's tort claims arise from GF Capital's common law duties to not commit fraud and to act with reasonable care. As noted, a claim does not "sound[] in contract" unless it arises from "a specific term" without referring to the "legal duties imposed by law" on the relationship between the parties. *G.W. Constr. Corp.*, 70 Wn. App. at 364. Redstone's claims for fraudulent concealment and negligent misrepresentation do not arise from the PSA. Nor could they—these tort claims are premised on conduct that GF Capital engaged in *prior* to the formation of the PSA, i.e., concealing material information about Black Lake I and II and carelessly misrepresenting their condition so as to induce Redstone's assent to purchase.

Although there are decisions in Washington construing fee-shifting provisions to permit awards for non-contractual claims, the instant case provides an opportunity for the Court to clarify that the rationale underlying these decisions is irreconcilable with the independent duty

doctrine. Of these decisions, the most often cited involves an instance where Division I reasoned that a plaintiff's tort claim for misrepresentation arose from a duty created by the contract. *Brown v. Johnson*, 109 Wn. App. 56, 59, 34 P.3d 1233 (2001).

As an initial matter, *Brown* is inconsistent with Division II's holding in *Norris* that a fraud claim is not "on the contract." *Compare id.* (concluding that action for misrepresentation was "on a contract") with *Norris*, 115 Wn. App. at 517 (concluding that action for fraud was "not on the contract").

Moreover, while the holding in *Brown* may have been tenable under the then-existing economic loss rule, the Supreme Court has since eliminated that rule and clarified that the duties to not commit fraud or negligent misrepresentation exist independently from any contract. *Jackowski*, 174 Wn.2d at 738; *Donatelli*, 179 Wn.2d at 96. The decisions continuing to construe such claims as contractual rely on *Brown* without addressing the change of law that has occurred since the issuance of that decision. *See, e.g., Douglas*, 173 Wn. App. at 835 (relying solely on *Brown*, 109 Wn. App. at 58); *Borish v. Russell*, 155 Wn. App. 892, 907, 230 P.3d 646 (2010) (same); *Hill v. Cox*, 110 Wn. App. 394, 411, 41 P.3d 495 (2002) (same); *Bullinger*, 2014 WL 1286328 at *8 (unpublished) (same).

In addition to reaffirming its holding that fraud is not a claim on the contract, this case offers an opportunity for the Court to clarify the scope of fees recoverable under RCW 4.84.330 in light of Supreme Court's adoption of the independent duty doctrine.

3. GF Capital Did Not Carry Its Burden to Segregate Recoverable Fees.

“If attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues.” *Mayer v. City of Seattle*, 102 Wn. App. 66, 79-80, 10 P.3d 408 (2000). This burden falls on the party requesting fees. *Boguch*, 153 Wn. App. at 620. The only exception exists where multiple claims are “so related” that it is impossible to reasonably segregate the costs attributable to each claim. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994).

Here, while the PSA permits an award of fees for defending against Redstone's breach of warranty claim, GF Capital did not segregate the expenses attributable to that claim. Moreover, the breach of warranty claim is not “so related” to Redstone's tort claims that reasonable segregation is impossible. *Boguch*, 153 Wn. App. at 620-21 (vacating and remanding fee award where tort claims were not segregated from breach of contract claim). GF Capital could have reasonably segregated its fees

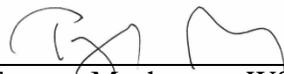
because defending against Redstone's breach of warranty claim required different factual development and analysis than defending against its tort claims. For instance, the warranty claim did not require GF Capital to develop the facts or law relevant to Redstone's due diligence or its reliance on GF Capital's misrepresentations. The award of fees and costs should be vacated.

V. CONCLUSION

For the foregoing reasons, Redstone respectfully requests that the Court: (1) reverse the Superior Court's order granting summary judgment on Redstone's claim for fraudulent concealment; (2) reverse the Superior Court's award of attorney's fees and costs to GF Capital for defending against Redstone's tort claims for fraudulent concealment and negligent misrepresentation; and (3) vacate the award.

RESPECTFULLY SUBMITTED this 30th day of July 2018.

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