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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.

REPLY 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

The Court should reverse the Superior Court's order dismissing Redstone's claim for fraudulent concealment because GF Capital has not carried its burden, as the moving party, to show the record contains no genuine issue of material fact as to the elements of Redstone's claim. At the outset, GF Capital misconstrues the standard of review by conflating the "clear and convincing" trial standard with the CR 56 summary judgment standard. By doing so, it ignores its burden as the moving party and the rule that the Court must construe reasonable inferences in Redstone's favor.

In contending the PSA bars Redstone's claim, GF Capital disregards principles of contract interpretation that render "as-is" or release clauses ineffective against claims for fraud. In contending the PSA Amendment is preclusive, GF Capital ignores genuine issues of fact regarding the scope of the Property Condition Email and misconstrues deposition testimony.

As for the elements of the claim, GF Capital does not dispute that, even if Redstone discovered evidence of concealed water intrusion defects (it did not), there is a genuine issue whether further inquiry would have been fruitless. Perplexingly, GF Capital disavows knowledge of the concealed defects, yet claims Redstone had such knowledge. Lastly, GF

Capital requests that the Court conclude, as a matter of law, that destructive testing is necessary for inspecting commercial properties, when industry standards state the opposite.

The Court should also reverse the Superior Court's order awarding attorney's fees to GF Capital because the PSA permits an award of fees only for defending against a claim "to enforce" its provisions and neither of Redstone's tort claims qualify as such. Redstone's claims for fraudulent concealment and negligent misrepresentation arise from common law duties of care that are independent from the PSA. As such, they are not "on the contract" and do not entitle GF Capital to fees.

II. ARGUMENT

A. GF Capital, Not Redstone, Must Carry the Burden on Summary Judgment.

GF Capital misconstrues the summary judgment standard. GF Capital is correct that the Court "engages in the same inquiry as the trial court," but nowhere states what that inquiry actually is. *See* Resp'ts Br. at 20-21. GF Capital's brief does not contain a single instance of the phrase "genuine issue" or "material fact." *See generally id.*

Instead, GF Capital cites the clear and convincing evidentiary standard for fraudulent concealment that applies *at trial* and then equates the trial standard with the summary judgment standard. *See id.* at 20-21

(citing *Stieneke v. Russi*, 145 Wn. App. 544, 561, 190 P.3d 60 (2008), where the Court reviewed the sufficiency of findings of fact at a bench trial, and *In re Estate of Thornton*, 189 Wn. App. 1044 (2015) (unpublished)). By doing so, GF Capital seeks to avoid its burden, as the moving party, to demonstrate it is entitled to summary judgment. GF Capital's effort to tilt the standard of review in its favor must fail.

The correct standard for deciding if the trial court erred by dismissing Redstone's claim for fraudulent concealment is whether **GF Capital** has carried its burden to demonstrate the **absence** of any genuine issue of material fact as to that claim. *Save Our Scenic Area v. Skamania County*, 183 Wn.2d 455, 463, 352 P.3d 177 (2015). If GF Capital has not carried this burden, the trial court's decision must be reversed. While the Court must "keep in mind" the clear and convincing standard, the protections of CR 56 still apply: the Court views facts in the light most favorable to the nonmoving party, draws reasonable inferences in that party's favor, and reserves credibility determinations for the jury. *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989).

B. Neither the PSA nor the PSA Amendment Bars Redstone's Claim for Fraudulent Concealment.

1. The "As-Is" Clause in the PSA

GF Capital acknowledges the rule that an "as-is" clause cannot bar

a claim for fraudulent concealment, but contends that the “as-is” clause in this case is somehow exempt. *See* Resp’ts Br. at 21-22. According to GF Capital, the “as-is” clause in the PSA precludes Redstone’s claim because this case is “factually distinguishable” from *Sloan v. Thompson*, 128 Wn. App. 776, 790, 115 P.3d 1009 (2005). Resp’ts Br. at 21-22.

But the degree to which this case is factually similar to *Sloan* does not weaken the rule set forth in that decision, which is that an “as-is” clause cannot bar a claim for fraudulent concealment. 128 Wn. App. at 790. As the Court explained, this rule is premised on the unfairness of permitting a seller to conceal information from a buyer and face no consequences. *Id.* The Court did not, as GF Capital contends, confine this principle of contract law to the specific facts in *Sloan*. *See id.* n.39 (citing *Syvrud v. Today Real Estate, Inc.*, 858 So. 2d 1125, 1130 (Fla. App. 2003) and *Logue v. Flanagan*, 213 W. Va. 552, 556, 584 S.E.2d 186 (2003)). The “as-is” clause in the PSA does not bar Redstone’s claim.

2. The Release in the PSA

Similar to its effort to disavow *Sloan*, GF Capital acknowledges the principle that a release obtained by fraud is unenforceable, but contends that the Court should nevertheless enforce the PSA release against Redstone’s claim for fraudulent concealment. *See* Resp’ts Br. at 23-24. Once again, GF Capital seeks to avoid a rule of general application

by distinguishing the particular facts of the case setting forth that rule. *See id.* (citing *Hawkins v. Empres Healthcare Mgmt., LLC*, 193 Wn. App. 84, 99, 371 P.3d 84 (2016)).

The release in the PSA does not bar Redstone’s claim for fraudulent concealment because the release language does not specifically exculpate fraud in the execution of the release itself. *Hawkins*, 193 Wn. App. at 99. In GF Capital’s view, it is immaterial that the PSA release lacks a specific statement of exculpatory language because it is a general release, whereas the release in *Hawkins* was not. *See Resp’ts Br.* at 23-24. But the breadth of the release in *Hawkins* is not what rendered it unenforceable—the release was unenforceable because it did not “include a specific statement of exculpatory language referencing the fraud.” *Hawkins*, 193 Wn. App. at 99.

The rule in *Hawkins* applies to general releases because it derives from a decision applying the rule precisely in that manner. *See id.* (quoting *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 371 (9th Cir. 2005) (quoting *E.I. DuPont de Nemours & Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 461 (Del. 1999)). In the *Florida Evergreen* decision, the Delaware Supreme Court reasoned:

There is some merit to the contention that parties entering into a **general release** are chargeable with notice that any uncertainty with respect to the contours of the dispute

which led to the litigation, including that which is provable and that which is not, is resolved through the release. It is quite another thing, however, to conclude that a person is deemed to have released a claim of which he has no knowledge, when the ignorance of such a claim is attributable to fraudulent conduct by the released party.

744 A.2d at 460-61 (emphasis added) (citations omitted). As such, the court concluded “that the absence of a specific reference to the actionable fraud limits the scope of the *general release* in this case.” *Id.* at 462 (emphasis added). Here, like the general release in *Florida Evergreen*, the release in the PSA does not contain a specific statement exculpating fraud. As such, it cannot bar Redstone’s claim.

Even so, GF Capital contends it could not have defrauded Redstone into signing the PSA because Redstone had no right to rely on Brad McKinley’s misrepresentations during the due diligence process. *See* Resp’ts Br. at 24. According to GF Capital, Redstone could not rely on McKinley’s misrepresentations because the “no representation” provision in the PSA negates the possibility of reliance. *Id.*; CP 2272.

But, like the “as-is” and release clauses, the “no representation” provision is unenforceable because GF Capital induced Redstone’s assent to the PSA through fraudulent concealment. CP 4 (Compl. ¶ 29); *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000) (holding that contracts procured by fraud are voidable); *Nguyen v. Doak*

Homes, Inc., 140 Wn. App. 726, 731, 167 P.3d 1162 (2007) (fraudulent concealment is “a species of fraud”).

Moreover, a contract provision that purports to negate reliance does not alter the rule from *Hawkins* that a release obtained by fraud is invalid. Indeed, the release that the Court of Appeals invalidated in *Hawkins* contained precisely this type of provision. *Hawkins*, 193 Wn. App. at 92 (“The no-reliance clause makes no reference to inducing fraud. It does not bar Hawkins’s claims of fraudulent inducement.”).

Further, it makes no difference whether Redstone disclaimed the right to rely on McKinley’s misrepresentations because reliance is not an element of fraudulent concealment. *See Norris v. Church & Co.*, 115 Wn. App. 511, 514, 63 P.3d 153 (2002) (listing elements). Unlike a claim for affirmative misrepresentation, where “the plaintiff must establish that he had a right to rely on the representation,” a fraudulent concealment claim does not require the same showing. *See Jackowski v. Borchelt*, 151 Wn. App. 1, 17, 209 P.3d 514 (2009), *aff’d but criticized on other grounds*, 174 Wn.2d 720 (2012). Reliance is not required for such claims because it is impossible for a plaintiff to have relied on information that the defendant did not disclose. *See In re Harris*, 458 F. Supp. 238, 242 (D. Or. 1976) (“I do not believe it was necessary for the plaintiffs to prove actual reliance here because this is a case of concealment, not affirmative

misrepresentation.”); *Ansin v. River Oaks Furniture, Inc.*, 105 F.3d 745, 754 (1st Cir. 1997) (holding that a securities claim for fraud by omission does not require proof of reliance “[b]ecause of the logical impossibility of proving that plaintiffs relied on information that they did not have”).

Because GF Capital induced the PSA through fraudulent concealment, and because reliance is not an element of that claim, GF Capital cannot invoke the “no representation” clause to preclude Redstone’s claim.¹

3. The PSA Amendment

Whereas the unenforceability of the “as-is” and release provisions of the PSA is an issue of law, the inapplicability of the PSA Amendment is an issue of fact. GF Capital does not dispute that the PSA Amendment applies exclusively to “certain maintenance items identified in [the Property Condition Email].” CP 2340 (PSA Amendment § 6); CP 2343-45 (Property Condition Email). Thus, the issue is whether the mold

¹ GF Capital cannot challenge the admissibility of McKinley’s statements as hearsay because it failed to raise this evidentiary issue in the Superior Court. *Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 755-56, 162 P.3d 1153 (2007) (“Where a party believes that proffered evidence is not properly before the trial court, it must move the trial court to strike such evidence from the record. . . . [I]t is our duty to review a trial court’s ruling on summary judgment on the record actually before the trial court.”). In any event, McKinley’s statements fall within the party-opponent exception to the hearsay rule, which provides that a statement is “not hearsay” if it was made “by a person authorized by the party.” ER 801(d)(2). His statements also fall within the party-opponent exception because McKinley was GF Capital’s “agent . . . acting within the scope of [his] authority.” *Id.* GF Capital granted McKinley actual authority to communicate information about the Black Lake Properties. *See, e.g.*, CP 2165. Even if he lacked actual authority, he had apparent authority because GF Capital, as the principal, led Redstone to reasonably believe that McKinley was its agent. *See, e.g.*, CP 2335 (identifying McKinley as GF Capital’s “Key Site Manager”).

damage, caused by water intrusion through exterior metal panels between the windows and at the interface between the exterior wall and the window frame, arose from these “certain maintenance items.” GF Capital contends this is an undisputed issue. GF Capital is wrong.

GF Capital cannot show there is no genuine issue because the record is replete with evidence that the mold damage did not arise from the “certain maintenance items” identified in the Property Condition Email. According to GF Capital, the mold damage arose from the following maintenance item:

Windows:

...

Building 1 and 2 have a total of 291 window units which will require replacement over the next 12-16 months.

Building 3 has 28 failed units requiring replacement.

All 3 buildings have additional units which require resealing.

The total cost to replace and correct the failed units for all 3 buildings is \$235,000 dollars.

CP 2344.² Redstone based this maintenance item on a price quotation from Capitol Glass (“Capitol Glass Quote”) and the property condition assessment from Marx Okubo (“Marx Okubo Report”). CP 2420 (Velji

² “Building 3” refers to Black Lake III, a property located across the street from Black Lake I and II. Black Lake III is not at issue in this dispute.

Dep. 105:8-11); CP 2411 (Nanji Dep. 73:8-12). A “window unit” is two panels of glass, or “glazing,” sealed together by a spacer bar. CP 1458 (Perry Dep. 8:12-18). A unit has “failed” when moisture has seeped past the spacer bar into the space between the panels. *Id.* (Perry Dep. 8:16-18). Critically, a failed unit does **not** present a threat of mold or water intrusion in the building—all it means is the window will fog up. *Id.*; 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.”); CP 1460 (Perry Dep. 13:12-18).

GF Capital is incorrect that this maintenance item for replacing window units entailed replacing all of the components of the window system, such as flashing, break metal, framing, and caulking. Although the Property Condition Email contains two instances of the term “window system,” the author of the email, Ayaz Velji, testified that he was referring only to the replacement of the glazing and seals:

Q: Why did you use the term window system and window units? Those are two different terms. What’s the difference between a window unit and a window system, in your email, using your words?

A: In my thinking at the time of what the window system was, I was only referring to what Capitol Glass had said as far as the glazing and the seals were concerned, ***not the whole window with the frame.***

CP 2403 (Velji Dep. 146:3-10) (emphasis added); CP 1508 (Velji Dep.

147:18-21) (Q: In your mind, did the window system, as you used the term, include the flashings? A: No. As I said, just the inside. The glazing and the seals is, to me, the system that I'm referring to there.”).

The Capitol Glass Quote and the Marx Okubo Report are consistent with the number of window units identified in the Property Condition Email as requiring replacement. Like the Property Condition Email, the Capitol Glass Quote identifies “291 units” in need of replacement at Black Lake I and II. *Compare* CP 2344 (Property Condition Email) *with* CP 1714 (Capitol Glass Quote). Like the Property Condition Email, the Marx Okubo Report identifies the need to replace 28 window units as deferred maintenance items in Black Lake III. *Compare* CP 2344 (Property Condition Email) *with* CP 1581 (Marx Okubo Report) (identifying four deferred expenditures of \$3,500 “to replace seven [double pane glazing] panels every two years” for a total for \$14,000).

Nevertheless, GF Capital contends that, if the maintenance item was based on the Capitol Glass Quote, then it must encompass the entire window system because the quote included an \$5,000 to \$6,000 estimate for re-anchoring “some” instances of loose break metal. Resp'ts Br. at 27.

The problem with this contention is that the author of the Property Condition Email testified repeatedly that the only portion of the Capitol Glass Quote he relied upon when drafting the email pertained to replacing

the glazing and the connecting seals. CP 2407 (Velji Dep. 174:4-8) (“Again, we’ve answered that question over and over again, as far as the amendment is concerned. We’ve said the—when we looked at the scope of Capitol Glass and came up with the dollars that they came up with was to do with the sealants and the glazing.”); *see also* CP 2401-02 (Velji Dep. 71:1-73:16); CP 2403 (Velji Dep. 146:3-10); CP 2407 (Velji Dep. 173:19-174:25, 175:13-176:9); CP 2410-11 (Nanji Dep. 72:17-74:19).

As a final effort to expand the Property Condition Email beyond its scope, GF Capital contends that Redstone representative Ali Nanji “admitted” the PSA Amendment was motivated by concerns about water intrusion and mold. *See* Resp’ts Br. at 27-28. According to GF Capital, this “admission” entitles GF Capital to summary judgment. *See id.* at 28.

But it is plain from reviewing GF Capital’s citations, *see id.* at 27-28, that the record contains no such admission. GF Capital relies on a statement from an email that Nanji wrote to CBRE on April 21, 2014: “The windows in SL1 and SL2 are failing, not just the seals but the water ingress.” CP 788. GF Capital then quotes deposition testimony where Nanji explains his general concerns about water ingress. CP 1029 (Nanji Dep. 79:17-80:1).³ In characterizing these statements as an admission,

³ The portion of the record that GF Capital cites does not include page 80 of Nanji’s deposition. *See* CP 1029-30 (pages 79 and 84). Page 80 of Nanji’s deposition is available at CP 1432.

however, GF Capital omits Nanji's immediately preceding testimony, which shows that the concern he expressed was about window units, not the entire systems:

Q: And when you said, "not just the seals but the water ingress," what did you mean by water ingress?

A: Well, because of the wet sealing, they had water ingress coming into the windows and that's why they wet sealed the windows. So when I was referring to the seals and water ingress, ***I was talking about the window unit.***

CP 1029 (Nanji Dep. 79:11-16) (emphasis added).

As Nanji had testified previously, he understood the Property Condition Email as referring only to the window units, i.e., the glass panels: "Well, when you have two insulated glass panels, you have the metal in between and then you have a seal that makes it an insulated glass unit, that's what I believe Mr. Velji is referring to." CP 2411 (Nanji Dep. 74:16-19); *see also id.* (Nanji Dep. 76:7-9) ("What I believe Mr. Velji was dealing with here was the glass units and the sealed units that were damaged."). When Nanji explained his "concerns" about water ingress, he was answering GF Capital's open-ended question, "What are the potential concerns about water ingress as it may impact the building?" CP 1029 (Nanji Dep. 79:18-19). In describing his concerns about water ingress—the "same concerns we've discussed over our deposition," *id.* (Nanji Dep.

79:20)—he was speaking generally, not changing his previous answers that the Property Condition Email applied only to window units. *Compare id.* (Nanji Dep. 79:20-24) *with* CP 1017 (Nanji Dep. 17:1-25) (preceding testimony regarding the general impact of water intrusion).⁴

For these reasons, GF Capital cannot show there is no genuine issue of material fact whether the mold damage arose from the “certain maintenance items” set forth in the Property Condition Email. As such, the PSA Amendment cannot bar Redstone’s claim as a matter of law.

C. GF Capital Fails to Show There Is No Genuine Issue as to the Elements of Redstone’s Claim for Fraudulent Concealment.

1. The Defects Were Concealed.

GF Capital contends that, if a building has undergone prior repairs for leaks, then, as a matter of law, latent structural decay, mold, and water intrusion can never again constitute concealed defects in that building.

See Resp’ts Br. at 29-31.

This proposition has no basis in law or common sense. Where, as

⁴ GF Capital repeats this mischaracterization on *five separate occasions* in its brief. Resp’ts Br. at 2 (contending PSA Amendment arose because “Redstone’s owner was concerned about ‘water ingress’”); *id.* at 15 (“Nanji explained in an email to CBRE . . . that the concern and basis for the purchase price reduction was . . . ‘the water ingress’”) (emphasis omitted) (citing CP 788-792); *id.* at 27-28 (contending “Nanji admitted” that concerns about water ingress motivated the PSA Amendment) (citing CP 788-792); *id.* at 31 (contending “Nanji[] admitted that the defects he was concerned about when he sought and obtained the PSA Amendment were not just the windows but also ‘water ingress’”) (citing CP 1029); *id.* at 35 (contending “Nanji was concerned” about water ingress and sought the PSA Amendment to address this concern) (citing CP 1028-29).

a here, a buyer learns that a building has undergone previous repairs for leaks, but the seller assures the buyer the leaks were repaired and there are no ongoing water intrusion issues, undisclosed water intrusion issues can most certainly constitute a concealed defect. What distinguishes this case from a decision like *Dalarna*, where water intrusion issues were apparent, is testimony from the property inspector in that case who “had observed evidence of water penetration, including stains, cracked plaster, and loose tiles” and who testified that these defects were “readily observable.” *Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 211, 752 P.2d 1353 (1988). The buyer in *Dalarna* even “concede[d] that some water leakage was apparent.” *Id.* at 214.

Unlike the buyer in *Dalarna*, Redstone does **not** concede that the water leakage was apparent and its property inspector, Marx Okubo, testified to having found no “active or prior stains,” only de minimis staining on one ceiling tile. CP 1393 (Helms Dep. 90:17-91:1). Marx Okubo “couldn’t find . . . visual indications” of leaks, found “[n]o evidence of wall moisture,” and found no “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.” CP 1392 (Helms Dep. 82:8-12); CP 1390 (Helms Dep. 59:21-60:10); CP 1393 (90:17-91:1). Further, GF Capital **falsely assured** Redstone that there

were no concealed defects when McKinley told Velji and Nanji that there were no “major issues at all” and that “everything had been well maintained,” CP 1500 (Velji Dep. 38:3-4), despite having notified Taussig only four months beforehand of the very defects that caused the mold damage at issue in this dispute, CP 1865 (“I believe it is necessary to seriously examine the window mullions (metal between the windows), replace and recaulk as needed, and clean and seal the brick exterior.”). In light of these facts, and without damning testimony from a property inspector or the buyer’s own concession that the water intrusion issues were apparent, the Court cannot grant summary judgment on this element of Redstone’s claim.

2. GF Capital Was Aware of the Concealed Defects.

GF Capital maintains there is no genuine issue whether it had actual knowledge of the concealed defects in Black Lake I and II. Resp’ts Br. 31-33.

But GF Capital knew at the time of the sale there were water intrusion issues in the buildings that would cause, and had already caused, mold. *See, e.g.*, CP 2071 (email notifying Taussig of failed window systems that “have the potential for allowing water penetration into the wall cavities”); CP 2142 (email notifying Taussig “there is water intrusion happening at old caulk joints”). Later, Taussig admitted in his deposition

that he knew water intrusion can cause mold issues. CP 1480 (Taussig Dep. 27:2-4) (“Q: Do you understand that water intrusion into a building can lead to mold? A: Yes.”).

GF Capital cannot avoid a question of fact on this issue because it has advanced precisely the same theory (albeit unsuccessfully) as to why Redstone was “fully aware” of the concealed defects. Resp’ts Br. at 31 (“Redstone understood that water infiltration into a building can cause rot, mold and decay to drywall and wood in a building.”). The difference is that Taussig had the benefit of countless documents demonstrating the defects, whereas Redstone did not as a consequence of GF Capital’s intentional concealment of such information.

3. GF Capital Does Not Dispute that Further Inquiry Would Have Been Fruitless.

GF Capital contends that during the due diligence process Redstone discovered evidence of concealed water intrusion and mold issues in the Black Lake I and II, and thus, that Redstone had a duty to further inquire with GF Capital about the condition of the buildings. *See* Resp’ts Br. at 34-36.

As an initial matter, GF Capital has failed to show, beyond any genuine dispute of fact, that Redstone discovered the undisclosed defects in Black Lake I and II. *See* Appellants’ Br. at 35-37. To recap, Ayaz

Velji and Ali Nanji did not learn of the moisture intrusion and mold problems until years after purchasing the properties. CP 1433 (Nanji Dep. 108:2-12); CP 2404 (Velji Dep. 159:13-160:16). What Redstone learned during the due diligence process (and what GF Capital told them) was that there had been a history of leaks, but moisture intrusion was not a current issue, and the only issues with the exterior were deferred maintenance items. *See, e.g.*, CP 1556 (“No evidence of wall moisture was observed on the interior.”); CP 1577-80 (deferred maintenance items). Now, there is evidence that GF Capital affirmatively misrepresented the condition of the properties, *see, e.g.*, CP 1500 (Velji Dep. 37:5-38:10), made superficial repairs that concealed but did not resolve the defects, *see, e.g.*, CP 1336 (Riordan Aff. ¶ 4); CP 1452-53 (Passero Dep. 31:17-33:22), and refused to provide information in response to Redstone’s requests, *see, e.g.*, CP 2378-79; CP 1489-90 (Taussig Dep. 184:8-20, 185:16-186:14). GF Capital cannot carry its burden, as the moving party, to show Redstone discovered the undisclosed moisture intrusion and mold issues such that it had a duty to further inquire with GF Capital.

But even if Redstone did have a duty to further inquire, GF Capital does not dispute Redstone’s contention that such an inquiry would have been fruitless. *See generally* Resp’ts Br. A party that discovers evidence of a hidden defect has two options: approach the seller with further

inquiries “or at trial show that further inquiry would have been fruitless.”
Douglas v. Visser, 173 Wn. App. 823, 834, 295 P.3d 800 (2013); *see also*
Dalarna, 51 Wn. App. at 215.

At a minimum, the fruitlessness of further inquiry is a genuine issue of fact that precludes summary judgment as to the fifth element of Redstone’s claim for fraudulent concealment. *See* Appellant’s Br. at 38-42. GF Capital denied Redstone’s requests for information, refused to answer a property questionnaire from Marx Okubo, forbade Redstone from interviewing tenants, and affirmatively misrepresented the condition of Black Lake I and II. *See id.* at 38.

GF Capital faults Redstone for not making further inquiries, but in doing so ignores that such inquiries are to be directed to “*the seller*.”
Douglas, 173 Wn. App. at 830 (emphasis added). For instance, GF Capital contends that, upon receiving a general ledger containing an entry for “water clean” work by ServPro, Redstone should have contacted ServPro to discuss what that work entailed. Resp’ts Br. at 39. But GF Capital glosses over the fact that, upon receiving the general ledger, Redstone highlighted the ServPro entry and contacted GF Capital to request additional information: “We would like details on the attached highlighted lines. If you can please provide the invoices and scope of work would be appreciated.” CP 1296 (Velji Dep. 82:20-22). GF Capital

denied the request. CP 2378-79; CP 1489-90 (Taussig Dep. 184:8-20, 185:16-186:14). In other words, when Redstone *did* make inquiries of the seller, GF Capital rejected them. GF Capital cannot fault Redstone for not further inquiring when it announced it would not answer such inquiries. Thus, even if Redstone discovered evidence of the concealed defects in Black Lake I and II, it is a genuine issue of fact whether further inquiry would have been fruitless.

4. Redstone Performed a Reasonable Inspection.

GF Capital requests that the Court determine “as a matter of law” that Redstone could not have performed a reasonable inspection of Black Lake I and II without destructive testing. Resp’ts Br. at 36.

But this is a question of fact, not of law. If anything, the Court should find, as a matter of undisputed fact, that destructive testing was not required for a reasonable inspection. As noted in Redstone’s opening brief, industry standards do *not* require the use of destructive testing when inspecting a commercial property. CP 13 (Romero Aff. ¶ 9); CP 1767-91 (ASTM Standard E2018).

More importantly, GF Capital cannot show beyond any genuine issue that Redstone failed to conduct a reasonable inspection. Marx Okubo, Partner Engineering, Applied Construction, and Capitol Glass all inspected Black Lake I and II at the behest of Redstone, yet none of them

discovered the extensive water intrusion issues throughout the buildings.

See Appellants' Br. at 16-22.

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

1. RCW 4.84.330 Applies.

GF Capital contends the Court should not rely upon Washington's fee-shifting statute, RCW 4.84.330, in determining whether the Superior Court erred by awarding fees for Redstone's tort claims. Resp'ts Br. at 40-43. GF Capital contends the Court should decline to review the statute for the same reasons as in *Boules v. Gull Indus., Inc.*, 133 Wn. App. 85, 89, 134 P.3d 1195 (2006).

But the fee provision at issue in *Boules* was considerably broader than both RCW 4.84.330 and the PSA. *Id.* In *Boules*, a purchase and sale agreement entitled the prevailing party to fees "in the event *any litigation* between any of the parties . . . arising out of *this transaction* (whether *closed or not*), is instituted." *Id.* (emphasis added). By contrast, RCW 4.84.330 entitles the prevailing party to fees only in an "action on a contract" that are "incurred to enforce the provisions of such contract." *Id.* Like the statute, the PSA allows fees to the prevailing party for an "action" commenced "to enforce any of the provisions of this Agreement." CP 2289 (PSA § 23.6).

Where, as here, a contract contains a fee provision that follows the language of RCW 4.84.330, this Court routinely interprets the provision in accordance with the statute and cases interpreting it. *See, e.g., Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 859, 158 P.3d 1271 (Div. II 2007) (“For RCW 4.84.330 to apply: (1) the action must be ‘on a contract or lease,’ (2) the contract must contain a unilateral attorney fee or cost provision, and (3) there must be a ‘prevailing party.’”), *aff’d*, 165 Wn.2d 481 (2009).

2. GF Capital Is Not Entitled to Fees for Redstone’s Tort Claims.

GF Capital maintains the term “action” is all-or-nothing for purposes of construing a fee-shifting provision—it, along with all claims alleged, is either “on the contract” or it is not. *See* Resp’ts Br. at 43-46. On this basis, GF Capital seeks to distinguish *Norris*, 115 Wn. App. at 517, where this Court held that a claim for fraudulent concealment is not “on the contract” for purposes of awarding fees. *Id.*; *see* Resp’ts Br. at 45. GF Capital suggests that, if the plaintiffs in *Norris* had included a contract claim along with their fraud claim, the Court would have awarded fees for the fraud claim. *See* Resp’ts Br. at 45.

But this “either/or” proposition is untenable in light of the numerous decisions where the prevailing party was entitled to fees on

some claims, but not others. *See Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 702, 106 P.3d 258 (2005) (reversing summary judgment on fraudulent concealment claim and holding that, on remand, attorney’s fees would be permissible for implied warranty contract claim but not for fraudulent concealment claim); *Pearson v. Schubach*, 52 Wn. App. 716, 723, 763 P.2d 834 (1988) (remanding fee award where “the court failed to distinguish between the attorney fees incurred as a result of the contract action . . . and those which were the result of the various tort claims by Mr. Pearson”); *Boguch v. Landover Corp.*, 153 Wn. App. 595, 619, 621, 224 P.3d 795 (2009) (reversing fee award for tort claim and remanding for calculation of fees attributable to contract claim). Consistent with these decisions, if the plaintiffs in *Norris* had included a contract claim, the result would have been to award fees for defending against that claim, but to still deny fees for the fraud claim.

Above all, GF Capital fails to offer a meaningful explanation for the inherent tensions among Washington’s fee-shifting jurisprudence. *See, e.g.*, Resp’ts Br. at 46 (disregarding *Boguch* decision on the basis that it was decided prior to *Douglas*, 173 Wn. App. at 833). Yet it is beyond dispute that these tensions run deeper than the chronological order in which they were decided. *Compare Brown v. Johnson*, 109 Wn. App. 56, 59, 34 P.3d 1233 (Div. I 2001) (awarding fees for fraud claim because it

arose “out of the parties’ agreement”) *with Norris*, 115 Wn. App. at 517 (Div. II 2002) (“[T]he Norrises sued for fraud, a tort, not on the contract. Thus, they are not entitled to attorney fees.”); *Burbo*, 125 Wn. App. at 702 (Div. III 2005) (“Fraudulent concealment sounds in tort, not contract. Therefore, the prevailing party would not be entitled to attorney fees.”).

The best way to resolve these inconsistencies is for the Court to apply the legal principles clarified by recent decisions on the independent duty doctrine. This doctrine provides the clearest picture of the divide between contract claims and tort claims: whereas claims for torts such as negligence and fraud arise from independent common law duties, contract claims arise from the terms of a contract. *Jackowski v. Borchelt*, 174 Wn.2d 720, 738, 278 P.3d 1100 (2012) (fraud); *Donatelli v. D.R. Strong Consulting Eng’rs, Inc.*, 179 Wn.2d 84, 96, 312 P.3d 620 (2013) (negligent misrepresentation). Relying on this doctrine is consistent with the principle that an “action,” for purposes of awarding attorney’s fees, “sounds in contract when the act complained of is a breach of a specific term of the contract, ***without reference to the legal duties imposed by law on that relationship.***” *Boguch*, 153 Wn. App. at 616 (quoting *G.W. Constr. Corp. v. Prof’l Serv. Indus., Inc.*, 70 Wn. App. 360, 364, 853 P.2d 484 (1993) (emphasis added).

Here, while Redstone’s contract claim arises from the warranty

provisions of the PSA, its tort claims arise from GF Capital's breach of its common law duties to not commit fraud or negligent misrepresentation. Because Redstone's tort claims do not arise from the PSA, the Court should reverse the Superior Court's award of attorney's fees. The Court should also reverse the Superior Court's award of attorney's fees for the breach of warranty claim because GF Capital did not segregate recoverable fees from unrecoverable fees.

III. 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; (3) vacate the award; and (4) deny GF Capital's request for the attorney's fees it has incurred on appeal.

RESPECTFULLY SUBMITTED this 28th day of September 2018.

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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.

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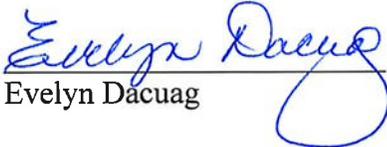
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I, Evelyn Dacuag, declare under penalty of perjury under the laws of the State of Washington that I am over the age of 18; not a party to this action; am competent to give testimony if requested; and I make this declaration based on personal knowledge.

On September 28, 2018, I served the REPLY BRIEF OF APPELLANTS REDSTONE BLACK LAKE 1, L.P. AND REDSTONE BLACK LAKE 2, L.P. upon the persons named below in the manner indicated.

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DATED this 28th day of September 2018, at Seattle, Washington.


 Evelyn Dacuag

DAVIS WRIGHT TREMAINE LLP

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