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

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**JAMES BROOKS,**

Plaintiff/Respondent,

V.

**JOHN NORD,**

Defendant/Appellant

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

In the Brief of Appellant, defendant John Nord demonstrated that the vast weight of authority calls for an award of the attorney fees he incurred in successfully defending against the plaintiff's misrepresentation claims. In the Respondent's Brief, plaintiff James Brooks tries to overcome this vast weight of authority, but his arguments contain four fundamental flaws.

First, Brooks seeks to distinguish the numerous decisions awarding attorney's fees in cases with similar facts by arguing that his claims were based "solely on a failure to disclose a defect in a Form 17 Disclosure Form."<sup>1</sup> But Brooks' argument ignores multiple allegations in his complaint, which go well beyond a mere failure to disclose a defect in the Seller's Disclosure Form.

Second, Brooks attempts to distinguish the cases relied upon by Nord, but his distinctions fail because the cases all

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<sup>1</sup> Respondent's Brief, p. 1.

involve the same type of alleged conduct; they all involve misrepresentation claims arising out of the alleged failure to disclose some defect in the sale of real property.

Third, plaintiff sets up a straw man argument that attorney's fees are not available under the REPSA because the Seller's Disclosure Statement is not part of the REPSA. While this statement may be true, it is not the end of the analysis. In all of the cases cited by Nord, fees were awarded despite the fact the disclosure statement is not part of the contract.

Finally, Brooks does not attempt to distinguish, or even acknowledge, several other cases cited by Nord, wherein fees were awarded under a REPSA in suits based on alleged misrepresentations. Nor does Brooks address the reasonable expectations of the parties to a REPSA—that if there is a lawsuit “arising out of” the transaction, then the prevailing party will be awarded attorney fees.

## II. REBUTTAL OF BROOKS' ARGUMENTS

### A. Brooks' Claims Were Not Based Solely on an Alleged "Breach" of the Form 17 Disclosure

As noted above, Brooks bases much of his argument on the false premise that his complaint was based solely on the alleged failure to disclose certain defects in the Form 17 Seller's Disclosure Statement. Brooks seeks to recharacterize his complaint in this way in an effort to distinguish the decision in *Brown v. Johnson*, in which the court wrote:

Johnson's contention that Brown's claim arises solely out of the disclosure statement is not accurate. In fact, the action is a common law action for misrepresentation of which Johnson's failure to disclose on the disclosure statement was but one act among several acts and omissions by Johnson culminating in the jury's verdict for Brown.<sup>2</sup>

Exactly the same observation, however, can be made about the Brooks complaint. While it is true that Brooks' complaint makes reference to two answers in the disclosure statement, in Paragraph 4.17, these answers are not the sole

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<sup>2</sup> 109 Wn. App. 56, 59, footnote 5

basis for his claims. To the contrary, Brooks' complaint alleges the following additional acts upon which he bases his misrepresentation claims: (1) "areas of the plywood subfloor had been cut out and replaced with new plywood, and then re-tiled" (Para. 4.8); (2) "[o]ver the years, the Huffmans used 2x4 splices attached to the original 2x6 support beams, in an effort to maintain the structural integrity of the atrium" (Para. 4.10); (3) "[i]n an effort to maintain the structural integrity fo [sic] the door frame, the Huffmans spayed a foam into the cavity left by the rot," leaving the frame "structurally unsound" (Para. 4.12); and (4) "[t]he defects in the atrium and around the sliding door were covered by the floor or finish work" (Para. 4.13).<sup>3</sup>

In addition to these allegations of other actions, Brooks' complaint also did not premise liability on an alleged "breach" of the statutory duty to provide a Seller's Disclosure Statement. Instead, the complaint premised liability on: (1) "a common law duty to disclose the rot and repairs in the sunroom and the rot at

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<sup>3</sup> CP 3.

the back door” (Para. 4.18); (2) the “duty to disclose a defect or defective condition of which [defendant] was aware” (Para. 5.2); and (3) “knowingly and intentionally failing to disclose” the multiple repairs mentioned above (Para. 6.2).<sup>4</sup>

In sum, Brooks has attempted to recharacterize his complaint in an effort to distinguish the *Brown* decision. But this recharacterization is contrary to the express language of the complaint. As a result, the court should reject this attempt.

**B. There is No Real Distinction Between the *Borish* and *Austin* Decisions**

As shown above, the express language in his complaint belies Brooks’ attempt to distinguish the *Brown*. Brooks’ attempt to distinguish the other cases cited by Nord are equally meritless.

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<sup>4</sup> CP 4-5.

For example, Brooks seeks to distinguish the *Borish* case from the *Austin* case.<sup>5</sup> He argues that attorney’s fees were warranted in *Borish* because the defendant prevailed by virtue of the economic loss rule, which Brooks argues “necessarily implicates the contract.” The decision in *Austin*, according to Brooks, did not implicate the contract because it was based solely on misrepresentations in the Seller’s Disclosure Statement. Brooks fails to acknowledge, however, that the defendant in *Austin* also prevailed by virtue of the economic loss rule. “The trial court granted the Ettl’s motion to dismiss, reasoning that...the ‘economic loss rule’ barred Austin’s negligent misrepresentation and unjust enrichment claims.”<sup>6</sup>

Because the economic loss rule was used to defeat the misrepresentation claims in both *Borish* and *Austin*, Brooks’ attempt to distinguish these two decisions fails; if the economic loss rule implicated the contract in *Borish*, then it also

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<sup>5</sup> *Borish v. Russell*, 155 Wn. App. 892, 210 P.3d 646 (2010); *Austin v. Ettl*, 171 Wn. App. 85, 286 P.3d 85 (2012)

<sup>6</sup> *Austin v. Ettl*, 171 Wn. App. at 86

implicates the contract in *Austin*. As a result, attorney's fees would be equally warranted in both cases.

### **C. Brooks' Straw Man Argument Misses the Point**

Under *Brown* and its progeny, a party who prevails in a suit based on alleged misrepresentations in the sale of residential property is entitled to an award of attorney's fees under the REPSA's attorney-fee provision. In an effort to avoid this conclusion, Brooks sets up a straw man by arguing that the Seller's Disclosure Statement is neither a part of nor an addendum to the REPSA. Nord has never argued that the Seller's Disclosure Statement is part of the REPSA. In fact, Nord concedes that RCW 64.06.020 clearly provides the disclosures made in the Form 17 Seller's Disclosure Statement "shall not be considered part of any written agreement between the buyer and seller of residential property."

The question, however, is not whether the disclosure statement is part of the REPSA. The question is whether the

claims based on alleged misrepresentations in the disclosure statement “arose out of the contract” and whether the contract is “central to the dispute.” Here, there can be no question that Brooks’ claims arose out of his contract to purchase the property and that the contract was central to the dispute, because there would be no claims but for the contract.

In making this argument, Brooks cites to *Stieneke* for the proposition that the Form 17 disclosures are not an addendum to the contract, which is not disputed.<sup>7</sup> Brooks’ discussion of *Stieneke*, however, fails to address the fact that the appellate court remanded the case to the trial court with instructions to award attorney’s fees to whichever party ultimately prevailed on the misrepresentation claims. Thus, the *Stieneke* decision actually supports Nord on this appeal, because it makes clear that the availability of attorney’s fees does not hinge upon whether Form 17 becomes part of the contract or not. Fees are still available, despite the fact that the statements made in Form

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<sup>7</sup> *Stieneke v. Russi*, 145 Wn. App. 544, 190 P.3d 60 (2008)

17 do not become part of the contract, and they should be awarded in this case, as well.

#### **D. Brooks Fails to Address Other Contrary Authority**

In Respondent’s Brief, Brooks attempts—albeit unsuccessfully—to distinguish the decisions in *Brown*, *Borish*, and *Stieneke*. But Brooks simply ignores three other cases cited in the Appellant’s Brief, all of which militate in favor of awarding attorney’s fees in misrepresentation cases arising out of a REPSA.

For example, in *Douglas v. Visser*, the Court of Appeals awarded attorney’s fees to the prevailing party in a suit involving claims of alleged misrepresentations in the Seller’s Disclosure Statement.<sup>8</sup> “[T]he purchase and sale agreement provides an attorney fee provision. When an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees. We award the

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<sup>8</sup> 173 Wn. App. 823, 295 P.3d 800 (2013)

[sellers] their reasonable attorney fees.”<sup>9</sup> Brooks does not address this case in his brief.

In addition to this published opinion, Nord cited several recent unpublished opinions that stand for the same proposition. For example, In *Bullinger v. Lilla*, the buyer sued the seller for alleged misrepresentations in the sale of a condominium.<sup>10</sup> The buyer prevailed, and the trial court awarded attorney’s fees under the REPSA. On appeal, the seller argued that no fees should be awarded because “there was no breach of contract found, and the damages awarded were based solely on [the buyer’s] tort claims.”<sup>11</sup> Division I held “the trial court properly granted [the buyer’s] request for fees and costs under the agreement.”<sup>12</sup> Brooks has no answer for this decision, either.

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<sup>9</sup> *Ibid.*

<sup>10</sup> Washington Court of Appeals Case No. 68446-9-I, opinion filed March 31, 2014

<sup>11</sup> *Id.* at p. 16

<sup>12</sup> *Ibid.*

Similarly, in *Kloster v. Roberts*,<sup>13</sup> Division III awarded attorney's fees to the prevailing party in a case involving alleged misrepresentations in the sale of real property. The court noted the broad language in the attorney fee provision and concluded that the buyers owed attorney's fees because "[t]he [buyers'] misrepresentation and concealment claims also arose out of the agreement by which Roberts sold property to them."<sup>14</sup>

Brooks' brief simply ignores these decisions, yet they all support Nord's claim for attorney's fees in this case. Brooks also has no answer to Nord's policy argument, that the courts should support the reasonable expectations of the parties that they will be awarded fees if they prevail in any suit arising out of a REPSA. This should include misrepresentation suits, which comprise a substantial portion of the suits that may arise out of a REPSA.

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<sup>13</sup> Washington Court of Appeals Case No. 30546-5-III, opinion filed February 6, 2014

<sup>14</sup> *Ibid.*

### III. CONCLUSION

For the foregoing reasons, Nord respectfully requests that the trial court order denying fees is reversed, and that this matter be remanded to the trial court to award Nord his reasonable attorney fees incurred at the trial court level. In addition, Nord respectfully moves, under RAP 18.1, for an award of his attorney's fees incurred on this appeal.

Respectfully submitted February 24, 2020

*s/ Steven E. Turner*

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I hereby certify that I served the foregoing **Reply Brief of**

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- Overnight courier, delivery prepaid.**

DATED this 24<sup>th</sup> Day of February, 2020.

*s/ Steven E. Turner*

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