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

**(Mason County Superior
Court No. 17-2-00645-23)**

**RICHARD NAU,
Appellant (Plaintiff)**

v.

**NANCY K. VOGEL, as Trustee for the Mark O. Vogel Residuary
Trust; and WEST REALTY, INC.
Respondents (Defendants)**

APPELLANT NAU'S OPENING BRIEF

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The Appellant, Richard Nau, through his attorney Ben D. Cushman, of Deschutes Law Group, PLLC, submits this Opening Brief. In the proceedings below, Mr. Nau was the Plaintiff, and the Vogel entities and West Realty Inc., were the Defendants. Patricia Lewallen was an agent at Defendant West Realty Inc., and represented Plaintiff Nau as his buyer's agent.

1. INTRODUCTION

This case arises from a property purchase on Hood Canal. In 2016, Plaintiff Nau bought the waterfront property from the Vogel Defendants. In that transaction, they were Patricia Lewallen of West Realty. (CP 249, ll 7-8.) The property is located within the boundaries of the Reservation of the Skokomish Tribe, which claims general jurisdiction over the property. (CP 454, ll. 15-22; CP 474-500.) This was not disclosed to Plaintiff by the Vogel Defendants during the transaction; nor did Patricia Lewallen or West Realty advise Plaintiff Nau about the possibility of tribal jurisdiction or that he should seek advice concerning the status of the property. (CP 350, ll. 3-6; 454 ll. 13-22.)

Further, and more central to this case, there is an historic cemetery located on the property. This cemetery served both as an Indian burial ground and a cemetery for missionaries. (CP 89; CP 474-488.) It is not disputed that the presence of a cemetery was known and disclosed during the transaction. Specifically, there was at least one onsite meeting in 2015,

prior to the entry of the Purchase and Sale Agreement, attended by all parties and testified about by all parties. Each of the parties recollects this meeting differently, in material ways, creating a triable dispute. As Plaintiff Nau remembers it, the location of the cemetery was identified by Ms. Lewallen (from information received from Ms. Vogel and confirming that information) in a location fifty feet from the house, where some gravestones are located on the property. (CP 455, ll. 6-18.) This is not the true location of the cemetery, which is actually located next to and under the garage attached to the house.

Ms. Lewallen confirms that the meeting took place, but alleges that she did not make any specific representations about the location of the cemetery, despite Plaintiff Nau's clear recollection that she did. (CP 350, ll. 3-6).

Ms. Vogel also confirms that the meeting occurred and that she made representations about the location of the cemetery, but she contends that she pointed out a survey marker that Plaintiff Nau recalls first discovering after he moved in, and that she provided accurate information about the location of the cemetery. (CP 443, l. 16 – 444, l. 18.)

Therefore, there is a material dispute about the communications among the parties as to the location of the cemetery and the presence of unremoved bodies in the cemetery. Based on the testimony of Plaintiff Nau, which is consistent with the written documents in the case, the location and

status of the cemetery were misrepresented by Lewallen during the transaction, and the inference is that Lewallen was passing on inaccurate information received from Vogel. Plaintiff Nau reasonably relied on these misrepresentations and would not have bought the property had the true location and condition of the cemetery been disclosed. (CP 349, ll. 9-12; CP 351, ll. 13-16, CP 453, l. 20 – 454, l. 14; CP 455, l. 6 – 456, l. 13; CP 457, l. 9 – 458, l. 16.)

Both Ms. Vogel and Ms. Lewallen contend that the transmittal of a Form 17 Disclosure to Plaintiff Nau (from Vogel, to Lewallen, to Nau) operates to establish that there was no misrepresentation. It doesn't. The Form 17 merely disclosed the presence of the cemetery onsite, which is not disputed. The misrepresentations concerned the location and current status of the cemetery, which were not disclosed in the Form 17. Plaintiff Nau did not recall the Form 17 because it was not presented to or discussed with him by Ms. Lewallen as an important document, and it did not end up in Mr. Nau's transaction file of key documents. (CP 110, ll. 9-11; CP 245, ll. 10-21; CP 454, ll. 9-14; CP 455, l. 19- 456, l. 7.) (Ms. Lewallen denies that (CP 425, ll. 1-7), but presents no evidence other than her testimony and only after she offered earlier testimony that it was her practice to "transmit" Form 17s rather than explain them or highlight their importance. (CP 126, ll. 1-11.) Mr. Nau's recollection, as well as explaining the absence of the Form

17 from his key document file, is consistent with the only communication in the record from Ms. Lewallen about the Form 17. (CP 292.))

The headstones in the cemetery were moved from their original location during Vogel's ownership (CP 64, 15-18), which greatly contributed to Plaintiff Nau's reliance on the misrepresentation. (CP 456, l. 8-13.) This amounts to an act of concealment by Vogel. Vogel contends that any misrepresentations in the transaction were cured by her leaving a packet of information for Mr. Nau to find when he moved in. (CP 64, l. 11 – CP 65, l. 3; CP 454, l. 13 – 455, l. 3). Mr. Nau disputes Ms. Vogel's description of where and how she left this information. (CP 246, l. 13 – 247, l. 17; CP 474-488.) However, even if the information were left as Ms. Vogel alleges, accurate disclosures after the fact do not and cannot cure misrepresentations prior to closing.

2. ASSIGNMENTS OF ERROR

2.1. The Trial Court erred in dismissing Plaintiff's misrepresentation claims, and the resulting claim for title defects, against Vogel.

2.2. The Trial Court erred in sanctioning Plaintiff under CR 11 after three years of hotly contested litigation of fairly debatable claims.

2.3. The Trial Court erred in dismissing Plaintiff's negligent misrepresentation claim against West Realty.

2.4. The Trial Court erred in dismissing Plaintiff's negligence and malpractice claim against West Realty and compounded this error by denying Plaintiff Nau's Motion to Amend.

3. ISSUES RELATED TO ASSIGNMENTS OF ERROR

3.1. When a seller fails to disclose and misrepresents the true location of a cemetery onsite and fails to disclose Tribal interests in property during a transaction, when those interests substantially impair the value of and use of the land, is the seller liable for fraud or negligent misrepresentation? **Yes.** (Assignment of Error 2.1.)

3.2. Is disclosure of relevant facts by leaving information at the house for the buyer to find after close of the transaction sufficient to cure misrepresentations during the transaction? **No.** (Assignment of Error 2.1)

3.3. Are CR 11 sanctions appropriate based on inartful pleading of otherwise debatable claims? **No.** (Assignment of Error 2.2.)

3.4. When a buyer's agent reiterates and affirms as accurate misrepresentations made by the seller in a real estate transaction, is the realtor liable for fraud or negligent misrepresentation? **Yes.** (Assignment of Error 2.3.)

3.5. When a buyer's agent fails to exercise due care and competence, drafts real estate documents that fail to protect the buyer from issues that should have been apparent to the agent, and fails to advise the buyer to seek independent expert advice on issues on which the buyer's

agent lacks knowledge or expertise, is the realtor liable for negligence, malpractice, and breach of statutory and common law duties? **Yes.**

(Assignment of Error 2.4.)

4. STATEMENT OF THE CASE

In 2016, Plaintiff Nau, working with realtor Patricia Lewallen of West Realty, bought property within the Skokomish Reservation on Hood Canal from Defendants Vogel. (CP 249, ll 7-8; CP 454, ll. 15-22; CP 474-500.) There is an historic cemetery located in a manner that includes part of the property. There are also gravestones onsite on the upper part of the property near the east boundary of the property (more than fifty feet from the footprint of the house and garage). The presence of the cemetery was disclosed, but the location of the land within the Reservation was not, and the location of the cemetery on the property was misrepresented by the Seller (Vogel) and affirmed through specific reassurances by Lewallen and West Realty. (CP 349, ll. 9-12; CP 351, ll. 13-16, CP 453, l. 20 – 454, l. 14; CP 455, l. 6 – 456, l 13; CP 457, l. 9 – 458, l. 16.)

Specifically, during the transaction, the Vogel Defendants misrepresented and concealed information about the cemetery. First, Vogel represented that all bodies had been removed. The currently available information is that while some bodies were removed (Indian bodies), other bodies remained in the cemetery (missionaries). Thus, while the cemetery was represented to not be an active burial site, it is. (CP 454, ll. 1-8; CP

455, ll. 6-17; CP 456, ll. 8-13; CP 457, ll. 9-13) Second, Vogel represented, through the information provided in the transaction, that the cemetery is primarily located on a neighboring property, encroaching only a few feet over the east property line well north of where the house and garage had been built onsite. (CP 452, l. 20 – 454, l. 8; CP 455, ll. 6-17; CP 456, ll. 8-13; CP 457, ll. 9-13) (Vogel denies that they misrepresented the location of the cemetery, but Plaintiff Nau has a clear recollection of where he was told the cemetery was located, and that location is not under or near any structures onsite.) Further, the grave stones were moved, while Vogel owned the property, from their original location (presumably near the house and garage) (CP 64, 15-18) to a location coinciding with the map information received by Nau, and Vogel failed to disclose that the grave markers had been moved or identified their original locations. Finally, Vogel failed to disclose that the Skokomish Tribe, in addition to having an interest in the cemetery as an ancestral burial, asserted general regulatory and land use jurisdiction over the property itself. (CP 454, 15-22; CP 455, 6-18; CP 474-488.)

Far from protecting Plaintiff Nau from these representations, by acting with reasonable competence and good faith and advising Nau to seek expert opinions to supplement her own observations (as she was obligated to do under RCW 18.86), Patricia Lewallen of West Realty repeated and reinforced Vogel's misrepresentations, affirming the accuracy and veracity

of those misrepresentations to Nau. In doing this, Patricia Lewallen not only failed to meet her standard of care or perform her statutory duties, she took on Vogel's misrepresentations as her own and took on liability for negligent misrepresentation when she did so.

Based on these facts, Plaintiff Nau filed the lawsuit. Not surprisingly, the Defendants disputed the facts, challenging Richard Nau's credibility and memory. The case was hotly contested, resulting in multiple motions for summary judgment (CP 35-49; 271-285; 368-379; 427-441) and a motion to dismiss (CP 225-234) over three years of litigation. These resulted in the piecemeal dismissal of Plaintiff's Nau's case, which was finally dismissed on December 16, 2019 (CP 588-589).

Thereafter, despite the long duration of the case and the mixed (albeit ultimate) success of the motions for summary judgment, Defendant Vogel sought and received attorney's fees as a sanction under CR 11. This fee award was based on two claims: (1) an inartfully drafted and mislabeled claim for "breach of the warranty of good faith and fair dealing" and (2) claims related to intentional misrepresentations and statutory violations by Defendant Vogel. The second set of claims mostly turns on issues surrounding the Form 17 seller's disclosure, which was not a document that West Realty highlighted to Plaintiff Nau as an important document and one which Nau therefore did not consider or even remember from the transaction. This absence of the Form 17 information from Richard Nau's

decision-making does not operate to excuse Vogel from responsibility for her misrepresentations in this case. Rather, it underscores the lack of due care by Patricia Lewallen and West Realty in their representation of Richard Nau in this transaction.

Richard Nau's claims are meritorious. There are genuine issues of material fact concerning them, but those issues should be tried and are not the proper basis for dismissal of the claims short of trial. This Court should reverse the dismissal of Richard Nau's claims and reinstate those claims for trial. Because the claims are meritorious enough for trial, they are certainly not frivolous. Even if not reinstated, all of Richard Nau's claims have sufficient merit that the CR 11 sanction should be reversed and the fee award vacated.

5. SUMMARY OF ARGUMENT

Richard Nau was misled during the transaction in which he purchased property on Hood Canal from the Vogel Defendants. While he was told that there was a cemetery onsite, he was given inaccurate information about both its location, about its status as an active burial site, and about the Skokomish Tribe's interest in the cemetery. This misrepresented and omitted information was very material. The cemetery was represented to be fifty feet from the structures onsite when it, in fact, extends under the garage attached to the house. While Indian bodies were removed from the cemetery, it appears that missionaries remain buried

onsite. Further, the Skokomish Tribe has asserted general jurisdiction over the property and specific interest in the cemetery and, prior to the sale of the property, Ms. Vogel had engaged in a long and contentious interaction with the Tribe through the same attorney she hired to defend this case, Richard Hoss. Mystifyingly, despite her dispute with the Tribe and despite the impact of the Native American Grave Protection and Repatriation Act on native artifacts, Ms. Vogel testified that she believed that the cemetery was an enhancement factor on the property value because it allowed for the collection of native artifacts. (CP 65: ll. 4-7.)

Richard Nau did not remember specific discussions of the cemetery he had with Ms. Vogel. However, Nau does remember the substance of the discussions and specifically remembers that his agent with West Realty, Patricia Lewallen, repeated the information and affirmed its accuracy. Ms. Vogel admits providing the information and participating in the discussions that Nau remembers, and Ms. Vogel was the original source of the inaccurate and incomplete information Richard Nau relied on in this transaction. On these facts, Richard Nau is entitled to damages for fraud and misrepresentation against the defendants (or rescission of the transaction with regard to Vogel plus a damage award against West Realty). The facts are disputed by the defendants, but that dispute was not properly resolved on summary judgment and the various orders granting summary judgment of dismissal should be reversed. (West Realty's argument, apparently

accepted by the Court, was that Plaintiff Nau’s testimony was not credible (CP 287, 1.6), while Vogel made both a credulity argument and asserted that Plaintiff Nau was “forgetful” as a result of a heart attack. (CP 433, 1. 1 – 434, 1. 18; CP 442, ll. 20-23.) These may be good trial arguments, but they should not have been the basis for summary judgment.)

Richard Nau has additional claims against his realtor, West Reality and Patricia Lewallen, related to her breach of common law and statutory duties in her representation of him. These should not have been dismissed and, insofar as inexact pleading contributed to their dismissal, the Trial Court should have allowed Plaintiff Nau to amend to capture any claims not previously captured by the original Complaint as the Trial Court understood it.

6. ARGUMENT

6.1 Standard of Review

When reviewing an order of summary judgment, the Court of Appeals engages in the same inquiry as the Trial Court, affirming the order only if there are no genuine issues of material fact and only if, on the undisputed facts, the moving party is entitled to judgment as a matter of law. *Failor's Pharmacy v. DSHS*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994). Nau presented evidence establishing material issues of fact as to whether Vogel fully and accurately disclosed the tribal interest in the property and the true location and status of the historic cemetery onsite. Nau also presented

evidence that his agent, Lewallen, failed to fulfill her statutory duties to act in good faith, exercise reasonable skill and competence, and properly advise him in this case. Further, Nau presented evidence that Lewallen not only failed to fulfill her statutory duties, but anxious to close the sale and earn a commission, whitewashed and misrepresented critical material facts about the cemetery onsite. The Trial Court erred in granting summary judgment on those issues and compounded those errors by sanctioning Nau under CR 11. This Court should reverse the Trial Court.

6.2 Law of Misrepresentation

Plaintiffs' claims arise under both fraud and negligent misrepresentation, and there is produced evidence of every factual element of these claims. On the evidence presented by Nau, a reasonable jury could find the Defendants liable for fraud and for both intentional and negligent misrepresentation. This case therefore presents triable claims and should have proceeded to trial.

The elements of fraud are:

- (1) Representation of an existing fact;
- (2) Materiality of the representation;
- (3) Falsity of the representation;
- (4) The speaker's knowledge of its falsity;
- (5) The speaker's intent that it be acted upon by the plaintiff;
- (6) Plaintiff's ignorance of the falsity;
- (7) Plaintiff's reliance on the truth of the representation;
- (8) Plaintiff's right to rely upon it; and
- (9) Resulting damage.

WPI 160.01 Elements of Fraud (in relevant part).

It is settled Washington law that a seller has a duty to disclose facts material to a sale of residential real property. The Form 17 document is the usual process for transmitting such information. In some cases, where there is no contact between buyer and seller, it is the only way such information is transmitted. However, when, as in this case, there are direct contacts and communications between the buyer and seller, then the seller's direct communications with the buyer at such times also counts as representations made in the course of the sale.

Similarly, it is well settled law, underscored by statutory duties, that real estate agents must also disclose material facts. RCW 18.86.030(1)(d). A realtor's failure to disclose material facts is a fraudulent omission or negligent representation by omission. Similarly, dissemination of inaccurate facts is an express fraud or negligent misrepresentation.

A material fact is "information that substantially adversely affects the value of the property or a party's ability to perform its obligations in a real estate transaction or operates to materially impair or defeat the purpose of the transaction." RCW 18.86.010(9); *Bloor v. Fritz*, 143 Wn. App. 718, 733, 180 P.3d 805 (2008). Purchasers of real estate have the right to rely on a seller's representation because the seller is in a better position to know about the property. See *McRae v. Bolstad*, 32 Wn. App. 173, 177, 646 P.2d 771 (1982) (citing *Dixon v. MacGillivray*, 29 Wn.2d 30, 35, 185 P.2d 109 (1947)).

Generally, Washington recognizes a tort claim for negligent misrepresentation based on the *Restatement (Second) of Torts* § 522(1) (1977). *Van Dinter v. Orr*, 157 Wn.2d 329, 332–33, 138 P.3d 608 (2006); 16 David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law and Practice § 18.10 (3d ed. Supp.2012); *Jackowski v. Borschelt*, 151 Wn. App. 1, 12-19 209 P.3d 514 (2009) (decided under the former “economic loss rule” and noting that the economic loss rule caused confusion, largely because its name was misleading; the Washington State Supreme Court abolished the economic loss rule and replaced it with the “Independent Duty Doctrine.” *Affiliated FM Insurance Co. v. LTK Consulting Svcs, Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010); *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010); and (*most importantly and most on point*) *Jackowski v. Borschelt*, 174 Wn.2d 720, 278 P.3d 1100 (2012)).

Since adopting the independent duty doctrine, the Washington Supreme Court has emphasized that in some circumstances, a fraud or negligent misrepresentation claim may be viable even when only economic damages are at stake and the parties contracted against potential economic liability.

In *Jackowski v. Borschelt*, 174 Wn.2d 720, 738, 278 P.3d 1100 (2012), the Supreme Court noted that, like a claim for fraud, a negligent misrepresentation claim might exist “to the extent the duty to not commit negligent misrepresentation is independent of the contract.” The rule

expressed in *Jackowski Id.*, recognizes that there are some circumstances where the duty to avoid misrepresentation might arise independently of the contract, from which the conclusion that a claim for such misrepresentation is based on an “independent duty” and therefore can proceed despite the ultimate existence of a contract between the parties.

For instance, a duty to avoid misrepresentation arises independently of the contract where one party, through misrepresentations, induces another to enter into a contractual relationship. See, e.g., *Haberman v. WPPSS*, 109 Wn.2d 107, 163–64, 744 P.2d 1032, 750 P.2d 254 (1987) (trial court erred in dismissing bondholders' negligent misrepresentation claim against design engineers when the engineers' statements induced the bondholders to purchase bonds issued to finance construction of nuclear power plant). The current case is similar.

Misrepresentation by a seller of real estate supports alternative claims for damages and rescission, at the election of the buyer. Nau's Complaint seeks these remedies as alternatives. However, Plaintiff Nau's claims were dismissed prior to his election. Nonetheless, the case law on rescission is very useful in highlighting the critical factors involved in misrepresentation claims in real estate transactions.

A purchase and sale contract that is made based upon mutual mistake, unilateral mistake, intentional misrepresentation, negligent misrepresentation, or even completely innocent misrepresentation, may be

rescinded by the buyer. See *Simonson v. Fendell*, 101 Wn.2d 88, 675 P.2d 128 (1984) (since purchase agreement would not have been formed but for mutual mistake of material fact that business was operating at a profit, buyer was entitled to rescission); *Davis v. Pennington*, 24 Wn. App. 802, 604 P.2d 987 (1979) (buyer was mistaken as to material facts that seller failed to disclose; unilateral mistake plus inequitable conduct meant buyer was entitled to rescission); *Lou v. Bethany Lutheran Church of Seattle*, 168 Wash. 595, 13 P.2d 20 (1932) (where seller knowingly misrepresented boundary lines to buyer, buyer was entitled to rescission); *Holland Furnace Co. v. Korth*, 43 Wn.2d 618, 262 P.2d 772 (1953) (buyer is entitled to rescission when entered into contract based on the seller's material misrepresentations, including misrepresentations recklessly or carelessly made); and *Anthony v. Warren*, 28 Wn.2d 773, 184 P.2d 105 (1947) (fraudulent intent not necessary for rescission; rescission may be granted based on innocent misrepresentation).

This is ancient law. It is found in hornbooks, learned treatises, and in binding caselaw:

In a system of contract law based on supposedly informed assent, it is in the interest of society as well as of the parties to discourage misleading conduct in the bargaining process. To this end both tort and contract law provide remedies for misrepresentation, sometimes affording the recipient of the misrepresentation a choice between the two.

E. Allan Farnsworth, *Farnsworth on Contracts*, § 4.9 (3d ed. 2004).

The party misled has an election; he can get benefit of the bargain damages measured by the difference in value between the price paid and the actual value without misrepresentation, or he can rescind and avoid the contract entirely. At law, the recipient of the misrepresentation may recover damages based on the value that the bargain would have had if it were as represented. Equity rules, on the other hand, allow the recipient of the misrepresentation to undo the transaction by avoiding it, and they seek to restore the parties to the positions in which they found themselves before they made the agreement. Equity asks what behavior – including misrepresentation – is not tolerable as the basis of a bargain. Courts frequently grant relief to a purchaser for nondisclosure of material facts, more frequently granting rescission than damages, even for misrepresentation actions sounding in tort. *Sorrell v. Young*, 6 Wn. App. 200, 224, 491 P.2d 1312 (1971).

A material innocent misrepresentation can render a contract voidable. *Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 390, 858 P.2d 245 (1993); *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 384, 745 P.2d 37 (1987) (citing *Restatement (Second) of Contracts* § 164 (1) (1981): "If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."). A misrepresentation is "an assertion that is not in accord

with the facts." *Rstmt. 2d Conts. § 159*, **adopted** in Yakima County, *supra*, 122 Wn. 2d at 390.

A person's nondisclosure of a fact known to him is equivalent to an assertion that the fact does not exist 'where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if nondisclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing'.

Brinkerhoff v. Campbell, 99 Wn. App. 692, 698, 994 P.2d 911 (2000).

6.3 Misrepresentation Claim Against Vogel Defendants

In this case, Plaintiff does not recall receiving a direct and false representation of fact from Ms. Vogel. However, Ms. Vogel has testified that she did communicate directly with Plaintiff Nau about the cemetery onsite, and Nau has testified about the information he received about the cemetery prior to closing and has provided evidence that it was false. Therefore, to the extent Vogel truthfully testified that she communicated directly with Nau, there is a strong inference that such communication was a misrepresentation.

Plaintiff Nau recalls receiving specific, false information from his realtor, Lewallen. The inference is that the source of this false information was Vogel, and Vogel therefore misrepresented material facts in her communications with Nau's agent with the intent that those facts be passed on to and relied on by Nau, as they were. That scenario also supports a triable claim for fraud or misrepresentation.

6.4 CR 11 Award

A CR 11 sanction is only appropriate if Plaintiff filed a pleading that is: (1) not well-grounded in fact; (2) not warranted by existing law or by a good faith argument for extension or modification of existing law; or (3) interposed for an improper purpose. CR 11 (a). The burden is on the moving party to justify the request for sanctions. *Biggs v. Vail*, 124 Wn.2d 193, 202, 867 P.2d 448 (1994); *Eugster v. City of Spokane*, 110 Wn. App. 212, 232, 39 P.3d 360 (2002); *Brin v. Stutzman*, 89 Wn. App. 809, 827, 951 P.2d 291 (1998). The sanctions imposed here are not appropriate and the award should be reversed.

The purposes of sanctions are to deter, to punish, to compensate and to educate. Where compensation to litigants is appropriate, then sanctions should include a compensation award. However, we caution that the sanctions rules are not “fee shifting” rules. Furthermore, requests for sanctions should not turn into satellite litigation or become a “cottage industry” for lawyers.

Wash. Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn. 2d 299, 356, 858 P.2d 1054 (1993).

CR 11 provides in relevant part:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party’s or attorney’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or

the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation....

“The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system.” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). CR 11 “is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.” *Bryant, Id.*, at 219.

Indeed, in order to assess CR 11 sanctions, “[t]he court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose.” *Biggs v. Vail*, 124 Wn. 2d 193 at 201, 876 P.2d 448 (1994).

Complaints which are ‘grounded in fact’ and ‘warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law’ are not ‘baseless’ claims, and are therefore not the proper subject of CR 11 sanctions.

Bryant, supra, at 219-20.

Further, sanctions are not appropriate merely because claims are “inartfully drafted” (such as labeling a claim with the wrong legal theory, which is the primary defect found by the Trial Court in Nau’s pleadings). *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 120, 791 P.2d 537 (1990), *aff’d*, 119 Wn.2d 210, 829 P.2d 1099 (1992). The party seeking sanctions has the burden to justify the request. *Biggs, supra* at 202.

The two causes of action the Trial Court ruled are frivolous are both examples of inartful drafting that than true frivolity. First, Nau’s original counsel pled a claim for “breach of warranty of good faith and fair dealing” – confused, as many people are, by the name of that doctrine into believing that an act of bad faith in contract negotiations breaches the implied warranty of good faith. The implied warranty is poorly named (in a manner similar to the “Statute of Frauds” – which doesn’t apply in fraud cases but to formal contract rules). The Warranty of Good Faith involves a circumstance where courts have found the risk of bad faith to be elevated and have therefore created a prophylactic rule to prevent such bad faith. *Edmonson v. Popchoi*, 172 Wn.2d 272 at 280, 256 P.3d 1223 (2011) (quoting *Restatement (Second) Of Contracts* § 205, cmt. A (1981)); *Rekhter v. Dep t of Soc. & Health Servs.*, 180 Wn.2d 103, 323 P.3d 1036 (2014). However, that is not to say that bad faith in a contract transaction is not actionable. It is actionable, usually as a fraud or misrepresentation. It just isn’t called “warranty of good faith and fair dealing.”

Similarly, Plaintiff’s seisen and title claim were inartfully drafted. There is no question that the cemetery poses use and even ownership questions relating to Plaintiff’s lot. The Tribe has asserted control of the cemetery. The Tribe has further asserted general jurisdiction over the property as land within its Reservation. These are serious and present

clouds on title – not merely speculative future clouds as the Trial Court ruled.

Finally, insofar as the Court ruled that Nau’s original allegation that he did not receive the Form 17 made some or all of his claims frivolous, Nau has provided an explanation for that confusion, arising from the poor representation he received from his realtor. He acted promptly to correct the record when he found the documents in email. Thereafter, he ceased to rely on arguments relating to the Form 17 and focused on arguments based on other misrepresentations, all of which were consistent with the information in the Form 17. This is just a failure of proof on a piece of evidence, and not even the only evidence that supports the misrepresentation claims. It is not sanctionable.

CR 11 sanctions for a claim are appropriate only if the pleadings were filed without a reasonable inquiry into the facts and law and are not warranted by existing law or a good faith argument for the extension of existing law. *Miller v. Badgley*, 51 Wn. App. 285 at 300, 753 P.2d 530 (1988); *Blair v. GIM Corp.*, 88 Wn. App. 475 at 482-83, 945 P.2d 1149 (1997). CR 11 sanctions are not appropriate merely because the factual basis of an action is ultimately found wanting or because a legal theory reasonably asserted in good faith ultimately proves incorrect. *Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127 at 142, 64 P.3d 691 (2003). Similarly, sanctions are not appropriate merely because a trier of fact

resolves a credibility dispute in favor of one party and against the other. *Saldivar v. Momah*, 145 Wn. App. 365 at 405, 186 P.3d 117 (2008).

Thus, imposition of CR 11 sanctions is “not a judgment on the merits of the action,” but rather “the determination of a collateral issue: whether the attorney [or party] has abused the judicial process.” *Biggs v. Vail*, 124 Wn.2d, 193 at 198, 876 P.2d 448 (1994) (quoting *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)). If the issues in the case are debatable and subject to rational legal and factual argument, the case is not frivolous. *Bill of Rights Legal Fun v. Evergreen State Coll.*, 44 Wn. App. 690 at 696-97, 723 P.2d 483 (1986) (analysis under RCW 4.84.185, but the standard for frivolity under that statute and CR 11 mirror each other (*Harrington v. Pailthorp*, 67 Wn. App. 901 at 911-13, 841 P.2d 1258 (1992)). Similarly, case of first impression is not frivolous. *Skimming v. Boxer*, 119 Wn. App. 748 at 756, 82 P.3d 707 (2004). Here, nothing in the Complaint or the rest of the case indicates that Plaintiff or Plaintiff’s counsel have abused the judicial process or outstretched a good faith argument for the application or extension of existing law.

The applicable existing law is the *Jackowski v. Borchelt*, 174 Wn.2d, 278 P.3d case and its progeny. In *Jackowski*, as here, there was evidence both of factual disclosure and of nondisclosure. Both this case and *Jackowski, Id.*, are, therefore, cases asserting misrepresentation claims on the ground that an incomplete disclosure was misleading enough, despite its

elements of candor and truth, to be deceptive. There is no bright line in that regard currently defined in the law, and the application of that principle outside the Form 17 context (the context in the *Jackowski* case) is a matter of first impression.

In this case, it is true that Ms. Vogel disclosed the presence of the cemetery onsite and Ms. Lewallen discussed it with Plaintiff Nau. However, there is also evidence that Ms. Vogel was either not candid about, or affirmatively misrepresented, its location (CP 452, l. 20 – 454, l. 8; CP 455, ll. 6-17; CP 456, ll. 8-13; CP 457, ll. 9-13) and that Ms. Lewallen reinforced this misrepresentation (CP 455, ll. 6-18.). Nau was misled.

Further, even in cases where a CR 11 sanction is appropriate, “the least severe sanctions adequate to serve the purpose should be imposed.” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992) at 225. CR 11 are not intended to be, and should not be used as, a fee-shifting mechanism. *Bryant, Id.*, at 220. CR 11 sanctions must limit those sanctions to the amount reasonably and necessarily expended responding to the improper pleadings. *McDonald v. Korum Ford*, 80 Wn. App. 877 at 891, 912 P.2d 1052 (1996). When faced with potentially frivolous pleadings, the party resisting the pleading “has a duty to mitigate and may not recover excessive expenditures.” *Miller v. Badgley, supra*, at 303. Here, the sanction was extremely high, awarded after years of litigation, including multiple unsuccessful or partially successful motions to dismiss the claim.

Vogel and the Trial Court improperly used the CR 11 process as a fee shifting provision, resulting in an award for much of the total cost of three years of hotly contested litigation. The mere fact that there was three years of hotly contested litigation belies the claim that Plaintiff Nau's case lacked any legal or factual merit. A case that lacks legal merit simply does not generate a hundred thousand dollars in fees over the course of three years and multiple summary judgment motions, some of which were not fully successful. No fees should have been awarded here.

However, if the Court concurs with the Trial Court opinion that some portions of Plaintiff Nau's lawsuit lack merit, this Court should only sustain the small amount fees narrowly limited to the reasonable cost of addressing those portions of the lawsuit and then only if some lesser sanction is not adequate.

6.5 Misrepresentation Claim Against West Realty

The information Plaintiff Nau has testified that he received about the location and status of the cemetery was false. Nau has a specific recollection of his agent, Lewallen, telling him that information and vouching for it. (CP 455, ll. 6-18.) Lewallen predictably denies that, but Nau's recollection is consistent with the documentary record. Lewallen argues that Nau's testimony is not credible, but credibility issues should not be resolved on summary judgment. *Amend v. Bell*, 89 Wn.2d 124, 570 P. 2d 138 (1977). This is properly a case for trial.

6.6 Breach of Realtor Duties Claim

Real estate agents are professionals who owe duties to their clients imposed at law and by statute. Attorneys' duties, for example, are found in common law, *see, e.g., Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992). Real Estate agents are authorized as Limited Practice Officers in Washington and if they violate a duty in that capacity, they violate the common law duties imposed on legal professionals. However, when acting in their general realtor capacity, realtors' duties are statutory, imposed by RCW Chapter 18.86, rather than fiduciary. (RCW 18.86.110.) This is a distinction without a relevant difference. The legal question remains: (1) what was the agent's duty and (2) did the agent's actions satisfy that duty? *See, e.g., Hoffman v. Connall*, 108 Wn.2d 69, 736 P.2d 242 (1987) (real estate agent is in same class of professionals as lawyers, chiropractors, and doctors); *Johnson v. Brado*, 56 Wn. App. 163, 783 P.2d 92 (1990) (buyer sued broker and agent for negligent misrepresentation); *Pacific Northwest Life Insurance Co. v. Turnbull*, 51 Wn App. 692, 754 P.2d 1262 (1988) (buyer recovered against broker and agent for negligence). It was error for the Trial Court to dismiss Nau's tort claims against his real estate agent for breaches of her common law duties as a LPA and statutory duties as a realtor, the foundation of each being to perform up to the standard of care. RCW 18.86.030(1)(a).

Further, breaches of realtor duties are also actionable breaches of contract. Actions on them are properly “contorts” (actions sounding simultaneously in both contract and tort). Just as statutory warranties are contractual in nature (are implied terms of contract) statutory agency duties are contractual in nature (are implied duties in the contract between agency and principal). *See, e.g.,* this Court's holding in *Brickler v. Myers Const., Inc.*, 92 Wn. App. 269, 273-75, 966 P.2d 335 (1998) (action by a home buyer against a builder-vendor under the implied warranty of habitability is *an action on a contract*). Therefore, an action by the principal, Nau, against his agent, Lewallen, for breach of statutory real estate agent duties, is *an action on a contract as well as tort*, and the statutory duties were *contractual* duties, and are recoverable under either theory, both of which can be simultaneously advanced as mutually consistent.

RCW 18.86.030(1)(a) provides that an agent has the duty to "exercise reasonable skill and care." Nau's agent is liable for failing to inform Nau of the importance of the Form 17, for failing to go over it with him in detail, highlighting issues of concern, and for vouching for information without verifying its accuracy. (CP 349, l. 7 – 350, l. 2.)

Lewallen had a further duty to "advise the buyer to seek expert advice on matters relating to the transaction that are beyond the agent's expertise." RCW 18.86.040(1)(c). She contends that she did so. (CP 242, ll. 23-24.) Nau contends she did not. (CP 350, ll 3-6.) This creates a

disputed issue of material fact on that point, which should have been resolved at a trial.

RCW 18.86.030(1)(d) requires an agent to disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party. The location of the property within the boundaries of the Skokomish Reservation was an issue that a competent real estate agent, experienced in the area, should have known and should have disclosed. The impacts on a non-tribal member owning land under tribal jurisdiction are extreme and universally negative, affecting the price and marketability.

Finally, RCW 18.86.030(1)(b) requires an agent to deal honestly and in good faith. There is a strong inference here that, angling for a commission, West Realty and Patricia Lewallen put their interests above that of their client and not only failed to protect him from a disastrous transaction, but led him down the garden path into it by whitewashing negative information and misrepresenting facts that would have caused Nau to move on from the transaction.

7. CONCLUSION

Nau is entitled to have issues of fact, including credibility issues and issues about the accuracy of his memory, resolved at a trial. Instead, those issues were resolved on summary judgment, which resulted in the dismissal of the claims he made in this lawsuit and the further imposition of CR 11

sanctions for some of those claims. The ruling below was a complete reversal of the standard the Trial Court should have used when evaluating the evidence, and the appealed orders of the Trial Court should be reversed, remanding this case for amendment of the Complaint to correct some inartful drafting followed by a trial on the merits.

SUBMITTED this 14th day of August, 2020.

DESCHUTES LAW GROUP, PLLC



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Attorney for Appellant Nau

CERTIFICATE OF SERVICE

I certify that on the date signed below, I caused the foregoing document to be e-filed with this Court, and e-served upon the Respondents' attorneys, plus mailed them paper copies.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON.

Dated this 14th day of August 2020, in Olympia, Washington.

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