

FILED  
Court of Appeals  
Division II  
State of Washington  
No. 54272-2-II  
9/11/2020 3:06 PM

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

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RICHARD NAU,

Appellant,

v.

NANCY K. VOGEL, as Trustee for the  
Mark O. Vogel Residuary Trust; and  
WEST REALTY, INC., a Washington Corporation,

Respondents.

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CORRECTED BRIEF OF RESPONDENT VOGEL

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## A. INTRODUCTION

The present appeal arises out of the 2015 sale of real property in Potlatch in Mason County by Nancy K. Vogel to Richard Nau. Vogel is a retired Weyerhaeuser Company employee who has been plagued by baseless litigation by Dr. Richard Nau claiming that she failed to disclose a cemetery on the property she sold him when that was patently untrue. Nau persists in his frivolous litigation.

Nau initially asserted that Vogel or her realtor never revealed to him that there was a cemetery on the affected property. But that assertion was false. Nau's case now morphs on appeal to an assertion that the significance of the cemetery and its relationship to the Skokomish Nation was not revealed to him. That assertion, too, is false.

The trial court dismissed Nau's multiple theories of recovery against Vogel and West Realty, Inc. ("West"). Rather than moving on, Nau persists in pursuing this frivolous appeal. Nau's only remaining theory is baseless in light of the fact, now well documented, that he knew of the cemetery *before* he purchased the property at issue. Moreover, Vogel and/or West provided him ample documentation disclosing, never hiding, the cemetery's existence, and the cemetery was a matter of public record on the plat. Nau independently researched the cemetery. Nau's claim of negligent misrepresentation, often based on his vague assertions that he could not

“recall” certain events, or statements made without a reference to the record, is unsupported and was properly dismissed.

This Court should affirm the trial court’s well-supported dismissal of Nau’s baseless negligent misrepresentation claim, and award Vogel her fees on appeal.

B. STATEMENT OF THE CASE<sup>1</sup>

An historic cemetery was located on the property that is the subject of this dispute. (“Potlatch Cemetery”). On July 18, 1941, Ernest and Hulda Carlson dedicated the plat for the Potlatch Beach Tracts, recorded in Volume 4 of Plats, Page 26, Records of Mason County, Washington. CP 61. That plat shows an area labeled “Cemet-ery” between Lots 102 and 103. *Id.* The Potlatch Cemetery is illustrated with solid lines indicating separate boundaries, with no indication that the boundary line between Lots 102 and 103 extends through the Cemetery; this indicates that Lots 102 and 103 do not include any portion of the Cemetery. CP 57. As Title Examiner Dennis Pickard noted below, the clear plat map is confirmed by the

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<sup>1</sup> This Court should reject Nau’s “two-part” statement of the case, the first, set forth in his 4-page “introduction,” and the remainder in his actual statement of the case. Both are argumentative, in violation of RAP 10.3(a)(5), and are hardly a fair recitation of the facts and procedure in this case. *Id.* Indeed, Nau resorts to factual contentions for which he often has no citation to the record, again violating RAP 10.3(a)(5). The procedural irregularities in Nau’s opening brief only reinforce the baseless character of his appeal.

description in capital letters on the face of the plat that not only shows the Cemetery area on the plat but also includes a paragraph beginning with the language, “EXCEPTING THEREFROM THE INDIAN CEMETERY TRACK DESCRIBED AS FOLLOWS,” which specifically excluded the Potlatch Cemetery by a metes and bounds description. CP 57, 64.<sup>2</sup>

The tax records of the Mason County Assessor’s Office also made clear that the Potlatch Cemetery existed. Those records identified the “Indian Cemetery” as Tax Parcel No. 42226-12-60050, and the Assessor’s tax rolls listed the owner of the parcel as Mason County. CP 57.<sup>3</sup>

In 1987, Vogel’s late husband, Mark, purchased Potlatch Beach lots 103 and 104 before they married. CP 62. After Mark’s death, Vogel inherited the lots, with the small house and garage located on them; in 2010, she made a small remodel of both structures that did not alter either’s footprint. CP 63, 67-68.

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<sup>2</sup> The deed Vogel ultimately provided to Nau specifically references the plat in its legal description of the property conveyed to him. CP 63-64, 82-83. The plat made clear the location of the Potlatch Cemetery to anyone who reviewed the plat.

<sup>3</sup> The face of the plat indicated the owner of the parcel was “J.D. Sherwood, Trustee.” CP 61. There are no records, deeds, or other documentation in the Mason County Assessor or Auditor’s files conveying or otherwise transferring the interest acquired by J.D. Sherwood, Trustee to Mason County or to any other party. CP 57-58. Mason County historic records showed that the Assessor had identified the owner of this tax parcel as Mason County since 1954, but those records did not include any reference to any document conveying or otherwise transferring ownership from J.D. Sherwood, Trustee. *Id.* The Mason County Commissioners have formally disclaimed any County interest in the Potlatch Cemetery. CP 452.

In 2015, Vogel decided to sell the lots, entering into a listing agreement with John L. Scott Real Estate in Bellevue. CP 125. Vogel's agent sent West realtor Patricia Lewallen, who represented Nau, a March 15, 2015 Form 17 that addressed the Cemetery. CP 125-26. In October 2015, Richard Nau initially viewed the lots with Lewallen. CP 286-87. When he viewed the property with her, Lewallen told Nau of the Potlatch Cemetery, CP 287, 442-43, and he observed "a small cluster of headstones" in area 40 to 50 feet away from the Vogel house and garage, CP 349, as he later admitted. CP 387, 454, 460-67.

Nau later visited the property a second time in October 2015 with Lewallen and Vogel. CP 443. Vogel told Nau that "there is a cemetery that extends onto her property." CP 286-87. Nau and Lewallen met on November 1, 2015 to discuss the sale. She specifically reviewed the Form 17 with Nau and told him of the need to investigate the Potlatch Cemetery. CP 424-25. That meeting resulted in the contingency referenced *infra. Id.*

On November 1, 2015, the parties entered into a real estate purchase and sale agreement ("REPSA"). CP 207-24. But Nau conditioned the deal on the satisfaction of a contingency; he signed a Feasibility Contingency Addendum on November 1, 2015 which stated: "Buyer will look into Shoreline requirements and the graves on #42216-12-60050." CP 63, 69, 424-25. That contingency gave him 30 days in which to perform the

contingency or the deal would be invalid. CP 69.<sup>4</sup> Contemporaneously, Nau reviewed the plat map that showed the dimension and location of the Cemetery, and looked at the online parcel map of the property, CP 350, as he now admits. CP 456.

Vogel left her entire property files for Lots 103 and 104 for Nau at the residence after the November 1, meeting at the property; they remained there through closing; the files were 3-4 inches thick and also included several rolled plat documents, blueprints, and other maps. CP 444.<sup>5</sup> She placed them in an obvious location in the house's office where they were available for months before the actual closing, and she told Nau about them. *Id.* In fact, she told him about them on *three occasions*. CP 444. Lewallen also heard Vogel tell Nau that she was leaving the property files in the residence. CP 265. Nau seemingly failed to grasp the documents' significance for a year, stating in his declaration:

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<sup>4</sup> The reference to "graves" evidences that Nau knew of graves on the property.

<sup>5</sup> The files were extensive:

Over the years I collected a file with all the information I had about the old cemetery, when the Indians removed the graves, the visits from the Indians and all other matters. These were summarized in my Form 17 Disclosure, and all the detail was left in my property folder. I left the folder on the kitchen counter in my house, in plain view, in November 2015, and the folder stayed in the house until I moved out after the February 2016 closing. I understand Mr. Nau has had my entire file since before closing.

CP 64.

I first discovered this issue over a year after I purchased the property. I found a file marked “cemetery file” or “property file” in a file cabinet in the house. It appeared to be a file that seller Ms. Vogel left behind.

CP 351.<sup>6</sup>

Like his denial of receiving the documents, Nau denied that he ever received the Form 17 disclosures from Vogel, but that was equally false; he initially swore under oath that Vogel failed to tell him anything about the Cemetery:

I never received any information from Vogel about the cemetery. She did not provide any information about it to me verbally, in writing, through her real estate agent, or in any other way.

CP 110. Nau doubled down on that falsehood, claiming:

I never received the Form 17 disclosures that Vogel claims she gave to a real estate agent to give to me. I recall receiving a portion of one, but it did not include any information at all about the cemetery.

*Id.* But then he was later forced to recant,<sup>7</sup> stating:

In a previous declaration submitted to this Court, I stated that I never received a set of Form 17 Disclosures from the Seller, Defendant Nancy Vogel. After signing that declaration, I found evidence in my personal email files that I actually did receive a set of Form 17 Disclosures from Nancy Vogel. Ms. Lewallen emailed them to me prior to closing.

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<sup>6</sup> Nau ultimately acknowledged that he received the files and that they were extensive. CP 111-12. But he claimed the files were in a cabinet and that Vogel never told him about them. CP 246, 351.

<sup>7</sup> This admission was compelled by the disclosure of West documents revealing that Nau had received the Form 17s. CP 288-300.

CP 245. Nau had the Form 17 disclosures *before closing*. *Id.*

Vogel's March 15, 2015 Form 17 as to the Cemetery was detailed:

To the best of my knowledge, there is an area approximately 70'x 70' partially on my lot 103 and partially on my neighbor Lois Culik's lot 102 that was designated "Potlatch Cemetery" on the original plat. The cemetery comprises five gravestones of the Walker missionary family dating late 1800's to early 1900's. The cemetery is excluded from my tax bill. Lois remembers the tribe removing a number of Indian remains from the cemetery and transferring them to a different Indian burial site around mid-1900, leaving the missionary headstones. The tribe surveyed the cemetery in early 2000, but they do not have access to the cemetery, and have only visited once or twice, with my permission, in the last 15 years. Neither the tribe nor county maintain the grounds. Also visiting twice in the last 20 years was a small South Sound college class studying early settler gravesites. Nancy K. Vogel.

CP 89. Similarly, Vogel's August 8, 2015 Form 17 stated:

Potlach Cemetery. To the best of my knowledge, there is an area approx. 70'x 70' partially on my lot 103 and on my neighbor Lois Culik's lot 102 that was designated "Potlatch Cemetery" on the original plat. The plot contains 5 gravestones from the Walker family, missionaries deceased late 1800's to early 1900's. The area is excluded from my tax bill. Lois remembers the tribe moving the Indian remains to a different Indian site around 1950. The tribe surveyed the plot in 2000 but they do not have access, and have only visiting twice in the last 20 yrs, along with a south sound college studying early settler gravesites. Neither tribe nor county maintain the grounds. I weed it, infrequently.

CP 94.<sup>8</sup> But ultimately none of this mattered to Nau; as his counsel stated to the trial court: “He just didn’t think they [the Form 17s] were important.” RP 103.

On November 7, 2015, Nau made notes on the Feasibility Contingency Agreement, specifically indicating that he would look into the graves on the adjoining property with a separate tax parcel no. 42226-12-60050; Nau wrote: “I’d be surprised if onsite meeting with Mason Co can be scheduled within 15 days, especially with holidays approaching. Interested in building restrictions and impact of graves/cemetery 11/07/15.” CP 450. In late November 2015, *more than two months before closing*, Nau submitted a Mason County Planning Department Pre-Inspection application and paid \$255 to Mason County for the following: “Purpose of Pre-Inspection: Limitation imposed by graves on site – Any other building restrictions.” CP 52-55, 331. Ultimately, Nau notified Vogel that his Feasibility Contingency was *satisfied* on December 11, including his obligation to check for encroachments by or on Lot 103. CP 70. By that action, Nau demonstrated his belief that any contingency associated with the Potlatch Cemetery was satisfied.

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<sup>8</sup> These Form 17 disclosures thus advised Nau of the Cemetery, its approximate dimensions, the presence of headstones in the Cemetery, and some tribal interest in the Cemetery.

Nau yet again inspected the property on January 8, 2016 with Lewallen and Vogel. CP 431. Vogel indicated where she thought the property line for the cemetery parcel was originally located. *Id.* They walked the perimeter of the cemetery and the property boundaries below the easement road. *Id.* Vogel pointed out the blue survey cap in the driveway and explained it was placed by a surveyor for the Native Americans and that she did not believe it was completed. CP 445. She again reminded Nau that her entire property file was in the home and she was leaving it there for him. *Id.*

In response to Nau's request to Mason County about the Cemetery, the County's Grace Miller left a January 20, 2016 message for Nau to contact at the state's Department of Archeology and Historic Preservation, and provided him contact information. CP 143. But Nau did not follow up until *15 months after closing*. On May 18, 2017, the Department of Archeology and Historical Preservation responded to Nau's request, stating: "Unfortunately historic burial grounds and particularly Native American graveyards are ill-defined geographically and there may be burials and/or archeology outside of the cemetery parcel but within your own land." CP 395.

As part of their agreement, Vogel purchased title insurance for the property. CP 63. Before closing, Nau received a commitment for title

insurance on February 13, 2016. CP 71-81. That commitment generally excluded losses arising by reason of Indian tribal codes or regulations, Indian treaty or aboriginal rights, including easements or equitable servitudes. CP 76. The Commitment specifically noted that the Cemetery was a special exemption: “Possible rights of sepulture, as described by the face of the plat and tax rolls.” CP 78.

Nau asked for multiple extensions of the deadline on committing to the deal, that Vogel granted. CP 63-64. Nau admits there may have been four extensions. CP 457. On February 18, 2016, Nau met with Vogel and Lewallen yet again on the property. CP 431. Again, Vogel reminded him about the property files she left him after closing. *Id.* The sale finally closed on February 19, 2016. *Id.*

On appeal, Nau contends that he was never told that the Vogel property was located within the boundaries of the Skokomish Reservation, that the Skokomish Tribe had jurisdiction over the Cemetery, or whether bodies remained buried there. Br. of Appellant at 1, 2, 6-7. This misstatement defies reality.

Vogel unambiguously disclosed the Cemetery, the presence of headstones, and possible remains to Nau. Nau *admits* now that the Cemetery was disclosed to him. Br. of Appellant at 1 (“It is not disputed that the presence of a Cemetery was known and disclosed during the

transaction.”); at 6 (“The presence of the cemetery was disclosed...”). Nau’s assertions are further contradicted by the physical evidence obvious to him and the public documents known to him. Nau’s contentions are contradicted by his own admissions in his declarations. For example, in his March 14, 2019 declaration, he stated:

“After Ms. Lewallen told me about the Cemetery, I investigated it by reviewing the plat map similar to that attached hereto as Exhibit 2...

At some point I also looked at an online parcel map hosted by the Mason County Assessor’s Office, and it showed that only a tiny sliver of the Cemetery overlapped my property...

On my own accord, I also submitted an application to Mason County prior to purchasing the Property on or about December 2, 2015 to find out if there were any building restrictions imposed by the gravestones or the Cemetery. There were not.”

CP 350. *See also*, CP 456 (“I did review the plat map ... during the transaction.”).

Nau admits that he was aware of the headstones physically onsite. CP 454, 460-67. And that the Cemetery is within the Skokomish Reservation is obvious from the plat he received, and the physical location of the town of Potlatch in the Reservation.<sup>9</sup>

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<sup>9</sup> This Court can take judicial notice of the fact that Potlatch straddles U.S. Highway 101 inside the boundaries of the Reservation. The tribal casino is located in Potlatch, for example.

On October 30, 2017, Nau filed a complaint for money damages against Vogel and West in the Mason County Superior Court falsely claiming he did not receive Vogel's Form 17 disclosures, and that he had not received information on the cemetery. CP 1-10.<sup>10</sup> In that complaint, Nau asserted four claims against Vogel, including breach of warranty against encumbrances, breach of a duty of good faith and fair dealing, negligent misrepresentation, and fraudulent concealment. CP 4-6. Vogel answered, denying Nau's allegations. CP 15-21.

The trial court then resolved Nau's case in a series of dispositive motions. On June 11, 2018, the trial court, the Honorable Monty D. Cobb, entered an order dismissing Nau's complaint counts relating to breach of the warranty against encumbrances, and negligent misrepresentation. CP 176-77. *See also*, CP 163-73 (court's oral ruling).<sup>11</sup> Both sides moved for

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<sup>10</sup> Nau's assertions obviously fly in the face of the fact Vogel told him that "there is a cemetery that extends on to her property", that Vogel showed him where she believed her property boundaries were and the blue survey cap in front of her garage, the file Vogel left him on the property, and Nau's multiple visits to the property.

<sup>11</sup> The court specifically granted summary judgment on Nau's negligent misrepresentation claim:

Excellent. So count three, negligent misrepresentation. To prevail on a claim of negligent misrepresentation the plaintiff must show - again, by clear, cogent and convincing evidence, that - and there are six things: Vogel gave false information to Dr. Nau; Vogel knew or should have known that the information was false; that Vogel was negligent in obtaining or communicating the false information; that Nau relied on the false information; that his reliance on this was justified, that is, reasonable under the circumstances; and that the false information was a proximate cause of his damages.

reconsideration. CP 178-94. The trial court denied those motions on July 27, 2018. CP 195-98. The court concluded that there were fact issues as to the fraudulent concealment claim. *Id.*

Vogel moved to dismiss Nau's claim of the breach of Vogel's duty of good faith and fair dealing for failure to state a claim. CP 225-35. The trial court, the Honorable Amber L. Finlay, granted that motion by an order entered on February 4, 2019. CP 269-70.

West moved for summary judgment on Nau's claims against it. CP 271-85. That motion was granted by an order entered on April 25, 2019.

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And then I looked and looked at the facts. Patricia Lewallen's declaration -- excuse me -- and she is Dr. Nau's real estate agent, she told him about the existence of a cemetery and actually pointed out a cluster of headstones to Dr. Nau while viewing the property. The parties are in dispute about the receipt by Dr. Nau of the Form 17, whether the original or amended version. Nau does concede in his declaration that he received a portion of one, but there is no evidence as to what the portion consisted of. So essentially it was a non-entity for the purposes of my review of this.

Nau did learn, after learning of the cemetery and seeing the headstones, review a plat map similar to the one that was included in the Declaration of Dennis Pickard, and he did request a pre-inspection report from Mason County Planning. So, the first question is: Did Ms. Vogel provide Dr. Nau with false information?

Our Supreme Court has simply stated: An omission alone cannot constitute negligent misrepresentation since the plaintiff must rely - justifiably rely on a misrepresentation. That's *Ross v. Kirner*. There are no facts before this Court to show that Ms. Vogel provided false information. By taking Dr. Nau's assertions as fact, he received no information from Vogel, and under the *Ross* case this claim fails. So, I will grant summary judgment on count three as well.

RP 29-30.

CP 567-68.

Vogel moved for summary judgment on Nau's remaining claims. CP 427-41. The trial court dismissed Nau's remaining fraudulent concealment count on December 16, 2019. CP 588-89. *See also*, RP 106-09 (court's oral ruling on fraudulent concealment). As for the fraudulent concealment, the trial court specifically held that "Plaintiff failed to establish all of the elements of the fraudulent concealment claim against Defendant by clear, cogent and convincing evidence." CP 589. Nau appealed to this Court on January 2, 2020. CP 590-604.<sup>12</sup>

Upon Vogel's motion, CP 615-24, the trial court determined in a June 4, 2020 memorandum opinion that Nau's action was frivolous under CR 11 in part, and awarded fees accordingly. CP 694-96.

### C. SUMMARY OF ARGUMENT

Nau has now abandoned all of his claims presented to the trial court, except negligent misrepresentation. On that claim, one that must be proved by clear, cogent, and convincing evidence, Nau failed to establish the requisite elements.

The trial court did not err in awarding Vogel her fees. Nau essentially concedes that certain claims he presented to the trial court were

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<sup>12</sup> Vogel filed a notice of cross-appeal, but she is not asserting any issues on cross-review.

baseless, abandoning them on appeal, claiming they were merely the product of “inartful pleading,” although he forced Vogel to incur fees to dismiss them. Moreover, his unjustifiable denial of his receipt of key transaction documents from Vogel is sanctionable. Alternatively, the trial court’s fee award is fully supported by the fee provision in the REPSA where Vogel prevailed below.

This Court should award Vogel fees on appeal pursuant to the parties’ REPSA or as a sanction under RAP 18.9(a) for Nau’s filing of a frivolous appeal taken for purposes of delay.

D. ARGUMENT

(1) Standard of Summary Judgment

Nau’s articulation of the standard for summary judgment under CR 56(c), br. of appellant at 11, is wrong because it fails to appreciate the higher burden of proof associated with his remaining theory for recovery against Vogel.<sup>13</sup> As will be noted *infra*, the burden on Nau was to prove his claim by clear, cogent, and convincing evidence. On summary judgment, a trial court must apply that burden, determining if a jury could find that Nau

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<sup>13</sup> As related *supra*, Nau’s complaint asserted multiple claims against Vogel including breach of warranty against encumbrances, breach of a duty of good faith and fair dealing, negligent misrepresentation, and fraudulent concealment. Nau abandons all of his theories, save negligent misrepresentation, by confining his argument to it. Br. of Appellant at 12-18. He abandoned his fraudulent concealment claim below as will be noted *infra*.

proved the requisite elements of his claims by that elevated burden to survive summary judgment. *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008) (The court “must view the evidence through the prism of the substantive evidentiary burden.”).<sup>14</sup> On review, this Court must apply the same heavier burden in its *de novo* review. *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 973, 948 P.2d 1264 (1997). Thus, whether a genuine issue of material fact is present is therefore a *heavier* burden than the usual CR 56(c) analysis.<sup>15</sup>

Nau’s assertion that there is a genuine issue of material fact here based on the existence of “credibility” issues or his inability to recall what occurred is simply baseless. Under the so-called Marshall Rule, *Marshall*

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<sup>14</sup> Nau’s counsel misrepresented to the trial court the requisite burden of establishing a genuine issue of material fact where there is an elevated burden of proof on a theory:

We are not here at trial. The trial burden of proof is clear, cogent and convincing evidence, but we are here on summary judgment and the summary judgment standard does not change with the trial burden of proof. The standard for summary judgment is always, is there an inference in favor of the nonmoving party, and is there produced evidence in favor of the elements of the claim by the nonmoving party? And that is true whether the standard of proof at trial is preponderance or clear, cogent and convincing. The standard of proof at trial makes no difference at all. All that matters is whether there is a scintilla of evidence here today.

RP 86-87.

<sup>15</sup> On review, the Supreme Court similarly analyzes whether substantial evidence supports findings of fact where there is an elevated burden of proof. *In re Disciplinary Proceedings Against Marshall*, 160 Wn.2d 317, 330, 157 P.3d 859 (2007) (clear preponderance burden for Bar discipline findings; Court takes that burden into account when assessing whether substantial evidence supports findings).

*v. AC & S, Inc.*, 56 Wn. App. 181, 184-85, 782 P.2d 1107 (1989), Nau does not create a genuine issue of material fact on summary judgment by contradicting unambiguous documentary evidence or prior sworn testimony. Moreover, vague denials of facts or self-serving statements as are peppered throughout his brief do not create genuine issues of material fact; Nau was obligated to set forth *specific facts*. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989); *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 157, 52 P.3d 30 (2002), *review granted*, 148 Wn.2d 1021 (2003). “I don’t remember” is not a fact when there are undisputed facts or documents of record. This Court need go no farther than to consider Nau’s now utterly baseless assertion that he received no vital transactional documents from Vogel to understand that Nau’s statements of “fact” are far from that.

(2) Nau’s Claims of Negligent Misrepresentation Is Baseless

Nau’s brief is a mishmash on the theories that he is presenting to this Court. As will be noted *infra*, Nau abandoned his fraudulent concealment theory below while attempting belatedly to assert a common law fraud claim that he never pleaded. Nor did Nau attempt to amend his complaint to raise a fraud claim. On appeal, he attempts to blur this fact by arguing “misrepresentation” without differentiating between negligent or

intentional forms of that theory. This Court should not tolerate such an effort. Nau has simply failed to preserve a fraud claim for review.

(a) Nau Cannot Establish the Elements of a Negligent Misrepresentation Claim

Nau fails to properly articulate the elements of claims of negligent misrepresentation in his opening brief. Br. of Appellant at 12-18. In particular, Nau *nowhere* bothers to even mention there that he was obligated to meet an *elevated* burden of proof to sustain such a claim.

Washington has adopted the *Restatement (Second) of Torts* § 552 with respect to the elements of negligent misrepresentation. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998). The *Restatement* notes that a person is liable for negligent misrepresentation when: “One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.” *Id.* A plaintiff must prove she/he justifiably relied on the information negligently supplied by the defendant. *Id.* “The recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in

reliance upon it if he is negligent in so relying.” *Restatement (Second) of Torts* § 552A (1971); *ESCA Corp.*, *supra* at 827.

In Washington, to prevail on a claim of negligent misrepresentation, a plaintiff must prove six elements:

(1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff’s reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.

*Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007). All six elements must be proven “by clear, cogent, and convincing evidence.” *Id.*; *Borish v. Russell*, 155 Wn. App 892, 905 n.7, 230 P.3d 646 (2010), *review denied*, 170 Wn.2d 1024 (2011). Nau cannot prove the requisite elements of his negligent misrepresentation theory.

A plaintiff cannot establish negligent misrepresentation where the defendant puts the plaintiff on notice of an issue and the plaintiff fails to exercise due diligence to follow up on that disclosure. For example, in *Van Dinter v. Orr*, 157 Wn.2d 329, 138 P.3d 608 (2006), the Supreme Court held that a purchaser failed to establish negligent misrepresentation as a matter of law where the sellers stated that they owed nothing on the unimproved property and no encumbrances existed. They noted a sewer

system was available for the property. The sellers had no obligation to disclose the fact that the buyer would have to pay a capital facility rate if they connected the property to the sewer.

In *Douglas v. Visser*, 173 Wn. App. 823, 295 P.3d 800 (2013), an action for fraudulent concealment and negligent misrepresentation, Division I held that because the buyers were on notice of the defect they had a duty to make further inquiry. The buyers learned through their home inspector of an area of wood and rot decay. *Id.* at 826. They failed to make further inquiry of the seller concerning possible wood rot. After the purchase, the buyer learned that the wood rot was much more extensive. In reversing the trial court verdict in favor of the buyers, this Court reasoned that Douglases as buyers, were on notice of the defect and had the duty to make further inquiries. *Id.* at 829, 832. The Douglases argued that they had no idea that 50 to 70 percent of the sill plate and rim joists were destroyed and the dry rot was extensive. *Id.* The fact that the extent of the defect is greater than anticipated does not negate the buyer obligation to make further inquiries. *Id.* See also, *Austin v. Ettl*, 171 Wn. App. 82, 286 P.3d 85 (2012) (this Court upheld dismissal of negligent misrepresentation claim where seller disclosed potential LID but not amount of any LID assessment and purchaser could, by due diligence, readily discover amount, stating at 93: “Buyers...must exercise common sense and due diligence to preserve a

right to bring a real estate dispute before the Court.”).<sup>16</sup>

Washington courts have routinely rejected negligent misrepresentation claims as a matter of law on facts similar to those posited by Nau, albeit without anything resembling the level of knowledge that Nau possessed regarding the Potlatch Cemetery. For example, in *Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 210, 752 P.2d 1353, review denied, 111 Wn.2d 1007 (1988), an apartment building had chronic water leaks and the buyer had the building inspected. The buyer’s inspection revealed stains, cracked plaster and loose tiles, and his report explained that the leaks were not serious but should be controlled by additional caulking, re-painting and/or re-plastering inside. The buyer purchased the building without making further inquiries. The buyer agreed it discovered evidence of water, but argued the true defect was the extreme chronic nature of the leaks. Division I held that when an actual inspection demonstrates evidence of water penetration, the buyer must make inquiries of the seller, reasoning that the buyer knew there was a defect but did not

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<sup>16</sup> In *Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), although it is a fraudulent concealment case, the home buyers had the septic system pumped before they purchased the house, the pumping company noted no obvious malfunction of the system at the time of the pumping, yet after the purchase the drainfield failed. 159 Wn.2d at 679. Our Supreme Court affirmed the dismissal of the buyer’s fraudulent concealment claim noting that an inspection of the septic tank back baffle would have been simple, and a careful examination would lead to discovery of the missing baffle. *Id.* at 690. *Alejandro* thus requires a home purchaser, like Nau, to make a reasonable and careful inspection.

make sufficient inquiry about the defect or establish that further inquiry would have been fruitless. *Id.* at 215.

In *Condor Enterprises, Inc. v. Boise Cascade Corp.*, 71 Wn. App. 48, 856 P.2d 713 (1993), a commercial lessee brought action against the lessor for negligent misrepresentation. This Court held that a plaintiff suing for negligent misrepresentation must prove that he or she justifiably relied upon information negligently supplied by a defendant. *Id.* at 52. If a party to a contract is negligent in failing to ascertain the truth of the other party's representations, that party's own negligence is a defense to a claim of negligent misrepresentation and any contributory negligence of that party acts as a complete defense to the claim. *Id.* at 53. Because a trier of fact could not find that Condor exercised ordinary care in looking out for its own interests, and Condor was negligent in relying upon what the landlord said, Condor's claim failed. *Id.* "Because Condor can recover only if it proves justifiable reliance, and because Washington case law presently equates justifiable reliance with lack of contributory negligence, Condor could not recover if this case went to trial." *Id.* at 54.<sup>17</sup>

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<sup>17</sup> See also, *Colvin v. Young*, 180 Wn. App. 1028, 2014 WL 1600923 (2014) (Division I upholds dismissal of buyer's negligent misrepresentation and fraudulent concealment claims); *Woodcock v. Conover*, 10 Wn. App. 2d 1014, 2019 WL 4262091 (2019) (Division I affirms summary judgment in seller's favor where buyer claiming fraudulent concealment as to sewer defects failed to conduct a sewer inspection; court also reversed trial court's failure to award fees to seller). *Hosmer Holdings LLC v. Tong*, 12 Wn. App. 2d 1013, 2020 WL 627299 (2020) (negligent misrepresentation claim dismissed

Nau's argument on his "misrepresentation" claim is imprecise. Br. of Appellant at 12-18. He apparently claims that Vogel's "misrepresentation" was that 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." *Id.* at 9. In his claim, Nau distorts what information he was provided and what his own research disclosed.

Nau's principal authority for his position is *Jackowski v. Borschelt*, 174 Wn.2d 720, 278 P.3d 1100 (2012), a fraudulent concealment case that is readily distinguishable. There, the purchaser sued the sellers for fraudulent concealment alleging the sellers concealed the fact that the addition on the north side of the house had been constructed on uncompacted fill material and that the seller concealed cracks in the concrete basement floor by covering the floor with carpet. A genuine issue of material fact existed relating to whether the fill could have been disclosed by a reasonable inspection before the house was damaged by a landslide. The Supreme Court stated that "we agree that it is significant that this evidence was obtained after the sliding event, and, therefore, the fill may not have been "obvious" or "apparent" prior to the landslide. *Id.* at 739.

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on summary judgment because plaintiff failed to prove damages element in connection with alleged square footage error as to property sold).

Unlike the purchaser in *Jackowski*, however, Nau had clear notice of the Potlatch Cemetery and its dimensions, he made the graves and Cemetery a subject of his Feasibility Contingency, and he investigated the Cemetery by contacting Mason County Community Development and paying them \$255 to review the Cemetery's impact on his property.

As the trial court correctly discerned, Nau failed to prove by clear, cogent, and convincing evidence the requisite elements of negligent misrepresentation, given the following central facts:

- Vogel gave Form 17 disclosures to Nau, both of which clearly described the Potlatch Cemetery;
- Vogel left her entire cemetery and property file on the kitchen counter for Nau to review before closing; Nau had sole possession of that file and read for the first time 2017;
- Nau made a Feasibility Contingency Addendum a part of his purchase offer that, "Buyer will look into shoreline requirements and the graves on tax parcel no. 42226-12-60050."
- Before closing, Nau submitted to Mason County a Planning Department Pre-Inspection Application and paid the Department \$255 for the following: "Purpose of Pre-Inspection: Limitation imposed by graves on site – Any other building restrictions."
- Nau had a copy of the Potlatch Beach Tracts Plat clearly showing "CEMET-ERY" nearly spanning the width of Lot 103, and the same Plat also describes the Cemetery with a simple metes and bounds legal description.

- Nau received preliminary commitment for title insurance disclosing the cemetery at Special Exception No. 9.
- Nau failed to follow up on inquiries about the Cemetery with County or State archeological authorities.

Vogel misrepresented or concealed *nothing* about the Cemetery.

Nau had both actual and constructive knowledge of the Potlatch Cemetery and he had duty to make further inquiry. From the Form 17s, his own walking of the property, the documents he received from the title insurer and the County, and his own research, Nau knew of the Potlatch Cemetery, its approximate dimensions, and the headstones located there. He knew Native Americans were buried there and that the Skokomish Tribe had an interest in the Cemetery. Once he had notice of issues associated with the Cemetery, Nau had a duty to make further inquiries. “Once a buyer discovers evidence of a defect, they are on notice and have duty to make further inquiries. They cannot succeed when the extent of the defect is greater than anticipated, even when it is magnitudes greater.” *Douglas*, 173 Wn. App. at 834. He did not. He cannot now complain about Vogel’s “nondisclosure” of the Cemetery when she disclosed it. Moreover, given his own research, any alleged reliance Nau may have had on statements by Vogel could not possibly have been justifiable. The trial court properly dismissed Nau’s bogus misrepresentation claim.

(b) Nau Cannot Present a Fraud or Fraudulent Concealment Claim

Nau fails to reveal anywhere in his brief that he *relinquished* his fraudulent concealment claim in arguing on summary judgment to Judge Finlay:

MR. CUSHMAN: Looking at the complaint, it's not pled, once again, the way I would have pled it. That's why I'm moving to amend. It does say fraudulent concealment, but the facts, as stated, state a claim for fraud, not fraudulent concealment. I think mislabeling the caption of the count should not make a difference on notice of pleading. This is a claim for fraud. This isn't a claim for fraudulent concealment. There's no allegation that there was any act of concealment.

RP 104.<sup>18</sup>

Nau's counsel attempted to belatedly raise a fraud claim that Nau *never pleaded* in his complaint. CP 1-10.<sup>19</sup> The trial court declined to permit Nau to change his theory against Vogel at such a later date in the proceedings. RP 107-08.<sup>20</sup> Nau has not appealed from that decision. Br.

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<sup>18</sup> See also, RP 87 ("The second mistake is what the claim is. We are not asserting a defect in a structure. We are not concerting a fraudulent defect claim. We are asserting a plain out, flat out fraud claim. ... We have not a fraudulent concealment case, not a defect in structure case. We have a nine element standard fraud misrepresentation case...").

<sup>19</sup> Nau belatedly moved to amend his complaint to assert new claims against West. CP 510-19. Critically, he did not seek to amend his complaint to claim common law fraud against Vogel. *Id.* The trial court denied the motion to amend in any event.

<sup>20</sup> The court stated:

The next thing the Court has is, what are we here for? So, I'm being, I think, told today that we're not here for fraudulent concealment.

of Appellant at 4-5. Neither a fraudulent concealment or fraud claim remains against Vogel under these circumstances.

In any event, even if Nau properly preserved a fraud or fraudulent concealment claim, which he did not, he cannot establish their requisite elements by clear, cogent, and convincing evidence. The elements of fraud are demanding; it is well settled law that in order to recover for common law fraud, the following elements must be proved by clear, cogent, and convincing evidence: (1) representation of existing fact; (2) its materiality; (3) its falsity; (4) the seller's knowledge of its falsity or ignorance of its truth; (5) her intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; and (9) his consequent damages. *Baertschi v. Jordan*, 68

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Essentially, what they're proposing - or what Mr. Cushman's proposing - and granted, it wasn't Mr. Cushman's complaint; he wasn't the original attorney here - but a fraud. And there is some citation as to fraud, but here, what the Court has is the complaint, and 7.2 in the complaint says: Vogel concealed from Nau material facts regarding property's condition with the intent to fraudulently induce the plaintiff to purchase the property. 7.3, she had an obligation to disclose all material fact, and 7.4, as a direct and proximate result of Vogel's fraudulent concealment, Nau was damaged. He uses the word fraudulent concealment.

We are a notice pleading state, but the Court can't find that I am on notice or the other part would be on notice that we are - and it doesn't - that we are talking about just fraud, so I have to assume that what we have in the complaint and what the summary judgment was brought for was on fraudulent concealment.

RP 107-08.

Wn.2d 478, 482, 413 P.2d 657 (1966).<sup>21</sup>

Nau failed to establish these elements of the claim by clear, cogent, and convincing evidence in any event. Vogel misrepresented nothing to Nau.<sup>22</sup>

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<sup>21</sup> Fraudulent concealment occurs when (1) there is a concealed defect in the premises; (2) the seller had actual knowledge of the defect at the time of the sale; (3) the defect is dangerous to the property, health, or life of the buyer; (4) the buyer does not know of the defect; and (5) a careful, reasonable inspection of the premises by the buyer would not disclose the defect. *Obde v. Schlemeyer*, 50 Wn.2d 449, 452, 353 P.2d 672 (1960); *Alejandro*, 159 Wn.2d at 689. The elements of the claim must be proved by clear, cogent, and convincing evidence. *Stienke v. Russi*, 145 Wn. App. 544, 561, 190 P.3d 60 (2008), *review denied*, 165 Wn.2d 1026 (2009). Critical for this case, where the defect is apparent, a buyer cannot make a fraudulent concealment claim. *Id.* “Once a buyer discovers evidence of a defect, they are on notice and have a duty to make further inquiries.” *Douglas*, 173 Wn. App. at 832. Again, Nau *abandoned* this theory below, a theory he could not prove in any event by clear, cogent, and convincing evidence.

<sup>22</sup> The trial court correctly discerned that Nau failed to establish the elements of fraudulent concealment by the requisite clear, cogent, and convincing evidentiary standard, correctly noting that Vogel did not conceal anything from Nau:

... you have to be able to establish that this defect wouldn't have been known by a careful, reasonable inspection by the plaintiff. And here, the Court has no evidence that the plaintiff did any - on notice. First, he was on notice that there was a cemetery somewhere on the property. He was clearly on notice of that.

He was told that he would be, according to the Form 17s and the other documents, that he would be doing the research on that. There's no indication that he did much research, and in fact being told he needs to address with an archeology society regarding this, where it was. And he admitted that he didn't do that prior to the sale. The Court would find that if knowing that, doing that one thing, that would have been a reasonable thing to do in this case. So, the Court can find that it - I'd have to grant the summary judgment motion because I don't find that there is any evidence to establish that Mr. Nau did a careful, reasonable inspection as required under the case law. And I'm reading from the *Alejandro* case, which is 159 Wash. 2d 674.

RP 108.

(3) Vogel Was Entitled to Fees in the Trial Court<sup>23</sup>

(a) The Trial Court Properly Determined that Nau's Action Was, at Least in Part, Frivolous under CR 11

Nau chose not to review the records in his possession that demonstrated Vogel advised him of the Cemetery. Instead, he sued her under a variety of theories. CP 1-10. As the trial court stated:

The Court also granted summary judgment as to the claim of negligent misrepresentation, finding that there were no facts that Ms. Vogel had provided false information. (At the time of this Summary Judgment, Plaintiff had stated that Ms. Vogel never provided him any information about the cemetery verbally or in writing). See Plaintiff Decl. dated 3/21/18. Later declarations filed by Plaintiff state the opposite.

The claim of breach of statutory duties, in particular the allegation that Ms. Vogel interfered with Mr. Nau's quiet and peaceful possession of the premises is not well grounded in fact. This is a "future" covenant which may be breached or become effective after conveyance. See, *Eisenburg v. Nelson*, 178 Wn. App. 879, 886 (2014). Likewise, given the lack of interest by the Tribe at the time of the sale towards the cemetery, the cases do not support likelihood that Ms. Vogel violated the warranty of encumbrances and seisin. *Id.* at 889-890. The Court finds these claims to be meritless, and will award attorney fees as a sanction.

Likewise the Court will award fees for efforts made in addressing Count 2. On February 4, 2019, Court granted defendant's motion to dismiss for failure to state a claim as to count 2, breach of duty of good faith and fair dealing. Plaintiff concedes that this claim was meritless.

CP 695.

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<sup>23</sup> Nau has not disputed the amount of the trial court's fee award.

Nau blithely argues that although he sued Vogel for utterly baseless claims (now abandoned on appeal) on which he could never recover and he made factual assertions that were completely untrue (like the claim that he never received documents from her), the Court should excuse such arguments that forced Vogel to considerable expense to defeat, because of “inartful pleading.” Nau does not get off that easily for his blatant misconduct.

Washington law awards fees as sanctions against a party whose lawsuit is in part or wholly frivolous in nature under CR 11. Nau’s action here fully merited such a fee award. CR 11 was adopted “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). It applies to every pleading, written motion, and legal memorandum filed or served during the litigation. CR 11 requires an attorney to sign pleadings, motions, or legal memoranda. An attorney’s signature certifies that the attorney believes, after “an inquiry reasonable under the circumstances,” that the pleading, motion or legal memorandum is: (1) well grounded in fact; (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; and (3) not interposed for any improper purpose, such as to harass or to cause

unnecessary delay or needless increase in the cost of litigation. CR 11(a). If an attorney signs a pleading, motion, or legal memorandum in violation of the rule, the court may impose an “appropriate sanction” against the attorney, the represented person, or both. *Id.*

Washington courts have developed criteria to determine whether the imposition of sanctions is appropriate. In *Miller v. Badgley*, 51 Wn. App. 285, 300, 753 P.2d 530, *review denied*, 111 Wn.2d 1007 (1988), Division I explained that sanctions under CR 11 may be imposed if any one of three conditions are met: (1) the attorney failed to conduct a reasonable inquiry into the facts supporting the paper; (2) the attorney failed to conduct a reasonable inquiry into the law to ensure that the pleading filed is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (3) the attorney filed the pleading for an improper purpose such as delay, harassment, or to increase the costs of litigation. As this Court has held, a filing is baseless only if it is not well grounded in fact, or not warranted by existing law or a good faith argument for the alteration of existing law. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883-84, 912 P.2d 1052 (1996); *Spice v. Pierce Cty.*, 6 Wn. App. 2d 1026, 2018 WL 6252912 (2018).

At a minimum, CR 11 requires attorneys to undertake a reasonable inquiry into the facts and the law before filing any pleading. The rule

“requires attorneys to stop, think, and investigate more carefully before serving and filing papers.” *Bryant*, 119 Wn.2d at 219. It was intended to deter the “shoot-first-and-ask-questions-later” approach to the practice of law, as Division II noted. *Watson v. Maier*, 64 Wn. App. 889, 891, 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992). As then-Judge Gerry Alexander observed for this court: “A famous lawyer once said: ‘About half of the practice of a decent lawyer is telling would be clients that they are damned fools and should stop.’”

Nau’s dismissed claims, now abandoned on appeal, were frivolous; *none* of the issues Nau argued were “debatable.” The trial court correctly determined that at least some of Nau’s theories were frivolous. Vogel was entitled her fees in the trial court for addressing those frivolous claims under CR 11.

(b) The Parties’ Contract Required a Fee Award

The trial court awarded fees to Vogel based on CR 11, CP 694-96, but Vogel argued for fees under the REPSA, CP 617, and that alternate ground also supported a fee award in the trial court. *Mudarri v. State*, 147 Wn. App. 590, 600, 196 P.3d 153 (2008), *review denied*, 166 Wn.2d 1003 (2009) (court may affirm on any alternative ground adequately supported by the record).

Washington law provides an exception to the American Rule on

attorney fees where fees are authorized by statute, control, or recognized equitable grounds. *E.g., Wagner v. Foote*, 128 Wn.2d 408, 417, 908 P.2d 884 (1996). Routinely, Washington courts treat a REPSA as such a contract, enforcing fee provisions in such agreements in favor of a prevailing party. *E.g., Geonerco, Inc. v. Grand Ridge Properties IV LLC*, 146 Wn. App. 459, 470-71, 191 P.3d 76 (2008); *Failes v. Lichten*, 109 Wn. App. 550, 554, 37 P.3d 301 (2001).

Here, the REPSA authorized the recovery of fees and Vogel was the prevailing party. The parties' REPSA for this property specifically provided that fees are recoverable here:

Buyer and Seller are advised to seek the counsel of an attorney and a certified public accountant to review the terms of this Agreement ... if Buyer or Seller institutes suit against the other concerning this agreement the prevailing party is entitled to reasonable attorneys' fees and expenses.

CP 210. Vogel was entitled to her fees under that contractual provision.

(4) Vogel Is Entitled to Her Attorney Fees on Appeal

Under RAP 18.1(a), Vogel asks this Court to award her reasonable attorney fees on appeal. With regard to Nau's groundless negligent misrepresentation claim, the REPSA authorized the recovery of fees because Vogel was the prevailing party. An award of fees on appeal to Vogel is merited. In *Geonerco*, for example, this Court noted that a REPSA fee provision authorized recovery of fees both at trial and on appeal. 146

Wn. App. at 471-71. *See also, Soundbuilt Northwest, LLC v. Price*, 187 Wn. App. 1035, 2015 WL 3385395 (2015).

Additionally, Nau's appeal is frivolous under RAP 18.9(a), meriting an award of fees to Vogel from Nau as a sanction.<sup>24</sup> Washington appellate courts award fees on appeal, where parties have abused the appellate rules or filed frivolous appeals. An appeal is frivolous if it is essentially factual, rather than legal, in nature, involves discretionary ruling where discretion was not abused by the trial court, or the appellant cannot cite any authority in support of its position. A respondent may recover its fees on appeal from the party filing a frivolous appeal. *Millers Cas. Ins. Co., of Texas v. Biggs*, 100 Wn.2d 9, 665 P.2d 887 (1983); *Boyles v. Dep't of Retirement Sys.*, 105 Wn.2d 499, 716 P.2d 869 (1986). In *Streater v. White*, 26 Wn. App. 430, 434, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980), Division I indicated that in analyzing whether an appeal is brought for purposes of delay, the court's "primary inquiry is whether, when considering the record as a whole, the appeal is frivolous, i.e., whether it presents no debatable

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<sup>24</sup> RAP 18.9(a) states:

The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

issues and is so devoid of merit that there is no reasonable possibility of reversal.” Here, there is obviously no prospect for success on Nau’s fraud or fraudulent concealment theories, given their procedural status on appeal. Moreover, on his negligent misrepresentation claim, on those facts, given the elevated burden of proof attendant upon that claim, Nau has no debatable issue under the *Streater* formulation.

However, that is not the *only* basis for assessing whether delay is an appellant’s purpose of appealing. RAP 18.9(a) also permits an appellate court to impose sanctions where a party uses the rules to delay or for an *improper purpose*. RAP 18.7 specifically incorporates the provisions of CR 11. *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 791 P.2d 537 (1990), *aff’d*, 119 Wn.2d 210, 223, 829 P.2d 1099 (1992) (party filed motion on appeal to disqualify opposing counsel); *Layne v. Hyde*, 54 Wn. App. 125, 773 P.2d 83, *review denied*, 113 Wn.2d 1016 (1989).

In *Harvey v. Unger*, 13 Wn. App. 44, 533 P.2d 403 (1975), for example, this Court concluded that an appellant filed an appeal only for purposes of delay and imposed \$1000 in terms to discourage appeals taken only to delay. *Id.* at 48. *See also, Trohimovich v. Director, Dep’t of Labor & Indus.*, 21 Wn. App. 243, 249, 584 P.2d 467 (1978), *review denied*, 91 Wn.2d 1013 (1979) (sanctions imposed in appeal where appellant asserted that U.S., currency was not properly used to pay premiums for workers;

appeal was delaying tactic); *Shutt v. Moore*, 26 Wn. App. 450, 457, 613 P.2d 1188 (1980) (same); *Rich v. Starczewski*, 29 Wn. App. 244, 250, 628 P.2d 831, *review denied*, 96 Wn.2d 1002 (1981) (sanctioning appellant for multiplicity of delaying motions, noting that courts are not “designed to provide recreational activity for litigants”); *In re Marriage of Hitz*, 188 Wn. App. 1018, 2015 WL 3766737 (2015) (recognizing delay as a distinct basis for RAP 18.9(a) sanctions).

That an appeal may be sanctionable as brought for an illegitimate purpose, even if the appeal is not technically “frivolous,” is supported by CR 11 jurisprudence. *See, e.g., Suarez v. Newquist*, 70 Wn. App. 827, 855 P.2d 1200 (1993) (attorney filed multiple affidavits of prejudice); *Skilcraft Fiberglass, Inc. v. Boeing Co.*, 72 Wn. App. 40, 863 P.2d 573 (1993) (attorney obtained default judgment improperly); *Eugster v. Wash. State Bar Ass’n*, 11 Wn. App. 2d 1067, 2020 WL 71351, *review denied*, 195 Wn.2d 1025 (2020) (this Court reversed a trial court’s failure to award CR 11 sanctions against an attorney who persisted in multiple actions against the WSBA and where reasonable inquiry would have revealed his claim was baseless),

Here, Nau has *persisted* in subjecting Vogel to this needless litigation over a matter of which he was fully cognizant. This appeal is but the latest tactic in that regard. Long ago, it was time for this litigation to

end. This Court should sanction Nau for his misusing the appellate process.  
RAP 18.9(a).

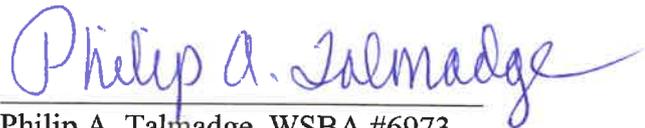
E. CONCLUSION

Although Nau has finally abandoned certain of his discredited theories for recovery, his remaining negligent misrepresentation claim was not proved by clear, cogent, and convincing evidence. The trial court properly dismissed that claim.

This Court should affirm the trial court's dismissal of Nau's negligent misrepresentation claim and its fee award. Costs on appeal, including reasonable attorney fees, should be awarded to respondent Vogel.

DATED this 14 day of September, 2020.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick  
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Third Floor, Suite C  
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(206) 574-6661

Richard T. Hoss, WSBA #12976  
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Attorneys for Respondent  
Nancy K. Vogel

# APPENDIX

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(2) JUN 11 2018

Superior Court of WA  
Sharon Fogo

*MFL*

17-2-00645-23  
JDSUM 34  
Judgment Summary  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF MASON

RICHARD NAU, a single man,

NO. 17-2-00645-23

Plaintiff,

ORDER FOR ENTRY OF PARTIAL  
SUMMARY JUDGMENT

vs.

NANCY K. VOGEL, as Trustee for the  
Mark O. Vogel Residuary Trust; and  
WEST REALTY, INC., A Washington  
Corporation

Defendants.

THIS MATTER having come on for hearing on the 16th day of April 2018 to consider Defendant NANCY K. VOGEL, as Trustee for the Mark O. Vogel Residuary Trust, Motion for Summary Judgment, and the Court having considered the argument of counsel, the files and records herein, and being fully advised of the pleadings and premises herein, and specifically considering the following:

1. Memorandum in Support of Defendant Nancy K. Vogel's Motion for Summary Judgment;
2. Declaration of Dennis Pickard;
3. Affidavit of Nancy K. Vogel;
4. Declaration of Richard T. Hoss;
5. Defendant West Realty, Inc.'s Non-Opposition to Defendant Vogel's Motion for Summary Judgment;

34

ENTRY OF ORDER on Defendant Vogel's Motion for Partial  
Summary Judgment Cause No. 17-2-00645-23  
NAU V. VOGEL & WEST REALTY Page 1 of 2

HOSS & WILSON-HOSS, LLP  
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No. 1

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- 6. Opposition to Defendant Vogel's Motion for Summary Judgment;
- 7. Declaration of Richard Nau;
- 8. Reply to Plaintiff's Opposition to Defendant Vogel's Motion for Summary Judgment;
- 9. Declaration of Patricia Lewallen; and
- 10. Second Declaration of Richard T. Hoss.

Based on the foregoing, this Court enters Partial Summary Judgment as follows:

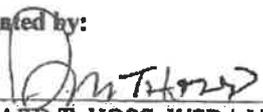
- 1. Summary Judgment is GRANTED to Defendant Vogel as to Count 1 – Breach of Statutory Warranties; and
- 2. Summary Judgment is GRANTED to Defendant Vogel as to Count 3 – Negligent Misrepresentation.
- 3. Summary Judgment ~~is~~ as to Count 2 – Breach of Duty of Good Faith and Fair Dealing; *WAS NOT BEFORE THE COURT AT THE SUMMARY JUDGMENT HEARING*
- 4. Summary Judgment is DENIED as to Count 4 – Fraudulent Concealment.

Dated this 11 day of June, 2018.

  
PRESIDING JUDGE

**MONTY D. COBB**

Presented by:



RICHARD T. HOSS, WSBA NO. 12976  
HOSS & WILSON-HOSS, LLP  
Attorneys for Defendant Vogel

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MERIDITH A. LONG, WSBA #48961  
LAW OFFICE OF MERIDITH A. LONG PLLC  
Attorneys for Plaintiff Nau

DANIEL P. MALLOVE, WSBA NO. 13158  
ERIC A. CASCIA, WSBA NO. 52941  
LAW OFFICE OF DANIEL P. MALLOVE, PLLC  
Attorneys for Defendant West Realty, Inc.

ENTRY OF ORDER on Defendant Vogel's Motion for Partial  
Summary Judgment Cause No. 17-2-00645-23  
NAU V. VOGEL & WEST REALTY Page 2 of 2

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Superior Court of WA  
Sharop Fogo

EP 2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF MASON

RICHARD NAU, a single man,

NO. 17-2-00645-23

Plaintiff,

vs.

ORDER ON DEFENDANT  
VOGEL'S MOTION TO DISMISS  
COMPLAINT FOR FAILURE TO  
STATE A CLAIM UPON WHICH  
RELIEF CAN BE GRANTED

NANCY K. VOGEL, as Trustee for the  
Mark O. Vogel Residuary Trust; and  
WEST REALTY, INC., A Washington  
Corporation

Defendants.

THIS MATTER having come on for hearing on the 28<sup>th</sup> day of January, 2019 to consider Defendant Nancy K. Vogel's, as Trustee for the Mark O. Vogel Residuary Trust, Motion to Dismiss Complaint for Failure to State a Claim upon which Relief can be Granted, and the Court having considered the argument of counsel, the files and records herein, and being fully advised of the pleadings and premises herein, and specifically considered the following:

1. Defendant Vogel's Motion to Dismiss Complaint for Failure to State a Claim upon which Relief can be Granted;
2. Defendant Vogel's Brief in Support of Motion to Dismiss Complaint for Failure to State a Claim upon which Relief can be Granted;
3. Third Declaration of Richard T. Hoss;

ORIGINAL

ORDER on Defendant Vogel's Motion to Dismiss Complaint  
For Failure to State a Claim Cause No. 17-2-00645-23  
NAU V. VOGEL & WEST REALTY Page 1 of 2

HOSS & WILSON-HOSS, LLP  
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- 4. Plaintiff Nau's Objection to Defendant Vogel's Motion to Dismiss;
- 5. Declaration of Richard Nau in Support of Objection to Defendant Vogel's Motion to Dismiss;
- 6. Defendant West Realty Inc.'s Non-Opposition to Defendant Vogel's Motion to Dismiss Complaint for Failure to State a Claim upon which Relief can be Granted; and
- 7. Declaration of Patricia Lewallen.

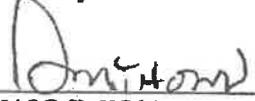
**THIS COURT HEREBY ORDERS, ADJUDGES AND DECREES** Defendant Nancy K. Vogel as Trustee of the Mark O. Vogel Residuary Trust's Motion to Dismiss Complaint for Failure to State a Claim upon which Relief can be Granted as follows:

- 1. Count 2, Breach of Duty of Good Faith and Fair Dealing (Against Vogel) of the Complaint is dismissed with prejudice.
- 2. \_\_\_\_\_
- 3. \_\_\_\_\_

Dated this 4<sup>th</sup> day of Feb, 2019.  
 YTH RTH

  
 PRESIDING JUDGE

Presented by:



RICHARD T. HOSS, WSBA NO. 12976  
 HOSS & WILSON-HOSS, LLP  
 Attorneys for Defendant Vogel

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Telephonic APPEARANCE

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not re

MERIDITH A. LONG, WSBA #48961  
 LAW OFFICE OF MERIDITH A. LONG PLLC  
 Attorneys for Plaintiff Nau

DANIEL P. MALLOVE, WSBA NO. 13158  
 ERIC A. CASCIA, WSBA NO. 52941  
 LAW OFFICE OF DANIEL P. MALLOVE, PLLC  
 Attorneys for Defendant West Realty, Inc.

ORDER on Defendant Vogel's Motion to Dismiss Complaint  
 For Failure to State a Claim Cause No. 17-2-00645-23  
 NAU V. VOGEL & WEST REALTY Page 2 of 2

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Superior Court of WA  
Sharon Fogo

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17-2-00645-23  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF MASON

RICHARD NAU, a single man,

NO. 17-2-00645-23

Plaintiff,

vs.

ORDER ON DEFENDANT  
VOGEL'S MOTION FOR  
SUMMARY JUDGMENT - FRAUD

NANCY K. VOGEL, as Trustee for the  
Mark O. Vogel Residuary Trust; and  
WEST REALTY, INC., A Washington  
Corporation

Defendants.

THIS MATTER having come on for hearing on DECEMBER 16, 2019 to consider Defendant NANCY K. VOGEL, as Trustee for the Mark O. Vogel Residuary Trust, Motion for Granting Summary Judgment in favor of Defendant Vogel, and the Court having considered the argument of counsel, the files and records herein, and being fully advised of the pleadings and premises herein, and specifically consider the following:

1. Memorandum in Support of Defendant Nancy K. Vogel's Motion for Summary Judgment;
2. Declaration of Nancy K. Vogel in Support of Motion for Summary Judgment;
3. Fourth Declaration of Richard T. Hoss;
4. Defendant Nancy K. Vogel's Motion for Summary Judgment - Fraud;
5. Plaintiff's Response to Defendant's Motion for Summary Judgment;
6. Declaration of Richard Nau in Opposition to Defendants' Motion for Summary

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ORDER on Defendant Vogel's Motion for  
Summary Judgment - Fraud Cause No. 17-2-00645-23  
NAU V. VOGEL & WEST REALTY Page 1 of 2

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Judgment;

7. \_\_\_\_\_

8. \_\_\_\_\_

**THIS COURT HEREBY ORDERS, ADJUDGES AND DECREES** Defendant NANCY K. VOGEL as Trustee of the Mark O. Vogel Residuary Trust's Motion for Summary Judgment against Plaintiff RICHARD NAU as follows:

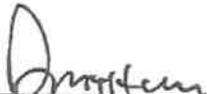
1. Summary Judgment is GRANTED as to Count 4 – Fraudulent Concealment.
2. Plaintiff's Complaint is DISMISSED WITH PREJUDICE;
3. Plaintiff failed to establish <sup>all</sup> ~~any~~ <sup>but</sup> of the elements of his fraudulent concealment claim against Defendant by clear, cogent and convincing evidence; and
4. All other matters, including attorney's fees, are reserved.

Dated this 16 day of Dec, 2019.

  
\_\_\_\_\_  
PRESIDING JUDGE

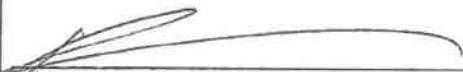
Presented by:

**Amber Finlay**

  
\_\_\_\_\_  
RICHARD T. HOSS, WSBA NO. 12976  
HOSS & WILSON-HOSS, LLP  
Attorneys for Defendant Vogel

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BEN CUSHMAN, WSBA #26358  
DESCHUTES LAW GROUP, PLLC  
Attorneys for Plaintiff Nau

\_\_\_\_\_  
DANIEL P. MALLOVE, WSBA NO. 13158  
ERIC A. CASCIA, WSBA NO. 52941  
LAW OFFICE OF DANIEL P. MALLOVE, PLLC  
Attorneys for Defendant West Realty, Inc.



convent of seisin because she did not own the land the garage was on, and breached the warranty against encumbrances because the garage was on top of the cemetery.

The Court granted summary judgment on these claims on April 30, 2018. On the same date, the Court also granted summary judgment as to the claim of negligent misrepresentation, finding that there were no facts that Ms. Vogel had provided false information. (At the time of this Summary Judgment, Plaintiff had stated that Ms. Vogel never provided him any information about the cemetery verbally or in writing). See Plaintiff Decl. dated 3/21/18. Later declarations filed by Plaintiff state the opposite.

The claim of breach of statutory duties, in particular the allegation that Ms. Vogel interfered with Mr. Nau's quiet and peaceful possession of the premises is not well grounded in fact. This is a "future" covenant which may be breached or become effective after conveyance. See, Eisenburg v. Nelson, 178 Wn. App. 879, 886 (2014). Likewise, given the lack of interest by the Tribe at the time of the sale towards the cemetery, the cases do not support likelihood that Ms. Vogel violated the warranty of encumbrances and seisin. Id at 889-890. The Court finds these claims to be meritless, and will award attorney fees as a sanction.

Likewise the Court will award fees for efforts made in addressing Count 2. On February 4, 2019, Court granted defendant's motion to dismiss for failure to state a claim as to count 2, Breach of duty of good faith and fair dealing. Plaintiff concedes that this claim was meritless.

The court will not however grant the entire request for fees. On April 30, 2018 the court denied Summary Judgment as to the claim of fraudulent concealment. This action was revisited again in December 2019. The parties did not oppose the court rehearing this matter as it was based on different facts/theory. Subsequently the Court granted the motion finding that at a minimum Mr. Nau has not established that he could prove all of the elements for fraudulent concealment. Given this history, the court will deny attorney fees as to this claim.

The Billing rate is not disputed and the court will find that \$350 an hour is appropriate. The court will find that the Paralegal billing rate of \$150 is also appropriate. Although the Defendant put the Plaintiff on notice that there would be a request for CR 11 sanctions, the Court is charged with imposing the least severe sanctions and as such will not provide for Attorney fees past the date on the hearing on the motion to dismiss. Thus, the Court deducted efforts made after that date, efforts made on 1 cause of action, a motion to reconsider, and exchanges/emails/conversations with co-defendant counsel.

The Court made the following deductions from the billings provided during this time frame:

\$350 from 9/26/17

\$120 from 12/1/17

\$940 from 1/31/18

\$2264 from 2/28/18

\$2300 from 3/31/18

\$300 from 4/30/18

\$3870.72 from 5/31/18

\$700 from 6/30/18

\$450 from 7/31/18

\$130 from 8/31/18

\$1249 from 10/31/18

\$150 from 1/31/19

Court will award attorney fees in the amount of \$ 41,796.12 plus costs of \$2233.61, for the amount of \$ 43,029.73.

DATED this 4 day of June, 2020.

  
JUDGE AMBER L. FINLAY

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Brief of Respondent Vogel* in Court of Appeals, Division II Cause No. 54272-2-II to the following:

Daniel P. Mallove, WSBA #13158  
Eric Cascio, WSBA #52941  
Law Offices of Daniel P. Mallove, PLLC  
2003 Western Ave, Suite 400  
Seattle, WA 98121

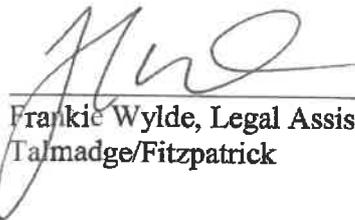
Ben D. Cushman, WSBA #26358  
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400 Union Ave SE, Suite 200  
Olympia, WA 98501

Richard T. Hoss, WSBA #12976  
Hoss & Wilson-Hoss, LLP  
236 West Birch Street  
Shelton, WA 98584

Original E-filed with:  
Court of Appeals, Division II  
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 8, 2020, at Seattle, Washington.

  
Frankie Wylde, Legal Assistant  
Talmadge/Fitzpatrick

DECLARATION

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Corrected Brief of Respondent* in Court of Appeals, Division II Cause No. 54272-2-II to the following:

Daniel P. Mallove, WSBA #13158  
Eric Cascio, WSBA #52941  
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Seattle, WA 98121

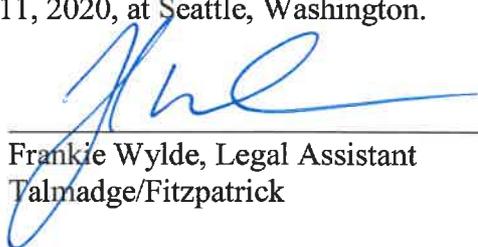
Ben D. Cushman, WSBA #26358  
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400 Union Ave SE, Suite 200  
Olympia, WA 98501

Richard T. Hoss, WSBA #12976  
Hoss & Wilson-Hoss, LLP  
236 West Birch Street  
Shelton, WA 98584

Original E-filed with:  
Court of Appeals, Division II  
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 11, 2020, at Seattle, Washington.

  
\_\_\_\_\_  
Frankie Wylde, Legal Assistant  
Talmadge/Fitzpatrick

DECLARATION

**TALMADGE/FITZPATRICK**

**September 11, 2020 - 3:06 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54272-2  
**Appellate Court Case Title:** Richard Nau, App./Cross Res. v Nancy K. Vogel As Trustee for Mark O Vogel, Res./Cross App.  
**Superior Court Case Number:** 17-2-00645-2

**The following documents have been uploaded:**

- 542722\_Briefs\_20200911145934D2764861\_8392.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Corrected Brief of Respondent.pdf*
- 542722\_Motion\_20200911145934D2764861\_7574.pdf  
This File Contains:  
Motion 1 - Other  
*The Original File Name was Mot for Voluntary Withdrawal of Cross Appeal.pdf*

**A copy of the uploaded files will be sent to:**

- Ben@DeschutesLawGroup.com
- assistant@tal-fitzlaw.com
- dmallove@dpmlaw.com
- ecascio@dpmlaw.com
- matt@tal-fitzlaw.com
- rross@hctc.com

**Comments:**

Motion for Voluntary Withdrawal of Cross Appeal Corrected Brief of Respondent Vogel

---

Sender Name: Frankie Wylde - Email: assistant@tal-fitzlaw.com

**Filing on Behalf of:** Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:  
2775 Harbor Avenue SW  
Third Floor Ste C  
Seattle, WA, 98126  
Phone: (206) 574-6661

**Note: The Filing Id is 20200911145934D2764861**