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APR 21 2016

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

N. 336140

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DERALD HAUCK and NOEL MOON,

Appellants,

v.

WILLIAM AND DIANA BARR, JEANNINE BURNS, and SOLEIL  
REAL  
ESTATE,

Respondents.

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RESPONSE BRIEF OF RESPONDENTS WILLIAM BARR AND  
DIANA BARR

---

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## I. ASSIGNMENTS OF ERROR

1. Did Appellants Hauck and Moon conduct sufficient inquiry to create a genuine issue of material fact after the Inspection Report revealed a pet urine smell? (Assignment of Error 1.)
2. Should Appellant Hauck have the opportunity to present to a jury that any reasonable inquiry into the pet urine smell would have been fruitless and have not revealed the tangible urine-and-feces-soaked floors hidden beneath the new carpeting? (Assignment of Error 1.)
3. Did Appellant Hauck present evidence to create a genuine issue of material fact as to Respondents Burns and Soleil's failure to exercise reasonable skill and care, deal honestly and in good faith, and disclose their knowledge of the urine and feces hidden beneath the new carpeting? (Assignment of Error 2.)
4. Did Appellant Hauck present evidence to create a genuine issue of material fact that Respondents' actions were unfair or deceptive acts or practices? (Assignment of Error 3.)
5. Does one of Hauck's other claims against Respondents Barr survive and allow his breach of contract claim to also proceed to trial? (Assignment of Error 4.)

6. Does one of Appellant Hauck's other claims against Respondents Barr survive and allow him the opportunity to unwind the deal through rescission? (Assignment of Error 5.)

## **II. STATEMENT OF THE CASE**

This lawsuit is based on claims for breach of contract, rescission, negligent misrepresentation, fraudulent concealment, and violation of the Consumer Protection Act all rising from the sale of a residential house. The Appellants contended the Respondents Barr sold them a house with cat urine and feces found beneath the carpet of the home and were unaware of this issue at the time of purchase. Appellant Hauck purchased the house and later transferred half interest to his daughter Appellant Noel Moon.

Both Respondents moved the Trial Court Judge Annette Plese for Partial Summary Judgment Dismissal. The Trial Court heard arguments on the Motions on March 27, 2015. After considering the arguments, the briefing by counsel, and the Court file, the Trial Court dismissed the Complaint against all Respondents.

## **III. SUMMARY OF ARGUMENT**

Through December 18, 2012, Respondents Barr were the owners of the residential property commonly known as 1718 E. 1st Ave., Spokane, Washington 99202 ("Property"). On November 10, 2012, Appellant Derald Hauck ("Hauck") entered into the Real Estate Purchase and Sale Agreement ("REPSA") with Respondents Barr for the purchase of the Property for \$63,500.00. Complaint ¶3.1. Appellant Noel Moon

never signed the RESPA. Complaint ¶3.1. Respondent Jeannine Burns ("Burns") was the listing real estate broker for Respondents Barr. Respondent Burns was an employee of the listing real estate brokerage firm Respondent Soleil Real Estate ("Soleil").

On November 10, 2012, a month prior to the closing of the sale solely to Hauck, pursuant to RCW 64.06.020, Respondent Barr completed and provided to Appellant Hauck a Real Property Transfer Disclosure Statement ("Disclosure Statement"). Complaint, Ex. A.

Appellants Hauck and Moon visited the Property two times prior to closing - on or about October 8 and October 9, 2012. Complaint ¶3.8. Appellant Moon picked up the keys to the Property from Respondent Burns around late December 2012. *Id.* Appellants Hauck and Moon claim they never smelled any animal urine or feces during those repeated visits to the Property. *Id.*

On October 18, 2012, Appellant Hauck located, retained and paid for the services of their certified home inspector, BrickKicker Property Inspection, who conducted a pre-closing inspection of the Property (the "Inspection Report"). More specifically, page 5 of the Inspection Report stated that, "**A VERY STRONG PET URINE SMELL WAS OBSERVED IN THE HOME.** This smell may be difficult to remove."

(Emphasis in original). Thus, both Appellants had actual knowledge of the strong pet urine smell at the Property one month prior to closing.

Respondent Barr executed a Statutory Warranty Deed transferring title to the Property solely to Hauck, which was dated December 11, 2012, and was recorded on December 18, 2012.

On or about December 12, 2012, Appellant Hauck executed a Promissory Note and Deed of Trust in the amount of \$50,400.00 for the benefit of Wells Fargo Bank (“Deed of Trust”) which was recorded on December 18, 2012. As far as Wells Fargo Bank is concerned the only owner of the Property is Appellant Hauck.

After closing, Appellant Hauck executed a Quit Claim Joint Tenancy with Right of Survivorship Deed for the benefit of Appellant Moon dated December 17, 2012.

Appellant Moon then began working on the outside and inside of the Property in early January 2013. Complaint, ¶3.9. During her work, Appellant Moon claims she would get an occasional whiff of an animal urine smell. Complaint, ¶3.9. On further investigation, Appellant Moon claims she pulled up the carpeting in the home, discovering that the new carpeting had allegedly been placed on top of urine and feces throughout the interior of the home. Complaint, ¶3.12.

On June 25, 2014, Appellants filed a lawsuit against the Respondents. The lawsuit was dismissed on July 15, 2015, by prevailing summary judgment dismissal motion filed by both Respondents.

#### IV. ARGUMENT

##### A. COURTS REVIEW ORDERS OF SUMMARY JUDGMENT *DE NOVO*.

Appellate courts review orders of summary judgment *de novo*, engaging in the same inquiry as the trial court. Mohr v. Grantham, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). Summary Judgment is appropriate when "there is a genuine issue as to any material fact ... and the moving party is entitled to judgment as a matter of law." CR 56(c). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). All facts and reasonable inferences are viewed in the light most favorable to the non-moving party. Dowler v. Clover Park Sch. Dist. No. 400, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

This Court must uphold the summary judgment dismissals of the Appellants Moon's and Hauck's claims.

**B. APPELLANT MOON DOES NOT HAVE STANDING TO BRING THIS APPEAL**

Respondents challenged successfully Appellant Moon's standing to proceed with this case as she was never a party to the real estate and purchase agreement (RESPA), the statutory warranty deed and neither Respondent owed her any legal duty. "The doctrine of standing generally prohibits a party from asserting another person's legal right. A party has standing to raise an issue if it has a distinct and personal interest in the outcome of the case. Stated another way, a party has standing if it demonstrates a real interest in the subject matter of the lawsuit; that is, a present, substantial interest as distinguished from a mere expectancy or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted." Timberlane Homeowners Assoc. v. Brame, 79 Wn. App. 303, 307-8 (1995) (internal citations omitted). In order to have standing, the "one seeking relief must show a clear legal or equitable right and a well-grounded fear of immediate invasion of that right. Gustafson v. Gustafson, 47 Wn. App. 272, 276 (1987).

Appellant Moon did not demonstrate nor argue that she had standing as a legal right, but claims that she had standing based in equity. "Standing to assert a claim in equity resides in the party entitled to equitable relief. It is not dependent on the legal relationship of those

parties." Smith v. Monson, 157 Wn. App. 443, 445 (2010). Washington cases that discuss claims in equity concerning real property, arise from a situation where the plaintiff is the original owner of the property and conveys that property to another party who, in turn, is supposed to convey it back to the original owner pending some condition subsequent, but fails to do so or transfers to another party. See Smith, 157 Wn. App. 443 (2010); Phillips v. Blaser, 13 Wn.2d 439 (1942). The standing in equity arises because, while there is no legal standing, the plaintiff was the original owner, and the receiving party had an equitable duty to the plaintiff based on intent. Smith, 157 Wn. App. at 448.

To create a third party beneficiary to a contract, one would have to show that the promiser intended to assume a direct obligation to a third-party at the outset of the contract. Lewis v. Boehm, 89 Wn. App. 103 (1997). This Court then must review the contract to determine if performance of the contract directly benefits a third party. Del Guzzi Constr. Co. v. Global NW Ltd., 105 Wn.2d 878 (1986).

There is no evidence to show that Respondents Barr and Appellant Hauck intended for Appellant Moon to be an additional party under their RESPA contract. Appellant Moon was never an original owner of the Property and did not obtain any interest in the Property until after the closing when Appellant Hauck executed a quit claim deed giving her a

fifty percent interest in the Property. Furthermore, Respondents Barr owed Appellant Moon no equitable duty as they did not intend to assume a direct obligation to a third-party beneficiary.

This Court must also rule (like the Trial Court) that Appellant Moon did not have standing, either legal or equitable, to pursue claims against Respondents Barr; therefore, the claims brought by Appellant Moon against Respondents Barr were properly dismissed.

**C. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS BARRS' MOTION FOR SUMMARY JUDGMENT DISMISSING APPELLANT HAUCK'S FRAUDULENT CONCEALMENT CLAIM.**

Appellant Hauck failed to produce any evidence to support his claim that Respondents Barr had a duty to speak as to the fraudulent concealment claims. This duty to speak arises "(1) where the residential dwelling has a concealment defect; (2) the vendor has knowledge of the defect; (3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect is unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser." Alejandre v. Bull, 159 Wn.2d 674, 689, 153 P.3d 864 (2007).

In Alejandre, the court held that the back baffle of a septic tank was "relatively shallow and easily accessible for inspection." Id. If a plaintiff on notice of a potential defect with a septic system can be

expected to expose it via excavation, it is not unreasonable that the Appellant Hauck, who was on notice of the smell of animal urine in the house, be required to conduct further investigation into its source. Since Appellants were on notice from the Home Inspection and chose no further follow up, they cannot show "concealment" of the defect.

Appellants failed to show the defect complained of would not have been discovered through further reasonably diligent investigation and have not provided sufficient evidence to support this claim.

The Appellant must establish each element of fraudulent concealment by clear, cogent, and convincing evidence. Stieneke, 145 Wn. App. at 561. Failure to disclose a material fact where there is a duty to disclose is fraudulent. Stieneke v. Russi, 145 Wn. App. 544, 560, 190 P.3d 60 (2008).

Appellants are hard pressed to prove any of the above five requirements as all of these items were known to the Appellants one month prior to closing as is set forth in the Inspection Report.

Appellants cannot prove the first requirement in that the "strong pet urine smell" is not a concealed defect. Appellants cannot prove the second requirement in that the "strong pet urine smell" was known to all parties. Appellants cannot prove the third element as the "strong pet urine smell" did not affect the Property, health or life of the purchasers,

especially where the Appellants have never lived in the Property. Appellants cannot prove the forth requirement in that the Appellants knew of the defect at least one month prior to closing. Appellants cannot prove the fifth requirement in that the alleged defect was disclosed by a reasonable and careful inspection by Appellants as is set forth in the Inspection Report.

INTERROGATORY NO. 12: On page 5 of the Property Inspection Report attached as Exhibit A, starting at Comment IV. B, the inspector stated, "A **very strong pet urine smell was observed in the home.** This smell may be difficult to remove." As to this paragraph of the Property Inspection Report, please set forth all actions taken by Appellants after they received the Property Inspection Report.

ANSWER: **No smell was detected by buyers and witnesses (other than Matthew Pedersen). Matthew Pedersen was called to discuss findings of the inspection. Odor was believed to be from the "cat box" under the house. Buyer has experienced removing a "cat box" from under a home. Matthew Pedersen and Buyer discussed all safety issues to be repaired. Buyer and Matthew Pedersen did not believe "pet urine smell" was a safety issue at that time. Ms. Moon discussed the inspection report over the phone with Jeannine Burns before moving forward and having Mr. Hauck sign the second RESPA. Ms. Moon asked Jeannine Burns what was under the carpet in case they discovered a spot and needed to remove it.**

Affid. of Robert R. Rowley, Exhibit A – Appellants’

Answers to Interrogatories.

The Inspection Report triggered Appellants' duty to inquire about the pet urine smell.

Our Supreme Court discussed a buyer's duty to inquire further in the fraudulent concealment context, "[A]lthough a fraudulent concealment claim may exist even though the purchaser makes no inquiries which would lead him to ascertain the concealed defect, in those situations where a purchaser discovers evidence of a defect, the purchaser is obligated to inquire further. Simply stated, fraudulent concealment does not extend to those situations where the defect is apparent." Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wn.2d 506, 525, 799 P.2d 250 (1990) (citations omitted); see also Douglas, 173 Wn. App. at 830 ("When a buyer is on notice of a defect, it must make further inquiries of the seller"); Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp., 51 Wn. App. 209, 214-15, 752 P.2d 1353 (1988) (same; if the buyer fails to inquire, he cannot later argue that he knew nothing about the extent of the problem).

In Alejandre, the respondent` Mary Bull owned a single family residence that was served by a septic system. Alejandre, 159 Wn.2d at 678. The year before she put the house up for sale, she noticed soggy ground over the septic system. Id at 678. She hired William Duncan of Gary's Septic Tank Service to pump the septic tank and also hired Walt

Johnson Septic Service to empty the tank and repair a broken pipe leading from the tank to the drain field. Id. Bull also applied for a connection to the city sewer, but abandoned the idea after learning she would have to pay a \$5,000 hook-up fee. Id.

Bull placed her home on the market in June 2000. Id. In September 2001, Bull and Arturo and Norma Alejandre entered into an agreement for the sale of Bull's home to the Alejandres. Id. The agreement required Bull to pump the septic tank before closing and conditioned the sale on a septic system inspection. Id.

As provided for in the agreement, Walt's Septic Tank Service pumped the tank and sent the Alejandres a copy of the bill. Id. at 679. The bill stated, "[T]he septic system's back baffle could not be inspected but there was [n]o obvious malfunction of the system at time of work done." Id. at 679. Bull gave the Alejandres a seller's disclosure statement indicating that the house had a septic tank system that was last pumped and inspected in fall 2000 and that "Walt Johnson Jr. replaced broken line between house and septic tank . . ." Id. at 679. Bull answered "no" to the inquiry whether there were any defects in the septic system's operation. Id. at 679.

A month after the sale closed, the Alejandres smelled an odor inside the home and heard water gurgling. Id. at 680. They also noticed a

foul odor outside the home and believed it came from the ground around the septic tank, which they said was soggy. Id. at 680. By chance, they hired William Duncan of Gary's Septic Tank Service—the same person who pumped the system for Bull in 2000. Id. at 680. Duncan told the Alejandres that he could pump the tank, but he could not fix the underlying problem because the drain fields were not working. Id. at 680. He also informed them that he previously told Bull that the drain fields were not working and that she should connect to the city's sewer system. Id. at 680.

The Alejandres sued Bull for fraud and misrepresentation, claiming costs and damages totaling nearly \$30,000. Id. at 680. After they rested their case, Bull moved for judgment as a matter of law. Id. at 680. The trial court granted the motion to dismiss, ruling that the economic loss rule barred the Alejandres' claims and that they failed to present sufficient evidence supporting their claims. Id. at 680. The Court of Appeals reversed, holding that the Alejandres presented sufficient evidence to warrant the jury's consideration. Id. at 680-81.

The Supreme Court reversed, affirming the trial court's decision to dismiss the Alejandres' fraudulent concealment and fraud claims. Regarding fraudulent concealment, the issue in Alejandre concerned element five — whether the buyers had shown that the defect in the septic

system would not have been discovered through a reasonably diligent inspection. Id. at 689-90. Our Supreme Court concluded they had not met their burden:

The Alejandres failed to meet their burden of showing that the defect in the septic system would not have been discovered through a reasonably diligent inspection. In fact, the Alejandres accepted the septic system even though the inspection report from Walt's Septic Tank Service disclosed, on its face, that the inspection was incomplete because the back baffle had not been inspected. The testimony at trial showed that this part of the septic system was relatively shallow and easily accessible for inspection. A careful examination would have led to discovery of the defective baffle and to further investigation.

Alejandre, 159 Wn.2d at 689-90.

Alejandre is controlling based on the facts before this Court. Our Supreme Court faulted the buyers for failing to conduct a reasonably diligent pre-purchase inspection of their home's septic system in the face of an obvious, incomplete inspection report that revealed no inspection of the back baffle. As the court observed, a reasonably diligent and careful inspection of the septic system would have revealed the defective baffle that was easily accessible for inspection.

In Douglas, 173 Wn. App. at 831-32, the buyers' inspector identified an area of rot and decay near the roof line and caulking suggestive of a prior roof leak. Id. at 831-32. The buyers argued that the area of rot their inspector discovered was not unusual and they had no

knowledge that 50 to 70 percent of the sill plate and rim joist were destroyed. The court rejected that argument. Citing Dalarna, the court stated the well-settled rule that "[w]hen a buyer is on notice of a defect, it must make further inquiries of the seller." Id. at 830. The court reasoned:

The Douglasses and their inspector were on notice of the defect and had a duty to make further inquiries. The Douglasses argue that "they had no idea that 50 to 70% of the sill plate and rim joist were destroyed" and that the area of rot [their inspector] discovered was not unusual. That, however, is the precise argument we rejected in Dalarna. Once a buyer discovers evidence of a defect, they are on notice and have a 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 832.

The court held that due to the buyer's prepurchase knowledge of the water leak, its severity was readily ascertainable through further inquiries. Dalarna, 51 Wn. App. at 215.

In Dalarna, a buyer purchased an apartment building and later sued the seller for fraudulent concealment after discovering substantial water leakage problems. The buyer's inspector noted water stains and loose tiles. Despite this prepurchase notice of a water leak, the buyer closed on the sale. The buyer later discovered the water damage was more extensive. The buyer claimed that the seller concealed the extensive nature of the leak. Id. at 211-12.

In Jackowski v. Borchelt, 151 Wn. App. 1, 209 P.3d 514 (2009), the buyers purchased a waterfront home and later sued the sellers for fraud and fraudulent concealment when soil instability caused the house to slide. Before the sale, the sellers gave the buyers a Form 17 disclosure statement that contained language referring the buyers to a Mason County Department of Community Development letter. Id. at 8. The letter indicated that the "following critical areas are present on this property:... Landslide Hazard Areas." Id. at 8. The letter also referenced an existing geotechnical report conducted by a geologist. Id. at 8. The sellers faxed a copy of the letter to their real estate agent. Id. at 8. The fax included an addendum provided by the geologist that again referenced the geotechnical report. Id. at 8. The sellers' real estate agent then faxed the letter and addendum to the buyers' agent. Id. at 8. The buyers received and read the letter and addendum. Id. at 8. An addendum to the real estate purchase and sale agreement provided that the sale was contingent on the buyers' inspection—including, at the buyers' option, a soils/stability inspection. Id. at 8. The buyers conducted no soil stability investigation before the sale closed. Id. at 8.

Jackowski addressed two issues relevant here—whether a reasonable inspection would have disclosed the landslide risk (fraudulent concealment claim) and whether the buyers established they had a right to

rely on the sellers' fraudulent representations (fraud claim). Id. at 17. The court affirmed summary judgment dismissal of those claims.

Douglas, Dalarna, and Jackowski stand for the unremarkable proposition that a buyer's failure to inquire further after prepurchase notice of a specific defect involving the specific property purchased defeats a fraudulent concealment claim. The undisputed facts and reasonable factual inferences support the conclusion that the Inspection Report triggered the duty flowing to Appellants to make further inquiry.

Therefore, as Appellants had actual knowledge of a “very strong pet urine smell” at least one month prior to closing the Appellants had prepurchase notice of a specified defect involving the specified Property, which like in the Douglas, Dalarna, and Jackowski cases defeats a fraudulent concealment claim. This Court must uphold dismissal of this claim by the Trial Court.

**D. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS BARRS' MOTION FOR SUMMARY JUDGMENT DISMISSING APPELLANT HAUCK'S NEGLIGENT MISREPRESENTATION CLAIM.**

The crux of a negligent misrepresentation claim is the conveying of and reliance upon false information. It is clear from the Inspection Report that Appellants knew of the pet urine smell a month prior to closing. Also, Respondents Barr made no representations to Appellants.

Appellants failed to provide evidence that they reasonably relied on false information that proximately caused their damages.

INTERROGATORY NO. 27: Describe in your own words all conversations, telephone calls, e-mails or text messages you directly had with Respondents Barr.

**ANSWER: Did not have any direct communications with the Respondents Barr.**

Affid. of Robert R. Rowley, Exhibit A – Appellants' Answers to Interrogatories.

Appellants Hauck and Moon acknowledge they never had any direct communication with Respondents Barr and their communications were solely limited to those written documents which form the basis of the real estate sale and purchase.

Appellant Hauck's claim of negligent misrepresentation is synonymous to that discussed by the Washington Supreme Court in Alejandre. Id.

In Washington, courts recognize negligent misrepresentation as a tort claim under the Restatement (Second) of Torts and have held "this claim is not available when the parties have contracted against potential economic liability." Id. at 686. The parties were in a contractual relationship based on the RESPA and statutory warranty deed. Therefore, the relationship is governed by contract, and the economic loss rule

applies. Appellants have failed to show an exception to this, and their claim for negligent misrepresentation were properly dismissed.

Furthermore, Appellants must show a misrepresentation was made that they justifiably relied upon. Appellants have failed to show any false information or misrepresentation supplied to them by the Respondents. It is typically an issue of fact as to whether a party justifiably relied on the misrepresentation; however, Appellants have acknowledged that an assumption was made based on the information they had from their own Inspection Report and the air fresheners in the house and not on any assertions from the Respondents.

In ESCA, the court reiterated the case laws of Washington "that justifiable reliance is equivalent to a lack of contributory negligence. As a result, contributory negligence is a complete bar to recovery rather than a trigger that causes the fault of plaintiff and defendant to be compared and apportioned." ESCA, 135 Wn.2d at 829. Appellants' assumption regarding the source of the smell even in the face of a home Inspection Report was negligent and, therefore, bars recovery under negligent misrepresentation.

In ESCA Corp. v. KPMG Peat Marwick, 135 Wash.2d 820, 826, 959 P.2d 651 (1998), this court reaffirmed its adoption of the definition of negligent misrepresentation set forth in the Restatement (Second) of Torts.

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. (quoting Restatement (Second) of Torts § 552(1) (1977)).

Appellants Hauck and Moon clearly indicate that they never spoke to Respondents Barr regarding this matter and as such have no representations by Barr upon which to rely. Thus, Appellants Hauck and Moon fail to establish elements (4), (5) and (6).

Whether Respondents Barr supplied false information, the Appellants negligent misrepresentation claims fail because as a matter of law, Respondents Barr have made no false representations. There is nothing inaccurate about the statutory Seller's Disclosure Statement.

**E. THE ECONOMIC LOSS RULE BARS ALL TORT CLAIMS BY APPELLANTS.**

Appellant Hauck (not Moon) contracted with Respondents Barr for the sale of the Property. There was no contractual relationship between Appellant Moon and Respondents Barr. In order for the economic loss rule to apply and preclude a negligent misrepresentation tort claim, there must be a contract between the parties. Water's Edge Homeowners, 152 Wash.App. at 589-91, 216 P.3d 1110; see also Alejandre, 159 Wash.2d at

681, 153 P.3d 864 (stating that the “economic loss rule applies to hold parties to their contract remedies.”); Wash. Water Power, 112 Wash.2d at 861 n. 10, 774 P.2d 1199. (“[E]conomic loss describes those damages falling on the contract side of “the line between tort and contract.”” (quoting Pa. Glass Sand, 652 F.2d at 1173)).

The economic loss rule applies to hold parties to their contract remedies when a loss potentially implicates both tort and contract relief. It is a “device used to classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remediable only in contract...’[E]conomic loss describes those damages falling on the contract side of “the line between tort and contract”.” Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wash.2d 816, 822, 881 P.2d 986 (1994) (citation omitted) (quoting Wash. Water Power Co. v. Graybar Elec. Co., 112 Wash.2d 847, 861 n. 10, 774 P.2d 1199, 779 P.2d 697 (1989) (quoting Pa. Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1173 (3d Cir. 1981)). The rule “prohibits Appellants from recovering in tort economic losses to which their entitlement flows only from contract” because “tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.” Factory Mkt., Inc. v. Schuller Int’l, Inc., 987 F.Supp. 387, 395 (E.D.Pa. 1997) (quoting Duquesne Light Co. v.

Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995) and Palco Linings, Inc. v. Pavex, Inc., 755 F.Supp. 1269, 1271 (M.D.Pa. 1990)).

Where economic losses occur, recovery is confined to contract “to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract....” A bright line distinction between the remedies offered in contract and tort with respect to economic damages also encourages parties to negotiate toward the risk distribution that is desired or customary.” Berschauer/Phillips, 124 Wash.2d at 827, 881 P.2d 986. In addition, the economic loss rule prevents a party to a contract from obtaining through a tort claim benefits that were not part of the bargain. See, e.g., Daanen & Janssen, Inc. v. Cederapids, Inc., 216 Wis.2d 395, 408, 573 N.W.2d 842 (1998).

In short, the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the Appellant characterizes the claims. See Snyder v. Lovercheck, 992 P.2d 1079, 1088 (Wyo.1999) (‘when parties’ difficulties arise directly from a contractual relationship, the resulting litigation concerning those difficulties is one in contract no matter what words the Appellant may wish to use in describing

it.” (quoting Beeson v. Erickson, 22 Kan.App.2d 452, 461, 917 P.2d 901 (1996)). Washington law consistently follows these principles. See Stuart, 109 Wash.2d at 420-22, 745 P.2d 1284; Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co., 115 Wash.2d 506, 799 P.2d 250 (1990); Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc., 119 Wash.2d 334, 350-51, 831 P.2d 724 (1992); Berschauer/Phillips, 124 Wash.2d at 825-26, 881 P.2d 986; Staton Hills Winery Co. v. Collons, 96 Wash.App. 590, 595-96, 980 P.2d 784 (1999); Carlson v. Sharp, 99 Wash.App. 324, 994 P.2d 851 (1999); Griffith v. Centex Real Estate Corp., 93 Wash.App.202, 211-13, 969 P.2d 486 (1998).

The key inquiry is the nature of the loss and the manner in which it occurs; i.e., are the losses economic losses, with economic losses distinguished from personal injury or injury to other property. If the claimed loss is an economic loss, and no exception applies to the economic loss rule, then the parties will be limited to contractual remedies.

Here, the Appellants sought substantial non-economic damages from the Respondents Barr which claims were properly dismissed by the Trial Court.

**F. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS BARRS' MOTION FOR SUMMARY JUDGMENT DISMISSING APPELLANT HAUCK'S CLAIM FOR FAILING TO ESTABLISH AN UNFAIR OR DECEPTIVE ACT OR PRACTICE.**

A violation of the Washington State Consumer Protection Act (CPA) exists when there is an unfair or deceptive act in the conduct of any trade or commerce. RCW 19.86.020. For one to prevail under a claim for CPA violation, one must establish all five elements: (1) unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to the plaintiff in his business or property, and (5) causation. Hangman Ridge Training Stables, Inc. v. Safeco, 105 Wn.2d 778, 719, P.2d 531 (1986).

In order to withstand a motion for summary judgment dismissal, the plaintiff must establish some material disputed issues of fact. The Appellants' own evidence shows that they were on notice of the defect and failed to make inquiry even in the face of their own Inspection Report informing them of the "strong pet urine smell".

Therefore, the Appellants failed to establish the unfair or deceptive act or practice element. Where there are concealed defects in a premises and known to the owner, but unknown to the purchaser, and which, on careful examination, on the plaintiff's part would not disclose it is the duty

to of the seller then to disclose them to the buyer. Obde v. Schlemeyer, 56 Wn.2d 449, 353 P.2d 672 (1960).

Because Appellants were on actual notice of the “strong pet urine smell” and had an affirmative duty to make further inquiry, it cannot be said that the alleged defect was unknown to Appellants, that it could not have been discovered by a reasonable inspection, and that Appellants justifiably relied on Respondents Barr’s representations, or that Respondents Barr committed an unfair or deceptive act that caused the Appellants’ injury. The law retains a duty upon a buyer to beware, to inspect, and to question.

Despite this discovery, there is no evidence that Appellants made any further inquiries whatsoever after the inspection. Under Dalarna, the Appellants’ failure means they were not entitled to maintain these claims. Thus, Respondents Barr were entitled to dismissal of the Appellants’ Consumer Protection Act claims.

**G. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS BARRS' MOTION FOR SUMMARY JUDGMENT DISMISSING APPELLANT HAUCK'S BREACH OF CONTRACT AND RESCISSION CLAIMS.**

In order to maintain a breach of contract claim, Appellants must show there was a valid contract. In this case it was undisputed there was a valid contract between the Respondents Barr (sellers) and Appellant

Hauck (buyer). As addressed supra, Appellant Moon was not a party to the original contract. Since there was a valid contract, Appellant Hauck must show there was a breach of the contract. Appellant Hauck made several breach of contract claims. However, since all those claims failed to show any disputed material facts, they failed to withstand summary judgment dismissal and Appellants cannot use those claims as a basis for a breach of contract claim. Therefore, this claim, too, was properly dismissed by the Trial Court.

If this Court should find that all of Appellants' breach of contract claims are barred then Appellants' claim for rescission is also barred. A claim for rescission can only arise if this Court finds that the seller of the property has engaged in any wrongful conduct. By virtue of dismissal of all of the Appellants' claims on summary judgment the Appellants have no rescission claim.

Therefore, Respondents Barr ask this Court to sustain dismissal of Appellants' claims for rescission.

**H. RESPONDENTS BARR ARE ENTITLED TO THEIR ATTORNEY FEES AND COSTS PER RAP 18.1(a).**

Respondents Barr are entitled to their attorney fees and costs as the prevailing party under the RESPA. In Washington, parties may recover attorney fees if allowed by statute, contract, or some well-recognized

principle of equity. Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 525, 210 P.3d 318 (2009).

Here, ¶ Q of the RESPA provides for an award of fees to the prevailing party in a dispute concerning the agreement. The RESPA between the Barrs and Hauck provides for reasonable attorneys' fees and expenses to the prevailing party. CP at 54. A contractual provision authorizing attorney fees is authority for granting fees incurred on appeal. Mike's Painting, Inc. v. Carter Welsh, Inc., 95 Wn.App.69, 71, 975 P.2d 532 (1999).

If Respondents Barr are the prevailing party on appeal, they are entitled to their attorney fees and costs. The Trial Court did award attorney fees and costs to the Respondents Barr against both Appellants.

Pursuant to RAP 18.1(a), Respondents Barr request this Court award their costs and reasonable attorneys' fees consistent with the Purchase and Sale Agreement against both Appellants.

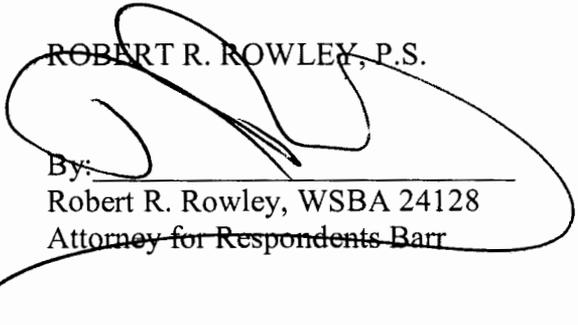
## V. CONCLUSION

The Trial Court properly dismissed Appellants' claims against the Respondents Barr. Viewing the facts and inferences in the light most favorable to Appellants, it is clear that summary judgment dismissal of all of their claims was appropriate.

Based upon the legal authorities and arguments presented herein, Respondents respectfully request that this Court uphold the Trial Court's summary judgment dismissal of the Appellants' claims and award Respondents their reasonable attorney fees and costs.

DATED this 21 day of April, 2016.

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By: 

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**CERTIFICATE OF SERVICE**

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