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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

WILLIAM BRADLEY WILLARD, JR., a single man, Corazon Johnson, a single woman, and COBRA REAL ESTATE, LLC, a Washington Limited Liability Company,

Appellants,

vs.

BENJAMIN ADDINK and JADA ADDINK, husband and wife and the marital community composed thereof, HEAVENLY ROCK PFF a Private Fund Foundation established in the Netherlands Antilles, WHITESTONE LAND MANAGEMENT, LLC, a Washington Limited Liability Company, JOE HORGAN, individually and d/b/a ASSIST 2 SELL HOME REALTY, STANLEY ADDINK and SHARON ADDINK, husband and wife and the marital community composed therefore, THOMAS LILLY and NANCY LILLY, husband and wife and the marital community composed thereof,

Respondents.

PETITIONERS' BRIEF

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I. Introduction

For purposes of this brief, the Appellants, William Bradley Willard Jr., Corazon de Johnson S., and COBRA REALTY, LLC, shall be collectively referred to as “Willard”. For purposes of this brief, Respondents Benjamin and Jada Addink, Heavenly Rock PFF, and Whitestone Land Management shall be collectively referred to as “Addink”. Respondents Thomas Lilly and Nancy Lilly shall be referred to as “Lilly”, and Respondents Stan Addink and Sharon Addink shall be referred to collectively as “Stan Addink”.

Willard and Addink entered a Real Estate Trade Agreement wherein the parties agreed to exchange real property. Willard contracted to trade their Willards of Saba Hotel, and Addink contracted to trade a twenty acre parcel in the Enterprise Ridge development and 3 lots in the Ridgeview Estates Development.

Willard claims Addink offered, showed, and described one 20 acre parcel in the Enterprise Ridge development, but conveyed an entirely different and less valuable 20 acre parcel at closing. Willard claims that Addink misrepresented values of the twenty acre parcel in Enterprise Ridge and the three lots in the Ridgeview Estates.

The trial court dismissed Willard’s claims as being barred by the statute of limitations and its interpretation of the discovery rule.

Under the contract, there is language that states Addink will help facilitate and ship personal property left at Willards of Saba to Willard. Willard claims Addink caused damage to property Addink shipped, and did not ship all of the property listed in the Trade Agreement. The court dismissed Willards claim on the Court's view that the language in the contract was not clear enough to confer a duty on Addink to perform.

II. Assignments of Error

2.1 The trial court erred in granting Addink's motion for summary judgment dismissing all of Willards' claims by the order entered on October 26, 2017 and denying Willards' motion for reconsideration by order entered on January 5, 2018.

Issues Pertaining to Assignment of Error 2.1

2.1.1. Are Willards' causes of action for fraud and misrepresentation against Addink barred by the three year statute of limitations under the "discovery rule" when a) Willard did not make actual discovery of the fraud and misrepresentations until May 28, 2012, when b) Willard could not have discovered the fraud and misrepresentation through the exercise of due diligence, when c) Willard cannot be imputed with constructive knowledge of the fraud and misrepresentation, and when d) Willard filed suit on December 21, 2012, within three years of actual discovery?

2.1.2 Are Willards' causes of action for fraud, and misrepresentation, waived by the terms in the Real Estate Trade Agreement entitling Addink to dismissal as a matter of law?

2.1.3. Is there a genuine issue of material fact in dispute that Addink and Lilly had a duty to pack and ship, exercise good faith and reasonable care in the packing and shipping of Willards' personal property, and had a duty to pack all of Willards' property listed in the Trade Agreement?

2.2 The trial court erred in granting reasonable attorney's fees in its ruling granting Addink attorney's fees as set forth in its written opinion filed March 19, 2018.

Issues Pertaining to Assignment of Error 2.2

2.2.1 Is Addink entitled to attorney's fees and costs incurred in defending Willards' claims based on fraud, negligent misrepresentation, negligence, conversion, civil conspiracy, and breach of fiduciary duty, when the attorney's fee provision in the real estate trade agreement limits fees to actions to enforce the terms of the agreement?

III. Statement of the Case

Willard and Addink entered into a Real Estate Trade Agreement (herein referred to as "Trade Agreement") on September 4, 2009. (CP 281). Under the terms of the Trade Agreement, Willard would convey title to Addink the property described as "Willards of Saba", a hotel owned by Willard, and located on the Island of Saba in the Netherlands Antilles. (CP 272). In turn, Addink would convey title to Willard the properties described as Lots 4, 80, and 94 in Ridgeview Estates and twenty (20) acres at Enterprise Ridge with commanding views of Lake Roosevelt as legally described in Exhibit E to the Trade Agreement (CP

273-274). The trades were completed and titles transferred on September 8, 2009. (CP 404).

Willards' claims arise out of the misrepresentations made by Addink and Stan Addink to Willard prior to entry of the Trade Agreement that induced Willards into entering the Trade Agreement. (CP 8-14).

Pre-Trade Agreement Facts: Mr. Willard has known defendant Stanley Addink for over 30 years and has always considered him a close personal friend. (CP 210) Over the course of years, they had spent time together engaging in various social activities with their families, including numerous family dinners. (CP 210) Ben Addink is Stan's son. (CP 210) Ben Addink helped his father build Willard's of Saba.(CP 210)

While having a close personal friendship with Stan Addink, Stan Addink has also been involved in five construction projects in which he was the general contractor for Mr. Willard, which were built at various times over the course of their friendship. (CP 210) These construction projects have been for Willard's own personal use. (CP 210) Mr. Willard is not a "real estate developer". (CP 210)

One of the projects involved the building of the Willard's of Saba Hotel located on the Caribbean Island of Saba, Netherlands

Antilles. In 1993, Willard contracted with Stan Addink to build the Hotel, which he did at a price of just over \$1,000,000.00. (CP 210). After the Hotel was built, Willard contracted with another contractor to build an additional apartment building with 2 rooms raising the total to 9 rooms and other improvements. (CP 210) In total, Willard spent \$1,764,598.71 to build the Hotel. (CP 210)

Willard began to market Willards of Saba for sale in 2007 and between 2007 and 2008, received a few verbal offers. (CP 211) They received an offer for 2 million dollars from a man who had other dealings on St. Maarten, and Mr. Willard did not consider it a legitimate offer. (CP 211) They received a verbal offer from Carl Bismarck, of the prominent Bismarck family of Germany. (CP 211) There was serious interest in his purchasing the Hotel for 3 million dollars. (CP 211) In addition, Willard received a written offer from his Realtor at ReMax, Cathy Jones, who provided an offer for 3 million dollars. That sale did not go through. (CP 211)

Willard subsequently listed the property with Century 21 located on the Island of Saba. (CP 211) He hired Daunesh Alcott as his Realtor. (CP 211) At his recommendation, they listed the Hotel for 3.4 million dollars. The listing agreement expired in September 2009. (CP 211)

In the Spring of 2009, Mr. Willard mentioned to Stan Addink that he was selling the Hotel. (CP 211) Stan Addink suggested that he speak with Ben Addink, who was in the process of developing property in Eastern Washington. (CP 211) Ben Addink was developing the high-end Ridgeview Estates development in Lincoln County and the Enterprise Ridge development in Stevens County, both of which had stunning views of Lake Roosevelt. (CP 211)

Willard contacted Addink and they started discussions about a real estate trade. (CP 212) They discussed trading the Hotel in Saba in exchange for lots in the high-end Ridgeview Estates development, with an option for a fourth lot (Lot 31), and a 20 acre parcel in the Enterprise Ridge*¹ development. (CP 212)

On June 3, 2009, Addink and Stan Addink took Willard on a tour of the Ridgeview Estates Development, and Enterprise Ridge development. (CP 212). At the Enterprise Ridge development, Addink and Stan Addink showed Willard a magnificent 20 acre parcel with commanding views of Lake Roosevelt. (CP 212) At the time, there were no road signs and no survey markers identifying one parcel from the next. (CP 212). Stan Addink owned property in this development

¹ Both parties have mistakenly used “Enterprise View” to reference “Enterprise Ridge”. All references to Enterprise View in the record actually are in reference to Enterprise Ridge.

and served as Treasurer responsible for collecting dues. (CP 212) He knew who owned property in this development. (CP 212). Addink did not own the property he showed Willard at the time of the site visit. (CP 212).

Addink, Stan Addink, and Willard walked a portion of the 20 acres. (CP 212) Addink and Stan Addink described how a pool and tennis courts could be built on the flat part of the property, with a house being located on the high ground at the northern end of the Parcel that has a 180 degree view of Lake Roosevelt. (CP 212) They further stated that the property could be sub-divided into four (4) buildable lots. (CP 212) There was a fence that separated the Parcel they were showing from the adjacent Parcels to the West. (CP 212) The parcel shown to Willard was located East of an adjacent parcel on which a log home was being built. (CP 212-213) The Parcel Addink and Stan Addink showed Willard is identified as tax parcel 1512040. (CP 213 and CP 224) Further, Addink and Stan Addink took Willard down to see the beautiful log home that was being built, the location of which is shown on Exhibit 1 (CP 213 and 224).

Addink and Stan Addink also took Willard to see the Ridgeview Estates Development. (CP 213) Addink described the development as a “high-end” development and provided literature that supported his

characterization of the development. (CP 213) The literature advertised the lot selling prices as between \$199,950.00 and \$289,950.00. (CP 213 and 226)

Negotiations commenced via emails. (CP 213) Willards were on the Island of Saba in the Caribbean where they were engaged with daily hands on efforts in managing the Willards of Saba during the negotiations. (CP 213) On June 18, 2009, Addink sent Willard an email stating that he was interested in a trade. (CP 213) He stated “I am interested in trading if you are. I was thinking to do the 20 acres that is the Ridge above the beach with the spectacular panoramas (sic) that you liked by the big log home.” (CP 213, 239) This email makes reference to Parcel 1512040 that Addink and Stan Addink showed Willard. (CP 213, 239) On June 18, 2009, Willard faxed Addink a letter stating that as a direct result of the tour, that he and Corazon have a high interest in a trade. (CP 213) Willard indicated that based on the information he had provided Addink, it cost him \$1,764,598.71 to build the Willards of Saba Hotel, and that the trade values of the properties Addink would trade need to be of comparable value of the listing price for the Hotel with Century 21 at 3.4 million. (CP 213, 241) Willard further stated that the proposed trade properties would include the magnificent 20 acre parcel in the Enterprise Ridge development that

has room for a tennis court near the log home under construction. (CP 214, 241) Willard asked Addink to provide him tax assessment statements for the lots he intended to trade. (CP 214) Susan Cook, Addink's employee, erroneously indicated that there were no tax assessments available because it was a newly developed sub-division, (CP 214, 246) which according to the tax assessor, was not true. (CP 214, 248) On June 26 2009, Addink sent Willard an email stating that he, Addink, was "getting an appraiser to assess the high and the low range of comparable properties current asking price to give some clarity on the trade values" of his Ridgeview Estates and Enterprise Ridge properties. (CP 214 , 250)

On June 26, 2009, Willard sent an email to Addink stating that he wants the results of the appraisal as well as any property tax statement in order to determine the fairness of the trade. (CP 214, 252)

On July 7, 2009, Addink sent Willard an email stating that he spent \$1,700 to get a market assessment of the properties he wanted to trade for me to "determine if you want to do the trade." (CP 214) He further states that Willard can use the market assessment to determine if he wants to do the trade. (CP 214) Addink states that he believes the total value of the properties he has offered to trade would come in at between 1.6 million and 2.4 million. (CP 214, 254.)

On July 8, 2009, Willard sent Addink an email stating that he appreciated his efforts to get a market assessment/appraisal for his properties. (CP 215) Willard again asked him for tax assessment information, which again, he did not get. (CP 215, 256.)

On July 15, 2009, Willard expressed to Addink of his frustration in not getting the information from Addink's appraiser. Willard also advised Addink that there would be a 5.2% transfer fee owed to the Neatherland's Antilles government for the Hotel transfer.(CP 215, 258) On July 16, 2009, Addink responds stating that he is chasing the appraiser down and will "try to get his assessment finished for you". (CP 215, 260) Addink further expresses concern about the 5.2% transfer fee if the appraiser's number for the properties is between 2 and 4 million because he is "cash poor". (CP 215)

On July 19, 2009, Willard requested specific information about the Enterprise Ridge parcel. (CP 215) On July 22, 2009, Addink provide a response. Regarding the Enterprise Ridge parcel, he indicated that a well for water would be needed, that there was power to the lot, and that septic perk has been approved. (CP 215) These representations are accurate for parcel 1512040, the parcel that Willard walked.(CP 215) They are not accurate for the parcel Addink actually transferred to Willard, parcel 1512030. (CP 215, 262)

On July 22, 2009, Addink faxed Willard a letter prepared by Kevin Hildebrandt, a Real Estate Appraiser. (CP 215, 264) Mr. Hildebrandt's letter is a "Letter of Opinion of Value." (CP 215) He values the Ridgeview Estate lots as premium view lots with stated values of between \$150,000 and \$310,000, or a combined value of between \$600,000 and \$1,200,000.00 for all four lots. (CP 215) He states that this development is one of the nicest in the area due to the amount of improvements such as chip sealed hard surface roads, extra entrances/exits, state of the art water systems for the area, etc. (CP 215,216)

He values the Enterprise Ridge parcel, identified as parcel 1512030, between \$150,000 and \$300,000 and states that if the parcel is subdivided into 4 lots, it would be at the higher end of \$300,000 for a total subdivided value of \$1,200,000.00. (CP 216, 264) He states that there have been several sales in this area, and that parcel has very good view of Lake Roosevelt and surrounding views. He states the parcel is already zoned for 4 lots all of which would have premium views and should be valued at the high end of the value range. (CP 216, 264).

Addink misrepresented to Kevin Hildebrandt the purpose for which the values were going to be used.(CP 373,374) As Mr. Hildebrandt stated in his deposition he was providing values for tax

purposes only, not for the purpose of assessing values for a real estate trade in property, a fact not disclosed to Willard. (CP 373, 374)

On July 24, 2009, Addink sent Willard an email proposing that they show a trade value of \$600,000 for the purpose of reducing the 5.2% transfer cost on the Saba hotel. (CP 216) This value was Addink's suggestion to reduce his tax fees. (CP 216)

On July 24, 2009, Willard responded to this email stating his agreement to the \$600,000 trade, provided the value was acceptable to the Notary who would close the transaction. (CP 216) The Notary is the one who determines acceptable values and compliance with Netherlands Antilles laws. (CP 216) On August 8, 2009, Willard faxed a note to Addink indicating that he is going to get approval from his attorney in Curacao (Hubert Braam) on the value of \$600,000 prior to submitting the deal to the closing agent for closing. (CP 217, 268)

Willard entered the Trade Agreement with Addink on September 4, 2009. (CP 281.) The agreement describes the 20 acre parcel of Enterprise Ridge as "Twenty (20) acres at Enterprise Ridge, as more particularly described in Exhibit E". (CP 274). Exhibit E provides a legal description, but does not include a parcel number. (CP 289). The transactions closed and title transferred on September 8, 2009. (CP 404).

Post- closing facts:

After the transaction closed, Addink put Willard in touch with Joe Horgan, a Realtor (CP 217). Willard hired Horgan to list his three properties in Ridgeview Estates. (CP 217) Horgan recommended that he list lot 4 at \$168,000, lot 80 at \$175,000 and lot 94 at \$170,000. (CP 217).

After the transaction closed, Willard visited both the Ridgeview Estates development and the Enterprise Ridge 20 acre parcel. (CP 217) Willard visited the Enterprise Ridge 20 acre parcel on May 28, 2012. (CP 217) On that date, Willard observed survey markers that divided up the magnificent 20 acre parcel that Willard thought they bought. (CP 218). After further research, Willard learned that Addink did not convey to him the parcel that Addink showed him. Addink and Stan Addink had showed Parcel number 1512040, but Addink conveyed the adjacent Parcel number 1512030. (CP 218) Parcel 1512030 is not flat, and is mostly a severe slope not suitable for building on. (CP 218) Further, it would be cost prohibitive to dig a well because the ground is slate with a low probability of finding water, it does not have electricity to it, and it had not been perked. (CP 218) Parcel 1512040 was flat, had an electrical box on it, had water, and had perked, (CP 218) all of

which had been pointed out to Willard when the property was showed by Addink.

After Willard discovered this fraud on May 28, 2012, he continued to investigate the values of the property that he acquired in the trade and learned that the values were not anywhere close to what was represented to him by Addink through his appraiser Kevin Hildebrandt. (CP 218) Ultimately, Willard hired a Real Estate Appraiser, Bruce Jolicoeur of Valbridge Property Advisors. (CP 218) Mr. Jolicoeur provided an analysis of the values of the Ridgeview Estates lots and both of the Enterprise Ridge properties as of September 2009. (CP 292-366)

Per Mr. Jolicoeur, the Ridgeview Estates lots combined were worth a total of \$108,000. (CP 218, 298). Addink represented they were worth between \$600,000 and \$1,240,000 through the appraisal provided by Mr. Hildebrandt. (CP 218, 264) At the low end, this is a \$492,000 value loss to Willard, and at the high end, it is a \$1,132,000 loss to them. (CP 218)

Further, per Mr. Jolicoeur, the Enterprise Ridge Parcel 1512040 was worth \$125,000 and Parcel 1512030 was worth \$60,000, a \$65,000 difference. (CP 298) Mr. Hildebrandt valued Parcel 1512030 at \$150,000 to \$300,000. (CP 218, 264) The difference in value of Parcel

1512030 between Mr. Jolicoeur's value of \$60,000, and the value range assigned by Mr. Hildebrandt at between \$150,000 and \$300,000 is \$90,000 at the low end and \$240,000.00 at the high end. (\$150,000 - \$60,000 = \$90,000, \$300,000 - \$60,000 = \$240,000.00.) (CP 218) Mr. Jolicoeur states that it would be extremely difficult to build on Parcel 1512030. (CP 347). In total, Willard's total loss is \$582,000 at the low end and \$1,342,000 at the high end. (CP 218)

Facts pertaining to personal property. Under the terms of the Trade Agreement, Addink was required to facilitate the shipping of personal property Willard left on Saba to them in the United States. CP 220,272) The items Addink was to facilitate shipping were listed in Exhibit B to the Trade Agreement. (CP 220, 284-286) Willard left the sum of \$4,000 in the Saba Hotel account for Addink to use to ship the personal property. (CP 13) In facilitating the shipment, Addink enlisted the help of his in-laws, Thomas and Nancy Lilly. (CP 220) The Lillys were at the Hotel between August 3, 2009 and on or about December 14, 2009 to learn the operations of the Hotel. (CP 220) Appellant de Johnson S. did a walk-through with Nancy Lilly advising her of the delicate nature of some of the artwork made of silk, rice paper and water colors. (CP 220) All art work was professionally framed and in good condition. (CP 220)

At Addink's direction, the Lilly's packed up most of the items on Exhibit B and shipped them to the US. (CP 220) When they arrived, the paintings shipped were not in their expensive frames, but were rolled up, which damaged some of them. (CP 220) Further, not all of the items were shipped, but were retained by Addink or the Lillys, who have converted them to their own use. (CP 220-221) Willards have suffered damages to their property in the amount of \$23,392.00. (CP 221).

Willard filed suit on December 21, 2012.(CP1)

IV. Summary of Argument

4.1 *Issue pertaining to Assignment of Error*2.1.1. Willards' causes of action for fraud and misrepresentation against Addink are not barred by the three year statute of limitations under R.C.W. 4.16.080(4) and the "discovery rule" when:

a) Willard made actual discovery of the fraud and misrepresentations on May 28, 2012;

b) Willard could not have discovered the fraud and misrepresentation through the exercise of due diligence as there were no facts or circumstances that would have lead them to discover the fraudulent misrepresentations;

c) Willard cannot be imputed with constructive knowledge of the fraud and misrepresentation because there were no documents in the public record that disclosed the fraudulent facts, and when

d) Willard filed suit on December 21, 2012, within three years of actual discovery.

4.2 Issue pertaining to Assignment of Error 2.1.2. A term in the Real Estate Trade Agreement states that Willard acknowledges and agrees they have had adequate time and opportunity to conduct a due diligence inquiry with respect to the Addink property and its value. It provides that Willard acknowledges and agrees that Willard have independently formed an opinion regarding the value of the Addink Property.

Willards' causes of action for fraud, and misrepresentation, are not waived by this term in the Trade Agreement because Willard could not have voluntarily relinquished a known right, when the fraudulent misrepresentations were not known by Willard at the time of entering the Trade Agreement.

4.3 Issue pertaining to Assignment of Error 2.1.3. Exhibit B of the Real Estate Trade Agreement states that the property listed in Exhibit B will be shipped to WBW at WBW's expense. It

states that Addink will help facilitate packing and arranging for the shipping of WBW's personal property.

There is a genuine issue of material fact in dispute that Addink and Lilly had a duty to pack and ship Willard's personal property, to exercise good faith and reasonable care in the packing and shipping of Willards' personal property, and they had a duty to pack all of Willards' property listed in the Trade Agreement, when

a) Determining what the parties to a contract intended is a question of fact under the "context rule", by i) viewing the contract as a whole, ii) including the subject matter and objective of the contract, iii) all circumstances surrounding its formation, iv) the subsequent acts and conduct of the parties, v) statements made by the parties in preliminary negotiations, vi) and usage of trade and course of dealings;

b) when Addink failed to perform his good faith duty to ensure that Willards property itemized in Exhibit B were properly packed and shipped,

c) when Addink, as a bailee, is liable for the negligent handling of Willard's property until it returned to Willard's possession, and,

d) when Addink failed to pack and ship all of the property listed in Exhibit B.

4.4 *Issue Pertaining to Assignment of Error* 2.2.1 Addink is not entitled to attorney's fees and costs incurred in defending Willards' claims based on fraud, negligent misrepresentation, negligence, conversion, civil conspiracy, and breach of fiduciary duty, when the attorney's fee provision in the real estate trade agreement limits fees to actions to enforce the terms of the agreement.

V. Argument

5.1 Procedural history. Willard filed their complaint on December 21, 2012. Addink filed their Motion for Summary Judgment on September 20, 2016. (CP 32). The Court entered an Order Granting Summary Judgment on October 26, 2017 dismissing all of Willards' claims. (CP 420). Willard filed a Motion for Reconsideration on November 3, 2017 (CP 424). The court entered an Order Denying Motion for Reconsideration on January 5, 2018 (CP 454). Addink filed a Motion for Attorney's fees on November 17, 2017. (Supp CP ____). The Court entered a written decision granting attorney's fees to Addink on March 19, 2018. (Supp CP ____). Willard filed their Notice of Appeal on January 30, 2018 as to the Summary Judgment ruling (CP 456), and their Amended Notice of Appeal on or about April 16, 2018 as to the award of attorney's fees. (Supp CP ____).

5.2 Standard of Review. The Court of Appeals reviews an order for summary judgment *de novo*. *City of Union Gap v. Printing Press Properties, L.L.C.*, 409 P. 3d 239, 248, ¶ 28 (Court of Appeals of Washington, Div. III, 2018). The court determines whether “ ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.’ ” (*Id.* at 249), (quoting, CR 56 (c)). An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Keck v. Collins*, 184 Wn.2d 370, ¶ 29, (2015). Further, the court considers the evidence in the light most favorable to the nonmoving party. *Keck* at 368, ¶ 22.

5.3 Assignment of Error 2.1, Issue 2.1.1 Under R.C.W. 4.16.080(4), Willards’ claims for fraud, and negligent misrepresentation are not barred by the statute of limitations when 1) Willard did not make actual discovery of the fraud and misrepresentations until May 28, 2012, 2) when Willard could not have discovered the fraud and misrepresentation through the exercise of due diligence, 3) when Willard cannot be imputed with constructive knowledge of the fraud and misrepresentation, and 4) when Willard filed suit on December 21, 2012, within three years of actual discovery.

Claims for fraud and misrepresentation are subject to the three year statute of limitations set forth in RCW 4.16.080(4), which reads as follows:

The following actions shall be commenced within three years:

...

(4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. RCW 4.16.080(4),

...

Under *First Maryland Leasecorp v. Rothstein*, 72 Wn. App. 278, 286 (1993), statute of limitations and principles of accrual are the same for negligent misrepresentation and fraud under R.C.W. 4.16.080(4).

There is no dispute that Willard acquired *actual* knowledge that Addink conveyed parcel 030 rather than parcel 040 when Willard visited the property on May 28, 2012 and discovered the parcel had been surveyed since it had been showed to him. (CP 217). The trial court based its decision that Willards claims are barred by the statute of limitations on its finding that Willard could have discovered the fraud because 1) the land was open and easily available for inspection, 2) Willard had constructive notice when the deed was recorded conveying the property, and 3) Willard had an obligation to exercise due diligence to discover the fraud and misrepresentation once it was made by

Addink. (CP 453). Willard disputes this interpretation of the discovery rule as applied to the statute of limitations.

The “discovery rule” defined. The “discovery rule” as embodied in RCW 4.16.080(4), is an exception to the general rule of accrual of the statute of limitations, and has been applied by Washington courts to claims where “injured parties do not, or cannot, know they have been injured.” *Shepard v. Holmes*, 185 Wn. App. 730, 739, ¶ 25 (Div. III, 2014). Where the discovery rule applies, a cause of action accrues when the injured party, through the exercise of due diligence knew or should have known the basis for the cause of action. *Shepard, supra*.

Whether an aggrieved party discovered or could have discovered facts of fraud is a question of fact, and the time at which a party discovered the facts constituting fraud is a material fact. *Young v. Savidge*, 155 Wn.App. 806, 824, ¶ 31 (Div. II, 2010).

As stated in *Young*, “[t]he injured party bears the burden to establish that he did not discover the facts constituting the fraud and that he could not reasonably have discovered them within the statute of limitations period. Mere suspicion of wrong is not discovery of the fraud; the discovery contemplated is of evidentiary facts leading to a belief in the fraud and by which the existence of the fraud may be established. Further, notice that would lead a diligent party to further

inquiry is notice of everything to which such inquiry would lead.

Young, supra at 823.(*emphasis added*).

In other words, whether a party could have discovered the fraud through the exercise of due diligence is determined by whether there were facts or circumstances known by the party that would reasonably lead to further inquiry that would ultimately lead to the discovery of the fraud.

See, Young, supra at 824.

5.3.1 Enterprise Ridge 20 acre parcel. There were no facts or circumstances known by Willard that would have lead them to further inquiry and ultimate discovery that they received Enterprise Ridge parcel 030 instead of parcel 040, which is the one shown to them and described by Addink prior to May 28, 2012.

In the present case, the inquiry is whether Willard had knowledge of facts or circumstances about their acquisition of Enterprise Ridge parcel 030 that should have lead them to further inquiry, and ultimate discovery that they did not receive the parcel they were shown, to wit, Enterprise Ridge parcel 040, and prior to their actual discovery on May 28, 2012.

Willard has been friends with Addink and Stan Addink for 30 years. (CP 210). Willard and Stan Addink have engaged in five construction projects in which Stan Addink was Willard's building. (CP 210). Stan Addink suggested to Willard that he speak with Addink who was developing property in Eastern Washington. (CP 211).

On June 3, 2009, Addink and Stan Addink took Willard on a tour of the Enterprise Ridge development. (CP 212). Addink and Stan Addink showed the magnificent 20 acre parcel with commanding views of Lake Roosevelt. (CP 212). At the time, there were no road signs or survey markers identifying one parcel from the next (CP 212). Addink, Stan Addink, and Willard walked a portion of the 20 acres. (CP 212) Addink and Stan Addink described how a pool and tennis courts could be built on the flat part of the property, with a house being located on the high ground at the northern end of the Parcel that has a 180 degree view of Lake Roosevelt. (CP 212) They further stated that the property could be sub-divided into four (4) buildable lots. (CP 212) There was a fence that separated the Parcel they were showing from the adjacent Parcels to the West. (CP 212) The parcel shown to them was located East of an adjacent parcel on which a log home was being built. (CP 212-213) The Parcel Addink and Stan Addink showed Willard is identified as tax parcel 1512040. (CP 213 and CP 224) Further, Addink and Stan Addink took Willard down to see the log home that was being built next to parcel 1512040. (CP 213 and 224).

Thereafter, negotiations commenced via email. (CP 213). Willards were on the Island of Saba in the Caribbean during the negotiations. (CP 213). On June 18, 2009, Addink emailed Willard that

he is interested in trading property was thinking to trade the 20 acres Willard liked in the Enterprise Ridge development by the big log home. (CP 213, 239). This makes reference to parcel 040, not 030. Willard confirmed his interest in the trade of the 20 acre parcel in Enterprise Ridge near the log home under construction. (CP 214, 241). Willard asked for tax assessment information, but Addink's employee said the tax information is not available, which was not true. (CP 214, 246, 248). On June 26, 2009, Willard asked for the tax information again. (CP 214, 252). On July 7, 2009, Addink sent Willard an email stating that he is getting a market assessment of the Addink properties so Willard can determine if he wants to do the trade. (CP 214).

On July 19, 2009, Willard requested specific information about the Enterprise Ridge parcel. (CP 215). On July 22, 2009, Addink advised Willard that the Enterprise Ridge parcel would need a well for water, has power to the parcel and was septic perk approved. (CP 215). These are characteristics of the parcel shown to Willard, not the parcel sold to Willard. (CP 215, 262).

On July 22, 2009, Addink faxes Willard the "Letter of Opinion of Value" generated by Kevin Hildebrandt, a Real Estate Appraiser. (CP 215, 264). He identified the Enterprise Ridge parcel 1512030, and indicated that the parcel can be subdivided into 4 lots.(CP 216, 264)

On September 4, 2009, Willard and Addink entered the Real Estate Trade Agreement (CP 281). The agreement describes the 20 acre parcel of Enterprise Ridge as “Twenty (20) acres at Enterprise Ridge, as more particularly described in Exhibit E”. (CP 274). Exhibit E provides a legal description, but does not include a parcel number. (CP 289). The transaction closed and title was transferred on September 8, 2009. (CP 404).

After title was transferred, Willard visited the Enterprise Ridge property. (CP 217). It was not until the visit dated May 28, 2012, that Willard observed survey markers dividing up the 20 acre parcel he believed he traded for. (CP 217). It was at this point he learned that Addink did not convey the parcel by the big log home, but rather, the next parcel over that is mostly a severe slope. (CP 218).

Under these circumstances, between the date Addink showed Willard the Enterprise Ridge property on June 3, 2009 and the date Willard saw his parcel surveyed on May 28, 2012, Willard could not have discovered the fraud through the exercise of due diligence because there were no facts or circumstances that would reasonably lead Willard to make a further inquiry. During this time, Willard had no reason to even suspect that he did not receive the parcel by the big log home that was shown to him by Addink and Stan Addink.

The trial Court's finding that simply because the Enterprise Ridge property was "open and easily available for inspection", is not a fact that would lead Willard to suspect something was wrong and cause him to make further inquiry. When Willard went to the Enterprise Ridge parcel on May 28, 2012, and saw the parcel had been surveyed, he exercised due diligence, determined that he did not receive the parcel that was shown to him, and filed suit within three years of that date. Therefore, the statute of limitations began to run on March 28, 2012. Since Willard filed suit on December 28, 2012, they filed within the three year period.

5.3.2 Ridgeview Estate and Enterprise Ridge values. There were no facts or circumstances known by Willard that would have lead them to further inquiry, and ultimate discovery that the values of the Ridgeview Estate and Enterprise Ridge properties represented by Addink were not true.

Willard alleged the causes of action of fraud and misrepresentation against Addink, regarding the values of the Ridgeview Estate lots and the Enterprise Ridge 20 acre parcel. (CP 12-13) The question is whether there were any facts or circumstances about the misrepresented values that would have lead Willard to further inquiry about the values, and ultimate discovery that the values were not as represented by Addink.

Willard and Addink have been family friends for years. (CP 210). Addink took Willard on a tour of the Ridgeview Estates and Enterprise

Ridge development on June 3, 2009. (CP 212, 213) Addink provided literature to Willard advertising the lots for between \$199,950 and \$289,950 each. (CP 213, 226). Thereafter, negotiations took place while Willard was on the Island of Saba. (CP 213) Willard asked for tax assessment documents, but did not receive them. (CP 214, 246, 248).

On June 26, 2009 Addink advised Willard that Addink was getting an appraiser to assess the high and low range of comparable properties to give some clarity on the trade values. (CP 214, 250) On June 26, 2009 Willard advised Addink that Willard wanted tax information and the appraisal in order to determine the fairness of the trade. (CP 214, 252) On July 7, 2009 Addink advised Willard that Addink had paid \$1,700 to get a market assessment of the properties to “determine if you (Willard) want to do the trade”. (CP 214). Addink further indicates that Willard can use the assessment to determine if he wants to do the trade. (CP 214) Addink represents that the total Addink property should value at between 1.6 million and 2.4 million dollars. (CP 214, 254) Willard requested the tax information again on July 8, 2009. (CP 215, 256) On July 16, 2009, Addink advised Willard that he was chasing down the appraiser and will “try to get his assessment finished for you.” (CP 215, 260)

On July 22, 2009, Addink faxed Willard a letter prepared by Kevin Hildebrandt, a Real Estate Appraiser (CP 215, 264) Mr. Hildebrandt’s

Letter of Opinion valued the Ridgeview Estate lots at between \$150,000 and \$310,000. (CP 215) He valued the Enterprise Ridge 20 acre parcel 1512030 at between \$150,000 and \$300,000, but if subdivided, the value could be upwards of \$1,200,000.00 (CP 216, 264)

Addink misrepresented to Hildebrandt the purpose for the appraisal. Addink indicated he needed the values for tax purposes, not to use in a real estate trade agreement. (CP 373,374)

Willard and Addink entered the trade agreement on September 4, 2009, and the transactions closed on September 8, 2009 (CP 281, 404). After closing, Willard listed his Ridgeview Estate lots with Joe Horgan, Realtor. (CP 217) Horgan recommended listing lot 4 at \$168,000, lot 80 at \$175,000, and lot 94 at \$170,000. (CP 217)

After Willard discovered the fraud involving the Enterprise Ridge 20 acre parcel on May 28, 2012, he continued to look into the values of all of the properties, including Ridgeview Estates. (CP 218) he ultimately learned that the values reported in Hildebrandt's appraisal were not anywhere close to the true values. (CP 218) Willard hired real estate appraiser Bruce Jolicoeur (CP 218). Mr. Jolicoeur valued the Ridgeview Estate lots at a combined value of \$108,000. (CP 218, 298) He valued the Enterprise Ridge parcel 1512040 at \$125,000 and parcel 1512030 at \$60,000.00.

The inquiry is whether Willard had knowledge of facts or circumstances about the values of Ridgeview Estate and Enterprise Ridge properties between the date July 22, 2009 and May 28, 2012 that should have lead them to further inquiry, and ultimate discovery that the values provided in the Hildebrandt letter were fraudulent misrepresentations.

Under the facts stated, there are no facts that would have led Willard to believe the values represented were inaccurate.

5.3.3 The mere recording of a deed does not provide constructive notice of fraud or misrepresentation when the conveyance deed does not contain any facts that would disclose the fraudulent facts.

Judge John D. Knodell ruled that “. . . because the land in question was open and easily available for inspection (and indeed the Plaintiffs represented in their written agreement with the Defendants that they had inspected it) and because the deed conveying the land became a matter of public record at the time it was recorded, that all of the elements of the Plaintiffs’ claims relating to the land transfer became easily discoverable when the deeds were recorded and the Plaintiffs had constructive notice, that is, notice as a matter of law, at that time of their contents.” (CP 452-453) The court cited *Shepard v. Holmes*, 185 Wn. App. 730, 742-43 (2014) in support of its decision. (CP 453).

In *Shepard*, the court stated that in applying the discovery rule, actual knowledge of fraud will be inferred for purposes of the statute if the aggrieved party, by the exercise of due diligence, could have discovered it. *Shepard* at 739-740, citing, *Strong v. Clark*, 56 Wash.2d 230 (1960). The court stated that one instance in which actual discovery will be inferred is where the facts constituting the fraud were a matter of public record, *Shepard* at 740, citing, *Davis v. Rogers*, 128 Wash. 231 (1924). The *Davis* court stated “where facts constituting the fraudulent acts were matters of public record, and thus ‘easily ascertainable’, the public record serves as ‘constructive notice to all the world of its contents’.” *Davis, supra*.

Shepard, and its antecedent cases are distinguishable from the present case. In *Shepard*, the defendant Seller told plaintiff Shepard that the parcel being sold could be sold as separate lots. However, there was a consolidation deed in the public record prior to closing that would have told the plaintiff her property was consolidated into one property and could not be sold as separate lots. The consolidation deed was notice to Shepard that defendant Seller’s representation was wrong.

In *Strong*, a bankruptcy trustee sued to invalidate a deed as a fraudulent conveyance on the basis that the amount of consideration

paid to the debtor was inadequate. The court ruled that the bankruptcy trustee had constructive knowledge of the amount of the consideration paid based on an option to purchase that was in the public record. Since the action was filed more than three years after the public record was recorded, the action was dismissed. *Strong* at 233.

In *Davis*, defendant Rogers claimed he could sell plaintiff Davis' property to a third-party, Weatherwax for \$4000.00. Davis sold the property to Rogers for \$4,000. Rogers sold to Weatherwax for \$6,500.00. Davis sued Rogers for the difference of \$2,500.00. The court dismissed the case as the sale price between Rogers and Weatherwax was of public record, and Davis had constructive knowledge of that fact. The court determined that the statute of limitations accrued as of the date of the recording, and Davis filed beyond the date of the statute of limitations.

In each of these cases, the facts constituting the fraud were a matter of public record.

Based on *Shepard*, the question in the present case is whether "the facts constituting the fraud were a matter of public record" so as to give Willard constructive knowledge of the falsity of the facts. Specifically, did the contents of the Deeds conveying the Ridgeview Estate lots and Enterprise Ridge 20 acre parcel, on their face, tell

Willard that the values represented by Addink were false, and that Addink did not convey the parcel “by the log home”.

Enterprise Ridge fraud. Willard alleges that Addink represented the following facts that are false: 1) that Addink would trade the parcel “by the big log home”(CP 213, 239, 241), 2) that the parcel can be divided into 4 lots (CP 212), 3) that a well could be dug on the parcel (CP 215), 4) that there was power to the parcel (CP 215), and 5) that the parcel had perked (CP 215). The Trade Agreement includes a legal description in Exhibit E with no parcel number. (CP 67). The Statutory Warranty Deed was recorded using the same legal description as in Exhibit E to the Trade Agreement. (CP 449).

The Statutory Warranty Deed, on its face, would not disclose to a reasonable person that Addink traded a piece of property other than the one shown to Willard, it does not reveal that the parcel can't be divided into 4 lots, that a well can't be dug, that there is no power to the parcel and that the parcel had not perked.

In short, unlike *Strong*, *Shepherd* and *Davis* there is no document of record that would disclose the falsity of the representations made by Addink to Willard. Therefore, constructive knowledge of the false facts cannot be imputed to Willard for statute of

limitations purposes, and the statute of limitations was not triggered by the recording of the Statutory Warranty Deed.

Misrepresentations as to value: Willard's complaint alleges the following facts that form the basis for his cause of action of fraud regarding the valuation of the Ridgeview Estates and Enterprise View properties: 1) Addink represented that the values of the Ridgeview Estates lots and Enterprise View 20 acre parcel were commensurate in value to the Willard's of Saba Hotel in the 1.7 million dollar range (CP 214, 254), 2) Addink provided an inaccurate appraisal by Kevin Hildebrandt, a licensed real estate appraiser, that supported Addink's representation (CP 215, 264), and 3) Addink did not provide tax assessment values Willard requested despite the fact that they existed. (CP 214, 215, 256)

At the time of closing, or any time subsequent to closing, there was no document of record, that had Willard looked, would have revealed that Addink had misrepresented the values of the Ridgeview Estates and Enterprise View properties. Therefore, the discovery rule is not triggered by any document of record.

To conclude, since there is no document of record that gave Willard constructive knowledge of the facts that form the basis for his cause of action for fraud, the statute of limitations did not start at the

time conveyance deeds were recorded. It started on May 28, 2012, when Willard discovered the Enterprise Ridge property surveyed. Since Willard filed his lawsuit on December 21, 2012, he filed within the three years of May 28, 2012, within the statute of limitations period.

Conclusion regarding statute of limitations. In sum, since there was no fact or circumstance that would have lead Willard to make a further inquiry that he did not receive the parcel at Enterprise Ridge represented by Addink, and since there were no facts or circumstances that would have lead Willard to make a further inquiry regarding the values of the Enterprise Ridge and Ridgeview Estates properties, Willard could not have discovered the fraudulent facts with the exercise of due diligence. Willard's claims are not barred by the statute of limitations.

Further, since the deeds conveying the properties did not disclose the fraudulent facts, actual knowledge cannot be imputed to Willard and their claims are not barred by the statute of limitations.

5.4. *Assignment of Error 2.1, Issue 2.1.2* Did Willard waive their right to make a claim for damages based on fraud and misrepresentation as a matter of law based on the terms of the Real Estate Trade Agreement?

Willards have made claims of fraud and misrepresentation against Addink alleging Addink conveyed Willard a parcel in Enterprise Ridge different than what he showed and described to Willard, and that the values of the Enterprise Ridge and Ridgeview Estate lots were worth a lot more than they really were.

Addink filed a motion for Summary Judgment to dismiss these claims asserting that Willard “waived” their rights to these causes of action by the language set forth in the Real Estate Trade Agreement. (CP 39). Specifically, the defendants reference paragraph 2.5, which states in pertinent part:

“WBW (Brad Willard) hereby acknowledges and agrees that they have had adequate time and opportunity to conduct a due diligence inquiry with respect to the Addink Property and its value. WBW further acknowledges and agrees that they have independently formed an opinion regarding the value of the Addink Property.”

(CP 41-42, 52).

The doctrine of waiver is aptly explained in *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wash. 2d 398, 409–10, (2011) as follows:

The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled. A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement or be inferred from circumstances indicating an

intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego [sic] some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them.

Bainbridge Island Police Guild, supra, at 409–10, (2011).

Under the terms of the paragraph 2.5 of the Real Estate Trade Agreement, Willard did not make a choice to forego any cause of action for fraud, or misrepresentation perpetrated by Addink. Willard could not have even known of the existence of their right to pursue claims of fraud or misrepresentation because at the time the Trade Agreement was signed, Willard did not know of the fraud and misrepresentation (CP 218). Specifically, Willard did not know the appraisal letter valuing the Addink property written by Kevin Hildebrandt was unsupported by real estate data, they did not know that Hildebrandt's letter was produced for "tax purposes" as opposed for use in a real estate trade agreement (CP 373, 374), they did not know Addink conveyed a different parcel than what was shown to them (CP 218), and they did not know the characteristics of the Enterprise View 20 acre parcel represented by Addink were false (CP 218). Since the right to pursue claims for fraud and misrepresentation were not known, Willard could not waive the right to pursue those claims.

In paragraph 2.5 of the Trade Agreement, Willard merely acknowledged that they had the opportunity to conduct a due diligent evaluation into the Addink property and values, and that they formed their own opinion as to the value. This paragraph does not say that Willard are waiving their right to rely on representations made by Addink as to the value, characteristics of property, and identification of property.

If this paragraph was intended to be a waiver of any claims based on fraud or misrepresentation, it could have been drafted to say just that. It was not.

Therefore, while there is no genuine issue of material fact in dispute on this issue, Addink is not entitled to a judgment as a matter of law, as Willard did not waive their right to pursue claims of fraud and misrepresentation by the terms of the Trade Agreement.

5.5 Assignment of Error 2.1, Issue 2.1.3 Is there a genuine issue of material fact in dispute that Addink had a duty under the terms of the Trade Agreement to exercise good faith and reasonable care to facilitate the packing and shipping of Willards' property, and to ship all personal property listed in Exhibit B to the Trade Agreement?

Addink sought dismissal of Willard's cause of action for breach of contract, negligence, and conversion on the basis that the Real Estate Trade agreement does not confer a duty on him to pack and facilitate the personal property listed in Exhibit B to the Trade Agreement. (CP 45).

Article II paragraph 2.2 of the Real Estate Trade Agreement describes property that will be conveyed from WBW (Brad Willard) to Addink (Ben Addink). (CP 50). Sub paragraph C of paragraph 2.2 of the Trade Agreement states that the items of Exhibit B *will be* shipped to WBW at WBW's expense. ADDINK will help *facilitate packing and arranging for the shipping* of WBW's personal property." (*Emphasis added*). (CP 50).

Pages two and three of Exhibit B itemize personal property that needed to be packed and then shipped. (CP 62-64). On page two of Exhibit B it states: "[The] List below will be shipped with the help of Ben Addink/or representative coordinating the shipment with pre-arranged company on a later date."(CP 63).

To determine what Addink's duty is under the contract, the Court has to interpret the contract term to ascertain the intent of the parties.

5.5.1 Contract interpretation. The touchstone of contract interpretation is the parties' intent. *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wash. 2d 656, 674, (1996). Every contract in Washington is interpreted to ascertain the intent of the parties under the "context rule". *Tjart v. Smith Barney, Inc.*, 107 Wash. App. 885, 895 (2001). Determining what the parties to a contract intended is generally

a question of fact. *Columbia Asset Recovery Grp., LLC v. Kelly*, 177 Wash. App. 475, 484, (2013).

The “context rule” is the framework for interpreting written contract language which involves determining the intent of the contracting parties by a) viewing the contract as a whole, b) including the subject matter and objective of the contract, c) all circumstances surrounding its formation, d) the subsequent acts and conduct of the parties, e) statements made by the parties in preliminary negotiations, f) and usage of trade and course of dealings. The application of the context rule leads the courts to discover the intent of the parties based on their real meeting of the minds, as opposed to insufficient written expression of their intent. Context may not be used, however, to contradict, modify or add to the written terms of an agreement. Nor may context be used for the purpose of importing into writing an intention not expressed therein. *Tjart v. Smith Barney, Inc.*, 107 Wash. App. 885, 895–96 (2001), citing *Berg v. Hudesman*, 115 Wash.2d 657 (1990).

In the present case, Addink has not stated what his interpretation of his obligation is. He simply states he has no duty to do anything regarding the personal property. (CP 45,46). Willard contends that the parties intended that Addink would pack and ship the personal

property to Willard. (CP 220). The intention of the parties is a “factual” inquiry, *Columbia Asset Recovery Grp., LLC, supra*, and the fact that there is a dispute as to the meaning of the language, precludes summary judgment on this issue.

At trial, the fact finder will examine the factors set forth in *Berg* to determine the meaning of the terms set forth in Exhibit B as it pertains to Addink’s obligation to pack and ship Willard’s personal property.

For example, the fact finder will look at the fact that Stan Addink, Addink, and Willard had specific conversations about packing the property. (CP 220). The Court will look at the fact that Corazon de Johnson S. walked the Willard’s of Saba Hotel with defendants and pointed out specific property to be shipped. (CP 220). The Court will look at the fact that Willards were leaving the Island of Saba and the Addinks were taking possession of the Hotel on Saba. (CP 220). Willards would not be there to pack and ship the remaining items of personal property, and the Addinks would be. (CP 220) The Court will look at the fact that Willard and the Addinks have been friends for 30+ years and this is the sort of thing that one would expect of friends. (CP 209). The Court will look at the fact that Addink undertook to do exactly what Willard says he should have done; pack and ship the

property. (CP 220). Addink failed to exercise the duty of care required in executing his obligation under the contract, which caused damage to Willard's property.

Further, Willard's claim for damages is not limited to damages caused by Addink and Lilly, he also has a claim for damages for some of the property items on pages two and three of Exhibit B that were never shipped; Willards' cause of action for conversion.

In sum, the contract language, and the contract as a whole, needs to be interpreted by a trier of fact. This being a factual inquiry precludes summary judgment.

Once it is determined that Addink had a duty, the next question is whether there is a genuine issue of material fact in dispute that Addink failed to exercise good faith and was negligent in caring for Willards' property.

5.5.2 Duty of good faith. The duty of good faith and fair dealing is implied in every contract. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Carlile V. Harbour Homes, Inc.*, 147 Wash.App. 193, 215 (2008). The duty requires only that the parties perform in good faith the obligations imposed by their agreement. *Id.*

In the present case, the Real Estate Trade Agreement creates a specific duty on Addink to facilitate the packing and shipping of Willard's property that is listed in Exhibit B. (CP 50, 62-64). As such, he has a duty of good faith to carry out this contractual obligation in good faith. Willard contends that Addink breached his duty of good faith under the terms of the contract by not ensuring that Willards' property was shipped in the same condition as it existed when Addink took possession of Willards' property, i.e. art work in the valuable frames that would protect the work. (CP 220). Further, Willard contends that Addink breached his duty of good faith by not facilitating the packing and shipping of the property in a manner that would not damage the property in the process. Finally, he breached his duty of good faith by not sending all the property listed in Exhibit B. (CP 220-221).

5.5.3 Bailment. The Real Estate Trade Agreement created a bailment for the mutual benefit of the parties. A bailment for mutual benefit arises when both parties to the contract receive a benefit flowing from the bailment. *Eifler v. Shurgard Capital Mgmt. Corp.*, 71 Wash. App. 684, 690, 861 P.2d 1071, 1075-76 (1993). The benefit to the bailee need not be in the form of cash. Rather, the benefit may derive from a bailment [which] is a mere incident to the performance of services for which the bailee receives compensation or to the conduct of business from

which the bailee derives profit, or where the bailment **1076 is motivated by the bailor's desire to promote a sale.... *American Nursery Products, Inc. v Indian Wells Orchards*, 115 Wash.2d 217, 232 (1990) at 232; *see also*, *White v. Burke*, 31 Wash.2d 573, 583, 197 P.2d 1008 (1948). A bailee is liable for the negligent handling of the property until it returns to the possession of the bailor. *Brown v. Wells*, 66 Wash. 2d 522, 524, 403 P.2d 846, 847 (1965).

In the present case, defendant Addink, and defendants Lilly were negligent in removing expensive artwork from their frames, rolling them up, and improperly packing them for shipment, which caused damage to the property. (CP 220, 221).

For the purposes of this motion, there are genuine issues of material fact in dispute regarding defendants Addink and Lilly's negligence in handling of Willards' personal property.

5.5.4 Conversion. Willard alleges that Addink and Lilly converted Willards' property to their own use. (CP 220, 221). Addink and Lilly deny that they retained personal property belonging to Willard. Willards' claims are based on the fact that they did not receive all property listed in Exhibit B to the Real Estate Trade Agreement, which means that the property is still in the possession of either Addink or Lilly.(CP 2210, 221). There is a genuine issue of material fact in dispute, regarding possession

of Willard's property, which precludes summary judgment on the issue of conversion.

5.5.5 Summary. In sum, since there is a genuine issue of material fact in dispute that Addink had a duty to pack and ship Willards' property under Exhibit B to the Trade Agreement, that Addink brached his duty of good faith to ensure that all of Willard's property was packed and shipped, that Addink was negligent in his facilitation of packing and shipping Willard's property, which caused damage to Willard's property, and that Addink did not pack and ship all of Willards' personal property listed in Exhibit B, summary judgment should be denied.

5.6 Assignment of Error 2.2, Issue 2.2.1 Addink is not entitled to attorney's fees and costs incurred in defending Willards' claims based on fraud, negligent misrepresentation, negligence, conversion, civil conspiracy, and breach of fiduciary duty, when the attorney's fee provision in the real estate trade agreement limits fees to actions to enforce the terms of the agreement.

The trial court awarded Addink attorney's fees in the amount of \$25,000.00. (Supp CP ____). The court ruled that Willards' claims arose out of the contract, and therefore the attorney's fee provision in the Trade Agreement entitled Addink to attorney's fees. (Supp CP ____).

The standard of review for an award of attorney's fees involves a two-step process. *State v. Mandatory Poster Agency, Inc.*, 199 Wn. App. 506, 531–32, *review denied*, 189 Wash. 2d 1021, 404 P.3d 496 (2017).

First, whether a statute, contract, or equitable theory authorizes the award is a matter of law, which the Court reviews *de novo*. *Id.* Second, if there is such authority, the amount of the award is subject to the abuse of discretion standard. *Id.* In the present case, Willard has appealed only the issue of whether the contract authorizes the award as a matter of law, which is a *de novo* review.

The vast majority of Willards' causes of action involve allegations of fraud, negligent misrepresentation, negligence, conversion, civil conspiracy, and breach of fiduciary duty.

The Real Estate Trade Agreement attorney's fee provision on which defendants rely for an attorney fee and cost award is set forth in paragraph 8.12 of the Real Estate Agreement and reads as follows:

“8.12 Attorney Fees: Should any Party hereto engage an attorney to *enforce any of its rights hereunder*, the prevailing Party shall, in addition to all other rights, be entitled to recover its attorney fees, costs and disbursements, including fees of experts, before, during and at trial, and on appeal if any.” (*Emphasis added*). (CP 58).

The right of parties to contract to seek attorney's fees incurred in pursuing or defending an action pertaining to the enforcement of the terms of a contract is confirmed in R.C.W. 4.84.330, which states as follows:

“In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.”

...

R.C.W. 4.84.330. (emphasis added).

Under the specific term of the Real Estate Trade Agreement, paragraph 8.12, a party is entitled to attorney's fees only when a party seeks to *enforce any of its rights* under the contract. That is, if a party brings a breach of contract case, and prevails, they are entitled to attorney's fees. Washington Courts support this view.

A prevailing party may recover attorney's fees under a contractual fee-shifting provision only if a party brings a “claim on the contract,” that is, only if a party seeks to recover under a specific contractual provision. *Boguch v. Landover Corp.*, 153 Wash. App.

595,615 (2009)(emphasis added). An action is on a contract for purposes of a contractual attorney fee provision if the action arose out of the contract and if the contract is central to the dispute. *Id.* Stated differently, an action sounds in contract when the act complained of is a breach of a specific term of the contract, without reference to the legal duties imposed by law on that relationship. *Id.* at 616., citing, *G.W. Construction Corporation v. Professional Service Industries, Inc.*, 70 Wash. App. 360, 364 (1993)(emphasis added). In *G.W. Const.*, the Court recognized that a claim that a party failed to fulfill an obligation that he or she specifically agreed to perform would constitute an action on the contract. *G.W. Const.* at 366, *Bough* at 616. In contrast, a party is not entitled to attorney's fees for an equity cause of action that does not pertain to the contract itself. *Nelson v. McGoldrick*, 127 Wash.2d. 124 (1995).

In the present case, the thrust of plaintiffs' causes of action were for fraud, negligent misrepresentation, negligence, civil conspiracy and breach of fiduciary duty. None of these causes of action state that defendants did not do something they contracted to do in the Real Estate Trade Agreement. In these causes of action, plaintiffs did not seek to *enforce any of their rights* created by the contract. Therefore, these causes of action do not sound in contract and the attorney's fee provision

in the Real Estate Contract does not entitle defendants to attorney's fees and costs.

VI. Conclusion

Willard requests the Court of Appeals to reverse the Trial Court's grant of Summary Judgment and remand the case back to the Trial Court for trial on the merits.

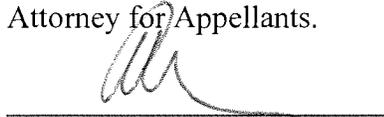
Willard requests the Court of Appeals to reverse the Trial Court's grant of attorney's fees to Addink.

Dated this 12 date of April, 2018.

Respectfully submitted,



Dan Platter, WSBA 19174
Attorney for Appellants.



Antoni H. Froehling, WSBA 8271
Attorney for Appellants.

CERTIFICATION OF SERVICE

I hereby certify that on the 12 day of April, 2018, at Puyallup Washington, I deposited in the United States Mail by first class mail and/or placed with Legal Messengers a copy of the document to which this certificate is attached for delivery to Paul Arthur Spencer, Counsel of record for Respondents at the address of 929 108th Ave. NE Suite 1200, Bellevue WA 98004-4787.

A handwritten signature in black ink, appearing to read "Dan Platter", with a long horizontal flourish extending to the right.

Dan Platter, WSBA 19174
Attorney for Appellants