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Division III
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NO. 358615

IN THE COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

WILLIAM BRADLEY WILLARD, JR., CORAZON JOHNSON and COBRA REAL ESTATE, LLC,

Appellants,

BENJAMIN ADDINK and JADA ADDINK et al.

Respondents.

BRIEF OF RESPONDENTS

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I. COUNTERSTATEMENT OF THE CASE

A. Background. Appellant William Bradley Willard Jr. ("Appellant Willard") is a real estate developer. Respondent Stan Addink is a retired contractor. Since the early 1980's Respondent Stan Addink had done contracting work for Appellant Willard. CP 143-144 In the early 1990's Appellant Willard approached Respondent Stan Addink about building a hotel on an island known as Saba in the Netherlands Antilles. Thereafter, in 1993-1994 Respondent Stan Addink built a hotel for Appellant Willard known as the "Willard's of Saba Hotel" on Saba Island in the Netherlands Antilles.CP 145-146 (hereinafter the "Hotel"). The Hotel was completed in February of 1994. Appellant Willard owned the Hotel from 1994 until he exchanged it for property in Eastern Washington owned by Respondent Ben Addink in September of 2009 under a Real Estate Trade Agreement. CP 49-67; CP 86-104.

The Hotel had seven guest rooms when constructed and later expanded to nine guest rooms and was built on a cliff on the small island of Saba. CP 147. Saba island is in the Caribbean and in total is less than 5.5 square miles. The total population of the island is approximately 2,000 people. The Hotel sits on a site that is less than two acres in size and has tennis Courts and a pool. CP 170-171

For roughly 15 years the Hotel was run by Appellant Willard and generated no net income. CP148,149,152. In fact, when the Trade Agreement was closed in September of 2009, over $300,000 of losses were available for future write-offs according to Appellant Willard. CP 149 Sometime in 2004, Appellant Willard decided he wanted to sell the Hotel. CP 150-151. Over five years later the trade transaction at issue occurred in September of 2009. The Hotel had survived eleven hurricanes in sixteen years, including four major hurricanes. CP 150. The risk of damage from the adverse weather was so great that Appellant Willard lost the ability to insure the Hotel in 1999. CP 150.

Respondent Ben Addink is Respondent Stan Addink's son. Respondent Ben Addink was in the business of real estate development. In roughly 2007-2008 Respondent Addink acquired some larger vacant tracks of land located in Lincoln and Stevens County Washington. Thereafter, Respondent Addink developed the infra structure of the land installing roads and some utilities and then subdivided them into saleable tracks. The two developments at issue were known as Ridgeview Estates and Enterprise Ridge. Ridgeview Estates was a development that included approximately 95 lots located in Lincoln County Washington. CP 172 Enterprise Ridge was a development of 20 acre lots located in Stevens County Washington. CP 172.

B. The Transaction. Sometime in the spring of 2009, Appellant Willard discussed his desire to get rid of the Hotel with Respondent Stan Addink who mentioned it to his son Ben. CP 153-155. Thereafter, informal discussions took place between Appellant Willard and Respondent Addink. Appellant Willard told Respondent Addink that he wanted to sell the Hotel for many reasons including the unprofitability of the Hotel. CP 171. Appellant Willard had previously explored many options for trying to sell the Hotel without success.

In June of 2009, Appellant Willard and Appellant Corazon Johnson traveled to Eastern Washington and met Respondents Ben and Stan Addink. The purpose of the trip was for the group to tour the Ridgeview Estates and Enterprise Ridge developments, as well as a home the Addinks owned in Keller Ferry. CP 172-173 The group traveled from Ephrata to the developments and spent the day together. Appellant Willard testified that he was not really looking at any parcels in particular during the tour just trying to get oriented. CP 160-161. Appellant Willard also testified that (after that visit) he never returned to Eastern Washington to look at either of the developments prior to executing the Trade Agreement. CP 157 and CP 162.

Informal discussion between Appellant Willard and Respondent Ben Addink continued into July of 2009 when specific lots in the

Ridgeview Estates and Enterprise Ridge developments were identified. CP 173. By the end of July, the parties had identified which parcels would be included in the trade exchange and both parties clearly understood that they would need to complete their own due diligence in the transaction. CP 106 and CP 108. Appellant Willard's email of July 25th 2009 states:

> We agree with your "Standard Disclosure" essentially "Caveat Emporus", I believe, or buyer beware. CP 108

Thereafter, in early August of 2009, Respondents Addink took a trip to the Hotel to look at the Hotel's condition and effectively conduct their due diligence. CP 174. The Hotel needed significant work and the Addinks were aware that it had been losing money since inception. CP 174. Nonetheless, the Respondents were willing to put some additional dollars into the Hotel and attempt to revitalize it. Shortly thereafter, the parties' attorneys drafted the Real Estate Trade Agreement and closed on the Agreement September 8th 2009.[1] Following closing, over the next six months, Respondent Ben Addink put approximately $250,000 into the Hotel in repairs and refurbishing to attempt to make it more desirable as a destination. CP 177.

Over three years later, on December 21, 2012 Appellants' filed the instant action alleging multiple causes of action stemming almost entirely

[1] Appellants were represented by attorney Dan Platter in the negotiation and drafting of the Trade Agreement, their counsel in this litigation.

from purported misrepresentations made by Respondents Ben and Stan Addink as to the characteristics and value of the property Ben Addink had exchanged for the Hotel. CP 1-20.

C. The litigation. Appellants' Complaint is dated December 20th 2012. CP 20. The Complaint lists many purportedly actionable facts and causes of action that fall into two categories.

1. Pre Closing Allegations. Appellants' allege that that misrepresentations were made to Mr. Willard and Ms. Corazon in correspondence and during the aforementioned site visit in June of 2009 when Willard, Ms. Johnson, and Respondents Ben and Stan Addink toured the two developments. The representations allegedly included the following:

> Ben Addink and Stan Addink represented that the parcel [at Enterprise Ridge] was ideal for subdividing into four building lots with a flat area for tennis courts and a prime location on the rocky point for a home with a 180 degree view of Lake Roosevelt.
> CP 8-9

Appellants' contend in the lawsuit that they were shown by Respondents a different parcel then was conveyed under the Trade Agreement. CP 10. Appellants' contend that the parcel that was purchased was far less desirable and worth less than the parcel they thought they were buying and that because of that they were entitled to damages or rescission of the

Trade Agreement CP 11. Respondents' deny misrepresenting the parcel that was being purchased. CP 21-31.

Other misrepresentations Appellants' claimed to have been made included: that a domestic well for water would be required; there was already power to the parcel; and the parcel had septic perk approval. CP 9. None of the forgoing representations have been shown to be false. The parcel at issue would require a well, has power located immediately adjacent to the lot, and as required by Stevens County in its subdivision process had perked. CP 172.

Appellants' have also alleged that Respondents Ben Addink and Kevin Hildebrandt purportedly conspired to produce an opinion of value for the property being traded that damaged Appellants'. CP 17. In other words, Appellants' contention is that the value of the lots conveyed was far less than what was represented or expected. Again, Respondents' deny these allegations. CP 29.

2. Post Closing Allegations. Appellants' complaint also includes allegations of breach of contract misrepresentation and/or fraud related to actions that purportedly were taken by Respondents <u>after</u> the Trade Agreement was closed. For example, Appellants' alleged that Respondents' caused covenants to be amended that de-valued their property after closing. CP 13. Respondents deny that any of the post-

closing actions either were intended to or caused any devaluation of the property included in the Trade Agreement nor did they in any way breach any provisions of the Trade Agreement. CP 175. Moreover, Appellants' have offered no support for these allegations. Perhaps as importantly, there are no provisions in the Trade Agreement that pertain to this claim.

Appellants Brad Willard further asserted that Defendant Ben Addink breached the Trade Agreement by failing to transfer Lot#31 to him. CP 13. However, the allegation was baseless at the time of filing because Respondent Addink had in fact conveyed Lot #31 to Willard. CP 175.

A third post-closing allegation relates to purported damage to personal property that was allegedly sustained by Appellants'. Following closing, Appellants' requested Respondents to "facilitate" the shipment of a number of items of personal property that they [Appellants] had left at the Hotel. CP 50-51. The bulk of the personal items were packed by Appellants' themselves. CP166. The balance of the personal property was packed and received by Appellants' in February 2, 2010. Almost two years later Appellants' notified Ben Addink that some of the personal items had been damaged and/or not received. CP 109-118.

A year to the day later, for the first time [over three years after the transaction had closed], Appellants' notified Respondents that they

claimed to have been defrauded into entering the Trade Agreement when they filed the Complaint in this matter. CP 4-20. Respondents' have denied any wrongdoing and brought their motion to dismiss all of Appellants' claims.

3. Procedural Posture. Respondents filed for Summary Judgment of Dismissal on September 20, 2016. CP 32-133. The matter was scheduled for argument on June 15, 2017. Following oral argument, the Court requested additional briefing with respect to the application of *Shepard v. Holmes*, 185 Wash. App. 730, 345 P.3d 786 (2014). The matter was scheduled for additional argument on August 10, 2017. Thereafter, on October 16, 2017 the Court issued a letter ruling that was filed on October 17, 2017.CP 417-419. Appellants moved for reconsideration which was denied on December 20, 2017. CP 452-453. Respondents moved for an award of fees and costs and the matter was argued before the Court on December 1, 2017. On March 16, 2018 the Court awarded Respondents $25,000 in attorney's fees only. CP 520-522. The letter ruling was filed on March 19th 2018. Thereafter, the Court took argument on the Order on Summary Judgment and the Order and Findings and Conclusions and entry of Judgment on the Fee Issue. On June 26th 2018 the Court entered Findings of Fact and Conclusions of Law and an

Order on the Fee Award in favor of Respondents. CP 567-572. However, to date the Court has yet to enter a Judgment on the Fees.

Appellants filed a Notice of Appeal on January 30, 2018. CP 456-464. Appellants' then filed an Amended Notice of Appeal on April 16, 2018. CP 523-534.

II. STANDARDS OF REVIEW

A. Summary Judgment of Dismissal. The standard of review of a trial Court's decision dismissing claims on summary judgment is de-novo. The appellate court reviews the summary judgment decision engaging in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982). Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment should not be entered. *Sheriff's Association v. Chelan County*, 109 Wn.2d 282, 745 P.2d. 1 (1987).

B. Award of Attorney's Fees. The appellate court applies a two step standard of review when analyzing a trial Court's decision awarding attorney's fees and costs to a party. First, the appellate court must review the findings of fact to ascertain whether or not the findings are supported by substantial evidence. *Schmidt v. Cornerstone Investment, Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990). Substantial evidence is such quantity of evidence that would persuade a fair minded rational person of

the truth of the premise advanced. *Bering v. Shore*, 106 Wn.2d 212,220, 721 P.2d 918 (1986) Assuming the trial court's findings are supported by substantial evidence, the appellate court typically analyzes the amount of the award under an abuse of discretion standard. *Schmidt v. Cornerstone Investment, Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990) "A trial court abuses its discretion if its decision to award or deny attorney fees under is manifestly unreasonable or based on untenable grounds or reasons." *In re Wash. Builders Benefit Trust*, 173 Wn. App. 34, 84-85, 293 P.3d 1206 (2013) Since "[t]he reasonableness of the amount of attorney fees is a factual matter within the trial court's wide discretion…[a]n abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court." *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn. App. 84, 98, 52 P.3d 43 (2002).

III. ARGUMENT

A. Standard applied on a motion for summary judgment. The burden of proof on a motion for summary judgment motion is on the moving party. The moving party must prove that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. CR 56; *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030(1982). A material fact is a fact upon which the outcome of litigation depends. *Hill v. Cox*, 110 Wn.App. 394, 402, 41 P.3d 495 (2002). All evidence, and the

reasonable inferences to be drawn therefrom, are viewed in a light most favorable to the non-moving party. *Wilson* at p.437.

B. Appellants' Claims for Fraud, Misrepresentation and Conspiracy are barred by the applicable statutes of limitations. As indicated above, Appellants contend that they were misled into purchasing the wrong parcel and with respects to the characteristics of the parcel and the values of the parcel. Respondents' have denied any misrepresentations were made. However, Respondents' recognize under the procedural posture of the underlying motion Appellants' are entitled to have all facts and the reasonable inferences drawn therefrom viewed in a light most favorable to them. *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030(1982). Respondents' are entitled to summary judgment of dismissal with respect to the aforementioned claims because (1) Appellants failed to timely bring the claims and the applicable statute of limitations; (2) Appellants' claims or some of them are based upon facts that have not been shown to be false or otherwise actionable; and (3) Appellants' could not reasonably rely upon Respondents' representations because under the Trade Agreement at issue they assumed the responsibility of conducting their own due diligence with respect to the property characteristics and value as well as otherwise effectively waiving any right to rely as claimed.

1. Appellants' claims for Fraud and Misrepresentation and related conspiracy theories are subject to a three-year period of limitations. RCW 4.16.080. Appellants' contend that the deception at issue occurred in the summer of 2009, prior to the transaction closing in September 2009. CP 7-13 The transaction closed on September 8, 2009. CP 8. Appellants' filed their complaint on December 20, 2012, more than three years after the purported wrongful conduct occurred. CP 1. Under RCW 4.16.080 claims based upon fraud and/or misrepresentation are subject to a three year period of limitations. Accordingly, unless somehow saved by the discovery rule, Appellants' claims of Fraud and Negligent Misrepresentation are barred by RCW 4.16.080 as they filed their action more than three years after the closing.

2. Appellants' Claims are not saved by the discovery rule as they were on constructive notice of the parcels they were purchasing and the characteristics of those parcels. Appellants' argue in response that they were unaware of the alleged misrepresentations with respect to the actual parcel conveyed and the value(s) of the parcels conveyed until much later. See Appellants brief at p.21. Appellants' contend under the discovery rule the period of limitations should be extended. See Appellants brief at p.35. Appellants rely on several erroneous assumptions and facts that lack evidentiary support.

(a) Appellants' contention that they did not know the tax parcel id number so that it could be matched up to the deed is not accurate. Appellants' argue that they essentially did not and could not have obtained the tax parcel id number to match it up with the legal description of the deed. (Appellants Opening Brief p. 33)

> 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 is in Exhibit E to the Trade Agreement.(CP 449) Appellants' Brief p.33

The argument is that had Appellants' known the tax id number of the parcel they could have presumably checked with the county. However literally 8 pages earlier in the brief, Appellants' acknowledge that on July 22, 2009 (over seven weeks prior to closing) they were provided the tax id number of the parcel by Mr. Hildebrandt. Appellants' Brief p.25. In short, Appellants had both the legal description and the tax id number of the parcel that was being purchased.

(b) Appellants contention that they had no ability to discover that they were not getting the parcel that they thought they were getting is simply not true. (Appellants argue that they had no ability to identify the parcel that they were acquiring prior to May 28, 2012. Appellants Opening Brief p. 26) Appellants openly admitted that there were no boundaries nor demarcation on the property when they visited the

property in June of 2009 – and further admitted that the purpose of that visit was simply to view the area to get somewhat oriented, not looking at any particular parcel. CP 160-161. Appellant Willard also testified that (after that visit) he never returned to Eastern Washington to look at either of the developments prior to executing the Trade Agreement. CP 157 and CP 162. Appellant apparently knowing no boundaries were marked or identifiable decided to proceed without a survey and without checking any county maps of the sub-division. The foregoing does not support an argument that "Plaintiffs' could not have discovered that they were not purchasing the parcel they thought they were purchasing." If in fact Appellants did not get the parcel they thought they were getting, they clearly could have discovered that pre-closing by having a survey done, an act that Appellant Willard had done several times in prior property acquisitions.

(c) Appellants argument that the parcel purchased could not be sub-divided, a well wasn't possible and there was no power is not supported by the evidence. Appellants argue without any evidentiary support that the parcel purchased could not be sub-divided, a well wasn't possible and there was no power to the property. (Appellants Opening Brief p. 33) In Appellants brief at p.10 they reference CP 215 and CP 262 as supporting the aforementioned factual assertions. CP 215 references its

attached Exhibit "E" (aka CP 262) which is an email from Respondent Ben Addink to Appellants Willard and Johnson. The email states in part:

> "The Enterprise Ridge Parcel ..... Would require domestic well for water, Has power to lot, Septic perc approved"

There is nothing in the referenced support, or in the record, that supports a position that any of the above statements are inaccurate. To the contrary, Respondent Addink's understanding is that all of the above representations are true. CP 172. Appellants argument that these were misrepresentations is simply not supported by the record.

However, even if for the sake of argument these were not accurate statements, Appellants' argument still fails for two reasons. First, Appellants had no right to rely on representations made by Respondents under the Trade Agreement. (See argument 3. below) Second, with respect to the alleged wrong parcel conveyed and/or the misrepresentation of characteristics of the parcels[2], the deed conveying the parcel put Appellants under actual and/or constructive notice at the time of closing when the deeds were recorded on September 8, 2009.CP 404-407. Under such circumstances a party cannot later claim ignorance with respect to the property. *Shepard v. Holmes*, 185 Wash. App. 730, 345 P.3d 786 (2014)

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[2] As indicated above, none of the characteristics alleged have been shown to be false: a well would be needed, power was immediately adjacent to the property and the property can support septic. CP 172

In *Shepard v. Holmes*, 185 Wash. App. 730, 345 P.3d 786 (2014) a purchaser sued a seller of real property, the agent and the title company for several causes of action including misrepresentation of the quality and characteristics of the real property at issue. Specifically, the purchaser in *Shepard* claimed that she was told that the four lots involved in the sale were separate distinguishable lots that could each be sold individually. In fact, the four lots had been previously consolidated by the seller – and could no longer be sold individually. Ms. Shepard claimed fraud, misrepresentation and asserted other causes of action as well that she had been damaged by these misrepresentations.

The defendants' in *Shepard* asserted that the purchaser's claims were barred by the applicable statute of limitation and the purchaser attempted to invoke the discovery rule to effectively extend the applicable period of limitations. The *Shepard* Court analyzed the discovery rule in the context of a real estate transaction – stating that such a cause of action accrues in such a transaction when the aggrieved party discovers the fraud or in the exercise of due diligence could have discovered it. *Shepard* at p. 739 citing *Green v. Am. Pharm. Co.*, 86 Wash .App. 63, 66, 935 P.2d 652 (1997), *aff'd,* 136 Wash.2d 87, 960 P.2d 912 (1998). The *Shepard* Court went on to hold that discovery of the fraud will be inferred for the purposes of the statute of limitations when the facts constituting the fraud

were a matter of public record. *Shepard* at p. 740 citing *Davis v. Rogers,* 128 Wash. 231, 236, 222 P. 499 (1924). As the Court stated:

> "where facts constituting 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.' '[T]he defrauded party cannot be heard to say that he has not discovered the facts showing the fraud within the limit of the statute if the facts should have been discovered prior to that time by anyone exercising a reasonable amount of diligence.'
> (*Shepard* at p. 740)

In *Shepard*, the factual issue was a "consolidation deed" which effectively voided the purchaser's ability to sell the lots purchased individually. The *Shepard* Court held that Ms. Shepard's actual timing and discovery of when she was misled in the transaction was not relevant for the purpose of discovering the alleged actionable misrepresentation – what was relevant is that there was a document that had been recorded – that was a matter of public record that constructively put her on notice that she had been misled. *Shepard* at p. 742.

In the case at bar, Appellants' claim that they had no idea that the property conveyed to them was different then the property they believed they had purchased. However, there is no factual dispute: (1) the property that was being purchased under the purchase and sale agreement was transferred by Statutory Warranty Deed dated September 4, 2009 recorded in Lincoln County Washington on September 8, 2009 (CP 404-

407); (2) the legal description of the property Appellants purchased was different then the property they believed they were purchasing (CP 217-218); and (3) the property they purportedly believed they were purchasing was not owned by Respondent Ben Addink. In short, as a matter of public record Appellants' were aware or were constructively aware that they had purchased a different parcel then they believed they were purchasing as of September 8, 2009. Under *Shepard*, Appellants were on notice from the date of recordation of the deed at issue which property they had purchased. Consequently, Appellants' claims, if any, accrued on September 8, 2009. Therefore, Appellants' filing of a complaint in December of 2012 was untimely and should be dismissed. *Shepard v. Holmes*, 185 Wash. App. 730, 345 P.3d 786 (2014)

Appellants' argue that the deed itself did not put them on notice – essentially taking the position that they had no idea what parcel (and the legal description of what parcel) they were purchasing. In short Appellants posture is that they did nothing to investigate the 4 properties that were being exchanged for their hotel. Any due diligence (which Appellants represented they had done – both with respect to the property and its value) would have clearly led Appellants to determine the parcel conveyed was not the parcel they thought they had received. Notably, the *Shepard* case further bolsters the due diligence argument raised in

Respondents' motion to dismiss based upon the contractual acknowledgment by Appellants' that they had done their own due diligence in the transaction and ascertained their own value.

3. The Trade Agreement itself Precludes any Reasonable Reliance by Appellants' to support the Fraud and Misrepresentation Claims. The crux of Appellants' pre-closing claims is that they were subject to several misrepresentations that were purportedly made to them by Respondents relating to the characteristics and nature of a 20 acre parcel at the Enterprise Ridge development that induced them into entering into this transaction. As indicated above, Appellants' contend that they did not get the value for which they bargained. Respondents have denied that any misrepresentations were made and denied that Appellants' received less than adequate consideration. In fact, as indicated above, the statements relating to the characteristics of the parcel were true (power was run to the lot, the lot was sub-dividable and was subject to a perk approval by Stevens county as required for the initial subdivision). Nonetheless, even if the statements were not true, Appellants' represented and warranted that they would conduct and did conduct their own due diligence with respect to the parcels being purchased and were not relying upon valuation and information provided by Respondents.

> 2.5 Value of Property Being Exchanged. For the purposes of this transaction, the parties hereby agree that the property described above in section 2.2 has a value of Six Hundred Thousand Dollars ($600,000.00) and the property described in section 2.3 has a value of Six Hundred Thousand Dollars ($600,000.00). ..... WBW 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 52 (Emphasis added.)

Appellants warranted that they had "independently formed an opinion of value" – and had time and the opportunity to conduct necessary due diligence, they cannot ignore such warranties and claim that they relied on Respondents.

As for the alleged misidentification of the lot location, Appellant Willard testified that there were no survey stakes nor any other demarcations reflecting lot lines on the property at Enterprise Ridge at the time of his visit. CP 158. Appellant Willard admitted that when he visited Enterprise Ridge property he was not looking at any particular lot – rather he was just trying to get oriented as to the development. CP 160-161. Appellant Willard himself chose not to have the property surveyed and/or locate the property lines. CP 159.

As identified in the passage above, Appellants expressly represented that they had time and opportunity to conduct their own due diligence on the property that they were purchasing – and specifically state

they had made their own determination whether or not it was suitable for them and their needs. Appellants' further expressly acknowledged that they had "independently formed an opinion on the value of the property that they were purchasing. Waiver is a voluntary relinquishment of a known right. *Wagner v. Wagner,* 95 Wash.2d 94,102, 621 P.2d 1279 (1980) In this case, any contention that Appellants' were relying on information purportedly conveyed to them by Respondents (including value) is contravened and has been waived under paragraph 2.5 of the Trade Agreement – an agreement that was represented to be mutually drafted by both parties. (CP 58). Notably, each party had counsel, in fact Appellants' counsel in the transaction is the same counsel as in this proceeding (ie. Dan Platter).

Appellant Willard himself testified that he is well familiar with the term "due diligence". CP 141-142. Appellant Willard further testified that he had consulted his financial advisor and his CPA [part of his team] as due diligence in the transaction at issue. CP 163. Appellants cannot represent that they conducted their own due diligence, arrived at their own opinion of value and then later contend that in fact they were relying upon Respondents' purported information.

Further, the Trade Agreement itself contains six different areas of warranty that Appellants believed were important to include within the

agreement with Respondents' CP 56-57. Notably, none of the warranties identified are at issue in the present action.

In short, there is no genuine issue of fact Appellants' claims of (1) Fraud, (2) Negligent Misrepresentation and (3) Conspiracy relating to the characteristics of the Enterprise Ridge parcel involved and related value were waived under the due diligence paragraph of the Trade Agreement or there was no reasonable reliance on the part of Appellants.

C. Appellants Post Closing Claims were properly dismissed. As indicated above, Appellants also included three post-closing claims. First, Appellants' contend that Respondent Ben Addink committed fraud when the covenants at Ridgeview Estates were subsequently changed, allegedly damaging Appellants and/or the value of Appellants' property received on closing. Second, Appellants contend that Respondents failed to convey Lot #31 to them in breach of the Trade Agreement. Third, Appellants contend that Respondents had assumed a duty under the Trade Agreement to insure the safe arrival of Appellants' personal property to them following shipment. Appellant doesn't raise the first two claims in its brief. However, as this is a de-novo appeal Respondents will briefly respond to them in any event so as to avoid any uncertainty as to their lack of support.

1. Appellants' claim of "fraud" by virtue of the Ridgeview Estates subsequent change of covenants was properly dismissed. Appellants' claim that Respondents' defrauded them when the covenants of Ridgeview Estates were changed *subsequent* to the closing of the trade agreement transaction. CP 12-13 Appellants' Complaint alleges that Respondent Ben Addink promoted Ridgeview Estates as a high-end development with covenants in place to preserve the value of property. CP 12-13 However, notably when testifying, Appellant Willard did not recall the specifics of any such discussion. CP 156. Moreover, there was and is no evidence before the Court that the above statements were not true. There is no issue of fact that (1) the covenants at issue were not modified until months after the closing of the transaction; and (2) the covenants were modified in accordance with the Association bylaws. CP 175. In other words, there is no evidence before the Court that reflects any wrongful action in modifying the covenants at issue.

The elements of fraud include: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) defendant's knowledge of its falsity; (5) intent of defendant that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff. *Adams v. King County*, 164 Wash.2d 640, 192

P.3d 891 (2008) Appellants have made no allegations nor have they offered any evidence of any warranties or representations that were made by any of the Respondents with respect to the covenants and/or continuity of the covenants at Ridgeview Estates. Appellants have neither plead nor identified any misrepresentations of any facts that were made prior to closing to support this claim.

To the extent that Appellants' are claiming there were other representations or agreements made with respect to the covenants at issue beyond those in the Trade Agreement, the Trade Agreement states in pertinent part:

> This Agreement, including the Exhibits, contains the entire agreement between the parties pertaining to the subject matter hereof and fully supercedes all prior written or oral agreements and understandings between the parties pertaining to such subject matter. (See Exhibit "A" §8.4)

Moreover, a claim of Fraud requires reliance which, as indicated above, Appellants' were again to conduct their own due diligence inquiry. Had Appellants' done so, they would have discovered that the covenants at issue could be changed by the Association through a vote of its members.

Finally, in addition to the foregoing, Appellants have not shown they have been damaged in whole or in part as a result of the modification of the covenants. Moreover, the decision to later amend any such covenants was made as an Association not Respondent Addink

individually and was made to maximize the values of the lots not negatively impact them. CP 175. Simply put, a Home Owners Association's decision to modify its covenants within its bylaws [literally months after a closing) is not actionable and was properly dismissed.

2. Appellants' Claims of Breach of Contract relating to Lot #31 have no basis and were properly dismissed. Appellants' have asserted a post-closing claim for breach of contract and conspiracy relating to the conveyance of Lot #31 at Ridgeview Estates. CP 14-15. Appellant Willard contends that he was entitled to have Lot #31 conveyed to him because no bona fide offer was received within one year of the listing date. CP 14. In fact, an offer was received within the one year period. However, the parties resolved this dispute in 2010 and 2011 when in fact Respondent Ben Addink and his affiliated company conveyed Lot #31 to Willard. CP 175; CP 120-125. As indicated, Lot #31 was conveyed to Appellant Willard in August of 2011 – over a year prior to commencement of the present action. CP 120-125. Appellants' offered no evidence below denying such conveyance and none is before this Court.

3. Appellants' claims for alleged damages to their personal property have no basis and were properly dismissed. Appellants' claim that Respondents breached the Trade Agreement by failing to "facilitate" the shipment of their personal items. The facts are for the most

part not in dispute. Appellants' left SABA island and made the decision to leave a number of personal items behind until they decided where they wanted them shipped. Appellants' packed most of the items themselves. CP 166. The items were all shipped and received by Appellants Corazon and Willard in November of 2009 and February 2010. CP 166. Thereafter, almost two full years later, Appellants' claimed that a number of items were damaged in shipment. CP 176; CP 110-118. Ignoring for the moment that almost two years had passed between the date that the items were received and notice of damage during shipment was passed along, there was no duty assumed by Appellants for safe shipment of these items under the Trade Agreement. The Trade Agreement states in pertinent part:

> ADDINK will help facilitate packing and arranging for the shipping of WBW's personal property. CP 87-88
>
> Merriam-Webster defines facilitate as:
>
> To make (something) easier; to help cause something; or to help something run more smoothly

Nothing in the Trade Agreement required or provided that Respondents' had assumed a duty or agreed to insure the safe passage of the Appellants' personal property. As indicated, Respondent Addink was to "help" and "cause" the items to be shipped. Respondent Addink did so in compliance with the Agreement – there is no breach of the agreement.

In addition to the breach of contract claim on the personal property, Appellants also asserted that Respondents' had a common law duty "to ensure that" Appellants' personal property was packed in a proper manner.[3] Appellants' have not identified any support for this "common law duty". While Respondents' believe that they exercised reasonable care in packing the items, they had no duty to do so contractually or under the common law. Moreover, if the items were as damaged as claimed, why did Appellants' wait almost two full years to advise Respondents on the matter. The claims with respect to personal property were properly dismissed.

Along with the claims of negligence and breach of contract, Plaintiffs' have also asserted the claim of conversion. A Conversion is an act by a person willfully interfering with possession of the property of another without lawful justification, whereby the person entitled to possession is deprived of the possession. *Wilson v. Wilson*, 53 Wash.2d 13, 330 P.2d 178 (1958). In this case, Respondents do not have possession of any of Appellants' personal property and Appellants have offered no evidence to support the claim of conversion. CP 176.

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[3] Notably, Plaintiffs' have joined Defendants Ben and Jada Addink's parents in this action Stan Addink, Sharon Addink, Tom Lilly and Nancy Lilly. No allegations have been asserted against Sharon Addink or Tom Lilly. The only allegation against Nancy Lilly relates to the negligence packing claim and conversion claim.

Based upon the foregoing, Plaintiffs' post-closing claims should also be dismissed.

D. The Court Properly Awarded Respondents' Fees but erred in not awarding Respondents' Costs. Appellants claim the trial Court erred in awarding Respondents' Attorney's Fees of $25,000. (See Appellants Opening Brief p. 3) As indicated above, the appellate Court has a two step standard of review of a fee award. First the Court must ascertain whether the trial Court's findings of fact are supported by substantial evidence. Then the appellate Court applies an abuse of discretion standard as to the amount awarded by the trial court. Appellants argue in their opening brief a *de novo* standard of review. Appellants' Brief at p. 46. Appellants' erroneously contend that whether or not a party is entitled to an award of fees is a pure question of law. In fact, the entitlement is a mixed question of law and fact.

As referenced by Appellants in their opening brief, "an action is on a contract for the purpose of a contractual attorney fee provision if the action arose out of the contract and if the contract is central to the dispute. (Appellants' opening brief at p.48) In the case at bar, all of Appellants' claims arose out of the contract and clearly the contract was central to the parties dispute.

1. The Trial Court's award of Fees was supported by substantial evidence.

The trial court made the following findings of fact:

1. Respondents' were the prevailing party in this matter. CP 568 Finding of Fact 1.
2. The Trade Agreement at issue required the Court to award fees and costs to the prevailing party. CP 568 – Finding of Fact 2.
3. The claims advanced by the Appellants involved the Trade Agreement, and that the Agreement was central to all of the claims advanced by Appellants. CP 569 Finding of Fact 3.
4. Detailed records supporting the time incurred by Respondents' counsel were submitted. CP 569 Finding of Fact 5.
5. Respondents' counsel's hourly rates were reasonable. CP 569 Finding of Fact 6.
6. The Court found that $25,000 was the "fair and reasonable amount of fees that was necessary to induce the Court to grant summary judgment". CP 570 Finding of Fact 9.

All of the above findings of fact were supported by the evidence before the Court at the time of the hearing and Appellants' have not made any showing otherwise. Although Appellants contend that the Trade Agreement fee provision did not apply to several of the causes of action

advanced, they failed to take issue with Finding of Fact No.3 which states that the claims advanced by Appellants all involved the Trade Agreement and that the Trade Agreement was central to the parties dispute.

Appellants' cite *Boguch v. Landover Corp.*, 153 Wn.App. 595 (2009) a case distinguishable from the facts in this case. In *Boguch*, the only issue was whether the seller's real estate agent was negligent in posting on the internet a photo of the waterfront lot with inaccurate boundaries that made the lot appear less valuable than it actually was. After the seller (Boguch) switched agents and was allegedly forced to sell at a reduced value, the seller sued the original agent for negligence and breach of statutory duties, as well as "an unspecified breach of contract claim." *Boguch*, 153 Wn. App. at 603. "*Boguch...was not sure whether he had a viable contract claim but included the claim out of an abundance of caution so as not to waive it.*" *Id.* at 620 n. 6 (italics added). When all claims were dismissed on summary judgment, the broker requested fees under a clause in the listing agreement that permitted fees "[i]n the event either party employs an attorney to enforce any terms of this Agreement." *Id.* at 607. Because the contract was not central to the dispute, and the negligent posting did not violate any specific terms of the listing agreement, the trial court's award of unsegregated fees to the broker under the fee clause of the listing agreement was reversed and remanded.

Unlike *Boguch*, Appellants' in the case at bar have asserted breach of contract allegations that are not redundant or incidental—they are central to their complaint, the fact that such claims may sound in tort is not dispostive. Attorney's fees are awardable for tort claims that have "a common core of facts and related legal theories" with a breach of contract claim for which a defendant is entitled to recover. *See Lakoda, Inc. v. OMH Proscreen USA, Inc.*, No. 32616-1-III, 195 Wash.App.1061 (Sept. 8, 2016) (unpublished), *rev. denied*, 388 P.3d 495 (2017), *quoting Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007) (common core of facts and related legal theories); *Stieneke v. Russi,* 145 Wash..App. 544, 190 P.3d 60 (2008) (If a tort action is based on a contract central to the dispute that includes an attorney fee provision, the prevailing party may receive attorney fees) Appellants' contract claims are intertwined with his fraud claims, negligent misrepresentation claim, breach of fiduciary duty claim, negligence claim regarding damaged personal property, conversion of personal property claim, and civil conspiracy claim all of which are actions that arose out of the Trade Agreement and related transaction. These tort claims were alleged in addition to Willard's two breach of contract claims (ie. Lot 31 and the personal property). As Appellants' admitted in their brief, "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." Appellants' Opening Brief at p.48, *quoting Boguch*, 153 Wn. App. at 616. As detailed below, that is precisely what Appellants have done here, variously claiming in each of their tort claims that Respondents' failed to fulfill contractual obligations specifically agreed to in the Trade Agreement.

Appellants argue that claims of fraud and misrepresentation are not claims for breach of contract as anticipated in the fee provision. However, this argument fails based upon the standards applied to such situations. "[A] claim that the defendant fraudulently induced plaintiffs to enter into a contract which the defendant had no intention of performing, together with a claim that the defendant breached the contract, involves a single wrong or injury." *Kammerer v. Western Gear Corp.*, 27 Wn. App. 512, 526, 618 P.2d 1330, (1980), *aff'd*, 96 Wn.2d 416, 635 P.2d 708 (1981). "[F]raudulent misrepresentation claims...are independent of the underlying contract...only where the misrepresentations are extraneous to the contract itself and do not concern the quality or characteristics of the subject matter of the contract or relate to the offending party's expected performance of the contract." *Alejandre v. Bull*, 159 Wn.2d 674, 690 n. 6, 153 P.3d 864 (2007).

In the case at bar, all of Appellants tort claims concern the quality or characteristics of the subject matter of the Trade Agreement and

Appellants' expectation of how Respondent Ben Addink as seller, would perform the contract. Appellants alleged that Respondents Addink made fraudulent and/or negligent misrepresentations regarding Parcel 1512040 in the Enterprise Ridge development and property values in the Enterprise Ridge and Ridgeview Estates developments that were "material to the Trade Agreement transaction…to induce [Appellant] Brad Willard to enter into the Trade Agreement." . Appellant Willard alleged Addink changed the character of Lot 31 (Ridgeway Estates) from a buildable lot to three smaller air space condominium lots, which was claimed to be both a fraud and a breach of the Trade Agreement, as well as a conspiracy between Respondent Addink and Respondent Horgan, who allegedly breached his fiduciary duty "in an effort to alleviate Respondent Addink's [contractual –obligation to convey Lot 31…to Appellant COBRA REAL ESTATE, LLC." See CP 12-14 and 17-19. Appellants' alleged Respondent Addink's failure to ship personal property without adequate packing caused damage, a duty that arose "[u]nder the Trade Agreement.". CP 14-15.

2. The Trade Agreement expressly provides for the recovery of Costs and Fees on Appeal. The Trade Agreement at §8.12 states as follows:

> Attorney Fees: Should any Party hereto engage an attorney to enforce any rights hereunder, the prevailing Party shall, in addition to all other rights, be entitled to recover its attorney fees, costs and

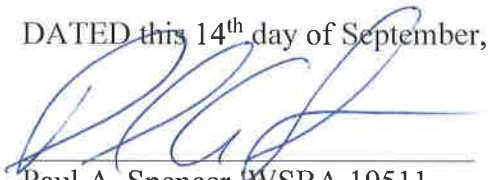
> disbursements, including fees of experts, before, during and at trial, and on appeal if any. CP 58.

The language is very straightforward and expressly mandates an award of costs and fees on appeal to the prevailing party. The Trial Court erred in failing to award costs and should award Respondents fees incurred in defending the appeal .

IV. CONCLUSION

For the reasons set forth above, the Trial Court's dismissal of Appellants' claims should be affirmed as should the award of fees. Respondents should also recover all of the costs incurred as plead below as well as Fees and Costs on Appeal.

DATED this 14th day of September, 2018.



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