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

BRIAN and MELANIE LAMARCHE,

Appellants,

v.

IZACK and SHAWNELL VAIL, et al.,

Respondents.

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

Izack and Shawnell Vail continue their pattern of deception in their responsive brief. At times, they overstate the evidence, claiming admissions where none were made and confusing the timeline of their many deceptive practices below. At others, they seek to hide the evidence by moving to strike or objecting to evidence that was properly before the trial court on summary judgment.

These tactics fail. Rather, the trial court committed clear error in dismissing Brian and Melanie Lamarche's claims against home sellers who breached contractual duties to disclose defects in the home and misrepresented its condition to induce a sale. By focusing on the disputed evidence and omitting any real defense of the case law cited below, the Vails only highlight that summary judgment was inappropriate. Issues of fact dominate this case, and summary judgment should have been denied so that a jury can resolve the disputed issues of fact in this case, most notably the Vails' credibility. Reversal is warranted.

B. REPLY ON STATEMENT OF CASE

The Vails' misrepresent and overstate the record throughout their brief. For example, the Vails contend that the Lamarches "admit that there was no evidence of water intrusion into the basement other than the dishwasher water leak between 2010 and 2016." Resp't br. at 12 (citing CP

450). The Lamarches admitted no such thing. How could they? They purchased the property in 2016 and have no personal knowledge of how often the basement flooded before then, outside of their experts' opinions that the basement showed signs of obvious, long-term flooding that a reasonable homeowner would have discovered.

For support in the record for this "admission," the Vails cite a passage in Brian Lamarche's deposition where he said that he did not notice any "mold or mildew" in the months between the closing of the sale and the first flood in the basement. *Id.* That is a far cry from admitting that there was *no evidence* of water intrusion in the basement for a period of six years before the Lamarche ever bought the house. Again, the record shows that there were signs of long-term water intrusion that the Vails hid behind new drywall and insulation. CP 374, 418-19, 426-27. Additionally, in the same passage the Vails cite, Brian testified that he did notice an "odor of some sort" that could have been mold or mildew, even before the basement flooded for the first time after he purchased the home. CP 450.

Unfortunately, this distortion of the record is just the latest in a long line of such efforts by the Vails. As discussed in the Lamarches' opening brief and below, those deceptive assertions should have precluded summary judgment where the Lamarches presented sufficient evidence to support

their claims for breach of contract and negligent misrepresentation. This Court should reverse.

C. ARGUMENT

(1) The Court Should Deny the Motion to Strike a Declaration That Was Submitted by a Co-Defendant on Summary Judgment and Considered by the Trial Court as Part of the Court File

At the outset, the Vails seek to improperly shield evidence in the record showing that they dishonestly marketed and sold the house at issue. Resp't br. at 4-6. Citing RAP 9.12, the Vails ask this Court to ignore the declaration of Samuel C. Thilo (CP 250-356), submitted in support of one of the Vails' co-defendant's motion for summary judgment. *Id.* This declaration was filed at the same time as the Vails' summary judgment motion when both co-defendants moved in late September 2018 to dismiss the Lamarches' claims. CP 80-82, 173-75.¹ When ruling on the Vails' summary judgment motion, the trial court noted that it considered not only "the parties' papers" but also the court "file herein." CP 455. Thus, the declaration was properly before the court ruling on summary judgment.

Even under RAP 9.12, courts should not ignore such evidence on appeal. For example, in *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343,

¹ The co-defendant was ultimately dismissed by stipulation at the same time the parties submitted their briefing on summary judgment. CP 428-30.

354 n.10, 423 P.3d 197 (2018), our Supreme Court rejected a challenge to consideration of a declaration on appeal where the declaration was not submitted in response to a summary judgment motion. The Court refused to ignore the declaration because it had been submitted to the court earlier, and the trial court noted that it considered “the entire court file in reaching this decision.” *Id.* Thus, RAP 9.12 did not preclude the Court from considering the declarations, even though a party did not directly offer them in support of the party’s summary judgment materials. *Id.*

Here, too, the trial court specifically indicated that it considered the *entire* court file in reaching its decision. This would include the Thilo declaration, which was contemporaneously submitted by a co-defendant as part of the summary judgment briefing and considered by the trial court as part of the entire court file. The Lamarches’ reference to this declaration in their brief is proper.

Even if the Court rules otherwise, excluding the Thilo declaration would not affect the outcome of the case, for several reasons. First, the Lamarches cite the declaration in their brief for many uncontested issues of fact, such as the purchase price of the house, the fact that the Lamarches hired engineers who discovered that the foundation was made from wood and not concrete, and the fact that their home inspector faced no liability after a mandatory private arbitration. *See, e.g.*, Appellants br. at 4-5 (citing,

e.g., CP 258, 338-40, 351-56). Many of these factual assertions are included elsewhere in the record, including deposition excerpts and exhibits submitted by multiple parties during the summary judgment briefing. *E.g.*, CP 373-27, 504-38. The Court should note that the Vails do not point to any specific statement or piece of evidence within the Thilo declaration that they ask the Court to ignore. Rather, they merely seek to cast a cloud of suspicion over the Lamarches' entire case. This attempt fails.

Second, the Lamarches presented ample evidence of the Vails' deception elsewhere in the record. The Vails failed to disclose any history of flooding in the basement or the wooden foundation, despite obvious evidence that the wooden foundation had leaked *for years*. CP 414-16, 419, 500. They admitted that they failed to disclose a significant flood caused by their dishwasher, which required *extensive* remodels in the basement. CP 382-86. They replaced the drywall throughout the basement sometime between 2010 and 2014, which also would have exposed both the wood foundation and signs of long-term water intrusion in the basement. CP 374, 426-27. And they lied about obtaining permits for the remodel work they performed themselves, creating the aura that professionals approved of the home's condition. CP 391.

As discussed below, considering the evidence found throughout the record, especially in the light most favorable to the Lamarches, summary

judgment was inappropriate due to the Vails' material misstatements and omissions.

(2) The Vails' Belated Evidentiary Objections Are Irrelevant

True to their pattern of hiding the ball, the Vails also raise several baseless challenges at the end of their brief to the form of evidence submitted on summary judgment and included in the record. Resp't br. at 24-26. The Vails objected below in their reply brief to some evidence the Lamarches submitted in response to their summary judgment motion and argue that their objections "continue in this appeal." Resp't br. at 24. These arguments are meritless especially where the trial court considered these objections, denied them *sub silentio*, and the Vails did not file a cross appeal. This Court does not review hypothetical issues, especially those that a respondent does not cross appeal. RAP 5.1(d); *see also, e.g., Neravetla v. Dep't of Health*, 198 Wn. App. 647, 672, 394 P.3d 1028, *review denied*, 189 Wn.2d 1010 (2017) (where the trial court made "no ruling" on the admissibility of evidence, "there is nothing for [the Court of Appeals] to review").

Even if the Court considers these "continued objections," they are meritless. The Vails object to an email from a neighbor and a property tax assessment. Resp't br. at 25-26 (citing CP 422-24, 471-72). This objection is irrelevant the Lamarches do not cite either of those sections of the clerk's

papers on appeal. The Vails also object to a report from Brent Cornelison, a construction engineer and witness who identified the long-term water damage in the basement, as hearsay. Resp't br. at 24. This, too, is meritless. Cornelison's report is not hearsay, it is the summary of his inspection of the house and expert opinions regarding its condition submitted for the purposes of summary judgment. CP 417-19; CR 56(e). The report is a business record Cornelison prepared before the Lamarches ever filed their lawsuit. RCW 5.45.020. Cornelison had personal knowledge of the report's contents, having inspected the house and prepared it himself, and, importantly, he testified extensively to the report's contents and his conclusions during his deposition, which the Court also considered. *E.g.*, CP 410. Under CR 56(e), the trial court was well within its right to consider this evidence for summary judgment purposes where Cornelison would have testified to the report's contents had the case gone to trial.²

Belying their argument on appeal, the Vails themselves offered Cornelison's deposition testimony and discussion of the report as evidence, waiving any objection to consideration of his report for summary judgment purposes. CP 439-40. In fact, they continue to rely on Cornelison's

² See also, *e.g.*, *United States v. 1 Parcel of Real Prop., Lot 4, Block 5 of Eaton Acres*, 904 F.2d 487, 491 (9th Cir. 1990) ("In defending a summary judgment motion, the nonmoving party need not produce evidence in a form that would be admissible at trial. Rather, that party may rely on...evidentiary materials" attached to a declaration).

deposition testimony in their brief, testimony regarding the conclusions and observations made in his report. Resp't br. at 22. Again, the Vails failed to cross appeal and have no basis to challenge the trial court's *sub silentio* decision to overrule their objection and consider the report. The report, along with all the other evidence in the record above, shows that the Vails deceptively marketed their home and breached their disclosure duties. This Court should reverse.

(3) Credibility Issues Preclude Summary Judgment

While the Lamarches presented evidence and expert testimony that the Vails knew about the defective foundation, the Vails' response boils down to the factual contention that they simply did not know that the basement frequently flooded. Thus, summary judgment was particularly inappropriate in this case, where it turned on issues of credibility. Credibility is a classic question for the trier of fact, and credibility issues will normally preclude summary judgment. *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 503, 722 P.2d 1343 (1986) (reversing summary judgment where the only witness who could corroborate a party's version of events was the party's spouse); *Riley v. Andres*, 107 Wn. App. 391, 398, 27 P.3d 618 (2001) (reversing summary judgment where a party's credibility was key to a dispute over adverse possession). Summary judgment is particularly inappropriate where the moving party largely relies on their

own self-serving statements, or where the key testimony comes from the parties themselves. “In such a case, the nonmoving party should have the opportunity to expose the moving party’s demeanor while testifying at trial.” *Riley*, 107 Wn. App. at 398.

Here, the Vails’ case is almost entirely contingent on their own self-serving testimony that they did not know anything about the defective, leaking foundation before they sold their house. This testimony is belied by the Lamarches’ experts who opined that the house showed obvious signs of long-term water damage that a reasonable homeowner would have uncovered. CP 414-16, 419, 500. A jury could infer that the Vails were aware of this water damage and repeated water intrusion in the basement, but chose not to disclose it to the Larmarches. This is especially true where they remodeled and replaced drywall in the basement sometime between 2010 and 2014, which would have exposed both the wood foundation and the signs of long-term water damage in the basement. CP 374, 426-27. They performed this work themselves, and a jury could infer that they would have discovered the water damage while performing that work. CP 391.

Importantly, a defendant’s knowledge is a classic question of fact that can be inferred by circumstantial evidence. *See* Appellants br. at 20 (citing, *e.g.*, *Equipto Div. Aurora. Co. v. Yarmouth*, 134 Wn.2d 356, 371, 950 P.2d 451 (1998); *Nauroth v. Spokane County*, 121 Wn. App. 389, 393,

88 P.3d 996 (2004)). Summary judgment was inappropriate where the Lamarches presented evidence showing that the Vails likely knew about the defective foundation.

Moreover, the Vails' credibility is already suspect, where they *admit* that they misrepresented other key facts on Form 17. For example, they admit that they did not obtain proper permits when remodeling the basement, despite claiming on Form 17 that they had done so. CP 391. The Vails intended to create the mistaken impression that professionals had recently signed off on the condition of the home (and the basement in particular), further reassuring the Lamarches about the sale. *Id.* They failed to disclose a significant flood caused by a faulty dishwasher. CP 382-86. They also affirmatively listed the home as having a concrete foundation, despite the fact that it is wood. CP 474-76. Either they intentionally lied, or were so cavalier with the truth, that a jury could seriously doubt their credibility.

The Vails' contrary arguments fundamentally misunderstand the nature of the summary judgment proceeding below. For example, the Vails claim that their failure to disclose the flood caused by the dishwasher was a "reasonable" interpretation of their disclosure obligations under the purchase and sale agreement ("PSA"). Resp't br. at 8. The question is not whether *their story* is a reasonable interpretation of the evidence. The

opposite is true. On summary judgment, courts must determine whether a reasonable juror could find in the Lamarches' favor, considering all the facts and reasonable inferences therefrom in the light most favorable to them. *Dowler v. Clover Park Sch. Dist. No. 409*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

Here, Form 17 plainly asked whether the “basement [has] flooded or leaked.” CP 118. It is reasonable to conclude that this required the Vails to disclose a major flood in the basement caused by a leaking dishwasher that required extensive repair. Yet, they never mentioned the major flood at any time before the sale. This omission conveniently preserved the “aura” that all was well with the basement. Even though the dishwasher flood did not directly cause the Lamarches' damages, disclosure of the flood would have resulted in a more intense scrutiny of the condition of the basement, which would have led to the discovery of the defects in the foundation walls.

The Vails seem to imply that misrepresentation cannot arise from a party omitting to disclose a fact. They are wrong. Fraud can result from omitting or failing to disclose a material fact. *Stiley v. Block*, 130 Wn.2d 486, 515, 925 P.2d 194 (1998) (Talmadge, J. concurring) (“It is well settled that the suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation.”) (quotation omitted).

Claims by homebuyers against sellers who fail to disclose material defects are commonplace. *See, e.g., Jackowski v. Borchelt*, 174 Wn.2d 720, 737, 278 P.3d 1100 (2012) (recognizing the common law right of a buyer to sue where the sellers failed to disclose the fact that uncompacted fill had been used to construct a house in a landslide area); *Bloor v. Fritz*, 143 Wn. App. 718, 739, 180 P.3d 805 (2008) (trial court properly ordered rescission of real estate sale, where the sellers failed to disclose that the home had been used as a methamphetamine lab); *Stryken v. Panell*, 66 Wn. App. 566, 570, 832 P.2d 890 (1992) (home buyer could pursue claim where seller failed to disclose faulty septic tank and roof). In sum, a reasonable juror could find that the Vails breached their contractual duties to disclose known defects and that they negligently misrepresented the condition of the home to the Lamarches. As such, summary judgment should be reversed, and the case should proceed to trial.

(4) The Spokane Addendum Is Part of the PSA and the Vails Can Be Liable for Breaching Their Contractual Duties to Complete it Honestly

As discussed in their opening brief, the Lamarches presented ample evidence that the Vails breached their duty to disclose the leaking foundation, where the PSA addendum required them to disclose “adverse conditions affecting the Property.” Appellants br. at 9-13; CP 113. In response, the Vails summarily argue that it is “[un]reasonable” to contend

that the Spokane Addendum created a duty to disclose. Resp't br. at 13. They cite no law that a disclosure addendum to a PSA is not part of the PSA itself or that an addendum cannot create an independent duty to disclose. *Id.* Nor can they, as courts have held that such disclosure addenda in PSAs can create a "contractual duty of disclosure." *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 215, 969 P.2d 486 (1998), *review denied*, 137 Wn.2d 1034 (1999).

In *Griffith*, a group of plaintiffs sued the company that built and sold them homes with defective paint and cedar siding. The PSA in that case contained a "disclosure addendum" with nearly identical language to the disclosure addendum here, requiring the company to disclose "all material facts adversely affecting the property and known by one party but not reasonably ascertainable by the other party." *Id.* Although the *Griffith* court discussed a CPA claim, it started from the premise that "[t]he duty to disclose material facts has also been recognized in real estate transactions." *Id.* (citing *McRae v. Bolstad*, 101 Wn.2d 161, 162-65, 676 P.2d 496 (1984)). "In addition to the general duty to disclose, the Disclosure Addendum to the parties' Real Estate Contract created an identical *contractual duty* of disclosure." *Id.* (emphasis added).

The *Griffith* court recognized that these affirmative, contractual disclosure duties are nothing new when it comes to real estate. Courts in

Washington have recognized for years that sellers have a duty akin to a landlord to discover defective conditions on the property and disclose them to buyers who would not discover them on their own through “careful examination.” *Id.* at 216 (quoting *Atherton Condo. Apartment–Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 524, 799 P.2d 250 (1990) (quoting *Obde v. Schlemeyer*, 56 Wn.2d 449, 452, 353 P.2d 672 (1960) (quoting *Perkins v. Marsh*, 179 Wash. 362, 365, 37 P.2d 689 (1934))))). “The failure to do so amounts to a fraud.” *Id.*³

Here, the Vails had a duty in contract to disclose the failing foundation. Like the addendum at issue in *Griffith*, the Spokane addendum created a specific obligation to disclose defects, separate and apart from obligations under Form 17.⁴ The Vails failed in their contractual duty, and this Court should reverse.

³ Likewise, in tort law, landowners have affirmative duties to discover defective conditions on their property that their invitees would not discover on their own. *See, e.g. Restatement (Second) of Torts* §§ 343, 343A; *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 132, 606 P.2d 1214 (1980); *Jarr v. Seeco Constr. Co.*, 35 Wn. App. 324, 326, 666 P.2d 392 (1983). This is analogous to the longstanding contractual duty to discover and disclose adverse conditions that might not be apparent to a buyer or home inspector who has not lived in the home, especially where a buyer has a duty under the PSA to disclose all adverse conditions affecting the property, as is the case here.

⁴ As discussed in the Lamarches’ opening brief, the Vails could have met both their statutory duty to disclose *and* their independent contractual duty to disclose by filling out Form 17 accurately and honestly. However, the Vails admitted that they did not take the form seriously by failing to spend sufficient time filling it out, CP 285, 293, and they failed to make any other disclosure regarding the long-term water damage in the basement that would have been obvious to a reasonable homeowner.

Faced with their own culpability under the contract, the Vails try to foist responsibility onto the Lamarches' home inspector, arguing that he should have discovered the defects. *E.g.*, resp't br. at 20. However, this only underscores the importance of full and accurate disclosures where the home inspector escaped liability at arbitration because the defective foundation was not "visible in the basement and therefore not detectable" by a visual inspection. CP 352. Thus, even with a "careful examination" of the home by a trained professional, the Lamarches could not have discovered the defect themselves. *Griffith, supra*. The Supreme Court has recognized that such evidence supports a claim against the seller of the home to rescind the sale. *Jackowski*, 174 Wn.2d at 724-26 (holding that the buyer was not required to hire a specialized inspector where the seller failed to disclose a defect that a typical home inspector would not discover).

The Vails were in a special position to know of the significant problems that had affected the property for years, and yet they failed to disclose them. A reasonable juror could infer not only that the Vails knew of the long-term flooding, which occurred regularly since the sale, but also that they were in a special position to discover the long-term damage as they had replaced the drywall in the basement, hiding the signs of long term damage. Their failure to disclose the faulty foundation and extensive water

damage was a breach of their obligations under the PSA and directly caused the Lamarches' damages. Summary judgment should have been denied.

The Vails also continue to make the irrelevant argument that a wood foundation is not necessarily a defect. Resp't br. at 20-23. This argument is a red herring. The issue here is not that the foundation is wood – although this is more evidence of the Vails' deceptions given that MLS listing the Vails signed affirmatively representing that the foundation was concrete. CP 474-76. Rather, the issue is the defective nature of the foundation, which had caused flooding and water damage in the basement for years. A jury could infer that they knew about this regular flooding, and the Vails breached their obligation to disclose this defect. The Lamarches met their evidentiary burden to survive summary judgment and bring their breach of contract claim before a jury.

(5) The Trial Court Erred in Dismissing the Lamarches' Negligent Misrepresentation Claim

As discussed in the Lamarches' opening brief, the trial court erroneously relied on *Austin v. Ettl*, 171 Wn. App. 82, 286 P.3d 85 (2012), in dismissing the Lamarches' negligent misrepresentation claim against the Vails. Appellants br. at 17-18. This error in law warrants reversal where *Austin* dealt with the misrepresentation of a potential adverse condition in the future (in that case a possible local improvement district assessment),

not the misrepresentation of the property's *existing* condition as is the case here. Notably, the Vails tacitly admit the trial court's error, as they fail to even discuss *Austin anywhere* in their responsive brief.

The Vails omit a discussion of the law because this case is dominated by disputed questions of fact. For all the reasons stated above and in the Lamarches' opening brief, the trial court wrongfully granted summary judgment on this claim, where the facts show that the Vails deceptively marketed the home. They lied about obtaining permits, about past flooding in the basement, and about the fact that the foundation was wood. They also omitted the history of regular flooding in the basement that a reasonable homeowner would have found to be particularly pertinent in deciding whether to buy the home. And they even covered up signs of long-term damage by remodeling areas of the basement themselves (without proper permits) and installing new drywall and new insulation, covering the defective foundation. The Lamarches should have their day in court to present this evidence to a jury.

The Vails largely ignore the evidence of their deceptions, instead focusing on the MLS listing and Zillow website, insinuating that the Lamarches could not have seen that they *falsely* listed the home as having a wooden foundation. Resp't br. at 18. But the record shows that the Vails affirmatively represented that the home had a concrete foundation one day

before the PSA was signed and, crucially, *before* the home inspector and appraiser looked at the home. CP 474-76. The Lamarches had 45 days to terminate the PSA, CP 103, which they would have considered doing had they learned that the Vails falsely marketed the home. *See, e.g.*, CP 165 (Brian Lamarche testifying that he “[a]bsolutely” considered a wood foundation to be a structural defect and that it would have affected his buying decision). At the very least, they would have directed their inspector to more closely scrutinize the foundation had they known it was made of wood. *Id.*

The Vails negligently misrepresented the condition of the home to induce the sale closing. The trial court improperly granted summary judgment in this fact-driven case.

D. CONCLUSION

Had the Vails been forthright from the beginning, this dispute, and the Lamarches’ substantial damages, could have been avoided. The Lamarches should be permitted their day in court to seek redress for their damages suffered as a result. For the foregoing reasons, and for the reasons stated in the Lamarches’ opening brief, the Court should reverse. A trial is necessary to resolve the disputed issues of fact, including the Vails’ credibility, which is the dominant issue in this case.

DATED this 7th day of November, 2019.

Respectfully submitted,



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On said day below, I electronically served a true and accurate copy of the *Reply Brief of Appellants* in Court of Appeals, Division III Cause No. 36606-5-III to the following by the method indicated below:

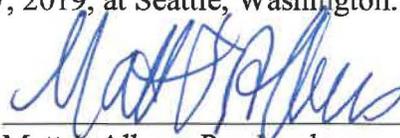
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

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Reply Brief of Appellants

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