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No. 36606-5-III

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

BRIAN and MELANIE LAMARCHE,

Appellants,

v.

IZACK and SHAWNELL VAIL, et al.,

Respondents.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii-iii
A. INTRODUCTION	1
B. ASSIGNMENT OF ERROR	1
(1) <u>Assignment of Error</u>	1
(2) <u>Issues Pertaining to Assignment of Error</u>	2
C. STATEMENT OF THE CASE.....	3
D. SUMMARY OF ARGUMENT	7
E. ARGUMENT	8
(1) <u>Standard of Review</u>	8
(2) <u>The Trial Court Erred in Dismissing the Lamarches' Breach of Contract Claim</u>	9
(3) <u>The Trial Court Erred in Dismissing the Lamarches' Negligent Misrepresentation Claim</u>	13
(4) <u>Alternatively, the Lamarches Could Pursue Their Negligent Misrepresentation Claim Based on the Form 17 Disclosures Alone Because They Alleged that the Vails Actually Knew Their Statements Were False</u>	19
F. CONCLUSION.....	22

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Austin v. Ettl</i> , 171 Wn. App. 82, 286 P.3d 85 (2012)	17, 18
<i>Bloor v. Fritz</i> , 143 Wn. App. 718, 180 P.3d 805 (2008)	12
<i>Dewar v. Smith</i> , 185 Wn. App. 544, 342 P.3d 328, <i>review denied</i> , 183 Wn.2d 1024 (2015).....	14
<i>Donatelli v. D.R. Strong Consulting Eng'rs, Inc.</i> , 179 Wn.2d 84, 312 P.3d 620 (2013).....	18
<i>Dowler v. Clover Park Sch. Dist. No. 409</i> , 172 Wn.2d 471, 258 P.3d 676 (2011).....	8
<i>Eastwood v. Horse Harbor Found., Inc.</i> , 170 Wn.2d 380, 241 P.3d 1256 (2010).....	18
<i>Equipto Div. Aurora Equip. Co. v. Yarmouth</i> , 134 Wn.2d 356, 950 P.2d 451 (1998).....	20
<i>Floyd v. Myers</i> , 53 Wn.2d 351, 333 P.2d 654 (1959).....	19
<i>Jackowski v. Borchelt</i> , 174 Wn.2d 720, 278 P.3d 1100 (2012).....	12, 19
<i>Jones v. State, Dep't of Health</i> , 170 Wn.2d 338, 242 P.3d 825 (2010).....	9
<i>Key Dev. Inv., LLC v. Port of Tacoma</i> , 173 Wn. App. 1, 292 P.3d 833 (2013).....	18
<i>Martini v. Post</i> , 178 Wn. App. 153, 313 P.3d 473 (2013).....	10
<i>Michaels v. CH2M Hill, Inc.</i> , 171 Wn.2d 587, 257 P.3d 532 (2011).....	10
<i>Morinaga v. Vue</i> , 85 Wn. App. 822, 935 P.2d 637, <i>review denied</i> , 133 Wn.2d 1012 (1997).....	9, 17
<i>Nauroth v. Spokane County</i> , 121 Wn. App. 389, 88 P.3d 996 (2004).....	20
<i>Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.</i> , 78 Wn. App. 707, 899 P.2d 6 (1995).....	10
<i>Shoulberg v. Pub. Util. Dist. No. 1 of Jefferson County</i> , 169 Wn. App. 173, 280 P.3d 491, <i>review denied</i> , 175 Wn.2d 1024 (2012)	9
<i>Stieneke v. Russi</i> , 145 Wn. App. 544, 190 P.3d 60 (2008), <i>review denied</i> , 165 Wn.2d 1026 (2009)	11
<i>Stryken v. Panell</i> , 66 Wn. App. 566, 832 P.2d 890 (1992).....	12

<i>Waite v. Whatcom County</i> , 54 Wn. App. 682, 775 P.2d 967 (1989).....	20
<i>Yakima County v. Yakima County Law Enf't Officers Guild</i> , 157 Wn. App. 304, 237 P.3d 316 (2010).....	9

Statutes

RCW 64.06.020	3
RCW 64.06.050(1).....	19, 20
RCW 64.06.070	12

Rules and Regulations

CR 56(e).....	8
RAP 18.1(a)	22

Other Authorities

14A Karl B. Tegland, <i>Wash. Practice: Civil Procedure</i> § 25:16 (2009).....	9
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A. INTRODUCTION

Brian and Melanie Lamarche purchased a residential home on E. Rockwood Boulevard in Spokane from Izack and Shawnell Vail. Just months later, the basement flooded. The Lamarches hired experts to assess the damage and discovered not only that the foundation was made from wood, despite the fact that the Vails listed it as being made from concrete, but it had been failing for years causing repeated and obvious flooding in the basement to the point that wood and insulation in areas of the basement had rotted. The Lamarches sued arguing that the Vails breached the parties' purchase and sale agreement ("PSA"), which required the Vails to affirmatively disclose adverse conditions affecting the property, and that the Vails negligently misrepresented the condition of the home to induce the Lamarches to buy the property.

The trial court dismissed the Lamarches' claims on summary judgment. In doing so, the trial court ignored controlling precedent, misinterpreted the law regarding a seller's duty to disclose defects in a property, and denied the Lamarches their day in court by deciding factual and credibility disputes as a matter of law where such findings are the sole province of the finder of fact. This Court should reverse.

B. ASSIGNMENT OF ERROR

(1) Assignment of Error

1. The trial court erred in entering its March 12, 2019 amended order granting Izack and Shawnell Vail’s motion for partial summary judgment and amended order denying plaintiffs motion for reconsideration.

(2) Issues Pertaining to Assignment of Error

1. Did the trial court err in dismissing a breach of contract claim where home buyers alleged that the sellers breached an affirmative duty under the PSA to disclose any adverse conditions affecting the property by failing to disclose a defective, wooden foundation that experts testified had been subject to obvious flooding for years? (Assignment of Error Number 1)

2. Did the trial court err in dismissing a negligent misrepresentation claim where home buyers alleged that the sellers misrepresented the defective condition of the basement in order to induce them into buying the home? (Assignment of Error Number 1)

3. Did the trial court err in dismissing all the buyers’ claims against the sellers thus foreclosing all potential remedies including rescission of the contract? (Assignment of Error Number 1)

C. STATEMENT OF THE CASE

In the spring of 2016, the Lamarches purchased a home in Spokane from the Vails. The Vails had prepared a Multiple Listing Service (“MLS”) listing for the property, indicating, among other things, that the foundation was poured concrete. CP 377-79. The Lamarches saw information from this public listing when they found the home on public realty websites like Zillow and Realtor.com. CP 453.

Before the sale was completed, the Vails provided a seller disclosure statement required by RCW 64.06.020 (“Form 17”). Among other things, Form 17 asked the Vails to disclose whether the basement had flooded or leaked within the past five years and whether there were any defects with the house, including the foundations, slab floors, and interior and exterior walls. CP 116-20. The Vails answered no. CP 118. However, they later admitted that their dishwasher had leaked in 2014, causing the basement to flood. CP 284, 382-86. The flood was so significant that the Vails hired a professional to perform extensive restoration of the basement, including removing drywall and allowing it to dry. CP 284. Experts would later report that in addition to this single flood caused by the dishwasher, the basement had *regularly* flooded over the course of many years due to the home’s defective foundation, which was made from wood, not concrete as the Vails had represented in the MLS listing. CP 414-16.¹

On the Form 17, the Vails also disclosed that the home had undergone “conversions, additions, or remodeling” but that all building permits and final inspections for such work had been obtained. *Id.* The Vails later admitted that this last disclosure was also false; they had

¹ The foundation of the garage is made from poured concrete, but the rest of the foundation is made from wood. CP 360.

remodeled several rooms, including the bathroom in the basement without obtaining the proper permits. CP 391. They performed the remodel work themselves. *Id.*

On April 29, 2016, the parties entered into a PSA. CP 98-114. The PSA included the following language in an addendum, “Seller acknowledges that Seller has the sole responsibility for disclosing to Buyer in writing any knowledge Seller has regarding the presence of adverse conditions affecting the Property.” CP 113. The Vails made no disclosures beyond what they had already written on Form 17. The sale closed in June 2016, and the Lamarches paid \$398,000 to purchase the home. CP 338-40, 359-60.

In February 2017, during the Lamarches’ first winter in the home, the basement flooded. CP 360. It flooded again in March. *Id.* Each time the flooding lasted about one week. *Id.* The Lamarches hired structural engineers to assess the leaks and discovered that the foundation of the home was made from wood and not poured concrete. CP 258. The engineers determined that the flooding had been occurring for years as evidenced by the rot and water stains in the basement – including on the wooden studs – and rust on the electrical fixtures. CP 414-16, 419, 500. Some of the insulation in the basement was also black with rot. CP 259.

The defective foundation affected the safety and structural integrity

of the home, and experts recommended a total replacement of the wood foundation with concrete. CP 418-21. The estimated cost of this project exceeded \$325,000. CP 301, 421.

The Lamarches sued the Vails, along with several other parties who were subsequently dismissed,² alleging breach of contract and negligent misrepresentation. CP 3-22. They sought the equitable common law remedy of rescission, or, in the alternative, monetary damages. CP 22.

The Vails denied knowing that the foundations of the property were made of wood, or that the basement had been subject to water intrusion through the foundation for many years. However, the Lamarches presented evidence showing the Vails did, in fact, know that the foundation was made from wood and was defective. Expert engineers reported and testified that the water intrusion has been ongoing for years, which would have resulted in regular and obvious flooding in the basement. CP 414-16, 419, 500. As discussed above, this included obvious signs of long-term intrusion in the basement, including rust, water

² The Lamarches also sued their home inspector Jefferey Schroeder (d/b/a Pillar to Post Home Inspections) because he negligently failed to discover the defective foundation and misrepresented the fact that it was made from poured concrete. The Lamarches' claims against Pillar to Post were subject to mandatory arbitration, pursuant to the parties' contract. CP 351-53. The Lamarches moved to set aside the final arbitration award finding in Pillar to Post's favor, which the Spokane County Superior Court denied. CP 355-56. That denial is the subject of a related appeal (Cause No. 36382-1-III) before this Court.

stains, and rot, both on the wood and the insulation in the basement. CP 418-19. The Vails did repair work and remodeling in multiple locations in the basement during which the wooden foundation and rot in the basement would have been exposed. CP 295, 301. The Vails also replaced the drywall throughout the basement sometime between 2010 and 2014 which also would have exposed the both the wood foundation and signs of water intrusion in the basement. CP 374, 426-27.

Izack Vail performed much of the remodel work himself, including structural remodels to the house and the remodel of the basement bathroom. CP 275, 284, 292. The Lamarches' structural engineer, Craig Lee, testified that it would have been difficult for someone to miss the wood foundation when remodeling the basement bathroom. CP 301. The Vails also painted the house themselves, and Lee noted that someone had painted the wood foundation in places to make it look "pretty close to concrete." CP 292, 302.³

During discovery, the Lamarches asked the Vails to produce the

³ Izack Vail was particularly evasive when asked about whether he painted the wood foundation and what color he painted it. CP 292. For example, when asked whether the Vails painted the area below the siding he answered, "Yeah possibly. We painted -- did a lot of painting." CP 292. He later he contradicted himself testifying, "We didn't actually ever paint the house properly. We just touched it up, you know, when it needed it." *Id.* But this flip-flop contradicted the MLS listing which advertised "[n]ew paint in [and] out." CP 378. Vail also testified that he "bought paint to paint the house" but could not recall that the foundation was a different color than the rest of the house. CP 292.

inspector's report they obtained when they bought the home in 2010, to determine whether they learned about about the wooden foundation or signs of past flooding when they bought the house. CP 361. The Vails never produced this document, claimed they did not retain a copy, and, at times, claimed not to recall the name of the professional or company they used to inspect the home. CP 291, 361.

Despite this evidence and the language in the PSA that the Vails had an obligation to disclose the defective foundation, the Vails moved for summary judgment, arguing that they did not breach any contractual obligation and that the Lamarches' negligent misrepresentation claim failed as a matter of law. The trial court, the Honorable Julie McKay, granted summary judgment in the Vails' favor. CP 455-56. The Lamarches moved for reconsideration, which the court denied. CP 545-46. The Lamarches timely appealed. CP 541-42.⁴

D. SUMMARY OF ARGUMENT

The trial court erred in dismissing the Lamarches' breach of contract claim where the Vails had a duty under the language of the

⁴ Although the summary judgment proceedings were couched as "partial" summary judgment, the parties subsequently entered a stipulated, amended final order, clarifying that all claims against all defendants had been dismissed, including claims for negligent misrepresentation, breach of contract, and rescission, and therefore, the Lamarches' appeal was as of right. This was clarified by this Court in a notation ruling by Commissioner Bromme on March 26, 2019.

parties' contract to affirmatively disclose adverse conditions affecting the property. The Lamarches presented ample evidence that the Vails failed to disclose a defective, wooden foundation which had regularly flooded for years causing extensive water damage and rot in the basement. Recent Supreme Court precedent demands reversal where the failure to disclose such adverse conditions is grounds to rescind a real estate contract.

The trial court also erred in dismissing the Lamarches' negligent misrepresentation claim. Again, the Lamarches presented ample evidence that the Vails breached their duty not to misrepresent material conditions to induce a buyer into purchasing a home. Recent, controlling precedent demands that the Lamarches be permitted their day in court.

E. ARGUMENT

(1) Standard of Review

As this Court well knows, as the moving party, the Vails had the burden on summary judgment to show that no genuine issue of material fact existed and that summary judgment was appropriate as a matter of law. CR 56(e). The court was obligated to construe the facts, and reasonable inferences from those facts, in light most favorable to the Lamarches. *Dowler v. Clover Park Sch. Dist. No. 409*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

This Court reviews the trial court's decision *de novo*. *Id.* A trial

court's findings and conclusions on summary judgment are superfluous on appeal. *Shoulberg v. Pub. Util. Dist. No. 1 of Jefferson County*, 169 Wn. App. 173, 177, 280 P.3d 491, *review denied*, 175 Wn.2d 1024 (2012); *Yakima County v. Yakima County Law Enf't Officers Guild*, 157 Wn. App. 304, 331, 237 P.3d 316 (2010). Courts must not weigh evidence or witness credibility when deciding summary judgment. *Jones v. State, Dep't of Health*, 170 Wn.2d 338, 354 n.7, 242 P.3d 825 (2010) (citing 14A Karl B. Tegland, *Wash. Practice: Civil Procedure* § 25:16 (2009)). "Summary judgment is not proper when credibility issues involving more than collateral matters exist." *Morinaga v. Vue*, 85 Wn. App. 822, 828, 935 P.2d 637, *review denied*, 133 Wn.2d 1012 (1997).

For the reasons stated below, the evidence when viewed in the light most favorable to the Lamarches supported their claims for breach of contract and negligent misrepresentation. The trial court erred where issues of fact and the credibility of witnesses (most importantly the Vails' credibility) permeated the case.

(2) The Trial Court Erred in Dismissing the Lamarches' Breach of Contract Claim

To support a claim for breach of contract, a plaintiff must prove each of the following: (1) the defendant owed plaintiff a contractual duty, (2) the defendant breached that duty, and (3) the defendant's breach

proximately caused plaintiff damages. *See Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

Here, the Lamarches alleged that the Vails breached their contractual duty under the language of the PSA to affirmatively disclose “in writing any knowledge Seller has regarding the presence of adverse conditions affecting the Property.” CP 113. The Lamarches presented ample evidence that the Vails breached that duty by failing to disclose the defective, wooden foundation and the condition of the basement. Viewed in the light most favorable to the Lamarches, a jury could find that the basement had regularly flooded over the years, and the Vails knew or should have known that it had. Not only would a reasonable homeowner discover obvious flooding, like the flooding the Lamarches discovered soon after they moved in, but the Vails also extensively remodeled the basement and did repairs which would have exposed both the wooden foundation and the signs of long-term water damage. Finally, the breach caused the Lamarches damages where the Lamarches relied on the lack of disclosures in buying the home and in paying the price they paid.⁵

Below, the Vails and the trial court trial wrongfully relied on

⁵ To the extent there is any doubt regarding this last element, the Court should remember that causation is a classic issue of fact for the jury. *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013) (“Cause in fact is usually a jury question and is generally not susceptible to summary judgment.”); *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611, 257 P.3d 532 (2011) (where the evidence is conflicting, causation is to be resolved by the trier of fact).

Stieneke v. Russi, 145 Wn. App. 544, 565, 190 P.3d 60 (2008), *review denied*, 165 Wn.2d 1026 (2009), a Division II case dealing with disclosures made exclusively in Form 17. RP 25-30. There, Division II held that a Form 17 disclosure was not part of a fully integrated PSA, and therefore a buyer cannot allege a breach of contractual duties created by Form 17 alone. *Id.* at 565-68.

However, the PSA analyzed by the *Stieneke* court did not include the analogous language in the PSA addendum between the Vails and the Lamarches which required that the Vails affirmatively disclose all adverse conditions that affected the property. Thus, the trial court wrongfully relied on *Stieneke* where the Lamarches never argued that Form 17 was part of the PSA or the basis for the contractual duty. CP 369. Rather, they argued that Form 17 was but *one way* the Vails could comply with their independent contractual obligation, *created by the PSA*, which required the Vails to disclose adverse conditions affecting the property. *Id.* *Stieneke* does not control where it did not consider similar language in the parties' PSA.

The trial court was also wrong to impose a strict interpretation of chapter 64.06 RCW and Form 17 disclosures based on *Stieneke*, where more recent Supreme Court opinions have clarified that the disclosure requirements in chapter 64.06 RCW “supplement[] the common law rights

of buyers; [they do] not displace those rights.” *Jackowski v. Borchelt*, 174 Wn.2d 720, 737, 278 P.3d 1100 (2012) (citing RCW 64.06.070 (“nothing in this chapter shall extinguish or impair any rights or remedies of a buyer of real estate”)). Therefore, since *Stienekie* was decided, our Supreme Court has clarified that “chapter 64.06 RCW does not bar a common law rescission action based on misrepresentations in the Form 17 disclosures.” 174 Wn.2d at 737.⁶

Jackowski is on point. There, the buyers purchased a property that was damaged in a landslide shortly after the sale. 174 Wn.2d at 724-26. The sellers disclosed that the home was in landslide area on the Form 17 but did not disclose the fact that uncompacted fill material had been used to construct an addition to the house in an unstable area. *Id.* The buyers also alleged that the sellers had attempted to conceal cracks in the basement floor by covering it with carpet. *Id.* The buyers had the home

⁶ The Lamarches undeniably sought rescission as their preferred remedy to their breach of contract claim. CP 22. Common law rescission is not the picture of clarity in the law. Sometimes it is referred to as a separate cause of action, as the court alluded to in *Jackowski*, other times courts discuss it as a substitute or alternative for contractual damages, especially in real estate transactions. *See, e.g., Bloor v. Fritz*, 143 Wn. App. 718, 739, 180 P.3d 805 (2008) (trial court properly ordered rescission of real estate sale, in lieu of contractual damages, 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 elect rescission in lieu of contractual damages where seller failed to disclose faulty septic tank and roof). Regardless, rescission is an equitable remedy where the court has broad discretion to restore the parties to their original positions prior to executing the contract, and it is often invoked in cases like this involving a seller’s failure to disclose adverse conditions in real estate sales. *Jackowski, Bloor, Stryken, supra.* The trial court erred in dismissing all claims against the Vails and foreclosing this equitable remedy to the Lamarches.

inspected but relied on the sellers' disclosures (or lack thereof) and did not have an expert inspect the soil stability before purchasing. *Id.* The Supreme Court affirmed the Court of Appeals reversal of summary judgment in favor of the sellers, allowing the buyers' claims for common law rescission, fraud, negligent misrepresentation, and breach of contract to go forward based on the sellers' lack of disclosure. *Id.*

Here, too, summary judgment was inappropriate where the Lamarches have alleged that the sellers failed in their contractual duty to make full disclosures regarding the defects in the property. They had a right to proceed in an action to rescind the contract based on the Vails' failure to make full and truthful disclosures as required by the PSA, whether in Form 17 or elsewhere. Reversal is warranted.

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

The trial court also erred in dismissing the Lamarches' claim for negligent misrepresentation. To establish the claim of negligent misrepresentation, the Lamarches had the burden to establish that (1) the Vails supplied information that was false to the Lamarches; (2) the Vails knew or should have known that the information was for the purpose of guiding the Lamarches; (3) the Vails were negligent in obtaining or communicating the false information; (4) the Lamarches relied on the

information; (5) the Lamarches' reliance was reasonable; and (6) the false information proximately caused the Lamarches damages. *Dewar v. Smith*, 185 Wn. App. 544, 561-62, 342 P.3d 328, *review denied*, 183 Wn.2d 1024 (2015).

The Lamarches met their burden for the purposes of summary judgment to move forward on their claim for negligent misrepresentation. The Vails produced false information. They affirmatively listed the house as having a concrete foundation when it was in fact wood, falsely represented that their remodels were properly permitted and inspected, and failed to disclose flooding in the basement which had been ongoing for years. *At the very least*, they failed to disclose the flood caused by the dishwasher, which required removal and repair of drywall in the basement. But the Lamarches also presented evidence that the Vails failed to disclose the defective, wooden foundation, which experts testified that a homeowner in their position would have discovered.

The Vails knew or should have known that the false information was for the purpose of guiding the Lamarches because this information was supplied as part of marketing and offering the home for sale.

The Lamarches were negligent in obtaining or communicating this false information. This is obvious from the fact that they relayed false information without verifying its truth. They also admitted that they did

not spend sufficient time filling out Form 17 and considering which relevant disclosures to make. CP 285, 293.

The Lamarches relied on the information in Form 17 and the lack of any additional disclosures when purchasing the house. The Lamarches reviewed the Vails' disclosures and relied on them when making the purchase. CP 501. The reasonable inference from the record is that the Lamarches would have conducted a more thorough investigation, altered their price, or refrained from purchasing the home had they known the foundation was defective.⁷ They were conscientious home buyers who hired a home inspector before purchasing. But they were unaware they needed to direct their inspector to more carefully scrutinize the condition of the foundation or the recent flooding in the basement, due to the Vails' misrepresentations. CP 451.

Below, the Vails tried to foist responsibility on the Lamarches and/or their home inspector for not discovering the defective foundation. But our Supreme Court rejected a similar argument in *Jackowski*. There, the Court found that summary judgment was inappropriate even though the buyers hired a home inspector who failed to uncover any issue with the fact that the home was built on a landslide area. 174 Wn.2d at 724-26.

⁷ Indeed, the primary remedy the Lamarches now seek is to rescind the PSA due to the multiple false statements which lead them to purchase the property in the first place.

The buyers relied on the sellers' disclosures and did not hire a specialist after the sellers misrepresented the fact that that the house was built on a fill area. *Id.*

Here, too, the Lamarches would have taken greater care inspecting the home had the Vails not affirmatively misrepresented the condition of the foundation. Not only did the Vails misrepresent the material from which it was made, but they misrepresented the fact that it had flooded for years, or, at the very least, that it flooded on one significant occasion when the dishwasher leaked and the Vails had to hire a professional to dry out the basement. They also lied and assured the Lamarches that they obtained permits and inspections for remodel work in the basement, which further created the aura that professionals had signed off on the condition of the basement.

The Lamarches' reliance was reasonable where the Vails negligently listed the home as having a concrete foundation and failed to disclose any defect in the foundation or history of flooding. The Vails attested that their disclosures were truthful, both as part of the MLS listing and in executing the PSA. CP 112-13, 474-85. Thus, the Lamarches had no reason to rely on their disclosures. Moreover, the Lamarches' reliance was reasonable where the record shows that the Vails took active steps to cover up the flooding in the lower level, including remodeling the

basement, installing new drywall and insulation, and drying out the existing drywall after the dishwasher leaked and flooded the basement. Someone also painted the wood foundation to appear concrete and placed clean insulation in the more visible areas of the basement, while leaving rotten insulation in less accessible areas of the basement. CP 259, 301-02.

Finally, the negligent misrepresentation caused the Lamarches damages. They would not have bought the house for \$398,000, had they known it was sitting on a faulty foundation which needed over \$325,000 in repairs.

To the extent there is any question regarding the veracity of any of this evidence or the credibility of any of the witnesses' testimony – most importantly the Vails' testimony regarding what they knew about the history of flooding and defective foundation – summary judgment was inappropriate, and the claim should have gone to trial. *E.g., Morinaga, supra.*

Below, the trial court wrongfully relied on *Austin v. Ettl*, 171 Wn. App. 82, 286 P.3d 85 (2012), in dismissing the Lamarches' negligent misrepresentation claim. RP 25-30. *Austin* is plainly distinguishable. In *Austin*, Division II held that a seller could not be liable for failing to disclose costs of proposed local improvement district assessments on Form 17 when the proposed assessments were not certain at the time of

sale. *Id.* at 86-87. Thus, the court held that the buyers' negligent misrepresentation claim failed as a matter of law because the sellers did not provide any false information. *Id.* at 85. There was no duty at the time of sale to disclose the "*likely costs of potential encumbrances.*" *Id.* (emphasis in original).

Here, the Lamarches' claims have nothing to do with the failure to disclose future problems in the home. The Vails failed to disclose and misrepresented the *existing* condition of the home and *past* instances of flooding. They have admitted that they supplied false information both in the public listings for the home and on Form 17. They also failed to disclose defects in the home as required by the PSA. *Austin* has no bearing on this case, and the trial court erred in relying on it to dismiss the Lamarches' claims.⁸

⁸ *Austin* was decided at a time when the law regarding tort claims among parties with contractual relationships underwent significant change in Washington. *See, e.g., Austin*, 171 Wn. App. at 85 (describing the confusion created by the recent "shifting sands" in the law). In short, through a series of fractured decisions, the Supreme Court replaced the old "economic loss rule" with the "independent duty doctrine." *See Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010). Under this doctrine, "[a]n injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract." *Id.* at 389. It is unnecessary to delve deep into the legal consequences of this doctrine, as the Supreme Court has specifically held that a party can sue in tort for negligent misrepresentation where "one party, through misrepresentations, induces another to enter into a contractual relationship." *Donatelli v. D.R. Strong Consulting Eng'rs, Inc.*, 179 Wn.2d 84, 96, 312 P.3d 620 (2013); *see also, Key Dev. Inv., LLC v. Port of Tacoma*, 173 Wn. App. 1, 26, 292 P.3d 833 (2013) ("Thus far, our Supreme Court has allowed claims to proceed for the following torts where the plaintiff can establish a tort duty owed by the defendant, independent of the related contract between them: Fraud, negligent misrepresentation, and tortious interference with contract."). This is because courts have long held that sellers have an independent duty

(4) Alternatively, the Lamarches Could Pursue Their Negligent Misrepresentation Claim Based on the Form 17 Disclosures Alone Because They Alleged that the Vails Actually Knew Their Statements Were False

Although the trial court erred for refusing to enforce the language in the PSA that the Vails affirmatively disclose defects in the home (whether by means of Form 17 or any other means of disclosure) even if the Lamarches' claim is limited to the misrepresentations in Form 17 alone, summary judgment was inappropriate.⁹ At the very least, dismissal was improper where the Lamarches alleged that the Vails knew the misrepresentations were false and RCW 64.06.050(1) specifically provides for liability where a seller has actual knowledge of an "error, inaccuracy, or omission" in a Form 17 disclosure.

The Supreme Court recently considered this issue in *Jackowski* and held that where a claim for negligent misrepresentation is based *solely* on

in tort to tell the truth when making a sale. *See, e.g., Floyd v. Myers*, 53 Wn.2d 351, 354, 333 P.2d 654 (1959) ("When a purchaser makes inquiry of the seller concerning a material matter within the seller's knowledge, the seller owes a duty to the purchaser to answer truthfully").

The economic loss rule and independent duty doctrine were not briefed in any significant detail below – likely because the Lamarches' claims are clearly permissible under the precedent cited *supra*. But the recent changes in the law caused some confusion in the trial court. *See* RP 27 (referencing the "economic factors (sic) and Independent Duty Doctrine" when dismissing the Lamarches' breach of contract claim).

⁹ Again, the Lamarches claims are not based *solely* on the disclosures in Form 17. Rather, the Vails affirmatively misrepresented that the house had a concrete foundation on public listings for the property, and they failed in their contractual duty under the PSA to affirmatively disclose all adverse conditions which may affect the property.

misrepresentations made on Form 17 disclosures, summary judgment is inappropriate where the buyer alleges that the seller had “actual knowledge” of the “error, inaccuracy, or omission” in the disclosure form. 174 Wn.2d at 737-38. Again, the Court noted that the statute regarding Form 17 disclosures specifically carved out this potential for liability, provided that the buyer can show actual knowledge. *Id.* (citing RCW 64.06.050(1)).

Importantly, whether the Vails had “actual knowledge” of the defective foundation is a *question of fact for the jury*. *See, e.g., Equipto Div. Aurora Equip. Co. v. Yarmouth*, 134 Wn.2d 356, 371, 950 P.2d 451 (1998) (reversing summary judgment in favor of defendant corporate officer because the officer’s “actual knowledge” of a corporation’s legal status was a question of fact for the jury); *Waite v. Whatcom County*, 54 Wn. App. 682, 686, 775 P.2d 967 (1989) (reversing summary judgment where a question of fact existed as to whether defendant had “actual knowledge” of a statutory violation). To survive summary judgment, a plaintiff must merely “come forward with evidentiary facts from which a trier of fact could reasonably infer actual knowledge.” *Nauroth v. Spokane County*, 121 Wn. App. 389, 393, 88 P.3d 996 (2004) (quotation omitted). “Actual knowledge may be established by circumstantial evidence.” *Id.*

Here, the Lamarches presented ample evidence from which a jury could infer that the Vails had actual knowledge that the foundation was defective. Engineers testified that the water intrusion in the basement had been occurring for years and would have been obvious to a reasonable homeowner. The Vails performed remodel work themselves in the basement which would have exposed the long-term water damage, including water stains and rot in the wood and insulation.

The record also contains evidence that the Vails took affirmative steps to hide their knowledge. First, *at the very least*, they admitted that they failed to disclose the flood in the basement caused by the dishwasher. This flood was significant, requiring professional repair, and yet they failed to mention it. Second, someone painted the wood foundation in a way to make it look like concrete and selectively replaced insulation in the basement only in the more visible areas.

Additionally, the Vails never produced a copy of the home inspection they obtained when they bought the house in 2010, which would have shown exactly what they knew regarding the foundation when they bought the house. The Vails claimed that their failure to produce a copy of the prior home inspection was innocent, but a jury should be allowed to evaluate the credibility of their claim that they could not produce a copy of that important document that was only six years old or

even remember the name of the professional or company who performed the inspection.

These material facts regarding the Vails' actual knowledge of the condition of the home should have precluded summary judgment and allowed the negligent misrepresentation to claim to go to the jury under this alternative theory based solely on the defects in Form 17. In sum, the Lamarches produced sufficient evidence which, when viewed in the light most favorable to them, met the low bar required to survive summary judgment. Reversal is warranted.

F. CONCLUSION

The Lamarches are entitled to their day in court to seek rescission of the contract which the Vails induced them to enter through material lies and omissions. Reversal is necessary so that a jury can resolve the factual disputes which permeate the Lamarches' claims for breach of contract and negligent misrepresentation. The Court should reverse and award the Lamarches their costs on appeal.¹⁰

¹⁰ The PSA provides that in the event of a lawsuit between the buyer and seller, "the prevailing party is entitled to reasonable attorney fees and expenses." CP 101. Pursuant to RAP 18.1(a), this would include fees to the prevailing party for time spent on appeal. Because the Lamarches ask that this court reverse summary judgment so that a jury can properly determine who is the prevailing party, a request for attorney fees would be premature. However, the Lamarches reserve all rights to seek fees in the future for time spent both in the trial court and on this appeal, pursuant to the parties' contract and/or any other source of applicable law or equity.

DATED this 12th day of July, 2019.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *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.

DATED: July 12, 2019, at Seattle, Washington.



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