

FILED  
Court of Appeals  
Division III  
State of Washington  
9/11/2019 11:07 AM

NO. 36606-5-III

STATE OF WASHINGTON, COURT OF APPEALS  
DIVISION III

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BRIAN and MELANIE LAMARCHE,

Appellants

vs.

IZACK and SHAWNELL VAIL, et al.,

Respondents.

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BRIEF OF RESPONDENTS

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JP. Diener, WSBA 36630  
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## **I. INTRODUCTION**

The Lamarches entered into a Real Estate Purchase and Sale Agreement (REPSA) with Izack and Shawnell Vail on April 29, 2016. (CP 112). The REPSA specifically advised the buyers (Lamarches) to “utilize the services of a licensed professional inspector to inspect the property.” (CP 112). The Form 17 Seller Disclosure also, in bold and emphatic language, advised the buyer to retain qualified experts to inspect the property. (CP 116). Following execution of the REPSA, the Lamarches retained the services of a licensed professional property inspector, Jeffrey Schroeder of Pillar to Post. Schroeder inspected the property and provided the Lamarches with a detailed report dated May 6, 2016. (CP 123-151). In reliance on Schroeder’s home inspection report, the Lamarches closed the transaction on June 2, 2016. (CP 114).

It wasn’t until February 2017 that the Lamarches first observed water intrusion into the basement. (CP 5). Contrary to the Lamarches’ arguments, there was no evidence the Vails knew of or should have known of outside intrusion or defects in the foundation. Based upon this lack of evidence, the trial court properly dismissed the Lamarches remaining causes of action of breach of contract, negligent misrepresentation, and rescission.

## II. STANDARD OF REVIEW

The standard of review of a summary judgment order is de novo. *Thompson v. Peninsula School Dist.*, 77 Wn. App. 500, 504, 892 P.2d 760 (1995). The appellate court engages in the same inquiry as the trial court. *Schaaf v. Highfield*, 127 Wn.2d 17, 896 P.2d 665 (1995). Summary judgment is proper even though there may be an issue of material fact when the record shows there is no issue of fact as to another material issue necessary as an element of proof. *Hulse v. Driver*, 11 Wn. App. 509, 524 P.2d 255, rev. denied, 84 Wn.2d 1011 (1974). Summary judgment is appropriate when there is no dispute as to any material fact. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

A material fact is one upon which the outcome of the litigation depends. *Morris*, 83 Wn.2d at 494. Mere unsupported conclusory allegations and argumentative assertions will not defeat a summary judgment motion. *Absher Constr. Co. v. Kent School Dist.*, 77 Wn. App. 137, 141-42, 890 P.2d 1071 (1995). Conclusory statements of fact are insufficient to withstand a summary judgment motion. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988).

With respect to causes of action or claims where the burden of proof is clear, cogent, and convincing evidence, the appellate court must view the

evidence presented through the prism of the substantive evidence burden. *Rockrock Grp., LLC v. Value Logic, LLC*, 194 Wn. App. 904, 914, 380 P.3d 545, 550 (2016). Thus, with respect to Plaintiffs' claim for negligent misrepresentation, the appellate court must determine whether, when viewing the evidence in favor of the nonmoving party, a rational trier of fact could find that the nonmoving party supported its claim by clear, cogent, and convincing evidence. *Rockrock Group*, 194 Wn. App. at 914.

### **III. SCOPE OF REVIEW**

The appellate court may only review or consider evidence submitted on a denial of a motion for reconsideration where the appellant adequately briefs the law and grounds attendant to the assignment of error to the motion for reconsideration. *Christian v. Tohmeh*, 191 Wn. App. 709, 728, 366 P.3d 16 (2015). Specifically, the appellate court will not consider evidence submitted in support of a motion for reconsideration where the appellant fails to analyze or identify the grounds for reconsideration under CR 59(a). The Lamarches did not brief or provide any analysis in their brief in this case regarding the grounds for reconsideration. Thus, any evidence submitted by the Lamarches on the motion for reconsideration cannot be considered by the appellate court. *Christian*, 191 Wn. App. at 728-29.

Moreover, under RAP 9.12 the appellate court, in reviewing an order granting a motion for summary judgment, will consider only evidence and issues called to the attention of the trial court.

**IV. EVIDENCE NOT PROVIDED ON SUMMARY JUDGMENT  
INADMISSIBLE ON APPEAL**

In their brief, the Lamarches referred to multiple pieces of evidence that were not provided to the trial court on the Vails' summary judgment, and were therefore not relied upon by the court in ruling on the motion. The general rule is that the appellate court will not accept evidence on appeal that was not before the trial court. See *State v. Curtiss*, 161 Wn. App. 673, 250 P.3d 496 (2011). Pursuant to RAP 9.11, such evidence will only be considered on appeal if six elements are met: (1) additional proof of facts is needed to fairly resolve the issues on review; (2) the additional evidence would probably change the decision being reviewed; (3) it is equitable to excuse a party's failure to present the evidence to the trial court; (4) the remedy available to a party through post-judgment motions in the trial court is inadequate or unnecessarily expensive; (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive; and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

Included in the Lamarches' Clerk's Papers is the Declaration of Samuel C. Thilo In Support of Defendant White's Motion for Summary Judgment to Dismiss Plaintiff's Claims. (CP 250-356). This document was not before the court on the Vails' Motion for Partial Summary Judgment. The trial court did not consider this document nor its exhibits in reaching its ruling on the Vails' motion. The Lamarches did not cite to this document or its exhibits in responding to the Vails' motion. Nevertheless, in their brief the Lamarches cite to this document several times. This is inappropriate and this Court should not consider these citations.

Under CR 56(h), a summary judgment order shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. The Thilo declaration and exhibits were not called to the attention of the trial court on the summary judgment motion, and therefore were not designated in the summary judgment order. (CP 357-372). As such, these documents and evidence cannot and should not be considered by the appellate court. RAP 9.12.

Moreover, there is nothing in the Thilo declaration that would now change the decision of the trial court, and there is no reason to excuse the Lamarches' failure to present this evidence at summary judgment. There is nothing inequitable about refusing to allow the Lamarches to rely on this

document at this late stage. Instead, it would be inequitable to the Vails to allow the sudden reliance on this document that was not cited to nor brought to the attention of the trial court when it ruled on the summary judgment motion.

The Lamarches made no argument pursuant to RAP 9.11 in order to allow this Court to consider the declaration, and it is clear they cannot meet the requirements of the rule. Therefore, (CP 250-356) should not be referenced or relied upon by this Court in making its ruling on appeal.

#### **V. STATEMENT OF THE CASE**

In April 2016, Defendants Izack Vail and Shawnell Vail entered into a Real Estate Purchase and Sale Agreement (REPSA) with Plaintiffs Brian Lamarche and Melanie Lamarche. (CP 98-114). Plaintiffs Lamarche were represented by their real estate agent, Laura Branning, in the transaction. (CP 4). As required by RCW 60.06.020, Defendant Vail submitted a Form 17 Seller Disclosure Statement. (CP 116-121).

Plaintiffs Lamarche retained a home inspector, Jeffrey Schroeder of Pillar to Post, to perform a detailed inspection of the home prior to closing, as it was common knowledge to hire such a home inspector when purchasing a house. (CP 9; CP 163). Mr. Lamarche expected the home inspector to inform him of the conditions of the house, and he expected the

home inspector to look for and discover any defects in the home. (CP 163, 164). Further, Mr. Lamarche expected the home inspector to discover any structural defects in the property. (CP 164). In this regard, Mr. Lamarche expected the home inspector to discover any defects in the foundation and to report any such foundation defects in the home inspection report. (CP 164-165). Mr. Lamarche believed that a wood foundation was a defect and that the home inspector would report to him if the foundation was in fact made of wood. (CP 165-166).

If the home inspector recommended that additional inspections be undertaken, then Mr. Lamarche stated he had an opportunity to undertake such additional recommended inspections. (CP 169). Further, if the home inspection conducted by the home inspector or any additional home inspections revealed defects, then Mr. Lamarche could terminate the REPSA. (CP 169).

The home inspection report generated by Mr. Schroeder did not identify any defects in the foundation of the house. (CP 125). The home inspection report did not identify a wood foundation. (CP 125). The sale of the house closed on June 2, 2016. (CP 114).

As stated above, the Vails filled out and provided the Lamarches with a Form 17 Seller Disclosure Statement. (CP 116-121). Mr. Lamarche

admitted there was nothing on Form 17 that a representation was made as to whether the foundation was concrete. (CP 171-172). In addition, Mr. Lamarche admitted that a reasonable interpretation of the section in Form 17 concerning basement water leaks referred to water intrusion from the outside. (CP 118; CP 451). In this case, the only evidence that water leaked into the basement between 2010 and 2016 was from a dishwasher leak. (CP 451-452). The Vails purchased the property in 2010. (CP 451).

During the first seven months after they moved in, the Lamarches did not observe any mildew, mold, or evidence of water intrusion in the basement. (CP 450). It was not until February 2017, during the course of a wet winter in Spokane, that the Lamarches first experienced water intrusion in the basement. (CP 5). After the water intrusion, the Lamarches retained a contractor to clean up the water intrusion damage. (CP 5). After removing the carpet in the basement it was apparent that the water intrusion in the basement emanated from cracks in the concrete basement floor and from underneath the sill plate which rested upon the concrete slab floor. (CP 411).

In May 2017, the Lamarches filed suit against the following:

- Izack and Shawnell Vail – sellers
- Jeffrey Schroeder, Sabrina Schroeder, J & S Investments, and Pillar to Post Home Inspectors – home inspectors

- Amanda White – real estate appraiser
- Joel Elgee and Coldwell Banker Schneidmiller Realty – Vail’s real estate agent
- Laura Branning and Exit Realty Corp. USA – Lamarches real estate agent

(CP 3-22). The Lamarches alleged several legal theories against Defendants Vail, including negligent misrepresentation, intentional misrepresentation, fraudulent concealment, breach of contract, and rescission. (CP 3-22). Subsequently, all of the other defendants were dismissed from this lawsuit. (CP 50-51; CP 62-64; CP 65-68; CP 72-74; CP 428-430). With respect to the Vails, the causes of action asserted against them for intentional misrepresentation and fraudulent concealment were dismissed with prejudice on September 5, 2018. (CP 77-79).

On October 26, 2018, the trial court entered a summary judgment order dismissing Plaintiffs’ causes of action against the Vails for breach of contract and negligent misrepresentation. (CP 455-456). Plaintiffs’ motion for reconsideration of the summary judgment order was denied on January 29, 2019. (CP 539-540). Thereafter, an amended order dismissing Plaintiffs’ remaining cause of action for rescission against the Vails was entered on March 12, 2019. (CP 548).

## VI. ARGUMENT

### A. The Court Properly Dismissed The Breach Of Contract Claim

#### 1. Form 17 Satisfied all Disclosure Obligations

The Lamarches' breach of contract claim failed at the trial court because they did not produce evidence of any contractual duty breached by the Vails. The argument they made then, and which they make again here on appeal, is that the "Spokane Addendum" to the REPSA imposed a special and separate duty on the sellers to disclose "to Buyer in writing any knowledge Seller has regarding the presence of adverse conditions affecting the Property." The trial court did not find the argument persuasive.

The duty referenced in the Spokane Addendum is not a new and separate duty created specifically by that document. Instead, the duty to disclose is codified by RCW 64.06.020, which in turn is satisfied by the seller's completion of Form 17, the Seller's Disclosure Statement. The Vails made this argument at the trial court and Judge McKay correctly agreed.

A cause of action for breach of a REPSA cannot be based on a failure to disclose something in Form 17. *Steineke v. Russi*, 145 Wn. App. 544, 190 P.3d 60 (2008), *review denied* 165 Wn.2d 1026 (2009). For the first time, the Lamarches push back against the clear doctrine established in *Steineke*

by citing to *Jackowski v. Borchelt*, 174 Wn.2d 720, 278 P.3d 1100 (2012). Though the Lamarches seem to indicate that *Jackowski* somehow contradicts or overrules *Steineke*, it does nothing of the kind.

The more recent case, *Jackowski*, recognizes a common law cause of action for rescission of a purchase and sale agreement where a seller fails to accurately and honestly fill out Form 17. *Jackowski* has no application here, because the Lamarches had no cause of action for rescission based on a problem with Form 17. Instead, the Lamarches' request for rescission was based entirely on their claim for breach of the REPSA. Regardless, as will be discussed in more detail in the following section of this brief, the Vails did not make any material misrepresentations of fact in Form 17 concerning the foundation of the house. (CP 116-121).

The *Jackowski* court merely held that a real estate buyer could pursue common law remedies, including rescission based upon misrepresentations in the Form 17 disclosure. However, the *Jackowski* court held that the buyer must establish that the seller had "actual knowledge" of the error, inaccuracy, or omission to recover for rescission. *Jackowski*, 174 Wn.2d at 737.

In this case, the Vails did not make any material misrepresentations on the Form 17 disclosure statement. The Lamarches admitted there were

no representations made on Form 17 as to whether the foundation was concrete (CP 171-172) and admitted that a reasonable interpretation of Form 17 with respect to basement water leaks was that such water leaks referred to water intrusion from the outside. (CP 351). The Lamarches went on to admit that there was no evidence of water intrusion into the basement other than the dishwasher water leak between 2010 and 2016. (CP 450). Accordingly, there is no evidence to support any claim for negligent misrepresentation and rescission for any representation made on the Form 17 disclosure.

The Lamarches failed to present any evidence to support their argument that the Spokane Addendum creates a distinct and independent duty of the seller to disclose defects. Instead, the law and the evidence squarely support the Vails' position that the language in the Spokane Addendum is merely a reference to the statutory duty of the seller to complete Form 17.

Washington follows the context rule in interpreting written contracts, regardless of whether the language is ambiguous. *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). Under the context rule, "extrinsic evidence is admissible as to the entire circumstances which the contract was made, as an aid in ascertaining the parties' intent." *Berg*, 115 Wn.2d at 667.

The context rule allows the court to consider extrinsic evidence while viewing the contract as a whole. *See generally Neuson v. Macy's Dept. Stores, Inc.*, 160 Wn. App. 786, 249 P.3d 1054 (2011); *Lopez v. Reynoso*, 129 Wn. App. 165, 118 P.3d 398 (2005). This approach allows the court to consider a variety of factors, including the reasonableness of the respective interpretations advocated by the parties and the usage of trade and course of dealings. *Lopez*, 129 Wn. App. 165 at 170. Contract interpretation is a question of law and does not create an issue of fact. *International Marine Underwriters v. ABCD Marina*, 179 Wn.2d 274, 313 P.3d 395 (2013).

The Lamarches' contention that the Spokane Addendum creates a distinct duty to disclose separate and apart from RCW 64.06.020 and Form 17 is not reasonable. There is no law and no factual evidence that the Lamarches have provided to show this interpretation is shared by anyone but themselves. There are no cases involving the Spokane Addendum nor any cases addressing a similar addendum. Nowhere in the Spokane Addendum is there a space or opportunity for the seller to list in writing any potential defects. Further, the document does not provide any direction as to how the seller is expected to comply with this duty. The only reasonable interpretation under the context rule is that any written disclosure is to be made by Form 17 pursuant to RCW 64.06.020.

Moreover, the Lamarches admit that completing and providing Form 17 is an acceptable way for the seller to satisfy the duty referenced by the Spokane Addendum. Brief of Appellant, p. 11:

... 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.

In their own brief, the Lamarches confirm that completing and providing Form 17 satisfied the seller's duty to disclose referenced in the Spokane Addendum. (CP 370). By providing Form 17, the Vails satisfied their obligations under the REPSA, and thus cannot be said to have breached the agreement. The Lamarches' acknowledgment of this reality completely undercuts their breach of contract claim and establishes that the Vails did exactly what they were required to do.

## **2. The Vails Completed Form 17 Correctly**

There is nothing in either the REPSA or Form 17 that requires the Seller to speculate about possible defects or list potential suspicions. The most the Seller is required to do is reveal defects about which they have actual knowledge. There is no evidence that the Vails had any actual knowledge of undisclosed defects; instead their own testimony clearly

shows they knew nothing about the physical makeup or condition of the foundation. (CP 395).

The REPSA, including the Spokane Addendum, and Form 17 both repeatedly caution and advise the Buyer to conduct a professional inspection of the Property and to do due diligence. (CP 110-113; CP 116). It is clear from these provisions that the burden is on the Buyer to inspect and investigate the property and uncover potential defects. The Lamarches have not been able to provide evidence of any such onus on the Seller to conduct an inspection, search for or speculate about potential defects. Mr. Lamarche testified that he understood this, and that he hired an inspector specifically to protect his interests. (CP 163-164). He further testified that he relied on the inspector to tell him about any defects in the property, including whether the foundation was wood or concrete. (CP 165). Mr. Lamarche knew that if any defects were revealed by the inspector, he had the ability under the contract to cancel the purchase. (CP 169).

The inspection revealed none of the defects of which the Lamarches now complain. (CP 164-165). A professional inspector could not find these defects, but the Lamarches claim it was a breach of contract for the Vails not to have known and disclosed them. Nothing in the record indicates that

the Vails have any special or professional knowledge about construction or property inspection.

The Lamarches now argue that the Vails breached the agreement by failing to make “full disclosures regarding the defects in the property.” Brief of Appellant, p. 13. This allegation is made without providing any argument or evidence about what would constitute a “full disclosure” under the law. The reality is that the law, as discussed above, only requires disclosure of defects that are actually known to the sellers, and then specifically only those that are addressed on Form 17. Nevertheless, the Lamarches close their argument by stating that they should have been able to proceed on their breach of contract claim because of “the Vails’ failure to make full and truthful disclosures as required by the PSA, whether in Form 17 or elsewhere.” *Id.* Yet, the Lamarches fail to show where or how the Vails failed to make the disclosures required by Form 17, and provide nothing about the “elsewhere” they speculate may control such disclosures. The trial court rightfully and properly dismissed the Lamarches’ claim for breach of contract, and the ruling should be affirmed.

**B. The Lamarches Did Not Meet Their Burden On Negligent Misrepresentation As A Matter Of Law**

To prevail on a claim of negligent misrepresentation, the plaintiff must prove by *clear, cogent and convincing evidence* that 1) the defendant

supplied false information for the plaintiff's guidance in a transaction; 2) that defendant knew or should have known the information supplied was to help guide the plaintiff; 3) that the defendant was negligent in communicating the false information; 4) that the plaintiff relied on the false information; 5) that the plaintiff's reliance was reasonable; and 6) that the false information proximately caused the plaintiff damages. *Merriman v. American Guarantee & Liability Insurance Co.*, 198 Wn. App. 594, 613, 396 P.3d 351-361 (2017).

Clear, cogent and convincing evidence means that each element of the claim "must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. [It] exists when occurrence of the element has been shown by the evidence to be highly probable." WPI 165.05. *See also, Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 242 P.3d 936 (2010) (holding that clear, cogent and convincing evidence requires a degree of proof greater than a mere preponderance, but something less than proof beyond a reasonable doubt).

**1. There is No Evidence of Any False Representation**

The Lamarches' first argument on their negligent misrepresentation claim rests on a Zillow or Realtor.com page that was allegedly based on a Multiple Listing Service listing prepared by the Vails. To argue this, they

cite to (CP 378-379) which is a printout from the Zillow website. However, that particular Zillow listing could not possibly have been the same one the Lamarches supposedly viewed prior to purchasing the property. The printout shows the sale on 6/6/2016 for \$398,000, which means that this listing was prepared after the sale, not before the sale.

Further, on the Zillow website there is a disclaimer which reads: “Note: This property is not currently for sale or for rent. The description below may be from a previous listing.” (CP 378). The evidence reveals that this home has been listed and sold multiple times. The Zillow website page shows at the bottom the sale to the Vails back in 2010. (CP 379). Based on the disclaimer, the information used in the Zillow listing could have been from the 2010 listing, or one previous (the house was built in 1986).

The listing provided to the trial court and this court presents only speculation about what the Lamarches may have seen in 2016. There is also no proof that Zillow took the information from the Vails’ MLS listing. Lemarche, who is not a real estate agent or broker, did not have access to the multiple listing service – MLS. (CP 453). Therefore, there is no evidence that the Lamarches saw any representation by the Vails regarding the type of foundation, so it cannot be concluded that the Lamarches

somehow relied on such a representation. This failure of evidence defeats their negligent misrepresentation claim.

Similarly, the Lamarches cannot point to any false representations on Form 17. They summarize their argument on the negligent misrepresentation claim as the Vails “misrepresent[ing] material conditions to induce a buyer into purchasing a home.” Brief of Appellant, p. 8. However, when it comes to the type of foundation, there is nothing on Form 17 to disclose that information. (CP 116-121). Nowhere on Form 17 did the Vails indicate the type of foundation of the home, and thus did not make any representation in this regard. Mr. Lamarche himself admitted that the Vails did not make any representations regarding the material makeup of the foundation (CP 171). Yet, the Lamarches still argue that they “relied on the information in Form 17” to support their negligent misrepresentation claim. Brief of Appellant, p. 15. Again, there were no representations about the foundation in Form 17, so it would have been impossible for the Lamarches to reasonably rely on Form 17 in regard to the material makeup of the foundation. (CP 171).

Repeatedly throughout their brief, the Lamarches refer to the Vails’ misrepresentations regarding the condition of the foundation. However, as the Lamarches have admitted, the Vails made no representations about the

type of foundation. The very first element of negligent misrepresentation cannot be shown by the Lamarches, and certainly cannot be proved by clear, cogent and convincing evidence. Accordingly, the trial court correctly dismissed the claim.

**2. The Lamarches Did Not Rely Upon Any Representations From the Vails**

Mr. Lamarche admitted that the Vails did not make any representations to him concerning the foundation. (CP 171-172). Instead, Mr. Lamarche looked to the home inspector to disclose and advise him of any structural defects in the property. (CP 163-166). Mr. Lamarche hired the home inspector, Jeffrey Schroeder, to discover any defects. (CP 163). Had the home inspector discovered any structural defects and reported those defects to the Lamarches, then the Lamarches could have terminated the purchase agreement. (CP 169). Thus, the Lamarches cannot establish the reliance element of the negligent misrepresentation claim as a matter of law.

**3. The Foundation is Not Defective**

The Lamarches' argument is rife with irrelevant claims and speculation about what they would have done if they had known the house had a wood foundation. They mention things that have no bearing on their claims or the elements of those claims. Nevertheless, some of these assertions deserve a limited response.

First, the Lamarches assert that the home requires \$325,000 in repairs and remodeling because of the wood foundation. There was no admissible evidence of necessary repairs admitted at the trial court, so the proclaimed damages are completely baseless. More importantly, however, all the evidence shows that a wood foundation is not a defect. (CP 435). Wood foundations were allowed under Spokane County Building Code in 1986, when the home was constructed, and are still allowed today. (CP 435). The Lamarches provided no evidence that a wood foundation could, by its nature, be considered defective or require removal and replacement.

Additionally, the Lamarches offer pure speculation about what they would have done if they had known the home had a wood foundation. These statements are inadmissible as evidence and could not have been properly considered by the trial court, nor can they be considered on appeal. ER 602 requires a witness to give testimony that is based only on personal knowledge; speculation does not raise to the level of the standard required by the rule. *See Tapio Investment Company I v. State by and through the Dept. of Transportation*, 196 Wn. App. 528, 384 P.3d 600 (2016). ER 401 allows only the admission of evidence that has a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Courts

have ruled that speculation is not relevant evidence and thus is barred by ER 401. *See State v. Donahue*, 105 Wn. App. 67, 18 P.3d 608 (2001).

The Lamarches also make the unsubstantiated claim that the wood foundation somehow contributes to frequent leaking or flooding in the basement, and that this should have made the Vails aware that the foundation was indeed wood. Nevertheless, the evidence presented, even by the Lamarches' own expert witness, Brent Cornelison, makes clear that if there was any water intrusion in the basement, it came up from under the concrete slab, not through the wood foundation. (CP 411-412). Mr. Cornelison also stated that it was possible for the Vails to never become aware of such water intrusion if it occurred gradually over time. (CP 413-414). The Lamarches themselves lived in the house for several months before they became aware of any issues. (CP 165).

As they did at the trial court, the Lamarches make references on appeal to the fact that the basement experienced a minor flood during the Vails' ownership. This was and still is a red herring. The water in the basement came from the Vails' main floor dishwasher that leaked. (CP 382-386, 388). The problem was fixed and the minor damage was repaired. Form 17 does not address internal leaks, but instead addresses flooding of water that comes from the exterior (CP 116-121); this has no relationship to the minor

dishwasher leak that has since been fully repaired. The dishwasher leak has no bearing on the home's foundation. (CP 451).

4. **The Vails Did Not Have Actual Knowledge of Any Defective Condition**

The Lamarches claim the trial court improperly dismissed their claims because the *Jackowski* case allows a negligent misrepresentation claim to proceed where the seller has "actual knowledge" of some "error, inaccuracy or omission" in Form 17. They argue that "whether the Vails had 'actual knowledge' of the defective foundation is a question of fact for the jury." There are two problems with this argument: 1) The foundation is not defective, as discussed above; and 2) the Lamarches have provided nothing more than bare allegations, speculation and conclusory statements to establish that the Vails had actual knowledge that the foundation was made of wood. To survive summary judgment, the plaintiff's proof of the elements of its claim must be based on more than mere conjecture or speculation. See *Ruff v. County of King*, 125 Wn.2d 697, 707, 887 P.2d 886 (1995). No reasonable trier of fact could conclude that these speculative statements rise to the level of clear, cogent and convincing evidence of negligent misrepresentation.

The fact that the Vails saw wood studs in the basement during the remodel amounts to nothing. It is common knowledge, and it would have

been reasonable for the trial court to take judicial notice, that wood studs are extremely common in all modern homes, even in poured concrete basements, as that is where and how one hangs the drywall. Mr. Vail left no doubt in his own deposition testimony that he did not know the house had a wood foundation. (CP 435). Further, there is no evidence or testimony in the record that observing wood studs in the basement would alert someone to the fact that the home had a wood foundation. Not only have the Lamarches provided no evidence that the Vails knew, or even should have known, about the wood foundation or water intrusion, the evidence makes clear that the Vails did not in fact know.

**C. Certain Evidence Included In The Record Is Inadmissible**

In the Vails' Reply Brief on their Motion for Summary Judgment, they objected to the consideration of certain evidence that had been submitted in response by the Lamarches. Those objections continue in this appeal.

**1. Letter from Brent Cornelison (CP 417-419)**

The Lamarches attached a letter from one of their experts, Brent Cornelius, as an Exhibit in their response. The letter is a hearsay document and is therefore inadmissible. ER 801 and ER 802.

**2. Purported Statement and Email of Una Zeck (CP 422-424)**

Also attached to the declaration of Ryan McNeice was a purported statement/email of an individual named Una Zeck. This statement is hearsay and therefore inadmissible. ER 801 and ER 802.

**3. Property Tax Assessment (CP 471-472)**

Property tax assessment reports are not admissible under Washington law. The Washington State Supreme Court in *Estate of Jones* specifically held that a property tax assessment record was not admissible as a public record. *In re Estate of Jones*, 152 Wn.2d 1, 113, n.5, 93 P.3d 147 (2004) (citing *Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941)). (While public records can be an exception to the hearsay rule, the record cannot contain statements that involve an exercise of judgment, discretion, or the expression of an opinion)).

In support of their Motion for Reconsideration, the Lamarches provided the trial court with a printout from the Spokane County Assessor's webpage that shows the property tax assessment for the subject home. That assessment, which is also included in these Clerks Papers (CP 471-472), is inadmissible hearsay, as it involves the exercise of judgment or discretion or the expression of opinion. *In re Estate of Jones* makes clear that property

tax assessments are inadmissible hearsay and not subject to the public records exception. 152 Wn.2d at p. 13, n.5.

## **VII. CONCLUSION**

The trial court properly granted summary judgment dismissing Plaintiffs' causes of action for breach of contract, negligent misrepresentation, and rescission. The Vails did not make any representations to the Lamarches as to alleged defects in the foundation nor did they make any misrepresentations concerning water intrusion into the basement from the outside. Moreover, a wood foundation is not a defect. Finally, the Lamarches did not rely upon any representations made by the Vails; instead, they relied upon the home inspector. Accordingly, the Court should affirm the trial court's summary judgment order dismissing the Lamarches' claims against the Vails.

DATED this 11th day of September 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2019, I electronically served a true and correct copy of the Brief of Respondents in Court of Appeals, Division III, Cause No. 36606-5-III to the following:

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**September 11, 2019 - 11:07 AM**

**Transmittal Information**

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**Appellate Court Case Number:** 36606-5  
**Appellate Court Case Title:** Brian and Melanie Lamarche v. Izack and Shawnell Vail, et al  
**Superior Court Case Number:** 17-2-00985-1

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