

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEASIDE

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No. 35352-1-IF
BY  DEPUTY

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

TERESA MCCORMICK, Appellant,

and

TERRY ESTVOLD and **KAY ESTVOLD**, Respondents.

REPLY BRIEF OF APPELLANT

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ORIGINAL

I. INTRODUCTION

Summary judgment dismissing Ms. McCormick's claims for negligent misrepresentation, fraud, and fraudulent concealment should be reversed. The evidence in the record establishes genuine issues of fact regarding the Estvolds' knowledge of defects in the home, their failure to adequately disclose, and their negligence in making representations that the defects had been repaired.

The following facts are critical to a just resolution in this matter. First, the Estvolds admit that they experienced various problems with the home, including mold in the upstairs office, CP 340, a leak in the attic near the master bath and bedroom, CP 341-43, defective flashing near the Gonzales side of the home, *id.*, mold in the attic, *id.*, drainage problems, CP 356, and that the Gonzales chimney had been resurfaced, CP 55. The Estvolds did not fully disclose each of these problems to Ms. McCormick at any time. The Estvolds rely on the real property transfer disclosure statement and the invoice from Bennett as evidence that the problems were disclosed, but it is clear from those documents that the disclosure was inadequate.

The disclosure form does not disclose mold in the home, drainage problems, or the resurfacing of one chimney, nor does it describe two defective areas in the attic. The form describes only "Some cosmetic

bubbling of stucco on inside of north chimney. It has been checked for moisture by Bennett Laboratories [sic] and sealed” and “Light mold problem in attic—treated in March ’02 by Bennett Laboratories [sic]. Roof & flashing repaired. Vents and 2 humidity sensitive fans installed. Top layer of insulation replaced. Copy of work & cost attached.” CP 323. The Bennett invoice also did not disclose the full extent of the defects in the home:

Chimney flashing replacement, Removal and replacement of water damaged top plate material (2x4) around chimney area inside of the home. Addition of three roof vents and two thermostat controlled air exchange fans. Removal and replacement of leaking roof shingles and replacement of water damaged roof sheathing.

CP 324. A comparison of these disclosures with the list of actual defects reveals several omissions.

Ms. McCormick signed the sellers’ disclosures, acknowledging her responsibility for the issues disclosed within the document, but that acknowledgement cannot be construed to apply to deficiencies that were not adequately disclosed on the form. The Estvolds had manipulated the form to conceal the extent of the deficiencies. They gave partial information to Ms. McCormick and her inspector, which they reasonably relied upon. Thus, although Ms. McCormick acknowledged that her inspection report was consistent with the disclosure form, this does not

preclude the conclusion that the form and receipts were purposely or negligently drafted to conceal the extent of the defects. After some time in the home, it became obvious to Ms. McCormick that she had purchased the “house from hell.”¹ CP 124. Construing the facts in Ms. McCormick’s favor, the evidence shows that the Estvolds negligently or fraudulently concealed material information regarding the condition of the home, and summary judgment was improper.

II. NEGLIGENT MISREPRESENTATION

Ms. McCormick’s claim of negligent misrepresentation should not have been dismissed at summary judgment. Contrary to the Estvolds’ assertion, the recent decision of *Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), does not preclude Ms. McCormick’s claim because she is seeking to recover personal injury damages in addition to costs to remedy the defects. Further, the evidence in the record is sufficient to raise an issue of material fact as to the Estvolds’ negligence in communicating information regarding the condition of the home. Accordingly, summary judgment was improper.

¹ The Estvolds’ counsel would have the Court believe that this comment was only a joke and that Appellant’s Brief uses the statement out of context. Respondents’ Brief at 12. However, the Estvolds themselves stated that the comment was not a joke, and that Ms. McCormick had made such a comment before. CP 124-25.

A. Negligent Misrepresentation Is Appropriate to Recover Damages for Personal Injury.

Alejandre does not apply to these facts because Ms. McCormick is seeking more than classic economic damages. The economic loss rule barred the negligent misrepresentation claim in *Alejandre* because the plaintiffs were seeking only economic damages. 159 Wn.2d at ¶ 30. The economic loss rule holds parties to contract remedies for breach of contract, but tort law, not contract, redresses injuries classified as physical harm. *Id.* at ¶¶ 13, 14. Thus, when only economic losses are claimed, then a tort claim of negligence is not appropriate. *Id.* at ¶ 19. However, when physical injury is alleged, then negligence, not breach of contract, is the proper claim. *See id.*

As acknowledged by Respondents, the complaint claims personal injury damages due to the mold and other deficiencies in the home. CP 6, 9. As this was the Estvolds' motion for summary judgment, they bore the burden of demonstrating that there were no issues of fact regarding Ms. McCormick's claims for damages. *See Hudesman v. Foley*, 73 Wn.2d 880, 889, 441 P.2d 532 (1968). "When a motion for summary judgment is made and supported as provided in this rule [by proper affidavits], an adverse party may not rest upon the mere allegations or denials of his pleading" CR 56(e). Conversely, when the moving party has not

submitted affidavits and has not met its burden, the opposing party does not need to submit affidavits. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 757 P.2d 507 (1988); *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980) (Defendant filed nothing in response to summary judgment, and counsel did not appear for argument, but summary judgment should have been denied because plaintiff did not establish lack of a genuine issue of fact).

The Estvolds have submitted nothing in response to Ms. McCormick's allegations of personal injury. There is no evidence from which a court could conclude that they satisfied their burden of showing that there are no issues of material fact and that the personal injury claims should be dismissed on summary judgment. In fact, their motion for summary judgment did not assert that the negligent misrepresentation should be dismissed due to the economic loss rule, so this issue was not addressed.² The extent of Ms. McCormick's medical condition and its relation to the defects in the home was not known at the time of summary judgment.

Because there is no evidence tending to show a lack of any personal injury claim, Ms. McCormick's allegation of personal injury is

² The statement by Ms. McCormick's prior attorney in response to summary judgment that Ms. McCormick had not raised any claim for personal injury was simply an error. See Respondent's Brief at 22. Clearly, the complaint alleges damages due to personal injury, and the complaint was never amended to drop those claims.

sufficient, and the Court must consider such claims when deciding how to apply *Alejandro* to this suit. Under the rule described in *Alejandro*, it is clear that negligent misrepresentation resulting in personal injury damages is a viable claim, even if a purchase contract is involved.

B. The Estvolds Negligently Supplied Information about the Home.

The evidence in the record supports Ms. McCormick's claim for negligent misrepresentation. The Estvolds have consistently misstated the elements of negligent misrepresentation. Contrary to the Estvolds' brief, negligent misrepresentation does *not* require a showing that the defendant "knew or should have known." Rather, Washington has adopted the definition of negligent misrepresentation from the Restatement (Second) of Torts, which focuses on the defendant's negligence in conveying information:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Lawyers Title Ins. v. Baik, 147 Wn.2d 536, 545, 55 P.3d 61 (2002) (quoting *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826-28, 959 P.2d 651 (1998) and Restatement (Second) of Torts § 552(1) (1977));

see also Haberman v. WPPSS, 109 Wn.2d 107, 161-62, 744 P.2d 1032, 750 P.2d 254 (1987). In a negligence action, a plaintiff does not need to plead the alleged negligent acts in detail in order to state a claim. *McLeod v. Chicago, M. & P.S. Ry. Co.*, 65 Wash. 62, 67-68, 117 P. 749 (1911).

Of course, if a defendant knew or should have known of a defect and nonetheless conveyed false information, then that fact could be used to satisfy the elements of negligent misrepresentation. But the elements of negligent misrepresentation do not strictly require a showing that the seller should have known of the defect, just that he was negligent in conveying information regarding the condition of the home.³ The “knew or should have known” language is used in stating the elements of negligent misrepresentation, but only in relation to whether the defendant knew or should have known that the information would be used by the plaintiff for guidance in the business transaction. *Lawyers Title*, 147 Wn.2d at 545.

Thus, a defendant can be held liable for negligent misrepresentation absent evidence that the representation was known to be false. *E.g. Brown v. Underwriters at Lloyd's*, 53 Wn.2d 142, 332 P.2d

³ In other words, negligence in obtaining or communicating information would include a defendant who should have known of a defect, but also includes a defendant who should have verified repairs allegedly performed. Negligence is broader than just “knew or should have known,” and includes lack of reasonable care in ascertaining facts, absence of skill and competence required by a particular business or profession, or the manner of expression utilized by the defendant. *Brown*, 53 Wn.2d at 151 (quoting Prosser on Torts, (2d ed.) chapter 18, § 88, 536, 541). In any event, the Estvolds’ statement that a plaintiff must show *both* “knew or should have known” *and* negligent conveyance of information is incorrect. Respondents’ Brief at 24.

228 (1958). *Brown* dealt with whether insurance coverage for a real estate agent's misrepresentation to a purchaser could be denied due to the policy's exclusion for fraud of the insured. *Id.* at 145. The agent had relayed to the purchaser that a heating and cooling system was adequate, which was in fact false. *Id.* at 143-44. The agent did not investigate the statement prior to making it, but nevertheless believed it to be true. *Id.* The agent's misrepresentation was *negligently* made due to his lack of independent investigation, but because he believed it to be true, there was no fraud:

When relied upon by the purchaser to his damage, false statements made to induce a sale, although innocently made and believed by the speaker to be true, are as actionable as if known to be false and made with intent to deceive. But the gist of the action is negligence and not fraud or deceit.

Id. at 150.

In support of this conclusion, the Court further noted: "When a positive misrepresentation of fact is made, causing damage to another, why is not the *negligent wagging of your tongue*, or the negligent flourishing of your pen, a positive act analogous to the negligent use of your hand in driving your car and causing damage thereby?" *Id.* at 150 n.5 (quoting *Carpenter*, 24 Ill. L. Rev. 749, 757 (1930)). The Court carefully distinguished negligent misrepresentation from fraud, and stated regarding negligent misrepresentation: "A representation made with an

honest belief in its truth may still be negligent, because of lack of reasonable care in ascertaining the facts, or in the manner of expression, or absence of the skill and competence required by a particular business or profession.” *Id.* at 151 (quoting Prosser on Torts, (2d ed.) chapter 18, § 88, 536, 541).

Based upon the foregoing, summary judgment should have been denied if a jury could determine from the facts that the Estvolds misrepresented the condition of the home and they were negligent in obtaining that information or communicating it to Ms. McCormick. The Estvolds apparently do not contest that a misrepresentation was made. Ms. McCormick’s experts confirm that the defects existed at the time of the sale. CP 392, 497-98. Even if the disclosure form is construed as not containing a specific representation that the defects were repaired, it was certainly implied on the form and stated orally to Ms. McCormick and her real estate agent. CP 164, 420. Further, the disclosures failed to mention a drainage problem, mold in the home, two separate defects in the attic, or the prior resurfacing of a chimney. CP 414-17. They further stated that the chimneys had a stucco coating, which was untrue. CP 498. Regardless of whether they believed their disclosures to be true, the Estvolds can be held liable if they were negligent in making those disclosures.

The facts available in the record support the conclusion that the Estvolds' representations were negligent, and summary judgment should be reversed. The Estvolds did absolutely nothing to verify whether the Bennett repairs were adequate or even performed. CP 344, 346. They simply "took Bennett at their word." CP 346. They knew from prior experience that mold could return, CP 340, but claim they did nothing to confirm whether the mold and other defects had actually been remediated. Further, Mr. Estvold had been on the roof of his home and could have easily seen that the chimney cap did not cover the chimney, that additional caulking was needed, or that portions of the chimney had cracked. CP 294, 397-402.⁴

The Estvolds also did not obtain any permits for the work done on the home, including the prior resurfacing of the chimney or the work done by Bennett. CP 55. Had a permit been sought, the various city inspectors would likely have discovered the problems, as they did when Ms.

⁴ It should be noted that Mr. Gonzales did see Mr. Estvold on the roof on various occasions, and there was more activity than Mr. Gonzales thought was consistent with normal maintenance. CP 294. The Estvolds exaggerate the supposed discrepancy between Ms. McCormick's statements and the testimony of Mr. Gonzales. Respondents' Brief at 13. In his deposition, Mr. Gonzales simply will not confirm what exactly occurred on the roof, but it is clear that he saw activity on the roof. CPP 293-301. At most, Ms. McCormick misunderstood what Mr. Gonzales had told her.

In a similar vein, the Estvolds imply that Ms. McCormick's prior counsel attempted to mischaracterize the testimony of Mr. Couch. The implication is simply untrue. Mr. Shillito interviewed Mr. Couch, drafted a declaration consistent with the interview, and submitted it to Mr. Couch. Mr. Couch apparently disagreed with the wording, but would not suggest alternate wording to correct any perceived misstatements. CP 781-782.

McCormick applied for permits. CP 390-92, 496-99. The fact that one chimney had required resurfacing was significant, especially when mold was later discovered in the office near the resurfaced chimney, and should have been evidence of a material defect in the home's other chimney. CP 391, 497. The Estvolds were not justified in making the statement that the mold had been repaired, and summary judgment on negligent misrepresentation should be reversed so that a jury can evaluate the evidence.

The Estvolds also negligently relied on the statements of an unlicensed contractor. Evidence in the record shows that Bennett Technical Services performed the repairs. CP 324. Neither this entity nor Bobby Dean Couch had a valid contractor's license. CP 404-08. Contrary to Mr. Couch's assertion, there is no evidence that Bennett Technical Services was a valid dba of Bennett Laboratories. CP 668-75. Further, there is no evidence that either Bennett Technical Services or Mr. Couch had any experience in mold remediation. Mr. Estvold testified that he believed Bennett Technical Services and Bennett Laboratories were separate entities. CP 346. Whether a contractor is properly licensed and whether it has experience in a particular area are certainly material to a determination of whether its work is reliable. From these facts, a jury

could reasonably conclude that the Estvolds were negligent in relying upon the opinion of an unlicensed and inexperienced contractor.

The Estvolds confuse the issues by claiming that a seller has no duty to disclose when he believes the repairs to be adequate. Respondents' Brief at 27. The citations to *Svendson* and *Luxon* are not appropriate, because these cases did not deal with negligent misrepresentation. *Svendson v. Stock*, 98 Wn. App. 498, 979 P.2d 476 (1999), reversed on other grounds, 143 Wn.2d 546, 23 P.3d 455 (2001) (fraudulent concealment); *Luxon v. Caviezel*, 42 Wn. App. 261, 710 P.2d 809 (1985) (fraud). In any event, *Svendson* held that a broker will not be held liable "if she *reasonably* believes that a past defect has been corrected." 98 Wn. App. at 503 (emphasis added). The whole point of Ms. McCormick's negligent misrepresentation claim is that the Estvolds' alleged belief that the defects had been repaired was unreasonable, and their representations of that belief were therefore negligent.

Ms. McCormick does not contend that every seller must perform an invasive inspection of their home. Rather, when a seller has experienced problems with the home, he has a duty to take reasonable action to ensure that the defect has been remedied before making such a representation to a potential purchaser. A seller also has a duty to fully disclose the extent of prior defects, rather than to conceal defects with

misleading statements. The Estvolds did not satisfy either of these obligations.

In summary, a seller can be liable for negligent misrepresentation even if he does not know of the defect, because the essence of the claim rests upon the seller's negligence in obtaining or communicating information about the condition of the home. Construing the facts in the light most favorable to Ms. McCormick, there is sufficient evidence of the Estvolds' negligence that the claim of negligent misrepresentation should not have been decided on summary judgment.

III. FRAUD AND FRAUDULENT CONCEALMENT

The trial court's dismissal of Ms. McCormick's claims for fraud and fraudulent concealment was also in error. Fraud and fraudulent concealment are not barred by the economic loss rule. *Alejanrde*, 159 Wn.2d at ¶ 31. These claims require knowledge that a representation is false and knowledge of a concealed defect, respectively. *Swanson v. Solomon*, 50 Wn.2d 825, 828, 314 P.2d 655 (1957); *Sloan v. Thompson*, 128 Wn. App. 776, 784, 115 P.3d 1009 (2005). The facts presented to the trial court support a finding that the Estvolds knew of the defects in the

home at the time of the sale. If an issue of material fact exists, summary judgment was improper.⁵

The record establishes that the Estvolds were aware of the following defects:

- They knew that water pooled against the foundation. CP 356.
- They knew that there had been mold in the upstairs office. CP 340.
- They knew that the north chimney flashing was defective. CP 341-43.
- They knew that there was a second leak separate from the chimney flashing on the south side of the house near the master bath. *Id.*
- They knew that there was mold in the attic. *Id.*
- They knew that the south chimney had been resurfaced without a permit. CP 55.

Significantly, the Estvolds did not adequately disclose any of these defects to Ms. McCormick. Rather, they made a general claim that prior defects had been repaired. CP 413-417. However, the circumstances surrounding the alleged repairs lead to the conclusion that the Estvolds knew that the repairs were inadequate.

⁵ The evidentiary standard to establish fraud *at trial* is irrelevant to determine whether summary judgment was proper. The Estvolds' implication that Ms. McCormick must produce clear, cogent, and convincing evidence to defeat summary judgment is false. Respondents' Brief at 31-32.

The Estvolds' disclosure form completely omitted the drainage problems they had experienced. CP 416. There was no mention of the prior resurfacing of one chimney. CP 417. They also failed to disclose that mold had been found inside the home itself, not just in the attic. *Id.* In light of the testimony of Ms. McCormick's experts, the statement that the attic only had a "light mold problem" was also fraudulent. Neither the disclosure form nor the Bennett receipt states that there were two distinct defects in the attic, each resulting in a leak. CP 417-19. The disclosure form further states that there was a stucco coating on the north chimney, CP 417, which was untrue, CP 498. The Estvolds attempted to conceal defects of which they had actual knowledge, and summary judgment was improper.

Ms. McCormick's experts clearly stated that Bennett's repairs were inadequate. CP 391, 430-33, 497. In fact, one expert implied that the alleged repairs might not have even been done. CP 391. Further, a witness testified to the existence of areas in the attic where good wood was specially cut and placed over rotten wood to add support. CP 677. Mr. Estvold had an opportunity to view the attic and the repairs being done. CP 344. Evidence of unequal amounts of mold on the plywood sheet replaced in 2002 as compared to adjacent sheets lends further

support to the conclusion that the mold remediation was not done as claimed. *Id.*

This evidence should be presented to the jury. Summary judgment must be denied if reasonable men could reach different conclusions from the facts presented. *Hudesman v. Foley*, 73 Wn.2d 880, 887, 441 P.2d 532 (1968) (citing *Wood v. Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960)). In other words, when the facts are such that “different inferences might reasonably be drawn therefrom,” the questions thus presented “are ordinarily for the jury under proper instructions.” *Id.* at 889 (quotation omitted). In *Hudesman*, there was an issue of fact as to how much information a purchaser had actually received, so summary judgment that the purchaser was a bona fide purchaser for value was reversed. *Id.* at 890.

This is in stark contrast to *Nejin v. City of Seattle*, 40 Wn. App. 414, 698 P.2d 615 (1985), quoted extensively by the Estvolds. Significantly, *Nejin* was an appeal from judgment after a trial in which extensive findings of fact and conclusions of law were entered. Thus, the issues in *Nejin* was whether the findings of fact were substantially supported by the evidence, and whether the resulting conclusions of law were appropriate. The standard in *Hudesman*, and the standard presented at this appeal of a summary judgment, is quite different—de novo review

to determine whether the evidence viewed in the light most favorable to the non-moving party presents any issues of fact. The plaintiff in *Nejin* did not prove proximate cause by a preponderance of the evidence at trial because the evidence lent equal support to two inconsistent conclusions. *Id.* at 421. This holding has no application to this appeal, however. Ms. McCormick has not yet had the opportunity to present her evidence to a jury because the trial court incorrectly dismissed her claims despite genuine issues of material fact.

Tabak v. State reversed summary judgment where there was testimony that the defendant knew of the existence of the defect that caused the plaintiff's injury. 73 Wn. App. 691, 696, 870 P.2d 1014 (1994). The defendant testified that he thought the defect had been repaired prior to the injury and knew of no other problems, but summary judgment was still denied. *Id.* Similarly, summary judgment was improper here, where there was testimony that the Estvolds were aware of the defects, failed to disclose the extent of the defects, and a jury could conclude that the Estvolds knew that the defects had not been adequately repaired.

The Estvolds' knowledge can also be imputed through their agent, Bennett. The Estvolds are insulated from liability for their agent's knowledge only if (a) they reasonably believed the repairs were adequate

or (b) Bennett was a licensed contractor. Neither of these conditions can be met on summary judgment. First, although authority suggests that a seller cannot be liable if he *reasonably* believes repairs were inadequate, *Svendsen*, 98 Wn. App. at 503, the discussion above highlights material issues of fact from which a jury could conclude the Estvolds' belief was unreasonable. Further, RCW 64.06.050(1)⁶ must be construed to allow a seller to rely on the statements of properly licensed professionals in fields where a license is required, and upon experienced professionals only when the profession is not regulated. Otherwise, the phrase "professional license" is superfluous, and statutes "must not be construed in a manner that renders any portion thereof meaningless or superfluous." *Svendsen v. Stock*, 143 Wn.2d 546, 555, 23 P.3d 455 (2001).

There is clearly an issue of fact as to whether Bennett Technical Services or Mr. Couch were properly licensed. Even if experienced, this should preclude application of RCW 64.06.050 to this case. In addition, though, Mr. Couch testified as to the business of Bennett Laboratories, not Bennett Technical Services, and there were no statements that could be construed as stating that either he or Bennett Technical Services had any

⁶ "Unless the seller of residential real property has actual knowledge of an error, inaccuracy, or omission in a real property transfer disclosure statement, the seller shall not be liable for such error, inaccuracy, or omission if the disclosure was based on information provided by public agencies, **or by other persons providing information within the scope of their professional license or expertise**, including, but not limited to, a report or opinion delivered by a land surveyor, title company, title insurance company, structural inspector, pest inspector, licensed engineer, or contractor." RCW 64.06.050(1) (emphasis added).

experience in mold remediation. CP 624. Accordingly, the Estvolds did not sustain their burden of proof, and whether Bennett's knowledge should be attributed to the Estvolds is at least a question of fact for the jury.

The Estvolds' knowledge of and failure to disclose significant defects in the home constitutes fraud. Further, given the abundant evidence that the Bennett repairs were sorely inadequate, a jury could reasonably conclude that the Estvolds knew that Bennett's work did not correct the defects, as claimed.

IV. McCORMICK'S SUBSEQUENT INVESTIGATION

Ms. McCormick's investigation of the home was reasonable in light of the disclosures she received. The Estvolds overstate a buyer's duty when presented with evidence of a defect. Washington does require a purchaser to make a reasonable investigation upon discovery of evidence of a prior defect. *Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 752 P.2d 1353 (1988). However, *Dalarna* specifically states that the buyer's duty is to make additional inquiries of the seller. 51 Wn. App. at 215. The reasonableness of a buyer's inspection should be a jury question. *See Lawyers Title*, 147 Wn.2d at 552. The buyer's duty to reasonably inspect does not equate to the buyer's total assumption of any

risk whatsoever. This is especially true where, as here, the seller fails to fully disclose the extent of prior defects.

After receiving the sellers' disclosures, Ms. McCormick asked the Estvolds whether the leak had been repaired and the attic mold remediated. CP 164, 420. Thus, she complied with her duty under *Dalarna* to inquire of the seller. In addition, Ms. McCormick hired an inspector to investigate the home, who also relied upon the sellers' statements regarding their repairs. CP 56-57, 172, 460, 467. Ms. McCormick and her inspector were not told that there had ever been mold inside the home, nor were they informed that there were two separate problems in the attic. In effect, Ms. McCormick was not put on notice that an extensive inspection would be necessary because the full extent of the defects was not disclosed. Thus, the inspection that was performed was reasonable and satisfied her duty under *Dalarna*.

In addition, later inspections indicated that the defects may not have been "readily apparent," but may have been hidden behind insulation in a hard-to-reach area of the attic, which may not normally be included in a home inspection. CP 204, 285. Further, the fact that the inspection report does not mention mold is not surprising, given that the inspector does not report on mold, but rather wood decay fungus, meaning rot. CP 256; Respondents' Brief at 10. This evidence creates genuine issues of

fact as to whether Ms. McCormick's investigation was reasonably diligent based upon the inadequate disclosures she had received. Summary judgment should not have been granted.

V. ATTORNEY'S FEES

The trial court improperly awarded attorney's fees for defense of Ms. McCormick's tort claims. The Estvolds would have the court award fees in any situation where a contract with an attorney's fees provision is even remotely related, but such is not the law in Washington. *E.g. Lincor Contractors, Ltd. v. Hyskell*, 39 Wn. App. 317, 324, 692 P.2d 903 (1984). In relying upon *Brown v. Johnson*, 109 Wn. App. 56, 34 P.3d 1233 (2001), the Estvolds ignore the more recent decisions of *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 698, 106 P.3d 258 (2005), and *Norris v. Church & Co., Inc.*, 115 Wn. App. 511, 517, 63 P.3d 153 (2002). Neither of these decisions allowed recovery of fees for claims of fraudulent concealment.

The Estvolds further overstate the holding in *Brown*, ignoring the test set out in that decision to determine whether attorney's fees should be awarded. *Brown* states that fees can be awarded only if the tort claims arise out of the contract *and* if the contract is "central to the dispute." 109 Wn. App. at 58. The Estvolds have not shown how this test is met in this

case. In fact, they pointed out at summary judgment that the disclosure statement is statutorily separate from the purchase and sale agreement under RCW 64.06.020(3).

Further, although *Alejandre* awarded fees, the decision did not explain the authority for its decision, nor did it reconcile (or even address) the discrepancy between the cases cited above. 159 Wn.2d at ¶ 35. *Alejandre* cited to RCW 4.84.300, under which attorney's fees may be awarded in actions with damages of \$10,000 or less. *Id.* That statute certainly does not apply here.

The Estvolds' other citations are similarly inapplicable. RCW 4.84.330 requires that a contractual fee provision be bilateral, but does not address when a contractual provision can apply to tort claims. The discussion in *Leingang v. pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 930 P.2d 288 (1997), pertains to a suit by an insured to obtain coverage under an insurance contract. Pursuant to the holding in *Norris* and given that Ms. McCormick's claims are in no way related to the contract, the award of attorney's fees must be reversed.

In response to the Estvolds' cross-appeal, the amount of the attorney fee award is in the discretion of the trial court, and will only be reversed if it is shown that the trial court "manifestly abused its discretion." *North Coast Elec. Co. v. Selig*, 136 Wn. App. 636, ¶ 10, 151

P.3d 211, 215 (2007); *see also Metropolitan Mortg. & Securities Co., v. Becker*, 64 Wn. App. 626, 634, 825 P.2d 360 (1992). There is no evidence that the amount of the award was manifestly unreasonable. The Estvolds admit that the trial court reviewed the documentation in support of their fee request, denied a portion of the request, and determined the amount of a reasonable award. Respondents' Brief at 48-49. The Estvolds did not request findings of fact or conclusions of law on the amount of the fees, without which this Court should not undertake to evaluate whether the amount of the award was an abuse of discretion. *E.g. Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

The amount of the award also should not be increased because the request was validly reduced for time spent on unsuccessful claims. It is appropriate to reduce a fee award by time spent on failed claims. *Id.* at 434. Further, Ms. McCormick objected to the amount requested because it appeared that some of the fees incurred were due to duplicated effort. CP 726-732. Thus, the trial court was justified in reducing the amount of the fee request by more than just the time spent on the unsuccessful attempt to obtain insurance coverage. The Estvolds' cross appeal must be denied.

VI. CONCLUSION

Ms. McCormick's claims should be presented to a jury, and should not have been dismissed on summary judgment. There are issues of fact supporting the conclusion that the Estvolds negligently misrepresented the condition of the home to Ms. McCormick, given their prior experience with mold and work on the home and their reliance upon an unlicensed contractor. The recent decision of *Alejandro v. Bull* does not affect this case because Ms. McCormick has alleged personal injury resulting from the misrepresentation, in addition to damages associated with necessary repairs. Further, comparing the many defects the sellers had experienced with their misleading disclosures results in a conclusion that the Estvolds concealed known defects with the home. Given the genuine issues of material fact presented by evidence in the record, summary judgment should be reversed.

The trial court also incorrectly awarded attorney's fees to the Estvolds. The tort claims raised by Ms. McCormick were completely separate from the parties' contract, and the contractual attorney's fee provision cannot be applied to this lawsuit.

Finally, the Estvolds have not shown a manifest abuse of discretion regarding the amount of the fees awarded. The trial court reviewed the billing records provided, considered the objections of Ms. McCormick in

relation to work spent on unsuccessful claims and duplicative effort, and determined a fee award. The Estvolds have not met their burden to justify an increase in that award.

Respectfully submitted this 7th day of May, 2007.

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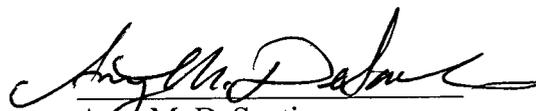
I, the undersigned, hereby certify under penalty of perjury of the laws of
the State of Washington that I caused the foregoing Reply Brief of Appellant to be
served upon:

Jason M. Whalen
Eisenhower & Carlson, PLLC
1201 Pacific Ave., Ste. 1201
Tacoma, WA 98402

Service was accomplished by:

- Hand delivery
- First class mail
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DATED this 7th day of May, 2007 at Tacoma, Washington.


Amy M. DeSantis
Legal Assistant