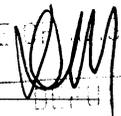


COURT OF APPEALS
DIVISION II

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NO. 35352-1-II

STATE OF WASHINGTON
BY  DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TERESA MCCORMICK, an individual,

Appellant,

v.

TERRY ESTVOLD and KAY ESTVOLD,

Respondents.

**BRIEF OF RESPONDENTS
TERRY ESTVOLD AND KAY ESTVOLD**

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**I. ISSUES PERTAINING TO APPELLANT'S
ASSIGNMENTS OF ERROR**

Appellant Teresa McCormick (“McCormick”) asserts three assignments of error: (1) the trial court’s grant of Respondents Terry and Kay Estvolds’ (“Estvold”) summary judgment motion; (2) the trial court’s denial of McCormick’s motion for reconsideration; and (3) the trial court’s award of attorneys’ fees and costs to the Estvolds. Brief of Appellant at 1.

McCormick asserts six issues pertaining to her assignments of error. Issues one, two, and three relate to the trial court’s dismissal of McCormick’s negligent misrepresentation claim—on both summary judgment and on reconsideration. Issues four and five relate to the trial court’s dismissal of McCormick’s claims for fraud and fraudulent concealment. Finally, issue number six pertains to the trial court’s entry of judgment in favor of the Estvolds for a portion of their attorneys’ fees and costs incurred, as the prevailing party under the parties’ contract.

The Estvolds assert the following issues on appeal:

A. Issues pertaining to the trial court’s grant of the Estvolds’ Motion for Summary Judgment and denial of McCormick’s Motion for Reconsideration (Appellant’s Assignments of Error 1 and 2).

1. Does the recent Supreme Court decision *Alejandro v. Bull*, -- Wn.2d --, 153 P.3d 864, 2007 WL 616064 (March 1, 2007), preclude Appellant’s claims for negligent misrepresentation, as a matter of law?

2. Did the trial court properly conclude that McCormick failed to produce sufficient evidence to raise any genuine issues of material fact with respect to McCormick's claim for negligent misrepresentation, where the record was void of any evidence that the Estvolds knew or should have known of any alleged defects with the property at the time of sale?

3. Did the trial court properly dismiss McCormick's claims for fraud and fraudulent concealment, where the record was void of any evidence, circumstantial or otherwise, that the Estvolds knew or should have known of any alleged defects with the property at the time of sale that they did not otherwise disclose?

4. Was the trial court correct in denying McCormick's motion for reconsideration where McCormick failed to demonstrate an error of law in the trial court's ruling, or to produce newly discovered evidence sufficient to raise any genuine issues of material fact?

B. Issue pertaining to the trial court's award of attorneys fees to the Estvolds as the prevailing party (Appellant's Assignment of Error 3).

Was the trial court correct in concluding that the Estvolds were the prevailing party under the parties' contract with respect to both contract and tort claims, entitling the Estvolds to judgment?

II. RESPONDENTS' ASSIGNMENT OF ERROR AND ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Estvolds filed a cross-appeal in this matter, asserting that the trial court erred (abused its discretion) by not granting the full amount of

attorneys' fees and costs as requested in their Motion for Entry of Order and Judgment Determining Attorneys' Fees and Costs.

Did the trial court err by not awarding the full amount of attorney's fees and costs requested by the Estvolds, where the amounts claimed were not duplicative, were reasonably necessary in the defense of the claims, and where the claims arose from the parties' purchase and sale contract?

III. INTRODUCTION/SUMMARY OF ARGUMENT

The trial court's grant of summary judgment to the Estvolds and denial of McCormick's motion for reconsideration should be affirmed. The trial court's subsequent entry of its Order and Judgment awarding the Estvolds a portion of their requested attorneys' fees and costs should also be affirmed, but modified as requested by the Estvolds in their cross-appeal. The Estvolds also request recovery of their attorneys' fees and costs on appeal pursuant to RAP 18.1.

Terry and Kay Estvold sold their Lakewood, Washington home to Teresa McCormick in June 2003. Prior to closing, the Estvolds provided McCormick with the required statutory disclosures, setting forth all they had experienced and knew about their home during the 12 years of their ownership. Prior to closing, McCormick conducted her own investigation, via a hired home inspector, and obtained a satisfactory appraisal. It is undisputed that the findings of McCormick's own inspector were consistent with the Estvolds' disclosures. McCormick signed off on the disclosures and inspection contingency, and closed on the home.

Months later, after a significantly wet fall and winter, McCormick began to experience water intrusion and mold in the areas previously referenced in the Estvolds' disclosures. After conducting a more in-depth investigation of her property, McCormick convinced herself that the Estvolds "defrauded her." McCormick filed this lawsuit, alleging claims of negligent misrepresentation, fraudulent concealment and constructive fraud.¹ The Estvolds subsequently engaged in significant, expensive, and lengthy discovery to pin down the purported "factual bases" for the myriad of McCormick's specious claims.

The trial court dismissed *all* of McCormick's claims on summary judgment based on the complete lack of supporting evidence for the material elements of McCormick's claims,. McCormick's subsequent motion for reconsideration (limited to her negligent misrepresentation claim) was also denied. The trial court then entered judgment against McCormick for a portion of the Estvolds' attorneys' fees and costs incurred in their defense, pursuant to the parties' purchase and sale contract. This appeal and cross-appeal followed.

On March 1, 2007, after McCormick filed her appellate brief, the Washington Supreme Court handed down *Alejandre v. Bull*, -- Wn.2d --, 153 P.3d 864, 2007 WL 616064, attached for convenience at Appendix "A". *Alejandre* holds that the economic loss rule precludes McCormick's negligent misrepresentation claims. Even without the recent *Alejandre*

¹ McCormick's claims initially also included intentional misrepresentation and breach of contract as well. These are not, however, part of the appeal.

ruling, the trial court properly dismissed McCormick's fraud and misrepresentation claims for lack of any genuine issues of material fact.

The sole relevant issue is whether or not the Estvolds' "should have" known of the alleged defects, or, in the case of the fraud claims, whether the Estvolds had "actual, subjective knowledge" of the alleged defects. There is not one shred of testimony or evidence supporting that link. Rather, McCormick's claims are loosely based on unsubstantiated accusations coupled with conclusory legal arguments. The trial court saw her claims for what they were—baseless and without factual support.

Furthermore, Washington law puts the burden of investigating disclosures of known potential issues on the buyer. Once a buyer has notice of potential problems, the burden shifts to the buyer to perform any desired inspections to determine their true nature and extent. McCormick had every opportunity to investigate the extent and nature of the disclosed previous problems and repairs before committing to the purchase.²

McCormick's proposed legal standard would place an onerous burden on residential sellers. If sellers, such as the Estvolds, are held responsible for "disclosing" latent defects of which they have no knowledge, one might be loath to ever sell a house. This is neither the

² The record reflects that the Estvolds had no knowledge of, and strenuously deny that there were, any ongoing "problems" with the home at the time of the sale. They accede to the possibility of latent defects relating to the previously resolved problems solely for purposes of considering the facts in the light most favorable to McCormick as the non-moving party.

intent nor application of existing Washington law. The trial court's holdings should be affirmed.

IV. STATEMENT OF THE CASE

A. Factual Background

This is a factually simple case befuddled only by McCormick's attempts to throw as many unsubstantiated and often irrelevant allegations at the wall as possible. McCormick brought this lawsuit based on her "hunch" that the Estvolds knew or should have known of alleged defects she discovered months after moving in. Regardless of McCormick's unsubstantiated "hunches," in the end McCormick could not provide any evidence supporting her claims. There is no evidence that the Estvolds knew of any of the alleged defects. There is no evidence that the Estvolds *should* have known of the alleged defects. The trial court properly dismissed these claims based upon the lack of admissible evidence sufficient to raise any genuine issues of material fact.

1. The Estvolds' Home.

Terry and Kay Estvold bought the property at 12018 Nyanza Road SW, Lakewood ("home") directly from the builder, Victor Otlans, in September of 1991. CP 48, 55. They lived in the home for twelve years, up until the sale to McCormick. CP 25-27. As common to most homeowners' experiences, the Estvolds' care for their home included regular maintenance and the occasional repair. The repair work that the Estvolds encountered during their ownership of the home included (1)

resurfacing of the south chimney (warranty work by builder Otlans in 1992); (2) flashing repair and mold removal in March 2002 (performed by Bennett Technical Services); and (3) periodic maintenance and roof cleaning. CP 49, 55-56, 129-140, 156. The Estvolds never encountered any further problems before their sale to McCormick, and never had need for performing structural repair. CP 132-35, 141-46, 149-50, 154-55, 157.

Like most homeowners, the Estvolds had never had occasion to go into the attic, and had rarely encountered the need to have anyone else go into their crawlspace or attic. CP 119-22, 135. Aside from cleaning his roof on a regular basis and performing minor “touch up” painting on interior and exterior surfaces, Mr. Estvold simply never had any need to invasively inspect any other areas of his home. CP 49, 55-56, 135-37, 147-48, 150-51. Again, the Estvolds had no notice of or reason to suspect any ongoing problems with the home at the time of the sale. CP 132-35, 141-46, 149, 154-55, 157. There is no contrary evidence in the record.

2. The Sale to McCormick and Estvolds’ Disclosures.

The Estvolds sold their home to McCormick by way of a negotiated Purchase and Sale Agreement signed on May 11, 2003. CP 216-227. McCormick’s offer was contingent upon her subjective satisfaction upon inspection of the home. CP 169-70, 219 (¶w), 225-26.

The Estvolds provided McCormick with a Real Property Transfer Disclosure Statement (RPTDS) that they had initialed and signed on January 20, 2003, when they first listed the home for sale. CP 17-23;

Appendix “B”. The Estvolds specifically disclosed that the roof leaked and had been repaired; that there were cosmetic defects with the chimney; and that there were defects with the LP siding. CP 18-19. The Estvolds handwrote in several details, including the following:

- With respect to the chimneys: “Some cosmetic bubbling of stucco on inside of north chimney. It has been checked for moisture by Bennett Laboratories and sealed.” CP 21.
- “Light mold problem in attic – treated in March 02’ by Bennett Laboratories. Roof & Flashing repaired. Vents and 2 humidity sensitive fans installed. Top layer of insulation replaced.” *Id.*

The Estvolds also attached the March 29, 2002 invoice from Bennett Technical Services regarding previously encountered mold and moisture issues. CP 22-23. McCormick does not dispute that she reviewed and approved the Estvolds’ disclosures, including the description of the Bennett work and invoiced amount. McCormick signed the RPTDS on May 16, 2003, forty days prior to closing on the sale in June. CP 21. McCormick signed under the following “Buyer’s Acknowledgement:”

Buyer acknowledges the duty to pay diligent attention to any material defects which are known to Buyer **or can be known to Buyer by utilizing diligent attention and observation.**

Id. (Emphasis added). McCormick also waived her right to revoke the offer based on the disclosures:

Buyer has read **and reviewed** the Seller’s responses to this Real Property Transfer Disclosure Statement. **Buyer approves this statement** and waives Buyer’s right to

revoke Buyer's offer based on this disclosure.

Id. (Emphasis added).

3. The Pre-sale Inspections.

Before signing the RPTDS on May 16th, McCormick hired a home inspector, Mr. DeSchryver of Lighthouse Home Inspection, LLC, to perform both structural and pest inspections of the Property. This is the same inspector she hired to inspect a home upon which she had previously put an offer, and whom her realtor and long-time friend had recommended as "the best." CP 160-62. Before the inspection, McCormick provided Mr. DeSchryver with a complete copy of the Estvolds' disclosures, including Bennett's invoice. CP 172. Mr. DeSchryver conducted his inspection on May 14, 2003 in McCormick's presence. CP 228-54. A copy of his Report is attached as Appendix "C".

Mr. DeSchryver noted very few issues of concern. The roof, chimney, and exposed flashings appeared functional and/or serviceable. CP 236. The grading and drainage of the Property appeared serviceable, though the inspector recommended "monitoring site drainage during & after heavy rains." CP 235. No defects were noted with the attic or insulation. CP 236. In terms of the ceiling areas, the inspector noted:

[E]vidence of water staining. . . at the ceiling above the office/bedroom. Stains appear to be dry at the time of inspection, however, it is recommended that these stains be monitored for potential leakage. The disclosure statement [RPTDS] makes reference to a previous leak in this area,

secondary to the failure of flashing around the chimney. Corrective measures were taken, and no evidence of new leaks were noted.”

CP 243. Mr. DeSchryver also performed a pest inspection and prepared a Uniform Structural Wood Destroying Organism Inspection Report. CP 255-58, a copy of which is attached as Appendix “D”. This report covered visible evidence of “wood destroying organisms,” defined to include termites, carpenter ants, as well as wood decay fungus (rot), and “conducive conditions” to such wood destroying organisms would also be noted, defined to include inadequate ventilation and excessive moisture. CP 256. As with the home inspection report, the pest report noted very few minor issues of concern. CP 255-58.

McCormick admits personal knowledge of each problem relating to the alleged defects before buying the home. McCormick saw the RPTDS disclosures. CP 171. McCormick noted water spotting on the wall in her first walk-through, before she had the inspection done. CP 163-64. McCormick knew about the previous leak in the office/library before she had the inspection done. CP 174. McCormick knew there was swelling of the LP siding in the back, and of the class action lawsuit. CP 165-68. McCormick saw that the sheetrock around the skylights was “bumpy.” CP 214-15. McCormick’s inspection report noted the level property grade, and recommended that she check for potential drainage problems after heavy rain. CP 192-93, 235. McCormick’s inspection report recommended monitoring water stains. CP 194, 243.

In short, McCormick does not dispute that before deciding to buy the home, she had notice of disclosed problems she later claims gave rise to the alleged defects. She does not dispute that a basic investigation into those issues uncovered the alleged defects. CP 202-5, CP 496-623. Thus, had McCormick done such an inspection before the sale, she would have discovered the actual extent of the previously disclosed problems.

4. Condition of the Home at Closing.

After reviewing the reports, McCormick prepared an “Inspection Notice” setting forth a list of 4 minor issues for the Estvolds to complete prior to closing. CP 196-99, 260. The Estvolds accepted McCormick’s request, and completed all tasks sufficiently for McCormick to close. CP 200-1, 260. McCormick removed the contingencies and closed the sale on June 24, 2003. CP 25-27. All of the evidence in the record supports the fact that the Estvolds disclosed all of the conditions that they knew or had reason to know about. McCormick admits that the inspection reports she obtained and paid for before closing **were consistent with the disclosures made to her by the Estvolds.** CP 195-96. McCormick has never produced any testimony or any other evidence that Estvolds knew or should have known of any undisclosed problems at the time of sale.

5. The Post-sale Allegations and Inspections.

The Estvolds regularly visited the home after the sale in order to access personal belongings that remained in the home pursuant to an agreement with McCormick. CP 50, 56-59. During the course of his

frequent visits to the home between the June 2003 sale and January of 2004, Terry Estvold never noticed any problems with the home, and McCormick never mentioned any to him. CP 38-39, 152-3. It was not until a dinner party in January 2004 that McCormick made some lighthearted remark that she had purchased “the house from Hell.” CP 123-24. This comment was a jesting comment regarding a shower door that had broken, a comment McCormick’s counsel misleadingly uses out of context in order to impart the desired effect. CP 88. Yet, thus began the Estvolds descent into their own “Hell” of defending themselves against the onslaught of McCormick’s wholly unfounded accusations.

In February of 2004, McCormick showed Terry Estvold some mold in the upstairs office area and a hall closet. CP 125-28. The mold was of an entirely different nature from the minor, light mold the Estvolds encountered in 2002, mold that to the best of the Estvolds’ knowledge had been remediated by Bennett in March 2002. CP 129-30. McCormick claimed that she found the mold during November, but admitted she did nothing about it. CP 128-29. McCormick filed this lawsuit three years later. CP 1-27. McCormick failed, however, to produce any evidence that the Estvolds knew, at the time of sale, of the extent of the previously disclosed problems, or that previously repaired problems persisted.

McCormick relied on illusory allegations by neighbors who supposedly saw the Estvolds attempting to hide damage. According to her, these allegations caused her to shake her previous impression of the Estvolds as honest, religious people. CP 183-84. However, the neighbors

never said any such thing. The testimony of James Gonzales and the declaration of Connie Rogel, the two neighbors in question, illuminate McCormick's outright fabrication of the truth. CP 77-84, 96-101, 176-89, 293-301. For example, McCormick asserted Mr. Gonzales had told her several things that "proved" that the Estvolds engaged in acts of deception, such as putting up new wood over old, rotten wood just before putting the house up for sale. CP 176-189. Mr. Gonzales, however, denied seeing Mr. Estvolds do anything untoward:

Q: ... I ask you again, sir, to be consistent with your testimony in this deposition, did you or did you not specifically tell Ms. McCormick, quote, Mr. Gonzales told me after the demolition of the chimney that they, meaning the Estvolds, had covered up the rot right before they put the market – the house on the market, period, end quote. Did you or did you not tell her that?

A: No, I did not.

CP 300; *see also generally* CP 293-301 (Gonzales deposition testimony, wherein Gonzales repeatedly denies ever seeing Estvolds placing good wood over bad, or doing anything other than basic care of the roof).

The Estvolds experienced no further problems after the disclosed repairs. CP 132-35, 141-46, 149, 154-55, 157. McCormick's own inspection reports – the home inspection, the pest report, and the appraisal – are **consistent** with the Estvolds' lack of any experience with or notice of ongoing problems. CP 228-280. McCormick failed to produce any evidence to the contrary. McCormick does not dispute that she was told of

the Estvolds' previous problems and repairs, which are at the root of the same alleged defects at issue in this lawsuit.

B. Proceedings Below.

McCormick filed her Complaint on March 16, 2006, claiming intentional and negligent misrepresentation; constructive fraud; fraudulent concealment; and breach of contract. CP 1-27. Estvolds filed their Answer, Affirmative Defenses and Counterclaim on April 19, 2006. CP 28-33. The Estvolds counterclaimed for fees and costs incurred in having to defend against McCormick's unsubstantiated claims, pursuant to the parties' contract. CP 34-36.

On June 30, 2006, the Estvolds moved for summary judgment based on (1) the complete lack of evidence that the Estvolds knew or should have known of the alleged defects; (2) McCormick's notice of the potential defects or problems; and (3) the complete lack of admissible evidence sufficient to create genuine issue(s) of material fact. CP 85-114.

The Estvolds supported their motion with the following declarations and supporting exhibits, including substantial deposition testimony: Declaration of Respondent Terry Estvold (CP 37-76); Declaration of neighbor Connie Rogel (CP 77-84); Declaration of counsel Jason M. Whalen (CP 115-329); Declaration of Bobby Dean Couch (of Bennett Laboratories) (CP 624-40); and the Estvolds' Reply (CP 641-67).

McCormick filed a response asserting that (1) the Estvolds had "actual knowledge;" (3) the Estvolds could not reasonably rely on an allegedly unlicensed contractor; (3) the Estvolds "recklessly" represented

information in their disclosures; and (4) McCormick did not know of ongoing problems. CP 366-419. McCormick also filed an untimely cross-motion for summary judgment, asking the court to find that the Estvolds were precluded from relying on an allegedly unlicensed contractor in making representations in their RPTDS. *Id.* McCormick supported her response and cross-motion with the following declarations and attendant exhibits: Declaration of Appellant Teresa McCormick (CP 420-495); Declaration from McCormick's then-current counsel, C. Tyler Shillito (CP 330-365); Declaration of building inspector George Dusty Rhodes III (CP 496-623); Supplemental Declaration of Kevin Steinacker (another attorney for McCormick)(CP 668-75); and Declaration of Jason Waits CP 676-79).

The trial court reviewed the plethora of pleadings, declarations and exhibits, and held that McCormick failed to provide sufficient evidence to create any genuine issues of material fact. July 28, 2006 Report of Proceedings ("RP I") at 2-3. The trial court granted the Estvolds' motion, and held that the Estvolds were entitled to their fees. CP 680-82. McCormick filed a Motion for Reconsideration (CP 707-721), supported by another Declaration of C. Tyler Shillito (CP 781-797) and their Reply (CP 798-809). The Estvolds responded. (CP 762-78).³ The trial court

³ The Estvolds' response was also supported by a Declaration of Scott Descrier (McCormick's home inspector) (CP 758-61) and a Supplemental Declaration of Bobby Dean Couch (CP 779-80). The trial court did not consider these supplementary declarations in her decision, as they were not submitted with the underlying summary judgment. They are, however, part of the clerk's papers, and will be used later in this brief for purposes of refuting attempts to mischaracterize witness testimony.

denied the motion and upheld its previous holdings. CP 821-22; August 25, 2006 Report of Proceedings (“RP II”) 25-27, 37-38.

With respect to the award of attorney’s fees and costs, the Estvolds filed their motion for entry of order and determination of fees and costs (CP 683-85). The Estvolds supported their request with the Declaration of Carmen R. Rowe and supporting exhibits (CP 686-706). McCormick filed a response seeking to reduce the fees. CP 722-57. The Estvolds filed Supplemental Declaration of Jason M. Whalen, which set forth a revised request for fees of \$38,772.50 in fees and \$3,233.90 in costs, including work required to respond to the motion for reconsideration. CP 810-20. The court awarded \$29,000 in attorney’s fees and \$3,233.90 in costs, at 12 percent interest per annum. CP 823-25.

This appeal followed.⁴ McCormick has assigned error to (1) the trial court’s grant of the Estvolds’ Motion for Summary Judgment by finding that there were no material facts in dispute, and that Estvolds were entitled to judgment as a matter of law; (2) that the trial court erred in denying McCormick’s motion for reconsideration; and (3) that the trial court erred in its award of fees and costs, specifically in finding the Estvolds to be the prevailing party under the parties’ contract with respect to the tort claims. Appellants’ Brief, p. 1. The Estvolds cross-appealed the court’s reduction of the requested attorney’s fees and costs.

⁴ Prior to filing her appeal, McCormick paid the judgment to avoid having to post a supersedeas bond.

V. ARGUMENT

McCormick ignores the record in favor of her own version of the truth. McCormick asserted multiple claims against the Estvolds, but failed to produce admissible evidence to support them. In this appeal, McCormick still attempts – and still fails – to weave threads of smoke into something of substance. McCormick urges the Court to allow conclusory, speculative leaps of logic to substitute for admissible evidence. This is exactly the type of case tailored for determination on summary judgment. Given the Washington Supreme Court’s recent decision in *Alejandro* (March 1, 2007), this court has both solid legal and factual support for affirming the trial court’s judgment.

A. Standard of Review.

The Court will review a summary decision de novo, reviewing the same facts and pleadings as the trial court. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Even though facts will be construed in the light most favorable to the non-moving party, summary judgment will be granted when the nonmoving party cannot raise a genuine issue of material fact. CR 56; see also *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 253, 59 P.3d 655 (2002). Once the Estvolds demonstrated an absence of material fact, the burden shifted to McCormick to present sufficient evidence to demonstrate an issue of material fact. McCormick could not

make such a showing, and the trial court properly granted the Estvolds' motion. *Atherton*, 115 Wn.2d at 517.

Material facts are limited to those "upon which the outcome of the litigation depends in whole or in part." *Fraternal Order of Eagles*, 148 Wn.2d at 252 n.126. The claims here arise from the Estvolds' RPTDS disclosures, and the outcome relies on the following material facts: (1) the Estvolds' alleged **knowledge** of the defects; (2) McCormick's **lack of knowledge** of the defects; and the fact that "**a careful, reasonable inspection on the part of the purchaser would not disclose the defects.**" *Lawyers Title Ins. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 61 (2002)(misrepresentation); *Sloan v. Thompson*, 128 Wn. App. 776, 784, 115 P.3d 1009, *as amended* (2005)(fraudulent concealment).

Recent Washington law confirms that the economic loss doctrine bars McCormick's negligent misrepresentation claims as a matter of law. *Alejandre v. Bull*, -- Wn.2d -- (2007). Even so, McCormick failed to provide sufficient *admissible* evidence to raise a material question of fact on the elements of misrepresentation, or the even higher burden on fraud.

To meet her burden, McCormick had to present more than bare assertions or unsupported allegations of counsel. Affidavits based on **conclusory allegations, speculative statements or argumentative assertions** are insufficient to create genuine issues of fact. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992); *see also* CR 56(e). McCormick tries unsuccessfully to distinguish her claims from those cases that reject evidence as insufficiently speculative to defeat

summary judgment. *Chen v. State Farm Mut. Auto. Ins. Co.*, 123 Wn. App. 150, 94 P.3d 326 (2004); *Vant Leven v. Kretzler*, 56 Wn. App. 349, 783 P.2d 611 (1989). Unfortunately for McCormick, those cases are exactly on point, as confirmed by the recent holding in *Alejandre*.

B. The Trial Court Properly Granted Summary Judgment, Dismissing Claims for Negligent Misrepresentation.

Negligent misrepresentation is McCormick's primary claim in this appeal, and the only claim in her underlying motion for reconsideration. However, the Washington Supreme Court's recent March 1, 2007 decision in *Alejandre v. Bull*, -- Wn.2d --, 153 P.3d 864, 2007 WL 616064⁵ confirms Washington law. Together with preceding Washington law, *Alejandre* strikes down the bulk of McCormick's claims right out of the gate. Even without *Alejandre*, the trial court properly dismissed McCormick's misrepresentation claims for lack of supporting evidence.

1. *Alejandre* bars McCormick's Negligent Misrepresentation Claims.

In a nearly identical fact pattern to the one here, the *Alejandre* Court held that the economic loss rule precludes claims for negligent misrepresentation in the residential sale context in Washington. *Id.* at 3 ¶ 12 through 8 ¶ 30. The parties' relationship is governed by contract in which the parties had the opportunity to allocate the risk of loss. Negligent misrepresentation claims are thus barred. *Id.* This negates McCormick's entire argument on negligent misrepresentation.

⁵ A copy of the opinion is attached hereto for the Court's convenience.

In *Alejandre*, the buyers sued over an alleged misrepresentation regarding defects in the home, in that case, a septic system. Some time before the sale, the seller had noticed soggy ground over the septic system. 2007 WL 616064 at 1 ¶ 3. She hired a service to empty the tank and fix a broken pipe. *Id.* She later sold the home with an inspection contingency allowing the buyer remedies if any aspect of the inspection of the septic system was not satisfactory. *Id.* at 1 ¶ 4.

In the same statutory residential property disclosures as are at issue here, the seller in *Alejandre* disclosed the prior repairs, and answered that she had no knowledge of any further defects. *Id.* There, as did McCormick, the buyers reviewed the disclosure statement with their agent and signed the “buyer’s waiver of right to revoke offer.” *Id.*; see also CP 21. There, as did McCormick, the buyers had an appraisal done, which failed to note any problems relating to the later alleged defects. *Id.* at 2 ¶ 6; see also CP 266-80. There, as did McCormick, the buyers hired an inspector. *Id.* at 2 ¶ 5; see also CP 228-254. There, as here, the inspection report noted some limitations (there, the inability to inspect the septic system’s back baffle). *Id.* There, as here, no ongoing problems were noted at the time of the inspection. *Id.*

The buyers in *Alejandre* noticed an odor a month after moving in, and subsequently discovered problems with the ground around the septic tank. *Id.* at 2 ¶ 7. They hired a contractor two months after moving in who confirmed problems with the septic system. *Id.* The contractor in the *Alejandre* case was the same one who performed the previous repairs for

the seller, and he told the buyers that he had warned the seller that there would be problems. *Id.* Therefore, *unlike* here, the buyers had proof that the seller had actual knowledge of the ongoing problem.

The buyers in *Alejandro* sued, as McCormick did here, for fraud and misrepresentation. *Id.* at 2 ¶ 9. The trial court granted the seller's motion for judgment as a matter of law, holding that the economic loss rule barred the buyer's claims for misrepresentation. *Id.* The trial court also found that the buyers failed to present sufficient evidence to meet their burden on fraud. *Id.* The appellate court overruled the trial court, finding that the economic loss rule did not apply to bar misrepresentation claims in the residential sales contract. *Id.* at 3 ¶ 10, *see also Alejandro v. Bull*, 123 Wn. App. 611, 626, 98 P.3d 844 (2004).

The Washington Supreme Court reversed. In short, the Supreme Court held (after lengthy discussion) that the economic loss rule applies to bar tort claims brought by homeowners in the residential sale context. The parties are limited to those remedies afforded to them by contract. *Id.* at 5 ¶ 19, citing *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 420-22, 745 P.2d 1284 (1987); *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 211-13, 969 P.2d 486 (1998). It is worthwhile to note that McCormick has abandoned her breach of contract claims as a sacrificial pawn in her bid for attorney's fees. CP 707-21.⁶

⁶ See particularly page 3 (CP 709), where McCormick asks that the Court reconsider its ruling to "grant Defendants' attorney's fees pursuant to the contract, as the Court ruled as a matter of law that Plaintiff had no claim for breach of contract." The breach of contract claim was not part of the motion for reconsideration, nor a part of this appeal.

Claims for defects in a residence, such as those asserted here, are classic economic damages. *Alejandre* at 5 ¶ 19, citing *Stuart*, 109 Wn.2d at 420-22; and *Atherton*, 115 Wn.2d. While McCormick claimed personal injury damages in her Complaint (CP 6, 9), she never provided any testimony or other evidence to support such damages in either her summary judgment responses or in her motion for reconsideration. McCormick belatedly throws out allegations of personal injury damages in her counsel's appellate argument (Brief of Appellant at 13), but cites no support for such claims. McCormick's own counsel affirmed in her summary judgment response that **she was not seeking personal injury damages in this lawsuit:**

[T]he court will note that at no time has my client raised any claims for personal injuries associated with the mold in her home.

CP 387. Aside from the curious flip-flops in her argument, the critical fact is McCormick **never** offered any evidence of non-economic damages, and there is **no such evidence** in the record. To defeat summary judgment, McCormick must rely on something other than the bare allegations of counsel. *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998) (argument of counsel does not constitute evidence, and cannot serve to defeat summary judgment). As such, McCormick's only damages are economic.

Washington's economic loss rule bars McCormick's negligent misrepresentation claims. It is therefore irrelevant whether or not

McCormick can show that the Estvolds did or didn't act "reasonably." Any proof to that effect is immaterial, and insufficient to defeat summary judgment. *Fraternal Order of Eagles*, 148 Wn.2d at 252 n.126,

2. Even without *Alejandre*, McCormick failed to present sufficient facts to defeat summary judgment.

Importantly, even without *Alejandre*, the trial court's decision was well grounded in law given the lack of evidence presented. Contrary to counsel's revised argument on appeal, there is no legal support for the assertion that "evidence that a seller should have known of the defect is not necessary to prevail on [a claim of misrepresentation]." Brief of Appellant at 18 (without case citation). As McCormick correctly recognized in her first recitation of the elements of proof, to sustain her claim for misrepresentation she must show that she (1) justifiably relied on (2) false information that (3) defendants negligently (or intentionally) supplied, when (4) defendants knew (or should have known) it was false, and (5) the false information was proximate cause of damage. *Lawyers Title Ins. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 61 (2002); *see also* CP 709 (summary judgment response brief) and RP II 25-26 (trial court decision). McCormick's lack of evidence of the Estvolds' knowledge clearly troubled Judge Lee. RP II, at 12-16; 25-27.

In her motion for reconsideration and in this appeal, McCormick asserts that the material question is not whether the Estvolds knew or "should have known" of the alleged defects in the home, but only whether it was "unreasonable" for Estvolds to fail to invasively inspect their home

in order to pinpoint any latent defects of which they had no prior notice. However, in making this argument, McCormick conveniently ignores the law and the bases for her own claims.

McCormick must establish *both* that the Estvolds “knew or should have known” about the alleged defects, *and* that they “negligently” conveyed information to McCormick. These are two separate and distinct elements of misrepresentation. *Baik*, 147 Wn.2d at 545. McCormick based her lawsuit on the Estvolds’ alleged knowledge:

- “Defendants made omissions, and certain oral and written statements, to [Plaintiff] regarding the physical condition of the subject property before the sale that **Defendants knew to be false**” CP 5-6.
- “Defendants **purposely and with intent to deceive**, failed to disclose to [Plaintiff] the problems related to the above mentioned roof repair and the water conditions in the home and otherwise misrepresented the true and correct condition of the property prior to sale.” CP 6.
- “Defendants **have taken steps to conceal or omit** the above problems from [Plaintiff] prior to sale.” *Id.*
- “Defendants **have actual knowledge** of the errors, inaccuracies or omissions not disclosed in their sale papers.” *Id.*
- “**Defendant [sic] knew** that one or more of the representations made to induce [Plaintiff] to purchase the above described property was false and misleading, and made such representations to [Plaintiff], intending that she rely on it in purchasing the above described property.” CP 7.
- “**The Defendants knew** of the above mentioned defects in the property ...” *Id.*

- “**The Defendants were aware** of a concealed defect which was present in the home ...” *Id.*

Plaintiff also alleged that “Defendants had the *duty to know of*” the alleged defects. CP 7. Yet McCormick has yet to provide *any* evidence outside her own inadmissible speculative statements, misstatements of testimony, and alleged hearsay statements (denied by the speakers) that the Estvolds *knew* of any alleged defects. McCormick now attempts to sidestep her burden of proof regarding knowledge.

McCormick dedicates a substantial portion of her appellate brief emphasizing the alleged existence of the defects at issue in an attempt to “prove” that the Estvolds “knew or should have known” of the alleged defects. Brief of Appellant at 9-13, 21-22. McCormick offers one witness (Mr. Rhodes) in asserting that alleged defects *may* have existed at the time of sale.⁷ CP 498. But the mere *existence* of the alleged defects is not a question of *material* fact. It is yet another red herring.

⁷ McCormick also asserts that the home inspector, Mr. DeSchryver, “indicated that the issue was probably a long-standing one.” Brief of Appellant at 10, citing CP 203-4. The Court should note that counsel references McCormick’s deposition testimony to support this “statement.” Hearsay testimony is not admissible evidence. ER 801. Mr. DeSchryver repeatedly refused to sign declarations McCormick’s counsel presented to him, under threat of litigation, based on the fact that Mr. DeSchryver felt the proffered statements were untruthful, unfair to the Estvolds, and “completely false.” CP 759. McCormick did file an action against Mr. DeSchryver and Lighthouse Home Inspection less than a week after filing this appeal. *Teresa McCormick v. Lighthouse Home Inspection, LLC et al.*, Pierce County Superior Court No. 06-2-11789-7, filed September 27, 2006. McCormick’s version of Mr. DeSchryver’s “opinion” is therefore suspect at best. At a minimum, such hearsay, inadmissible testimony of dubious credibility fails to rise to the level required to raise an issue of material fact.

It is important to note that mischaracterization of testimony has proven a repeated pattern in this litigation, and belies the credibility of the testimonial evidence McCormick tries to dredge up in this case. McCormick’s counsel tried a similar tactic with Mr. Couch (Bennett Laboratories), repeatedly urging him to sign a declaration specifically characterizing its contents as a complete statement of all work performed, when there were several obvious omissions. CP 779. Mr. Couch also refused a later request to sign

The fatal flaw to McCormick’s argument is that she has **no evidence** that the Estvolds knew or should have known that the alleged defects were present at the time of sale. **Not one** of the witnesses testifies that the Estvolds knew or reasonably should have known of problems. **Not one** of McCormick’s experts testify that the problems were so evident that even a layman homeowner would have or should have noticed them – and in fact, McCormick’s own inspectors failed to note the alleged defects at the time of sale. CP 228-258. **Not one** of McCormick’s experts testify that a layman homeowner would have or should have been aware of the problem in question. There is **no testimony** suggesting that the Estvolds noticed, discussed or otherwise acknowledged any problems in the home.

This is a critical “evidentiary void” precluding McCormick from meeting her burden in defeating summary judgment. Because McCormick failed to provide any *evidentiary basis* for her allegation that the Estvolds “knew or should have known” of the alleged defects, her allegation remains an unsupported assumption. Unsupported assumptions do not defeat summary judgment. *Green*, 136 Wn.2d at 100; *see also Las*, 66 Wn. App. at 198; CR 56(e)(conclusory allegations, speculative statements

a dubious statement about the Estvolds with respect to unidentified wood in a picture. CP 780. Coupled with McCormick’s previous misrepresentations as to the nature of the neighbors’ supposed testimony against the Estvolds (CP 77-84, 96-101, 176-89, 183-84, 293-301), there is little reason for giving any deference to McCormick’s unfounded assertions, absent *admissible evidence* supporting those assertions as required to defeat summary judgment. *Las*, 66 Wn. App. at 198; *see also* CR 56(e).

or argumentative assertions are insufficient to create genuine issues of fact).

McCormick also claims that the Estvolds were “negligent” in failing to ascertain that the previous repairs had been inadequate. However, where a homeowner believed that the repairs had been adequate, there is no duty to disclose. *See, e.g., Svendsen v. Stock*, 98 Wn. App. 498, 503, 979 P.2d 476 (1999); *Luxon v. Caviezel*, 42 Wn. App. 261, 265, 710 P.2d 809 (Div. I, 1985). The Estvolds disclosed that they had experienced problems previously, and had done repairs. CP 17-23. At that point, responsibility shifted to *McCormick* to further investigate. At a minimum, McCormick must provide *evidence* that the Estvolds knew the repairs had failed before she can assert misrepresentation claims.⁸ *Svendsen, Luxon*.

McCormick asserts that the reasonableness of whether the Estvolds properly relied on the previous repairs should go the jury. McCormick forgets to note a critical element of proof. Before a question of reasonableness is put to the jury, McCormick must provide something of substance to raise the question, something more than the creative arguments of her counsel. *Green*, 136 Wn.2d at 100. The jury is not allowed to draw unfounded conclusions without some admissible evidence on the record to support otherwise specious speculations. *Nejin v. City of*

⁸ Contrary to McCormick’s misuse of the statute, RCW 64.06.050(1) actually protects the Estvolds from liability, as it allows a homeowner to rely on information provided by “other persons” giving information within the scope of their “professional license or expertise,” in this case, the company performing the repair. There is no admissible evidence that the Estvolds had *actual knowledge* that the repairs had been inadequate (if they were), and that this information was thus incorrect.

Seattle, 40 Wn. App. 414, 420, 698 P.2d 615 (1985). McCormick has never submitted any evidence that the Estvolds had any notice of the alleged defects sufficient to somehow trigger any “duty” for the Estvolds to question their own knowledge and experiences.

Per McCormick’s argument, every homeowner would be obligated to perform a thorough, invasive inspection of their home before any sale, lest be held “unreasonable” in conveying beliefs formed and knowledge gained simply through living in the home. This is not the law. The homeowner is legally obligated to provide notice of all things within their knowledge. RCW 64.06.050. The *buyer* is then obligated to perform any required inspections into such issues. RCW 64.06.050; *Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 752 P.2d 1353, *rev. den’d* 111 Wn.2d 1007 (1988). McCormick has provided no legal authority for her proposition, because there is no such authority.

3. Licensing status of a previous contractor is irrelevant.

One of the many red herrings McCormick throws out is the argument that it was somehow inherently “unreasonable” for the Estvolds to rely on Bennett’s repairs, simply because the contractor was allegedly unlicensed. Brief of Appellant at 19-21, 30. The facts do not support McCormick’s assertion. First, Bennett *Laboratories*, the entity that performed the repairs, was licensed. CP 624-40. Bobby Dean Couch, an employee of Bennett Laboratories, confirmed that Bennett Technical was

a “dba” for Bennett Laboratories, and that all work was done under the auspices of Bennett Laboratories and its general contractor’s license. *Id.*

Most importantly, whether or not Bennett was licensed is *immaterial* to this question of whether the Estvolds “reasonably” relied on the repairs. Allegations about lack of licensing are insufficient to create a *material* issue of fact, and insufficient to defeat a summary judgment.

Even if it were a material issue, the logical inconsistency of the argument simply illustrates the confusion of issues that pervade McCormick’s claims. On the one hand, McCormick argues that the Estvolds were not reasonable in relying on the word of an “unlicensed” contractor. Yet McCormick’s justified reliance on the Estvolds’ disclosures is a critical element of her misrepresentation claim. *Baik*, 147 Wn.2d at 545. The Estvolds’ pre-sale disclosures included the name of the contractor and a copy of the Bennett invoice. If the Estvolds were not reasonable in relying on Bennett, then logic dictates that McCormick’s reliance on the sufficiency of the Bennett repairs was not reasonable, either. McCormick cannot have it both ways.

The proof is in the pudding. The Estvolds experienced no other problems after the repair. CR 132-35, 141-46, 149, 154-55, 157. McCormick provides testimony alleging that Bennett’s repairs were inadequate, but she fails to provide any testimony, or any other evidence, that the Estvolds *knew* that the repairs were insufficient, or that it was unreasonable for them to hire and rely on experienced contractors.

McCormick construes RCW 64.06.050(1) in a bizarre and legally unsupported manner in a desperate attempt to support her theory. This statute simply exempts the seller from liability **absent actual knowledge** of a purported error in the disclosures. *Id.* Contrary to McCormick’s creative interpretation, the statute exempts a homeowner from liability for reliance on *either* a licensed professional *or* someone working within the scope of their expertise. It is not the Estvolds’ obligation to “prove” the expertise of those who performed the prior repairs. There is no statutory obligation requiring the homeowner to use licensed contractors for every job. McCormick provides no legal authority for this far-fetched proposition. McCormick provided no evidence that Bennett Laboratories was not working within the scope of their expertise.

McCormick failed to come up with any *evidence* to show that the Estvolds’ reliance on Bennett was unreasonable, because there is no such evidence. Thus, there is no question for the jury.

C. Trial Court was Correct in Granting Summary Judgment Dismissing Claims for Fraud and Fraudulent Concealment.

Nor does McCormick fare any better on her remaining claims under *Alejandre*. *Alejandre* confirms the trial court’s conclusion: absent affirmative evidence supporting allegation that the Estvolds had *actual, subjective knowledge* of the alleged defects, claims of fraudulent concealment cannot survive summary judgment. Washington law requires only that a seller disclose all **known** defects to the buyer. RCW 64.06.050(1). The important factor is the seller’s “actual, subjective

knowledge” of the defect.” *See, e.g., Svendsen*, 98 Wn. App. at 503 (citing to RCW 64.06.050(2)); *see also House v. Thornton*, 76 Wn.2d 428, 433, 457 P.2d 199 (1969). There is no duty to disclose, nor any right of the seller to rescind the transaction, where the seller did not learn of issues until *after the sale*. RCW 64.06.040(2). McCormick has offered no proof that the Estvolds *knew* of any defects before the sale, other than those they duly disclosed. Without any such admissible evidence of the Estvolds’ subjective, actual knowledge of continuing defects, the trial court was correct in dismissing McCormick’s claims as a matter of law.

1. There is no evidence that the Estvolds had actual, subjective knowledge of the alleged defects.

Fraudulent concealment requires a showing by clear, cogent and convincing evidence that (1) the Estvolds had *actual knowledge* of the alleged defects, and (2) that McCormick did not.⁹ *See, e.g., Sloan*, 128 Wn. App. at 784. The burden of proof on fraud is clear, cogent and convincing evidence. *See, e.g., Douglas Northwest v. O’Brien*, 64 Wn. App. 661, 678, 828 P.2d 565 (1992)(“Each element of fraud is a material issue to be resolved and must be proven by clear, cogent and convincing evidence”). To defeat summary judgment, McCormick must, at a

⁹ Specifically: (1) there is a concealed defect in the premises; (2) of the residential building; (3) the seller knew of the defect; (4) the defect is dangerous to the property, health or life of the purchaser; (5) the purchaser does not know of the defect; (6) a careful, reasonable inspection on the part of the purchaser would not disclose the defect; and (7) the defect must substantially affect the value of the property adversely, or operate to materially impair or defeat the purpose of the transaction. *Sloan*, 128 Wn. App. at 784.

minimum, raise a question of material fact as to whether she can meet this burden of proof at trial. She cannot.

There is no evidence, outside McCormick's speculative assertions and hearsay statements, that McCormick can provide clear and convincing evidence that the Estvolds "knew" of ongoing problems. The Estvolds never experienced any problems with the home, including ongoing problems after repair, that were not disclosed to McCormick at the time of sale. CP 132-35, 141-46, 149, 154-55, 157. McCormick cannot provide *admissible* evidence refuting that fact, and thus cannot raise a genuine issue of material fact precluding summary judgment on her fraud claims.

The case cited by McCormick undermines her own argument. Brief of Appellant at 19. In *Kelsey*, as here, the plaintiff attempted to defeat summary judgments through speculative assertions that the owner surely "had to have known" of the defects. *Kelsey Land Homeowner's Ass'n v. Kelsey Lane Co.*, 125 Wn. App. 227, 235, 103 P.3d 1256 (2005). The court rejected the attempt, holding that without supporting *evidence* of any such knowledge, the plaintiff could not defeat summary judgment. *Id.* at 232-33. The *Kelsey* court held that there was no proof that the *owner* knew of the defects, despite testimony from a construction expert, an architecture expert, and an engineering expert that "any experienced construction professional on the condominium construction site would have clearly and obviously recognized the defects." *Id.*

In short, to defeat a motion for summary judgment, the plaintiff must provide evidence that the person alleged to have made the

misrepresentation actually *knew* of the defects. That is the evidence missing here. This critical link is further demonstrated in the case cited by *Kelsey, Norris v. Church & Co., Inc.*, 115 Wash.App. 511, 63 P.3d 153 (2002). In that case, the court found there was a question of fact as to whether the builder “knew” of the defects, because the builder admitted in his deposition that at the time of sale the alleged defects were “readily apparent.” *Id.* at 515. “Knowledge” is measured at the time of sale. *Id.* The only evidence on the record here is that the Estvolds did *not* know of the alleged defects at the time of the sale. CP 132-35, 141-46, 149, 154-55, 157. McCormick has not offered any evidence to refute this testimony. There is not even testimony that the Estvolds, as laymen homeowners, “would have clearly and obviously recognized the defects” if they existed at the time of the sale (*Kelsey*), or that the alleged defects were “readily apparent” at the time of sale (*Norris*). This failure is fatal to McCormick’s fraud claims.

2. McCormick’s speculative assertions lack the connecting evidence required to make a showing of knowledge by circumstantial evidence.

McCormick then tries to claim that she can prove her case based on circumstantial evidence. Brief of Appellant at 27-30. However, McCormick persistently ignores a critical flaw in her argument. She has no evidence connecting the dots. In every Washington case where a claimant successfully created a question of fact regarding “knowledge” through circumstantial evidence, there was evidence on the record

supporting the otherwise speculative assertion that the seller “had to have known” of a certain condition. There is no such evidence here.

The very case McCormick relies on reinforces this distinction. *Kelsey*, 125 Wn. App.; Brief of Appellant at 19. As McCormick notes, the court there found that the contractor “should have known” of defects based on testimony by expert witnesses that the defects were present *and apparent*. It is the “apparent” part that McCormick fails to establish here.

Even when utilizing circumstantial evidence, raising an issue of fact requires something more than mere conjecture:

“Where causation is based on circumstantial evidence, the factual determination may not rest upon conjecture; and if there is nothing more substantial to proceed upon than two theories, under one of which a defendant would be liable and under the other of which there would be no liability, a jury is not permitted to speculate on how the accident occurred.

Nejin v. City of Seattle, 40 Wn. App. 414, 420, 698 P.2d 615 (1985), quoting *Sanchez v. Haddix*, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981). *Nejin* dealt with a different factual context, but the nature of the facts presented and their weight as proof are strongly analogous to the case here. The question before the court was whether or not there was sufficient evidence of whether a break in the sewer line caused the damaging landslide at issue. The court’s discussion eloquently demonstrates the subtle but critical failure in McCormick’s argument:

Here no direct evidence existed that the broken sewer line had caused the landslide on Nejin's property. Proximate cause may be adduced as an inference from other facts proven. [citation omitted]. However,

[w]here causation is **based on circumstantial evidence, the factual determination may not rest upon conjecture**; and if there is nothing more substantial to proceed upon than two theories, under one of which a defendant would be liable and under the other of which there would be no liability, **a jury is not permitted to speculate** on how the accident occurred.

[citation omitted].

* * *

In matters of proof the existence of facts may not be inferred from mere possibilities. *Wilson v. Northern Pac. R. Co.*, 44 Wn.2d 122, 128, 265 P.2d 815 (1954). Here the evidence adduced at trial was that under certain conditions, water “could have exfiltrated” and “conceivably in some manner or fashion” could have reached Nejin's property. However, proximate cause **must be proved by evidence, whether direct or circumstantial, not by speculation or conjecture or by inference piled upon inference.** *Wilson, supra*, at 130, 265 P.2d 815.

The imposition of liability does not rest upon speculation or conjecture when

[t]he facts relied upon to establish a theory by circumstantial evidence [are] of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them.

[citations omitted]. However,

[w]hen the circumstances lend equal support to inconsistent conclusions or are equally consistent with contradictory hypotheses, the evidence will not be held sufficient to establish the asserted fact.

[citations omitted].

40 Wn. App. at 420-22 (emphasis added). Therefore, even when the “circumstantial evidence” is viewed in the light most favorable to McCormick, such evidence is insufficient to meet her burden at trial. McCormick lacks the critical evidentiary links to raise her conclusions out of the realm of speculation.

The other cases cited by McCormick further demonstrate this critical failure. In *Sloan*, 128 Wn. App., the builder testified that he had built the structure in question, that he was an experienced contractor, and that he was familiar with the applicable code. There was expert testimony that the construction was out of compliance with the code that the builder professed expertise with to an extreme degree. In this unusual case, a unique set of extreme facts led to one of the rare occasions where the court found knowledge based on circumstantial evidence:

If Thompson, by his own admission, knew the framing codes and then proceeded to construct a first floor frame that the unrefuted expert testimony and the findings of the superior court have found to be “terrible,” “unsafe,” “[un]ethical,” and “out and out dangerous,” we cannot see how Thompson cannot be attributed with knowledge of the defects, at least as far as the framing is concerned

(Citations omitted). Likewise, in *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 106 P.3d 258 (2005), there was evidence on the record that the builder “closely supervised and controlled the construction,” that the builder had extensive knowledge and experience with construction, that the builder was familiar with the building code and knew that not all components of the building met code, and that the builder had knowledge of other homes he had built that had similarly defective roofs. *Id.* at 699. Again, there was evidence connecting the dots between the existence of the defect and the defendant’s knowledge of those defects.

Burbo in turn relied upon the appellate case *Nauroth v. Spokane County*, 121 Wn. App. 389, 88 P.3d 996 (2004). The *Nauroth* court acknowledged that circumstantial evidence might establish the “actual, subjective knowledge” element of fraud, *but only* where there is *some* evidence of the critical link between the alleged condition and the defendant’s knowledge. In that case, the plaintiff brought claims alleging that the county was responsible for injuries sustained when she slipped on allegedly dangerous steps in a public park. An element of her claim was “actual, subjective knowledge,” similar to the element for fraudulent concealment. The court *upheld* the dismissal of the plaintiff’s claims for failure to provide evidence of actual knowledge on the part of the county:

Ms. Nauroth presented no evidence of actual knowledge. * * *

Ms. Nauroth has produced no evidence to dispute * * * asserts that the County must have had actual knowledge because the condition was obvious from her photographs

and affidavits and because the restrooms were located at the bottom of the steps.

The County first made a showing negating the knowledge element. And Ms. Nauroth failed to contradict that showing and thereby establish the existence of a genuine issue of material fact. *Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 752, 649 P.2d 836 (1982).

Id. at 393-94. That is exactly the situation here. *Nauroth* in turn relies on *Tabak v. State*, 73 Wn. App. 691, 695-96, 870 P.2d 1014 (1994). There, too, there was evidence in the record of the defendant's actual knowledge. There is no such evidence here.

Likewise, the "speculation" cases McCormick cites fail to support her cause. In *Zobrist*, the critical issue was whether or not a railroad had been used in recent years. There was evidence that the railroad company had performed maintenance on the tracks during the applicable time frame. *Zobrist v. Culp*, 18 Wn. App. 622, 637-38, 570 P.2d 147 (1977). The court concluded that such evidence gave rise to a dispute of facts. Here, there is no such evidence supporting the critical elements of proof. Instead, this case falls under the other cases cited by McCormick, *Vant Leven*, 56 Wn. App. at 355, and *Chen*, 123 Wn. App. at 158.

There is no testimony or evidence that the Estvolds performed the repairs, or that they otherwise had any personal involvement with the alleged defects. There is no testimony that the Estvolds knew of the alleged defects. There is no testimony that the Estvolds had the expertise to recognize construction problems even if they had seen them. Simply establishing the mere existence of an alleged defect is not enough. Failure

to provide evidence linking the existence of alleged defect with some knowledge on the seller's part does not serve to create a genuine issue of fact, and thus, does not serve to defeat summary judgment. *Green*, 136 Wn.2d at 100; *Kelsey* at 235; *Nauroth* at 393-94. McCormick would like to rely on circumstantial evidence, but first, she must provide an evidentiary link supporting her speculative assertions. Without such evidence, there is no issue of material fact.

3. Knowledge cannot be imputed to the Estvolds through Bennett.

McCormick tries to argue that Bennett was the Estvolds' "agent", and thus, knowledge that Bennett had should be imputed to the Estvolds. There are two critical problems with this argument. First and most importantly, McCormick ignores the on-point case law in the homeowner context. Where a homeowner believes that repairs were adequate, the homeowner is relieved from further liability absent *evidence* that they *knew* that the repairs were inadequate. *Luxon*, 42. Wn. App. 261; *see also Svendsen* at 503. The Estvolds have testified that they had no further problems after the repairs. CP 132-35, 141-46, 149, 154-55, 157. There is no evidence to the contrary. This undercuts the argument that a contractor's "knowledge" exposes the homeowner to further liability.

The disclosure statute also protects the homeowner when relying upon information from licensed contractors *or* persons performing within their expertise. RCW 64.06.050(1). McCormick suggests that the Estvolds failed to "prove" that Bennett had sufficient expertise. Brief of

Appellant at 20. McCormick confuses the respective burdens. Mr. Couch testified that Bennett “was in the business of doing environmental assessment (including mold related work), cleanup, and repair work.” CP 624. Mr. Couch generally described the work done, and the usual practices of his company. CP 624-26. Mr. Couch testified that the company actually performing the work was, in fact, licensed and bonded at the time. CP 624-25. In contrast, McCormick has failed to provide any evidence that Bennett did *not* have sufficient expertise. It was McCormick’s burden to provide sufficient evidence to raise a question of material fact, if indeed this issue is material at all. McCormick’s allegations, even if believed, do not counter the fact that Bennett was not performing work within the company’s expertise.

In addition, there is no evidence that Bennett *knew* of the problems, so therefore, there was no knowledge to impute. Nor can McCormick argue such knowledge through circumstantial evidence. As with *Sloan* and the other cases discussed above, a builder can be found to have knowledge of defects only where there is evidence (1) that the builder constructed or oversaw the construction in question; *and* (2) evidence or testimony that the builder was experienced and/or otherwise was familiar with the applicable standards. Here, McCormick spends a great deal of time arguing that Bennett was an incompetent contractor. Once again, she cannot argue it both ways. If Bennett is incompetent, McCormick then lacks the critical evidentiary link of expertise needed to use circumstantial evidence to raise a question of fact as to whether or not

Bennett had actual, subjective knowledge of the defects. If there is insufficient evidence to show that Bennett had actual, subjective knowledge of the alleged defects, then there is insufficient evidence to show that any such knowledge is imputed to the Estvolds.

D. McCormick Had Notice of All Alleged Defects, Relieving the Estvolds of Any Further Duties.

McCormick asserts that it is “unfair” to expect a prospective buyer to bear the burden of investigation of potential defects. However, under McCormick’s argument, every prospective seller would be responsible for an invasive inspection of their home and any previous repairs. This is hardly fair, either. The question is thus, who bears responsibility to further investigate the true nature and extent of the prior problems identified in the disclosures, the Estvolds as the sellers, or McCormick as the buyer? Fortunately, Washington law answers that question.

Washington law does not allow a purchaser who had notice of a defect to bring claims against the homeowner. Instead, Washington law puts the onus on the purchaser to inquire further. *Atherton*, 115 Wn.2d at 525 (citing *Dalarna Mgmt. Corp.*, 51 Wn. App.); *see also Luxon*, 42 Wn. App. at 264, and *Obde v. Schlemeyer*, 56 Wn.2d 449, 452, 353 P.2d 672 (1960). The purchaser is responsible for any failures in ascertaining the true nature and extent of known defects. *Id.*

There is not a single Washington case affirming a claim of constructive fraud where there was surface evidence of the defect, no matter how slight, at the time of sale. *Dalarna*, 51 Wn. App.; *see also*

Luxon, 42 Wn. App. at 264; *Obde*, 56 Wn.2d at 452, 353 P.2d 672 (1960)(additional citations omitted). Constructive fraud is limited to cases where there is absolutely no evidence of the defect at the time of sale, as any such evidence triggers the duty to investigate. *Id.* at 214-15; *see also Atherton*, 115 Wn.2d at 525.

It is undisputed that McCormick had pre-sale notice of the alleged defects. At most, McCormick simply did not appreciate their full nature or extent. McCormick's claims thus fail even *if* there *was* proof that the Estvolds knew or "should have known" of the alleged defects:

- McCormick saw the RPTDS disclosures when she first looked at the home. CP 171.
- McCormick noted water spotting in the office. CP 163-64.
- McCormick knew about the previous leak in the office/library. CP 174.
- McCormick knew of repairs on the home relating to the leak and mold that are at the core of her claim. CP 22-23.
- McCormick knew there was swelling of the LP siding, and knew of the pending class action lawsuit. CP 165-68.
- McCormick had an 1-800 number to call regarding her assigned claim under the LP class action lawsuit, but did not call it until after the sale. CP 166-68.
- McCormick saw that the sheetrock around the skylights was "bumpy." CP 214.

- McCormick’s inspection report recommended checking the property for potential drainage problems. CP 192-93, 235.
- McCormick’s inspection report noted that the water stains were dry, but “it is recommended that these stains be monitored for potential leakage.” CP 194, 243.
- McCormick did not pursue a more in-depth inspection specifically investigating the areas at issue. CP 190-91.

McCormick’s own reports claim that she discovered alleged defects upon “careful, reasonable inspection.” Therefore, under *Atherton*, 115 Wn.2d, and *Dalarna*, 51 Wn. App., McCormick accepted the risk – and responsibility – for the extent of defects that allegedly arose from the previously disclosed problems and repairs. This undercuts the fourth and final leg of McCormick’s appeal.

McCormick alleges that she relied on the Estvolds’ representation that the repairs had been fixed, and that her reliance on the Estvolds’ representation that the repairs fixed the problem constituted an adequate “investigation” into the issue, turning the burden back on the Estvolds. Washington courts have similarly rejected such claims. A homeowner is entitled to rely on their belief that repairs were adequate, absent *knowledge* of ongoing problems. McCormick had to offer admissible *evidence* that the Estvolds *knew* that the repairs were inadequate. *See, e.g., Luxon*, 42. Wn. App. 261. McCormick has never provided any such evidence.

Public policy in Washington does not support McCormick’s position, either. To follow McCormick’s logic, every homeowner would

be bound to perform an invasive inspection before selling their home, in order to ascertain whether there were any potential latent defects. Every homeowner would be bound to investigate every person they ever hired to perform repairs, and to re-inspect the repairs after they were done, despite having no further problems. This is not what the law requires.

The Washington Legislature has affirmed the respective allocation of duties to investigate through the passage of the residential sale disclosure statute. Disclosures are made on the basis of the seller's "actual knowledge." CP 17. The RPTDS advises the seller to hire a qualified specialist to inspect the property.

FOR A MORE COMPREHENSIVE
EXAMINATION OF THE SPECIFIC
CONDITION OF THIS PROPERTY YOU
ARE ADVISED TO OBTAIN AND PAY
FOR THE SERVICES OF A QUALIFIED
SPECIALIST TO INSPECT THE
PROPERTY ON YOUR BEHALF ...

Id. McCormick's own inspectors did not report seeing any of the problems she alleges the Estvolds had some duty to know about. CP 228-80. There is nothing reasonable about projecting responsibility onto the Estvolds given the facts of this case.

E. The Trial Court Properly Awarded Fees and Costs to Estvolds.

1. The trial court was correct in awarding the Estvolds their attorneys' fees and costs for successfully defending McCormick's contract and tort claims, as all claims arose out of the parties' contract.

On appeal, McCormick argues that the trial court erred in awarding the Estvolds a portion of their attorneys' fees and costs pursuant to the contract, asserting that her tort claims did not arise from the parties' contract. Brief of Appellant at 37-40. McCormick is wrong on the facts and the law.

First, there is no dispute that attorneys' fees in Washington are recoverable where provided for by contract, statute, or recognized ground of equity. Brief of Appellant at 37 (citing *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993)). There is also no dispute that the purchase and sale contract in this case contained an attorney fee provision. CP 1-27; 219 (¶ q).

Second, McCormick herself (before losing on summary judgment) claimed entitlement to recovery of her own attorney's fees and costs based on this contractual fee provision.¹⁰ McCormick argued in her Response to Defendants' Motion for Summary Judgment that: **"All claims asserted are related to the contract, including negligent misrepresentation (even though it is a tort) and therefore the prevailing party will be awarded its fees at the resolution of the matter."** CP 387. Judge Linda Lee was not impressed with McCormick's unseemly flip of position on

¹⁰ CP 1-27 (Complaint, ¶ 4.4 (Intentional Misrepresentation: "As a result of Defendant's misrepresentations, Ms. McCormick has been damaged in an amount to be proven at trial, *including reasonable attorney's fees and legal costs.*"); ¶ 4.5 (Negligent Misrepresentation: "Ms. McCormick is entitled to damages in an amount to be proven at trial, including reasonable attorney's fees and costs."); ¶¶ 4.6 and 4.7 (Constructive Fraud and Fraudulent Concealment: Same request for fees); ¶¶ 4.8 and 4.9 (Breach of Contract: Same request for fees, citing Paragraph q of the parties' Purchase and Sale Agreement); ¶ 5 of Request for Relief ("For judgment awarding Ms. McCormick her costs and attorney's fees incurred herein under the Purchase and Sale Agreement, paragraph q.")).

reconsideration, RP II, at 27-28. Judge Lee found that all of McCormick's claims arose out of the parties' contract. RP II, pp. 37-38.

The trial court's August 25, 2006 Order and Judgment awarding the Estvolds' fees and costs is consistent with Washington law. Our courts have consistently awarded fees to the prevailing party in the defense of tort claims based on contractual fee provisions, such as the fee provision in this case. *See Elliott Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5, 15, 98 P.3d 491(2004)(awarding defendant its attorney fees and costs incurred in defense of tort claims (including negligent misrepresentation) based on contractual provision in lease between the parties); *Brown v. Johnson*, 109 Wn. App. 56, 34 P.3d 1233 (2001) (awarded fees where purchaser prevailed on tort claims arising out of the contract for the sale of a home).

Most recently, the Washington Supreme Court awarded fees in *Alejandre*, a factual similar case where the parties' purchase and sale agreement provided that attorney fees and costs "shall be awarded to the prevailing party in any dispute relating to the transaction." *Alejandre*, 2007 WL 616064 at 9 ¶ 35. This is the same contractual provision present in this case. CP 219 (¶ q). Importantly, the *Alejandre* court also awarded fees and costs on appeal, as provided for by the parties' contract. *Id.* ¶37.

Alejandre confirms what has always been Washington law: where the parties' purchase and sale agreement provides for attorney's fees to the "prevailing party," as it does here (CP 219 ¶ q), the prevailing party is entitled to fees for *all* claims, including extracontractual ones. *Alejandre*,

2007 WL 616064 ¶35; *see also* RCW 4.84.330; *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 143, 930 P.2d 288 (1997); *Brown*, 109 Wn. App. at 58-59. Pursuant to contract, the Estvolds are entitled to reasonable attorneys fees for their successful (albeit belabored) defense against McCormick's numerous unsubstantiated claims.

McCormick's citations to the contrary are inapposite. Neither of the cases cited by McCormick involved claims arising from a homeowner purchase and sale agreement, and neither of the two cases dealt with claims arising from the contract itself. *See Pearson v. Schubach*, 52 Wn. App. 716, 723, 763 P.2d 834 (1988)(tortious interference with business expectancy and conspiracy); *Lincor Contractors, Ltd. v. Hyskell*, 39 Wn. App. 317, 324, 692 P.2d 903 (1984)(no recovery under fee provision in construction loan agreement, as no action to enforce the terms of the contract); *see also* CR 715-16. *Brown* and *Alejandro* verify that misrepresentation and fraud claims in the context of a residential sale governed by a purchase and sale agreement will trigger the attorney's fees provision in that contract, and apply to fees incurred in defending extracontractual claims.

2. Trial court erred in not awarding the full attorney's fees and costs requested.

With respect to the Estvolds' cross-appeal, the Estvolds ask the Court to amend the trial court's judgment awarding fees and costs only as to the amount awarded. Under the statute (RCW 4.84.330) permitting an award of attorneys' fees in an action on a contract that provides for fees,

the trial court's discretion is limited to deciding the amount of reasonable fees to award. *Metropolitan Mortg. & Securities Co., Inc. v. Becker*, 64 Wn. App. 626, 632, 825 P.2d 360 (1992).

In this case, the Estvolds presented their Motion for Entry of Order and Judgment Determining Attorneys' Fees and Costs, which was supported by the initial Declaration of Carmen Rowe, and later, the Supplemental Declaration of Jason M. Whalen. CP 686-706, CP 810-20. In the Supplemental Declaration of Whalen, the Estvolds claimed entitlement to all of their fees incurred through the hearing date, which totaled \$38,772.50, plus \$3,233.90 in costs. CP 810-20. The basis for the request for fees was set forth in detail as to hourly rates, time incurred, and work performed. *Id.*

McCormick's basic objection as to amount was that she should not have to pay for the Estvolds' fees and costs incurred in pursuing insurance coverage for her claims. In response to opposing counsel's objection, the parties estimated the range of a potential offset would be \$5,663.00 to \$6,500.00. CP 810-20 (Supp. Decl. of Whalen); CP 722-57 (Plaintiff's Response to Motion for Fees). The Estvolds disputed the propriety of any offset, given that all fees and costs were incurred as a result of the costly litigation filed and perpetuated by McCormick. RP II, pp. 30-34.

Upon review of the documentation supporting the Estvolds' fee request, the trial court found that (1) the hourly rates for the work performed were reasonable; and (2) the hours spent to pursue insurance coverage were not recoverable. After reviewing the hours and actual work

performed, the trial court awarded \$29,000.00 in attorneys' fees to the Estvolds, plus costs as requested. RP II, pp. 37-38; CP 823-25.

The Estvolds believe the trial court's exercise of discretion was improper, as "but for" McCormick's pursuit of the litigation the Estvolds would not have incurred the fees for the pursuit of insurance coverage.¹¹ Moreover, even offsetting the \$38,772.00 fee request by, at most, the \$6,500.00 offset claimed by McCormick, the Estvolds argue that the Court's award should have been, at the very least, the sum of \$32,272.00. The trial court found the hourly rates and time incurred to be reasonable, with the exception of the insurance claim work. The Estvolds respectfully request the Appellate Court, after reviewing the record, modify the fee award to the sum of at least \$32,272.00, but preferably to \$38,772.00.

F. Estvolds are Entitled to Fees on Appeal Pursuant to RAP 18.1.

Pursuant to RAP 18.1, the Estvolds request their attorneys' fees and costs incurred on appeal. As set forth in RAP 18.1(a), if applicable law grants to a party the right to recover attorney fees or expenses on review, the party must request the fees and expenses as provided in this rule. For the reasons set forth at length above, the Estvolds have a contractual right to recover their attorneys' fees and costs of defense, not only at the trial court but on appeal before this Court. *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989)(contractual provision for award of attorney fees at trial supports award of attorney fees on appeal);

¹¹ The Estvolds were unsuccessful in obtaining any coverage for the claims asserted by McCormick in this litigation.

Marine Enterprises, Inc. v. Security Pacific Trading Corp., 50 Wn. App. 768, 774, 750 P.2d 1290 (1988). The Estvolds request fees on appeal.

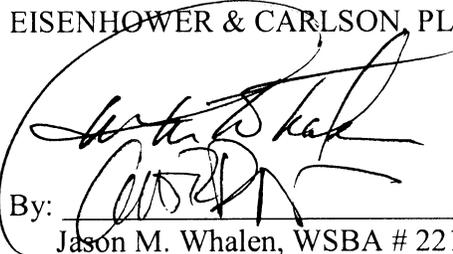
VI. CONCLUSION

The trial court correctly dismissed McCormick's claims as a matter of law, given the complete nonexistence of any admissible evidence supporting McCormick's claims, not even enough to raise any questions of material fact. McCormick's case simply did not measure up. McCormick failed to offer any admissible evidence that the Estvolds knew of the alleged problems with the home. McCormick failed to offer any admissible evidence that the Estvolds should have known of alleged problems, or that it was unreasonable to honestly convey the full extent of their previous experiences. McCormick failed to demonstrate that she could meet her burdens of proof at trial. At best, Washington law precludes McCormick's claims as she had notice of disclosed problems and repairs, and could have ascertained the full nature and extent of those defects before the sale.

The only evidence on the record supports the only conclusions that any reasonable person could reach: the Estvolds disclosed all that they knew. Their disclosures were consistent with the observations of McCormick's own inspectors. Given the lack of any disputed issue of material fact, the Estvolds are entitled to judgment, as a matter of law. The trial court's Order Granting Summary Judgment and its Order and Judgment for fees should be affirmed. The Estvolds are also entitled as a matter of law to their attorney's fees and costs, both below and on appeal.

RESPECTFULLY SUBMITTED this 6th day of April, 2007.

EISENHOWER & CARLSON, PLLC

By: 

Jason M. Whalen, WSBA # 22195

Carmen R. Rowe, WSBA # 28468

Attorneys for Respondents

Terry and Kay Estvold

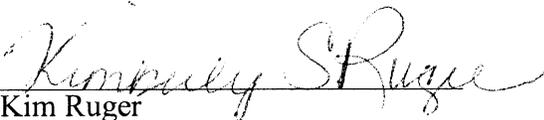
Certificate of Service

I certify that on the 6th day of April, 2007, I served the party listed below with a true and correct copy of the foregoing Brief of Respondents Terry and Kay Estvold in the above-entitled matter by hand delivering the same to:

Kevin T. Steinacker
Dickson Steinacker LLP
1201 Pacific Avenue, Suite 1401
Tacoma, WA 98402

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

DATED at Tacoma, Washington, this 6th day of April, 2007.


Kim Ruger
Legal Assistant

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APPENDIX A

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Briefs and Other Related Documents

Alejandro v. BullWash.,2007.Only the Westlaw citation is currently available.

Supreme Court of Washington,En Banc.
 Arturo **ALEJANDRE** and Norma **Alejandro**,
 husband and wife, Respondents,
 v.

Mary M. BULL, a single person, Petitioner.
No. 76274-1.

Argued Sept. 29, 2005.
 Decided March 1, 2007.

Background: After buyers purchased house with defective septic system, they sued vendor alleging fraudulent or negligent misrepresentation, fraudulent concealment, and common law fraud. The Superior Court, Walla Walla County, Donald W. Schacht, J., ruled as a matter of law that buyers had failed to prove their claims, and that their claims were barred by the economic loss rule, and dismissed. Purchasers appealed. The Court of Appeals, 123 Wash.App. 611, 98 P.3d 844, reversed. Review was granted.

Holdings: The Supreme Court, Madsen, J., held that:

- (1) economic loss rule barred misrepresentation claim;
- (2) plaintiffs did not demonstrate that defect could not have been discovered through reasonable inspection, as required to support fraudulent concealment claim; and
- (3) plaintiffs failed to demonstrate that they had right to rely on allegedly fraudulent representations, as required to support common law fraud claim.

Court of Appeals judgment reversed.

Chambers, J., filed opinion concurring in result, in which Sanders, J., joined.

[1] Appeal and Error 30 ↻893(1)

30 Appeal and Error
 30XVI Review
 30XVI(F) Trial De Novo
 30k892 Trial De Novo
 30k893 Cases Triable in Appellate Court
 30k893(1) k. In General. Most Cited Cases
 An appellate court reviews the trial court's grant or denial of a judgment as a matter of law de novo.

[2] Trial 388 ↻139.1(9)

388 Trial
 388VI Taking Case or Question from Jury
 388VI(A) Questions of Law or of Fact in General
 388k139.1 Evidence
 388k139.1(5) Submission to or Withdrawal from Jury
 388k139.1(9) k. Substantial Evidence. Most Cited Cases

Trial 388 ↻142

388 Trial
 388VI Taking Case or Question from Jury
 388VI(A) Questions of Law or of Fact in General
 388k142 k. Inferences from Evidence. Most Cited Cases
 A motion for judgment as a matter of law must be granted when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or

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reasonable inference to sustain a verdict for the nonmoving party.

[3] Evidence 157 ↪597

157 Evidence

157XIV Weight and Sufficiency

157k597 k. Sufficiency to Support Verdict or Finding. Most Cited Cases

“Substantial evidence” is evidence that is sufficient to persuade a fair-minded, rational person of the truth of a declared premise.

[4] Contracts 95 ↪1

95 Contracts

95I Requisites and Validity

95I(A) Nature and Essentials in General

95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases

Damages 115 ↪95

115 Damages

115VI Measure of Damages

115VI(A) Injuries to the Person

115k95 k. Mode of Estimating Damages in General. Most Cited Cases

Damages 115 ↪120(1)

115 Damages

115VI Measure of Damages

115VI(C) Breach of Contract

115k120 Failure to Perform in General

115k120(1) k. In General. Most Cited Cases

Torts 379 ↪105

379 Torts

379I In General

379k105 k. Purpose or Function of Tort Law. Most Cited Cases

In general, whereas tort law protects society's interests in freedom from harm, with the goal of restoring the plaintiff to the position he or she was in prior to the defendant's harmful conduct, contract law is concerned with society's interest in

performance of promises, with the goal of placing the plaintiff where he or she would be if the defendant had performed as promised.

In general, whereas tort law protects society's interests in freedom from harm, with the goal of restoring the plaintiff to the position he or she was in prior to the defendant's harmful conduct, contract law is concerned with society's interest in performance of promises, with the goal of placing the plaintiff where he or she would be if the defendant had performed as promised.

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[5] Torts 379 ↪118

379 Torts

379I In General

379k116 Injury or Damage from Act

379k118 k. Economic Loss Doctrine. Most Cited Cases

The purpose of the “economic loss rule” is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses; if the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.

[6] Fraud 184 ↪32

184 Fraud

184II Actions

184II(A) Rights of Action and Defenses

184k32 k. Effect of Existence of Remedy by Action on Contract. Most Cited Cases

“Economic loss rule” barred home purchasers from bringing tort claim against vendor for fraudulent and negligent misrepresentation, after buyers discovered that home's septic system was faulty; despite fact that specific risk of loss from defective

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septic system was not expressly allocated in parties' contract, defective system at heart of plaintiffs' claim was an economic loss within the scope of their contract. Restatement (Second) of Torts § 552.

[7] Fraud 184 ↪22(1)

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k19 Reliance on Representations and Inducement to Act

184k22 Duty to Investigate

184k22(1) k. In General. Most Cited Cases

Home purchasers did not demonstrate that defect in septic system could not have been discovered through reasonable inspection, as required to support fraudulent concealment claim against vendor; purchasers accepted septic system even though septic inspection report disclosed, on its face, that inspection was incomplete.

[8] Fraud 184 ↪16

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k16 k. In General. Most Cited Cases

Vendor's failure to inform purchasers of defect constitutes fraudulent concealment when there is concealed defect in premises of residential dwelling; vendor has knowledge of the defect; defect presents danger to the property, health or life of the purchaser; defect is unknown to purchaser; and, defect would not be disclosed by careful, reasonable inspection by purchaser.

[9] Fraud 184 ↪22(1)

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k19 Reliance on Representations and Inducement to Act

184k22 Duty to Investigate

184k22(1) k. In General. Most Cited Cases

Home purchasers did not demonstrate that they exercised sufficient diligence to attain right to rely on vendor's allegedly fraudulent representations about condition of defective septic system, as required to support common law fraud claim against vendor; purchasers were on notice that septic system had not been completely inspected but failed to conduct any further investigation and indeed, accepted findings of incomplete inspection report.

Albert Joseph Golden, Attorney at Law, Walla Walla, WA, for Petitioner.

Ronald Kurt McAdams, McAdams Ponti & Wernette, Walla Walla, WA, for Respondents.

Diana M Kirchheim, Groen Stephens & Klinge LLP, Bellevue, for Amicus Curiae Wash. Ass'n of Relations.

Daniel Joseph Gunter, Riddell Williams PS, Shilpa Bhatia, Wilson Smith Cochran Dickerson, Seattle, for Amicus Curiae Wash. Defense Trial Lawyers.

MADSEN, J.

*1 ¶ 1 Petitioner Mary M. Bull sold a house to the respondents, Arturo and Norma **Alejandre**. The **Alejandres** subsequently learned the septic system was defective and sued Ms. Bull for fraudulently or negligently misrepresenting its condition. The trial court dismissed the **Alejandres'** claims after they rested their case, determining as a matter of law that the **Alejandres** had failed to prove their claims and that the claims are barred by the economic loss rule. The Court of Appeals reversed, concluding that sufficient evidence was presented in support of the claims and that the economic loss rule did not apply because the parties did not contractually allocate risk for fraudulent or misrepresentation claims.

¶ 2 We reverse the Court of Appeals. Under Washington law, the defective septic system at the heart of plaintiffs' claims is an economic loss within the scope of the parties' contract, and the economic loss rule precludes any recovery under a negligent misrepresentation theory. There is no requirement that a risk of loss must be expressly allocated in a contract before a tort claim based on that loss will be precluded under the economic loss rule. Further, although under existing case law the plaintiffs' fraudulent concealment claim based on *Obde v. Schlemeyer*, 56 Wash.2d 449, 353 P.2d 672 (1960)

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is not barred by the economic loss rule, that claim fails here because the **Alejandres** cannot meet their burden to show the defect in the septic system could not have been discovered through a reasonable inspection. Finally, insofar as the **Alejandres** assert common law fraud, they have failed to present sufficient evidence to survive a motion under CR 50.

FACTS

¶ 3 Ms. Bull owned a single family residence that was served by a septic system. The year before she put the house up for sale, Ms. Bull noticed soggy ground over the septic system. She hired William Duncan of Gary's Septic Tank Service to pump the tank. She also contacted Walt Johnson Septic Service, which emptied the tank and patched a broken pipe leading from the tank to the drain field. In April 2000, Ms. Bull applied for a connection to the city sewer, but when she learned there was a \$5,000 hook-up fee she abandoned the idea.

¶ 4 Ms. Bull placed her home on the market in June 2000. In September 2001, Ms. Bull and the **Alejandres** entered into an earnest money agreement for the sale of Ms. Bull's home to the **Alejandres**. This agreement contained Ms. Bull's representation that the property was served by a septic system and her promise to have the septic tank pumped prior to closing. The earnest money agreement contained an addendum providing, among other things, that the sale was contingent on an inspection of the septic system. It stated that "[a]ll inspection(s) must be satisfactory to the Buyer, in the Buyer's sole discretion." Ex. 4. The addendum also provided that if the buyer disapproved of any inspection report, the buyer had to notify the seller and state the objection. Ex. 4. If the seller did not receive such notice, the inspection contingency would be deemed satisfied. Ex. 4.

*2 ¶ 5 As provided in the earnest money agreement, a septic tank service (Walt's Septic Tank Service) pumped the tank, and the **Alejandres** received a copy of the bill. The bill stated on it that the septic system's back baffle could not be inspected but there was "[n]o obvious malfunction of the system at time of work done." Ex. 6. In

addition, prior to closing Ms. Bull provided the **Alejandres** with a seller's disclosure statement as required by RCW 64.06.020.^{FN1} She disclosed that the house had a septic tank system which was last pumped and last inspected in the fall 2000 and that "Walt Johnson Jr. replaced broken line between house and septic tank," and she answered "no" to the inquiry whether there were any defects in operation of the septic system. Ex. 5.^{FN2} Ms. Bull also disclosed that she was aware of changes or repairs to the system. The **Alejandres** reviewed the disclosure statement with their agent and then signed the section of the disclosure statement headed "BUYER'S WAIVER OF RIGHT TO REVOKE OFFER." Ex. 5. See RCW 64.06.030. The **Alejandres** thus acknowledged, as expressly explained in the disclosure statement, their duty to "pay diligent attention to any material defects which are known to Buyer or can be known to Buyer by utilizing diligent attention and observation." Ex. 5.

¶ 6 Also prior to closing, the **Alejandres** lending bank required an inspection of the property. The resulting inspection report stated that its purpose was to notify the client of all defects or potential problems. The report indicated that the septic system "Performs Intended Function" and stated that "everything drains OK." Ex. 7.

¶ 7 On December 10, 2001, the sale closed. The **Alejandres** moved into the house a week later. In January 2002, the **Alejandres** smelled an odor inside their home. They also heard "water gurgling like it was coming back up." Verbatim Report of Proceedings at 15. They noticed a foul odor outside the home as well, which they believed came from the ground around the septic tank, which they said was soggy. In February, they hired William Duncan of Gary's Septic Tank Service. Mr. Duncan told the **Alejandres** that he could pump the tank but could not fix the problem because the drain fields were not working. He also told the **Alejandres** that he had told Ms. Bull that the drain fields were not working and that she needed to connect to the city's sewer system.

¶ 8 The **Alejandres** subsequently hired another company to connect to the city sewer system. During this work, the company discovered that the

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baffle to the outlet side of the septic system was gone, thus allowing sludge from the septic tank to enter the drain field and plug it.

¶ 9 The **Alejandres** sued Ms. Bull for fraud and misrepresentation, claiming costs and damages totaling nearly \$30,000. After the plaintiffs rested their case, Ms. Bull moved for judgment as a matter of law. The court granted the motion, ruling that the economic loss rule bars the **Alejandres'** claims and that they failed to present sufficient evidence in support of their claims. The court entered judgment in favor of Ms. Bull and awarded her attorney fees as provided for in the parties' purchase and sale agreement.

*3 ¶ 10 The **Alejandres** appealed. The Court of Appeals reversed, holding that the **Alejandres** presented sufficient evidence to take their claims to the jury and that the economic loss rule does not apply because the parties' contract did not allocate risk for fraudulent or negligent misrepresentation claims. *Alejandre v. Bull*, 123 Wash.App. 611, 626, 98 P.3d 844 (2004).

ANALYSIS

[1][2][3] ¶ 11 When reviewing a trial court's decision on a motion for judgment as a matter of law, the appellate court applies the same standard as the trial court and reviews the grant or denial of the motion de novo. *Davis v. Microsoft Corp.*, 149 Wash.2d 521, 531, 70 P.3d 126 (2003). "A motion for judgment as a matter of law must be granted 'when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.'" *Id.* (quoting *Sing v. John L. Scott, Inc.*, 134 Wash.2d 24, 29, 948 P.2d 816 (1997)). "Substantial evidence" is evidence that is sufficient "to persuade a fair-minded, rational person of the truth of a declared premise." *Davis*, 149 Wash.2d at 531, 70 P.3d 126 (quoting *Helman v. Sacred Heart Hosp.*, 62 Wash.2d 136, 147, 381 P.2d 605 (1963)).

¶ 12 Ms. Bull maintains that the **Alejandres'** tort

claims are precluded by the economic loss rule, as the trial court ruled.

¶ 13 The economic loss rule applies to hold parties to their contract remedies when a loss potentially implicates both tort and contract relief. It is a "device used to classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remediable only in contract.... '[E]conomic loss describes those damages falling on the contract side of "the line between tort and contract.'" " *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wash.2d 816, 822, 881 P.2d 986 (1994) (citation omitted) (quoting *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wash.2d 847, 861 n. 10, 774 P.2d 1199, 779 P.2d 697 (1989) (quoting *Pa. Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165, 1173 (3d Cir.1981))). The rule "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from contract" because "tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement." *Factory Mkt., Inc. v. Schuller Int'l, Inc.*, 987 F.Supp. 387, 395 (E.D.Pa.1997) (quoting *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 618 (3d Cir.1995) and *Palco Linings, Inc. v. Pavex, Inc.*, 755 F.Supp. 1269, 1271 (M.D.Pa.1990)).

[4] ¶ 14 "Tort law has traditionally redressed injuries properly classified as physical harm." *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 420, 745 P.2d 1284 (1987). It "is concerned with the obligations imposed by law, rather than by bargain," and carries out a "safety-insurance policy" that requires that products and property that are sold do not "unreasonably endanger the safety and health of the public." *Id.* at 421, 420, 745 P.2d 1284. Contract law, in contrast, carries out an "expectation-bargain protection policy" that "protects expectation interests, and provides an appropriate set of rules when an individual bargains for a product of particular quality or for a particular use." *Id.* at 420-21, 745 P.2d 1284. In general, whereas tort law protects society's interests in freedom from harm, with the goal of restoring the plaintiff to the position he or she was in prior to the defendant's harmful conduct, contract law is

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concerned with society's interest in performance of promises, with the goal of placing the plaintiff where he or she would be if the defendant had performed as promised. *Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236, 239 (6th Cir.1994); see also *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244, 1246-47 (Fla.1993).

*4 ¶ 15 The economic loss rule maintains the “fundamental boundaries of tort and contract law.” *Berschauer/Phillips*, 124 Wash.2d at 826, 881 P.2d 986. Where economic losses occur, recovery is confined to contract “to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract.... If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity.” *Id.* A manufacturer or seller sets prices in contemplation of, among other things, potential contractual liability. See *id.* at 827, 881 P.2d 986. If tort liability is expanded to include economic damages, parties would be exposed to “liability in an indeterminate amount for an indeterminate time to an indeterminate class.” *Id.* (quoting Justice Cardozo in *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 179, 174 N.E. 441, 74 A.L.R. 1139 (1931)). “A bright line distinction between the remedies offered in contract and tort with respect to economic damages also encourages parties to negotiate toward the risk distribution that is desired or customary.” *Berschauer/Phillips*, 124 Wash.2d at 827, 881 P.2d 986. In addition, the economic loss rule prevents a party to a contract from obtaining through a tort claim benefits that were not part of the bargain. See, e.g., *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis.2d 395, 408, 573 N.W.2d 842 (1998).

[5] ¶ 16 In short, the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims. See *Snyder v. Lovercheck*, 992 P.2d 1079, 1088 (Wyo.1999) (“‘when parties’ difficulties arise directly from a contractual

relationship, the resulting litigation concerning those difficulties is one in contract no matter what words the plaintiff may wish to use in describing it’” (quoting *Beeson v. Erickson*, 22 Kan.App.2d 452, 461, 917 P.2d 901 (1996))). Washington law consistently follows these principles. See *Stuart*, 109 Wash.2d at 420-22, 745 P.2d 1284; *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wash.2d 506, 799 P.2d 250 (1990); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wash.2d 334, 350-51, 831 P.2d 724 (1992); *Berschauer/Phillips*, 124 Wash.2d at 825-26, 881 P.2d 986; *Staton Hills Winery Co. v. Collons*, 96 Wash.App. 590, 595-96, 980 P.2d 784 (1999); *Carlson v. Sharp*, 99 Wash.App. 324, 994 P.2d 851 (1999); *Griffith v. Centex Real Estate Corp.*, 93 Wash.App. 202, 211-13, 969 P.2d 486 (1998). The key inquiry is the nature of the loss and the manner in which it occurs, i.e., are the losses economic losses, with economic losses distinguished from personal injury or injury to other property. If the claimed loss is an economic loss, and no exception applies to the economic loss rule, then the parties will be limited to contractual remedies.

*5 ¶ 17 The same fundamental approach applies to products liability claims governed by the Washington Product Liability Actions Act, chapter 7.72 RCW (WPLA). The WPLA does not allow recovery for direct or consequential economic losses under the Uniform Commercial Code, Title 62A.RCW. RCW 7.72.010(6). Rather, the WPLA “confines recovery to physical harm of persons and property and leaves economic loss, standing alone, to the Uniform Commercial Code.” *Touchet Valley Grain Growers*, 119 Wash.2d at 351, 831 P.2d 724. The court therefore applies a risk of harm analysis in the product liability setting under the WPLA to determine the nature of the damages and whether an economic loss has occurred, *id.*, but, as in other cases, the focus is on the harm or injury and whether it constitutes an economic loss.

¶ 18 In *Berschauer/Phillips*, a general contractor sought to recover economic damages in tort from an architect, an engineer, and an inspector. We first noted that the case was not governed by the WPLA, and therefore turned to the common law to

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determine whether the economic loss rule precludes recovery in tort. We held that the economic loss rule applies to bar recovery of economic loss due to construction delays. *Berschauer/Phillips*, 124 Wash.2d at 825-27, 881 P.2d 986. We expressly did so in order to “align the common law rule on ‘economic loss’ with the Legislature’s” application of the rule under the WPLA to limit purely economic damages to contract claims under the UCC. *Id.* at 827, 881 P.2d 986.

[6] ¶ 19 The **Alejandres** maintain that the economic loss rule does not apply in the context here, i.e., the sale of a residence. However, as Ms. Bull contends, in this state the economic loss rule applies to tort claims brought by homebuyers. *Stuart*, 109 Wash.2d at 417-22, 745 P.2d 1284; *Griffith*, 93 Wash.App. at 212-13, 969 P.2d 486. ^{FN3} And, as in other circumstances, where defects in construction of residences and other buildings are concerned, economic losses are generally distinguished from physical harm or property damage to property other than the defective product or property. The distinction is drawn based on the nature of the defect and the manner in which damage occurred. In *Stuart*, 109 Wash.2d at 420-22, 745 P.2d 1284, and in *Atherton*, 115 Wash.2d 506, 799 P.2d 250, we declined to recognize any tort cause of action for negligent construction because the plaintiffs in each of these cases presented no evidence of personal or physical injury resulting from the manner in which the condominium complexes in each case were constructed and instead sought only economic damages.

¶ 20 Here, the injury complained of is a failed septic system. Purely economic damages are at issue. *See Stuart*, 109 Wash.2d at 420, 745 P.2d 1284 (defects evidenced by internal deterioration are characterized as economic losses); *Griffith*, 93 Wash.App. at 213, 969 P.2d 486 (same). There is no question that the parties’ relationship is governed by contract. Thus, unless there is some recognized exception to the economic loss rule that applies, the plaintiffs’ claim of negligence cannot stand because they are limited to their contract remedies. No exception to the economic loss rule has been established.

*6 ¶ 21 The plaintiffs allege that Ms. Bull made negligent misrepresentations about the condition of the septic system contrary to the duty of due care under the Restatement (Second) of Torts § 552 (1977). ^{FN4} Both *Berschauer/Phillips* and *Griffith* hold that although Washington recognizes a tort claim for negligent misrepresentation under the Restatement (Second) of Torts § 552 (1977), this claim is not available when the parties have contracted against potential economic liability. *Berschauer/Phillips*, 124 Wash.2d at 827-28, 881 P.2d 986; *Griffith*, 93 Wash.App. at 212, 969 P.2d 486.

¶ 22 Accordingly, the **Alejandres**’ reliance on § 552 and what must be proven under it is foreclosed by our precedent. Because the parties’ relationship is governed by contract and the loss claimed is an economic loss, the trial court correctly concluded that plaintiffs’ negligent misrepresentation claim must be dismissed. *See, e.g., Atherton*, 115 Wash.2d at 526-27, 799 P.2d 250 (negligent construction claim precluded where plaintiff sought only economic damages).

¶ 23 The Court of Appeals held, however, that if the parties fail to specifically allocate a risk of loss in their contract, the economic loss rule does not apply as to that risk. *Alejandre*, 123 Wash.App. at 626, 98 P.3d 844. This holding is inconsistent with the weight of authority and with *Berschauer/Phillips*.

¶ 24 In *Berschauer/Phillips*, we stated that our holding limiting the recovery of economic loss due to construction delays ensures “that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. We hold parties to their contracts.” *Berschauer/Phillips*, 124 Wash.2d at 826, 881 P.2d 986. We did not say, however, that the parties will be held to their bargained-for remedies only if they explicitly addressed any or all potential economic losses and allocated the risks associated with them.

¶ 25 Other courts have also rejected this premise. Courts reason, instead, that the economic loss rule applies where the parties could or should have allocated the risk of loss, or had the opportunity to

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do so. In *Nextel Argentina, S.R.L. v. Elemar International Forwarding, Inc.*, 44 F.Supp.2d 1306, 1309 (Fla.1999), the court saw “ ‘no reason to burden society as a whole with the losses of one who has failed to bargain for adequate contractual remedies.’ ” (Quoting *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So.2d 628, 630 (Fla.1995)). The court held that the “economic loss rule prevents recovery in tort for risks that *should have been* allocated in a contract.” *Nextel*, 44 F.Supp.2d at 1309 (emphasis added). If the party could have allocated its risk, the rule applies; all that is required is that the party had an opportunity to allocate the risk of loss. *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 852 (6th Cir.2002); *Lexington Ins. Co. v. W. Roofing Co.*, 316 F.Supp.2d 1142, 1148 (D.Kan.2004); *Nat'l Steel Erection, Inc. v. J.A. Jones Constr. Co.*, 899 F.Supp. 268, 274 (N.D.W.Va.1995); *Nigrelli Sys., Inc. v. E.I. DuPont de Nemours & Co.*, 31 F.Supp.2d 1134, 1138 (E.D.Wis.1999); *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 73 (Colo.2004); *Nw. Ark. Masonry, Inc. v. Summit Specialty Prods., Inc.*, 29 Kan.App.2d 735, 744-45, 31 P.3d 982 (2001); *Neibarger v. Universal Coops., Inc.*, 439 Mich. 512, 521, 486 N.W.2d 612 (1992) (quoting *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 579-80, 489 A.2d 660 (1985)).

*7 ¶ 26 Further, where allocation of risk occurs, it can occur directly or indirectly. For example, parties might allocate risk through express contract terms, such as the inclusion of warranties, or through the procuring of insurance, or risk might be reflected in a lower price obtained by the buyer in exchange for the risk falling on the buyer. *Maersk Line Ltd. v. CARE & ADM, Inc.*, 271 F.Supp.2d 818, 822 (E.D.Va.2003). As one court stated: “ ‘ Courts should assume that parties factor risk allocation into their agreements and that the absence of comprehensive warranties is reflected in the price paid. Permitting parties to sue in tort when the deal goes awry rewrites the agreement by allowing a party to recoup a benefit that was not part of the bargain.’ ” *Daanen & Janssen*, 216 Wis.2d at 408, 573 N.W.2d 842 (quoting *Stoughton Trailers, Inc. v. Henkel Corp.*, 965 F.Supp. 1227, 1230 (W.D.Wis.1997)); see *Nigrelli Sys.*, 31 F.Supp.2d at

1138.

¶ 27 In fact, if a court permits a tort claim on the ground that the parties have not expressly allocated a particular risk, it interferes with the parties' freedom to contract. *Rich Prods. Corp. v. Kemutec, Inc.*, 66 F.Supp.2d 937, 968-69 (E.D.Wis.1999), *aff'd*, 241 F.3d 915 (7th Cir.2001); see also *Maersk Line*, 271 F.Supp.2d at 822 (“ ‘to permit a party to a broken contract to proceed in tort where only economic losses are alleged would eviscerate the most cherished virtue of contract law, the power of the parties to allocate the risks of their own transactions’ ” (quoting *Princess Cruises, Inc. v. General Elec. Co.*, 950 F.Supp. 151, 155 (E.D.Va.1996), *rev'd on other grounds*, 143 F.3d 828 (4th Cir.1998))); *Snyder*, 992 P.2d at 1087 (“ ‘ [t]he effect of confusing the concept of contractual duties, which are voluntarily bargained for, with the concept of tort duties, which are largely imposed by law, would be to nullify a substantial part of what the parties expressly bargained for-limited liability’ ” (quoting *Isler v. Texas Oil & Gas Corp.*, 749 F.2d 22, 23 (10th Cir.1984))).

¶ 28 In accord with the overwhelming weight of authority from other jurisdictions, and under our decision in *Berschauer/Phillips*, the economic loss rule applies regardless of whether the specific risk of loss at issue was expressly allocated in the parties' contract.

¶ 29 Finally, on this issue, a cautionary note is added. There is some suggestion that the economic loss rule applies only if the contract is between two sophisticated parties. However, we observed in *Berschauer/Phillips*, 124 Wash.2d at 827, 881 P.2d 986, that the “unsophisticated consumer” is deprived of economic damages under the WPLA. Just as the economic loss rule applies under the WPLA to “unsophisticated” parties, the same “bright line distinction between the remedies offered in contract and tort with respect to economic damages,” *Berschauer/Phillips*, 124 Wash.2d at 827, 881 P.2d 986, may apply to “unsophisticated” parties who enter a contract on essentially equal footing.^{FN5} If there is significant disparity in bargaining power, likely accompanied by some other contractual infirmity, then there may be an

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issue as to enforceability of the contract—a different question from whether tort remedies should be available.

***8 ¶ 30** The **Alejandres'** negligent misrepresentation tort claim is precluded under the economic loss rule for the reasons explained above.

[7] ¶ 31 The plaintiffs also assert a claim of fraudulent concealment. In *Atherton*, we rejected the plaintiff's claim of negligent construction as barred by the economic loss rule, but in the same opinion held that there was an issue of fact as to whether the defendant had fraudulently concealed construction practices violating the building code and therefore the trial court had erred in dismissing the plaintiffs' claim for fraudulent concealment on a motion for summary judgment. *Atherton*, 115 Wash.2d at 523-27, 799 P.2d 250. Thus, under *Atherton*, the **Alejandres'** fraudulent concealment claim is not precluded by the economic loss rule.

[8] ¶ 32 However, the fraudulent concealment claim fails because, as the trial court ruled, the **Alejandres** failed to present sufficient evidence to support the claim. Under *Obde*, 56 Wash.2d 449, 353 P.2d 672, and similar cases, the vendor's duty to speak arises (1) where the residential dwelling has a concealed defect; (2) the vendor has knowledge of the defect; (3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect is unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser. *Atherton*, 115 Wash.2d at 524, 799 P.2d 250. The **Alejandres** failed to meet their burden of showing that the defect in the septic system would not have been discovered through a reasonably diligent inspection. In fact, the **Alejandres** accepted the septic system even though the inspection report from Walt's Septic Tank Service disclosed, on its face, that the inspection was incomplete because the back baffle had not been inspected. The testimony at trial showed that this part of the septic system was relatively shallow and easily accessible for inspection. A careful examination would have led to discovery of the defective baffle and to further investigation.

[9] ¶ 33 Next, insofar as the **Alejandres** have asserted common law fraud theories, they have failed to present sufficient evidence of the nine elements of fraud. *See Williams v. Joslin*, 65 Wash.2d 696, 697, 399 P.2d 308 (1965). In particular, they have failed to present sufficient evidence as to the right to rely on the allegedly fraudulent representations about the condition of the septic service. The “right to rely” element of fraud is intrinsically linked to the duty of the one to whom the representations are made to exercise diligence with regard to those representations. *Id.* at 698, 399 P.2d 308; *Puget Sound Nat'l Bank v. McMahon*, 53 Wash.2d 51, 54, 330 P.2d 559 (1958). As explained, the **Alejandres** were on notice that the septic system had not been completely inspected but failed to conduct any further investigation and indeed, accepted the findings of an incomplete inspection report. Having failed to exercise the diligence required, they were unable to present sufficient evidence of a right to rely on the allegedly fraudulent representations. ^{FN6}

***9 ¶ 34** Accordingly, the trial court correctly determined, as to the **Alejandres'** fraudulent conveyance and fraudulent representation theories, that Ms. Bull was entitled to judgment as a matter of law under CR 50 because the **Alejandres** failed to present sufficient evidence in support of these theories.

¶ 35 Finally, we turn to Ms. Bull's request for attorney fees. The parties purchase and sale agreement provides that attorney fees and costs shall be awarded to the prevailing party in any dispute relating to the transaction. Ex. 4; *see* RCW 4.84.300. Accordingly, Ms. Bull is entitled to attorney fees as the prevailing party, at trial, as the trial court ruled, and on appeal and discretionary review, to be awarded pursuant to RAP 18.1.

CONCLUSION

¶ 36 In this case involving the sale of a residence with a defective septic system, we hold that the economic loss rule applies and forecloses the buyers' claim that the seller negligently misrepresented the condition of the septic system.

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The buyers' claim of fraudulent conveyance is not subject to the economic loss rule. However, the buyers failed to present sufficient evidence on this claim and on their claims of fraudulent misrepresentation to take these issues to the jury. The trial court properly dismissed all of the claims under CR 50 at the close of the plaintiffs-buyers' case.

¶ 37 We reverse the Court of Appeals and reinstate the trial court's judgment, including the award of attorney fees and costs, and we award attorney fees and costs to Ms. Bull for the appeal and this discretionary review, as provided for in the parties' contract.

WE CONCUR: GERRY L. ALEXANDER C.J., CHARLES W. JOHNSON, SUSAN OWENS, MARY E. FAIRHURST, JAMES M. JOHNSON, BOBBE J. BRIDGE, JJ.CHAMBERS, J. (concurring in result).

*10 ¶ 38 I agree with the majority in result but write separately to suggest a different analytical approach to the economic loss rule.

¶ 39 Like the majority, I would reject Arturo and Norma **Alejandre's** negligent misrepresentation claim. Once the economic loss rule is applied, this negligent misrepresentation claim is revealed to be a breach of contract claim, not remediable in tort. Like the majority, I would hold that the contract does not control the **Alejandres'** fraudulent concealment claim. In this state, fraud is not a contract claim. Like the majority, I would hold that the **Alejandres** failed to present sufficient evidence on all of their claims and that the trial court properly dismissed them.

¶ 40 Unlike the majority, I do not believe that the best approach to the economic loss rule is to find it bars recovery for any undefined economic loss between parties whose relationship is governed by contract unless an exception applies. *Cf.* majority at ----. The economic loss rule is a misnomer, and the majority mistakes the name of the doctrine for its function.

¶ 41 Instead, I would approach the economic loss rule in light of what it is: a tool we use to ensure

that tort is tort, contract is contract, and that each comes with its own remedies. The distinction between tort and contract matters because our society has made the rational choice to limit contract remedies to the typically efficient remedies laid out by the specific contract signed by the parties or provided by background contract and commercial law. *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 561, 489 A.2d 660 (1985).^{FN1} Our society has also made the rational choice that tort remedies should make the victim whole and thus often include significant consequential damages, such as pain and suffering, which are generally inappropriate for mere breaches of contract. *See Rardin v. T & D Mach. Handling, Inc.*, 890 F.2d 24, 25-26 (7th Cir.1989). Only after I determined that there was a potential question as to whether a suit filed in tort should instead sound in contract would I examine whether the loss was, rightly understood, an "economic loss"-that is to say, a "commercial loss," properly addressed in contract law. *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 574 (7th Cir.1990). In this case, either approach achieves the same results.

¶ 42 The majority aptly recites the relevant facts. Mary Bull, an elderly widow, sold her home to a young couple. The house had a septic system that had needed significant repair in recent years. A repairman told her that her system was unrepairably defective and that she should connect to the city's sewer system. Bull made some initial inquiries about connecting to the sewer system but did not follow through.

*11 ¶ 43 At the time the **Alejandres** made an offer on the house, the septic system was performing adequately. Bull disclosed that she had had the system repaired recently. She did not disclose (and it appears may not have remembered or understood) the extent of the septic system's problems or that she had been told to connect to the city's sewer system.

¶ 44 Before buying Bull's home, the **Alejandres** had her septic system inspected by two different inspectors. Their inspectors reported that the septic system appeared to be working, though one cautioned that he was unable to examine parts of it.

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Unfortunately, shortly after the **Alejandres** purchased the home, the system began to fail. By chance, the **Alejandres** sought help from the very person who had originally told Bull that the system was fatally flawed. In the end, the couple spent around \$30,000 to have adequate plumbing in a house they purchased for \$115,000.

The Economic Loss Rule

¶ 45 Bull argues, and the trial court agreed, that the **Alejandres'** claims are barred by the “economic loss rule.” Claims for breach of contract and some tort claims, especially products liability claims, often bear great similarity to one another. Tort remedies are often, perhaps always, significantly larger than contract remedies. It appears to me that the economic loss rule is a response to the risk that the tort remedies available in products liability law, if applied in contract law, could gut it. One way we have prevented the death of contract is through the economic loss rule. It prevents one party to a contract from rewriting the damage provisions after a breach by styling the case in tort. As the inimitable Judge Richard Posner put it:

The insight behind the [economic loss rule] doctrine is that commercial disputes ought to be resolved according to the principles of commercial law rather than according to tort principles designed for accidents that cause personal injury or property damage. A disputant should not be permitted to opt out of commercial law by refusing to avail himself of the opportunities which that law gives him.

Miller, 902 F.2d at 575; see also *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wash.2d 816, 821, 881 P.2d 986 (1994); *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866, 872-74, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) (warning that without some sort of analytical tool to separate them, “contract law would drown in a sea of tort”); *Seely v. White Motor Co.*, 63 Cal.2d 9, 403 P.2d 145, 45 Cal.Rptr. 17 (1965) (first clearly articulating an economic loss rule to divide tort and contract remedies.)^{FN2}

¶ 46 I say the rule is unfortunately named because

describing the “loss” as economic is not particularly helpful and can be positively misleading. Again, as Judge Posner quite aptly noted:

*12 It would be better to call it a ‘commercial loss,’ not only because personal injuries and especially property losses are economic losses, too—they destroy values which can be and are monetized—but also, and more important, because tort law is a superfluous and inapt tool for resolving purely commercial disputes. We have a body of law designed for such disputes. It is called contract law.

Miller, 902 F.2d at 574.

¶ 47 “Economic loss” (for which I suggest we read in our heads “commercial loss”) includes “ ‘the diminution in the value of [a] product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.’ ” Christopher Scott D’Angelo, *The Economic Loss Doctrine: Saving Contract Warranty Law from Drowning in a Sea of Torts*, 26 U. Tol. L.Rev. 591, 592 (1995) (quoting *Comment, Manufacturers’ Liability to Remote Purchasers for ‘Economic Loss’ Damages—Tort or Contract?*, 114 U. Pa. L.Rev. 539, 541 (1966)). It “is called in law an ‘economic loss,’ to distinguish it from an injury to the plaintiff’s person or property (property other than the product itself), the type of injury on which a products liability suit usually is founded.” *Miller*, 902 F.2d at 574.

¶ 48 Thus, merely because a loss can be expressed in economic terms, it is not necessarily an “economic loss” triggering application of the unfortunately named “economic loss rule.” See *Miller*, 902 F.2d at 575. I recognize that this is the sort of linguistic perversity that gets lawyers laughed at. Nonetheless, I point it out because I fear the majority may be misunderstood as holding that we start from the position that any damage, or at least any property damage, that can be expressed in a dollar figure is presumptively an economic loss and the economic loss rule will keep a case out of tort (whether or not a contractual relation that could give rise to relief exists) unless an exception applies. While in most cases, that will get us to the right type of law, it is a needlessly complicated way to approach the problem.

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¶ 49 In my view, we should start by recognizing that the “economic loss rule” is the analytical tool we use to determine whether a dispute implicates tort or contract law in those cases that could potentially sound in either. *Cf. Berschauer/Phillips*, 124 Wash.2d at 826, 881 P.2d 986; *see also Factory Mkt., Inc. v. Schuller Int'l, Inc.*, 987 F.Supp. 387, 395 (E.D.Pa.1997).^{FN3} Once the choice is made, then the applicable measure of damages either in tort or contract, may be applied. This approach empowers contracting parties to negotiate remedies just like any other contract term, while recognizing the tort duties of care all owe to all. *Berschauer/Phillips*, 124 Wash.2d at 821-28, 881 P.2d 986. It also gives appropriate deference to the legislature's decision to impose different statutes of limitations in different areas of law. *See generally Spring Motors Distribs.*, 98 N.J. at 561, 489 A.2d 660. Especially in products liability, an area of law that had its origins in contracts before finding its home in tort, the economic loss rule can be very helpful in deciding whether a particular “products liability” case is really a breach of contract claim in disguise. *See generally E. River*, 476 U.S. at 871, 106 S.Ct. 2295; *Miller*, 902 F.2d 573.

¶ 50 We have used the economic loss rule in residential purchase and sale disputes already. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wash.2d 506, 526-27, 799 P.2d 250 (1990); *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 417-21, 745 P.2d 1284 (1987); *Griffith v. Centex Real Estate Corp.*, 93 Wash.App. 202, 213, 969 P.2d 486 (1998). Often in the real property context, the breach of contract is revealed when the property suffers damage. Property damage often invokes tort remedies, but, “[i]ncidental property damage, however, will not take a commercial dispute outside the economic loss doctrine; the tail will not be allowed to wag the dog.” *Miller*, 902 F.2d at 576 (citing *Chi. Heights Venture v. Dynamit Nobel of Am., Inc.*, 782 F.2d 723, 726-29 (7th Cir.1986)).

*13 ¶ 51 This demonstrates why understanding “economic loss” to mean “commercial loss” would be helpful. When a piece of property is bought that is worth less because of a property defect, that is easily understood to be a commercial loss. But that

exact same damage caused by a trespass or nuisance, or occurring in a products liability context, may well sound in tort. In those cases, the “loss,” properly understood, is not a commercial loss and does not arise from a breach of contract. While the loss can be expressed in economic terms (and what cannot be in these days?) the damage should properly be understood to be a property damage, potentially giving rise to relief in tort.

¶ 52 While negligent misrepresentation *may* sound in tort, *see* Restatement (Second) of Torts § 552 (1977), in this case, the claim falls under the contract these parties signed. The remedies available to the parties are controlled by the contract between the parties.

¶ 53 Turning briefly to whether there is potential relief in contract, under the inspection addendum to the contract, the **Alejandres** were authorized to inspect the septic system and required to notify Bull that they found it unsatisfactory within 10 days. Fairly read, that contractual language put a duty of due diligence on the **Alejandres** to take steps to protect themselves and to anticipate that Bull might not have complete knowledge of the workings of an underground system. *Cf. Ex. 5* (“Buyer acknowledges the duty to pay diligent attention to any material defects which are known to Buyer or can be known to Buyer by utilizing diligent attention and observation.”). Thus, it was the **Alejandres'** duty, under the purchase and sale agreement, to exercise due diligence and to satisfy themselves that the septic system was acceptable. If, upon a reasonably diligent inspection, they discovered the septic system was not in good working order, their remedy under the purchase and sale agreement was to rescind the contract or seek other contract remedies. I conclude under the facts of this case that the contract controls, and this claim properly sounds in contract, not tort. To recover, they must prove that the contract they signed was breached. They have not done so. I agree with the majority that the economic loss rule takes this case to contract, and under the contract, they have no claim.^{FN4}

Fraud

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*14 ¶ 54 The majority is correct that the economic loss rule does not preclude the **Alejandres'** fraudulent concealment claim. Majority at ---- - ---- (citing *Atherton*, 115 Wash.2d at 523-27, 799 P.2d 250). Whether we see this as an exception to the economic loss rule or simply that we recognize that in this state, being defrauded is a dignitary injury, not a commercial one, we reach the same result. I concur with the majority that the **Alejandres** have not submitted sufficient evidence to go to the jury with this claim, or on their common law fraud theories. I also agree with the majority that Bull is entitled to her attorney fees.

CONCLUSION

¶ 55 A house was purchased with a defective septic system. I do not wish to minimize the significant injury the **Alejandres** have suffered because of this. The cost of repair was close to a third of the purchase price of the house. I too would be outraged and looking for someone to sue.

¶ 56 But the **Alejandres'** claim for negligent misrepresentation was primarily a claim for a commercial loss, stemming from an alleged breach of contract. To recover in tort, "there must be a showing of harm above and beyond disappointed expectations evolving solely from a prior agreement." *Factory Mkt.*, 987 F.Supp. at 396 (quoting *Sun Co.*, 939 F.Supp. at 371). They have not shown this, nor have they proved breach of contract. While a fraud claim is not barred by the economic loss rule, they have not submitted sufficient evidence to take theirs to the jury. I concur with the majority in result.

WE CONCUR: Justice RICHARD B. SANDERS.

FN1. Chapter 64.06 RCW contains requirements for sellers of residential real property to make certain disclosures unless the buyer has expressly waived the right to receive the disclosure statement or the sale is exempt from the disclosure requirements under RCW 64.06.010. RCW 64.06.020(1). If the buyer does not waive the right, the buyer can, in the buyer's sole discretion,

rescind the earnest money agreement within three business days after receipt of the disclosure statement. RCW 64.06.030.

FN2. The **Alejandres** maintain that Ms. Bull knew that the disclosure statement was wrong in stating that the tank was last pumped in the fall, rather than in May 2000, and that a broken pipe was replaced between the house and the tank, rather than between the tank and the drain field. At trial Ms. Bull was unsure why she said "fall" rather than "May" and she testified that the line was not broken between the house and the tank. The **Alejandres** also maintain that Ms. Bull failed to disclose that she had to do her laundry outside the home because of the failed system. Ms. Bull says she did not disclose that she did her laundry outside the home for one month because the problem with the system was taken care of by the time she filled out the disclosure form.

FN3. Other courts have applied the economic loss rule to homeowners alleging construction defects. In *Casa Clara*, 620 So.2d at 1247, the court stated: If a house causes economic disappointment by not meeting a purchaser's expectations, the resulting failure to receive the benefit of the bargain is a core concern of contract, not tort, law. There are protections for homebuyers, however, such as statutory warranties, the general warranty of habitability, and the duty of sellers to disclose defects, as well as the ability of purchasers to inspect houses for defects. Coupled with homebuyers' power to bargain over price, these protections must be viewed as sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses. Therefore, we again "hold contract principles more appropriate than tort principles for recovering economic loss without an accompanying physical injury or property damage." *Florida Power & Light [Co. v.*

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Westinghouse Elec. Corp.], 510 So.2d [899,] 902 [(Fla.1987)]. If we held otherwise, “contract law would drown in a sea of tort.” *East River [S.S. Corp. v. Transamerica Delaval, Inc.]*, 476 U.S. [858,] 866[, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986)].

(Citation and footnotes omitted.)

FN4. The **Alejandres** briefing to the Court of Appeals also relies on § 552 for their argument that alternatively, Ms. Bull made “innocent misrepresentations.” Just as reliance on this tort provision is foreclosed insofar as alleged negligent misrepresentation is concerned, it is also foreclosed for alleged innocent misrepresentation.

FN5. Exact parity in bargaining power is not required. *Mt. Lebanon*, 276 F.3d at 852 .

FN6. The **Alejandres** urge the court to hold that the economic loss rule does not apply to claims of fraud in the inducement, and they argue their fraud claims are claims of fraud in the inducement. We are aware that some courts recognize a broad exception to the economic loss rule that applies to intentional fraud. *E.g.*, *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 218 Ill.2d 326, 337, 843 N.E.2d 327, 300 Ill.Dec. 69 (2006) (citing *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill.2d 69, 88-89, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982)). Other courts recognize a limited exception to the economic loss rule for fraudulent misrepresentation claims that are independent of the underlying contract (sometimes referred to as fraud in the inducement) but only where the misrepresentations are extraneous to the contract itself and do not concern the quality or characteristics of the subject matter of the contract or relate to the offending party's expected performance of the contract. *See, e.g.*, *Huron Tool & Eng'g Co. v. Precision Consulting Servs.*,

Inc., 209 Mich.App. 365, 532 N.W.2d 541 (1995) (leading case); *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 884-87 (8th Cir.2000); *Rich Prods.*, 66 F.Supp.2d at 977; *Indem. Ins. Co. v. Am. Aviation, Inc.*, 891 So.2d 532, 537 (Fla.2004). We need not address the question whether any or all fraudulent representation claims should be foreclosed by the economic loss rule because we resolve the **Alejandres'** fraudulent representation claims on other grounds.

FN1. As the New Jersey Supreme Court noted:

[A] seller's duty of care generally stops short of creating a right in a commercial buyer to recovery a purely economic loss. Thus viewed, the definition of a seller's duty reflects a policy choice that economic losses inflicted by a seller of goods are better resolved under principles of contract law. In that context, economic interests traditionally have not been entitled to protection against mere negligence.

Spring Motors Distributions, 98 N.J. at 579, 489 A.2d 660.

FN2. Over the years, the economic loss rule has been applied in cases where there was no privity of contract between the parties. This is because there are types of injuries for which the law gives no remedy, and injuries to third parties stemming from someone else's breach of contract are often (though not always) of that type. Properly used, the economic loss rule can be a useful tool to tell us if the claim is also of that type. *Cf. Spring Motors Distributions*, 98 N.J. at 561, 489 A.2d 660. None of this is before us today. *See generally Berschauer/Phillips*, 124 Wash.2d 816, 881 P.2d 986.

FN3. As the Pennsylvania District Court noted:

In general, the economic-loss doctrine “prohibits plaintiffs from recovering in tort economic losses to which their entitlement

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flows only from a contract.” “The rationale of the economic loss rule is that tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.” Compensation for losses suffered as a result of a breached agreement “requires an analysis of damages which were in the contemplation of the parties at the origination of the agreement, an analysis within the sole purview of contract law.” “In order to recover negligence, ‘there must be a showing of harm above and beyond disappointed expectations evolving solely from a prior agreement. A buyer, contractor, or subcontractor’s desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects.’ ”

Factory Mkt., 987 F.Supp. at 395-96 (quoting *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 618 (3d Cir.1995); *Palco Linings, Inc. v. Pavex, Inc.*, 755 F.Supp. 1269, 1271 (M.D.Pa.1990); *Auger v. Stouffer Corp.*, 1993 U.S. Dist. LEXIS 12719, at *9, No. CIV.A.93-2529, 1993 WL 364622, at *3 (E.D.Pa. Aug.31, 1993); *Sun Co. v. Badger Design & Constructors, Inc.*, 939 F.Supp. 365, 371 (E.D.Pa.1996)).

FN4. I disagree slightly with the majority that “the economic loss rule applies regardless of whether the specific risk of loss at issue was expressly allocated in the parties’ contract.” Majority at ----. Rather I would say that whether or not a claim sounds in tort or contract is not dependent upon whether or not the parties have allocated the risk. The contractual risk allocation goes to whether a contractual term has been breached, not to whether a case sounds in tort or contract.

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Briefs and Other Related Documents (Back to top)

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- 2005 WL 3950633 (Appellate Brief) Brief of Amicus Curiae Washington Defense Trial Lawyers (Aug. 29, 2005) Original Image of this Document (PDF)
- 2005 WL 2492288 (Appellate Brief) Petitioner's Supplemental Brief (Jul. 27, 2005) Original Image of this Document (PDF)
- 2004 WL 3438015 (Appellate Brief) Reply Brief of Appellants (Feb. 11, 2004) Original Image of this Document (PDF)
- 2004 WL 3438016 (Appellate Brief) Brief of Respondent (Jan. 21, 2004) Original Image of this Document (PDF)
- 2003 WL 24131211 (Appellate Brief) Brief of Appellants (Dec. 19, 2003) Original Image of this Document (PDF)

END OF DOCUMENT

APPENDIX B

REAL PROPERTY TRANSFER DISCLOSURE STATEMENT †

† To be used in transfers of residential real property, including multi-family dwellings up to four units; new construction; condominiums not subject to a public offering statement, certain timeshares, and manufactured and mobile homes. See RCW Chapter 64.06 and Section 43.22.432 for further explanations.

INSTRUCTIONS TO THE SELLER

Please complete the following form. Do not leave any spaces blank. If the question clearly does not apply to the property write "NA". If the answer is "yes" to any asterisked (*) item(s), please explain on attached sheets. Please refer to the line number(s) of the question(s) when you provide your explanation(s). For your protection you must date and initial each page of this disclosure statement and each attachment. Delivery of the disclosure statement must occur not later than five (5) business days, unless otherwise agreed, after mutual acceptance of a written purchase and sale agreement between Buyer and Seller.

NOTICE TO THE BUYER

THE FOLLOWING DISCLOSURES ARE MADE BY THE SELLER(S), CONCERNING THE CONDITION OF THE PROPERTY LOCATED AT 12018 Nyanza Road SW CITY Lakewood, COUNTY Pierce ("THE PROPERTY") OR AS LEGALLY DESCRIBED ON THE ATTACHED EXHIBIT A. DISCLOSURES CONTAINED IN THIS FORM ARE PROVIDED BY THE SELLER ON THE BASIS OF SELLER'S ACTUAL KNOWLEDGE OF THE PROPERTY AT THE TIME THIS DISCLOSURE FORM IS COMPLETED BY THE SELLER. YOU HAVE THREE (3) BUSINESS DAYS (UNLESS BUYER AND SELLER AGREE OTHERWISE) FROM THE SELLER'S DELIVERY OF THIS SELLER'S DISCLOSURE STATEMENT TO RESCIND YOUR AGREEMENT BY DELIVERING YOUR SEPARATE SIGNED WRITTEN STATEMENT OF RESCISSION TO THE SELLER, UNLESS YOU WAIVE THIS RIGHT AT OR PRIOR TO ENTERING INTO A PURCHASE AND SALE AGREEMENT.

THE FOLLOWING ARE DISCLOSURES MADE BY THE SELLER AND ARE NOT THE REPRESENTATIONS OF ANY REAL ESTATE LICENSEE OR OTHER PARTY. THIS INFORMATION IS FOR DISCLOSURE ONLY AND IS NOT INTENDED TO BE A PART OF ANY WRITTEN AGREEMENT BETWEEN THE BUYER AND THE SELLER.

FOR A MORE COMPREHENSIVE EXAMINATION OF THE SPECIFIC CONDITION OF THIS PROPERTY YOU ARE ADVISED TO OBTAIN AND PAY FOR THE SERVICES OF A QUALIFIED SPECIALIST TO INSPECT THE PROPERTY ON YOUR BEHALF, FOR EXAMPLE, ARCHITECTS, ENGINEERS, LAND SURVEYORS, PLUMBERS, ELECTRICIANS, ROOFERS, BUILDING INSPECTORS, OR PEST AND DRY ROT INSPECTORS. THE PROSPECTIVE BUYER AND THE OWNER MAY WISH TO OBTAIN PROFESSIONAL ADVICE OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN THEM WITH RESPECT TO ANY ADVICE, INSPECTION, DEFECTS OR WARRANTIES.

Seller is/ is not occupying the property.

I. SELLER'S DISCLOSURES:

* If you answer "Yes" to a question with an asterisk (*), then attach a copy or explain. If necessary, use an attached sheet.

1. TITLE

YES NO DON'T KNOW

- A. Do you have legal authority to sell the property? YES NO DON'T KNOW
- *B. Is title to the property subject to any of the following?
 - (1) First right of refusal YES NO DON'T KNOW
 - (2) Option YES NO DON'T KNOW
 - (3) Lease or rental agreement YES NO DON'T KNOW
 - (4) Life estate YES NO DON'T KNOW
- *C. Are there any encroachments, boundary agreements, or boundary disputes? YES NO DON'T KNOW
- *D. Are there any rights of way, easements, or access limitations that may affect the owner's use of the property? YES NO DON'T KNOW
- *E. Are there any written agreements for joint maintenance of an easement or right of way? YES NO DON'T KNOW
- *F. Is there any study, survey project, or notice that would adversely affect the property? YES NO DON'T KNOW
- *G. Are there any pending or existing assessments against the property? YES NO DON'T KNOW
- *H. Are there any zoning violations, nonconforming uses, or any unusual restrictions on the subject property that would affect future construction or remodeling? YES NO DON'T KNOW
- *I. Is there a boundary survey for the property? YES NO DON'T KNOW
- *J. Are there any covenants, conditions, or restrictions which affect the property? YES NO DON'T KNOW

PLEASE NOTE: Covenants, conditions, and restrictions which purport to forbid or restrict the conveyance, encumbrance, occupancy, or lease of real property to individuals based on race, creed, color, sex, national origin, familial status, or disability are void, unenforceable, and illegal. RCW 49.60.224.

SELLER'S INITIAL: TE DATE: 1-20-03 SELLER'S INITIAL: KE DATE: 1-20-03

2. WATER

	YES	NO	DON'T KNOW	
A. Household Water				54
(1) The source of the water is <input checked="" type="checkbox"/> Public <input type="checkbox"/> Community <input type="checkbox"/> Private <input type="checkbox"/> Shared				55
(2) Water source information:				56
*a. Are there any written agreements for shared water source?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	57
*b. Is there an easement (recorded or unrecorded) for access to and/or maintenance of the water source?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	58
*c. Are any known problems or repairs needed?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	59
*d. Does the source provide an adequate year round supply of potable water?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	60
*(3) Are there any water treatment systems for the property? <input type="checkbox"/> Leased <input type="checkbox"/> Owned	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	61
B. Irrigation				62
(1) Are there any water rights for the property?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	63
*(2) If they exist, to your knowledge, have the water rights been used during the last five-year period?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	64
*(3) If so, is the certificate available?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	65
C. Outdoor Sprinkler System				66
(1) Is there an outdoor sprinkler system for the property?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	67
*(2) Are there any defects in the outdoor sprinkler system?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	68

3. SEWER/SEPTIC TANK SYSTEM

A. The property is served by:				69
<input checked="" type="checkbox"/> Public sewer main <input type="checkbox"/> Septic tank system <input type="checkbox"/> Other disposal system				70
(describe) _____				71
B. If the property is served by a public or community sewer main, is the house connected to the main?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	72
- C. Is the property currently subject to a sewer capacity charge? <i>N/A</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	73
D. If the property is connected to a septic tank system:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	74
(1) Was a permit issued for its construction, and was it approved by the city or county following its construction?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	75
(2) When was it last pumped? _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	76
*(3) Are there any defects in the operation of the septic tank system?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	77
(4) When was it last inspected? _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	78
By whom: _____				79
(5) How many bedrooms was the septic tank system approved for? _____ bedrooms				80
*E. Are any plumbing fixtures, including laundry drain, not connected to the septic tank/sewer system?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	81
If not explain: _____				82
*F. Are you aware of any changes or repairs to the septic tank system?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	83
G. Is the septic tank system, including the drainfield, located entirely within the boundaries of the property?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	84

4. STRUCTURAL

*A. Has the roof leaked?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	85
If yes, has it been repaired?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	86

SELLER'S INITIAL: TE DATE: 1-20-03

SELLER'S INITIAL: KE DATE: 1-20-03 97

	YES	NO	DON'T KNOW	98	99
*B. Have there been any conversions, additions or remodeling?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		100
*(1) If yes, were all building permits obtained?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		101
*(2) If yes, were all final inspections obtained?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		102
C. Do you know the age of the house? If yes, year of original construction: <u>1991</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		103
					104
*D. Do you know of any settling, slippage, or sliding of either the house or other structures/ improvements located on the property? If yes, explain: _____	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		105
					106
*E. Do you know of any defects with the following: (Please check applicable items)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		107
<input type="checkbox"/> Foundations					108
<input checked="" type="checkbox"/> Chimneys (Cosmetic)					109
<input type="checkbox"/> Doors					110
<input type="checkbox"/> Ceilings					111
<input type="checkbox"/> Pools					112
<input type="checkbox"/> Sidewalks					113
<input type="checkbox"/> Garage Floors					114
<input type="checkbox"/> Other _____					115
<input type="checkbox"/> Decks					116
<input checked="" type="checkbox"/> Exterior Walls L.P. Siding					117
<input type="checkbox"/> Interior Walls					118
<input type="checkbox"/> Windows					119
<input type="checkbox"/> Slab Floors					120
<input type="checkbox"/> Hot Tub					121
<input type="checkbox"/> Outbuildings					122
<input type="checkbox"/> Walkways					123
<input type="checkbox"/> Fire Alarms					124
<input type="checkbox"/> Patios					125
<input type="checkbox"/> Driveways					126
<input type="checkbox"/> Saunas					127
<input type="checkbox"/> Fireplaces					128
<input type="checkbox"/> Wood Stoves					129
*F. Was a pest or dry rot, structural or "whole house" inspection done? When and by whom was the inspection completed? <u>Sept. 1991</u>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		130
					131
*G. Since assuming ownership, has your property had a problem with wood destroying organisms and/or have there been any problems with pest control, infestations, or vermin?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		132
					133
5. SYSTEMS AND FIXTURES					134
If the following systems or fixtures are included with the transfer, do they have any existing defects:					135
*A. Electrical system, including wiring, switches, outlets, and service	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		136
*B. Plumbing system, including pipes, faucets, fixtures, and toilets	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		137
*C. Hot water tank	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		138
*D. Garbage disposal	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		139
*E. Appliances	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		140
*F. Sump pump	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		141
*G. Heating and cooling systems	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		142
*H. Security system <input type="checkbox"/> Leased <input checked="" type="checkbox"/> Owned	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		143
*I. Other _____					144
					145
6. COMMON INTEREST					146
A. Is there a Home Owners' Association?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		147
Name of Association _____					148
B. Are there regular periodic assessments?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		149
\$ _____ per <input type="checkbox"/> month <input type="checkbox"/> years					150
<input type="checkbox"/> Other _____					151
*C. Are there any pending special assessments?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		152
*D. Are there any shared "common areas" or any joint maintenance agreements (facilities such as walls, fences, landscaping, pools, tennis courts, walkways, or other areas co-owned in undivided interest with others)?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		153
					154

SELLER'S INITIAL: TE DATE: 1-20-03

SELLER'S INITIAL: KE DATE: 1-20-03 143

YES	NO	DON'T KNOW	144
			145

7. GENERAL

- *A. Is there any settling, soil, standing water, or drainage problems on the property? 146
- *B. Does the property contain fill material? 147
- *C. Is there any material damage to the property or any of the structure from fire, wind, floods, beach movements, earthquake, expansive soils, or landslides? 148
- *D. Is the property in a designated flood plain? 149
- *E. Has the local (city or county) planning agency designated your property as a "frequently flooded area"? 150
- *F. Are there any substances, materials, or products that may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, and contaminated soil or water on the subject property? 151
- *G. Are there any tanks or underground storage tanks (e.g., chemical, fuel, etc.) on the property? 152
- *H. Has the property ever been used as an illegal drug manufacturing site? 153

8. LEAD BASED PAINT (Applicable if the house was built before 1978.)

- A. Presence of lead-based paint and/or lead-based paint hazards (check one below): 160
- Known lead-based paint and/or lead-based paint hazards are present in the housing (explain). 161
 - Seller has no knowledge of lead-based paint and/or lead-based paint hazards in the housing. 162
- B. Records and reports available to the Seller (check one below): 163
- Seller has provided the purchaser with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below). 164
 - Seller has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing. 165

9. MANUFACTURED AND MOBILE HOMES

- If the property includes a manufactured or mobile home for which title has not been eliminated pursuant to RCW Chapter 65.20, 173
- *A. Did you make any alterations to the home? 174
 - If yes, please describe the alterations: N/A 175
 - *B. Did any previous owner make any alterations to the home? 176
 - If yes, please describe the alterations: 177

10. FULL DISCLOSURE BY SELLERS

- A. Other conditions or defects: 179
- *Are there any other material defects affecting this property or its value that a prospective buyer should know about? 180
- B. Verification 181

The foregoing answers and attached explanations (if any) are complete and correct to the best of Seller's knowledge and Seller has received a copy hereof. Seller agrees to defend, indemnify and hold real estate licensees harmless from and against any and all claims that the above information is inaccurate. Seller authorizes real estate licensees, if any, to deliver a copy of this disclosure statement to other real estate licensees and all prospective buyers of the Property. 182

Date: Jan. 20, 2003 Date: 1-20-03 188

Seller: Jerry Estvold Seller: Kay Estvold 189

SELLER'S INITIAL: TE DATE: 1-20-03 SELLER'S INITIAL: KE DATE: 1-20-03 190

WMLS Form No. 17
W.A.R. Form No. D-5
rev. 07/01
Page 5 of 5 Pages

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II. BUYER'S ACKNOWLEDGEMENT

191

- A. Buyer acknowledges the duty to pay diligent attention to any material defects which are known to Buyer or can be known to Buyer by utilizing diligent attention and observation. 192
- B. Buyer acknowledges and understands that the disclosures set forth in this statement and in any amendments to this statement are made only by the Seller and not by any real estate licensee or other party. Buyer acknowledges that, pursuant to RCW 64.06.050 (2), real estate licensees are not liable for inaccurate information provided by Seller, except to the extent that real estate licensees know of such inaccurate information. This information is for disclosure only and is not intended to be a part of the written agreement between Buyer and Seller. 193-198
- C. Buyer (which term includes all persons signing the "Buyer's acceptance" portion of this disclosure statement below) hereby acknowledges receipt of a copy of this disclosure statement (including attachments, if any) bearing Seller's signature(s). 199-200
- D. If the house was built prior to 1978, Buyer acknowledges receipt of the pamphlet *Protect Your Family From Lead in Your Home*. 201

DISCLOSURES CONTAINED IN THIS FORM ARE PROVIDED BY THE SELLER ON THE BASIS OF SELLER'S ACTUAL KNOWLEDGE OF THE PROPERTY AT THE TIME OF DISCLOSURE. YOU, THE BUYER, HAVE THREE (3) BUSINESS DAYS (UNLESS OTHERWISE AGREED) FROM THE SELLER'S DELIVERY OF THIS SELLER'S DISCLOSURE STATEMENT TO RESCIND YOUR AGREEMENT BY DELIVERING YOUR SEPARATE SIGNED WRITTEN STATEMENT OF RESCISSION TO THE SELLER UNLESS YOU WAIVE THIS RIGHT OF RESCISSION. 202-206

BUYER HEREBY ACKNOWLEDGES RECEIPT OF A COPY OF THIS REAL PROPERTY TRANSFER DISCLOSURE STATEMENT AND ACKNOWLEDGES THAT THE DISCLOSURES MADE HEREIN ARE THOSE OF THE SELLER ONLY, AND NOT OF ANY REAL ESTATE LICENSEE OR OTHER PARTY. 207-209

DATE: 5-16-03 DATE: _____ 210

BUYER: James M'Connell BUYER: _____ 211

BUYER'S WAIVER OF RIGHT TO REVOKE OFFER

Buyer has read and reviewed the Seller's responses to this Real Property Transfer Disclosure Statement. Buyer approves this statement and waives Buyer's right to revoke Buyer's offer based on this disclosure. 213-214

DATE: 5-16-03 DATE: _____ 215

BUYER: James M'Connell BUYER: _____ 216

BUYER'S WAIVER OF RIGHT TO RECEIVE COMPLETED REAL PROPERTY TRANSFER DISCLOSURE STATEMENT

Buyer has been advised of Buyer's right to receive a completed Real Property Transfer Disclosure Statement. Buyer waives that right. 217-218

DATE: _____ DATE: _____ 219

BUYER: _____ BUYER: _____ 220

If the answer is "Yes" to any asterisked (*) items, please explain below (use additional sheets if necessary). Please refer to the line number(s) of the question(s). 221-222

- 4E (1) Some cosmetic bubbling of sheetrock on inside of north chimney. It has been checked for moisture by Bennett Laboratories () and sealed. 223-224
- 4E (2) LP siding 225
- 5E Light mold problem in attic - treated in March '02 by Bennett Laboratories. Roof + flashing repaired. Vents and 2 humidity sensitive fans installed. Top layer of insulation replaced. Copy of work + cost attached. 226-228

BENNETT TECHNICAL SERVICES, INC.

6429 S. Tacoma way, Suite 200 Tacoma, WA. 98409

Phone: 253.472.9887 Fax: 253.472.2104

To: Terry Estvold
12018 Nyanza Rd. SW
Lakewood, WA. 98499

29Mar02

Ref: Mold Inspection and mold removal.

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.

1. Mold inspection and removal.	\$450.00
2. Repair of water damaged roof sheathing and top plate material.	
	<hr/>
	\$990.00
	Total: \$1440.00
	+8.9% WA Sales Tax \$128.16
	<hr/>
	\$1568.16

BENNETT TECHNICAL SERVICES, INC.

6429 S. Tacoma way, Suite 200 Tacoma, WA. 98409

Phone: 253.472.9887 Fax: 253.472.2104

29Mar02

The home of Terry Estvold, located at 12018 Nyanza Rd. SW Lakewood, WA. Was inspected for a possible mold problem in early March of this year. It was found that poor installation of metal flashing designed to keep water from leaking into the home was the cause of the water damaged Sheetrock in the homeowner's office. The flashing was removed and replaced correctly.

The attic was also found to have poor ventilation causing a light surface mold to adhere to the roof sheathing of the home. Three non-mechanical roof vents as well as two thermostat controlled air exchange ventilation fans were added to increase the airflow to proper levels to eliminate the mold friendly climate. The surface mold was removed and no further problem should be experienced. Surface mold in attics is a common occurrence in the Pacific Northwest, which is easily remedied when proper ventilation is achieved.

APPENDIX C

05/14/2003

McCormick, Teresa
1166 Sw Florida
Portland, OR 97219

Re: 12018 Nyanza Rd. SW, Lakewood

Dear Mrs. McCormick,

At your request, and in your presence, a visual inspection of the above referenced property was conducted on 05/14/2003. This inspection report reflects the visual conditions of the property at the time of the inspection only. Hidden or concealed defects cannot be included in this report. No warranty is either expressed or implied. This report is not an insurance policy, nor a warranty service.

An earnest effort was made on your behalf to discover all visible defects, however, in the event of an oversight, maximum liability must be limited to the fee paid. The following is an opinion report, expressed as a result of the inspection. Please take time to review limitations contained in the inspection agreement.

REPORT SUMMARY

Overall, the home was constructed in a workmanlike manner, consistent with the local building trades and codes in effect at the time of construction, and has average maintenance over the years. However in accordance with prevailing local real estate purchase agreements, the following items should be addressed:

Exterior

WALLS:

CONDITION:

Siding appears functional and within its useful life. Some siding was damaged/rotted from moisture in places- typical of LP siding damage. The conditions reported on are the results of a careful visual inspection. There is a possibility other damage or conditions conducive to damage may be present that are not readily identifiable by visual means. This report is not a warranty or guarantee that all damage or conditions conducive to damage associated with the composition siding have been identified.

Roof System

EXPOSED FLASHINGS:

TYPE AND CONDITION:

Metal, Appears serviceable.

Foundation / Structure

BASEMENT/CRAWL SPACE/FRAMING:

CRAWL SPACE:

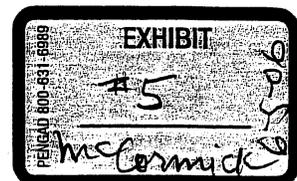
Remove wood debris and trash from the crawl space area to prevent wood destroying insect infestation.
Sub-floor insulation present and secure between floor joists. Evidence of prior rodent activity was noted.
You may wish to have treatment carried out by a licensed exterminator.

Heating

CONDITION OF HEATING SYSTEM(S):

GENERAL SUGGESTIONS:

Suggest cleaning/servicing blower motor, pilot light, vent system and burners by a licensed HVAC specialist.



Interior

FLOORS:

TYPE & CONDITION:

Carpet, Vinyl, Wood, General condition appears serviceable, Carpet was found lifting from bottom step of stairwell. Recommend that this carpet be secured to the subfloor to prevent further damage and a possible tripping hazard.

Kitchen / Laundry

DISHWASHER:

CONDITION:

Appears functional. Door seal intact and without leaks at time of inspection. A proper air gap IS NOT installed in the dishwasher drain line. An air gap is recommended in the drain hose running from the dishwasher to the main drain under the sink. Air gaps assist in positive drainage and act to prevent clogging, as well as serving to prevent back siphoning in the event the sink becomes clogged. This line, located under the sink, is usually made of rubber or copper. The easiest way to create an air gap is to raise the drain hose at some point along its route so it passes 6 inches ABOVE the elevation at which it empties into the main drain. Wire or some other means of support can easily be installed to insure the hose stays in place. A licensed plumber can make this repair in a few minutes.

Bathroom

MAIN UPSTAIRS BATHROOM AREA:

TUB/SHOWER AND WALLS:

Caulking and/or re-grouting is needed along base and sides of tub to prevent water intrusion.

MASTER BATHROOM AREA:

CONDITION OF SINK:

Appears serviceable, Drain appear serviceable at left sink. The following problems were noted at the drain: Drainage is a bit slower than normal at right sink.

Electrical System

SWITCHES & OUTLETS:

Outlets: Overall Condition:

Appears serviceable. GFCI receptacle at rear yard was tested with Sperry GFCI tester and was found to be defective. There appears to be an open neutral terminal at the outlet and it should be repaired. Have a licensed electrician make further evaluation and corrections as needed.

SMOKE DETECTORS

CONDITION

An alarm system is present. Smoke detectors may be tied into alarm system, therefore were not inspected. Contact the alarm company for testing procedures. At least one battery powered or hard-wired battery back-up smoke detector should be provided on each floor and outside each sleeping room.

Each of these items will likely require further evaluation and repair by licensed tradespeople. Obtain competitive estimates for these items. Other minor items are also noted in the following report and should receive eventual attention, but none of them affect the habitability of the house and their correction is typically considered the responsibility of the purchaser. The majority are the result of normal wear and tear.

Thank you for selecting our firm to do your pre-purchase home inspection. If you have any questions regarding the inspection report or the home, please feel free to call us.

Sincerely,

Scott DeSchryver

Scott DeSchryver

Inspector

Lighthouse Home Inspection, LLC

P.O. Box 884

Silverdale, WA 98383

253-380-8402

800-207-4857

965 3479

Home Inspection LLC

Inspection Report

12018 Nyanza Rd. SW
Lakewood, WA 98499

Prepared for: Mrs. Teresa McCormick



11/21
06/11

Prepared by: Lighthouse Home Inspection, LLC
P.O.Box 884
Silverdale, WA 98383
253-380-8402 Fax: 253-853-7784

11/17
253-380-8402

UTILITY SERVICES:

Page2

WATER
SOURCE: Public.

SEWAGE
DISPOSAL: Public.

UTILITIES
STATUS: All utilities on.

OTHER INFORMATION:

AREA: City.

BUILDING
OCCUPIED? Yes.

CLIENT
PRESENT: Yes.

REALTOR
NAME: Judy Bigelow.

COMPANY: Windermere Real Estate.

ADDRESS: 9939 Mickelberry Rd. NW
Silverdale, WA 98383 360-692-6102

REALTOR
PRESENT: Yes.

PAYMENT INFORMATION:

TOTAL FEE: 300.

REPORT LIMITATIONS

This report is intended only as a general guide to help the client make his own evaluation of the overall condition of the home, and is not intended to reflect the value of the premises, nor make any representation as to the advisability of purchase. The report expresses the personal opinions of the inspector, based upon his visual impressions of the conditions that existed at the time of the inspection only. The inspection and report are not intended to be technically exhaustive, or to imply that every component was inspected, or that every possible defect was discovered. No disassembly of equipment, opening of walls, moving of furniture, appliances or stored items, or excavation was performed. All components and conditions which by the nature of their location are concealed, camouflaged or difficult to inspect are excluded from the report.

Systems and conditions which are not within the scope of the building inspection include, but are not limited to: formaldehyde, lead paint, asbestos, toxic or flammable materials, and other environmental hazards; pest infestation, playground equipment, efficiency measurement of insulation or heating and cooling equipment, internal or underground drainage or plumbing, any systems which are shut down or otherwise secured; water wells (water quality and quantity) zoning ordinances; intercoms; security systems; heat sensors; cosmetics or building code conformity. Any general comments about these systems and conditions are informational only and do not represent an inspection.

The inspection report should not be construed as a compliance inspection of any governmental or non governmental codes or regulations. The report is not intended to be a warranty or guarantee of the present or future adequacy or performance of the structure, its systems, or their component parts. This report does not constitute any express or implied warranty of merchantability or fitness for use regarding the condition of the property and it should not be relied upon as such. Any opinions expressed regarding adequacy, capacity, or expected life of components are general estimates based on information about similar components and occasional wide variations are to be expected between such estimates and actual experience.

We certify that our inspectors have no interest, present or contemplated, in this property or its improvement and no involvement with tradespeople or benefits derived from any sales or improvements. To the best of our knowledge and belief, all statements and information in this report are true and correct.

Should any disagreement or dispute arise as a result of this inspection or report, it shall be decided by

arbitration and shall be submitted for binding, non-appealable arbitration to the American Arbitration Association in accordance with its Construction Industry Arbitration Rules then obtaining, unless the parties mutually agree otherwise. In the event of a claim, the Client will allow the Inspection Company to inspect the claim prior to any repairs or waive the right to make the claim. Client agrees not to disturb or repair or have repaired anything which may constitute evidence relating to the complaint, except in the case of an emergency.

Inspection Conditions

CLIENT & SITE INFORMATION:

DATE OF INSPECTION: May 14, 2003.
TIME OF INSPECTION: 03:30 PM.
CLIENT NAME: Mrs. Teresa McCormick.
MAILING ADDRESS: 1166 Sw Florida
Portland OR 97219.
CLIENT PHONE #: 503-244-4766.
INSPECTION SITE: 12018 Nyanza Rd. SW
Lakewood, WA 98499.

CLIMATIC CONDITIONS:

WEATHER: Cloudy.
SOIL CONDITIONS: Wet.
APPROXIMATE OUTSIDE TEMPERATURE: 50 deg.

BUILDING CHARACTERISTICS:

ESTIMATED AGE OF BUILDING:

Buying a newer home is not a guarantee of a perfect house. New houses are built to the current municipal code, which is a *minnum* set of standards. With the number of contractors and subcontractors involved in the construction of a new home, it is not uncommon that some items may get overlooked. New construction poses certain inspection challenges: there has been no time frame of actual performance to evaluate, no years of "testing" and correction. Do not be surprised by minor drying/shrinking/cracking in the building materials. Become familiar with latex caulk and it's applications (check home improvement stores and home repair books for further information). If changes occur that are more than minor and cosmetic in nature, consult your homeowners warranty and then contact your builder.

BUILDING TYPE: Contemporary.
STORIES: 2
SPACE BELOW GRADE: Crawl space.

Site

This inspection is not intended to address or include any geological conditions or site stability information. For information concerning these conditions, a geologist or soils engineer should be consulted. Any reference to grade is limited to only areas around the exterior of the exposed areas of foundation or exterior walls. This inspection is visual in nature and does not attempt to determine drainage performance of the site or the condition of any underground piping, including municipal water and sewer service piping or septic systems.

DRIVEWAY:

TYPE: Asphalt.
CONDITION: Appears serviceable.

SIDEWALKS:

TYPE: Concrete.
CONDITION: Appears serviceable.

LANDSCAPING:

CONDITION: Grounds appear to be maintained. Vegetation was noted to be in close proximity to the structure. Although no contact exists with the structure at this time, it is recommended that routine trimming of vegetation be performed to prevent moisture problems and increase ventilation of the siding material.

FENCES & GATES

TYPE: Wood.
CONDITION: Appears functional. Fencing does not completely enclose the property around structure. Breaks in the fence-line exist.

GRADING/ DRAINAGE:

SITE: Near level.
CONDITION: Grade at foundation appears serviceable, Recommend monitoring site drainage during & after heavy rains.

Roof System

The foregoing is an opinion of the general quality and condition of the roofing material. The inspector cannot and does not offer an opinion or warranty as to whether the roof leaks or may be subject to future leakage. This report is issued in consideration of the foregoing disclaimer. The only way to determine whether a roof is absolutely water tight is to observe it during a prolonged rainfall. Many times, this situation is not present during the inspection.

ROOF:

ROOF DESIGN: Gable.

ROOF COVERING: The roof covering is made of asphalt composition shingles, the most common type of roof shingle used in this country.

ROOF ACCESS: Walked on roof.

CONDITION: Appears functional and within useful life. Moss was observed growing on the surface. Moss can damage the roof and will reduce its effective life. Remove chemically, with caution. See your local building supply store for detailed product availability and use. After removing current moss consider installing zinc flashing and/or "Tide Detergent" at the peaks of the affected sides of the roof to prevent further growth. Remove cellulose debris was also noted on the roof. Pine needles and twigs and retain moisture on the roof covering and lead to deterioration of the shingles more quickly.

CHIMNEY:

MATERIAL: Metal.

CONDITION: Appears functional.

EXPOSED FLASHINGS:

TYPE AND CONDITION: Metal, Appears serviceable.

We've found that gutters, downspouts and drains are often ignored, and not properly maintained. In our experience, poorly-maintained gutters, downspouts and drains cause more damage to house exteriors and foundations than any other component. Gutters and downspouts should be cleaned twice a year (or more if necessary); and, the system should be maintained and kept in good condition, to ensure that water flows through the gutters to the downspouts, and then well away from the house.

GUTTERS & DOWNSPOUTS:

TYPE & CONDITION: Metal, Appears serviceable.

ATTIC AND INSULATION:

ROOF FRAME: Trusses.

CEILING FRAME: Trusses.

ROOF SHEATHING: Oriented strand board.

ACCESSIBILITY AND CONDITION: Accessible. Mechanical exhaust vents controlled by humidity sensors were found in the attic. These fans were put in place to reduce and prevent mold growth in the attic area. The fan above the master bedroom area is fully operational and responded to controls. The fan above the hallway attic access did not function properly. It appears that the fan blades are obstructed and adjustment is needed. The appeared dry with no evidence of leaks or moisture

*fixed
within days
by Jim Anderson*

Exterior

Areas hidden from view by finished walls or stored items can not be judged and are not a part of this inspection. Minor cracks are typical in many foundations and most do not represent a structural problem. If major cracks are present along with bowing, we routinely recommend further evaluation be made by a qualified structural engineer. All exterior grades should allow for surface and roof water to flow away from the foundation. All concrete floor slabs experience some degree of cracking due to shrinkage in the drying process. In most instances floor coverings prevent recognition of cracks or settlement in all but the most severe cases. Where carpeting and other floor coverings are installed, the materials and condition of the flooring underneath cannot be determined.

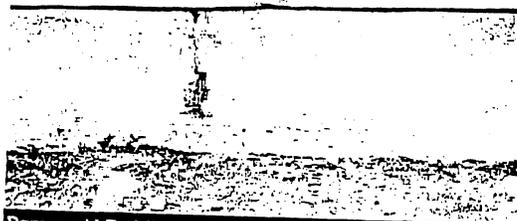
WALLS:

MATERIAL:

LP as well as Weyerhaeuser composite wood siding products have a history of design flaws. In some cases, these flaws have allowed water to penetrate the material, causing premature failure. With proper care and maintenance, the life of these products can be significantly extended. It is EXTREMELY important that all joints (including end joints, lap joints, windows and doors) as well as nail heads be properly sealed and painted.

CONDITION:

Siding appears functional and within its useful life. Some siding was damaged/rotted from moisture in places-typical of LP siding damage.



Damaged LP siding

The conditions reported on are the results of a careful visual inspection. There is a possibility other damage or conditions conducive to damage may be present that are not readily identifiable by visual means. This report is not a warranty or guarantee that all damage or conditions

conductive to damage associated with the composition siding have been identified.

TRIM:

MATERIAL:

Wood.

CONDITION:

Trim appears to be in serviceable condition.

PATIO/PORCH COVER:

TYPE:

Same as structure.

CONDITION:

Appears serviceable.

PATIO:

TYPE:

Concrete.

CONDITION:

Appears serviceable.

Home Inspection LLC

accumulation.

Page 7

**INSULATION
TYPE AND
CONDITION:
DEPTH AND R-
FACTOR:**

Fiberglass batts, Fiberglass- Blown, Appears serviceable.

11 inches, R-32.

Bathroom

BATHROOM AREA:

BATH LOCATION: Main Floor, Upstairs.

CONDITION OF SINK: Appears serviceable, Drain appear serviceable.

CONDITION OF TOILET: Appears serviceable.

TUB/SHOWER PLUMBING FIXTURES: Appears serviceable, Drain appears serviceable, Shower head appears serviceable.

TUB/SHOWER AND WALLS: Tub and shower areas appear serviceable, Shower walls appear serviceable. Caulking and/or re-grouting is needed along base and sides of tub to prevent water intrusion.

BATH VENTILATION: Appears serviceable.

BATHROOM AREA:

BATH LOCATION: Half Bath, Downstairs.

CONDITION OF SINK: Appears serviceable, Drain appear serviceable.

CONDITION OF TOILET: Appears serviceable.

BATH VENTILATION: Appears serviceable.

BATHROOM AREA:

BATH LOCATION: Master bedroom.

CONDITION OF SINK: Appears serviceable, Drain appear serviceable at left sink. The following problems were noted at the drain: Drainage is a bit slower than normal at right sink.

CONDITION OF TOILET: Appears serviceable.

TUB/SHOWER PLUMBING FIXTURES: Appears serviceable, Drain appears serviceable, Shower head appears serviceable, Caulk and seal all joints regularly to prevent water penetration behind tub/shower walls.

TUB/SHOWER AND WALLS: Tub and shower areas appear serviceable, Shower walls appear serviceable, Enclosure appears serviceable.

Home Inspection LLC

FIXTURES
CONDITION

Page 11

A representative number of fixtures was tested. As a whole the fixtures throughout the house are in acceptable condition.

SMOKE DETECTORS
CONDITION

An alarm system is present. Smoke detectors may be tied into alarm system, therefore were not inspected. Contact the alarm company for testing procedures. At least one battery powered or hard-wired battery back-up smoke detector should be provided on each floor and outside each sleeping room.

Heating

The inspector is not equipped to inspect furnace heat exchangers for evidence of cracks or holes, as this can only be done by dismantling the unit. This is beyond the scope of this inspection. Some furnaces are designed in such a way that inspection is almost impossible. Electronic air cleaners, humidifiers and de-humidifiers are beyond the scope of this inspection. Have these systems evaluated by a qualified individual. The inspector does not perform pressure tests on coolant systems, therefore no representation is made regarding coolant charge or line integrity. Subjective judgment of system capacity is not a part of the inspection. Normal service and maintenance is recommended on a yearly basis. Determining the condition of oil tanks, whether exposed or buried, is beyond the scope of this inspection. Leaking oil tanks represent an environmental hazard which is sometimes costly to remedy.

PRIMARY HEATING SYSTEM DESCRIPTION:

LOCATION OF
PRIMARY UNIT: Garage.
SYSTEM TYPE: Forced Air.
M
ANUFACTURER: Carrier.
MODEL #: 58CRC75- AA.
SERIAL #: 3590A09398.

SECONDARY HEATING DEVICES:

LOCATION: Bathroom baseboards upstairs.
TYPE: Wall Heater.
M
ANUFACTURER: Intertherm Soft Heat.

FUEL SYSTEM:

METER/TANK
LOCATION: Meter located at, West side.
CONDITION: System appears serviceable.
FUEL SYSTEM
SHUTOFF: AtMeier.
FUEL TYPE AND
NOTES: Natural Gas.

CONDITION OF HEATING SYSTEM(S):

GENERAL
NOTES: Unit responded to thermostat and appears operational.

BURNERS/HEAT
EXCHANGERS: Unit ignited and appears serviceable, Burner Flame(s) appear typical, The heat exchanger portion of a gas or oil fired heater is difficult to access without disassembly, and cannot be adequately checked during a visual inspection. The heat exchanger is not inspected.

PUMP/BLOWER
FAN: Appears Serviceable.

Home Inspection LLC

COMBUSTION

AIR: Appears serviceable.

VENTING: Appears functional.

AIR PLENUM: Appears serviceable.

AIR FILTERS: NOTE: Electronic air cleaners and humidifiers are beyond the scope of this inspection.

**THERMOSTAT/
NORMAL
CONTROLS:** Appear serviceable.

**GENERAL
SUGGESTIONS:** Suggest cleaning/servicing blower motor, pilot light, vent system and burners by a licensed HVAC specialist.

DUCTWORK:

TYPE: Flexible Round.

**DUCTS/AIR
SUPPLY:** Appears serviceable.

AUXILIARY EQUIPMENT:

**WHOLE HOUSE
ATTIC FAN:** Appears satisfactory.

FIREPLACES/ STOVE HEATERS/ WOOD BURNING DEVICES:

LOCATION: Location #1: Living Room, Location #2: Family room.

TYPE: Prefabricated metal gas fireplace.

FIREBOX: Firebox(s) was found to be functional without any signs of obvious damage.

CLEARANCE: Adequate clearance to combustible materials is provided.

HEARTH: Appears functional.

GAS: Gas valve is within reach of firebox, Valve key is present.

DAMPER: Appears functional.

Interior

The condition of walls behind wall coverings, paneling and furnishings cannot be judged. Only the general condition of visible portions of floors is included in this inspection. As a general rule, cosmetic deficiencies are considered normal wear and tear and are not reported. Determining the source of odors or like conditions is not a part of this inspection. Floor covering damage or stains may be hidden by furniture. The condition of floors underlying floor coverings is not inspected. Determining the condition of insulated glass windows is not always possible due to temperature, weather and lighting conditions. Check with owners for further information. All fireplaces should be cleaned and inspected annually (before the first fire of the season) to make sure that no cracks have developed. Large fires in the firebox can overheat the firebox and flue liners, sometimes resulting in internal damage. We recommend that the chimney and flue be cleaned and evaluated before closing.

DOORS:

EXTERIOR

DOORS:

Wood, Sliding glass, Doors appear functional.

INTERIOR

DOORS:

Appear functional and without damage.

WINDOWS:

TYPE:

Vinyl, Metal, Insulated glass, Sliding, Casement, Fixed.

CONDITION:

Appear functional.

Minor cracks and nail pops on interior surfaces occur in all houses and are typically cosmetic in nature. These cosmetic defects usually are caused by settlement and/or shrinkage of building components. Small defects of this type are not mentioned in the report

INTERIOR WALLS:

MATERIAL &

CONDITION:

Drywall, General condition appears serviceable.

CEILINGS:

TYPE &

CONDITION:

Drywall, General condition appears serviceable, Evidence of water staining was noted at the ceiling above the office/bedroom. Stains appear to be dry at the time of inspection, however it is recommended that these stains be monitored for potential leakage. The disclosure statement makes reference to a previous leak in this area, secondary to the failure of flashing around the chimney. Corrective measures were taken, and no evidence of new leaks were noted.

FLOORS:

TYPE &

CONDITION:

Carpet, Vinyl, Wood, General condition appears serviceable, Carpet was found lifting from bottom step of stairwell. Recommend that this carpet be secured to the subfloor to prevent further damage and a possible tripping hazard.

Maintenance Advice

UPON TAKING OWNERSHIP

After taking possession of a new home, there are some maintenance and safety issues that should be addressed immediately. The following list should help you undertake these improvements:

Change the locks on all exterior entrances for improved security

Check that all the windows and doors are secure. Improve window hardware if necessary. Security rods can be added to sliding windows and doors. Consideration should also be given to a security system.

Install smoke detectors on each level of the home. Ensure that there is a smoke detector outside all sleeping areas. Replace batteries in any existing smoke detectors and test them. Make a note to replace the batteries every six months when you change your clocks for daylight saving time.

Create a plan of action in the event of a fire in your home. Ensure that there is an operable window or door in every room in the house. Consult with your local fire department regarding fire safety issues and what to do in the event of a fire.

Examine driveways and walkways for trip hazards. Undertake repairs where necessary.

Examine the interior of the home for trip hazards. Loose or torn carpeting and flooring should be repaired.

Undertake improvements to all stairways, decks, porches and landings where there is a risk of stumbling or falling.

Review your home inspection report for any items that require immediate improvement or further investigation.

Install rain caps and vermin screens on all chimney flues, as necessary.

Investigate the location of the main shut-offs for the plumbing, heating and electrical systems. If you attended the inspection, these items would have been pointed out to you.

REGULAR MAINTENANCE

Here is a list of regular maintenance items:

MONTHLY

Check that the fire extinguisher(s) are fully charged. Re-charge if necessary.

Examine heating/cooling air filters and replace or clean as necessary.

Inspect and clean humidifiers and electronic air cleaners

If the house has hot water heating, bleed the radiator valves.

Clean gutters and downspouts. Ensure that downspouts are secure, and that the discharge of the downspouts is located appropriately. Remove debris from the window wells.

Carefully inspect the condition of shower enclosures. Repair or replace deteriorated grout and caulk. Ensure that water is not escaping the enclosure during showering. Check below all plumbing fixtures for evidence of leakage.

Repair or replace leaking faucets or shower heads

Secure loose toilets, or repair flush mechanisms that become troublesome.

SPRING AND FALL

Examine the roof for evidence of damage to roof coverings, flashings and chimneys.

Look in the attic (if accessible) to ensure that roof vents are not obstructed. Check for evidence of leakage, condensation or vermin activity. Level out insulation if needed.

Trim back tree branches and shrubs to ensure that they are not in contact with the house.

Inspect the exterior walls and foundation for evidence of damage, cracking or movement. Watch for bird nests or other vermin or insect activity.

Survey the basement and/or crawl space walls for evidence of moisture seepage.

Look at overhead wires coming to the house. They should be secure and clear of trees or other obstructions.

Ensure that the grade of the land around the house encourages water to flow away from the foundation.

Inspect all driveways, walkways, decks, porches, and landscape components for evidence of deterioration, movement or safety hazards.

Clean windows and test their operation. Improve caulking and weather-stripping as necessary. Watch for rot in wood window frames. Paint and repair window sills and frames as necessary.

Test all ground fault circuit interrupter (GFCI) devices, as identified in the inspection report.

Shut off isolating valves for exterior hose bibs in the fall, if below freezing temperatures are anticipated.

Inspect for evidence of wood boring insect activity. Eliminate any wood/soil contact around the perimeter of the home.

Test the overhead garage door opener, to ensure that the auto-reverse mechanism is responding properly. Clean and lubricate hinges, rollers, and tracks on overhead doors.

Replace or clean exhaust hood filters.

Clean, inspect and/or service all appliances as per the manufacturer's recommendations.

Replace smoke detector batteries

ANNUAL

Have the heating, cooling and water heater systems cleaned and serviced.

Have chimneys inspected and cleaned. Ensure that rain caps and vermin screens are secure.

Examine the electrical panel(s) wiring and electrical components for evidence of overheating. Ensure that all components are secure. Flip the breakers on and off to ensure that they are not sticky.

If the house utilizes a well, check and service the pump and holding tank. Have the water quality tested. If the property has a septic system, have the tank inspected (and pumped as needed).

If your home is in an area prone to wood destroying insects (termites, carpenter ants, etc.) have the

Environmental Risks

A FEW WORDS ABOUT ENVIRONMENTAL RISKS

During a standard inspection, no screening for toxins, carcinogens, or other health or safety risks is conducted.

We can tell you this:

Many, but not all, pre-1980 houses have lead-based paint on interior and exterior surfaces. Lead-laced dust is sometimes created during renovation or repainting projects; and, it is possible that some lead-laced dust could be created by moving parts such as the window sash.

Lead might also be present in the tap water, particularly in houses built before 1960. Consult your local water utility or private lab regarding a lead test for the tap water. Many utilities will do this test at no cost to the customer, and, if any lead-bearing pipes are owned by the utility, the utility might be required to replace the pipe at no cost to the customer.

Breathing or ingesting can cause lead poisoning. Children are particularly susceptible to lead poisoning, and if pregnant women inhale or ingest lead, the fetus could be harmed. The risk of lead poisoning in houses is a subject of significant social, political, and medical debate. Some are unnecessarily alarmed; others are unnecessarily cavalier. Common sense dictates that pregnant women stay away from lead dust, and that children have their blood lead levels tested. This is an inexpensive test; consult your pediatrician.

Many, but not all, pre-1980 houses contain asbestos. Many older building products, including but not limited to insulation, flooring products, patching plaster, window putty, roofing products, exterior siding and interior fiberboard finishes contained asbestos. If you suspect the presence of asbestos in any material, do not disturb the material. Consult with an environmental engineer or asbestos remediation contractor to confirm or rule out the presence of asbestos, and for advice on how best to deal with any asbestos present.

Kitchen / Laundry

We test appliances by turning them on briefly. We do not perform extensive testing of timers or thermostats; and, we make no report regarding the effectiveness of any appliances. Central vacuum systems and elevators are not inspected. We strongly recommend that appliances and all other components be tested again during a pre-closing walk-through. The inspection is not an assurance that the appliances will continue to work in the future. Appliances can fail at any time, including the day after the inspection. We encourage you to obtain a homeowner's warranty or service contract to cover repairs to the appliances.

KITCHEN SINK:

CONDITION: Appears serviceable, Faucet is serviceable, Hand sprayer is serviceable.

RANGE/COOK TOP AND OVEN:

TYPE: Combination, Electric ignition.

M

ANUFACTURER: Kenmore, Modem Maid- Gas range.

MODEL #: 665.4438912.

SERIAL #: XA0701604.

CONDITION: Appears serviceable.

KITCHEN VENTILATION:

TYPE AND

CONDITION: External, Downdraft, Fan/Hood operational.

REFRIGERATOR:

M

ANUFACTURER: General Electric.

MODEL #: TBX24ZPK.

SERIAL #: SF506833.

TYPE AND

CONDITION: Electric, Refrigerator appears in serviceable condition. Icemaker appears functional.

DISHWASHER:

M

ANUFACTURER: Kenmore.

MODEL #: 3631441191.

SERIAL #: MF 315721 R.

CONDITION: Appears functional. Door seal intact and without leaks at time of inspection. A proper air gap IS NOT installed in the dishwasher drain line. An air gap is recommended in the drain hose running from the dishwasher to the main drain under the sink. Air gaps assist in positive drainage and act to prevent clogging, as well as serving to prevent back siphoning in the event the sink becomes clogged. This line, located under the sink, is usually made of rubber or copper. The easiest way to create an air gap is to raise the drain hose at some point along its route so it passes 6 inches ABOVE the elevation at which it empties into the main drain. Wire or some other means of support can easily be installed to insure the hose stays in place. A licensed plumber can make this repair in a few minutes.

Home Inspection, LLC
GARBAGE DISPOSAL:

CONDITION: Appears serviceable, Wiring appears serviceable.

TRASH COMPACTOR:

CONDITION: Lady Kenmore. Appears serviceable.

MICROWAVE:

M

MANUFACTURER: Kenmore.

CONDITION: Appears serviceable.

COUNTERS & CABINETS:

TYPE: Counters are Formica (plastic laminate) Cabinets are wood.

CONDITION: Appear serviceable, Cabinets appear functional and without significant wear.

Laundry appliances are tested if present and in operational mode. Washers that do not have their water supply on are not tested. Water supply valves may be subject to leaking if turned.

LAUNDRY FACILITY:

CONDITION: Appears serviceable, Plumbing appears serviceable, Dryer is properly vented to the exterior of the house, No plumbed gas lines found in laundry area.

WASHER AND DRYER:

CLOTHES

WASHER: Not Tested.

CLOTHES

DRYER: Dryer was not operated at the time of inspection.

Garage / Carport

Notice: Determining the heat resistance rating of firewalls is beyond the scope of this inspection. Flammable materials should not be stored within closed garage areas.

TYPE:

LOCATION: Attached, Two car.

ROOF:

TYPE &
CONDITION: Same as main structure. See Roof Section of this report for details. Appears functional and within the expected service life.

EXTERIOR WALLS:

CONDITION: Same as structure. See exterior section of this report.

FLOOR:

TYPE: Concrete Slab.
CONDITION: Appears serviceable and without damage/ deterioration.

FIRE WALL:

CONDITION: Appears serviceable.

GARAGE DOOR(S):

CONDITION: Appears functional. Automatic door opener is functional. Auto-Reverse feature of opener is within normal limits.

Bathroom

BATHROOM AREA:

BATH
LOCATION: Main Floor, Upstairs.
CONDITION OF
SINK: Appears serviceable, Drain appear serviceable.
CONDITION OF
TOILET: Appears serviceable.
TUB/SHOWER
PLUMBING
FIXTURES: Appears serviceable, Drain appears serviceable, Shower head appears serviceable.
TUB/SHOWER
AND WALLS: *
Tub and shower areas appear serviceable, Shower walls appear serviceable. Caulking and/or re-grouting is needed along base and sides of tub to prevent water intrusion.
BATH
VENTILATION: Appears serviceable.

BATHROOM AREA:

BATH
LOCATION: Half Bath, Downstairs.
CONDITION OF
SINK: Appears serviceable, Drain appear serviceable.
CONDITION OF
TOILET: Appears serviceable.
BATH
VENTILATION: Appears serviceable.

BATHROOM AREA:

BATH
LOCATION: Master bedroom.
CONDITION OF
SINK: Appears serviceable, Drain appear serviceable at left sink. The following problems were noted at the drain: Drainage is a bit slower than normal at right sink.
CONDITION OF
TOILET: Appears serviceable.
TUB/SHOWER
PLUMBING
FIXTURES: Appears serviceable, Drain appears serviceable, Shower head appears serviceable, Caulk and seal all joints regularly to prevent water penetration behind tub/shower walls.
TUB/SHOWER
AND WALLS: Tub and shower areas appear serviceable, Shower walls appear serviceable, Enclosure appears serviceable.

Maintenance Advice

UPON TAKING OWNERSHIP

After taking possession of a new home, there are some maintenance and safety issues that should be addressed immediately. The following list should help you undertake these improvements:

Change the locks on all exterior entrances for improved security

Check that all the windows and doors are secure. Improve window hardware if necessary. Security rods can be added to sliding windows and doors. Consideration should also be given to a security system.

Install smoke detectors on each level of the home. Ensure that there is a smoke detector outside all sleeping areas. Replace batteries in any existing smoke detectors and test them. Make a note to replace the batteries every six months when you change your clocks for daylight saving time.

Create a plan of action in the event of a fire in your home. Ensure that there is an operable window or door in every room in the house. Consult with your local fire department regarding fire safety issues and what to do in the event of a fire.

Examine driveways and walkways for trip hazards. Undertake repairs where necessary.

Examine the interior of the home for trip hazards. Loose or torn carpeting and flooring should be repaired.

Undertake improvements to all stairways, decks, porches and landings where there is a risk of stumbling or falling.

Review your home inspection report for any items that require immediate improvement or further investigation.

Install rain caps and vermin screens on all chimney flues, as necessary.

Investigate the location of the main shut-offs for the plumbing, heating and electrical systems. If you attended the inspection, these items would have been pointed out to you.

REGULAR MAINTENANCE

Here is a list of regular maintenance items:

MONTHLY

Check that the fire extinguisher(s) are fully charged. Re-charge if necessary.

Examine heating/cooling air filters and replace or clean as necessary.

Inspect and clean humidifiers and electronic air cleaners

If the house has hot water heating, bleed the radiator valves.

Clean gutters and downspouts. Ensure that downspouts are secure, and that the discharge of the downspouts is located appropriately. Remove debris from the window wells.

Carefully inspect the condition of shower enclosures. Repair or replace deteriorated grout and caulk. Ensure that water is not escaping the enclosure during showering. Check below all plumbing fixtures for evidence of leakage.

Repair or replace leaking faucets or shower heads

Secure loose toilets, or repair flush mechanisms that become troublesome.

SPRING AND FALL

Examine the roof for evidence of damage to roof coverings, flashings and chimneys.

Look in the attic (if accessible) to ensure that roof vents are not obstructed. Check for evidence of leakage, condensation or vermin activity. Level out insulation if needed.

Trim back tree branches and shrubs to ensure that they are not in contact with the house.

Inspect the exterior walls and foundation for evidence of damage, cracking or movement. Watch for bird nests or other vermin or insect activity.

Survey the basement and/or crawl space walls for evidence of moisture seepage.

Look at overhead wires coming to the house. They should be secure and clear of trees or other obstructions.

Ensure that the grade of the land around the house encourages water to flow away from the foundation.

Inspect all driveways, walkways, decks, porches, and landscape components for evidence of deterioration, movement or safety hazards.

Clean windows and test their operation. Improve caulking and weather-stripping as necessary. Watch for rot in wood window frames. Paint and repair window sills and frames as necessary.

Test all ground fault circuit interrupter (GFCI) devices, as identified in the inspection report.

Shut off isolating valves for exterior hose bibs in the fall, if below freezing temperatures are anticipated.

Inspect for evidence of wood boring insect activity. Eliminate any wood/soil contact around the perimeter of the home.

Test the overhead garage door opener, to ensure that the auto-reverse mechanism is responding properly. Clean and lubricate hinges, rollers, and tracks on overhead doors.

Replace or clean exhaust hood filters.

Clean, inspect and/or service all appliances as per the manufacturer's recommendations.

Replace smoke detector batteries

ANNUAL

Have the heating, cooling and water heater systems cleaned and serviced.

Have chimneys inspected and cleaned. Ensure that rain caps and vermin screens are secure.

Examine the electrical panel(s) wiring and electrical components for evidence of overheating. Ensure that all components are secure. Flip the breakers on and off to ensure that they are not sticky.

If the house utilizes a well, check and service the pump and holding tank. Have the water quality tested. If the property has a septic system, have the tank inspected (and pumped as needed).

If your home is in an area prone to wood destroying insects (termites, carpenter ants, etc.) have the

home inspected by a licensed specialist. Preventative treatments may be recommended in some cases.

PREVENTION IS THE BEST APPROACH

Although we've heard it many times, nothing could be more true than the old cliché "an ounce of prevention is worth a pound of cure." Preventative maintenance is the best way to keep your house in great shape. It also reduces the risk of unexpected repairs and improves the odds of selling your house at fair market value, when the time comes.

Please feel free to contact our office should you have any questions regarding the operation or maintenance of your home

Enjoy your home!

Environmental Risks

A FEW WORDS ABOUT ENVIRONMENTAL RISKS

During a standard inspection, no screening for toxins, carcinogens, or other health or safety risks is conducted.

We can tell you this:

Many, but not all, pre-1980 houses have lead-based paint on interior and exterior surfaces. Lead-laced dust is sometimes created during renovation or repainting projects; and, it is possible that some lead-laced dust could be created by moving parts such as the window sash.

Lead might also be present in the tap water, particularly in houses built before 1960. Consult your local water utility or private lab regarding a lead test for the tap water. Many utilities will do this test at no cost to the customer, and, if any lead-bearing pipes are owned by the utility, the utility might be required to replace the pipe at no cost to the customer.

Breathing or ingesting can cause lead poisoning. Children are particularly susceptible to lead poisoning, and if pregnant women inhale or ingest lead, the fetus could be harmed. The risk of lead poisoning in houses is a subject of significant social, political, and medical debate. Some are unnecessarily alarmed; others are unnecessarily cavalier. Common sense dictates that pregnant women stay away from lead dust, and that children have their blood lead levels tested. This is an inexpensive test; consult your pediatrician.

Many, but not all, pre-1980 houses contain asbestos. Many older building products, including but not limited to insulation, flooring products, patching plaster, window putty, roofing products, exterior siding and interior fiberboard finishes contained asbestos. If you suspect the presence of asbestos in any material, do not disturb the material. Consult with an environmental engineer or asbestos remediation contractor to confirm or rule out the presence of asbestos, and for advice on how best to deal with any asbestos present.

APPENDIX D



WASHINGTON STATE PEST CONTROL ASSOCIATION Uniform Structural Wood Destroying Organism Inspection Report

Company Name Lighthouse Home Inspection, LLC.

Company Address P.O. Box 884, Silverdale WA 98383.

Company Phone 253-380-8402. File/ Case No. _____

Inspection Date May 12, 2003. Time 3:30 pm. Type of Building Single family dwelling.

Address of Building Inspected 12018 Nyanza Rd. SW. Lakewood. WA. 98499.

Owner/Seller _____ Buyer Teresa McCormick.

Structural Pest Inspector Name Scott DeSchryver. License # 63928.

LIMITATION OF LIABILITY

The above inspecting firm endeavors to perform its services in a professional manner consistent with the care and skill ordinarily exercised by similar pest control professionals. No warranty, expressed or implied, other than as set forth herein, is made or intended by performing the work identified in this agreement. Should this firm, or its employees, be found to have been negligent in their performance of services, it is agreed that the maximum total recovery against us or our employees shall be limited to our fee for the services provided under this agreement.

In the event any person or company makes a claim for any alleged error, omission, or other act arising out of their performance of professional services under this contract, each signer of this agreement agrees to defend and hold us harmless from any such claim, including reasonable attorney's fees and costs incurred by us in defending against the claim.

ACCEPTANCE: This report is of no force or effect unless signed by the Seller and Purchaser and a copy returned to the inspecting firm. We have read the report and inspection standards and understand all of the terms and conditions thereof, including the scope and limitations thereof and do accept the same:

Accepted By: _____ Date _____
Seller's Signature

Purchaser's Signature Date _____

THIRD PARTY AGREEMENT

Should all or part of the recommendations on page 3 be performed by a person or persons other than the inspecting firm, this Third Party Agreement must be signed by said person(s) and a copy returned to the inspecting firm before a Final Report will be issued.

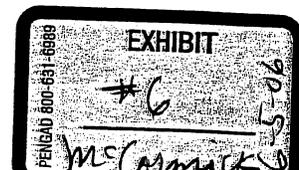
I/we certify that the work, or portion thereof, described in the Preliminary Report(s), performed or caused to be performed by the undersigned has been completed in a workmanlike manner, complies with the Uniform Building Code (current revision), and is warranted for one year as per the inspection standards. I/we have notified the inspecting firm of any conditions revealed during performance of recommendation as per article V. (c) of the inspection standards.

Scott DeSchryver Lic.#63928.

(SIGNATURE) of Party performing Work (Owner - Contractor) _____ Date _____

PRINT NAME AND PHONE NUMBER OF ABOVE SIGNEE _____

CONTRACTORS REGISTRATION # _____ DRIVERS LICENSE # _____
(If applicable) (If other than licensed contractor)



**WOOD DESTROYING ORGANISM INSPECTION STANDARDS of the
WASHINGTON STATE PEST CONTROL ASSOCIATION**

I. **WOOD DESTROYING ORGANISM INSPECTION REPORT.**
A wood destroying organism inspection report is a written opinion of a qualified Washington State Licensed Structural Pest Control Inspector based upon what was visible and evident at the time of inspection. As such, the inspection report does not in any way represent or guarantee the structure to be free from wood destroying organisms or their damage, nor does it represent or guarantee that the total damage or infestation is limited to that disclosed in this report.

II. **INSPECTION PROCEDURES.**

The inspector shall make a thorough inspection of the subject structure to render an opinion of the visible evidence of wood destroying organisms, as well as, those conditions which are conducive to such wood destroying organisms.

AREAS INSPECTED shall include: Structural Exterior (that which is readily accessible, visibly and physically, to an inspector at ground level); Structure Interior; Substructural Crawl Space(s); Garages, Carports, and Decks which are attached to the structure. (Deck inspection shall include railings, wooden steps, and accessible wooden surface materials, as well as, deck substructures which are accessible (those with at least a 5' soil-to-joist clearance, or, in the case of elevated decks, those which can be suitably reached using a 6 step ladder).)

WOOD DESTROYING ORGANISMS shall include: Subterranean Termites, Dampwood Termites, Carpenter Ants, Wood Boring Beetles, (and Wood Decay Fungus) (rd).

CONDUCTIVE CONDITIONS shall include, but not be limited to:

- a) **INADEQUATE CLEARANCES.** This shall normally exist where there is less than 18" clear space between the bottom of the floor joists and the unimproved ground area in any crawl area or portion thereof.
- b) **EARTH-WOOD CONTACT.** This condition exists where wood of the structure is in direct contact with the soil.
- c) **CELLULOSE DEBRIS.** Cellulose debris in the crawl area shall be considered any wood or wood by-product material that can be raked, or larger.
- d) **INADEQUATE VENTILATION:** Where there is detectable excessive moisture content in the wood of a substructure, and/or an active infestation of wood destroying organisms which can be attributed to the lack of sufficient ventilation in the substructure.
- e) **EXCESSIVE MOISTURE.** Any condition with the potential to enhance the moisture content of the wood such as: obvious plumbing or roof leaks; bare moist soil, or standing and/or seasonal standing water in the crawl space.

III. **LIMITATIONS OF INSPECTIONS.**

The inspecting firm shall not be held responsible by any party for any condition or consequence of wood destroying organisms which is beyond the scope of this inspection. The scope, defined in section I. **INSPECTION PROCEDURES**, is limited as follows:

- a) **INACCESSIBLE AREAS.** Certain areas of a structure, which are inaccessible by their nature, may be subject to infestation of wood destroying organisms yet cannot be inspected without excavation, or unless physical obstructions are removed. Such areas include, but are not limited to: wall voids; spaces between floors; substructures concealed by subfloor insulation or which have inadequate clearance; floors beneath coverings; sleeper floors; areas concealed by furniture, appliances, and/or personal possessions; and deck substructures with less than a 5-foot clearance.
- b) **ROOF SYSTEMS AND ATTIC AREAS.** The inspecting firm shall not be held responsible or assume liability in any manner concerning the condition of any portion of the roof area, including outside covering, soffits, eaves, rafter tails, fascia boards, barge rafters, gutters and inside attic spaces, their soundness or estimated life. The inspector may note visual evidence of infestation and/or infections of wood destroying organisms in the portions of the eaves that are visible and accessible from the ground. He/she may also make note of conditions of the gutters and downspouts that are contributing to moisture conditions in the subarea or at the exterior perimeter of the foundation. No opinion is rendered nor guarantee implied concerning the water-tight integrity of the roof or concerning the condition or future life of the roof coating system. Any comment(s) made by the inspector regarding an obvious condition of (a) component(s) of the roof system or attic space(s) shall not imply an extension of scope of this inspection. It is recommended that if professional opinion or certifications are needed for these areas, that the interested parties contact a qualified, licensed roofing contractor.
- c) **SHEDS AND OUTBUILDINGS.** Sheds, garages, carports, decks, or other structures which are not attached to the main structure are excluded from this report unless specifically requested and noted. The inspecting firm reserves the right to charge additionally to inspect any unattached structures.
- d) **CARPENTER ANT DORMANCY.** Due to the natural habit of carpenter ants to go dormant during the winter months, carpenter ants may go undetected if this inspection was performed during their dormant season. We do not assume any responsibility for carpenter ant infestations that were not detected during their dormant season.
- e) **MINOR ROT CONDITIONS.** In certain geographical areas of Washington State where wet climate is common, a large percentage of structures are subject to minor rot conditions. While such conditions are technically fungi infestations they may not substantially affect the quality, structural soundness or anticipated future life of the structure. Such conditions as spot areas on doors, window casings, and common weathering on siding, and non-supporting wooden members shall not be reported on inspection reports except at the discretion of the inspecting firm for purposes of clarification only.

f) **STRUCTURAL ASSESSMENT.** While it may be possible for the pest inspector to note damaged materials, neither the inspector or the pest control firm is liable nor responsible in any way to determine the structural integrity of any infested building materials. It is recommended that if professional opinions are needed in regards to this area that the interested party contact a qualified, licensed engineer or building contractor.

g) **REQUIREMENTS OF OTHERS.** Inspection standards shall not be altered by any person, private or government agency on any given Structural Wood Destroying Organism inspection report.

IV. **REPORTS.**

No report shall be issued by the inspecting firm unless a state licensed inspector from that firm has made a careful and thorough inspection of the structure in conformity with these standards. Reports shall be subject to III. **LIMITATIONS OF INSPECTIONS**.

a) **PRELIMINARY REPORTS.** Any report, whether pertaining to an initial or subsequent inspection, which discloses current visible evidence of wood destroying organisms or conducive conditions shall be considered a Preliminary Report only. As such, a Preliminary Report should not be relied upon for the closing of any real estate transaction and necessary steps should be taken to obtain a Final Report. Preliminary Reports shall contain inspection findings and shall recommend procedures necessary to obtain a Final Report. In addition, Preliminary Reports shall include a diagram to help identify locations of wood destroying organism infestations, infections, and/or conducive conditions.

b) **FINAL REPORTS.** A wood destroying organism inspection Final Report shall be issued when the inspecting firm performing the inspection has found no visible evidence of active wood destroying organisms or conducive conditions in the subject structure.

IV. **WORK RECOMMENDATIONS AND TREATMENTS.**

a) **WARRANTIES.** No Final Report shall be issued unless those firms which contract to perform all or part of the work recommendations, warrant the quality of workmanship and the effectiveness of such work for a minimum period of one year from the date of completion. As used in these standards, the term "warranty" shall mean that, should the effectiveness of any work performed fail, the contracting firm shall correct the workmanship or perform additional treatments to eliminate infestations at no charge.

b) **THIRD PARTY AGREEMENT.** Should the owner, purchaser, or other interested party elect to perform all or part of the work recommendations or to contract with a contractor other than the inspecting firm, the owner, buyer, or other interested party shall provide a written agreement certifying that either he and/or the contractor performing the work has completed the recommendations as specified in the inspection report and agree to assume full liability for, hold the inspecting firm harmless for any defects in the work performed (including but not limited to defects resulting from non-compliance with the Uniform Building Code (current revision)), and that all work is warranted for a minimum period of one year.

c) **CONDITIONS REVEALED DURING PERFORMANCE OF RECOMMENDATIONS.** Should any wood destroying organism, damage, or conducive condition be revealed during the performance of any recommendations, whether performed by the owner, the purchaser, a contractor, or any other party in interest, the inspecting firm must be notified of such conditions for the purpose of having a reasonable opportunity of re-inspection and determining any additional work recommendations before such conditions are covered. The owner, the purchaser, or any party undertaking the work shall be responsible for such notification. The inspecting firm, if notified as provided in this paragraph, shall perform an additional inspection to determine and document, at its discretion, any additional finding and/or recommendations that may be necessary to obtain a Final Report. Nothing contained herein shall prevent the inspecting firm from assessing additional charges for each additional inspection.





May 12, 2003 # _____
 INSPECTION DATE
 12018 Nyanza Rd. SW.
 RUBENLAND STREET
 Lakewood, WA 98499
 CITY STATE ZIP

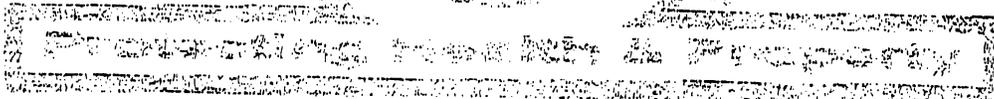
NOTICE: The owner(s) and/or person(s) performing any work relative to these recommendations must ensure that all construction work performed meets the standards of good construction practices and materials as provided for in the Uniform Building Code (current revision). Pest control measures must be performed by state licensed applicators in conformance with all current federal, state and local laws. Should all or part of the following recommendations be performed by a person or persons other than the inspecting firm, the "third party agreement" on page one must be signed by said person(s) and a copy returned to the inspecting firm before a Final Report will be issued.

A fee of \$ 0.00 will be charged for each reinspection.

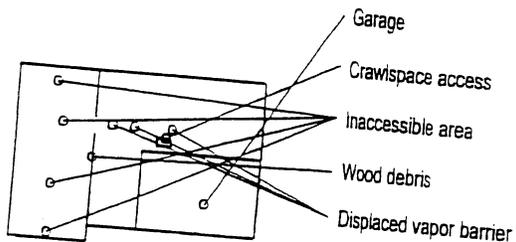
FINDINGS AND RECOMMENDATIONS

1. Remove and discard cellulose debris such as wood scraps, paper, cardboard, and other trash present in crawlspace.
2. Displaced vapor barrier on the soil of the crawlspace. Rearrange or install a 6 mil. black, polyethylene vapor barrier over the soil of the crawlspace for full coverage.
3. Missing caulk along tub/shower floor line in the upstairs main bathroom. Make certain that finish floor is secured down flat to the underlayment, and then provide a continuous bead of caulking to the tub/shower floor line for a watertight seal.

NOTE: The siding has been identified as Louisiana-Pacific (LP siding). The siding materials are specifically excluded from this report as permitted under WSDA Guidance Document of August 2001. You are advised that conditions may (or do) exist that cause damage from or infestation by wood destroying organisms. You are advised to have the siding inspected by a person qualified to address siding issues by this manufacturer.



SKETCH
(NOT TO SCALE)
(FRONT)



(LEFT)

(RIGHT)

(REAR)

LEGEND

- S—Subterranean Termites
- Z—Dampwood Termites
- CA—Carpenter Ants
- B—Wood Boring Beetles
- F—Wood Decay Fungus (rot)
- X—Structural Damage
- EW—Earth-Wood Contact

- CD—Cellulose Debris
- M—Excessive Moisture Condition
- PL—Plumbing Leak
- NV—New Vents Needed
- V—Existing Vents
- IA—Inaccessible Area
- CSA—Crawl Space Access

1. _____
2. _____
3. _____
4. _____
5. _____

