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NO. 35505-1-II

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

PETER GLENN STIENEKE and CYNTHIA DIANNE STIENEKE, a marital
community,

Respondents,

vs.

TROY RUSSI and RENE A RUSSI, a marital community,

Appellants,

and

STERLING GRIFFIN and JANE DOE GRIFFIN, a marital community; and
KELLER WILLIAMS REALTY,

Respondents.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable Bryan Chushcoff, Judge

BRIEF OF APPELLANTS

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I. NATURE OF THE CASE

To fill out the required disclosure form for a house sale, the buyer's agent asked the seller whether the roof leaked. Thinking the agent was asking whether the roof leaked at that time, the seller said "no." The seller knew the roof had leaked years earlier but believed the problem had been fixed.

The roof leaked after the buyers moved in. The trial court found the sellers liable for breach of the purchase and sale agreement even though that agreement made no representations about the condition of the roof or the house. The trial court also found the sellers had negligently misrepresented the roof's condition even though a statute and the economic loss rule barred the claim and the buyers could not have justifiably relied on any misrepresentation, having elected to forego inspecting the roof despite an inspection contingency in their purchase agreement.

II. ASSIGNMENTS OF ERROR¹

The trial court erred in—

- A. Entering judgment against respondents Russi (CP 617-30);

¹ Copies of the Findings of Fact, Conclusions of Law, and Judgment and Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Reasonable Attorneys' Fees and Expense are set forth in the Appendix hereto.

1. Entering finding of fact 14 to the extent it reads, “The Stienekes agreed to forgo the roof inspection and to complete the transaction, in reliance on Troy Russi’s oral statement that he had not had problems with the roof and on the statement in Russis’ Form 17 disclosure that the roof had not leaked” (CP 620);

2. Entering finding of fact 23 to the extent it provides that there was “an inaccurate statement regarding a material and important fact about the history of the house” (CP 622-23);

3. Entering finding of fact 24 (CP 623);

4. Entering finding of fact 28 (CP 623-24);

5. Entering finding of fact 29 (CP 624);

6. Entering finding of fact 30 (CP 624);

7. Entering finding of fact 31 (CP 624);

8. Entering finding of fact 33 (CP 624);

9. Entering finding of fact 34 (CP 624-25);

10. Entering finding of fact 36 (CP 625);

11. Entering conclusion of law 2 (CP 625);

12. Entering conclusion of law 4 (CP 626);

13. Entering conclusion of law 5 (CP 626);

14. Entering conclusion of law 6 (CP 626);

15. Entering conclusion of law 7 (CP 626);

16. Entering conclusion of law 8 (CP 626);
 17. Entering conclusion of law 16 to the extent it states defendants Russi are jointly and severally liable to plaintiffs for their damages (CP 627);
 18. Entering conclusion of law 17 to the extent it finds defendants Russi liable for anything and that plaintiffs were without fault (CP 627);
 19. Entering conclusion of law 18 (CP 627-28);
 20. Entering conclusion of law 19 (CP 628);
 21. Entering conclusion of law 20 to the extent it provides plaintiffs are entitled to judgment against defendants Russi, apportions liability to defendants Russi, and holds defendants Russi jointly and severally liable (CP 628);
- B. Entering an order granting attorney fees and expenses against defendants Russi (CP 940-48);
1. Entering finding of fact 1 (CP 940);
 2. Entering finding of fact 3 (CP 941);
 3. Entering finding of fact 4 (CP 941);
 4. Entering finding of fact 5 (CP 941);
 5. Entering finding of fact 6 (CP 941-42);
 6. Entering finding of fact 8 (CP 942);

7. Entering finding of fact 9 (CP 942);
 8. Entering finding of fact 10 (CP 942-43);
 9. Entering finding of fact 11 (CP 943);
 10. Entering conclusion of law 1 (CP 943);
 11. Entering conclusion of law 4 (CP 944);
 12. Entering conclusion of law 5 (CP 944);
 13. Entering conclusion of law 6 (CP 945);
 14. Entering conclusion of law 7 (CP 945);
 15. Entering conclusion of law 8 (CP 945);
 16. Entering conclusion of law 9 (CP 946);
- C. Denying defendant Russis' Motion for Reconsideration (CP 271-79);
- D. Denying defendants' Russis' CR 41(b)(3) motion to dismiss the negligent misrepresentation claim (CP 395-406; RP 1783);
- E. Denying defendants' Russis' CR 41(b)(3) motion to dismiss the breach of contract claim (CP 395-406; RP 1783);
- F. Entering the Order Granting Defendants Griffin and Keller Williams Realty's Motion To Strike Stienekes' Jury Demand (CP 315-17);
- G. Entering its August 31, 2006, Decision of the Court (Damages Only) (CP 529-34).

III. ISSUES PRESENTED

A. Did defendants Russi breach their contract with the plaintiff buyers? (Assignments of Error A, C, E, and G)

1. Does RCW 64.06.050(1) preclude the claim?
2. Was Form 17 a part of the RESPA?

B. Should the negligent misrepresentation award be reversed? (Assignments of Error A, D, and G)

1. Does RCW 64.06.050(1) preclude the claim?
2. Does the economic loss rule bar the negligent misrepresentation claim?
3. Did plaintiff buyers justifiably rely on the alleged misrepresentation?

C. Did the trial court deprive defendant Russis of their constitutional right to a jury trial? (Assignments of Error F)

D. Were the plaintiff buyers entitled to attorney fees? (Assignments of Error A, B, C, D, E, and G)

E. Are the defendant Russis entitled to their attorney fees on appeal?

IV. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

Defendant Sterling Griffin, a real estate agent with defendant Keller Williams Realty, approached defendant/appellant Troy Russi to see if the Russis would be willing to show their house to Griffins' clients, plaintiffs/respondents Peter Glenn and Cynthia Stieneke ("the buyers"). (CP 618, FF 3) The Russis did not then have their house on the market, but agreed the agent could show it to the buyers. (RP 1103-04) After viewing the Russis' home, the buyers made an offer, eventually agreeing to the Russis' counteroffer. (CP 619, FF 6-7)

On March 6, 2003, the parties signed a Residential Real Estate Purchase and Sale Agreement (RESPA). (Ex. 32) The RESPA included an inspection addendum, signed by the buyers and the Russis, which provided, among other things:

The following is part of the Purchase and Sale Agreement dated 3/6/03

The above Agreement is conditioned on Buyer's personal approval of an inspection of the Property and the improvements on the Property. . . .

a. Buyer's Obligations. All inspections are to be (a) ordered by Buyer; (b) performed by an inspector of Buyer's choice and (c) completed at Buyer's expense. . . .

b. Buyer's Notice of Disapproval. This inspection contingency SHALL CONCLUSIVELY BE DEEMED SATISFIED (WAIVED) unless Buyer gives notice of

disapproval within 5 days . . . of mutual acceptance of this Agreement.

(Ex. 32) (capitalization in original). The addendum gave the seller the option to repair, offer an alternative remedy for the disapproved conditions, or do nothing. If the seller did not agree to repair and the parties could not agree to an alternative remedy, the buyer could terminate the agreement. (*Id.*) The addendum further stated (*id.*):

ATTENTION BUYER: You should carefully note paragraphs 1(b) Unless you give these notices, you may be required to purchase the Property without the Seller having corrected the conditions noted in the inspection report and without any alternative remedy for those conditions.

The RESPA also included the following integration clause (Ex. 32):

This Agreement constitutes the entire understanding between the parties and supersedes all prior or contemporaneous understandings and representations. No modification of this Agreement shall be effective unless agreed in writing and signed by Buyer and Seller.

RCW 64.06.020 requires a seller of residential property to make certain written disclosures to the buyer in a form whose minimum contents are mandated by the statute. Because the Russis did not have an agent to assist them, the buyers' agent decided to read the questions on the disclosure form ("Form 17") to Mr. Russi, so that the agent could check

the appropriate boxes on the form. (CP 621, FF 17) The disclosure form also stated, as required by RCW 64.06.020 (Ex. 36):

THIS INFORMATION IS FOR DISCLOSURE ONLY AND IS NOT INTENDED TO BE A PART OF ANY WRITTEN AGREEMENT BETWEEN BUYER AND 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. . . .

. . . .

BUYER'S ACKNOWLEDGMENT

- 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.

. . . .

In addition, the form 17 required the buyer to acknowledge (Ex. 36)—

- B. This information is for disclosure only and is not intended to be a part of the written agreement between Buyer and Seller.

Question 4A on the form said, “Has the roof leaked?” (Ex. 36, p. 2) When the agent asked about this, Mr. Russi heard him say, “Does the roof leak?” (CP 621, FF 18) Because the roof was not currently leaking, Mr. Russi answered in the negative, and the agent checked the “no” box next to question 4A. (CP 621, FF 18; RP 1133) Although the roof had

leaked in the past, Mr. Russi had had repairs made in 1997 and believed there was no longer a problem. (CP 622, FF 20; RP 1068,) He would have answered “yes” had the question been read properly. (RP 1133-34) Mr. Russi signed the completed Form 17 on March 10, 2003, but did not read it. (CP 621, FF 17; Ex. 36)

In accordance with the inspection addendum, the buyers retained an inspector to inspect the property. (CP 620, FF 11) However, the inspector advised them that he did not inspect roofs. (CP 620, FF 12) The buyers told their agent they wanted a roof inspection, so the agent obtained the Russis’ agreement to extend the period for inspection so that the roof could be inspected. (Ex. 32; CP 620, FF 12)

When a second home inspector retained by the buyers came out to the house to inspect the roof, it was raining and thus unsafe to go onto the roof. (CP 620, FF 14) The buyers’ expert would later testify that a reasonable inspection of the roof and the crawl space of the home would have revealed the problems that led to the leakage:

Q. . . . Did I correctly hear you earlier to say that you would expect a roof inspector whose inspection was devoted to inspecting the roof itself would do just that, remove some tiles and see what’s underneath?

A. Yes.

Q. . . . [I]f a homebuyer were to hire a roof inspector, you would expect a reasonable roof inspection to include that task?

A. I would expect a good, professional, knowledgeable one to do that, yes.

....

Q. . . . So what you found in the crawlspace and everything you've testified to that was in the crawlspace was visible to the naked eye once you got in into the crawlspace?

A. That is correct.

Q. And if somebody has suitable credentials to know what he's looking at, it would be there and available . . . to be determined, correct?

A. That is correct.

(Clapp Dep. 117-18, *see also id.* at 12-16, 34-43, 48-65, 117-18).

The buyers, however, decided to forego the roof inspection. (CP 620, FF 14) They later claimed that their decision was in reliance on the form 17 disclosure form and Mr. Russi's oral assurances that he had not had problems with the roof. (RP 1485, 1487)

After the purchase and sale closed and the buyers had moved in, they had the roof power washed. During the washing, water leaked from the roof into the front entry. Their expert later testified that the leak was due to an improperly constructed "blind" or "dead" valley in the roof. (CP 622, FF 21; Clapp Dep. 37, 41, 60-61, 65)

B. STATEMENT OF PROCEDURE.

The buyers sued both the Russis and the buyers' agent. The complaint alleged intentional misrepresentation, fraudulent concealment, and breach of contract against the Russis and prayed for rescission or, alternatively, damages. (CP 1001-18) The breach of contract claim was based on the allegations that the sellers had provided express warranties. (CP 1015) Nearly two years later, the complaint was amended to add a negligent misrepresentation claim against the Russis. (CP 349)

The trial court denied the Russis' request to dismiss the breach of contract claim as a matter of law. (CP 331-32)

At the request of the agent, and over the objections of both the buyers and the Russis, the trial court struck the buyers' jury demand. (CP 1-2, 228-34, 280-307, 315-17) A 10-day bench trial was held. (CP 420-33) The Russis filed a CR 41(b)(3) motion to dismiss, which was not formally ruled upon. (CP 395-406)

The trial court found the Russis liable for breach of contract and negligent misrepresentation. (CP 625-27) The trial court did not find any express warranties, as the buyers' breach of contract allegations had claimed, in the RESPA itself. Rather the trial court found that the form 17 disclosure statement had become part of the RESPA and that the

inaccurate answer in the form 17 constituted breach of contract. (CP 623, 626)

The trial court also found the agent liable for negligence and breach of fiduciary duty. (CP 626-27)

The court apportioned 45 percent of the fault to the Russis and the remaining 55 percent to the agent, but held the defendants jointly and severally liable for all damages. The damages totaled \$72,048.50, representing the cost to repair including the cost of temporary storage and housing during repair. (CP 624, 627-28) While the court found that the buyers could rescind the deal, they elected to receive damages instead. (CP 627-628) The court also imposed \$174,578.90 in attorney fees and expenses against the Russis under the attorney fee clause in the purchase and sale agreement. (CP 628, 946)

The Russis appealed. (CP 951-95) The agent did not and is not a party to this appeal.

V. ARGUMENT

This is an appeal from a bench trial. This court will “review the trial court's findings of fact for substantial evidence in the record and conclusions of law to see if the findings support them.” *Roeder Co. v K&E Moving & Storage Co.*, 102 Wn. App. 49, 52, 4 P.3d 839 (2000), *rev. denied*, 142 Wn.2d 1017 (2001). Conclusions of law are reviewed *de*

nov. *City of Tacoma v. William Rogers Co.*, 148 Wn.2d 169, 181, 60 P.3d 79 (2002).

This court may “resort to the trial judge's oral decision to ascertain the legal and factual bases upon which the trial court predicated its findings.” *Nord v. Eastside Association, Ltd.*, 34 Wn. App. 796, 798, 664 P.2d 4, *rev. denied*, 100 Wn.2d 1014 (1983). Furthermore, when findings of fact are in reality conclusions of law, this court will treat them as conclusions of law. *Fine v. Laband*, 35 Wn. App. 368, 374, 667 P.2d 101 (1983).

As will be discussed, the conclusions of law imposing liability on the Russis are erroneous. In addition, some of the findings of fact are unsupported by substantial evidence and thus do not support the conclusions of law.

Moreover, the trial court should have never even gotten as far as entering findings and conclusions, because it should have granted the sellers' CR 41(b)(3) motion to dismiss. Under this rule, “[d]ismissal is proper if there is no evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff.” *Willis v. Simpson Investment Co.*, 79 Wn. App. 405, 410, 902 P.2d 1263 (1995).

A. THE RUSSIS CANNOT BE LIABLE FOR BREACH OF CONTRACT.

In finding of fact 28 and conclusion of law 8, the trial court found that the Form 17 disclosure statement became a part of the purchase and sale agreement, even though by its terms, as required by RCW 64.06.020, and pursuant to the RESPA integration clause, the form was not part of the RESPA. (CP 623, 626) Conclusion of law 8 held that Mr. Russi's misrepresentation of the roof's history in Form 17 was a material breach of the RESPA and proximately caused the buyers' damages.

Both FF 28 and CL 8 are erroneous because (1) RCW 64.06.050(1) precludes liability for any error, omission, or inaccuracy in the form 17 unless the seller had actual knowledge of such error, omission, or inaccuracy, which Mr. Russi did not; and/or (2) form 17, by its terms, as required by statute, and because of the integration clause in the RESPA, was not a part of the RESPA. Consequently, all findings of fact (FF 28-30, 33-34, 36) and conclusions of law (CL 8, 16-20) dealing with the breach of contract claim are unsupported by the law or the facts.

1. RCW 64.06.050(1) Bars the Breach of Contract Claim.

RCW 64.06.050(1)² provides:

² Although this statute was not raised below, "a statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal." *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990). This is particularly true where, as here, the statute affects whether the plaintiff has the right to

The seller of residential real property shall not be liable for any error, inaccuracy, or omission in the real property transfer disclosure statement if the seller had no actual knowledge of the error, inaccuracy, or omission. . . .

“Actual knowledge” means just that: it does not include facts the seller *should have* known. *Svendsen v. Stock*, 98 Wn. App. 498, 503, 979 P.2d 476 (1999), *rev'd on other grounds*, 143 Wn.2d 546, 23 P.3d 455 (2001).

Mr. Russi was a seller of residential real property. The trial court found he had breached the RESPA because of an error or inaccuracy in the form 17 real property transfer disclosure statement. (CP 626, CL 8) But Mr. Russi did not have actual knowledge of the error or inaccuracy in form 17 because he never read it and believed the agent had asked him, “Does the roof leak?” rather than “Has the roof leaked?”. (CP 621, FF 17-18; RP 1133)

Indeed, the trial court tacitly acknowledged that Mr. Russi did not have actual knowledge of the error or inaccuracy in form 17 because it did not find the Russis liable for fraudulent concealment or intentional misrepresentation. *Cf. Cummings v. Pacific Standard Life Insurance Co.*, 10 Wn. App. 220, 223, 516 P.2d 1077 (1973), *rev. denied*, 83 Wn.2d 1012 (1974) (where trial court makes no finding of fact, issue is deemed to have

maintain the action. *Becker v. County of Pierce*, 126 Wn.2d 11, 19, 890 P.2d 1055 (1995) (statutory time limit for challenging election may be raised for first time on appeal).

been determined against party having burden of proof). Instead, the trial court found Mr. Russi careless. (CP 622, FF 22)

RCW 64.06.050(1) thus barred the buyers from bringing their breach of contract claim against the Russis. Insofar as the judgment is based on the breach of contract claim, it must be reversed.

2. The Form 17 Was Not Part of the RESPA.

Even if RCW 64.06.050(1) did not apply, the breach of contract claim must still fail because it was premised solely on the trial court's belief that form 17 became part of the RESPA. (CP 623, FF 28; CP 626, CL 8) Whether by statute, the terms of the documents, or common law integration principles, this was erroneous.

At the time of the transaction in question, RCW 64.06.020³ required that the seller's disclosure statement state, among other things, "THIS INFORMATION IS FOR DISCLOSURE ONLY AND IS NOT INTENDED TO BE A PART OF ANY WRITTEN AGREEMENT BETWEEN THE BUYER AND THE SELLER." In addition, form 17 required the buyers to acknowledge (Ex. 36):

³ The version of the statute in effect at the time is set forth at 1996 WASH. LAWS ch. 301, § 2. The statute has since been amended twice. As used in this brief, "RCW 64.06.020" refers to 1996 WASH. LAWS ch. 301, § 2.

- B. . . . This information is for disclosure only and is not intended to be a part of the written agreement between Buyer and Seller.

This acknowledgement was signed by the buyers (Ex. 36, p. 5) and was consistent with RCW 64.06.020(2), which then provided:

The real property transfer disclosure statement shall be for disclosure only, and ***shall not be considered part of any written agreement between the buyer and seller of residential real property.*** . . .

1996 WASH. LAWS ch. 301, § 2(2) (emphasis added).

Thus, not only did the parties agree that the form 17 disclosure statement not be part of the RESPA, the declared public policy of the State of Washington is that such disclosure statements not be part of any written agreement between the buyer and seller of residential real property. Yet finding of fact 28 (CP 623) states “The Disclosure Statement signed by Troy Russi became ***a part of the Purchase and Sale Agreement*** between the Russis and the Stienekes”; and conclusion of law 8 (CP 626) provides:

The Disclosure Statement was ***part of the agreement*** between the Russis and the Stienekes, pursuant to its terms and pursuant to the circumstances surrounding the formation of the agreement as established by the evidence. Troy Russi’s misrepresentation regarding the history of the roof in the Disclosure Statement constituted a material breach of the purchase and sale agreement between the Russis and the Stienekes. That breach was a proximate cause of the Stienekes’ damages.

(Emphases added.) FF 28 and CL 8 are contrary to RCW 64.06.020⁴ as it read at the time of the transaction. This court should reverse.

Even absent RCW 64.06.020, reversal would still be required by the terms of form 17 and the RESPA integration clause. CL 8 states (CP 626):

The Disclosure Statement was part of the agreement by the Russis and the Stienekes, pursuant to its terms and pursuant to the circumstances surrounding the formation of the agreement as established by the evidence.

But not only do the terms of the disclosure statement expressly state to the contrary, the trial court never identified what “circumstances surrounding the formation of the agreement as established by the evidence” led to the conclusion that the disclosure statement was part of the purchase and sale agreement. Thus, CL 8 is not supported by a single finding of fact, let alone by the law.

The form 17 disclosure statement (Ex. 36) was filled out and signed four days *after* the parties entered into the RESPA. (Exs. 32, 36). The form twice expressly says it is not intended to be part of any written agreement between the buyers and the sellers. The sellers signed an

⁴ As with RCW 64.06.050, this court may consider RCW 64.06.020 for the first time on appeal as it is a statute that affects whether the plaintiff sellers are entitled to maintain this action. *See* footnote 2, *supra*.

acknowledgement that the statement said this.

The RESPA contains no language making it contingent upon form 17. Instead, the parties made the RESPA contingent upon the buyers' inspection. Furthermore, the RESPA contains an integration clause. Under these circumstances, it is hard to envision how the parties could have made any clearer their intent that form 17 not be part of the RESPA.

Thus, the trial court's conclusion that the form 17 disclosure form became part of the RESPA is not supported by the evidence or the law. Yet the trial court's conclusion that the Russis breached the RESPA was premised on its unwarranted assumption that form 17 had become part of the RESPA. There was no finding or conclusion that any oral misrepresentations became part of the RESPA.

The trial court's failure to dismiss the breach of contract claim upon the sellers' CR 41(b)(3) motion was also error for the same reasons. Accordingly, the judgment to the extent based on the breach of contract claim must be reversed.

B. THE RUSSIS CANNOT BE LIABLE FOR NEGLIGENT MISREPRESENTATION.

The trial court found that in telling the buyers that he had not had problems with the roof, Mr. Russi was liable for negligent misrepresentation. (CP 621-23, 625-26) But the economic loss rule, as

reaffirmed in a brand new Washington Supreme Court case, *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), bars the negligent misrepresentation claim. Furthermore, the buyers did not justifiably rely on any misrepresentation as a matter of law. Thus, the findings (FF 14, 24, 29-31, 33-34, 36) and conclusions (CL 2, 4-7, 16-18, 20) regarding the buyers' negligent misrepresentation claim cannot stand, and the trial court should have granted the sellers' CR 41(b)(3) motion to dismiss that claim.

In addition, to the extent the negligent misrepresentation claim was based on the form 17 disclosure statement, RCW 64.06.050(1) precludes liability unless the seller had actual knowledge of such error, omission or inaccuracy, which Mr. Russi did not. Thus, to the extent the findings of fact and conclusions of law dealt with the negligent misrepresentation claim, they are unsupported by the law or the facts.

1. The Sellers Have No Negligent Misrepresentation Claim Under the Economic Loss Rule.

The trial court found the Russis liable for negligent misrepresentation. Under the economic loss rule, this was error.

The economic loss rule maintains the boundaries between tort and contract by limiting recovery of economic loss to contract remedies. Thus, Washington courts have ruled that the economic loss rule precludes suits for negligent misrepresentation arising out of construction defects.

See Griffith v. Centex Real Estate Corp., 93 Wn. App. 202, 213, 969 P.2d 486 (1998), *rev. denied*, 137 Wn.2d 1034 (1999).

Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007), a Washington Supreme Court case decided after this case went on appeal, is dispositive. There the earnest money agreement on a house sale made the sale contingent upon inspection of the septic system. If the buyer was dissatisfied with the inspection, the buyer was to notify the seller. But if there was no such notification, the inspection contingency would be deemed satisfied.

The seller's disclosure statement stated that there were no defects in the septic system. The buyers then waived their right to revoke their offer, thereby acknowledging in the disclosure statement "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.* at 679.

Shortly after the sale closed, the septic system failed. The buyers learned that the seller had been told that the drain fields were not working and that the home needed to be connected to the city's sewer system. The buyers sued the seller for misrepresentation.

The Washington Supreme Court ruled that the economic loss rule barred the buyers' negligent misrepresentation claim as a matter of law.

The court said that the rule applied even though the contract did not purport to allocate the risk: “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.” *Id.* at 687. Furthermore, the court held that the rule applies regardless of the sophistication or lack thereof of the parties. *Id.* at 688-89.

This case is governed by *Alejandre*. As in *Alejandre*, the buyers of residential real property brought a negligent misrepresentation claim against the sellers, claiming that the seller had misrepresented the condition of the property. As in *Alejandre*, there was an error or inaccuracy in the disclosure statement. As in *Alejandre*, the damage was limited to the property itself. Under these circumstances, the economic loss rule precludes the negligent misrepresentation claim. This court must reverse the judgment to the extent based on that claim.

2. The Buyers Did Not Justifiably Rely as a Matter of Law.

Even if the economic loss rule did not apply, reversal of the judgment insofar as based on the negligent misrepresentation claim would still be required. As will be discussed, as a matter of law, the buyers could not have justifiably relied on any misrepresentations.

Justifiable reliance on the claimed misrepresentations is a required element of a negligent misrepresentation claim. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998). “[R]eliance is justifiable if it is reasonable under the circumstances.” *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 551, 55 P.3d 619 (2002). If the correct information is reasonably ascertainable by the buyer, the buyer cannot justifiably rely on the seller’s representations. *See Rainier National Bank v. Clausing*, 34 Wn. App. 441, 446, 661 P.2d 1015 (1983). When a careful, reasonable inspection would disclose the problem, there can be no recovery. *See Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 697, 106 P.3d 258, *rev. denied*, 155 Wn.2d 1026 (2005).

Generally, whether a plaintiff justifiably relied on a misrepresentation presents a question of fact for the fact finder, here the trial court. When reasonable minds can reach but one conclusion, however, questions of fact may be determined as a matter of law. *Barnes v. Cornerstone Invs., Inc.*, 54 Wn. App. 474, 478, 773 P.2d 884, *rev. denied*, 113 Wn.2d 1012 (1989).

Again, the *Alejandre* case, 159 Wn.2d 674, is dispositive. There the earnest money agreement between the parties made the sale of the house contingent on inspection of the septic system. Under the agreement, if the buyer disapproved of any inspection report, the buyer had to notify

the seller and identify his objection. Absent such notice, the inspection contingency would be deemed satisfied.

An inspection occurred and the buyers were advised that the septic system's back baffle could not be inspected, although there was no obvious malfunction at the time. The seller's disclosure statement had stated that the septic system had no defects. After closing of the sale, the buyers discovered that the septic system was defective and sued for fraudulent concealment.

As with negligent misrepresentation, a plaintiff claiming fraudulent concealment must show justifiable reliance. *See Pacific Northwest Life Insurance Co. v. Turnbull*, 51 Wn. App. 692, 701, 754 P.2d 1262, *rev. denied*, 111 Wn.2d 1014 (1988). "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." *Alejandre*, 159 Wn.2d at 690. In *Alejandre*, the Washington Supreme Court ruled that the buyers had failed to show the required reliance as a matter of law, explaining:

[T]he 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.

Id. at 690.

Alejandre is on all fours with this case. As in *Alejandre*, the RESPA here included an inspection addendum that conditioned the sale on an inspection satisfactory to the buyers. The agreement provided, “This inspection contingency SHALL CONCLUSIVELY BE DEEMED SATISFIED (WAIVED) unless Buyer gives notice of disapproval”

It further provided:

ATTENTION BUYER: You should carefully note paragraphs (1)(b) and (1)(c)(ii). Unless you give these notices, you may be required to purchase the Property without the Seller having corrected the conditions noted in the inspection report and without any alternative remedy for those conditions.

....

(Ex. 32)

The buyers’ first inspector refused to inspect the roof. Hence, as in *Alejandre*, the buyers here knew they had an incomplete inspection report. Although the parties negotiated an amendment to the addendum—at the buyers’ request—to allow additional time for a roof inspection, the buyers ultimately decided to forego the opportunity to inspect the roof. It is undisputed that an inspection would have shown them the roof had leaked in the past: their own expert testified as much. (Clapp Dep. 117-18)

Thus, under *Alejandre*, the buyers here cannot be deemed to have justifiably relied on any misrepresentations about the roof as a matter of

law. *See also Hoel v. Rose*, 125 Wn. App. 14, 105 P.3d 395 (2004) (no justifiable reliance on misrepresentations where buyer had full opportunity to inspect but chose not to).

The buyers' claim, and the trial court's finding, that Mr. Russi orally advised them he had never had problems with the roof and that the buyers had relied on this representation as well as the form 17 representation is irrelevant. The buyers not only had the opportunity to inspect, they actually went so far as to obtain an extension of time to have another inspector inspect the roof. And when it rained the day the inspector came so that the inspection could not be done, they did not ask for another extension to allow the inspection. (RP 1609) Moreover, their own expert testified the roof problems would have been evident to any competent inspector. (Clapp Dep. 117-18)

Dewey v. Wentland, 38 P.3d 402 (Wyo. 2002), provides a helpful comparison. In that case, the buyers claimed that a real estate agent misrepresented the age of the house they had purchased. An inspection would have shown that the home was much older than represented. Affirming summary judgment dismissing this claim, the court explained:

[O]ne cannot recover if he blindly relies upon a representation, the falsity of which would be obvious to him upon a cursory examination or investigation. In this instance, . . . ***because they had the opportunity to inspect***

the property, no reasonable jury could conclude they relied on the statement.

Id. at 413 (emphasis added).

Furthermore, the purchase and sale agreement here contained an inspection contingency conditioning the agreement on the buyers' "personal approval of an inspection of the Property and the improvements on the Property". (Ex. 32) There would have been no reason for the parties to have included such a contingency in their agreement if the buyers could justifiably rely on the required form 17 disclosure form or on any oral representations the seller might make. To hold otherwise where, as here, inspection would have put the buyers on notice of a roof problem, would be to render the inspection contingency meaningless.

3. The Negligent Misrepresentation Claim Could Not Be Based on Form 17 under RCW 64.06.050(1).

In any event, even if the economic loss rule did not apply and the trial court's findings and conclusions on justifiable reliance are affirmed, RCW 64.06.050(1) precludes a negligent misrepresentation claim based on the form 17 disclosure statement. As discussed *supra*, RCW 64.06.050(1) bars the seller's breach of contract claim because it is based solely on the inaccurate answer in the form 17 and Mr. Russi had no actual knowledge of that inaccuracy. For the same reasons, the statute bars the

negligent misrepresentation claim against the Russis to the extent that claim is based on the inaccurate answer in form 17.

C. THE RUSSIS WERE DEPRIVED OF THEIR CONSTITUTIONAL RIGHT TO A JURY TRIAL.

Article 1, section 21, of the Washington Constitution provides, “The right of trial by jury shall remain inviolate” Over the objections of both the buyers and the sellers, the trial court struck the jury demand at the request of the agent. This was error.

Where a civil action is purely legal, there is a right to trial by jury. *Brown v. Safeway Stores, Inc.*, 94 Wn. 2d 359, 365, 617 P.2d 704 (1980). Where a civil action is purely equitable, there is no right to a trial by jury. *Id.*

“Where an action is neither purely legal nor purely equitable in nature, the trial court must determine whether it is primarily legal or equitable in nature, and has wide discretion in this exercise.” *Auburn Mechanical, Inc. v. Lydig Construction, Inc.*, 89 Wn. App. 893, 898, 951 P.2d 311 (1998). Whether an action is primarily legal or equitable is determined by considering all issues raised by all the pleadings at the time it rules on the motion to strike the jury demand. *Brown*, 94 Wn.2d at 368; *Auburn Mechanical*, 89 Wn. App. at 899.

Here, the action was neither purely equitable or purely legal. The buyers sought equitable relief in the form of rescission, but only against the sellers. Alternatively, they sought damages, purely a legal remedy, against the sellers. They also sought damages against the agent as well as injunctive relief against him. To support their claim for rescission, they alleged legal causes of action: breach of contract, fraudulent concealment, and negligent misrepresentation.

Pertinent factors in determining whether an action is primarily legal or equitable in nature include, but are not limited to the following:

“(1) who seeks the equitable relief; (2) is the person seeking the equitable relief also demanding trial of the issues to the jury; (3) are the main issues primarily legal or equitable in nature; (4) do the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury; (5) are the equitable and legal issues easily separable; (6) in the exercise of such discretion, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed; (7) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of such issues.”

Brown, 94 Wn.2d at 368.

Here, it was the plaintiff buyers who sought the equitable relief. And it was the buyers who filed the jury demand. (CP 1-2) Along with the sellers, the buyers strenuously opposed the agent’s motion to strike

that demand. (CP 280-91, 292-96, 297-307) As a practical matter, while the rescission and injunctive relief claims presented complexities, these complexities would arise only at the remedy stage of the proceedings. To show that they were entitled to either rescission against the sellers or injunctive relief against the agent, the buyers still had to prove the same causes of action for which they claimed damages.

Moreover, the Washington “constitution, in article I, section 21, protects the jury's role to determine damages.” *Auburn Mechanical*, 89 Wn. App. at 902. At the very least, a jury should have been impaneled to hear the buyers’ damages case.

Under these circumstances, “great weight should [have been] given to the constitutional right of trial by jury and [since] the nature of the action [was] doubtful, a jury trial should [have been] allowed.” *Brown*, 94 Wn.2d at 368. Conclusion of law 18, finding that rescission was the primary relief sought by the buyers and ordering rescission, is thus incorrect. (CP 627) This court should reverse and remand for a new trial before a jury.

Alternatively, the trial court here should have used an advisory jury on all or at least some of the issues. CR 39(c); *see Dash Point Village Associates v. Exxon Corp.*, 86 Wn. App. 596, 603-04, 937 P.2d 1148, 971

P.2d 57 (1997); *Scavenius v. Manchester Port District*, 2 Wn. App. 126, 129, 467 P.2d 372 (1970).

D. THE RUSSIS CANNOT BE LIABLE FOR THE ATTORNEY FEE/EXPENSES AWARD.

“Washington follows the American rule in awarding attorney fees.” *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). Under that rule, a court has no power to award attorney fees as a cost of litigation in the absence of a contract, statute, or recognized ground of equity providing for fee recovery. *Id.* (citing *State ex rel. Macri v. Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941)).

The only potential ground for awarding attorney fees here was contractual. Paragraph q of the RESPA contained the following attorney fees clause:

If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys’ fees and expenses.

(Ex. 32)

Conclusion of Law 19 in support of the principal judgment found:

Because this litigation arose out of the purchase and sale agreement and because that agreement was central to the dispute in the sense described in *Hill v. Cox*, 110 Wn. App. 394 (2002) and because of section q of the purchase and sale agreement, the Stienekes are entitled to recover reasonable attorneys’ fees and expenses against defendants Russi. . . . Defendants Russi are solely liable for reasonable attorneys’ fees and expenses. . . .

(CP 628) *See also* Conclusion of Law 1 to the attorney fees award. (CP 943) Clearly, if this court agrees that the breach of contract and negligent misrepresentation rulings must be reversed, so must the attorney fee and expenses award as well as the findings (FF 1, 3-6, 8-11) and conclusions (CL 19; CL 1, 4-9) that the buyers are entitled to fees and expenses, because the buyers will no longer be the prevailing party.

Even if only the breach of contract rulings are reversed, the attorney fee/expenses award must be as well. The attorney fee clause in the RESPA applies only to suits “concerning” the RESPA. The negligent misrepresentation claim did not “concern” the RESPA: Mr. Russi’s oral misrepresentations were not in the RESPA and, as discussed *supra*, the form 17 disclosure statement was not part of the RESPA.

If, however, this court concludes that this suit “concerned” the RESPA, and if the Russis prevail on appeal, they are entitled to their attorney fees in both the trial court and this court under the attorney fee clause in the RESPA. RAP 18.1.

VI. CONCLUSION

The buyers had no right to maintain this action against the sellers. RCW 64.06.050(1) bars both their breach of contract and negligent misrepresentation claims to the extent based on form 17. Their breach of contract claim must fail in any event, because form 17 could not be part of

the RESPA, and the trial court's breach of contract ruling was based exclusively on its belief that the form 17 was part of the RESPA.

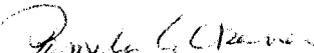
The economic loss rule also precluded the negligent misrepresentation claim. Furthermore, the buyers elected to waive their right to a roof inspection, so could not have justifiably relied on any misrepresentations—in writing or oral—about the roof.

Under these circumstances, the case should have never gone to trial. And even if it should have, the sellers were entitled to a jury trial.

The court should reverse and remand for entry of judgment in favor of the sellers, the Russis. Alternatively, reversal and remand for a new trial are required. In either event, the sellers are entitled to their attorney fees on appeal.

DATED this 23rd day of April, 2007.

REED McCLURE

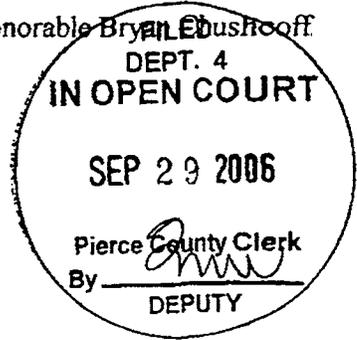
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Attorneys for Appellants

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04-2-04469-9 26233038 JD 10-02-06

The Honorable Bryan Edushoff



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

PETER GLENN STIENEKE and
CYNTHIA DIANNE STIENEKE, a
marital community,

Plaintiffs,

v.

TROY and RENEA RUSSI, a marital
community; STERLING GRIFFIN, an
individual; and KELLER WILLIAMS
REALTY,

Defendants.

NO. 04-2-04469-9

~~PROPOSED~~ ^{SUG} FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
JUDGMENT ^{DEC}

This matter came on for trial to the court sitting without a jury on March 20, 2006. The taking of testimony and presentation of evidence was completed on April 5, 2006. The parties presented closing statements on May 5, 2006. The court thereafter issued an oral ruling, finding defendants Russi liable to plaintiffs for negligent misrepresentation and breach of contract, and finding defendants Griffin and Keller Williams Realty liable to plaintiffs for negligence and breach of fiduciary duty. The court requested supplemental briefing with respect to the remedy of rescission and the damages that should be awarded

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~~PROPOSED~~ ^{SUG} FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND JUDGMENT - 1

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APPENDIX A

1 with and without rescission. After receiving the parties' supplemental briefing, the Decision
 2 of the Court (Damages Only) was issued on August 31, 2006. In accordance with the
 3 court's directions and with CR 54(e), plaintiffs' counsel has prepared findings of fact,
 4 conclusions of law and a judgment in accord with the oral decision of the court and with the
 5 court's decision as to the award of damages.

6 I. FINDINGS OF FACT

7
 8 1. Defendants Russi were the owners of residential real property located at 2502
 9 Sixth Street NW in Gig Harbor, Washington. The property was improved with a single-
 10 family residence built for defendant Troy Russi.

11 2. Plaintiffs Peter Glenn Stieneke and Cynthia Stieneke were living in a rental
 12 apartment in Seattle and looking to purchase a home in 2003. The Stienekes saw one
 13 property in the Saratoga community of Gig Harbor, which led them to call defendant Keller
 14 Williams Realty and to come into contact with defendant Sterling Griffin, who was a
 15 licensed real estate agent with Keller Williams Realty. The Stienekes described their criteria
 16 to Griffin and expressed interest in finding a home in the Saratoga community.
 17

18 3. The Russis' property was not listed for sale, but Griffin and Troy Russi were
 19 acquaintances and Griffin knew that the Russis just had purchased a new home. Griffin
 20 informed the Stienekes that he knew of a home that met their criteria and might be
 21 available. Griffin contacted Troy Russi to inform them that he had potential clients who
 22 might be interested in purchasing the Russis' home and asked whether the Russis would
 23 agree to showing the home. The Russis agreed.
 24
 25
 26
 27

28 [PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW,
 AND JUDGMENT - 2

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1 4. On March 6, 2003, Griffin showed the Russi home to the Stienekes. After
 2 viewing the home, the Stienekes decided to make an offer to purchase the home. The
 3 Stienekes called Griffin to inform him that they wished to make an offer, and then arranged
 4 to meet Griffin at Griffin's office for that purpose on the afternoon of March 6, 2003.

5 5. The Stienekes asked Griffin's advice regarding an offering price, as the Russis'
 6 home was not listed and they had not provided an asking price. Griffin advised the
 7 Stienekes that houses in Saratoga moved fast, and that they should make a "strong offer"
 8 over \$400,000. Griffin typically does a ~~competitive~~ ^{COMPARATIVE SUG JPD BEE} market analysis to obtain data to advise
 9 his buyer clients on value and price. Griffin did not do a ~~competitive~~ ^{COMPARATIVE SUG JPD BEE} market analysis.

10 6. The Stienekes decided to offer \$410,000. Griffin filled out a Residential Real
 11 Estate Purchase and Sale Agreement form to present the offer to the Russis. In the course
 12 of filling out the form, Griffin informed the Stienekes that Griffin was their agent and was
 13 representing them. The Stienekes signed the offer, and left Griffin's office by car to return
 14 to Seattle. The offer included a provision making the offer contingent upon an inspection.
 15

16 7. Griffin presented the Stienekes' offer to the Russis on the afternoon of March 6,
 17 2003. The Russis made a counteroffer of \$415,000. Griffin reached the Stienekes on their
 18 cell phone before the Stienekes reached Seattle to inform them of the counteroffer. The
 19 Stienekes told Griffin that they wished to accept the counteroffer.
 20

21 8. On the evening of March 6, 2003, Griffin faxed documents to the Stienekes for
 22 them to sign to state their acceptance of the Russis' counteroffer. The documents included
 23 the Law of Real Estate Agency pamphlet and a form for the Stienekes to acknowledge their
 24 receipt of the pamphlet.
 25
 26
 27

1 9. On the evening of March 6, 2003, the Stienekes signed the purchase and sale
2 agreement to evidence their acceptance of the \$415,000 counteroffer and also signed the
3 acknowledgment of receipt of the pamphlet, and sent these documents to Griffin by fax.
4 Griffin transmitted the acceptance to the Russis.

5 10. The Russis did not employ an agent in connection with the transaction.

6
7 11. The Stienekes hired Jim O'Brien and O'Brien Home Inspection to conduct an
8 inspection of the property. O'Brien inspected the property on March 10, 2003. O'Brien
9 prepared and provided to the Stienekes a list of 18 recommended items, and thereafter
10 supplemented the list to add three items.

11 12. The Stienekes were present when O'Brien inspected the house. During the
12 inspection, O'Brien informed the Stienekes that he does not inspect roofs. The Stienekes
13 informed Griffin that they wanted a roof inspection. Griffin obtained Russis' agreement to
14 extend the inspection contingency so that the Stienekes could obtain a roof inspection.
15

16 13. The Stienekes asked Troy Russi questions regarding the house and property.
17 Troy Russi told the Stienekes that he had not had any problems with the roof.
18

19 14. The Stienekes arranged for an inspection of the roof after O'Brien informed
20 them that he did not do roof inspections. However, when the roof inspector showed up the
21 workers were not able to go onto the roof to complete their inspection because it was
22 raining and it would not have been safe to do that. The Stienekes agreed to forgo the roof
23 inspection and to complete the transaction, in reliance on the statement in Russis' Form 17
24 disclosure that the roof had not leaked.

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TROY RUSSI'S ORAL STATEMENT
THAT HE HAD NOT HAD
PROBLEMS WITH THE ROOF AND ON

1 15. The Stienekes informed Griffin that they wanted to request that the Russis
2 remedy all 21 of the items recommended by Inspector O'Brien. Griffin told the Stienekes to
3 choose among the items, and expressed concern that the Russis would refuse to proceed
4 with the transaction if the Stienekes insisted on having all 21 items addressed. The
5 Stienekes reaffirmed to Griffin that they wanted all 21 items addressed.
6

7 16. Griffin thereafter informed the Stienekes that the Russis had agreed to remedy
8 all 21 items on O'Brien's list. This was not true. Troy Russi had informed Griffin that
9 there were items on the list to which he would not agree. Griffin never obtained the Russis'
10 written agreement in an addendum to the purchase and sale agreement to address the items
11 he had told the Stienekes that Russi had agreed to do.
12

13 17. Because the Russis did not have their own agent, Griffin decided to meet with
14 Troy Russi to help him complete the Real Property Transfer Disclosure Statement
15 ("Form 17") that is required to be made by a seller in conjunction with the sale of residential
16 real estate. Griffin filled out the form for the Russis. Griffin read the questions on the form
17 to Troy Russi, and checked the boxes on the form according to Troy Russi's oral answers
18 to the questions. Griffin did not read the instructions to Troy Russi. Troy Russi signed the
19 form, but did not read it.
20

21 18. In response to question number 4A on the form, "Has the roof leaked?" Griffin
22 checked the "No" box based on the response Troy Russi orally gave Griffin to that
23 question. Troy Russi testified that the question he heard was "Does the roof leak?"
24
25
26
27

1 19. Troy Russi's answer to question 4A in Form 17 regarding the roof was false.
2 The roof had leaked. Defendants Russi have admitted that the roof had leaked and that the
3 answer was false.

4 20. Troy Russi experienced roof leaks at various times during his ownership of the
5 home. Troy Russi contacted the builder, who in turn contacted the roofer Bruce Hunter-
6 Duschel who came out and worked on the roof. The roofer worked on the roof on various
7 occasions between about 1994 and 1997. He did not charge the Russis for any of his work
8 after the house was completed. After 1997 Troy Russi did not contact the builder or roofer
9 regarding any further roof leaks. The Russis had interior repairs resulting from a roof leak
10 done in 1999, including repairs to the front entry wall and replacement of the wood floor.
11

12 21. The work done by roofer Hunter-Duschel did not remedy the problem of a
13 "blind" or "dead" valley, which had not been properly constructed and which had caused
14 water to leak into the Russi home during heavy rain. Shortly after closing the transaction
15 and taking possession, the Stienekes experienced water intrusion from the roof into the
16 front entry of the home when they had the roof cleaned. The Stienekes continued to
17 experience water intrusion into the front entry during or after heavy rainfall thereafter.
18

19 22. Troy Russi was careless in providing the inaccurate answer to question 4A
20 regarding the history of the roof to Griffin, in signing the Disclosure Statement with the
21 inaccurate answer, and in telling the Stienekes orally that he had not had problems with the
22 roof.
23

24 23. Griffin was careless in filling out the Disclosure Statement for the seller rather
25 than allowing the seller to complete it himself. Griffin's conduct failed to protect his clients,
26
27

28 [PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND JUDGMENT - 6

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1 the purchasers Stieneke, from exactly what happened, an inaccurate statement regarding a
 2 material and important fact about the history of the house which the seller could seek to
 3 excuse on the basis that the buyers' agent had read the questions inaccurately or that the
 4 seller did not hear them correctly. The harm to the Stienekes was foreseeable to Griffin.

5 24. The history of the Russis' roof was material to their transaction with the
 6 Stienekes. Troy Russi's misrepresentations of the history of the roof pertained to a
 7 condition which threatened and caused damage to property, materially defeated the purpose
 8 of the purchase and sale agreement, ~~and substantially affected the value of the property.~~ *SMS*
 9 *MG JPD*

10 25. Griffin has not on any prior or subsequent occasion when acting as a buyers'
 11 agent assisted the seller in completing the Disclosure Statement. Griffin violated the
 12 standard of care of a buyers' agent by filling out the Disclosure Statement form for the
 13 seller.
 14

15 26. Griffin was careless and violated the standard of care of a buyers' agent by
 16 informing his clients that the sellers had agreed to fix the items on the inspector's repair list
 17 when the sellers had not in fact so agreed, and by failing to secure an addendum to the
 18 Purchase and Sale Agreement for the repairs.
 19

20 27. All of Griffin's actions and failures to act set forth in these findings were within
 21 the course and scope of his employment as a licensed real estate agent for the real estate
 22 agency and brokerage firm of Keller Williams Realty.
 23

24 28. The Disclosure Statement signed by Troy Russi became a part of the Purchase
 25 and Sale Agreement between the Russis and the Stienekes.
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 28

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW,
 AND JUDGMENT - 7

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1 29. It was foreseeable that the Stienekes would be harmed by Troy Russi's false
2 answer to question 4A in the Disclosure Statement form regarding the history of the roof
3 and by his oral statements that he had not had any problems with the roof.

4 30. The Stienekes suffered substantial harm as a result of defendants' actions. The
5 roof has continued to leak and needs to be replaced. There was damage caused by the
6 water leaking through the roof to the front entry walls and wood floor, which need to be
7 repaired or replaced.

8 31. The Stienekes were not careless, negligent, contributorily negligent or at fault
9 with respect to the history of the roof, the roof leak, and the resulting damage. The
10 Stienekes reasonably and justifiably relied on Russi's Disclosure Statement and on Troy
11 Russi's oral statements regarding the roof. The Stienekes did not know that the roof had
12 leaked when they purchased the property. The history of roof leaks was not readily
13 apparent from an inspection of the property.

14 32. It will cost \$54,010.50 to replace the roof. Sheetrock and repainting will cost
15 \$10,038.00. It will cost \$5,000 to replace the portion of the wood floor that was damaged.
16 The Stienekes will incur \$3,000 in expenses for storage and temporary housing during
17 repairs. The total of these damages is \$72,048.50.

18 33. Defendants Russi are collectively responsible for 45 percent of plaintiffs'
19 damages. Defendants Griffin and Keller Williams Realty are collectively responsible for 55
20 percent of plaintiffs' damages.

21 34. The Stienekes have paid the purchase price and have performed all things
22 required of them to be performed by the purchase and sale agreement.

35. There has been extraordinary appreciation in real estate values subsequent to the Stienekes' purchase of the Russi property. In one of the three years between the purchase and trial, residential real estate in the Gig Harbor area appreciated by approximately 29 percent. This increase would apply to the property purchased by the Stienekes. Property values in the area appreciated by substantial percentages in the other years. Again, this increase would apply to the property purchased by the Stienekes.

36. The Stienekes can ~~retain the benefit of the increased market value by retaining the property. They can be made whole~~ ^{BE MADE WHOLE INCLUDING ANY APPRECIATION IN MARKET VALUE} by accepting an award of damages to repair the roof ^{to} and make the interior repairs attributable to the leaks.

37. Any finding of fact which properly should be regarded as a conclusion of law shall be adopted by this reference as a conclusion of law.

II. CONCLUSIONS OF LAW

1. The court has personal jurisdiction over the parties and jurisdiction over the subject matter of this action.

2. Troy Russi's representations to the Stienekes regarding the history of the roof in the Disclosure Statement and orally were false and constituted negligent misrepresentation. The information was provided to guide the Stienekes in their purchase decision. Troy Russi knew or should have known that the Stienekes would use and rely on his representations regarding the roof.

3. Troy Russi was negligent in ~~communication~~ ^{communicating} the false information regarding the history of the roof to the Stienekes.

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1 4. The Stienekes relied on the false information supplied by Troy Russi. The
 2 Stienekes had a right to rely on the information, and their reliance was justified and
 3 reasonable under the surrounding circumstances.

4 5. The history of the roof was material to the transaction. Troy Russi's negligent
 5 misrepresentations of the history of the roof materially defeated the purpose of the
 6 agreement, and pertained to a condition which ~~substantially affected the value of the~~
 7 ~~property and which~~ threatened and caused damage to property.
 8

9 6. Troy Russi's negligent misrepresentations regarding the roof were a direct and
 10 proximate cause of the Stienekes' damages.

11 7. The Stienekes have proved the elements of negligent misrepresentation by clear,
 12 cogent, and convincing evidence.
 13

14 8. The Disclosure Statement was part of the agreement between the Russis and the
 15 Stienekes, pursuant to its terms and pursuant to the circumstances surrounding the
 16 formation of the agreement as established by the evidence. Troy Russi's misrepresentation
 17 regarding the history of the roof in the Disclosure Statement constituted a material breach
 18 of the purchase and sale agreement between the Russis and the Stienekes. That breach was
 19 a proximate cause of the Stienekes' damages.
 20

21 9. Griffin was careless, failed to exercise the reasonable care that would be
 22 expected of a buyer's real estate agent, and was negligent in his representation of the
 23 Stienekes.
 24

25 10. Griffin's negligence was a proximate cause of the Stienekes' damages.

26 11. Keller Williams Realty is liable to the Stienekes for Griffin's negligence.
 27

1 12. The relationship between Griffin and the Stienekes was a fiduciary one. Griffin
2 breached his fiduciary duties to the Stienekes.

3 13. Griffin's breach of his fiduciary duty to the Stienekes was a proximate cause of
4 the same damages the Stienekes sustained as a result of Griffin's negligence.

5 14. Keller Williams Realty is liable to the Stienekes for Griffin's breach of fiduciary
6 duty.

7
8 15. Although the court has found and concluded that Griffin breached his fiduciary
9 duty to the Stienekes, the court declines to order forfeiture of Griffin's commission. The
10 court's conclusion that Griffin breached his fiduciary duty to the Stienekes provides an
11 independent basis to award the Stienekes the same damages that the court is awarding them
12 for Griffin's negligence.

13
14 16. Defendants Russi, Griffin, and Keller Williams Realty are jointly and severably
15 liable to the Stienekes for the Stienekes' damages.

16 17. Pursuant to the request of defendants Russi, the court has apportioned fault
17 among the defendants. The court finds Russis collectively responsible for 45 percent of the
18 Stienekes' damages, or \$32,421.83. The court finds Griffin and Keller Williams Realty
19 collectively responsible for 55 percent of the Stienekes' damages, or \$39,626.67. The court
20 finds and concludes that plaintiffs were without fault.

21
22 18. The primary relief sought by the Stienekes was rescission. In the exercise of its
23 equitable power the court has concluded that the purchase and sale agreement is voidable and that the
24 Stienekes are entitled to rescind their purchase. Troy Russi's misrepresentations materially
25 defeated the purpose of the transaction and substantially affected the value of the property.
26

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1 The court has considered the equities and what provisions, if any, would be required to
2 equitably restore the parties to their status prior to the transaction if it is rescinded. In its
3 decision on damages, which the court adopts into its findings and conclusions by this
4 reference, the court has declined to order the Russis to pay interest on the purchase price
5 and has declined to award any damages or other monetary adjustment if the Stienekes elect
6 to rescind the contract. As anticipated in that decision based on the Stienekes' briefing on
7 damages and rescission, the Stienekes have informed the court and defendants that they are
8 electing money damages, ~~in light of the court's refusal to order the Russis to pay interest or~~
9 ~~make any other payment to the Stienekes in conjunction with a rescission remedy.~~ *FILE*

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11 **BECAUSE THIS LITIGATION AROSE OUT OF THE PURCHASE AND**
12 **SALE AGREEMENT AND BECAUSE THAT AGREEMENT WAS CENTRAL [→ *]**
13 19. Pursuant to section q of the purchase and sale agreement, the Stienekes are
14 entitled to recover reasonable attorneys' fees and expenses against defendants Russi. There

15 is no ground on which to award fees and expenses against defendants Griffin and Keller
16 Williams Realty, and none are awarded. Defendants Russi are solely liable for reasonable
17 attorneys' fees and expenses. Plaintiffs may apply for an award of attorneys' fees and
18 expenses by separate motion within 30 days after entry of judgment.

19 20. Pursuant to the court's findings and conclusions, plaintiffs Stieneke are entitled
20 to judgment for damages against defendants in the amount of \$72,048.50, with liability to
21 be joint and several AS TO THAT SUM and to be apportioned between the defendants as set forth in these *FILE*
22 conclusions.
23

24 21. Any conclusion of law which should be properly regarded as a finding of fact
25 shall so be regarded.

26 * TO THE DISPUTE IN THE SENSE DESCRIBED IN *FILE*
27 HILL V. COX, 110 WN. APP. 394 (2002) AND BECAUSE OF

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28 [PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND JUDGMENT - 12

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III. JUDGMENT

Pursuant to the foregoing findings of fact and conclusions of law, the court enters the following judgment:

1. Judgment is hereby entered in favor of plaintiffs Stieneke against defendants Russi, Griffin, and Keller Williams Realty in the amount of \$72,048.50. Defendants are jointly and severably liable for these damages.

2. The court apportions fault and liability between the defendants, finding defendants Russi collectively responsible for 45 percent of the damages, or \$32,421.83, and finding defendants Griffin and Keller Williams Realty collectively responsible for 55 percent of the damages, or \$39,626.67.

3. Plaintiffs may apply for an award of reasonable attorneys' fees and expenses against defendants Russi only by motion within 30 days after entry of this judgment.

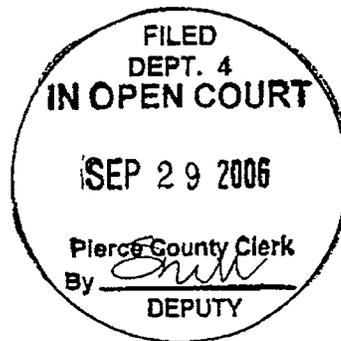
Dated this 29 day of SEPTEMBER, 2006.

Bryan Chushcoff
THE HONORABLE BRYAN CHUSHCOFF
PIERCE COUNTY SUPERIOR COURT JUDGE

Presented by:

GENDLER & MANN, LLP

By: *Michael W. Gendler*
Michael W. Gendler
WSBA No. 8429
Attorneys for Plaintiffs



[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT - 13

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Approved as to form, ~~notice of presentation waived.~~

LEE SMART COOK MARTIN & PATTERSON, PS

By: Jeffrey P. Downer
Jeffrey P. Downer
WSBA No. 12625
Attorneys for Defendants Sterling Griffin
& Keller Williams Realty

GULLIFORD McGAUGHEY & DUNLAP PLLC

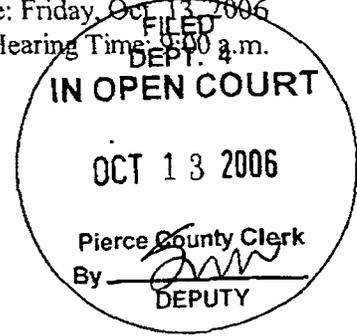
By: Shelie McGaughey
Shelie McGaughey
WSBA No. 16809
Attorneys for Defendants Russi

\\Stiencke(Den)\Findings of Fact WD 9 13 06



04-2-04469-9 28312978 ORG 10-18-06

The Honorable Bryan Chushcoff
Hearing Date: Friday, Oct 13, 2006
Hearing Time: 9:00 a.m.



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

PETER GLENN STIENEKE and
CYNTHIA DIANNE STIENEKE, a
marital community,

Plaintiffs,

v.

TROY and RENE A RUSSI, a marital
community; STERLING GRIFFIN, an
individual; and KELLER WILLIAMS
REALTY,

Defendants.

NO. 04-2-04469-9

~~FILED~~
[PROPOSED] FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER GRANTING PLAINTIFFS'
MOTION FOR REASONABLE
ATTORNEYS' FEES AND EXPENSES

This matter comes before the court on Plaintiffs' Motion for Reasonable Attorneys' Fees and Expenses. The court has considered the motion and declarations of Michael W. Gendler and Philip A. Talmadge filed in support of the motion, defendants Russi's opposition, plaintiffs' reply, and has heard the argument of counsel.

I. FINDINGS OF FACT

1. Plaintiffs are the prevailing parties. Plaintiffs have obtained significant relief, and prevailed on their most substantial claim for damages.

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING PLAINTIFFS' MOTION FOR
REASONABLE ATTORNEYS' FEES AND EXPENSES - 1

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Handwritten notes: "asset fact in the court's 'calculation' dated October 13, 2006" with initials and a checkmark.

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2. The court has used the "lodestar" method to calculate the "reasonable" attorneys' fees and expenses provided for in the parties' agreement, Ex. 32, ¶ a.

3. The time devoted to the case by plaintiffs' attorneys, including associate attorneys and law clerks, was necessary and reasonable to obtain the result that was achieved. Plaintiffs' motion reflects reasonable billing judgment and coordination between attorneys to avoid unnecessary duplication of effort. The use of associate attorneys and law clerks, at lower hourly rates, was cost effective and appropriate.

4. The time records of plaintiffs' counsel and law clerks are sufficiently detailed to identify the person performing each task, that person's category, the nature of the task, and the time devoted to it.

5. Plaintiffs' motion provided an appropriate and reasonable segregation of time devoted to claims exclusive to defendant Griffin for which plaintiffs are not seeking fees. Plaintiffs have excluded time specific to legal research on breach of fiduciary duty and to the Consumer Protection Act claim. They also have excluded time spent working with and presenting the evidence of standard of care expert Richard Hagar, whose testimony was offered to establish defendant Griffin's negligence and breach of fiduciary duty. Plaintiffs could have included the segregated hours in their motion because their claims against Griffin arose out of a common core of fact and were inextricably intertwined with their claims against defendants Russi, and because the claims involved related legal theories.

6. The amount of time devoted to the case overall was necessary and reasonable. The litigation was ongoing for nearly three years. Trial took 12 court days. The court requested post-trial briefing on damages, pursuant to which plaintiffs filed two briefs. The parties took

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFFS' MOTION FOR REASONABLE ATTORNEYS' FEES AND EXPENSES - 2

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12 non-party depositions and eight depositions of the parties. There was extensive motion practice, including three defense summary judgment motions and a motion by defendants Russi for reconsideration of denial of their summary judgment motion. The litigation was difficult and hard fought, requiring all counsel including plaintiffs' counsel to devote the time necessary to ensure a high quality of presentation.

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7. The hourly rates of plaintiffs' counsel and law clerks are reasonable. The rates reflect the skill and experience of each participant. The use of less experienced attorneys and law clerks for the tasks they performed was an appropriate allocation of resources and is reflected in the hourly rates.

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8. There is no reason to adjust the lodestar figure either upward or downward. Plaintiffs are the prevailing parties, and have achieved substantial success on their claims. They prevailed on the most substantial claim for damages, the damages pertaining to the roof. They also prevailed in their request for rescission, notwithstanding their election to accept a damages remedy rather than rescission. The quality of work by all counsel including plaintiffs' counsel was very high, but no upward adjustment of the lodestar is appropriate because that aspect is taken into account in determining reasonable hourly rates.

9. The lodestar figure for reasonable attorneys' fees is ~~\$226,209.37~~. See Declaration of Michael W. Gendler in Support of Plaintiffs' Motion for Reasonable Attorneys' Fees and Expenses (Oct. 5, 2006), ¶ 2, summarizing detail presented in ¶¶ 3-17 & Exs. 1-12.

\$145,740.10, including SUS

15 hours at \$250/hour for the Reply on Fees.

10. The expenses requested by plaintiffs of ~~\$28,379.34~~ were necessarily incurred and are reasonable. The largest categories of expenses are the expert witness fees of Don Clapp of DBM Investigative Engineers, and deposition transcripts. Mr. Clapp's services were

are awarded pursuant to the court's calculation

\$28,058.80 plus Mr.

in the amount
of \$780.00

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFFS' MOTION FOR REASONABLE ATTORNEYS' FEES AND EXPENSES - 3

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1 necessary and appropriate to identify and explain the roof leak and resulting water intrusion
2 into the house. The taking of the depositions by all parties was appropriate to the needs of the
3 case, and it was appropriate for plaintiffs to incur costs for transcripts as well as the other
4 itemized costs identified in Exhibit 11 to the declaration of plaintiffs' attorney Gendler. The
5 costs were identified and documented appropriately.

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~~173,748.90~~
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6 11. The total amount of reasonable attorneys' fees and expenses is ~~\$254,068.71~~

7
8 12. Any conclusion of law set forth below which properly should be regarded as a
9 finding of fact is hereby adopted as a finding of fact.

10 13. CONCLUSIONS OF LAW

11
12 1. Plaintiffs are entitled to recover reasonable attorneys' fees and costs pursuant to Hill
13 v. Cox, 110 Wn. App. 394, 41 P.3d 495 (2002) and the authorities cited therein, pursuant to
14 the parties' purchase and sale agreement (Ex. 32), paragraph q, and pursuant to the court's
15 Conclusion of Law 19 and paragraphs 1 and 3 of the court's Judgment entered on
16 September 29, 2006. This litigation arose out of the purchase and sale agreement between
17 plaintiffs and defendants Russi and the agreement was central to the dispute in the sense
18 described in Hill v. Cox, supra.

19
20 2. The lodestar method is applied to calculate reasonable attorneys' fees in cases where
21 there is a contractual fee provision. Mehlenbacher v. DeMont, 103 Wn. App. 240, 248, 11
22 P.3d 871 (2000).

23
24 3. The "lodestar" is determined by multiplying a reasonable hourly rate by the number
25 of hours reasonably expended on the matter. Id. at 248, quoting Scott Fetzer Co. v. Weeks,
26 122 Wn.2d 141, 149-50, 859 P.2d 1210 (1993). See also Bowers v. Transamerica Title Ins.
27

28 [PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING PLAINTIFFS' MOTION FOR
REASONABLE ATTORNEYS' FEES AND EXPENSES - 4

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1 Co., 100 Wn.2d 581, 675 P.2d 193 (1983) (utilizing lodestar method in Consumer Protection
2 Act case).

3 4. Plaintiffs have provided "reasonable documentation" of the work performed, as
4 required by Bowers and Mehlenbacher. Plaintiffs' time records have sufficiently informed the
5 court of the number of hours worked, the category of attorney performing the work, the type
6 of work performed, and the fees for non-lawyer services.

7
8 5. Plaintiffs prevailed on their principal and most important claim, that the history of
9 the roof was misrepresented to them. All of plaintiffs' claims "involve a common core of facts"
10 and were "based on related legal theories." Brand v. Department of Labor and Industries, 139
11 Wn.2d 659, 672, 989 P.2d 1111 (2000), quoting Hensley v. Eckerhart, 461 U.S. 424, 440
12 (1983). This case falls into the second category of cases identified in Brand and Hensley,
13 "cases in which the plaintiffs' claims are related to the extent that counsel's work on the
14 unsuccessful claims can be deemed to have been 'expended in pursuit of the ultimate result
15 achieved.'" Brand, 139 Wn.2d at 673, quoting Hensley, 461 U.S. at 435. The legal work
16 devoted to establishing defendants Russis' liability for misrepresentation, both intentional and
17 negligent, was "expended in pursuit of the ultimate result achieved." Brand and Hensley, supra.
18 See also Martinez v. City of Tacoma, 81 Wn. App. 228, 243, 914 P.2d 86 (1996) ("a plaintiff
19 who has won substantial relief should not have his attorney's fee reduced simply because the
20 [trial] court did not adopt each contention raised"), quoting Hensley, 461 U.S. at 440;
21 Mehlenbacher, 103 Wn. App. 247 (fees needs not be reduced where fee generating successful
22 claim is "inextricably intertwined" with claim for which fees were not recoverable).
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[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING PLAINTIFFS' MOTION FOR
REASONABLE ATTORNEYS' FEES AND EXPENSES - 5

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6. These cases apply to the time devoted by plaintiffs' counsel to plaintiffs' claims against Griffin as well as to the time spent on their claims against defendants Russi. Plaintiffs were successful on their claims against defendant Griffin, and those claims arose out of the "common core" of facts and were intertwined inextricably with plaintiffs' claims against the Russis. Griffin's negligence in filling out the Disclosure Statement for Troy Russi occurred in conjunction with and was intertwined with Troy Russi's negligent misrepresentation. The work that needed to be done by plaintiffs' counsel to establish the claims against both defendants involved a "common core of fact" and were intertwined with respect to the incidents and evidence of the case, the discovery that was needed to ascertain and establish the evidence, as well as the legal theories of the case.

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7. The number of hours and hourly rates of plaintiffs' attorneys and law clerks used to establish the lodestar was reasonable. There is no reason to adjust the lodestar either upward or downward. That plaintiffs are seeking a fee which is higher than the amount recovered does not warrant an adjustment of the lodestar or reduction of the fee in this case, where plaintiffs are the prevailing party and have recovered substantial damages. Brand, 139 Wn.2d at 667; Martinez, 81 Wn. App. at 244; Silverdale Hotel Associates v. Lomas & Nettleton Co., 36 Wn. App. 762, 774, 677 P.2d 773 (1984) ("a party need not recover its entire claim in order to be considered the prevailing party").

as set forth in the courts "calculation" b/c

8. The time spent by non-lawyers such as law clerks is compensable. Absher Construction Company v. Kent School District No. 415, 79 Wn. App. 841, 844-45, 917 P.2d 1086 (1995); Mehlenbacher, 103 Wn. App. at 248 (motion should itemize "the fees for non-lawyer services").

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFFS' MOTION FOR REASONABLE ATTORNEYS' FEES AND EXPENSES - 6

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1 9. In providing for "reasonable attorneys' fees and expenses" to the prevailing party,
2 Ex. 32, ¶ q (emphasis added), the parties' agreement provided for recovery of expenses in
3 addition to the statutory costs authorized by RCW 4.84.010. Ernst Home Center, Inc. v. Sato,
4 \$28,058.80 plus \$7800
5 80 Wn. App. 473, 491, 910 P.2d 486 (1996). The expenses of ~~\$28,379.34~~ set forth in Exhibits
6 11 and 12 to the Gendler declaration were reasonably and necessarily incurred, and should be
7 awarded.

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as modified by the court's "Calculation"
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8 10. Any finding of fact above which should properly be regarded as a conclusion of law
9 is hereby adopted as a conclusion.

10 ORDER

11 Pursuant to the foregoing findings of fact and conclusions of law, it is hereby ordered:

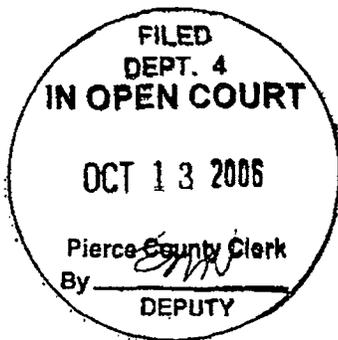
12 1. Plaintiffs' motion is granted;

13 2. Defendants Russi are ordered to pay to plaintiffs Stieneke reasonable attorneys' fees
14 \$145,740.10
15 in the amount of ~~\$226,289.37~~ and expenses in the amount of ~~\$28,379.34~~ for a total of
16 ~~\$173,748.90~~ \$174,578.90
17 ~~\$254,688.71~~

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\$28,058.80 plus \$780
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18 3. This order shall supplement the Judgment entered on September 29, 2006, and
19 plaintiffs may file an amended judgment summary consistent with this order.

20 Dated this 12 day of OCTOBER, 2006.



21
22 *[Signature]*
23 THE HONORABLE BRYAN CHUSHCOFF
24 PIERCE COUNTY SUPERIOR COURT JUDGE

25 [PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW
26 AND ORDER GRANTING PLAINTIFFS' MOTION FOR
27 REASONABLE ATTORNEYS' FEES AND EXPENSES - 7

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Presented by:

GENDLER & MANN, LLP

By: *Katherine Seage* WSBA No. 36288
for Michael W. Gendler
WSBA No. 8429
Attorneys for Plaintiffs

Approved as to form, notice of presentation waived:

LEE SMART COOK MARTIN & PATTERSON, PS

By: _____
Jeffrey P. Downer
WSBA No. 12625
Attorneys for Defendants Sterling Griffin & Keller Williams Realty

GULLIFORD McGAUGHEY & DUNLAP PLLC

By: *Shellee McGaughey*
Shellee McGaughey
WSBA No. 16809
Attorneys for Defendants Russi

\\Stieneke(Den)\Findings Order FINAL 10 05 06.wpd

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFFS' MOTION FOR REASONABLE ATTORNEYS' FEES AND EXPENSES - 8

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**IN THE SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

Calculation of Fees/Costs Award

Stieneke v. Russi

Cause No.: 04-2-04469-9

<i>Legal professional</i>	<i>Rate</i>	<i>Hours</i>	<i>Total</i>
Gendler	\$250.00	461.0	\$115,250.00
Mann	\$225.00	12.0	\$2,700.00
Arias	\$110.00	50.0	\$5,500.00
Lester	\$110.00	11.3	\$1,243.00
Rasmussen	\$190.00	3.7	\$703.00
George	\$125.00	26.5	\$3,312.50
Orman	\$60.00	141.8	\$8,508.00
Mensher	\$60.00	44.0	\$2,640.00
Dennig	\$210.00	10.2	\$2,133.60
Totals		760.46	\$141,990.10

Other fees

Don Clapp	\$12,724.60
Expenses	\$15,334.20
Total Total	\$170,048.90

Date: October 13, 2006.

Bryan Chushcoff, Judge

Association of Counsel, Brief of Appellants, together with a copy of this

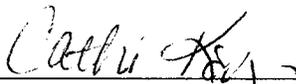
Affidavit of Service by Mail addressed to the following parties:

Michael W. Gendler
Gendler & Mann
1424 Fourth Avenue, #1015
Seattle, WA 98101-2217

Jeffrey Paul Downer
Matthew D. Taylor
Lee Smart Cook Martin & Patterson
701 Pike Street, #1800
Seattle, WA 98101-3929

Shellie McGaughey
McGaughey Bridges Dunlap PLLC
325 – 118TH Avenue SE, #209
Bellevue, WA 98005

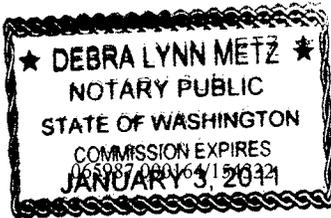
DATED this 23rd day of April, 2007.

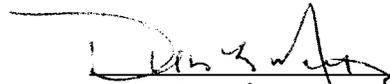


Cathi Key

SIGNED AND SWORN to before me on 4-23-07 by

Cathi Key.





Print Name: Debra Metz
Notary Public residing at: Tacoma
My appointment expires: 1-3-2011