

COURT OF APPEALS
DIVISION II

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NO. 35505-1-II

STATE OF WASHINGTON
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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**

REPLY BRIEF OF APPELLANTS

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Faced with the fact their breach of contract and negligent misrepresentation claims cannot stand, plaintiffs now seek affirmance based on claims they did not prove. This court should reverse.

I. ARGUMENT

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

The trial court held the Russis liable for breach of contract on the ground there was a misrepresentation in the Form 17 and that the Form 17 was part of the parties' real estate purchase and sale agreement (REPSA). (CP 623, FF 28; CP 626, CL 8) The Russis cannot be liable for breach of contract: (1) the Form 17 was not part of the REPSA; and (2) even if it were, RCW 64.06.050(1) bars the claim because the Russis had no actual knowledge of the error, inaccuracy, or omission in the Form 17.

1. The Form 17 Was Not Part of the REPSA.

The trial court erred as a matter of law in concluding that the Form 17 was part of the REPSA.

First, RCW 64.06.020 required that the Form 17 state:

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

Indeed, RCW 64.06.020(2) 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). The Form 17 here contained the required language on its first page. (Ex. 36) Plaintiffs have not even bothered to respond to this point. (Brief of Respondents 48-49) Second, even absent RCW 64.06.020, the very terms of the documents in question mandate the same result. Not only did the Form 17 specify “THIS INFORMATION IS FOR DISCLOSURE ONLY AND IS NOT INTENDED TO BE PART OF ANY WRITTEN AGREEMENT BETWEEN THE BUYER AND THE SELLER”, it also expressly required the buyers to acknowledge (Ex. 36, p. 5) (emphasis added):

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

Plaintiff buyers—who now claim that they, as opposed to the Russis, “recognize[] the responsibilities and significance of signing a legal document”—signed this acknowledgement. (Ex. 36, p. 5; Brief of Respondents 29) They signed it four days *after* the REPSA was executed. (Exs. 32, 36) The REPSA contains no language making it contingent on the Form 17. Instead, the REPSA includes an integration clause. Under these circumstances, the trial court’s conclusion that the Form 17 was part of the REPSA “pursuant to its terms and pursuant to the circumstances” is without any foundation whatsoever. (CP 626, CL 8)

Plaintiffs do not even bother to try explaining why Form 17's above quoted language does not mean what it says. Instead, they claim the trial court could properly find that the Form 17 became part of the REPSA on the ground that the parties confirmed their intent to modify the REPSA by providing in the Form 17 for rescission within 3 days. They further contend that the trial court declared that it would be "nonsensical" to give the Form 17 no meaning or effect. (Brief of Respondents 48)

The Form 17 is a creature of statute. RCW 64.06.020. The statute requires the form to provide for rescission. *Id.* But as RCW 64.06.020 mandates and the Form itself says, the form's purpose is for "disclosure only", not to be part of any written agreement between the parties. The Legislature provided for this as well as for relief by rescission. If plaintiffs have any quarrel with this, they should look to the Legislature to change the law. It is not for this court to second guess the Legislature.

Moreover, the trial court was simply wrong in concluding the Form 17 had to be part of the REPSA to prevent sellers from lying "all you want." (RP 1738-39) And plaintiffs are simply wrong in claiming the Russis' argument is that the Form 17 can never be actionable. RCW 64.06.050(1) provides that if the seller has actual knowledge of an error, inaccuracy, or omission in the Form 17, the seller can be liable. (Brief of Appellants at 14-15, 20) Thus, the Legislature provided a remedy for

deliberate lying. But where, as here, the seller did not actually know that the Form 17 contained an error, there is no liability.

Plaintiffs claim this court should not consider RCW 64.06.050(1) because it was not raised below. But “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 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); *see also* RAP 2.5(a)(2) (failure to establish facts upon which relief may be granted can be raised for the first time on appeal).

Plaintiffs do not dispute that RCW 64.06.050(1) is “pertinent to the substantive issues which were raised below.” *Bennett*, 113 Wn.2d at 918. Indeed, they concede as much, asserting that the statute “defines the parameters or elements of liability.” (Brief of Respondents 24)

Instead, plaintiffs claim the statute does not affect whether they had a right to maintain the action because “[i]t does not define or establish the cause of action.” (Brief of Respondents 24) But a statute does not have to do so to enable an appellant to raise it for the first time on appeal.

For example, a party may raise issues regarding the statute of limitations for the first time on appeal because the limitations period affects the right to maintain an action. *Morales v. Westinghouse Hanford Co.*, 73 Wn. App. 367, 370, 869 P.2d 120, *rev. denied*, 124 Wn.2d 1019 (1994). The statute of limitations does not “define or establish the cause of action.”

A party may raise the validity of process for the first time on appeal because that issue affects the right to maintain an action. *Jones v. Stebbins*, 122 Wn.2d 471, 479-80, 860 P.2d 1009 (1993). The validity of process does not “define or establish the cause of action.”

A party may raise for the first time on appeal whether plaintiff tendered taxes due before suing for recovery of property sold for taxes, because that issue affects the right to maintain the action. *Holzer v. Rhodes*, 24 Wn.2d 184, 188-89, 163 P.2d 811 (1945). Whether the taxes were first tendered does not “define or establish the cause of action.” *See also Capper v. Callahan*, 39 Wn.2d 882, 887-88, 239 P.2d 541 (1952) (differentiating between whether a complaint states a cause of action and issues that affect right to maintain action).

Here RCW 64.06.050(1) precludes a buyer of residential real property from imposing liability on the seller for any error, inaccuracy, or omission in the Form 17 when the seller had no actual knowledge of the

error, inaccuracy, or omission. The statute thus affects the plaintiff buyer's right to maintain an action based on the error or inaccuracy in the Form 17 and can therefore be raised for the first time on appeal.

Plaintiffs also claim that RCW 64.06.050(1) does not preclude their claims on the ground that Mr. Russi actually knew that the home had had a history of roof leakage. According to plaintiff, RCW 64.06.050(1) does not protect the seller from inadvertent errors or inaccuracies in the Form 17, but only from misrepresentations where the seller did not have actual knowledge of the condition of the property.

RCW 64.06.050(1) provides (emphasis added):

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. . . .***

The trial court did ***not*** find Mr. Russi had actual knowledge of the error or inaccuracy in the real property transfer disclosure statement. The court instead found he had been negligent, having testified he had heard "does the roof leak". (RP 1133; CP 621, FF 18)

Plaintiffs would have this court read RCW 64.06.050(1) as if it read (emphases added):

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 condition with respect to which the error, inaccuracy, or omission was made. . . .

The plain meaning of a statute's words determines its construction. *State v. Fisher*, ___ Wn. App. ___, 161 P.3d 1054 (2007). This court will not read in language it believes was omitted, intentionally or inadvertently, by the Legislature. *State v. Cooper*, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006). Yet that is what plaintiffs would have this court do.

Plaintiffs claim Washington courts have held sellers liable for Form 17 misrepresentations. But their cited cases do not support *the Russis* being liable. *Svendson v. Stock*, 143 Wn.2d 546, 23 P.3d 455 (2001), involved a broker's liability, not a seller's. The issue in *Brown v. Johnson*, 109 Wn. App. 56, 34 P.3d 1233 (2001), was attorney fees. The court did not decide whether RCW 64.06.050(1) precluded the buyer's claim. *Olmsted v. Mulder*, 72 Wn. App. 169, 863 P.2d 1355 (1993), *rev. denied*, 123 Wn.2d 1025 (1994), does not even mention RCW 64.060.050(1).

Plaintiffs also contend that under contract law, Mr. Russi is held to know the contents of the Form 17, even if he did not read it. But the Form 17—a creature of statute—is not a contract. RCW 64.06.020(2). Further, one who signs a document without reading it is not bound if he was not given an ample opportunity to examine it. *McCorkle v. Hall*, 56 Wn. App.

80, 83, 782 P.2d 574 (1989), *rev. denied*, 114 Wn.2d 1010 (1990).

Here, Mr. Russi was not given ample time to examine the Form 17. He and plaintiff's real estate agent, defendant Griffin, met to fill out the form shortly before they were to meet with the plaintiffs and their home inspector. (RP 1131) Griffin read the questions to Mr. Russi and marked down his answers. Griffin had never used this procedure before. Mr. Russi testified that they went through the form "relatively quick." (RP 693, 1132) Indeed, the trial court noted in its oral ruling (RP 1782):

. . . I got the impression that he [Mr. Griffin] may have been doing just that [have been in a hurry and was trying to get this thing over with rapidly] because I think that he felt that Mr. Russi was a little bit of someone who might just as soon not do this deal as do this deal, and he didn't want to do anything that was going to make Mr. Russi go, well, it's not worth this hassle, forget it. . . .

(Emphasis added.)

Further, when there is mutual mistake, even one who has had the opportunity to read the contract is not bound. *Chadwick v. Northwest Airlines, Inc.*, 33 Wn. App. 297, 303, 654 P.2d 1215 (1982), *aff'd*, 100 Wn.2d 221, 667 P.2d 1104 (1983). Mr. Griffin, plaintiffs' agent, either read the question about the roof incorrectly, or Mr. Russi misheard the question as whether the roof currently leaked, rather than had the roof ever leaked. He testified that had he been asked whether the roof had ever

leaked, he would have said, “yes”. (RP 1133-34) In either event, both men were mistaken as to the correct answer to the correct question.

Plaintiffs claim the integration clause in the REPSA did not preclude the Form 17 from becoming part of the REPSA because the REPSA allows modifications signed by both parties. Because both parties signed the Form 17, plaintiffs contend it must have become part of the REPSA, even though they signed an acknowledgement it was not intended to be part of any written agreement between them.

This makes no sense. If the parties had intended to modify the REPSA, they would have said so. They certainly would not have stated that the alleged modification was not intended to become part of any written agreement between them.

In sum, the trial court’s conclusion that the Russis breached the REPSA because the Form 17 became part of the REPSA is unsupported by the evidence or the law. The Russis cannot be liable for breach of the REPSA because the Form 17 never became part of it. The judgment must be reversed insofar as based on the breach of contract claim.

B. THE RUSSIS CANNOT BE LIABLE FOR NEGLIGENT MISREPRESENTATION.

In addition to finding the Russis liable for breach of contract, the trial court also found them liable for negligent misrepresentation. As

discussed in the Russis' opening brief, they cannot be liable for negligent misrepresentation as a matter of law, primarily because the economic loss rule bars that claim and, in any event, plaintiffs could not have justifiably relied on any misrepresentation as a matter of law.

Recognizing this, plaintiffs' brief barely mentions their negligent misrepresentation claim. Instead, to circumvent the economic loss rule, they claim this court should affirm on the basis of two claims the trial court did not even rule upon—fraud and fraudulent concealment.¹

1. The Economic Loss Rule Precludes the Negligent Misrepresentation Claim.

The economic loss rule precludes suits for negligent misrepresentation arising out of construction defects. *See Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007); *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213, 969 P.2d 486 (1998), *rev. denied*, 137 Wn.2d 1034 (1999). Yet the trial court here found the Russis liable for negligent misrepresentation arising out of construction defects.

Nevertheless, plaintiffs claim the economic loss rule does not require reversal, arguing that the rule does not apply (1) where there is

¹ Citing RP 1722, plaintiffs claim the Russis asked to be found liable for negligence rather than intentional torts, for insurance purposes. Plaintiffs claim this constitutes invited error. (Brief of Respondents 2, 3, 23) But RP 1722, a copy of which is included in the appendix, does not say what plaintiffs claim it does. The Russis vigorously argued they should not be liable under *any* of plaintiffs' theories. (RP 1705-25)

property damage to property other than the defective property or (2) where the claim is for fraud or fraudulent concealment.

2. There Was No Damage to Other Property.

The economic loss rule bars a claim for negligent misrepresentation arising out of construction defects, unless there is injury to the plaintiff's person or property other than the defective property itself. *Alejandre*, 159 Wn.2d at 685-86, 689. Plaintiffs claim that because the trial court awarded damages for repair of the leakage damage to the home's wood floor and for expenses for storage and temporary housing during the repairs, as well as damages for the repair of the leaky roof, the economic loss rule does not bar their negligent misrepresentation claim.

Plaintiffs fail to cite authority for this specific proposition. In fact, “[o]ther jurisdictions have concluded that a defective building creates only economic loss, *even if the particular defect causes damage to other parts of the structure.*” *Association of Apartment Owners v. Venture 15, Inc.*, ___ P.3d ___, ___ (Hawaii 2007) (2007 WL 2181605) (quoting *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259, 1268 (2000)) (emphasis added). Thus, the economic loss rule bars negligence claims against—

- a window subcontractor arising out of the installation of defective windows, even though the plaintiffs sought damages for water

damage to insulation, walls, ceilings, and electrical outlets. *Washington Courte Condominium Association-Four v. Washington-Golf Corp.*, 150 Ill. App. 3d 681, 683-87, 501 N.E.2d 1290 (1986).

- a masonry subcontractor arising out of his installing defective concrete floor slabs in a condominium, even though the plaintiffs sought damages for damage to the units, loss in value of the units, costs of experts, increases in maintenance costs, repair costs, and other consequential damages. *Venture 15*, 2007 WL 2181605, at *60.

- a home builder arising out of defective siding, even though plaintiff sought damages to replace windows, painting, and caulking. *Prendiville v. Contemporary Homes, Inc.*, 32 Kan. App. 2d 435, 83 P.3d 1257, 1264 (2004).

- a window contractor arising out of defective windows, even though plaintiff sought damages for repairs to both the interior and exterior of the building. *Oceanside at Pine Point Condominium Owners Association v. Peachtree Doors, Inc.*, 659 A.2d 267, 271 (Me. 1995).

- framing subcontractors arising out of defective framing, even though plaintiffs sought damages for water intrusion, damage to flooring and ceilings, and structural and wood decay. *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259, 1269 (2000).

- a window manufacturer arising out of defective windows, even though plaintiff sought damages for damage to exterior and interior walls and casements. *Bay Breeze Condominium Association, Inc. v. Norco Windows, Inc.*, 257 Wis. 2d 511, 651 N.W.2d 738, 746 (2002).

This case is no different. The plaintiffs here purchased a house. They did not purchase just a roof. The roof was defective. Nothing besides parts of the house was damaged. Thus, the economic loss rule bars their negligent misrepresentation claim.

3. There Was No Finding of Fraud or Fraudulent Concealment.

The trial court did not find fraud or fraudulent concealment.² While plaintiffs argue that a judgment can be affirmed on any ground within the pleadings and the proof, this precept does not apply where, as here, the trial court did not make findings of fact on issues on which the plaintiffs had the burden of proof. *See, e.g., Crites v. Koch*, 49 Wn. App. 171, 176, 741 P.2d 1005 (1987); *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 518, 728 P.2d 597 (1986), *rev. denied*, 107 Wn.2d 1022 (1997); *Lewis v. Estate of Lewis*, 45 Wn. App. 387, 391, 725 P.2d 644 (1986); *Brust v. McDonald's Corp.*, 34 Wn. App. 199, 209, 660

² Consequently, the Russis did not discuss these claims in their opening brief. Plaintiffs' claim that the Russis waived any appeal with respect to these claims is baseless.

P.2d 320 (1983). “[T]he failure of the trial court to make an express finding on a material fact *requires* that the fact be deemed to have been found against the party having the burden of proof.” *Crites*, 49 Wn. App. at 176 (emphasis added).

None of plaintiffs’ cited cases involved a bench trial where the trial court did not make findings on facts for which plaintiffs had the burden of proof. Nor have plaintiffs provided any authority for their contention that the absence of findings rule “applies against a party that did not prevail.” (Brief of Respondents 20) Even if plaintiffs are correct on this last point, they did not prevail on their fraud and fraudulent concealment claims.

A plaintiff claiming fraud must prove each of the following nine elements by clear, cogent, and convincing evidence:

- (1) representation of an existing fact;
- (2) materiality;
- (3) falsity;
- (4) the speaker's knowledge of its falsity;
- (5) intent of the speaker that it should be acted upon by the plaintiff;
- (6) plaintiffs ignorance of its falsity;
- (7) plaintiff's reliance on the truth of the representation;
- (8) plaintiff's right to rely upon it; and
- (9) damages suffered by the plaintiff.

Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). Fraud is never presumed. *Brown v. Underwriters at Lloyd's*, 53 Wn.2d 142, 145, 332 P.2d 228 (1958). “The burden of proving fraud is on the party alleging it, and it is a heavy burden.” *Columbia International Corp. v. Perry*, 54 Wn.2d 876, 880, 344 P.2d 509 (1959).

Nowhere in the trial court’s findings was there a finding that Mr. Russi knew the misrepresentations were false, let alone that this had been proven by clear, cogent, and convincing evidence.³ Although plaintiffs claim “the trial court did not find that Russi was unaware of his own false disclosure,” “[n]o presumption of knowledge arises from the mere fact that the representation was false.” *Brown*, 53 Wn.2d at 148. (Brief of Respondents 21) Plaintiffs had the heavy burden of proving Mr. Russi knew of the falsity. *Columbia International*, 54 Wn.2d at 880. The absence of a finding of such knowledge is deemed a finding there was no such knowledge. *Crites*, 49 Wn. App. at 176.

In fact, while the trial court did, as plaintiffs acknowledge, “reject[] Russi’s denial”, the court said it felt “sympathy for Mr. Russi”, that the trial court “d[id]n’t know whether or not Mr. Griffin read the thing to him correctly and he [Mr. Russi] gave him false information,” and that “Mr. Russi may well have made a completely innocent misstatement.” The court confirmed that it was not finding liability for intentional torts:

With respect to the joint and several and all of that kind of stuff, I don’t think that there is any intentional harm here particularly. I do think that there was negligence all the

³ As plaintiffs acknowledge, Mr. Russi denied making oral misrepresentations. (Brief of Respondents 25, n.11) The trial court found that as to the Form 17 error, Mr. Russi testified he heard “Does the roof leak”, not “Has the roof leaked.” (CP 621, FF 18)

way around. I would not, using Tegland [*sic*], segregate out anything.⁴

(RP 1786) Thus, the trial court found Mr. Russi had merely been “careless” and “negligent”, not fraudulent. (CP 622, FF 22; CP 625, CL 2; RP 1782, 1786) (Brief of Respondents 20)

Moreover, as will be discussed *infra*, because plaintiffs could not have justifiably relied as a matter of law, there could be no fraud, even if Mr. Russi could be deemed to have had knowledge of the falsity.

The fraudulent concealment claim, to the extent based on the Form 17, would be barred by RCW 64.06.050 for the reasons stated *supra*. In any event, plaintiffs failed to prove fraudulent concealment. A cause of action for fraudulent concealment in the sale of real property exists—

- (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 careful, reasonable inspection by the purchaser.

Alejandre v. Bull, 159 Wn.2d 674, 689, 153 P.3d 864 (2007); *Luxon v. Caviezel*, 42 Wn. App. 261, 264, 710 P.2d 809 (1985). Fraudulent concealment must also be proved by clear, cogent, and convincing

⁴ The trial court was likely referring to *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 109-10, 75 P.3d 497 (2003), holding that negligence damages must be segregated from intentional tort damages and that negligent defendants are jointly and severally liable only for negligence damages.

evidence. *Hughes v. Stusser*, 68 Wn.2d 707, 709, 415 P.2d 89 (1966). As with any other cause of action, plaintiffs had the burden of proof on all the elements of fraudulent concealment. *See generally Jeffers v. City of Seattle*, 23 Wn. App. 301, 311, 597 P.2d 899 (1979).

Nowhere in the trial court's findings is there a finding that at the time of the misrepresentations, Mr. Russi knew there were still defects in the roof. This was not surprising: Mr. Russi had had the roof repaired in 1997. (CP 622, FF 20) Afterwards, he had no further roof leakage.⁵ (RP 1064-68) While plaintiffs proved defects, the Russis did not know about them. The Russis' knowledge was an issue on which plaintiffs had the burden of proof. Because there was no finding, the fact is deemed to be found against plaintiffs. *Crites*, 49 Wn. App. at 176.

Even if a claim for fraudulent concealment could be supported by a misrepresentation of the roof's history, as opposed to of a concealed defect, the claim here must still fail. This is because the roof's *history*—by its very nature—would not have presented a danger to the purchaser's property or health. To the extent the trial court found otherwise, it erred. Indeed, there was no evidence of roof leaks since repairs in 1997.

⁵ Although the trial court found that in 1999 the Russis repaired interior damage from the roof leak, it did not find that leakage occurred in 1999. Mr. Russi testified that after the roof was repaired, he waited more than a year to repair the interior on the advice of his insurance company. (RP 1069)

Furthermore, nowhere in the trial court's findings is there a finding that a careful examination by the purchaser would not have revealed the defects, let alone that this had been proved by clear, cogent, and convincing evidence. It is true that Finding of Fact 31 stated that the history of roof leaks was not readily apparent from an inspection of the property. (CP 624) But the test is whether the defect could be disclosed by "a careful, reasonable inspection", *i.e.*, a reasonably diligent inspection. *Alejandre*, 159 Wn.2d at 689-90. Indeed, one of plaintiffs' cited cases, *Sorrell v. Young*, 6 Wn. App. 220, 491 P.2d 1312 (1971), states that the purchaser's ignorance of the defect must be "because *either* he has had no opportunity to inspect the property, *or* the existence of the [defect] was not apparent or readily ascertainable. *Id.* at 225.

Here, a careful, reasonable inspection would have revealed the defect. The trial court found the leakage was caused by a defective "blind" or "dead valley" in the roof. Plaintiffs' roof expert, Mr. Clapp,⁶ testified the dead valley had been improperly constructed because it was lined with an asphalt-impregnated material rather than metal, as code

⁶It is indeed odd that plaintiffs are now seeking to discredit their own expert. In any event, their claim the trial court disregarded Mr. Clapp's roof testimony as "too picky" misrepresents the record. The trial court found him "a little bit picky" about such things as whether the roof was sagging and could support the weight of the tile. (RP 1780-81)

required, and because there was a gap in the flashing, which was shorter than code required. (CP 622, FF 21; Clapp Dep. 36-37, 49-52, 55-56)

Mr. Clapp discovered the improper material during a visual, non-invasive inspection. (RP 795, 803) He discovered the flashing problem *during the defense expert's inspection*, when some tiles were removed from the roof. (Clapp Dep. 49-52) He testified a reasonable roof inspector would have removed some tiles and that the absence of flashing was “readily observable” when one knew what one was looking at. (Clapp Dep. 117-18, 120) In fact, he testified that a reasonable home inspector performing a visual, noninvasive inspection of the crawlspace in the attic would have discovered there was a water intrusion problem. (Clapp Dep. 117-19) Thus, this case is no different than *Alejandre*, where a careful examination would have led to discovery of the problem.

Plaintiff's reliance on the defense expert's estimate of the cost to find the cause of the leakage is misplaced. First, a buyer's due diligence does not require the buyer to find that a defect would actually cause damage, only that there is a defect. Plaintiff has cited no authority that a buyer must perform an expensive water test to determine whether defective construction actually causes leakage.

Second, in *Alejandre* two people—an experienced septic system person and a real estate inspector—did not discover the defect in question.

Alejandre v. Bull, 123 Wn. App. 611, 622, 98 P.3d 844 (2004), *rev'd*, 159 Wn.2d. 674, 153 P.3d 864 (2007). Ultimately, the excavation to discover the defect cost “many thousands of dollars.” *Alejandre v. Bull*, 123 Wn. App. 611, 617, 622, 98 P.3d 844 (2004), *rev'd*, 159 Wn.2d at 691. None of this prevented the Supreme Court from ruling that, as a matter of law, the defect could have been found by a careful examination.

Further, unlike Mr. Clapp, the defense expert did not testify that the roof’s asphalt material was improper; he did not testify that the flashing defects—which Mr. Clapp discovered *during the defense expert’s inspection* and measured *with the defense expert’s help*—was a problem. (RP 467; Clapp Dep. 55) Since the defense expert did not think these were issues and could not explain what caused the leakage, his testimony that it would cost \$10,000 to find its cause is irrelevant.

Plaintiffs’ attempt to distinguish *Alejandre* fails. While the seller there did disclose that a broken line to the property’s septic tank had been replaced, the line was not what went wrong after the sale. What went wrong was plugged drain fields caused by a missing baffle. The seller knew but did not disclose that the drain fields were not working. Thus, as here, the buyers were not told of the problem that led them to sue.

Indeed, the facts here are even more favorable to the Russis than they were to the seller in *Alejandre*. In that case, although one inspection

report told the buyers that the baffle could not be inspected, a subsequent inspection said everything was fine.⁷ Nevertheless, the Washington Supreme Court ruled that the seller was entitled to judgment *as a matter of law* on the buyers' fraudulent concealment claim because—

The [buyers] 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 [buyers] 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.

159 Wn.2d at 689-90.

Here, there was *no* report saying the roof was fine. Instead, plaintiffs' home inspector told them he did not do roofs. Thus, just as in *Alejandre*, the buyers here chose to ignore what they knew was an incomplete inspection in favor of the seller's representations.

Plaintiffs claim that if this court does not affirm, purchasers will have to walk away from transactions or obtain expensive invasive inspections. But if plaintiffs here had obtained a competent roof inspection, as they originally intended to do, they would not had to do either. A visual, noninvasive inspection would have told them the dead

⁷ *Alejandre* demonstrates the buyers need not have a report that actually shows the seller's representation is false, as plaintiffs seem to imply in discussing *Hoel v. Rose*, 125 Wn. App. 14, 105 P.3d 395 (2004). *Alejandre* also confirms the defect must not have been discoverable by "a careful, reasonable inspection". 159 Wn.2d at 689.

valley had been improperly constructed because it was not lined with metal, as code required. A visual, noninvasive inspection of the crawl space would have told them that there had been prior water intrusion.

4. There Was No Justifiable Reliance as a Matter of Law.

In any event, the Russis could not be liable because there was no justifiable reliance as a matter of law.

Alejandre again controls. There the buyers not only had an inspection report saying the baffle (the defect) had not been inspected, they also had a report that said the septic system was working fine. Yet, the Washington Supreme Court held there could be no fraud *as a matter of law* because the buyers could not have justifiably relied on the seller's misrepresentation of no defects in the septic system's operation:

[The buyers] 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.

159 Wn.2d at 690.

Here, plaintiffs elected to forego the roof inspection they had planned to do. Like the buyers in *Alejandre*, they knew the roof had not been inspected, yet accepted the incomplete inspection report. They failed

to exercise the diligence required and therefore could not have justifiably relied on any misrepresentation by Mr. Russi as a matter of law.

Plaintiffs claim buyers have a right to rely on a seller's representations and that the *Alejandre* seller's disclosure of prior repairs imposed on the buyers there a duty to further inspect. But that is not what *Alejandre* says. In *Alejandre*, the court ruled that because the buyers had one inspection report that they knew was incomplete, they could not rely on another inspection report that said the septic system was working fine. Thus, under *Alejandre*, buyers do not have a blanket right to rely on a seller's representations. Where, as here, the buyers knew their inspection report was incomplete, they could not reasonably rely on it where, as here, a reasonable investigation would have revealed the defect.

5. RCW 64.06.050(1) Bars the Claim Insofar As Based on the Form 17.

As explained in subsection A *supra*, RCW 64.06.050(1) bars the negligent misrepresentation claim to the extent based on the Form 17.

C. THE RUSSIS WERE ENTITLED TO A JURY TRIAL.

“The right of trial by jury shall remain inviolate” WASH. CONST. art. I, § 21. Accordingly, plaintiffs here filed a jury demand. When their agent moved to strike it, plaintiffs vigorously objected. (CP 1-2, 297-307) Now plaintiffs claim that striking the jury demand was warranted after all.

In the trial court, plaintiffs stated (CP 304):

There should be no dispute that the majority of the Stienekes' claims against the Russis are legal in nature. While the Stienekes' alternative remedy of rescission may be equitable in nature, . . . it is not the "first and foremost relief" sought by the Stienekes. To the contrary, it is an alternative relief to damages. . . .

. . . The court and jury will hear the same evidence, including damages, on Stienekes' claims against Russi. . . .

(Footnote omitted.) Plaintiffs should not be heard to claim otherwise.

D. PLAINTIFFS ARE NOT ENTITLED TO ATTORNEY FEES.

Plaintiffs claim the Russis have waived challenging that the action was in tort based on a contract containing an attorney fee provision. In addition, plaintiffs claim the only preserved attorney fees issue is that fees should not be assessed against the Russis if they prevail on appeal.

Wrong. Page 32 of the Russis' opening brief states:

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 REPSA applies only to suits "concerning" the REPSA. The negligent misrepresentation claim did not "concern" the REPSA: Mr. Russi's oral negligent misrepresentations were not in the REPSA and, as discussed *supra*, the form 17 disclosure statement was not part of the REPSA.

Since plaintiffs' breach of contract claim must be reversed so they can recover, if at all, only in tort, they are not entitled to attorney fees in the trial court or on appeal. *See Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 702, 106 P.3d 258, *rev. denied*, 155 Wn.2d 1026 (2005)

(fraudulent concealment); *Norris v. Church & Co., Inc.*, 115 Wn. App. 511, 517, 63 P.3d 153 (2002) (fraud).

Plaintiffs do not dispute that if they are not the prevailing party, their attorney fee award must be reversed. Nor do they dispute that *if* they would be entitled to fees if they prevailed, the Russis will be entitled to fees in the trial court and on appeal if the Russis prevail.

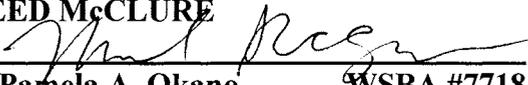
II. CONCLUSION

The economic loss rule bars the negligent misrepresentation claim. RCW 64.06.050(1) bars the breach of contract claim and, to the extent based on the Form 17, the negligent misrepresentation claim. The negligent misrepresentation claim in its entirety cannot stand because there could be no justifiable reliance as a matter of law.

The trial court not only did not find the Russis liable for fraud or fraudulent concealment, it did not make the necessary findings to support these claims. Under these circumstances, this court must reverse.

DATED this 14th day of September 2007.

REED McCLURE

By 

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Attorneys for Appellants

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1 I want to hit just very quickly on -- obviously,
2 the Court's well aware of the four causes of actions
3 against Mr. and Mrs. Russi. I think that this really
4 comes down to a burden of proof case. The fraudulent
5 concealment, plaintiffs must show a defect. There has
6 been no evidence of a defect. The sellers, Mr. and
7 Mrs. Russi, they didn't know about a defect. I submit
8 to you that all of the elements in fraudulent
9 concealment have not been met in this case, the same
10 for fraud, the same for negligent misrepresentation.

11 I must suggest -- it's my duty to my client to
12 suggest -- that I don't believe that the Court will get
13 to negligent misrepresentation; but, if you do, really,
14 the only thing that Mr. Russi did wrong in this case
15 was not read the Form 17 disclosure. Obviously, he
16 won't be doing that again. It doesn't rise to the
17 level of fraud. It doesn't rise to the level of intent
18 based on the standard. You know, this standard, clear,
19 cogent, and convincing, we know from all of the civil
20 trials that we have all done -- you know, we always
21 talk about preponderance of the evidence and, you know,
22 what is clear, cogent, and convincing. Well, if our
23 preponderance of evidence is, you know, the scales of
24 justice and we are over on the total -- you know, the
25 tipping side, then I would suggest that that burden is

Brief of Appellants, together with a copy of this *Affidavit of Service by*

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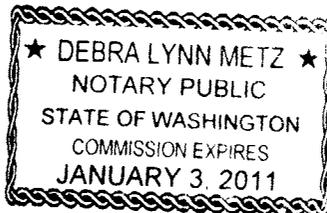
DATED this 14th day of September, 2007.

Cathi Key

Cathi Key

SIGNED AND SWORN to before me on September 14, 2007 by

Cathi Key.



065987.000164/164337

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