

No. 36944-3-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

TIMOTHY JACKOWSKI AND ERI TAKASI,

Appellants,

vs.

DAVID BORCHELT, et ux., et al.

Respondents

COURT OF APPEALS
DIVISION II
08 APR -8 PM 8:55
STATE OF WASHINGTON
BY DEPUTY

JACKOWSKIS' OPENING BRIEF

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I. Assignments of Error

Assignments of Error

- A. The Trial Court erred in granting Defendants Hawkins Poe, Inc.'s and Robert Johnson's two Motions for Summary Judgment, dismissing Plaintiffs Jackowskis' claims of negligent misrepresentation and dismissing all other claims pursuant to Alejandre v. Bull and the economic loss rule.
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Issues Pertaining to Assignments of Error

- A. Are any of Jackowskis' monetary damage claims barred by the Economic Loss Rule, or was the landslide damage to their house a sudden, catastrophic event more properly remedied in tort?
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- F. Can Jackowskis receive a jury trial as is their Constitutional right as to their legal claims, when they have not yet elected equitable or legal remedies?
- G. Can the Jackowskis receive attorneys' fees on appeal?

II. SUMMARY OF ARGUMENT

The case of Alejandre v. Bull, published just weeks before the hearings in this case, was the basis for all the Trial Court's rulings dismissing most of Jackowskis' case. The Trial Court misapplied Alejandre. It misapplied the economic loss rule to claims and remedies beyond the scope of the rule, and it misapplied what constitutes "reasonable reliance" under Alejandre to rule that Jackowskis were unreasonable to rely on most of the defendants' misrepresentations.

The economic loss rule bars a plaintiff from recovering *tort* damages in an *action at law* for *purely economic losses* when the parties' relationship, rights and duties *arise exclusively from and are governed exclusively by contract*. Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864

(2007); Stuart v. Coldwell Banker Commercial Group, Inc., 109 Wn.2d 406, 745 P.2d 1284 (1987). The rule thus maintains a proper, but permeable, barrier between tort and contract. However, there are many limitations to this rule, which were disregarded by the Trial Court.

First, the economic loss rule does not apply to bar claims in tort that arise from extreme and catastrophic events beyond the reasonable expectations of the parties. Here, the claim arose from the structural failure of the house. Thus, Jackowskis' losses were *not economic losses* but *physical damage*. The Trial Court should not have applied the economic loss rule at all. Moreover, the economic loss rule applies only if a party is seeking a *recovery at law* of economic loss damages; it does not apply to bar claims in equity for equitable relief, like rescission.

Even if the economic loss rule does apply, it does not bar a plaintiff from seeking a contractual remedy under a contract, including claims for expectation damages on a breach of warranty contract claim. Defendants Borchelt (sellers) breached their contract by failing to provide a house as warranted. Hawkins Poe and Robert Johnson, Jackowskis' agents, breached their contract by failing to fulfill their statutory duties as real estate agents (imported into the contract by law). The economic loss rule does not affect the Jackowskis' contract claims.

Conversely, Alejandre bars a plaintiff from seeking tort damages in an action at law for purely economic losses when the parties' relationship is governed by contract. It does not bar a plaintiff from seeking damages, even purely economic losses, in tort when there is no contract privity.

Alejandre has nothing to say when Jackowskis, who are not in privity of contract with the sellers' agents, Windermere and Mr. Jef Conklin, suffer damages when those agents make misrepresentations and breach duties. This situation supports a classic negligent misrepresentation case.

Further, the economic loss rule limits recovery in tort only when the parties' relationship, rights and duties *arise exclusively from and are governed exclusively by contract*. If the relationship between the parties is not governed *only by agreement*, such as a professional/client relationship, then Alejandre does not restrict recovery when sought in malpractice. However, the Trial Court, in dismissing Jackowskis' *malpractice* claims against Hawkins Poe and Johnson, applied Alejandre as a general bar to any malpractice claim by a client against a professional.

Finally, while Alejandre preserved the claims of fraud and fraudulent concealment (even between parties in contractual privity), the Alejandre Court, in a fact-specific discussion, held that the plaintiffs unreasonably relied on the defendants' alleged misrepresentations. The

Trial Court misapplied the holding to find that Jackowskis' reliance on the defendants' misrepresentations was unreasonable, except for the concealment of the floor cracks. Alejandre is distinguishable; Jackowskis reasonably relied on all the misrepresentations.

III. STATEMENT OF THE CASE

Plaintiffs Tim and Eri Jackowski were residents of Clearwater, Florida, who sought to buy waterfront property in South Puget Sound. Living far away, they had to rely primarily on their agent at Hawkins Poe Realtors. CP 1189, 1191. Hawkins Poe assigned the file to an inexperienced agent named Robert Johnson, even though Hawkins Poe's broker, Steve Furst, had a policy not to give waterfront-purchasing clients to an inexperienced agent. *Cf.* CP 1035 and 1040 with CP 1000. Hawkins Poe breached its duty of care by giving the file to Johnson without mentoring him through the representation. CP 1187-88; 1185. Johnson and Jackowskis entered into a written agency agreement. CP 1035. Johnson communicated with Jackowskis by email. CP 1036-37. Hawkins Poe has lost all the emails. CP 1036; 993-95; 1014-15. Jackowskis eventually chose to buy the Borchelt property. CP 1391.

Unknown to the Jackowskis, the property was in a landslide hazard area and had a history of slope instability. In 1995 or '96, during a slide,

six inches of soil had subsided out from under the Borchelts' front steps, leaving the steps hanging in the air. CP 410; 351. The Borchelts concealed this on the Seller Disclosure Statement, Form 17, answering "no" to the question, "[h]as there been any settling, slippage or sliding of the property or its improvements?" and "no" to the question, "[i]s there any material damage to the property from fire, wind, floods, beach movements, earthquake, expansive soils, or landslides?" CP 921-22.

Preparing to build an addition, in June 2000, Borchelts sought and received a slope stability report from geologist Hal Parks. CP 338. *See* Report at CP 1215-25. *See* CP 1187 and 1200-01 for interpretations of the report. The report identified unstable slopes on the property and mandated that any addition must be built uphill of the existing house, to the west, on firm native soil. CP 1223. Likewise, Borchelts' engineer, Randall Thompson, engineered the plans for the addition based on the proviso that it be built on firm native soil, not on fill. CP 1406, 1408. If the Borchelts had told Parks that they planned to build the addition to the north, he would have required an "engineered fill." CP 347, 348.

Borchelts built the addition north, not west, of the house. They did not build it on native ground or engineered fill. Instead, they had their contractor, Dusty Watz, take soil from elsewhere on the property and

deposit it on the building site, directly underneath the slab foundation of the addition. CP 334-35. Robin Borchelt knew there was fill on the site. CP 309-10. Borchelts concealed this on Form 17, answering “no” to the question, “[d]oes the property contain fill material?” CP 922. Likewise, they concealed the fact that they built the addition contrary to engineer and geologist recommendations, answering “no” to “[a]re there any other existing material defects affecting the property that a prospective buyer should know about?” *Id.*

Borchelts cleared the slope downhill from the house to the water of native plants and trees. CP 407. After they built their addition in 2002, their contractor began building an unpermitted road from the house to the water. Mason County ordered them to stop. CP 301-02. The County then required Borchelts to revegetate the area. It required 90% of the plants to live and also required Borchelts to post a bond pending restoration of the area. Initially, Borchelts concealed this as well, answering “no” on Form 17 to “[a]re there any other existing material defects affecting the property that a prospective buyer should know about?” and “no” to the question, “[i]s there any study, survey project, or notice that would adversely affect the property?” CP 922, 919.

Borchelts were represented by Jef Conklin, a real estate agent with Windermere. Conklin is an experienced real estate agent who specializes in waterfront property. CP 264. He has taken classes on shoreline property and knew what site conditions indicate that a buyer of waterfront property should get geotechnical advice. CP 265-69. These conditions include cracks or fissures and vegetation and misaligned trees. *Id.* Conklin testified he would handle the site conditions the same whether he were acting as buyer's or seller's agent. CP 267, 270. He estimates that he visited the Borchelt property about 10 times.

Conklin ignored clear warning signs. Maple trees on the parcel to the north, within a few feet of the property line and clearly visible from Borchelts' land, were leaning out at a 30-degree angle (a sign that a landslide has occurred in the past). CP 286-87. Conklin also had personal knowledge of past landslides in the area. Regarding two nearby properties, he testified, "[S]everal years after I sold [the northernmost parcel], it sloughed and shifted down into the bay quite significantly, and it continues to move as we speak. The [other parcel] was a residence in the Franjo beach area, which historically has at least in recent years soil instability issues, and it's well known and documented." CP 275. Despite these facts, he did not question the Borchelts' choice to answer "no" to the

question on Form 17, “[a]re there any other existing material defects affecting the property that a prospective buyer should know about?” (CP 922), nor did he inform Jackowskis of the significant sloughs in the neighborhood. However, he testified that, “If there’s a significant slough in the neighborhood, it would have been something worth exploration. . . .” CP 283. Charles Hawkins, owner of Hawkins Poe, testified that he advised a buyer to get a waterfront bank inspected when a house four doors down fell into the bay. CP 1020.

While preparing to sell the house, Conklin walked through the house with the Borchelts. CP 278, 317. At the time they walked through, the concrete slab floor of the addition was uncarpeted. *Id.* There were large cracks in the slab, ranging from 1/8 inch to 3/8 inch in width. CP 1399. The cracks would have been readily apparent to anyone visiting the house. CP 354. On March 1, Conklin received a follow-up feedback report fax from another real estate agent, George Greer, who had shown the Borchelt house to some prospective buyers. CP 279-81. Greer said in the fax that the people were interested in the house but were concerned about the cracks in the slab. CP 291. Thus, Conklin knew there were cracks material enough to cause prospective buyers concern. Conklin wrote Mrs. Borchelt’s name and number on the bottom of the fax (*id.*),

indicating that he had probably called her and told her about the fax. CP 280-81. It is a fair inference that Mrs. Borchelt also knew that there were cracks material enough to cause buyers concern.¹ On March 18, Conklin printed a page of “Agent Remarks” that were drafted a few days earlier: “Floors being done - please remove shoes. Concrete & Carpet being done March 13th, 16th and 17th - Please NO showings on those days!” CP 294. A few minutes later, he printed a second page: “New carpet - please remove shoes.” CP 296. The carpets concealed the cracks.

The cracks were material and were significant; *they signified* that the soil under the addition was unstable and was moving as early as March 2004, and that the addition slab had been poured on unconsolidated fill. CP 354, 380, 382, 387, 1399. They were also concealed by the carpet. Mr. Conklin was asked in deposition, “You know, after that carpet goes in, no other buyer is going to see cracks in that floor. You know that?” CP 280. He answered “Right.” *Id.* Even knowing about the cracks, Mr. Conklin did not question the Borchelts’ decision to answer “no” on Form

¹ The contractor who filled the cracks with caulk and covered them with carpet, Charles Rutherford, testified that he discussed the cracks with Mr. Borchelt and gave him a bid for the job on February 6, 2004, the same day the Borchelts filled out and initialed the Form 17. CP 108-14 (not considered by Trial Court, RP 09/14/07 at 4-5).

17, nor did he disclose the existence of the cracks to Jackowskis or to their agents. Jackowskis' expert offers his opinion that it was a breach of Conklin's agent's duty to conceal the cracks. CP 386-87.

In May 2004, after the cracks had been covered with carpet, Jackowskis flew out to Washington, met with their realtor, Johnson, and viewed the Borchelt house. Mr. Jackowski did not see the cracks, CP 221, and did not see any signs, inside or out, that indicated that there was fill on the property. CP 220. He relied on Borchelts' representation that there was no fill on the property. *Id.* He and his wife made an offer on the property and Borchelts accepted on or around May 13, 2004. The parties then entered into a Purchase and Sale Agreement ("PSA").

Around that same time, Mason County conducted its routine annual inspection of the plants it had ordered to be planted and determined that 90 percent had not lived. CP 318-19. The Borchelts *only then* decided to disclose to Jackowskis the fact that they were required to revegetate the slope, that the revegetation was not yet complete, and that they had posted a \$4,400 bond with the County. CP 319-21. They amended their Form 17 on May 13, 2004, adding, "Please refer to Mason County Dept. of Community Development letter attached regarding

Restoration Bond of \$4,400.00.” CP 923. Ms. Borchelt gave the letter to Conklin, who presumably gave it to Jackowskis’ agent. CP 321.

The letter of June 11, 2003 is a permit for the installation of an ecology block wall. It contains a hand-drawn map showing the wall, some riprap, and the required plants. It also contains an undated letter from Harold Parks that refers to erosion control vegetation, to a slope stability study and to a letter about the bond. CP 548-52. The permit letter of June 11 contains form language: “The following critical areas are present on this property: . . .” CP 548. Below that language are listed, “Long-Term Commercial Forest,” “Mineral Resource Lands,” “Inholding Lands,” “Wetlands,” “Critical Aquifer Recharge,” “Aquatic Management Areas,” “Frequently Flooded Areas,” “Landslide Hazard Areas,” “Seismic Hazard Areas,” and “Erosion Hazard Areas.” *Id.* “Aquatic Management Areas” and “Landslide Hazard Areas” are circled. *Id.*

Johnson gave the documents to Jackowskis. However, he cannot show that he did so before the inspection contingency period ran. CP 1048. Johnson characterized the letter as “dealing with planting issues or revegetation issues.” CP 289. He explained that “[the Borchelts] tried to put in a road. They got caught because they didn’t have a permit for it. And that it was the coastal people . . . that had them basically undo that

and put in plants so that the silt and the other material doesn't wash and kill the clams." *Id.* Mr. Jackowski "talked to Bob Johnson about it. He didn't have – didn't set off – no red flags went off for him. I felt comfortable with the characterization of what had happened and decided to continue with the – take it at face value and go through with purchasing the property." CP 290; *see also* 1191.

The PSA was amended to deal with the failed revegetation. The amendment date (June 24) indicates that the inspection deadline (May 28) had already passed. CP 545-46. Mr. Conklin was on notice (via the addendum) that Jackowskis, relying on Johnson's interpretation of the documents, viewed them as only concerning revegetation, and not slope instability. Yet Conklin did not disclose to Jackowskis that the documents contained red flags warranting a geotechnical inspection.

Although the Harold Parks letter (attached to the Mason County revegetation letter) referred to a slope stability report, no one gave Jackowskis this report (the Parks report of 2000) before the sale closed. CP 1192-93. Jackowskis found the report in a drawer in the house after they had moved in. CP 162. Mrs. Borchelt does not know whether she gave it to her agent or to Jackowskis' agent. *Cf.* CP 800 with 305-07. Johnson believes he gave the report to Jackowskis, but he could not recall

if he received all or part of the slope stability report, when he received it, or if he sent it to the Jackowskis before the inspection contingency period had run. CP 1049. He did testify that he *never had any discussions* with Mr. Jackowski about “the geological report there, the slope stability investigation.” CP 1047. All his emails (which would have confirmed *if* and *when* he gave the report to the Jackowskis) were lost by Hawkins Poe. CP 1036; 993-95; 1014-15. Steve Furst, the broker at Hawkins Poe, said Johnson had a duty to give the report to his clients, CP 1002, as did two of Jackowskis’ experts. CP 1184-88. Furst also admitted he could not understand the report, and agreed that an agent has a duty, if the agent has a report that he cannot understand, to advise the buyer to seek expert advice. CP 1004-05. The report showed the land was unstable. CP 1187.

The PSA had a standard inspection contingency addendum. CP 1041. Under the inspection contingency, Johnson advised Jackowskis to “get a home inspection and . . . a well inspection.” CP 1042. He gave them a list of three home inspectors. Jackowskis hired the one Johnson knew best, Greg Walman. CP 1042. Johnson knew the scope of the inspection that Walman would conduct. *Id.* Mr. Jackowski declared, “I did arrange for a basic home inspection, and picked an inspector recommended by Mr. Johnson. . . . Mr. Johnson did not recommend that

we have a geotechnical engineer inspect the property, and attended the inspection on my behalf as I was out of state.” CP 1191. Walman found a noisy heater fan, recommended caulking the space between the front door threshold and the floor, and found carpenter ants in the landscaping. CP 705. Walman did not pull up the carpet and discover the cracks. Not surprisingly, given Borshelts’ answers on the Form 17, Walman *did not inspect* the property for slope stability or fill. Nor would he, as a home inspector, have been competent to do so. Johnson admitted, that were he buying waterfront property himself, he would hire a geologist to inspect the property. CP 1041. He did not advise Jackowskis to do so.

Johnson testified that he thought he had done his duty by making sure the PSA included the inspection addendum. CP 1041. In contrast, his broker, Furst, said that the inspection addendum does not fulfill an agent’s duty to advise a buyer to seek an expert opinion on matters the agent does not understand. CP 1007-08. Both Hawkins and Furst have advised buyers to seek engineer or geotechnical advice under similar circumstances. CP 998, 1020. Furst requires his agents to include the inspection addendum and to advise a home inspection at a minimum. CP 1000. He also trains his agents to evaluate three criteria to determine if they need to advise the homebuyer that further investigation is needed. CP

1001. One of these criteria is “is there anything in the permitting process that has addressed any issue or problem or anything the County has.” *Id.* Despite possessing the Mason County revegetation letter, with its circled “landslide hazard area” language (and possessing the slope stability report!), Johnson did not apply the three criteria and did not advise Jackowskis to investigate further or to seek expert advice. Further, Jackowskis’ experts believe that the failure to advise Jackowskis to investigate further was a breach of an agent’s duty of care. CP 1184-85; 1187.

Jackowskis moved into the property in late Spring of 2005. The following winter, they felt movement and heard sounds during the stormy night of February 3, 2006. When Mr. Jackowski inspected the house the next morning, the addition along the north side of the house had moved, and pulled the rest of the house with it. Sheetrock was cracked and doors were stuck. CP 335-56. Jackowskis hired an engineer – coincidentally, Randall Thompson, the Borchelts’ engineer – who inspected the house and advised them to vacate immediately. CP 1416. Jackowskis immediately moved out of the house. A second engineer, Vince McClure, told Jackowskis the house was in a state of collapse or imminent collapse. CP 356. After the house moved, neighbors told Jackowskis that the whole

area had a problem with fissures and slope instability in the past. CP 286. The house movement was exacerbated by the fill under the addition. CP 1398-1400; 355-56; 379-82.

Jackowskis filed suit against Borchelts, Jef Conklin and Windermere, and Robert Johnson and Hawkins Poe seeking, from the Borchelts, rescission or, in the alternative, damages for intentional fraud, constructive fraud, negligent misrepresentation, fraudulent concealment, and breach of contract, and from all other defendants, damages for misrepresentations, fraud (as to the sellers' agents) and breaches of statutory duties (which are breaches of contract by the buyers' agents and torts by the sellers' agents). All defendants brought motions for summary judgment. The Trial Court dismissed Jackowskis' claims against their own seller's agents, Johnson and Hawkins Poe, on a misreading of Alejandro v. Bull and the economic loss rule. 159 Wn.2d 674, 153 P.3d 864 (2007). The Trial Court dismissed Jackowskis' plea for rescission, and all their claims against the Borchelts and their agents, Conklin and Windermere, also on a misreading of Alejandro, except for fraudulent concealment of the floor cracks. The Trial Court held that the Borchelts disclosed the fact that the property was in a landslide hazard area and that a reasonably diligent inspection would have disclosed the presence of fill.

IV. ARGUMENT

A. **The Court of Appeals Reviews Summary Judgments De Novo, as a Pure Question of Law**

When reviewing an order of summary judgment, the Court of Appeals engages in the same inquiry as the Trial Court, affirming the order only if there are no genuine issues of material fact and only if, on the undisputed facts, the moving party is entitled to judgment as a matter of law. Failor's Pharmacy v. DSHS, 125 Wn.2d 488, 493, 886 P.2d 147 (1994). Jackowskis presented evidence to create issues of fact whether Borchelts and Windermere disclosed that the property had a history of earth movement, and whether there was fill on the property, or reports indicating problems. The Trial Court erred in granting summary judgment on those issues, and erred in misapplying Alejandre and the economic loss rule to dismiss other claims. This Court should reverse the Trial Court.

B. **The Economic Loss Rule Does Not Apply At All**

After the earth movement occurred the night of February 3, Jackowskis' house was in a state of imminent collapse. The engineer, Randall Thompson, told them it was unsafe. Their lives were at risk. This kind of catastrophic injury to property and the associated risk to life and limb puts the safety-insurance policy of tort law directly in play.

The Trial Court applied Alejandre and the economic loss rule to bar most of Jackowskis' claims against Borchelts and all of their claims against Johnson and Hawkins Poe. RP 09/14/07 at 27; 30; 37. This was an error. The economic loss rule should not apply at all in this case, because the collapse of Jackowskis' home was a sudden, dangerous event, causing damage to property and threatening life, remediable in tort.

Tort law protects society's interests in freedom from harm. Alejandre, 159 Wn.2d at 682. It is concerned with the obligations imposed by law, rather than by bargain. Stuart v. Coldwell Banker Commercial Group, Inc., 109 Wn.2d 406, 420, 745 P.2d 1284 (1987). Washington's common law and statute imposed a duty on the Borchelts to disclose material defects in the property to Jackowskis. RCW 64.06.020. They did not. The statutes imposed a duty on Conklin and Windermere, and on Johnson and Hawkins Poe to exercise reasonable care, to pass on all documents concerning the property, and to disclose all known material facts. RCW 18.86.030(1)(a)(c) and (d). They did not. Further, Johnson and Hawkins Poe had the additional duty to advise Jackowskis to seek advice on matters beyond the agents' ken. RCW 18.86.040(1)(c). They did not. As a result, Jackowskis bought the property, the earth movement

occurred, the fill subsided, the house collapsed, and they had to flee their home.

When determining whether the economic loss rule applies, a court's first duty is to decide if the losses were *economic losses*, like the cost to repair a deck or fix a septic tank, or rather *physical damage*, like a collapsed house with its associated threat of personal injury, including emotional injury. This must be done even in "cases such as the present one where only the defective product is damaged." Stuart, 109 Wn.2d at 420. This line between tort and contract must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. *Id.* at 420-21; Alejandre, 159 Wn.2d at 684. The Trial Court did not draw this line.

Here, the defect is that the house was built on unstable land and the addition was built on unconsolidated fill, making the house especially vulnerable to earth movement. It collapsed and is unsafe for human habitation. There was a risk of personal injury to Jackowskis themselves. Through the grace of God, they were not personally physically injured in the landslide, but they have suffered emotional distress. The manner in which the injury arose was a sudden, catastrophic event; in the middle of the night, the earth moved and the house moved with it. This is not a

clogged septic field like Alejandre, nor a slowly-deteriorating deck and walkway like Stuart. This is a collapsing house. *See also Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Construction*, 119 Wn.2d 334, 352-53, 831 P.2d 724 (1992) (“The building was literally coming apart at the seams. A 24-by 27-foot wall panel falling to the ground is certainly a sudden and highly dangerous event, which posed a real, nonspeculative threat to person and property.”) (applying the same analysis in the context of the WPLA).

Why shouldn't Jackowskis' agents, Johnson and Hawkins Poe (upon whom they relied, who directed and controlled the inspections, and who had, but withheld, information regarding the very risk that nearly cost Jackowskis their lives) be held liable? Why shouldn't the Borchelts' agents, Conklin and Windermere (who wilfully donned blinders to observable warning signs, who ignored *knowledge they already had* about nearby landslides, and who were complicit in the concealment of the floor cracks) be held liable? Why shouldn't Hawkins Poe's and Windermere's insurance policies (which indemnify against agents' errors and omissions) answer for these catastrophic loss damages? Why shouldn't the Borchelts be forced to restore Jackowskis to the emotional and financial condition they enjoyed before the Borchelts' misconduct? The policy reasons for the

economic loss rule that were found in Alejandre and Stuart do not exist here. In fact, the very policy exceptions that keep tort law alive are here. The Trial Court erred in applying the economic loss rule.

C. Even if the Economic Loss Rule Applies, it Does Not Foreclose Jackowskis' Claims Against the Real Estate Agents

Even if the Trial Court had concluded that Jackowskis' losses were economic and had been correct in doing so, the economic loss rule does not foreclose Jackowskis' claims against the real estate agents, Conklin and Windermere and Johnson and Hawkins Poe.

1. The Economic Loss Rule Does Not Bar Malpractice Claims Against Professionals

Here, there are two sets of real estate agents: the buyers' agents, Johnson and Hawkins Poe, with whom Jackowskis had a contract and the sellers' agents, Conklin and Windermere, with whom they had no contract. Both sets of agents owed Jackowskis statutory duties. RCW 18.56.030. The Trial Court held that the economic loss rule and Alejandre barred all Jackowskis' claims against their own agents that it had not already dismissed on a reasonable reliance misreading of Alejandre. RP 09/14/07 at 37. This was error.

The application of the economic loss rule in malpractice claims against professionals presents a dilemma. Does professional malpractice

as a tort survive Alejandre, when the professional is hired by a client, and is therefore in privity of contract? The Trial Court read Alejandre as meaning that no tort remedies are available between parties in contract. Yet malpractice insurance does not insure against contract claims. Are lawyers and real estate agents now immune from malpractice suits because the type of loss their clients usually suffer is economic? Under the Trial Court's ruling, the existence of a professional service contract is now an absolute defense to a professional malpractice claim.

This cannot be right; it is not what the Supreme Court intended. Alejandre concerned a buyer in contract with a seller, not a buyer seeking damages from its own agent. Real estate agents are professionals who owe duties to their clients imposed at law and by statute. Attorneys' duties, for example, are found in common law, *see, e.g., Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992). Real estate agents' duties are statutory, RCW Chapter 18.56, and at common law. The statute specifically retains common law duties, superseding them where and to the extent they are inconsistent with statute. RCW 18.86.120. Alejandre states that "tort law is not intended to compensate parties for losses suffered as a result of a *breach of duties assumed only by agreement.*" 159 Wn.2d at 682 (emphasis added). Here, the real estate agents breached statutory and

common law duties – *not* duties assumed *only by agreement*.

Washington courts adopted the economic loss doctrine at least twenty years ago, with Stuart in 1987. During those years, plaintiffs have brought tort cases against professionals for breaches of statutory and common law duties; cases that were not barred by the economic loss rule. *See, e.g., Hoffman v. Connall*, 108 Wn.2d 69, 736 P.2d 242 (1987) (real estate agent is in same class of professionals as lawyers, chiropractors, and doctors); Johnson v. Brado, 56 Wn. App. 163, 783 P.2d 92 (1990) (buyer sued broker and agent for negligent misrepresentation); Pacific Northwest Life Insurance Co. v. Turnbull, 51 Wn App. 692, 754 P.2d 1262 (1988) (buyer recovered against broker and agent for negligence)² (These cases imposed a common law duty on the agents that may be limited by RCW 18.86.030(2). They are cited here only to demonstrate that a tort cause of action against a real estate agents survives the economic loss rule.) It was error for the Trial Court to dismiss Jackowskis' tort claims against the real estate agents for breaches of their statutorily imposed duties, the first of

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See also Hizey v. Carpenter, 119 Wn.2d 251, 830 P.2d 646 (1992) (attorney malpractice); Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 111 P.3d 866 (2005) (attorney malpractice); *and* Bush v. O'Connor, 58 Wn. App. 138, 791 P.2d 915 (1990) (attorney malpractice).

which is to perform up to the standard of care. RCW 18.86.030(1)(a).

2. The Economic Loss Rule Does not Bar Contract Claims Against Real Estate Professionals, Nor Does it Bar Tort Claims When there is No Privity of Contract

Even if the Trial Court *were* correct in holding that the economic loss rule barred Jackowskis' tort claims against the agents, the court erred in barring Jackowskis' contract claims against Hawkins Poe and Johnson. While the duties an agent assumes on being hired are statutorily imposed, the Trial Court erred in holding that the breach of statutory duty claims sounded *only in tort*, not contract. RP 09/14/07 at 37. Jackowskis were in an contactual agency relationship; the statutory duties were owed under that relationship.

Agency is a form of contract. The principal engages the agent to perform some function for the principal. Here the agency was for the purpose of buying real estate. The Jackowskis were in Florida, and could only find and acquire real estate in Washington through the services of an agent; they engaged Hawkins Poe and Johnson. Johnson's and Hawkins Poe's duties under this agreement are described in the real estate agency statute, RCW 18.86 *et seq* and also in the pamphlet on real estate law that every agent is statutorily required to provide to his clients, and which Johnson provided to Jackowskis.

Jackowskis and their agents entered into a contractual relationship. Just as statutory warranties are contractual in nature (are implied terms of contract) statutory agency duties are contractual in nature (are implied duties in the contract between agency and principal). *See, e.g.*, this Court's holding in Brickler v. Myers Const., Inc., 92 Wn. App. 269, 273-75, 966 P.2d 335 (1998) (action by a home buyer against a builder-vendor under the implied warranty of habitability is *an action on a contract*).

Therefore, an action by the principals, Jackowskis, against their agents, Hawkins Poe and Johnson, for breach of statutory real estate agent duties, is *an action on a contract* and the statutory duties were *contractual* duties. If these statutory duties (identified in writing through the pamphlet on real estate agency) are not enforceable in contract (or in malpractice), then citizens of Washington have no ability to recover from real estate agents who harm them. Under the Trial Court's rulings, professional real estate agents enjoy absolute immunity from claims brought by their clients. Alejandre *does not provide such immunity*.

Finally, in oral arguments made by the attorney of the sellers' agents, Windermere and Conklin, those agents likewise argued that the economic loss rule should bar claims of statutory breaches against them as well, since the Trial Court had already ruled that statutory claims are

barred by the economic loss rule because they sound in tort. RP 09/14/07 at 40. The Trial Court properly declined to rule on this argument, since the issue was unbriefed. *Id.* at 44. Even if the sellers' agents had briefed that argument, it would have been error to dismiss Jackowskis' statutory claims against the sellers' agents pursuant to the economic loss rule. There is no contractual privity at all between Jackowskis and Windermere and Conklin. Moreover, Conklin and Windermere owed Jackowskis statutory duties, in contrast to the architect and engineer in Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, who owed the plaintiff general contractor nothing. *Cf.* RCW Chapter 18.56 *with* 124 Wn.2d 816, 881 P.2d 986 (1994).

3. Jackowskis Presented Evidence to Overcome Summary Judgment on the Agents' Breach of Duties

Not only did the Jackowkis present compelling legal arguments for why the economic loss rule should not apply to bar their claims against their own agents – whether on a professional malpractice theory, sounding in tort, or on an agency relationship theory, sounding in contract – they also presented enough evidence to create a fact dispute *and* to sustain a favorable jury verdict on their claims against all the agents involved.

a. The Agents Knew Form 17 Was Incorrect

All the agents are liable for the Borchelts' misrepresentations on Form 17 because they had actual knowledge that the information on the form was incorrect. "Any licensed real estate salesperson or broker involved in a residential real property transaction is not liable for any error, inaccuracy, or omission in the real property transfer disclosure statement *if the licensee had no actual knowledge* of the error, inaccuracy, or omission." RCW 64.06.050(2) (emphasis added). Conklin and Windermere *knew* that there were significant cracks in the basement slab, indicating soil movement beneath the slab. Conklin and Windermere *also knew* that there had been landslides near the property. Conklin and Windermere are therefore liable for the Borchelts' misrepresentations on Form 17 that there had been no soil movement on the property and that there were no other material defects. Likewise, Johnson and Hawkins Poe had actual knowledge that the Borchelts' statement that there were no other material defects was inaccurate. Johnson admitted to possessing the slope stability report, a report that Jackowski never received before the transaction was closed, but that his wife found in a drawer in the home after they moved in. Johnson and Hawkins Poe are liable as well.

b. Buyers' Agents Did Not Transmit Documents

RCW 18.86.030(1)(c) provides that an agent has the duty to transmit all written communications to and from either party in a timely manner. Johnson and Hawkins Poe had the slope stability report, but *did not transmit* it to Jackowskis before closing. Further, while Johnson received the Mason County revegetation letter and documents and transmitted it to Jackowskis, he cannot show that he gave it to them before the inspection deadline. (Hawkins Poe lost all emails between Jackowskis and Johnson, in a further violation of the duty to keep transaction records for at least three years. RCW 18.85.230(17) (2002))³. The agents are liable for these breaches.

c. Buyers' Agents Did Not Urge Expert Advice

Hawkins Poe and Johnson had a duty to “advise the buyer to seek expert advice on matters relating to the transaction that are beyond the agent’s expertise.” RCW 18.86.040(1)(c). The agents possessed the slope stability report, which none of them understood, yet none of them advised

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The loss of the emails constitutes spoliation. Evidence of spoliation allows the Jackowskis to argue adverse inferences sufficient to defeat summary judgment. U.S. v. Kitsap Physicians Services, 314 F.3d 995, 1001 (9th Cir. (Wash.) 2002).

Jackowskis to get a geotechnical inspection. Johnson and Hawkins Poe can not hide behind Johnson's urging Jackowskis to make the purchase contingent on an inspection. Furst himself admitted that merely providing the addendum does not fulfill an agent's duty. The Jackowskis would not know to get a soils inspection when the Form 17 said there had been no slippage or sliding and no fill on the property and when their own agent did not advise getting one. Johnson admitted advising Jackowskis to get a *home* inspection, which inspection was limited to the house itself, not the land or stability thereof, and was conducted in Johnson's sole presence with an inspector that he suggested to Jackowskis. Jackowskis followed his advice in that respect and would have followed him further, if he had advised a geotechnical inspection. Johnson also admits that he would have gotten a geotechnical inspection if he himself were buying waterfront property. Johnson and Hawkins Poe are liable for this breach.

d. Agents Did Not Exercise Due Care

RCW 18.86.030(1)(a) provides that an agent has the duty to "exercise reasonable skill and care." Conklin, despite his experience with waterfront properties and with selling waterfront properties that later suffered landslides, did not note that the maple trees indicated slope instability. This would have required no extra investigation; it merely

required Conklin not to don blinders while on the Borchelt property. Nor, having received the George Greer fax that told him that the cracks were material, did Conklin warn the Borchelts that it would violate their duty not to disclose the cracks or to cover the cracks with carpet. Further, he himself did not disclose the cracks to the Jackowskis. The agents are liable for these breaches.

Johnson and Hawkins Poe violated this duty of care as well by failing to transmit the soil stability report and by failing to timely transmit the revegetation letter. More importantly, Johnson had been trained to evaluate three criteria to determine whether to advise the buyer to investigate further, including whether or not there were any permitting documents that indicated the County had recognized a problem. Johnson had the revegetation letter, yet did not advise the Jackowskis to get a geotechnical inspection. Most fundamentally, Johnson had the slope stability report (while not giving it to the Jackowskis), but did not advise his clients to get expert advice. Jackowskis' experts confirm that these were breaches of the standard of care.

e. Both Agents Did Not Disclose Material Facts

RCW 18.86.030(1)(d) requires an agent to disclose all existing material facts known by the licensee and not apparent or readily

ascertainable to a party. Conklin and Windermere did not disclose the concealed cracks, nor did they disclose Conklin's knowledge that nearby properties had already suffered significant landslides. This, too, required no investigation. Conklin knew about the cracks and knew about the neighboring landslides. Johnson admitted receiving the slope stability report, yet he did not disclose it to the Jackowskis.

f. Both Agents Did Not Deal in Good Faith

RCW 18.86.030(1)(b) requires an agent to deal honestly and in good faith. Conklin and Windermere knew that the cracks existed, were material enough to cause another prospective buyer concern, and knew that the Borchelts planned on concealing them, after which they would no longer be visible to prospective buyers – including the Jackowskis. They said nothing. Johnson did not seek for his clients, the Jackowskis, the information he said he would have sought for himself, were he buying waterfront property. This was not dealing honestly and in good faith. Both sets of agents are liable for their breaches of this duty.

D. Even if the Economic Loss Rule Does Apply, Neither It Nor RCW 64.06.030 Abrogates the Equitable Remedy of Rescission for Negligent Misrepresentation

The Trial Court abrogated the equitable remedy of rescission for Borchelts' misrepresentations on Form 17, pursuant to RCW 64.06.030.

RP 09/14/07 at 29. This was error. Further, the Trial Court completely dismissed Jackowskis' claim of negligent misrepresentation against the Borchelts pursuant to the economic loss rule and Alejandre. *Id.* at 27. This was error as well, *insofar as it foreclosed the Jackowskis' claim for rescission of the contract that they entered into based on the Borchelts' negligent misrepresentations*. Rescission is an equitable remedy not barred by the economic loss rule, even when sought by an injured party in privity of contract with the tortfeasor. It is available in tort and contract.

1. Chapter RCW 64.06 Does Not Bar Rescission for Misrepresentations on Form 17

RCW 64.06.030 provides that after a seller fills out, signs, and delivers the Form 17 disclosure statement to the buyer, the buyer may either approve and accept the statement, or may rescind the agreement for purchase or sale of the property within three business days if there are disclosed defects the buyer does not wish to accept. The Borchelts' counsel argued that since the Jackowskis did not seek rescission for the Borchelts' misrepresentations on Form 17 within three business days, the remedy of rescission was unavailable. The Trial Court accepted this argument. RP 09/14/07 at 29; 48. This is error.

The three-day window for rescission is in the event that the seller makes a disclosure on Form 17 that the buyer does not like. The three-day window *does not apply* where the seller makes misrepresentations on Form 17. Here, the Borchelths made several misrepresentations: that there was no fill on the property, that the property had never suffered landslides or slippage, that there were no orders or reports adversely affecting the property, and that there were no other existing material defects that a buyer should know about. While it is reasonable to put time limits on rescission for disclosed defects, it is not proper to impose those same time limits for defects concealed by lies on Form 17.

RCW 64.06.040(2) does not support the Borchelths' argument in any way. That statute says, "In the event any act, occurrence, or agreement arising or becoming known after the closing of a residential real property transfer causes a real property transfer disclosure statement to be inaccurate in any way, the seller of such property shall have no obligation to amend the disclosure statement, and the buyer shall not have the right to rescind the transaction under this chapter." This applies to facts "*arising or becoming known*;" the Borchelths *knew* that they were making misrepresentations. Further, the statute is limited to rescission "under this chapter." RCW 64.06.070 specifically states that nothing in the chapter

(with the exception of RCW 64.06.050) “shall extinguish or impair any rights or remedies of a buyer . . . against the seller . . . otherwise existing pursuant to common law, statute, or contract.” Rescission of a contract is a venerable remedy when the contract was entered into based on misrepresentations; this chapter does not extinguish that remedy.

Finally, RCW 64.06.050 specifically limits a seller’s liability for inaccuracies or omissions on Form 17 to cases where the seller *has actual knowledge* of the inaccuracies or omissions. The Borchelts *had actual knowledge* of the fill, actual knowledge of the slippage of soil out from under their front porch steps, actual knowledge that the addition was built in the wrong place *and* on fill, actual knowledge of the slope stability report, and actual knowledge of the revegetation order. They are liable; RCW 64.06.050 does not shield them. It was error for the Trial Court to hold that the Jackowskis could not get common law rescission for the Borchelts’ misrepresentations on Form 17.

2. The Economic Loss Rule Does Not Bar Rescission as a Remedy for Negligent Misrepresentation

It is impossible to have rescission as a remedy if there is no contract to rescind. Only a party in privity of contract with another will ever seek rescission. Rescission is not, however, a *recovery*. It is an

equitable remedy that *avoids* the contract and places the parties in the positions they occupied before they entered into the contract. While a person who has suffered economic losses may seek rescission, even then rescission is not a *recovery* of economic losses. After rescission, it is as though the contract never existed and the loss never occurred.

The Trial Court would have been correct, after Alejandre, to hold that the Jackowskis could not recover economic loss damages from the Borchelts – with whom they were in privity of contract – for the tort of negligent misrepresentation. The Trial Court erred in dismissing Jackowskis’ claims of negligent misrepresentation in their entirety, since one of the remedies the Jackowskis sought was rescission.

a. Rescission is a Venerable Remedy for Misrepresentation

A purchase and sale contract that is made based upon mutual mistake, unilateral mistake, intentional misrepresentation, negligent misrepresentation, or even completely innocent misrepresentation, may be rescinded by the buyer. *See* Simonson v. Fendell, 101 Wn.2d 88, 675 P.2d 1218 (1984) (since purchase agreement would not have been formed but for mutual mistake of material fact that business was operating at a profit, buyer was entitled to rescission); Davis v. Pennington, 24 Wn. App. 802,

604 P.2d 987 (1979) (buyer was mistaken as to material facts that seller failed to disclose; unilateral mistake plus inequitable conduct meant buyer was entitled to rescission); Lou v. Bethany Lutheran Church of Seattle, 168 Wash. 595, 13 P.2d 20 (1932) (where seller knowingly misrepresented boundary lines to buyer, buyer was entitled to rescission); Holland Furnace Co. v. Korth, 43 Wn.2d 618, 262 P.2d 772 (1953) (buyer is entitled to rescission when entered into contract based on the seller's material misrepresentations, including misrepresentations recklessly or carelessly made); and Anthony v. Warren, 28 Wn.2d 773, 184 P.2d 105 (1947) (fraudulent intent not necessary for rescission; rescission may be granted based on innocent misrepresentation).

This is ancient law. It is found in hornbooks, learned treatises, and in binding caselaw. In March 2007, the State Supreme Court determined for the first time that a buyer may not seek a monetary recovery at law for economic loss damages from a seller based upon a theory of negligent misrepresentation. Alejandre, 159 Wn.2d 674. The Court said that the parties must assign risk for economic losses under ordinary contract principles. After Alejandre, a plaintiff buyer could no longer recover money damages for economic loss based upon a theory of negligent misrepresentation by a seller. However, Alejandre decided only that a

money damages recovery was unavailable under a theory of negligent misrepresentation when the parties are in contract. It did not say that the same contract could not be avoided and rescinded for misrepresentation.

b. Misrepresentation Sounds in Tort and Contract

“In a system of contract law based on supposedly informed assent, it is in the interest of society as well as of the parties to discourage misleading conduct in the bargaining process. To this end both tort and contract law provide remedies for misrepresentation, sometimes affording the recipient of the misrepresentation a choice between the two.” E. Allan Farnsworth, Farnsworth on Contracts, § 4.9 (3d ed. 2004). The party misled has an election; she can affirm the contract and get benefit of the bargain damages measured by the difference in value between the price paid and the actual value without misrepresentation, or she can rescind and avoid the contract entirely. *At law*, the recipient of the misrepresentation may recover damages based on the value that the bargain would have had if it were as represented. *Equity* rules, on the other hand, allow the recipient of the misrepresentation to undo the transaction by avoiding it, and they seek to restore the parties to the positions in which they found themselves before they made the agreement. Equity asks what behavior – including misrepresentation – is not tolerable as the basis of a bargain.

Courts frequently grant relief to a purchaser for nondisclosure of material facts, more frequently granting rescission than damages, even for misrepresentation actions sounding in tort. Sorrell v. Young, 6 Wn. App. 200, 224, 491 P.2d 1312 (1971).

c. Economic Loss Rule Forbids Contracting Parties from *Recovering* Economic Losses in Tort

In its economic loss rule jurisprudence, the Supreme Court has consistently held that parties to contracts, suffering only economic losses rather than injury to person or property, may only recover in contract. *See, e.g.,* Stuart, 109 Wn.2d at 421-22 (Court declined to recognize a cause of action for negligent construction and refused to “provide relief where the contract did not”); Atherton Cond. Apt.-Owners Ass’n Bd. of Directors. v. Blume, 115 Wn.2d 506, 526-27, 799 P.2d 250 (1999) (tort recovery is an inappropriate remedy for economic damages); *and* Berschauer/Phillips, 124 Wn.2d at 827 (plaintiffs may not bring a cause of action in tort to recover benefits not obtained in contract).

In arguing that Alejandre precludes the equitable contract remedy of rescission for misrepresentation, attorneys frequently quote one sentence: “the economic loss rule precludes any recovery under a negligent misrepresentation theory.” 159 Wn.2d at 677. Relying on this sentence

betrays fundamental confusion. *Rescission* is not a *recovery*. *Rescission* is an avoidance of the contract. Here, the Jackowskis seek rescission because they entered into the contract based on misrepresentations. There is no economic loss rule caselaw where any court said that a plaintiff cannot receive the equitable remedy of rescission of a contract for a claim of misrepresentation – even one sounding in tort.

In fact, a recent case – a case that *postdates* Alejandre – affirmatively allows a buyer of real estate to seek rescission for the tort claim of negligent misrepresentation. Ross v. Kirner, 162 Wn.2d 493, 172 P.3d 701 (2007). The Court in Ross did not discuss the economic loss rule because the plaintiff did not seek economic loss damages. Instead, the plaintiff sought rescission. The Court allowed it. Just as the plaintiff in Ross, the Jackowskis may seek rescission for misrepresentations.

d. Jackowskis May Also Seek Rescission for Innocent Misrepresentations

Even if the Trial Court were correct in foreclosing any *remedy* under a negligent misrepresentation theory, rather than foreclosing an economic loss *recovery*, the Jackowskis may still seek rescission for “innocent misrepresentations.” They have alleged sufficient facts to prevail in either

case. Moreover, Washington, being a notice pleading state, allows the Jackowskis, having alleged misrepresentations in the complaint, to do so.

A material innocent misrepresentation can render a contract voidable. Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 390, 858 P.2d 245 (1993); Skagit State Bank v. Rasmussen, 109 Wn.2d 377, 384, 745 P.2d 37 (1987) (*citing* Restatement (Second) of Contracts § 164(1) (1981): “If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”).

A misrepresentation is “an assertion that is not in accord with the facts.” Rstmt. 2d Conts. § 159, *adopted* in Yakima County, 122 Wn.2d at 390. “A person’s nondisclosure of a fact known to him is equivalent to an assertion that the fact does not exist ‘where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if nondisclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing’.” Brinkerhoff v. Campbell, 99 Wn. App. 692, 698, 994 P.2d 911 (2000). Here, the Borchelts failed to disclose that the property had already experienced a six-inch loss of soil under the steps,

that there was fill on the property, and that the addition had been sited and built contrary to the engineer and geologist recommendations.

Most damning of all, the Borchelths and their agent concealed the cracks in the slab floor of the addition. The Borchelths' act of concealment is the very act the Restatement used to illustrate § 161: "When Action is Equivalent to an Assertion (Concealment)."

A, seeking to induce B to make a contract to buy his house, paints the basement floor in order to prevent B from discovering that the foundation is cracked. B is prevented from discovering the defect and makes the contract. The concealment is equivalent to an assertion that the foundation is not cracked, and this assertion is a misrepresentation. Whether the contract is voidable by B is determined by the rule stated in § 164 ["When a Misrepresentation Makes a Contract Voidable," adopted in Washington by Skagit State Bank, *supra*].

Rstmt. 2d Conts. § 160, Illus. 1. This illustration is directly on point. The Borchelths sought to sell their house. They filled the cracks with caulk and covered them with carpet, in order to prevent the Jackowskis from discovering that the addition had been built on unstable soil and had already suffered slippage that had caused the concrete slab to crack. Their concealment was equivalent to an assertion that the addition had *not* been built on unstable soil and had *not* already suffered slippage that had caused the concrete slab to crack. This was a misrepresentation.

The rule that this illustration illuminates says, “Action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist.” Rstmt. 2d Consts. § 160.

Jackowskis found no Washington cases explicitly adopting § 160, but found a case predating the Restatement that recites essentially the same rule. “[T]here must normally be, as a basis for . . . misrepresentation affecting the validity of a sale of land, a representation of fact . . . [A] misrepresentation may be as well by deeds or acts as by words. . . .”

Ramsey v. Mading, 36 Wn.2d 303, 313, 217 P.2d 1041 (1950). By the deed or act of covering up the cracks in the slab floor of the addition, the Borchelts misrepresented the structural integrity of the addition and the stability of the land beneath it. Even if they had not failed to disclose the presence of fill, history of landslides and soil instability, and that the addition was sited and built improperly – this – the concealing of the cracks in the floor – is a material misrepresentation justifying rescission.⁴

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Since innocent misrepresentation is a claim sounding in contract, the Jackowskis could, in the alternative to seeking rescission, elect to seek benefit of the bargain damages and could obtain an economic loss recovery of monetary damages. The economic loss rule would so allow.

E. Jackowskis May Also Maintain Breach of Warranty Contract Claims

The Trial Court erred in dismissing Jackowskis' breach of contract claims against the Borchelts. RP 09/14/07 at 27. Jackowskis responded to the Borchelts' summary judgment motion as to their contract claims. CP at 376. The economic loss rule does not bar a plaintiff from seeking purely economic damages under a breach of contract theory. In fact, the Alejandre Court privileged contract actions over tort action when the parties are in privity. *Id.* at 681.

The Borchelts' misrepresentations constituted warranties, which warranties – since the representations were false – they breached. A warranty is a creature of contract, and an action for breach of warranty is contractual in nature. Where a plaintiff brings breach of warranty claims, the economic loss rule is entirely inapplicable.

The common law of breach of warranty actions is discussed at length in Hausken v. Hodson-Feenaughty Co., 109 Wash. 606, 187 P. 319 (1920). Although Hausken involved a warranty in the context of the sale of goods, it was decided under the common law of contract because it predated the UCC. Therefore, even though Hausken may no longer apply to cases involving transactions in goods, it is good authority for contract

law generally, including contracts for the sale of real property, such as this one. The Court in Hausken observed:

A warranty is a statement or representation made by the seller of goods contemporaneously with and as a part of the contract of sale, though collateral to the express object of it, having reference to the character, quality, or title of the goods, and by which he promises that certain facts are or shall be as he represents them.

Id. at 611. Thus, a warranty has two elements – (1) it is a representation of fact (2) made as part of a contractual relationship. That is – a warranty is specialized element of a contract, and, *a fortiori*, an action on a warranty is contractual in nature. There are two kinds of warranties: express and implied:

A warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the treaty of sale, upon which it is intended that the buyer shall rely in making the purchase. A warranty is implied when the law derives it by implication or inference from the nature of the transaction, or the relative situation or circumstances of the parties.

Id. at 611. Here, Borchelts made express and implied warranties. They made express warranties by filling out Form 17 so as to say that there was no fill and no stability issues. They made implied warranties – like the implied warranty of fitness – by advertising the property and house as a “home,” which implies that it was safe for human habitation. “[A] warranty . . . whether express or implied, will give rise to the same

liability.” *Id.* Jackowskis’ action is a breach of warranty action, entitling them to contract remedies, including economic loss damages.

F. Jackowskis Reasonably Relied on the Misrepresentations That There Was No Fill and No Landslide History

The Trial Court abrogated all the rest of Jackowskis’ claims insofar as they were based on the misrepresentations that there was no fill on the property and that the property had no landslide history, leaving only claims of fraud and fraudulent concealment of the floor cracks. RP 04/09/07 at 18-19; RP 09/14/07 at 29-30; 44-45. The Trial Court held that the fill would have been discovered by a reasonably diligent inspection and was therefore, pursuant to Alejandre, Jackowskis were foreclosed from bringing an action based on the fill. RP 09/14/07 at 30. The court said that Conklin’s knowledge as to nearby landslides was immaterial because an agent has no duty to investigate. *Id.* at 44. Finally, the court said that the Mason County revegetation document gave Jackowskis notice that the property was in a landslide hazard area, and that a reasonable inspection would have discovered that the property was in a landslide area. *Id.* at 29-30; 44. This was error.

As to the fill, Alejandre is distinguishable. There, the seller, Ms. Bull, disclosed to the Alejandres in her Form 17 that the septic system had

been broken and repaired, and that she was aware of changes or repairs to the system. 159 Wn.2d at 679. The Alejandres undertook an inspection specifically of the septic system, an inspection that was incomplete on its face. *Id.* at 690. The incomplete inspection failed to discover that the baffle was missing and that the sewage sludge had clogged the septic drain field. *Id.* at 690, 680. The Court held that “the Alejandres were on notice that the septic system had not been completely inspected but failed to conduct any further investigation and indeed, accepted the findings of an incomplete inspection report.” *Id.*

Here, the Borchelts – unlike Ms. Bull – disclosed *nothing*. Jackowskis had an absolute right to rely on the Borchelts’ “disclosures” on Form 17 and no duty to investigate them. Jeness v Moses Lake Dev. Co., 39 Wn.2d 151, 160, 234 P.2d 865 (1951). The burden is not on the Jackowskis to search for and find falsehoods on Form 17. The burden is on the Borchelts to completely and honestly answer the questions on Form 17. Moreover, the Jackowskis relied on their real estate agents, Johnson and Hawkins Poe, to advise them as to what inspections were necessary. Johnson and Hawkins Poe advised that a *home* inspection was necessary and gave the Jackowskis a list of three inspectors from whom to choose; the Jackowskis followed that advice and chose one who had worked with

Johnson in the past. In the event that this Court deems the home inspection to be deficient insofar as it failed to discover the fill, that fault may be laid *squarely* at Johnson's and Hawkins Poe's feet for advising only a home inspection and at the Borchelts' feet for concealing the fill.

As to Conklin's knowledge that nearby properties had experienced significant landslides; there was no need for him to do any investigation. He *already knew it*, and he failed to disclose this knowledge or to contradict the Borchelts' representation on Form 17 that there were no other existing material defects that a prospective buyer should learn about. RCW 18.86.010(9) defines "material fact" to include information that substantially adversely affects the value of the property, including information about any neighboring property affecting "the physical condition" of the property. Here, Conklin's knowledge about previous neighborhood landslides was material. It would have told Jackowskis that the property was prone to earth movement and that its own "physical condition" might be unstable.

Finally, the Trial Court held that the Mason County revegetation document was sufficient to tell the Jackowskis that the property was in a landslide hazard area. This was error. Hawkins Poe has lost all emails between Johnson and Jackowskis, that is, it has committed spoliation of

evidence. Johnson cannot show that he gave the revegetation document to the Jackowskis before the expiration of the inspection contingency period. A showing of spoliation of evidence by the party moving for summary judgment can be sufficient to defeat a motion for summary judgment. U.S. v. Kitsap Physicians Services, 314 F.3d 995, 1001 (9th Cir. (Wash.) 2002) (construing FRCP 56(e), the same in all essential parts to CR 56(e)). “[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.” Marshall v. Bally’s Pacwest, Inc., 94 Wn. App. 372, 381, 972 P.2d 475 (1999). The Trial Court should have inferred that Johnson did not give the Jackowskis the letter before the inspection contingency period ran.

Even if Johnson could have shown that he gave the letter in a timely fashion to the Jackowskis, no defendant can show that it put the Jackowskis on notice that the property was in a landslide hazard area. Johnson and Hawkins Poe represented these documents to the Jackowskis as being *solely* concerned with revegetation, in order to prevent silt from washing down and killing clams in the bay. Jackowskis took these

documents seriously and took steps to allocate the risk, within the PSA, that Johnson told them the documents represented. They signed addenda with the Borchelts making the Jackowskis responsible for the revegetation and for the bond. Further, given the Borchelts' material misrepresentations on Form 17 – on which the Jackowskis were entitled to rely – that there was no history of landslides or slippage on the property (belying the fact that six inches of soil slipped out from underneath the Borchelts' front steps, leaving the steps suspended in the air), it is entirely reasonable for the Jackowskis to have relied on Johnson's and Hawkins Poe's explanation of what the documents meant and what they signified. In the event that this Court finds that the revegetation documents should have told the Jackowskis that the property was in a landslide hazard area, this fault, too, may be laid at the Borchelts' and Johnson's and Hawkins Poe's feet.

G. Since Jackowskis Had Not Yet Elected a Remedy, the Trial Court Erred in Striking The Jury Demand

This Court has held that a plaintiff, who has pled remedies in the alternative – even inconsistent remedies like rescission of the contract through avoidance and damages based on affirmation of the contract – does not have to elect a remedy but may prosecute both of them through

final judgment. Stryken v. Panell, 66 Wn. App. 566, 517, 832 P.2d 890 (1992) (Alexander, J.). In that case, the court's choice at final judgment becomes the pleading party's choice. *Id.* Here, the Jackowkis seek alternative remedies. They seek rescission, or, in the alternative, damages. They have a Constitutional right to have a jury hear and determine their damages at law. Const. Art. I, § 21. If, at that juncture, the Trial Court determines that rescission is the appropriate remedy, then that remedy will be, in effect, the remedy that the Jackowskis have chosen. It is error for the Trial Court to have effectively made the election for the Jackowskis *at this stage* in the proceedings by striking Jackowskis' jury demand.

H. Request for Fees on Appeal

RAP 18.1 allows the award of attorney fees on appeal if authorized by applicable law. A contractual provision authorizing attorney fees is authority for granting fees incurred on appeal. Marassis v. Lau, 71 Wn. App. 912, 920, 859 P.2d 605 (1993). Pursuant to the contract between Jackowskis and Borchelts (CP 532) and RCW 4.84.300, Jackowskis are entitled to an award of attorney fees incurred in this appeal.

IV. CONCLUSION

Alejandre is merely one piece of Washington's economic loss rule jurisprudence, itself a narrow exception to the common law, nothing more. Yet after the Supreme Court published Alejandre, in March, 2007, attorneys and trial courts have seized on Alejandre as a giant sponge, wiping away entire causes of action with broad strokes. We – members of the bar – need guidance and clarification.

Yet the injury caused by the overextension of Alejandre is not merely general; it is particularized. The Jackowskis need the relief that this Court affords when a trial court errs. The Trial Court here used Alejandre to dispose of much of the Jackowskis' case. The Trial Court first failed to examine the nature of the Jackowskis' injury to determine if the economic loss rule even applies. Their injury, a collapsing house, is more properly remediable in tort. Next, the Trial Court used Alejandre to eliminate in their entirety the Jackowskis' claims of negligent misrepresentation. This was error as to the Borchelts, since the Jackowskis also sought the equitable remedy of rescission in the alternative to economic loss damages. It was likewise error as to the real estate agents, since Alejandre and the economic loss rule have not

eliminated the tort of professional malpractice. The Trial Court also ruled that all actions for breaches of statutory duties were tort actions, even when, as with the Jackowskis' own buyers' agents, the statutory duties were implied by law in the contract of agency. The Trial Court's application of Alejandre created a Catch 22 where the Jackowskis could sue their own agents neither in tort, nor in contract, even for the very real breaches of statutory duties the agents owed them! Neither, under the logical implications of the Trial Court's ruling, would the Jackowskis be able to sue the sellers' agents in tort, even though there was no contractual privity between them.

Finally, the Trial Court took Alejandre's fact-based holding that the buyers did not reasonably rely on the seller's misrepresentation – there, no real misrepresentation at all, since the seller admitted on Form 17 that the septic system had been repaired – insofar as a reasonably diligent inspection would have discovered the septic tank defect and applied it here to say that the Jackowskis unreasonably relied on the defendants' misrepresentations. In contrast to Alejandre, the evidence the Jackowskis presented to the Trial Court showed that the Borchelts actually lied on Form 17, the sellers' agents were complicit in concealing the cracks, and the buyers' agents failed to pass on material documents and failed to

advise the Jackowskis to get anything other than a standard home inspection – advice the Jackowskis took. Alejandre is distinguishable on the facts and does not eliminate the common law right of a buyer to rely on the affirmative representations of a seller.

The Jackowkis pray this Court for relief. They pray for this Court to overrule the Trial Court and to restore their claims against the Borchelts, Hawkins Poe and Johnson, and Windermere and Conklin, and to clarify what Alejandre means and to what extent it applies.

Respectfully Submitted this 8th day of April, 2008.

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Rhonda Davidson certifies and declares as follows:

1. I am a legal assistant at Cushman Law Offices, P.S. I am over the age of 18, and not a party to this action.

2. On April 8, 2008, I sent via ABC Legal Messengers, for same business day delivery/filing, Jackowskis' Opening Brief to:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

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3. On April 8, 2008, I sent via e-mail and via ABC Legal Messengers for next business delivery, a copy of the above-described document to:

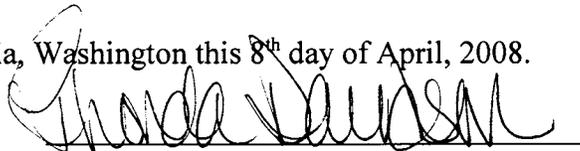
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3. On April 8, 2008, I sent via e-mail and via U.S. Mail, first class postage prepaid, a true and correct copy of the same document to the following attorney for Respondents Borchelt:

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DATED at Olympia, Washington this 8th day of April, 2008.


Rhonda Davidson