

Res. Borchelt

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COURT OF APPEALS
DIVISION II

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

TIMOTHY JACKOWSKI AND ERI TAKASI,

Appellants,

vs.

DAVID BORCHELT, et ux., et al.

Respondents

BORCHELT'S' RESPONSE BRIEF

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INTRODUCTION

This case arose from a real estate transaction in which David and Robin Borchelt (“Borchelts”) conveyed waterfront property to Timothy and Eri Jackowski (“Jackowskis”). A residential structure was constructed on the parcel in the mid 1990s. It served as the Borchelts’ personal vacation residence. The Borchelts received initial occupancy approval for the home in late 1996. They subsequently made occasional visits to the property until approximately 2003, when their schedules entirely precluded such visits. Borchelts listed the property for sale, and on June 30, 2004, closed the sale to the Jackowskis. On February 3, 2006, after over a month of record rainfall, the home located on the property was damaged by a landslide. Jackowskis claim that the home is a total loss. They seek rescission of the sale agreement and, in the alternative, judgment against Borchelts for damages.

On September 19, 2007, the trial court issued an Order granting in part and denying in part Borchelts’ motion for summary judgment. Jackowskis’ assign err to the portion of the decision granting Borchelts’ summary judgment.

STATEMENT OF THE CASE

The real estate transaction at issue closed on June 30, 2004. CP 623. The transaction involved Borchelts' sale of a personal residence, used in that capacity since 1996. Pursuant to Chapter 64.06 RCW, Borchelts completed a real property transfer disclosure statement ("Form 17"). The Form 17 was provided to Jackowskis prior to closing. Prior to closing, Borchelts also provided Jackowskis' real estate agent with a full set of documents regarding the property which included a complete slope stability study conducted by Hal Parks indicating the slope on the property was unstable, a supplemental geological study conducted by Hal Parks discussing slope stability, documents from Mason County indicating that the property was in a landslide hazard area and other engineering documents related to the construction of an addition to the home¹. Throughout the course of the sale, the Jackowskis had no direct contact or discourse with the Borchelts. CP 630; CP 680-81.

It is undisputed that Jackowskis were advised to obtain and pay for the services of qualified experts to evaluate the condition of the property. The Form 17 included language to this effect, capitalized at the beginning of the form. Language to this effect is also incorporated in the parties'

¹ While Jackowskis claim that their real estate agent did not forward these documents to them prior to closing, it is undisputed that Borchelts provided all documents to the Jackowskis' agent prior to closing.

purchase and sale agreement. CP 753-54; CP 784-85. Yet, it is undisputed that Jackowskis took no affirmative action to investigate or evaluate the condition of the soil, slope stability, or issues regarding excavation and relocation of native soil prior to purchasing the property. Jackowskis acknowledge actual notice regarding the existence of some of the geotechnical documentation and the fact that the property is located in an area designated as a “landslide hazard.” CP 769-70; CP 772-75. Even after learning about the existence of certain geotechnical documents, and after receipt of government documentation stating that the property is located in a “landslide hazard area,” Jackowskis took made no related investigation and solicited no professional evaluation prior to closing. *Id.* Jackowskis agree that it would have been fairly easy to solicit further information regarding existing slope stability documentation. CP 772. Jackowskis acknowledge that it was their burden to obtain an inspector to evaluate the property prior to closing the sale, and they failed to do so. CP 784-85.

A major earth movement event occurred in the neighborhood on the night of February 3, 2006, following two months of record rainfall. CP 623. Jackowskis’ power went out, and they felt movement and heard sounds throughout the night. Jackowskis’ subsequent inspection allegedly revealed that the north side of the house was downset, and that cracking

and other distress features had appeared in the sheet rock. *See* Jackowskis' Opening Brief, 16. Jackowskis' experts testified that the slide event extended beyond the subject property. The entire area, both offsite and onsite, moved down towards the saltwater shoreline. CP 789; CP 797. It is uncontested that soil instability and soil movement are not limited to areas where construction-related excavation and soil relocation took place.

ARGUMENT

Standard of Review

On review of an order for summary judgment, an appellate court performs the same inquiry as the trial court. *City of Tacoma v. Price*, 137 Wn.App. 187, 190, 152 P.3d 357 (2007). Therefore, the standard of review is de novo. *Id.* The party that moves for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact, however, if the moving party shows there is no genuine issue for trial, the inquiry shifts to the party opposing summary judgment. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 77 P.2d 182 (1989). If the moving party is a defendant and meets this initial burden, "then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that

party will bear the burden of proof at trial,' then the trial court should grant the motion." *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986)). In *Celotex*, the Court explained that where a party fails to prove an essential element of the case, all other facts are rendered immaterial and there can be no genuine issue as to any material fact. *Id.* at 225 (citing *Celotex*, 447 U.S. at 322-23).

Scope of Review

On review of an order granting or denying a motion for summary judgment, the appellate court will consider only the evidence and issues called to the attention of the trial court. RAP 9.12. Evidence and issues called to the attention of the trial court are designated in the order granting or denying summary judgment. *Id.* Jackowskis' attempts to incorporate new issues and evidence at this point conflicts with RAP 9.12. *See* Jackowkis' Opening Brief, 40-41 ("innocent misrepresentation" argument); Jackowskis' Opening Brief, 10 (reference to Charles Rutherford's testimony not considered by trial court due to late submittal). This court should consider only evidence and issues considered by the trial court. The claims presented by Jackowskis and ruled on by the trial court include: negligent misrepresentation, fraud, fraudulent concealment and breach of contract. *See* Jackowski's Opening Brief, 17. The trial court

specifically addressed each of these claims in the order, granting summary judgment in part and denying summary judgment in part. Review on appeal should be confined to these claims.

Argument Summary

Jackowskis' claims against Borchelts are founded solely upon (1) allegations that Borchelts' made inaccurate Chapter 64.06 RCW (Form 17) disclosures; and (2) allegations that Borchelts fraudulently concealed slope instability, fill on the site or cracks in a concrete slab. Each cause of action stems from either the Form 17 disclosures, allegations of common law fraud or fraudulent concealment. While Jackowskis spend considerable time in their brief discussing fraudulent concealment of concrete cracks, this claim was not disposed of on summary judgment. Jackowskis will have an opportunity to litigate that cause of action before the trial court. The Jackowskis' arguments regarding concrete cracks are irrelevant to this appeal. Jackowskis ultimately seek rescission or damages based upon negligent representation, fraud or fraudulent concealment.

1) Rescission based upon Form 17 disclosures:

With the exception of the breach of contract claim, all issues now on appeal pertaining to affirmative representations made by Borchelts arise out of the Chapter 64.06 RCW (Form 17) disclosure.

Jackowskis argue that they are entitled to rescission and/or damages arising from the Form 17 disclosures because negligent misrepresentation supports a claim for rescission. This argument ignores the statutory scheme of Chapter 64.06 RCW. Rescission for Form 17 statements is not allowed under Chapter 64.06 RCW after closing. RCW 64.06.030.

While Jackowskis can still assert other common law, statutory or contractual claims, any claims founded upon Form 17 disclosures are subject to a limitation of seller's liability under RCW 64.06.050 and 64.06.070. Any common law, statutory or contractual claim founded upon Form 17 disclosures fails unless Jackowskis establish that Borchelts had "**actual knowledge**" of the error, inaccuracy, or omission. RCW 64.06.050; RCW 64.06.070. Jackowskis failed to offer evidence that Borchelts possessed "actual knowledge" contrary to their Form 17 disclosures therefore the trial court properly granted summary judgment.

2) Negligent Misrepresentation, Fraud & Fraudulent Concealment:

Even if Jackowskis were able to establish that Borchelts possessed "actual knowledge" contrary to their Form 17 disclosures, Jackowskis still

need to establish the fundamental elements of each particular claim. For negligent misrepresentation, fraud and fraudulent concealment claims, Jackowskis must produce evidence that a reasonable investigation would not have disclosed the existence of slope instability or fill.

Jackowskis' failure to offer evidence to support the elements of each claim provides additional justification for the trial court's disposition of each claim on summary judgment.

3) Economic Loss Rule:

Application of *Alejandre v. Bull* and the "economic loss" rule provides yet another justification for disposition of negligent misrepresentation claims on summary judgment. *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007). However, in light of Jackowskis' failure to offer evidence regarding "actual knowledge" and fundamental elements of a fraud or fraudulent concealment claim, *Alejandre* and the "economic loss" merely constitute secondary justifications. Jackowskis convoluted arguments regarding *Alejandre* and the "economic loss" rule should not be allowed to cloud basic issues regarding the sufficiency of evidence. In the absence of evidence establishing "actual knowledge" and fundamental claim elements, the trial court correctly granted summary judgment on each claim. Although Borchelts do contend that *Alejandre* and the "economic loss" rule preclude Jackowskis' negligent

misrepresentation claims, this argument merely supplements fundamental contentions that Jackowskis failed to put forth sufficient evidence to withstand summary judgment.

Analysis

A) Chapter 64.06 RCW

Jackowskis assign error to the trial court's grant of summary judgment regarding claims founded upon Chapter 64.06 RCW disclosures. *See* Jackowskis' Opening Brief, 33. Pursuant to RCW 64.06.020 and .030, Borchelts provided a standard seller's disclosure statement to the Jackowskis. The disclosure statement contained standard language set forth in the statutory sample form at RCW 64.06.020. It included the following clauses capitalized on the front page: **(1)** "Seller makes the following disclosures of existing material facts or material defects to buyer based on seller's actual knowledge of the property at the time the seller completes this disclosure statement;" **(2)** "The information is for disclosure only and is not intended to be a part of any written agreement between buyer and seller;" **(3)** "For a more comprehensive examination of the specific condition of this property, you are advised to obtain and pay for the services of qualified experts" CP 784-85.

RCW. Chapter 64.06 RCW establishes one specific buyer's remedy (RCW 64.06.030), and explicitly limits a seller's liability with respect to Form 17 disclosures (RCW 64.06.050; RCW 64.06.070). Plaintiffs argue that they are entitled to rescission based upon the theory of negligent misrepresentation in the context of answers to questions on Form 17. That is not the law.

The remedy of rescission may be modified by statute. 17 Am.Jur. 2nd §565. Washington has done so in enacting Chapter 64.06 RCW. RCW 64.06.020 requires certain disclosures of a seller of residential real property. In exchange for requiring Plaintiff to fill out the disclosure form, the statute limits a plaintiff's remedy to rescission. Damages from such disclosure form inaccuracies are not available. 64.06.070. RCW provides:

“Except as provided in RCW 64.06.050, nothing in this chapter . . . creates any new right or remedy for a buyer of residential real property other than the right of rescission exercised on the basis and within the time limits provided in this chapter.”

Jackowskis rely solely on the Form 17 disclosures for their misrepresentation causes of action. There were no other representations made by Borchelts. RCW 64.06.050 specifically limits a seller's liability under Form 17 disclosures: “(1) 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.” As to rescission based upon disclosures in Form 17, the buyer must prove actual knowledge of the misstatement.

A major obstacle for the Jackowskis claim for rescission is the timeline imposed under Chapter 64.06 RCW. RCW 64.06.060 requires that a buyer exercise the remedy of the disclosure within 3 days of receiving the information. Any claim for rescission based upon the Form 17 disclosures had to be exercised within 3 business days. Washington Practice provides:

“If the statute allowed buyers a remedy of rescission or even damages for, say, several years after they purchased and took possession and defects showed up, then they would have a meaningful opportunity to discover the defects in time to invoke a remedy. However, as stated above, the statute expressly limits its remedy to rescission within three days (or other period if agreed) after receipt of the disclosure statement.

18 WAPRAC § 16.5

The real estate transaction between the Borchelts and Jackowskis closed June 30, 2004. CP 623. RCW 64.06.040(2) provides that in the event that 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. RCW 65.06.040. Jackowskis did not deliver any written rescission notice to the Borchelts prior to closing, and therefore approved and accepted the disclosure statement. Jackowskis learned of the alleged inaccuracies in the disclosure statement no later than February 2006 yet they did not seek to exercise rescission until May 1, 2006 well beyond the three day limit.

The Jackowskis' limited right of rescission under RCW 64.06.030 is now foreclosed by the plain statutory language. Jackowskis cannot base any claim for rescission on RCW 64.06.030.

B) Reasonable Reliance

In each of the other causes of action alleged by Jackowskis, they must prove that a reasonable investigation would not have disclosed the defects about which they complaint.

To prevail on a claim of negligent misrepresentation, a plaintiff must prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of others in their business transaction that was false; (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in business transactions; (3) the defendant was negligent in obtaining or

communicating false information; (4) **the plaintiff's reliance on the false information was justified (reasonable under the circumstances)**; and (5) the false information was the proximate cause of damages to the plaintiff. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 827-28, 959 P.2d 651 (1998). Likewise, in a fraudulent concealment claim the plaintiff must prove the defect would not be disclosed by a careful, reasonable inspection by the purchaser. *Alejandre v. Bull*, 159 Wash.2d at 689 (2007).

Even if Jackowskis were able to establish that certain Form 17 disclosures were false, and even if Jackowskis were able to satisfy the “actual knowledge” element imposed by RCW 64.06.050, Jackowskis’ cannot establish that their reliance on the challenged Form 17 disclosures was reasonable. Reasonable reliance is a fundamental element of a negligent misrepresentation claim. The court in *Alejandre v. Bull* explained that a buyer of residential real estate has a burden to reasonably investigate the property. The court held that liability only arises if the defect complained of “would not be disclosed by a careful, reasonable inspection by the purchaser.” *Alejandre*, 159 Wn.2d at 689. Jackowskis had a duty to exercise “reasonable diligence” and inspect and investigate the issues related to the subject property. *Id.*

Borchelts represented that the property contained no “fill” material. Although the parties debate the definition of “fill” as used in the Form 17 disclosure, a reasonable inspection of the property would have revealed that portions of the steeply sloping property were excavated, and soil was relocated, in order to create the homesite. If on-site excavation and soil relocation meets the definition of “fill” as used in the Form 17 disclosure, a reasonable investigation would have disclosed the existence of such “fill” activity. Similarly, a reasonable inspection of the site would have disclosed slope instability. Jackowskis’ own experts testified that any reasonable investigation would have disclosed both the existence of fill on the subject property and the slope instability issues. It is undisputed that a reasonable investigation would have revealed that the property was located in a landslide area, was listed on the coastal atlas as unstable, had geotechnical reports, and had signs of past instability. CP 215. It is also clear that if the Jackowskis had conducted a reasonable investigation, they would have discovered the back fill located on the property. According to Randall Thompson the “[f]ill is apparent and is located along the north boundary line of the property and is armored with quarry rock.” CP 215. According to Phil Weigand, a standard investigation of waterfront property should include a geological survey and a review of the County building department records. CP 215. The Jackowskis simply chose not to

have the inspections done, even though they conditioned their offer on being able to make such investigations. They now seek to blame others for their failure to perform a reasonable investigation.

The very documents supplied by the Borchelts to Jackowskis' agent were also available as county public records and disclosed the existing geotechnical documents. A reasonable investigation would have revealed any alleged discrepancy between the geotechnical professional's recommendations and the actual construction. Additionally, a reasonable inspection would have disclosed slope revegetation requirements imposed by Mason County. In fact, Jackowskis became aware of the requirements prior to closing, and made a conscious decision to go through with the property purchase. See Jackowskis' Opening Brief, 13. Jackowskis cannot argue that they reasonably relied on the Form 17 disclosures.

Borchelts represented that there had been no settling, slippage, or sliding of the property or its improvements. With respect to this disclosure, Jackowskis were on notice that the property was classified as a "landslide hazard area." Mr. Jackowski viewed formal County correspondence with the term "landslide hazard area" circled on the front page, prior to closing. CP 769-70. Mr. Jackowski also viewed documents that referenced an existing geotechnical report prepared for the property, prior to closing. CP 772-73. Mr. Jackowski is a college graduate with a

degree in computer science and a minor in mathematics from Cal State Hayward. CP 636. An educated individual with knowledge of landslide issues in California, extensive family ties in the immediate vicinity of the subject property, and knowledge of express language urging Jackowskis to obtain independent inspections of the property, Mr. Jackowski made no investigatory efforts whatsoever in the slope stability context. CP 636-637-38, CP 751-54. Mr. Jackowski walked the subject property with his agent, father, and brother, a California real estate agent with knowledge that certain waterfront property is prone to slippage problems. CP 763-65. Yet, during the course of the site visits the issue of slope stability was never discussed. Despite the fact that Jackowskis, prior to closing, were provided with a Mason County documentation that had the term "landslide hazard area" circled on the cover page, and which referenced the existing geotechnical report and addendum to the original report, the Jackowskis did not contact Mason County to inquire about the report and requested nothing from their agent in this respect.

Jackowskis arguments that a reasonable investigation would not have revealed slope instability issues are in direct conflict with the claims they assert against Robert Johnson and Jef Conklin. In those claims they assert that signs of slope stability were obvious to any observer of the property at the time of the sale, and that the existing geotechnical report

addressed slope stability issues. Jackowskis agree that it would have been fairly easy to further review the existing geotechnical documentation. CP 772. However, Mr. Jackowski simply “assumed” and “concluded” that such an evaluation was not necessary. CP 774-75. Jackowskis did not solicit any slope stability study as it “never occurred” to them. CP 782. Mr. Jackowski acknowledged that it was his burden to obtain an inspector to evaluate the property prior to closing the sale, and he failed to do so. CP 784-85. Through reasonable investigation efforts, Jackowskis could have obtained information regarding slope stability and information regarding the excavation and relocation of native soil that occurred during construction of the residence. Jackowskis did not justifiably rely on the Form 17 disclosures. CP 638-39.

C) Proximate Cause

The evidence establishes that Borcheltes’ Form 17 disclosures did not proximately cause Jackowskis’ damages. In order to meet the requirement of proximate cause in a negligence case, the negligent conduct must cause, through direct sequence unbroken by any independent cause, the event complained of, and without which the event would not have happened. *Alger v. City of Mukilteo*, 107 Wn.2d 541, 545, 730 P.2d 1333 (1987) (citing *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77

(1985); *King v. Seattle*, 84 Wn.2d 239, 249, 525 P.2d 228 (1974), overruled on other grounds). The evidence establishes, and Jackowskis agree, that one significant, distinct and widespread movement proximately caused the damage at issue. *See* Jackowskis' Opening Brief, 19; CP 789; CP 797. On February 3, 2006, nearly two years after Jackowskis' purchase, a significant slide event caused the alleged structural damage. At about 8:30 p.m. on February 3, 2006, the power went out in the Jackowskis' home. Mrs. Jackowski felt movement and heard sounds throughout the night, and when Mr. Jackowski inspected the house the next morning, the addition along the north side of the house was allegedly downset, with cracks and other distress features appearing in the sheet rock. Jackowskis' experts testified that the slide event extended beyond the subject property. *Id.*; Jackowskis' Opening Brief, 16.

Jackowskis assert that the damage to the home resulted from a "sudden, dangerous event." *See* Jackowskis' Opening Brief, 19. They argue that because the event was sudden and catastrophic, it should be distinguished from a situation where property is damaged slowly over time. *See* Jackowskis' Opening Brief, 20 – 21. During the event, the entire area, both on and offsite, moved down towards the saltwater shoreline. It is uncontested that the soil instability and soil movement are not limited to areas where construction-related excavation and soil

relocation took place. CP 789; CP 797. The evidence establishes that no one could have anticipated the particular slide event that resulted in the damage. CP 791-92. It was likely the result of several variables, including extreme levels of precipitation. *Id.* The alleged structural damage resulted directly from the slide event. The damage is not proximately related to Borchelts' Form 17 disclosures. There is no evidence that the damages were in any way caused by any fill or construction practices utilized on the site.

D) Rescission for Negligent Misrepresentation

Jackowskis seek contract rescission based on allegedly negligent misrepresentations. Jackowskis state that “the trial court would have been correct, after *Alejandre*, to hold that Jackowskis could not recover economic loss damages from the Borchelts – with whom they were in privity of contract – for the tort of negligent misrepresentation.” See Jackowskis' Opening Brief, 36. However Jackowskis go on to assert that the claim of rescission should survive. *Id.* Washington has adopted the Restatement (Second) of Torts with regard to negligent misrepresentation. *Janda v. Brier Realty*, 97 Wn.App. 45, 50, 984 P.2d 412 (1999) (citing *ESCA Corp.*, 135 Wn.2d at 826; *Condor Enterprises, Inc. v. Boise Cascade Corp.*, 71 Wn.App. 48, 52, 856 P.2d 713 (1993)). The

Restatement defines the elements of the tort, and limits damages to those necessary to compensate the plaintiff for pecuniary loss of which the misrepresentation is a legal cause. Damages include (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation. *Id.* (citing Restatement (Second) of Torts §552(1), §552B (1977)).

Jackowskis cite *Ross v. Kirner* and assert that the Court “allowed” contract rescission in the context of a negligent misrepresentation claim. *See* Jackowskis’ Opening Brief, 40. This proposition is misplaced, as the *Ross* Court simply determined that genuine issues of material fact remained to be resolved at trial. The Court remanded the matter to the trial court for further proceedings consistent with that determination. *Ross v. Kirner*, 162 Wn.2d 493, 172 P.3d 701 (2007). Jackowskis’ negligent misrepresentation claim is not supported by the evidence. Even if the claim were viable, the law does not afford contract rescission as a remedy.

E) Breach of Contract and Breach of Warranty

Jackowskis assign error to the trial court’s grant of summary judgment regarding claims founded upon breach of contract. *See*

Jackowskis' Opening Brief, 44. Jackowskis assert that Borchelts breached the contract by failing to provide a house as warranted. *See* Jackowskis' Opening Brief, 3. Jackowskis contend that Borchelts' completion of the Form 17 disclosures constituted an express warranty in the context of fill on site and slope stability, and that Borchelts' advertisement of the property and house as a "home" constitutes an implied warranty of habitability. *See* Jackowskis' Opening Brief, 45. Jackowskis argue that these actions constitute warranties that give rise to a breach of warranty claim. *Id.* Jackowskis seek a related contractual remedy. *See* Jackowskis' Opening Brief, 3. Jackowskis cite to a case involving warranties related to the sale of goods, and attempt to extend warranty law in the sale of goods context to the sale of used residential property sold for non-commercial purposes. *See* Jackowskis' Opening Brief, 44-45. However, the Washington State Supreme Court has made it clear that the warranties of habitability and fitness apply only where a new home is sold by a builder-vendor in a commercial context. *Klos v. Gockel*, 87 Wn.2d 567, 571, 554 P.2d 1349 (1976); *Frickel v. Sunnyside Enterprises, Inc.*, 106 Wn.2d 714, 717 - 20, 725 P.2d 422 (1986).

The *Frickel* Court observed that a builder "who puts a house on the market, brand-new and never occupied, has some responsibility to the ultimate buyer." *Frickel*, 106 Wn.2d at 717. In the context of residential

property sales, implied warranties arise only where a new home is constructed and sold in a commercial fashion by a vendor-builder. *Id.* at 717-18 (citing *House v. Thornton*, 76 Wn.2d 428, 457 P.2d 199 (1969); *Berg v. Stromme*, 79 Wn.2d 184, 196, 484 P.2d 380 (1971); *Klos*, 87 Wn.2d 567). No case law supports Jackowskis' contention that an implied warranty exists in the context of the Borchelt-Jackowski transaction: an arms' length transaction involving the sale of a used home by residential owner-vendors in a non-commercial context.

Jackowskis' assertions regarding the existence of an express warranty are similarly flawed. The purchase and sale agreement executed by the parties contains no express warranty provision. Form 17 disclosures do not become a part of any written agreement between the buyer and seller. RCW 64.06.020. Form 17 contains explicit language to this effect, located on the front page, in capital letters, and accompanied by an explicit recommendation that the buyer obtain and pay for the services of qualified experts to facilitate a more comprehensive examination of the specific condition of the property. CP 784-85.

The trial court properly granted summary judgment with respect to claims founded upon breach of contract. Jackowskis failed to establish that Borchelts breached any contractual provision or warranty, express or implied. Once again, Jackowskis' misplace emphasis on the meaning and

applicability of *Alejandro*. See Jackowskis' Opening Brief, 3. Jackowskis' argument - that the economic loss rule "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" - is irrelevant. Jackowskis failed to establish the fundamental elements of a contractual breach. A party that fails to establish the elements of a claim is in no position to make arguments regarding the availability of remedies related to the failed claim.

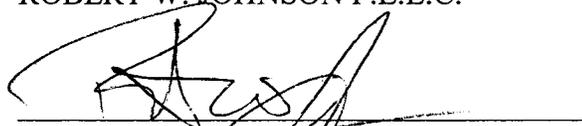
CONCLUSION

Respondents request that this Court affirm the decision of the trial court. Jackowskis fail to present evidence that their reliance on any representation was justified under the fact of this case or that any concealed facts were not readily ascertainable by a reasonable investigation. Without proof as to these essential elements of their claim, summary judgment was proper.

DATED this 8 day of May, 2007.

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

TIMOTHY L. JACKOWSKI and ERI
JACKOWSKI, husband and wife,

Plaintiffs/Petitioners,

vs.

DAVID BORCHELT and ROBIN
BORCHELT, husband and wife, HAWKINS
POE, INC. dba COLDWELL BANKER
HAWKINS-POE REALTORS, HIMLIE
REALTY INC., VINCE HIMLIE, Broker for
WINDERMERE HIMLIE REAL ESTATE,
real estate brokers, and ROBERT JOHNSON
and JEF CONKLIN, real estate agents,

Defendants/Respondents.

Case No.: 36944-3-II

DECLARATION OF MAILING

I, FAY E. HUGHES, declare the following:

I am a citizen of the United States and a resident of Washington, I am over the age of eighteen years and not a party to the above-entitled action; I am employed by the office of Settle & Johnson, P.L.L.C., Attorneys at Law, located at 103 S. 4th Street, Shelton WA 98584.

On the 8th day of May 2008, I mailed copy of Response Brief and Declaration of Mailing, proper postage thereon as follows:

Jeffrey P. Downer
Attorney at Law
1800 One Convention Place, 701 Pike St.
Seattle, WA. 98101-3929

1 Melanie A. Leary
2 Demco Law Firm, P.S.
3 5224 Wilson Ave. South
4 Suite # 200
5 Seattle, WA. 98118

6 Jon E. Cushman
7 Attorney at Law
8 924 Capital Way South
9 Olympia, WA 98501

10 **I declare under penalty of perjury under the laws of the State of Washington that**
11 **the foregoing is true and correct.**

12 Signed at Shelton, Washington on the 8th day of May 2008.

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FAY E. HUGHES