

NO. 36944-3-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

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

Appellants,

v.

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 JEFF CONKLIN, Real Estate Agents,

Respondents.

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BRIEF OF RESPONDENTS HAWKINS POE, INC. AND JOHNSON

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A. INTRODUCTION

Plaintiffs-appellants Tim and Eri Jackowski's kitchen-sink opening brief cannot overcome the simple fact that the trial court correctly entered summary judgment of dismissal of all claims against defendants-respondents Hawkins Poe, Inc. and Robert Johnson (hereinafter collectively Hawkins Poe). Those claims were for negligent misrepresentation and violation of RCW 18.86.050(1)(c). Both sound in tort, not contract, so the economic-loss rule bars both. This court's decision in *Stieneke v. Russi*, no. 35505-1-II (July 1, 2008) strongly reaffirms that rule and refutes the Jackowskis' main effort to evade it.

The trial court properly dismissed the Jackowskis' negligent-misrepresentation claim on summary judgment. The Jackowskis received written notification from Hawkins Poe of the landslide risk that they claim was withheld from them, and they would have discovered it again had they conducted the full inspection to which they were contractually entitled under their Real Estate Purchase and Sale Agreement (REPSA). Their attempts to blame Mr. Johnson for the inspection's incompleteness are both untrue and contrary to contract law governing their REPSA.

This court should affirm dismissal of the RCW 18.86.050(1)(c) on its merits as well. RCW 18.86 does not create any right of action; even if it did, Hawkins Poe complied with that statute.

B. ASSIGNMENTS OF ERROR

Assignments of Error

Hawkins Poe assigns no error to the trial court's decisions.

Issues Pertaining to Assignments of Error

1. Whether the trial court correctly dismissed all of plaintiff real estate buyers' claims against their real estate broker and agent, where:
 - a. The buyers alleged negligent misrepresentation and other professional negligence under RCW 18.86 *et seq.*, based on alleged nondisclosure of the risk of earth movement on the property;
 - b. Because the buyers' claims arise from a contract, as a matter of law, Washington's economic-loss rule defeats all of the buyers' non-contract claims against their broker and agent;
 - c. The buyers admit that their agent timely provided them with documentation stating that the property was in a Landslide Hazard Area, so that as a matter of law the buyers could not prove justifiable reliance on any other alleged nondisclosure regarding earth movement;
 - d. The buyers' purchase was expressly contingent on a full inspection of the property, including a soils-stability inspection, yet they chose not to conduct one;
 - e. The buyers admit that a reasonable inspection would have disclosed the problem of instability on which they now sue; and

f. As a matter of law, RCW 18.86 does not create a right of action against real estate brokers or agents but merely codifies standards of conduct that would apply to pre-existing common-law claims; and

2. Whether the trial court acted within its discretion in striking plaintiffs' jury demand, where the main relief their complaint seeks is the equitable remedy of rescission, which only the court may decide.

C. STATEMENT OF THE CASE

This appeal arises from a real estate transaction in which Hawkins Poe represented the Jackowskis in their purchase of a waterfront home in Mason County. CP 1256. Jef Conklin of Windermere Himlie Real Estate represented the sellers, defendants Borchelt. *Id.* The Jackowskis initially alleged claims against Hawkins Poe for negligent misrepresentation and "breach of duties." CP 517, 1392. After Hawkins Poe successfully moved for summary judgment of dismissal of the negligent-misrepresentation claim, CP 834-36, and the Jackowskis moved for leave to amend their complaint, CP 510-18, the court permitted them to add only one claim against Hawkins Poe other than the dismissed negligent-misrepresentation claim: That Hawkins Poe "violated RCW 18.86.050(1)(c), for allegedly failing to advise plaintiffs, during the pendency of the real estate transaction at issue in this action, to seek the advice of a geotechnical expert." CP 492. The trial court refused the

Jackowskis' request to plead any other claims against Hawkins Poe, including of violation of RCW 18.86.030 or breach of contract. *Id.* The Jackowskis assign no error to that order.

The REPSA provided for the transaction to close on or about June 28, 2004. CP 1256. On February 2, 2006, more than a year and a half after closing, a major earth movement occurred in the neighborhood. The Jackowskis felt movement and heard sounds during the night. The Jackowskis allege that on later inspection, the north side of the house was down set, and signs of distress such as cracking had appeared. App. Br. at 16. The Jackowskis claim that the house is unlivable. *Id.*

1. **The Jackowskis failed to prove negligent misrepresentation.**
 - a. **Hawkins Poe gave the Jackowskis documentation that told them of the risk of landslides.**

Mr. Johnson did disclose to the Jackowskis all of the information he had available on the Property, consistent with his standard practice. CP 1299. While the transaction was pending, Mr. Johnson gave the Jackowskis a document from the Mason County Department of Community Development Planning Commission. CP 1292, 1298, 1313-14. That document states that the Property was located in an Aquatic Management and Landslide Hazard Area. *Id.* The document stated, “**The following critical areas are present on this property,**” and circled on

this document were “aquatic management areas” and “**landslide hazard areas.**” CP 1292. Mr. Jackowski admitted that he received this document before the sale closed. CP 1291-92. He admitted, “I read it, but I obviously misread it.” *Id.* The Jackowskis now openly admit receiving this explicit written warning. App. Br. at 12.

b. The Jackowskis agreed that Hawkins Poe made no representations about the Property’s condition.

The Jackowskis offer no proof that Mr. Johnson made any representations about slippage or landslides. They repeatedly received and/or signed documentation stating that Hawkins Poe was making no representations about the Property’s condition whatsoever. First, **Mr. Johnson provided the Jackowskis with the Form 17**, or Seller Disclosure Statement, which the Borchelts filled out pursuant to RCW 64.06.020. CP 1301-11. Mr. Jackowski received the Borchelts’ Form 17. CP 1282, 1301-11. He acknowledged that it contained only statements by the seller, not any real estate agent. The first page of the Form 17 states:

The disclosures set forth in this statement and in any amendment to this statement are made only by the seller, not by any real estate licensee or other party.

CP 1283, 1301, 1307. In the Form 17, the Borchelts denied any settling, slippage, or sliding of the Property or its improvements. CP 1310. Mr. Jackowski admitted receiving, signing, and understanding the Form

17. He admitted he had no facts suggesting that Hawkins Poe knew the Form 17 was wrong. *Id.* By signing the Form 17, he acknowledged that Hawkins Poe was “not liable for any inaccurate information provided by the seller except to the extent that the real estate licensees know of such inaccurate information.” CP 1305-06, 1311.

Second, the Jackowskis made their written offer to purchase the Property from the Borchelts via the REPSA. CP 1256-72. In signing the REPSA, they acknowledged receipt of a “**Law of Real Estate Agency**” pamphlet from Mr. Johnson. CP 1278.

Third, the REPSA further contained a **Property Condition Disclaimer**, which notified the Jackowskis:

Property Condition Disclaimer. Real estate brokers and salespersons do not guarantee the value, quality or condition of the Property. ... [S]ome properties may have other defects arising after construction, such as drainage, leakage, pest, rot and mold problems. Real estate licensees do not have the expertise to identify or assess defective products, materials, or conditions.

Mr. Jackowski read, understood, and signed this term. CP 1278.

Fourth, the REPSA was a fully integrated contract:

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

CP 1258. This conclusively defeats the Jackowskis' allegations that they relied on any oral communications to the contrary. *See* § D.2.d., *infra*.

Mr. Jackowski repeatedly admitted that he has no proof that Hawkins Poe knew that the Property was prone to, or had ever experienced, a landslide. CP 1286-88, 1290, 1293. The Jackowskis' only "proof" that Hawkins Poe **actually knew** about landslides is merely Mr. Jackowski's subjective assumption that Hawkins Poe **should have known** of that condition. He testified only to his hearsay belief that "there is training available to real estate agents for selling coastal property, and part of that training is being able to identify features on the property or around the property that indicates that there may be a history of landslides." CP 1284-86. But he admitted that he had "no idea" whether Mr. Johnson "had any actual knowledge that the land was slipping" or "whether Robert Johnson or anybody at Coldwell Banker Hawkins Poe had ever even looked at the USGS coastal map." *Id.* This assumption that Hawkins Poe "must have known" about landslide hazards through its training as real estate agents, *id.*, contradicts what Mr. Jackowski admits he knew and contractually agreed to by signing the REPSA and Form 17. CP 1282-83.

Fourth, as set forth immediately below, the Jackowskis **bought the Property contingent on their approval of an inspection of the**

Property. That fact is fatal to the Jackowskis' claims against Hawkins Poe, because it shows that the Jackowskis were to rely on the results of that inspection, not on any defendant, to determine the Property's condition. *See* § D.2.d.-e., *infra*. Had the Jackowskis pursued their full contractual right of inspection, it would have revealed the landslide risk on which they now sue, which likewise defeats their claims. *See id.*

c. The Jackowskis had the contractual right to hire an inspector, and they did so.

The Form 17 notified the Jackowskis, on its first page:

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** to inspect the property, which may include, without limitation, architects, engineers, land surveyors, plumbers, electricians, roofers, building inspectors, on-site wastewater treatment inspectors, or structural pest inspectors. The prospective buyer and seller may wish to obtain professional advice or inspections of the property or to provide appropriate provisions in a contract between them with respect to any advice, inspection, defects or warranties.

CP 1307. This provision clearly included not only the improvements to the property but the condition of the land itself. *Id.* Mr. Jackowski read this provision and understood that it was his burden to hire an inspector prior to closing the sale. CP 1289. Furthermore, this provision in the Form 17 singlehandedly refuted the Jackowskis' claim based on RCW 18.86.050(1)(c), because whether or not Mr. Johnson told the Jackowskis

to retain experts, this document told them to do so. *See* § D.2.e., *infra*.

The Jackowskis also contractually agreed to an Inspection Addendum to the REPSA that existed for their own protection:

The above Agreement is conditioned on Buyer's subjective satisfaction with an inspection of the Property. Buyer's inspection may include, at Buyer's option, the structural, mechanical and general condition of the improvements to the Property, compliance with building and zoning codes, an inspection of the Property for hazardous materials, a pest inspection, and a **soils stability inspection**.

CP 540, 1265 (emphasis added). Again, this binding contract explicitly told the Jackowskis in writing to order a geotechnical inspection. The Jackowskis did hire a building inspector but did not attend the inspection or request that it include a soils-stability inspection because, Mr. Jackowski testified, it "[n]ever occurred to me." CP 1280-81.

d. A reasonable inspection would have disclosed the risk of landslides.

The Jackowskis assert that defendant Jef "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 had occurred in the past). CP 286-87." App. Br. at 8. That assertion defeats their negligent-misrepresentation claim against Hawkins Poe. They admit that the trial court held "that a reasonably diligent inspection would have disclosed the

presence of fill.” App. Br. at 17. The Jackowskis were bound by facts that a reasonable inspection would disclose and thus did not justifiably rely on any alleged misrepresentation. *See* § D.2.e., *infra*.

2. The trial court dismissed the Jackowskis’ negligent-misrepresentation claim on its merits and later dismissed all remaining claims against Hawkins Poe based on the economic-loss rule.

Based on the above-described transaction documentation and testimony of Mr. Jackowski, Hawkins Poe moved for summary judgment of dismissal of the Jackowskis’ complaint. On May 29, 2007, the trial court granted Hawkins Poe’s motion and dismissed the Jackowskis’ claim of negligent misrepresentation against Hawkins Poe. CP 835.

That ruling did not specify whether all, or only some, of the Jackowskis’ claims against Hawkins Poe were dismissed. The Jackowskis’ counsel argued that Hawkins Poe owed duties under RCW 18.86.050(1)(c) to advise the Jackowskis to seek expert advice regarding the stability of the Property. The trial court did not dismiss the Jackowskis’ claims against Hawkins Poe in their entirety. CP 834-36. Therefore, Hawkins Poe brought a second motion for summary judgment, because RCW 18.86 *et seq.* did not create any new cause of action that would have survived the May 29, 2007 summary judgment order. On July 10, 2007 the court denied that motion. CP 802. However, Hawkins

Poe later moved for summary judgment based on the economic-loss rule, CP 594-97, 628-29, which generally prohibits plaintiffs from suing in tort for economic loss when a contract could have provided for that remedy. The trial court granted Hawkins Poe's motion for Summary judgment of Dismissal Regarding Economic Loss Rule, resulting in dismissal of all remaining claims against Hawkins Poe. CP 106.

3. The Jackowskis never alleged or proved spoliation.

The Jackowskis allege spoliation of evidence, asserting that Hawkins Poe "lost all the emails" between the Jackowskis and Hawkins Poe. App. Br. at 5, 29, 48-49, citing CP 993-95, 1014-15, 1036. But those CP citations show not spoliation but only that Hawkins Poe did not retain routine e-mails as a matter of policy, CP 993-95, as the statute requiring retention of transaction documents did not require it. CP 1015. Furthermore, the Jackowskis' spoliation argument, App. Br. at 48-49, is raised for the first time on appeal; it appears nowhere in their oppositions to Hawkins Poe's summary judgment motions. CP 403-05, 840-64, 1232-47. This court thus must disregard it. *See* § D.1.d., *infra*.

4. The Jackowskis' factual assertions regarding fraud and fraudulent concealment do not pertain to Hawkins Poe.

A lengthy portion of the Jackowskis' brief asserts facts concerning fraud and/or fraudulent concealment. App. Br. at 5-12. They do not direct

those assertions, and never pleaded such claims, against Mr. Johnson or Hawkins Poe. CP 492, 514, 1393.

5. The Jackowskis make factual assertions that they fail to support with proper citations to the record.

In their opening brief, the Jackowskis make factual assertions that they fail to support with any citations to the Clerk's Papers, or that their citations to the record do not support. This court thus must ignore those factual assertions. *See* § D.1.b., *infra*. The Jackowskis' citations to the record do not bear out the following factual assertions:

- (1) The Jackowskis mischaracterize Mr. Johnson as an "inexperienced agent," App. Br. at 4, citing CP 1000, 1035, 1040. Those citations do not so state.
- (2) The Jackowskis falsely assert that Mr. Johnson's broker Steve Furst "had a policy not to give waterfront-purchasing clients to an inexperienced agent," App. Br. at 5, citing CP 1000, 1035, 1040. Mr. Furst actually testified to the contrary.
- (3) The Jackowskis assert that Mr. Furst testified that the inspection addendum does not meet an agent's duty to advise a buyer client to seek an expert opinion on matters the agent does not understand. App. Br. at 15. In fact Mr. Furst rejected that notion. He told the Jackowskis' counsel, "You're trying to make a blanket statement,

and it's not applicable in every instance. And in this case, I don't think it applies at all[.]” CP 1007. He testified that the buyer's right to neighborhood review and “a scrutiny of the Form 17” are “a couple of places beyond just the inspection that meet the requirement.” CP 1008.

- (4) As set forth above, the CP citations for the assertion that “Hawkins Poe lost all the emails,” App. Br. at 5, show no such thing.
- (5) The Jackowskis assert that those supposedly “lost” e-mails “would have confirmed *if* and *when* he [Mr. Johnson] gave the report to the Jackowskis,” App. Br. at 14, citing CP 993-95, 1014-15, 1036, when those CPs do not support that rank speculation.
- (6) The Jackowskis assert that Mr. Johnson “admitted” that he would hire a geologist if he were buying waterfront property for himself, App. Br. at 14, citing CP 1041; in fact Mr. Johnson was asked whether he would hire a geologist **if** he knew that the property had “an unstable slope and the old unstable slide area behind.” *Id.*
- (7) The Jackowskis assert that the REPSA “had a standard inspection contingency addendum,” App. Br. at 14, citing 1041, falsely implying that the inspection contingency was limited in scope. In fact the contractually binding Inspection Contingency was sweeping in its scope and expressly provided for “Buyer's personal

approval of an **inspection of the Property and the improvements on the Property**. The inspection may include, at Buyer's option, ... a **soils/stability inspection**." CP 540, 1265.

- (8) The Jackowskis assert that "Johnson advised Jackowskis to 'get a home inspection and ... a well inspection.'" App. Br. at 14, citing CP 1042. That assertion leaves the misleading impression that only limited, discrete conditions rather than soils stability should be inspected, when in fact the Jackowskis' REPSA always expressly included a soils stability inspection.
- (9) The Jackowskis imply that they sued Hawkins Poe for "breaches of contract." App Br. at 17. In fact the trial court denied their motion for leave to amend their complaint to add such a claim. CP 492.
- (10) The Jackowskis imply that Mr. Johnson knew that home inspector Greg Walman would perform only a limited home inspection. App. Br. at 14-15, citing CP 1042. That citation to the record does not support the implication. In fact, the Jackowskis contractually agreed that their inspection should include "a soils/stability inspection." CP 540, 1265.
- (11) The Jackowskis assert that Mr. "Walman did not inspect the property for soil stability or fill," App. Br. at 15, but offer no supporting citation to the record.

(12) The Jackowskis assert that Hawkins Poe received the Hal Parks soil-stability report and withheld it from them. App. Br. at 29-30, citing CP 305-07, 800, 1047, 1049. That assertion misstates the record. Ms. Borchelt asserted in a declaration that she mailed the report “to either Agent Jef Conklin or Agent Robert Johnson,” CP 800, without explaining why she would send it to Mr. Johnson, who represented the Jackowskis rather than her. At deposition, she testified only that she gave it to Mr. Conklin and does not know if Mr. Johnson ever received it. CP 305-07. Mr. Johnson testified that prior to closing, he provided the Jackowskis with everything that he received regarding the Property. CP 1047. The Jackowskis offer no citation to the record that shows that Mr. Johnson ever received the Parks report.

D. SUMMARY OF ARGUMENT

The trial court was correct in dismissing the Jackowskis’ claims against Hawkins Poe on summary judgment, for several reasons.

1. The economic-loss rule bars all such claims as a matter of law. That doctrine applies where parties could have negotiated remedies by contract, even if they did not do so. *Alejandre v. Bull*, 159 Wn.2d 674; 153 P.3d 864 (2007) applies the economic-loss rule to private real estate transactions. Here, the Jackowskis signed the REPSA, a contract, which

set out the parties' rights and duties; therefore, any claim for economic loss must be brought under the REPSA. Short of fraud, the Jackowskis cannot recover in tort for alleged economic losses.

2. The trial court properly dismissed the Jackowskis' negligent-misrepresentation claim against Hawkins Poe and Mr. Johnson because the Jackowskis failed to present the required clear, cogent, and convincing evidence of (1) a misrepresentation of existing fact regarding the Property or (2) that they reasonably relied on any misrepresentation. They failed to show that either Hawkins Poe or Mr. Johnson even knew of the alleged problems with the home. Hawkins Poe had no duty to discover or investigate the alleged problems. RCW 18.86.030(2).

3. As a matter of law, RCW 18.86 *et seq.* creates no substantive cause of action against real estate professionals, but merely codifies standards of conduct. Thus, even if the economic-loss rule did not apply, this court may affirm the dismissal of the Jackowskis' claim of violation of RCW 18.86 claim because no such claim exists.

The trial court was correct when it struck the Jackowskis' jury demand, because they always sought rescission of the REPSA as their first remedy. Only in the alternative did they pray for damages. Rescission is an equitable remedy that requires a bench, not jury, trial.

The Jackowskis raise for the first time on appeal allegations of

spoliation against Hawkins Poe. App. Br. at 49. This court must ignore all issues that the Jackowskis failed to raise to the trial court.

E. ARGUMENT

1. This court should ignore part or all of the Jackowskis' brief because it violates the RAPs.

a. The Jackowskis violate the 50-page limit.

RAP 10.4(b) plainly limits a brief of appellant to 50 pages; “[f]or compelling reasons the court may grant a motion to file an over-length brief.” The Jackowskis’ 54-page brief violates this rule. They did not bother to move for leave to file an over-length brief. The best remedy is for the court to strike the Jackowskis’ brief, grant them leave to file a brief that does not violate the rules, and order them to pay all respondents’ legal expenses incurred in responding to the Jackowskis’ improper brief.

b. The court should ignore factual assertions that the Jackowskis fail to support with proper citations to the record.

The Jackowskis offer several factual assertions that they fail to support with citations to the record. *See* § B.5., *supra*. A party must cite the record for each factual statement in the Statement of the Case. RAP 10.3(a)(4). This court should ignore any assertions of fact which lack such citations. *Simmerman v. U-Haul Co. of Inland Northwest*, 57 Wn. App. 682, 685, 789 P.2d 763 (1990). Such rules are intended to relieve this court from searching through the lengthy record. *Cf. Thomas v. French*,

99 Wn.2d 95, 100-01, 659 P.2d 1097 (1983). This court may impose sanctions for a party's failure to cite the record adequately. RAP 10.7.

c. The court should ignore arguments that the Jackowskis fail to support with citations to authority.

The Jackowskis offer several arguments that they fail to support with citations to authority. This court should ignore any arguments that lack such citations. *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 36, 723 P.2d 1195 (1986). Absent such citations, this court need not search for authority. *State v. Hunter*, 3 Wn. App. 552, 553-54, 475 P.2d 892 (1970). Where no authorities are cited, this court may assume that counsel, after diligent search, has found none. *DeHeer v. Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

One example is particularly egregious. The Jackowskis ask rhetorically, "Why shouldn't Hawkins Poe's and Windermere's insurance policies (which indemnify against agents' errors and omissions) answer for these catastrophic loss damages?" App. Br. at 21. Not only do the Jackowskis fail to cite authority to support this as a proper basis for deciding any issue in this case; they also flagrantly violate the law in even posing the question and invite this court to decide this case on improper grounds. The Jackowskis appeal summary judgment orders, which the trial court could decide only on admissible evidence. CR 56(e). "A court

cannot consider inadmissible evidence when ruling on a motion for summary judgment.” *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986). Considerations of liability insurance are not relevant or admissible, ER 411, and would be grounds for a mistrial and sanctions had the Jackowskis posed the same improper question to the trier of fact.

d. The court should ignore arguments that the Jackowskis raise for the first time on appeal.

The Jackowskis cannot offer arguments for the first time on appeal. RAP 2.5(a)(3); *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996). Yet the Jackowskis offer assertions against Hawkins Poe that they never offered to the trial court, including: (1) the false assertion that Hawkins Poe “lost” e-mails and thereby committed spoliation, App. Br. at 5, 29, 48-49; (2) the false assertion that Hawkins Poe transmitted a Form 17 that it knew was false, App. Br. at 28; (3) the assertion that “Hawkins Poe possessed the slope-stability report, but did not transmit it to the Jackowskis before closing, App. Br. at 29, when in fact the record does not directly support that assertion; and (4) the argument that the economic-loss rule does not apply to “catastrophic events” or professional-liability claims, App. Br. at 18-27. This court should ignore all of those assertions.

- e. **The court should ignore arguments as to which the Jackowskis have failed to assign error.**

The Jackowskis argue points as to which they failed to assign error. RAP 10.3(a)(4) requires that an appellant's brief contain:

(4) *Assignments of Error.* A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

The Jackowskis fail to assign error to the trial court's decisions in several respects and thereby violate of RAP 10.3(a)(4). The "spoliation" argument, for example, not only is a gross mischaracterization of the record, § B.3., *supra*, but also was never pleaded, CP 492, 514, 1393, is raised for the first time on appeal, and appears nowhere in the Jackowskis' Assignments of Error or statement of issues. App. Br. at 1-2.

This court must not consider matters to which no error has been assigned or argument made, and for which no citations are provided. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 504 (1995). Without such information, this court cannot properly consider the issue and "more importantly, the other party is unable to present argument on the issue or otherwise respond and thereby potentially suffers great prejudice." *Id.* The court, and Hawkins Poe, are left to search the Jackowskis' brief and the record to determine what if any error they are assigning to which trial

court decisions. It is not this court's job to search through the record to find legal argument or evidence supporting it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992).

2. The trial court correctly held that the economic-loss rule bars the Jackowskis' claims.

a. The economic-loss rule defeats all of the Jackowskis' claims against Hawkins Poe.

The economic-loss rule applies where parties could have negotiated remedies by contract, whether or not they in fact did so. *Alejandre*, 159 Wn.2d at 682-85. The purpose of this rule is to mark the bright-line distinction between damages available in tort and those available in contract. *Carlson v. Sharp*, 99 Wn. App. 324, 325, 984 P.2d 851 (1999); *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 821, 881 P.2d 986 (1994). The rule prohibits a plaintiff from recovering economic losses in tort that he could have negotiated under a contract.

Where the parties' expectancies as to liability are contained in bargained-for contracts, a plaintiff may not recover economic losses in tort **even where there is no privity of contract** between the parties. *Berschauer/Phillips*, 124 Wn.2d at 828; *Carlson*, 99 Wn. App. at 330. In *Berschauer/Phillips*, a builder who contracted with the Seattle School

District asserted negligence claims against an architect and structural engineer, who had done design work for the District earlier. Although there was no contract between the builder and the architect and engineer, a unanimous Washington Supreme Court affirmed dismissal of the claim:

[W]hen parties have contracted to protect against economic liability, as is the case in the construction industry, contract principles override tort principles in §552 [of the Restatement of Torts] and thus, purely economic damages are not recoverable.

Id. Thus, a plaintiff may not recover economic loss in tort that arises from a contractual relationship, even against a non-party to the contract.

The Jackowskis offer several creative assertions in their effort to evade the binding effect of *Alejandre and Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987). (1) They assert that the economic-loss rule “thus maintains a proper, but permeable, barrier between tort and contract[.]” App. Br. at 3. (2) They assert that “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.” *Id.* (3) They assert that “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.” *Id.* The Jackowskis cite no authorities that would support any of these arguments, all of which their counsel apparently invented, and Hawkins Poe knows of

none. This court thus must ignore them. *See* § D.1.c., *supra*.

b. The Jackowskis' assertions that they had a contract with Hawkins Poe are self-defeating.

The Jackowskis repeatedly argue that they “had a contract” with Hawkins Poe, App. Br. at 22; that they “were in an [sic] contractual [sic] agency relationship,” *id.* at 25; that “Jackowskis and their agents entered into a contractual relationship,” *id.* at 26; that Hawkins Poe’s “duties are contractual in nature,” *id.*; that their claims against Hawkins Poe are “an action on a contract,” *id.*; and that Hawkins Poe’s “duties were contractual duties.” *Id.* If these assertions by the Jackowskis are true, then the economic-loss rule plainly applies: Whether the risk of loss was **or could have been allocated** by contract. *Alejandre*, 159 Wn.2d at 687-88. “There is no requirement that a risk of loss must be expressly allocated in a contract before a tort claim based on that loss will be precluded under the economic loss rule.” *Id.* at 678. The supposed contract between the Jackowskis and Hawkins Poe could have been the vehicle for the parties to allocate the risk of loss to someone other than the Jackowskis. It did not. The economic-loss rule applies to defeat the Jackowskis’ claims, all of which sound in tort, not contract. Indeed, the Jackowskis moved to amend their complaint to add claims for breach of contract, and the trial court rejected any such contract claims. CP 492.

The Jackowskis assert that the trial court's reading of *Alejandre* would bar any malpractice claim by any client against any professional. On the contrary, *Alejandre* permits clients to recover non-contract damages in tort, and economic losses whenever the parties have so agreed.

The economic-loss rule allows contracting parties to allocate risk and protects contractual certainty by enforcing that risk allocation. As to a similar contract, the *Alejandre* Court held that the buyers assumed the risk of any loss flowing from their failure to carry out a full inspection.

c. The REPSA did contain certain contractual rights and duties pertaining to Hawkins Poe.

The key inquiry under the economic-loss rule is whether the risk of loss could have been allocated by contract. *Alejandre*, 159 Wn.2d at 687-88. Here, the answer is yes. The REPSA contained several provisions limiting Hawkins Poe's liability. The REPSA delineated Mr. Johnson and Hawkins Poe's responsibilities, and it allocated the risk of loss to the buyers, the Jackowskis. Indeed, the Jackowskis assert, "**Johnson and Jackowskis entered into a written agency agreement. CP 1035.**" App. Br. at 5. Even if these provisions did not specify who bears the risk of loss if a real estate agent allegedly breaches his duties, they clearly gave the Jackowskis the **opportunity to do so**. It is clear that the economic-loss rule applies in this situation and bars the Jackowskis' claims.

The Jackowskis imply that they could not have negotiated remedies under a contract between themselves and Hawkins Poe. Any such implication is false. The REPSA, a buyer-agency agreement, or both were proper vehicles for doing so. Indeed, the REPSA's Paragraph u. set out contractual rights and duties among Hawkins Poe, the Jackowskis, and the Borchelts, so that the parties could have set out other contractual rights and duties had they wished to do so. CP 877. The REPSA did delineate certain specific rights and responsibilities of Hawkins Poe. But for the REPSA, the Jackowskis would not have purchased this property, and there would be no conceivable causation of any of the damages that they allege here. The REPSA was the Jackowskis' opportunity to provide whatever remedies for themselves that they wished. Several undisputed facts show that the REPSA was central to their **tort** claims against Hawkins Poe:

- (1) Hawkins Poe prepared the initial written offer that, upon the parties' mutual acceptance, became the REPSA. CP 1256-70.
- (2) The REPSA gives Hawkins Poe the right to its commission.
- (3) The REPSA spells out the role of Hawkins Poe as buyers' agent, which is the premise on which the Jackowskis allege their tort claims against Hawkins Poe.
- (4) The REPSA provides Hawkins Poe with complete defenses to the Jackowskis' tort claims against Hawkins Poe, pursuant to

Paragraph u. of the main body of the REPSA and its Inspection Addendum. The REPSA contractually allocated risk between all parties, including several disclaimers of Hawkins Poe's liability.

- (5) Had the REPSA not been performed, this transaction would not have closed, and the Jackowskis would have no damage claim against Hawkins Poe or anyone else.

d. The Jackowskis' damages were fixed as of the closing date and are economic losses only.

The REPSA provided for closing by July 2, 2004. CP 1272. The earth movement did not occur until February 3, 2006, more than 19 months later. App. Br. at 16. In cases involving misrepresentation of real estate, Washington courts traditionally measure damages as of the date of the plaintiff's purchase of the property. In such cases, "a buyer who justifiably relies on this misrepresentation is entitled to the difference between the market value of the land had it been as represented and the market value of the property as it actually was **at the time of the sale.**" *Tennant v. Lawton*, 26 Wn. App. 701, 703, 615 P.2d 1305 (1980) (emphasis added). Thus the court does not weigh additional damages that might arise 10 or 15 or 19 months after closing, as the Jackowskis would have it do. The only conceivable damages that the Jackowskis suffered "at the time of the sale" in mid-2004 were a loss of market value based on

the property's condition, which were purely economic losses.

The February 2006 damage to the Property also is an economic loss. In *Stuart*, 109 Wn.2d at 417-22, the Court held that construction defects were economic losses only. Improper design and construction “led to rotting and the substantial impairment” of many areas of the subject condominiums. *Id.* at 411. “Defects of quality are evidenced by internal deterioration” were economic losses only. *Id.* at 420-21.

In *Stieneke*, this court strongly reaffirmed that principle. *Stieneke* included a negligent-misrepresentation claim arising from roof leaks and attendant interior damage and repair costs. Plaintiff buyers, the Stienekes, argued against application of the economic-loss rule on the basis that their damages were “property damage to property other than the defective product or property and that such damages are distinguished from the ‘economic losses[.]’” *Stieneke*, slip op. at 6. Thus, the Stienekes’ argument against the economic-loss rule was the same as the Jackowskis’ main argument here. *See* App. Br. at 18-20. This court in *Stieneke* thoroughly analyzed decisions from Washington and other jurisdictions on the economic-loss rule and squarely rejected that argument:

[A] defective building creates purely economic losses if it further injures itself. This is true even if the particular defect ... causes damage to other parts of the building's structure. The Stienekes’ claimed damages are not damage to property other than the defective property or

product because the house's defective roof damaged the house, creating purely economic losses. There is no reason to draw a distinction between the defective and the damaged parts of the improvements; **the point is that both are subjects of the parties' contract and any assurances of their condition should be evaluated through that agreement.**

Stieneke, slip op. at 9-10 (emphasis added).

3. The trial court correctly dismissed the negligent-misrepresentation claim against Hawkins Poe.

a. The Jackowskis had the burden of proving negligent misrepresentations by clear, cogent, and convincing evidence.

A plaintiff claiming negligent misrepresentation must prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.

Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007). Proof of negligent misrepresentation must be by clear, cogent, and convincing evidence. *Id.* When a party has the burden of proving a claim by clear, cogent, and convincing evidence and the claim is reviewed on summary judgment, the party having that burden of proof must present clear, cogent, and convincing evidence of the claim in response to the summary

judgment motion. See *Guntheroth v. Rodaway*, 107 Wn.2d 170, 175-76, 727 P.2d 982 (1986) (therein defamation). This standard of proof is essential here: It is not enough for the Jackowskis to assert vague “questions of fact” or unspecified “inferences from the evidence” that might overcome summary judgment in other cases:

The term clear, cogent and convincing denotes a quantum or degree of proof greater than a mere preponderance of the evidence. It is the equivalent of saying that the ultimate fact in issue must be shown by evidence that is highly probable.

Alexander Myers & Co., Inc. v. Hopke, 88 Wn.2d 449, 465, 565 P.2d 80 (1977) (citations omitted). Here, summary judgment was properly granted because the Jackowskis lacked clear, cogent, and convincing evidence that Hawkins Poe knew of and failed to disclose any history of slippage with the subject property or that it was in an area prone to landslides, or that it had a duty to discover and disclose such information to the Jackowskis.

b. Hawkins Poe supplied no false information.

Hawkins Poe supplied two items of information to the Jackowskis regarding soil stability. First, Hawkins Poe supplied the Mason County Department of Community Development Planning Commission document that explicitly said that the Property was located in a Landslide Hazard Area. CP 1292. **That information was correct.** It put the Jackowskis on notice of the very condition they now claim was withheld from them.

Mr. Jackowski admits that he received and reviewed the letter before his purchase of the Property closed, but he simply failed to pay enough attention to it. “I read it, but I obviously misread it. ... I saw these [disclosures that “the following critical areas are present on this property: ... aquatic management areas ... and landslide hazard areas] circled.” CP 1292. Thus the Jackowskis cannot argue that Hawkins Poe “failed to disclose” that “the Property was in a landslide hazard area,” since the Jackowskis received a document that told them precisely that.

Second, Hawkins Poe gave the Jackowskis the Borchelts’ Seller Disclosure Statement that there had never been any “settling, slippage, or sliding of the property or its improvements.” Whatever the potential liability of the Borchelts for this representation, as a matter of law Hawkins Poe is not liable for it. Under Washington law, Hawkins Poe is not liable for incorrect information in a Seller Disclosure Statement unless it had **actual knowledge** of its falsity. RCW 64.06.050(2) (emphasis added). The Jackowskis never even alleged that Mr. Johnson or Hawkins Poe had actual knowledge of slippage of the Property. Rather, they alleged only that because the problems were “widely known and documented” Hawkins Poe had a duty to disclose it. CP 1393. This allegation assumes that Hawkins Poe should have investigated the accuracy of the Disclosure Statement, an alleged duty that Washington

law clearly does not impose. RCW 18.86.030(2). That statute provides that absent agreement to the contrary, a real estate agent “owes no duty to independently verify the accuracy or completeness of any statement made by either party[.]” Thus, without proof that Hawkins Poe had actual knowledge that the Property had been subject to slippage 10 years before, Hawkins Poe had no duty to question or investigate any representation made by the Borchelts.

c. Hawkins Poe was not negligent in obtaining or communicating false information.

Despite the wide-ranging assertions of their opening brief, the Jackowskis still fail to cite to the record to substantiate that Hawkins Poe acted in a negligent manner – that it violated the standard of care of a reasonably prudent real estate professional. That omission is fatal to their claims against Hawkins Poe. Expert testimony is required in a professional-liability claim against a real estate broker. *Hoffman v. Connall*, 108 Wn.2d 69, 736 P.2d 242 (1987). Real estate brokers should be judged on professional standards no different than those applicable to other professionals. *Id.* at 75. Whenever a plaintiff alleges professional liability, the claim must be supported by expert testimony of the professional peer of the defendant. *McKee v. American Home Prods. Corp.*, 113 Wn.2d 701, 707-08, 782 P.2d 1045 (1989) (citation omitted).

d. The Jackowskis did not rely on information that Hawkins Poe supplied.

To prove negligent misrepresentation, the Jackowskis must prove by clear, cogent, and convincing evidence that they actually relied on the allegedly false statement. But the Jackowskis supply conclusive proof that they did not rely: Their written assent in a binding contract that says the opposite. The Jackowskis initialed or signed the REPSA no fewer than 35 times, thereby contractually agreeing to the following:

- The Jackowskis acknowledged receipt of a “Law of Real Estate Agency” pamphlet. CP 1278. RCW 18.86.120 requires that that pamphlet set forth the entire text of RCW 18.86.010-110. Thus the Jackowskis agreed that Hawkins Poe “owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party’s financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the licensee to be reliable.” RCW 18.86.030(2).
- The Jackowskis agreed that Hawkins Poe did “not guarantee the value, quality or condition of the Property.” CP 1278.
- The Jackowskis agreed that Hawkins Poe “do not have the expertise to identify or assess defective ... conditions.” *Id.*

- The Jackowskis agreed that the REPSA was integrated. CP 1258.
- The Jackowskis agreed that their purchase of the Property was contingent on their “subjective satisfaction with an inspection of the Property.” CP 1265.
- The Jackowskis agreed that the “inspection, may include, at [the Jackowskis’] option, ... a soils/stability inspection.” CP 1265.
- The Jackowskis agreed that the inspection contingency could be resolved either by the sellers’ agreeing to repair any defective conditions to the Jackowskis’ satisfaction, or by terminating the REPSA. CP 1265-66.

These contractual terms refute the Jackowskis’ allegations that they relied on any oral statements or nondisclosures to the contrary. A party to a contract that he has voluntarily signed may not assert that he did not read it, or was ignorant of its contents. *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987) (citing *Perry v. Continental Ins. Co.*, 178 Wn. 24, 33 P.2d 661 (1934)). Absent fraud, deceit, or coercion, one may not repudiate his own signature voluntarily fixed to an instrument whose contents he was in law bound to understand. *Skagit State Bank*, 109 Wn.2d at 381. The whole panoply of contract law rests on the principle that one is bound by the contract that he voluntarily and knowingly signs. *Id.* In *Lake Air, Inc. v. Duffy*, 42 Wn.2d 478, 256

P.2d 301 (1953), the Court stated:

Appellant had ample opportunity to examine the contract in as great a detail as he cared, and he failed to do so for his own personal reasons. Under these circumstances, he cannot be heard to deny that he executed the contract, and he is bound by it.

Id. at 480. Courts consistently have held that a party whose rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein. *Skagit State Bank*, 109 Wn.2d at 381.

For the same reasons, this court should reject the Jackowskis' assertions that Mr. Johnson orally downplayed the importance of the Mason County letter, App. Br. at 12-13, or the scope of the inspection, App. Br. at 14-15. The REPSA's plain language refutes those assertions. One ordinarily may not contradict orally a contract's written terms. *See, e.g., Berg v. Hudesman*, 115 Wn.2d 657, 670, 801 P.2d 222 (1990). This is because the parol evidence rule "precludes use of parol evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract, *i.e.*, one which is intended as a final expression of the terms of the agreement." *DePhillips v. Zolt Const. Co., Inc.*, 136 Wn.2d 26, 32, 959 P.2d 1104 (1998). Therefore, the Jackowskis cannot recover on a claim that depends on contradiction of the terms of the contract.

The integration clause in particular defeats the Jackowskis' claim. When a written, integrated contract is unambiguous, the court must "declare the meaning of what is written," not rewrite it. *Meyer v. Consumers Choice, Inc.*, 89 Wn. App. 876, 880, 950 P.2d 540, 542 (1998).

Accordingly, the Jackowskis cannot now deny that they read the REPSA in full or were ignorant of its contents. The law presumes them to have read and acknowledged the several provisions of the REPSA in which they contractually agreed not to rely on real estate agents or on any oral communications and to inspect the Property to their own satisfaction.

e. Any reliance by the Jackowskis on alleged misrepresentations was not reasonable.

Even if Hawkins Poe had made misrepresentations regarding whether slippage of the Property had occurred, or its location in a landslide hazard area, any claim for negligent misrepresentation must be dismissed unless the Jackowskis can provide clear, cogent, and convincing evidence that they **justifiably** relied on those representations. Whether a party justifiably relied is a question of fact unless "reasonable minds could reach but one conclusion," in which case the issue may be determined as a matter of law. *Bolser v. Clark*, 110 Wn. App. 895, 903, 43 P.3d 62 (2002) (citing *Barnes v. Cornerstone Invs., Inc.*, 54 Wn. App. 474, 478, 773 P.2d 884, *review denied*, 113 Wn.2d 1012, 779 P.2d 730 (1989)). In *Barnes*,

the court held that a plaintiff's reliance on an opinion letter was unjustified as a matter of law, in part, because the opinion letter contained "numerous explicit disclaimers and conditions to its use" that made the plaintiff's reliance unreasonable. *Barnes*, 54 Wn. App. at 478.

A property buyer is bound by facts that a reasonable inspection would disclose. *Hoel v. Rose*, 125 Wn. App. 14, 20, 22, 105 P.3d 395 (2004) (no legal right to rely on representations where buyer "had a full opportunity to inspect"); *Atherton Condo. Apartment-Owners Assn. v. Blume Dev. Co.*, 115 Wn.2d 506, 524, 799 P.2d 250 (1990); *Puget Sound Services Corp. v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 214-15, 752 P.2d 1353 (1988); *Davey v. Brownson*, 3 Wn. App. 820, 825, 478 P.2d 258 (1970). As the Court held in *Farrar v. Churchill*, 135 U.S. 609, 10 S. Ct. 771, 34 L. Ed. 2d 246 (1890), the buyer has a duty of due care. A purchaser who discovers evidence of a defect is obligated to inquire further. *Atherton*, 115 Wn.2d at 525. If purchasers investigate for themselves and nothing is done to prevent his investigation from being as full as they choose, they cannot say that they relied on any representations. *Id.*; see also *Hoel*, 125 Wn. App. at 20, 22.

Thus the Jackowskis' negligent-misrepresentation claim against Hawkins Poe fails as a matter of law. The Jackowskis' contractual right to a soils/stability inspection, and their failure to exercise that contract right

fully, eliminate their negligent-misrepresentation claim, just as they eliminated the fraud claim in *Alejandre*:

As explained, the Alejandres were on notice that the septic system had not been completely inspected but failed to conduct any further investigation and, indeed, accepted the findings of an incomplete inspection report. Having failed to exercise the diligence required, they were unable to present sufficient evidence of a right to rely on the allegedly fraudulent representations.

Alejandre, 159 Wn.2d at 690. That circumstance parallels the present case. As in *Alejandre*, an element of the tort (therein fraud) is proof of a right to rely by clear, cogent, and convincing evidence. *Ross*, 162 Wn.2d at 499. As in *Alejandre*, the plaintiff property buyers knew that the actual inspection was less than that to which they were contractually entitled. As in *Alejandre*, the buyers “failed to conduct any further investigation and, indeed, accepted the findings of an incomplete inspection report.” As in *Alejandre*, they “failed to exercise the diligence required ... [and] were unable to present sufficient evidence of a right to rely[.]” Indeed, here, the Jackowskis had even **less** right to rely than the Alejandres did, because Mr. Jackowski received and read the Mason County Department of Community Development letter that notified him:

- That the property was in a **landslide hazard area**;
- That the property was in an aquatic management area;
- That **geologist** Harold Parks of **Geotechnical** Testing Laboratory had

made recommendations regarding the subject property;

- That rock armoring increases slope stability while removal of such armoring **may allow saturated soil to become unstable**; and
- That **erosion** could be an issue on the property.

CP 1292, 1313-14.

It does not matter whether Mr. Walman's inspection failed to inspect soils stability; the Jackowskis had the contractual right to do so. CP 1265. And as the Jackowskis themselves argue, "warning signs" were open and obvious. App. Br. at 8. The Jackowskis clearly failed to present the requisite clear, cogent, and convincing evidence that their supposed reliance on misrepresentations by any defendant was reasonably justified and thus cannot prove negligent misrepresentation.

4. **As a matter of law, RCW 18.86 gave the Jackowskis no separate right of action against Hawkins Poe; this court thus should affirm the dismissal of such claims.**

This court may affirm summary judgment on any ground supported by the record. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). While the trial court denied Hawkins Poe's second motion for summary judgment, seeking dismissal of all non-negligent-misrepresentation claims against Hawkins Poe on their merits, the trial court ultimately dismissed such claims based on the economic-loss rule. This court should

affirm the trial court's dismissal of those non-negligent-misrepresentation claims on their merits even if the economic-loss rule did not apply.

The Jackowskis' original complaint alleged only generally that Hawkins Poe "knew or should have known the Property was in a landslide hazard area" and "breached duties to the Plaintiffs by failing to disclose this material information." CP 1392. They later moved for leave to amend their complaint, but the trial court allowed only one new theory: That Hawkins Poe "violated RCW 18.86.050(1)(c), for allegedly failing to advise plaintiffs, during the pendency of the real estate transaction at issue in this action, to seek the advice of a geotechnical expert." CP 492. To the extent that these allegations pleaded a cause of action other than negligent misrepresentation, Washington law does not recognize it.

a. RCW 18.86 limited rather than expanded liability of real estate professionals.

Inherent in the Jackowskis' claim under RCW 18.86.050(1)(c) is that the legislature intended to create a right of action. It did not.

Prior to 1997, common-law rules of agency applied to real estate professionals. Effective January 1, 1997, the legislature changed and codified these obligations in RCW 18.86 *et seq.*, redefining real estate professionals' duties and expressly abrogating their fiduciary duties. RCW 18.86 represented a sea change as to the duties of real estate agents.

18 Wash. Prac. Ch. 14 (1995) is Professor William Stoebuck's treatise on the law of real estate professionals in Washington. In the 2001 pocket part to that treatise, he discussed the many changes to the law governing real estate agents and brokers and the liabilities arising therefrom. RCW 18.86 "redefined the relationships real estate brokers have to clients and among themselves, especially the agency and subagency relationships. The provisions of Chapter 18.86 may affect many aspects of brokers' duties and relationships." *Id.* at § 14.1 (2001 supp.). Similarly:

Before the legislature intervened in 1996, Washington common law regarded the selling broker as a subagent of the listing broker, who of course is the seller's agent. Thus, the selling broker was a fiduciary of the seller, with the same legal duties to that person as the listing broker. This relationship, though sound on common law principles, was contrary to the assumptions of most buyers[.] ... In 1996, at the urging of the Washington Association of Realtors, the legislature adopted what is now RCW Chapter 18.86[.] ... In addition to the relationships that are involved in sales through multiple listing agencies, Chapter 18.86 clarifies and modifies a number of other aspects of brokerage agency relationships.

Id. at § 14.5 (2001 supp.). Furthermore, RCW 18.86 *et seq.*

appears to have the potential to alter, if not nullify, the rules adopted in *Hoffman v. Connall*, 108 Wn.2d 68, 736 P.2d 242 (1987), and in other decisions cited in this section.

Id. at § 14.10, n.4 (2001 supp.).

When it was drafted in 1996, RCW 18.86 was known as "Real Estate Agency Simplified Now," or "REASN." CP 866, 925. Attorney

Douglas S. Tingvall was the principal drafter of REASN. CP 930. Mr. Tingvall wrote an article for the September 1996 issue of the Washington State Bar Association's *Bar News* titled "REASN Comes to Real Estate Brokerage." CP 866. Professor Stoebuck cited that article with approval. Stoebuck, 18 Wash. Prac. § 14.5 n.2 (2001 supp.). Mr. Tingvall's article notes that RCW 18.86 "replaces common law fiduciary duties with statutory duties." CP 925; *see also* CP 929. Under prior common law, a real estate agent historically owed "stringent fiduciary duties" to his client, the seller, CP 925, but under the statute, "[t]he common law fiduciary duty of undivided loyalty is replaced by a limited duty[.]" CP 929. It is beyond question that the legislature intended to restrict rather than expand the liability of real estate professionals when it enacted RCW 18.86.

For example, while the statute sets out a duty to use reasonable care and to deal honestly and in good faith. RCW 18.86.030(1).

Unless otherwise agreed, a licensee owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the licensee to be reliable.

RCW 18.86.030(2). Thus a buyer's agent has no legal duty discover potential problems with or defects of a property.

b. RCW 18.86 abrogated fiduciary duties of real estate professionals.

Real estate professionals no longer owe fiduciary duties.

This chapter supersedes only the duties of the parties under the common law, including fiduciary duties of an agent to a principal, to the extent inconsistent with this chapter.

RCW 18.86.110. In interpreting this or any statute, the court must begin with “the statute’s plain language and ordinary meaning.” *Nat’l Elec. Contractors Ass’n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Davis v. Dept. of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)). Here, RCW 18.86 replaced common-law fiduciary duties with a specific enumeration of statutory duties. As to real estate professionals, common-law fiduciary duties no longer exist.

c. Hawkins Poe’s duties under RCW 18.86 sound in negligent misrepresentation only.

The Jackowskis’ claims against Hawkins Poe therefore sound in misrepresentation only. *Cf. Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 697-98, 754 P.2d 1262, *rev. denied* 111 Wn.2d 1014 (1988) (citing *Hoffman*, 108 Wn.2d 69; *Tennant*, 26 Wn. App. 701) (when

trial court found real estate broker liable on “negligent misrepresentation” theory, appellate court combined the negligent-misrepresentation analysis with two cases that established broker’s duty).

As set forth above, RCW 18.86 *et seq.* creates no new or independent rights of action. *See* RCW 18.86.110. But even under Washington law that predated RCW 18.86’s enactment in 1997, the Jackowskis’ allegations against Hawkins Poe sound in negligent misrepresentation only. A real estate agent’s standard of care is that of a reasonably prudent real estate broker under all of the circumstances. *Hoffman*, 108 Wn.2d at 77; *see also* RCW 18.86.030. In negligent-misrepresentation cases, Washington courts analyze the negligent-misrepresentation claim in conjunction with the applicable broker’s duty. *Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 697-98, 754 P.2d 1262, *rev. denied* 111 Wn.2d 1014 (1988) (citing *Hoffman*, 108 Wn.2d 69; *Tenant*, 26 Wn. App. 701). Washington courts do not treat a breach of a broker’s duty as a separate claim for damages, over and above the negligent misrepresentation claim.

In *Tenant*, the court stated that liability for the real estate agent “attaches in this context on grounds of negligence.” *Tenant*, 26 Wn. App. at 706 (citing *First Church v. Cline J. Dunton Realty*, 19 Wn. App. 275, 574 P.2d 1211 (1978)). Later, in *Janda v. Brier Realty*, 97 Wn. App.

45, 51, 984 P.2d 412 (1999), the court criticized the *Tennant* analysis as being “unclear exactly what theory the case was decided under.” The *Janda* court went on to apply the theory of negligent misrepresentation and affirm summary judgment in favor of the real estate agent. *Id.* at 53-54. Thus, the Jackowskis have no separate “negligence” cause of action, and the court properly dismissed all negligence claims.

d. Even if RCW 18.86 created a right of action, Hawkins Poe met its duties through the transaction documents.

The Jackowskis have argued that Hawkins Poe violated the standard of care because it should have known that waterfront property might be unstable and should have told the Jackowskis to consult experts. The Jackowskis are wrong factually and legally.

From a factual standpoint, the Jackowskis contractually agreed in the REPSA, “**Real estate brokers and salespersons do not guarantee the value, quality or condition of the Property.** ... Real estate licensees do not have the expertise to identify or assess defective ... conditions.” CP 1259. Furthermore, the Form 17 explicitly told the Jackowskis, “[Y]ou are advised to obtain and pay for the services of qualified experts to inspect the property The prospective buyer and seller may wish to obtain professional advice or inspections of the property[.]” CP 1301.

From a legal standpoint, any suggestion that Hawkins Poe should

have done more is wrong. The real estate agency statute provides:

Unless otherwise agreed, a licensee owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the licensee to be reliable.

RCW 18.86.030(2).

5. The trial court correctly granted Hawkins Poe's motion to strike jury demand.

When a case involves both equitable and legal causes of action, trial courts have wide discretion in deciding whether the case is primarily equitable or legal in nature. *State v. State Credit Ass'n, Inc.*, 33 Wn. App. 617, 622-23, 657 P.2d 327 (1983) (citations omitted). This court reviews such decisions only for a manifest abuse of discretion. *Id.*

CR 39(a)(1) provides:

The trial of all issues so demanded shall be by jury, unless ... the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the constitution or statutes of the state.

No right to a jury trial exists for equitable claims. Absent a statute granting jury trial, Washington courts take a historical approach in analyzing the constitutional guarantee of the right to a jury trial, preserving the right in actions whose common law counterparts were triable to a jury when the constitution was adopted. *State Credit Ass'n*, 33

Wn. App. at 620-21 (citations omitted). No jury trial right exists in actions regarded as equitable in nature and therefore triable to the court at common law. *Id.* at 621. Nor does the right to a jury trial exist in statutorily created actions without common law analogues. *Id.*

In *Dep't of Ecology v. Anderson*, 94 Wn.2d 727, 732, 620 P.2d 76 (1980), the Supreme Court reviewed the policies underlying the rule that equitable actions must be tried to a court and not to a jury.

In equitable actions, if relief is to be effective it often must be speedy, and calling a jury almost inevitably involves delay. While a jury is capable of ascertaining the facts upon which an equitable decree can be based, **the function of balancing equities can be performed only by a learned judge.** Where extraordinary and onerous remedies are to be employed, it is essential that the judge's knowledge and understanding of equitable principles should be utilized in evaluating the evidence as well as deciding upon the appropriate relief to be granted.

State Credit Ass'n, Inc., 33 Wn. App. at 622 (citing *Anderson*, 94 Wn.2d at 732) (emphasis added). The trial court should consider:

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

should be granted on all or part of such issues.

Id. at 623 (citing *Brown*, at 368, n.1); *Scavenius v. Manchester Port Dist.*, 2 Wn. App. 126, 467 P.3d 372 (1970). Those factors show the trial court acted well within its discretion in concluding that this case is primarily equitable:

Who is the party seeking equitable relief? The Jackowskis seek the equitable remedy of rescission of the REPSA.

Is the party seeking the equitable relief also demanding trial of the issues to the jury? Yes. CP 1390.

Are the main issues primarily legal or equitable in nature? Equitable. The Jackowskis filed a complaint, CP 1391, and an amended complaint, CP 514. In both, **rescission** of the REPSA was the first remedy that they requested in their Prayer for Relief. CP 518, 1394. They sought only “**alternatively**” a judgment against all defendants “for all damages resulting from fraud, negligent misrepresentation or breach of contract, in amounts to be proven at trial[.]” CP 518, 1394.

Complexities at trial affecting the orderly determination of issues by the jury. The causes of action in this case derive from a single real estate transaction, which has given rise to both legal and equitable claims. It is impractical, and perhaps impossible, to craft jury instructions that would adequately instruct the jury regarding this matter. For the jury

to hear and decide the Jackowskis' legal claims, it would have to be instructed regarding each piece of evidence. The evidence presented in support of the various legal claims could be considered, but the jury would have to be instructed to ignore the evidence in support of all equitable claims. In preparation for trial, each item of evidence would need to be categorized and separated accordingly. Properly following the jury instructions would be a monumental task for the jury. It is unreasonable to expect the members of the jury to avoid confusion or prejudice while they heard evidence regarding equitable claims, such as rescission.

If a case is classified on an overall basis as equitable, there is no right to a jury trial on any issues in the case. *Knudsen v. Patton*, 26 Wn. App. 134, 137-38, 611 P.2d 1354 (1980) (citing Trautman, *Right to Jury Trial in Washington – Present and Future*, 34 Wash. L. Rev. 401, 406-07 (1959)). **If one of the main issues in an action is equitable, equity takes jurisdiction for all purposes, and there is no right to trial by jury.** *Id.*; see also *Coleman v. Highland Lumber, Inc.*, 46 Wn.2d 549, 283 P.2d 123 (1955); *Ranta v. German*, 1 Wn. App. 104, 459 P.2d 961 (1969). Here, rescission is unquestionably “one of the main issues” in the present action. Because rescission is an equitable remedy, *Willener v. Sweeting*, 107 Wn.2d 388, 397, 730 P.2d 45 (1986), equity must take jurisdiction of this action for all purposes, and no party has any right to a trial by jury.

F. CONCLUSION

The economic-loss rule compels dismissal of both of the Jackowskis' properly pleaded claims against Hawkins Poe and Mr. Johnson. This court's recent *Stieneke* decision reaffirms that result.

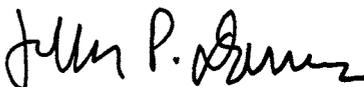
Furthermore, the Jackowskis failed to present the requisite clear, cogent, and convincing proof of the merits of their negligent-misrepresentation claim against Hawkins Poe, most notably because they have no proof that they justifiably relied on any statement or nondisclosure by Hawkins Poe. Hawkins Poe gave them documentation from Mason County that told them that the Property was in a landslide area. The REPSA provided that they were not relying on oral representations and that the Jackowskis could and should have soils stability inspected. They cannot ignore that documentation and that right of inspection and claim they were misled.

Nor may the Jackowskis recover against Hawkins Poe on their other liability theory based on RCW 18.86.050(1)(c), for supposed failure to refer the Jackowskis to a geotechnical expert. That statute does not create a cause of action, and in any event the REPSA, the inspection addendum, and other documentation that the Jackowskis received from Hawkins Poe was functionally equivalent to such oral advice from Hawkins Poe.

The trial court acted well within its discretion in striking the Jackowskis' jury demand, since the Jackowskis themselves sought the equitable remedy of rescission as their primary remedy, thereby defeating any right to trial by jury.

RESPECTFULLY SUBMITTED this 10th day of July, 2008.

LEE SMART, P.S., INC.

By: 

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that I caused service of the foregoing pleading on the following individuals:

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