

Res. Windermere

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COURT OF APPEALS
DIVISION II

No.: 36944-3-II

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

STATE OF WASHINGTON
BY *J.P.*
DEPUTY

TIMOTHY JACKOWSKI and
ERI TAKASI, husband and wife,

Appellants.

v.

DAVID BORCHELT, et ux, et al,

Respondents.

BRIEF OF RESPONDENTS HIMLIE REALTY, INC. DBA
WINDERMERE REAL ESTATE/HIMLIE AND JEFF CONKLIN

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ESTATE AND JEFF CONKLIN'S BRIEF

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ASSIGNMENTS OF ERROR

Respondents Jef Conklin and Windermere Real Estate/Himlie, Inc. (“Windermere Respondents”) assign no error to the trial court’s October 17, 2007 order on Windermere’s Summary Judgment Motion.

I. INTRODUCTION

Appellants’ brief distorts both the evidence and the law and raises claims not made below. This court should affirm.

Appellants sued Windermere Respondents after Appellants purchased a home, alleging Windermere Respondents “knew or should have known” that the subject property was in a landslide hazard area but failed to disclose this material information to Appellants. CP at 1392-1394 (Complaint, ¶5, ¶12, ¶2 (Relief Requested)).

However, the undisputed facts show that Windermere Respondents gave Appellants a letter from Mason County that identified the subject property as a landslide hazard area. Appellants admitted they received a copy of this letter before they purchased the subject property. Appellants also made their purchase and sale contract contingent on a soils/stability inspection, but failed to conduct one before the sale closed.

The trial court found that the Mason County letter put Appellants on notice that the subject property was in a landslide hazard area, and that

a reasonable inspection would have disclosed the very defect Appellants claimed resulted in their damages. Thus, the trial court appropriately granted Windermere Respondents' motion for summary judgment.

Appellants cannot hide the fact that they were informed, prior to the sale, that the property was located in a landslide hazard area. Thus, they attempt to argue on appeal that the trial court improperly applied the economic loss rule articulated by the Washington State Supreme Court's recent decision in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007).

Appellants seem to have conveniently forgotten that the *Alejandre* decision was not limited to the economic loss rule. The critical holding of *Alejandre* with respect to the diligence element of a fraud claim is that a buyer must prove, as an element of the claim, that an undisclosed defect could not have been discovered with reasonable diligence. *Id.* This was the basis for the trial court's order granting summary judgment to Windermere Respondents. And, *Alejandre* did not abrogate existing common law requiring evidence of justifiable reliance in negligent misrepresentation claims. Appellants cannot provide this evidence.

Although the trial court declined to apply the economic loss rule portion of the *Alejandre* decision to Windermere Respondents' motion for summary judgment, Appellants nevertheless argue on appeal that the economic loss rule does not bar tort claims for catastrophic events,

malpractice claims, or tort claims where no contractual privity exists between the parties. These arguments were not raised below as to Windermere Respondents and should not be considered on appeal.¹ RAP 2.5(a).

In sum, Appellants' failure to exercise due diligence after receiving the Mason County letter, which gave them notice of the very defect they assert resulted in damages, bars any tort recovery against Windermere Respondents. This Court should affirm the trial court's award of summary judgment to Windermere Respondents.

II. STATEMENT OF THE CASE

This appeal arises from a real estate transaction wherein Appellants purchased a house in Mason County from Robin and David Borchelt. (hereinafter "Borchelts"). Appellants were represented in the sale by Robert Johnson of Coldwell Banker Hawkins Poe Realtors (hereinafter "Hawkins Poe Respondents"). The Borchelts were represented by Jef Conklin of Windermere Real Estate/Himlie, Inc. ("Windermere Respondents"). CP 1391-1392 (Complaint).

¹ Appellants also make two arguments on appeal that do not apply to Windermere Respondents. Appellants assert that *Alejandre* does not bar the equitable remedy of rescission against the Borchelts. Appellants also argue that *Alejandre* does not bar contract claims against the Borchelts, Johnson or Hawkins-Poe. Appellants' Brief at 3, 33-45.

Prior to listing the property for sale, on or around February 6, 2004, the Borchelts filled out a Seller Disclosure Statement. CP 919-923. On the statement, the Borchelts answered “no” to the question “Has there been any settling, slippage, or sliding of the property or its improvements?” CP 921. The Borchelts answered “no” to the questions “Does the property contain fill material?” and “Is there any material damage to the property from fire, wind, floods, beach movements, earthquake, expansive soil or landslides?” CP 922. The Borchelts stated there were no other existing material defects with the property. CP 922.

Appellants made an offer to purchase the house on or around May 13, 2004. CP 529-546. The Borchelts updated their Seller Disclosure Statement that same day, referencing a letter from Mason County Department of Community Development (hereinafter “Mason County letter”). CP 923. The Borchelts faxed a copy of the Mason County letter to their real estate agent, Mr. Conklin, on May 14, 2004. CP at 548-552.

The Mason County letter stated, “[t]he following critical areas are present on this property,” and circled on the letter were “Aquatic Management Areas” and “**Landslide Hazard Areas.**” CP 549 (emphasis added). The Mason County letter referenced a geotechnical report conducted by Harold Parks, an engineering geologist. Id. The Borchelts’ fax included an addendum provided by Mr. Parks, which again referenced

his geotechnical report. CP 551. Mr. Conklin faxed the County letter and Mr. Parks' addendum to Appellants' real estate agent, Mr. Johnson, who gave them to Appellants. CP 554-556 (Dep. Robert Johnson, 12/07/06).

Appellants made their offer contingent on a fifteen (15) day soils/stability inspection. The final contract provided:

The above Agreement is conditioned on Buyer's personal approval of an inspection of the Property and the improvements on 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, and inspection of the Property for hazardous materials, a pest inspection, and a soils/stability inspection.

CP 540 (Inspection Addendum to Purchase and Sale Agreement); CP 1155-1156 (Dep. Timothy Jackowski, 10/24/06).

Appellant Timothy Jackowski admitted receiving and reading both the Mason County letter and Mr. Parks' addendum the day after his offer. CP 567-570, 574 (Dep. Timothy Jackowski, 10/24/06). However, Appellants failed to conduct any investigation regarding soils stability before the sale closed. CP 576. (Dep. Timothy Jackowski, 10/24/06).

The transaction closed on or around June 30, 2004 and Appellants moved into the house. CP 1392 (Complaint). Sometime on February 3, 2006, after several straight days of rain, the house slid. CP 562-565, 1392.

Appellants sued the Borchelts, Hawkins-Poe Respondents and Windermere Respondents. CP 1391-1394 (Complaint). Appellants

alleged that the Borchelts knew the subject property had experienced landslides in the past and had built an addition on fill material, but had failed to disclose these facts to Appellants. CP at 1391-1394 (Complaint).

Appellants alleged that all Defendants should have disclosed that the property was located in an area that had had problems with fissures and slope instability ten years prior to the sale:

After the February 3, 2006 incident, several neighbors told Plaintiffs that the whole area had a problem with fissures and other evidence of slope stability approximately ten years ago, which they believed to be caused by improper drainage. Based on the fact that these problems were widely known and documented, all Defendants should have disclosed them to Plaintiffs prior to the sale of the Property. This failure to disclose pertinent information is a breach by all Defendants which caused Plaintiffs to close on property they would not have purchased otherwise.

CP at 1393 (Complaint, pg. 3, ¶12).

Appellants further alleged that all the real estate agents involved in the transaction “knew or should have known” that the subject property was in a landslide hazard area but failed to disclose this to Appellants:

The Broker/Agent Defendants knew or should have known the Property was in a landslide hazard area. The Broker/Agent Defendants breached duties to the Plaintiffs by failing to disclose this material information, and those breaches caused Plaintiffs to close on property they would not have purchased otherwise.

CP at 1392 (Complaint, pg. 2, ¶5).

On July 30, 2007 Windermere Respondents moved for summary judgment, asserting that the Mason County letter put Appellants on notice

that the subject property was located in a landslide hazard area, but that Appellants did nothing to investigate the stability of the property prior to the sale. CP 584-590. Citing the Washington Supreme Court's recent decision in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), Windermere Respondents argued that Appellants' lack of diligence and reasonable reliance justified dismissal of their claims. CP 584, 587. Windermere Respondents further argued because they had provided the Mason County letter to Appellants, they had not breached any duty under RCW 18.86.030 to disclose material facts to Appellants. CP 588-589.

During this same time frame, on August 13, 2007, Appellants moved to amend their complaint to include misrepresentation claims against the Borchelts and Windermere Respondents for allegedly concealing cracks in the floor of the basement addition. *Compare*, CP 515, ¶7; CP 1392, ¶7. Appellants also moved to amend their complaint to include claims against the Hawkins-Poe Respondents for violations of RCW 18.86 et. seq. *Compare*, CP 518, §2; CP 1394). Appellants did not move to amend the complaint to include any additional claims against Windermere Respondents based on RCW 18.86 et. seq. CP 514-518.

On August 20, 2007, the trial court permitted the additional claims against Windermere Respondents regarding the basement floor. The court also granted Appellants' motion to amend the complaint to allege the

Hawkins-Poe Respondents violated RCW 18.86.050(1)(c) for allegedly failing to advise Appellants to seek the advice of a geotechnical expert. However, the court denied any other claims against Hawkins-Poe Respondents based on alleged violations of RCW 18.86.030. CP 492. Appellants did not ask the court to reconsider or modify its decision. Appellants did not thereafter seek to amend the complaint to add additional claims against Windermere Respondents.

Appellants responded to Windermere Respondents' summary judgment motion on September 4, 2007. Appellants' response did not raise the issue of nor address *Alejandro*'s applicability to tort claims for catastrophic events or professional malpractice. Rather, in a single sentence, Appellants argued that the economic loss rule set forth in *Alejandro* was immaterial to Appellants' claims because they were not in privity with Windermere Respondents. Appellants provided no authority to support this argument. CP 397-398.

Appellants further asserted that Windermere Respondents' liability was based on Mr. Conklin's failure to disclose the existence of other landslides "less than a mile and a half away,"² and their alleged complicity in concealment of the basement floor cracks. CP at 388-402, 395

² Mr. Conklin had testified in Dep. that he was aware that two properties, one a mile and a half from the subject property and one less than a mile from the property, had experienced soil instability. CP 275 (Dep. Conklin, 12/07/06).

(Plaintiff's Summary Judgment Response). Appellants also argued that Windermere Respondents violated RCW 18.86.030 by failing to disclose the basement floor cracks. CP 400.

The Borchelts and Respondents Hawkins Poe also filed summary judgment motions. CP 476-487 (Hawkins Poe's Summary Judgment Motion, 08/28/07); CP 623-641 (Borchelts' Summary Judgment Motion, 07/18/07). Appellants opposed both motions. In support of their opposition to Borchelts' motion, Appellants argued Dusty Watz, who constructed the addition, testified the addition was built on fill. CP 333-335 (Dep. Watz). Appellants also pointed out that geologist Mr. Parks testified the subject property contained fill and quarry spall, and the addition was built on a slope with unstable soil. CP 344-348 (Dep. Parks).

Appellants further provided a declaration from Dave Strong, a licensed engineering geologist, who inspected the property and determined that the house addition was built on fill material and that the quarry spall did not retain the slope. CP 379-385. CP 367-368 (Plaintiffs' Response to Borchelts' Motion for Summary Judgment).

All three summary judgment motions were heard on September 14, 2007. VRP 09/14/07. At the hearing, Appellants did not argue *Alejandro's* applicability to tort claims for catastrophic events or professional malpractice

as to Windermere Respondents.³ Rather, Appellants asserted that the court should not consider the economic loss rule set forth in *Alejandre* as to Windermere Respondents because it had not been properly briefed. VRP 09/14/07 at 42-43. Appellants also argued that Windermere Respondents' failure to disclose the cracks in the basement violated RCW 18.86.030. VRP 09/14/07 at 43.

The court declined to rule on the economic loss rule set forth in *Alejandre*. VRP 09/14/07 at 44. Instead, the court found that the County letter disclosed the landslide hazard issue to Appellants prior to the sale. Regarding the landslide hazard and the existence of fill, the court further found the evidence showed "a reasonable investigation, which the buyer had the opportunity to do and actually made the sale contingent upon, would have revealed this aspect." VRP 09/14/07 at 29-30, 44-45. The court further found Windermere Respondents had no duty as realtors to investigate off-site landslides. VRP 09/14/07 at 44.

The trial court granted Windermere Respondents' summary judgment motion and dismissed with prejudice "[a]ll claims arising out of the alleged nondisclosure of landslides on other properties . . . [a]ll claims arising out of the landslide on the property . . . [and] [a]ll claims arising out of the fill on the property." CP 76 (Summary Judgment Order). The

³ In contrast, Appellants did argue that the actions of the Hawkins Poe Respondents constituted professional malpractice. VRP 09/14/07 at 31-34.

trial court denied summary judgment on Appellants' claims for fraudulent concealment of basement cracks. CP 77 (Summary Judgment Order).

III. ARGUMENT

In reviewing summary judgment, this Court engages in the same inquiry as the trial court, viewing the evidence de novo in the light most favorable to the non-moving party. CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wilson*, 98 Wn.2d at 437, 656 P.2d 1030.

A. APPELLANTS ADMIT THEY RECEIVED NOTICE OF THE DEFECT THEY CLAIM CAUSED THEM DAMAGES

Appellants sued Windermere Respondents for fraud and negligent misrepresentation claiming they (1) “knew or should have known” that the subject property was in a landslide hazard area but failed to disclose this material information to Appellants, and (2) failed to disclose that properties a mile and a half away had experienced landslides. CP at 1392-1394 (Complaint, ¶5, ¶12, ¶2 (Relief Requested)); CP at 388-402, 395 (Summary Judgment Response). Appellants' claims fail because they cannot show justifiable reliance or due diligence.

1. NEGLIGENT MISREPRESENTATION

Appellants argue the trial court erroneously applied the economic loss rule set forth in the Washington Supreme Court's decision of *Alejandre* to bar their negligent misrepresentation claims. As discussed above, the trial court declined, at the Appellants' request, to apply the economic loss rule to Windermere Respondents.

However, *Alejandre* did not abrogate existing common law regarding the evidence required in negligent misrepresentation claims. This court may affirm summary judgment upon any theory established by the pleadings and supported by the proof. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). The trial court here appropriately granted summary judgment because Appellants could not prove justifiable reliance on the alleged misrepresentations. Appellants also cannot prove that Windermere Respondents misrepresented the condition of the property. Thus, this court should affirm summary judgment.

Negligent misrepresentation is defined as:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, ***supplies false information for the guidance of others in their business transactions***, is subject to liability for pecuniary loss caused to them ***by their justifiable reliance upon the information***, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 826, 959 P.2d 651 (1998) (emphasis added) (citing RESTATEMENT (SECOND) OF TORTS § 552(1)(1977)).

To prove the elements of negligent misrepresentation “[a] plaintiff must prove he or she justifiably relied upon the information negligently supplied by the defendant.” *ESCA*, 135 Wn.2d at 826 (citing *Condor Enterprises, Inc. v. Boise Cascade Corp.*, 71 Wn. App. 48, 52, 856 P.2d 713 (1993)). “The recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying.” *ESCA*, 135 Wn.2d at 826 (quoting Restatement (Second) of Torts § 552A (1977)). Claimants must prove all elements of negligent misrepresentation by clear, cogent and convincing evidence. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 180, 76 P.2d 435 (1994).

Here, Appellants had clear notice from the Mason County letter that the subject property contained “Landslide Hazard Areas.” These words were clearly circled on the first page of the letter. CP 549. Appellants argue the trial court should have inferred that Appellant’s real estate agent did not give them this letter before the inspection contingency ran. Appellants’ Brief at 49. However, Appellant Timothy Jackowski admitted receiving this letter just one day after making an offer on the

property. CP 567-570 (Dep. Timothy Jackowski). Thus, Appellants timely received notice of the claimed defect.

Appellants further argue that it was “entirely reasonable for the Jackowskis to have relied on Johnson’s and Hawkins Poe’s explanation of what the documents mean and what they signified.” Appellants’ Brief at 50. Appellants argue “this fault, too, may be laid at the Borchelts’ and Johnson’s and Hawkins Poe’s feet.” Appellants’ Brief at 50. Appellants therefore admit they did not rely on Windermere Respondents in interpreting this letter.

Windermere Respondents provided the Mason County letter to Appellants before closing and did not interpret this letter for Appellants. The County letter also clearly stated that the subject property contained “Landslide Hazard Areas.” Appellants cannot show by clear, cogent or convincing evidence that Windermere Respondents misrepresented this fact to Appellants.

Further, because Appellants admitted to receiving and reading the Mason County letter prior to the close of the sale, they received notice of the very defect they later claimed caused their damages. Appellants also made their purchase contingent on a soils stability inspection. However, they admit they failed to undertake any investigation regarding the landslide hazard or soils stability.

Thus, Appellants cannot prove, by clear, cogent and convincing evidence, that they justifiably relied on any alleged misrepresentations regarding the claimed defect. Appellants' own negligence in failing to investigate the claimed defect bars their negligent misrepresentation claim. This court should affirm the trial court's grant of summary judgment to Windermere Respondents on this claim.

2. FRAUD

Appellants' fraud claims sound in either common law fraud or fraudulent concealment. Such claims are not barred by the economic loss rule, but are barred when the elements of fraud cannot be proven. *Alejandre*, 159 Wn.2d at 689. *Accord, Glenn v. Russi*, --- P.3d ----, 2008 WL 2582977 (COA Div. II, July 1, 2008).

Under the theory of fraudulent concealment, "the vendor's duty to speak arises (1) where the residential dwelling has a concealed defect; (2) the vendor has knowledge of the defect; (3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect is unknown to the purchaser; and (5) ***the defect would not be disclosed by a careful, reasonable inspection by the purchaser.***" *Alejandre*, 159 Wn.2d at 689-690 (emphasis added) (citing *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 524,

799 P.2d 250 (1990); *Obde v. Schlemeyer*, 56 Wn.2d 449, 452, 353 P.2d 672 (1960)).

Similarly, a claimant alleging common law fraud must show proof of the following elements: (1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity; (5) his intent that it shall be acted upon by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom the representation is addressed; (7) the latter's reliance on the truth of the representation; (8) **his right to rely upon it**; and (9) his consequent damage. *Williams v. Joslin*, 65 Wn.2d 696, 697, 399 P.2d 308 (1965) (emphasis added).

Both fraudulent concealment and common law fraud require proof of all elements by clear, cogent and convincing evidence. *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996); *Hughes v. Stusser*, 68 Wn.2d 707, 709, 415 P.2d 89 (1966). As discussed above, Appellants cannot show that Windermere Respondents misrepresented the fact that the subject property was located in a landslide hazard area. Appellants' fraud claims also fail because they cannot show due diligence or reasonable reliance by clear, cogent and convincing evidence.

In *Atherton*, the Washington Supreme Court addressed the relationship between a buyer's reliance on an alleged misrepresentation regarding a condominium and the buyer's duty to inspect:

Although a fraudulent concealment claim may exist even though the purchaser makes no inquiries that would lead him to ascertain the concealed defect, in those situations where a purchaser discovers evidence of a defect, the purchaser is obligated to inquire further. Simply stated, fraudulent concealment does not extend to those situations where the defect is apparent.

Atherton, 115 Wn.2d at 525 (citations omitted).

In *Alejandre*, the Washington Supreme Court discussed what constituted an apparent defect in the context of a homebuyer's claims that a seller failed to disclose a defective septic system. *Alejandre*, 159 Wn.2d at 680. After citing *Atherton* with approval, the *Alejandre* court dismissed the homebuyer's fraudulent misrepresentation and fraud claims because the homebuyer received an incomplete septic system inspection, but failed to follow up on that inspection. The court stated:

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 689-690.

Here, Appellants had specific notice via the Mason County letter that the subject property contained "Landslide Hazard Areas." Appellants

admitted to receiving this letter prior to the close of the sale. This was an apparent defect and was more direct notice than the claimants in *Alejandro* received. Appellants also made the sale contingent on a soils stability analysis. Nevertheless, Appellants failed to conduct such an analysis or investigate the landslide hazard prior to the close of the sale.

Appellants themselves pointed out below that two individuals hired by the Borchelts when they built their addition, the contractor and Mr. Parks the geologist, testified the subject property contained fill and that the addition was built on unstable fill. CP 333-335; CP 344-348. Appellants' own expert discovered fill on the property and stated that the quarry spill referenced by Mr. Parks did not contain the slope. CP 381. Appellants even argue on appeal that leaning trees on neighboring property constituted "clear warning signs" that landslides had occurred in the past. Appellants' Brief at 8.

The overwhelming evidence presented to the trial court shows that a reasonable investigation would have revealed both the landslide hazard and the presence of fill. *Compare, Glenn*, 2008 WL 2582977, at *7, ¶9 (expert witness testimony supported the trial court's finding that a careful, reasonable inspection would not have revealed the defective roof because only an expensive investigation involving disassembly and repairs would have revealed the defect).

As the *Alejandre* court explained:

‘the right to rely’ element of fraud is intrinsically linked to the duty of the one to whom the representations are made to exercise diligence with regard to those representations.

Alejandre, 159 at 690. Having failed to exercise due diligence with regard to the County letter, Appellants cannot now complain they relied on any alleged fraudulent disclosures, or failures to disclose, by Windermere Respondents. Appellants are unable to prove all elements of their fraud claims by clear, cogent and convincing evidence. This court should affirm summary judgment to Windermere Respondents.

3. GEOTECH REPORT MERELY ELABORATED ON STABILITY ISSUES FOR SUBJECT PROPERTY

A substantial portion of Appellants’ brief is devoted to the argument that Appellants did not receive Mr. Parks’ geotechnical report prior to the close of the sale. Appellants argue that this report showed the subject property was unstable, and that it was a material fact not readily ascertainable to Appellants. *See, e.g.*, Appellant’s Brief at 13, 28-31.

Appellants’ argument mirrors the argument rejected by the court in *Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 752 P.2d 1353, (1988) *review denied*, 111 Wn.2d 1007 (1988) (hereinafter *Dalarna*). In that case, plaintiffs argued that the seller of an apartment

building had committed fraud by failing to disclose the extent of water damage in a property. Plaintiffs asserted that although they had notice of “water leakage,” the property vendors did not tell them about the property’s history of “extreme chronic water leakage,” and that this defect was neither apparent or readily ascertainable. *Dalarna*, 51 Wn. App. at 214-215.

The *Dalarna* court disagreed, finding that “extreme chronic water leakage” was not a separate defect from “water leakage” and that the plaintiff had a duty after receiving notice of the defect to investigate the extent of the defect by making reasonable inquiries to the vendors. Having failed to do so, plaintiffs could not support a claim for fraud. *Dalarna*, 51 Wn. App. at 215.

Here, Mr. Parks’ geotechnical report merely elaborates on the condition of the subject property. Thus, it does not constitute notice of a different or new defect. Appellants were under a duty to investigate the landslide hazard after receiving notice of it, but failed to do so.

Appellants could have easily obtained this report. The Mason County letter referenced Mr. Parks’ geotechnical report. Mr. Parks’ addendum also referenced his report. Appellant Timothy Jackowski admitted that although he read the County letter and Mr. Parks’ addendum, he never contacted Mr. Parks prior to the close of the sale and

never asked to see the geotechnical report. CP 574-575 (Dep. T. Jackowski). Because Appellants had notice that the property contained “Landslide Hazard Areas” they were under a duty to investigate this fact before closing. Their failure to do so bars their fraud claims.

4. BASEMENT CRACKS IRRELEVANT TO CLAIMS ON APPEAL

Finally, Appellants alleged Windermere Respondents assisted in concealing structural cracks in the basement floor. CP at 388-402, 395 (Summary Judgment Response). Appellants argue several times in their appellate brief that this alleged complicity constitutes evidence of Windermere Respondents’ overall liability to Appellants. Appellants Brief at 9-11, 28, 31-32, 42, 53. However, the trial court denied summary judgment on this issue and it is not properly before this Court. RAP 2.2(a)(1). And this issue is irrelevant to whether Appellants received notice that the subject property contained “Landslide Hazard Areas.”

In sum, Appellants received notice from Windermere Respondents, prior to the close of the sale, that the subject property was in a landslide area. Windermere Respondents did not misrepresent this fact to Appellants. Appellants’ own lack of diligence and reasonable reliance

justified the trial court's dismissal of their fraud and negligent misrepresentation claims. This court should affirm.

B. APPELLANTS CANNOT MAKE NEW ARGUMENTS ON APPEAL AS TO WINDERMERE RESPONDENTS

Appellants cannot hide the fact that they were informed, prior to the sale, that the property was located in a landslide hazard area. Thus, they attempt to argue on appeal that the trial court improperly applied the economic loss rule articulated by the Washington State Supreme Court's recent decision in *Alejandre*, 159 Wn.2d 674.

As discussed above, Appellants asserted below that the court should not consider the economic loss rule set forth in *Alejandre* because it had not been properly briefed by Windermere Respondents. VRP 09/14/07 at 42-43. The trial court thus specifically declined to address *Alejandre*'s economic loss rule as it applied to Windermere Respondents. VRP 09/14/07 at 44. Appellants nevertheless argue on appeal that the economic loss rule set forth in *Alejandre* does not bar tort claims for catastrophic events, malpractice claims, or tort claims where no contractual privity exists between the parties.

Appellants failed to make any argument below regarding catastrophic events or malpractice as to Windermere Respondents. These arguments should not be considered on appeal. RAP 2.5(a). Appellants

also argue on appeal that *Alejandre* does not bar damages where there is no contractual privity. Appellants' Brief at 3. This argument was mentioned, but not argued, in Appellant's response to the summary judgment motion. CP 397-398 (Plaintiff's Summary Judgment Response). However, Appellants admit that the trial court declined to rule on this issue because it was not briefed. Appellants' Brief at 26-27. This argument also should not be considered on appeal. RAP 2.5(a).

C. APPELLANTS ARE NOT ENTITLED TO CONTRACTUAL ATTORNEY'S FEES FROM WINDERMERE

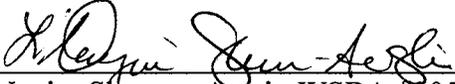
Finally, Appellants request attorneys' fees pursuant to their contract with the Jackowskis and Borchelts. Appellants' Brief at 51. Appellants have admitted that Windermere Respondents are not a party to the contract. No fees should be granted against Windermere Respondents.

IV. CONCLUSION

Windermere Respondents gave Appellants notice of the very defect they claim resulted in their damages. Appellants failed to exercise their contractual right to investigate this defect prior to closing. This Court should affirm the trial court's grant of summary judgment in favor of Windermere Respondents and deny any fees request.

DATED this 8th day of July, 2008.

DEMCO LAW FIRM, P.S.



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DECLARATION OF SERVICE

I, Teresa L. DiTommaso, state:

On this day I caused to be mailed by U.S. Mail, postage prepaid, to:

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A copy of the following documents:

Respondents' Windermere Real Himlie Real Estate and Jeff
Conklin's Brief

Declarant is a resident of the State of Washington and over the
age of eighteen (18) years. I certify under penalty of perjury under the
laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of July, 2008 at Seattle, Washington.

Teresa L. DiTommaso
Teresa L. DiTommaso