

~~COURT OF APPEALS
DIVISION II~~

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~~STATE OF WASHINGTON
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DEPUTY~~

NO. 38551-1-II

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

JOHN HAAS,

Appellant,

v.

VALERY KARTASHEV, and ANNE KARTASHEV, husband and
wife; VALERY KARTASHEV, dba THE PLUMBING DEPOT, and
THE PLUMBING DEPOT, INC.,

Respondents

STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

6/9/11/13
W/A

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

In 2005, appellant John Haas bought a home (the “Haas Residence”) in Camas, Washington from defendants/respondents Valery and Anne Kartashev, who built the home and acted as general contractors, scheduling and supervising the work of subcontractors. Valery Kartashev worked directly on the home. The purchase price was \$705,000. Shortly after moving in, Haas discovered that the construction of the house was severely defective and that conditions the Kartashevs had explicitly agreed to remedy were not in fact remedied. Haas has since spent in excess of \$400,000 repairing the house. For purposes of summary judgment, the Kartashevs do not dispute these facts. Nonetheless, the trial court concluded on summary judgment that Haas had no remedy as a matter of law. In this appeal, Haas asks the Court of Appeals to reverse and to give him his day in court.

Haas’s primary claim argued that the Kartashevs had breached the implied warranty of habitability. Despite substantial evidence that Kartashev is or was a professional builder and constructed the Haas Residence for resale, the trial court held as a matter of law that the mere fact that Kartashev had resided in the Haas Residence for less than two years before selling to Haas barred Haas’s claim. In doing so, the trial

court wrongly relied upon *Klos v. Glockel*, 87 Wn.2d 567, 554 P.2d 1349 (1976), which is easily distinguished.

Haas also alleged that the Kartashevs had breached an express contractual undertaking to remedy certain defects discovered by Haas's inspector prior to closing. Despite clear written evidence of the undertaking and substantial evidence of Kartashevs' failure to perform, the trial court dismissed. In doing so, it wrongly concluded that Haas had waived a right to recover by closing the purchase, despite evidence that Kartashev failed to notify Haas's inspector that repairs allegedly were complete and ready for reinspection such that no reinspection occurred – and despite an explicit clause in the purchase and sale agreement that undertakings to repair survived closing.

The trial court also dismissed Haas's Consumer Protection Act claim, apparently in the belief that a single transaction between Haas and Kartashev could never satisfy the public interest requirement of *Hangman Ridge Stables Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 78, 719 P.2d 531 (1986). The court ignored the many other sales made by Kartashev and failed to analyze the factors identified in *Hangman Ridge* under which an essentially private transaction may nonetheless affect the public interest. There was substantial evidence that the *Hangman Ridge* public interest

factors were met; consequently, it was error for the trial court to dismiss summarily.

Discovery had barely begun when Kartashev moved for summary judgment. The trial court compounded its error by denying Haas additional time to discover and present evidence pursuant to CR 56(f), and by denying Haas the right to further amend his complaint by asserting claims, among others, for fraudulent inducement and fraudulent concealment.

For the reasons stated below, the Court of Appeals should reverse summary dismissal, denial of Haas's motion for leave to amend, and the trial court's award of prevailing party attorneys fees and remand for further proceedings.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in entering summary judgment dismissing Haas's claim for breach of the implied warranty of habitability.
2. The trial court erred in entering summary judgment dismissing Haas's breach of contract claim.
3. The trial court erred in entering summary judgment dismissing Haas's Consumer Protection Act Claim.
4. The trial court erred in denying Haas's motion for more time pursuant to Civil Rule 56(f).

5. The trial court erred in denying Haas's motion to amend to assert additional claims.

6. Having erred in summarily dismissing Haas's claims, the trial court erred in entering judgment against Haas awarding the Kartashevs prevailing party attorneys fees.

Issues Pertaining to Assignments of Error

1. When the buyer of a residence presents substantial evidence that a builder/seller of a residence is a professional builder and built the residence for resale, does the trial court err by dismissing a claim for breach of the implied warranty of habitability on summary judgment solely on the basis that the builder/seller had resided in the residence for a short period of time prior to sale? (Assignment of Error No. 1)

2. When the buyer of a residence presents substantial evidence that his seller explicitly undertook to make certain repairs but failed to make those repairs, does the trial court err by dismissing a claim for breach of contract on summary judgment solely on the basis that the buyer "waived" a claim for damages by closing the purchase, despite evidence that the seller failed to notify and therefore deprived the buyer of the opportunity to reinspect and the purchase and sale agreement explicitly preserved repair rights? (Assignment of Error No. 2)

3. When the buyer of a residence presents substantial evidence that his seller was engaged in the business of building and selling homes, solicited the public in an effort to sell those homes, solicited the buyer specifically, and had unequal knowledge of defects in the construction of the home, does the trial court err by dismissing a claim for violation of the Consumer Protection Act on summary judgment solely on the basis that the buyer cannot prove “public interest impact”? (Assignment of Error No. 3)

4. When discovery has barely begun and a plaintiff seeks more time in which to discover specifically-identified facts and has otherwise shown appropriate diligence, does the trial court abuse its discretion in denying a CR 56(f) motion, particularly where the movant is shown to have given inaccurate or misleading testimony in deposition? (Assignment of Error No. 4)

5. When a plaintiff seeks leave to amend its complaint only a couple of weeks after discovering evidence supporting an as-yet unpleaded claim and no trial date has been set, does the trial court abuse its discretion in denying leave to amend? (Assignment of Error No. 5)

6. When a trial court erroneously dismisses all claims asserted by a plaintiff and the Court of Appeals reverses as to one or more of those claims, should the Court of Appeals also reverse judgment awarding

prevailing party attorneys fees to the defendants? (Assignment of Error No. 6)

III. STATEMENT OF THE CASE

A. Purchase and Sale of Residence Subject to Inspection

In February 2005, defendants/respondents Valery and Anne Kartashev sold a residence they had constructed for resale to plaintiff/appellant John Haas located at 20626 Deerfern Loop, Camas, Washington (the “Haas Residence”). CP 223. The original Purchase and Sale Agreement was dated February 2, 2005. *Id.* The purchase price was \$705,000. *Id.*

Prior to sale, on or about September 20, 2004, the Kartashevs executed a Seller Disclosure Statement pursuant to RCW 64.06.020. Despite clear evidence that they had knowledge of and had concealed damage, the Kartashevs declared among other things that there were “no” defects in the exterior walls, doors, and decks. CP 285-89.

The Purchase and Sale Agreement contained a standard inspection addendum. Under that addendum, Haas’s agreement to purchase was conditioned upon his approval of an inspection of the property, including any improvements. CP 229-30. Haas was obligated to arrange and pay for this inspection. *Id.* ¶ 1.

If the inspection disclosed conditions to which Haas objected, then the Kartashevs had the option of agreeing to correct those conditions.¹ *Id.* In that case, the Kartashevs were to accomplish such corrections in a commercially reasonable manner prior to closing. *Id.* Nowhere did the addendum relieve the Kartashevs from correcting the deficiencies, even though that work was subject to reinspection and approval. *Id.*

If the Kartashevs refused to correct conditions to which Haas objected, then the inspection addendum gave Haas the right to terminate the purchase and sale agreement and to have his \$10,000 in earnest money returned to him. *Id.* ¶ 1(II).

The purpose of the inspection addendum was limited. If the inspection addendum was satisfied, then it “shall be deleted from and no longer [be] a part of the [Purchase and Sale] Agreement.” *Id.* ¶ 1. In other words, if the addendum was satisfied, Haas lost his contractual right to terminate the agreement and recover his earnest money. The addendum did not purport to affect any other of Haas’s rights, including any rights he might have as a result of the Kartashevs’ breach of any warranties, express or implied, breach of the Kartashevs’ obligations under RCW 64.06, violation of the Washington Consumer Protection Act, RCW 19.86, or

¹ The addendum also permitted the parties to agree on an alternative remedy, including *e.g.* a modification of purchase price.

negligent or intentional misrepresentation concerning the condition of the home.

Haas in fact arranged for an inspection of the property. On February 9, 2005, the home was inspected by Western Architectural Waterproofing Consultants (“Western”), which issued a report on February 11, 2005. CP 234-63. That Western report raised several issues that needed correction, including missing sealant, cracks and voids in exterior cladding, the Exterior Insulation & Finish System (EIFS), and problems with deck flashing. CP 236-37. The inspection did not include destructive testing; consequently, only conditions visible on the surface could be noted. CP 238. Nonetheless, Western found:

- That flashing at the gutter line on the third floor deck was improperly installed. CP 237.
- That sealant was missing where light fixtures and deck handrails penetrated the EIFS system. CP 236.
- That there was a void in the EIFS on the outside wall of the second floor deck; reinforcing mesh and EPS foam was exposed there. CP 236-37.
- That there were cracks in the EIFS system at the window corners. CP 237.

- That counter flashing at the master bedroom deck/gutter transition was incomplete, creating an avenue for moisture to migrate behind the EIFS cladding. CP 237.

In response to the Western report, the parties negotiated and signed an addendum to the Purchase and Sale Agreement (Addendum G) by which the Kartashevs explicitly undertook to correct the deficiencies noted in the inspection report. CP 281-82. Prior to execution of Addendum G, Kartashev's realtor stated that Kartashev was the builder of the Haas Residence and that Kartashev would repair the defects listed, CP 214-15 (150:14-151:8), 375, inducing Haas to agree. Addendum G required Kartashev agreed to perform the following, among other repairs:

As indicated in Western Architectural EIFS report:

All of the repairs detailed below are to be completed in accordance with the manufacturer's specifications and requirements, shall completed in a fashion that is aesthetically pleasing to the buyer or designated agent, and shall pass reinspection by Western Architectural:

- (1) Seal all exterior light fixture penetrations. See photo #3.
- (2) Seal all handrail penetration[s]. See photo #2.
- (3) Seal all the void on the outside wall of the second floor deck where the EIFS mesh and EPS foam are exposed. See photo #4.

- (4) Seal all voids where cultured stone and EIFS join. See photo #5.
- (5) Repair all window corner cracks. See photo #5.
- (6) Reinstall counter flashing at the deck/gutter transition above the master bedroom. Reinstallation to include remediation for existing high moisture levels. See photos 7 & 8.
- (7) Recondition cladding at the underside of the far right top floor deck, where the improperly installed counterflashing in Item #6 has resulted in staining.

CP 281-82.

The Kartashevs allege that they completed the repairs they agreed to make in Addendum G. Although Kartashev alleged that Haas's inspector reinspected and approved the repairs, the only evidence he offered was the hearsay statement that his real estate agent told him so. CP 36 ¶ 6. Haas understood that Kartashev would call his inspector when the repairs were done to perform a reinspection. CP 375. Haas denied that Kartashev had called his inspector and that the repairs were reinspected, and there is no evidence in the record that the repairs were reinspected or approved in fact. *Id.*

Whether or not the repairs were performed, under paragraph 21(h) of the Purchase and Sale Agreement, certain terms survived closing if not satisfied or waived, including representations, warranties, and repairs:

- (h) Survival: All terms of this Agreement, which are not satisfied or waived prior to closing, shall survive closing. These terms shall include, but not be limited to, *representations and warranties*, attorney's fees and costs, disclaimers, *repairs*, rents and utilities, etc.

CP 226 (emphasis added). In other words, the mere fact of closing did not bar claims arising from misrepresentation, breach of warranty, or failure to repair.

The sale closed on February 25, 2005.

B. Haas's Post-Sale Discovery of Significant Defects

After closing the purchase of the Haas Residence, Haas moved into the house. He soon experienced water penetration issues and so ordered a full inspection and subsequent repair of the Haas Residence. The report of Haas's contractor, Sean Gores Construction, reads like a horror novel.

Mr. Gores summarized his findings as follows:

The following is a summary of the repairs conducted at your house. The repairs were necessary due to the improper and/or incomplete weatherproofing and flashing of the house, including faulty installation of the Exterior Insulation and Finish System, improper installation of the secondary moisture barrier paper behind the EIFS, Cultured Stone, and Hardi-plank siding, improper sealant installation, improper deck construction, improper window and door installation, improper installation of concrete, improper framing of the house, improper roof flashing installation, improper gutter installation,

and leaking plumbing in the master bathroom and guest bathroom. The above-mentioned defects allowed water to migrate behind the siding and caused extensive dry rot damage to the sheathing and framing.

CP 379; *see also* CP 377-82. Significantly more, and more severe, defects were found by Mr. Gores than by Haas's pre-sale inspection because Mr. Gores had the advantage of being able to remove cladding and other materials to expose the bad workmanship underneath. *Id.*

Of importance, the defects discovered by Mr. Gores included items Kartashev agreed to repair as part of the purchase and sale agreement.

Specifically:

- Caulking around windows was installed improperly, directly on finished surfaces. CP 379.
- Exterior light fixture and handrail penetrations were not sealed. *Id.*; 380.
- Gutters at the decks were nailed through the EIFS system without the use of sealant, CP 381; the roof above the master bedroom was missing step flashing in two locations, *id.*

By October 15, 2007, Haas had spent in excess of \$400,000 to repair all construction defects in the home, including latent structural issues and those defects Kartashev explicitly agreed to fix. CP 382.

C. Kartashevs Were Commercial Builders Who Built the Haas Residence for Resale

At the time they constructed and sold the Haas Residence, the Kartashevs were engaged in the business of building homes for resale. Kartashev claimed to have built his first home in 1994-95. CP 150-56 (20:25-26:5). He purchased the lot then hired, coordinated, and supervised subcontractors to build the home. *Id.* (24:20-25:3; 25:21-26:5). He acted as and performed all of the duties of a general contractor in constructing that home. *Id.*; *see also* CP 164 (34:5-13).

After he had completed construction of his first house, Kartashev began to construct another home, again acting as the general contractor. CP 156-57 (26:6-27:15); 164 (34:5-13). He was told by his accountant that he would realize significant tax benefits if, rather than selling the home immediately, he lived in the second home for about two years. CP 174-77 (72:4-18; 74:20-75:4). The Kartashevs therefore made a habit of purchasing lots, building homes on those lots, residing in them for a period of time, selling them, and benefiting from favorable tax treatment. *Id.*; CP CP 161-64 (third and fourth houses). Kartashev therefore admitted to having built a total of four homes in this fashion and is currently residing in the fourth. The Haas Residence was allegedly Kartashev's third such business venture.

After the first summary judgment hearing, Haas discovered that Kartashev had at least one other project that was ongoing and which Kartashev had failed to disclose during his deposition – a \$1,800,000 home in West Linn, Oregon. CP 438-39; 443-45. In deposition, Kartashev admitted only that he owned two other lots. CP 446-50. In fact, he owned at least four lots – two in Clark County, one in Oregon, and one in Hawaii. CP 438-39; 443-45. Kartashev presumably would continue in his business of building and selling homes.

Kartashev obtained financing for the Haas Residence not only from Riverview Bank, but also at least \$40,000 from five individuals Kartashev refused to identify. CP 168-72. Kartashev admitted that those loans were not repayable until he sold the Haas Residence. *Id.* That Kartashev obtained loans only due upon sale of the home supports the notion that the Haas Residence was built for resale, not merely for Kartashev's individual use.

In short, Kartashev did not told the truth in his deposition when testifying to the number of homes he had constructed and the number of properties owned. In light of this evidence, the trial court would not “disagree” with Haas’s counsel’s characterization of Kartashev as being “less than candid.” RP Vol. II 26:25-27:8 (5/9/2008). At the very least,

Kartashev has built at least five residences and has sold or attempted to sell all of them.

D. Kartashev's Knowledge of Defects Prior to Sale

After bringing suit, with the advantage of discovery, Haas found that the Kartashevs actually knew of and failed to disclose serious defects in the Haas Residence. Specifically, Kartashev had the Haas Residence inspected by at least two different entities, Stucco Inspections NW and MPI, both of which prepared written reports. CP 291-354. In his deposition, Kartashev failed to mention the MPI inspection and report. The Stucco Inspections report, performed July 30, 2004, found, among other things:

THE DECK MEMBRANE WAS NOT PROPERLY INSTALLED UNDER THE DOORS. WATER THAT GETS INTO THIS LOCATION WILL EVENTUALLY DO DAMAGE TO THE INSIDE OF THE DWELLING. THE DECK WILL MORE THAN LIKELY HAVE TO BE REDONE.

ALL LIGHT FIXTURES, HOSE BIBS, UTILITY BOXES ALONG WITH ANY OTHER MATERIALS THAT GOES INTO OR THROUGH YOUR EIFS-SYNTHETIC STUCCO SYSTEM NEED TO BE PROPER SEALED. REMEMBER TO PROPERLY PREPARE ALL AREAS PRIOR TO SEALING AS IT IS NOT A GOOD IDEA TO SEAL DIRECTLY ONTO THE FINISH COAT. IT IS ALSO A GOOD IDEA TO USE BOND

BREAKER TAPE WHEN SEALING
SUCH AREAS.

THE OUTER DECK FLASHING DOES
NOT EXTEND DOWN PROPERLY INTO
THE OUTER GUTTER. THUS WIND
BLOWN RAIN CAN BLOW BACK
UNDER THE DECK. THIS WILL CAUSE
EVENTUAL DRY ROT.

THERE IS SOME DAMAGED EIFS-
SYNTHETIC STUCCO ON THE
DWELLING. THE DAMAGED EIFS
SHOULD BE PROPERLY REMEDIATED
AND REPAIRED. PLEASE DISCUSS
THE DAMAGED EIFS WITH YOUR
SYNTHETIC STUCCO SPECIALIST AND
ASK THIS PERSON HOW TO
PROPERLY REPAIR THE DAMAGED
EIFS. ...

CP 305.

Kartashev claimed to have made some attempt to repair those defects but could not provide any corroborating evidence that repairs were performed. No written contracts or documents exist to prove that any of the claimed repairs were done. CP 178-79 (80:23-81:2); 208 (132:12-22); 210 (134:5-7); 438 ¶ 5. Although Kartashev claimed that Stu McMullen, the author of the Stucco Inspections report, returned to supervise the repair of the defects identified, Mr. McMullen denied that claim. CP 428-35. Kartashev never disclosed those defects or the existence of the Stucco Inspection report to Haas prior to closing of the sale. CP 204 (125:21-24

(McMullen report “was not to have these papers for someone to show”);
285-89 (seller’s disclosure fails to identify defects, report).

Many of the defects identified by Haas’s contractor after the purchase closed were identical to those conditions Kartashev claimed to have repaired in response to the report Stucco Inspections prepared for Kartashev. Specifically, Haas’s contractor found:

- Deck doors were missing the pan flashing under the thresholds, and the thresholds themselves were cut back in an attempt to repair the decks, leading to extensive water damage in the door jambs and framing beneath the doors. CP 380-81. In this case, the “cure” was as bad as or worse than the disease.
- Some penetrations were not sealed at all; other penetrations were sealed directly onto EIFS finish texture – which the Stucco Inspections report specifically warned against. CP 379.
- The outer deck flashing did not perform as installed, leading to extensive water damage. CP 380-81.

The Stucco Inspections report demonstrates that Kartashev knew of these defects. It may reasonably be inferred (particularly on summary judgment) from the Gores report that Kartashev did not in fact repair them, and thus Kartashev failed to disclose defects he knew about when selling the home to Haas.

E. Proceedings Below

1. Claims Pleaded

Haas initiated this lawsuit in 2006. In his third amended complaint, filed July 30, 2007, Haas named as defendants the Kartashevs individually, Kartashev d/b/a The Plumbing Depot, a sole proprietorship, and The Plumbing Depot, Inc., a Washington corporation of which the Kartashevs are sole owners. CP 1-9. The third amended complaint asserted the following claims: (a) negligent construction and negligence *per se*; (b) breach of contract; (c) breach of the implied warranty of habitability; (d) breach of express warranty; (e) rescission; (f) violation of the Consumer Protection Act; and (g) unjust enrichment. *Id.*

The Kartashevs in turn brought third-party claims against various subcontractors.

2. Defendants' Motion for Summary Judgment

By agreement of the parties, discovery was informally stayed while Haas performed the necessary repairs on the Haas Residence. CP 438 ¶ 4. On November 26, 2007, immediately after the repairs were complete and before discovery of any significance had occurred, the Kartashev defendants moved for summary judgment. CP 22.

In response, Haas's trial counsel conceded summary dismissal of all claims against The Plumbing Depot, Inc. CP 130-32. Haas does not

contest dismissal of The Plumbing Depot, Inc., in this appeal. Haas's trial counsel also conceded claims for negligent construction, negligence *per se*, rescission, and unjust enrichment. CP 143-44; RP Vol. I 3:12-22 (3/7/2008). This left breach of contract, breach of express warranties, breach of the implied warranty of habitability, and violation of the Washington Consumer Protection Act. *Id.* Haas does not here contest dismissal of the express warranty claim.

a. Implied Warranty of Habitability

Haas claimed that the Kartashevs breached the implied warranty of habitability recognized in Washington since *House v. Thornton*, 76 Wn.2d 428, 457 P.2d 199 (1969). The Kartashevs countered that they were not "commercial builders" and that the Haas Residence was built for personal occupancy, not resale. They therefore argued that the implied warranty of habitability did not apply, relying principally upon *Klos v. Glockel*, 87 Wn.2d 567, 554 P.2d 1349 (1976). The trial court granted summary judgment solely on the basis of the Kartashevs' occupancy prior to sale of the Haas Residence. RP Vol. II 29:4-16 (5/9/2008).

b. Breach of Contract

The Kartashevs moved for summary dismissal of Haas's breach of contract claim, arguing that Haas had failed to identify any contract provision breached. Haas responded with substantial evidence that Kartashev

had failed to perform the repairs he had contractually committed in Addendum G to perform following Haas's inspection – including specifically missing sealant, cracks in the siding, and improper gutter flashing. CP 139-40, 281-82 (Addendum G); 377-82 (Gores report).

The Kartashevs then argued that they were not liable because the repairs were accomplished as part of an inspection contingency. Whether or not the repairs were “reinspected” (a point hotly contested below), the Kartashevs argued that Haas's decision to close waived the inspection contingency.

The trial court agreed with the Kartashevs that the right to reinspect barred Haas's claims for breach of contract. In doing so, it wrongly relied upon the case of *Alejandro v. Bull*, 159 Wn.2d 674, 689, 153 P.2d 864 (2007), a case in which the plaintiff made no claim for breach of contract but instead asserted solely claims for fraud and misrepresentation. It rejected Haas's argument that there was at least a disputed issue of fact as to whether Haas had waived any rights at all, and ignored an express contractual provision that preserved claims for repair despite closing.

c. Consumer Protection Act

Haas also claimed violation of the Washington Consumer Protection Act, RCW 19.86. The Kartashevs moved for summary judgment based solely on the argument that Haas could not prove public

interest impact, CP 31, relying on *Sloan v. Thompson*, 128 Wn. App. 776, 115 P.3d 1009 (2005). The trial court agreed, despite substantial evidence that Kartashev, unlike the defendant in *Sloan*, was engaged in the business of building homes for resale when he built and sold the Haas Residence.

3. Motion for Additional Time Under CR 56(f)

Haas opposed Kartashevs' motion for summary judgment in part by seeking additional time for discovery, pursuant to CR 56(f). When the Kartashevs filed their motion, no depositions had occurred. Only days before filing his opposition, Haas deposed Kartashev. Based upon information obtained in that deposition, Haas prepared, and submitted with his opposition, six document subpoenas to US Bank, Riverview Community Bank, Gurnink & Co., Inc., Amerprise Financial, and Debra Younger and Michael Park of RE/MAX, identifying the documents sought. CP 356-73.

Specifically, Haas expected to obtain from these sources additional facts supporting his argument that Kartashev was in the business of building homes for resale. CP 138. He also sought the marketing materials used by Kartashev to prove more specific express warranties concerning the construction of the Haas Residence. *Id.* Finally, Haas needed more time to depose and obtain documents from Kartashev's repair subcontractors – those who allegedly performed repairs before

Kartashev agreed to sell the Haas Residence to Haas, and those who allegedly performed the work required by Addendum G. *Id.* Haas expected to obtain from such sources information supporting the conclusion that Kartashev intentionally failed to disclose known defects and failed, on several occasions, to repair known defects. *Id.*

The trial court denied the motion. RP Vol. I 35:12-22 (3/7/2008).

4. Motion to Amend

In his brief in opposition to the Kartashevs' summary judgment motion, Haas's trial counsel sought leave to file an amended complaint to add claims for breach of contract and fraudulent concealment based upon Kartashev's failure to disclose known defects; fraud based upon Kartashev's statements that defects had been repaired when, in fact, they had not; and breach of contract based upon Kartashev's failure to perform the repairs identified by Haas's inspector. CP 144-45. The trial court denied the motion. RP Vol. I 35:12-22 (3/7/2008).

5. Motion for Reconsideration/Clarification

On March 17, 2008, in response to the trial court's actions on his motions for more time and to amend, Haas timely moved for clarification, reconsideration, and leave to file an amended complaint. CP 389-99. The proposed Fourth Amended Complaint first asserted a claim for fraud, alleging that Kartashev had fraudulently induced Haas to enter into the

purchase and sale agreement by representing by failing to disclose material defects and by affirmatively representing that Kartashev could and would repair any and all of the defects. CP 394-99. The trial court denied the motion in all respects. CP 469.

6. Judgment/Notice of Appeal

The trial court entered judgment dismissing Haas's claims on October 24, 2008. CP 825-29; 830-31. On October 31, 2008, it entered an order awarding the Kartashevs as prevailing parties attorneys fees in the approximate amount of \$80,000. CP 832-35. Haas timely filed his notice of appeal on November 17, 2009. CP 836.

IV. SUMMARY OF ARGUMENT

A. Implied Warranty of Habitability

The trial court improperly granted summary judgment on Haas's claim for breach of the implied warranty of habitability based solely upon Kartashev's temporary residence in the home prior to sale to Haas. Haas presented substantial evidence that the Kartashevs were in fact commercial builders and that the Haas Residence was built for resale rather than personal occupancy, and thus that the implied warranty applied. Under the facts presented, this case is easily distinguishable from *Klos v. Glockel*, 87 Wn.2d 567, 554 P.2d 1349 (1976), on which the trial court relied. Because *Klos* recognized that the analysis it compels is one of fact, and the

facts present in this case vary significantly from those present in *Klos*, it was error for the trial court to rule as a matter of law that the Kartashevs could not be held liable for breach of the implied warranty of habitability.

B. Breach of Contract

Haas claimed that the Kartashevs were liable for breach of contract for failure to build the Haas Residence in a reasonable and workmanlike manner, in accordance with applicable codes, standards, and manufacturer specifications. CP 6. In opposition to summary judgment, as noted above, Haas presented substantial evidence that Kartashev had agreed, in Addendum G, to make specific repairs and that Kartashev failed to do so.

The trial court improperly relied upon the argument that Haas had waived any claim he had by proceeding to closing. This was error because the inspection contingency and Addendum G did not relieve Kartashev of any liability for failure to perform the tasks agreed to; indeed, the purchase and sale agreement stated explicitly that claims for repair survived closing, and there was no evidence that Haas in fact waived any right. Under Washington law, Kartashev failed to produce evidence that Haas actually waived anything.

Considering the evidence in the light most favorable to Haas, summary dismissal was improper.

C. Consumer Protection Act

The trial court improperly dismissed Haas's Consumer Protection Act claim solely on the argument that Haas could not, as a matter of law, prove the "public interest" element of a CPA claim. Haas presented substantial evidence that his claim against Kartashev in fact implicated the public interest as required by *Hangman Ridge Stables Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 78, 719 P.2d 531 (1986). In brief, as required by *Hangman Ridge*, Haas presented substantial evidence that (1) the acts alleged were committed in the course of Kartashev's business; (2) that Kartashev advertised to the public in general; (3) that Kartashev actively solicited Haas, indicating potential solicitation of others; and (4) that Kartashev was uniquely in a position to understand far better than Haas the serious defects present in the Haas Residence.

The case of *Sloan v. Thompson*, 128 Wn. App. 776, 115 P.3d 1009 (2005), on which Kartashev and the trial court relied, is easily distinguished. First, that case was decided following trial, not summary judgment, and as a result review was far more deferential. Second, in this case, Haas presented far more substantial evidence that Kartashev was engaged in the business of building homes for resale and that his sale to Haas was not an isolated event.

D. Motion for Additional Time Under CR 56(f)

By agreement, the parties had delayed discovery while Haas completed repairs on the Haas Residence. Immediately after those repairs were complete and before there was any opportunity to conduct meaningful discovery, Kartashev moved for summary judgment. Haas deposed Kartashev shortly before the hearing on summary judgment and identified additional needed discovery. He identified to the trial court the need for additional discovery, the proposed targets, and the likely evidence that discovery would uncover. In what little discovery Haas could accomplish, he discovered that Kartashev had testified falsely in several material respects directly relating to the arguments he made to the trial court about his activities as a commercial builder. Under the circumstances, the trial court abused its discretion in denying the motion.

E. Motion to Amend

In opposition to the Kartashevs' summary judgment motion, Haas sought leave to file an amended complaint to add claims for breach of contract and fraudulent concealment based upon Kartashev's failure to disclose known defects; fraud based upon Kartashev's statements that defects had been repaired when, in fact, they had not; and breach of contract based upon Kartashev's failure to perform the repairs identified by Haas's inspector. There was no trial date and discovery had barely

begun; consequently, Kartashev could show no prejudice. “[L]eave [to amend] shall be freely given when justice so requires.” CR 15(b). The trial court abused its discretion in denying amendment.

F. Attorneys Fees

The trial court awarded fees based on the conclusion that the Kartashevs were the substantially prevailing party. If the Court of Appeals reverses summary dismissal of any of Haas’s claims, Kartashev can no longer be deemed the prevailing party. The award should be vacated.

V. ARGUMENT

A. Standard of Review

Although summary judgments are intended to avoid unnecessary trials, courts have zealously protected litigants’ right to trial on all legitimately contested issues. Summary judgment is only appropriate if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. CR 56(c); *Mutual of Enumclaw Ins. Co. v. Jerome*, 122 Wn.2d 157, 160, 856 P.2d 1095 (1993).

A genuine issue of fact exists and precludes summary judgment when reasonable minds could reach different factual conclusions after considering the evidence. See *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 256-57, 616 P.2d 644 (1980). Even where eviden-

tiary facts are not in dispute, summary judgment is not appropriate if “different inferences may be drawn therefrom as to ultimate facts” such as intent, knowledge, good faith, negligence, and any other issue in dispute. *Preston v. Duncan*, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960). Thus, summary judgment is improper even if the basic facts are not in dispute if those facts are reasonably subject to conflicting inferences. *Coffel v. Clallam County*, 58 Wn. App. 517, 520, 794 P.2d 513 (1990).

It is not enough to show an absence of disputed facts, the movant must also demonstrate that those facts entitle the movant to judgment in its favor and as a matter of law. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975), citing CR 56(c). The court must give all favorable inferences from the evidence to a party opposing summary judgment. *Coffel*, 58 Wn. App. at 520.

On appeal, the appellate court decides the case on a *de novo* basis, engaging in the same analysis as the trial court. *See, e.g., Roger Crane & Assocs. v. Felice*, 74 Wn. App. 769, 875 P.2d 705 (1994). Both the law and the facts will be reconsidered by the appellate court. *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990). Any findings of fact entered by the trial court will be considered superfluous and will be disregarded by the appellate court. *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 878 P.2d 483 (1994).

B. The Trial Court Erred in Dismissing Haas's Claim That the Kartashevs Breached the Implied Warranty of Habitability

The Kartashevs moved to dismiss Haas's claim that they had breached the implied warranty of habitability for new construction by arguing that they were not commercial builders and that the Haas Residence was not built for resale rather than personal occupancy, CP 28-30, relying in particular upon *Klos v. Glockel*, 87 Wn.2d 567, 554 P.2d 1349 (1976), and *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1987). The trial court agreed and in doing so erred.

The Washington Supreme Court first recognized the implied warranty of habitability in *House v. Thornton*, 76 Wn.2d 428, 457 P.2d 199 (1969). In *House*, the Court stated:

When a vendor-builder sells a new house to its first intended occupant, he impliedly warrants that the foundations supporting it are firm and secure, and the house is structurally safe for the buyer's intended purpose of living in it.

Id., 76 Wn.2d at 436.

Klos v. Glockel, 87 Wn.2d 567, 554 P.2d 1349 (1976), the case relied upon by the trial court, presented unique facts. In *Klos*, the widow of an occasional builder of homes continued for a brief period after her husband's death to construct a total of three houses on Mercer Island. The

first of the three houses constructed was purchased by the plaintiffs in *Klos*. The widow lived in the house for about a year before the sale. The widow acted as her own general contractor and subcontracted out the foundation, plumbing, and electrical work.

The house was designed to suit the widow's personal needs, and personal considerations led her to sell it:

The house itself was small and built primarily to suit appellant's personal needs and tastes, as opposed to one built for speculation. [Footnote omitted.] Appellant did not originally contemplate selling the house. She occupied the house for a full year. During that time she suffered injuries on two occasions by falling on the stairs, and decided to sell that house and build on one level.

87 Wn.2d at 569. After selling the first house, the widow built a second house for personal use, sold it, moved to Arizona for a time, returned and built a third house. *Id.* n.1. She resided in the third house at the time of trial. *Id.* at 568.

When confronted with this unique set of facts, the Washington Supreme Court chose to protect widow Gockel, reversing judgment for the purchaser. In clarifying when the implied warranty arises, the Court held that (1) the vendor must be a commercial builder; and (2) the structure must be built for resale. *Id.* at 570. Although a sale must be "fairly contemporaneous with completion and not interrupted by an intervening

tenancy,” *id.* at 571, where a builder-vendor “created such an intervening tenancy for the primary purpose of promoting the sale of the property,” *id.* at 571, 554 P.2d 1349, liability would still attach.

After *Klos* was decided, it was strongly criticized for its potentially insidious effect. In *Frickel v. Sunnyside Enters., Inc.*, 106 Wn.2d 714, 725 P.2d 422 (1986), Chief Justice Pearson, in dissent, recognized that a builder should not be held liable if defects in a home result from the tenancy and were not present in the original construction. *Frickel*, 106 Wn.2d at 430. That rationale loses its force when the defects are fundamental and unlikely to change with mere passage of time. *Id.* Chief Justice Pearson argued that the “for resale” prong of *Klos* made no sense from a policy perspective; applied mechanically, it encouraged builders to reside temporarily in homes they constructed simply to defeat the claims of otherwise deserving purchasers. *Id.*, 106 Wn.2d at 729 n.1 (Pearson, C.J., dissenting). Since *Klos* was decided, only one other Washington case, *Boardman v. Dorsett*, 38 Wn. App. 338, 685 P.2d 615 (1984), has dismissed claims on facts even remotely similar to those here. In *Boardman*, the vendor had constructed only two residences – his own and the one in suit.

This case presents facts quite different from those in *Klos* and *Boardman*. Haas introduced substantial evidence that Kartashev was a

commercial builder and that he constructed the Haas Residence for resale. Those facts will not be restated in full here, but Kartashev, among other things, had built a total of *five known* homes (compared to three in *Klos* and two in *Boardman*), including the Haas Residence, selling or attempting to sell all the homes he has constructed. There was no evidence before the trial court that Kartashev had designed the Haas Residence for his personal use. By contrast, widow Gockel had built primarily to suit her personal needs and tastes.

Further, in this case Kartashev admitted that part of the funds used to build the house were borrowed, with repayment due “on sale” of the Haas Residence, indicating an intent from the outset that the home be sold. Kartashev also admitted that his post-construction residence in each of his houses was driven by tax considerations, with his residence never exceeding by much the minimum period recommended by his accountant. By contrast, the evidence concerning an intent to resell in *Klos* was much less clear. The elderly widow Gockel moved only after suffering two falls on the stairs of the multi-level house, and there was no evidence that widow Gockel had borrowed funds to construct the house payable only on resale.

In neither *Klos* nor *Boardman* was there evidence from which it might be inferred that the builder’s tenancy was simply a ploy – either to defeat the expectations of a buyer or to maximize profit by obtaining

favorable tax treatment. Here, the evidence is clear – for business/tax reasons, Kartashev resided briefly in each home he constructed. Unlike widow Gockel’s residence, the Haas Residence was not designed specifically for Kartashev, and Kartashev did not move out of the Haas Residence for any reason other than the fact that he had completed yet another of his several homes. The situation present in this appeal is thus more like the exception recognized in *Klos* for tenancies for the “primary purpose of promoting the sale of the property” than a tenancy that exposes the builder to greater risk. Kartashev’s brief tenancy should not defeat Haas’s claims.

The *Klos* Court itself recognized that whether a home is “new” or not so as to give rise to the warranty is a question of fact:

It is true that for purposes of warranty liability, the house purchased must be a “new house”, but this is a question of fact. The passage of time can always operate to cancel liability, but just how much time need pass varies with each case.

Klos, 87 Wn.2d at 571. The record below discloses that Kartashev continued work on the Haas Residence up to the time of sale to Haas, and never fully repaired the defects discovered. The record also shows that the defects were systemic and not the result of Kartashev’s tenancy. As a result, it remained a jury question whether the home remained a “new house” subject to the implied warranty.

In sum, because the *Klos* analysis is one of fact and the facts present in this case vary significantly from those present in *Klos* and *Boardman*, it was error for the trial court to rule as a matter of law that the Kartashevs could not be held liable for breach of the implied warranty of habitability. It should have allowed the claim to proceed to trial.

C. The Trial Court Erred in Dismissing Haas's Claim for Breach of Contract

In his complaint, Haas claimed that the Kartashevs were liable for breach of contract for failure to build the Haas Residence in a reasonable and workmanlike manner, in accordance with applicable codes, standards, and manufacturer specifications. CP 6. The Kartashevs moved to dismiss these claims, arguing that the only contract between Haas and the Kartashevs was the purchase and sale agreement, which they allege was silent on the matter and manner of construction. CP 28. In response, Haas properly argued that the purchase and sale agreement obligated Kartashev to undertake certain repairs, and introduced substantial evidence that Kartashev failed to do so. CP 281-82 (Addendum G); CP 377-82 (Gores report).

The trial court should not have dismissed the claim for at least four reasons: (a) the authorities relied upon concerned only tort, not contract, claims; (b) the inspection contingency and Addendum G did not relieve

Kartashev of any liability for failure to perform the tasks agreed to; (c) both in fact and at law Haas did not waive any right; and (d) the Purchase and Sale Agreement explicitly stated in paragraph 21(h) that repair obligations survived closing.

First, in dismissing Haas's claim, the trial court improperly relied upon the decision of *Alejandre v. Bull*, 159 Wn.2d 674, 689, 153 P.2d 864 (2007), and generally upon the notion that because Haas reserved the right to reinspect, but nonetheless closed the transaction, Haas waived his right to seek damages for breach. Kartashev cited no Washington case to the trial court addressing waiver in a breach of contract claim. The trial court's reliance on *Alejandre* was sorely misplaced because, in *Alejandre*, the plaintiff buyer ***made no claim for breach of contract***. Instead, the plaintiff asserted claims for fraud and misrepresentation as to conditions that would have been discovered with a reasonable inspection. Having hired his own inspector, *Alejandre* could not "reasonably rely" on the alleged misrepresentations of Bull.

Second, the contract itself counters the notion that any waiver occurred. A brief review demonstrates clearly that the trial court misapprehended the purpose and impact of the inspection contingency and right of reinspection. Properly understood, they do not bar Haas's claim.

The Purchase and Sale Agreement contained a standard inspection addendum. Haas's obligation to purchase was conditioned upon his approval of an inspection of the property. If the inspection disclosed conditions to which Haas objected, one of three things could happen. First, if the Kartashevs refused to correct, then Haas had the right to terminate the agreement and to return of his \$10,000 in earnest money. Second, the parties could agree to modify the purchase price or otherwise account for the conditions.

Of greatest importance here, third, if the Kartashevs agreed to correct the conditions to which Haas objected, they were obligated to accomplish such corrections in a commercially reasonable manner prior to closing. CP 43. In the inspection addendum, the Kartasheves agreed "to correct all conditions to which Buyer has objected." *Id.* The parties in fact executed Addendum G – independent from the inspection addendum – specifically identifying those tasks Kartashev was to perform. CP 281-82. Although Addendum G stated that remedial work was subject to reinspection, no clause in the contract relieved Kartashev from performing those tasks he agreed to perform even if a reinspection occurred and approval was given – and certainly did not relieve Kartashev of liability if no reinspection/approval occurred. Under no circumstances did the contract relieve Kartashevs from performing; to the contrary, Addendum

G explicitly required that repairs “shall pass reinspection by Western Architecture.” *Id.*

By executing Addendum G, Haas lost only his contractual right to terminate the agreement and recover his earnest money pursuant to the inspection addendum, but specifically preserved his right to pursue a damages claim against Kartashev if Kartashev failed to perform the work in a “commercially reasonable manner.” Addendum G, the only part of the contract to refer to reinspection, did not purport to affect any of Haas’s other rights, including any rights he might have as a result of the Kartashevs’ breach of any warranties, express or implied, breach of the Kartashevs’ obligations under RCW 64.06, violation of the Washington Consumer Protection Act, RCW 19.86, or negligent or intentional misrepresentation concerning the condition of the home.

Third, under well-established Washington law, waiver is “the intentional abandonment or relinquishment of a known right. It must be shown by unequivocal acts or conduct showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive.” *Harmony at Madrona Park Owners Ass’n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 361, 177 P.3d 755 (2008). Whether waiver has occurred is a question of fact. *Id.* The evidence below is at least disputed as to whether Kartashev called Haas’s inspector to perform a reinspection;

Haas denied that his inspector was called and that reinspection occurred, despite Addendum G's requirement that the repairs "*shall* pass reinspection by Western Architecture." Dismissing Haas's contract claim based upon "waiver" was thus improper.

Fourth, the mere fact that the sale "closed" cannot by itself demonstrate waiver because paragraph 21(h) of the Purchase and Sale Agreement states that terms relating to "repairs" survive closing and Addendum G states that repairs "shall pass reinspection by Western Architecture." CP 40 (paragraph 21(h)); 281-82 (Addendum G).

In sum, Haas presented substantial evidence below that Kartashev in fact failed to perform the remedial work to which he had agreed in Addendum G. It was error for the trial court to dismiss this claim.

D. The Trial Court Erred in Dismissing Haas's Claim for Violation of the Consumer Protection Act

Kartashev moved to dismiss Haas's Consumer Protection Act claim solely on the argument that Haas could not, as a matter of law, prove the "public interest" element of a CPA claim. CP 31. The trial court agreed, concluding that this was essentially a private transaction, and in doing so erred.

Under the CPA, Haas has the burden of proving each of five elements: (a) an unfair or deceptive act or practice; (b) occurring in trade

or commerce; (c) public interest impact; (d) injury to Haas in his business or property; and (e) causation. *Hangman Ridge Training Stables Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 1986). Only the third element is at issue here.

In *Hangman*, the Washington Supreme Court recognized that there were at least three different ways to establish the required “public interest impact.” First, a plaintiff may (but need not) identify a legislative declaration of public interest.² *Hangman*, 105 Wn.2d at 792. Second, there are cases in which the nature of proof of the cause of action necessarily meets the public interest requirement. *E.g., Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 742-43, 733 P.2d 208 (1987) (trade name infringement dispute). Neither of these modes of proof is at issue here.

Third, and most important, a plaintiff may establish public interest impact even in an essentially private transaction by demonstrating that “additional plaintiffs have been or will be injured in exactly the same fashion.” *Sloan v. Thompson*, 128 Wn. App. 776, 792, 115 P.3d 1009 (2005). Relevant factors include: (1) were the alleged acts committed in the course of the defendant’s business? (2) did the defendant advertise to the public in general? (3) did the defendant actively solicit this particular

² Because the “public interest” requirement may be met in any of three ways, only one of which involves a legislative declaration, the fact that the Legislature has declared that requiring a seller to provide a seller’s disclosure statement does not “vitally [affect] the public interest,” RCW 64.06.060, is of no moment.

plaintiff, indicating potential solicitation of others? (4) did the plaintiff and defendant occupy unequal bargaining positions? *Hangman*, 105 Wn.2d at 790-91. No single factor is dispositive, and each factor need not be present. *Id.*, Wn.2d at 791.

Here, Haas introduced substantial evidence meeting each of these factors. Kartashev was in the business of building homes then selling them to the public; he had built at least five houses and sold three, apparently residing in each briefly so as to take advantage of favorable tax treatment. Kartashev clearly “advertised” to the public in general, as he engaged a real estate broker to assist him in selling the Haas Residence. CP 189 (103:2-7 (discussion with his realtor); 205-06 (admitting he did not talk with his realtor about whether to disclose leak/repairs). He solicited Haas in particular, as he provided to Haas a misleading seller’s disclosure statement and further agreed to repair defects uncovered by Haas’s inspector. CP 285-89 (disclosure statement); 281-82 (Addendum G). Kartashev, as the builder and recipient of the Stucco Inspections report, had knowledge of the defects in the Haas Residence that Haas simply could not have obtained. Under these circumstances, it was a question for the jury whether the public interest standard was met.

Sloan v. Thompson, 128 Wn. App. 776, 115 P.3d 1009 (2005), does not support the trial court’s dismissal of Haas’s CPA claim on

summary judgment. To begin with, in *Sloan*, the plaintiff's claim was dismissed after a trial on the merits, not on summary judgment. The Court of Appeals therefore affirmed under a more deferential standard of review. It found only that the trial court's conclusion that there was no public interest impact was supported by substantial evidence. *Id.*, 128 Wn. App. at 792.

Second, the evidence in *Sloan* was quite different. There, although the defendant builder had purchased other properties, fixed them up, and resold them, the trial court specifically found that the defendant "built this home with the intention of it being his retirement home. Thompson and his family lived in the house for the greater portion of *six years* and left only when personal reasons necessitated the family's relocation to Utah." *Id.* (emphasis added). Accordingly, the Court of Appeals found that substantial evidence supported the trial court's finding that the sale at issue "did not occur within the course of [the defendant's] business." *Id.*

By contrast, Haas submitted substantial evidence that Kartashev built the Haas Residence and others for resale, living in them only the minimum time necessary to qualify for favorable tax treatment, before moving onto his next project. That is a far cry from the facts in *Sloan*.

The trial court erred in dismissing the claim on summary judgment.

E. The Trial Court Abused Its Discretion in Denying Haas's Request for More Time Pursuant to CR 56(f)

When the trial court heard argument on Kartashev's motion for summary judgment, no trial date had been set. Haas had begun repairs on the Haas Residence in February/March of 2007; those repairs were not completed until November 2007. CP 438 ¶¶ 3-4. By mutual agreement of the parties, discovery was put "on hold" until the repairs were complete. *Id.* Kartashev filed his motion for summary judgment on November 26, 2007, immediately after completion of repairs and before discovery could even begin in earnest.

Haas deposed Kartashev in February 2008, only days before Haas's opposition to the motion was due. Kartashev's testimony led Haas to believe that additional discovery was necessary on several points. Accordingly, he moved for additional time under CR 56(f), identifying with specificity the need for discovery, the proposed targets, and the likely evidence that discovery would uncover. In what little discovery Haas could complete between the trial court's granting of summary judgment and denial of reconsideration, he discovered that Kartashev had testified falsely about the extent of his activities as a commercial builder, how many lots and homes he had developed, and his sources of financing. He

was precluded by the trial court's denial of his CR 56(f) motion from fully discovering the facts relevant to Kartashev's claims.

A trial court should not consider a motion for summary judgment until the completion of relevant discovery. *Bernal v. America Honda Motor Corp.*, 87 Wn.2d 406, 553 P.2d 107 (1976). When a party opposing summary judgment requests additional time pursuant to CR 56(f), "the primary consideration in the trial court's decision on the motion should be justice." *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990) (finding under facts present there that trial court had abused its discretion in denying additional time). CR 56(f) protects a party opposing a motion for summary judgment and allows that party an opportunity to develop facts essential to justify his opposition to the motion for summary judgment. *See Bernal*, 87 Wn.2d at 416.

"Where a party knows of the existence of a material witness and shows good reason why the witness' affidavit cannot be obtained in time for the summary judgment proceeding, the court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case," and a court abuses its discretion in denying additional time. *Coggle*, 56 Wn. App. at 507; *see also Turner v. Kohler*, 54 Wn. App. 688, 775 P.2d 474 (1989); *Lewis v. Bell*, 45 Wn. App. 192, 724 P.2d 425

(1986); *Sternoff Metals Corp. v. Vertecs Corp.*, 39 Wn. App. 333, 693 P.2d 175 (1984).

Haas properly moved under CR 56(f). The request identified specific targets: Kartashev's real estate agent, his lenders, his accountant and financial advisor, the real estate agents involved in the sale, and Kartashev's various subcontractors. The request explicitly stated that by pursuing this discovery Haas believed he would obtain facts with which to dispute Kartashev's defenses to his claims, specifically:

- Kartashev's claims that he was not in the business of building and selling homes;
- Kartashev's knowledge of and failure to repair known defects; and
- Marketing materials used by Kartashev to sell the house.

Finally, Haas explained to the trial court why the evidence had not yet been obtained – discovery had been stayed pending completion of repairs. Under these circumstances, the trial court abused its discretion when it denied the motion.

F. The Trial Court Abused Its Discretion in Denying Haas's Motion To Amend

In opposition to Kartashev's motion for summary judgment, Haas moved for leave to amend his complaint. Haas renewed his motion when

he filed his motion for clarification, reconsideration, and leave to file an amended complaint. The proposed Fourth Amended Complaint asserted the following claims:

- For fraudulent inducement based upon Kartashev's effort to induce Haas to enter into the purchase and sale agreement for the Haas Residence while failing to disclose known material defects in the home.
- For breach of contract based upon Kartashev's failure to perform repair work promised to be done in Addendum G.
- For fraud based upon Kartashev's statements that certain defects had been repaired when they had not.
- For misrepresentation based upon Kartashev's failure to disclose known material defects in the home.

CP 394-99.

When a party seeks leave to file an amended complaint, "leave shall be freely given when justice so requires." CR 15(b). "Courts should not dismiss the complaint unless it is beyond a doubt that there are no facts to support relief. Similarly, a court should not refuse leave to amend unless the same rigorous standard is met." 3 MOORE'S FEDERAL PRACTICE § 15.15[3] (3d ed. 2009).

Frankly, it is difficult to understand exactly why the trial court denied the motion to amend, either at the outset or on reconsideration. Kartashev argued in his motion that the tort claims already pleaded by Haas (negligence, negligence *per se*) were barred by the economic loss rule, citing, among other cases, *Alejandre v. Bull*, 159 Wn.2d 674, 689, 153 P.2d 864 (2007), and *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1987). CP 25-28. However, as *Alejandre* and *Atherton* make clear, the economic loss rule does not bar claims for fraudulent concealment or fraud – exactly the claims Haas sought to bring by amendment. *Alejandre*, 159 Wn.2d at 689 (“[U]nder *Atherton*, the Alejandres’ fraudulent concealment claim is not precluded by the economic loss rule,” then proceeding to consider the merits of both the Alejandres’ fraudulent concealment and fraud claims).

Under *Alejandre*, a purchaser can establish a fraudulent concealment claim (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. *Id.*

Because the Kartashevs had moved for summary judgment based solely upon the economic loss rule, Haas had no opportunity to brief or support the elements of a fraudulent concealment claim. It was only in reply that Kartashev argued that Haas should be barred under the *Alejandre* elements – specifically arguing that Kartashevs’ knowledge was limited to what Haas knew and that Haas’s pre-purchase inspection was sufficient to put him on notice of defects in the house. Accordingly, this issue was not fully and fairly before the trial court when it denied leave to amend.

Although Haas had no opportunity to respond, nonetheless, there was substantial evidence in the record that (1) the Haas Residence had countless concealed defects, CP 377-82 (the Gores report); (2) Kartashev acted as general contractor and had knowledge of the defect, CP 291-354 (Stucco Inspections report); (3) the defect presented a danger to the property, health, or life of Haas, CP 377-82 (Gores report detailing cost of repair exceeding \$400,000); (4) the defect was unknown to Haas, CP 204 (125:21-24 (McMullen report “was not to have these papers for someone to show”); 285-89 (seller’s disclosure fails to identify defects, report); and (5) the defect would not be disclosed by a careful, reasonable inspection by Haas.

The trial court denied leave to amend apparently relying upon the fact that Haas's pre-purchase inspection had discovered "some" defects. RP Vol. I 35:12-22 (3/7/2008). However, as the Western report made clear, there were limits to what could be accomplished in a pre-purchase inspection. CP 238 (no destructive testing). The defects disclosed by the Western report were actually reasonably modest; it was only when Haas's contractor could strip the cladding from the house to disclose what was underneath that certain types of defects were discovered for the first time and the full magnitude of the problem was disclosed. Again, the posture of the case precluded a full presentation of facts and argument. However, Haas believes that an expert could testify that the Western report was "reasonable" under the *Alejandre* factors, and unless this Court is prepared to rule as a matter of law that a "reasonable" inspection occurs only if the dwelling is essentially demolished at considerable expense, the proper course is to remand for further proceedings.

It bears repeating: "Courts should not dismiss the complaint unless it is beyond a doubt that there are no facts to support relief. Similarly, a court should not refuse leave to amend unless the same rigorous standard is met." 3 MOORE'S FEDERAL PRACTICE § 15.15[3] (3d ed. 2009). It truly cannot be said on this state of facts that it is "beyond doubt that there are

no facts to support relief.” Accordingly, the trial court abused its discretion in denying leave to amend.

G. The Trial Court’s Award of Attorneys Fees Should Be Reversed

The trial court awarded approximately \$80,000 in attorneys fees to Kartashev as the prevailing party below. Should the Court of Appeals reverse, it should also vacate the judgment for fees. The issue of fees should await further proceedings below.

VI. CONCLUSION

For the foregoing reasons, the Court of Appeals should vacate the judgment entered by the trial court, reverse the order granting summary judgment, and remand for further proceedings consistent with its opinion.

RESPECTFULLY SUBMITTED this 10th day of June, 2009.

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PROOF OF SERVICE

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Washington and executed at Seattle, Washington, this 10th day of June,
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Denise Ratti