

COURT OF APPEALS  
DIVISION II

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NO. 38551-1-II

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

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JOHN HAAS,

Appellant,

v.

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

Respondents.

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REPLY BRIEF OF APPELLANT

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Alan S. Middleton, WSBA No. 18118  
Randall R. Steichen, WSBA No. 19264  
Davis Wright Tremaine LLP  
Attorneys for Appellant

1201 Third Avenue, Suite 2200  
Seattle, WA 98101-3045  
(206) 622-3150 Phone  
(206) 757-7700 Fax

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## I. INTRODUCTION

Summary judgment may be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Respondents Valery Kartashev and Anne Kartashev (Kartashevs) ignore substantial evidence offered by Haas below, urging that their self-serving (and, as found by the trial court, not credible) statements be taken as verities. Among other things, Haas introduced substantial evidence below that the Kartashevs were commercial builders building for resale; that the Haas Residence was “new” as that term applies to the implied warranty; and that Haas is entitled to the benefit of the warranty. The trial court erred in dismissing the warranty claim.

Haas also introduced substantial evidence that the Kartashevs agreed to make certain repairs but failed to do so. The Kartashevs argue that Haas waived the right to claim breach of that agreement despite the lack of evidence of waiver and an explicit contractual clause preserving such claims. The trial court erred in dismissing Haas’s contract claims.

Haas also introduced substantial evidence proving public interest impact under the Consumer Protection Act – the sole basis on which the Kartashevs moved to dismiss the CPA claim. Far from immunizing the Kartashevs from CPA liability, the seller disclosure statute preserves such claims. The trial court erred in dismissing the CPA claim.

Finally, the trial court erred in denying Haas additional time within which to discover material facts pursuant to CR 56(f) and leave to amend to assert additional claims.

This court should reverse summary dismissal and the trial court's award of attorneys fees and remand for trial consistent with its order.

## **II. ARGUMENT**

### **A. The Trial Court Erred in Dismissing Haas's Claim for Breach of the Implied Warranty of Habitability**

#### **1. Haas Introduced Substantial Evidence Precluding Summary Judgment**

Despite acknowledging that respondent Valery Kartashev had been less than candid in many respects, RP Vol. II 26:25-27:8 (5/9/2008), the trial court took at face value Kartashev's self-serving testimony that the Haas Residence was not built for resale and Kartashev resided there in good faith as the "first occupant" such that the residence was not "new" when purchased by Haas. The trial court thereby ignored substantial evidence in favor of Haas and established Washington authority, improperly taking the case from the jury, which should decide disputed facts.

The Kartashevs argue five inter-related points, none of which withstands critical review. Resp. Br. 12-13.

#### **a. The Haas Residence Was Built for Resale**

The Kartashevs' claim that the Haas Residence was not built for

resale is refuted by at least the following evidence:

- Kartashev built his first home in 1994-95. He purchased the lot then hired, coordinated, and supervised subcontractors to build the home. He acted as and performed all of the duties of a general contractor in constructing that home. App. Br. 13. This is uncontradicted.
- After he had completed construction of his first house, Kartashev began to construct another home, again acting as the general contractor. *Id.* This is uncontradicted.
- Kartashev's accountant told him that he would realize significant tax benefits if, rather than selling the home immediately, he lived in the home for about two years. *Id.* This is uncontradicted.
- The Kartashevs thereafter 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.*
- Kartashev admitted to having built a total of four homes in this fashion, acting as general contractor, and is currently residing in the fourth. The Haas Residence was allegedly Kartashev's third such business venture. *Id.* These facts are uncontested.
- 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. *Id.* at 14. This fact is uncontested.

- 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. These loans were not repayable until he sold the residence. *Id.* These facts are uncontested.
- The Kartashevs cite to no evidence that Kartashev designed the Haas Residence for his personal use.
- The Kartashevs moved out of their “dream home” (the Haas Residence) as soon as the tax-motivated residence expired, having completed the next in a series of homes built for resale.
- Contrary to Kartashevs’ sworn testimony, the Kartashevs did not live in the Haas Residence for two years (allegedly from November 2002 to January 2005). Indeed, in a real estate listing executed in September 2004, the house was listed as “vacant.”<sup>1</sup>

**b. The Kartashevs Were Commercial Builders**

The facts stated in the preceding section also refute the claim by the Kartashevs that they were not commercial builders. These first two

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<sup>1</sup> Haas will move to admit the listing, which was not before the trial court.

elements exhaust the formal requirements of *Klos v. Gockel*, 87 Wn.2d 567, 554 P.2d 1349 (1976).

**c. The Haas Residence Was New**

The Kartashevs next state three factors as separate elements, but all are related – claims that the Haas Residence was not “new”; that Haas was not the original “occupant”; that the sale was not contemporaneous with completion. Resp. Br. 12-13. In *Klos*, the Court held that whether a home is “new” or not so as to give rise to the warranty is a question of fact. *Klos*, 87 Wn.2d at 571. Despite widow Gockel’s residence of at least a year, ***the Supreme Court refused to find that Gockel’s residence rendered the house “not new.”*** *Id.*, 87 Wn.2d at 570. Here, there is at least a genuine issue as to whether the Haas Residence was “new” when sold to Haas.

The rationale underlying the requirement that a structure be “new” is simple: It is not fair to hold a builder liable if “defects” are likely to have resulted from the intervening tenancy. *Frickel v. Sunnyside Enters., Inc.*, 106 Wn.2d 714, 729, 725 P.2d 422 (1986) (Pearson, C.J., dissenting). Because the defects alleged here were systemic and not the result of occupancy, Kartashev’s tenancy could be much longer than widow Gockel’s one year yet the house still be considered “new.” Finally, an intervening tenancy does not matter if the tenancy is to “promote sale of the property.”

*Klos*, 87 Wn.2d at 571. It is at least an issue of fact whether Kartashev's occupation of the Haas Residence was to "promote sale of the property" on terms favorable to the Kartashevs – specifically, after they had realized the benefit of favorable tax treatment.

- There was substantial evidence that Kartashev in fact never completed the Haas Residence at anytime prior to Haas's purchase. App. Br. 15-17. Specifically, by Kartashev's own admission, work was performed on the Haas Residence during the fall of 2004, after he listed the property for sale and before he relisted the property. CP 177:16-181:13; Resp. Br. 3-4. Problems explicitly listed in the McMullen report were never addressed. App. Br. 15-17.
- There is no evidence that defects subsequently found resulted from Kartashev's limited occupation of the residence, rather than being systemic in nature.
- There is no dispute that Kartashev acted as the general contractor in building the Haas Residence. There is therefore no dispute that Haas was the first "purchaser" occupant of the home. In any event, *see* preceding section.

## **2. Under Controlling Authority, Entry of Judgment as a Matter of Law Was Improper**

The Kartashevs do not dispute that only two Washington cases

have dismissed claims for breach of the implied warranty of habitability under facts even remotely similar to those present here, App. Br. 31, and that in one of them, *Boardman v. Dorsett*, 38 Wn. App. 338, 685 P.2d 615 (1984), the vendor had constructed only two residences – his own and the one in suit – a far cry from the five homes constructed by the Kartashevs.

The Kartashevs also do not dispute critical facts that distinguish this case from *Klos v. Gockel*, 87 Wn.2d 567, 554 P.2d 1349 (1976).

Specifically:

- Widow Gockel had specifically designed the house at issue to suit her personal needs – indicating a lack of intent to resell. App. Br. 32. The Kartashevs cite to no evidence that Kartashev designed the Haas Residence for his personal use.
- In *Klos*, widow Gockel moved out for personal reasons. App. Br. 30. By contrast, the Kartashevs moved out simply because they had completed the next in a series of residences built for resale, as was their pattern and practice.
- Part of the funds used to build the Haas Residence were borrowed, with repayment due “on sale,” indicating an intent that the home be sold. There was no such evidence in *Klos* or *Boardman*.
- Kartashev’s 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.

Again, there was no such evidence in *Klos* or *Boardman*.

In short, in neither *Klos* nor *Boardman* was there evidence (as there is here) from which to infer 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 – either goal defeating the Kartashevs' claim that they built the house primarily for personal use. There are at least sufficient facts to preclude summary judgment on whether the house was built for resale, whether the Kartashevs were commercial builders, and whether the house was “new” when sold to Haas.

In his opening brief, Haas cited to the dissent in *Frickel v. Sunny-side Enters., Inc.*, 106 Wn.2d 714, 725 P.2d 422 (1986), for the sole purpose of identifying judicial concern for the potential for abuse in a mechanic application of *Klos*'s “for resale” prong. As Chief Justice Pearson noted, applied mechanically, the “for resale” prong encourages builders to reside temporarily in homes they construct simply to defeat the claims of otherwise deserving purchasers. *Id.*, 106 Wn.2d at 729 n.1 (Pearson, C.J., dissenting). That is precisely the effect here.

Haas's argument does not stand or fall on whether the “for resale” continues to be good law. Instead, it was error for the trial court to conclude as a matter of law that the test had been met in this case, given the

disputed evidence discussed above. The trial court should have allowed this case to proceed to trial.

If the Kartashevs rely upon *Frickel* for the proposition that Haas is not entitled to the benefit of the implied warranty, that case is easily distinguished. There, the defendants had a business developing and holding apartment buildings for their own ownership and management. *Id.*, 106 Wn.2d at 715. A portion of the apartment development had already been occupied by rental tenants for as long as eighteen months when the plaintiff approached defendants about purchasing the entire apartment complex. *Id.* Defendants were in the business of owning apartments for investment, not personal residence. *Id.* Being in the business, plaintiffs were not at the disadvantage common among individuals purchasing a single-family residence for their own use. *Id.*, 106 Wn.2d at 719. By contrast, Kartashev listed the Haas Residence for sale, as he had his previous houses shortly after completing them. There is no evidence that, once the tax-inspired delay had expired, Kartashev held onto any home he built for investment purposes.

The Kartashevs blandly assert that the Haas Residence was not “new” when sold to Haas. 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, ***and refused to hold that widow Gockel’s one-year residence ren-***

*dered the home “used.” 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*, the trial court erred by ruling 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.

### **3. The Alleged Defects Are Subject to the Implied Warranty**

The Kartashevs suggest that the defects alleged by Haas are too minor to be considered breaches of the implied warranty of habitability. As the Kartashevs did not base their motion for summary judgment on this argument, CP 28-30, it should be disregarded. Even if this Court were to consider the argument, the attempt to minimize over \$400,000 in defects flies in the face of Washington authorities.

The law is fairly stated in *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 694-96, 106 P.3d 258 (2005). Whether a particular defect

implicates the implied warranty is a highly fact-intensive inquiry determined on a case-by-case basis. *Id.*, 125 Wn. App. at 694. A builder of a new home impliedly warrants that the construction is ““of proper workmanship and reasonable fitness for its intended use.”” *Id.* at 695, citing *Hoye v. Century Builders, Inc.*, 52 Wn.2d 830, 833, 329 P.2d 474 (1958). The purchaser of a new home has a cause of action for breach of the warranty if the builder-vendor ““deviates from fundamental aspects of the applicable building code.”” *Id.*, citing *Atherton Condo. Apartment-Owners’ Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 522 n.10, 799 P.2d 250 (1990). The building’s condition need not be dire. In *Gay v. Cornwall*, a leaky roof requiring extensive repairs violated the implied warranty. *Gay v. Cornwall*, 6 Wn. App. 595, 596, 494 P.2d 1371 (1972). And the occupant need not be forced to evacuate. *Lian v. Stalick*, 106 Wn. App. 811, 816, 25 P.3d 467 (2001).

Under this authority, Haas presented substantial evidence raising a triable issue as to whether the warranty was breached.

**B. The Trial Court Erred in Dismissing Haas’s Claim for Breach of Contract**

Haas agrees that the contract between himself and the Kartashevs is one of purchase and sale; however, in Addendum G to that contract, the Kartashevs explicitly agreed to repair certain defects discovered by Haas’s

inspector. Haas presented substantial evidence that the Kartashevs failed to do so and further that Haas did not waive this failure. Consequently, the trial court erred in dismissing on summary judgment.

**1. Haas Does Not Claim Breach of a Contract to Construct**

The Kartashevs respond with three arguments. In the first, they argue that Haas has no *contract* claim based upon the initial construction of the house. Haas agrees, and does not press the issue here.

**2. Haas Did Not Have To Amend His Complaint**

Second, the Kartashevs claim that for Haas to pursue a claim based upon the Kartashevs' failure to perform in accordance with Addendum G, Haas had to amend his complaint. That argument fails for the simple reason that the issue was fully briefed, argued, and decided by the trial court. Civil Rule 15(b) provides:

(b) Amendments To Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues *may* be made upon motion of any party at any time, even after judgment; *but failure so to amend does not affect the result of the trial of these issues.* ...

CR 15(b) (emphasis added).

The Kartashevs agree that Haas raised the issue at summary judgment. Resp. Br. at 16; CP 140. They also agree that “each of these

claims was argued during the summary judgment.” Resp. Br. at 17. The trial court held that Haas’s reservation of a right to reinspect, followed by closing of the purchase and sale, barred his claim. The Kartashevs identify no prejudice to the actual litigation of the claim. A clearer case for application of CR 15(b) is hard to imagine. The parties having actually litigated the claim, and the trial court having dismissed on summary judgment, the proper standard of review is de novo.

### **3. Haas Did Not Waive Defects in Kartashevs’ Obligation To Repair**

Third, the Kartashevs argue that Haas waived any right to claim that the tasks listed in Addendum G were not completed.

The Kartashevs first argue that Haas may not rely upon Paragraph 21(h) of the Purchase and Sale Agreement, which explicitly stated that terms relating to “repairs” survived closing, because this evidence, although of record, was not explicitly called to the trial court’s attention. None of the cases cited by the Kartashevs remotely supports this argument. In *Seattle-First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 588 P.2d 1308 (1978), the Court rejected an effort by respondents to raise an entirely new legal argument – that a plaintiff’s “fault” should be a damage-reducing factor in a strict liability action – because it had not been raised below. *Id.*, 91 Wn.2d at 240. In *Demelash v. Ross Stores, Inc.*, 105

Wn. App. 508, 20 P.3d 447 (2001), the Court rejected a plaintiff's effort to introduce an entirely new claim (for negligent supervision) at the appellate stage. *Id.*, 105 Wn. App. at 527. In *Clapp v. Olympic View Pub. Co., LLC*, 137 Wn. App. 470, 154 P.3d 230 (2007), the Court actually considered the argument raised on the merits. *Id.*, 137 Wn. App. at 476.

Here, the purchase and sale agreement was in evidence and both sides referred to it. The “theory” at issue – whether Haas waived a claim – was briefed and argued. There is no dispute that the Kartashevs signed the agreement and therefore agreed to be bound by paragraph 21(h). It is simply one more piece of evidence – undisputedly of record – that Haas did not waive. This is not a case at all similar to those cited by the Kartashevs, where a party on appeal seeks to raise an entirely new argument. There is no reason to ignore it here. Even if the “rule” is interpreted to apply to paragraph 21(h), first, Rule 2.5(a) grants this Court discretion in determining whether an argument not previously raised may be considered on appeal. RAP 2.5(a) (court “may refuse”); *see, e.g., State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (“By its own terms, however, [RAP 2.5(a)] is discretionary rather than absolute.”). Second, Washington courts will consider issues raised for the first time on appeal when fundamental justice so requires. *State v. Card*, 48 Wn. App. 781, 784, 741 P.2d 65 (1987); *Greer v. Northwestern Nat'l Ins. Co.*, 36 Wn.

App. 330, 338-39, 674 P.2d 1257 (1984). This Court should consider paragraph 21(h).

The law of waiver is undisputed. 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) (emphasis added). Whether waiver has occurred is a question of fact. *Id.*

The evidence below is at least disputed on the issue of waiver, even without paragraph 21(h). The evidence is in conflict 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.” Against this backdrop, the Kartashevs argue that the mere fact that Haas proceeded to closing is sufficient to indicate waiver. That, however, is not the case – in fact or at law.

Paragraph 21(h) makes it clear that the Kartashevs cannot argue that merely closing the transaction resulted in waiver. The text of paragraph 21(h) bears repeating:

(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). The mere fact of closing does not bar claims for breach of representations, warranties, or undertakings to repair – waiver requires something else. The Kartashevs have failed to produce evidence of this “else” or authority<sup>2</sup> that Haas in fact waived meeting the demanding standards of *Harmony*.

The parties surely intended that the Kartashevs perform the repair work listed in Addendum G prior to closing. But the contract does not absolve the Kartashevs if they failed to perform that work, or performed it inadequately. With the execution of Addendum G, the inspection contingency was “satisfied” in the sense that Haas lost the option of backing out and recovering his earnest money – but not any other claim.

The Kartashevs agreed to correct the conditions to which Haas objected. They had 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

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<sup>2</sup> The Kartashevs have on appeal abandoned the argument that tort cases, like *Alejandro v. Bull*, 159 Wn.2d 674, 689, 153 P.2d 864 (2007), establish Haas's waiver.

Kartashev was to perform. CP 281-82. Although Addendum G stated that remedial work was subject to reinspection, neither Addendum G nor any other contract provision relieved Kartashev from liability *even if a reinspection occurred and approval was given* – and certainly did not relieve him of liability if no reinspection/approval occurred. It bears repeating that Addendum G explicitly required that repairs “*shall pass reinspection* by Western Architecture.” *Id.* (emphasis added). There is no admissible evidence that Western Architecture ever performed a reinspection.

By executing Addendum G, Haas lost only his contractual right to terminate the agreement and recover his earnest money pursuant to the inspection addendum. He 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, does not purport to affect any of Haas’s other rights, whether in contract, tort, or statutory law.

Haas presented substantial evidence that Kartashev failed to perform the remedial work listed in Addendum G and that Haas did not waive any claim relating to that failure. The trial court erred in dismissing.

**C. The Trial Court Erred in Dismissing Haas’s Claim for Violation of the Consumer Protection Act**

Haas claimed violation of the Washington Consumer Protection

Act based upon the Kartashevs' failure to disclose material defects. The trial court dismissed, based upon Kartashevs' sole argument that Haas failed to establish public interest impact. In doing so, the court erred.

**1. RCW 64.06.060 Does Not Immunize the Kartashevs**

By enacting RCW 64.060.060, the Legislature did not immunize sellers who previously would have been liable under the Consumer Protection Act simply because they failed to disclose known defects in their residences. Indeed, RCW 64.06.070 *preserves* causes of action against a seller who knowingly fails to disclose defects.

*Svendsen v. Stock*, 143 Wn.2d 546, 23 P.3d 455 (2001), cited by the Kartashevs, confirms this. There, a purchaser sued the seller, the seller's broker, and a homeowners association for failure to disclose flooding on the property. Claims against the seller were resolved and the seller was dismissed. *Id.*, 143 Wn.2d at 551. A jury found that the broker fraudulent concealed the flooding and violated the CPA. *Id.* at 552. The Court of Appeals reversed judgment on the CPA claim, relying upon RCW 64.06.060, holding that the broker's liability stemmed from her participation in the filling out of the disclosure form. *Id.*

While holding that RCW 64.06.060 may in some cases immunize a broker from CPA liability because the act of *filling out the disclosure*

*form* is a “practice covered by” RCW 64.06.060, the Supreme Court declared that that was not the end of the inquiry. Rather, it held that RCW 64.06.070 *preserves* claims against a broker independent of the filling out of a disclosure form. *Id.*, 143 Wn.2d at 555-57. RCW 64.06.070 states:

Except as provided in RCW 64.06.050 [where the seller has no actual knowledge of the defect omitted], ***nothing in this chapter shall extinguish or impair any rights or remedies of a buyer of real estate*** against the seller or against any agent acting for the seller otherwise existing ***pursuant to common law, statute, or contract***; nor shall anything in this chapter create a new right or remedy for a buyer of residential real property other than the right of rescission [sic] exercised on the basis and within the time limits provided in this chapter.

RCW 64.06.070 (emphasis added). In *Svendsen*, the purchaser identified numerous cases holding a broker liable for failure to disclose a known material defect decided prior to enactment of RCW 64.06. The Supreme Court rejected the Court of Appeals’ dismissal of such cases, and clearly favored preservation of CPA claims in doing so:

[I]t is difficult to believe that the Legislature intended to eviscerate preexisting protections afforded to home buyers prior to the adoption of the seller disclosure statute. A more reasonable interpretation of the legislature’s intent is that it expressly reserved all existing remedies for residential purchasers in RCW 64.06.070. In that regard, our interpretation is in accord with the goal of the CPA that it “shall be liberally construed that its beneficial purposes may be served.” RCW 19.86.920.

*Id.*, 143 Wn.2d at 558.

Prior to enactment of the seller disclosure statement, sellers of residential real estate have been found liable under the CPA for failure to disclose. *See, e.g., Luxon v. Caviezel*, 42 Wn. App. 261, 710 P.2d 809 (1985) (listing residence falsely on listing service as four-bedroom house); *McRae v. Bolstad*, 101 Wn.2d 161, 676 Wn.2d 496 (1984) (failure to disclose defects). As the Supreme Court has stated, there is no reason to believe that in enacting RCW 64.06 the Legislature intended to immunize conduct previously actionable simply because a defendant fills out a form.

In *Svendsen*, the Supreme Court found evidence of the broker's failure to disclose separate from the disclosure form itself; the broker had independent knowledge of defects in the property and chose not to disclose them. Consequently, the broker's liability did not rest simply upon a "practice covered by" RCW 64.06 – the filling out of the disclosure form. *Svendsen*, 143 Wn.2d at 558. The Supreme Court reversed and reinstated the judgment for violation of the CPA. *Id.*, 143 Wn.2d at 560.

As in *Svendsen*, Haas below presented substantial evidence that the Kartashevs' knowledge of defects and failure to disclose was independent from the disclosure form and of public interest impact. Kartashev, as the builder and recipient of the Stucco Inspections report, had knowledge of the defects in the Haas Residence and subsequent (failed) efforts to repair that Haas simply could not have obtained. It is not merely Kartashev's

filling out of a form that leads to liability, but his independent knowledge and failure to disclose, just as in *Svendsen*. RCW 64.06.060 does not immunize them. Taken to its extreme, the Kartashevs' argument would mean that despite actual knowledge of defects, a builder could immunize itself simply by filling out a form incorrectly! That surely is not what the Legislature intended.

**2. Haas Presented Substantial Evidence Creating a Triable Issue as to Public Interest Impact**

There is ample evidence of public interest impact. 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. For the reasons discussed in Haas's opening brief, *Sloan v. Thompson*, 128 Wn. App. 776, 115 P.3d 1009 (2005), does not support the Kartashevs here. The trial court erred in dismissing Haas's CPA claim on summary judgment.

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

The Kartashevs argument on Haas's request for more time boils down to three points. First, they claim that the motion was procedurally

defective; second, that Haas did not demonstrate due diligence in discovering facts relevant to his claim; third, that additional time would have been pointless. None of these arguments has merit.

First, Haas's motion was not procedurally defective. Haas moved for more time when he filed his opposition to the summary judgment motion (and again on reconsideration); accordingly, *Transamerica Ins. Group v. Chubb*, 16 Wn. App. 247, 554 P.2d 1080 (1976), where the motion was not brought until six days after oral argument on summary judgment, does not dispose of the issue. An affidavit is not strictly required. *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002) (plaintiff adequately fulfilled purpose of Rule 56(f) by stating reasons why summary judgment was premature in its opposition to summary judgment); *Novecon, Ltd. v Bulgarian-American Enterprise Fund*, 977 F. Supp. 52, 54 (D.D.C. 1997) (same).

Although lack of diligence by a party may be cause for denial, Haas was diligent. In any event, the trial court denied the motion not on the basis of lack of diligence – on which it made no finding – but on the basis that the discovery would not raise a genuine issue of material fact under the trial court's erroneous interpretation of the law. RP Vol. II 27:10-20 (5/9/08). In fact, under the discussion above, evidence of Kartashev's status as a commercial builder for resale was highly relevant,

as it is a question of fact whether Kartashev's tenancy rendered the Haas Residence "not new." As stated in Haas's opening brief, the trial court abused its discretion in denying Haas additional time.

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

Similarly, the trial court abused its discretion in denying leave to amend. The Kartashevs argue that the motion to amend was untimely, prejudicial, and improperly supported because no proposed amended complaint was attached. But the trial court did not deny the motion to amend on these grounds; it was certainly within the trial court's discretion to consider the motion on the merits, and it did so. It would be improper for this Court to substitute its judgment for the trial court's with respect to whether to consider the motion on the merits.

The trial court denied the motion to amend because it allegedly presented nothing "new" in light of its prior dismissal of the implied warranty and breach of contract claims. RP II 25:18-26:2 (5/9/08). Considering the broad differences in proof between these claims, that conclusion is unsound and unsupported.

The Kartashevs argue for the first time on appeal that the motion would have been futile because a claim for fraud or fraudulent inducement would be barred by the economic loss rule, Resp. Br. 33-35, citing *Carlile*

*v. Harbour Homes Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008). As *Carlile* notes, however, in *Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), the Court held that the economic loss rule does not bar claims for fraudulent concealment, which is the essence of the claims Haas sought to add by amendment. Haas below presented substantial evidence of fraudulent concealment; it was error for the trial court to conclude that amendment would be futile and therefore an abuse of discretion to deny Haas's motion to amend.

### III. 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 September 14, 2009.

Davis Wright Tremaine LLP  
Attorneys for Appellant

By   
Alan S. Middleton, WSBA No. 18118  
Randall R. Steichen, WSBA No. 19264  
1201 Third Avenue, Suite 2200  
Seattle, WA 98101-3045  
Telephone: (206) 622-3150  
Fax: (206) 757-7000  
E-mail: [alanm Middleton@dwt.com](mailto:alanm Middleton@dwt.com);  
[randysteichen@dwt.com](mailto:randysteichen@dwt.com)

COUNT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY \_\_\_\_\_

PROOF OF SERVICE

I hereby certify that on this 14th day of September, 2009, I caused

to be sent for filing the foregoing REPLY BRIEF OF APPELLANT via  
first-class mail to the following:

Clerk of the Court  
Washington State Court of Appeals, Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

I further certify that on this day, I caused the foregoing REPLY  
BRIEF OF APPELLANT to be sent for service via first-class mail to the  
following:

Bruce M. White  
Mitchell, Lang & Smith  
2000 One Main Place  
101 S.W. Main Street  
Portland, OR 97204-3230

Thomas A. Heinrich  
Mitchell, Lang & Smith  
1001 Fourth Avenue, Suite  
3714  
Seattle, WA 98154

William Davis  
Davis Rothwell Earle & Xóchihua  
P.C.  
111 SW 5th Avenue, Suite 2700  
Portland, OR 97204-3653

Ray P. Cox  
Foresberg & Umlauf, PS  
900 5<sup>th</sup> Avenue, Suite 1700  
Seattle, WA 98164

Joanne Blackburn  
Gordon, Thomas Honeywell  
600 University Street, Suite 2100  
Seattle, WA 98101

Norma S. Ninomiya  
Law Offices of Norma S. Ninomiya  
Safeco Property & Casualty  
Insurance Cos.  
500 Broadway, Suite 425  
Vancouver, WA 98660

Martin M. Rall  
Lachenmeier Enloe Rall &  
Heinson  
9600 Capitol Highway  
Portland, OR 97219  
Attorney for JC Concrete

Michael C. Mitchel  
Zipse Elkins & Mitchell  
500 E. Broadway St., Suite 370  
Vancouver, WA 98660

Declared under penalty of perjury under the laws of the State of  
Washington and executed at Seattle, Washington, this 14th day of  
September, 2009.

  
\_\_\_\_\_  
Alan S. Middleton