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COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS DIVISION TWO STATE OF WASHINGTON  
BY JW  
DEPUTY

STATE OF WASHINGTON

JOHN HAAS,

Petitioner,

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

Repondents

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BRIEF OF RESPONDENT

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Respondent's Counsel  
Thomas A. Heinrich, WSBA # 19925  
Bruce M. White, WSBA # 14131  
1001 Fourth Ave., Suite 3714  
Seattle, WA 98154  
(206) 292-1212

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## **I. Issues Pertaining to Assignments of Error**

1. Did the trial court properly dismiss the plaintiff's claim for breach of the implied warranty of habitability, where the defendants, who are not professional builders or sellers, had the home constructed for them by others, and lived in the home in excess of two years before selling it to plaintiff?

2. Did the trial court properly dismiss the breach of contract claim where the claim as pled asserted that breach consisted of defendants' alleged failure to build the home in a proper manner, where the parties only contracted for the sale of the home, not its construction, and where no warranties of quality were given?

3. Did the trial court properly dismiss plaintiff's claim for breach of the Consumer Protection Act, where this was a private transaction between two individuals, and where the alleged deceptive act occurred in the Seller's Disclosure Statement, which the legislature has determined does not affect the public interest?

4. Did the trial court appropriately exercise its discretion in denying plaintiff's motion for a continuance of the summary judgment motion under CR 56(f), where plaintiff provided no good reason for his lack of diligence in seeking additional discovery until 18 months after the case was filed, and shortly before the summary

judgment hearing, and where the additional discovery sought would not have created a material issue of fact?

5. Did the trial court appropriately exercise its discretion in denying plaintiff's motion to amend his complaint for a fourth time, where the motion was not appropriately made until after the order dismissing his remaining claims, where the undue delay in amending the complaint could have resulted in significant prejudice to the defendants, and where the proposed amended claims would have lacked merit?

6. Did the trial court appropriately award defendants their attorneys' fees as the prevailing party?

## **II. Statement of the Case**

Valery and Anne Karteshev purchased property at 20626 Deer Fern Loop in Camas, Washington in 2001. CP 35, ¶2. Mr. Karteshev applied for and received a building permit in his capacity as owner of the property to build a home on the site. *Id.* ¶3. Mr. Karteshev contracted with numerous trades who constructed the house, with the exception of the plumbing work which he performed himself. *Id.* Mr. Karteshev is a plumber by trade and had been the owner of the Plumbing Depot, which was operated as a sole

proprietorship until it was incorporated in July of 2002 and became the Plumbing Depot, Inc. *Id.* ¶3. It was the Karteshevs intent that the house on Deer Fern Loop would be their primary residence. They did not build the home with the intention of selling it. *Id.* ¶2. On two prior occasions, in 1994 and in 1997 the Karteshevs had homes built for them in a similar manner. CP 157.

The Karteshevs moved into the new house under a temporary certificate of occupancy in November of 2002. CP 35, ¶4. Construction was complete in December of 2002. *Id.* They continuously lived in the home until approximately January of 2005 when they moved to a new home a few blocks away. *Id.*

Several months after moving in to the home, Mr. Karteshev noticed a wet spot on the carpet near the exterior doors to the balcony. CP 122, 56:11-17. He retained an inspector, Stuart McMullen to investigate the cause. CP 123, 58:16-25. Mr. McMullen prepared a report in July of 2004. CP 291-306. That report also identified some stucco maintenance issues. *Id.* Following receipt of this report, Mr. Karteshev requested that the original stucco installer, Bordak Brothers, repair the stucco issues identified in the report. CP 123, 59:24-60:3. He also requested that VNAT Construction, the company that originally installed the doors,

do some repairs/modifications to those doors. CP 123, 59:9-20.

This apparently did not solve the problem. CP 124, 80:3-10. After consulting with several of the original contractors it was determined that the source of water may relate to the tile surface on the balconies. He retained a company called Protos, Inc. to resurface the decks. CP 125, 85:9-86:25. Following this repair he put the home on the market believing that any leaks had been repaired. *Id.*

On September 20, 2004 the Karteshevs signed a seller's disclosure statement which was prepared in conjunction with listing the home for sale. CP 285-89.

On February 2, 2005 the Karteshevs entered into a Residential Purchase and Sale Agreement with plaintiff John Haas. CP 269-283. The Agreement included an inspection addendum (Addendum B) which contained an inspection contingency. CP 275-76. Mr. Haas retained Western Architectural Waterproofing Consultants to perform that inspection. That company issued an inspection report dated February 11, 2005. CP 50-79. The issues raised in that report primarily related to the exterior cladding or Exterior Installation and Finish System (EIFS). *Id.* Following receipt of that report, an additional addendum was prepared by Haas (Addendum G) which sought correction of many of the items raised

in that report. CP 281-82. Karteshev agreed to make the requested corrections. CP 35, 283.

He performed some of the minor work himself, such as replacing light bulbs and adjusting the garage door, and requested the original stucco contractor and gutter installer perform the other identified repairs. CP 35-36. The inspection contingency addendum provided that if the seller agreed to correct the conditions identified by buyer, they were to be accomplished at seller's expense in a reasonable manner prior to the closing date. CP 275. The document further provided that seller's corrections were subject to reinspection and approval prior to closing by the inspector who prepared the inspection report, if buyer elected to order and pay for such reinspection. *Id.* Language in Addendum G contained the same right to have Western Architectural perform a re-inspection. CP 282.

At the request of Mr. Haas, and by agreement of the parties, the closing date was moved up to February 25, 2005. CP 79. The Karteshevs had no direct and personal knowledge of whether Mr. Haas hired Western Architectural to reinspect the home, though they were advised by their real estate agent that the repairs had been

approved. CP 36. The closing of the transaction occurred as scheduled on February 25, 2005.

On July 18, 2006 Mr. Haas filed this lawsuit against Mr. Karteshev alleging that there were defects in the construction of the home which allowed water to penetrate into the interior. The Complaint was amended three times to add additional causes of action and add Mrs. Karteshev and the Plumbing Depot, Inc. as defendants. The Third Amended Complaint alleged 8 separate causes of action: negligence, negligence *per se*, breach of contract, breach of the implied warranty of habitability, breach of express warranties, rescission, violation of the Consumer Protection Act, and unjust enrichment. CP 1-9. The Karteshevs subsequently filed a Third Party Complaint against the various trades and subcontractors who constructed the home together with Protos Inc. which retiled the decks. CP 10-22.

The defendants filed a motion for summary judgment on November 21, 2007. The hearing of that motion was rescheduled on multiple occasions at the request of plaintiff's counsel, ostensibly to conduct discovery including the deposition of Valery Karteshev. CP 114, ¶ 4, CP 115, ¶ 9. No effort was made to schedule that deposition however until February 6, 2008 and it was ultimately

scheduled for February 14, 2008. CP 116, ¶ 10. The hearing was held on March 7, 2008 in which Judge Nichlos granted the Defendants' Motion for Summary Judgment dismissing all claims in the Third Amended Complaint. CP 387-88. Plaintiffs subsequently filed a Motion for Clarification, Reconsideration, and Leave to Amend which was denied by the trial court on May 9, 2009. CP 469-73. The court subsequently granted defendant Karteshevs' motion for an award of attorneys' fees as the prevailing party. CP 832-36. This appeal followed.

### **III. Argument**

#### **A. The Trial Court Properly Dismissed Plaintiff's Claim for Breach of the Implied Warranty of Habitability.**

##### ***1. Washington cases support a narrow interpretation of the implied warranty of habitability.***

The implied warranty of habitability was first recognized by Washington courts in the case of *House v. Thornton*, 76 Wn.2d 428, 457 P.2d 199 (1969). There, 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. Current literature on the subject overwhelmingly supports this idea of an implied warranty of fitness in the sale of new houses.

*Id.* at 436.

Subsequent case law has further refined this implied warranty, though the courts have never strayed from the requirements that the warranty only applies to new construction and extends only to the first occupier of the residence.

In *Klos v. Gockel*, 87 Wn.2d 567, 554 P.2d 1349 (1976), the Court reversed the trial court judgment in favor of the plaintiffs who purchased a home from Mrs. Gockel. Her husband had been a self employed house builder for 22 years until the time of his death. Mrs. Gockel was active in the family business, which historically purchased several lots in close proximity to each other, would build on one lot, occupy the first house when finished, and remain long enough to complete houses on the remaining lots, ultimately selling all of the houses. *Id.* at 568. After the death of her husband, she built three houses on Mercer Island, acting as her own general contractor. She subcontracted out only the foundation, plumbing and electrical work. *Id.* at 569. She lived in the first home for eleven months before selling it to plaintiffs in that case. She built the second home, sold it, then moved to Arizona for a time then returned and built the third home which she was living in at the time of trial. *Id.* In discussing the implied warranty the Court noted:

The essence of the implied warranty of suitability or habitability requires that the vendor-builder be a person regularly engaged in building so the sale is commercial rather than casual or personal in nature.

*Id.* at 570. The Court went on to explain,

It is not enough however that appellant contemplated an eventual sale of the house, for as is stated in *House v. Thornton . . . Padula v. J.J. Deb-Cin Homes, Inc.* . . . and *Centrella v. Holland Construction, Corp.* . . . the sale must be fairly contemporaneous with completion and not interrupted by an intervening tenancy unless the builder-vendor created such an intervening tenancy for the primary purpose of promoting the sale of the property.

*Id.* at 571 (citations omitted). The Court held that there was nothing in Mrs. Gockel's conduct that should have created any sort of belief by the Klosses that this was a commercial sale. *Id.* at 571.

Ten years after *Klos*, the Washington Supreme Court considered the case of *Frickel v. Sunnyside Enterprises Inc.*, 106 Wn.2d 714, 725 P.2d 422 (1986). There, the plaintiffs purchased a five building apartment complex which had been built and operated by Sunnyside Enterprises. The first four buildings, containing twenty eight units, had been completed and occupied by tenants for approximately eighteen months. The last building had only been framed and was unfinished at the time of the purchase. *Id.* at 715.

Historically the defendants had built apartment complexes which they routinely owned and managed. They had not built this

complex for the purpose of resale. *Id.* Several years after the sale, problems developed with outside stairways and it was subsequently learned that the foundations were inadequate and improperly designed. In order to prevent a failure of the foundation, extensive repairs were necessary. *Id.* at 716.

The Supreme Court reversed the trial court's judgment for the purchasers finding that the facts of the case did not come within the implied warranty doctrine as outlined in *House, supra*, and *Klos, supra*.

Unlike the sale of a house-brand new and never-occupied- to its first intended occupant, the sale here involved the purchase of a 40 unit apartment complex, of which 28 units were completed at the time of sale and occupied by tenants for as long as 18 months. The defendants did not build apartment complexes for resale but for their own ownership and management purposes.

*Id.* at 718-19.

The appellants opening brief makes much of the three person dissent in *Frickel* authored by Justice Pearson (App. Op. Brief at 31). At the outset of that dissenting opinion Justice Pearson made clear that under existing case law the majority correctly ruled on the case. *Id.* at 723 (Pearson, J., dissenting). He dissented however, arguing that the implied warranty of habitability should be interpreted more

broadly to make the warranty applicable to any residential structure sold by a professional builder, regardless of whether it was constructed for purposes of resale. *Id.* at 723.

Interestingly, that opinion makes clear that even under his expanded view of the warranty (a view never adopted by the Court), it would still apply in the facts of the present case. Although Justice Pearson questioned the requirement that the dwelling be “new”, he acknowledged that this was an appropriate requirement where the alleged defects were non-structural (e.g., damage to interior and exterior surfaces), *id.* at 729, such as is the case in the house sold to Mr. Haas.

Moreover, Justice Pearson would have retained the requirement that the warranty apply only to dwellings built by professional or commercial builders. As he noted in his opinion,

This court will imply the warranty of habitability only to “commercial rather than to casual or personal” sales. *Klos*, 87 Wn.2d at 570, 554 P.2d 1349. In my opinion, this means the builder must be in the business of building residential structures. The reason for the requirement flows from the justifiable belief that a nonprofessional house builder should not be deemed to warrant the same quality of construction demanded of his professional counterpart. Consistent with this belief, this court limits the liability of one who builds a dwelling for his personal residence and subsequently sells it to another. Because such a builder’s construction is casual and for personal

purposes, I agree that liability for defective construction should not attach.

*Id.* at 730.

Regardless, subsequent cases decided by the Supreme Court rejected Justice Pearson's call to expand the implied warranty of habitability. *See, e.g., Stuart v. Coldwell Banker Commercial Group*, 109 Wn.2d 406, 415-16, 745 P.2d 1284 (1987); *Atherton Condominium Apartment-Owners Ass'n. Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 519, 799 P.2d 250 (1990).

**2. *The facts in this case do not support a claim for breach of the implied warranty of habitability.***

There are multiple independent reasons why the implied warranty of habitability does not apply in the current case and why the trial court was correct in dismissing that claim. Those reasons include:

- The house was not new. It had been built more than two years prior to the sale.
- Mr. Haas was not the original occupant. The Karteshevs resided in the home for more than two years.
- The Karteshevs are not professional or commercial builders.
- The house was not built for resale, the Karteshevs intended the house to be their primary residence.

- Even if resale had been intended, the sale was not fairly contemporaneous with completion of construction.

In his appellate brief Mr. Haas alleges that whether a house is “new” is a question of fact. The age of the house in this case however is beyond dispute. Twenty-six months passed from the time the construction was complete until the time it was sold to Mr. Haas. Under no stretch of the imagination could this be considered a new home. Other cases rejecting the implied warranty of habitability involved dwellings which were sold considerably closer to the time of their construction than in the present case. (an eleven month difference in *Klos, supra*, and an eighteen month difference in *Frickel, supra*). As noted in *Klos*, the sale of the house must be fairly contemporaneous with its completion and not interrupted by an intervening tenancy. 87 Wn.2d at 571. The exception to this rule is where the seller created such an intervening tenancy for the primary purpose of promoting the sale of the property. *Id.* As the trial court correctly noted, this was intended to deal with the issue of model homes used to market properties. RP Vol. I 31:19-20 (3/7/08). No such evidence exists in this case.

Mr. Haas’ effort to paint the Karteshevs as professional builder-vendors falls woefully short. The evidence upon which he

relies to support this conclusion is that, prior to the sale of this house, the Karteshevs had sold two prior houses which had similarly been built by others at their direction. Those homes were sold in 1997 and in 2001, a total of eight years passing between the first sale and the sale of the house to Mr. Haas.

Compare the facts of the present case to those in *Klos*, where Mrs. Gockel had been a part of the family business constructing homes, where the family business routinely purchased several lots, building on one and residing there, and then selling each lot. She acted as her own general contractor performing all of the work with the exception of the foundation, electrical and plumbing. 87 Wn.2d at 568-69. Clearly, Mrs. Gockel was much more of a commercial builder-vendor than were the Karteshevs. Mr. Karteshev's business was that of a plumber. He owned his own plumbing business and that is how he earned his income. CP 35. As to the Karteshevs' intention at the time their house was built, the only evidence before the court, notwithstanding plaintiff's speculation and supposition, is that the house was built with the intention of being their primary residence and was not built for the purpose of resale. CP 35, ¶ 2.

The implied warranty of habitability was simply never intended to apply to a situation such as this, where the Karteshevs

oversaw the construction of their own home and resided in that home for more than two years before selling it.

**B. The Trial Court Properly Dismissed the Plaintiff's Claim for Breach of Contract.**

**1. *There is no breach of contract for failing to properly construct the home.***

In analyzing Mr. Haas' claim for breach of contract it is important that this court distinguish between the contract claims as pled in the Third Amended Complaint as opposed to the claim which plaintiff sought to assert in his Fourth Proposed Amended Complaint. As the Appellant's Opening Brief correctly points out, plaintiff's complaint alleged that the Karteshevs' breach of contract was premised on their failure to build the residence in a reasonable and workmanlike manner, and in accordance with applicable codes, standards, and manufacturer's specifications. CP 6 (App. Op. Brief at 34). The Karteshevs' Motion for Summary Judgment argued that the parties had not entered into a construction contract, but rather the contract was for the sale of a home and that contract contained no express warranties with regard to the manner of construction. CP 28.

2. ***A claim for breach of contract for failing to perform repairs would have required an amendment to the complaint.***

Plaintiff does not dispute that the manner and methods of construction do not support a breach of contract claim, as was alleged in his Third Amended Complaint. Rather, in response to the summary judgment motion Haas argued what amounted to a negligent misrepresentation claim by asserting that the Karteshevs had liability for failing to disclose defects of which they were aware. CP 140. Secondly, Haas argued that because the issues identified by his pre-purchase home inspection were the same as those raised in the Stuart McMullen report a year prior, it could be presumed that the Karteshevs failed to perform the repairs recommended by Mr. McMullen. CP 140. Once again this response simply implied that the defendants had misrepresented the condition of the home. It did not address the alleged breach of contract.

Third and finally, Mr. Haas argued in response to summary judgment on the breach of contract issue, as follows:

Third, there is at a minimum, an issue about whether the repairs that were to be done *contingent to Haas' purchase* were ever completed. See, Gores Dec. at ¶3 and Section II above. Again, to the extent those repairs were not performed at all or performed poorly, a breach of contract claim exists.

CP 140 (emphasis added).

Mr. Haas' response to the summary judgment also included a motion to amend the complaint to include this theory of a contractual breach due to the alleged failure to perform these punch list repairs identified in Addendum G. CP 137. That motion was deficient, however, as it failed to comply with CR 15(a) which requires that a copy of the proposed amended pleading be attached with the motion.

A proper motion to amend ultimately was filed ten days after summary judgment was granted, and was included in plaintiff's Motion for Clarification, Reconsideration, and Leave to Amend. CP 389-93. This motion attached a proposed Fourth Amended Complaint (CP 394-99) which was substantially different from their four prior complaints. The Proposed Fourth Amended Complaint contained two claims for relief. The first was a claim for fraud alleging that the Karteshevs fraudulently induced plaintiff into purchasing the home. CP 397-98. The second was for breach of contract, alleging that defendants failed to perform the repairs agreed to following the pre-purchase inspection. CP 398. Although each of these claims was argued during the summary judgment, the particular causes of action were not properly before the court until after summary judgment was granted and the Motion for Clarification, Reconsideration, and Leave to Amend had been filed.

The reason this distinction matters is that there is a different standard of review for the denial of a motion to amend the complaint as opposed to the granting of summary judgment. The appropriate standard of review for an order of summary judgment is de novo, such that the appellate court performs the same inquiry as the trial court. *Parmelee v. Clarke*, 148 Wn.App. 748, 753, 201 P.3d 1022 (2008). On the other hand the appellate court reviews the denial of a motion to amend under an abuse of discretion standard. *Ino Ino, Inc. v. City of Bellevue* 132 Wn.2d 103, 142, 937 P.2d 154 (1997).

The breach of contract claim, as originally pled by Mr. Haas, was properly dismissed on summary judgment. It is undisputed that the parties did not enter into a construction contract. Moreover, Haas has now conceded the defendants' argument that the contract contained no express warranties. (App. Op. Brief at 19).

**3. *Plaintiff waived his claim for performance of repairs identified in the pre-purchase inspection.***

Even if this court believes that the original breach of contract claim as pled by Mr. Haas encompassed the claims he now is making, alleging failure to perform repairs identified in the pre-purchase inspection report, the trial court properly dismissed that claim.

In the opening brief of the Appellant, Mr. Haas raised an argument for the first time on appeal which was not brought to the attention of the trial court. He claims that ¶ 21(h) of the Purchase and Sale Agreement permits the corrections and repairs identified in Addendum G to survive closing. Because this argument was never raised to the trial court at any time during its consideration of the case, the appellate court should decline to consider it. *Seattle First Nat. Bank v. Shoreline Concrete Co.* 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); *Demelash v. Ross Stores, Inc.* 105 Wn.App. 508, 527, 20 P.3d 447 (2001); *Clapp v. Olympic View Pub. Co., LLC.*, 137 Wn.App. 470, 476, 154 P.3d 230 (2007).

Even if the court does consider this argument, it would be of no effect as the repairs in this case arose in the context of the inspection contingency which made clear that both the repairs and any reinspection of those repairs was to take place prior to closing. The clause on which the plaintiff now relies makes clear that terms which are not *satisfied or waived* survive closing. As discussed in more detail below, by proceeding to close the transaction this contingency and addendum were waived.

The sale of the home was conditioned on performance of an inspection of the property. This inspection contingency was spelled

out in Addendum B of the Purchase and Sale Agreement. CP 275-76. That inspection and subsequent report identified numerous issues to be addressed. These were spelled out in a punch list of items to be repaired which was drawn up as Addendum G to the Agreement. As purchaser, Mr. Haas reserved the right to have his inspector at Western Architectural reinspect and approve the repairs. On page 2 of the inspection contingency Mr. Haas checked the box marked: "OPTION 1B Seller's Opportunity to Repair if Buyer Disapproves of Inspection." Under the terms of that option, the inspection contingency was to be deemed satisfied (waived) unless buyer gave notice of disapproval within 10 days. CP 276. Mr. Haas gave such notice of disapproval on a form entitled "Option B Inspection Notice" CP 283. On that form buyer requested that seller perform the repairs as identified on Addendum G. Seller agreed to perform those repairs. *Id.*

The inspection contingency addendum contained the following language:

**Corrections.** If Seller agrees to correct the condition(s) identified by Buyer, then it shall be accomplished at Seller's expense in a commercially reasonable manner *prior to the Closing Date*. . . . Seller's corrections are subject to reinspection and approval *prior to Closing*, by the inspector who

prepared Buyer's inspection report, *if Buyer elects to order and pay for such reinspection.*

CP 275 (emphasis added). There can be no doubt that under the terms of the agreement the repairs were to be performed prior to the closing date. It is also beyond dispute that Mr. Haas had the option of paying for his inspector to reinspect the home following the repairs. Mr. Karteshev has testified that he believes that those repairs took place and some of those he did himself. CP 35, ¶ 5. Mr. Haas choose to proceed to closing of the transaction without confirming the adequacy of those repairs.

Paragraph 7 of the Purchase and Sale Agreement governed closing of the transaction. It provided:

7. CLOSING: Closing shall be within ten (10) days *after satisfaction or waiver of all contingencies and "subject to's"* but not earlier than March 7, 2005 nor later than March 11, 2005, the latest of which shall be the termination date of this Agreement. Closing shall mean the date on which all documents are recorded and the net sales proceeds are available for disbursement to Seller. Buyer and Seller shall deposit, when notified and without delay, in escrow with the closing agent all instruments, monies, and other documents reasonably required to complete the closing of the transaction in accordance with the terms of this Agreement.

CP 269 (emphasis added).

The closing date was modified by Addendum E to February 25, 2005. CP 279. Interestingly, Addendum E, drawn up by Mr. Haas' agent, included the following language:

Buyer understands that by moving closing date that there is a possibility that due to having to order replacement appliances, that they may not be installed before closing but will be at the earliest date after closing.

CP 279.

No similar language was included with regard to repairs and corrections agreed to pursuant to the inspection contingency. Those corrections were to have been made prior to closing as was any reinspection. By proceeding with the closing, Mr. Haas confirmed that all contingencies were satisfied or waived.

**C. The Trial Court Properly Dismissed the Consumer Protection Act Claim.**

Mr. Haas claims that the trial court erred in dismissing his Consumer Protection Act (CPA) claim. In order to prevail in a CPA claim a plaintiff must prove 5 distinct elements:

(1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business; and (5) causation.

*Hangman Ridge Training Stables Inc. v. Safeco Title Ins. Co.* 105

Wn.2d 778, 780, 719 P.2d 531 (1986). Although the deceptive act or

practice upon which plaintiff bases this claim has never been specifically articulated, it is presumed that plaintiff bases this claim on his allegation that the Karteshevs had knowledge of certain defects in the home which were not disclosed to the plaintiff.

It should first be noted that the only defects that the Karteshevs had knowledge of, are those identified in the report from Stuart McMullen (CP 291-306) which they believed had been repaired. As counsel for plaintiff noted, in the summary judgment briefing, those defects are the same ones identified by Mr. Haas' own inspector prior to his purchase. CP 135-36.

***1. RCW 64.06.060 bars plaintiff's CPA claim.***

The only disclosures made by the Karteshevs to Mr. Haas regarding the condition of the property were those contained in the Seller Disclosure Statement, MLS Form 17. The Legislature has determined in no uncertain terms that the use of that disclosure form does not affect the public interest. RCW 64.06.060 provides:

The legislature finds that the practices covered by this chapter [governing Seller's Disclosure Statements] are not matters vitally affecting the public interest for purpose of applying the Consumer Protection Act, Chapter 19.86 RCW.

Appellant's opening brief in this case attempts to minimize the impact of this statute in a footnote (App. Op. Brief at 39, n.2) by

claiming that a legislative declaration is only one of the ways to prove public interest impact. The *Hangman* case on which he relies stands for the proposition that the public interest impact may be proven either *per se*, where a statute has been violated which contains a specific legislative declaration of public interest impact, or by meeting a 3-prong test announced in *Anhold v. Daniels*, 94 Wn.2d 40, 614 P.2d 184 (1980):

the *Anhold* method requires proof that: (1) the defendant by unfair or deceptive acts or practices in the conduct of trade or commerce has induced the plaintiff to act or refrain from acting; (2) the plaintiff suffers damage brought about by such action or failure to act; and (3) the defendant's deceptive acts or practices have the potential for repetition.

*Hangman*, 105 Wn.2d at 789 (citing, *Anhold*, 94 Wn.2d at 46).

Plaintiff in the present case confuses the absence of a legislative declaration of public interest with a legislative declaration that the matters do not affect the public interest. RCW 64.06.060 contains the latter, thus there is no need to look further to determine if the public interest impact is met. In the only reported case which has interpreted RCW 64.06.060 to date, the Washington Supreme Court held that the statute did not necessarily apply to actions of real estate agents or brokers, as opposed to sellers.

*Svendsen v. Stock*, 143 Wn.2d 546, 557-58, 23 P.3d 455 (2001). In

that decision the Court noted:

Had the fraudulent concealment in this case occurred only as a consequence of Edwards' [the broker's] participation in filling out the seller disclosure form the court of appeals would have been correct in concluding that RCW 64.06.060 bars his CPA claim.

*Id.* at 557. Because the allegedly deceptive act in this case stems directly from the Seller's Disclosure Statement, RCW 64.06.060 does bar his claim.

**2. Case law supports dismissal of the CPA claim.**

Notwithstanding the effect of the statute, the courts have also made clear that a private transaction where one individual sells property to another does not affect the public interest. *Sloan v. Thompson*, 128 Wn.App. 776, 792, 115 P.3d 1009 (2005). Haas argues that under *Sloan*, plaintiff may demonstrate public interest impact by demonstrating that additional plaintiffs have been or will be injured in exactly the same fashion. No such evidence exists in this case. The record shows that the Karteshevs have sold a total of three houses which were built for them in the manner that this house was (i.e. at their direction by various trades and subcontractors), over an eight year period. There is no indication that the other two purchasers had any complaints about the condition of their homes or

any suggestion that misrepresentations regarding the quality of the homes had been made. The Consumer Protection Act does not apply in this case.

**D. The Trial Court Did Not Abuse Its Discretion in Denying Plaintiff's Motion for Additional Time Under CR56(f).**

Plaintiff next alleges that the trial court abused its discretion in denying his motion for addition time under CR 56(f). That motion was contained in Plaintiff's Response and Memorandum in Opposition to Defendant Karteshev's Motion for Summary Judgment. CP 138. The motion was deficient in several respects.

Under CR56(f) a trial court may properly deny a motion for continuance if: (1) the requesting party offers no good reason for the delay in obtaining the evidence sought, (2) the requesting party fails to indicate what evidence would be established through more discovery, or (3) the evidence sought fails to raise an issue of fact.

*Olson v. City of Bellevue*, 93 Wn.App. 154, 165, 968 P.2.d. 894 (1998). It is generally within a trial court's discretion whether to grant or deny a continuance to a party opposing summary judgment in order to obtain information necessary for the required affidavits. *Alaska National Ins. Co. v. Bryan*, 125 Wn.App. 24, 40, 104 P.3d 1 (2004). A trial court's ruling in this regard will not be reversed absent a manifest abuse of discretion. *Id.* The trial court abuses its

discretion if it bases its decision on untenable or unreasonable grounds. *Id.*

**1. Plaintiff failed to diligently pursue discovery.**

The trial court had more than ample grounds to deny this request. First, plaintiff offered no good reason for the delay in obtaining the evidence he sought. As pointed out in Defendant's Reply Brief, his initial motion provided no reason whatsoever for his delay in obtaining the necessary discovery. This case had been going on for more than 18 months during which the plaintiff could have deposed Mr. Karteshev or sent out the subpoenas seeking records, discovery which he sought only days prior to the summary judgment hearing.

Plaintiff's subsequent Motion for Clarification, Reconsideration, and Leave to Amend did not seek reconsideration of the CR 56(f) motion. CP 390. It was only in a supplemental memorandum filed by plaintiff's counsel some six weeks later, a memorandum not permitted by any court rule, that Mr. Haas sought reconsideration for the denial of his motion under CR 56(f). CP 420. Because this motion was well beyond the 10-day time limit for filing a motion for reconsideration pursuant to CR 59(b), it could and

should have been rejected on that basis. It was in this supplemental memorandum that plaintiff first alleged that “[b]y mutual agreement of all counsel in the case, document discovery and deposition discovery was placed ‘on hold’ until after the repairs to Mr. Haas’ home had been completed.” CP 438.

This statement, contained in the declaration of plaintiff’s prior counsel, Peter Vitezink, contained no supporting documentation and was a pure fabrication. No such agreement had ever been reached, nor was one ever discussed. In response to the supplemental memorandum, defendants submitted the declaration of Bruce White which appended an index of discovery including responses to written discovery to the plaintiff in January of 2007 and additional written discovery in August, September, and October 2007 amongst the various third-party defendants. This alleged agreement to hold off on discovery is also belied by correspondence from Mr. Vitezink himself who wrote to prior counsel for the Karteshevs on June 14, 2007 stating: “I have been holding off on scheduling your client’s deposition to give you time to file the third-party action. However, given the status of the case, I do not want to wait further to depose Mr. Karteshev.” No mention was made of the supposed agreement to stay discovery pending repairs. The issue,

rather, was the joining of the third-party defendants. The third-party complaint was filed on July 31, 2007 (CP 10) yet still the deposition of Mr. Kartashev was never scheduled by plaintiff until February of 2008.

Even after the summary judgment motion had been filed on November 26, 2007 and noted for argument on December 21, 2007, plaintiff's counsel sought a continuance at that time ostensibly to conduct the deposition of Mr. Karteshev. CP 114, ¶ 4. The hearing was moved to February 8, 2008. Plaintiff's counsel then sought another continuance, yet once again failed to do anything to schedule that deposition. CP 115, ¶ 9. Counsel for defendants reluctantly agreed and re-noted the motion for March 7, 2008. It was not until February 6, 2008 when counsel for plaintiff finally made an effort to schedule that deposition which ultimately occurred on February 14, 2008. CP 116, ¶10. There was simply no reasonable basis to wait as long as they did to schedule that deposition or to send out subpoenas seeking records.

In *Alaska National*, *supra*, the court held that the trial court had given the plaintiff ample opportunity to conduct necessary discovery given that the case had been pending for over a year and plaintiff had not diligently pursued discovery. Under those

circumstances it was not an abuse or discretion to deny a request for a continuance. 125 Wn.App. at 41. Similarly, the decision by Haas or his counsel to wait for 18 months before pursuing discovery cannot be considered diligent. This is particularly true in light of the fact that plaintiff was in possession of the motion for summary judgment for more than two months before attempting to schedule that deposition.

**2. *Additional discovery would have had no effect on the court's ruling on summary judgment.***

Beyond the lack of diligence, the trial court held that the additional discovery sought by the plaintiff would not have been sufficient to raise an issue of fact. RP Vol. II 28:2-9 (5/9/08). The information the plaintiff was seeking related to other homes which defendants may have built and sold. Plaintiff was attempting to prove that the defendants were professional builder/vendors for purposes of the implied warranty of habitability. The trial court correctly noted that it would have been a moot point given that the house was more than two years old and had been occupied by the Karteshevs during that period. RP Vol. II 28:5-9, 29:11-16 (5/9/08). It cannot be said that the trial court's decision in this regard was based on untenable or unreasonable grounds.

**E. The Trial Court Did Not Abuse its Discretion in Denying Plaintiff's Motion to Amend**

**1. The motion to amend was untimely and prejudicial.**

As discussed above, at the time he responded to the motion for summary judgment, the plaintiff sought leave to amend his complaint for the fourth time. The motion was improper as it failed to comply with CR 15(a) in that the proposed pleading was not attached. A formal motion to amend was filed with the Motion for Clarification and Reconsideration on March 17, 2008, ten days after summary judgment had been granted. CP 389-93. A copy of the proposed Fourth Amended Complaint was attached. CP 394-99. The trial court denied the motion to amend and noted during oral argument:

JUDGE NICHOLS: For the record, to make the record clear, the reason I'm denying the motion to amend is because you haven't introduced anything new—any new theory that would allow you to prevail. That's my interpretation of it, my review of it, is that you are asking again for fraud, which I do not think is anything new. You are asking for a breach of contract due to his duty to repair, which again would have been discoverable upon reinspection. Again, that's nothing new. So that's why I'm denying the motion to amend.

RP Vol. II 25:18-26:2 (5/9/08).

The denial of a motion to amend is reviewed for abuse of discretion. *Ino Ino Inc., supra* at 142. The trial court's decision to

deny the motion to amend was more than reasonable and was not based on untenable grounds. In *Doyle v. Planned Parenthood of Seattle-King County Inc.*, 31 Wn.App. 126, 639 P.2d 240 (1982), the plaintiff, who had filed a complaint alleging negligence and medical malpractice, sought to amend her complaint shortly after those claims were dismissed on summary judgment. The court noted:

When a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in litigation....In addition to timeliness, the court may consider the probable merit or futility of the amendments requested.

*Id.* at 130-31 (citations omitted). As was discussed in detailed above, there is no reason why the proposed new claims could not have been made much earlier.

The case of *Wallace v. Lewis County*, 134 Wn.App.1, 137 P.3d 101 (2006), is also instructive in this regard. In facts remarkably similar to those in the present case, the trial court denied a plaintiff's motion to amend to assert entirely new claims, which motion was brought 18 months after the complaint was originally filed, and one month before the defendant's summary judgment motion was to be heard. The appellate court held that the trial court had not abused its discretion in denying the motion to amend, noting

that the undue delay could have had a prejudicial effect on the defense. *Id.* at 26.

The record in the present case shows that the defendants would have been significantly prejudiced by the filing of such late claims. The Declaration of Bruce White explained that the Kartashevs' insurer had filed and was pursuing a Declaratory Judgment Action, and had filed for summary judgment in that case, seeking a declaration that it owed no coverage. Such a motion, if successful, would have withdrawn not only the obligation to indemnify the defendants for any possible judgment, but would also withdraw the defense being provided to the Kartashevs in this underlying action. CP 114. Much as in *Wallace*, the trial court acted within its discretion to deny this last minute motion to amend.

**2. *The proposed amended claims were meritless.***

**a. *The claim for fraud was barred by the economic loss rule.***

Plaintiff's lack of diligence aside, the court correctly ruled on the motion to amend based on the futility of those proposed amended claims. Contrary to the statement contained in Appellant's Opening Brief (at page 45) the proposed Fourth Amended Complaint asserted only two claims: that defendants fraudulently induced plaintiff into entering into the Purchase and Sale Agreement, and for breach of

contract by failing to perform the repairs agreed to following the pre-purchase inspection or performing them improperly. CP 397-98.

Plaintiff argues (App. Op. Brief at 46) that claims for fraud or fraudulent concealment would not be barred by the economic loss rule. He fails to recognize the distinction between a claim of fraud as opposed to fraudulent concealment. This distinction was explained by the court in *Carlile v. Harbour Homes Inc.*, 147 Wn.App. 193, 194 P.3d 280 (2008):

But no Washington court has held that a claim for intentional misrepresentation (fraud) falls outside of the economic loss rule. The two tort claims have distinct elements. A claim for fraudulent concealment requires a plaintiff to show: (1) [that] 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.

The nine elements of intentional misrepresentation (fraud) are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speakers' knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon the representation; and (9) damages suffered by the plaintiff.

*Id.* at 204-05 (citations omitted). The court in *Carlile* went on to hold that the economic loss rule did apply and barred a claim for intentional misrepresentation (fraud). *Id.* at 206.

The claim which Mr. Haas sought to pursue in his proposed Fourth Amended Complaint, is that the Karteshevs falsely represented the condition of the home which induced him into purchasing it. The elements of a claim of fraudulent inducement are, not coincidentally, the exact same elements identified by the *Carlile* court as those for intentional misrepresentation. *Estate of Mumby v. Caldwell*, 97 Wn.App. 385, 392, 982 P.2d 1219 (1999). Because such a claim would not survive another summary judgment motion, the court was well within its discretion to deny the motion to amend.

**b. The facts do not support a claim for fraud or fraudulent concealment.**

Even if the claim plaintiff sought to add was a claim for fraudulent concealment, that claim would also have lacked merit justifying a denial of his motion to amend. The only evidence that the Karteshev had knowledge of defects in the home is based on the report of Stuart McMullen (albeit they believed those issues had been corrected). As counsel for plaintiff noted in his Response and Memorandum in Opposition to Defendant Karteshevs' Motion for

Summary Judgment, the deficiencies identified by his own pre-purchase inspection were the same issues raised in the McMullen report. CP 135-36. This means that prior to his purchase, the plaintiff was on notice of the very same defects of which the Karteshevs were arguably aware. This evidence does not even support a negligent misrepresentation claim, let alone constitute clear, cogent and convincing evidence of fraud or fraudulent concealment. Because such a claim likewise would not survive summary judgment the trial court was within its discretion to deny plaintiff leave to amend his complaint.

**c. Plaintiff waived his right to insist upon repairs.**

The proposed amendment to add an additional claim for breach of contract is discussed above in Section B. Because Mr. Haas proceeded to closing, disregarding his right to have any repairs or corrections inspected, he waived his right to insist on those repairs, making a claim of breach of contract based on such repairs, meritless.

**F. The Trial Court Properly Awarded Attorneys' Fees to the Defendants.**

The Purchase and Sale Agreement at issue in this case has a clause providing for an award of attorneys' fees to the prevailing

party. The trial court correctly awarded fees to the defendants following dismissal of the case on summary judgment. CP 832. Plaintiff does not argue that such an award was improper, and only asks that the award be vacated should the Court of Appeals reverse. Because summary judgment was proper, this court should affirm the award and additionally award the Karteshevs their reasonable attorneys' fees on appeal.

#### **IV. Conclusion**

The trial court properly granted summary judgment to the defendants in this case. The implied warranty of habitability does not apply as the home in question was not new at the time it was sold, was not built for purposes of resale, and the plaintiff was not the original occupant. The breach of contract claim was properly dismissed as this was a contract for sale of the home, not for construction. The contract contained no express warranties with regard to quality. Moreover, while plaintiff's purchase was contingent upon correction of items raised in his pre-purchase inspection, he chose to close the transaction without having a reinspection performed and thus waived his claim with regard to those corrections. The Consumer Protection Act Claim was properly dismissed by the trial court as this was a private transaction between

two individuals which did not affect the public interest. Finally, the trial court did not abuse its discretion in denying plaintiff's motion for additional time under CR 56(f) or to amend his complaint, as those motions were untimely and the additional discovery and proposed amendments would have been futile and would not have raised any material issues of fact. Defendants therefore respectfully request the judgment of the trial court be affirmed.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of July, 2009.

MITCHELL LANG & SMITH  
Attorneys for Respondent

By: 

Thomas A. Heinrich, WSBA # 19925  
Bruce M. White, WSBA # 14131  
1001 Fourth Avenue, Suite 3714  
Seattle, WA 98154  
Telephone: (206) 292-1212  
Fax: (206) 682-4687  
E-mail: [theinrich@mls-law.com](mailto:theinrich@mls-law.com)

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COURT OF APPEALS DIVISION TWO STATE OF WASHINGTON  
THE STATE OF WASHINGTON BY \_\_\_\_\_  
DEPUTY

JOHN HAAS,

Appellant,

v.

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

Case No. 38551-1-11

**CERTIFICATE OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that on July 13, 2009, the original of the Brief of Respondent was sent for filing with The Appeals Court of the State of Washington, Division Two, via ABC Legal Messenger Special Service. Copies were also sent to the following via the method of service indicated:

Allan Scott Middleton  
Davis Wright Tremaine LLP  
1201 3<sup>rd</sup> Ave.  
Suite 2200  
Seattle, WA 98101-3045  
Attorney for Appellant

*Via ABC Legal Messenger Special Service*

<p>Michael C. Mitchell  Zipse Elkins &amp; Mitchell  500 East Broadway St., Suite 370  Vancouver, WA 98660  Attorney for V&amp;P Tile</p> <p><i>Via US Mail</i></p>	<p>William Davis  Davis Rothwell Earle &amp; Xochihua P.C.  1300 S.W. Fifth Ave.  Portland, OR 97201-5604  Attorney for The Plumbing Depot, Inc.</p> <p><i>Via US Mail</i></p>
<p>Joanne Blackburn  Gordon Thomas Honeywell  600 University St., Suite 2100  Seattle, WA 98101  Attorney for Bordak Brothers, Inc.</p> <p><i>Via US Mail</i></p>	<p>Martin M. Rall  Lachenmeier Enloe Rall &amp; Heinson  9600 Capitol Highway  Portland, OR 97219  Attorney for JC Concrete</p> <p><i>Via US Mail</i></p>
<p>Norma S. Ninomiya  Law Office of Norma S. Ninomiya  Safeco Property &amp; Casualty Co.  500 Broadway, Suite 425  Vancouver, WA 98660  Attorney for Protos, Inc.</p> <p><i>Via US Mail</i></p>	

Dated and signed this <sup>th</sup>13 day of July, 2009, at Seattle, Washington.

  
Bonney A. Otlow