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## **I. NATURE OF THE CASE**

Mrs. Baxter, an elderly single woman, sold her condominium to a Trust. The trustees (hereinafter collectively referred to as “the Trust”) sued her, seeking rescission or monetary damages because of allegedly undisclosed construction defects. Although the Trust received association records identifying an envelope inspection, construction defects, and other issues with the quality of the condo construction, the Trust waived all contingencies. Indeed, the week before closing, the condo board agreed to pursue a construction defect claim against the developer. The Trust received a copy of the meeting minutes, but took no action.

The trial court refused to apply the economic loss rule. It ignored factual issues as to the Trust’s knowledge of construction defects and the justifiability of its reliance on Mrs. Baxter. It granted the Trust’s motion for summary judgment, ordered rescission, and entered judgment for more than \$750,000.

## **II. ASSIGNMENTS OF ERROR**

A. The trial court erred in granting plaintiffs’ motion for partial summary judgment dated November 20, 2009.

B. The trial court erred in denying defendant Mrs. Baxter’s request for a CR 56(f) continuance on November 20, 2009.

C. The trial court erred in entering Opinion and Order on Reconsideration denying defendant Mrs. Baxter's motion for reconsideration of the court's ruling on plaintiffs' motion for partial summary judgment and defendant's request for a CR 56(f) continuance dated December 16, 2009.<sup>1</sup>

D. The trial court erred in entering Memorandum Opinion and Order for Entry of Judgment dated March 3, 2010.

E. The trial court erred in entering judgment in favor of the plaintiffs dated March 3, 2010.

F. The trial court erred in including attorney fees in entering its March 3, 2010 order.

G. The trial court erred in applying the interest rate in RCW 4.56.110(4) to the judgment entered by its March 3, 2010 order.

### **III. ISSUES PRESENTED**

A. Does the economic loss rule apply to some or all tort claims related to the purchase and sale of real property even if a clause in the

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<sup>1</sup> Assignments of error B, C, and D, to the extent they assign error to oral rulings and memorandum opinions, are made in an excess of caution as assignments of error addressed to oral or memoranda opinions are not required if not incorporated in formal findings of fact and conclusions of law. *Huzzy v. Culbert Const. Co.*, 5 Wn. App. 581, 583, 489 P.2d 749 (1971). The trial court did not enter any formal findings of fact and conclusions of law. In any event, on appeal from granting of summary judgment any trial court's findings are superfluous. *Banuelos v. TSA Washington Inc.*, 134 Wn. App. 607, 614, 141 P.3d 652 (2006).

agreement permits a remedy for negligent misrepresentation?  
(Assignments of Error A, B, C)

B. Did the trial court err when it granted the Trust's motion for summary judgment where the Trustees received association minutes disclosing construction defects, did not inquire further, and knowingly waived the resale certificate contingency without receipt and then compounded the error by refusing to reconsider and reverse its ruling?  
(Assignments of Error A, C, D, E)

C. Did the superior court err in denying Mrs. Baxter's request for a CR 56(f) continuance to conduct limited discovery and then compound the error by refusing to reconsider and reverse its ruling?  
(Assignments of Error B, D)

D. Which of RCW 4.56.110(3) or 4.56.110(4) provides for the proper interest rate on a judgment based on the torts of fraudulent concealment, negligent misrepresentations, and/or constructive fraud?  
(Assignments of Error G)

E. Can the attorney fee provision in a rescinded contract be enforced? (Assignments of Error F)

F. Was Mrs. Baxter denied her constitutional right to a trial by jury when the court weighed the evidence proffered by the Trust and granted its motion for summary judgment? (Assignments of Error A, C)

#### IV. STATEMENT OF THE CASE

##### A. STATEMENT OF RELEVANT FACTS.

###### 1. **The Trust Signed a Fully Integrated Purchase and Sale Agreement Contingent Upon Satisfactory Inspection and Resale Certificate.**

The Trust (plaintiffs/respondents/cross-appellants Eisenhardt) made an offer sight unseen on a condo unit for sale. (CP 408) On March 3, 2008 the Trust signed a condominium purchase and sale agreement (CPSA). (CP 51) Mrs. Baxter (defendant/appellant/cross-respondent Marilyn Baxter) signed on March 5, 2008. (CP 51)

The CPSA was contingent on a satisfactory inspection and receipt of a resale certificate. (CP 51-83) The contract contained an integration clause. (CP 55 “n”) On March 24, 2008, the Trust signed an addendum extending the resale certificate contingency. (CP 81) The following week, on April 2, the Trust waived all contingencies: “All inspections and contingencies of the purchase and sale agreement have been completed to the buyers satisfaction and are hereby waived. The buyer’s [sic] agree to proceed to closing.” (CP 80).

###### 2. **Defects Are Disclosed to the Trustees by Mrs. Baxter and in the Association Meeting Minutes.**

When the Trustees visited the unit on March 10, 2008, they observed substantial cracks in the fireplace and master bath. Extensive

water intrusion at the common area hallway windows was also observed. (CP 110, 151, 210, 305, 364, 416)

The Form 17 disclosure completed by Mrs. Baxter identified these defects. (CP 72) The findings from a building envelope inspection performed in August 2006 were not listed. (CP 72, 252-54) When asked by the Trust on March 10, Mrs. Baxter confirmed what was listed on Form 17. (CP 110, 210, 364, 377-79) This was the only time Mrs. Baxter communicated with the Trust. (CP 364) Otherwise, all documents received and communications the Trust had with respect to the condo unit were from the real estate agents, the condominium CPA, and condo association secretary. (CP 364, CP 361)

The CPA was responsible for preparing all resale certificates and for the maintenance and production of all requested association records. (CP 363) Consequently, Mrs. Baxter believed that all required records had been provided to the Trust. (CP 364) Unbeknownst to her, however, the CPA had failed to provide the Trust with the resale certificate and the minutes of a February 9, 2008, board meeting. (CP 112, 211, 300, 321-59, 364)

However, a month prior to closing, the Trust did receive board minutes disclosing numerous construction defects. (CP 112, 212, 328-59) In 2006 the Building Envelope Inspection Corporation had performed an

envelope inspection on the condominium building. (CP 182-84) The resulting report identified multiple defects in the construction of the building. (CP 182-84) Regarding the weather resistive barrier beneath the siding, the report stated it “appears to be ‘roofing felt.’ Roofing felt is unsuitable as a wall vapor barrier as it does not have an adequate perm rating. Roofing felt does not allow vapor transmission to pass through itself, this poses greater risk of water damage to this building.” (CP 183) This defect was disclosed to the Trust by the association minutes it received a month prior to closing. (CP 302, 359)

Moreover, a week before the scheduled closing date, the condo board voted to retain counsel to pursue a claim against the developer for construction defect. (CP 149, 212, 361) Mrs. Baxter, a member of the three-person condo board, made the motion. (CP 149, 150) The Trust received a copy of the April 15 meeting minutes three days prior to the scheduled closing, yet took no action. (CP 361) The sale closed on April 21, 2008. (CP 77, 112, 212)

In the meantime, the Trust had only the individual condo unit inspected despite purchasing an ownership interest in the entire condominium building. (CP 111, 210-11, 388) The Trust waived all contingencies without completing a full inspection and investigation. (CP 80)

Although in retrospect, Mrs. Baxter acknowledged the information on the Form 17 disclosure could have been more thorough (CP 155), in January 2008, an engineering firm retained by the condominium developer to inspect the building had concluded that there was no “structural problem or safety issue at this building.” (CP 264-66) And, at the time of the sale, the building was still within the four-year warranty period. (CP 151-52, 155, 373-74) Mrs. Baxter testified this was the reason she did not disclose any other issues with the condominium building; “we knew that we had this warranty time period and that things would be taken care of. If not, then the warranty would be extended.” (CP 150-51)

The following year, 2009, Mrs. Baxter was diagnosed with Alzheimer’s disease, specifically atrophied and decreased function in the parietal and temporal lobes of the brain bilaterally. (CP 833) Compounding the effects on Mrs. Baxter’s memory is the lack of blood flow to her brain, diagnosed as moderate small vessel ischemic disease. (CP 833)

**B. STATEMENT OF PROCEDURE.**

**1. The Trust Sues.**

After the sale closed, the Trust conducted further investigation and discovered other construction defects. (CP 212)

Initially, the Trust brought suit against only Mrs. Baxter. (CP 665) On October 7, 2008, the Trust filed an amended complaint. (CP 1-31) The Trust complained that the resale certificate, envelope inspection report and construction defects it identified were not disclosed or provided, and sought rescission or monetary damages. (CP 1-31) Mrs. Baxter timely answered and asserted two affirmative defenses: fault of a nonparty and failure to join a necessary party. (CP 32-37) On December 5, 2008, Mrs. Baxter filed a third-party complaint against her real estate agent. (CP 665, 776-80)

The Trust conducted two full day depositions of Mrs. Baxter on March 17, 2009, and July 1, 2009. (CP 148, 154) On the same date, July 1, 2009, the Trust filed a second amended complaint adding all others involved in the transaction including the real estate agents, condo board members, and the condo's CPA as defendants allegedly responsible for the lack of a resale certificate or disclosure of construction defects identified in the envelope inspection report. (CP 38-83)

**2. The Trust Moves for Summary Judgment Against Mrs. Baxter Just Weeks After She Retained New Counsel.**

In September 2009, Mrs. Baxter retained new counsel. (CP 428) She moved to stay proceedings pending the outcome of the related construction defect litigation brought by the Trust against the condo

developer. (CP 268-92, 781-87, 800-05) The motion to stay was joined by the other defendants. (CP 788-99) It was denied on October 30. (CP 315, 317, 665, 806)

In the meantime, on October 21, the Trust filed a motion for partial summary judgment. (CP 84-107, 108-297) Mrs. Baxter opposed the motion and requested a continuance for newly retained counsel to conduct limited discovery including deposing the Trustees of the Trust. (CP 298-314A, 314B-17, 318-61, 362-67) The trial court denied the request for a continuance and granted the Trust's summary judgment on the ground that Mrs. Baxter had fraudulently concealed and negligently misrepresented the condition of the property. The court ordered the sale rescinded. (CP 418-20, 451; RP 36)

Mrs. Baxter promptly moved for reconsideration. (CP 421-26) The trial court issued a written opinion and order denying reconsideration. (CP 451-55)

Thereafter, the Trust sought entry of judgment including principal, attorney fees, interest, and miscellaneous expenses based on the summary judgment order of rescission. (CP 456-558) Mrs. Baxter objected that the Trust failed to request CR 54(b) finding, attorney fees were unsupported, the wrong interest rate on a judgment was requested, no requisite showing had been made to support fees and expenses. Furthermore, the proposed

order did not set forth a mechanism to accomplish the rescission. (CP 559-69) The Trust submitted a reply with an amended proposed judgment requesting CR 54(b) findings. (CP 570-84). At oral argument, the court commented that it had not fully considered the issue of entitlement to attorney fees when a contract is rescinded. (RP 53) The trial court continued the hearing for three weeks and asked for supplemental briefing. (RP 56) Mrs. Baxter submitted the requested supplemental briefing explaining the lack of entitlement to attorney fees on a rescinded contract. (CP 620-56) The Trust submitted a reply supplemental brief. (CP 657-63)

On March 3, 2010, the trial court issued its Memorandum Opinion and Order on Entry of Judgment. (CP 664-89) The trial court entered CR 54(b) certification. The court awarded \$28,380 of the \$33,177 requested in attorney fees. (CP 669-70) The judgment against Mrs. Baxter was for \$722,122.81 plus interest at 12%, \$28,380.00 in attorney fees, and \$465.00 in costs. (CP 690-94)

Mrs. Baxter appealed. (CP 695-737) The Trust cross-appealed. (738-72) The other defendants are not parties to the appeal.

Mrs. Baxter cannot afford to post a supersedeas bond. (CP 844) The Trust has actively sought to enforce the judgment. The Trust examined Mrs. Baxter at a supplemental proceeding on May 7, 2010. (CP

829, 836-37) The same day the court ordered Mrs. Baxter to deliver \$55,800 to the court registry within three court days. (CP 807-08) The Trust filed multiple writs of garnishment including obtaining judgment and order to pay against Edward Jones in the amount of \$7,771.45 and against Kitsap Bank in the amount of \$19,927.68. (CP 809-11, 812-14) The Trust moved ex-parte for a second supplemental proceeding. (CP 815-17, 818-19) Due to Mrs. Baxter's progressing Alzheimer's disease and to prevent physical injury, a motion to modify supplemental proceedings order was filed supported by a declaration of Mrs. Baxter's treating neurologist. (CP 826-31, 832-35, 836-37) The motion was denied. (CP 838) The Trust examined Mrs. Baxter at a second supplemental proceeding on July 23, 2010. (CP 820-23) Then, on July 30, the trial court granted plaintiffs' motion for determination of Homestead and entered an order declaring Mrs. Baxter's Homestead exemption invalid. (CP 871-73)

## V. ARGUMENT

This is an appeal from an order granting partial summary judgment, denying a request for CR 56(f) continuance, and entering judgment. The portions of this appeal from the order granting summary judgment are to be reviewed *de novo*. *Heg v. Alldredge*, 157 Wn.2d 154, 160, 137 P.3d 9 (2006).

Summary judgment shall be denied where there is a genuine issue of material fact. CR 56(c). The party moving for summary judgment has the burden to show that there is no genuine issue as to any material fact. CR 56; *State ex rel. Bond v. State*, 62 Wn.2d 487, 490, 383 P.2d 288 (1963). The facts and all reasonable inferences are viewed in the light most favorable to the nonmoving party. *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008).

On a motion for summary judgment the court does not try issues of fact; it only determines whether or not factual issues are present which should be tried. *See Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980). The trial court ““must view the evidence presented [on summary judgment] through the prism of the substantive evidentiary burden”” the party must satisfy at trial. *Sedwick v. Gwinn*, 73 Wn. App. 879, 873 P.2d 528 (1994). The Trust, as plaintiff, had the burden to prove each and every element of its claims with undisputed facts and show that no material issue of fact remained for trial. The Trust had to disprove Mrs. Baxter’s affirmative defense that a third party was at fault. *State ex rel. Bond*, 62 Wn.2d at 490. Even where the facts are undisputed, summary judgment is improper if reasonable minds could reach different conclusions. *Chelan County Deputy Sheriffs’ Ass’n v. Chelan County*, 109 Wn.2d 282, 295, 745 P.2d 1 (1987).

**A. SUMMARY JUDGMENT ON THE NEGLIGENT MISREPRESENTATION CLAIM WAS IMPROPER.**

Neither the law nor the evidence supports summary judgment for the Trust on the negligent misrepresentation claim.

**1. The Economic Loss Rule Bars the Trust's Negligent Misrepresentation Claim.**

Mrs. Baxter raised the economic loss rule as a defense to the negligent misrepresentation claim. (CP 310-11) The application of the economic loss rule is reviewed *de novo*. See *Alejandre v. Bull*, 159 Wn.2d 674, 681, 153 P.3d 864 (2007); *Stieneke v. Russi*, 145 Wn. App. 544, 555-56, 190 P.3d 60 (2008), *rev. denied*, 165 Wn.2d 1026 (2009).

The economic loss rule bars negligent misrepresentation claims in cases such as this. *Alejandre v. Bull*, 159 Wn.2d at 689. Yet the trial court failed to apply the rule when it found Mrs. Baxter liable for negligent misrepresentation as a matter of law. This was error.

Washington courts have held the economic loss rule applies to limit parties to their contract remedies when a loss potentially implicates both tort and contract relief. *Alejandre v. Bull*, 159 Wn.2d at 681. The economic loss rule precludes suits for intentional and negligent misrepresentation arising out of a contract. *Poulsbo Group, LLC v. Talon Dev. LLC*, 155 Wn. App. 339, 347, 229 P.3d 906 (2010); *Carlile v. Harbour Homes, Inc.* 147 Wn. App. 193, 194 P.3d 280 (2008), *rev.*

*granted in part*, 166 Wn.2d 1015 (2009). The rule applies where a party to a contract seeks damages under a tort theory of recovery for a commercial or economic loss that was part of the contractual relationship. *Alejandre v. Bull*, 159 Wn.2d at 683.

*Stieneke v. Russi*, 145 Wn. App. 544, 190 P.3d 60 (2008), *rev. denied*, 165 Wn.2d 1026 (2009), illustrates the application of the economic loss rule. There the buyers of a home sued for rescission after discovering the seller's failure to disclose a history of leaks in the roof. *Id.* at 551. The appellate court held that the economic loss rule barred plaintiff's claims of negligent misrepresentation and reversed the trial court's damage award for negligent misrepresentation. *Id.* at 559.

Here, as in *Stieneke*, the buyer of residential real property brought a negligent misrepresentation claim against the seller, claiming that the seller had misrepresented the condition of the property. As in *Stieneke*, there was an error or inaccuracy in the disclosure statement. As in *Stieneke*, the damage was limited to the property itself. No individual or property other than the defective property was harmed. Under these circumstances, the economic loss rule applies and precludes a negligent misrepresentation claim.

Although clause 9 in the CPSA permits claims for negligence (CP 51, 52) the economic loss rule should still apply to preserve the distinction

between tort and contract relief. Clause 9 did not purport to deprive Mrs. Baxter of her legal defenses and said nothing about the economic loss rule. Clause 9 should not be permitted to eviscerate the economic loss rule, which safeguards the distinction between tort and contract.

**2. There Were Material Issues of Fact Whether the Trust Justifiably Relied Because the Trust Had Knowledge of the Complained Defects and Failed to Investigate.**

Even if the economic loss rule did not apply, reversal of the judgment based on the negligent misrepresentation claim would still be required because there are genuine issues of material fact as to the Trust's justifiable reliance.

Justifiable reliance on the claimed misrepresentations is a required element of a negligent misrepresentation claim. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998). “[R]eliance is justifiable if it is reasonable under the circumstances.” *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 551, 55 P.3d 619 (2002). If the correct information is reasonably ascertainable by the buyer, the buyer cannot justifiably rely on the seller's representations. *See Rainier Nat'l Bank v. Clausing*, 34 Wn. App. 441, 446, 661 P.2d 1015 (1983). When a careful, reasonable inspection would disclose the problem, there can be no recovery. *See Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 697, 106 P.3d 258, *rev. denied*, 155 Wn.2d 1026 (2005). “[I]n those situations

where a purchaser discovers evidence of a defect, the purchaser is obligated to inquire further.” *Atherton Condo. Apartment-Owners Assn. Board of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 525, 799 P.2d 250 (1990).

Whether a plaintiff justifiably relied on a misrepresentation is a material fact generally decided by the fact finder. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d at 828. Evidence of justifiable reliance in a negligent misrepresentation claim must be by clear, cogent, and convincing evidence. *Hoel v. Rose*, 125 Wn. App. 14, 18, 105 P.3d 395 (2004). There is no justifiable reliance where a buyer has opportunity to inspect, nothing inhibits the investigation, and the buyer has information at variance with the representation. *Id.* at 22 (concerning size and boundary lines in the purchase of a parcel of real property).

Here, there are genuine issues of material facts preventing reasonable minds from reaching only one conclusion. Specifically, the association records the Trust admits it received described the building as having “faulty construction” and identified construction defects including the “[c]ontractor used tarpaper not Tyvec and used cedar not Harti-plank.” (CP 351, 359) The minutes also disclosed a history of water intrusion and multiple unsuccessful attempts at repairs. (CP 328-59) In addition, the need for recaulking, replacement of flashing, roof repairs, and replacement

of French doors were specifically mentioned. (CP 328, 337, 342-43) The minutes document a request for an expert to examine the deck surface. (CP 338) The minutes also mention owners' concerns about problems with the exterior of the building. (CP 336-38, 342-43, 346-48) The minutes disclosed many of the same areas of concern as the envelope inspection report: siding, roof, decks, inadequate weather resistant barrier, and water intrusion. (CP 182-84, 320-59)

The Trust had sufficient opportunity to investigate the accuracy of Mrs. Baxter's representations and the conflicting information disclosed in the minutes. The minutes further disclosed that an envelope inspection had identified defects needing repair. (CP 351) The findings of the envelope inspection report prompted one owner in October 2006 to make a motion to "contact an attorney to write a letter regarding correction of the faulty construction of the Aldrich's building as described in the report of the 8/10/06 inspection." (CP 351) The minutes never stated that the defects had been resolved. In fact, the December 2007 minutes contained discussion of the need for another envelope inspection. (CP 328)

At a minimum, the Trust should have inquired about or requested a copy of the 8/10/06 inspection report. It did not. In fact, despite placing a question mark next to the discussion of having another envelope

inspection in the December 18, 2007 minutes, the Trust did not inquire about the reasons or concerns prompting the discussion. (CP 328)

Moreover, the Trust had notice of the warranty claim and hiring of a lawyer to pursue a construction defect claim from the April 15 minutes its Trustees received before the closing of the sale. The minutes were e-mailed to the Trustees on April 18 at 10:15 am. (CP 361) The e-mail stated: "Attached are the minutes of the April 15 Special Membership Meeting and Board Meeting." (*Id.*) The Trust's receipt of this e-mail is undisputed as a trustee sent a reply e-mail just two hours later. (*Id.*) The mere fact that the e-mail referred to the meeting as a "Special Membership Meeting" was enough to put the Trust on notice that information about something important regarding the condominium was being sent.

There is no justifiable reliance on a seller's representations about the condition of property where the seller's representation is contradicted by documents provided to the buyer. *Williams v. Joslin*, 65 Wn.2d 696, 698, 399 P.2d 308 (1965). Evidence of defects not directly disclosed by Mrs. Baxter was contained in the association minutes received by the Trust. Any omission or error by Mrs. Baxter in her disclosure on Form 17 or oral representation in March was directly contradicted by the April 15 and other association meeting minutes received by the Trust prior to closing.

Failure to exercise reasonable diligence is not excused by mere confidence in the honesty of the other party to the transaction. *Courseview, Inc. v. Phillips Petroleum Co.*, 158 Tex. 397, 407, 312 S.W.2d 197, 205 (1957); (CP 413). The Trust's receipt of the April 15 minutes before the sale closing alone precludes clear, cogent, and convincing evidence of justifiable reliance. A reasonable trier of fact could conclude that the Trust's claimed failure to review the April 15 minutes is not a careful, reasonable inspection.

The material facts should have been decided by a jury at trial, not by the judge on summary judgment. *See Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980); CONST. art. I, § 21. Mrs. Baxter's right to a jury trial was unduly infringed.

It is true that the resale certificate would have contained information about the association's warranty claim, budget, reserves for repairs, and anticipated repairs and would have given explicit notice to the Trust of the February 2008 warranty claim. *See RCW 64.34.425.* (CP 256) But the Trust waived the resale certificate contingency after extending the time period of the contingency knowing it had not received it. (CP 80, 81, 112, 211-12) And in any event, the minutes the Trust received prior to closing were sufficient to create a genuine issue of

material fact whether the Trust had notice of the construction defects negating its claim of justifiable reliance on Mrs. Baxter's representations.

The Trust did not request the envelope inspection report identified in the association minutes and waived the resale certificate contingency without receipt of it. The Trust failed to inquire further about the disclosed defects until the week after the sale closed. (CP 112, 212, 413)

When the facts are viewed in the light most favorable for the non-moving party, there is a reasonable inference the Trust had knowledge of some of the construction defects. The knowledge obligated it to inquire further. It did not. Any assumption that the defects were resolved was wishful thinking unsupported by any inspection or investigation. The Trust alone should be responsible for its Trustees' dilatory and inadequate due diligence.

There would have been no reason for the parties to have included the contingencies in their agreement if the Trust could justifiably rely on the required Form 17 disclosure or on any oral representations the seller might make. Moreover, the Trust knew from the April 15 minutes of the denied warranty claim and resolution to hire an attorney to pursue a construction defect claim. To hold otherwise would be to render the contingencies meaningless.

The summary judgment should be reversed and the case remanded for trial.

**3. Form 17 Was Not Part of the Contract.**

The trial court's summary judgment on the negligent misrepresentation claim is erroneous for yet another reason. The trial court erred to the extent it allowed representations in the Form 17 to form the basis for the Trust's negligent misrepresentation claims. Form 17 stated, "THIS INFORMATION IS FOR DISCLOSURE ONLY AND IS NOT INTENDED TO BE A PART OF ANY WRITTEN AGREEMENT BETWEEN BUYER AND SELLER." (CP 69) The Trust signed Form 17 on March 5, 2008. (CP 69-74) The CPSA, which was signed by the Trust two days before, on March 3, 2008, had an integration clause. (CP 55) The clause stated "Integration. This Agreement constitutes the entire understanding between the parties . . . ." (CP 55) Thus, by the express terms of the Form 17 and the CPSA, Form 17 was not part of the agreement. *See Stieneke v. Russi*, 145 Wn. App. 544, 567, 190 P.3d 60 (2008), *rev. denied*, 165 Wn.2d 1026 (2009). Form 17 is a statutorily required form. RCW 64.06.020.

The CPSA clause 9 referencing Form 17 should not supersede the integration clause or otherwise modify the terms of the agreement. (CP 51) The negligent misrepresentation claim, to the extent it is based on

Form 17, is barred by RCW 64.06.050.<sup>2</sup> To the extent the trial court found representations in Form 17 the basis for its finding of negligent misrepresentation, the judgment must be reversed.

**B. SUMMARY JUDGMENT ON THE FRAUDULENT CONCEALMENT CLAIM WAS IMPROPER.**

**1. Fraudulent Concealment Was Not Established with Clear, Cogent, and Convincing Evidence.**

Fraudulent concealment must be proved by clear, cogent, and convincing evidence. *Hughes v. Stusser*, 68 Wn.2d 707, 709, 415 P.2d 89 (1966). The necessary elements include: (1) a concealed defect in a residential building; (2) knowledge by the seller of the defect; (3) a defect that is dangerous to the property, health, or life of the purchaser; (4) the purchaser does not know of the defect; (5) a careful, reasonable inspection on the part of the purchaser would not disclose the defect; and (6) the defect substantially affects adversely the value of the property or operates

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<sup>2</sup> RCW 64.06.050(1) provides:

The seller shall not be liable for any error, inaccuracy, or omission in the real property transfer disclosure statement if the seller had no actual knowledge of the error, inaccuracy, or omission. Unless the seller has actual knowledge of an error, inaccuracy, or omission in a real property transfer disclosure statement, the seller shall not be liable for such error, inaccuracy, or omission if the disclosure was based on information provided by public agencies, or by other persons providing information within the scope of their professional license or expertise, including, but not limited to, a report or opinion delivered by a land surveyor, title company, title insurance company, structural inspector, pest inspector, licensed engineer, or contractor.

to materially impair or defeat the purpose of the transaction. *Atherton*, 115 Wn.2d at 524. The Trust failed to establish at least two key elements with clear, cogent, and convincing evidence to support the claim of fraudulent concealment: the Trust's lack of knowledge of the defects and that a careful, reasonable inspection would not have revealed the defects.

When a buyer sees evidence of a potential defect, the buyer is required to seek further information from the seller. *Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 215, 752 P.2d 1353, *rev. denied*, 111 Wn.2d 1007 (1988) (seller held not liable for fraudulent concealment because buyer had ample opportunity to inspect building and was aware of water leakage problems and did nothing to inquire about the extent of the problem). There is no justifiable reliance on a seller's representations about the condition of property where the seller's representation is contradicted by documents provided to the buyer. *Williams v. Joslin*, 65 Wn.2d 696, 698, 399 P.2d 308 (1965).

As discussed *supra*, on pages 15 to 21, the minutes received by the Trust disclosed defects not disclosed by Mrs. Baxter. The Trust had ample opportunity by the contract contingencies to conduct a thorough investigation including further inquiry after receipt of the association meeting minutes, but did not. Based on the admittedly received minutes reasonable inferences must be construed in favor of Mrs. Baxter which

preclude granting summary judgment. When the evidence is viewed in the light most favorable to Mrs. Baxter the evidence is not undisputed, clear, cogent, or convincing. The Trust's claim of fraudulent concealment fails on summary judgment.

**2. Economic Loss Rule Should Bar the Trust's Fraudulent Concealment Claim.**

Even if there were no issues of genuine material fact on the Trust's fraudulent concealment claim, summary judgment must be reversed. Since the economic loss rule applies to both intentional and negligent misrepresentation, it should also apply to fraudulent concealment. *See Carlile v. Harbour Homes, Inc.* 147 Wn. App. 193, 194 P.3d 280 (2008), *rev. granted in part*, 166 Wn.2d 1015 (2009).

Fraudulent concealment requires knowledge, not the intent required for fraud. *Atherton*, 115 Wn.2d at 523. Thus fraudulent concealment sits between negligent misrepresentation and intentional misrepresentation. The application of the economic loss rule should have the same result whether the cause of action is fraudulent concealment or intentional misrepresentation.

The different treatment of fraudulent concealment under the economic loss rule by the *Alejandre* and *Carlile* courts makes sense only in circumstances where there is a tort injury. *Alejandre*, 159 Wn.2d at 689

& 690 n.6; *Carlile v. Harbour Homes, Inc.* 147 Wn. App. at 204-05. But this case does not involve a tort injury. A tort injury is a personal injury or harm to other property. *See Alejandre*, 159 Wn.2d at 683. Defects in construction that harm only itself and diminish the property's value are an economic loss. *Id.* at 685. Here, like *Carlile*, the only injury was the construction defect, an economic loss in the condition of the condominium unit.

The purpose of the economic loss rule would be undermined if the rule does not also apply to fraudulent concealment in cases such as this, where there is no harm above and beyond disappointed expectations evolving solely from a prior agreement. The court should apply the economic loss rule and reverse the fraudulent concealment claim to preserve the distinction between contract and tort.

**3. No Justifiable Reliance as the Trust Had Knowledge of the Complained Defects and Failed to Investigate.**

As with negligent misrepresentation, a plaintiff claiming fraudulent concealment must show justifiable reliance. *See Pacific Northwest Life Insurance Co. v. Turnbull*, 51 Wn. App. 692, 701, 754 P.2d 1262, *rev. denied*, 111 Wn.2d 1014 (1988). “The ‘right to rely’ element of fraud is intrinsically linked to the duty of the one to whom the representations are

made to exercise diligence with regard to those representations.”  
*Alejandre*, 159 Wn.2d at 690.

To prove its fraudulent concealment claim, the Trust had the burden to establish justifiable reliance with clear, cogent, and convincing evidence. As previously discussed on pages 15 to 21 there are genuine issues of material fact regarding justifiable reliance. Accordingly, the finding of fraudulent concealment must be reversed.

**C. MRS. BAXTER CANNOT BE LIABLE FOR CONSTRUCTIVE FRAUD ON SUMMARY JUDGMENT.**

The trial court granted summary judgment on negligent misrepresentation and fraudulent concealment. (CP 418-20) However, its subsequent Opinion and Order on Reconsideration attributed the elements of fraudulent concealment to constructive fraud, stating, “Use of the adjective ‘constructive’ in reference to Ms. Baxter’s fraudulent misrepresentations in this case is charitable to Ms. Baxter.” (CP 451-55)

The Trust did not expressly plead a claim for constructive fraud. (CP 38-83) Its motion for partial summary judgment did not argue or offer evidence to support a constructive fraud claim. (CP 84-107) It mentioned the term for the first and only time in its reply to Mrs. Baxter’s opposition to summary judgment motion. (CP 399-400) A new cause of action cannot be raised for the first time in a reply in support of a

summary judgment motion. Furthermore, fraud or mistake must be pled with particularity, CR 9.

In any event, the trial court's written memorandum and opinions are superfluous and nonbinding. *Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 607, 614, 141 P.3d 652 (2006). Nonetheless, in an excess of caution, constructive fraud, first mentioned by the trial court in its memorandum and opinion denying reconsideration will be briefly addressed.

Constructive fraud is fraud without inquiring into the intent or motive of the actor. *Stewart v. Baldwin*, 86 Wash. 63, 73, 149 P. 662 (1915). As with negligent misrepresentation and fraudulent concealment the evidentiary standard is clear, cogent, and convincing.

Because the economic loss rule applies to bar claims for intentional misrepresentation, *Carlile v. Harbour Homes, Inc.* 147 Wn. App. at 205, it should also apply here to bar a claim of constructive fraud.

As previously discussed, at the very least, there are genuine issues of material facts on whether the Trust justifiably relied. Even if the Trust properly pled constructive fraud, the trial court's finding of constructive fraud is improper, unsupported, and should be reversed.

**D. A CONTINUANCE WAS NECESSARY.**

Review of the trial court's refusal to grant a 56(f) continuance is for abuse of discretion. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369, 166 P.3d 667 (2007). This court may "resort to the trial judge's oral decision to ascertain the legal and factual bases upon which the trial court predicated its findings." *Nord v. Eastside Ass'n, Ltd.*, 34 Wn. App. 796, 798, 664 P.2d 4, *rev. denied*, 100 Wn.2d 1014 (1983).

Mrs. Baxter's counsel submitted a declaration outlining the necessary discovery in support of the request for a continuance. (CP 314B-17) The Trustees were never deposed or otherwise cross-examined about their inspection, investigation, knowledge of construction defects, receipt and review of the April 15 meeting minutes and prior experience purchasing and owning condominiums. (*Id.*) No discovery was conducted of the inspector that conducted the limited inspection for the Trust nor of the previously undisclosed expert inspector whose declaration was submitted in support of the summary judgment motion. (*Id.*) Lastly, Mrs. Baxter was prevented from retaining a rebuttal expert inspector to offer an opinion about the reasonableness of the inspection. (*Id.*) All of these discovery activities would have provided specific support for her defense on the already disputed material facts: the Trust's knowledge of the construction defects, justifiable reliance, and reasonableness of the

inspection. Mrs. Baxter should not be penalized for retaining new counsel the month before the Trust filed its motion for summary judgment. The Trust would not have been prejudiced if a short continuance had been granted.

**E. MRS. BAXTER CANNOT BE LIABLE FOR ATTORNEY FEE/EXPENSES AWARD.**

Even if this court affirms the summary judgment, the award of attorney fees must be reversed.

The determination of entitlement to attorney fees is a question of law. Accordingly, the trial court's decision is reviewed *de novo*. *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 586, 167 P.3d 1125 (2007).

“Washington follows the American rule in awarding attorney fees.” *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). Under that rule, a court has no power to award attorney fees as a cost of litigation in the absence of a contract, statute, or recognized ground of equity providing for fee recovery. *Id.* (citing *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941)).

**1. Election of the Rescission Remedy Bars Enforcement of Terms of the Contract.**

The only potential ground for awarding attorney fees here was contractual. (CP 55, 668) Paragraph q of the CPSA provided “if Buyer or

Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys' fees and expenses." (CP 55) The trial court awarded fees and expenses based on this contract provision. (CP 668, 690-94)

However, the terms of the contract became void and unenforceable when the Trust elected the remedy of rescission. *Russell v. Stephens*, 191 Wash. 314, 315, 71 P.2d 30 (1937) ("To rescind a contract is to declare it void in its inception and to put an end to it as though it never were."). Since the trial court put an end to the contract as though it never were, there is no contractual attorney fees provision under which to award attorney fees.

A requirement for rescission is a willingness to do equity. *Empey v. Nw. & Pac. Hypotheekbank*, 129 Wash. 392, 396, 225 P. 226 (1924). The Trust gave empty lip service to this legal requirement. (CP 403) The Trust recognized that rescission means to abrogate or annul the contract, but nonetheless asked the trial court to enforce terms of the contract including paragraph q. (CP 105) To the extent the judgment of rescission stands the attorney fees and expenses award must be reversed.

**2. Attorney Fees Are Inappropriate for Claims Not Concerning the Contract.**

The existence of a contractual relationship does not transform tort claims into claims on a contract. *Cox v. O'Brien*, 150 Wn. App. 24, 34, 206 P.3d 682, *rev. denied*, 167 Wn.2d 1006 (2009). The contract provided: “if Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys’ fees and expenses.” (CP 55) The Trust’s negligent misrepresentation and fraudulent concealment claims are not causes of action on a contract and thus are not “concerning this Agreement.” Fraudulent concealment and negligent misrepresentation sound in tort, not contract. *See Norris v. Church & Co., Inc.* 115 Wn. App. 511, 517, 63 P.3d 153 (2002). Thus an award of attorney fees based on a contractual provision is improper. *See Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 702, 106 P.3d 258, *rev. denied*, 155 Wn.2d 1026 (2005).

The representations the Trust contends support its claim of fraudulent concealment are outside of the CPSA. (CP 46-47) Omission of the envelope inspection report is separate from the terms of the contract. The negligent misrepresentation claim did not “concern” the CPSA as Mrs. Baxter’s oral representations were not in the CPSA and the Form 17

disclosure statement was not part of the CPSA. Thus, the CPSA is not the basis of the tort claims pursued by Trust.

**F. THE TRIAL COURT IMPOSED THE WRONG INTEREST RATE.**

Review of the proper statutory interest rate to apply to the judgment is *de novo*, as the interest rate is governed by statute. *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 165, 208 P.3d 557, *rev. denied*, 220 P.3d 210 (2009).

The postjudgment interest rate is controlled by RCW 4.56.110. The proper section of the statute is determined by the judgment, not the category of claims. *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. at 167.

The proper interest rate on a judgment based on tort is governed by RCW 4.56.110(3).<sup>3</sup> Instead, the trial court applied the contract interest

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<sup>3</sup> RCW 4.56.110(3)(b) provides:

[J]udgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the prime rate, as published by the board of governors of the federal reserve system on the first business day of the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

rate provided under RCW 4.56.110(4).<sup>4</sup> This was error.

RCW 4.56.110(4) would apply only if the judgment was based on the contract. *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. at 168. None of the trial court's judgment was based on the contract since the contract was rescinded. Negligent misrepresentation, as discussed above, is not based on contract because it is a tort. Fraudulent concealment and constructive fraud (if this court decides that the trial court properly found constructive fraud) are both tort causes of action outside of and separate from the terms of the contract.

Accordingly, the RCW 4.56.110(4) interest rate is inapplicable to the judgment. To the extent the finding of negligent misrepresentation, fraudulent concealment, or constructive fraud is affirmed RCW 4.56.110(3) must apply.<sup>5</sup>

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<sup>4</sup> RCW 4.56.110(4) provides:

Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. The method for determining an interest rate prescribed by this subsection is also the method for determining the "rate applicable to civil judgments" for purposes of RCW 10.82.090.

<sup>5</sup> Former RCW 4.56.110(3) applies from entry of Judgment on March 3, 2010, through June 9, 2010. Amended RCW 4.56.110(3) applies from the effective date of June 10, 2010.

**G. MOTION FOR RECONSIDERATION IMPROPERLY DENIED.**

Review of a trial court's ruling on a motion for reconsideration is for abuse of discretion. *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008). "A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons." *Id.* For the reasons discussed above, the motion for reconsideration should have been granted and the motion for summary judgment denied. There was not clear, cogent, and convincing evidence of fraudulent concealment. The economic loss rule bars negligent and intentional misrepresentation claims. Even if the economic loss rule did not apply, the Trust failed to offer evidence proving all material facts as a matter of law and negating Mrs. Baxter's affirmative defense. The material facts are disputed. There are reasonable inferences that the Trust did not inquire further after receipt of association meeting minutes identifying defects and/or chose to knowingly waive all contingencies based on incomplete inspection and investigation. The trial court's ruling on summary judgment rests upon untenable grounds. Therefore, the trial court abused its discretion when it denied seller's motion for reconsideration.

**H. IF MRS. BAXTER PREVAILS ON APPEAL AND THIS SUIT “CONCERNS” THE CPSA, MRS. BAXTER IS ENTITLED TO ATTORNEY FEES ON APPEAL.**

If this court concludes that this suit “concerned” the CPSA and if Mrs. Baxter prevails on appeal, then she is entitled to her attorney fees on appeal under the attorney fee clause in the CPSA. RAP 18.1. *See also* legal authority discussed on pages 29-31.

**VI. CONCLUSION**

The trial court committed errors of law when it refused to apply the economic loss rule, awarded attorney fees, and imposed the wrong post-judgment interest rate. It also impermissibly determined questions of fact when it granted summary judgment because of the genuine factual issues regarding the Trust’s justifiable reliance and reasonableness of its inspection.

The consequences of the trial court’s rulings are life changing. The aggressive, bordering on abusive, execution of the judgment against Mrs. Baxter makes the significance of the trial court’s rulings even greater.

Mrs. Baxter requests that this court reverse the summary judgment order because the economic loss rule bars the Trust’s claims or, at the very least, reverse and remand for further proceedings because there are genuine issues of material fact. Alternatively, if the summary judgment

order is affirmed, Mrs. Baxter requests the judgment be modified to apply the proper postjudgment interest rate and remove the award of attorney fees and expenses.

DATED this 13<sup>th</sup> day of August, 2010.

**REED McCLURE**

By Danielle Evans  
**Danielle M. Evans      WSBA #39925**  
**Attorneys for Appellant/Cross-  
Respondent**

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

PAUL EISENHARDT and  
ELIZABETH CHANEY  
EISENHARDT, as Trustees of the  
Eisenhardt 1995 Living Trust,

Respondents/Cross-  
Appellants,

vs.

MARILYN J. BAXTER, a single  
woman,

Appellant/Cross-  
Respondent,

and

LEE CORBIN and LAILA CORBIN,  
husband and wife; BOBBIE NUTTER  
and JOHN DOE NUTTER, husband  
and wife; TERESA GOLDSMITH  
and JOHN DOE GOLDSMITH,  
husband and wife; NEW OLYMPIC  
ENTERPRISES, INC. d/b/a/ JOHN L.  
SCOTT PORT TOWNSEND, a  
Washington corporation; JIM FOX  
and JANE DOE FOX, husband and  
wife; VALERIE SCHINDLER and  
JOHN DOE SCHINDLER, husband  
and wife; HOOD CANAL REAL  
ESTATE, INC., a Washington  
corporation d/b/a/ WINDERMERE  
HOOD CANAL; and GOODING,  
O'HARA & MACKEY, P.S., a  
Washington corporation,

Defendants.

No. 40455-9-II

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