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I. ARGUMENT

A. NUMEROUS MATERIAL FACTS ARE DISPUTED.

This is an appeal from a summary judgment. Far from showing that there are no genuine issues of material fact, the Brief of Respondents actually highlights the numerous material disputed facts.

1. The Trust Had Minutes Disclosing Defects and Envelope Inspection.

Contrary to its claim that it was not until “[s]hortly after purchase [that the Trust] discovered that the building had undergone an envelope inspection”, the Trust was on notice *before closing* that an envelope inspection had identified defects needing to be fixed. (Resp. Br. 1) The minutes admittedly received and reviewed by the Trust before the April 21 closing expressly disclosed that the contractor had been contacted to “start work on the items noted in the envelope inspection.” (CP 351) Then again on April 18, the Trust was notified of the envelope inspection report and problems it identified. (CP 149-50, 212, 361)

The Trust’s assertion that the identified defects and deficiencies were repaired is not supported by the minutes. (CP 111, 211, 328-359, 410-417) The Trust’s chart summarizing defects identified and repair status is incomplete and inaccurate. (CP 416) For example, the left side of the chart fails to include multiple unresolved defects that were disclosed to the Trust, including a need for recaulking (CP 337) replacement of

flashing (CP 328), roof repairs (CP 337), and the defects disclosed in the April 15 meeting minutes.

Moreover, nothing in the minutes suggested that the concerns about “faulty construction” (CP 351), problems with the exterior of the building (CP 347) and the contractor’s use of “tar paper not Tyvex and . . . cedar not Harti-plank” (CP 359) had been corrected.

In fact, the minutes reflect multiple occurrences of water intrusion in multiple locations. (CP 328-59) The water intrusion at the stairwell window which was observed by the Trust had been a problem since at least January 7, 2006. (CP 354) The Trust was on notice from the meeting minutes, and the site visit, that the water intrusion had been ongoing for over two years despite attempts at repair. (CP 110, 210, 328, 335, 342, 354, 363-64)

Therefore, a reasonable inference is that the Trust knew that the water intrusion problem was greater than represented and/or had reason to investigate further. On a motion for summary judgment all inferences must be construed in favor of the nonmoving party. *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008).

The chart submitted by the Trust also misleads by referencing and misstating the findings from a structural report, referred to as Pioli. (CP

416) That structural report did not identify any "structural problem or safety issue." (CP 186-88)

The Trust admits that only one set of minutes—for the February 9, 2008 meeting—was not included in the package of minutes it received. (Resp. Br. 7) (CP 259-60). The absence of these meeting minutes does not eliminate or resolve any of the disputed material facts. Not only was Mrs. Baxter unaware that the Trust received an incomplete set of records from the homeowners association's CPA (CP 364), other minutes that the Trust did receive put it on notice about the envelope inspection report, building defects, and hiring a lawyer. (CP 328-59)

Moreover, the resale certificate would have also disclosed the warranty claim recorded in the February minutes. RCW 64.34.425. (CP 259) But the Trust waived the resale certificate contingency without receipt. (CP 80, 81)

Thus, the Trust could not justifiably rely on earlier representations by Mrs. Baxter. Despite being on notice about the defects in the building, the Trust failed to conduct a careful, reasonable inspection or inquire further.

The Trust claims that "[t]he discovery that all omitted minutes shared a common element – the word "Jobe" – has led us to conclude during the course of this suit, that this non-disclosure was deliberately

orchestrated . . .” (CP 413) This is a conclusory statement. Conclusory statements cannot resolve a material issue on summary judgment. *Meyer v. Univ. of Washington*, 105 Wn.2d 847, 855, 719 P.2d 98 (1986).

In any event, there is no evidence to support the Trust’s statement that the minutes were “edited to systematically omit reference to ‘Jobe’.” (Resp. Br. 8) The meeting minutes do not have gaps or contain any indication that any words were redacted or removed. (CP 328-59) The envelope inspection report itself only contains the word “Jobe” twice: identifying the inspector and on the signature line “Mark Jobe”. (CP 182-84)

The jurors, not the trustees of the Trust, are the persons whose evaluation and conclusions about the evidence count. It is up to the jurors to determine whether the minutes placed the Trust on notice of the defects and whether the Trust justifiably relied.

2. April 15 Meeting Minutes Reiterate Disclosed Defects.

The Trust claims that the April 18 e-mail with the April 15 meeting minutes “did not indicate on its face that it was of any particular importance”. (Resp. Br. 13) But it is not for the Trust to decide whether it should have realized that the e-mail was of particular importance. That is a question for the jury.

For example, the Trust's statement raises such questions for the jury to determine as: Would a careful and reasonable inspection include reading all association minutes received? What is the significance of the phrase "Special Membership Meeting" in the one line e-mail? (CP 361) Did the Trust act reasonably when it failed to read the April 15 meeting minutes before the sale closed?

The Trust submits a conclusory statement from a trustee that "[w]e were unable to review until 4/22". (CP 412) There is no explanation why. Conclusory statements are insufficient to carry the burden of proof regarding material facts on summary judgment. *Meyer v. Univ. of Washington*, 105 Wn.2d 847, 855, 719 P.2d 98 (1986).

Indeed, even if receipt of the April 15 meeting minutes were insufficient, *when* the Trust actually reviewed those minutes is a genuine issue of material fact because they disclosed the envelope inspection report identifying defects, denial of the warranty claim, and that the association had retained a lawyer. It is undisputed that on April 18 the Trust received and responded to the email with the April 15 meeting minutes attached. (CP 361) Without an explanation of why the Trust was "unable" to review the minutes, a jury could reasonably infer that the Trust read the minutes the same day, April 18. Moreover, even if the Trust did not in fact read the April 15 minutes before the April 21 closing,

a jury could find that the Trust *reasonably should have read* the documents it received *before*, not *after* closing.

3. The Trust Failed to Inquire Further.

“[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 Dir. v. Blume Dev. Co.*, 115 Wn.2d 506, 525, 799 P.2d 250 (1990). The Trust claims without support that it “made further inquiry”. (Resp. Br. 22) The term “further” means the inquiry was after, not before, discovery of evidence of a defect.

The only time the Trust spoke with Mrs. Baxter was on March 10, before receipt of the association meeting minutes. (CP 110-11, 210-11, 363-64, 409-10) However, the association meeting minutes directly contradicted the oral representations made on March 10 and written representations in Form 17 dated March 4. (*Id.*, CP 71-72, 328-59)

There is no evidence to support the Trust’s argument that it made inquiry after review of the association minutes. There is insufficient evidence to determine as a matter of law when the Trust received and reviewed the packet of meeting minutes. Any ambiguity to the sequence of events must be construed in favor of Mrs. Baxter, the nonmoving party. When the Trust reviewed the association minutes is a material fact for the jury to decide.

The Trust never inquired further about why in October 2006 the homeowners association planned to hire 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) (emphasis added). The Trust never inquired about the concerns about the deck, problems with the exterior or any other item mentioned in the minutes. (CP 328-59)

4. The Trust Failed To Have the Condominium Building Inspected.

The Trust admits that its offer to purchase “was made subject to the condition that the condominium and building” would meet their needs (Resp. Br. 3) (emphasis added). Yet, the Trust had an inspector examine only the individual unit. (CP 111, 210-11) There is no evidence that the Trust gave the inspector any information regarding the history of the defects reported in the meeting minutes. The Trust did not have the inspector do a visual inspection of the building. (CP 111, 210-11, 388) Portions of the building, with complained defects, including the roof and exterior of the building were accessible for a visual inspection. Again, these raise fact questions for the jury to decide. Did the Trust conduct a careful, reasonable inspection? Would a visual inspection of the building have provided further notice of defects identified in the meeting minutes?

5. The Trust Was on Notice of the Defects Without Intrusive Testing.

There is no support for the Trust's argument that intrusive testing was the only way to discover the defects. (Resp. Br. 26, 29) Reading the meeting minutes the Trust admits it received would have disclosed many of the defects. (CP 328-359) The Trust could and should have asked the inspector to perform a visual inspection of the building. The Trust could and should have informed the inspector of the defects it knew about from reading the meeting minutes. Intrusive testing merely would have confirmed the defects disclosed in the minutes, as occurred when subsequent investigation was made after the sale. (CP 131-37) At the very least, whether intrusive testing was required to discover the defects is a disputed material fact. A disputed material fact cannot be decided as a matter of law on summary judgment.

Absent from the declaration submitted by the Trust from Mr. Bechtold¹ is any opinion about what he would have advised if he had been informed of the defects identified in meeting minutes and known to the Trust. (CP 131-38) Nor does Mr. Bechtold offer an opinion about what

¹ Steven Bechtold is the owner and operator of Construction Defect Consulting, Inc., hired by the trustees in August 2008 for subsequent inspection of the condominium building. (CP 132)

he would have advised if he had been the inspector observing the hallway windows with extensive water damage and sheetrock removed exposing the flashing and installation of the window. (*Id.*, CP 328)

Whether Mrs. Baxter negligently misrepresented or fraudulently concealed the condition of the condominium building roof is another disputed material fact for the jury to determine. Mrs. Baxter testified she was unaware of problems on the roof although the envelope inspection report identified issues with the roof. (CP 151, 184, 416)

In short, the record is replete with genuine issues of material fact. Moreover, as will next be discussed, the law also requires reversal of the summary judgment.

B. THE LAW REQUIRES REVERSAL OF THE SUMMARY JUDGMENT.

1. Negligent Misrepresentation.

The case law in Washington is clear. Negligent misrepresentation claims related to a real estate purchase and sale agreement are barred by the economic loss rule. *See Alejandre v. Bull*, 159 Wn.2d 674, 689, 153 P.3d 864 (2007).

The Trust cites no legal authority that would allow a *negligent misrepresentation* claim to survive application of the economic loss rule. Instead the Trust reiterates its argument that *fraudulent concealment* claims are not always barred by the economic loss rule. (Resp. Br. 18)

The presence of another claim, fraudulent concealment, does not alter the legal application of the economic loss rule to claims of negligent misrepresentation. Even if the Trust's claim for fraudulent concealment survives the economic loss rule, it does not save the negligent misrepresentation claim. *Stieneke v. Russi*, 145 Wn. App. 544, 555-59, 190 P.3d 60 (2008), *rev. denied*, 165 Wn.2d 1026 (2009). Indeed, not only does the Trust fail to distinguish *Stieneke v. Russi*, but it later acknowledges that the court in that case applied the economic loss rule and dismissed the negligent misrepresentation claim while permitting the fraudulent concealment claim. (Resp. Br. 29)

The Trust's negligent misrepresentation claim is primarily based on items outside of the contract. The Trust points to Mrs. Baxter's oral comments on March 10. (Resp. Br. 22-23) The Trust points to the absence of the February 9, 2008, meeting minutes in the association records received. (Resp. Br. 7) Neither event can support a negligent misrepresentation claim pursued under contract provision clause 9 which only addresses claims arising from the representations in Form 17. (CP 52) Moreover, clause 9 does not claim to alter the legal defenses available to Mrs. Baxter.

2. No Justifiable Reliance.

Justifiable reliance is a required element for both negligent misrepresentation and fraudulent concealment claims. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998); *Pac. Northwest Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 701, 754 P.2d 1262, *rev. denied*, 111 Wn.2d 1014 (1988). The Trust fails to address, let alone distinguish, the legal authority cited by Mrs. Baxter regarding justifiable reliance. It is established that where, as here, a buyer has information at variance with the representation of a seller, there is no justifiable reliance. *See Hoel v. Rose*, 125 Wn. App. 14, 18, 22, 105 P.3d 395 (2004). Likewise, where the correct information is reasonably ascertainable, there is no justifiable reliance. *Rainier Nat'l Bank v. Clausing*, 34 Wn. App. 441, 446, 661 P.2d 1015 (1983); *see also Williams v. Joslin*, 65 Wn.2d 696, 698, 399 P.2d 308 (1965) (no justifiable reliance where the seller's representations of motel's profits directly contradicted by financial records provided to the buyer).

Contrary to the Brief of Respondents at pages 26-27, there is no indication that *Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 215, 752 P.2d 1353, *rev. denied*, 111 Wn.2d 1007 (1988), is limited to situations with a single type of property defect. In *Dalarna*, the seller was held not liable for fraudulent concealment because the buyer

had ample opportunity to inspect the building and was aware of water leakage problems, yet did nothing to inquire about the extent of the problem.

Moreover, a significant portion of the complained defects here are water intrusion and related defects: improper weather resistant barrier, flashing, type and installation of windows and doors causing water intrusion. (CP 182-84) The Trust witnessed and had notice from the minutes of the extensive water intrusion and made no effort to investigate the extent of the problem. (CP 328, 335, 338, 340, 342, 354, 412)

Brown v. Johnson, 109 Wn. App. 56, 34 P.3d 1233 (2001), also does not support summary judgment on the question of justifiable reliance. Instead, that decision further supports Mrs. Baxter's position that a jury, not a judge, should determine the facts. *See id.* at 58. *Brown v. Johnson* was a fact specific decision where the Form 17 and other acts and omissions were considered by a jury. *Id.*

The Trust asserts that RCW 64.06.050, barring liability for error, inaccuracy, or omission in Form 17 does not apply because the statute differentiates if the seller had actual knowledge of the error or omission. (Resp. Br. 24-25) The exception in the statute does not allow a claim for negligent misrepresentation.

3. Fraudulent Concealment.

The decisions applying the economic loss rule to intentional misrepresentation and fraudulent concealment claims are inconsistent. *Compare Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008), *rev. granted in part*, 166 Wn.2d 1015 (2009) with *Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 514 (2009), *rev. granted*, 168 Wn.2d 1001 (2010). The issue of applying the economic loss rule to fraudulent concealment claims is directly before the Supreme Court now. Therefore, the Trust's heavy reliance on the appellate court opinion in *Jackowski* should be considered in context and cautiously. The Washington Supreme Court made it clear in *Alejandre v. Bull* that the economic loss rule applies to real estate purchase and sale agreements. 159 Wn.2d at 681-86. The inconsistent subsequent case law regarding intentional misrepresentation and fraudulent concealment will be resolved shortly.

C. BY ANY NAME, THE FRAUDULENT CONCEALMENT/ CONSTRUCTIVE FRAUD CLAIMS FAILS.

Fraudulent concealment and constructive fraud are not one and the same claim, yet the trial court failed to distinguish the two. The Trust admits that the trial court did not make a finding of the requisite elements of constructive fraud when it says, "[T]he court references the elements of fraudulent concealment in its Opinion and Order on Reconsideration *when*

referring to its finding of constructive fraud.” (Resp. Br. 30) (emphasis added). 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). The elements of the claims are completely different. *See Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 204-05, 194 P.3d 280 (2008), *rev. granted in part*, 166 Wn.2d 1015 (2009) (discussing and distinguishing the nine elements of fraud from the five elements of fraudulent concealment). Fraudulent concealment requires a concealed defect that presents a danger to the property, health, or life of the purchaser. *Id.* Whereas, constructive fraud requires a false representation of a material fact. *Id.* Constructive fraud, unlike fraudulent concealment, expressly requires a showing of damages. *Id.* The Court of Appeals found the differences in elements supported different results when applying the economic loss rule. *Id.* Thus the order on reconsideration is based on untenable grounds and is an abuse of discretion.

D. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A CONTINUANCE.

The Trust argues that because Mrs. Baxter had legal counsel at all times in the case, despite retaining new attorneys who appeared the month before the Trust filed its summary judgment motion, there was not a good reason for a continuance of the summary judgment proceedings. (Resp.

Br. 32; CP 429-35) But Mrs. Baxter’s counsel submitted a detailed declaration explaining why discovery had not been obtained earlier and the evidence that would be uncovered. (CP 314B-17; *see also* CP 428, 423) When considering Mrs. Baxter’s request for a continuance, the trial court abused its discretion when it found that a continuance would not result in raising a material issue of fact. As discussed above, there are disputed material facts concerning the extent of knowledge of the Trust and its inspection of defects, both of which would have been further developed during a continuance.

E. THE ATTORNEY FEES AWARD WAS IMPROPER.

The Trust mistates the law concerning attorney fees. Attorney fees are not mandatory with rescission, as rescission is an equitable remedy. *See Hornback v. Wentworth*, 132 Wn. App. 504, 512, 132 P.3d 778 (2006), *rev. granted*, 158 Wn.2d 1025 (2007); *Rummer v. Throop*, 38 Wn.2d 624, 637, 231 P.2d 313 (1951). The Trust acknowledges that “[r]escission means to abrogate or annul” (Resp. Br. 33-34) yet then makes the nonsensical argument that “voiding th[e] contract by rescission does not abrogate the right to fees”, even though the right to fees is based solely on an attorney fees clause in the abrogated contract. (Resp. Br. 35) The Trust wants to have it both ways – abrogate and enforce the contract.

The Trust's cited cases do not support its position. In *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 141, 157 P.3d 415 (2007), *rev. denied*, 162 Wn.2d 1022 (2008), there was no rescission.

In *Bloor v. Fritz* the parties disputed the amount of attorney fees, not the entitlement to attorney fees, under an order of rescission. 143 Wn. App. 718, 180 P.3d 805 (2008). Thus the Court of Appeals was not asked to opine on the entitlement issue. *Id.*

The Trust contends that *Hackney v. Sunset Beach Investments*, 31 Wn. App. 596, 644 P.2d 138 (1982), was a "rescission action." (Resp. Br. 34) However, the case arose from anticipatory breach of contract because the contract was no longer desirable. 31 Wn. App. at 600. The court found breach of contract and awarded the requested remedy of rescission. *Id.* at 600-01. Here, the court did not find breach of contract. Instead the order finds negligent misrepresentation and fraudulent concealment, two causes of action outside of the terms of the contract. (CP 418-20) The Trust offers no support for its request to impose the terms of an abrogated contract on claims that arose outside of the contract.

The third case cited by the Trust, *Stryken v. Panell* is another action on a contract. 66 Wn. App. 566, 832 P.2d 890 (1992). For the reasons discussed above and in the opening brief, the Trust's claims are not an action on the contract as the Trust's complaints are primarily

focused on (1) oral representations in March and (2) incomplete production of association records.

The Trust cites no legal authority or clause in the contract permitting an award of attorney fees on its fraudulent concealment claim. Clause 9 does not mention fraudulent concealment. All of the Trust's arguments for fees are directed towards its negligent misrepresentation claim.

F. THE POSTJUDGMENT INTEREST RATE IS ERRONEOUS.

The proper interest rate on a judgment is based on the successful claims, not on the claims asserted in a complaint. The Trust argues without authority that its claims were “more than just tort”, so that it is entitled to the interest rate for breach of contract. (Resp. Br. 36) The Trust is wrong.

The trial court did not find that the contract was breached. (CP 418-20) Moreover, negligent misrepresentation and fraudulent concealment are torts. *See Norris v. Church & Co., Inc.*, 115 Wn. App. 511, 517, 63 P.3d 153 (2002). Accordingly, the proper statute is RCW 4.56.110(3).²

² 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,

II. CROSS-APPEAL

A. CROSS CLAIM.

The Trust's cross-appeal is not directed at Mrs. Baxter. Accordingly, there is no need for her to respond, except to say that the trial court entered CR 54(b) findings because, at the time, there was no final order or determination regarding the other defendants. (CP 664-89)

III. CONCLUSION.

The Trust failed to carry its burden of proof as the party moving for summary judgment; it did not demonstrate that all material facts are undisputed or that it is entitled to judgment as a matter of law.

Therefore, Mrs. Baxter requests that this court reverse the summary judgment order because the economic loss rule bars the Trust's claims. At the very least, reversal and remand for further proceedings are necessary because the reasonableness of the Trust's inspection and review of the records along with whether there was justifiable reliance are issues to be decided by the jury. Alternatively, if the summary judgment order is

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.

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 1st day of November, 2010.

REED McCLURE

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

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COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON
BY _____
DEPUTY

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

AFFIDAVIT OF SERVICE BY
MAIL

