

No. 40455-9 II

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

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

Respondent/Cross-Appellant

v.

MARILYN J. BAXTER, a single woman

Appellant/Cross-Appellant

APPEAL FROM THE SUPERIOR COURT FOR JEFFERSON
COUNTY
STATE OF WASHINGTON
THE HONORABLE CRADDOCK VERSER

BRIEF OF RESPONDENT/CROSS APPELLANT

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COMES NOW Respondents and Cross-Appellants Paul Eisenhardt and Elizabeth Chaney Eisenhardt, as Trustees of the 1995 Eisenhardt Living Trust, by and through its attorneys of record, MAHER AHRENS FOSTER SHILLITO PLLC, and Kelly DeLaat-Maher and Jordan K. Foster, and submits Respondents' brief on Appeal as follows:

I. INTRODUCTION

This case concerns the Eisenhardts' purchase of a condominium from Appellant, Marilyn Baxter (hereinafter "Defendant Baxter" or "Baxter"). In effectuating the purchase, Baxter failed to disclose known material defects to the Eisenhardts, despite specific request by the Eisenhardts to Baxter as to whether there were any defects other than an identified issue with the common area windows. Shortly after purchase, the Eisenhardts discovered that the building had undergone an envelope inspection wherein various significant defects were revealed, the subject of which was a warranty claim submitted to the developer that had been rejected. Despite these events occurring prior to the sale, Defendant. Baxter willfully declined to disclose that information, resulting in institution of litigation against Baxter.

In addition to Baxter, the Eisenhardts named several other parties as defendants, including the realtors involved, the president of the Association at the time of sale, and the Association CPA for failure to

maintain accurate records. In November 2009, the trial court granted Summary Judgment against Defendant Baxter for rescission, and also additionally ruled that the rescission effectively dismissed the Eisenhardts' causes of action against the remaining defendants.

II. ASSIGNMENTS OF ERROR

A. BAXTER'S ASSIGNMENTS OF ERROR

Did the trial court err in granting the Eisenhardts' Motion for Summary Judgment against Defendant Baxter on November 20, 2009, as well as the subsequent Judgment against Defendant Baxter on March 3, 2010? **No.**

B. EISENHARDTS' ASSIGNMENTS OF ERROR

Did the trial court err in dismissing the Eisenhardts causes of action against the remaining defendants in its Memorandum Opinion entered on March 3, 2010? **Yes.**

III. ISSUES PRESENTED

A. BAXTER'S ISSUES ON APPEAL

The Eisenhardts will not reiterate the issues presented in subparagraphs A through F of Baxter's brief.

B. EISENHARDT'S ISSUES ON APPEAL

Does the grant of rescission as to Defendant Baxter operate to deprive the Eisenhardts of their causes of action and claims for damages against the additional defendants?

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND OF THE CASE

At the time of institution of the case, Paul and Elizabeth Eisenhardt were living in San Francisco, California. CP 209. In early spring, 2008, the Eisenhardts learned about a condominium for sale at 940 Lawrence Street, #404 in Port Townsend, Washington, listed for sale by Defendant Baxter. CP 209. The Eisenhardts hoped to purchase a home or condominium in Port Townsend in which they would eventually retire. CP 209

On March 3, 2008, the Eisenhardts and Defendant Baxter signed a Condominium Purchase and Sale Agreement (“CPSA” or “Purchase and Sale Agreement”) for purchase of the condominium for \$689,000. CP 209. Although not having seen the condominium unit itself, the Eisenhardts were very familiar with the building and various floor plans of the units, and they felt comfortable making an offer. CP 408. The offer was made subject to the condition that the condominium and building (constructed in 2005) would be as represented by the seller in the promotional materials, and that it would meet the Eisenhardts’ needs. CP

209, 408-409. The Eisenhardts were represented by real estate agent Bobbie Nutter in the transaction, and she assisted them in preparation of the offer. CP 209. Defendant Baxter was represented by Realtor Jim Fox. CP 109, 209.

The agreement between the parties contains a specific provision under Paragraph 9, Specific Terms, located on the first page of that document. CP 52, 220. That section allows the buyer to maintain a remedy for seller's negligent errors, inaccuracies, or omissions contained in the Form 17. *Id.*; see also General Terms subsection y. CP 56, 225. The Eisenhardts also received a Seller Disclosure Statement (the Form 17) required under RCW 64.06. CP 210. The Disclosure Statement revealed no issues, with the exception of an attached sheet acknowledging nonstructural cracks in the fireplace and master bath, and water intrusion through the south side stairwell common area windows. CP 210, 245-250. In this attachment, Baxter also noted that these common area windows would be repaired in the summer of 2008. CP 245-250.

On March 10, 2009, the Eisenhardts conducted a site visit to the unit along with their Realtor, Bobbie Nutter, to determine its suitability and to remove the contingency above. CP 110, 210. During this visit, Defendant Baxter returned home. CP 110, 140, 210. The Eisenhardts asked Defendant Baxter, in person and in the presence of Bobbie Nutter,

about specific conditions on the property, including needed repairs to common area windows and the existence of any other known defects in the condominium unit or building. CP 110, 210. Defendant Baxter advised that there were no other defects or repairs necessary except the common area stairwell windows and further indicated that necessary repairs to the common area windows would be completed by the developer at the developer's expense, in the early summer of 2008 after the rainy season ended. CP 110, 210. The Eisenhardts' real estate agent, Bobbie Nutter, provided Declaration testimony supporting this recollection. CP 140.

In deposition testimony, Defendant Baxter too supports this recollection. Therein, she testified as follows:

Q. I will represent to you that Exhibit 27 is a page of handwritten notes that was produced in a file that Bobbie Nutter produced to me in conjunction with this lawsuit. It's dated March 10, 2008, and it says:

"Appointment with Eisenhardts, 3:00 p.m., Lawrence Street condos. During showing, M.J. came home with dog."

Do you have a dog?

A. I do.

Q. Do you recall coming home with the dog during that showing?

A. Yes.

Q. It goes on:

"Introduced both parties and myself. Had Form 17 on counter with M.J.'s attached letter explaining windows in common area."

Now, that's the one, Form 17, the subsequent one that you filled out the second time; correct?

A. With the addendum on the back, that's correct.

Q. It goes on to state:

"She stated that Ham & Rye were to take care of this when the rain stopped in late spring/summer. Asked if there was anything else that she knew of that was wrong with condos, and she said no, which made the Eisenhardts happy and willing to go forward with purchasing the condo."

Do you recall that conversation?

A. Yes.

Q. **Do you think these notes accurately reflect the gist of the conversation that took place that day?**

A. **Yes.**

CP 391, 377-378, (Emphasis added) (Deposition of Marilyn Baxter, Vol 2, 50:11-25; 51:1-21).

The Eisenhardts also conducted an inspection with a licensed inspector, who discovered no material issues with the unit, other than the stairwell windows and cracks noted in the Disclosure Statement. CP 111, 210-211.

Pursuant to the requirements of the CPSA, the Eisenhardts received limited Association records. CP 111, 211. None of the records provided disclosed any deficiencies or defects that had not already been repaired prior to entry into the CPSA with Defendant Baxter. CP 111, 211, 410-417. Defendant Baxter argues those minutes revealed building defects, thereby giving the Eisenhardts notice of defects that they should have investigated. Specific reference should be made to a chart prepared

by Elizabeth Eisenhardt submitted to the trial court at Summary Judgment, outlining each reference to alleged defect issues identified in those records received, and their subsequent reference to repairs made in those same minutes. CP 416-417. As such, the Eisenhardts found no issues of concern after their careful review of the information they did receive. CP 407-417.

It was only through the course of discovery after litigation had been instituted that the Eisenhardts discovered that they did not receive a complete set of Association records as requested in their CPSA, for which Defendant Baxter remained responsible pursuant to the terms of the CPSA. CP 221-243. They discovered that key board meeting minutes were not included in the packet they received prior to closing that were subsequently included in the records provided in discovery. CP 111, 145, 211. Most importantly, what was omitted from the package were the February 2008 board meeting minutes, wherein the board voted to file a warranty claim against the developer for building defects highlighted in a building envelope inspection completed in 2006 by the Building Envelope Inspection Corporation (known as the "Jobe" Report). CP 111, 211, 252-265. Also the Association records received by the Eisenhardts omitted any mention of the defects that were reported in the Jobe Report which were later verified by another inspection firm, BET&R, in the summer of

2008, and further appeared to have been edited to systematically omit reference to “Jobe” at all. CP 214-215, 407-417. Based upon the information received, which clearly did not encompass the full set of records available, the Eisenhardts completed inspection and removed all other contingencies on April 2, 2008. CP 112, 212.

Following closing, the Eisenhardts soon began to learn of additional significant building construction defects in addition to the known issue of the common area windows. CP 112, 212. Only then did the Eisenhardts learn that a Warranty Claim based upon the Jobe report had been made and subsequently rejected by the developer, and that the board had voted to retain legal counsel. CP 112-113, 212. The Eisenhardts also learned of a structural report obtained by Defendant Baxter (the “Pioli” report), along with several other members of the Association, identifying greater than normal settling and recommending the need for monitoring for potential structural defects of the building. 114, 214, 264-266.

Through discovery, the Eisenhardts learned that Defendant Baxter had specific knowledge of the building defects, which she knowingly chose not to reveal. In deposition, Defendant Baxter admitted that she introduced the Board motion to pursue the Request for Warranty Service. She testified as follows:

Q. (By Ms. Delaat-Maher) Isn't it true that by these minutes, there was a motion made to send the Request for Warranty Service?

A. Yes.

Q. And you were the one who made that motion; correct?

A. That's what it says.

CP 150 (Deposition of Marilyn Baxter, Vol. 1, 68:17-22). Further, it is clear that the Request for Warranty Service was prepared as a follow up to the Jobe report. Ms. Baxter testified in response to questioning as follows:

Q. Yet Mr. Corbin, in this Request for Warranty Service, is referring to the August 10, 2006 inspection done by Building Enclosure Inspection Corporation, or the Jobe report; is that right?

A. Yes. If that's what it says, yes.

Q. Isn't this Request for Warranty Service to follow up on the Jobe report, then?

A. Yes.

CP 150 (Deposition of Marilyn Baxter, Vol 1, 67:3-10).

Ms. Baxter also participated in meetings with legal counsel culminating in an April 15th Association Board action to engage said counsel to respond to the Developer's rejection of the February warranty claim and to initiate action to correct building defects. She testified as follows:

Q. . . I do have -- and I did not make a copy of this, so I'm not going to make it a formal exhibit -- the April 15, 2008 Board meeting minutes; and if you'll look there, it does indicate that you moved to retain Dean Martin pursuant to the fee-structure agreement on April 15, 2008; is that correct?

A. Yes.

Q. All right. Then go ahead and take a look at that.

Q. (By Ms. Delaat-Maher) Do you see the provision where you moved to retain Mr. Martin? It's on the first page about halfway down, I think.

A. Oh, yes.

Q. So the date of agreeing to hire Mr. Martin was in April of 2008, that is correct?

A. Yes.

Q. So I have to go back and ask the question again: What prompted the Board to decide that they needed an attorney at that point in time? To pursue what?

A. I believe it was to prompt the developers to go ahead and work on the resolutions of the previous inspection, now that I have my time line a little better.

CP 149 (Deposition of Marilyn Baxter, 43:11-25; 44:1-8). Defendant Baxter testified that those items included in the Warranty Request for Service were not corrected at the time the Board met with counsel on April 15, 2008, just a few days prior to closing. Her testimony is as follows:

Q. And isn't it true to say that on April 15, 2008 when the Board decided to hire Mr. Martin, those items had not been corrected and these Request for Warranty Service items were not fixed?

A. I would say that's correct.

Q. Isn't it also true that the developer denied this Request for Warranty Service?

A. Yes, I think they did.

CP 150 (Deposition of Marilyn Baxter, Vol 1, 67:18-25). In her responses to Requests for Admission, Defendant Baxter admitted that she did not

disclose the Jobe report, the Pioli Report, the Request for Warranty Claim, or the decision to retain counsel to the Eisenhardts. CP 157-166.

Indeed, Defendant Baxter acknowledged during deposition testimony that the only building issue she advised the Eisenhardts of was the stairwell windows, due to the obvious nature of the issue. Specifically, she testified as follows:

- Q. Was the stairwell window not under warranty?
A. It was under warranty.
Q. Then why disclose it?
A. Because it was an obvious defect.
Q. Which, in fact, is one of the reasons why not disclosing would not have been such a big deal?
A. That's true. Good point.
Q. So you disclosed the stairwell windows because it was blatantly obvious that there was something wrong with that, and you chose not to disclose any of the other issues of which you were aware, but you were relying on the fact that all of it was going to be repaired by the developer, so it didn't matter; is that correct?
A. Correct.
Q. As we sit here today, do you think you could have been more thorough with your seller disclosures?
A. Yes, in retrospect.

CP 155 (Deposition of Marilyn Baxter, Vol. 2, 71:9-25). Additionally, Ms. Baxter testified as follows in relation to specific omissions on the Form 17:

- Q. All right. And one of the things identified in the Jobe report was regarding the leaks and the roof leaking, for example; yet, in Subsection IV of the Seller Disclosure Statement, it asks whether the roofs leak, and you said, "No."

A. I didn't know anything about the roof leaking.

Q. Was that not one of the issues identified on the Jobe report?

A. I don't know. I guess -- well, I don't know. Was it leaking? I don't know. I know the roof was discussed, but I don't know that it said particularly that it was leaking. I don't know that for a fact.

Q. In Subsection F under Subparagraph 4, where it says, "Are there any defects with the following," you then say, "See note on reverse."

A. Yes.

Q. This note refers to the stairwell windows in the common areas; is that correct?

A. Yes.

Q. Do you feel that that was the only issue that needed to be told to the buyers?

A. Well, the buyers, when they purchased the condo, were aware of the cracks in the fireplace and above the door sill, so that was not included in there, no.

Q. But the Jobe report also identified issues with the exterior walls of the condominium; correct?

A. Yes.

Q. And yet you did not mark down that there were any problems with the exterior walls in Subparagraph F, did you?

A. No.

Q. Why not?

A. Because I assumed they would be taken care of within the four-year warranty period.

Q. Well, why didn't you write that on Form 17?

A. I guess I just never thought to include that in the note.

Q. The Jobe report identifies issues with the siding, and you didn't mark down anything in regard to siding either, did you?

A. No, I did not.

Q. Why did you not mark that?

A. For the same reason.

Q. *At the time this document was filled out, those issues identified in the Jobe report were still an issue; correct?*

A. Yes.

Q. *But, yet, you did not identify any of those issues in this Form 17; correct?*

A. *No, I did not.*

CP 151-152 (emphasis added) (Deposition of Marilyn Baxter, Vol. 1, 92:12-25; 93:1-25; 94:1-11).

There is no dispute that the issues identified in the Jobe report were significant, and still an issue at the time the Eisenhardts purchased the unit. At summary judgment, the Eisenhardts introduced a Declaration of Steven Bechtold, a construction industry expert. CP 131-138. Mr. Bechtold's Declaration was uncontroverted by Defendants. Mr. Bechtold opined that the building defects and estimated repair were significant. CP 131-138. Mr. Bechtold also stated in his Declaration that had the Eisenhardts provided him a copy of the Jobe report, he would have recommended an envelope inspection that would have revealed the defects. CP 131-138.

Defendant Baxter points to an e-mail the Eisenhardts received from Defendant Laila Corbin on Friday April 18, 2008, containing an attachment of April 15, 2008 board meeting minutes that referenced the decision to retain counsel. It is important to note that the e-mail did not indicate on its face that it was of any particular importance, and simply stated "Attached are the minutes of the April 15 Special Membership

Meeting and Board Meeting.” CP 360. The Eisenhardts signed closing documents on April 14, 2008, and as of April 18, 2008, believed they were the owners of the condo. CP 395, 412. The decision to hire legal counsel had been discussed as early as February 9, 2008, and was information that should have been provided well before an e-mail one-half business day before closing was recorded by title. CP 260, 395, 412-413. Further, the Eisenhardts did not have an opportunity to review the actual minutes prior to closing on April 21, 2008. CP 412-413.

B. PROCEDURAL HISTORY OF THE CASE

After discovery of the undisclosed issues regarding the condominium, the Eisenhardts filed suit against Defendant Baxter in September, 2008. CP 665. Subsequently, Defendant Baxter appeared and answered the Complaint in October 2008 by and through counsel Gary Colley. CP 32-37. Ms. Baxter later sought to amend her answer to file a Third Party Complaint against her realtor. CP 665; 776-780.

In June, 2009, the Eisenhardts sought to amend their complaint to add additional parties as Defendants. They specifically sought to add Lee and Laila Corbin as board members of the Aldrich Market Homeowner’s Association for failure to provide complete and accurate records that disclosed the status of claims regarding defects in the building; Gooding, O’Hara & Mackey, P.S. as agent of the Association for failing to provide

complete, accurate and appropriate minutes of the Association and a resale certificate (as one was requested by the Eisenhardts); Bobbie Nutter, Teresa Goldsmith and John L. Scott, their real estate agents, for misrepresenting the HOA package as the Resale Certificate and failure to ensure that the requested resale certificate was provided; and Jim Fox and Valerie Schindler of Windermere, for failure to disclose defects in the property that were known to them. CP 665. The Eisenhardts' Motion was granted on June 26, 2009, and the Eisenhardts' Second Amended Complaint was subsequently filed on July 1, 2009. CP 38-83.

In October, 2009, the Eisenhardts' moved for Partial Summary Judgment against Defendant Baxter only. CP 84-107. Defendant Baxter opposed the request, and further sought a continuance under CR 56(f). No other party submitted a response to the Eisenhardts' motion. The trial court denied the request for continuance and granted the Eisenhardts' Motion for Summary Judgment and rescission against Defendant Baxter. Baxter moved for reconsideration, which was denied.

The Eisenhardts then moved for entry of judgment against Ms. Baxter. Following hearing and additional briefing, the trial court ultimately entered its Memorandum Opinion and Order on Entry of Judgment on March 3, 2010. The order awarded judgment in the amount of \$722,122.81 plus interest at 12%, \$28,380.00 in attorney's fees, and

\$465.00 in costs. CP 690-694. The Memorandum Opinion further effectively dismissed all of the Eisenhardts' claims against each of the other defendants, by stating as follows:

By granting rescission of the CPSA and subsequent judgment against Ms. Baxter, the court will attempt to place plaintiffs in a position they were in had no CPSA been signed as if no sale took place. *Hornback v. Wentworth*, 132 Wn.App. 504, 513, 132 P.3d 778 (2006). This effectively eliminates an element of every cause of action the plaintiffs might have against the other parties, as the rescission of the contract eliminates the element of damages from their cause of action against the officers and agents of the homeowner's association and from their own real estate agents. The only claims that remain to be adjudicated are Ms. Baxter's claims against her real estate agent.

CP 666.

Defendant Baxter appealed the court's judgment. The Eisenhardts filed a cross-appeal on the issue of dismissal of the remaining defendants from the suit. The Eisenhardts further have made attempt through garnishment and supplemental proceedings to gain Defendant Baxter's compliance with the court ordered rescission, which she has significantly failed to do. The Eisenhardts have only collected a little over \$88,000 to date, all of which is deposited in the court's registry. Defendant Baxter has not filed a supersedeas bond.

V. ARGUMENT

On review of an order for summary judgment, the court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). As specifically stated in *Kruse v. Hemp*, in reviewing a summary judgment order, an appellate court evaluates the matter de novo, performing the same inquiry as the trial court. *Kruse*, at 722.

On an appeal, the appellate court must engage in the same inquiry as the trial court, “. . .construing the facts and reasonable inferences therefrom in the manner most favorable to the nonmoving party to ascertain whether there is a genuine issue of material fact.” *Dumont v. City of Seattle*, 148 Wn.App. 850, 860-861, 200 P.3d 764 (2009) (citing to *Sellested v. Wash. Mut. Sav. Bank*, 69 Wn.App. 852, 857, 851 P.2d 716 (1993)). Summary judgment is proper “if reasonable persons could reach but one conclusion from the evidence presented.” *Korlund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Here, the court properly concluded that no material issues of fact existed as to Defendant Baxter.

A. SUMMARY JUDGMENT ON THE NEGLIGENT MISREPRESENTATION CLAIM WAS NOT IMPROPER.

Defendant Baxter argues on appeal that neither the law nor the evidence presented support summary judgment on the issue of negligent misrepresentation. Defendant's argument is severely misplaced.

i. The Economic Loss Rule Does Not Bar the Eisenhardts' Claims

Defendant Baxter asserts that the trial court erroneously failed to apply the economic loss rule when it found Defendant Baxter liable for negligent misrepresentation. The economic loss rule is inapplicable to the case at hand.

The Washington Supreme Court summed up the economic loss rule in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), as follows:

In short, the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.

Id. The rule only serves to limit damages in a misrepresentation case, and does not bar claims in a situation where fraudulent concealment is present. Indeed, fraudulent concealment is specifically not barred by the Court's decision in *Alejandre*, supra, at 689, or later cases; see also *Carlisle v. Harbor Homes, Inc.*, 147 Wn.App. 193, 194 P.2d 180 (2008). Further, the rule allows parties to provide contractual remedies for causes

arising in tort, such as here, where the parties specifically contracted to allow claims for negligent misrepresentation. None of the cases cited by defendant contains a fact pattern wherein the parties specifically agreed to allow claims for negligent misrepresentation. Thus, under the economic loss rule, the Eisenhardts are not prevented from pursuing any of their claims, including those for negligent misrepresentation – as this was a negotiated contractual provision.

Contrary to Defendant Baxter’s assertion, the trial court here specifically considered the economic loss rule. In its oral deliberation on summary judgment, the court stated as follows:

Well, *Alejandre* and *Carlisle* say that the economic loss rule, just in a nutshell, says your remedies are limited to the remedies provided for in the contract. And this is a remedy provided for in the contract. So wouldn’t that render *Alejandre* and *Carlisle*, those cases, inapplicable to this situation?

RP 27:23-24; 28:1-4.

Further, an action for rescission is not barred under the economic loss rule. In *Jackowski v. Borchelt*, 151 Wn.App. 1, 209 P.3d 514 (2009), *review granted*, 168 Wn.2d 1001, 226 P.3d 780 (2010), the appellate court determined that the trial court erred in dismissing claims for rescission arising out of misrepresentation. Therein, the Jackowskis argued that although *Alejandre* barred monetary recovery for economic loss damages

against a seller in a negligent misrepresentation claim, rescission is not a recovery and, thus, should still be available to them. *Jackowski*, 151 Wn. App. at 15. Contract rescission is an equitable remedy in which the court attempts to restore the parties to the positions they would have occupied had they not entered into the contract. *Jackowski*, at 15-16, (citing to *Hornback v. Wentworth*, 132 Wn.App. 504, 513, 132 P.3d 778 (2006), review granted, 158 Wn.2d 1025, 152 P.3d 347 (2007); *Bloor v. Fritz*, 143 Wn.App. 718, 739, 180 P.3d 805 (2008)). A court sitting in equity has broad discretion in shaping relief. *Id.* at 16 (citing to *Hough v. Stockbridge*, 150 Wash.2d 234, 236, 76 P.3d 216 (2003)). The court went on to state as follows:

As an initial matter, the Jackowskis acknowledge that many attorneys have argued that *Alejandre* precludes the equitable remedy of rescission for misrepresentation and that the common language those attorneys cite is “the economic loss rule precludes any recovery under a negligent misrepresentation theory.” Br. of Appellant at 39 (quoting *Alejandre*, 159 Wash.2d at 677, 153 P.3d 864). Nevertheless, they argue that rescission is an avoidance of contract rather than a recovery. They contend that they should be entitled to relief because they entered into a contract based on misrepresentations. **We agree.**

Jackowski, at 16 (emphasis added). Thus, under the economic loss rule, the Eisenhardts were not prevented from pursuing their claims for rescission of the contract they entered into based upon misrepresentations, whether negligent, intentional, or based upon fraudulent concealment.

ii. The Eisenhardts Justifiably Relied on Defendant's Representations

Defendant next argues that even if the economic loss rule is inapplicable, material issues of fact existed as to whether the Eisenhardts justifiably relied upon the information provided to them by Defendant Baxter. No material issues of fact exist as to the Eisenhardts' justifiable reliance, making summary judgment appropriate on that issue.

In *Hoffman v. Connall*, 108 Wash.2d 69, 736 P.2d 242 (1987) the court referred to the Restatement of Torts in outlining the elements of negligent misrepresentation. Therein, the Court stated as follows:

The Restatement (Second) of Torts defines the tort of innocent misrepresentation as follows:

Misrepresentation in Sale, Rental or Exchange Transaction

(1) One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

Restatement (Second) of Torts § 552C(1) (1977).

Hoffman, at 72-73.

Defendant Baxter cites to *Atherton Condominium Apartment-Owners Assn. Board of Directors*, 115 Wn.2d 506, 799 P.2d 250 (1990)

for the proposition that the Eisenhardts had a duty to inquire further if they discovered evidence of a defect. That case states that although a fraudulent concealment claim may exist even though the purchaser makes no inquiries which would lead him to ascertain the concealed defect, in those situations where a purchaser discovers evidence of a defect, the purchaser is obligated to inquire further. *Atherton* at 525 (citing to *Puget Sound Serv. Corp. v. Dalarna Management Corp.*, 51 Wn.App. 209, 752 P.2d 1353, review denied, 111 Wash.2d 1007 (1988)). In this case, unlike *Atherton*, the Eisenhardts made further inquiry of Defendant Baxter, and were specifically told there were no issues outside of what Ms. Baxter had disclosed.

Further, review of the issues identified in the Jobe report and comparison to those issues cited within the meeting minutes the Eisenhardts did receive allowed the court to determine that the minutes referred to a different set of issues, most of which were resolved prior to purchase. CP 407-414. The Eisenhardts do not deny knowledge of the leaks in the stairwell windows, or the cracks in the condominium unit which they were purchasing. However, Defendant's argument ignores one basic *undisputed* fact. The Eisenhardts, along with their real estate agent Bobbie Nutter, specifically asked Defendant Baxter whether any further issues with the condominiums existed when they met in Defendant

Baxter's unit on March 10, outside of the stairwell windows. CP 110, 140, 210. In her deposition testimony, as outlined above, Ms. Baxter acknowledged that she replied there were no other issues. CP 391, 377-378; see Deposition of Marilyn Baxter, Vol. 2, 50:11-25; 51:1-21. Defendant cannot cite a single piece of law that states that a purchaser must inquire even further after receiving oral assurances from the seller, along with written assurances in the Form 17, none of which advise of any further issues.

iii. The Eisenhardts Can Maintain An Action for Misrepresentations Contained Within the Form 17

Defendant next argues that the trial court erred to the extent it allowed representations in the Form 17 to form the basis for the Eisenhardts' negligent misrepresentation claims. The basis for Baxter's assertion is that the CPSA was a fully integrated contract and the Form 17 has no effect in this matter. This contention is misplaced and incorrect.

RCW 64.06.070 provides as follows:

Except as provided in RCW 64.06.050, nothing in this chapter shall extinguish or impair any rights or remedies of a buyer of real estate against the seller or against any agent acting for the seller otherwise existing pursuant to common law, statute, or contract; nor shall anything in this chapter create any new right or remedy for a buyer of residential real property other than the right of rescission exercised on the basis and within the time limits provided in this chapter.

(emphasis added). In *Brown v. Johnson*, 109 Wn.App 56, 34 P.3d 1233 (2001), a seller provided false information on a seller disclosure form relative to the condition of the property, including issues relative to water problems, septic and permitting. When the buyer discovered the problems, she brought suit against the seller and others for misrepresentation. On appeal, the Court of Appeals noted that: “Brown's action for misrepresentation arises out of the parties' agreement to transfer ownership of Johnson's home to Brown.” *Brown*, 109 Wn.App at 59. The court addressed the exact issue that the Defendant raised in her response and in footnote 5, where the court stated:

Johnson's contention that Brown's claim arises solely out of the disclosure statement is not accurate. In fact, the action is for common law misrepresentation of which Johnson's failure to disclose is but one act among several acts and omissions by Johnson culminating in the jury's verdict for Brown.

Id.

Similarly, Defendant Baxter's recitation to RCW 64.06.050 is not controlling, as it prevents liability for error, inaccuracy and omissions if the seller had no knowledge of the error, inaccuracy, or omission. Here, Defendant Baxter explicitly admitted that the Form 17 was inaccurate. CP 151-152 (Deposition of Marilyn Baxter, Vol. 1, 92:12-25; 93:1-25; 94:1-

11). Because Defendant Baxter knew she was inaccurately completing the Form 17, RCW 64.06.050 is inapplicable.

B. SUMMARY JUDGMENT ON FRAUDULENT CONCEALMENT WAS PROPER

i. Fraudulent Concealment was Proven by Clear, Cogent, and Convincing Evidence

Defendant next goes on to state that the Eisenhardts did not prove their case for fraudulent concealment by clear, cogent, and convincing evidence. Baxter's argument is again misplaced.

In *Alejandre v. Bull*, supra the court listed the elements of fraudulent concealment as follows:

- (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.

Alejandre, at 689. In addition, the defect complained of must "substantially affect adversely the value of the property or operate to materially impair or defeat the purpose of the transaction." *Atherton*, at 524 (citing to *Mitchell v. Straith*, 40 Wn.App. 405, 411, 698 P.2d 609 (1985); and *Luxon v. Caviezel*, 42 Wn.App. 261, 264-65, 710 P.2d 809 (1985)). Defendant Baxter argues that the Eisenhardts failed to meet two of those elements: that they had no knowledge of the defects and that a

careful, reasonable inspection would not have revealed those defects. Analysis of the Eisenhardt's situation reveals that they meet each of the elements outlined by *Alejandre* and previous case law.

Defendant cites *Puget Sound Serv. Corp. v. Dalarna*, 51 Wn.App. 209, 752 P.2d 1353 (1988) for the proposition that once evidence of water intrusion is apparent to a buyer, they have a duty to make inquiry and are precluded from making a claim for failure to make that inquiry. In *Puget Sound Serv. Corp. v. Dalarna*, the purchaser bought an apartment building that had a well known history of water leaks and repairs. *Id.* at 210. Indeed, the buyer's inspector prior to purchase identified the leaks, and stated that the evidence of the leaks was readily observable. *Id.* at 211. In bringing suit, the purchaser argued that although they were aware of some evidence of leaks, the seller's failure to disclose the extent of the leaks constituted constructive fraud by nondisclosure. *Id.* at 213.

Puget Sound Serv. Corp. v. Dalarna is not applicable when there is no readily discernable property defect. Thus, the case is inapplicable to the multiple issues identified in the Jobe report, which report was admittedly not disclosed and which defects were not readily discernable without intrusive testing. Further, it is important to note that the *Dalarna* case dealt with essentially a single property defect – water leaks, albeit extensive ones. Here, the Eisenhardts complain that each of the issues

identified in the Jobe report were not disclosed to them, with the exception of the common area windows. Those defects do not concentrate solely on leaks. Thus, the court's ruling in *Dalarna* is not controlling here.

Defendant Baxter again cites to the receipt of meeting minutes that allegedly disclosed defects that Baxter admittedly failed to disclose. Defendant's assertion is simply flawed, as the issues identified in those minutes were largely rectified at the time of sale, were not at issue at the time of the transaction with the Eisenhardts, and also were largely different than that evidenced by the Jobe report. CP 407-414. The Eisenhardts, through their inspector, conducted an inspection that did not reveal any issues other than the common area windows. CP 111, 210-211. Defendant Baxter chose not to reveal any further information other than the common area windows, despite her wealth of knowledge.

ii. The Economic Loss Rule Does Not Bar the Eisenhardts' Fraudulent Concealment Claim.

Defendant Baxter next argues that the economic loss rule should apply to the Eisenhardts' claims for fraudulent concealment, and thus summary judgment on that issue is not proper. Defendant argues that fraudulent concealment does not require the same intent as fraud, and thus should be subject to the same restrictions on claims for negligent and intentional misrepresentation. Defendant's argument once again fails

since the parties specifically contracted to allow claims for negligent errors, omissions, and inaccuracies. In doing so, the parties agreed to allow a remedy that would otherwise be barred under the economic loss rule.

Defendant Baxter argues that the economic loss rule should be extended to prohibit claims for fraudulent concealment. Defendant Baxter's argument is nonsensical, given the clear mandate provided by the court in *Alejandre v. Bull*, *supra*. Therein, the court specifically determined that the economic loss rule does not bar a claim for fraudulent concealment. The court stated as follows:

In *Atherton*, we rejected the plaintiff's claim of negligent construction as barred by the economic loss rule, but in the same opinion held that there was an issue of fact as to whether the defendant had fraudulently concealed construction practices violating the building code and therefore the trial court had erred in dismissing the plaintiffs' claim for fraudulent concealment on a motion for summary judgment. *Atherton*, 115 Wash.2d at 523-27, 799 P.2d 250. Thus, under *Atherton*, **the Alejandres' fraudulent concealment claim is not precluded by the economic loss rule.**

Id. at 689 (emphasis added) (citing to *Atherton Condominium Apartment-Owners Assn. Board of Directors*, 115 Wn.2d 506, 799 P.2d 250 (1990)). This directive is mirrored in subsequent case law, wherein the court allowed claims for fraudulent concealment to proceed. See *Carlisle v. Harbor Homes, Inc.*, 147 Wn.App. 193, 204-205, 194 P.3d 280 (2008);

Stieneke v. Russi, 145 Wn.App. 544, 560-561, 190 P.3d 60 (2008). The economic loss rule does not apply to claims for fraudulent concealment, and the trial court's decision as to fraudulent concealment should not be overturned on that basis.

iii. The Eisenhardts Meet the Justifiable Reliance Element of Fraudulent Concealment

Similar to her argument in relation to negligent misrepresentation, Defendant Baxter again argues that the Eisenhardts cannot meet the justifiable reliance element required in a claim for fraudulent concealment. As with her claims in relation to negligent misrepresentation, Defendant's position is similarly flawed here.

The Eisenhardts, along with their real estate agent, specifically asked the Defendant whether there were any additional issues outside of the common area windows she listed on the Form 17, to which she specifically said no. CP 110, 140, 210. Defendant Baxter later acknowledged in deposition that this was not the case. Further, the Eisenhardts hired an inspector, who noted no other conditions outside of what Defendant Baxter had already revealed. Any further inspection would likely have required intrusive testing, which goes well beyond what is required of a buyer in light of representations from a seller that the property has no issues. Defendant Baxter's argument seems to imply that

despite specific assurances received from her, the Eisenhardts should have continued to investigate in order to prove that she was a liar, based on veiled references in meeting minutes that she argues should have alerted them to the significant issues with the building. In effect, she seems to argue that although she lied about the condition of the building, the Eisenhardts' failure to discover her lies prevents them from making a case against her.

C. THE COURT'S DECISION ON CONSTRUCTIVE FRAUD MUST STAND

Defendant Baxter argues that the court made a specific finding as to constructive fraud. The court referenced constructive fraud in its Opinion and Order on Reconsideration. CP 451-55. The Court also referenced that it made a finding of constructive fraud in its Memorandum Opinion and Order on Entry of Judgment. CP 704. Notwithstanding, it is important to note that the court references the elements of fraudulent concealment in its Opinion and Order on Reconsideration when referring to its finding of constructive fraud. CP 453. Thus, although the court may have indicated it made a finding of constructive fraud in its opinion, that finding was made based on the Eisenhardts' proof of the elements of fraudulent concealment by clear, cogent, and convincing evidence. As

argued above, a finding of fraudulent concealment was warranted and should not be overturned.

D. A CONTINUANCE UNDER CR 56(f) WAS NOT NECESSARY

In response to the Eisenhardts' Motion for Summary Judgment, Defendant Baxter requested a continuance of the hearing under CR 56(f). CP 298-314. Defendant's counsel submitted a Declaration in support of the request. CP 315-317. The court denied Defendant's request, and specifically stated in its oral ruling that a CR 56(f) continuance was not appropriate since there had been time prior to the motion to obtain the requested experts, and even with a continuance, no material issue of fact would be raised. RP 36:9-14. The court made additional specific findings mirroring its oral opinion in its Opinion and Order on Reconsideration. CP 451-455. The Court did not abuse its discretion in making that decision.

A trial court has considerable latitude in managing its court schedule to ensure the orderly and expeditious disposition of cases. *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn.App. 125, 129, 896 P.2d 66 (1995); *Wagner v. McDonald*, 10 Wn.App. 213, 217, 516 P.2d 1051 (1973). The consideration of whether or not to grant continuance pursuant to CR 56(f) is no different and is left to the sound discretion of the trial

court. *Lewis v. Bell*, 45 Wn.App. 192, 196, 724 P.2d 425 (1986). Pursuant to CR 56(f), a motion for a continuance should not be granted when: “1) the moving party does not offer a good reason for the delay in obtaining the evidence; 2) the moving party does not state what evidence would be established through the additional discovery; or 3) the evidence sought will not raise a genuine issue of fact.” *Cogle v. Snow*, 56 Wn.App. 499, 508, 784 P.2d 554 (1990). Here, Defendant offered no good reason for delay in obtaining a home inspection expert. She offered no good explanation as to why she has not previously deposed the Eisenhardts, or conducted the deposition of the Eisenhardts’ home inspector, as requested at the hearing. Defendant Baxter had well over a year in order to identify which parties and witnesses to depose, and only engaged in limited discovery despite being deposed twice herself. Although her attorney who appeared and opposed the summary judgment motion was new to the case as associated counsel, Defendant Baxter was ably represented by her initial attorney at all times. CP 431.

E. DEFENDANT IS LIABLE FOR ATTORNEY’S FEES

Defendant Baxter argues that she cannot be liable for attorney’s fees in the event the court upholds the trial court’s decision in granting summary judgment. Defendant’s position is baseless.

i. An Award of Rescission Does Not Bar Attorney’s Fees

The basis for fees in this case arose from the Purchase and Sale Agreement between the parties. Pursuant to paragraph q, under General Terms in the Purchase and Sale Agreement, “. . .if the Buyer or the Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorney’s fees.” CP 55, 668. Fees are also provided under RCW 4.84.330, which states as follows:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section “prevailing party” means the party in whose favor final judgment is rendered..

RCW 4.84.330. Defendant argues that because rescission was awarded, the contract is void, and Plaintiffs may therefore not claim the right to fees arising from the contract. Defendant’s argument is severely misplaced.

The purpose of rescission is to return the parties to the position they would be in had the contract not occurred. “Rescission means to abrogate or annul and requires the court to fashion a remedy to restore the

parties to the relative positions they would have occupied if no contract had ever been made.” *Busch v. Nervik*, 38 Wn.App. 541, 547, 687 P.2d 872 (1984). Just as annulling the contract is to put the parties in their pre-contractual position, so should an award of attorneys’ fees. The Eisenhardts would not have even expended attorneys’ fees and costs on this lawsuit, but for Defendants’ actions herein.

Ample support for the Eisenhardts’ fees request is found in case law. In *Bloor v. Fritz*, 143 Wn.App. 718, 180 P.3d 805 (2008), the appellate court not only awarded rescission of a purchase and sale agreement when the plaintiffs discovered the home they purchased had been used for manufacturing methamphetamine, but also awarded attorney’s fees pursuant to the contract between the parties. *Id.* at 740, 746-747. In *Hackney v. Sunset Beach Investments*, 31 Wn.App. 596, 644 P.2d 138 (1982), the court reversed the trial court’s refusal to award attorney’s fees incurred on a rescission action pursuant to a provision contained within the purchase and sale agreement and under RCW 4.84.330. Even when the underlying contract itself is determined to be void and unenforceable, attorneys’ fees must be awarded to the prevailing party when the underlying grounds for the lawsuit are for breach of contract and there is an attorneys’ fee provision in the contract. *Stryken v. Panell*, 66 Wn.App. 566, 832 P.2d 890 (1992) (award of attorney’s fees to

purchaser after rescission of purchase and sale agreement based upon RCW 4.84.330).

An award of attorneys' fees and costs is mandatory when there is a contractual provision providing such, and the only discretion the court may impose concerns the amount of said award. *CHD, Inc. v. Boyles*, 138 Wn.App. 131, 157 P.3d 415 (2007), *review denied* 162 Wn.2d 1022, 178 P.3d 1033. Because the contract provided for fees, voiding that contract by rescission does not abrogate the right to fees on that contract. The only discretion the court had was to the amount awarded.

ii. Attorney's Fees Are Appropriate For Claims of Fraudulent Concealment

Defendant Baxter argues that the Eisenhardts' claims for negligent misrepresentation and fraudulent concealment do not arise from the contract and therefore cannot benefit from the attorney's fees provision in the contract. Defendant's argument ignores the contract provisions which specifically allow for claims based upon negligence. Specific contract term 9 retained a remedy for the Seller's negligence. CP 52. General Term y provided in part "If Seller provides Buyer with a disclosure statement pursuant to RCW 64.06 (Form 17) and if, in Specific Term No. 9, the parties agree that the Buyer will have a remedy for economic loss resulting from negligent errors, inaccuracies or omissions in Form 17, then

Buyer may bring an action in tort for negligent misrepresentation against Seller. . .” CP 56, 668. Thus, the Eisenhardts’ claims specifically arise from contract, even though they are based in tort. Based on such, as well as *Bloor v. Fritz, supra*, the Eisenhardts are not robbed of the attorney’s fees provision of that contract.

F. THE TRIAL COURT IMPOSED THE PROPER INTEREST RATE

Defendant Baxter argues that the trial court imposed the wrong interest rate of 12%, and that the proper interest rate should be the significantly lower rate for a judgment based on tort under RCW 4.56.110(3). To characterize the claims against Defendant as solely arising in tort is ridiculous. The judgment entered against Defendant is for more than just tort. Specifically, the claims arise from fraudulent concealment and breach of contract, as well. As argued extensively, the Eisenhardt’s right to pursue claims for negligent misrepresentation and fraud were specifically preserved by the contract between the parties.

Based on the court’s finding that the action arose from the agreement between the parties, RCW 4.56.110(3) is not applicable. Rather, RCW 4.56.110(4) is the appropriate provision. It provides as follows:

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.

Under RCW 19.52.020, the applicable rate would be 12%, as requested by Plaintiff in the proposed judgment. It is the responsibility of the trial court to enter a judgment which complies with the statute governing interest rate on judgments. *Safeco Ins. Co. of America v. JMG Restaurants, Inc.* 37 Wn.App. 1, 680 P.2d 409 (1984). Here, the trial court determined the proper interest rate, and that judgment must stand.

G. THE MOTION FOR RECONSIDERATION WAS PROPERLY DENIED

Defendant argues that her motion for reconsideration was improperly denied. The appellate court’s 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 based upon untenable grounds. *Id.* For all the reasons outlined above, the court’s decision on its motion for reconsideration should not be

overturned. Defendant Baxter failed to establish grounds for a continuance under CR 56(f), and further failed to raise genuine issues of material fact in response to the Eisenhardts' motion for summary judgment. The trial court did not abuse its discretion in failing to find otherwise in its Opinion and Order on Reconsideration. CP 451-455.

H. THE EISENHARDTS ARE ENTITLED TO FEES ON APPEAL

Pursuant to the contract provisions of the Purchase and Sale Agreement between the parties and RCW 4.84.330, the Eisenhardts were awarded fees as the prevailing party below. Upon successful defeat of Defendant Baxter's appeal, they are entitled to fees on appeal pursuant to RAP 18.1.

I. NEW FACTS AND ARGUMENTS SHOULD NOT BE CONSIDERED ON APPEAL

Baxter inappropriately introduces new information that was not presented at Summary Judgment. These new facts center on representations that Ms. Baxter has now been diagnosed with Alzheimer's disease, presumably as an excuse as to her abhorrent behavior. Brief of Appellant p. 7.

New facts and arguments relating to those new facts cannot be considered for the first time on appeal. *Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978); *Martin v. Municipality of Metropolitan Seattle*,

90 Wn.2d 39, 40, 578 P.2d 525 (1978). Defendant Baxter first provided information as to her alleged condition to the trial court well after the court rendered its decision on summary judgment decision, in support of a motion to modify an order granting supplemental proceedings. CP 826-831. Information as to Defendant Baxter's condition was not considered by the trial court in relation to the Eisenhardt' motion for summary judgment, and therefore has no place on appeal here. RAP 9.12 supports this conclusion, which provides a special rule for submission of the record following summary judgment. It provides as follows:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

RAP 9.12 (emphasis added). Reference to Baxter's alleged condition should be disregarded.

J. THE TRIAL COURT ERRED IN DISMISSING THE REMAINING DEFENDANTS FROM THE SUIT

In its Memorandum Opinion and Order on Entry of Judgment, the court effectively dismissed the remaining defendants from suit in

awarding rescission to the Eisenhardts. Specifically, the court stated as follows:

By granting rescission of the CPSA and consequent judgment against Ms. Baxter, the court will attempt to place plaintiffs in a position they were in had no CPSA been signed and as if no sale took place. *Hornback v. Wentworth*, 132 Wn.App. 504, 513, 132 P.3d 778 (2006). This effectively eliminates an element of every cause of action the plaintiffs might have against the other parties, as the rescission of the contract eliminates the element of damages from their cause of action against the officers and agents of the homeowner's association and from their own real estate agents.

CP 666. The court effectively, sua sponte, dismissed the other defendants under the premise that the transaction did not occur and therefore the other defendants had no hand in liability. This decision only applies well in theory, but in reality, the other named defendants did have in their own liability and must not be dismissed. Furthermore, rescission does not wipe the slate clean under Washington law; therefore this decision was in error.

Rescission of the condominium purchase and sale agreement should have no effect on the claims against the HOA defendants, as Washington decisions reject the idea that the doctrine of election of remedies bars actions against third parties. *Wolarich v. Van Kirk*, 36 Wn.2d 212, 216, 217 P.2d 319 (1950) (“...[T]he doctrine of election of remedies cannot be applied between one of the parties to a contract and a third person, a stranger thereto, since it is applicable only to the parties to

the contract.”); *Godefrey v. Reilly*, 146 Wn. 257, 264, 262 P. 39 (1928). (“[T]he doctrine of election of remedies cannot be applied between one of the parties to a contract and a third person, a stranger thereto, since it is applicable only to the parties to the contract. *20 C. J. 18.*”).

In two recent Washington decisions involving real estate, the remedy of rescission was employed against the seller, while claims for damages were simultaneously litigated against persons not parties to the real estate purchase agreement. See *Jackowski v. Borchelt*, 151 Wn.App. 1, 209 P. 3d 514 (2009), *review granted*, 168 Wn.2d 1001 (2010); *Bloor v. Fritz*, 143 Wn.App. 718, 180 P. 3d 805 (2008). In *Bloor v. Fritz*, in addition to awarding the remedy of rescission of the transaction against the seller, the trial court also awarded the purchasers a range of damages against the realtors involved in the transaction, including lost earnings, replacement of personal property, impairment of credit, emotional distress, and Consumer Protection Act damages. *Bloor* illustrates how the relief afforded by rescission of a real estate transaction may not exhaust a purchaser’s range of damages against persons not parties to the purchase and sale agreement. Further, the appellate court in *Bloor* affirmed the trial court’s awarded attorneys fees against the realtor and the seller jointly and severally. *Id.* at 747. This demonstrates that joint and several liability

applies in cases dealing with fraudulent concealment and negligent misrepresentation, notwithstanding a rescission remedy.

Paragraphs 3.1 and 3.4 of the judgment explain the items of damage included therein. CP 692. Those paragraphs do not include the elements of damage requested in paragraph 3.17 of the second amended complaint: “Plaintiffs also seek damages for any costs related to relocation, moving expenses, loss of work, etc., ...” CP 45. Further, the Eisenhardts also sought claims under the Consumer Protection Act that are similarly not eliminated by rescission. CP 49. Thus, the trial court’s conclusion that rescission has eliminated the element of damages from plaintiffs’ claims against the HOA defendants is not accurate. This is especially important considering Defendant Baxter’s inability and refusal to comply with the court’s judgment for rescission.

The Eisenhardts should have the opportunity to collect damages they cannot recover from Defendant Baxter from the remaining defendants due to those defendants joint and several liability for the harm caused to the Eisenhardts, as they were acting in concert with, or as an agent of Defendant Baxter. RCW 4.22.070. Because Baxter refuses to comply, the Eisenhardts’ remedy of rescission is not realized. Those additional named defendants participated in the property misrepresentation and were negligent in the transaction and so, in the event the Eisenhardts are unable

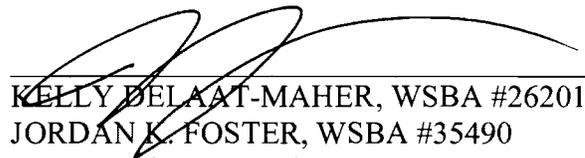
to be made whole due to Baxter's refusal to comply, the additional defendants should share in the shortfall. The Eisenhardts only seek to be made whole, not receive double recovery. The court's effective dismissal of those defendants should be remanded so that the Eisenhardts can proceed to trial against those remaining defendants.

VI. CONCLUSION

Based on the foregoing, the Eisenhardts request that Defendant Baxter's appeal be denied, that the court affirm the trial court's decision on Summary Judgment against her, and that the court award fees and costs on appeal. The Eisenhardts request that the trial court's effective elimination of their causes of action against the remaining defendants be reversed and remanded for further proceedings against those defendants.

RESPECTFULLY SUBMITTED this 30 day of September, 2010.

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CERTIFICATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on this 30th day of September, 2010, I caused to be delivered a true and correct copy of the foregoing Brief of Respondent/Cross Appellant to the following via U.S. mail, postage prepaid, and via e-mail transmission:

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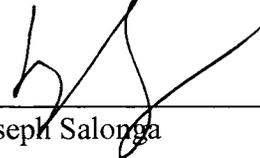
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COURT OF APPEALS
DIVISION II

DATED this 30th day of September, 2010.

MAHER AHRENS FOSTER SHILLITO, PLLC



Joseph Salonga