

No. 44430-5-II

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

SHELLY and JOHN DOE FOREST, Respondent

v.

ERIC and SUSIE KIM, a married couple;
Appellants

SUPERIOR COURT CASE NO. 09-2-00769-0

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

APPEAL FROM LEWIS COUNTY SUPERIOR COURT
THE HONORABLE NELSON E. HUNT

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERRORS

A. The Trial Court erred by granting the Plaintiff's motion for summary judgment when there are genuine issues of material facts still in dispute.

B. The Trial Court Erred in awarding sanctions under Civil Rule 11 because there was a clear factual and legal basis for this action, and the action was not filed for any improper purpose.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether the Trial Court erred by granting the Plaintiff's motion for summary judgment when there are genuine issues of material facts still in dispute?

B. Whether the Trial Court erred by awarding sanctions against the Appellants and their attorney when there was a clear factual and legal basis for the action and where the action was not filed for any improper purpose?

III. STANDARD OF REVIEW

A. Summary Judgment

This Court reviews a grant or denial of summary judgment de novo. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 230, 119 P.3d 325 (2005). Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291,

300-01, 45 P.3d 1068 (2002). The Court must consider the evidence in the light most favorable to the nonmoving party. *Stansfield v Douglas County* 107 Wn App 1,27 (2001)

B. Civil Rule 11 Sanctions

This Court also reviews a Trial Court's decision to impose CR 11 sanctions for abuse of discretion. *Doe v. Spokane and Inland Empire Blood Bank*, 55 Wash.App. 106, 110, 780 P.2d 853 (1989); *In re Guardianship of Laskey*, 54 Wash.App. 841, 851-52, 776 P.2d 695 (1989); *Cooper v. Viking Ventures*, 53 Wash.App. 739, 742, 770 P.2d 659 (1989). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Laskey*, at 854, (citing *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)).

IV. SUMMARY OF ARGUMENT

The Trial Court granted the Respondent's Motion for Summary Judgment on December 21 2012. See Clerk's Papers pp 223-226. However, in their ruling, the Trial Court erred in stating that the Respondent entered into a new agreement based on the Addendum because that new agreement was not supported by new consideration. Instead, the new agreement required new consideration which was not provided for in the initial agreement. The Trial Court also erred because they ruled that there was no dispute as to a material fact relating to the

whether or not the drain system was actually installed when there were disputed opinions on that point.

Finally the Trial Court also erred because it abused its' discretion when they awarded sanctions against Appellants and Appellants' counsel when there was sufficient factual support for the Appellants' action based on the statement of numerous expert reports and this action was not filed for an improper purpose, but to repair the damage sustained to the Appellants' property.

V. STATEMENT OF THE CASE

The Respondent, Shelly Forest, built a house which is located at 510 SE Hilltop Drive, Chehalis Washington. The Appellants, the Kims entered into a contract to purchase the house at 510 SE Hilltop Drive in Chehalis Washington on the conditions that Respondent install a proper draining system and address standing water in the crawl space. Respondent made statements and representations to the Appellants that a proper draining system had been installed and that the water in the crawl space was addressed.

Based on the statements and representations of Respondent, the Appellants relied on those statements and closed the sale for the purchase of the property located at 510 SE Hilltop Drive in Chehalis Washington.

On or about December 15, 2008, following a normal rain, water filled a portion of the Appellants' house in the basement and the crawl space area. Zdenka Trnka, an engineer inspected the property and he made the determination that the water problem occurred because a proper draining system was not installed to allow the water to drain properly and that there was a defect in the design and construction of the alleged drainage system which was not properly installed as claimed by the Respondent. See Clerk's Papers pp 155-160. Also, Roddy Nolten, another engineer, stated that the sub grade was not prepared as customary in construction and that a substandard drainage system was the cause of the water problems. See Clerk's Paper pp 161-171. The Appellants obtained an estimate to determine how much it would cost to repair the damage to their property and to repair the drainage system. See Clerk's Papers pp 172-177.

A. Inaccurate Factual Assumptions

The Respondent implies in her declaration that the Appellants removed soil from around the house which exposed a waterline that is identified in Exhibit 5. See Clerk's Papers pp 227-231. However, this is incorrect according to the facts presented by the Appellants. The Appellants did not remove any soil, they did not dig up any waterlines and they did not remove any dirt around the French Drain or the house. See Clerk's Papers pp 178-188. The pictures taken by Mr. Martin and

Respondent depict the same pipe appears in both pictures. Mr. Martin's notes reference a number of instances where the soil is sloping toward the foundation of the house and this was noted before the Appellants did any landscaping work. See Clerk's Papers pp 189-204. These are significant and important factual disputes that would constitute a genuine issue of material fact; and the law mandates this Court reverse the granting of the Respondent's motion for summary judgment.

Also Trent Lougheed in his declaration bases his conclusion on the same false presumptions. He stated:

"I was **informed by Ms. Forest** that the waterline was completely buried at the time of the completion of construction, but landscaping had been done that exposed the waterline.

The waterline, in its current condition is at risk of being frozen and could cause a water leak if it freezes or the water line is cracks due to exposure to the elements.

"It is not possible to know exactly what caused the blockage from the video that I saw." (emphasis added)

See Clerk's Papers pp 85-90.

Mr. Lougheed's only knowledge of this information was based upon hearsay, related to him by the Respondent. The Appellants' did not expose the waterline pipe and therefore that portion of Mr. Lougheed's declaration can not be considered. There is also a dispute that the Appellants did any digging. This material fact is set forth in Eric Kim's Declaration. See Clerk's Paper pp 178-188. Furthermore, even after his

summary, Mr. Lougheed still stated, **“It is not possible to know exactly what caused the blockage from the video that I saw.”** (emphasis added).

Finally, the Declarations of Zdenka Trnka and Roddy Nolten directly contradicted this conclusion, thereby creating a genuine issue of material fact that should have prevented the Trial Court from granting the Respondent’s motion for summary judgment. (See Clerk’s Papers pp 155-160 and pp 161-171).

After normal rain, the Appellants had the property inspected and it was determined that the source of the water in the Appellants’ basement and crawl space was coming from the entrance of the home and the water was running down under the crawl space and pooling there. The water then accumulated in the crawl space and once the water reached a certain level in the crawl space, it flooded the Appellants basement. This water problem was noted in the inspection performed by Kim Martin (see Clerk’s Papers pp 189-204) and the Respondent was required to resolve the problem. Apparently the Respondent deceived the Appellants into believing that the necessary repairs were made pursuant to the agreement when in fact they were not.

VI. ARGUMENT AND AUTHORITY

A. Summary Judgment Standards

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Civil Rule 56(c). The Court considers the evidence and the reasonable inferences therefrom in a light most favorable to the nonmoving party. *Stansfield v. Douglas County*, 107 Wn. App. 1, 27 P.3d 205 (2001). Once the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth adequate specific facts that sufficiently rebut the moving party's contentions and disclose an existence of a material issue of fact. *Drombrowsky v. Farmers Ins. Co.*, 84 Wn. App. 245, 253 928 P.2d 1127 (1996).

Genuine issues of material fact are still in dispute in this case regarding whether the Respondent properly installed the drainage system and whether they addressed the water problem in the crawl space on the Appellants' property. The Declarations of Zdenka Trnka and Roddy Nolten stated the drainage system was not properly installed. (See Clerk's Papers 155-160 and 161-171). Therefore because this is a material fact to this case, summary judgment was completely improper and the Court must deny the

Respondent's motion for summary judgment.

B. Breach of Contract

Any unjustified failure to perform when performance is due is a breach of contract which entitles the injured party to damages. *Colorado Structure, Inc. v. Insurance Co. of West*, 161 Wn. 2d 577, 589, 167 P.3d 1125 (2007). The Respondent promised to repair the water problem found on the inspection report and she failed to do so thereby breaching her agreement and causing the Appellants to suffer damages as a result. See Clerk's Papers pp 155-160 and pp 161-171 and pp 172-177.

C. The Addendum "Agreement" Made Was Not Supported by New Consideration and Therefore was an Illusory Contract.

Respondent claims that she and the Appellants renegotiated the warranty in the addendum to one year. See Clerk's Papers pp. 178-188. The Addendum, as set forth by the Respondent, altered the terms of the initial agreement of the parties and therefore required new consideration. Consideration is "any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange." *King v. Riveland*, 125 Wash.2d 500, 505, 886 P.2d 160 (1994). Consideration is a bargained-for exchange of promises. *Williams Fruit Co. v. Hanover Ins., Co.*, 3 Wash.App. 276, 281, 474 P.2d 577 (1970). The Restatement (Second) of Contracts states:

1) To constitute consideration, a performance or a return promise must be bargained for.

2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

(3) The performance may consist of

(a) an act other than a promise, or

(b) a forbearance, or

(c) the creation, modification, or destruction of a legal relation.

Restatement (Second) of Contracts § 71(1)-(3) (1981).

Courts generally do not inquire into the adequacy of consideration and instead utilize a legal sufficiency test. *Browning v. Johnson*, 70 Wash.2d 145, 147, 422 P.2d 314, 430 P.2d 591 (1967). Legal sufficiency "is concerned not with the comparative value but with that which will support a promise." *Id.*

The addendum eviscerated the warranty that was given to the Appellants. The Respondent did not offer anything in exchange for the reduced warranty except an agreement to complete the drain system and in the future to address the water in the crawl space. The Respondent was already obligated to complete these items as part of the construction project and this was an illusory promise. An 'illusory promise' is a purported promise that actually promises nothing because it leaves to the speaker the choice of performance or nonperformance. When a 'promise'

is illusory, there is no actual requirement upon the 'promisor' that anything be done because the 'promisor' has an alternative which, if taken, will render the 'promisee' nothing. When the provisions of the supposed promise leave the promisor's performance optional or entirely within the discretion, pleasure and control of the promisor, the 'promise' is illusory. *Interchange Associates v. Interchange, Inc.*, 16 Wn.App. 359, 360-61, 557 P.2d 357, (1976). As stated in Restatement of Contracts § 2, comment B (1932):

An apparent promise which according to its terms makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise, although often called an illusory promise.

An 'illusory promise' is neither enforceable nor sufficient consideration to support enforcement of a return promise.

Interchange Associates at 361, citing *Sandeman v. Sayres*, 51 Wash.2d 539, 314 P.2d 428 (1957); *Winslow v. Mell*, 48 Wash.2d 581, 295 P.2d 319 (1956); *Spooner v. Reserve Life Ins. Co.*, 47 Wash.2d 454, 287 P.2d 735 (1955); *Calkins v. Boeing Co.*, 8 Wash.App. 347, 506 P.2d 329 (1973); 1 S. Williston, A Treatise on the Law of Contracts § 104 (3d ed.1957); 1 A. Corbin, Corbin on Contracts § 145 (1963).

In the Addendum, the Respondent agreed to complete the drain system and address the water problem in the crawl space. See Clerk's Papers pp 178-188. Something she was already obligated to do under the contract to build the house and under the applicable building codes. Therefore, her "promise" to repair the drain and address the water in the crawl space was a promise she was already obligated to perform and thus not a promise at all. Therefore, any agreement purported to have been made in the Addendum based on the promise to resolve the drain system and the water problems in the crawl space was not enforceable and therefore did not alter the terms of the original agreement, nor the warranty in place on the property under the original agreement. Furthermore, it did not relieve the Respondent of her duty to properly install the drain and fix any drain problems noted in the crawl space and elsewhere; and as a result, the Court can not grant the Respondent's motion for summary based on the fact that her obligation to construct a house properly was not altered by her illusory promises.

D. Breach of Contract/Implied Warranty

As a matter of policy, Washington courts determined that:

[I]t seems apparent that a builder who puts a house on the market, brand-new and never occupied, has some responsibility to the ultimate buyer. The builder built the

thing. It was intended to be sold to a buyer for occupancy by the buyer--not as an assemblage of concrete and pieces of wood, but as a residence. It is no different from the manufacturer of an automobile. The auto should run down the road without wheels falling off and new houses should provide habitation without foundations falling apart. This court and other courts have recognized this principle. See, e.g., *House v. Thornton*, 76 Wash.2d 428, 457 P.2d 199 (1969); *Yepsen v. Burgess*, 269 Or. 635, 525 P.2d 1019 (1974); *Tavares v. Horstman*, 542 P.2d 1275 (Wyo.1975); *Petersen v. Hubschman Constr. Co.*, 76 Ill.2d 31, 27 Ill.Dec. 746, 389 N.E.2d 1154 (1979); *Dixon v. Mountain City Constr. Co.*, 632 S.W.2d 538 (Tenn.1982). See, generally, Annot., Liability of Builder-Vendor or other Vendor of New Dwelling for Loss, Injury, or Damage Occasioned by Defective Condition Thereof, 25 A.L.R.3d 383 (1969) and cases cited therein. Thus, in *House v. Thornton, supra*, we held that the sale of a new house by a vendor-builder to the first intended occupant carries with it an implied warranty "that the foundations supporting it are firm and secure and that the house is structurally safe for the buyer's intended purpose of living in it." 76 Wash.2d at 436, 457 P.2d 199.

Frickel v. Sunnyside Enterprises, Inc., 106 Wn.2d 714, 717-718, 725 P.2d 422 (Wash. 1986).

In this case, the inspection stated that the foundation of the house was compromised and that the Respondent should consult a soil or drainage contractor to correct the problem. See Clerk Papers pp 189-204. However, the Respondent did not consult any one and she claimed that she fixed the problem. See Clerk Papers pp 178-188 and Clerk Papers pp 29-84. It was determined by the engineers, however, that she did not correct

the problems and that she fraudulently mislead the Appellants into believing that she did. See Clerk Papers pp 161-171 and pp 155-160. Therefore, the Respondent breached the implied warranty she owed to the Appellants and the Court should deny the Respondent's motion for summary judgment.

E. The Discover Rule

In *McLeod v. Northwest Alloys, Inc.*, 90 Wash.App. 30, 969 P.2d 1066 (1998), the Court held that, "in applying the discovery rule, a cause of action accrues when the claimant knew, or should have known the essential elements of the cause of action". *Allen v. State*, 118 Wash.2d 753, 758, 826 P.2d 200 (1992). "The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action." *Id.* The cause of action accrues when the claimant knows, or should have known the relevant facts, "whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action." *Id.* An aggrieved party need not know the full amount of damage before a cause of action accrues, only that some actual and appreciable damage occurred. *Gazija v. Nicholas Jerns Co.*, 86 Wash.2d 215, 219, 543 P.2d 338 (1975). See also *McLeod at*1070 (1998).

Any claim under the warranty, according to the discovery rule,

would have accrued when the Appellants discovered the water in their basement in December of 2008 and this action was filed in May 2009, well within one year of the discovery of the water problem in their basement and therefore the Appellants' claims were properly and timely filed in this case within the limitation period.

F. Fraud/Intentional Misrepresentation

To sustain a finding of common law fraud, the Court in most cases must make findings of fact as to each of the nine elements of fraud. *Howell v. Kraft*, 10 Wash. App. 266, 517 P.2d 203 (1973). Those elements generally are: (1) a representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) his right to rely upon it, and (9) his consequent damage. See *Turner v. Enders*, 15 Wash. App. 875, 878, 552 P.2d 694 (1976). Also, if there was a duty to disclose information, a misrepresentation can result from subsequent non-disclosure. *Wilkinson v. Smith*, 31 Wn. App. 1, 6-7 639 P.2d 768 (1982). The Respondent told the Appellants that she fixed the drain and water problems and they relied on her statement. The Respondent knew the statement was false and the Appellants relied on the

statement and were damaged.

The Respondents claim that the existence of the drainage system can no longer be disputed. This is clearly not the case. The Declarations submitted by the Appellants all show that the Respondent did not properly install the drainage system. See Clerk Papers pp 161-171 and pp 155-160. Thus, there are significant and genuine issues of material facts still in dispute regarding whether or not the Respondent installed the drainage system and fixed the water problem in the crawl space. Summary judgment must be denied as a matter of law.

G. Negligent Misrepresentation

To prevail on a claim of negligent misrepresentation, a party must prove by clear, cogent, and convincing evidence six elements:

(1) That [the defendant] supplied information for the guidance of others in their business transactions that was false; and (2) That [the defendant] knew or should have known that the information was supplied to guide [the plaintiff] in business transactions; and (3) That [the defendant] was negligent in obtaining or communicating false information; and (4) That [the plaintiff] relied on the false information supplied by [the defendant]; and (5) That [the plaintiff's] reliance on the false information supplied by [the defendant] was *justified* (that is, that *reliance was reasonable under the surrounding circumstances*); and (6) That the false information was the proximate cause of damages to [the plaintiff]."

Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 545, 55 P.3d 619, (Wash. 2002)(*Citation omitted*).

The Respondent told the Appellants that she fixed the drain problems and they relied on her statement. The Respondent knew the statement was false and the Appellants relied on the statement and were damaged. It is obvious that fraud was established by the Appellants. Thus, Respondent is not entitled to summary judgment based on the evidence in this case.

H. Economic Loss Rule

Washington recognizes a duty owing from a builder-vendor of a newly completed residence to its first purchaser that is embodied in the implied warranty of habitability, which arises from the sale transaction. In *House v. Thornton, supra* the Court held that a new house by a vendor-builder to the first intended occupant carries with it an implied warranty "that the foundations supporting it are firm and secure and that the house is structurally safe for the buyer's intended purpose of living in it." *House v. at* 436. Here the vendor/builders, real estate broker and building contractor, constructed a residence for purpose of sale. The buyers, a husband and wife, purchased the "brand new house" with the intention of

making it their family home. In time, however, the house proved to have structural defects which rendered it unfit for further occupancy. In imposing an implied warranty of habitability or fitness upon the vendor-builders, this court, in effect, "did no more than apply a rule of common sense to the kind of transaction that recurs perhaps more than a million times annually in the country--the purchase of a brand new house." *Berg v. Stromme*, 79 Wash.2d 184, 196, 484 P.2d 380 (1971), discussing *House v. Thornton*, supra (same rationale used for adoption of implied warranty in sale of brand new automobiles). The Appellants also detrimentally relied on the Respondent's representations because they could dig up the drain to see if it was actually installed properly until after the damage occurred.

Here, there is clearly a duty owed by the Respondent to Appellants in the present case. Thus, Appellants' claims are allowed under the *House* Court's reasoning.

I. Award of Civil Rule 11 Sanctions

CR 11(a) states in pertinent part:

The signature of a party or of an attorney constitutes a certificate by him that he has read the pleading, motion, or legal memorandum; that to the best of his knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any

improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11(a). Civil Rule 11 deals with two types of filings: those lacking factual or legal basis (baseless filings), and those made for improper purposes. *Hicks v. Edwards*, 75 Wash.App. 156, 162, 876 P.2d 953 (1994), review denied, 125 Wash.2d 1015, 890 P.2d 20 (1995) (citing *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 217, 829 P.2d 1099 (1992)).

The purpose behind CR 11 "is to deter baseless filings, not filings which may have merit." *Bryant*, at 220. Accordingly, application of CR 11 requires "consideration of both CR 11's purpose of deterring baseless claims as well as the potential chilling effect CR 11 may have on those seeking to advance meritorious claims." *Bryant*, at 219. A trial court may not impose CR 11 sanctions for a baseless filing "unless it also finds that the attorney who signed and filed the [pleading, motion or legal memorandum] failed to conduct a reasonable inquiry into the factual and legal basis of the claims." *Bryant*, at 220. The court must use an objective

standard, asking "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." *Bryant*, at 220; *Doe at* 111. To avoid being swayed by the benefit of hindsight, the trial court should impose sanctions only when it is " 'patently clear that a claim has absolutely no chance of success.' " *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir.1986) (quoting *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir.1985)), cert. denied, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Bryant*, at 220.

The Appellants and their counsel filed this action because there was a factual basis for the action. As stated above, three different individuals inspected the property at different times to show that there was a problem with the drain system. See Clerk Papers pp 161-171 and pp 155-160 and pp 189-204. It was also inspected by a contractor to determine what it would cost to repair the Kim property. See Clerk Papers pp 172-177. So based on these reports, it shows that there was a factual basis for this action.

This action could not be filed for improper purposes where the Respondents committed fraud; the Appellants had incurred damages to their property that were verified and the damage was something that was

caused by an item that had already been in dispute between the Appellants and the Respondent.

In addition, the independent duty rule does not bar a tort claim involving a contract issue. See *Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co.*, 115 Wash. 2d 506, 524, 526, 799 P.2d 250 (1990). *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 826, 881 P.2d 986 (1994). This rule includes a specific exception if there is a personal injury or damage to the property of the plaintiffs. See *Atherton and Berschauer/Phillips Constr. Co. supra*. Therefore, since this rule is not a full bar on tort claims including intentional misrepresentation, tort actions are not completely excluded under this rule and because the Appellants suffered damage to their property, they felt, in good faith, that their claim was an exception to the independent duty rule; and thus their action was not without a factual basis, was not filed with any improper motives and was not frivolous.

J. Notice of Request for Sanctions.

The Defendant stated that they gave notice of their intention of requesting sanctions under CR 11 in September 2012. However, at that time, there was nothing that changed the facts under the case. It was not until the Defendant had the drain video taped in October 5, 2012, that new

evidence was discovered. However, the video tape evidence was reviewed by the Appellants and discussed with the Appellants' expert and it was determined that the video was not conclusive evidence of a functioning drain system and the thus Appellants were going to have the drain excavated as soon as they could afford to do so. However, this Court ruled on the Respondent's motion before the Appellants were able to have the drain excavated. Thus, the Appellants were continuing to investigate whether or not the drain system was properly installed when this Court ruled on the Respondent's motion for summary judgment. Also as stated above, the property was partially excavated in January 2013 and it was determined that the water problem was caused by a drain problem that allowed water to penetrate and pool in the crawl space and then flood into the Appellants' basement

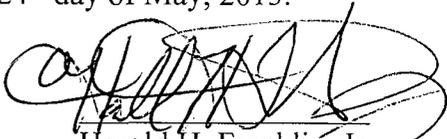
Finally, the case was filed not only against the Respondent but other Defendants as well, who agreed to settle their portion of the claim. Therefore, this Court should not award sanctions against the Appellants or their attorney under CR 11.

VI. CONCLUSION

Given the above, the Appellants would ask this Court to deny the Respondent's motion for summary judgment because there still are

genuine issues of material facts in dispute as to whether or not the Respondent installed the drainage system and fixed the water problem in the crawl space. Also, based on the record before this Court, it is clear that the Appellants investigated this incident, to determine if there was a factual basis for their claim. It is also clear that the Appellants did not bring this action for any improper purposes because it is without a doubt that their property was damaged and the damage was caused by the drain system and water problems not addressed by the Respondent that had already been a point of contention between the parties; and it is also clear that the Appellants were continuing to investigate and review the facts in the case as noted by their desire to have the drain system excavated. Given all these reasons, sanctions under CR 11 are completely inappropriate and we would ask that the Court not impose them in this case and this Court should reverse the Trial Court's decision and deny the Respondent's motion for summary judgment and their motion for sanctions under CR 11.

RESPECTFULLY SUBMITTED this 24th day of May, 2013.


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No. 44430-5-II

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

SHELLY and JOHN DOE FOREST, Respondent

v.

ERIC and SUSIE KIM, a married couple;
Appellants
SUPERIOR COURT CASE NO. 09-2-00769-0

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STATE OF WASHINGTON
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APPEAL FROM LEWIS COUNTY SUPERIOR COURT
THE HONORABLE NELSON E. HUNT

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
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ERIC and SUSIE KIM, a married couple)
Appellants,)

NO. 44430-5-II

vs.)

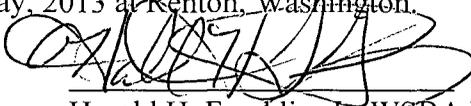
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Respondent.)

I hereby declare under the penalty of perjury under the laws of the state of Washington that I
mailed postage prepaid, a true and correct copy of the Appellants' Brief to:

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