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DIVISION II
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STATE OF WASHINGTON
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DEPUTY

No. 44430-5-II

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

ERIC and SUSIE KIM, Appellants

v.

SHELLY FOREST, Respondent

BRIEF OF RESPONDENT

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A. INTRODUCTION

The Kims filed this lawsuit on May 26, 2009. The deposition of Forest and her agent, Beckie Stephens, were taken on February 9, 2012.¹ Finally, a trial date was assigned for October 10, 2012.

The Kims filed a motion for summary judgment and scheduled a hearing on September 28, 2012. The Kims motion was denied. The trial date was continued by the court due to a conflict with a criminal proceeding.

Forest then filed her motion for summary judgment, which was heard on December 21, 2012². Forest's motion for summary judgment was granted. Forest moved for an award of attorney fees against the Kims pursuant to the terms of the Real Estate Purchase and Sale Agreement (the "REPSA"), and against the Kims' attorney, Harold Franklin, under CR 11. The trial court entered findings of fact and conclusions of law, and awarded Forest judgment against the Kims for \$21,510.25 in fees and costs, and ordered that the Kims' attorney pay \$17,688.75 of the fees and costs awarded to Forest within thirty days. This appeal was timely filed by the Kims. No supersedeas bond has been filed and no payment has been made on the judgment or pursuant to the order directing payment.

¹ For periods during the winters of 2009-10, 2010-11 and 2011-12, Forest's counsel worked remotely and was unavailable for trial, but the absences have not materially interfered with the proceedings. Notices of absences were filed in advance of the absences.

² Forest's attorney appeared at the summary judgment hearing via Court Call.

B. COUNTERSTATEMENT OF ISSUES RELATING TO ASSIGNMENTS OF

ERROR

1. Did any genuine issues of material fact remain at the time the trial court granted Summary Judgment to Respondent?
2. Did the Kims have any factual basis upon which to prosecute their action against Forest?
3. Did the Kims' attorney have evidence of a factual basis upon which to prosecute the action on behalf of the Kims?
4. Was the award of attorney's fees and costs that was made against the Kims authorized by the REPSA?
5. Was the order directing that the Kims' attorney pay a portion of the fees and costs justified under CR 11?
6. Is the Kims' appeal frivolous, and if so, should the Kims attorney be responsible with the Kims for the attorney fees and costs incurred by Forest?

C. COUNTERSTATEMENT OF THE CASE³

Shelly Forest was in the process of constructing a home in Chehalis Washington when Eric and Susie Kim made an offer to purchase the home. CP 29. The Kims and Forest were each represented by a licensed real estate agent. CP 30. The Kims agent prepared an extensive REPSA that contained numerous addendums with provisions regarding selection of materials for the home (CP 55), a construction retainer (CP 50), and a change in the term of the warranty offered by Forest (CP 57). The REPSA also contained several contingencies, including an inspection contingency. CP 30,

³ Because this case was resolved on Summary Judgment, Forest cites here only the undisputed facts and facts that are indisputable from the record.

The Kims hired KLM Enterprises, Inc., a home inspection company, to inspect the home. CP 105. The inspector, Kim J. Martin, identified an area of the home where water had accumulated in a crawl space. CP 199. The inspector recommended that the design of the drainage system be reviewed by a licensed drainage contractor. CP 199. The Kims were aware of and raised the issue of the finding of water in the crawl space because a provision in an addendum provided that “Moisture in the crawl space will be eliminated by stem wall was just done 3/25 water was used by builder, will dry. French drain will be installed.” CP 077

Forest proceeded with normal construction of the home and installed a foundation drain system according to normal building standards. CP 286. The home was approved by the City of Chehalis building Department. CP 286. Nothing indicates that the Kims ever had Mr. Martin come back to the house to inspect the french drain, and there is no evidence indicating that the drain system was ever actually inspected by the Kims or any of their experts.

The inspector had recommended to the Kims that the drainage system be inspected by an engineer to assure that it would be effective. CP 130. The Kims took no action in response to the inspector’s report and did not provide Forest with a copy of the report or make demand upon Forest. CP 288.

The REPSA specifically reduced the builders warranty on the home from four (4) years to one (1) year. CP 56-57. (Duplicate copies were filed because the original set was signed in counterparts. CP 30.) The change in the length of the warranty is initialed by both Forest and Mr. Kim. CP 57. The parties conducted a “final walk through” prior to the closing and inspected all of the items that had been listed for

correction, including completion of the “French Drain behind the stem wall”. CP 121. CP 289.

The sale to the Kims closed on March 31, 2006. CP 30. The Kims moved into the home immediately thereafter. The Kims made no complaint or otherwise contacted Forest until November, 2008, when the Kims called Forest and informed her they had discovered that water had seeped into the basement. Forest inspected the property and made recommendations to the Kims on how to address the problem. CP 287.

The Kims notified their insurer who sent an inspector to the home. CP 155. The inspector, Zdenka Trnka, P.E., viewed the home but did not excavate or test the drain system. He opined that “the standing water is also an indication that the footing drain system is non-existent or has failed⁴.” CP 160.

The Kims hired another inspector, Roddy Nolten, P.E. a month later. CP 166. Mr. Nolten also viewed the property, but he also made no excavations and conducted no tests of the drainage system. CP 167. His “conclusions” consist of a series of questions inviting further investigation, which was never conducted. CP 168. Mr. Nolten suggested that there was either no drainage system or that the drainage system had failed. CP 168. From that time on, the Kims have claimed that Forest did not install the drainage system. CP 100; 105; 106;107; 277.

After filing the complaint, the Kims allowed the case to sit idle from November, 2009, until February, 2012, when a trial date was requested. The Kims took the depositions of Beckie Stephens and Forest on February 9, 2012. Thereafter, the Kims

⁴Mr. Trnka also gave other opinions that were not supported by facts and were stricken by the trial court. The Kims have not assigned error to the trial court’s orders striking portions of the Kims evidence.

negotiated a settlement with Beckie Stephens, Forest's agent, and dismissed her from the case. The Kims have presented no evidence indicating that they or anyone acting for them has ever tested or excavated any of the drainage system.

On September 7, 2012, Forest's attorney e-mailed the Kims' attorney and informed him that there was no basis for the Kims' claim that Forest had made any misrepresentations or that the drainage system did not exist. CP 242. The Kims continued to prosecute their lawsuit, including the filing of a Motion for Summary Judgment, which was denied.

Forest then engaged an engineer and a plumber to inspect the drainage system. CP 85. The plumber ran a video camera down the drainage pipe. The video disclosed that the foundation drainage pipe had been crushed and was blocked. CP 86.

Forest then moved for summary judgment and in support of her motion filed the declaration of Forest's engineer, Trent Lougheed, P.E. CP 85-90. Lougheed declared that a foundation drainage system had been installed, but the drainage system had failed because the line had been crushed. CP 86. Based upon the absence of any history of problems prior to 2008, Forest's engineer concluded that the failure of the drainage system was caused by the crushing of the pipe, which likely occurred sometime after the winter of 2007 and before the winter of 2008 when the water intrusion was discovered. CP 87-88.

Although the Kims obtained statements from Mr. Trnka and Mr. Nolton confirming their prior reports, there is no evidence that Mr. Trnka or Mr. Nolton ever made any direct inspection of the drainage system, or that the Kims ever inspected the drainage system.

After Forest's motion for summary judgment was granted she moved for and received an award of attorney fees and costs against the Kims, pursuant to the terms of the REPSA, and against the Kims' attorney, Harold H. Franklin, Jr., pursuant to CR 11. Findings of Fact and Conclusions of Law re Award of Attorney Fees were entered, to which no assignment of error has been made. CP 268-273.

D. SUMMARY OF ARGUMENT

There are no disputed material facts that necessitate a trial of this case. The Kims' claims at the hearing on the motion for summary judgment and in this appeal are baseless and without merit. The fact that a drainage system was installed by Forest is indisputable, and the Kims have presented no evidence to indicate what Forest allegedly said or did that could conceivably constitute representations that were false.

The Kims prosecution of this lawsuit has continued for four (4) years and still they have never conducted any actual inspection of the drainage system or excavated any portion thereof. The trial court's decision that the Kims have no evidence to support their claims was correct and the trial court's determination that the Kims attorney prosecuted this case without a factual basis was also correct. Forest should be awarded attorney's fees against the Kims pursuant to the terms of the REPSA.

E. ARGUMENT

A. Standard of Review:

When reviewing an Order of Summary Judgment, this court engages in the same analysis as the trial court. *Wilson v. Steinback*, 98 Wn.2d 434, 437, 656 P.2d 1030(1982). Summary Judgment is appropriate only if the pleadings, affidavits, depositions and admissions on file show the absence of any genuine issues of material

fact and that the moving party is entitled to judgment as a matter of law. CR56(c) Like the trial court, this court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party and uphold the order if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson v. Steinbeck*, supra, at 437.

The United States Supreme Court held that summary judgment should be denied only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). This federal approach was followed in *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989), where the Washington Supreme Court held that a trial court properly granted a defendant's motion for summary judgment because the plaintiff failed to present evidence to establish even a prima facie case of medical malpractice. The Washington State Supreme Court also followed this approach in *Fischer-McReynolds v. Quasim* when it held that:

The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Where, as here, the moving party is a defendant who met this initial burden, the inquiry shifts to the plaintiff, the party with the burden of proof at trial, to produce specific facts that show the existence of a genuine issue. *Young*, 112 Wn.2d at 225, 770 P.2d 182; *Las v. Yellow Front Stores, Inc.*, 66 Wn.App. 196, 198, 831 P.2d 744 (1992). **Where there is “a complete failure of proof concerning an**

essential element of the nonmoving party's case," all other facts become immaterial and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).” *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 808, 6 P.3d 30, 34 (2000). (Emphasis added).

Review of the award of attorney’s fees and costs to Forest by the trial court is subject to review under the standard of abuse of discretion. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 114 Wn. 2d 677, 688, 790 P.2d 604 (1990). A trial court does not abuse its discretion unless it exercises its discretion in a manifestly unreasonable manner or on untenable grounds or reasons. *Progressive Animal Welfare Soc’y*, 114 Wn. 2d at 688-89.

The award of attorney fees and costs to Forest against the Kims’ attorney under CR 11 is also subject to review under the standard of abuse of discretion.

In deciding whether the trial court abused its discretion, we must keep in mind that “[t]he purpose behind CR 11 is to deter *baseless* filings and to curb abuses of the judicial system”. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218-19, 829 P.2d 1099 (1992). CR 11 is not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings. *Bryant*, at 220, 829 P.2d 1099. Courts should employ an objective standard in evaluating an attorney's conduct, and the appropriate level of pre-filing investigation is to be tested by “inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted”. *Bryant*, at 220, 829 P.2d 1099. In deciding upon a sanction, the trial court should impose the least severe sanction necessary to carry out the purpose of

the rule. *Bryant*, at 225, 829 P.2d 1099. CR 11 sanctions are not appropriate where other court rules more specifically apply. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339-40, 858 P.2d 1054 (1993).

Biggs v. Vail, 124 Wn.2d. 193, 197, 876 P.2d 448 (1994).

The trial court is required to make findings to specify the conduct for which the sanction under CR 11 is imposed. *Biggs v. Vail, supra*, at 453. Findings were entered by the trial court in this case to which no error has been assigned. On review, unchallenged findings will be considered verities and, if challenged, findings will be considered verities if supported by substantial evidence. *In re Estate of Jones*, 152 Wn.2d. 1, 8, 93 P.3d 147.

B. No Challenge of Trial Court's Evidentiary Rulings.

The Kims have not contested the trial courts evidentiary rulings regarding the Declarations that were submitted. Therefore, the record to be reviewed by this court is the same as the record that the trial court determined was admissible and considered. As stated in *Gain v. Carroll Mill Company, Inc.*, 114 Wn. 2d 254, 787 P.2d 553 (1990) at page 260: "On an appeal from a summary judgment, evidence that is absent from the materials considered by the trial judge cannot be considered on appeal. *Margoles v. Hubbart*, 111 Wn.2d 195, 199, 760 P.2d 324 (1988)."

C. The Actual Cause of the Failure of the Drain System is Irrelevant.

The trial court's decision was not based upon evidence that the Kims may have caused the crushing of the drain pipe or that they had removed any soil from around the house. The trial court's conclusion was based on the absence of any evidence at all showing Forest made any representations that were false or misleading. In the absence

of any evidence that Forest had made any false representations, the trial court properly concluded that the Kims' claims for negligent misrepresentation and fraud were without factual basis.

Likewise, the Kims' claim of breach of contract was without factual basis because the alleged defect was not claimed by the Kims until long after the agreed warranty period had expired. The Kims have the burden of proof, and since they have made absolutely no showing that Forest misrepresented the existence or condition of the drainage system, their claims of misrepresentation and fraud fail.

D. The Existence of the Drainage System Is Indisputable.

The Kims discovery responses repeatedly claimed that Forest had not installed **any** drainage system. CP 100, 105, 106, and 107. This claim was made without the Kims or anyone acting on their behalf making any physical investigation to determine if a foundation drain system or french drain had been installed. Forest presented the only competent evidence of the existence of the drain system in her declaration (CP 287), the declarations of her employees (Baker, Larson and Petrich. CP 292-295), and the declaration of Trent Lougheed, the engineer Forest hired to inspect the system. CP 85-90. This evidence, coupled with the fact that the first complaint of water intrusion occurred more than two years after the sale to the Kims, leads inescapably to the conclusion that a drainage system exists and that it functioned properly until November 2009.

E. The Kims Claim of Breach of Contract and that the Discovery Rule Applies to Extend the Warranty Is Frivolous.

The trial court properly concluded that the discovery rule does not apply in the context of the warranty that the Kims claim applied to the alleged defect. Not only did the Kims approve of the shortened warranty period, they had prior notice of the possible water intrusion problem, received recommendations from their inspector on how to investigate the system and assure it functioned, and had exclusive control of the property after the sale. The Kims failed to inspect the system and their basement apparently stayed dry for two years. They should not be heard to claim the discovery of water intrusion over two years later as a basis to extend the warranty.

The condition of the drainage system was not impossible for the Kims to determine (such as Forest was able to do) and the reason for inspection was well known due to the recommendation of the Kims' inspector, Mr. Martin. If there was a defect in the drainage system at closing, it was not a latent defect because the system was capable of being tested and thoroughly inspected (which is essentially what Mr. Martin recommended). The discovery rule does not apply to defects that are not latent defects. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423; *Douglas v. Visser*, 173 Wn.App. 283, 295 P.3d 800 (Feb. 2013). A latent defect is one that could not have been discovered by inspection. *Arrow Transp. Co. v. A.O. Smith Co.*, 75 Wn.2d 843, 851, 454 P.2d 387 (1969); *Rottinghaus v. Howell*, 35 Wn. App. 99, 108, 666 P.2d 899. The defect, if one existed at the time of closing, was patent because it could have been discovered by inspection, and therefore the discovery rule does not apply.

The Kims did not claim a breach of warranty in their Complaint. In their Complaint the Kims only alleged that Forest had committed misrepresentation, fraud and breach of contract⁵ (CP 275-281). It seems likely that the Kims knew that a breach of warranty claim would not succeed because the contract did not provide a warranty beyond one year. Instead, the Kims attempt to prosecute claims of misrepresentation and fraud, which, without any evidence of any false statements by Forest or any factual basis to claim fraud, is frivolous; and a claim of breach of contract that is in reality a claim of breach of warranty.

The recent case of *Douglas v. Visser, supra*, further supports the trial court's decisions. In *Douglas*, the seller did conceal extensive rot and decay in a home and didn't disclose the full extent of the defect to the buyer. But the buyer was on notice of the presence of the defect. The buyer was held to be under duty to make further inquiries once on notice of a defect. In *Douglas*, despite the reprehensible conduct of the seller, the buyers were held to have accepted the property with the defect and were denied relief. In this case, the Kims were on notice from their inspector to investigate further the sufficiency of the drainage system but did nothing. The Kims accepted the home with the drainage system that Forest installed. (Despite the inspector's warning, the drainage system appears to have functioned properly for two years before failing.)

⁵ The allegation made in the Complaint was simply that Forest "breached the contract by failing to meet the conditions set forth in the contract with Plaintiffs". The only claim made by the Kims has been that the drainage system was not installed, which has been proven to be false.

F. The Kims' Claim of Fraud is Frivolous.

The Kims' claim of fraud is essentially that:

1. Forest represented that a drainage system would be installed in the Kim Home;
2. Forest represented that it was installed; and
3. Forest did not install the drainage system.

The Kims claim this conduct was fraud or, alternatively, that Forest made a negligent misrepresentation. The Kims had the burden of proving each of their allegations by clear, cogent and convincing evidence.

As stated in *Turner v. Enders*, 15 Wn.App. 875, 878, 552 P.2d 694, 696 (1976):

The(..) nine elements of fraud are as follows:

- (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; (9) his consequent damage.

The Kims had to present evidence of **each** of the nine elements or face entry of a summary judgment on their claim of fraud. The Kims' proof of the 3rd, 4th, 5th, 8th or 9th elements of their fraud claim failed. These elements of the fraud claim cannot be proven because **a drainage system was installed** by Forest.

Elcon Const., Inc. v. E. Washington Univ., 174 Wn. 2d 157, 273 P.3d 965, (2012) is a Washington State Supreme Court case where the Court granted summary judgment for the defendant on claims of fraud and intentional interference⁶. Eastern Washington University hired Elcon to drill wells. In asserting its fraud claim: “Elcon claimed that Eastern misrepresented the necessary depth of the replacement wells and its knowledge of subsurface conditions by failing to produce the Golder Report.” *Id.* at 166. The Court observed that: “When asked whether there was a hydrology report for *this* project, Eastern replied there was not. CP at 673. Based on the character of the Golder Report, this was not a false statement.” *Id.* at 167. Finally, the Court held that:

Based on the character of the Golder Report, nondisclosure of the report did not, in this case, constitute a material misrepresentation. As such, there are no genuine issues of material fact and summary judgment was appropriate. *Id.* at 167-168.

In this case, there is also no evidence of a “false statement” or “material misrepresentation” because there is indisputable proof that Forest did install the French drain and foundation drainage system at the Kim Home. This evidence is fatal to the Kims’ claims of fraud and misrepresentation, and this evidence has been available to the Kims from the time they purchased the Kim Home.

In *Adams v. Allen*, 56 Wn.App. 383, 783 P.2d 635 (1989), a medical malpractice case, some of the plaintiff’s claims were based upon a theory of fraudulent misrepresentation. In *Adams*, the Court of Appeals approved the trial court’s grant of a defense motion for summary judgment on those claims because, even considering the

⁶ The contract claims in that case were resolved by arbitration.

plaintiff's evidence as true, the plaintiff had not established all of the necessary elements of fraud by clear, cogent, and convincing evidence.

The Kims claim that Forest made intentional misrepresentations and committed fraud by representing that she had installed a drainage system on the property when she allegedly had not. The trial court's grant of summary judgment to Forest on the fraud claim was appropriate because there was, and is, no genuine issue of material fact as to whether a drainage system was installed. **The existence of the drainage system can no longer be disputed.** Summary judgment was proper because "...the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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." CR 56 (c).

Conclusions, without supporting facts, are insufficient to overcome a motion for summary judgment. *McBride v. Walla Walla County*, 95 Wn.App. 33, 975 P.2d 1029 (1999); *Kirk v. Moe*, 114 Wn.2d 550, 789 P.2d 84 (1990). Therefore, conclusory hearsay statements, such as were offered by the Kims in support of their motion for summary judgment (for instance, those made in the Eric Kim declaration, that are ostensibly from the "engineer," and which are based on the stricken report), are not nearly enough to meet the burden the Kims faced to defeat the motion for summary judgment.

The Kims' entire basis of claiming fraud or negligent misrepresentation stands or falls on the determination of whether a drainage system was installed - and the Kims cannot prove that no drainage system was installed. The Kims have the burden of proof. The Kims failed to conduct a legitimate investigation of the existing drainage

system at the Kim Home. In fact, the Kims **never** made a legitimate investigation to determine if a drainage system was installed on their property.

In contrast, Forest clearly and affirmatively established that a French drain and a foundation drainage system were installed. See *Declaration of Louis Baker*, CP 292-293; *Declaration of Nick Larson*, CP 296-297; and *Declaration of Shelly Forest*, CP 286-291. In addition, Mr. Lougheed, the engineer who personally viewed the video from a camera put in the drainage system at the Kim Home, concluded that the French drain and foundation drain systems were properly installed. *Declaration of Trent Lougheed, P.E.*, CP 86.

G. The Kims' Claim of Negligent Misrepresentation is Frivolous.

The Kims have the burden of proving each element of their negligent misrepresentation claim by clear, cogent and convincing evidence.

The elements of the Kims' claim of negligent misrepresentation are as follows:

(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 plaintiffs] 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, 624 (2002); *Ross v. Stuart*, 162 Wn. 2d 493, 499, 172 P.3d 701 (2007). “And, [a]n omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation.” *Ross v. Kirner, supra*, at 499.

As stated above in the discussion of the fraud claims, the Kims’ proof of the first element of their negligent misrepresentation claim fails because they cannot prove a drainage system was not installed by Forest at the Kim Home. In fact, Forest has provided competent evidence that the drainage system was installed. There is literally no evidence of a negligent misrepresentation⁷. As with the fraud claim, the Kims cannot prove their claim of negligent misrepresentation. The necessary element of establishing that Forest made a false statement cannot be met. Forest was entitled to summary judgment as a matter of law on the Kims’ negligent misrepresentation claim.

H. Even if a Negligent Misrepresentation Claim Could be Proven, It is Barred by the Independent Duty Rule (formerly the “economic loss rule”).

In *Elcon Const., Inc. v. Eastern Washington University*, 174 Wn. 2d 157, 165, 273 P.3d 965, 969 - 970 (March 29, 2012), our Supreme Court wrote:

⁷ At most, the Kims have produced a preliminary opinion of an engineer in which the engineer posited some possible causes of the water intrusion, and recommending that the footing drains be inspected to see if they are functioning properly. The Kims never made the inspection and continue to prosecute their claims despite the discovery by Forest that the drainage system pipe is plugged.

The independent duty doctrine is “an analytical tool used by the court to maintain the boundary between torts and contract.” *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 416, 241 P.3d 1256 (2010) (Chambers, J., concurring). In *Eastwood*, we adopted the term “independent duty doctrine” because it more accurately captured the principle behind the rule: “An injury,” we held, “is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract.” *Eastwood*, 170 Wn.2d at 389, 241 P.3d 1256. To date, we have applied the doctrine to a narrow class of cases, primarily limiting its application to claims arising out of construction on real property and real property sales. “We have done so in each case based upon policy considerations unique to those industries. We have never applied the doctrine as a rule of general application outside of these limited circumstances.” *Eastwood*, 170 Wn.2d at 416, 241 P.3d 1256 (Chambers, J., concurring). Indeed, in *Eastwood* we directed lower courts not to apply the doctrine to tort remedies “unless and until this court has, based upon considerations of common sense, justice, policy and precedent, decided otherwise.” *Eastwood*, 170 Wn.2d at 417, 241 P.3d 1256 (Chambers, J., concurring).

The Kims’ claim of negligent misrepresentation is subject to the independent duty rule. In their negotiations the Kims did address their concerns about the drainage system, and Forest’s warranty on materials and workmanship was specifically

negotiated in the REPSA. The Kims' attempt to recover under theories of fraud and misrepresentation is an attempt to evade the very terms they accepted in the REPSA.

In *Griffith v. Centex Real Estate Co.*, 93 Wn.App. 202, 211, 969 P.2d 486 (1998), the court wrote:

Washington has adopted the “economic loss rule,” barring claims for negligent misrepresentation when a contract allocates liability. See *Berschauer/Phillips*, 124 Wn.2d at 825, 828, 881 P.2d 986; *Atherton Condominium Apartment Owners Ass’n Bd. Of Directors v. Blume Development Co.*, 115 Wn.2d 506, at 526-27, 799 P.2d 250; *Stuart v. Coldwell Banker*, 109 Wn.2d 406, at 417-23, 745 P.2d 1284.

The Court in *Griffith* also quoted *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d at 825, 881 P.2d 986 (1994):

We follow the *Stuart* and *Atherton* line of cases and maintain the fundamental boundaries of tort and contract law by limiting the recovery of economic loss due to construction delays to the remedies provided by contract. We so hold to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. We hold parties to their contracts. If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of the

precise allocation of risk as secured by contract. *Berschauer/Phillips*,
124 Wn.2d at 826-27, 881 P.2d 986. *Id.* at 212.

The REPSA signed by Forest and Mr. Kim specifically states that Forest limits Forest's liability for issues of materials or workmanship to claims made within **one year** after closing. The Kims' negligent representation claim is based on the alleged absence of a drainage system, but the evidence shows that a drainage system was installed and does exist. The Kims' claim therefore necessarily involves alleged defects in the materials or workmanship related to the drainage system. The claim of defective materials or workmanship is outside of the warranty period, and the claim of negligent misrepresentation is barred by the independent duty rule.

In addition, the Kims do not allege or establish that Forest had an independent duty (outside the contract) to make disclosures concerning the drainage system. The Kims do not allege in their complaint any specific legal duty outside the contract that Forest had or violated.

"The duty to disclose in a business transaction arises if imposed by a fiduciary relationship or other similar relationship of trust or confidence or if necessary to prevent a partial or ambiguous statement of facts from being misleading." *Colonial Imports v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 731, 853 P.2d 913 (1993). In *Austin v. Ettl*, 171 Wn. App. 82, 286 P.3d 85 (2012), this court considered whether the failure to disclose the potential costs of two proposed LIDs amounted to negligent misrepresentation. In finding that the Ettl's non-disclosure of the potential costs did not amount to negligent misrepresentation, the court commented that: "Austin's failure to research the cost of the proposed LIDS disclosed by Ellis was entirely

unreasonable.” *Austin v. Ettl, supra, at 89*. Similarly, the Kims’ failure to inspect the drain system prior to closing was unreasonable (as is their continued failure to investigate the drainage system since this action commenced).

There is no competent evidence that indicates there was any problem with the drainage system at closing, and there was nothing to prevent the Kims from having their inspector re-check the drainage system prior to closing. Summary judgment dismissing the Kims’ claim of negligent misrepresentation under the “independent duty rule” was proper.

I. Forest Was Entitled to Summary Judgment Dismissing the Kims’ Breach of Contract Claim.

The Kims’ right to claim that Forest committed a “breach of contract” is limited by the provisions in the presale addendum of the REPSA that limited Forest’s warranty to one year. There, the Kims agreed to limit their right to make claims for defects in materials or workmanship in the Kim Home to claims made within one year.

The Kims’ Complaint claims that Forest breached the REPSA by “failing to meet the conditions set forth in the contract with Plaintiffs.” *Plaintiffs’ Complaint for Damages* paragraph 4.25, CP 280. In the Kims’ discovery responses they claimed that a French drain was not installed and the absence of the French drain was the proximate cause of water intrusion into the basement. However, the Kims did not claim, and never provided any evidence of water intrusion or defect in the Kim Home within the relevant one year period, or that they made any claim or demand to Forest within one year.

Provisions in the REPSA addendum (CP 77) stated:

11. Moisture in crawlspace will be eliminated by stem wall was just done 3/25 water was used by builder, will dry. French drain will be installed. ...
13. **If within warranty period, crawlspace continues to retain moisture, builder will remedy.** (emphasis added).

As evidenced by the above language of the REPSA addendum, the Kims were aware of the “moisture in the crawlspace” issue and they still agreed to limit their remedy for breach of contract to the one year warranty period.

The Kims’ argument that they can pursue their breach of contract action because they didn’t discover the alleged defect in the drainage system until after the one year warranty period is specious. “A person who has notice of facts that are sufficient to put him or her upon inquiry notice is deemed to have notice of all facts that reasonable inquiry would disclose.” *Hawkes v. Hoffman*, 56 Wn. 120, 126, 105 P. 156 (1909). The Kims were on notice of the moisture/drain issue, and the REPSA clearly stated the “builder will remedy” **if notified** that the crawlspace retained moisture in the **one year period**. The uncontroverted evidence is that moisture was not detected until far after the one year period, and it is evident that it may have been caused by a blockage in the drainage system that occurred more than two years after closing.

It is uncontroverted that Forest was not notified of a problem with the drainage system within the one year warranty period. The absence of competent evidence of a defect, and notice, as required by the contract, inside the one year period, is a complete defense to the alleged breach of contract claim. Moreover, regardless of whether the

water intrusion that the Kims experienced was caused by a defective system or by damage to the system by the Kims when they did their landscaping in the summer of 2008, the claim falls outside of the one year warranty period during which the Kims had a right to make a claim against Forest arising from any defects found in the Kim Home.

Finally, the contract did not specify the type of French drain - just that one would be installed. Again, as explained in the discussion above regarding the Kims' fraud and negligent misrepresentation claims, there is no genuine issue of material fact as to whether a French drain and foundation drainage system was installed. On the breach of contract claim, even if a factual dispute exists regarding whether a French drain was installed – it is immaterial to the breach of contract claim because dismissal is compelled as a matter of law.

In *Griffith v. Centex Real Estate Corp.*, 93 Wn.App. 202, 969 P.2d 486 (1998), the Court of Appeals upheld a one year limited warranty provision in a real estate contract and granted summary judgment for the builder-seller as to the breach of contract claim. *Griffith* was a class action suit by Griffith and 162 other home buyers against builder-seller Centex Real Estate Corporation. The Court of Appeals held: “Because the contract warranty had expired and the negligent misrepresentation claim is barred by the economic loss rule, we affirm dismissal of those claims.” The case was remanded by the Court of Appeals because a genuine issue of material fact existed under the Consumer Protection Act. *Id* at 206. The *Griffith* court stated:

Our courts have recognized the validity of time limitations on warranties in real estate contracts. In *Southcenter View*, a condominium

association sued the owner/developers, the builder, and the selling agent. Its claims included breach of express and implied warranties. The contract included a one-year warranty limitation. *Southcenter View*, 47 Wn.App. at 768-70, 736 P.2d 1075. The trial court dismissed the claims and this court affirmed, holding that the one-year warranty limitations were valid. *Southcenter View*, 47 Wn.App. at 770, 736 P.2d 1075. The court distinguished the contractual limitation on the warranty term from contracts involving total exclusion of warranties or remedies, and rejected the argument that the limitations were “foisted upon naive and unsuspecting home buyers.” *Southcenter View*, 47 Wn.App. at 771, 736 P.2d 1075.

As in *Southcenter*, the warranty limitation and disclaimer here are valid and enforceable. The Class attempts to distinguish this case by arguing that Centex's warranty limitation applies only to defective materials and workmanship, and that its claim involves materials not used and work not done. This argument is unpersuasive. Use of materials for an unsuitable purpose is defective workmanship. Even assuming, therefore, that an express warranty was created by sales materials promising top quality, and/or by the Homeowner's Manual describing the exterior surface as “high quality, cedar sided, caulked and sealed,” any such warranty was subject to the one-year limitation, the disclaimer, and the waiver provisions of the Real Estate Contract. The trial court correctly dismissed this claim. *Id* at 210-211.

Enforcement of the “validity of time limitations on warranties in real estate” as stated in *Griffith* and *Southcenter*, is warranted because the parties specifically negotiated the term of the warranties and the concern regarding possible water intrusion was specifically addressed. This Court should enforce the one year warranty limitation against the Kims and affirm the summary judgment of dismissal of the Kims’ breach of contract claim.

J. CR 11 Sanctions Were Warranted and Properly Imposed.

The award of CR11 sanctions was warranted because despite all the time that passed from the time the Kims’ attorney filed the lawsuit, and the deposition by the Kims’ attorney of Forest, he continued, and still continues to allege that Forest falsely represented that a drainage system was installed. The existence of the drainage system was proven by Forest and not contested by any competent evidence presented by the Kims or their attorney. Even after Forest was deposed in February, 2012, the Kims’ attorney apparently did nothing to determine the truth of Forest’s claim that she had installed a drainage system. No one bothered to excavate or even attempt to inspect the connection of the drain that was in the crawl space, which is what the plumber did when he put his camera down the drain system. The e-mail message sent to Mr. Franklin on September 7, 2012, (CP 242) made it very clear that Forest did install a drainage system and seal the walls and challenged Mr. Franklin to produce evidence to the contrary or face the risk of CR 11 sanctions. To date, there is no indication that any further investigation was ever conducted. Mr. Franklin proceeded at his own peril and the trial court was warranted in imposing sanctions.

The terms imposed represented attorney fees incurred by Forest after the September 7, 2012, e-mail message and properly compensated Forest for unnecessary legal fees and costs incurred that would have been unnecessary had Mr. Franklin simply done his job of requiring valid evidence supporting his clients' claims. The award the trial court made was well supported by its findings of fact and conclusions of law, and within its discretion. Since neither the Kims nor Mr. Franklin have assigned error to the findings entered by the trial court they are verities on appeal. *In re Estate of Jones, supra*.

K. Forest Should Be Awarded Attorney Fees on Appeal.

“In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001), *review denied*, 146 Wash.2d 1008, 51 P.3d 86 (2002). Generally, if such fees are allowable at trial, the prevailing party may recover fees on appeal as well. *Landberg*, 108 Wash.App. at 758, 33 P.3d 406 (citing RAP 18.1).” *Thompson v. Lennox*, 151 Wn. App. 479, 484, 212 P.3d 597, 599 (2009)

If the judgment of the trial court is affirmed, Forest should receive an award of attorney fees and costs on appeal pursuant to the terms of the REPSA and applicable law. In *Brown v. Johnson*, 109 Wn.App. 56, 58, 34 P.3d 1233, the court held:

If an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees. An action is “on a contract” if a) the action arose out of the contract; and b) if the contract is central to the dispute.

This holding was also followed in *Douglas v. Visser, supra*, at 835, in which *Brown v. Johnson, supra*, is cited. The REPSA here contains an attorney fee clause

(CP 36). The Kims specifically pleaded that Forest breached “a contract for the purchase of the subject property”. CP 280. The Kims’ allegations of fraud and negligent misrepresentation were inseparable because they were all based on the same basic factual premise – the allegation that Forest had failed to install a drainage system. A similar award was made in *Bloor v. Fritz*, 143 Wn. App. 718, 180 P.3d 805 (2008). Forest is entitled to an award of her attorney fees and costs on appeal.

The Kims’ attorney should be sanctioned for filing this appeal. As stated in *Brigade v. Economic Development Board for Tacoma-Pierce County*, 61 Wn.App. 615, 811 P.2d 697 (1991) at 699:

Three conditions must be met before an attorney can be subjected to CR 11 sanctions: (1) the pleading, motion, or memorandum must not be well grounded in fact; (2) it must not be well grounded in law; and (3) viewed objectively, the attorney must have failed to make a reasonable inquiry into the factual or legal basis of the action. *Rhinehart v. The Seattle Times, Inc.*, 59 Wn. App. 332, 341, 798 P.2d 1155 (1990). The trial court has discretion to determine whether CR 11 has been violated. *John Doe v. Spokane & Inland Empire Blood Bank*, 44 Wn. App. 106, 780 P.2d 853 (1989). If the Court determines that a violation occurred, the court must impose “appropriate” sanctions. CR 11. *Miller v. Badgley*, 51 Wn. App. 285, 300-01, 753 P.2d 530, *review denied*, 111 Wn. 2d 1007 (1988). The trial court retains broad discretion as to the nature and scope of sanctions, which can include the full award of attorney’s fees. *Rhinehart v. The Seattle Times, Inc.*, 59 Wn. App. At 341, 798 P.2d 1155; *Miller v. Badgley*, 51 Wn. App. At 303, 753 P.2d 530.

The trial court should consider the following factors in deciding whether counsel made a reasonable inquiry:

The knowledge that reasonably could have been acquired at the time the pleading was filed, the type of claim and the difficulty of acquiring sufficient information, ... which party has access to the relevant facts, and ... the significance of the claim in the pleading as a whole.

Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1142, *modified*, 929 F.2d 1358 (9th Cir. 1990).

In *Brigade*, the sanctions imposed were upheld because the attorney failed to present any evidence in support of his motion for summary judgment, and was shown to have had no legal basis for the allegations in his complaint. A similar situation exists here. The basis for the Kims' claim of fraud is that no drainage system was installed. The existence of the drainage system was not difficult to determine, and the Kims were living in the house when this action commenced. The Kims' attorney did not require that the Kims or anyone acting for them inspect to see if a drainage system had been installed. Had he done so, he would have discovered that Forest had installed a drainage system, and quite possibly would have discovered that the system was merely plugged. Due to this failure, Forest has been forced to defend in the trial court, and now in this appeal. RAP 18.9(a) provides:

The appellate court on its own initiative or on motion of a party may order a **party or counsel** who uses these rules for the purpose of delay, files a frivolous appeal, **to** pay terms or compensatory damages to any other

party who has been harmed by the delay or the failure to comply

(Emphasis added.)

In *Streater v. White*, 26 Wn. App. 430, 613 P.2d 187 (1980) the court observed, at 434-5:

In determining whether an appeal is brought for delay under this rule, our primary inquiry is whether, when considering the record as a whole, the appeal is frivolous, i.e., whether it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. (Citation omitted.)

The trial court found that the alleged non-existence of the drainage system was key to the claims of the Kims' claims, and that the Kims and their attorney failed to make a diligent investigation. Although they did hire an engineer, Mr. Nolton, neither his report nor the report of the insurance company's engineer, Mr. Trnka, on which the Kims rely, determined whether a drainage system had been installed. Instead, Mr. Nolton recommended further investigation. Had the Kims or their attorney simply told Mr. Nolton to determine if a drainage system existed, this action might never have been filed. The trial court did not abuse its discretion in finding that the Kims' attorney had violated CR 11 for filing and prosecuting this action without any factual basis for the Kims' claims.

L. CONCLUSION

The Kims and their counsel started this lawsuit without first investigating and determining the actual cause of the water intrusion into the Kims' residence. Although two apparently qualified consultants viewed the property, neither consultant "turned a shovel" to find whether the foundation and French drain system was installed and was

functioning. Instead, they speculated on possible causes, including the absence of a drainage system.

The Kims jumped to the conclusion that no drain system had been installed, and their attorney accepted their theory without any investigation. The result was over 4 years of needless litigation.

The Kims have not met their burdens to show that summary judgment dismissing their lawsuit was error, and the Kims attorney has failed to show that the trial court abused its discretion in awarding CR 11 sanctions against him.

The trial court decisions should be affirmed and Forest should be awarded her attorney fees and costs on appeal.

Respectfully submitted this 1st day of July 2013.

OLSON ALTHAUSER SAMUELSON
& RAYAN, LLP
Attorneys for Respondent

By: 
T. Charles Althausen WSBA #6863

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COURT OF APPEALS
DIVISION II

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ERIC and SUSIE KIM, a married couple,

Appellants,

vs.

SHELLY FOREST,

Respondent,

Case No. 44430-5-11

Trial Court Case No. 09-2-00769-0

CERTIFICATE OF SERVICE

I, **T. CHARLES ALTHAUSER**, hereby certify under penalty of perjury under the laws of the State of Washington that the original and one copy of *Respondents' Brief* were filed with the State Court Administrator on July 1, 2013, by mailing by First Class Mail to the following addresses:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of July, 2013, at Centralia, Washington.


T. Charles Althaus WSBA # 6863