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No. 61419-3-I

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

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ROBERT CARLILE and ANGIE CARLILE, et al.,

*Appellants,*

v.

HARBOUR HOMES, INC., et al,

*Respondent.*

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**HARBOUR HOMES, INC.'S ANSWER TO PETITIONERS  
ROBERT CARLILE AND ANGIE CARLILE, ET AL.'S PETITION  
FOR REVIEW**

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## I. IDENTITY OF RESPONDENT

Harbour Homes, Inc. f/k/a Geonerco, Inc. responds to Petitioner Robert Carlile and Angie Carlile, et al.'s ("Petitioner") Petition for Review.<sup>1</sup>

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## II. CITATION TO THE COURT OF APPEAL'S DECISION

*Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (October 20, 2008), motion for reconsideration denied November 20, 2008.

## III. INTRODUCTION

Petitioner's request for review involves three issues. The first issue appealed by Petitioners is whether the implied warranty of habitability may be assigned to a subsequent homeowner with whom the builder of the home had no relationship, contractual or otherwise. Washington law is well settled that the implied warranty of habitability extends only to first purchasers. This settled law has been repeatedly affirmed by this Court as well as the courts of appeal, therefore, there is no basis for review. RAP 13.4(b)(1) and (2).

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<sup>1</sup> On December 19, 2008, Robert Carlile and Angie Carlile, et al., filed a petition for review. Harbour Homes also filed a Petition for Review on December 22, 2008. Because Carlile, et al. filed their petition first, and because this Answer responds to their petition, Robert Carlile and Angie Carlile, et al., are hereafter referred to as "Petitioners," and Harbour Homes is hereafter referred to as "Respondent."

In addition, the rights of subsequent homebuyers is an issue currently being considered by the state legislature. Accordingly, the decision whether to expand such rights should be left to the legislative branch.

Petitioners also claim that the Appellate Court erred by affirming the trial court's dismissal of their fraud claims. The Court of Appeal correctly held that Washington does not recognize an exception to the economic loss doctrine for fraud in the inducement; a decision consistent with this Court's recent decision in *Alejandre v. Bull*.

Finally, Petitioners claim that the Appellate Court made a "clear error of law" by applying the economic loss doctrine to the Subsequent Owner's misrepresentation and fraud claims brought against Harbour Homes in their own right (as opposed to those claims brought as assignees of the Original Owner's claims). See *Carlile, et al. Petition for Review*, p.6. The Court of Appeals correctly affirmed the trial court's dismissal of these claims, noting, among other reasons, that the Petitioners failed to demonstrate a duty Harbour Homes owed by Harbour Homes, or that Harbour Homes made any direct representations to these Claimants.

Moreover, the Appellate Court correctly relied on this Court's decision in *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, which holds that when a party contracts to protect against economic

liability, purely economic damages are not recoverable. There is no good reason to overturn *Berschauer/Phillips*. Petitioner's request for review should therefore be denied.

#### **IV. ISSUES PRESENTED FOR REVIEW**

1. Whether the Court should deny review of the Petitioner's implied warranty of habitability claim because (a) decades of well established law holds that the implied warranty of habitability only extends to first purchasers; and (b) the state legislature is currently considering whether the implied warranty of habitability should be extended beyond first purchasers.

2. Whether the Court should deny review of the Petitioner's fraud in the inducement claim because the claim is barred by the economic loss doctrine, and Washington does not recognize an exception for fraud.

3. Whether the Court should deny the Petitioner's request for review of their misrepresentation and fraud claims in their own rights, because the Court of Appeals correctly dismissed the claims on the merits, and because the claims are barred by the economic loss doctrine.

#### **VI. STATEMENT OF THE CASE**

This is a case in which subsequent homeowners have filed claims as assignees of the Original Owner's claims, based on assignments

executed years after the sale of the homes. Harbour Homes filed a petitioned for review on December 22, 2008, requesting review of the Court of Appeal's decision with regards to the Consumer Protection Act claims and the validity of the Subsequent Owners' assignments.

For the sake of brevity, Harbour Homes relies on its Statement of the Case in its Petition for Review.

## **VII. WHY THE COURT SHOULD DENY REVIEW**

Petitioners' request for review should be denied, because the factors set forth in RAP 13.4(b) are not met. As discussed more fully below, none of the issues raised by Petitioners conflict with Supreme Court or Appellate Court precedent. RAP 13.4(b)(1) and (2). Further, to the extent there are any public interest considerations at issue, these considerations have already been considered by the Courts in their prior decisions, and is currently be evaluated by the state legislature. Therefore, review is unwarranted under RAP 13.4(b)(4).

**A. Review of the Appellate Court's decision regarding the implied warranty of habitability should be denied because there is no conflict with appellate or Supreme Court case law, and consideration of the public interest in extending the implied warranty of habitability is a legislative issue.**

Petitioner's request for review should be denied, because the Court of Appeals decision is consistent with decades of well settled law. In shaping that law, this Court balanced the equities between homebuyers

and builders, and has consistently held that the public interest is best served by limiting the implied warranty of habitability to the first owner of a home. Thus, the requirements of RAP 13.4(b)(1) and (2) are not met.

Further, our state legislature is currently considering whether the implied warranty of habitability should or should not be extended to subsequent owners. Therefore, to the extent that this involves an issue of substantial public interest, the issue should be left to the legislative branch. Thus, the requirements of RAP 13.4(b) are not met, and review should be denied.

1. The Court of Appeals decision dismissing the implied warranty of habitability claim is consistent with decades of well settled law.

For nearly 40 years, it has been settled law that the implied warranty of habitability runs only from the builder to the first intended occupant. *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 415, 745 P.2d 1284 (1987) (“The implied warranty of habitability in Washington is a limited one: When a vendor-builder sells a house to its first intended occupant, he impliedly warrants ... the house ...”). *See also, Frickel v. Sunnyside Enterprises, Inc.*, 106 Wn.2d 714, 718, 725 P.2d 422 (1986); *Klos v. Gockel*, 87 Wn.2d 567, 571, 554 P.2d 1349 (1976) (“for purposes of warranty liability ... the house purchased must be a ‘new house’”); *House v. Thorton*, 76 Wn.2d 428, 436, 457 P.2d 1999

(1969); *Satomi Owners Ass'n v. Satomi, LLC*, 139 Wn. App. 175, 181, 159 P.3d 460 (2007) (“the implied warranty of habitability runs from the builder-vendor to the original purchaser.”).

The seminal case that defines the scope of a builder’s liability to subsequent homeowners is *Stuart v. Coldwell Banker Commercial Group, Inc.* In that case, a condominium association sued a builder for alleged construction defects, asserting breach of the implied warranty of habitability, negligent construction, misrepresentation, and violation of the CPA. *Id.* at 410-11. More than half of the association members were subsequent purchasers. *Id.* at 411. Reversing the trial court’s “peculiar combination of tort and contract law...”, the Court firmly held that the implied warranty of habitability is strictly limited to first purchasers. *Id.* at 417.

The *Stuart* Court also rejected negligent construction as a cause of action in Washington, because it would likewise expand a builder’s liability to subsequent owners. *Id.* at 422. Carefully explaining the differences between contract claims and tort claims, the Court held that the construction of a home is a contractual transaction between the builder and the buyer, in which risks may be delegated in accordance with the parties’ bargain. *Id.* at 419. Construction claims that do not result in personal injury or property damage beyond the dwelling itself are not tortious, and

therefore are contract based claims. *Id.* Extending the builder's liability beyond the contract to parties with which it has no privity would "unduly upset the law upon which expectations are built and business is conducted." *Id.* at 418. The Court stated:

Imposition of tort liability upon the builder-vendors would require them to become the guarantors of the complete satisfaction of future purchasers. A builder vendor could contract to limit liability for defects with the original purchaser and then find themselves liable for the same defects to a future purchaser with whom they had absolutely no contact.

*Id.* at 421.

The *Stuart* Court deliberately limited a builder's liability to parties with whom it contracted by (1) holding that the implied warranty of habitability extends only to first purchasers, and (2) rejecting negligent construction as a cause of action. This decision was based on public policy, noting that the construction business is "in an area of the law so vitally enmeshed in our economy and dependent on settled expectations..." *Id.* at 422. The Court balanced the equities between subsequent owner's rights and the impact of ongoing and uncertain liability on the building industry and the public at large.

Petitioners here seek to perform an "end run" around *Stuart*, under the guise of assignments. However, both the trial court and the Appellate Court recognized such an action is in direct conflict with decades of

precedent. Petitioner's request for review should therefore be denied, because the court of Appeals decision is not in conflict with any appellate or Supreme Court decision. RAP 13.4(b)(1) and (2).

2. The implied warranty of habitability should only be extended by legislative action.

The implied warranty of habitability is a judicially created doctrine that, as noted above, has undergone a balancing process by the courts in consideration of the rights and liabilities of builders and homeowners. *See Stuart*, 109 Wn.2d at 418-19. Petitioners ask this Court to once again undergo such a balancing process, however, that process is currently occurring in the legislature, and should be properly reserved for legislative determination. *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001). As this Court has recently stated, "the Legislature is the fundamental source for the definition of this state's public policy and we must avoid stepping into the role of the Legislature by actively creating the public policy of Washington." *Id.*

For the past several years, the legislature has considered extending the statutory warranties provided by the Washington Condominium Act to the owners of single family residential homes. *See House Bill Rep. on SB 6385*, 60th Leg., Reg. Sess. (Wash 2008). To date, the legislature has

decided not to extend the implied warranty of habitability beyond its current scope.

However, the issue is again before the legislature. On December 29, 2008, House Bill 1045 was pre-filed in the Washington House of Representatives for the current legislative session. *See* House Bill 1045, 61st Leg., Reg. Sess. (Wash 2009) (*Attached as Appendix A*). The proposed bill seeks to extend the implied warranty of habitability to subsequent homeowners. Determination of whether the bill should be made law, and whether the implied warranty of habitability should be extended to subsequent owners is a matter of public policy which should be left to the legislature.

Therefore, to the extent that this issue does affect the public interest, that interest is currently being considered by the legislature, and should be reserved for that body's determination. Review of the Court of Appeals decision on the implied warranty of habitability should be denied.

**B. The Appellate Court correctly dismissed the Petitioner's fraud claim, because Washington does not recognize an exception to the economic loss doctrine for fraud in the inducement.**

Contrary to the Petitioner's assertion, there is no conflict between the Appellate Court decision and Washington law. Washington has long recognized the economic loss doctrine as establishing a bright line between contract and tort law. *Alejandre v. Bull*, 159 Wn.2d 674, 153

P.3d 864 (2007). Consistent with this principal, and like the majority of other states, Washington does not except fraud in the inducement from the economic loss doctrine. See Ralph C. Anzivino, *The Fraud in the Inducement Exception to the Economic Loss Doctrine*, 90 Marq. L. Rev. 921, 931 (2007); *Alejandre*, 159 Wn.2d at 690 n.6. Therefore, review is unwarranted. RAP 13.4(b)(1), (2) and (4).

In *Alejandre v. Bull*, this Court recently outlined both the purpose and the scope of the economic loss doctrine. *Alejandre*, 159 Wn.2d at 162-83. The Court defined the purpose of the economic loss doctrine as follows:

[T]he economic loss rule maintains the fundamental boundaries of tort and contract law. Where economic losses occur, recovery is confined to contract to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in contract. . . . If tort liability is expanded to include economic damages, parties would be exposed to liability for an indeterminate amount for an indeterminate time to an indeterminate class.

*Id.* (internal citations and quotations omitted).

With this purpose in mind, the *Alejandre* Court held that the economic loss doctrine bars a contracting party from recovering under a negligent misrepresentation theory. *Id.* at 689. The *Alejandre* Court created a narrow exception to the economic loss doctrine which allows a contracting party to file a claim for fraudulent concealment; however, the

Court did not extend the exception to claims for fraud in the inducement. *Id.* at 690 n.6. Thus, Washington law provides no exception to the economic loss doctrine for claims of fraud in the inducement. The Court of Appeals correctly affirmed the trial court's ruling dismissing the Petitioner's fraud claims, because it is consistent with this Court's ruling in *Alejandre v. Bull*. Therefore, review is not warranted under RAP 13.4(b)(1).

Further, there is no conflict between the appellate decision and decisions of other Washington appellate courts. The Court of Appeals addressed the Petitioner's exact same arguments in its decision, and correctly held that Division II's decision in *Stieneke v. Russi*, and Division III's decision in *Baddley v. Seek* did not address the economic loss doctrine, and decided the fraud claims on the merits. *Carlile v. Harbour Homes*, 159 Wn.2d 674, 205-06, 194 P.3d 280 (2008). Review is not warranted under RAP 13.4(b)(2).

Finally, Petitioner's claim this issue is on of public interest. However, Washington's decision not to except fraud in the inducement from the economic loss doctrine when there is an underlying contract is consistent with the majority of jurisdictions. *See Anzivino*, 90 Marq. L. Rev. at 931; *Alejandre*, 159 Wn.2d at 690 n.6. Moreover, it maintains the

fundamental line between contract and tort law, and preserves the parties' freedom to contract.

Here, the parties had a contractual agreement that expressly allocated the rights and liabilities arising from the performance and/or quality of the property. Notably, Petitioner's breach of contract claim was dismissed by both the trial court and the Court of Appeals, and is not appealed here.<sup>2</sup> Nevertheless, Petitioners seek a remedy under tort law for the same subject matter that was expressly considered in the contract.

The public interest in freedom to contract is best achieved by continuing to maintain a clear line between tort law and contract law. Thus, the current state of law should stand: Fraud in the inducement is not excepted from the economic loss doctrine when an underlying contract exists. Petitioner's request for review should be denied.

**C. The Court of Appeals correctly dismissed the Petitioner's claims in their own rights on both the merits of the claims, and because the claims are barred by the economic loss rule.**

The Court of Appeals affirmed dismissal of the Petitioners' misrepresentation and fraud claims in their own right on two bases. First, the claim was dismissed on the merits. The Appellate Court held that the Petitioners failed to articulate a cognizable claim because they did not

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<sup>2</sup> It should also be noted that the parties' contract contained an express warranty relating to performance and quality issues. Although, Petitioners admitted during the CR 54(b) hearing that they were not making any express warranty claims, the existence of a written homeowner warranty is evidence that the parties' contract did allocate risk. CP 13-16.

demonstrate what duty Harbour Homes owed to them, nor did they allege that they relied on any representation made by Harbour Homes when purchasing the homes. *Carlile*, 147 Wn. App. at 207.

Moreover, the record is completely devoid of any evidence alleging that the Subsequent Owners relied upon representations made directly to them by Harbour Homes. As the Appellate Court stated:

The record does not show that Harbour Homes made any representations directly to the homeowners, that the homeowners knew about representations made to the original purchasers, or that the homeowners justifiability relied on Harbour Homes's information.

*Carlile*, 147 Wn. App. at 207.

Second, the Appellate Court held that the claims were barred by the economic loss doctrine. The Appellate Court relied heavily on this Court's decision in *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, which holds that purely economic damages are not recoverable when a party has entered into a contractual agreement. 124 Wn.2d 816, 827-28, 881 P.2d 986 (1994).

Petitioners argue that there is a conflict between the Court of Appeals decision and this Court's decision in *Berschauer/Phillips*. See *Carlile, et al. Petition for Review*, § C. However, *Berschauer/Phillips* is the case on which the Court of Appeals decision is based. *Carlile*, 147 Wn. App. at 206-07. The Appellate Court cited *Berschauer/Phillips* at length, noting:

We hold that when parties have contracted to protect against potential economic liability, as is the case in the construction industry, contract principals override tort principles in § 552 and, thus, purely economic damages are not recoverable. There is a beneficial effect to society when contractual agreements are enforced and expectancy interests are not frustrated. In cases involving construction disputes, the contracts entered into among the various parties shall govern their economic expectations.

*Carlile*, 147 Wn. App. at 206-07 (citing *Berschauer/Phillips*, 124 Wn.2d at 827-28).

Here, Harbour Homes contracted with the Original Owners. Those contract rights have purportedly been assigned to the Subsequent Owners. Yet, the Subsequent Owners seek additional rights; rights not available to the Original Owners because of the economic loss doctrine. This is exactly what the *Berschauer* Court sought to avoid, and why it held that when a contractual agreement exists, the parties cannot also assert tort claims. *See Berschauer/Phillips*, 124 Wn.2d at 827-28.

The Petitioners additionally assert that the Court of Appeals decision conflicts with other Appellate Court decisions, but, as the Court of Appeals correctly stated, those Courts did not address the economic loss doctrine, but rather decided the cases on the merits. *Carlile*, 147 Wn. App. at 205.

The Appellate Court's decision on both bases is consistent with Washington law, and does not raise an issue of substantial public interest. To the extent that the public interest is at issue, the legislature is the proper venue for its resolution. Therefore, review is unwarranted.

### VIII. CONCLUSION

The Petitioner's request for review should be denied, because none of the issues raised warrants review under RAP 13.4(b). The Court of Appeals decision is consistent with this Court and other appellate court decisions, and to the extent that the public interest is implicated, that interest has already been considered by courts in their prior decisions. Review should be denied.

Respectfully submitted on this \_\_\_\_\_ day of January, 2009.

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## APPENDIX A

## DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of:

1. Harbour Homes' Motion for Reconsideration and Clarification;

directed to the following individuals:

**Counsel for Appellants Carlile, et ux., et al.:**

Robert J. Curran, Esq.  
Brittenae Pierce, Esq.  
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1201 Third Ave., Suite 3400  
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- Via Messenger**  
 **Via Facsimile – (206) 583-0359**  
 **Via U.S. Mail, postage prepaid**  
 **Via Overnight Mail, postage prepaid**  
 **Via Email, with recipient's approval**

DATED at Seattle, Washington, this 20<sup>th</sup> day of January, 2009.

/s/

\_\_\_\_\_  
Nicole Calvert

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HOUSE BILL 1045

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State of Washington                      61st Legislature                      2009 Regular Session

By Representatives Williams, Dunshee, Nelson, Simpson, Moeller,  
Hasegawa, Chase, Roberts, Kirby, Appleton, Hunt, and Upthegrove

Prefiled 12/29/08. Read first time 01/12/09. Referred to Committee on  
Judiciary.

1            AN ACT Relating to residential real property; amending RCW  
2 64.50.010; adding new sections to chapter 64.50 RCW; and creating a new  
3 section.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5            NEW SECTION.    **Sec. 1.**    (1) The legislature finds that, for  
6 Washington's families, purchasing a new home is both the greatest  
7 investment they will make and the culmination of their dreams. The  
8 legislature intends that those making the very significant investment  
9 in a new home should receive genuine accountability in return and  
10 should not be expected to bear, particularly on top of the heavy  
11 financial burden of a mortgage, the costs of homebuilder negligence.  
12 Toward that end, and consistent with principles of equal treatment  
13 under the law, the legislature intends that those citizens purchasing  
14 new homes or remodeling their homes receive statutory warranty rights  
15 similar to those purchasing condominiums. Finally, the legislature  
16 intends that anyone purchasing a home within six years of its  
17 construction, including purchasers subsequent to the initial  
18 owner-occupant, be entitled to the common law implied warranty of

1 habitability to ward against egregious defects in the fundamental  
2 structure of their homes, and intends that this warranty cannot be  
3 contractually waived.

4 (2) The legislature by this act does not intend to create a cause  
5 of action in tort for defects in the construction of improvements upon  
6 real property intended for residential use, nor does the legislature  
7 intend to overrule the holding in *Berschauer/Phillips Constr. Co. v.*  
8 *Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994) and other  
9 cases in which the courts have held that the economic loss rule applies  
10 to construction defect claims.

11 (3) This act may be known and cited as the homeowner's bill of  
12 rights.

13 NEW SECTION. **Sec. 2.** A new section is added to chapter 64.50 RCW  
14 to read as follows:

15 (1) A construction professional involved in the construction of  
16 improvements upon residential real property or real property intended  
17 for use as residential real property warrants that the work, and any  
18 part thereof, will be suitable for the ordinary uses of real property  
19 of its type and that the work, and any part thereof, will be:

20 (a) Free from defective materials;

21 (b) Constructed in accordance with sound engineering and  
22 construction standards;

23 (c) Constructed in a workmanlike manner; and

24 (d) Constructed in compliance with all laws then applicable to the  
25 improvements.

26 (2) If a construction professional breaches a warranty arising  
27 under this section and the breach results in damage to any portion of  
28 the residential real property, the current owner of the residential  
29 real property may bring a cause of action for damages against the  
30 construction professional. Absence of privity of contract between the  
31 owner and the construction professional is not a defense to the  
32 enforcement of a warranty arising under this section.

33 (3) In a judicial proceeding for breach of a warranty arising under  
34 this section, the plaintiff must show that the alleged breach has  
35 adversely affected or will adversely affect the performance of that  
36 portion of the property alleged to be in breach. To establish an  
37 adverse effect, the person alleging the breach is not required to prove

1 that the breach renders the property unfit for occupancy. As used in  
2 this subsection, "adverse effect" must be more than technical and must  
3 be significant to a reasonable person.

4 (4) Proof of breach of a warranty arising under this section is not  
5 proof of damages. Damages awarded for a breach of a warranty arising  
6 under this section are the cost of repairs. However, if it is  
7 established that the cost of repairs is clearly disproportionate to the  
8 loss in market value caused by the breach, damages are limited to the  
9 loss in market value.

10 (5) (a) A judicial proceeding for breach of a warranty arising under  
11 this section must be commenced within four years after the cause of  
12 action accrues. This period may not be reduced by either oral or  
13 written agreement, or through the use of contractual claims or notice  
14 procedures that require the filing or service of any claim or notice  
15 prior to the expiration of the period specified in this section.

16 (b) Except as provided under (c) of this subsection, a cause of  
17 action for breach of a warranty under this section accrues, regardless  
18 of the owner's lack of knowledge of the breach:

19 (i) In the case of the purchase of newly constructed residential  
20 real property, on the date the initial owner enters into possession of  
21 the property; or

22 (ii) In the case of existing residential real property upon which  
23 the construction of improvements are made, on the date of substantial  
24 completion of construction or termination of the construction project,  
25 whichever is later.

26 (c) A cause of action for breach of a warranty under this section  
27 based on a latent structural defect or a latent water penetration  
28 defect accrues when the claimant discovers or reasonably should have  
29 discovered the latent structural defect or latent water penetration  
30 defect.

31 (d) An action for breach of a warranty under this section is  
32 subject to the time limits provided in RCW 4.16.310.

33 (6) If a written notice of claim is served under RCW 64.50.020  
34 within the time prescribed for the filing of an action under this  
35 section, the statutes of limitation in this section and any applicable  
36 statutes of repose for construction-related claims are tolled until  
37 sixty days after the period of time during which the filing of an  
38 action is barred under RCW 64.50.020.

1 (7) The warranties imposed by this section may not be waived,  
2 disclaimed, or limited.

3 (8) In a judicial proceeding under this section, the court may  
4 award reasonable attorneys' fees and costs to the prevailing party.

5 (9) This section does not apply to condominiums subject to chapter  
6 64.34 RCW or nonprofit housing developers.

7 (10) This section does not affect the application of the  
8 requirements imposed under other provisions of this chapter.

9 (11) The warranties created in this section are in addition to any  
10 other remedies provided by statutory or common law and do not abrogate  
11 or limit such common law or statutory remedies in any way.

12 (12) For the purposes of this section:

13 (a) "Nonprofit housing developer" means a nonprofit organization or  
14 housing authority that has among its purposes the provision of housing  
15 that is affordable to low-income households.

16 (b) "Residential real property" means a single-family house or a  
17 duplex occupied by the owner as a residence.

18 (c) "Substantial completion of construction" means the state of  
19 completion reached when an improvement upon real property may be used  
20 or occupied for its intended use.

21 **Sec. 3.** RCW 64.50.010 and 2002 c 323 s 2 are each amended to read  
22 as follows:

23 Unless the context clearly requires otherwise, the definitions in  
24 this section apply throughout this chapter.

25 (1) "Action" means any civil lawsuit or action in contract or tort  
26 for damages or indemnity brought against a construction professional to  
27 assert a claim, whether by complaint, counterclaim, or cross-claim, for  
28 damage or the loss of use of real or personal property caused by a  
29 defect in the construction of a residence or in the substantial remodel  
30 of a residence. "Action" does not include any civil action in tort  
31 alleging personal injury or wrongful death to a person or persons  
32 resulting from a construction defect.

33 (2) "Association" means an association, master association, or  
34 subassociation as defined and provided for in RCW 64.34.020(4),  
35 64.34.276, 64.34.278, and 64.38.010(1).

36 (3) "Claimant" means a homeowner or association who asserts a claim

1 against a construction professional concerning a defect in the  
2 construction of a residence or in the substantial remodel of a  
3 residence.

4 (4) "Construction professional" means an architect, builder,  
5 builder vendor, contractor, subcontractor, engineer, or inspector,  
6 including, but not limited to, a dealer as defined in RCW  
7 64.34.020(~~(+12)~~) and a declarant as defined in RCW 64.34.020(~~(+13)~~),  
8 performing or furnishing the design, supervision, inspection,  
9 construction, or observation of the construction of any improvement to  
10 real property, whether operating as a sole proprietor, partnership,  
11 corporation, or other business entity. "Construction professional"  
12 does not include an inspector who is an agent or employee of a local  
13 government and is acting in his or her official capacity as an  
14 inspector.

15 (5) "Homeowner" means: (a) Any person, company, firm, partnership,  
16 corporation, or association who contracts with a construction  
17 professional for the construction, sale, or construction and sale of a  
18 residence; and (b) an "association" as defined in this section.  
19 "Homeowner" includes, but is not limited to, a subsequent purchaser of  
20 a residence from any homeowner.

21 (6) "Residence" means a single-family house, duplex, triplex,  
22 quadraplex, or a unit in a multiunit residential structure in which  
23 title to each individual unit is transferred to the owner under a  
24 condominium or cooperative system, and shall include common elements as  
25 defined in RCW 64.34.020(6) and common areas as defined in RCW  
26 64.38.010(4).

27 (7) "Serve" or "service" means personal service or delivery by  
28 certified mail to the last known address of the addressee.

29 (8) "Substantial remodel" means a remodel of a residence, for which  
30 the total cost exceeds one-half of the assessed value of the residence  
31 for property tax purposes at the time the contract for the remodel work  
32 was made.

33 NEW SECTION. Sec. 4. A new section is added to chapter 64.50 RCW  
34 to read as follows:

35 (1) The legislature finds that as a matter of public policy the  
36 common law warranty of habitability applicable to newly constructed  
37 residential real property should be modified to extend greater

1 protection to home purchasers. The legislature intends by this section  
2 to modify the common law implied warranty of habitability in two  
3 respects: To extend the implied warranty of habitability to subsequent  
4 purchasers; and to prohibit the waiver, disclaimer, or limitation of  
5 this warranty through contractual agreement. The legislature does not  
6 intend by this act to change any other aspect of the common law implied  
7 warranty of habitability as developed through case law.

8 (2) (a) The common law implied warranty of habitability for newly  
9 constructed residential real property extends to any homeowner who  
10 purchases the property within six years of its construction, and is not  
11 limited to the initial owner-occupant of the property. A homeowner who  
12 purchases the property subsequent to the initial owner-occupant, and  
13 within six years of the construction of the property, receives the same  
14 protections of the common law implied warranty of habitability as  
15 possessed by the person from whom the property was purchased.

16 (b) The common law implied warranty of habitability may not be  
17 waived, disclaimed, or limited by contractual agreement. A provision  
18 of any contract for the purchase or sale of newly constructed  
19 residential property that purports to waive, disclaim, or limit the  
20 common law implied warranty of habitability is void and unenforceable.

--- END ---

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**To:** Nicole Calvert  
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Rec. 1-20-09

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**From:** Nicole Calvert [mailto:[ncalvert@pregodonnell.com](mailto:ncalvert@pregodonnell.com)]  
**Sent:** Tuesday, January 20, 2009 12:16 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** ROBERT CARLILE and ANGIE CARLILE, et al., Appellants, v. HARBOUR HOMES, INC., et al., Respondents

Attached for filing with the Supreme Court please find Harbour Homes, Inc.'s Answer to Petitioner Robert Carlile and Angie Carlile, et al.'s Petition for Review.

Thank you for your assistance with this matter.

**Nicole Calvert** | Preg O'Donnell & Gillett PLLC  
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