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No. 61419-3-I

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

ROBERT CARLILE, et ux, et al,

Appellants,

v.

HARBOUR HOMES, INC. f/k/a GEONERCO, INC., a Washington
corporation,

Respondent.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

This case arises from the failure of Respondent Harbour Homes, Inc. f/k/a Geonerco, Inc. (“Harbour Homes”) to properly construct ten single family homes within the Bluegrass Meadows development in Mill Creek, Snohomish County. The alleged defects include the failure to install any weather resistive barrier (“WRB”) under the siding on two or three sides of the homes or “elevations” and the failure to flash or weatherproof the windows and other penetrations as required by applicable building codes. The claims include breach of the implied warranty of habitability, breach of contract, intentional or negligent misrepresentation, and breach of the Washington Consumer Protection Act.

Appellants are ten sets of homeowners who purchased their homes from the original purchasers and hold their claims against Harbour Homes by right of assignment, and in the case of the misrepresentation and CPA claims, in their own right as well. The claims were dismissed at summary judgment by the Honorable James Allendorfer by Order dated February 12, 2008. This decision was later certified as a final order of the court under CR 54(b). By this appeal, the subsequent homeowners seek reversal of the trial court’s order, and remand for trial.

II. ASSIGNMENT OF ERROR

1. The trial court erred in granting Harbour Homes' motion for summary judgment dismissing plaintiffs' claims as a matter of law.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there are genuine issues of material fact which preclude summary judgment? (Assignment of Error No. 1)

2. Whether Harbour Homes is entitled to summary judgment dismissing the subsequent purchasers' claims as a matter of law? (Assignment of Error No. 1).

3. Whether the subsequent homeowners are in privity with Harbour Homes as the assignees of the original homeowners' claims?

4. Whether the Assignments of Claim are valid when they are in writing, signed by the assignors, adequately describe the claims assigned, and recite that they are entered into for adequate consideration? (Assignment of Error No. 1).

a. Whether a general, boilerplate anti-assignment clause bars assignment of a cause of action for breach of contract? (Assignment of Error No. 1).

b. Whether the Assignments of Claims are ineffective because the assigned claims are "personal" to the original homeowners? (Assignment of Error No. 1).

- c. Whether it is against public policy to assign an implied warranty of habitability claim? (Assignment of Error No. 1).
 - d. Whether RCW 4.08.080 requires monetary consideration for an assignment? (Assignment of Error No. 1).
 - e. Whether the original homeowners assigned valid claims when there were numerous existing construction defects and they had the right to sue for the cost of repair as damages? (Assignment of Error No. 1).
 - f. Whether CPA claims may be assigned? (Assignment of Error No. 1).
5. Whether Harbour Homes' misrepresentations and failure to disclose constitute unfair or deceptive acts or practices under the CPA? (Assignment of Error No. 1).
6. Whether there is a genuine issue of material fact regarding the causal link between Harbour Homes' deceptive representations and failure to disclose when the homeowners relied upon such representations when deciding to purchase? (Assignment of Error No. 1).
7. Whether the economic loss rule bars claims for intentional misrepresentation, fraudulent inducement, and fraudulent concealment? (Assignment of Error No. 1).

8. Whether negligent misrepresentation claims can only be made a party in privity? (Assignment of Error No. 1).

9. Whether the economic loss rule applies to tort claims between two parties who did not contract? (Assignment of Error No. 1).

IV. STATEMENT OF THE CASE

This lawsuit arises from Harbour Homes' construction and sale of 36 homes in the Bluegrass Meadows development in Mill Creek, Washington. CP 186-201. The homes share the same construction details and the construction defects. CP 86. For example, the elevations which do not front on a street (three sides for most homes, two for corner lots) are sided with T1-11 plywood siding. CP 86. There is no weather resistive barrier or "WRB" installed behind the T1-11, no penetration wrap around any of the windows to make them weatherproof, and no head flashing over most of the penetrations. CP 86. According to plaintiffs' forensic building expert, Mark Jobe, the list of defects includes:

- Water intrusion is evident at all openings. There is water staining and discoloration on the back of siding, trim and framing. Framing and siding nails are rusting.
- Rot/mold is present at all openings.
- There is no weather resistive barrier (WRB) present behind the T1-11 type plywood siding and trim.

- There is no head flashing present at windows, doors, trim and column caps, or at other miscellaneous penetrations including environmental air vents, lights, electrical and phone panels, foundation vents, etc.
- Panel-to-panel 'Z' flashing is inadequate and allows water into framing.
- Alpine windows were not installed with any penetration wraps and do not appear to be set in a bed of sealant.
- Windows appear to be installed with too few fasteners.
- Caulk is failing and missing.
- White wood trim is not painted on all six sides.
- Foundation holdown [sic] straps are bowed and not completely nailed into framing.
- No corresponding floor-to-floor holdown [sic] straps were found above foundation straps.

CP 86-87. "[A]ll of the conditions stem from and are the result of the original construction." CP 88. The construction deficiencies have caused the homes to suffer from excessive moisture, degradation, and/or damage to building components and the buildings will continue to suffer ongoing damage until repaired. CP 88.

When the homes were originally marketed by Harbour Homes, its promotional and advertising materials represented the homes were of the highest quality and workmanship:

- “[W]e are committed to providing quality homes.” CP 105.
- “Our goal is to provide each of our home buyers with a home of the highest quality and workmanship” CP 105.
- “Our construction practices and attention to detail . . . is your assurance of satisfaction.” CP 105.
- “We want our home buyers to enjoy the highest standards of quality and workmanship, standards that translate into lasting value and pride of ownership.” CP 105.
- “With a Harbour Home, maintenance is kept to a minimum for many years due to the high quality of material and workmanship included in every Harbour Home.” CP 104.

Harbour Homes does not deny making these statements. CP 65-76.

When the original homeowners purchased their homes between 2001 and 2003, they entered into Purchase and Sale Agreements with Harbour Homes, then known as Geonerco, Inc. CP 126, 161-65. As a result, each of the original homeowners had contractual privity with Harbour Homes.

The homeowners filed suit against Harbour Homes on July 12, 2007. A Second Amended Complaint was filed on October 9, 2007 naming 37 sets of homeowners as plaintiffs. CP 186-201. Of the 37

homeowners, 11¹ were subsequent purchasers who owned claims by assignment from the original purchasers. CP 98-101.

The subsequent homeowners each obtained identical Assignments of Claims from their original owners. These assignments provide:

For valuable consideration, the receipt and sufficiency of which is hereby acknowledged, _____ (“Seller”) hereby assigns to _____ (“Purchaser”) all claims arising out of tort, contract, statute or any other source, all causes of action, demands, and all rights to sue Generco, Inc. dba Harbour Homes, and any and all other related entities or contractors (hereinafter collectively referred to as “Generco”) for claims arising out of or related to the sale by Generco to Seller of a new single family home in Bluegrass Meadows, a residential development located in Mill Creek, Snohomish County, Washington.

This assignment shall include all of Seller’s claims, causes of action, demands and rights to sue Generco under any legal theory whatsoever arising out of Generco’s ownership, development, construction, marketing and sale of Seller’s former property in Bluegrass Meadows, the contract of sale or deed between any Generco entity and Seller, and all such Seller’s claims, causes of action, demands, and rights to sue Generco held by Seller. Seller agrees to provide all necessary information and documentation to Buyer relating to such claims as Buyer may reasonably request.

Seller hereby warrants that Seller is the owner of all such claims, causes of action, demands, and other rights to sue Generco assigned herein and that all such

¹ One of the subsequent homeowners non-suited by stipulation of the parties, leaving the current ten subsequent homeowners whose claims are at issue in this appeal. CP 99.

claims, causes of action, demands, and other rights to sue Generco have not been assigned in full or in part to any other person or entity.

CP 101. By declaration, three original homeowners acknowledged the assignments of their claims to the current owners of their homes. CP 77-78, 81-82, 94-95.

Harbour Homes filed a motion to remove the claims of the original homeowners to arbitration in November, 2007. This motion was granted by the Honorable Ronald L. Castleberry by Order dated November 19, 2007. CP 49-52. With the entry of this Order, the subsequent homeowners became the only active plaintiffs in the case.

Harbour Homes filed Defendant's Motion for Summary Judgment Dismissal of All Claims by Subsequent Purchasers on January 11, 2008. CP 166-181. In support, it filed the Declaration of Lori K. McKown, an attorney for Harbour Homes, with four exhibits. CP 124-165. No declarations were filed by anyone employed by Harbour Homes. The asserted grounds for Summary Judgment were (1) lack of privity, which Harbour Homes argued required dismissal of the breach of contract, warranty of habitability, and misrepresentation/fraud claims as a matter of law; and (2) the absence of a deceptive or unfair act causing injury to the plaintiffs as required by the CPA. CP 166-67.

Plaintiffs' Opposition to Defendant's Summary Judgment Motion was filed on February 1, 2008. CP 108-123. In support, plaintiffs filed the Declaration of Britenae Pierce, an attorney for the homeowners, with exhibits including an exemplar copy of the Assignment of Claims. Plaintiffs also filed declarations of three original homeowners stating they had relied upon Harbour Homes' representations of quality and would not have purchased their homes if they did not believe Harbour Homes' assurances that they were buying a high quality home. CP 77-78, 81-82, 94-95. Plaintiffs also submitted the declaration of their forensic building expert, Mark Jobe, described above. CP 95-93.

In its Reply, Harbour Homes argued for the first time that the Assignments of Claim were invalid as a matter of law.² CP 65-76. The new arguments included: (1) the assignments were invalid because the claims were "personal" to the original homeowners and could not be assigned; (2) assignment of implied warranty of habitability claims are against public policy; (3) the assignments do not comply with RCW 4.08.080 because there was no monetary consideration; (4) the original homeowners had no rights to assign; (5) CPA claims cannot be assigned as a matter of law; and (6) plaintiffs failed to prove reliance by the

² In footnote 2 on page 8 of its motion, Harbour Homes erroneously states that a copy of the Assignment had not been produced. CP 173. In fact, no discovery had been propounded requesting Assignments. CP 99 § 7.

subsequent homeowners on Harbour Homes' misrepresentations. CP 65-73. At the summary judgment hearing, plaintiffs objected that they had no opportunity to respond to these arguments. The Court refused to consider the new reliance argument (no. 6, above) but considered the remaining arguments in the Reply.

The Motion for Summary Judgment was granted by the Honorable James Allendorfer by Order dated February 12, 2008, dismissing all claims.³ CP 62-64.

Plaintiffs filed a Motion for Certification for immediate appeal under CR 54(b) and RAP 2.2(d). CP 57-61. On March 25, 2008, the trial court certified the Order and entered supporting findings and conclusions. CP 13-16.

The plaintiffs timely filed a Notice for Discretionary Review on March 14, 2008. CP 24-28. After the trial court issued the order certifying its summary judgment order for immediate appeal, the plaintiffs timely filed their Amended Notice of Appeal on March 27, 2008. CP 4-12.

³ The Order states that the plaintiffs retained any express warranty rights they might have, but the Complaint did not assert a claim for breach of express warranties. CP 63; CP 186-201.

V. ARGUMENT

A. **The standard of review for a motion for summary judgment is *de novo*.**

An appellate court reviewing an order on summary judgment engages in the same inquiry as the trial court, considering all matters *de novo*. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004). A court may grant a motion for summary judgment only if “there is no genuine issue as to any material fact” and the moving party has established that it is entitled to the relief requested as a matter of law. CR 56(b). “The court must consider all facts submitted and all reasonable inferences drawn from them in the light most favorable to the nonmoving party. The court should grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion.” *Denaxas v. Sandstone Court of Bellevue*, 148 Wn.2d 654, 662, 63 P.3d 125 (2003) (citations omitted); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 630-31, 71 P.3d 644 (2003). When challenging the sufficiency of the evidence, the moving party must meet its initial burden either by presenting its version of facts by affidavit, *or* by affirmatively alleging a deficiency of proof *and* identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Guille v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 23, 851 P.2d 689 (1993).

If the moving party fails to meet its initial burden, summary judgment may not be granted. *Graves v. P.J. Taggares, Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980).

B. The subsequent homeowners hold valid assignments of the original purchasers' claims against Harbour Homes. Accordingly, the subsequent owners stand in the original owners' shoes when prosecuting the claims.

1. The plaintiffs are in privity of contract with Harbour Homes as a result of the Assignments of Claims from the original purchasers.

Harbour Homes moved for dismissal of the subsequent owners' claims for breach of contract, breach of the implied warranty of habitability, and misrepresentation/fraud on the ground there was no privity between Harbour Homes and the subsequent homeowners. CP 166. Privity exists, however, because Harbour Homes was in privity with the original homeowners and the subsequent homeowners hold their claims by assignment. Accordingly, the subsequent homeowners stand in the shoes of the original homeowners as their assignees, and may assert the claims in their stead as if they were in direct privity of contract. *See Int'l Commercial Collectors, Inc. v. Mazel Co.*, 48 Wn. App. 712, 716-17, 740 P.2d 363 (1987) (it is well established that contract rights may be assigned); *Morse Electro Prods. Corp. v. Beneficial Indus. Loan Co.*, 90 Wn.2d 195, 198, 579 P.2d 1341 (1978) (an assignee stands in the shoes of the assignor); *Puget Sound Nat'l Bank*

v. Dep't of Revenue, 123 Wn.2d 284, 292, 868 P.2d 127 (1994) (an assignee has all rights of the assignor); *see generally* Restatement (2nd) of Contracts § 317 (1979) (cited with approval in *Mazel, supra*). Harbour Homes therefore failed to demonstrate that it was entitled to dismissal on this issue as a matter of law.

2. Causes of action may be assigned in Washington and prosecuted by the assignees in their own names.

Causes of action or choses in action are generally assignable in Washington. *Stover v. Winston Bros. Co.*, 185 Wash. 416, 429, 55 P.2d 821 (1936). The traditional test for whether a cause of action is assignable is whether the claim would survive to the personal representative of the assignor upon death; if the claim would survive, the cause of action is assignable. *See Cooper v. Runnels*, 48 Wn.2d 108, 110, 291 P.2d 657 (1955); *Harvey v. Cleman*, 65 Wn.2d 853, 855, 400 P.2d 87 (1965); *Woody's Olympia Lumber, Inc. v. Roney*, 9 Wn. App. 626, 633, 513 P.2d 849 (1973). The Washington Legislature provided for the survival of all causes of action in RCW 4.20.046(1):

All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law prior to the date of enactment of this section

The only limitations are on the right to recover for pain and suffering and emotional damages, which are not relevant here. *Woody's*, 9 Wn. App. at 633. Accordingly, the causes of action which were assigned in this case were assignable.

3. The Assignment of Claims executed by the original homeowners meet the requirements for a valid assignment.

“The requisites respecting a valid and binding assignment entitling the assignee to sue in his own name have been variously described. No particular words of art are required.” *Amende v. Town of Morton*, 40 Wn.2d 104, 106, 241 P.2d 445 (1952) (citing 2 Williston on Contracts 1220, § 424). Any language showing an intent in the owner to transfer and invest the cause of action in the assignee is sufficient. *Id.*

RCW 4.08.080 allows for actions on assigned choses in action, and provides for the preservation of defenses against the original assignor. In pertinent part it reads:

Any assignee or assignees of any . . . chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors, named in such . . . chose in action, notwithstanding the assignor may have an interest in the thing assigned: PROVIDED, That any debtor may plead in defense as many defenses, counterclaims and offsets, whether they be such as have heretofore been

denominated legal or equitable, or both, if held by him against the original owner

The Assignment of Claims form executed by the original owners is fully compliant with both common law and statutory requirements. It provides for the assignment of “all claims arising out of tort, contract, statute or any other source, all causes of action, demands, and all rights to sue [Harbour Homes].” CP 101. The assignment goes on to state that it includes “all of Seller’s claims, causes of action, demands and rights to sue [Harbour Homes] under any legal theory whatsoever.” CP 101. This language creates a valid assignment: it is in writing; the subject matter is clearly identified; the assignors’ intent is evidenced by his or her signature; and ownership of all claims is relinquished to the assignee. Therefore, the Assignments are fully in compliance with *Amende*, 40 Wn.2d at 106-07 and RCW 4.08.080.

4. Harbour Homes’ arguments that the Assignments are invalid are without merit.

- a. *The anti-assignment clause in the Purchase and Sale Agreements does not prevent the assignment of the original homeowners’ causes of action.*

Harbour Homes asserts that claims arising under the Purchase and Sale Agreements could not be assigned because there is an anti-assignment clause. CP 173-74. It is well established, however, that a

general anti-assignment clause does not prevent a party from assigning a cause of action for breach under Washington case law.

In *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 830, 881 P.2d 986 (1994), the Washington Supreme Court addressed whether a breach of contract claim could be assigned when the contract at issue contained the following anti-assignment provision:

Neither the Owner nor the Architect shall assign, sublet or transfer any interest in this Agreement without written consent of the other.

Id. at 829. The Court held that “a general anti-assignment clause, one aimed at prohibiting the assignment of a contractual performance, does not, absent specific language to the contrary, prohibit the assignment of a breach of contract cause of action.” *Id.* The primary purpose of such clauses is to protect a party “in selecting the person with whom he [or she] deals,” and not is shielding the party from suit. *Id.* at 830.

Here, the anti-assignment clause states:

Buyer may not assign this Agreement, or the Buyer’s rights hereunder, without Seller’s prior written consent, unless provided otherwise herein.

CP 165 ¶ o. There is no specific provision preventing the assignment of claims for breach. As in *Berschauer/Phillips*, this is a “boiler plate provision intended to prohibit the exchange of contractual

performances,” nothing more. The assignments of breach of contract claims are valid.

Harbour Homes also argues that it is against public policy to allow assignment of a breach of contract claim because it will expand the warranty of habitability beyond first purchasers. CP 173. This argument confuses breach of contract with breach of warranty claims and is made without citation to supporting authority. Moreover, as set forth in subsection c below, there is no public policy against assigning implied warranty of habitability claims. Even if there were, it would not prevent the assignment of the original homeowners’ breach of contract claims. Accordingly, the assignment of contract claims falls squarely within existing authority allowing contract claims to be assigned.

- b. *The assigned claims are not “personal claims” which cannot be assigned under existing case law.*

In its Reply, Harbour Homes argued for the first time that the assignments were invalid because the claims were personal to the original homeowners and could not be assigned. As set forth above, causes of action are generally assignable in Washington if they would survive death and pass to the personal representative. By statute, the only exceptions are for pain and suffering and emotional damages, which do not apply here. RCW 4.20.046(1). No case law has been cited which

would take the claims in this case out of the normal rule allowing assignment.

Harbour Homes can cite only four cases to support this argument, none of which justifies dismissal of the assigned claims in this action. As its principal support, Harbour Homes cites *Federal Financial Co. v. Gerard*, 90 Wn. App. 169, 177, 949 P.2d 412 (1998), which in turn cites *Gillam v. The City of Centralia*, 14 Wn.2d 523, 128 P.2d 661 (1942), and *Heian v. Fisher*, 189 Wash. 59, 63 P.2d 518 (1937). Unfortunately, *Gerard* erroneously describes *Gillam* and *Heian* as standing for the proposition that certain claims may not be assigned, when neither case even addresses the issue of assignment.

Gillam involved an action to recover damages to real property caused by construction of an overpass. The plaintiff sued in his capacity as the administrator of his deceased wife's estate. The trial court awarded damages to the plaintiff, and the City appealed questioning the husband's capacity to sue. The Court ruled that the right to sue for damages for an injury to property is a personal right belonging to the owner, which did not pass by deed to the husband when the wife quitclaimed her interest to him shortly before death. *Id.* at 530. Thus, upon the wife's death, the claim became subject to probate and the

husband, as her administrator, could properly sue for damages. *Id.* at 531.

Contrary to Harbour Homes' position, the *Gillam* case does not hold that the right to sue for damage to property must be assigned by deed, nor does it hold that the failure to do so extinguishes the claim. To the contrary, the claim remained with the community even after the real property became the separate property of the husband, and the community retained its right to sue.⁴

Heian v. Fisher, 189 Wash. 59, involved a three-way deal in which a Certificate of Purchase for real property was placed for sale through an intermediary. The intermediary found a purchaser and the deal was placed in escrow. The buyer investigated further, and decided he did not want to proceed with the deal because it had been misrepresented by the intermediary. The buyer then contacted the seller directly, and the seller withdrew the Certificate from the intermediary. When the intermediary sued the seller for breach of contract, the seller counterclaimed for fraud. The Supreme Court dismissed the counterclaim because the alleged fraud was against the buyer and not the seller, holding that an action for fraud can only be brought by the one to

⁴ Although the claim was never assigned, it is worthy of note that this claim passed the traditional test for an assignable claim: it passed to the party's personal representative at death. See *Cooper v. Runnels*, 48 Wn.2d at 110.

whom the fraudulent representations are made. *Id.* at 63. As in *Gillam*, the only issue was who had the right to bring the claim, and not whether the claim could be assigned.

Federal Financial Co. v. Gerard merely cites *Gillam* and *Heian* in passing without discussion. *Federal Financial Co. v. Gerard* dealt with the limited issue of whether the assignee of a promissory note formerly held by the FDIC as a receiver could use the extended statute of limitations under federal law when suing on the note. After noting that contract rights are generally assignable under Washington law, the Court erroneously identified *Gillam* and *Heian* as two cases standing for the proposition that certain rights were personal and could not be assigned, but also noted, “no Washington case explicitly defines the nature of a right that is personal and hence, not assignable.” *Federal Financial*, 90 Wn. App. at 178. Ultimately, the Court held that the statute of limitations issue was a right attendant to the Note which passed with the Note. Nothing in *Federal Financial v. Gerard* supports Harbour Homes’ argument that the claims in this case cannot be assigned as can any other claim which survives death.

Finally, Harbour Homes completes its argument by misrepresenting the holding in *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 418-21, 745 P.2d 1284 (1987). According

to Harbour Homes, “[t]he primary rationale behind our Supreme Court’s limitation on claims to first owners is because the claims are personal Therefore, assignment of the original owners’ claim is not assignable.” In fact, *Stuart* never discusses the concept of personal claims or the assignability of such claims, and its holding is inapposite.

Harbour Homes’ personal claims argument is based upon a misreading of the cases, and an inadvertent misstatement in *Federal Financial v. Gerard*. A careful reading of the cases demonstrates that Harbour Homes’ argument lacks authoritative support and cannot be used to vary from the normal and long-standing rule that the causes of action at issue here are assignable.

- c. *No existing case law prevents the assignment of an implied warranty of habitability claim.*

Harbour Homes also contends that an implied warranty of habitability claim cannot be assigned as a matter of law. CP 66-67. This argument is made without citation to supporting case law. CP 66-67. Instead, Harbour Homes cites decisions such as *Stuart v. Coldwell Banker*, which hold that the implied warranty of habitability arises from the sale of a new home by a builder/developer to its first intended occupant. 109 Wn.2d at 415. None of Harbour Homes’ cited cases, however, deal with the issue of whether or not an implied warranty claim

can be assigned, which is the very issue Harbour Homes claims entitles it to summary judgment “as a matter of law.” CP 65. Accordingly, this claim is made without supporting authority.

Even if this Court elects to consider the issue from a public policy perspective, no public policy prevents the assignment of an original owner’s claim for breach of the implied warranty of habitability. The assignment does not extend a builder/vendor’s liability as the assignee merely stands in the shoes of the assignor, subject to all original defenses including the statutes of limitation and repose. The Washington State Legislature has also extended the implied warranty of suitability, which is coextensive with the warranty of habitability, to subsequent owners of a condominium unit for up to four years after the initial purchase. RCW 64.34.445(6). Moreover, the majority of other states have extended the implied warranty of habitability to subsequent owners, limited only by a period of years. *See, e.g., Richards v. Powercraft Homes, Inc.*, 678 P.2d 427, 430 (Ariz. 1984) (“[t]he purpose of a warranty is to protect innocent purchasers and hold builders accountable for their work . . . any reasoning which would arbitrarily interpose a first buyer as an obstruction to someone equally deserving of recovery is incomprehensible”); *Redarowicz v. Ohlendorf*, 441 N.E.2d 324, 330 (Ill. 1976) (“The compelling public policies underlying the implied warranty

of habitability should not be frustrated because of the short intervening ownership of the first purchaser.”); *Terlinde v. Neely*, 271 S.E.2d 768, 769 (S.C. 1980) (“Common experience teaches that latent defects in a house will not manifest themselves for a considerable period of time, likely . . . after the original purchaser has sold the property to a subsequent unsuspecting buyer.”); *see also Blagg v. Fred Hunt Co., Inc.*, 612 S.W.2d 321, 322 (1981); *Tusch Enterprises v. Coffin*, 740 P.2d 1022, 1035-36 (1987); *Speight v. Walters Dev. Co., Ltd.*, 744 N.W.2d 108 (Iowa 2008); *Keyes v. Guy Bailey Homes, Inc.*, 439 So.2d 670, 673 (Miss.1983); *Lempke v. Dagenais*, 547 A.2d 290 (N.H. 1988); *Hermes v. Staiano*, 437 A.2d 925 (N.J. Super 1981); *Elden v. Simmons*, 631 P.2d 739 (Okla.1981); *Nichols v. R.R. Beaufort & Associates, Inc.*, 727 A.2d 174 (R.I.1999); *Sewell v. Gregory*, 371 S.E.2d 82 (W. Va. 1988); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo.1979). Because subsequent purchasers are allowed to exercise the protections of implied warranties of habitability or suitability in this and other states, it cannot be against public policy to allow an assignment of such claims simply because the homeowners in question purchased a single family home in Washington. The public policy argument should be rejected.

- d. *RCW 4.08.080 does not require monetary consideration for an assignment.*

According to Harbour Homes, RCW 4.08.080 requires the payment of monetary consideration for an assignment to be valid. It does not. The reference in the statute to the “payment of money” describes the type of assigned claims or choses in action which require a writing: *i.e.*, claims for the payment of money. It is not a statutory consideration requirement as Harbour Homes would read it, nor has any case law been cited to support this position.

Harbour Homes also makes the argument that irrespective of RCW 4.08.080, consideration is required for the assignments to be valid. For support, Harbour Homes cites a Wyoming case, *Farr v. Link*, 746 P.2d 431, 433 (Wyo. 1987), for the proposition that consideration is required. But *Farr* only holds that an assignment must be “interpreted or construed according to the rules of contract construction.” *Farr*, 746 P.2d at 433. The decision never mentions consideration.

Under *Amende*, 40 Wn.2d at 106-07, any language showing an intent in the owner to transfer and invest the cause of action in the assignee is sufficient. Under RCW 4.08.080, only the assignor is required to execute the assignment, not the assignee. In this case, the assignors agreed that the assignment was made “[f]or valuable

consideration, the receipt of which is hereby acknowledged.” CP 99, 101. There is no requirement that more be stated.⁵

e. *The original homeowners held valid assignable claims.*

Harbour Homes also argued for the first time in its Reply that the original owners suffered no damages, and thus could not assign valid claims. The only case cited in support is a Utah case, *West v. Inter-Financial, Inc.*, 139 P.3d 1059 (Utah App. 2006). In *West*, the seller of a home hired an appraiser to value his house. The seller then sold the home to a subsequent purchaser. The purchaser discovered the appraiser overestimated the square footage and therefore the house’s value. The original owner assigned his rights and claims against the appraiser to the purchaser who filed suit. The court held the assignment was invalid

⁵ This argument was raised for the first time on Reply. Prior to that, Harbour Homes only stated in a footnote that it did not know “the legal sufficiency of the assignments” with a citation to Am. Jur. 2nd and a will case, *Saunders v. Callaway*, 42 Wn. App 29, 37, 708 P.2d 652 (1985), which holds that an “expectation of succession to property [*i.e.*, an inheritance] . . . is transferable upon adequate consideration” citing several treatises as support. CP 173. As a result, this argument was never fully formed or briefed by Harbour Homes, and plaintiffs did not have an opportunity to respond prior to the hearing. If consideration is needed, it is supplied by forbearance from filing claims against the original homeowners in lieu of pursuing the assigned claims against Harbour Homes. Alternatively, a party may assign its rights by gift. 6A CJS Assignments § 4 (1975) (“An assignee is one to whom any right or property is assigned, whether by sale, gift, legacy, transfer, or cession”) cited with approval in *Farr v. Link*, 746 P.2d at 433.

because the original owner had suffered no damages thus had no claim to assign.

West is distinguishable. Here, the original homeowners purchased new homes which failed to meet minimum code requirements for water intrusion, were in breach of the implied warranty of habitability, and which fell far below Harbour Homes' advertised representations of quality. The measure of damages for construction defects claims is the cost of repair. *See, e.g., Eastlake Construction Company, Inc. v. Hess*, 102 Wn.2d 30, 45-48, 686 P.2d 465 (1984). Alternatively, the defendant may attempt to prove that repair is economically unfeasible. In this instance, the measure of damages is the difference between the value of the home as represented, and value as constructed. *Id.* Thus, under either measure, the original homeowners held the right to sue for damages arising from the defects Harbour Homes built into their homes.

The original homeowners had the right to sue for damages until they assigned those claims to the plaintiffs. *See AAA Cabinets & Millwork, Inc. v. Accredited Sur. & Cas. Co., Inc.* 132 Wn. App. 202, 208, 130 P.3d 887 (2006) (the assignee steps into the shoes of the assignor and acquires whatever rights the assignor had prior to assignment). Harbour Homes presented no evidence and made no

allegation that the homes were not in need of repair, or that there was no diminution in value based upon the defects. The Jobe Declaration establishes that the homes were defective and that the defects dated from the original construction. CP 86-88. Accordingly, Harbour Homes' argument that the original homeowners did not have the right to sue for damages prior to assignment is not supported by the law or the facts.

f. *CPA claims may be assigned.*

In its Reply, Harbour Homes claims that CPA claims cannot be assigned as a matter of law, claiming such claims are "personal" to the owner.⁶ CP 71. For support, it cites case law which does not address the issue of assignments. CP 71.

In fact, Washington law allows for the assignment of Consumer Protection Act claims. *Steinmetz for Benefit of Palmer v. Hall-Conway Jackson, Inc.*, 49 Wn. App. 223, 228, 741 P.2d 1054 (1987) (dismissal of an assigned CPA claim at summary judgment reversed and remanded); *Werlinger v. Clarendon Nat. Ins. Co.*, 129 Wn. App 804, 808-09, 120 P.3d 593 (2005) (assigned CPA claim decided on the merits); *Besel v. Viking Ins. Co. of Wisconsin*, 105 Wn. App. 463, 467-68, 472-73, 482-84, 21 P.3d 293 (2001), *rev'd on other grounds*, 146 Wn.2d 730, 49 P.3d 887 (2002) (assigned CPA claim addressed on the merits). No case law

⁶ The issue of "personal" claims is discussed in subsection b above.

has been cited which would take these claims out of the normal rule that choses in action are assignable. Therefore, the original owners' assignments of their claims against Harbour Homes for violation of the Consumer Protection Act are valid, and it was error to dismiss them.

C. Harbour Homes committed unfair and deceptive acts in the course of its trade or business which caused damages to the original homeowners and subsequent homeowners. Accordingly, it was error to dismiss plaintiffs' CPA claims.

Harbour Homes argued at Summary Judgment that the claims for breach of the Consumer Protection Act should be dismissed because the homeowners could not prove: 1) the existence of an unfair or deceptive act or practice; or 2) causation. CP 177-81. Neither argument has merit.

1. Harbour Homes committed unfair and deceptive acts or practices in the conduct of its trade.

Harbour Homes makes no attempt to allege there is an absence of proof regarding the nature and quality of its acts, nor does it allege that it disclosed the existence of construction defects to its purchasers. Instead, Harbour Homes argues that its acts did not rise (or sink) to the level of deceptive acts or practices as a matter of law.

Harbour Homes first argues that its representations of quality construction were not "an act that is unfair or deceptive that occurs in trade." CP 178. Harbour Homes postulates that the act of mass marketing defective homes to the general public is instead the "negligent

provision of a service.” CP 178. For support, it relies upon *Ramos v. Arnold*, 141 Wn. App. 11, 169 P.3d 482 (2007), a case involving a single contract between a professional appraiser and a homeowner.

Nothing in *Ramos* stands for the proposition that misleading statements in mass advertising, marketing materials, misleading statements of quality construction, and the failure to disclose latent defects are not unfair and deceptive acts under the CPA. To the contrary, the Supreme Court ruled long ago that a contractor/developer’s activities are within the express definition of trade or commerce in RCW 19.86.010. See *Eastlake Construction Company, Inc. v. Hess*, 102 Wn.2d 30, 49-50, 686 P.2d 465 (1984). Moreover, misleading statements made in advertising directed to the general public “constitute unfair or deceptive acts or practices within the meaning of RCW 19.86.020.” *Fisher v. World-Wide Trophy Outfitters, Ltd.*, 15 Wn. App. 742, 748, 551 P.2d 1398 (1976). Nothing in *Ramos* alters this established precedent.

Harbour Homes also relies upon *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 167 P.3d 1162 (2007). In *Nguyen*, the second purchasers of a home sued in their own right for failure to disclose defects, fraudulent concealment, and breach of the CPA arising from concealed defects in a home. The plaintiffs had no contact or

communication with the builder, and there is no representation that the contractor used mass advertising. *Id.* at 731-32. The CPA claim was based solely upon the failure to comply with industry standards and nothing more. Under these facts, the court dismissed based upon a failure of proof. *Id.* at 733-34.

The present case bears no resemblance to *Nguyen*. The second purchasers are assignees of the original homeowners' claims and stand in their shoes. Three of the original homeowners provided declarations stating they relied upon Harbour Homes' representations of quality construction when deciding to purchase their homes. CP 77-78, 81-82, 94-95.⁷ Unlike the CPA claim in *Nguyen*, it is undisputed that Harbour Homes made affirmative representations of quality, workmanship, and construction to induce members of the general public to buy its homes. *Fisher v. World-Wide Trophy*, 15 Wn. App. at 748 (deceptive acts or practices may include practices designed to induce a potential buyer to purchase goods or services). Representative statements include:

- “[W]e are committed to providing quality homes.”
- “Our goal is to provide each of our home buyers with a home of the highest quality and workmanship”

⁷ Additional declarations could not be obtained because of shortness of time and the fact that the original homeowners had moved. CP 99.

- “Our construction practices and attention to detail . . . is your assurance of satisfaction.”
- “We want our home buyers to enjoy the highest standards of quality and workmanship, standards that translate into lasting value and pride of ownership.”
- “With a Harbour Home, maintenance is kept to a minimum for many years due to the high quality of material and workmanship included in every Harbour Home.”

CP 103-107. As set forth in the Declaration of Mark Jobe, the actual condition of the homes fall far short of these representations of quality. The defective conditions include: the total absence of WRB on two or three elevations of the homes; the total absence of penetration wrap; missing or improperly installed head flashings; water intrusion at all openings, rot and mold; improperly installed windows; and missing or improperly installed hold-down straps. CP 86-87. The disparity between what was marketed and advertised, and what was delivered, is striking. Moreover, there is no evidence or allegation in the record that Harbour Homes disclosed any of the defective conditions listed above. *See Griffith v. Centrex Real Estate Corp.*, 93 Wn. App. 202, 214-15, 969 P.2d 486 (1998) (the failure to disclose known defects is a deceptive act or practice under the CPA).

In *Griffith*, the plaintiffs claimed Centex committed unfair and deceptive practices by failing to disclose known defects in the siding and failing to conform to industry standards. *Id.* at 214. Viewing the evidence in the light most favorable to the plaintiffs, the Court concluded that Centex knew its purchasers expected high quality finishes as

described in its sales materials and its homeowners manual, and that it knew of problems with the finishes from complaints, product information, and its subcontractors. *Id.* at 215-16. Accordingly, the Court ruled there was a genuine issue of material fact whether Centex engaged in unfair or deceptive acts, reversing the earlier grant of summary judgment. *Id.* at 217-18.

As in *Griffith v. Centrex*, when the evidence is viewed in the light most favorable to the plaintiffs, it must be concluded that Harbour Homes knew of the construction defects and failed to disclose them. For example, Harbour Homes knew there was no WRB behind the walls with T1-11 siding, no penetration wrap around any of the windows, and missing or improperly installed hold-down straps and head flashings because these were all defective conditions created by Harbour Homes when the houses were built. Yet, there is no allegation or evidence in the record that Harbour Homes disclosed these conditions. Harbour Homes continued to make representations of quality to the general public, including the second purchasers, which were misleading and deceptive.

As in *Griffith v. Centrex*, there is a genuine issue of material fact regarding Harbour Homes' deceptive acts and practices which requires a trial. *Id.* at 214-15. The dismissal of the CPA claim at summary judgment therefore should be reversed.

2. Causation exists because the homeowners relied on Harbour Homes' unfair and deceptive acts.

Harbour Homes also argues that the CPA claims should be dismissed for lack of causation. This is based upon the allegation that the subsequent owners did not rely on assertions made by Harbour Homes. Again, Harbour Homes chooses to ignore the fact that the subsequent homeowners stand in the shoes of the original homeowners as their assignees.

The original homeowners relied on Harbour Homes' statements about the quality, workmanship, and construction of their homes. CP 77-78, 81-82, 94-95. The declarations of three original owners who assigned their claims demonstrate (1) Harbour Homes represented to the purchasers that its homes were "of highest quality and workmanship"; (2) the homeowners relied upon these representations; and (3) the homeowners would not have purchased the homes if they did not believe Harbour Homes' statements. *Id.* This creates the necessary causal link, or "but for" causation, between Harbour Homes' deceptive business acts and practices, and the injury suffered. *See Fisher*, 15 Wn. App. at 748 (causal link established when misleading ads induced plaintiffs to initially contact defendant outfitter); *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 168, 795 P.2d 1143 (1990) (plaintiffs

established causal link by testifying they would not have made the investment if shown deceptive appraisal); *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 83-85, 170 P.3d 10 (2007) (causation established if plaintiffs can show injury would not have occurred but for the deceptive acts). Plaintiffs met this standard by establishing a link between the deceptive acts and the decisions of the original homeowners to purchase their homes.⁸ At a minimum, a material issue of fact exists which cannot be resolved at summary judgment.

D. The economic loss rule does not apply to intentional fraud or the claims of the second homeowners who did not contract with Harbour Homes.

1. The economic loss rule does not apply to claims for intentional misrepresentation, fraudulent inducement, or fraudulent concealment.

The economic loss rule pertains to claims for negligent misrepresentation when the parties have allocated the risk by contract, or had the opportunity to allocate the risk. *Griffith v. Centex*, 92 Wn. App. at 211; *Alejandre v. Bull*, 159 Wn.2d 674, 689, 153 P.3d 864 (2007). No Washington court has held that a claim for intentional misrepresentation,

⁸ The subsequent homeowners can also establish a causal link between their injury and Harbour Homes' failure to disclose because disclosure by Harbour Homes would have required repair or disclosure of the defects by the original owners at the time of sale. As a result, the subsequent owners would not have unknowingly purchased defective homes "but for" Harbour Homes failure to disclose.

fraudulent inducement, or the intentional failure to disclose when under a duty to do so is barred by the economic loss rule. Numerous outside jurisdictions allow such claims. *See Baddeley v. Seek*, 138 Wn. App. 333, 156 P.3d 959 (2007). In *Alejandre*, the Supreme Court expressly declined to rule on this issue because it resolved the fraud claim on other grounds. *Alejandre*, 159 Wn.2d at 690. Even so, the present state of the law is that no Washington decision has extended the economic loss rule to limit claims for common law fraud. Moreover, Harbour Homes did not brief the issue of intentional misrepresentation or fraud as a part of its Motion. Accordingly, it was error to dismiss the intentional fraud claims as a matter of law.

2. The second homeowners' claims for negligent misrepresentation do not require privity, and are not barred by the economic loss rule.

a. *Privity is not a requirement for a negligent misrepresentation claim.*

Harbour Homes argued below that the negligent and/or intentional misrepresentation claims asserted by the plaintiffs should be dismissed for lack of privity. CP 197-99. In making this argument, Harbour Homes confuses tort with contract principles, and misinterprets the case law it relies upon. Moreover, Harbour Homes again ignores the fact that the plaintiffs stand in the shoes of the original homeowners and therefore are in privity. Accordingly, the privity issue could only pertain

to the misrepresentation claims of the second homeowners asserted in their own right. Even then, it is without merit.

For support, Harbour Homes cites to *Berschauer/Phillips*, 124 Wn.2d at 828, and *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 167 P.3d 1162 (2007). Contrary to Harbour Homes' representations, *Berschauer/Phillips* does not require privity of contract for a misrepresentation claim. Were this the case, there could never be a misrepresentation claim because there would always be a contract which would take precedent. No Washington decision stands for this proposition. Instead, *Berschauer/Phillips* holds that when parties have contracted to protect against potential economic liability, contract principles override the tort principles and, thus, purely economic damages are not recoverable. *Berschauer/Phillips*, 124 Wn.2d at 828. In this case, the parties did not contract to protect against purely economic liability.

Second, Harbour Homes relies upon *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726 to support its privity argument. CP 174-75. Again, *Nguyen* is inapposite. The decision merely held that because the plaintiffs had no contact whatsoever with the builder-vendor, they could not have been victimized by the builder-vendor's alleged fraudulent concealment. *Id.* at 733. There is no discussion in the decision

indicating that privity is a requirement of a tort claim and no indication that the defendant engaged in mass marketing as Harbour Homes does.⁹

The Washington Supreme Court has ruled specifically that “lack of privity is no defense to a claim of negligent misrepresentation.” *Schaaf v. Highfield*, 127 Wn.2d 17, 26, 896 P.2d 665 (1995); *see also Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 162-63, 744 P.2d 1032 (1987). Accordingly, Harbour Homes’ attempt to graft a privity requirement onto the tort of misrepresentation should be rejected.

b. *The economic loss rule does not apply when the parties have not entered into a contract.*

The economic loss rule applies to a claim for negligent misrepresentation “where a contractual relationship exists and the losses are economic losses.” *Alejandre*, 159 Wn.2d at 683. The economic loss rule does not apply to the subsequent owners’ claims for negligent misrepresentation,¹⁰ because the subsequent homeowners did not contract with Harbour Homes and were not parties to the original construction and purchase agreements.

⁹ See CP 103-107 for examples of Harbour Homes’ general marketing statements. CP 107 refers to multiple neighborhoods developed by Harbour Homes, and includes references to its web site, www.harbourhomes.com.

¹⁰ See CP 197-98 for the subsequent owners’ allegations of direct claims.

The economic loss rule applies “when a contract allocates liability.” *Griffith v. Centrex Real Estate Corp.*, 93 Wn. App. 202, 213, 969 P.2d 486 (1998); *see also Berschauer/Phillips*, 124 Wn.2d at 828 (“when parties have contracted to protect against potential economic liability . . . purely economic damages are not recoverable”). The weight of authority in Washington is that the economic loss rule requires a contractual relationship. *See, e.g., Alejandre*, 159 Wn.2d at 683-86; *Berschauer/Phillips*, 124 Wn.2d at 828; *Griffith*, 93 Wn. App. at 213. The second homeowners are not in an analogous position to the architects in *Berschauer/Phillips*, which involved numerous contracts among construction professionals allocating risk in the construction of a school. Because the subsequent homeowners asserted claims for negligent misrepresentation in their own right, and the subsequent owners do not have a contract with Harbour Homes and were not involved in the allocation of risk between Harbour Homes and the original homeowners, the economic loss rule does not apply.¹¹

¹¹ Harbour Homes did not challenge the sufficiency of the evidence supporting the negligent misrepresentation claims, choosing instead to challenge the claims as a matter of law. As a result, the trial court rejected the argument made for the first time in Reply that the plaintiffs had failed to prove reliance, as there was no requirement that they do so.

VI. CONCLUSION

For the reasons stated above, this Court should reverse the Order Granting Plaintiff's Motion for Summary Judgment, and remand for trial.

RESPECTFULLY SUBMITTED this 27th day of May, 2008.

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DECLARATION OF SERVICE

I declare that on the 27th day of May, 2008, I caused to be served the foregoing document on counsel for Appellee, as noted, at the following addresses:

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Susan Smith

Dated: May 27, 2008

Place: Seattle, WA