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No. 61419-3-1

COURT OF APPEALS - DIVISION ONE
IN AND FOR THE STATE OF WASHINGTON

ROBERT CARLILE and ANGIE CARLILE, et al,

Appellants,

v.

HARBOUR HOMES, INC., et al,

Respondent.

BRIEF OF THE RESPONDENT

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
2008 JUN 26 PM 1:48

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ORIGINAL

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I. INTRODUCTION

Ten plaintiffs, who did not purchase their homes from defendant Harbour Homes, and therefore had no relationship with Harbour Homes, contractual or otherwise, filed suit against Harbour Homes alleging that construction defects exist in their homes.

Because these "Subsequent Purchasers" had no contractual privity with Harbour Homes, and because they could not show that any of their alleged injuries were caused by Harbour Homes, Harbour Homes moved for summary judgment dismissal of all of the Subsequent Owners' claims, which was granted by Order of the Superior Court on February 13, 2008.

Washington has a well-settled body of law on construction defect jurisprudence. In short, our Supreme Court has consistently held that a builder's liability is constrained to terms upon which the builder and first intended purchasers contracted. The Court has held that Washington does not recognize negligent construction as a cause of action, and tort claims in which no personal injury has occurred are limited to contract remedies pursuant to the economic loss doctrine. Under this body of law, the Honorable James Allensdorfer granted Harbour Homes' motion for summary judgment, and dismissed the Subsequent Purchasers' claims with prejudice.

The Subsequent Purchasers, however, attempted to circumvent the law by claiming rights as assignors to the Original Owners claims through assignments that were obtained, in most cases, years after the sale of the homes from the Original Owners to the Subsequent Owners. The Superior Court, however, held that the assignments were ineffective and invalid.

Harbour Homes requests that the Court affirm the Superior Court's decision granting Harbour Homes' motion for summary judgment dismissal of all of the Subsequent Purchasers' claims.

II. STATEMENT OF THE CASE

This case arises from alleged construction defects at the Bluegrass Meadows single-family residential neighborhood, located in Snohomish County, Washington. CP 193-195. The homes at issue were built by Respondent, Harbour Homes, Inc. ("Harbour Homes") between 2001 and 2003. CP 167.

In August 2007, thirty-seven (37) homeowners filed suit against Harbour Homes, alleging that their homes contain construction defects. CP 186. Of the thirty-seven homeowners, eleven (11) did not purchase their homes directly from Harbour Homes.¹ CP 98. Rather, these "Subsequent Purchasers" purchased their homes years after the homes had been built, from

¹ One of the Subsequent Purchasers, Yen Dahn, sought a voluntary dismissal of his claim in January, 2008. CP 99. Thus, only 10 Subsequent Purchasers remain.

the Original Owners. *Id.* Harbour Homes, therefore, had no relationship with these Subsequent Purchasers, contractual or otherwise.

The Subsequent Purchasers' complaint alleges four causes of action: violation of the implied warranty of habitability; breach of contract; negligent and/or intentional misrepresentation; and violation of the Consumer Protection Act ("CPA"). CP 195-200.

In February 2008, Harbour Homes moved for summary judgment dismissal of the Subsequent Purchasers' claims. CP 166. The Honorable James H. Allendorfer dismissed the Subsequent Purchasers' claims in their entirety because the Subsequent Purchasers were not in contractual privity with Harbour Homes. CP 64.

The Subsequent Purchasers attempted to circumvent the privity requirement by obtaining "assignments" from the Original Owners of the homes. CP 99. However, the assignments at issue were not obtained when the homes were purchased from the Original Owners, but rather, in most cases, years after the

purchase and sale had occurred.² CP 99; 101; 94-95; 81-82; 77-78. The Superior Court therefore held that these assignments were ineffective and invalid.³ CP 62.

The Subsequent Owners have also made numerous and unsubstantiated allegations regarding alleged construction defects and violations of the building code in both their summary judgment motions and their appellate brief. CP 119-120; Opening Brief of the Appellant § IV. However, notwithstanding the fact that these allegation are untrue and that Harbour Homes complied with all required building codes, industry standards, and manufacture recommendations, Harbour Homes has not addressed or responded to these false allegations because the issues on

² It should be noted that only one Subsequent Owner, Darrell and Judell Hughes, has produced an assignment in this case. CP 99; 101. Because this assignment is the only assignment on record, 9 of the 10 plaintiffs should be dismissed outright because they have failed to meet their burden establishing that such assignments exist. *Olmsted v. Mulder*, 72 Wn. App. 169, 182, 863 P.2d 1355 (1993) (“The party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue.”)

³ Contrary to the Subsequent Purchasers’ assertion, the validity of the assignments was raised in Harbour Homes’ opening motion for summary judgment. CP 172-73. Despite several requests from Harbour Homes’ counsel, an “exemplar” assignment was not produced until it was attached as an exhibit to the Subsequent Purchasers’ opposition motion. *Id.* Therefore, the Subsequent Purchasers’ assertion that this issue was newly raised is incorrect and without merit.

summary judgment and before this Court are strictly a matter of law.

III. ARGUMENT

A. Claims arising from alleged construction defects may only be asserted by the first intended purchaser of a home, because the claims are personal as between the builder and the original owner.

Claims arising from the original construction of a home may only be asserted by the first intended purchaser of a home, because the claims are personal as between the builder and the original owner. *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 421-22, 745 P.2d 1284 (1987). Absent first purchaser privity, a party has no standing to sue. As explained more fully below, over the past forty years, our Supreme Court has constrained the liability of a builder to contract, and further limits contract claims to those in which there is contractual privity with the first purchaser.

This principle has been repeatedly upheld by strictly limiting claims against builders to first purchasers by:

- (1) Expressly and repeatedly holding that the implied warranty of habitability only applies to the first intended purchaser; *See, e.g. Stuart*, 109 Wn.2d at 415-16;

- (2) Rejecting negligent construction as a cause of action; *See, e.g., Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 526, 799 P.2d 250 (1990); and
- (3) Strictly enforcing the economic loss rule in the construction context. *See, e.g., Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007).

The Court has carefully established this precedent to protect first purchasers from the harshness of the doctrine of *caveat emptor*, while at the same time protecting builders from becoming guarantors of a subsequent purchaser's satisfaction.

In this case, the Appellants are all Subsequent Purchasers who have no contractual privity with Harbour Homes. Nevertheless, they assert claims that are strictly limited to first purchasers. The Subsequent Purchasers attempt to circumvent the well-established principals of construction defect jurisprudence by claiming rights as assignees. Any recognition of such "assignment", however, undermines the vast body of case law that Washington Courts have developed over the past several decades. The Superior Court, therefore, correctly dismissed the Subsequent Purchasers' claims.

1. The Subsequent Purchasers' implied warranty claim fails because there is no first purchaser privity.

For nearly 40 years, our Supreme Court has repeatedly held that the implied warranty of habitability runs only from the builder to the first intended occupant. *Stuart*, 109 Wn.2d at 415 (“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.

In addition, the *Stuart* Court rejected negligent construction as a cause of action in Washington. *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 in which risks and liabilities may be allocated 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 claims asserted here by these Subsequent Purchaser Appellants are exactly what the *Stuart* Court sought to avoid. Harbour Homes contracted directly with the Original Owners for an express warranty that defined the parties' obligations and liabilities. CP 162-65. Now, several years later, Harbour Homes is asked to be the guarantor of the Subsequent Purchasers' satisfaction – parties with whom Harbour Homes did not contract.

Stuart reaffirmed the rule that the common law doctrine of implied warranty of habitability only applies to first purchasers and that construction defect claims are only subject to contract remedies between the builder and the first purchaser. To extend Harbour Homes' liability to the Subsequent Purchasers here would “upset the law upon which expectations are built,” making Harbour Homes a guarantor. This outcome is in direct conflict with Supreme Court precedent. Therefore, the Subsequent Purchasers' claims were properly dismissed.

2. The Subsequent Purchasers' breach of contract claim was properly dismissed because there is no contractual relationship between the Subsequent Purchasers and Harbour Homes.

It is black letter law that “a contract cannot be enforced by a person who is not a party to it or in privity with it...” Laura Dietz, et.

al., *Contracts*, 17A Am. Jur. 2d § 416 (2007). “Generally, whenever a wrong is founded upon a breach of contract, the plaintiff suing in respect thereof must be a party or privy to the contract, and none but a party to a contract has the right to recover damages for its breach against any of the parties thereto.” *Id.*

The Subsequent Purchasers, however, assert that their claims are cognizable as assignees. *See Opening Brief of Appellants, § V.B.* This assertion fails because the plaintiffs’ implied warranty and contract claims are personal as between the builder, Harbour Homes and the Original Owners, and personal claims are not assignable.

While generally claims are assignable, a “well established exception” is that claims that involve “a relation of personal confidence” cannot be assigned. *R.B Robbins v. Hunts Food & Indus., Inc.*, 64 Wn.2d 289, 294, 391 P.2d 713 (1964); *Federal Financial Co. v. Gerard*, 90 Wn. App. 169, 177, 949 P.2d 412 (1998) (“Washington case law recognizes the existence of rights that are personal to the assignor and incapable of assignment.”) Determination of whether a particular claim is assignable is “not one of mere definition.” *R.B Robbins*, 64 Wn.2d at 294. Rather, “it lies in the application of these general principals to the given case”,

i.e., whether the rights that are being assigned arise from a relation that is personal. *Id.*

Our Supreme Court has unequivocally held that the implied warranty of habitability extends only to first purchasers, and that “negligent construction” is not recognized as a cause of action in Washington, because the transactional process in building and purchasing a home is one of personal confidence and personal service. *See Stuart*, 109 Wn.2d at 421-22.

The Subsequent Purchasers’ claim for breach of contract is subject to the same principal, because it arises from the same transaction as the implied warranty of habitability. In fact, the *Stuart* court noted:

The plaintiffs advanced theories of recovery under the Consumer Protection Act, RCW 19.86, under a theory of misrepresentation, and under the express warranties contained in the contract of sale with the builder-vendor. The trial court correctly held that recovery was not available under any of these theories, and plaintiffs have not appealed those rulings. This is unremarkable, in that the express terms of the contract with the builder-vendor delegated the risks among the parties, and formed part of the basis of their bargain.

Id. at 421.

Here, the Appellants have filed identical claims, and, as in *Stuart*, the contract delegated risks among the parties. However,

the Subsequent Purchaser Appellants were not a party to the transactions between Harbour Homes and the Original Owners.

Upholding the assignment of any claim arising from the relationship between a builder and the first intended purchaser creates an end-run in derogation of the policy and law repeatedly upheld by the Court, and will unnecessarily expand the warranty of habitability and breach of contract claims beyond first purchasers, forcing builders to become guarantors – the exact opposite of what the *Stuart* Court intended.

3. Our Supreme Court has held, and our legislature has recognized, that claims against a builder may only be brought by the first intended purchaser.

The policy of Washington State has long been that claims arising from alleged construction defects may only be brought by the first intended purchaser. This policy is built upon the principal that (1) the relationship between a builder and first purchaser is personal; and (2) that construction law jurisprudence is “vitaly enmeshed in our economy and dependent on settled expectations.” *Stuart*, 109 Wn.2d at 422. Appellants, however, attempt to persuade the Court to change this long established principal and expectation by (1) pointing to laws of other states, and (2) looking to the Washington State Condominium Act. Neither is availing.

Appellants claim that the majority of states permit Subsequent Purchasers to sue builders absent any contractual privity. *See Opening Brief of the Appellant, § 5.B.4.c.* However, it is unnecessary to look to other states, because Washington has a well-settled body of law that is directly on point. Moreover, many states are in accord with Washington law, and do not extend claims against a builder beyond the original owners. *See, e.g., Lee v. Clark & Assocs. Real Estate, Inc.*, 512 So.2d 42, 45 (Ala.1987) (“We are not inclined to depart from the longstanding rule that the doctrine of *caveat emptor* applies to subsequent purchasers of a house.”); *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041 (Colo. 1983); *Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 378 A.2d 599 (1977); *Tereault v. Palmer*, 413 N.W.2d 283 (Minn.Ct.App.1987); *John H. Armbruster & Co. v. Hayden Co.-Builder Developer, Inc.*, 622 S.W.2d 704 (Mo.Ct.App.1981); *Briggs v. Riversound Ltd. P'ship*, 942 S.W.2d 529 (Tenn.Ct.App.1996); and *Moore v. Meeks*, 483 S.E.2d 383 (Ga.App.1997).

Second, Appellants look to the Washington Condominium Act for the proposition that claims against builders should be extended to Subsequent Purchasers. *See Opening Brief of Appellants, § 5.B.4.c.* However, in the last legislative session our

legislature expressly declined to extend the claims of parties that are not in contractual privity with the builder. See House Bill Rep. on SB 6385, 60th Leg., Reg. Sess. (Wash 2008). In fact, the proposed bill, which was not voted into law, confirmed the state of the law as follows:

Common Law Implied Warranty of Habitability.

Under the common law, the buyer of a new home may sue the builder of the home for a breach of an implied contractual "warranty of habitability." This warranty covers structural defects in the house and its foundation that make the home unfit for its intended purpose. The warranty extends only to the first purchaser who occupies the home, and the home must have been purchased soon after the completion of construction...

Id. (emphasis added). Law making is better left to the legislature, not the courts, and the law as stated should stand.

The long-held policy of Washington State is that construction claims against a builder may only be brought by the first intended purchaser. This law was set forth by our Supreme Court, and is recognized by our legislature. Accordingly, the long-standing policy of our State should not be upset by recognizing the Subsequent Purchasers' assignments.

B. The Subsequent Purchasers' Assignments are void as a matter of law because the Original Owners did not have a present interest in the homes when the assignments were executed, and the assignments lack consideration.

The purported assignments are invalid as a matter of law, because they were executed years after sale of the home from the Original Owner to the Subsequent Purchaser. The Original Owners, therefore, had no rights to assign. Thus, to the extent that the assignments are valid and the Subsequent Purchasers' "stand in the shoes of the Original Owners," there can be no claim because the original owners had no injury, no claim, and no rights to assign when the assignments were executed.

In addition, the purported assignments lack consideration, and only one "exemplar" assignment was submitted into evidence. Therefore, the trial court properly dismissed the Appellants' claims.

1. The assignments are invalid because the Original Owners had no present legal interest in the homes when the assignments were executed.

An assignee takes only those present legal rights held by assignor at the time of assignment. *Assoc. Collectors, Inc. v. Hardman*, 2 Wn.2d 414, 98 P.2d 318 (1940). Where an assignor has no present legal interest or claim, there is nothing to assign, and the assignment therefore fails. *AAA Cabinets & Millwork, Inc.*

v. Accredited Sur. & Cas. Co., Inc., 132 Wn. App. 202, 207, 130 P.3d 887 (2006); *West v. Inter-Financial, Inc.*, 139 P.3d 1059, 1061 n.1 (Utah App. 2006).

Here, the assignments are invalid because the Original Owners had no present legal interest in the homes when the assignments were executed, *i.e.*, the Original Owners could not have sued Harbour Homes when the assignments were executed.

The assignments were made in most cases years after the Original Owners sold the homes to the Subsequent Purchasers, and at a time when the Original Owners had no legal interest or rights to the property. Further, and most notably, absent from the record is what, if any, damages or injury the Original Owners have assigned.

An assignor only acquires the rights that the assignee possesses when the assignment is executed. *AAA Cabinets and Millwork, Inc.*, 132 Wn. App at 208. Where the assignor has no rights or claims to assign, the assignment necessarily fails. *Id.* In *AAA Cabinets and Millwork*, a project was constructed in which a general contractor hired a subcontractor, who in turn hired a sub-subcontractor. *Id.* at 205. A Joint-payee check to the subcontractor and the sub-subcontractor was issued by the general

contractor. *Id.* at 206-06. The subcontractor endorsed the check to the sub-subcontractor. *Id.* at 210. The sub-subcontractor then assigned its rights to the general contractor to proceed against the subcontractor's bond. *Id.* at 206.

The issue before the Court was whether the claim was assignable. *Id.* at 209. The Court held that if the joint-payee check was considered payment in full by the subcontractor to the sub-subcontractor, then the sub-subcontractor would have no claim against the subcontractor, and nothing to assign. *Id.* at 211.

In our case, the same principal applies: Because the Original Owners had no claim against Harbour Homes at the time that the assignments were executed, there was no claim to assign. The Original Owners could not have sued Harbour Homes when the assignments were executed, because the Original Owners did not have a present legal interest in the property, and they had suffered no damages or injury. *West*, 139 P.3d at 1061 n.1.

In *West*, a seller of a home hired an appraiser to determine the square footage of his home. *Id.* at 1060. The seller then sold the home to a buyer, who relied on the appraisal. *Id.* After the sale, the buyer discovered that the appraisal overestimated the square footage of the house, and therefore overestimated its value.

Id. Because the buyer was not in contractual privity with the appraiser, the seller assigned his rights and claims against the appraiser to the buyer, but the court held the assignment was ineffective, because the seller suffered no damages, and therefore had no rights to assign:

[T]he Sellers cannot transfer the right to a cause of action they do not have. By the [buyer's] own admission, the Sellers could not have demanded economic damages because they had obtained a \$30,000 windfall as a result of the purportedly incorrect appraisal. Thus, without a claim for damages, the [buyers] have no breach of contract action.

Id. at 1061 n.1.

In our case, validation of the purported assignment leads to an absurd result. If an Original Owner has rights to assign post-sale, as the Appellants assert, what prevents an Original Owner from selling his or her home for full market value, and then turning around to sue the builder for alleged defects? No claim exists, because there is no injury or damages. The Original Owners could not have sued Harbour Homes when the assignments were executed.

Here, the Original Owners obtained full market value for their homes at the time of the subsequent sale. Therefore, the Original Owners have no damages, and therefore have no claim to assign.

2. The assignments are void as a matter of law because there is no monetary consideration as required by statute, and no consideration as required by the common law.

“Assignments are governed by contract law, so an assignment is subject to the same requisites for validity as are other contracts, such as intent or mutuality of assent, proper parties with the capacity to make a contract, consideration, and a legal subject matter.” Theresa L. Leming, *Requisites for assignment compared to those for contract*, AmJur Assign § 118 (2008). See also, *Mercantile Ins. Co. of America v. Jackson*, 40 Wn.2d 233, 236, 242 P.2d 503 (1952) (to constitute a valid equitable assignment, “Any words or transactions indicating an intent, on the one side, to assign, and an intent, on the other, to receive, are sufficient, assuming there is a valuable consideration.”); *AAA Cabinets and Millwork, Inc.*, 132 Wn. App. at 206 (General contractor paid subcontractor/supplier balances, to which it had no duty to pay, as consideration for assignment of claims.)

RCW 4.08.080 places additional requirements on an assignment contract:

Any assignee or assignees of any judgment, bond, specialty, book account, or other 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...

(emphasis added).

Here, the purported assignment does not meet the requisites of a valid contract or the requirements of RCW 4.08.080, because there was no payment of money for the assignment of the claims. Though the document states that “valuable consideration” was exchanged, such conclusory language is insufficient to create a binding contract or a valid assignment.

The burden of proving the existence of a contract is on the party asserting its existence, and requires proof of each essential element of the contract. *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 765, 162 P.3d 1153 (2007). “Whether a contract is supported by consideration is a question of law and may be properly determined by a court on summary judgment.” *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 840 P.2d 851 (1992). Here, the legal sufficiency of the assignments was challenged in Harbour Homes’ opening motion for summary judgment. CP 173. Yet, the Subsequent Purchasers have never provided any proof of consideration, and the Superior Court was therefore unable to determine what, if any, consideration was given.

Moreover, the assignment is not supported by “the payment of money” as required by statute. RCW 4.08.080. Again, the

document does not state what the consideration was, it merely states "for valuable consideration." No dollar figure is listed, and no evidence has been producing showing monetary consideration.

Finally, the assignment also fails for lack of consideration under the common law because, at the time of the alleged assignment, the Original Owners had no rights to assign, nor did they suffer any damages. Therefore, even if there was some consideration given by the Subsequent Purchasers to the Original Owners, the Subsequent Purchasers received nothing in return. *See Guenther v. Fariss*, 66 Wn. App. 691, 696, 833 P.2d 417 (1992) (the surrender of a valueless claim is not legal consideration).

C. The Subsequent Purchasers CPA claim was properly dismissed because they could not establish the requisite elements of a CPA claim.

The Subsequent Purchasers' Consumer Protection Act claim was correctly dismissed because the Subsequent Purchasers did not establish the requisite elements of a CPA claim. To prevail on a claim under the CPA, a plaintiff must show "(1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public impact; (4) injury to plaintiff in his or her business or property; and (5) causation." *Hangman Ridge Training Stables, Inc. v.*

Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Failure to establish any one of these elements is fatal to the claim. *Id.* at 793.

At the outset, it should be noted that to the extent that the Subsequent Purchasers rely on their purported assignments, the claim fails, because, as discussed above, the assignments are invalid and only one "assignment" is in the record. In addition, the CPA claim is defective in itself as well, both as to the Original Owners and as to the Subsequent Purchasers, because the elements of causation and deceptive act or practice are absent. Accordingly, the Superior Court correctly dismissed the CPA claims.

1. The Subsequent Purchasers' CPA claim in their own right fails because Harbour Homes' allegedly deceptive acts were not the cause of any alleged injury.

To satisfy the fifth element of a CPA claim, causation, the Subsequent Purchasers have the burden of establishing that their alleged injuries were a direct and proximate cause of assertions made to them by Harbour Homes. See *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007). The Subsequent Purchasers

did not meet this burden, because Harbour Homes did not make any assertions to the Subsequent Purchasers.

Our Supreme Court recently articulated for the first time what is required to satisfy the causation element of a CPA claim:

We hold that the proximate cause standard embodied in WPI 15.01 is required to establish the causation element in a CPA claim. A plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury.

Indoor Billboard/Washington, 162 Wn.2d at 84.

WPI 15.01 reads as follows:

The term "proximate cause" means a cause which in a direct sequence [unbroken by any new independent cause,] produces the [injury] [event] complained of and without which such [injury] [event] would not have happened. [There may be more than one proximate cause of an [injury] [event].]

Pursuant to this standard, the Subsequent Purchasers have the burden of establishing that their alleged damages were a direct and unbroken result of assertions made by Harbour Homes. The Subsequent Purchasers have not met this burden.

In fact, the Subsequent Purchasers have not produced a single declaration, or any other evidence, which shows that they relied on any assertion by Harbour Homes when purchasing their homes, when in fact, the Subsequent Purchasers bought their

homes years after the development plat closed and marketing ceased.

In *Schmidt v. Cornerstone Investments, Inc.*, a defendant used an inflated appraisal of real property that he owned to induce the plaintiffs to invest in the property. 115 Wn.2d 148, 153-55, 795 P.2d 1143 (1990). The Court held that there was a causal link between the plaintiff's injury (lost investment) and the defendant's deceptive act (inflated appraisal) because the plaintiffs testified "that had they not been shown the inflated appraisal, they never would have made the investment..." *Id.* at 168. Therefore, unlike our case, the causal link was established because the plaintiffs set forth evidence establishing that they relied on assertions by the defendant. *See also, Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 167 P.3d 1162, 1166 (2007) (reliance on general allegations of construction defects is insufficient to establish a prima facie case under the CPA).

Here, because the Subsequent Purchasers have not met their burden of proof and they have not alleged that they relied on any assertion by Harbour Homes, their CPA claim necessarily fails.

2. The Subsequent Purchasers' CPA claim as assignees fails because there is no evidence that, "but for" Harbour Homes' assertions, the Original Owners would not have suffered an injury.

To the extent that the Subsequent Purchasers seek to advance their claims as assignees, the CPA claim likewise fails,

because there is no evidence that “but for” Harbour Homes alleged deceptive acts, the Original Owners would not have suffered an injury. Causation requires a link between the allegedly deceptive act, and the alleged injury. *Indoor Billboard/Washington, Inc.* 162 Wn.2d at 78-79. (“Where a defendant engages in an unfair or deceptive act or practice, and there has been an affirmative misrepresentation of fact ... there must be some demonstration of a causal link between the misrepresentation and the plaintiff’s injury.”)

As discussed above, the record is completely absent as to any evidence of injury to the Original Owners. The Original Owners purchased their homes from Harbour Homes, lived in them for several years, and sold them for market value to the Subsequent Purchasers. Absent injury, there can be no causation. *See Indoor Billboard/Washington*, 162 Wn.2d at 82; *Wright v. Safeco Ins. Co. of America*, 124 Wn. App. 263, 279-80, 109 P.3d 1 (2004).

In *Wright*, a plaintiff alleged that her insurer violated the CPA because the insurer did not cover water and mold damage to her home. *Id.* at 279-80. The Court held that because the insurance policy excluded these damages, the plaintiff had not suffered an injury due to the insurers conduct. *Id.* Because the plaintiff could not establish an injury, the Court dismissed the CPA claim finding that, as a matter of law, there was no injury, and therefore, no causation. *Id.* at 280 n.28.

Here, the Original Owners cannot establish the causation element of a CPA claim, because they have suffered no injury caused by Harbour Homes alleged representations. Therefore, even if the Original Owners' claims are assigned to the Subsequent Owners, the claims are meritless.

3. The Subsequent Purchasers' assigned CPA claim was correctly dismissed because they have not shown that Harbour Homes engaged in an act that is unfair or deceptive.

The Subsequent Purchasers failed to establish a prima facie case under the CPA because Harbour Homes did not engage in any deceptive or unfair act or practice. The first two elements of a CPA claim are established by showing that an unfair or deceptive act or practice has the capacity to deceive a substantial portion of the public and has occurred in the conduct of trade or commerce. *Hangman Ridge*, 105 Wn.2d at 785-86 (emphasis added). The CPA does not define "unfair or deceptive act or practice," but implicit in the definition of "deceptive" under the CPA is the understanding that the practice misleads or misrepresents something of material importance. *Holiday Resort Community Assoc. v. Echo Lake Assoc., LLC*, 134 Wn. App. 210, 226, 135 P.3d 499 (2006).

While the Subsequent Purchasers characterize their claim as an “unfair or deceptive act”, it is really a claim for simple negligence. The Subsequent Purchasers allege that Harbour Homes advertised that they would build quality homes and then failed to build quality homes. CP 199-200: The failure to build a quality home, however, is an inadequacy in service, not a deceptive act. An inadequacy in service is a negligence claim, not a deceptive act in one’s business or trade. *Ramos v. Arnold*, 141 Wn. App. 11, 169 P.3d 482, 486 (2007).

In *Ramos*, a plaintiff asserted that a real estate appraiser committed a deceptive act by “failing to include major defects in the residence in the appraisal report...” *Id.* at 486. The court, however, held that the claim did not constitute a deceptive act under the CPA because it did not arise from a “trade,” such as “how the cost of services is determined, billed, and collected and the way a professional obtains, retains, and dismisses clients.” *Id.* “Trade,” as used by the CPA only includes the entrepreneurial or commercial aspects of commercial service, not the substantive quality of services provided.” *Id.* The complaint in this case targeted the inadequacy of the appraisal, and therefore amounts to an allegation of negligence. *Id.*

Here, like *Ramos*, the Complaint arises from the alleged inadequacy of the construction of their homes, not a trade aspect of Harbour Homes' business, and therefore sounds in negligence.

Additionally, to establish a deceptive act in a construction case, a plaintiff must specifically identify how the builder failed to comply with its obligation to disclose material defects about the home. *Nguyen*, 167 P.3d at 1166. While the Subsequent Purchasers make broad, general, and unsubstantiated assertions that Harbour Homes constructed homes in contrast to building codes and industry standards, "the mere failure to comply with industry standards does not constitute a deceptive act or practice under the CPA." *Id.* at 1166-67. In *Nguyen*, a second purchaser homeowner alleged violation of the CPA against a builder-vendor, basing the claim on general allegations in a preliminary report by the plaintiff's construction expert. *Id.* The court held that, notwithstanding the allegations that the builder failed to comply with industry standards, the plaintiff had failed to show a deceptive act or practice occurred, thereby affirming summary judgment of the subsequent purchasers' CPA claim. *Id.* at 1167.

Here, as in *Nguyen*, summary judgment is proper because the Subsequent Purchasers fail to show any unfair or deceptive act

or practice. The Subsequent Purchasers have merely stated that Harbour Homes was deceptive by stating it would build quality homes, and then by alleging we failed to build quality homes. Moreover, as in *Ramos*, the failure to build a quality home is not a deceptive act – it is a negligence claim. Accordingly, the Subsequent Purchasers fail to establish the first element of a CPA claim.

D. The Subsequent Purchasers' claim of negligent and/or intentional misrepresentation was properly dismissed because the claims are barred by the economic loss rule, and the Subsequent Purchasers are not in privity with Harbour Homes.

1. The Subsequent Purchasers' claim of negligent misrepresentation is barred by the economic loss doctrine.

a. *The Subsequent Purchasers negligent misrepresentation claim as assignees is barred by the economic loss rule.*

The Subsequent Purchasers' claim of negligent misrepresentation is barred by the economic loss doctrine. *Alejandro v. Bull*, 159 Wn.2d 674, 688, 153 P.3d 864 (2007). The economic loss rule precludes parties from recovering tort damages where only economic losses have occurred. *Id.* at 683. "Economic loss" is defined in the context of construction claims where, as here, the damage is limited to the actual structure itself. *Griffith v.*

Centrex Real Estate Corp., 93 Wn. App. 202, 213, 969 P.2d 486 (1998).

A homeowner's construction defect claim is limited to contract remedies pursuant to the economic loss rule. *Griffith*, 93 Wn. App. at 211. In *Griffith*, the plaintiffs alleged negligent misrepresentation against the builder of a development when the paint began to peel from the cedar siding. *Id.* at 206. The court affirmed summary judgment of the plaintiffs' claim under the holdings of *Stuart* and *Berschauer*, stating "the economic loss rule [is a] bright lined distinction between the remedies offered in contract and tort with respect to economic damages which encourages parties to negotiate toward the risk distribution that is desired or customary." *Id.* at 211. Thus, construction defect claims sound only in contract, not tort. *Id.* "We conclude that *Berschauer/Phillips* controls the disposition of this case, and that when a contract allocates liability, the economic loss rule bars claims of negligent misrepresentation by homebuyers against builder-vendors." *Id.* at 213; citing *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994).

Similarly, in *Alejandro v. Bull*, the Supreme Court held that the economic loss rule squarely applies to homeowners alleging construction defects:

If a house causes economic disappointment by not meeting a purchaser's expectations, the resulting failure to receive the benefit of the bargain is a core concern of contract, not tort law. There are protections for homebuyers, however, such as statutory warranties, the general warranty of habitability, and the duty of sellers to disclose defects, as well as the ability of purchasers to inspect houses for defects. Coupled with homebuyers' power to bargain over price, these protections must be viewed as sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses.

159 Wn.2d 674, 685 n.3, 153 P.3d 864 (2007) citing *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244 (Fla. 1993).

b. The Subsequent Purchasers negligent misrepresentation claim in their own right is barred by the economic loss rule.

The Subsequent Purchasers' claim of negligent misrepresentation is barred by the economic loss rule. *Alejandro*, 159 Wn.2d at 681-82. However, the Subsequent Purchasers state that the economic loss rule does not apply to them because they have no contract with Harbour Homes. *See Opening Brief of the Appellants § V.D.2.b.* This argument fails because (1) a contract is

unnecessary for application of the economic loss doctrine, and (2) this position is contradictory to the Subsequent Purchasers stated position that they are assignees and “stand in the shoes” of the Original Owners, and is therefore barred by the doctrine of judicial estoppel.

A contractual relationship is not required for application of the economic loss rule. *Alejandre*, 159 Wn.2d at 695 n.2 (J. Sanders, concurring) (“Over the years, the economic loss rule has been applied where there is no privity of contract between the parties.”); *Berschauer/Phillips Const. Co.*, 124 Wn.2d at 821. In *Berschauer*, the plaintiff alleged tort claims as both an assignee and in its own right with parties in which it did not have a contract. *Id.* The Court affirmed the Superior Court’s ruling, dismissing both the direct and assigned claims. *Id.*

The *Berschauer* Court’s holding squarely applies to this case. The Subsequent Purchasers are asserting claims as assignees and in their own right. As in *Berschauer*, both claims were correctly dismissed by the Superior Court.

Further, the Subsequent Purchasers’ assertion simply does not make sense, because under their application of the economic loss doctrine, a party that is not in contractual privity with the builder

has more rights than a party that is in privity. The *Berschauer* Court rejected this proposition, and held that a plaintiff's claims properly lie against the party with whom he or she directly contracted, *i.e.*, in this case, the Original Owners. *Berschauer/Phillips Const. Co.*, 124 Wn.2d at 828 ("The preservation of the contract represents the most efficient and fair manner in which to limit liability and govern economic expectations in the construction business.")

In addition, requiring privity for a claim of negligent misrepresentation is consistent with the reasoning behind *Stuart* and our State's longstanding construction defect jurisprudence: Construction claims are limited to contract claims – not tort claims – and further limit contract claims to those in which there is contractual privity with the first purchaser. To the extent that the Subsequent Purchasers have valid claims, those claims should be brought against the parties with whom they are in contractual privity: The Original Owners, the home inspectors, the real estate agents, and/or the appraisers.

Finally, the Subsequent Purchasers' claims are barred by judicial estoppel. The doctrine of judicial estoppel bars a party from making factual assertions which are contrary to evidence or sworn

testimony that has been given in the same or prior judicial proceedings. *King v. Clodfelter*, 10 Wn. App. 514, 519, 518 P.2d 206 (1974). The doctrine seeks to avoid inconsistency, duplicity, and the waste of time. *Id.*

Here, for this cause of action only, the Subsequent Purchasers deny they are assignees of the Original Owner's claim and assert that they have no contract with Harbour Homes. See *Opening Brief of the Appellants § V.D.2.b.* The Subsequent Purchasers contradictory positions are that, on one hand, they are assignees of the Original Owners' contract and therefore may assert a breach of contract claim. However, on the other hand they assert that because they do not have a contract with Harbour Homes, the economic loss rule does not apply. These positions are contradictory to both the arguments raised in the Subsequent Owners' brief, as well as the declarations they have produced. CP 77, 84, and 91. Judicial estoppel therefore bars this claim.

2. The Subsequent Purchasers' claim of negligent and/or intentional misrepresentation requires privity with Harbour Homes.

Privity of contract is required for a party to prevail on a claim of negligent and/or intentional misrepresentation that arises from construction. *Berschauer/Phillips Const.*, 124 Wn.2d at 828;

Nguyen, 167 P.3d at 1164. Here, the Subsequent Purchasers had no privity with Harbour Homes; therefore, their claims of negligent and/or intentional misrepresentation were properly dismissed.

Privity of contract is required to maintain a misrepresentation claim in a construction defect action. *Berschauer*, 124 Wn.2d at 828. As noted above in regards to the economic loss doctrine, the *Berschauer* Court held that the plaintiff could only maintain its tort claims against a party with whom it had a contract. *Id.*

Similarly, in *Nguyen v. Doak Homes*, the Court held that a second purchaser of a home cannot maintain an action for fraudulent concealment against a builder-vendor when there is no contractual relationship. *Nguyen*, 167 P.3d at 1164.

In *Nguyen*, a second owner plaintiff purchased a home and subsequently found water intruding into the walls coupled with mold growth. *Id.* at 1164. The plaintiff sued the builder for breach of contract, breach of the implied warranty of habitability, fraudulent concealment, and violation of the CPA. *Id.* The trial court dismissed all claims on summary judgment because there had been no contract or contractual relationship with the builder. *Id.* Division One affirmed the trial court, and specifically rejected the plaintiff's claim of fraudulent concealment holding that a builder

does not owe Subsequent Purchasers an “independent or concurrent duty based on foreseeability.” *Id.* at 1166. “[The plaintiff] has not cited any relevant authority suggesting that a second purchaser can maintain an action for fraudulent concealment against a builder-vendor under the circumstances presented here.” *Id.*

The Subsequent Purchasers’ reliance on *Schaaf v. Highfield* is misplaced. In *Schaaf*, our Supreme Court held that privity was not required so long as the claim of negligent misrepresentation is only advanced against a limited class. 127 Wn.2d 17, 26, 896 P.2d 665 (1995). In that case, the Court did not require privity because the plaintiff was “a proximal third party” to the transaction. *Id.* The plaintiff was a prospective homebuyer who had applied to the VA for a loan guaranty. *Id.* The VA hired the appraiser solely because of the plaintiff’s application. *Id.* Notably, the Court held that “The liability of a real estate appraiser in these circumstances extends only to those involved in the transaction that triggered the appraisal report...” *Id.* at 27.

In this case, the Subsequent Purchasers were not parties to the transaction between Harbour Homes and the Original Owners. Rather, the Subsequent Owners were distal to the transaction,

purchasing the homes several years after the original transaction. *Berschauer* and *Nguyen* therefore control the scope of Subsequent Purchasers' misrepresentation claims, which hold that contractual privity is required in construction defect cases.

3. The Subsequent Purchasers did not rely on any assertion by Harbour Homes, and therefore their claim of negligent and/or intentional misrepresentation fails as a matter of law.

The Subsequent Purchasers did not rely on any assertion by Harbour Homes, and therefore they fail to meet the requisite elements of a claim of negligent and/or fraudulent misrepresentation.⁴ To prevail on a claim of negligent misrepresentation, a party must show that he or she justifiably relied upon the allegedly negligent misrepresentations. *Schaaf*, 127 Wn.2d at 30. To prevail on a claim of intentional misrepresentation (fraud), a party must prove by clear, cogent, and

⁴ The Subsequent Purchasers claim here, as they did before the trial court, that this argument was raised for the first time in Harbour Homes reply. While Harbour Homes did not directly assert reliance as a defense to the Subsequent Purchasers' misrepresentation claims, the argument was briefed at length in Harbour Homes' opening motion in regards to the Appellants' derivative claim under the Consumer Protection Act. CP 177; 179-181.

RAP 2.5(a) provides that "A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.

convincing evidence that he or she justifiably relied on an alleged misrepresentation of material fact. *Baddeley v. Seek*, 138 Wn. App. 333, 339, 156 P.3d 959 (2007).

As discussed above in regards to the Subsequent Purchasers' CPA claim, Harbour Homes was not a party to the transaction when the Subsequent Purchasers' purchased their homes from the Original Owners. Thus, Harbour Homes did not make any assertions to any of the Subsequent Purchasers. Moreover, the Subsequent Purchasers did not produce any evidence or declarations showing that they relied on any assertion by Harbour Homes. Therefore, this dearth of evidence supports the Appellate Court's dismissal of the Subsequent Purchasers' misrepresentation claims.

E. Harbour Homes should be awarded its reasonable fees and costs for responding to this appeal.

The appellate court is authorized to award statutory attorney fees and reasonable expenses actually incurred and reasonably necessary for review to the substantially prevailing party on review. RAP 14.3. An appellate court may order a party to pay compensatory damages or terms for filing a frivolous appeal. RAP 18.9(a). An appeal is frivolous if, considering the entire record, the

Court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal. *Lutz Tile, Inc. v. Krech*, 136 P.3d 899, 906, 151 P.3d 219 (2007).

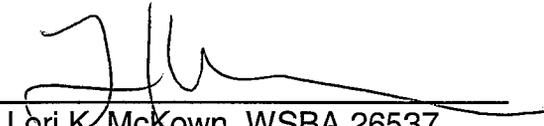
Fees are appropriate in this case because the Subsequent Owners' claims are meritless and frivolous. As discussed above, Washington has a well-established body of law that bars the Subsequent Owner's claims. Not only has this law existed for 40 years, but in the very past legislative session, our legislature refused to extend that law. Nevertheless, the Subsequent Owners are asking this Court to create new law by recognizing their claims through the guise of improperly made assignments. Harbour Homes, therefore, should be awarded its fee and expenses pursuant to RAP 14.3.

IV. CONCLUSION

Based on the foregoing, Harbour Homes, Inc. respectfully reiterates its request that this Court affirm the Superior Court's Order granting Harbour Homes, Inc.'s motion for summary judgment dismissal, and for reasonable fees and costs for responding to this appeal.

Respectfully submitted this 26th day of June, 2008.

PREG O'DONNELL & GILLETT PLLC

By 

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COURT OF APPEALS - DIVISION ONE
IN AND FOR THE STATE OF WASHINGTON

ROBERT CARLILE and
ANGIE CARLILE, et al,

Appellant(s),

v.

HARBOUR HOMES, INC., et
al,

Respondent(s).

CASE NO. 61419-3-1

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:

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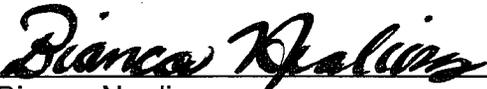
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		Case Name Carlile, et ux., et al. v. Harbour Homes, Inc.				Your ABC Acct. No. 98300		
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COURT OF APPEALS - DIVISION ONE
IN AND FOR THE STATE OF WASHINGTON

RYAN SWANSON & CLEVELAND, PLLC

ROBERT CARLILE and ANGIE CARLILE, et al,

Appellants,

v.

HARBOUR HOMES, INC., et al,

Respondent.

BRIEF OF THE RESPONDENT

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