

FILED
SEP 25 2009

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

83660-4

Supreme Court No. _____
Court of Appeals No. 36944-3-II

FILED
COURT OF APPEALS
DIVISION II

09 SEP 10 PM 1:42

STATE OF WASHINGTON
BY *[Signature]*

DEPUTY

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TIMOTHY L. JACKOWSKI and ERI JACKOWSKI, husband and
wife, Plaintiffs/Respondents,

v.

DAVID BORCHELT and ROBIN BORCHELT, husband and wife,
Defendants/Petitioners,

and

HAWKINS POE, INC. d/b/a Coldwell Banker Hawkins-Poe
Realtors, HIMLIE REALTY, INC., VINCE HIMLIE, broker for
Windermere Himlie Real estate, real estate brokers, and ROBERT
JOHNSON and JEF CONKLIN, real estate agents,

Defendants.

DEFENDANT BORCHELT'S PETITION FOR REVIEW

Robert W. Johnson, WSBA No. 15486
Attorney for Petitioners Borchelt

Law Office of Robert W. Johnson, P.L.L.C.
P.O. Box 1400 Shelton, WA 98584-0919
(360) 426-9728

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES 1

IDENTITY OF PETITIONER 2

CITATION TO COURT OF APPEALS DECISION 2

ISSUES PRESENTED FOR REVIEW 2 - 4

STATEMENT OF THE CASE 4

ARGUMENT 6

Economic Loss Rule 6

Review is proper under RAP 13.4(b)(1), as Division Two’s decision conflicts with this Court’s decision in *Alejandre v. Bull*, 159 Wn.2d 674, 689-90, 153 P.3d 864 (2007). ...
6

Review is proper under RAP 13.4(b)(2), as Division Two’s decision conflicts with decisions issued by the Court of Appeals in cases such as *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008), and *Cox v. O’Brien*, 150 Wn. App. 24, 206 P.3d 682 (May 5, 2009). ..7

Review is proper under RAP 13.4(b)(4), as the application of Washington’s economic-loss rule presents issues of substantial public interest that should be determined by this Court. .. 9

Chapter 64.04 RCW 9

Review is proper under RAP 13.4(b)(4), as the scope of claims that may be based solely on disclosures set forth in a “seller disclosure statement” (Form 17) required pursuant to Chapter 64.04 presents an issue

of substantial public interest that should be determined by this Court, in light of the statutory requirement that a significant number of sellers of improved real property complete a Form 17. .. 16

Fraudulent Concealment 16

Review is proper under RAP 13.4(b)(1) and (2) as Division Two's decision to reverse the trial court's grant of summary judgment, in the absence of any evidence that any fill-related defect was unknown to purchasers/Jackowskis and that a reasonable inspection by Jackowskis would not have disclosed the defect, improperly departs from decisions of this Court and the Court of Appeals. .. 17

CONCLUSION 17 - 18

TABLE OF CASES AND AUTHORITIES

CASES

- Alejandre v. Bull*, 159 Wn.2d 674, 689-90, 153 P.3d 864 (2007) .. **2, 6, 7, 8, 9, 12**
- Baddeley v. Seek*, 138 Wn. App. 333, 156 P.3d 959 (2007) .. **8, 9**
- Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008) .. **8, 9**
- Cox v. O'Brien*, 150 Wn. App. 24, 206 P.3d 682 (May 5, 2009) .. **7, 8**
- Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 514 (June 16, 2009) .. **2, 5, 6, 14, 16**
- Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 55 P.3d 619 (2002) .. **15**
- Ross v. Kirner*, 162 Wn.2d 493, 172 P.3d 701 (2007) .. **15**
- Stieneke v. Russi*, 145 Wn. App. 544, 190 P.3d 60 (2008), review denied, 165 Wn.2d 1026 (2009) .. **8, 9, 12**

STATUTES

- RCW 64.06.005 .. **16**
- RCW 64.06.020 .. **10**
- RCW 64.06.030 .. **10, 12**
- RCW 64.06.040 .. **3, 10, 12**
- RCW 64.06.050 .. **3, 10, 13, 14, 15, 16, 18**
- RCW 64.06.060 .. **13**
- RCW 64.06.070 .. **10, 13, 14**

RULES

- RAP 13.4(b)(1) .. **6, 16, 17**
- RAP 13.4(b)(2) .. **6, 16, 17**
- RAP 13.4(b)(4) .. **6, 17**

ADDITIONAL AUTHORITY

- 17 Am.Jur. 2nd § 565 .. **12**
- 18 Wash. Prac. Ch. 16.5 .. **10**
- 1996 Wash. Legis.Serv. Ch. 301 .. **13**

A. IDENTITY OF PETITIONER

Petitioners Borchelt (hereinafter “Borchelts”), defendants at the trial court and respondents at the Court of Appeals, submit this petition for review with respect to the decision identified in Part B.

B. CITATION TO COURT OF APPEALS DECISION

Borchelts request that this Court accept review of (1) the published opinion issued by Division Two of the Court of Appeals, *Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 514 (June 16, 2009) (as amended August 18, 2009); and (2) the order by Division Two of the Court of Appeals, 2009 Wash. App. LEXIS 2094 (August 11, 2009), denying Borchelts’ motion for reconsideration of the above-referenced opinion.

C. ISSUES PRESENTED FOR REVIEW

- 1) Whether Washington’s economic-loss rule bars fraudulent misrepresentation claims arising from parties’ contractual agreements:
 - a. Whether Division Two erroneously cited *Alejandro v. Bull*, 159 Wn.2d 674, 689-90, 153 P.3d 864 (2007) to support Division Two’s erroneous and overly-broad assertion that fraud-related claims generally, including fraudulent

misrepresentation, fall outside the scope of the economic-loss rule and are therefore not precluded by the economic-loss rule; and

- b. Whether Division Two's broad assertion, that fraud-related claims fall outside the scope of the economic-loss rule and are therefore not precluded by the economic-loss rule, conflicts with other decisions rendered by this Court and the Court of Appeals.

2) Whether the statutory scheme set forth in Chapter 64.06 RCW allows a buyer to seek remedies outside the scope of the limited rescission remedy explicitly authorized under RCW 64.06.040, where the cause of action is based solely on Form 17 disclosures required pursuant to RCW 64.06.020:

- a. If so, whether RCW 64.06.050 prevents a buyer from seeking contract rescission or damages based on a claim related solely to disclosures made on a real property transfer disclosure statement ("Form 17"), where the underlying claim lacks any "actual knowledge" element; and
- b. If so, whether Division Two erred in its determination that Jackowskis may pursue contract rescission based on a

claim of negligent misrepresentation based solely on disclosures made on a real property transfer disclosure statement ("Form 17").

- 3) Whether a plaintiff/buyer asserting a claim of fraudulent concealment of fill must prove the fill defect would not have been disclosed by a careful, reasonable inspection by the purchaser; and
 - a. If so, whether Division Two improperly shifted the burden in the present case from plaintiff Jackowskis to defendant Borchelts regarding the claim of fraudulent concealment of fill, by reversing the trial court's grant of summary judgment on the issue of fraudulent concealment of fill absent any evidence establishing that the "fill" would not have been disclosed by a careful and reasonable inspection by Jackowskis.

D. STATEMENT OF THE CASE

The real estate transaction at issue closed on June 30, 2004. CP 623. The transaction involved Borchelts' sale of a recreational residence, used in that capacity since 1996. Pursuant to RCW 64.06.020, Borchelts completed a real property transfer disclosure statement ("Form 17"). The Form 17 was provided to Jackowskis prior to closing. Throughout the course of the sale,

the Jackowskis had no other direct contact or discourse with the Borchelts.
CP 630; CP 680-81.

The subject property was affected by a landslide that occurred on the night of February 3, 2006, following two months of record rainfall. CP 623. Jackowskis asserted claims against Borchelts including claims of fraudulent misrepresentation, fraudulent concealment, constructive fraud, negligent misrepresentation, and a claim for rescission of the sale contract. Borchelts moved for summary judgment on all of Jackowskis' claims against Borchelts.

The trial court granted Borchelts' summary judgment motion with respect to all fraud and fraudulent concealment claims relating to the landslide issue. Division Two affirmed based on a determination that Jackowskis had knowledge of the landslide hazard area classification. *Jackowski*, 151 Wn. App. at 18. The trial court granted Borchelts' motion regarding Jackowskis' negligent misrepresentation claims, based on the economic loss rule as set forth in *Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007). Division Two affirmed in part, concluding that the trial court did not err in holding that the economic loss rule applies to bar the Jackowskis' negligent misrepresentation claims. *Id.* at 13. However, Division Two reversed in part, holding that Jackowskis could pursue *common law rescission* with respect to the negligent misrepresentation claim

based solely on Form 17 disclosures. *Id.* at 16. Division Two also reversed the trial court's grant of summary judgment regarding fraud and fraudulent concealment claims relating to the presence of fill on the property. In doing so, Division Two broadly concluded that fraud-related claims fall outside the scope of the economic loss rule and are therefore not precluded by the economic loss rule. *Id.* at 17. Division Two also concluded that fill-related evidence was insufficient to support the trial court's grant of summary judgment. *Id.* at 18.

E. ARGUMENT

ECONOMIC LOSS RULE

The review criteria set forth in RAP 13.4(b)(1), (2), and (4) are satisfied. First, Division Two's broad conclusion that fraud-related claims fall outside the scope of the economic loss rule, and are therefore not precluded by the economic loss rule, conflicts with other decisions issued by the Court of Appeals and with a decision issued by this Court. Division Two's opinion, states: "Because the Jackowskis' fraud and fraudulent concealment claims fall outside the scope of the economic loss rule, we will address them briefly." *Jackowski*, 151 Wn. App. at 17 (citing *Alejandre*, 159 Wn.2d at 689, 690). This statement and reference to *Alejandre* is not entirely accurate, as *Alejandre* did not address the question of whether any or all fraud claims

should be foreclosed by the economic loss rule. See *Alejandre*, 159 Wn.2d at 690. The question of the extent to which fraud-related claims fall outside the scope of the economic loss rule involves issues of substantial public interest that should be determined by this Court.

In *Alejandre*, this Court determined that under existing case law fraudulent concealment claims are not barred by the economic loss rule. *Id.* at 677. However, this Court explicitly declined to address the question of whether any or all fraudulent representation claims should be barred by the economic loss rule, as the Court resolved the fraudulent representation claims at issue on other grounds. *Id.* at 690.

On May 5, 2009, Division Two issued a decision in the matter entitled *Cox v. O'Brien*, 150 Wn. App. 24, 206 P.3d 682 (2009). Division Two held, on facts that appear analogous to the facts in the present case, that the economic loss rule barred purchasers' claims for negligent representation *and* fraudulent representation. *Id.* at 27. In *Cox*, the Coxes purchased a residence from the DeMers, and in the course of the transaction waived any structural home inspection. The parties executed a purchase and sale agreement and Form 17 "Real Property Transfer Disclosure Statement."

Subsequent to closing the sale and after taking possession of the home, the Coxes became aware of certain significant structural defects, including rotten and unstable walls. The Coxes asserted negligent

representation and fraudulent representation claims against the sellers. The trial court ruled that the economic loss rule barred these claims. Division Two agreed, based on the following: the loss at issue is the structural damage within the walls of the home, discovered after the home sale closed and the Coxes took occupancy; the seller set the price in consideration of potential contractual liability; the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists between the parties and the losses are economic in nature; and where applicable, the economic loss rule will hold parties to their contractual remedies, regardless of how a plaintiff characterizes the claims. *Id.* at 27; 34-6 (citing *Alejandre*, 159 Wn.2d 674).

In *Cox*, Division Two cited *Carlile, et al. v. Harbour Homes, Inc.*, where several homebuyers brought a fraud action (alleging intentional misrepresentation) against Harbour Homes, Inc. for construction defects in their homes. *Cox*, 150 Wn. App. at 34-5 (citing *Carlile, et al. v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008)). In *Carlile*, Division One affirmed the trial court's conclusion that the economic loss rule precluded the purchaser's fraud action. The *Carlile* court stated,

[a]lthough the homeowners cite to *Baddeley v. Seek*, 138 Wn. App. 333, 156 P.3d 959 (2007), a Division Three case, and *Stieneke v. Russi*, 145 Wn. App. 544, 190 P.3d 60 (2008), from Division Two, for support of their argument, neither court expressly decided that intentional misrepresentation and

fraud claims fall outside the scope of the economic loss rule. The court in *Baddeley* did not reach the question of whether the economic loss rule bars fraud claims in Washington. Instead, it held that the plaintiffs' intentional misrepresentation claims failed because they failed to show all of the necessary elements of fraud. In *Stieneke*, Division Two denied a claim for negligent misrepresentation under the economic loss rule and *Alejandre* but still considered the merits of a fraud claim. The *Stieneke* court did not expressly consider the potential barring effect of the economic loss rule on the fraud claim. Thus, the case is not helpful here.

Carlile, 147 Wn.App. at 205.

In sum, *Cox* and *Carlile* provide that where a purchaser seeks purely economic damages from a seller, to compensate for losses related to improvements that were the subject of the sale, the economic loss rule precludes recovery under both negligent representation and fraudulent representation claims.

The apparent conflict between existing decisions rendered by this Court and the Court of Appeals, and the Division Two opinion at issue, coupled with the fact that application of Washington's economic-loss rule presents issues of substantial public interest, provide a basis for this Court to accept review.

CHAPTER 64.06 RCW

In 1994, the Washington legislature enacted the "Residential Real Property Transfers – Seller's Disclosures" law: Chapter 64.06 RCW,

Chapter 200, Laws of 1994. The law significantly changed the obligations of a seller of residential real estate. The legislative intent was to create an extremely limited right of rescission based on a seller's answers to statutorily required questions. Significantly, the law provided:

1. The disclosures were not to be a part of the contract between buyer and seller (RCW 64.06.020(3));
2. The sole remedy under the statutory scheme was a limited right of rescission to be exercised within a brief time period but under any circumstances no later than the closing of the transaction; (RCW 64.06.030 & 64.06.040):
3. That the seller of residential real property could not be liable for any error, inaccuracy, or omission if the seller had no actual knowledge of the error, inaccuracy, or omission (RCW 64.06.050);
4. Nothing in the law was to create any new right or remedy for a buyer of residential real property other than the right of rescission exercised on the basis and within the time limits provided the chapter (RCW 64.06.070);

Professor William B. Stoebuck and John W. Weaver question the effectiveness of the statutory scheme in Washington Practice, 18 WAPRAC Ch. 16.5:

The disclosure statute has some limitations that raise questions about what its effect actually can be in the marketplace. First, it appears that buyers may waive the statement entirely by an “express” clause in a standard-form earnest money agreement with the “environmental” exception. Second, even if the full disclosure statement, numerous questions plus subparts, is delivered, the buyer has only three days to accept or rescind unless the parties have agreed on a longer period. It would take an army of experts to check out the many, many detailed and varied items. One would have to have a title examination, including a survey on the ground (“encroachments”), and inspections by such varied experts as plumbers, electricians, architects, construction contractors, and soil engineers to verify all the items of information seriously! If the statute allowed buyers a remedy of rescission or even damages for, say, several years after they purchased and took possession and defects showed up, then they would have a meaningful opportunity to discover the defects in time to invoke a remedy. However, as stated above, the statute expressly limits its remedy to rescission within three days (or other period if agreed) after receipt of the disclosure statement. In actual operation, the main effect of the statute seems to be to give the buyer a three-day option to change his or her mind about the sale.

Id.

In practice, however, the courts have turned the disclosure law into a litigation trap for residential home sellers. This case presents the court the opportunity to clarify this often misapplied law¹. In this case, the only representations made by the sellers to the buyer were contained in the residential disclosure statement, commonly referred to as “Form 17”. The disclosure statement was not incorporated into the purchase and sales agreement so purchasers’ only remedy is pursuant to the statutory scheme. In its decision reversing the trial court’s grant of summary judgment, the court of appeals completely disregarded the language of Chapter 64.06 RCW and held that a buyer could rescind a purchase based on negligent misrepresentations contained in the Form 17 which could be exercised years after the sale. In contrast, the statute limits rescission to within three business days, or until the sale closes depending on whether RCW 64.06.030 or .040 applies. This is supposed to be the only remedy granted by the legislature.

The common law remedy of rescission may be modified by statute. 17 Am.Jur. 2nd §565. Washington has modified the remedy of rescission in

¹ In *Alejandre v. Bull*, buyers sued a seller for negligent misrepresentation, relying on statements in the disclosure list, along with a number of other statements. The issue of the use of the disclosure statement was neither raised nor argued on appeal. *Alejandre v. Bull*, 159 Wash. 2d 674, 153 P.3d 864 (2007). In *Stieneke v. Russi*, the purchaser argued that the seller's disclosure statement had been incorporated into the Earnest Money Agreement and that the representations could be the basis for an action on the contract. The trial court agreed with the purchaser, but on appeal the court found that the findings of fact to support this conclusion were insufficient. *Stieneke v. Russi*, 145 Wash. App. 544, 190 P.3d 60 (Div. 2 2008), review denied, 165 Wash. 2d 1026 (2009).

the context of Chapter 64.06 RCW. First, RCW 64.06.060 requires that a buyer exercise the statutory remedy of rescission based upon Form 17 disclosures within three business days. RCW 64.06.060.

In addition to explicitly limiting the timeframe in which a buyer can exercise the statutory right of rescission, Chapter 64.06 RCW explicitly eliminates the possibility that a seller of residential property could be held liable for any error, inaccuracy, or omission in the real property transfer disclosure statement *if the seller had no actual knowledge of the error*. RCW 64.06.050. It necessarily follows that Chapter 64.06 RCW eliminates the availability of common law rescission with respect to claims based solely on Form 17 disclosures, where any such claim does not require proof of the seller's "actual knowledge."

RCW 64.06.070, which generally provides that nothing in the chapter extinguishes or impairs any rights or remedies of a buyer "otherwise existing pursuant to common law, statute, or contract," was amended in 1996. As amended, RCW 64.06.070 now begins with the phrase: "*Except as provided in RCW 64.06.050*" 1996 Wash. Legis. Serv. Ch. 301. This phrase acts as a qualifier and serves the purpose of clarifying that the liability limitation set forth in RCW 64.06.050 does function to extinguish or impair buyers' rights and remedies. RCW 64.06.050 extinguishes buyers' rights and remedies where the buyer fails to establish that the seller had "actual

knowledge” of any error, inaccuracy, or omission in the real property transfer disclosure statement.

To summarize, RCW 64.06.050 and RCW 64.06.070 dictate that any cause of action based solely on a real property transfer disclosure statement must contain an “actual knowledge” element. A buyer’s allegation that a seller “should have known” of an error, inaccuracy, or omission in the real property transfer disclosure statement is an insufficient basis for imposition of liability upon the seller in the Form 17 context. A buyer seeking to impose liability upon a seller based solely on a real property transfer disclosure must allege and establish that the seller possessed “actual knowledge” of the error, inaccuracy, or omission.

Division Two concluded that Jackowskis may pursue the equitable remedy of rescission based on their negligent misrepresentation claim. *Jackowski*, 151 Wn. App. at 16. Division Two concluded that Jackowskis should be entitled to relief because they “entered into a contract based on misrepresentations.” *Id.* This order is erroneous for two reasons. First, the Form 17 was the only source of any communication or disclosures made by Borchelts to Jackowskis. Second, given that Borchelts *shall not be liable for any error, inaccuracy, or omission in the real property transfer disclosure statement if the seller had no actual knowledge of the error, inaccuracy, or*

omission (RCW 64.06.050), Division Two's conclusion that Jackowskis may pursue a claim of negligent misrepresentation and rescission based solely on Form 17 disclosures is contrary to the statutory provisions set forth in Chapter 64.06 RCW. "Actual knowledge of an error, inaccuracy or omission" is not a required element of a negligent misrepresentation claim. It is well established that a plaintiff claiming negligent misrepresentation must prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. *Ross v. Kirner*, 162 Wn.2d. 493, 499, 172 P.3d 701 (2007) (citing *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002)).

Negligent misrepresentation is established without proof of a buyer's "actual knowledge of an error, inaccuracy, or omission." Allowing a cause of action for rescission based on a negligent misrepresentation claim, where the alleged misrepresentations stem solely from the Form 17, is contrary to the

express limitations on seller liability in the Form 17 context, as detailed in RCW 64.06.050.

In sum, any recovery or remedy (economic damages and/or rescission) sought with respect to a negligent misrepresentation claim stemming solely from Form 17 disclosures is barred by RCW 64.06.050. Division Two erred in reversing the trial court's grant of summary judgment regarding Jackowskis' claim for rescission based on negligent misrepresentation in the limited context of Form 17 disclosures. The scope of claims that may be based solely on Form 17 disclosures is an issue of substantial public interest that should be determined by this Court, in light of the fact that a significant number of sellers of improved real property are required by statute to complete a Form 17.

FRAUDULENT CONCEALMENT

Jackowskis asserted a claim against Borchelts for fraudulent concealment of fill. Division Two's reversal of the trial court's grant of summary judgment for Borchelts on this issue improperly departs from decisions of this Court and the Court of Appeals. Review of this issue is proper pursuant to RAP 13.4(b)(1) and (2).

To prove a fraudulent concealment claim, a plaintiff/purchaser must establish that the alleged defect was unknown to the plaintiff/purchaser and a reasonable inspection by the plaintiff/purchaser would not have disclosed the

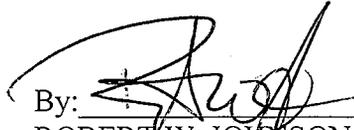
defect. Division Two explicitly acknowledged this requirement in its opinion. *Jackowski*, 151 Wn. App. at 17. This requirement is an element of any claim for fraudulent concealment, not a defense. Jackowskis, as plaintiff/purchaser, have set forth no evidence whatsoever to establish this fundamental element. It is undisputed that Jackowskis did not conduct any investigation regarding soil conditions before the sale closed. *Id.* at 8. Although Division Two properly acknowledged that a plaintiff/purchaser must establish that the alleged defect was unknown to the plaintiff/purchaser and must establish that a reasonable inspection by the plaintiff/purchaser would not have disclosed the defect, Division Two erred in reversing the trial court's grant of summary judgment in the absence of any evidence that any fill-related defect was unknown to Jackowskis and that a reasonable inspection by Jackowskis would not have disclosed the defect. *Id.* at 18-19. In doing so, Division Two improperly departed from decisions of this Court and the Court of Appeals.

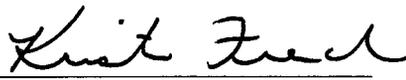
F. CONCLUSION

In sum, Borchelts seek review based on satisfaction of the review criteria set forth in RAP 13.4(b)(1), (2), and (4), and respectfully request: (1) a determination that Washington's economic-loss rule precludes recovery of economic damages related to certain fraud-based claims, including the claim

of fraudulent misrepresentation; (2) reversal of Division Two's determination that fraud claims fall outside the scope of the economic loss rule; (3) reversal of Division Two's determination that Jackowskis' claim of fraudulent misrepresentation is not barred by the economic loss rule; (4) a determination that RCW 64.06.050 prevents a buyer from seeking contract rescission or damages based on a claim related solely to disclosures made on a real property transfer disclosure statement ("Form 17"), where the claim lacks any "actual knowledge" element (for example, a negligent misrepresentation claim); (5) reversal of Division Two's determination that Jackowskis may pursue rescission of the contract with respect to the claim of negligent misrepresentation regarding Form 17 disclosures; (6) a determination that a plaintiff/buyer asserting a claim of fraudulent concealment of must prove the defect would not have been disclosed by a careful, reasonable inspection by the buyer; and (7) reversal of Division Two's reversal of the trial court's grant of summary judgment on the issue of Borchelts' fraudulent concealment of fill, as Division Two's decision is contrary to decisions by this Court and the Court of Appeals, given the absence of any evidence that the alleged "fill" would not have been disclosed by a careful and reasonable inspection by the buyers, Jackowskis.

DATED this 10th day of September, 2009.

By: 
ROBERT W. JOHNSON, #15486
Law Office of Robert W. Johnson, P.L.L.C.
Attorney for Petitioners Borchelt

By: 
KRISTIN L. FRENCH, #41274
Law Office of Robert W. Johnson, P.L.L.C.
Attorney for Petitioners Borchelt

Attorneys for Borchelts:

Robert W. Johnson, WSBA #15486
Kristin L. French, WSBA #41274
Robert W. Johnson PLLC
P.O. Box 1400
Shelton, WA 98584
(360) 426-9728

Attorney for Jackowskis:

Jon E. Cushman, WSBA #16547
Nate J. Cushman, WSBA #34944
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
(360) 534-9183

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TIMOTHY L. JACKOWSKI and ERI
JACKOWSKI, husband and wife,

No. 36944-3-II

Appellants,

v.

DAVID BORCHELT and ROBIN
BORCHELT, husband and wife; HAWKINS-
POE, INC. dba COLDWELL BANKER
HAWKINS-POE REALTORS; HIMLIE
REALTY, INC., and VINCE HIMLIE, Broker
for WINDEMERE HIMLIE REAL ESTATE,
real estate brokers, and ROBERT JOHNSON
and JEF CONKLIN, real estate agents,

ORDER AMENDING OPINION

Respondents.

Respondents, Hawkins-Poe, Inc. and Robert Johnson, move this court for reconsideration of the published opinion issued on June 16, 2009. The opinion is amended as follows:

In the second paragraph on page 10, RCW 18.86.040(1)(c) is deleted and RCW 18.86.050(1)(c) is inserted in its place.

IT IS SO ORDERED.

DATED this _____ day of _____, 2009.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TIMOTHY L. JACKOWSKI and ERI
JACKOWSKI, husband and wife,

Appellants,

v.

DAVID BORCHELT and ROBIN
BORCHELT, husband and wife; HAWKINS-
POE, INC. dba COLDWELL BANKER
HAWKINS-POE REALTORS; HIMLIE
REALTY, INC., and VINCE HIMLIE, Broker
for WINDEMERE HIMLIE REAL ESTATE,
real estate brokers, and ROBERT JOHNSON
and JEF CONKLIN, real estate agents,

Respondents.

No. 36944-3-II

PUBLISHED OPINION

Bridgewater, J. — Following landslide damages to their waterfront home, Timothy and Eri Jackowski appeal the Mason County Superior Court's summary judgment dismissal of their fraud and misrepresentation claims against the seller, the seller's agent, and the Jackowskis' own real estate agent. The Jackowskis also fault the trial court for granting their real estate agent's motion to strike the Jackowskis' jury demand. We affirm in part and reverse and remand in part.

FACTS

Hawkins-Poe Real Estate and its real estate agent, Robert Johnson, represented the

Jackowskis in a real estate transaction for the purchase of a waterfront home in Mason County from the sellers, David and Robin Borchelt. Windermere Himlie Real Estate and its agent, Jef Conklin, represented the Borchelts in the transaction.

The Jackowskis purchased the house from the Borchelts in 2004. The majority of the Jackowskis' claims involve the Borchelts' actions several years before the sale. For example, several years before the transaction, the Borchelts sought and received a slope stability report from geologist Harold Parks while preparing to add an additional bedroom to the house. The slope drawing attached to the report indicates "New building addition to be west of house." CP at 1223. Parks stated during his deposition that adding the bedroom would not create any additional instability for the house. He indicated that the slope down to the water was unstable only within the first 25 feet of the shoreline, especially within the first 10 feet. He noted that the house was not within 25 feet of the shoreline. In 2002, the Borchelts built the addition to the north of the house instead of the west.

The Borchelts then attempted to improve a road going from their house, down the slope, and to the water, but the county issued a stop-work order. The county ordered the Borchelts to revegetate the slope, requiring at least 90 percent of the plants to survive.

At the time of the sale to the Jackowskis, the parties signed a Residential Real Estate Purchase and Sale Agreement (RESPA) and the Borchelts completed a real property transfer disclosure statement (Form 17), which they provided to the Jackowskis before closing. The Borchelts checked the box labeled "NO" on Form 17 in response to the following questions:

4. STRUCTURAL

.....

E. Has there been any settling, slippage, or sliding of the property or its

improvements?

CP at 921.

7. GENERAL

.....

B. Does the property contain fill material?

C. Is there any material damage to the property from fire, wind, floods, beach movements, earthquake, expansive soils, or landslides?

10. FULL DISCLOSURE BY SELLERS

.....

A. Other conditions or defects:

Are there any other existing material defects affecting the property that a prospective buyer should know about?

CP at 922. The Borchelts amended Form 17 on May 13, 2004, to include the following language:

Please refer to Mason County Dept. of Community Development letter attached regarding restoration bond of \$4,400.

CP at 923. The letter indicates that the “following critical areas are present on this property:

. . . Landslide Hazard Areas.”¹ CP at 549. The letter also referenced the geotechnical report conducted by geologist Harold Parks.

The Borchelts faxed a copy of the letter to Conklin, their real estate agent. The fax included an addendum, provided by Parks, which again referenced his geotechnical report. Conklin faxed the letter and addendum to Johnson, who then gave them to the Jackowskis. Tim Jackowski admitted receiving and reading both the letter and Park’s addendum the day after he made his purchase offer.

The parties included an inspection addendum to the RESPA that provided:

¹ The “Landslide Hazard Areas” language is circled along with “Aquatic Management Areas.” CP at 549.

INSPECTION CONTINGENCY. The above Agreement is conditioned on Buyer's personal approval of an inspection of the Property and the improvements on the Property. Buyer's inspection may include, at Buyer's option, the structural, mechanical and general condition of the improvements to the Property, compliance with building and zoning codes, an inspection of the Property for hazardous materials, a pest inspection, and a soils/stability inspection.

CP at 540. The contingency allowed the Jackowskis 15 days to provide a notice of disapproval, with three days provided for the Borchelts to respond. The Jackowskis did not conduct any investigation regarding soil stability before the sale closed. The sale closed on June 30, 2004.

On February 3, 2006, the house slid such that sheetrock cracked and doors stuck. The Jackowskis sued the Borchelts seeking rescission, or in the alternative, damages for fraud, negligent misrepresentation, or breach of contract. The Jackowskis sued Hawkins-Poe, Johnson, Windermere Himlie Real Estate, and Conklin, alleging that they knew or should have known and failed to disclose that the property was in a landslide area. The trial court allowed the Jackowskis to amend their complaint to include claims that Hawkins-Poe and Johnson violated RCW 18.86.050(1)(c) by failing to advise the Jackowskis during the pendency of the real estate transaction to seek the advice of a geotechnical expert, but it denied the Jackowskis' request to include breach of contract claims against Hawkins-Poe and Johnson. The Jackowskis' claims all relate to alleged fraud or misrepresentation regarding the risk of landslides on the property and about the presence of fill on the property.

BORCHELTS

The Borchelts moved for summary judgment on all of the Jackowskis' claims against them, including the Jackowskis' claims for rescission of the sale agreement, fraudulent misrepresentation, constructive fraud, and negligent misrepresentation. The Borchelts argued

before the trial court that the Jackowskis' breach of contract claim should fail because the Jackowskis failed to respond to the portion of the Borchelts' motion for summary judgment regarding breach of contract. The trial court agreed and granted that portion of the Borchelts' motion.

The trial court then granted the Borchelts' motion regarding the Jackowskis' negligent misrepresentation claims based on the economic loss rule as described in *Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007). The trial court next dismissed the Jackowskis' fraud and fraudulent concealment claims relating to Form 17 because it found that the Jackowskis failed to satisfy the statute of limitations for such claims.²

To the extent that any of the Jackowskis' fraud claims regarding the landslide issue fell outside of Form 17, the trial court granted the Borchelts' summary judgment motion because the evidence showed that the Borchelts disclosed to the Jackowskis in written form that the property was in a landslide area. The trial court also noted that a reasonable investigation, which the Jackowskis made their acceptance contingent on, would have revealed the landslide issue. With regard to the issue of whether there was fill on the property, the trial court granted summary judgment on all fraud claims outside of Form 17, again stating that a reasonable investigation would have revealed the presence of the fill.

The trial court denied one of the Borchelts' summary judgment requests. Specifically, the trial court denied summary judgment regarding the fraudulent concealment claim arising from

² RCW 64.06.020, which addresses the seller's disclosure duty and the minimum information that Form 17 must include, provides that the buyer has three days after he or she receives the disclosure statement to rescind the contract.

36944-3-II

cracks in the basement slab that the Borchelts allegedly covered in order to conceal the defects. We do not address the concrete slab issue here.

HAWKINS-POE AND JOHNSON

The trial court granted Hawkins-Poe and Johnson's first motion for summary judgment regarding negligent misrepresentation claims against them based on similar circumstances in *Alejandre*, 159 Wn.2d 674, where the buyer knew of potential issues, but failed to investigate. The trial court dismissed Hawkins-Poe and Johnson without addressing any other claims that the Jackowskis brought against them, including the breach of duty claims under RCW 18.86.050(1)(c).

When the Jackowskis alleged that valid claims remained against Hawkins-Poe and Johnson, Johnson and the agency filed another motion for summary judgment seeking to dismiss any remaining claims against them based on the economic loss rule. The trial court granted Hawkins-Poe and Johnson's second summary judgment motion in its entirety and again dismissed Hawkins-Poe and Johnson from the lawsuit.

By separate motion, the trial court granted Hawkins-Poe and Johnson's summary judgment request to strike the Jackowskis' jury demand. The Borchelts joined that motion.

WINDERMERE HIMLIE AND CONKLIN

The trial court partially granted Windermere Himlie and Conklin's motion for summary judgment, finding that the Jackowskis received written information disclosing that the property was in a landslide hazard area and that a reasonable inspection of the area would have disclosed the existence of fill on the property. The trial court dismissed all claims against Windermere

Himlie and Conklin arising out of the alleged nondisclosure of the landslides on the property and on other property and on all claims involving fill on the property. The trial court did not address the economic loss rule in regard to Windermere and Conklin's summary judgment requests because they did not brief the issue.

As with the Borchelts, the trial court denied the motion regarding the Jackowskis' fraudulent concealment claim involving cracks in the basement slab that the Borchelts repaired, covered with carpet, and failed to disclose.

The Jackowskis appeal.

ANALYSIS

Standard of Review

A trial court should grant a motion for summary judgment when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. CR 56(c). We review summary judgment orders de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. *Lam v. Global Med. Sys. Inc.*, 127 Wn. App. 657, 661 n.4, 111 P.3d 1258 (2005).

I. Economic Loss Rule

The Jackowskis first contend that the economic loss rule did not apply to their situation because their lives were at risk, which places their claims inside the realm of tort law. We disagree. As an initial matter, we note that the trial court did not grant summary judgment in favor of Windermere Himlie and Conklin based on the economic loss rule because they did not argue it, so we limit this discussion to the Borchelts, Hawkins-Poe, and Johnson.

In *Alejandre*, our Supreme Court addressed the economic loss rule in detail. *Alejandre*, 159 Wn.2d at 681-82. “The economic loss rule applies to hold parties to their contract remedies when a loss potentially implicates both tort and contract relief.” *Alejandre*, 159 Wn.2d at 681. It is a “device used to classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remediable only in contract.” *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 822, 881 P.2d 986 (1994). The rule prohibits parties from recovering economic losses in tort claims when the entitlement to recovery comes from the contract. *Alejandre*, 159 Wn.2d at 682.

“Tort law has traditionally redressed injuries properly classified as physical harm.” *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 420, 745 P.2d 1284 (1987). It concerns legal obligations rather than bargained-for obligations and serves as a “safety-insurance policy” requiring that products and property that parties sell do not “unreasonably endanger the safety and health of the public.” *Alejandre*, 159 Wn.2d at 682 (quoting *Stuart*, 109 Wn.2d at 421).

In short, the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims. Washington law consistently follows these principles. The key inquiry is the nature of the loss and the manner in which it occurs, i.e., are the losses economic losses, with economic losses distinguished from personal injury or injury to other property. If the claimed loss is an economic loss and no exception applies to the economic loss rule, then the parties will be limited to contractual remedies.

Alejandre, 159 Wn.2d at 683-84 (internal citations omitted).

The Jackowskis contend that because the slide was a “sudden, dangerous event, causing

damage to property and threatening life,” that tort remedies should be available. Br. of Appellant at 19. We disagree.

The Jackowskis’ attempt to reclassify the circumstances in their case as pure, life-threatening, tort claims fails. All the claims the Jackowskis brought stem from their RESPA and the related Form 17 for the purchase of the residential property and their relationships with the sellers and agents involved in the transaction. Accordingly, the Jackowskis’ claims seek economic damages rather than redress for physical harm. The trial court did not err by finding that the economic loss rule applied to bar the Jackowskis’ negligent misrepresentation claims.

II. Claims Against the Real Estate Companies and Their Agents

The Jackowskis next contend that even if the economic loss rule precluded their negligent misrepresentation claims against the Borchelts, the trial court erred by applying it to all of their statutory claims against Hawkins-Poe and Johnson.³ In particular, the Jackowskis contend that their claims that Hawkins-Poe and Johnson breached statutory duties owed under RCW 18.86.030, as well as common law duties should have survived summary judgment dismissal. We agree.

The Jackowskis correctly note that RCW 18.86.110 specifically retains common law duties, only superseding them where and to the extent that they are inconsistent with the statute.

This chapter supersedes only the duties of the parties under the common law, including fiduciary duties of an agent to a principal, to the extent inconsistent with this chapter. The common law continues to apply to the parties in all other respects.

³ We note that the Jackowskis amended their complaint to allege statutory violations against Hawkins-Poe and Johnson and did not do so regarding Windermere Himlie and Conklin. Accordingly, we consider only Hawkins-Poe and Johnson in this section.

36944-3-II

RCW 18.86.110. For clarity, we reiterate that chapter 18.86 RCW does not abrogate professional and fiduciary duties of real estate agents.

Neither do we believe that the economic loss rule, as described in *Alejandre*, abrogates all professional malpractice claims, particularly where a client hires a professional and, therefore, establishes a privity of contract with that professional. We distinguish this holding from *Alejandre*, which did not involve a buyer suing his real estate agent, but rather, suing the seller. *Alejandre*, 159 Wn.2d at 680. We are not willing at this time to expand our Supreme Court's holding in *Alejandre* to preclude all recovery for economic loss against professional agents, as to do so would be to abrogate professional malpractice claims for all cases not involving physical harm. We do not believe this to be the *Alejandre* court's intention.

The Jackowskis cite *Alejandre* for the proposition that “tort law is not intended to compensate parties for losses suffered as a result of a *breach of duties assumed only by agreement.*” Br. of Appellant at 23 (quoting *Alejandre*, 159 Wn.2d at 682). They allege that Hawkins-Poe and Johnson breached statutory and common law duties, not duties assumed only by agreement.

Specifically, they allege that Hawkins-Poe and Johnson violated their duties to the Jackowskis under RCW 18.86.030(1)(a), which requires agents to exercise reasonable skill and care. They contend that Hawkins-Poe and Johnson violated the RCW 18.86.030(1)(c) requirement that agents transmit all written communications to and from either party in a timely manner. The Jackowskis allege that Hawkins-Poe and Johnson violated the RCW 18.86.040(1)(c) duty to advise the buyer to seek expert advice on matters relating to the

transaction that are beyond the agent's expertise. Accordingly, we hold that the trial court erred by dismissing the Jackowskis' statutory and common law claims against Hawkins-Poe and Johnson under the economic loss rule.

III. Rescission

The Jackowskis contend that the trial court erred by precluding them from rescinding the contract because neither the economic loss rule nor RCW 64.06.030 abrogate the equitable remedy of rescission for negligent misrepresentation claims. Because we resolve this issue based on common law rescission, we do not address chapter 64.06 RCW rescission.

The Jackowskis contend that they should be entitled to common law rescission because RCW 64.06.070 provides:

Except as provided in RCW 64.06.050, nothing in this chapter shall extinguish or impair any rights or remedies of a buyer of real estate against the seller or against any agent acting for the seller otherwise existing pursuant to common law, statute, or contract; nor shall anything in this chapter create any new right or remedy for a buyer of residential real property other than the right of rescission exercised on the basis and within the time limits provided in this chapter.

The Jackowskis allege that, although *Alejandro* barred monetary recovery for economic loss damages against a seller in a negligent misrepresentation claim, rescission is not a recovery and, thus, should still be available to them. After all, they pleaded in the alternative for either rescission of the contract or damages.

Contract rescission is an equitable remedy in which the court attempts to restore the parties to the positions they would have occupied had they not entered into the contract. *Hornback v. Wentworth*, 132 Wn. App. 504, 513, 132 P.3d 778 (2006), review granted, 158 Wn.2d 1025, 152 P.3d 347 (2007).

Bloor v. Fritz, 143 Wn. App. 718, 739, 180 P.3d 805 (2008). A court sitting in equity has broad

discretion in shaping relief. *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003).

As an initial matter, the Jackowskis acknowledge that many attorneys have argued that *Alejandre* precludes the equitable remedy of rescission for misrepresentation and that the common language those attorneys cite is “the economic loss rule precludes any recovery under a negligent misrepresentation theory.” Br. of Appellant at 39 (quoting *Alejandre*, 159 Wn.2d at 677). Nevertheless, they argue that rescission is an avoidance of contract rather than a recovery. They contend that they should be entitled to relief because they entered into a contract based on misrepresentations. We agree.

They cite a post-*Alejandre* case, *Ross v. Kirner*, 162 Wn.2d 493, 172 P.3d 701 (2007), alleging that our Supreme Court has allowed a buyer of real estate to seek rescission for a negligent misrepresentation tort claim. It is true that one of the buyer’s underlying requests was to rescind the contract. *Ross*, 162 Wn.2d at 497-98. But the *Ross* court did not address *Alejandre* or the economic loss rule, nor did the parties address them. *Ross*, 162 Wn.2d at 500. Instead, the *Ross* court found that undisputed evidence did not establish as a matter of law that the respondent committed negligent misrepresentation and a trial should occur to make that determination. *Ross*, 162 Wn.2d at 500. While we note the differences between *Ross* and this case, we nevertheless hold that the trial court erred by dismissing the Jackowskis claims that they should be able to rescind the contract.

IV. Breach of Contract Claims - Borchelts

The Jackowskis contend that the trial court erred by dismissing their breach of contract claims against the Borchelts. The trial court dismissed the Jackowskis’ breach of contract claims

because it found that the Jackowskis did not respond to the Borchelts' summary judgment argument regarding breach of contract. The Jackowskis listed breach of contract claims against the Borchelts in their complaint. However, the Borchelts did not make a summary judgment argument regarding breach of contract. The Jackowskis nevertheless mentioned the breach of contract claim in their response to the Borchelts' summary judgment motion, but only as an example of claims that survive the economic loss rule. Accordingly, we hold that the Jackowskis' breach of contract claims were not before the trial court for summary judgment dismissal and accordingly, such dismissal was in error.

V. Reasonable Reliance - Fill and Landslides

The Jackowskis contend that the trial court erred by finding that their reliance on the alleged misrepresentations and fraudulent statements was not reasonable. To the extent that the Jackowskis argue that they reasonably relied on the statements as proof of negligent misrepresentation, their argument fails under the economic loss rule. *Alejandre*, 159 Wn.2d at 683. Because the Jackowskis' fraud and fraudulent concealment claims fall outside the scope of the economic loss rule, we will address them briefly. *Alejandre*, 159 Wn.2d at 689, 690.

We clarify that the Jackowskis sued the Borchelts alleging both fraud and fraudulent concealment, while alleging only fraudulent concealment against Hawkins-Poe, Johnson, Windermere Himlie, and Conklin. In a fraudulent concealment claim, the plaintiff must prove the defect would not have been disclosed by a careful, reasonable inspection by the purchaser. *Alejandre*, 159 Wn.2d at 689. Similarly, in a fraud claim, the plaintiff must establish that he had a right to rely on the representation. *See Williams v. Joslin*, 65 Wn.2d 696, 697, 399 P.2d 308

36944-3-II

(1965).

Here, as we discussed above, the Jackowskis had knowledge of the landslide hazard area and, thus, reliance on the Form 17 disclosure could not be reasonable. A reasonable inspection would have disclosed the landslide risk. The Jackowskis acknowledge that they had read the letter indicating that the property that they were contracting to buy was in a landslide hazard area. Tim Jackowski read documents before closing that referenced an existing geotechnical report. Tim Jackowski acknowledged that he made the sale contingent on his ability to hire professionals to conduct property inspections including soil and slope stability. Nevertheless, he failed to utilize the contingency to request such inspections. The trial court did not err by granting summary judgment on the Jackowskis' fraudulent concealment claims based on the landslide risk.

However, we are not convinced to the same extent regarding the fill issue. The Jackowskis' expert, David Strong, testified in deposition that the presence of fill was "obvious." CP at 141.1.

Q. And I also understand that in your inspection of the property, you said the presence of fill was obvious, or something to that effect; is that correct?

A. I believe so, yeah.

Q. So any competent soils inspector, reviewing the property, would have been able to see there was fill on the property?

A. Yes.

CP at 141.1. However, his property evaluation occurred after the sliding event and does not help us decide whether the presence of fill would have been disclosed with a careful, reasonable inspection at the time of the sale.

Architect Randall Thompson stated in his declaration that when he inspected the property following the slide that the "fill is apparent and is located along the north boundary line of the

36944-3-II

property and is armored with quarry rock.” Suppl. CP at 1402. Further, the “fill appears to be as much as 15 feet deep along that edge, and that is only 12 feet north of the north foundation wall of the addition.” Suppl. CP at 1402. Again, Thompson based these statements on what he observed when he inspected the property after the sliding event.

Accordingly, the Borchelts were not entitled to summary judgment dismissal of the fill issue as a matter of law for the Jackowskis’ fraud and fraudulent concealment claims.

VI. Jury Demand

We next address whether the trial court erred by granting the Borchelts' motion to strike the Jackowskis' jury demand. The Jackowskis contend that we have allowed plaintiffs who pleaded remedies in the alternative, even inconsistent remedies such as rescission of contract through avoidance and damages based on affirmation of the contract, to hold off on electing a remedy, instead of prosecuting both through final judgment. At final judgment, the trial court's election becomes the pleading party's choice. *Stryken v. Panell*, 66 Wn. App. 566, 571, 832 P.2d 890 (1992). The Jackowskis argue that because they pleaded both rescission and damages, they are entitled to wait and see what remedy the trial court will find appropriate and will accept the trial court's decision at that time.

There is a right to a jury trial where the civil action is purely legal in nature. *Peters v. Dulien Steel Prods., Inc.*, 39 Wn.2d 889, 239 P.2d 1055 (1952). Conversely, there is no right to a jury trial where the action is purely equitable in nature. *Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 116 P.2d 507 (1941); *Knudsen v. Patton*, 26 Wn. App. 134, 137, 611 P.2d 1354, *review denied*, 94 Wn.2d 1008 (1980). "The overall nature of the action is determined by considering all the issues raised by all of the pleadings." *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365, 617 P.2d 704 (1980). In determining whether an action is primarily equitable or is an action at law, we grant the trial court wide discretion and will not disturb that discretion absent clear abuse. *Brown*, 94 Wn.2d at 368.

The trial court should exercise its discretion with reference to a non-exhaustive list of factors including: (1) who seeks the equitable relief; (2) is the person seeking the equitable relief

also demanding trial of the issues to the jury; (3) are the main issues primarily legal or equitable in their nature; (4) do the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury; (5) are the equitable and legal issues easily separable; (6) if the nature of the action is doubtful, a jury trial should be allowed; and (7) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether to grant a jury trial on all or part of the issues. *Scavenius v. Manchester Port Dist.*, 2 Wn. App. 126, 129-30, 467 P.2d 372 (1970).

Applying these factors to the current case, the Jackowskis seek the equitable relief, rescission. The Jackowskis also demand a jury trial. One of the main issues is whether the Jackowskis are entitled to rescind the contract, which is clearly equitable. They seek, in the alternative, damages resulting from fraud, negligent misrepresentation, and breach of contract, in amounts to be proven at trial. The complexities at trial could affect the orderly determination of issues by the jury. We cannot say, however, that the trial court abused its discretion where a major basis of the claim, the rescission request, is equitable. We hold that the trial court did not err by granting the Borchelts' motion to strike the Jackowskis' jury demand.

VII. Attorney Fees on Appeal

The Jackowskis request attorney fees on appeal under terms authorized in the contract. RAP 18.1 allows attorney fees on appeal if they are authorized by applicable law. The RESPA provides that if either party institutes a suit against the other, the prevailing party is entitled to attorney fees and expenses. The Jackowskis cite RCW 4.84.300 in support of their request, but not only is this an incorrect citation, it applies only to damage actions of \$10,000 or less. RCW

36944-3-II

4.84.250. RCW 4.84.260 provides that the prevailing party is the party that receives recovery that totals as much as or more than the amount offered in settlement. None of this information is available to us at this time.

We affirm summary judgment dismissal of the Jackowskis' negligent misrepresentation claims against the Borchelts based on the economic loss rule. We reverse and remand for trial the Jackowskis' statutory and common law claims against Hawkins-Poe and Johnson. We reverse the trial court and hold that common law rescission is not precluded by the economic loss rule. We affirm summary judgment dismissal on all claims against Windermere Himlie and Conklin based on the Jackowskis' knowledge of the landslide risk. We affirm summary judgment dismissal of all fraud and fraudulent concealment claims relating to the landslide issue for all parties because a reasonable inspection would have revealed the risk and because the Jackowskis' knew that the property was within a landslide hazard area. We reverse and remand the Jackowskis' fraud and fraudulent concealment claims relating to the presence of fill on the property. We hold that the trial court did not abuse its discretion by striking the Jackowskis' jury demand. We reverse and remand the trial court's dismissal of the Jackowskis' breach of contract claims against the Borchelts as they were not properly before the trial court for dismissal. We deny attorney fees on appeal because the Jackowskis fail to inform us how they are the prevailing party.

Bridgewater, J.

We concur:

Armstrong, J.

Penoyar, A.C.J.