

NO. 63221-3-I

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION I

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MARK AND KRISTINA GREY, individually and the marital community  
composed thereof,

Appellants,

v.

JAMES AND SUE LEACH, individually and the marital community  
composed thereof,

Respondents and Cross-Appellants.

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REPLY BRIEF OF RESPONDENTS AND CROSS-APPELLANTS

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**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. STATEMENT OF THE CASE .....	1
A.    The Greys mischaracterize some “undisputed facts.” .....	1
B.    The Greys ignore key facts. ....	2
III. SUMMARY OF ARGUMENT .....	2
IV. ARGUMENT.....	3
A.    The testimony creates a question of fact and does not support the Grey’s argument on the contract defense.....	3
1.  There are multiple reasons why the Greys argument is unpersuasive.....	3
2.  Mr. Leach’s testimony relating to the REPSA does not support the Greys’ argument.....	4
3.  Mr. Grey’s testimony does not support the Greys’ argument on REPSA interpretation.....	5
B.    The Greys contracted for the right to perform the inspection that would have uncovered the oil leak.....	10
1.  The Greys’ argument that the REPSA limited their inspection is wrong. ....	10
2.  The Greys argument that inspection under the basement was impossible is wrong. ....	11
3.  The Greys were aware of the risk of fuel-oil contamination....	13
C. <i>Car Wash</i> does not support the Grey’s argument on allocation of risk loss. ....	13
1.  The facts here are clearly distinguishable from <i>Car Wash</i> . ....	13
2. <i>Car Wash</i> does not require that the term MTCA be mentioned in the contract to allocate risk. ....	15
D.    The Greys’ argument that <i>caveat emptor</i> does not apply is misleading. ....	15
1.  The doctrine of <i>caveat emptor</i> still applies to this real estate transaction. ....	15
2.  The argument relating to equitable defenses is not relevant here where no equitable relief is sought and equitable issues are not on appeal. ....	18

3. The Greys bear the risk of mistake. .... 19  
V. CONCLUSION .....20

**TABLE OF AUTHORITIES**  
**Table of Cases**

	<b>Page(s)</b>
<b>Federal Cases</b>	
<i>Smith Land &amp; Improvement Corp. v. Celotex Corp.</i> , 851 F.2d 86 (3d Cir. 1988) .....	17, 18
<i>Western Properties Service Corp v. Shell</i> , 358 F.3d 678 (9th Cir. 2004)	17
 <b>State Cases</b>	
<i>Aspon v. Loomis</i> , 62 Wn. App. 818, 816 P.2d 751 (1991) .....	17
<i>Bennett v. Shinoda Floral Inc.</i> , 108 Wn.2d 386, 396, 739 P.2d 648 (1987) .....	14
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 901 P.2d 222 (1990) .....	3
<i>Car Wash Enterprises v. Kampanos</i> , 74 Wn. App. 537, 874 P.2d 868 (1994) .....	13, 14, 15, 18, 19
<i>Chandler v. State Office of Ins. Comm'r</i> , 141 Wn. App. 639 .....	16, 17
<i>CPL LLC v. Conley</i> , 110 Wn. App. 786, 793, 40 P.3d 679 (2002) .....	19
<i>Davey v. Brownson</i> , 3 Wn. App. 820, 478 P.2d 258 (1970) .....	19
<i>Felt v. McCarthy</i> , 130 Wn.2d 203, 209, 922 P.2d 90 (1996) .....	9, 10
<i>Fleishman v. Hockett</i> , 49 Wn. 2d 328, 301 P.2d 166 (1956) .....	16
<i>Hearst Communications Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005) .....	6
<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 696-98, 974 P.2d 836 (1999) .....	9
<i>Hudesman v. Foley</i> , 73 Wn.2d 880, 889, 441 P.2d 532 (1968) .....	4, 8
<i>In re Marriage of Schweitzer</i> , 81 Wn. App. 589, 915 P.2d 575, 132 Wn.2d 318, 937 P.2d 1062 (1997) .....	4
<i>Lynott v. Nat'l. Union Fire Ins. Co.</i> , 123 Wn.2d 678, 684, 871 P.2d 146 (1994) .....	6, 7
<i>Moran Junior College v. Standard Oil Co. of California</i> , 184 Wash. 543, 52 P.2d 342 (1935) .....	11
<i>Scott v. Petett</i> , 63 Wn. App. 50, 58, 816 P.2d 1229 (1991) .....	9, 11, 14, 20
<i>State v. Hoffman</i> , 116 Wn.2d 51, 71, 804 P.2d 577 (1991) .....	5
 <b>Statutes</b>	
RCW 48.01 .....	16
RCW 70.105D.010 .....	15
RCW 59.18 .....	17
 <b>Regulations and Rules</b>	
CR 8 .....	16

## I. INTRODUCTION

Respondents and cross-appellants, James and Sue Leach, dispute the Greys' argument that this court should affirm the dismissal of the Leaches' contract defense, because: (1) the parties may allocate MTCA liability in a real estate purchase and sale agreement (REPSA); and (2) questions of fact remain unresolved whether the parties allocated the risk of loss under MTCA. Given that the Greys contracted for the right to inspect for hazardous materials, learned during inspection that there were facts suggesting a leak, and formed the opinion before closing that there was a risk of incurring costs from a leak from an existing oil tank, this court should direct that the trier of fact decide the issue of allocation of MTCA liability.

## II. STATEMENT OF THE CASE

### A. The Greys mischaracterize some "undisputed facts."

The Greys' statement of the case contains a list of material facts which the Greys describe as "mostly undisputed." App. Br. at 2. The Greys assert that the relationship of the parties does not arise solely from the REPSA. App. Br. at 3. Other than to argue that MTCA forms the basis of the parties' "relationship," the Greys fail to cite to any portion of the record that supports their statement that the REPSA is not the sole basis of the parties' relationship.

**B. The Greys ignore key facts.**

The Greys rely on the report of their property inspector for the conclusion that the inspector was only concerned with a fuel oil leak from an abandoned oil tank. App. Br. at 4, CP199. The Greys ignore Mr. Grey's admission that he understood he had more risk than mentioned in the inspector's report.

Q. Did you understand that if there had been a fuel oil leaking from the tank that you knew existed that it could be an expensive mess to clean up?

A. I guess from Solvang's report, we understood that there could be some costs associated if there was a leak.

CP 179, at 101, lns 19-24.

Despite this understanding before closing, the Greys never asked to perform destructive testing, CP 135, and the Greys never asked the Leaches to perform any repairs on the property. CP 179, at 101 ln. 25 to 102, ln. 4.

**III. SUMMARY OF ARGUMENT**

On summary judgment, the burden was on the Greys to establish the absence of material questions of fact and that they were entitled to judgment as a matter of law. The Greys relied on testimony by Mr. Grey, expressing his subjective intent regarding the REPSA terms, and ambiguous statements by Mr. Leach, about what he thought the REPSA contained, to establish that the parties did not intend to transfer MTCA

liability in the transaction. The testimony of Mr. Grey, which is contrary to the express terms of the REPSA, is inadmissible. The testimony of Mr. Leach does not address the issue the Greys raised. Therefore, the Greys never met their burden on summary judgment to establish that there was no question of material fact. It has been held that the risk of liability under MTCA may be allocated in real estate transactions. The REPSA allocated the risk in the terms that provided for the Greys' right to inspect for hazardous materials, and demand remediation. Given that the Greys were on notice of the risk of a fuel-oil leak, the superior court erred when ruling as a matter of law that under the admissible facts presented, the REPSA did not allocate MTCA liability to the Greys.

#### **IV. ARGUMENT**

**A. The testimony creates a question of fact and does not support the Grey's argument on the contract defense.**

**1. There are multiple reasons why the Greys argument is unpersuasive.**

The Greys argue that the REPSA does not allocate liability for cleaning up the fuel oil. Their argument is unpersuasive because they have no relevant authority supporting their interpretation of the REPSA, and the facts on which they rely do not support their argument. Because the Greys drafted the REPSA, if there is any ambiguity in the REPSA the court must interpret the terms against the Greys. *Berg v. Hudesman*, 115

Wn.2d 657, 901 P.2d 222 (1990). Additionally, because the issue is before the court on summary judgment, the court must interpret all facts and inferences in a light most favorable to the Leaches. *Hudesman v. Foley*, 73 Wn.2d 880, 889, 441 P.2d 532 (1968). The two legs on which the Greys' argument depends, the declaration of Mr. Grey and the deposition of Mr. Leach, fail on close scrutiny to support their argument.

**2. Mr. Leach's testimony relating to the REPSA does not support the Greys' argument.**

The Greys argue that two vague statements from Mr. Leach amount to an admission that the REPSA did not allocate the risk of contamination to the Greys. App. Br. at 24. The Greys rely on the fact that Mr. Leach testified that he "did not think" that the REPSA included an indemnification for environmental claims, or a waiver of the right to sue. App. Br. at 24. Mr. Leach's statement is not an objective expression of his intent concerning the meaning of any contract terms. What Mr. Leach thought the REPSA contained is not relevant to the determination of any issue. It is a contract's written terms, rather than a person's recollection of them, that determines the rights and responsibilities of the parties. *In re Marriage of Schweitzer*, 81 Wn. App. 589, 915 P.2d 575, *affirmed and remanded*, 132 Wn.2d 318, 937 P.2d 1062 (1997). It follows that Mr. Leach's recollection of the content of the REPSA, of lack thereof, does not determine whether the parties allocated the risk of liability for

contamination of the property. Therefore, this leg of the Greys' argument fails to support summary judgment in their favor.

When presenting these statements by Mr. Leach, the Greys argue that the REPSA does not allocate environmental responsibility because it does not include an indemnification or agreement not to sue. Yet, the Greys failed to cite any authority for this proposition. Argument without citation to authority may be disregarded by the court. *State v. Hoffman*, 116 Wn.2d 51, 71, 804 P.2d 577 (1991).

**3. Mr. Grey's testimony does not support the Greys' argument on REPSA interpretation.**

**a. Mr. Grey's testimony is not admissible under the context rule of contract interpretation.**

The second leg supporting the Greys' motion for summary judgment was Mr. Grey's declaration statement that the parties never intended to allocate MTCA liability, and the intent is consistent with the REPSA. The fact that the Greys relegated this argument to a footnote signifies the weakness of argument. App. Br. at 24, n. 7.

The Greys argue that Mr. Grey's declaration does not contradict the express terms of the REPSA and therefore it is admissible under the context rule of contract interpretation. They are wrong.

The Greys agree with the general rule that the parties' intent is determined by objective manifestations, rather than the unexpressed

subjective intent of the parties. *Hearst Communications Inc., v. Seattle Times Co.* 154 Wn.2d 493, 115 P.3d 262 (2005). A subjective intention is an undisclosed intention. *Lynott v. Nat'l. Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). Yet, the Greys do not explain how Mr. Grey's statement about what the parties "intended" is anything other than an undisclosed expression of his subjective intent. Mr. Grey stated what the parties intended, but he does not attempt to describe how that intention was manifested by word, act, or writing. CP 118. Because Mr. Grey's declaration does not establish that both parties manifested this "intention" in any way, the testimony does not fall within the context rule. *Lynott*, 123 Wn.2d at 685.

*Lynott* is an example of how the court must separate fact from conclusions, and expressed from unexpressed intentions. National Union Fire Insurance Company (National Union) issued an insurance policy covering the Tacoma Boat Building Company (TBC). After officers of TBC were sued for wrongful acts arising from the sale of stock, National Union denied coverage arguing that it never intended to issue a policy covering a specific transaction relating to investors. National Union relied on the declaration of an underwriter that stated, in conclusory fashion, that he never intended the policy to cover the particular transaction about which TBC's officers were sued. The court looked closely at the

declaration and noted that “the underwriter never asserts that he and Grant discussed specific exclusion of a ‘merger’ ... or ‘acquisition’, nor does he claim that National Union said it would insert a ‘mergers, acquisition’ exclusion.” *Lynott*, 123 Wn.2d at 686. When finding that this evidence was insufficient to establish mutual intent, the court stated:

It is critical to note that the National Union Underwriter never claims that he and the insurance broker ever discussed specific exclusion of the investments through Midland Capital. It is clear that National Unions fails to establish a mutually manifested intent that the stock purchases then being negotiated were to be excluded from coverage. ... Without any other proof, it is a fair inference that the parties did not mutually agree that the Midland transaction was to be excluded.

*Id.* at 688.

Just as in *Lynott*, the Greys do not establish that the parties specifically communicated and agreed that the Greys could assert MTCA claims against the Leaches after the transaction closed, or that the Greys’ inspection for hazardous materials excluded fuel-oil contamination. Indeed, Mr. Grey testified that his use of the term “hazardous substance” in the complaint referred to fuel oil. CP 184, at 187, lns. 10-20. Just as in *Lynott*, the Greys failed to show objective manifestation of **mutual** intent. This failure results in the inadmissibility of the testimony under the context rule of contractual construction. Accordingly, the court may not consider the declaration of Mr. Grey to the extent it expressed the intent of

the parties regarding whether the REPSA reserved the Greys' right to assert MTCA claims. All inferences relating to the content of the Grey declarations must be interpreted in the light favorable to the Leaches. *Hudesman*, 73 Wn.2d at 889.

**b. Mr. Grey's testimony is not consistent with the REPSA.**

The Greys argue that Mr. Grey's declaration statement, that the parties never intended to transfer the risk of environmental liabilities, is consistent with the REPSA. This is inaccurate. Under the REPSA, the Leaches make no warranty about the condition of the property. CP 122-36. The Grey's made their purchase contingent on their inspection of the property, including inspection for hazardous materials. CP 135. The terms included corrections required by the seller including:

In the case of hazardous materials, **'correction' means removal or treatment** (including but not limited to removal, or at Seller's option, decommissioning of any oil storage tanks) of the hazardous material at Seller's expense **as recommended by and under the direction of a licensed hazardous material engineer or other expert** selected by the Seller.

CP 135.

Mr. Grey's statement that the parties never contemplated the risk of loss from hazardous substances is clearly inconsistent with the written contract which specifically reserved the right of the Greys to inspect the property for hazardous material and withdraw from the transaction.

Furthermore, Mr. Greys testified that he knew before closing that if there were **fuel oil leak from the “existing tank” on the subject premises** there would be costs associated with that leak. CP 179, at p 101, lns. 19-24. In other words, Mr. Grey accepted the risk of a latent defect -- one that he had not yet discovered.

Once a transaction for the sale of real estate closes, the buyer assumes all risk of loss for the property regardless of whether that risk was foreseeable. *Felt v. McCarthy*, 130 Wn.2d 203, 209, 922 P.2d 90 (1996). When a purchase and sale agreement contains a contingency clause concerning a particular issue, the buyer is allocated the risk associated with the issue in the contingency clause. *Scott v. Petett*, 63 Wn. App. 50, 58, 816 P.2d 1229 (1991). The Greys fail to explain how the REPSA would have transferred all the risk of loss to the Greys except for fuel-oil spill risks, when the REPSA contained a contingency clause regarding the inspection for hazardous substances. The Greys fail to explain how Mr. Grey’s subjective intent that fuel-oil spill risk is not transferred to him when the Greys specifically bargained for the right to demand the seller cleanup of any hazardous conditions including fuel oil before closing. The inevitable conclusion is that Mr. Grey’s testimony about the parties’ intent is inconsistent with REPSA. Inconsistent subjective intent is not admissible. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696-98, 974 P.2d 836

(1999). Because Mr. Grey's testimony on subjective intent is contrary to the written terms of the contract, the Greys no legs to support their summary judgment. The admission by Mr. Grey that he was aware that he might incur costs **cleaning up a leak from an existing fuel oil tank** created a question of fact on the allocation of MTCA liability, so that the the superior court erred in ruling as a matter of law on this issue.

**B. The Greys contracted for the right to perform the inspection that would have uncovered the oil leak.**

**1. The Greys' argument that the REPSA limited their inspection is wrong.**

The Greys concede that the inspection addendum is admissible under the context rule of contract interpretation. However, the Greys argue that their inspection of the property for fuel-oil contamination was limited to determining the presence of tanks on the property. App. Br. at 25. Making this argument the Greys ignore the language that the limitation exists "unless otherwise agreed to in writing by the parties." Obviously, the Greys could have included terms that provided them more rights relating to the oil tank inspection. As drafters of the REPSA, they cannot argue that they were limited in their inspection rights. As drafters, the Greys had the power to include provisions in the contract to protect themselves, including a right to sue under MTCA. They choose not to do so. The contract should be interpreted against the Greys as drafters. *Felt,*

130 Wn.2d at 210. Proceeding to closing with limited information of a risk subject to a contingency clause, and failing to exercise rights allowed by the contingency clause, placed the risk of loss on the Greys. *Scott*, 63 Wn. App. at 58-59.

**2. The Greys argument that inspection under the basement was impossible is wrong.**

The Greys cite *Moran Junior College v. Standard Oil Co. of California*, 184 Wash. 543, 52 P.2d 342 (1935) to support their argument that the Greys could not have inspected under the concrete floor. This case is distinguishable. There was no sale of property involved in the case. The suit arose after a college building was damaged due to a gas leak from a pipe under the basement floor that had been installed by an employee of the college. The defendant was a gas provider. The facts showed that a professor at the college, who was aware of the gas leak, opened the gas line after the defendant's representative had shut off the gas supply and warned against its use. The *Moran* Court noted that the gas supplier had no control of the pipes because they had been installed by the school before the supplier was contacted to provide gas. In contrast to the facts in *Moran*, the current case involves the sale of property in which the Greys set the level of inspection of the property as a condition of buying the property, and had the right to request destructive testing. CP 135. The

Greys admitted that they could have requested destructive testing, but did not do so. CP 176, at 71, lns. 15-17.

The Greys cannot argue that it would have been impossible to perform. The Grey's argue that it would have cost up to \$30,000 to "tear up the floor and do soil testing". App. Br. at 26. They cite to their itemization of damages to support this figure. Yet, the itemization of damage is for remediation work, including the removal of 86.55 tons of soil. CP 205. This figure does not reflect what it would have cost to conduct a sample testing in a specific location which would be typical of inspection testing. A more realistic figure is closer to \$2,000. Only two samples were taken to make the initial determination of contamination. CP 360-61, (Grey at 191-92) and CP 428. This was enough to find contaminated soil under the basement slab. The Greys had previously found contaminated soil when they had a contractor remove the rusted fuel-oil pipes under the basement concrete slab so that vinyl flooring could be placed over the concrete. CP 360-61(Grey at 191-92), and CP 657-61. Soil sample testing costs only \$125.00 per sample. CP 432. And two days labor associated with sample taking and other work totaled only \$1,200.00. CP 431-32. This is the total of 48 hours labor at \$25.00 per hour as per invoice. CP 431-32.

**3. The Greys were aware of the risk of fuel-oil contamination.**

Finally, the court should reject the Greys' argument that they had no notice of the risk of a leak from the existing oil tank. App. Br. at 29. The Greys misrepresent what warning they were given by their inspector. The inspection report states: "If fuel oil has been leaking into the ground **from an oil tank** it can be an expensive mess to clean up." CP 199. The inspector's report did not just warn that it would be an expensive mess to cleanup from an abandoned oil tank. As noted above, Mr. Grey understood before he bought the property that it would cost money to clean up a leak from the **existing oil tank**. CP 179, at p 101, lns. 19-24.

**C. *Car Wash* does not support the Greys' argument on allocation of risk of loss.**

**1. The facts here are clearly distinguishable from *Car Wash*.**

The Greys continue to argue that *Car Wash Enterprises v. Kampanos*, 74 Wn. App. 537, 874 P.2d 868 (1994) supports their argument that the parties did not allocate the risk of fuel-oil contamination. In *Car Wash*, the buyer bought the property "As Is." The "As Is" clause did not mention environmental pollution. *Car Wash*, 74 Wn. App. at 546, n. 6. In contrast, the Greys' inspection addendum details the Greys' right to inspect for hazardous materials, and established a procedure for cleanup if demanded by the Greys. CP. 135-36. The

REPSA in this case is distinctly different from the contract provisions discussed in *Car Wash*.

In *Car Wash*, the court addressed whether the buyer bore the risk of mistake that the property was contaminated, referring to Restatement (Second) of Contracts section 154(b) which provides that a party bears the risk of a mistake when the risk is allocated to that party by agreement or when the party “is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake related, but treats his knowledge as sufficient.” *Car Wash*, 74 Wn. App. at 547. In such cases, there is no “mistake” regarding a basic assumption for the contract, but an awareness of uncertainty or a conscious ignorance of the future. *Bennett v. Shinoda Floral Inc.*, 108 Wn.2d 386, 396, 739 P.2d 648 (1987). In *Car Wash*, the court addressed the limited knowledge issue because it found that the contract did not allocate MTCA liability. In contrast, the REPSA signed by the Greys specifically contemplated and allocated the risk of hazardous substance contamination by way of the Greys’ property inspection rights. The facts of this case are more like those in *Scott*, 63 Wn. App. at 58-59, in which the buyer did assume a risk that was the subject of a contingency clause in the agreement.

Finally, *Car Wash* was decided in a trial on the merits after the court weighed the evidence. Here, the Greys have the burden to show that

no material questions of fact exist and that they are entitled to summary judgment as a matter of law. Based on Mr. Grey's admission that he understood he had a risk of costly fuel-oil cleanup from an existing fuel-oil tank, the Leaches raised a material question of fact whether the Greys accepted the risk of fuel contamination when they purchased the property.

**2. *Car Wash* does not require that the term MTCA be mentioned in the contract to allocate risk.**

*Car Wash* does not stand for the proposition that the contract must contain an express mention of "MTCA" in order to allocate the risk of fuel-oil contamination. The transaction at issue arose before MTCA was enacted, but the court still considered whether the contract allocated the risk of cleanup costs for hazardous materials. *Car Wash*, 74 Wn. App. at 539, 543-46; RCW 70.105D.010. Certainly, if the facts had supported the allocation of environmental contamination, the court would have found the risk was allocated without mention of MTCA. It follows that the REPSA here, which specifically mentions inspection for hazardous substances, can allocate MTCA liability without express mention of the statute.

**D. The Greys' argument that *caveat emptor* does not apply is misleading.**

**1. The doctrine of *caveat emptor* still applies to this real estate transaction.**

The Greys argue that the doctrine of *caveat emptor* does not apply because it is an ancient doctrine, and claim that the Leaches may not raise

the doctrine as an affirmative defense , and citing the Order Striking Certain Affirmative Defenses. CP 979-80. App. Br. at 38 n. 12. Yet the court specifically did not strike the Leaches' contract defense to MTCA. The contract defense to MTCA was accepted for discretionary review. Furthermore, *caveat emptor* is not an affirmative defense. It is a doctrine that attaches to a defense that contract terms bar a claim. See *Fleishman v. Hockett*, 49 Wn. 2d 328, 301 P.2d 166 (1956) (claim for fraud defended on grounds that the buyers inspected the property before sale, and doctrine of *caveat emptor* applied). *Caveat emptor* is not a listed affirmative defense under CR 8.

The Greys rely on cases that are clearly distinguishable on their facts in support of their argument on *caveat emptor* . To support their argument that MTCA liability cannot be eliminated by contract, the Greys rely on *Chandler v. State Office of Ins. Comm'r*, 141 Wn. App. 639, 173 P.2d (2007). *Chandler* involved an insurance agent's license revocation proceeding based on allegations of untruthfulness and other misconduct. Because the agent's ability to transact business was a licensed occupation, the court applied the statutory requirements for licensing, RCW 48.01, as the standard of care. The court determined that the administrative law judge who heard the case erred in applying a *caveat emptor* standard for the insurance agent's standard of care. There is no factual or legal

similarity between a case applying a statutory standard of care for a licensed profession and the real estate transaction at issue here. MTCA is not a statute created to regulate the contents of real estate transactions, and therefore it is not comparable to a statute intended to regulate the insurance agent's profession. *Chandler* simply does not address the issue, or hold that the doctrine of *caveat emptor* is not applicable to real estate sales transactions. Similarly, the Greys' reliance on *Aspon v. Loomis*, 62 Wn. App. 818, 816 P.2d 751 (1991) is misplaced. In *Aspon*, a tenant sued the landlord for negligence based on duties established in the Residential Landlord Tenant Act, (RLTA) RCW 59.18. The landlord did not assert the terms of the lease as a defense to the negligence action. Therefore, in *Aspon* the court never reached the issue, nor does *Aspon* stand for the proposition, that *caveat emptor* no longer applies in real estate sales transactions.<sup>1</sup>

The Greys cite two federal cases interpreting CERCLA in support of their argument that *caveat emptor* principle cannot be applied to bar MTCA claims. However, *Smith Land & Improvement Corp. v. Celotex Corp.* 851 F.2d 86 (3d Cir. 1988), (and thus *Western Properties Service Corp v. Shell*, 358 F.3d 678 (9th Cir. 2004) which relied on *Smith Land*),

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<sup>1</sup> In *Aspon*, the court held that the landlord did not have a duty to discover latent defects. *Aspon*, 62 Wn. app. at 826-27.

specifically held that the ruling on the *caveat emptor* doctrine was limited to CERCLA claims. *Smith Land*, 851 F.2d at 89. *Smith Land* did not hold that *caveat emptor* was not a viable defense to other claims. Even though federal courts may not allow a *caveat emptor* argument as a defense to CERCLA, it would be wrong to argue an analogy to MTCA, when it has been held in Washington that MTCA does not prohibit parties from allocating MTCA liability in contracts. *Car Wash*, 74 Wn. App. at 543. If the parties to a real estate sales contract allocate MTCA liability, it follows that the contract containing such terms can be used as a defense to a MTCA claim. Therefore, cases which limit CERCLA defenses are not relevant to the determination of whether a contract is a defense to MTCA. Thus the court should reject the Greys' argument that the *caveat emptor* principle does not form part of the basis to a contract defense to a MTCA claim.

**2. The argument relating to equitable defenses is not relevant here where no equitable relief is sought and equitable issues are not on appeal.**

The court granted discretionary review as to three specific issues: (1) whether the innocent purchaser defense applies to the facts; (2) whether the domestic purpose defense applies to the facts; and (3) whether the contract defense bars the MTCA claims. Commissioner's Ruling, June

1, 2009. The equitable claims asserted in the complaint are not among the topics subject to this discretionary review. For this reason, the Greys' argument that *caveat emptor* principle does not bar equitable claims is irrelevant. The Greys cite *Davey v. Brownson*, 3 Wn. App. 820, 478 P.2d 258 (1970) for the proposition that *caveat emptor* does not preclude a suit for "equitable remedies." In *Davey*, the equitable remedy sought was rescission. The Greys have never sought rescission on which the holding of *Davey* relied. In contrast, the Greys' sole request for relief is recovery of damages. CP 8. *Davey* simply does support the Greys' argument that *caveat emptor* does not apply in this transaction.

### **3. The Greys bear the risk of mistake.**

The Leaches have always argued that the Greys assumed the risk of environmental liability when they purchased the property. CP 157-58. As noted in *Car Wash*, a buyer bears the risk of mistake in a real estate purchase when he has limited knowledge of the facts, but treats that knowledge as sufficient. The key inquiry is whether the party relied on uncertain information. *CPL LLC v. Conley*, 110 Wn. App. 786, 793, 40 P.3d 679 (2002) (holding that the buyer assumed the risk of mistake when it knew it was dealing with uncertain financial information but proceeded to sign an agreement based on that information). Here, the Greys retained an inspector who provided them written warning that there was a concern

about a fuel-oil leak. CP 199. The Greys choose not to undertake further investigation. CP 176, at 72, lns. 12-17, CP 178 at 89, lns. 10-13; and at 90, lns 11-17. Mr. Grey's testimony established that he was aware before closing that there was a risk of a fuel-oil leak and that it would be costly to cleanup. CP 179, at 101, lns. 19-24. The Greys proceeded to close the transaction knowing of the risk. CP 177, at 72, lns. 1-3. These facts establish that the Greys were acting on a limited knowledge about a fuel-oil leak and treated that knowledge sufficient for the purposes of purchasing the property from the Leaches. The Greys assumed the risk of the issues that were the subject of their inspection addendum to the REPSA. *Scott*, 63 Wn. App. at 58-59. The Greys must bear the risk of loss, and are precluded by contract from suing the Leaches under MTCA.

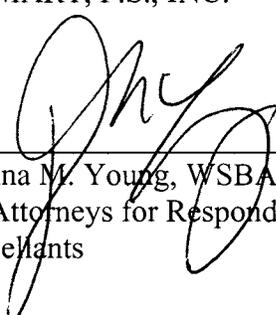
## V. CONCLUSION

This court reviews a summary judgment de novo. Summary judgment may not be granted if there are genuine issues of material fact. The admission by Mr. Grey that he was aware before purchasing the property that there was a risk of fuel-oil contamination from an existing fuel-oil tank established a question of fact of whether the REPSA allocated the risk of MTCA liability to the Greys. Therefore the superior court erred in dismissing the contract defense as a matter of law. This court should reverse that order.

RESPECTFULLY SUBMITTED this 4 day of January, 2010.

LEE SMART, P.S., INC.

By: \_\_\_\_\_

  
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The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on January 4, 2010, I caused service of the foregoing pleading on each and every attorney of record herein:

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