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HONORABLE ELIZABETH J. BERNS
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Hearing Date: August 30, 2013
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Hearing Time: 10:00 am
CASE NUMBER: 13-2-00452-6 KNT
Courtroom: 4D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JACOB FRAZIER and SHAWNACEE
FRAZIER, husband and wife and the marital
community comprised thereof,

Plaintiffs,

vs.

JEFFERY L. BOYER and PATRICIA D.
BOYER, husband and wife and the marital
community comprised thereof, KENNETH J.
FREED and JUDITH A. FREED, husband
and wife and the marital community
comprised thereof, WINDERMERE REAL
ESTATE / LAKE TAPPS, INC., a
Washington corporation, and CRAIG D.
THIELBAR and JANE DOE THIELBAR,
and the marital community comprised
thereof,

Defendants.

NO. 13-2-00452-6 KNT

PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT AS TO LIABILITY
RE PLAINTIFFS' CLAIMS AGAINST
DEFENDANTS BOYER FOR FRAUDULENT
CONCEALMENT, FRAUD AND BREACH
OF CONTRACT

COME NOW the plaintiffs, Jacob Frazier and Shawnacee Frazier, by and through their
attorney of record, Daniel G. Wilmot, and move this court for partial summary judgment as
follows:

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PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT - 1
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Judgment\Boyer2013-06-19_Mot for SJ re Boyer.docx

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1 I. *Relief Requested.* Plaintiffs request that this court enter an Order pursuant to CR
2 56 awarding to them partial summary judgment as to liability regarding plaintiffs' claims
3 against defendants Boyer for fraudulent concealment, fraud and breach of contract.

4 II. *Statement of Facts.*

5 On or about May 8, 2012, Jacob and Shawnacee Frazier ("Fraziers") and Jeffery L.
6 Boyer entered into a Residential Real Estate Purchase and Sale Agreement (the "Purchase and
7 Sale Agreement") for the purchase and sale of the residential property located at 30229 - 108th
8 Ave SE, Auburn, WA 98092 (the "Property").¹ *Declaration of Jacob C. Frazier* ("Frazier
9 Dec."), Ex. A. The Property is improved with a single family home served by an on-site septic
10 system and drain field. *Id.*; see also, *Declaration of George T. Streepy* ("Streepy Dec."), Ex. A.
11 The closing for the real estate transaction was to occur on or before June 22, 2012. *Frazier*
12 *Dec.*, Ex. A.

13 The parties agreed to and attached several addenda to the Purchase and Sale Agreement
14 including the King County Septic Addendum to Purchase and Sale Agreement (MLS Form
15 22S-King) (the "Septic Addendum"). *Id.*, Ex. B. The Septic Addendum provides in relevant
16 part:
17

18 THIS ADDENDUM SUPERCEDES [sic] ANY OTHER PROVISIONS OF
19 THIS AGREEMENT RELATING TO THE ON-SITE SEWAGE SYSTEM
20 ("OSS") SERVING THE PROPERTY.

- 21 1. Type of OSS. The Property is: Served by a private septic system.
22 2. Seller's Representations. Seller represents that, to the best of Seller's
23 knowledge, the OSS serving the Property (a) *does not require repair other*
than pumping and normal maintenance; (b) does not currently violate any

24 ¹ The Fraziers and Mr. Boyer were each represented by real estate brokers. Defendant Ken Freed of Windermere
25 Real Estate/Lake Tapps, Inc. represented Mr. Boyer. The Fraziers were represented by Rebecca Del Pozo of
Keller Williams Realty.

1 applicable local, state, and federal laws, standards, and regulations; and (c)
2 *has no material defects.*

3 3. King County Board of Health Code (“Health Code”).

4 a. Health Code. *Seller will retain a licensed on-site system*
5 *maintainer (“OSM”) to prepare a monitoring and performance*
6 *inspection report of the OSS (“Operation and Maintenance*
7 *Report”) and to complete the other requirements of Health Code*
8 *§13.60.030.² As soon as the OSM completes the requirements of*
9 *Health Code §13.60.030, Seller shall deliver to Buyer a copy of the*
10 *Operation and Maintenance Report and a copy of the maintenance*
11 *records for the OSS, if available.*

12 b. Operation and Maintenance Report Contingency. Buyer’s
13 obligations under this Agreement are contingent on Buyer’s
14 approval of the Operation and Maintenance Report. This
15 contingency shall be deemed waived unless Buyer gives notice of
16 disapproval of the Operation and Maintenance Report within _____
17 days (5 days if not filled in) after receipt of the Operation and
18 Maintenance Report. If Buyer gives timely written notice of
19 disapproval, the Agreement shall terminate and the Earnest Money
20 shall be refunded to Buyer. [Emphasis added].

21 Mr. Boyer completed a “Form 17” seller disclosure statement regarding the Property
22 (the “Seller Disclosure Statement”). *Frazier Dec.*, Ex. C. On this form, Mr. Boyer checked
23 “No” in response to the following questions: (1) Are there any defects in the operation of the
24 on-site sewage system? (2) Does the on-site sewage system require monitoring and
25 maintenance services more frequently than once a year? *Id.* Mr. Boyer represented that the
septic system was last pumped in November 2011. *Id.* at ¶ 9. Pat’s Plumbing Inc. was the
general contractor for the November 2011 septic service. The Boyers provided the Fraziers

26 _____
27 ² The King County Health Code § 13.60.030, provides in relevant part:

28 A. The seller of any single family . . . residential property served by an OSS *shall, prior to transfer of title to the*
29 *property, have a monitoring and performance inspection performed by a licensed OSM.* The licensed OSM shall
30 file with the department an on-site system report and applicable fee in accordance with the fee schedule.

31

32 D. At the time of property transfer, the owner *shall provide, to the buyer, maintenance records, if available, in*
33 *addition to the completed seller disclosure statement* in accordance with chapter 64.06 RCW for residential real
34 property transfers. [Emphasis added]. *Declaration of Daniel G. Wilmot* (“DGW Dec.”), Ex. A.

35 PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY

JUDGMENT - 3

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1 with copies of the Pat's Plumbing invoices dated November 18, 2011 bearing Mrs. Boyer's
2 signature as the owner or authorized representative for the owner, and a copy of what appeared
3 to be a work description. *Id.*, Exs. D and E.

4 The Boyers did not disclose to the Fraziers that during the November 2011 service,
5 Pat's Plumbing discovered that the concrete drain field lines were collapsing and that the drain
6 field needed to be replaced. *Declaration of Eric D. Volkert* ("Volkert Dec."), ¶¶ 10-16, and Ex.
7 C. Mr. Volkert prepared a written report to document that the drain field piping was
8 collapsing, that the drain field piping needed to be replaced, and that the septic system should
9 be used lightly until the drain field piping was replaced (the "Drain Field Repair Report"). *Id.*,
10 Ex. C., and *Frazier Dec.*, Ex. G. He verbally discussed his concerns regarding the condition of
11 the drain field with Mrs. Boyer. *Volkert Dec.* at ¶ 11. He provided the Drain Field Repair
12 Report to Mrs. Boyer, which she signed. *Id.* at ¶ 16. Mr. Volkert spoke with Mr. Boyer over
13 the phone and informed him that the drain field was failing and that further repairs were
14 needed. *Id.* at ¶¶ 11 and 15. Mr. Boyer paid the Pat's Plumbing invoices using his credit card.
15 *Id.* at ¶ 15, Ex. B.

17 The Boyers admit that Mrs. Boyer received the Drain Field Repair Report from Pat's
18 Plumbing. See, *Boyers' Answer to Plaintiffs' First Amended Complaint*, ¶ 2.8.³
19 Notwithstanding this admission, the Boyers' contend that Mr. Boyer did not receive the Drain
20 Field Repair Report because he "was out of town at the time." *DGW Dec.*, Ex. D.⁴ Although
21

22 _____
23 ³ Notice to one spouse is notice to the other. *Chase v. Beard*, 55 Wn.2d 58, 64, 346 P.2d 315 (1959).

24 ⁴ Mr. Boyer admits he was out of town on November 18, 2011. Thus, he has no foundation for personal
25 knowledge as to what occurred at the Property that day, what work was performed, or what conditions were
observed. Mr. Boyer cannot offer testimony to controvert the testimony of expert eye witnesses (i.e. Mr. Volkert)
who were present at the Property on November 18, 2011, observed and supervised the work, and noted that the
drain field was failing

1 the Boyers deny that Mr. Boyer received the Drain Field Repair Report, they concede that it
2 was available to him and that he reviewed it prior to making the representations and disclosures
3 to the Fraziers regarding the condition of the septic system and drain field. *DGW Dec.*, Ex. D.⁵

4 Mr. Boyer admits that he did not provide a copy of the Drain Field Repair Report to the
5 Fraziers. *Id.* at Ex. E. The Boyers did, however, provide the Fraziers with a partial copy of the
6 Drain Field Repair Report which they manipulated by omitting the portion of the document
7 stating that the drain field piping was collapsing, that it needed to be replaced, and that the
8 septic system should be used lightly until the drain field was replaced. See, *Frazier Dec.*,
9 compare Exs. E and G.

10 The Fraziers' broker, Rebecca Del Pozo, and their mortgage broker, Sheila Christy,
11 repeatedly inquired with the Boyers' broker, Ken Freed, regarding the septic inspection. See,
12 *Declaration of Rebecca Del Pozo* ("Del Pozo Dec.") Ms. Del Pozo provided Mr. Freed and
13 Mr. Boyer with the link to the King County Health Department website which explained in
14 detail the seller's responsibility to inspect the septic system. *Id.* at ¶ 10, Ex. C.
15 Notwithstanding the multiple inquiries, and the detailed information that Ms. Del Pozo
16 provided to Mr. Freed and Mr. Boyer which they reviewed and discussed over email,⁶ Mr.
17 Boyer disregarded his legal and contractual obligations in failing to have the septic system
18 inspected prior to the closing.⁷

20
21
22
23 ⁵ Although the Boyers admit that Mrs. Boyer received the Drain Field Repair Report and Mr. Boyer admits to
having reviewed it, Mr. Boyer denies that *he* was informed that the drain field was collapsing or that the septic
system should be used lightly until the drain field was replaced. *DGW Dec.*, Ex. E.

24 ⁶ See, *Del Pozo Dec.*, Ex. E.

25 ⁷ Mr. Boyer admits that he did not retain an on-site septic system maintainer ("OSM") to prepare a septic operation
and maintenance report regarding the septic system. *DGW Dec.*, Ex. F.

1 On June 22, 2012, the real estate transaction closed. *Frazier Dec.* at ¶ 11. The Fraziers
2 were not informed prior to or at closing that Mr. Boyer failed to deliver proof of satisfaction of
3 the Septic Addendum contingencies to escrow. *Id.* At no time prior to closing did the Boyers
4 or Mr. Freed inform the Fraziers or Ms. Del Pozo that the Boyers did not intend to inspect the
5 septic system, that Boyers were refusing to inspect the septic system, or that there was any
6 issue or concern with respect to inspecting the septic system. *Del Pozo Dec.* at ¶ 21.

7 In September 2012, approximately three months after closing, the Fraziers noticed signs
8 that the septic system was malfunctioning. *Frazier Dec.*, ¶ 12. On or about September 24,
9 2012, the drain field failed. *Id.* at ¶¶ 12, 13 and 18. On even date, the Fraziers contacted Pat's
10 Plumbing regarding the issues they were having. *Id.* at ¶ 13. Pat's Plumbing informed the
11 Fraziers that the cause of the problem was due to the defective drain field which Pat's
12 Plumbing had identified and disclosed to the Boyers during the November 2011 service work.
13 *Id.* Pat's Plumbing provided the Fraziers with a complete copy of the Drain Field Repair
14 Report. *Id.* at ¶ 14, Ex. G.

15
16 Upon receipt of the Drain Field Repair Report, the Fraziers were informed for the first
17 time that there was a defective condition with the drain field; that the Boyers were aware of the
18 condition and did not disclose it; that Mr. Boyer misrepresented the condition of the septic
19 drain field in the Seller Disclosure Statement and Septic Addendum; and that the Boyers
20 suppressed the Drain Field Repair Report by disclosing an incomplete, partial copy which
21 excluded the portion of the document stating that the drain field was collapsing and needed to
22 be replaced. *Id.* at ¶¶ 15, 16, and 17; compare Exs. E and G.

23 On September 26, 2012, G&N Septic Tank Service ("G&N") inspected the septic
24 system. *Streepy Dec.*, at ¶ 6, Ex. A. G&N performed a stress test on the drain field by
25

1 irrigating the drain field lines. *Id.* The drain field failed the stress test. *Id.* at ¶ 7, Ex. B. G&N
2 recommend that a drain field diagnosis be performed including excavating the drain field lines.
3 *Id.*

4 On October 2, 2012, G&N's owner and principal, George T. Streepy, a licensed on-site
5 septic system maintainer and master septic system installer, went to the Property to further
6 diagnose the problems with the drain field and excavate the drain field lines. *Id.* at ¶ 8. Mr.
7 Streepy observed that the concrete drain field tiles were in poor condition. *Id.* at ¶ 10. The
8 concrete drain field tiles were collapsing and breaking apart in the ground as Pat's Plumbing
9 found in November 2011. *Id.* at ¶ 9-10; see also, *Volkert Dec.*, ¶ 10. G&N recommend the
10 installation of a new gravity drain field. *Id.* at 11, Ex. C.

11 III. *Statement of Issues.*

12 1. Whether the Boyers are liable for fraudulent concealment because they had
13 actual knowledge of a concealed defect at the Property that threatened the property, health or
14 life of the Fraziers that was not readily apparent or ascertainable by the Fraziers, and the
15 Boyers intentionally misrepresented the condition of the septic system, and concealed the
16 evidence of the defect, in order to prevent the defect from being revealed?

18 2. Whether the Boyers are liable for fraud?

19 3. Whether Mr. Boyer breached the Purchase and Sale Agreement because he
20 failed to perform his obligations as set forth in the Septic Addendum and the King County
21 Health Code, §13.60.030, including delivering to the Fraziers all available maintenance records
22 regarding the septic system and performing a septic operation and maintenance inspection?

23 IV. *Evidence Relied Upon.* This Motion is based on the pleadings and papers on file
24 in this case, including the following:
25

1. Declaration of Jacob C. Frazier;
2. Declaration of Rebecca Del Pozo;
3. Declaration of Eric D. Volkert;
4. Declaration of George T. Streepy; and
5. Declaration of Daniel G. Wilmot.

6 V. *Argument & Authority.*

7 A. *Review of Summary Judgment Standard.*

8 “A party seeking to recover upon a claim may move for a summary
9 judgment in his favor upon all or any part thereof.” CR 56(a). Summary judgment shall be
10 granted when there is no genuine issue of material fact and the moving party is entitled to
11 judgment as a matter of law. CR 56 (c); *Doe v. Dept. of Transportation*, 85 Wash.App. 143,
12 147, 931 P.2d 358 (1998).

13 While a material fact is one upon which the outcome of the case depends, *Tran v. State*
14 *Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998), it is the job of the moving
15 party to show the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112
16 Wn.2d 216, 225, 770 P.2d 182 (1989). When a motion for summary judgment is before the
17 court, it may decide questions of fact as a matter of law when reasonable minds could reach but
18 one conclusion. *Ruff v. County of King*, 125 Wn.2d 697, 703-704, 887 P.2d 886 (1995).

19 B. *The Boyers are liable for fraudulent concealment.*

20 An action for fraudulent concealment, a species of fraud, rests on the recognition that in
21 the sale of residential homes, the doctrine of caveat emptor no longer applies to the complete
22 exclusion of any moral and legal obligation to disclose material facts not readily observable
23 upon reasonable inspection by the purchaser. *Hughes v. Stusser*, 68 Wn.2d 707, 711, 415 P.2d
24
25

1 89, 92 (1966); *Nguyen v. Doak Homes, Inc.*, 140 Wash. App. 726, 731, 167 P.3d 1162, 1165
2 (2007), and *Atherton Condo. Apartment – Owners Ass’n. v. Blume Dev. Co.*, 115 Wn.2d 506,
3 523, 799 P.2d 250 (1990).

4 On a claim for fraudulent concealment, the seller's duty to speak arises:

5 (1) where the residential dwelling has a concealed defect; (2) the vendor has
6 knowledge of the defect; (3) the defect presents a danger to the property, health,
7 or life of the purchaser; (4) the defect is unknown to the purchaser; and (5) the
defect would not be disclosed by a careful, reasonable inspection by the
purchaser.

8 *Stieneke v. Russi*, 145 Wash. App. 544, 560-61, 190 P.3d 60, 68 (2008); *Alejandre v. Bull*, 159
9 Wn.2d 674, 689, 153 P.3d 864, 872 (2007); *Obde v. Schlemeyer*, 56 Wn.2d 449, 353 P.2d 672
(1960).

10 Failure to disclose a material fact where there is a duty to disclose is fraudulent. *McRae v.*
11 *Bolstad*, 32 Wash.App. 173, 177, 646 P.2d 771 (1982), *aff’d*, 101 Wash.2d 161, 676 P.2d 496
12 (1984) (citing *Obde*, 56 Wash.2d 449, 353 P.2d 672). A vendor has a duty to disclose all
13 material facts relevant to the subject matter of the contract that are not reasonably ascertainable
14 to the buyer. *Sorrell v. Young*, 6 Wash. App. 220, 222, 491 P.2d 1312, 1314 (1971);
15 *Liebergessell v. Evans*, 93 Wn.2d 881, 893, 613 P.2d 1170 (1980) (“[T]he duty to disclose
16 relevant information to a contractual party can arise as a result of the transaction itself within
17 the parties' general obligation to deal in good faith.”). Each element of fraudulent concealment
18 must be established by clear, cogent, and convincing evidence. *Hughes v. Stusser*, 68 Wash.2d
19 707, 709, 415 P.2d 89 (1966). The King County Health Code, § 13.60.030, requires the seller
20 to disclose to the buyer all available maintenance records concerning the septic system *in*
21 *addition to* providing the seller disclosure statement required by Chapter 64.06 RCW. *DGW*
22 *Dec.*, Ex. A, King County Health Code § 13.60.030 (4).

1 In *Obde*, the defendants discovered a serious termite infestation in an apartment house
2 they owned. The defendants concealed the evidence of the infestation and sold the property to
3 the plaintiffs without disclosing the defective condition. The defendants argued that they had
4 no obligation to inform the plaintiffs of the termite condition, emphasizing the fact that the
5 plaintiffs had not asked any questions concerning the existence of a termite condition. *Obde*,
6 56 Wn.2d at 451.

7 The Court ruled that there was an affirmative duty as between the vendor and purchaser
8 to disclose the defective condition even though the parties were dealing at arm's length. *Id.* at
9 452. The Court held that if there is a condition known to the vendor that is dangerous to the
10 property, health, or life of the purchaser, which a careful examination by the purchaser would
11 not reveal, the vendor's failure to disclose the condition amounts to fraud, even if the purchaser
12 has made no inquiry. *Id.* The Court quoted Professor Keeton in relevant part:

13 The statement may often be found that if either party to a contract of sale
14 *conceals or suppresses a material fact* which he is in good faith bound to disclose
15 then his silence is fraudulent [T]he object of the law in these cases should be
16 to impose on parties to the transaction a duty to speak *whenever justice, equity,*
and fair dealing demand it.

17 *Id.* at 453, quoting 15 Tex. Law Review (December, 1936), 1, 14-16, Keeton: *Fraud-*
18 *Concealment and Non-Disclosure.* [Emphasis added].

19 An undisclosed fact is a material fact to the extent it adversely impacts the value of the
20 property or operates to materially impair or defeat the purpose of the transaction. *Mitchell v.*
21 *Straith*, 40 Wash. App. 405, 411, 698 P.2d 609, 613 (1985). A faulty or inadequate septic
22 system is dangerous to the health of the purchaser. *Luxon v. Caviezel*, 42 Wash. App. 261, 265,
23 710 P.2d 809, 811 (1985). The value and marketability of a residential property on septic is
24 impaired if the septic system is defective, hence a properly functioning septic system is
25 material to all purchase and sale transactions for residential properties served by septic.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
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1 The Court's reasoning in *Obde* is applicable to this case. The Fraziers and Mr. Boyer
2 contracted at arms-length for the purchase and sale of the Property. The parties executed the
3 Septic Addendum to comply with the King County Health Code, § 13.60.030. Mr. Boyer and
4 Mrs. Boyer were aware that the septic drain field was failing. The Boyers were in possession
5 of the Drain Field Repair Report which put them on notice that the drain field piping was
6 collapsing and needed to be replaced. The Boyers were obligated to deliver a complete copy of
7 the Drain Field Repair Report to the Fraziers pursuant to the King County Health Code and the
8 Purchase and Sale Agreement.

9 The condition of the septic system was material to the real estate transaction. The
10 Fraziers' intended to live at the Property with their family. Contrary to the Boyers'
11 representations which they alone knew to be false, the septic drain field had a concealed defect.
12 The concealed defect was not reasonably ascertainable by the Fraziers. The Fraziers believed
13 that the Boyers were dealing with them honestly and in good faith. The Fraziers relied on the
14 Boyers representations and disclosures that the septic system was free of defects. In light of the
15 Boyers' representations and disclosures that the septic system worked properly, the Fraziers did
16 not have reason to excavate the back yard to prove that the Boyers were being unfair or
17 dishonest.
18

19 The Fraziers were unaware of the defective condition because the Boyers falsely
20 represented the condition of the septic system and suppressed the Drain Field Repair Report.
21 Mr. Boyer intentionally misrepresented the condition of the septic system in the Seller
22 Disclosure Statement and Septic Addendum. He falsely represented that there were no defects
23 with the operation of the septic system when in fact he and his wife had been told verbally and
24 in writing that the drain field was collapsing and needed to be replaced. The Boyers withheld
25

1 the Drain Field Repair Report which they were obligated by good faith, the Purchase and Sale
2 Agreement, and the King County Health Code, to disclose to the Fraziers. The Boyers
3 provided the Fraziers with incomplete information. The Boyers manipulated the copy of the
4 Drain Field Repair Report to exclude the evidence of the defective drain field. The Boyers
5 delivered a falsified copy to the Fraziers. The Boyers sought to deceive and mislead the
6 Fraziers. The Fraziers had no reason to believe that the Boyers' representations regarding
7 septic system were false, or that the Boyers were suppressing the Drain Field Repair Report.

8 The Boyers had an affirmative duty to act in good faith and fully and accurately
9 disclose their knowledge of a defective condition concerning the septic drain field. Like the
10 sellers in *Obde*, the Boyers were aware of a concealed, dangerous condition at their Property
11 that was not readily apparent or ascertainable to the Fraziers, they failed to give full disclosure,
12 and they manipulated the evidence relating to the defective condition to keep the defect hidden
13 and concealed from the Fraziers. The Boyers acted in bad faith and in violation of the vendor's
14 duty to disclose known dangerous concealed defects. The court should find the Boyers liable
15 for fraudulent concealment.
16

17 C. *The Boyers are liable for fraud.*

18 The elements of fraud are: (1) A representation of an existing fact; (2) its materiality;
19 (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent
20 that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the
21 part of the person to whom it is made; (7) the latter's reliance on the truth of the representation;
22 (8) his right to rely upon it; (9) his consequent damage. *Dixon v. MacGillivray*, 29 Wn.2d 30,
23 34, 185 P.2d 109, 112 (1947); see also, *Williams v. Joslin*, 65 Wash. 2d 696, 399 P.2d 308
24 (1965). Fraud may be proven in the instant case by clear, cogent, and convincing evidence.
25

1 Mr. Boyer owned the Property and resided there with his wife. The Boyers had
2 knowledge of a dangerous concealed defect at the Property (i.e. that the septic drain field was
3 in poor condition and collapsing, and that the septic system should be used lightly until it was
4 replaced). The Boyers had in their possession the Drain Field Repair Report which put them on
5 notice of the dangerous condition.

6 Mr. Boyer contracted to sell the Property to the Fraziers. Notwithstanding the Drain
7 Field Repair Report, Mr. Boyer materially represented in the Seller Disclosure Statement and
8 Septic Addendum that there were no defects with the operation of the septic system. Mr. Boyer
9 knew or should have known that his representations were false. These representations were
10 material to the residential real estate transaction and served the purpose of informing the
11 Fraziers concerning the condition of the septic system. Thus, Mr. Boyer intended for the
12 Fraziers to rely upon the representations which they did.

13
14 In reliance on Mr. Boyer's representations and disclosures, the Fraziers reasonably
15 believed that the septic system was free of defects because there were no indications that the
16 drain field was failing. The Fraziers were unaware that the Boyers were withholding the Drain
17 Field Repair Report, or that the Boyers manipulated the copy they disclosed to exclude the
18 evidence of the concealed defect. The Boyers' tampering with the Drain Field Repair Report to
19 omit the information that the drain field was defective demonstrates bad faith and the
20 malignancy of their intent to deceive the Fraziers. The Fraziers had no reason to believe or
21 suspect that the Boyers were intentionally misrepresenting the condition of the Property, or that
22 the Boyers had suppressed Drain Field Repair Report. The Fraziers were damaged as result of
23 the fraud. The defective drain field impairs the value and marketability of the Property, and its
24 usefulness as a single family residence. The court should find the Boyers liable for fraud.
25

1 D. *The Fraziers justifiably relied on the Boyers' representations*
2 *concerning the condition of the septic system and drain field.*

3 In a fraud claim, the plaintiffs must establish that they had a right to rely on the
4 representation. The rule is that such reliance must be reasonable under the circumstances; that
5 is, a party may not be heard to say that he relied upon a representation when he had no right to
6 do so. *Williams v. Joslin*, 65 Wn.2d 696, 698, 399 P.2d 308 (1965). “The right to rely on
7 representations is inseparably connected with the correlative problem of the duty of a
8 representee to use diligence in respect of representations made to him.” *Id.*, citing *Puget Sound*
9 *Nat. Bank v. McMahon*, 53 Wn.2d 51, 330 P.2d 559 (1958).

10 Under the circumstances of this case, the Fraziers reasonably relied on Mr. Boyer’s
11 representations in the Seller Disclosure Statement and Septic Addendum. Mr. Boyer
12 represented that there were no defects with the operation of the septic system while at the same
13 time suppressing the Drain Field Repair Report which he was obligated to disclose. See,
14 *Jackowski v. Borchelt*, 174 Wash.2d 720, 738, 278 P.3d 1100 (2012) (“Because the
15 [defendants] represented in Form 17 that the property *did not* contain fill material, the
16 [plaintiffs] were entitled to rely upon the representation.” [Emphasis added]). The Fraziers did
17 not observe any conditions at the Property which suggested that there was a problem with the
18 drain field. The Fraziers had no reason to disbelieve Mr. Boyer’s representations, nor did they
19 have any reason to question or suspect that the Boyers were not providing full disclosure
20 regarding the condition of the septic system and drain field.

21 In *Williams v. Joslin*, a fraud case, the Washington Supreme Court ruled that the
22 plaintiff failed to demonstrate reasonable reliance on certain oral representations because he
23 was provided with and reviewed documentation that controverted the oral representations.
24 Unlike in *Williams*, the Fraziers were not provided with any documentation controverting Mr.

1 Boyer's representations in the Seller Disclosure Statement and Septic Addendum. In fact, the
2 Boyers suppressed the Drain Field Repair Report and manipulated the copy they disclosed in
3 order *to support* Mr. Boyer's false representations and deceive the Fraziers into believing that
4 the drain field functioned properly. The Boyers preyed upon the Fraziers' trust. In the face of
5 the Boyers' fraudulent and bad faith conduct, the Fraziers could not protect themselves. Under
6 these circumstances, the Fraziers' reliance on Mr. Boyer's representations was reasonable and
7 justifiable.

8 E. *Because the Fraziers had no notice of any drain field defect, they*
9 *had no obligation to make inquiry with the Boyers, and any inquiry would have*
10 *been fruitless because the Boyers were acting in bad faith by fraudulently*
11 *misrepresenting the condition of the drain field and suppressing and*
12 *manipulating the contents of the Drain Field Repair Report.*

13 When a buyer is on notice of a defect, it must make further inquiries of the vendor.
14 *Douglas v. Visser*, 173 Wash. App. 823, 830, 295 P.3d 800, 803 (2013). In *Douglas*, the
15 Washington Court of Appeals, Division One, ruled that although the vendors' conduct in
16 concealing a rot problem at the house they were selling was reprehensible, the purchaser could
17 not recover on a claim for fraudulent concealment because the purchasers had notice of the
18 defect and they failed to make further inquiry, thus it could not be said that the condition was
19 unknown or unascertainable. *Id.* at 834. In making its ruling, the court cautioned that the
20 purchasers did not have a duty to perform an exhaustive inspection, or endlessly assail the
21 vendors with questions; they merely had to make further inquiries after discovering rot or show
22 that further inquiry would have been fruitless. *Id.*

23 In *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864, (2007), a case concerning a
24 defective septic system, the Washington Supreme Court ruled that the plaintiffs' fraudulent
25 concealment claim failed because they accepted the condition of the septic system

1 notwithstanding that the inspection report disclosed on its face that the inspection was
2 incomplete. *Id.* at 689-690.

3 *Douglas* and *Alejandre* are distinguishable. Mr. Boyer intentionally misrepresented the
4 condition of the septic system. Mr. Boyer represented that there were no defects with the
5 operation of the septic system notwithstanding the Drain Field Repair Report which informed
6 him and Mrs. Boyer that the septic drain field was failing and needed to be replaced, and that
7 the septic system should be used lightly until the drain field was replaced. The Boyers did not
8 disclose the Drain Field Repair Report to the Fraziers. In fact, they deliberately concealed it
9 from the Fraziers by disclosing a manipulated copy which the Boyers edited to exclude the
10 evidence of the drain field defect.

11 The Fraziers were not on notice of any defect regarding the septic system and drain
12 field due to the Boyers' deception. Unlike the purchasers in *Alejandre* and *Douglas*, the
13 Fraziers did not have any notice of a problem because the Boyers were intentionally
14 misrepresenting the condition of the septic system and suppressing and concealing the contents
15 of the Drain Field Repair Report. In addition, Mr. Boyer failed to have the septic system
16 inspected as he was obligated to do by the Purchase and Sale Agreement and the King County
17 Health Code. Reasonable minds can conclude that the Boyers intentionally misrepresented the
18 condition of the septic system, suppressed and manipulated the contents of the Drain Field
19 Repair Report, and failed to perform the septic inspection because they were trying to keep the
20 defective drain field condition secret and concealed.

21 Without notice of a defect, the Fraziers had no obligation to make inquiry with the
22 Boyers. Moreover, any inquiry would have been fruitless because the facts overwhelmingly
23 demonstrate that the Boyers were intentionally misrepresenting the truth and engaging in bad
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1 faith conduct in order to conceal the defect and defraud the Fraziers. Ms. Del Pozo's and Ms.
2 Christy's multiple inquiries to the Boyers' broker, Mr. Freed, regarding the septic inspection
3 certainly proved to be fruitless. See, *Del Pozo Dec.* It is not reasonable to believe, based on
4 these facts, that the Boyers would have reversed their course of conduct and been honest about
5 a condition they were actively and deliberately concealing.

6 F. *Mr. Boyer breached the Purchase and Sale Agreement because he*
7 *materially misrepresented the condition of the septic system, failed to disclose the*
8 *Drain Field Repair Report, and failed to inspect the septic system prior to*
9 *closing.*

10 The Purchase and Sale Agreement memorialized the Fraziers' and Mr. Boyer's
11 understanding regarding the sale of the Property. The Purchase and Sale Agreement is a fully
12 integrated contract. The terms are not vague or ambiguous.

13 Mr. Boyer represented in the Purchase and Sale Agreement (i.e. the Septic Addendum)
14 that there were no material defects with the operation of the septic system. Mr. Boyer knew
15 that his representations were false because the Drain Field Repair Report indicated that the
16 drain field was in fact collapsing and needed to be replaced.

17 In King County, the seller of residential real property served by a private on-site septic
18 system is required to have a county licensed on-site system maintainer perform an operation
19 and maintenance inspection regarding the septic system prior to the transfer of title. King
20 County Health Code, § 13.60.030 (A). In addition, the King County Health Code requires the
21 seller to disclose the maintenance records regarding the septic system to the buyer. *Id.* at (D).
22 Mr. Boyer agreed to and executed the Septic Addendum which contractually obligated him to
23 comply with the King County Health Code, § 13.60.030.

24 Mr. Boyer breached the Purchase and Sale Agreement because he failed to perform the
25 terms of the Septic Addendum and the requirements of the King County Health Code, §

1 13.60.030. He did not provide the Drain Field Repair Report to the Fraziers. He did not have a
2 septic operation and maintenance inspection performed by a King County licensed on-site
3 system maintainer. Mr. Boyer disregarded these obligations because the Boyers were
4 committing fraud. Reasonable minds can conclude that the Boyers suppressed the Drain Field
5 Repair Report, manipulated the contents of it, and did not have the septic system inspected
6 because they knew the drain field was defective, and rather than deal with the issue in good
7 faith, they sought to conceal it. The court should find Mr. Boyer and his marital community
8 liable for breach of contract.

9 VI. *Conclusion.*

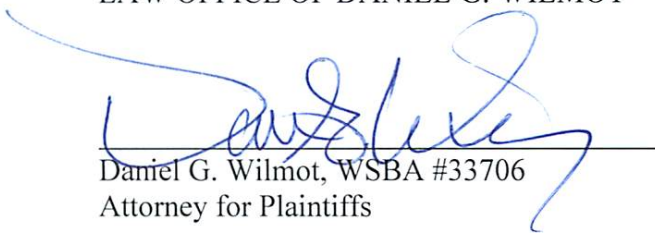
10 There is no genuine issue of material fact that defendants Boyer acted in bad faith and
11 in violation of the vendor's duty to disclose a known, dangerous, defective condition at the
12 Property that was not reasonably ascertainable by the Fraziers. There is no genuine issue of
13 material fact that the Boyers intentionally misrepresented the condition of the septic system and
14 suppressed and manipulated the contents of the Drain Field Repair Report. There is no genuine
15 issue of material fact that defendants Boyer fraudulently represented that there were no defects
16 with the operation of the septic system when they knew that to be false, intending for the
17 Fraziers to rely on such representations, which the Fraziers did justifiably and reasonably rely
18 upon to their detriment. There is no genuine issue of material fact that Mr. Boyer breached the
19 Purchase and Sale Agreement by intentionally misrepresenting the condition of the septic
20 system and failing to perform his contractual and legal obligations related to the septic system
21 as set for in the Septic Addendum and the King County Health Code, § 13.60.030.
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1 Based on the foregoing, and the files and records herein, the court should grant the
2 plaintiffs' motion for partial summary judgment.

3 Respectfully submitted this 25th day of July, 2013.

4 LAW OFFICE OF DANIEL G. WILMOT

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7 Daniel G. Wilmot, WSBA #33706
8 Attorney for Plaintiffs
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