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

ROBERT C. LIONS and NICOLE E. MOORE, husband and wife, and the marital community composed thereof, and DARLENE MOORE, a single individual, Appellants, v. CAMILLE E. EVANS, a single individual, Respondent, STEPHANIE JONES, and "JOHN DOE" JONES, a presumed marital community, and H & N REAL ESTATE CONNECTIONS, LLC, a Washington limited liability company, dba WINDERMERE REAL ESTATE/NCW, Defendants.	)	No. 40278-9-III OPINION PUBLISHED IN PART

LAWRENCE-BERREY, C.J. — Robert Lions and Nicole Moore, husband and wife, and Darlene Moore (collectively, Moore) appeal the trial court's order granting summary judgment dismissing their fraudulent concealment, fraudulent misrepresentation, and innocent misrepresentation claims against Camille Evans. The claims arise out of Evans' sale of her custom home to Moore.

The facts of this case require us to clarify the fifth element of the *Atherton* fraudulent concealment test—whether "a careful, reasonable inspection on the part of the

purchaser would not disclose the defect." *Atherton Condo. Apartment-Owners Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 524, 799 P.2d 250 (1990). We reaffirm our prior holding that such an inspection does not require residential purchasers to engage in an exhaustive search for a defect that might not exist. We hold that a residential purchaser may satisfy the fifth element of the *Atherton* inquiry by proving they took reasonable steps toward discovering the existence or scope of the possible defect. What steps were reasonable typically is a factual question and involves considering what the purchaser reasonably believed at the time of the home purchase. We reverse the trial court's summary judgment order.

FACTS

In 2001, Camille Evans hired a contractor to build her custom home. One year later she moved into it and, one year after that, she began noticing substantial cracks and voids under the home's foundation—much more than would be expected from normal settling. In 2003, she hired Forsgren Associates, Inc. (Forsgren) to investigate the cause of the settling and to recommend solutions. In 2004, she filed suit against her contractor.

Forsgren had discovered fill material under Evans' home and tension cracks in the crawlspace beneath it. The engineering firm also discovered cattails growing below the adjacent property, indicating that water was flowing through the fill.

Forsgren determined that the problem required a two-part solution. The first part required that the portion where the foundation had settled be raised and several helical piers be placed into the native soil and connected to the foundation. Forsgren completed this work for Evans in 2003. The second part required the fill under the house to be stabilized with a subsurface pile wall to prevent future sliding of the fill material. In a declaration filed in the 2004 lawsuit, Evans' engineer explained why such a wall was needed: "Stabilization of the fill material is *essential*, as the helical piers could buckle and compromise the home." Clerk's Papers (CP) at 135 (emphasis added).

The need for slope stabilization was confirmed by Nelson Geotechnical Associates, Inc. (NGA), a separate engineering firm hired by Evans. NGA performed an exhaustive investigation of the problem and detailed its findings and recommendation in a comprehensive 2004 report to Evans. NGA determined that the home was on a thick layer of unstable fill that was continuing to slide. The report stated:

> The fill is moving very slightly in a general west to northwest direction and consolidating under its own weight and the loads from the residence and pool. The rate of fill movement, although slight, could be accelerated by external factors such as weather and human activity. *In that case a major failure of the fill mass that would significantly affect the property and the residence could take place without major warning signs.*
>
> . . . [W]ithout stabilizing the fill mass, the Helical piers may lose confinement as the fill pulls away from the pie[r]s, thus causing the piers to buckle, which in turn would cause the residence to experience major distress.

CP at 188 (emphasis added).

The 2004 report recommended that a subsurface pile wall be constructed and stated that such a "wall should stop the lateral movement of the fill mass and prevent future sliding above the wall location." CP at 188. Nothing in the report supported the notion that the fill was stable or that a lack of cracks in the house over a period of time meant that the fill stabilized. In short, the fill was moving slightly and would continue to move if not stabilized.

Evans settled her lawsuit against her contractor. Despite the warnings from both Forsgren and NGA, Evans did not have the subsurface pile wall installed. In a deposition connected with this case, Evans admitted she did not have any information to refute the conclusion that a subsurface pile wall was necessary.

Years later, in 2017, Evans listed her home for sale and completed a Form 17 Disclosure Statement for potential buyers to review. One of the required disclosures asked if the property contained fill material. Evans disclosed that a portion of the lot contained fill material, that she was advised to install helical piers to stabilize the foundation, and that a contractor had raised a corner of the house 4.5 inches, drove 13 piers into the native soil, and attached the piers to the foundation. She concluded, "*I have no reason to believe that there are any issues with the stability of the foundation of the home*." CP at 23 (emphasis added).

In addition to disclosing the construction of the piers, Evans attached letters from two licensed engineers—Forsgren and Structural Phil LLC (SPL)—and a letter from the contractor who had installed the piers.

The Forsgren letter was written in 2011 and discussed its 2003 investigation, the work done by the contractor, and explained it had since inspected the work and the "foundation and home are stable due to the corner being stabilized with engineered helical piers." CP at 28. The SPL letter explained that one of its engineers had tested the soil and it was found to be "a good bearing material," and the repair to the foundation would provide a "stable and permanent support for this house." CP at 29-30. The contractor letter noted that its installation of the piers had been overseen by a Forsgren engineer. None of the letters alluded to the need for or the absence of a subsurface pile wall.

In the spring of 2017, Moore signed a purchase and sale agreement to buy the home. Moore hired a home inspector to perform a prepurchase inspection. The inspector prepared an extensive report and, in the report, included pictures showing large gaps between a portion of the foundation and the soil. The inspector surmised that the gaps were possibly caused by erosion or settlement and recommended an evaluation by a qualified geotechnical engineer.

Moore then contacted four engineering firms. One of the firms, Forsgren, responded that it did not have any structural engineers available to inspect the foundation and recommended that Moore contact SPL or Pacific Engineering.

Moore contacted Pacific Engineering. Mike Rolfs, the principal engineer at the firm, provided some informal opinions, said that the 2011 letter from Forsgren was reassuring, and said that if his company was to do an onsite inspection, it would hire a geotechnical engineer and a structural engineer, and an adequate inspection "would take weeks to complete and is not feasible in your short inspection window." CP at 107. Rolfs recommended that Moore contact NGA.

Moore then spoke to NGA's president, David Nelson, who disclosed that his company had done stabilization work on the property in the past but said he needed Evans' paperwork[1] before he could give an opinion, and the opinion would cost between $2,000 and $3,000.

In a text message between Evans' realtor and Evans, the realtor informed Evans that Nelson would not talk with Moore without Evans' e-mail permission. There is no evidence that Evans gave Nelson e-mail permission to talk to Moore. When Moore asked

[1] It is unclear what "paperwork" refers to. Based on context, we construe "paperwork" as information from Evans about what stabilization work had been performed.

Evans to pay for NGA's $2,000 to $3,000 opinion, Evans countered that she would pay one-half but only after Nelson gave a firm price.

Moore also contacted SPL, who helped resolve the impasse. On June 2, 2017, Evans agreed to pay the cost of injecting polyurethane foam to fill the large gaps between the foundation and soil, shown in the prepurchase inspection. According to a June 19, 2017 letter from SPL to Evans,[2] the "foam [would be] a good solution [because it] expands as it cures to fill cavities and actually provides a significant bearing pressure . . . [that will] provide stability to this residence." CP at 161.

Two years after the sale closed, the home's kitchen floor receded about one-half inch from the northwest wall. Moore contacted NGA and learned that NGA had prepared a report about the settling problem in 2004, but NGA would not provide the actual report without Evans' permission. Evans then gave NGA permission to disclose the report to Moore. Upon learning that a subsurface pile wall was necessary to stabilize the fill and that Evans had not installed the wall, Moore filed this lawsuit.

Moore's complaint asserted three causes of action against Evans: fraudulent concealment, fraudulent misrepresentation, and innocent misrepresentation. The parties conducted discovery, and Evans moved for summary judgment dismissal. Evans

[2] We presume the letter was written for Evans to give to Moore to facilitate the closing, which occurred on June 28, 2017.

primarily argued that Moore had notice of the settling issues but failed to conduct a careful and reasonable inspection, which according to Moore's own inspector, required an evaluation from a geotechnical engineer. The trial court agreed and summarily dismissed the three causes of action.

Moore appeals the dismissal of those claims to this court.

ANALYSIS

A. STANDARD OF REVIEW

We review summary judgment orders de novo and engage in the same analysis as the trial court. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). That is, we consider the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Rinehold v. Renne*, 198 Wn.2d 81, 96, 492 P.3d 154 (2021). Summary judgment is appropriate only if the submitted pleadings show that there is no genuine issue as to any material fact. CR 56(c). A genuine issue of material fact exists when reasonable minds could differ on the facts that control the outcome of the case. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

With these standards in mind, we address whether summary judgment dismissal was appropriate on each of Moore's three causes of action.

B. FRAUDULENT CONCEALMENT

A seller of a residential dwelling has a duty to inform a purchaser of a defect when "(1) the residential dwelling has a concealed defect; (2) the vendor has knowledge of the defect; (3) the defect presents a danger to the property, health, 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." *Alejandre v. Bull*, 159 Wn.2d 674, 689, 153 P.3d 864 (2007); *see also Atherton*, 115 Wn.2d at 524; *Obde v. Schlemeyer*, 56 Wn.2d 449, 452, 353 P.2d 672 (1960).

Evans challenges each of the five fraudulent concealment elements. For the reasons explained below, we disagree with her challenges.

1. Concealed defect

Evans argues there was no defect when she sold her home in 2017, given that it took Moore two years to notice any settling problems. This argument is disingenuous.

In a November 2004 declaration filed in her lawsuit against her contractor, Evans stated:

> Forsgren analyzed the problem and determined that two phases of engineering work *would be required to save the house*. The first phase was to install several supporting helical piers under the foundation of the house, to jack up the house. Forsgren completed this work in 2003. The second phase of engineering required is to stabilize the lot itself. . . .

> . . . I then hired Nelson Geotechnical Associates [NGA], which is currently working on engineering solutions for phase two of the remediation.

CP at 119 (emphasis added).

From the 2004 NGA report, Evans also knew that the fill under her home's foundation was continuing to slide. The continued sliding of the fill was confirmed in 2017 by the prepurchase inspection report, which reported large gaps between the northwest foundation of her home and the soil. Evans knew she did not complete the second step, which in her own words was "required to save the house." CP at 219. The failure to complete the necessary repair was a concealed defect.[3]

2. Seller's knowledge of defect

Evans claims she had forgotten all about the second step of the repair by the time she sold the house in 2017. We are unmoved by this claim. When, on summary judgment, a "fact" is particularly within the knowledge of the moving party, and where this "fact" might reasonably be disbelieved by a jury, the matter should proceed to trial to permit the nonmoving party to impeach the witness directly through cross-examination or

[3] Evans makes much ado about the reluctance of any engineer to guaranty that the subsurface pile wall would hold. Her argument is a red herring. No repair lasts forever. What was guaranteed is that the fill would continue sliding and further sliding risked the piers buckling and compromising the home. This is why the pile wall was required.

indirectly through inferences drawn from other evidence. *Acosta v. City of Mabton*, 2 Wn. App. 2d 131, 138, 408 P.3d 1095 (2018).

Evans also argues she told her realtor in a text exchange that she was willing to disclose the 2004 NGA report to Moore. A jury might reasonably believe otherwise. In the same text exchange, Evans' realtor told Evans that NGA's president, Nelson, would not talk with Moore without Evans' consent and then clarified that Nelson needed the consent in an e-mail. The fact that Evans did not provide e-mail consent to Nelson supports a reasonable inference that Evans changed her mind and was unwilling to risk the sale unraveling by Nelson sharing the 2004 NGA report with Moore.

Evans further claims that one could not know why settling had begun to occur after several years. We disagree. The 2004 NGA report explains why. The 13 helical piers provided only temporary support for the foundation; thus, the home would not show signs of problems until one or more of the piers buckled. That it took years for the fill to slowly slide and buckle enough piers to cause the foundation to drop is not surprising. As noted previously, nothing in the 2004 NGA report warranted Evans believing that the fill would stop sliding or that the risk of pier buckling would simply go away.

3. Finding of danger

Evans argues the trial court did not make any express finding of danger. Given our de novo review, the lack of or presence of trial court findings in a summary judgment

order are superfluous. *Chelan County Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1987). The 2004 NGA report warns that continued fill movement could cause the helical piers to buckle and compromise the home.

4. Defect is unknown to buyer

The trial court found that Moore had knowledge that there was a problem with the foundation and that a geotechnical evaluation was recommended. The record supports the trial court's finding, but knowledge of a general problem, reasonably believed to have been remedied, does not impute to the buyer knowledge of the actual, unknown defect.

The prepurchase inspection found large gaps between the foundation in the northwest portion of the home and the dirt. But two engineers familiar with the property—Forsgren and SPL—had issued previous reports attesting to the stability and adequacy of the 2003 foundation repair. But more significantly, prior to closing, SPL attested in writing to the adequacy of the polyurethane foam repair agreed to by the parties, describing the repair as one that would provide stability for the residence. The letter contained a stamp across the engineer's signature, attesting to his status as a "Professional Engineer." CP at 161.

What Moore (and SPL) did not know was what Evans had not disclosed: the 2003 foundation repair was only a partial repair without the subsurface pile wall. Moore did not know this critical fact.

5. Careful, reasonable inspection

Evans argues that Moore did not conduct a careful, reasonable inspection once the soil problem was noted in the prepurchase inspection report. She argues that a careful, reasonable inspection required Moore to hire a geotechnical engineer to evaluate the problem and points to the recommendation from Moore's prepurchase inspection report. We disagree that this fifth element can be decided as a matter of law, given the care that Moore took prior to closing the purchase.

In *Atherton*, the court explained what it meant by a careful, reasonable, inspection: "[I]n those situations where a purchaser discovers evidence of a defect, the purchaser is obligated to inquire further. Simply stated, fraudulent concealment does not extend to those situations where the defect is apparent." 115 Wn.2d. at 525. *Atherton* made clear that the rule of caveat emptor no longer applied to residential sales of property "'to the complete exclusion of any moral and legal obligation to disclose material facts *not readily observable upon reasonable inspection by the purchaser*.'" *Id.* at 523 (emphasis added) (quoting *Hughes v. Stusser*, 68 Wn.2d 707, 711, 415 P.2d 89 (1966)). Were we to hold, as a matter of law, that the rule in *Atherton* requires a residential buyer to hire a specialized engineer to find defects hidden beneath a home's foundation, our holding would be inconsistent with the softening of caveat emptor, as described in *Atherton*. Consistent with this, we affirm that residential buyers do not need to engage in an

exhaustive search for a defect that may not exist. *Douglas v. Visser*, 173 Wn. App. 823, 834, 295 P.3d 800 (2013). We clarify that a residential purchaser may satisfy the fifth element of the *Atherton* rule by proving they took reasonable steps toward discovering the existence or scope of the possible defect.[4] What steps were reasonable is typically a factual question and involves considering what the purchaser reasonably believed at the time of the home purchase.

Here, a rational trier of fact could find that Moore took reasonable steps toward discovering the existence or scope of the possible defect. After the prepurchase inspection report, Moore called four engineers, including the two engineers who knew, but did not advise Moore, that the property needed a subsurface pile wall. Without written consent from Evans to discuss this with Moore, the silence of the engineers was understandable.

A rational trier of fact could find that Moore reasonably believed that the soil was stable and the foundation problem would be fixed after the polyurethane foam was injected into the gaps under the foundation. After all, Evans had provided Moore

[4] We note that the second and third elements of the *Atherton* rule require a residential purchaser to prove that the residential seller had knowledge of a serious defect. Where a seller has knowledge of a serious defect and elects not to disclose it to the purchaser, the seller knows that the purchaser will likely suffer substantial harm. In such a situation, placing a duty on the purchaser to make a reasonable inquiry strikes a proper balance between the culpable seller and the typical home buyer.

assurances that the soil was stable in her disclosures, which included letters from two engineers and the contractor who did the 2003 repair. In addition, just before the sale closed, SPL provided written confirmation that injecting polyurethane foam to fill the gaps shown in the prepurchase inspection was a "good solution," and the "procedure will perform as advertised to provide stability to this residence." CP at 161.

We conclude that the trial court erred in summarily dismissing Moore's fraudulent concealment claim.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

MISREPRESENTATION CLAIMS

Negligent misrepresentation[5] has six elements: (1) the defendant gave false information for others' guidance, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in their business transactions, (3) the

[5] On appeal, Moore changes her "innocent misrepresentation claim" to a "negligent misrepresentation" claim. Evans does not object to this change. Because of the similarity between the two theories, Moore might successfully move to amend the complaint. We exercise our discretion to determine whether the theory would be viable, given the record here. We note that "innocent misrepresentation" is not a cause of action in Washington. *Hoffman v. Connall*, 108 Wn.2d 69, 77-78, 736 P.2d 242 (1987).

defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) that 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).

The elements of fraudulent misrepresentation are similar: (1) a representation of an existing fact, (2) that representation was material, (3) the representation was false, (4) the proponent of the representation knew it was false, (5) the proponent intended that the other party act on the false representation, (6) the other party was ignorant of the representation's falsity, (7) the other party relied on the representation, (8) the other party had the right to rely on the representation, and (9) the other party suffered damages due to their reliance on the false representation. *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996).

In the Form 17 disclosure question about fill material, Evans disclosed the initial problems with her foundation and the repairs made by the contractor, but stated, "I have no reason to believe that there are any issues with the stability of the foundation of the home." CP at 23. Construing the evidence and all reasonable inferences in the light most favorable to Moore, it is evident that all six elements of negligent misrepresentation and all nine elements of fraudulent misrepresentation are met. Evans' arguments concerning these causes of action, similar to her arguments concerning fraudulent concealment, focus

on facts and inferences favorable to her. This is not the standard of review we employ when reviewing summary judgment dismissals.

We conclude that the trial court erred in summarily dismissing Moore's fraudulent concealment and fraudulent misrepresentation claims, and that sufficient facts exist to make a negligent misrepresentation claim viable.

Reversed.

Lawrence-Berrey, C.J.

WE CONCUR:

Staab, J.

Murphy, J.