IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RANDY JORGENSON and CYNDI JORGENSON, husband and wife,	)	**No. 27320-2-III**
Appellants,	)	
v.	)	**Division Three**
JOEL GOUGH and JANET GOUGH, husband and wife,	)	
Respondents and Cross-Appellants.	)	**UNPUBLISHED OPINION**

Korsmo, J. —This case is a dispute over the water output of a well. In April 2005, Randy and Cyndi Jorgenson purchased a 20 acre parcel near Davenport from Joel and Janet Gough. The well on the property produced insufficient water for the Jorgensons' use. They sued the Goughs for breach of contract. The case was tried to a jury. Before the end of trial, the court granted judgment as a matter of law to the Goughs. The Jorgensons appeal that ruling. We affirm the trial court and decline to address the Goughs' claims on cross-appeal.

FACTS

The Jorgensons made an initial offer on the property on April 9, 2005. To obtain financing, the Jorgensons needed to install a water holding tank on the property. The Goughs rejected this offer. A new offer containing a condition that the Goughs verify well performance and allowing a 10-day inspection period was accepted. This offer also contained an "as is" provision, a merger clause claiming complete integration, and a clause awarding attorney fees to prevailing parties in disputes over the agreement.

To comply with the verification condition, the Goughs supplied the Jorgensons with a well test report. The Tarbert well report, dated May 18, 2004, indicated that the well produced water at a rate of 2.6 gallons per minute (gpm). The well had been drilled in 1996. The initial test of the well at that time showed production of approximately 1 gpm. This report was filed with the Washington Department of Ecology. The Goughs did not recall supplying the Jorgensons with a copy of the initial test. A third test of the well conducted in May 2008, on the eve of trial, showed production of 1.3 gpm.

The Goughs had their agent fax the well report showing 2.6 gpm to the Jorgensons on April 15, 2005. The fax included a standard Seller's Disclosure Form (Form 17). The Goughs checked a box on this form indicating that the property had supplied them with an "adequate year-round supply of potable water" during their ownership. On April 18,

2005, the Goughs and the Jorgensons entered into a Real Estate Sales and Purchase Agreement (RESPA) to purchase the property.

The Jorgensons moved onto the property in August 2005. Shortly thereafter, they installed a 3,000 gallon holding tank. They attempted to fill the tank with water from the well. The well produced approximately 200 gallons and stopped supplying water. For the next two years the Jorgensons hauled water onto the property to supply their needs. In 2007, the Jorgensons drilled a new well which is expected to produce more than 10 gpm.

On July 3, 2007, the Jorgensons filed suit against the Goughs for fraud and breach of contract. The court bifurcated trial on liability and damages. The trial on liability was held June 18-19, 2008.

At trial, the Jorgensons asserted that they believed that the combination of the Tarbert well report and the Goughs' Form 17 constituted an assurance that the property had a year-round adequate supply of water. Frederick Budinger testified that the Goughs' initial well was not capable of 2.6 gpm production year round. Alice Treband testified that Janet Gough had indicated to her that lack of water was a problem with the property.

At the close of the presentation of the Jorgensons' evidence, the trial court granted the Goughs' motion for judgment as a matter of law. The court ruled that Form 17 could

not be used to interpret the RESPA. The court also found that the Jorgensons had not presented evidence that the Goughs knew of the defect in the well. The court entered judgment against the Jorgensons and awarded the Goughs attorney fees and costs in the amount of $28,712.

This appeal follows.

ANALYSIS

This court reviews judgments as a matter of law "de novo, applying the same standard as the trial court." *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d 126 (2003). Such a judgment is appropriate "if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences, [no] substantial evidence exists to sustain a verdict for the nonmoving party." *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). Substantial evidence is that which would convince a "rational, unbiased person" of the truth of a given fact. *Davis*, 149 Wn.2d at 531. "An order granting judgment as matter of law should be limited to circumstances in which there is no doubt as to the proper verdict." *Schmidt*, 162 Wn.2d at 493.

Use of Form 17

RCW 64.06.020(3) states:

> The seller disclosure statement shall be for disclosure only, and shall not be considered part of any written agreement between the buyer and seller of residential property. The seller disclosure statement shall be only a

> disclosure made by the seller, and not any real estate licensee involved in the transaction, and shall not be construed as a warranty of any kind by the seller or any real estate licensee involved in the transaction.

The trial court properly found that this statute barred the Jorgensons' use of Form 17 to establish a promise of adequate well water production. The Jorgensons contend they were using the form to show the intent of the parties to agreeing to the verification provision. They argue that following *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990), the broad context of the transaction is relevant to proving intent. Thus, they claim that the fact that the Goughs supplied Form 17 along with the 2.6 gpm report makes the form admissible for purposes of showing the parties' intent. This ignores the plain language of RCW 64.06.020(3) which does not allow Form 17 to be used as part of an "agreement" or as a "warranty." The Jorgensons rely on *Stieneke v. Russi*, 145 Wn. App. 544, 567, 190 P.3d 60 (2008), *review denied*, 165 Wn.2d 1026 (2009), for the proposition that Form 17 is not always inadmissible. But the *Stieneke* court specifically declined to address the issue of a statutory bar, finding the issue had not been properly raised below. *Id.* at 565 n.4.

Here, the trial court ruled the form could not be used to show intent. We agree. The plain purpose of the statute is to require disclosures without creating contractual obligations.[1] To adopt the Jorgensons' position would frustrate this purpose. The

[1]Misrepresentations on this form may give rise to tort liability. *See Svendsen v.*

Goughs' statement regarding potable water on Form 17 forms the sole basis of the Jorgensons' contractual misrepresentation claim. Because we hold Form 17 inadmissible to prove intent to contract, we decline to address the misrepresentation claim based on its content.

Breach of Contract

The Jorgensons contend the trial court erred in not allowing the jury to determine the intent of the parties and the scope and terms of the contract between the parties. But where a contract term is unambiguous on its face, interpretation is a question of law for the court. *See Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 424 n.9, 191 P.3d 866 (2008). Here, the term in question was "verification of well performance." Verification of well performance plainly means simply verifying that the well pumps water. The Tarbert well report supplied this verification and the Jorgensons accepted it. If the Jorgensons had wanted a guarantee of a specific output from the well, they could have included that in the RESPA. They did not. The Jorgensons failed to supply any evidence that a specific output of water was bargained for. Thus, because no substantial evidence existed to support their claim of breach of contract, judgment as a matter of law was appropriate.

Stock, 98 Wn. App. 498, 502, 979 P.2d 476 (1999), *rev'd on other grounds*, 143 Wn.2d 546, 23 P.3d 455 (2001).

The Jorgensons also contend the Goughs breached a duty to disclose that the property did not have telephone service. They claim that the court erred in not addressing this claim. Because this court reviews the granting of CR 50 motion *de novo*, it is immaterial that the trial court supplied no reasoning in dismissing the Jorgensons' claim related to telephone service. This court's inquiry is whether or not the record supports the trial court's ruling. The record supports dismissal. While the Jorgensons might have had a separate fraud claim based on a duty to disclose, the only claim the Jorgensons raise on appeal is for breach of contract. To establish a breach of contract based on a failure to disclose, the matter in question must rise to a level that would violate the implied covenant of good faith and fair dealing in every contract and thus, frustrate the purposes of the transaction. *See, e.g., Ross v. Ticor Title Ins. Co.*, 135 Wn. App. 182, 190, 143 P.3d 885 (2006) (failure to disclose additional easements was important part of real estate transaction and gave rise to basis for refusal to enforce the sales agreement), *aff'd in part,* 162 Wn.2d 493, 172 P.3d 701 (2007).

The Jorgensons presented no evidence at trial of an agreement to disclose information regarding telephone service. The RESPA is silent on the issue of disclosure. Telephone service is not so vital to the purpose of a residential property agreement as to rise to the level of a duty to disclose. Accordingly, because no reasonable juror could

find that an agreement was violated, dismissal of this claim was appropriate.

The Jorgensons have also asserted that the Goughs had a duty to disclose that they did not live on the property year round. As with the claim of lack of telephone service, this fact does not go to the central purpose of the contract. The Goughs were under no obligation to disclose where they lived.

Attorney Fees

RCW 4.84.330 allows for agreements that provide for a prevailing party to recover reasonable attorney fees in disputes arising under the agreement. The RESPA in this case contained such an agreement. A statute authorizes an award of costs to prevailing parties. RCW 4.84.010, .030.

There is no dispute that the Goughs were the prevailing party at the trial court. The Jorgensons did not appeal the reasonableness of the attorney fees and costs award. The Goughs are entitled to attorney fees at both the trial court and for this appeal.

CONCLUSION

The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, A.C.J. Sweeney, J.