IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN HAAS,
Appellant,

v.

VALERY KARTASHHEV and ANNE KARTASHEV, husband and wife; VALERY KARTASHEV, dba THE PLUMBING DEPOT; and THE PLUMBING DEPOT, INC.,
Respondents.

VALERY KARTASHHEV and ANNE KARTASHEV, husband and wife,
Third-Party Plaintiffs,

DARRELL M. TALLMADGE, dba ACCURACY CONCRETE CONSTRUCTION; SERGEY G. BOCHAROV and ALEXANDR P. MEDVEDSKIY, dba BOCHAMED CONSTRUCTION; BORDAK BROTHERS, INC.; JC CONCRETE, INC.; MICHAEL KHARITONENKO, dba IMAGE CONSTRUCTION; SUBURBAN DOOR, INC.; THE PLUMBING DEPOT, INC.; V&P TILE & MARBLE, INC.; VLADIMAR YUDINTSEV, dba VNAT CONSTRUCTION; and PROTOS, INC.,
Third-Party Defendants.

No. 38551-1-II

UNPUBLISHED OPINION

Van Deren, C.J. — John Haas appeals the trial court's order granting summary judgment

on his claims of implied warranty of habitability, breach of contract, and violation of the consumer protection act (CPA)[1] in favor of Valery Kartashev. He also appeals the trial court's denial of his CR 56(f) motion for additional time for discovery and his motion to amend his complaint. We hold that there are numerous genuine issues of material fact related to Haas's implied warranty of habitability, breach of contract, and CPA claims and, thus, summary judgment was improper. We reverse and remand for further proceedings, including additional discovery and further amendments to the pleadings as necessary.

FACTS

In February 2005, Valery Kartashev[2] sold the house at issue here, located in Camas, Washington, to John Haas for $705,000. Kartashev had built the house and resided there from November 2002 until January 2005. Kartashev claims that during this time the house was his primary residence. When Kartashev built it, he understood that he would accrue tax benefits from living in the house for two or more years before selling it. He acquired loans from a bank as well as individuals that he "mostly" repaid when he sold it. Clerk's Papers (CP) at 172. The loans from individuals were not due until the house sold.

Kartashev, a plumber by profession, acted in the capacity of a general contractor in building and selling four houses since 1994, including the house that Haas purchased. Kartashev planned to sell the most recently completed house and use the profits to buy more real estate. He also owned lots in Clark County, Oregon, and Hawaii, "upon which . . . single family home[s]

[1] Chapter 19.86 RCW.

[2] The record shows that the alleged actions that gave rise to this case were committed by Valery, with minimal assistance from his wife, Anne Kartashev. Because both Valery and Anne are respondents in this action and in the interest of simplicity, this opinion refers to respondents as "Kartashev."

could be built." CP at 164.

While Kartashev was living in the house, Stucco Inspections NW (Inspections) inspected it at Kartashev's request and issued a report on August 11, 2004. The report showed: improper installation of the deck membrane, the need to properly seal anything that penetrates the exterior insulation and finish system (EIFS), improper extension of the outer deck flashing, and some damaged EIFS. Kartashev claimed that he repaired the defects enumerated in the Inspections report and that Stuart McMullen, the author of the Inspections report, returned to supervise the repairs; however, McMullen denied supervising the repair work. In addition to the problems the report identified, Kartashev had work done on the doors and the tiled deck while he lived in the house. He claimed that he put the house on the market after he made the repairs. Haas asserted that Kartashev did not disclose these defects or the Inspections report before closing.

In September 2004, Kartashev signed a seller disclosure statement pursuant to RCW 64.06.020, in which he declared that there were no defects in the exterior walls, doors, and decks. On February 2, 2005, Haas and Kartashev executed a purchase and sale agreement (PSA). The PSA contained an inspection addendum, which stated the following:

> . . . The [PSA] is conditioned on Buyer's personal approval of a written inspection of the Property and the Improvements on the Property . . . . ordered by Buyer, . . . performed by an Inspector of Buyer's choice and . . . completed at Buyer's expense.
> . . . .
> If Seller agrees to correct the condition(s) identified by Buyer, then it shall be accomplished at Seller's expense in a commercially reasonable manner prior to the Closing Date. . . . Seller's corrections are subject to reinspection and approval, prior to Closing, by the Inspector who prepared Buyer's inspection report, if Buyer elects to order and pay for such reinspection.
> . . . .
> This inspection contingency SHALL CONCLUSIVELY BE DEEMED SATISFIED (WAIVED) unless Buyer gives notice of disapproval within [10] days

. . . of mutual acceptance of this Agreement.

CP at 229-30.

On February 9, 2005, at Haas's request, Western Architectural Waterproofing Consultants (Western) inspected the property. In its report, Western pointed to several areas that needed repairs, including missing sealant, cracks and voids in the EIFS, and problems with deck flashing.

In response to the Western report, "Haas was informed by his realtor that Kartashev, as the builder of the home, would repair all of the defects found by [Western]." CP at 137. Haas and Kartashev agreed on an addendum (addendum G) to the PSA, in which Kartashev undertook to correct the defects noted in Western's report.[3]

Kartashev states that he completed the repairs outlined in addendum G and that his real estate agent told him that Haas's inspector reinspected and approved the repairs. Haas denies Kartashev's claim, stating no reinspection occurred. The sale closed on February 25, 2005.

When Haas moved into the house after closing, the house experienced water penetration problems and Haas ordered a full inspection by Sean Gores Construction (Gores). The Gores report included some defects[4] that Kartashev had agreed to fix under addendum G. Ultimately, Haas spent over $400,000 to repair the defects discovered in the house.

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[3] Addendum G states:

> IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS: AS INDICATED IN WESTERN . . . REPORT: All of the repairs detailed below are to be completed in accordance with the manufacturer[']s specifications and requirements, shall be completed in a fashion that is aesthetically pleasing to the buyer . . . and shall pass reinspection by Western.

CP at 282.

[4] These defects included: improper installation of caulking around windows, unsealed exterior light fixture, gutter and handrail penetrations, and missing step flashing in the roof above the master bedroom.

Haas initiated this suit, asserting the following claims against Kartashev: (1) negligent construction and negligence per se, (2) breach of contract, (3) breach of implied warranty of habitability, (4) breach of express warranty, (5) rescission, (6) violation of the consumer protection act, and (7) unjust enrichment.

On November 26, 2007, after Haas completed the repairs, Kartashev filed a motion for summary judgment. Haas claims that the parties agreed to informally stay discovery while he repaired the house and that the repairs were completed in November 2007. Kartashev denies that there was any agreed upon stay of discovery and argues that "[e]xtensive interrogatories and requests for production were served and responded to well before the hearing on [the] motion for summary judgment." CP at 460. The motion hearing was rescheduled twice at Haas's request. It was first rescheduled to allow Haas to depose Kartashev, which occurred on February 14, 2008. Thereafter, Haas agreed to dismiss the claims of negligent construction, negligence per se, rescission, and unjust enrichment.

Haas sought additional time for discovery under CR 56(f) and submitted copies of six subpoenas still outstanding—subpoenas to US Bancorp, Riverview Community Bank, Gurnink & Co., Inc., Ameriprise Financial Services, Inc., and RE/MAX agents. The trial court denied the motion.

The trial court granted Kartashev's summary judgment motion, dismissing all of Haas's claims on October 31, 2008; it also granted attorney fees to Kartashev as the prevailing party.

Haas unsuccessfully filed a motion for clarification, reconsideration, and leave to file an amended complaint. This proposed fourth amended complaint asserted that Kartashev fraudulently induced Haas to enter into the PSA by failing to disclose defects, by declaring that

Kartashev would repair any defects, and that Kartashev breached the contract when he failed to repair the defects.

Haas appeals.

ANALYSIS

I. Implied Warranty of Habitability

Haas argues that the trial court erred in entering summary judgment on his implied warranty of habitability claim based on its finding that the house was not built for resale but, rather, for Kartashev's personal occupancy. Kartashev argues that the trial court properly dismissed this claim because Washington law creates an implied warranty in a narrow set of circumstances, none of which applies to Haas's case. We hold that under an implied warranty analysis, whether Kartashev was a "vendor-builder" who sold a "new house" poses a genuine issue of material fact and that the trial court improperly dismissed Haas's implied warranty of habitability claim.

A. Standard of Review

We review an order or denial of summary judgment de novo, performing the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). We must construe the "facts and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). "A material fact is one upon which the outcome of the litigation depends." *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). The burden is on the moving party to show there is no issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The nonmoving party must set forth specific facts that demonstrate a genuine issue of material

fact and cannot rest on mere allegations. CR 56(e); *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). We affirm a summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000).

B. Vendor-Builder and New House

A "vendor-builder" is "a person regularly engaged in building, so that the sale is commercial rather than casual or personal in nature." *Klos v. Gockel*, 87 Wn.2d 567, 570, 554 P.2d 1349 (1976). When a vendor-builder sells a new house to its first intended occupant, there is an implied warranty "that the foundations supporting it are firm and secure and that the house is structurally safe for the buyer's intended purpose of living in it." *House v. Thornton*, 76 Wn.2d 428, 436, 457 P.2d 199 (1969). "[T]he sale must be fairly contemporaneous with completion and not interrupted by an intervening tenancy unless the builder-vendor created such an intervening tenancy for the primary purpose of promoting the sale of the property." *Klos*, 87 Wn.2d at 571.

An implied warranty does not attach merely because "the [vendor] contemplated an eventual sale." *Klos*, 87 Wn.2d at 570. What constitutes a "new house" is a question of fact; while the passage of time will "cancel [implied warranty] liability, but just how much time need pass varies with each case." *Klos*, 87 Wn.2d at 571.

Here, whether Kartashev is a "vendor-builder" who sold a "new house" to Haas presents genuine issues of material fact. Kartashev, a licensed plumber who owned his own plumbing business, acted as a general contractor by building and selling four houses between 1994 and 2005. He planned to sell the most recently completed house and use the profits to buy more real estate. While this suit was pending, he also owned lots in Oregon, Clark County and Hawaii,

"upon which . . . single family home[s] could be built." CP at 164. The cases Kartashev relies on involved builders who built and sold, respectively, one apartment complex building, two houses, and one house. *Frickel v. Sunnyside Enters., Inc.*, 106 Wn.2d 714, 715, 725 P.2d 422 (1986); *Klos*, 87 Wn.2d at 568; *Boardman v. Dorsett*, 38 Wn. App. 338, 341-42, 685 P.2d 615 (1984). The determinative factor was not the number of buildings in those cases but, rather, whether the builders were "regularly engaged in building" and, thus, sophisticated, commercial vendor-builders. *Klos*, 87 Wn.2d at 570. Although Kartashev emphasizes that he is a plumber, we note that one may have more than one business.

Kartashev claims that he built the house at issue for personal use, intending the house to be his primary residence. Similarly, the defendants in *Frickel* and *Klos* built the buildings for their personal use.[5] *Frickel*, 106 Wn.2d at 719; *Klos*, 87 Wn.2d at 568-69. But when Kartashev built and resided in the house, he knew that tax benefits accrue from living in a house for two or more years before selling. He also continued to work on the house during his residency, creating an issue of material fact about when the house was actually completed, leaving the possibility that a fact finder might determine that the house was "new" when Kartashev sold it to Haas and that Kartashev living there to facilitate its completion. Furthermore, he acquired loans, which he "mostly"[6] repaid when he sold the house and some loans were due only when the house sold. CP

[5] The *Boardman* court does not discuss for what purpose the defendant built the house. *See* 38 Wn. App. at 341-42. In *Klos*, "[t]he house itself was small and built primarily to suit [the defendant's] personal needs and tastes, as opposed to one built for speculation. [The defendant] did not originally contemplate selling the house." 87 Wn.2d at 569. In *Frickel*, "[t]he defendants did not build apartment complexes for resale but for their own ownership and management purposes. The apartment complex at issue here was no different. It was not built for purposes of sale nor had it been listed or placed on the market when the buyers approached the defendants." *Frickel*, 106 Wn.2d at 719.

[6] We are uncertain about the amount of money involved or repaid, as the appellate record does

at 72.

This evidence may allow a jury to infer that Kartashev built the house for resale, not for personal use, and that he resided in it for business purposes, as part of a sequential build and sell business. Thus, there is a genuine issue of material fact about whether Kartashev's intervening tenancy was "for the primary purpose of promoting the sale of the property" and not solely for personal use. *Klos*, 87 Wn.2d at 571. Consequently, there are genuine issues of material fact that remain unresolved for an implied warranty analysis.

C. Alleged Damages

While an implied warranty of habitability does not cover alleged defects that involve mere defects in workmanship or aesthetic concerns, "[t]he entire realm of defects which are within the purview of this implied warranty has not been precisely defined." *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 519, 799 P.2d 250 (1990). "[T]he implied warranty [of habitability] is intended to ensure that serious structural deficiencies will be fixed before major damage results." *Westlake View Condo. Ass'n v. Sixth Ave. View Partners, LLC*, 146 Wn. App. 760, 771, 193 P.3d 161 (2008). These deficiencies include construction defects, "such as the failure to seal the windows or properly apply weather resistant barrier paper" that allow water intrusion. *Westlake*, 146 Wn. App. at 771.

The Gores report identifies construction defects, including incomplete weatherproofing, incomplete flashing, faulty installation of the EIFS, faulty installation of secondary moisture barrier paper, and improper sealant installation; these faults "allowed water to migrate behind the siding and caused extensive dry rot damage to the sheathing and framing." CP at 379. Kartashev

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not include those numbers on appeal.

did not provide evidence from his "own experts to rebut [Haas's] reports detailing the construction defects." *Westlake*, 146 Wn. App. at 771. The defects Gores identified are similar to those "serious structural deficiencies" plaintiffs suffered in *Westlake*, which fell under the purview of an implied warranty. Thus, because the types of alleged defects fall under the purview of the implied warranty and because Kartashev argued that he repaired construction defects, the issue of whether he did so "is a question for the jury." *Westlake*, 146 Wn. App. at 771.

II. Breach of Contract

Kartashev moved for summary judgment on Haas's breach of contract claim, arguing that the parties had not entered into a construction contract but, rather, a purchase and sale contract that contained no express warranties on the manner of construction. The trial court, in granting summary judgment, did not state its finding in breach of contract language. Instead, it relied on Haas having waived an express warranty claim because Haas closed the sale without exercising his right to reinspect.

Haas does not contest the dismissal of the express warranty claim but he now argues that Kartashev breached the contract because he failed to perform the repairs he agreed to in addendum G. Kartashev argues that Haas's failure-to-repair argument was not properly before the trial court and that Haas waived his breach of contract claim when he closed the sale.

A. Breach of Contract Argument

While generally we do not consider new arguments on appeal, "the purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority." *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 291, 840 P.2d 860 (1992). Courts have considered for the first time on appeal issues not addressed below when

those issues are "pertinent to the substantive issues . . . raised below." *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990).

In the trial court, Haas raised a breach of contract claim based on Kartashev's alleged oral warranty. The trial court addressed the claim of waiver, albeit under an express warranty theory. Haas presents the same claim and the same issue of waiver to us, relying on paragraph 21(h) of the PSA, the inspection addendum, and addendum G. All these documents were before the trial court and the court examined them before making its ruling. Thus, Haas's breach of contract claim on appeal arises from the substantive breach of contract issue, which was properly before the trial court.

B. Waiver of Breach of Contract Claim

"Waiver is the intentional abandonment or relinquishment of a known right, and intent to waive must be shown by unequivocal acts or conduct which are inconsistent with any intention other than to waive." *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 361, 177 P.3d 755 (2008), *review denied*, 164 Wn.2d 1032 (2008). "Whether a waiver has occurred is a question of fact, unless reasonable minds could reach but one conclusion." *Harmony*, 143 Wn. App. at 361.

The inspection contingency provided that, under "Option 1B," the contingency was waived unless Haas gave notice of disapproval of the house's condition. CP at 44. Kartashev concedes that Haas did give such notice and, thus, did not waive the contingency under option 1B.

Paragraph 21(h) of the PSA states: "Survival: All terms of this Agreement, which are not satisfied or waived prior to closing, shall survive closing. These terms shall include . . . repairs."

CP at 40. But Kartashev now argues that Haas waived his right to repairs because he did not reinspect the house. Kartashev concedes that he agreed to perform the repairs outlined in addendum G but he argues that, by the act of closing, Haas waived the survival contingency

under paragraph 21(h). But Kartashev cannot point to any contract language[7] that unambiguously establishes that, if Haas does not reinspect the house, he waives: the right to reinspect, the right to have Kartashev complete adequate repairs, and to any subsequent claim for failure to repair. The plain meaning of paragraph 21(h) suggests that Kartashev's argument does not apply to paragraph 21(h). Paragraph 21(h) concerns terms—including repairs—that are waived "prior to closing" and not by the act of closing.

Kartashev also points to paragraph 7 of the PSA, which states: "Closing shall be within ten (10) days after satisfaction or waiver of all contingencies." Br. of Resp't at 21 (emphasis omitted). Once again, Kartashev argues that, by virtue of the closing, Haas waived all contingencies. This interpretation is inconsistent with the plain meaning of paragraph 21(h), which allows for at least some contingencies to survive closing, including repairs.

While Kartashev alleges that he completed the repairs and that Haas's inspector reinspected and approved the repairs, Haas denied that Kartashev ever called the inspector for a reinspection. Haas did close the sale despite his apparent confusion surrounding the reinspection. Even though closing without reinspection may not be good business practice, Haas did inspect the house, complained about construction defects, and obtained Kartashev's promise to repair those defects. Haas's conduct does not compare to the "'unequivocal acts or conduct'" that undergird a waiver. *Dep't of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 505, 694 P.2d 7 (1985) (*quoting Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958). Because

[7] The only language that mentions reinspection is the following in the inspection contingency: "Seller's corrections are subject to reinspection and approval prior to Closing . . . [I]f Buyer elects to order and pay for such reinspection." CP at 43. This language merely gives the buyer the option of reinspection, but does not waive the inspection contingency at closing.

evidence of Haas's alleged waiver does not meet the "intentional abandonment" standard, we hold that it does not resolve the issue of material fact about whether Haas waived his right to raise claims based on Kartashev's contractual commitment to repair the defects. S*ee Puget Power & Light*, 103 Wn.2d at 505.

In any event, contract interpretation based on the meaning of the contract terms in light of the circumstances is for the trier of fact if the interpretation depends on a choice among reasonable inferences drawn from extrinsic evidence. *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990). Here, a reasonable juror could infer that Haas's act of closing did not constitute a waiver of the adequate repair Kartashev promised and that the inspection contingency and the concomitant duty to repair survived closing. Accordingly, summary judgment on these grounds was not proper.

C. Breach of Contract Claim

The Gores report outlined post sale defects, which included some defects that addendum G required Kartashev to repair. Kartashev concedes that he agreed to perform the repairs outlined in addendum G. And Kartashev has provided no evidence that he made all the repairs. Accordingly, there is a genuine issue of material fact about whether Kartashev breached the contract by failing to repair the defects as provided in addendum G.

III. Consumer Protection Act

Kartashev moved to dismiss Haas's CPA claim because Haas could not, as a matter of law, prove the "public interest" element of the claim. CP at 31. The trial court agreed with Kartashev. Kartashev now adds that RCW 64.06.060 also bars the claim because Kartashev's alleged unfair or deceptive practices flow only from the seller's disclosure statement. Haas argues

that the "public interest" element is satisfied and that RCW 64.06.060 does not immunize Kartashev. We hold that RCW 64.06.060 does not bar Haas's CPA claim on this record and that the trial court improperly dismissed the claim.

Washington's CPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RCW 19.86.020. The CPA is to be "liberally construed that its beneficial purposes may be served." RCW 19.86.920. To prevail in a private CPA claim, the plaintiff must prove (1) "an unfair or deceptive act or practice," (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986).

A. RCW 64.06.060 does Not Bar Haas's CPA Claim

RCW 64.06.060 states: "The legislature finds that [seller's disclosures] are not matters vitally affecting the public interest for the purpose of applying the [CPA]." But RCW 64.06.070[8] preserves an independent cause of action under the CPA against a seller when the fraudulent concealment is not connected to the seller disclosure statute. *Svendsen v. Stock*, 143 Wn.2d 546, 557-58, 23 P.3d 455 (2001).

Here, Haas's fraudulent concealment claim is related to the lack of repair of known defects and is unrelated to Kartashev's seller disclosure statement. Evidence of such concealment

[8] RCW 64.06.070 provides: "Except as provided in RCW 64.06.050, nothing in this chapter shall extinguish or impair any rights or remedies of a buyer of real estate against the seller or against any agent acting for the seller otherwise existing pursuant to common law, statute, or contract; nor shall anything in this chapter create any new right or remedy for a buyer of residential real property other than the right of rescission exercised on the basis and within the time limits provided in this chapter."

arises out of Kartashev's knowledge of the defects: (1) as the builder of the house, (2) from the Inspections report, (3) from Haas's subsequent preclosing inspection identifying construction defects, and (4) from Kartashev's promise to repair the known defects and his failure to do so. Because Haas does not rely on the seller disclosure statement, RCW 64.06.060 does not bar Haas's CPA claim.

B. Deceptive Practices Under the CPA

A seller's failure to disclose material facts to the purchaser in a real estate transaction may support a CPA claim when the facts are known to the seller but not easily discoverable by the buyer. *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 215, 969 P.2d 486 (1998). We review whether a party committed an unfair or deceptive act for substantial evidence. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

Haas argues that he "simply could not have obtained" the information about the defects from Kartashev and that Kartashev was "uniquely in a position to understand [the defects] far better than Haas." Reply Br. of Appellant at 21. Before closing the sale, Kartashev failed to reveal the Inspections report. Although Haas had the contractual right to inspect and reinspect the house with his own expert before closing and Haas's expert could have, and did, uncover some defects in the house, Haas's presale inspection was limited because the inspector did not "remove all exterior cladding, windows, and other materials overlaying the moisture barrier." CP at 238. It is unclear to what extent[9] a potential seller's expert could reasonably inspect the presale

[9] The inspection addendum states:

> Buyer's Inspection may include . . . the structural, mechanical, and general condition of the improvements to the Property, an inspection of the Property for hazardous materials, a pest inspection, and a soils/stability inspection.
> . . . Buyer shall not alter the Property . . . without first obtaining Seller's Permission. . . . Buyer shall restore the Property . . . to the same condition [it was]

house for the construction defects known to the seller. In other words, whether Haas's expert could have engaged in "destructive testing" or other more intrusive inspection and whether such inspection was reasonable, when the seller did not reveal an inspection report identifying construction defects and when the purchase was from a builder-seller are questions of fact not resolved in the pleadings before the trial court. Thus, whether Kartashev committed a deceptive practice, poses a genuine issue of material fact. *See Griffith*, 93 Wn. App. at 217-18.

C. The "Public Interest" Element of the CPA

Kartashev argues that a "private transaction where one individual sells property to another does not affect the public interest." Br. of Resp't at 25. Recently, our Supreme Court held that the CPA does "not support the argument that a CPA claim must be predicated on an underlying consumer or business transaction." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 39, 204 P.3d 885 (2009). The CPA allows "'[a]ny person who is injured in his or her business or property by a violation'" of the act to bring a claim. *Panag*, 166 Wn.2d at 39 (emphasis omitted) (quoting RCW 19.86.090).

Thus, the relevant factors to determine whether an action affects the public interest include: "(1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?" *Hangman*, 105 Wn.2d at 790-91. These factors "represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact, but

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in prior to the Inspection.

CP at 229. It is unclear whether a comprehensive inspection that involved destructive testing was feasible under the limitations placed on the inspection.

none of the factors is dispositive and not all of the factors need be present. *Hangman*, 105 Wn.2d at 791.

Kartashev does not contest that Haas's CPA claim meets the *Hangman* factors of occurring in trade or commerce, injury to a person's business or property, and causation. *Hangman*, 105 Wn.2d at 784. But here, there are material issues of fact about whether Kartashev: (1) sold the house in the course of his business; (2) is a commercial vendor-builder; (3) advertised to the public when he engaged a real estate broker to assist in selling the house; (4) solicited Haas, in particular, because Kartashev's agent represented that Kartashev was the builder and he would repair the defects; (5) had plans for sale of the Oregon house and building houses in the future that indicate potential solicitation of others; and (6) occupied a stronger bargaining position because the defects may not have been easily discoverable by Haas's expert. Thus, whether Haas's claim satisfies the "public interest" element relies on unresolved material issues of fact.

Accordingly, we hold that there are genuine issues of fact about whether Kartashev engaged in a deceptive practice and whether Haas's claim satisfies the "public interest" element. Consequently, the trial court improperly granted summary judgment on Haas's CPA claim.

IV. CR 56(f)[10] Motion

Haas next argues that the trial court abused its discretion in denying his request under CR

[10] CR 56(f) states:

> Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

56(f) for more time to pursue discovery. We do not address this assignment of error because on remand the parties may again pursue discovery on all material issues of fact according to the new trial schedule.

V. Motion to Amend

Haas also argues that the trial court abused its discretion in denying his motion to amend the complaint to include claims of fraud arising from Kartashev's representation that he "could and would repair any and all defects" and breach of contract arising from Kartashev's failure to repair the defects in addendum G. CP at 397. Kartashev responds that the trial court properly denied the motion because the motion was untimely, prejudicial, and the proposed claims were meritless.

A. Standard of Review

We review a trial court's decision on a motion to amend for abuse of discretion. *Del Guzzi Constr. Co., Inc. v. Global Nw. Ltd.*, *Inc.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986).

B. Haas' Motion to Amend

Leave to amend a complaint "shall be freely given when justice so requires." CR 15(a). "When a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation." *Doyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wn. App. 126, 130-31, 639 P.2d 240 (1982). The court may also consider the "probable merit or futility of the amendments requested." *Doyle*, 31 Wn. App. at 131. The "touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party." *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

The trial court denied the motion to amend because Haas did not "introduce[] anything new -- any new theory that would allow [him] to prevail." Report of Proceedings (RP) (May 9, 2008) at 25. Haas filed the motion to amend after the trial court entered summary judgment. We hold that a breach of contract arising from Kartashev's failure to repair was properly before the trial court before the court entered summary judgment. Thus, the amendment to add another breach of contract claim is unnecessary and the trial court did not abuse its discretion in denying an amendment to add this claim.

The trial court based its decision that the fraud claim is not a "new theory" because Haas conducted an inspection that disclosed the defects. RP (May 9, 2008) at 25. Although the trial court did not use the word "waiver," it seemed to dismiss an amendment to add a fraud claim based on its previous finding that Haas waived his right to raise the issue of defects when he closed the sale, without reinspecting the house.[11] But the trial court's reasoning on the record before us is unclear and, because we remand the case for further proceedings, we leave subsequent amendments to development at the trial court.

VI. Attorney Fees

[11] The trial court also seemed to invoke *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007) in dismissing Haas's fraud claim. Presumably, it was relying on the following language:

> [Defendant]s were on notice that the septic system had not been completely inspected but failed to conduct any further investigation and, indeed, accepted the findings of an incomplete inspection report. Having failed to exercise the diligence required, they were unable to present sufficient evidence of a right to rely on the allegedly fraudulent representations.

Alejandre, 159 Wn.2d at 690. Unlike the defendants in *Alejandre*, Haas did not receive a report that "disclosed, on its face, that the inspection was incomplete." 159 Wn.2d at 690. On the contrary, Haas did inspect the house and Kartashev agreed to make the repairs and it remains to be resolved whether Haas waived his right to raise the issue of defects or whether the contract provided expressly that the obligation to repair survived the closing.

The trial court awarded attorneys fees to Kartashev because he was the prevailing party. Haas does not argue that the award was improper at that stage but he asks that we vacate the award if we reverse the summary judgment in Kartashev's favor. Because we reverse the order granting Kartashev's summary judgment motion, we vacate the trial court's award of attorney fees to Kartashev.

We reverse the trial court's order on summary judgment and remand for further proceedings, to include an opportunity for additional discovery and further amendments to the pleadings.

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

Van Deren, C.J.

We concur:

Houghton, J.

Penoyar, J.