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CASE NUMBER: 12-2-08537-4 SEA

KING COUNTY SUPERIOR COURT OF WASHINGTON

HARTLEY McGRATH,

Plaintiff,

v.

VESTUS LLC; WINDERMERE REAL
ESTATE/EAST, INC., and
CHRISTOPHER HALL and JANE DOE
HALL and the Marital Community of
CHRISTOPHER AND JANE DOE HALL,

Defendants.

NO. 12-2-08537-4 SEA

PLAINTIFF'S RESPONSE TO
DEFENDANTS' SECOND MOTION
FOR SUMMARY JUDGEMENT

I. RELIEF REQUESTED.

The Defendants' (collectively "Vestus") second Motion for Summary Judgement repeats its first. It does cite a new case, but the new case does not provide any new law. It does offer new evidence, but the new evidence cannot eliminate a central disputed material fact. Plaintiff Hartley McGrath asks the Court to deny Vestus' Second Motion for Summary Judgement and further asks the Court to impose terms pursuant to CR 11 for McGrath's legal expenses in responding to Vestus' motion.

II. FACTS.

1. Facts Underlying Complaint.

The facts supporting Hartley McGrath's claims are more fully set forth in her Response to Vestus' first Motion for Summary Judgement. To respond to Vestus' present motion to dismiss

1 McGrath’s fraudulent concealment claim, the following facts are material:

2 Hartley McGrath and her partner Mark Cooley began looking earnestly for houses as an
3 investment for McGrath in early 2011. Specifically, she wanted to buy a house, fix it up, and then
4 sell it at a profit. She considered approximately 100 houses and made unsuccessful bids on about
5 five houses. McGrath Dep 15-16.¹

7 McGrath received some guidance in her searches from her father, an engineer, who had
8 specifically advised her, “Do not buy a house with foundation issues.” McGrath Dep 12. Before
9 going to Vestus, she had rejected two prior houses specifically because they appeared to have
10 foundation problems. She knew foundation repairs were lengthy and expensive. McGrath Dep
11 13. She would never have knowingly purchased a house with foundation issues. McGrath Dep
12 53-54.

14 McGrath’s first interaction with Vestus was through its website. McGrath Dep 17. Vestus’
15 website describes the services it provides to foreclosure investors. Ex. 7. In particular, it promises
16 to gather information on foreclosing properties not generally available to the public, to drive to the
17 property, to perform due diligence on the information it has gathered, and to provide that
18 information to its investors. It also promises that every Thursday evening it will “go over every
19 single top pick of that week to prepare you for the upcoming auction. Each analysis provides an
20 in-depth study of the foreclosing property.”

23 On March 22, 2011 McGrath executed a Client Agreement with Vestus. Brian Jessen
24 Declaration, Exhibit 1, submitted with Vestus’ first Summary Judgement Motion. The Agreement,
25 like the website, promises “Vestus, LLC collects and compiles information on properties in
26 foreclosure Broker will make available to Client information that VESTUS, LLC has
27

28 ¹References to deposition testimony and exhibits are to the attachments to Luppert Declaration unless otherwise specified.

1 compiled about properties in foreclosure.”

2 Each week Vestus spends Monday through Thursday gathering information on properties
3 scheduled for auction. See Jessen and Melgard Declarations. On Mondays, Vestus’ website lists
4 between 300 and 500 properties are scheduled for auction. Hall Dep 55. McGrath’s awareness
5 on Monday, four days before the action, of the property at issue was only that it was one of
6 hundreds. McGrath Dep 28. By Thursday evening, Vestus has narrowed down the best prospects
7 for its clients to its “top thirty picks” to present to its clients. Hall Dep 55.
8

9 On Thursday nights, Vestus presents its “top thirty” picks to its clients in a paper Auction
10 Packet. According to Jim Melgard’s Declaration, Vestus also emails a copy of the Auction Packet
11 to “certain regular customers.” Melgard does not claim to have emailed any Auction Packets to
12 Hartley McGrath.
13

14 The Auction Packet contains a cover sheet of Vestus information and ratings (“Vestus Fact
15 Sheet”) for every property in the packet. The packet may contain a Residential Agent Detail
16 Report (“Agent Detail Report”) for some properties obtained by Vestus from the Multiple Listing
17 Services (“MLS”). The Packet may also contain MLS listings of comparable properties. Melgard
18 Declaration, Hall Dep 27-28, 55; McGrath Dep 58.
19

20 On April 7, 2011 Hartley McGrath and Mark Cooley attended Vestus’ regular Thursday
21 night meeting. The Auction Packet they received contained information on a property at 33130
22 Second Place SW in Federal Way, Washington. (“The Property.”) The Property was presented to
23 the attendees at the meeting by Chris Nelson, the Vestus’ real estate agent whose territory is
24 Federal Way, and who had driven to the Property earlier that week. Nelson Dep 10; Hall Dep 37.
25

26 Nelson told the group that he lived near the Property. He assured the meeting participants
27 that he knew the house well, that the exterior had been neglected and needed paint, that he had
28

1 spoken to the neighbors, and that there was a public trail behind the house. Cooley Dep 36, 38-39.

2 Nelson told McGrath he had walked the Property. McGrath Dep 65. Nelson created an
3 expectation that he had the skill to make a reasonable assessment of the condition of the property
4 and would report it. McGrath Dep 54, 63.

5
6 McGrath selected the Property as one of four properties to be bid upon the next morning.
7 McGrath Dep. 100. The meeting concluded after dark. McGrath Dep 62-63. Because three of the
8 properties were close to the meeting location, she and Cooley drove to those three on their way
9 home. The Property, however, was in Federal Way, and because it was occupied they could not
10 see the interior, and because it was after dark they could not see the exterior. Cooley Dep 55-56;
11 McGrath Dep 62-63. They therefore did not drive to Federal Way to see the Property. McGrath
12 was assured, however, that Nelson knew the house because he lived nearby and that he had
13 personally gone to the house to assess its condition. McGrath Dep 54, 63.

14
15 On Friday morning, April 8, Vestus' Christopher Hall successfully bid on the Property for
16 McGrath. McGrath Dep. 101. On Saturday, McGrath and Cooley drove to the Property and
17 discovered that it had very serious foundation problems.

18
19 Well before the April 7, 2011 meeting, Vestus acquired an Agent Detail Report on the
20 Property. On March 13, 2011, Hugh Stewart, one of Vestus' principals, pulled the Agent Detail
21 Report from the MLS site. Hall Dep 21-22. At about one third of the way down the page contains
22 the words, "Partial Slope." At the bottom, in a section called "Agent Only Remarks," is "settling
23 issues."
24

25 The Agent Detail Report is not available to the public. Hall, Dep 63-64 ("Can ordinary
26 citizens go on the MLS site and get the agent remarks, the agent-only remarks?" "No; because it
27 is agent-only remarks.").

1 The Agent Detail Report for the Property was not in the Auction Packet Vestus distributed
2 on April 7, 2011. Hartley McGrath, Mark Cooley, and Chris Nelson all testified that they did not
3 see the Residential Agent Detail Report for the Property before McGrath's purchase. McGrath
4 testifies that the Agent Detail Report was not in the package, McGrath Dep 46-47. Cooley testifies
5 that Vestus provided no information about "settling issues." Cooley Dep 96. Chris Nelson also
6 testifies that he did not see the agents remark concerning "settling issues" prior to McGrath's
7 purchase of the Property. Nelson, Dep 34-35. Because McGrath and Cooley selected the Property
8 for bid the next day, and because Nelson presented the property at the April 7 meeting, Nelson Dep
9 10; Hall Dep 37, they all had specific reasons to have observed the Agent Detail Report had it been
10 in the Auction Packet: .

11
12
13 **2. Prior Procedure.**

14 McGrath brought a Complaint against Vestus alleging, in paragraph 24, among other
15 claims, "The actions of Defendants constitute either negligent or fraudulent misrepresentation."
16 McGrath did not explicitly assert "fraudulent concealment" among her claims.

17
18 Vestus introduced the term "fraudulent concealment" when it brought its first motion for
19 summary judgment, and cited *Alejandre v. Bull*, 159 Wn.2d 674, 689, 153 P.3d 864 (2007), for the
20 elements of fraudulent concealment. Vestus likened itself to a seller in a real estate transaction.
21 (See Motion, at pages 12-13.) McGrath responded,

22
23 There are two ways to prove fraud or misrepresentation: (1) prove the nine elements of
24 fraud; or (2) show that the nonmoving party breached the affirmative duty to disclose a
25 material fact. *Baddley v. Seek*, 138 WnApp. 333, 338-39, 156 P.3d 959 (2007) (citing
Baertschi v. Jordan, 68 Wn2d 478, 482, 413 P.2d 657 (1966)).

26 (Plaintiff's Response, page 12.) McGrath did not use the term "fraudulent concealment" in her
27 response.

28 This Court dismissed McGrath's intentional fraud and intentional misrepresentation claims.

1 See Appendix 2 to Vestus' second motion for summary judgment. As this writer recalls, the Court
2 reasoned that McGrath had not stated facts evidencing Vestus' *intent* to deceive. The Court did
3 not, however, dismiss "fraudulent concealment," which, unlike other fraud claims, does not require
4 intent to deceive.. See, *Atherton Condo. Apartment-Owners Ass'n v. Blume Dev. Co.*, 115 Wn.2d
5 506, 523-24, 799 P.2d 250 (1990); *Sloan v. Thompson*, 128 Wn.App. 776, 787, 115 P.3d 1009
6 (2005) ("intent is not an element of a cause of action for fraudulent concealment.")
7

8 **III. ISSUES.**

9
10 1. Whether a real estate broker providing services to purchasers of foreclosing
11 properties commits negligent misrepresentation or fraudulent concealment when the broker has
12 undisclosed information that a property has a defect, when the defect is unknown to the broker's
13 client, when the broker assures its client that it has provided its client all the information it has
14 about the property, when the broker claims to have conducted a careful, albeit partial, inspection
15 of the property for its clients, when the broker's practices preclude its clients from conducting
16 their own inspection, and when the client is damaged by the defect?
17

18 2. Whether issues of disputed fact still preclude summary judgement?

19 3. Whether the Court should award McGrath her legal expenses as sanctions for
20 responding to Vestus' redundant motion for summary judgement?
21

22 **IV. EVIDENCE RELIED UPON.**

23 Hartley McGrath relies upon the pleadings and papers in the file and upon the Declaration
24 of Sylvia Luppert, filed on December 31, 2012², to which is attached the following exhibits:
25

- 26 1. Excerpts from the deposition of Hartley McGrath,
- 27 2. Excerpts from the deposition of Mark Cooley,

28 ²McGrath submits the Declaration and exhibits to the Court with McGrath's working papers, but will not file it again.

- 1 3. Excerpts from the deposition of Christopher Hall,
2 4. Excerpts from the deposition of Chris Nelson,
3 5. Vestus Fact Sheet concerning the Property taken from Deposition Exhibit 8.
4 6. Agent Detail Report concerning the Property taken from Deposition Exhibit 8
5 which Vestus claims to be its Auction Packet of April 7, 2011.
6 7. Vestus website pages taken from Deposition Exhibit 9, identified by Christopher
7 Hall in his deposition at pages 31-32.

8
9 **V. ARGUMENT AND AUTHORITY.**

10 **A. THE NATURE OF McGRATH’S CONCEALMENT CLAIM.**

11 Hartley McGrath alleges in her Complaint that Vestus breached its duty to her to disclose
12 a material fact in its possession, that the fact was unknown to her, and that Vestus’ failure to
13 disclose caused her damage. In many kinds of business transactions, the failure to disclose, as
14 asserted by Hartley McGrath in her Complaint, is called “negligent misrepresentation.” See, e.g.,
15 *Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 732, 853 P.2d 913 (1993); *Richland*
16 *Sch. Dist. v. Mabton Sch. Dist.*, 111 Wn.App. 377, 385, 45 P.3d 580 (2002), review denied, 148
17 Wn.2d 1002 (2003); *Oates v. Taylor*, 31 Wn.2d 898, 903, 199 P.2d 924 (1948). In the context of
18 purely real estate transactions, this failure to disclose is sometimes called “fraudulent
19 concealment.”³

20 Negligent misrepresentation, like fraudulent concealment, is a “species of fraud” recognized
21

22
23

24 3

25 The West publications uses the words “fraudulent concealment” in its headnotes for cases both in the context of
26 purely real estate transactions and other business transactions even though the actual text of the opinion does not
27 necessarily use the words “fraudulent concealment.” For example, *Colonial Imports, id.*, never uses “fraudulent
28 concealment” in the opinion, but the West headnote provides: “[2] KeyCite Citing References for this Headnote
184 Fraud . . . 184I Deception Constituting Fraud, and Liability Therefor . . . 184k15 *Fraudulent Concealment*
184k17 k. Duty to Disclose Facts. Most Cited Cases . . . Duty to disclose, which may give rise to liability for
negligent misrepresentation, can be found outside of fiduciary context, though some kind of special relationship
must exist before duty will arise.”

1 in Washington courts. *Schaaf v. Highfield*, 127 Wn.2d 17, 22, 896 P.2d 665 (1995). The affirmative
2 duty to disclose material facts and the failure to disclose are elements in both negligent
3 misrepresentation and fraudulent concealment, although they are “slightly different, though
4 potentially overlapping.” *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 391, note
5 2, 241 P.3d 1256 (2010). McGrath addresses both her negligent misrepresentation claim,
6 specifically pled, and the fraudulent concealment claim, not expressly pled.
7

8 **B. THE ELEMENTS OF NEGLIGENT MISREPRESENTATION ARE SUPPORTED.**

9 Washington explicitly adopted the Restatement (Second) of Torts (1977) (Restatement) as
10 the standard governing claims of negligent misrepresentation in *Haberman v. WPPSS*, 109 Wn.2d
11 107, 161-62, 744 P.2d 1032 (1987), 750 P.2d 254 (1988).
12

13 Liability under Section 551 arises for a failure to disclose when:

14 (1) One who fails to disclose to another a fact that he knows may justifiably induce the other
15 to act or refrain from acting in a business transaction is subject to the same liability to the
16 other as though he had represented the nonexistence of the matter that he has failed to
17 disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose
the matter in question.

18 (2) One party to a business transaction is under a duty to exercise reasonable care to disclose
19 to the other before the transaction is consummated,
20 (a) matters known to him that the other is entitled to know because of a fiduciary or other
21 similar relation of trust and confidence between them; and
(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous
statement of the facts from being misleading;....

22 *Colonial Imports, Inc.*, at 731. See also, *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55
23 P.3d 619 (2002).

24 McGrath has provided evidence supporting negligent misrepresentation. Vestus was in the
25 business of supplying information regarding foreclosing properties to its clients in the clients’
26 business transactions, and specifically promised McGrath that it would provide all of the
27 information it acquired about the foreclosing properties. It did not, however, use reasonable care
28

1 to provide the Residential Agent Detail Report identifying that the Property was on a slope and had
2 settling issues. The nondisclosure of a fact which one is bound to disclose is an indirect
3 representation that such fact does not exist. *Oates v. Taylor*, 31 Wn.2d 898, 902-05, 199 P.2d 924
4 (1948). McGrath was particularly alert to foundation problems, and would not purchase a property
5 with foundation problems.
6

7 McGrath reasonably relied upon Vestus' contractual obligation to provide all the
8 information in its possession concerning the Property. Her purchase of the Property with
9 undisclosed settlement issues caused her damage.
10

11 **C. THE ELEMENTS OF FRAUDULENT CONCEALMENT ARE ALSO SUPPORTED.**

12 "Fraudulent concealment in a real estate transaction is a cause of action that has long been
13 recognized in Washington." *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 391, 241
14 P.3d 1256 (2010), citing *Atherton Condo. Apartment-Owners Ass'n v. Blume Dev. Co.*, 115 Wn.2d
15 506, 524, 799 P.2d 250 (1990); *Hughes v. Stusser*, 68 Wn.2d 707, 711, 415 P.2d 89 (1966); *Obde*
16 *v. Schlemeyer*, 56 Wn.2d 449, 452-53, 353 P.2d 672 (1960); and *Perkins v. Marsh*, 179 Wash. 362,
17 367-68, 37 P.2d 689 (1934). *Eastwood, id.*, describes the tort of fraudulent concealment, stating,
18 "[T]he vendor or lessor has an affirmative duty to 'disclose material facts,' of which the vendor or
19 seller has knowledge, and which are 'not readily observable upon reasonable inspection by the
20 purchaser' or lessee."
21

22 The six elements of fraudulent concealment are:
23

- 24 (1) There was a concealed defect in the house;
- 25 (2) The sellers knew of the defect prior to selling the house;
- 26 (3) The defect was unknown to the purchasers;
- 27 (4) A careful, reasonable, and diligent inspection by the purchasers would not have
28 disclosed the defect;

1
2 (5) The defect was dangerous to the property, health, or life of the purchaser; and

3 (6) The defects substantially lowered the value of the property or operated to materially
4 impair or defeat the purpose of the transaction.

5 *Atherton*, at 524.

6 Elements 1, 2, 3, 5, and 6 are readily met here. Vestus, through its possession of the Agent
7 Detail Report knew before the sale of the Property that it was on a slope and that there were
8 “settling issues.” McGrath knew nothing of the Agent Detail Report and, in particular, did not know
9 of the reported settling issues. Because McGrath did not have access to the Agent Detail Report,
10 and because Vestus’ weekly schedule did not allow McGrath to see the Property prior to the
11 auction, the settling issues were concealed to her.
12

13 Vestus principally argues that the fourth element, “A careful, reasonable, and diligent
14 inspection by the purchasers would not have disclosed the defect,” defeats McGrath’s claim.
15 Vestus, however, overlooks the long standing law concerning the inspection element.
16

17 Absent some notice of the defect, neither inquiry nor inspection by the purchaser is required
18 to state a claim for fraudulent concealment. “However, ‘a fraudulent concealment claim may exist
19 even though the purchaser makes no inquiries which would lead him to ascertain the concealed
20 defect.’ Only in situations where a purchaser discovers evidence of the defect, and thus the defect
21 becomes apparent, is the purchaser required to inquire further.” *Sloan v. Thompson*, 128 Wn.App.
22 776, 789, 115 P.3d 1009 (2005), quoting *Atherton*, at 525, (“a fraudulent concealment claim may
23 exist even though the purchaser makes no inquiries which would lead him to ascertain the concealed
24 defect”), citing *Obde*, at 453 (sellers had duty to speak “regardless of the latter's failure to ask any
25 questions relative to the possibility of termites.”). *Sloan* involved a case where a house had
26 multiple defects, but the plaintiffs’ fraudulent concealment claim was based upon concealed
27
28

1 structural defects and defective septic system. The Court stated, at 790, “However, there is no
2 evidence in the record to suggest that the Sloans’ knowledge of other unrelated defects in the house
3 such as the leaky roof, faulty deck, and improperly flushing toilets would have put them on notice
4 of the structural defects in the first floor framing or in the septic system, thus making such defects
5 readily ascertainable.” McGrath expected to make repairs to the roof and outside paint – conditions
6 of which she had notice. She had no notice of the foundation problems, however.
7

8 The “new” case cited by Vestus, *Douglas v. Visser*, __ Wn.App. __, 295 P.3d 800 (2013),
9 adds nothing new to the existing law that the buyer’s duty to inspect arises *only after* notice of the
10 defect. Indeed, from *Douglas*’ very first sentence, it is clear that inquiry or inspection is required
11 only after the purchasers have notice of the defect: “When prospective homebuyers discover
12 evidence of a defect, the buyers must beware. They are on notice of the defect and have a duty to
13 make further inquiries.” *Id.*, at 800-801. Later, at 803, “When a buyer is on notice of a defect, it
14 must make further inquiries of the seller.” At 804, *Douglas* again states, “Once a buyer discovers
15 evidence of a defect, they are on notice and have a duty to make further inquiries.”
16
17

18 Vestus contends that McGrath had prior notice based only upon its assertion that McGrath
19 saw the Agent Detail Report. Just as the assertion that McGrath had the Agent Detail Report before
20 the purchase was disputed in Vestus’ first motion for summary judgement, it remains disputed now.
21

22 Finally Vestus asserts the mistaken argument that a fraudulent concealment claim may not
23 be sustained when the defendant is not a seller or vendor. Vestus cites no case which disallows a
24 fraudulent concealment claim when the defendant is not a seller, or limits the tort to sellers and
25 purchasers. Its argument is based solely on its inability to find a case which permits a fraudulent
26 concealment claim when the defendant is not the seller.
27

28 Most, but not all, fraudulent concealment claims are made against sellers. In fraudulent

1 concealment claims prior to *Obde v. Schlemeyer*, 56 Wn.2d 449, 452-53, 353 P.2d 672 (1960), the
2 defendants were lessors. *Obde* widened the scope of defendants holding, “We deem this rule to be
3 equally applicable to the vendor-purchaser relationship.” *Svendsen v. Stock*, 143 Wn.2d 546, 23
4 P.3d 455 (2001), broadens the category of proper defendants by holding that the seller’s real estate
5 agent fraudulently concealed her knowledge of drainage problems acquired independently of the
6 seller’s representations in its statutory seller disclosure form.

8 *Obde*, at 452-53, in expanding the scope of liability in fraudulent concealment cases, noted
9 “The statement may often be found that if either party to a contract of sale conceals or suppresses
10 a material fact which he is in good faith bound to disclose then his silence is fraudulent.” Neither
11 *Obde* nor any of the cases following it have limited liability for fraudulent concealment to the
12 immediate parties to the sale of property, but instead “impose on parties to the transaction a duty
13 to speak whenever justice, equity, and fair dealing demand it.” *Id.*

15 *Schaaf v. Highfield*, 127 Wn.2d 17, 896 P.2d 665 (1995), although a negligent
16 misrepresentation case, evidences Washington courts’ intention to include parties directly connected
17 to a real estate transactions as proper defendants in fraudulent concealment claims, including
18 foreclosure brokers such as Vestus. There the court extended liability for negligent
19 misrepresentation to real estate appraisers. *Schaaf*, at 27. *Schaaf*, however, limited liability “only
20 to those involved in the transaction that triggered the appraisal report, including, but not necessarily
21 limited to, the buyer and the seller.” Vestus’ involvement in the transaction here is more direct than
22 a real estate appraiser. Vestus has expressed no policy reason or rationale why it should be excepted
23 from liability for fraudulent concealment, and none is apparent. Businesses like Vestus, who supply
24 information to guide their clients in real estate purchases should face liability for fraudulent
25 concealment in similar circumstances.

1 **D. SUMMARY JUDGEMENT STANDARDS REQUIRE DENIAL OF VESTUS' MOTION.**

2 The same dispute of material fact precludes Vestus' second motion for summary judgement
3 as it did in its first. While Vestus' new evidence may add to its evidence that settling issues were
4 disclosed to McGrath , it does not subtract from McGrath's evidence that she did not.
5

6 Summary judgment is appropriate only if "there is no genuine issue as to any material fact
7 and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Scott v. Pac. W.*
8 *Mt. Resort*, 119 Wn.2d 484, 502, 834 P.2d 6 (1992). Facts and all reasonable inferences therefrom
9 must be considered in the light most favorable to the nonmoving party, and summary judgment
10 should be granted only if a reasonable person would reach but one conclusion. *International Ass'n*
11 *of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 223, 45 P.3d 186 (2002).
12

13 Here, the testimony of Hartley McGrath, Mark Cooley, and Vestus' real estate agent
14 employee Chris Nelson all support that the Agent Detail Report was not in the packet of materials
15 provided by Vestus in its April 7, 2011 meeting. Vestus' computer forensics expert's opinion that
16 the Agent Detail Report was emailed to select clients is simply irrelevant to whether the Agent
17 Detail Report was also in the paper packet handed out at the meeting. Jim Melgard's opinion that
18 the Agent Detail Report must have been in the paper packet, is simply an assumption. He does not
19 state that he saw the Report in the paper package. Even if he did, McGrath, Cooley, and Nelson's
20 testimony contradicts that. Perhaps a jury will believe Mr. Melgard's assumption. A jury might
21 reasonably believe, instead, that the three people at the April 7 meeting who were the most
22 interested in the Property that night would have seen the Agent Detail Report if it had actually been
23 in the packet. For purposes of summary judgement, however, the disputed fact must be construed
24 in McGrath's favor.
25
26

27 When the moving party does not sustain its burden to show there are no disputes of material
28

1 fact, “summary judgment should not be entered, irrespective of whether the nonmoving party has
2 submitted affidavits or other materials.” *Graves v. P. J. Taggares Co.*, 94 Wn.2d 298, 302, 616
3 P.2d 1223 (1980). Vestus was unable to sustain its burden of showing there are no disputes of
4 material fact in both its first summary judgement motion and its present motion. Merely bolstering
5 its version of the facts does not change that its version remains disputed.
6

7 **E. VESTUS’ MOTION VIOLATES CR 11.**

8 CR 11 requires of all motions and pleadings “(1) it is well grounded in fact ; (2) it is
9 warranted by existing law or a good faith argument for the extension, modification, or reversal of
10 existing law or the establishment of new law.” Vestus knew when bringing its second summary
11 judgement motion that there continues to be a disputed material fact regarding notice of settling
12 issues, and it should have recognized that *Douglas v. Visser* does not change the law regarding a
13 purchaser’s obligation to investigate only after notice. The second motion violates the requirements
14 of CR 11.
15

16
17 Hartley McGrath has incurred legal expenses in defending Vestus’ unwarranted second
18 motion. CR 11 further provides, “If a pleading, motion, or legal memorandum is signed in violation
19 of this rule, the court, upon motion or upon its own initiative, may impose upon the person who
20 signed it, a represented party, or both, an appropriate sanction, which may include an order to pay
21 to the other party or parties the amount of the reasonable expenses incurred because of the filing of
22 the pleading, motion, or legal memorandum, including a reasonable attorney fee.” She asks for an
23 order imposing sanctions for her reasonable fees incurred because of the second motion for
24 summary judgement. If the Court grants sanctions, she will submit a request for the specific
25 amount of fees and costs.
26

27 **VI. CONCLUSION.**
28

1 Hartley McGrath asks the Court to deny Vestus' second Motion for Summary Judgement
2 and to award sanctions to her for her legal expenses pursuant to CR 11.

3 Respectfully filed this 10th day of June, 2013.

4 REAUGH OETTINGER & LUPPERT, P.S.

5
6 By _____
7 Sylvia Luppert, WSBA 14802
8 Attorneys for Hartley McGrath
9 sll@reaugh.com