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Washington Appeals Court Clarifies Fraudulent Concealment Under Form 17 Disclosure Rules

In a recent Division III case, ***Lions v. Evans*** (40278-9, May 6, 2025) the Washington State Court of Appeals, addressed the "fraudulent concealment" test arising under a misrepresentation claim associated with the purchase and sale of a residential property.

In 2001, Evans hired a contractor to build her custom home. After moving in she began noticing substantial cracks and voids under the home's foundation. 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.

Forsgren determined the problem required a two-part solution. The first part required the portion where the foundation had settled to be raised and several helical piers be placed into the soil and connected to the foundation. Forsgren completed this work. The second part required the fill material under the house to be stabilized with a subsurface pile wall to prevent future sliding of the fill material. Forsgren identified this additional work as "essential". This was further confirmed by an engineering firm hired by Evans, who found the home was built on a thick layer of unstable fill material which was continuing to slide.

Evans settled her lawsuit with her contractor. Despite recommendations by Forsgren and the subsequent engineering firm, she did not have a subsurface pile wall installed.

In 2017, Evans listed her home for sale. On the Form 17 Disclosure Statement she identified that there was fill material on the property and that she had had helical piers installed to stabilize the foundation. She noted on the disclosure form "I have no reason to believe that there are any issues with the stability of the foundation of the home." She also provided a copy of a letter from Forsgren, as well as a letter from a third engineering company. None of the letters mentioned the prior recommendations for a subsurface pile wall.

Moore executed a purchase and sale agreement with Evans to purchase Evans' home. Moore hired a home inspector, who identified large gaps between the foundation and the soil and recommended consultation with a geotechnical engineer. Moore contacted several engineering companies but ultimately there was not time to perform a full evaluation. One of the engineers contacted was a firm that had previously advised Evans of the need for a subsurface pile wall. This company could not release the report without Evans' consent, which was not forthcoming. To attempt to address the problem, the Evans agreed to have polyurethane foam injected into the large gaps between the foundation and the soil.

Two years after the Evans-Moore sale closed, the home's kitchen floor pulled free from the NE wall. Moore sued Evans for, inter alia, fraudulent concealment, fraudulent misrepresentation and innocent (negligent) misrepresentation.

Evans sought dismissal of Moores' lawsuit, claiming that Moores had notice of the settlement issues but failed to conduct a careful and reasonable inspection. The trial court agreed and dismissed Moores' lawsuit. The appeal followed.

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Fraudulent Concealment. The Court of Appeals noted 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); ***Atherton Condo. Apartment-Owners Ass'n v. Blume Dev. Co.***, 115 Wn.2d 506, 524, 799 P.2d 250 (1990).

Focusing on element number 5 ("defect would not have been disclosed by a careful, reasonable inspection"), the Court of Appeals revisited the ***Atherton*** decision. 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 *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)).

> The Court of Appeals in Evans noted:
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> 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.

The Court of Appeals went on to conclude a "rational trier of fact" could conclude Moore had taken reasonable steps to attempt to discover the existence or scope of a possible defect, and that Moore could have reasonably believed the soil was stable and the foundation problem was fixed after the polyurethane foam was injected. The Court of Appeals reversed the trial court's decision and sent the case back for further proceedings.

This case is just another in a long line of Washington cases dealing with Form 17 disclosure issues. The appellate courts have tried to balance between requiring full and fair disclosure and the concept of *caveat emptor* for buyers. This ***Evans*** case represents a push back against the holding of ***Alejandro*** and further muddies the waters of this murky legal issue. If you are faced with questions relating to or arising out of a Form 17 Disclosure, you may wish to consult with an experienced real estate attorney to evaluate the situation. You may reach attorney Chris Thayer at thayer@carneylaw.com or (206) 607-4150.