

FILED 2/23/2023

AT 4:55 o'Clock P. M
CLERK OF DISTRICT COURT

Janet Lawson
Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

JAY SHUIT and CLAUDIA FIELDS,
husband and wife,

Plaintiffs,

vs.

GEORGE BALLING, and MARY
LANCASTER, husband and wife,

Defendants.

Case No. **CV28-22-5357**

**MEMORANDUM DECISION AND
ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION TO STRIKE, GRANTING
DEFENDANTS' MOTION TO
STRIKE, AND GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on a Motion for Summary Judgment brought by defendants George Balling ("Balling") and Mary Lancaster ("Lancaster"), husband and wife (collectively "defendants"), filed on January 25, 2023, against plaintiffs Jay Shuit ("Shuit") and Claudia Fields ("Fields"), husband and wife (collectively "plaintiffs"). Additionally in front of the Court is the plaintiffs' Motion to Strike filed on February 8, 2023, and the defendants' Motion to Strike filed on February 15, 2023.

This case regards the purchase of the defendants' real property by the plaintiffs in August 2020. In their motion for summary judgment, defendants move for an order dismissing the plaintiffs' Complaint for (1) fraud by misrepresentation, (2) fraud by omission, (3) violation of the Idaho Property Condition Disclosure Act, (4) violation of the Idaho Consumer Protection Act, and (5) violation of the implied covenant of good

faith and fair dealing, in its entirety.

A. Factual Background

This matter involves the sale of real property located in Kootenai County, at 2600 E. Lookout Drive, Coeur d'Alene, ID 83815 ("Property"). Mem. in Supp. of Pl.'s Opp'n. to Defs.' Mot. for Summ. ("Mem. in Opp'n.") J. 2. The Property is legally described as:

LOT 3, BLOCK F, HAYDEN VIEW ESTATES 1ST ADDITION, ACCORDING TO THE PLAT RECORDED IN BOOK "F" OF PLATS, PAGE II, KOOTENAI COUNTY, IDAHO.

Id. The defendants purchased the property in 2011. *Id.* at 2, ¶ 1. The defendants allege that when they purchased the Property, "the closing documents stated that a septic system was 'not applicable' to the Property" (*Id.* at 2, ¶ 1 (citing to Balling Decl. ¶3, Ex. A.)), and that they, "paid monthly bills to the Hayden [Lake Recreational Water and] Sewer District to utilize its sewage system" while they owned the property. *Id.* at 2, ¶ 2. Between 2011 and 2020, defendants claim:

they had to have the line to the sewage system cleared twice, once in 2017 and once in 2018. The Defendants were not informed during either of these maintenance calls that the Property had a septic system. After the line was cleared in 2018, the Defendants had no further issues with the sewage system and understood it to be functioning properly.

Mem. in Supp. of Mot. for Summ. J. 2, ¶ 4. (internal citations omitted).

The defendants sold the Property to the plaintiffs in 2020. Mem. in Supp. of Mot. for Summ. J. 2. In connection with the sale of the Property, the defendants provided the plaintiffs with a RE-25 Property Condition Disclosure Form ("Condition Disclosure Form"), on or about June 22, 2020 (Compl. 2, ¶ 7), and the parties entered into a Real Estate Purchase and Sale Agreement ("REPSA") on or about July 3, 2020. *Id.* at ¶ 6, Ex. A. The parties closed on the Property on August 10, 2020. Mem. in Opp'n. 4, ¶ 6. The defendants claim that the, "[c]losing documents from the sale of the Property in

2020 . . . show that the Property was serviced by the Hayden [Lake Recreational Water and] Sewer District, as funds were taken from escrow to pay off remaining sums owed to the Hayden [Lake Recreational Water and] Sewer District.” Mem. in Supp. of Mot. for Summ. J. at 2, ¶ 3. (citing to Balling Decl. ¶¶6, Exs. C, D, E).

Prior to closing on the Property, plaintiffs received a copy of the Condition Disclosure Form. Mem. in Opp’n. 3. The relevant portion of the Property Disclosure Form, relating to the Water & Sewer System Section is shown below:

mold or mold-related problems on the property remediated, repaired, fixed or replaced?					
	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
	None/Not Included	Working	Not Working	Do Not Know	Remarks
WATER & SEWER SYSTEMS SECTION					
Hot Tub/Spa and Equipment	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Pool and Pool Equipment	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Plumbing System - Faucets and Fixtures	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Water Heater(s)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Water Softener (owned)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Water Softener (leased)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Landscape Sprinkler System	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Septic System	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Sump Pump/Lift Pump	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
SEWER SYSTEM TYPE SECTION					
Property Sewer Provided By:	Public System (City/Township)	Community System	Private System	Other/Remarks	
If a private system, please provide the following information about the septic system:	Date Last Pumped	Is there a Maintenance Fee?		If Yes, list amount & explain monthly or annual fee?	
		<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
	Yes	No	Do Not Know	Other/Remarks	
If a private septic system, is there a shared drain field?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
Date: 6/15/20 BUYER'S Initials: [Signature] Date: 7/3/2020 3:38 PM PC1					

Compl. Ex. B. As can be noted above, the Property Disclosure Form,

has a line for checking whether the [] Property is serviced by a septic system, with a corresponding blank area to enter remarks about the septic system. The [d]efendants checked the box for “None/Not Included” on the line for the [] Property’s septic system. The [d]efendants also left the “remarks” section blank.

The [Property Disclosure Form] also has a line for checking a box to indicate whether the [] Property is serviced by a public system, a community system, or a private system. On that same line, there is a blank area to enter remarks about the [] Property’s sewer system. All of those boxes were left blank by the [d]efendants.

Mem. in Opp’n. 3, ¶¶ 3,4. (formatting altered) (internal citations omitted).

After the purchase of the property, plaintiffs claim they “noticed that its sewer

system was backed up,”¹ and that in or about October 2021, their property management company² informed the plaintiffs that the sewage line to the property had overflowed (*Id.*), and that The Rooter Guys had been hired to clear the blockage in the line. *Id.* at ¶ 8. The Rooter Guys is managed by David Howe (“Howe”). Mem. in Opp’n. 4, ¶ 11.

Plaintiffs claim that they, “subsequently received an invoice dated October 18, 2021[,] from The Rooter Guys which informed the [p]laintiffs that there is a belly in the sewage line which was previously located during the [d]efendants’ period of ownership.” Mem. in Opp’n. 4, ¶ 8. (citing to Fields Decl. 9. ¶¶ 9–10.)

The Rooter Guys reported to the [p]laintiffs that they were familiar with the [] Property because they had previously been called out by the [d]efendants to investigate the same issue [and] their prior investigation revealed there was a belly in the sewer line just in front of the septic tank causing the sewer system to back up.

Complaint at 3 ¶ 8; Memo in Opp’n. 2. The plaintiffs claim that The Rooter Guys provided the plaintiffs with copies of Invoice No. 45066, from when The Rooter Guys came to the Property in 2017, and Invoice No. 47153 from when The Rooter Guys came to the Property in 2018. Mem. in Opp’n. 4, ¶ 9.

Invoice No. 45066, dated November 23, 2017, purports to provide a “diagnosis” of “main line backup” and “description of products and services” as “used a 5/8 snake to remove clog though outside cleanout ran snake about 25 feet to remove clog ran camera to see what looks like tank,” as pictured below:

¹ Plaintiffs claim it was both noticed “a few months” after purchasing the property, (Compl. at 3 ¶ 8.), and noticed, “immediately” after purchasing the property, after “the toilet on the lower level of the residence became clogged and overflowed, causing raw sewage to spill back into the residence” on August 10, 2020, the night the property closed. Mem. in Opp’n. 4, ¶ 6.

² The plaintiffs rented the property from 2020 to 2022 through a property management company. Mem. in Opp’n. 4, at ¶ 7.

Plb WD

The Rooter Guys
LICENSED • BONDED • INSURED

P.O. BOX 2470
 HAYDEN, ID 83630
 (208) 778-4408 • (208) 888-8097 • (208) 743-1378
 FAX: (208) 743-1378

INVOICE / CONTRACT **45066**
 DATE: **11/23/17**

Customer: Mary Loresster		Address: 2600 N. Lockport Dr (600)		City: CDR		State: Idaho		Zip: 83401			
Service: 5065		Estimate: 7047		Job No: 7047		Job Date: 11/23/17		Job Code: 5065			
<input type="checkbox"/> Sewer <input type="checkbox"/> Drain <input type="checkbox"/> Water <input type="checkbox"/> Gas <input type="checkbox"/> Electric <input type="checkbox"/> HVAC <input type="checkbox"/> Other		<input type="checkbox"/> Sewer (Small) <input type="checkbox"/> Sewer (Large) <input type="checkbox"/> Camera <input type="checkbox"/> Line Locator <input type="checkbox"/> Cable Machine <input type="checkbox"/> Snakes <input type="checkbox"/> Hydro-Jet <input type="checkbox"/> Other		<input type="checkbox"/> New Home <input type="checkbox"/> New Customer <input type="checkbox"/> Estimate <input checked="" type="checkbox"/> Repair <input type="checkbox"/> Treat <input type="checkbox"/> Residential <input type="checkbox"/> Commercial		<input type="checkbox"/> Approved <input type="checkbox"/> Declined <input type="checkbox"/> Approved <input type="checkbox"/> Declined <input type="checkbox"/> Approved <input type="checkbox"/> Declined		<input type="checkbox"/> Approved <input type="checkbox"/> Declined <input type="checkbox"/> Approved <input type="checkbox"/> Declined		<input type="checkbox"/> Approved <input type="checkbox"/> Declined <input type="checkbox"/> Approved <input type="checkbox"/> Declined	
Description: Main line backing up Notes: used a 3/8 snake to remove clog through outside cleanout ran snake about 25 feet to remove clog ran camera to see what looks like a tank											
Signature: <i>[Signature]</i> Date: 11/23/17											

Howe Decl. 2, ¶ 3, Ex. A. Invoice No. 47153, dated September 9, 2018, proports to provide a “diagnosis” of “main line backing up,” a “warranty” of “30 days,” and the legible parts of the “description of products and services” state “Removed . . . on cleanout and sewer line was full so I used the snake to open up the line and camera the line and found a belly right before the tank showed customer / all working at this time,” as pictured below:

The Rooter Guys
 LICENSED • BONDED • INSURED

P.O. Box 2470
 Myrtle, MD 21235
 (410) 772-4408 • (410) 890-0077 • (410) 762-1875
 Fax: (410) 772-4408

INVOICE / CONTRACT
 DATE: 7/7/22 47153

Customer: *Greco + Billings*
 Name: *Nori Lukapt DC*
 C/P: *5385* *3000*
 Address: *Telco*

ORDER: *3901* EP: *3901* QTY: *1*

DESCRIPTION: *main line blocking*

WORK: *30 min. blocked line section out and see line case with 30' used for work to open up the line and remove the line and sawed a hole right before the hole about customer arriving at this time*

APPROVED: *[Signature]* CANCELLED: *[Signature]*

24 Hours a Day • 7 Days a Week... Never An Overtime Charge!

Howe Decl. 2, ¶ 3, Ex. A.

Over 8 months after the October 18, 2021, clearing of the Property’s sewage line, the Rooter Guys pumped the septic tank at the Property on July 8, 2022. Mem. in Opp’n. 5, ¶ 13. The plaintiffs then claim that they “had the Subject Property’s septic tank inspected and found that it was cracked and needed replacement,” and that “The Rooter Guys [] provided [p]laintiffs with an estimate to replace the septic tank for \$11,500.00.” Compl. 3, ¶¶ 10, 11.

While the plaintiffs claim that the Property “utilizes a ‘septic system’ because it utilizes a septic tank,” (Mem. in Opp’n. 7. ¶ 25), the defendants claim that the “Property does not utilize a septic system, nor does one exist at the property.” Mem. in Supp. of Mot. for Summ. J. 4.

A. Procedural History

The plaintiffs filed their Complaint in this matter on filed on September 1, 2022. The defendants filed their Answer to Complaint on October 6, 2022.

On January 25, 2023, the defendants filed their Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, and Affidavit of George Balling in Support of Motion for Summary Judgment. On February 8, 2023, plaintiffs filed their Memorandum in Opposition to Defendants' Motion for Summary Judgment, Objection to the Affidavit of George Balling in Support of Motion for Summary Judgment, and Declarations of Dustin Jacobson, David Howe, Claudia Fields, and Corey Metzner in Opposition to Defendants' Motion for Summary Judgment. On February 15, 2023, defendants filed an Objection to the Declaration of David Howe in Opposition to Motion for Summary Judgment and a Reply Brief in Support of their Motion for Summary Judgment.

II. STANDARD OF REVIEW

A. Motion to Strike

"Summary judgment proceedings are decided on the basis of admissible evidence." *Shea v. Kevic Corp.*, 156 Idaho 540, 544, 328 P.3d 520, 524 (2014) (quoting *Campbell v. Kvamme*, 155 Idaho 692, 696, 316 P.3d 104, 108 (2013)). Hence, "[t]he admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold matter before applying the liberal construction and reasonable inferences rule to determine whether the evidence creates a genuine issue of material fact for trial." *Id.* (quoting *Fragnella v. Petrovich*, 153 Idaho 266, 271, 281 P.3d 103, 108 (2012)).

"When determining whether testimony offered in connection with a motion for summary judgment is admissible" "[t]his Court applies an abuse of discretion standard." *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 15, 175 P.3d 172, 177 (2007). "A trial court does not abuse its discretion if it (1) correctly perceived the issue as one of

discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.” *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

B. Motion for Summary Judgment

Idaho Rule of Civil Procedure 56 governs motions for summary judgment.

According to that Rule, summary judgment must be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by “citing to particular parts of materials in the record” or “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” *Id.*

If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
- (4) issue any other appropriate order.

Id. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168

(1997)). “Such an absence of evidence may be established either by an affirmative showing with the moving party’s own evidence or by a review of all the nonmoving party’s evidence and the contention that such proof of an element is lacking.” *Heath v. Honker’s Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478). “A material fact is one upon which the outcome of the case may be different.” *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998). “For a factual issue to be material on a motion for summary judgment, it must be placed in dispute by the pleadings.” *Country Cove Development, Inc. v. May*, 143 Idaho 595, 603, 150 P.3d 288, 296 (2006) (citing *Frazier v. J.R. Simplot Co.*, 136 Idaho 100, 105, 29 P.3d 936, 941 (2001) (citation omitted)).

Once the moving party meets their burden of establishing the absence of a genuine issue of material fact, the burden shifts to the non-moving party to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party “must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact.” *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). “Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence.” *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

“When an action will be tried before the court without a jury, the trial court as the

trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences.” *Bedard & Musser v. City of Boise City*, 162 Idaho 688, 689–90, 403 P.3d 632, 633–34 (2017) (quoting *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 360–61, 93 P.3d 685, 691–92 (2003)). Even when an action will be tried to the court rather than to a jury, the court cannot assess credibility at the summary judgment stage when credibility can be tested in court during the trial. *Hilliard v. Murphy Land Co., LLC*, 158 Idaho 737, 742, 351 P.3d 1195, 1200 (2015).

As a general rule, a trial court does not make findings of fact when deciding a motion for summary judgment because it cannot weigh credibility, must liberally construe the facts in favor of the non-moving party, and must draw all reasonable inferences from the facts in favor of the non-moving party. [When a] case [is] to be tried to the district court rather than to a jury, the court [is] entitled to determine the most reasonable inferences from the undisputed facts and [is] not required to draw all reasonable inferences in favor of the non-moving party.³
Id.

158 Idaho at 744, 351 P.3d at 1202 (citing to *Beus*, 151 Idaho at 238, 254 P.3d at 1234) (internal citations omitted). As of this date, neither side has demanded a jury trial.

III. ANALYSIS

The defendants move this Court for an Order “dismissing the Plaintiffs’ Complaint in its entirety and awarding the Defendants their attorneys’ fees and costs in defending this matter.” Mem. in Supp. of Mot. for Summ. J. 1. Defendants additionally move this Court for an Order to Strike Declaration of David Howe, Paragraph 9. Defs.’ Obj. to the Decl. of David Howe in Opp’n. to Mot. for Summ. J. 2. The Plaintiffs move this Court for an Order to Strike the Affidavit of George Ballings’ Paragraphs 4, and 5, and the first line of Paragraph 6. Pl.’s Obj. to Aff. of George Balling in Supp. of Mot. for

³ It should be noted that while the plaintiffs correctly assert that when an action will be tried to a court without a jury that the tier of fact is entitled to arrive at the most probable inferences, throughout their briefing plaintiffs assert that

Summ. J.

A. Plaintiffs' Motion to Strike

Plaintiffs move to strike George Balling's Affidavit in Support of Motion for Summary Judgment paragraphs 4 and 5, and the first line of paragraph 6 claiming that these sections:

Contain[] expert testimony for which no foundation has been provided. I.R.E. 701(0); I.R.E. 702. Specifically, the declarant has not demonstrated he is 'qualified as an expert by knowledge, skill, experience, training, or education' to provide an opinion on what a septic system is, what a sewer system is, and the differences between them.

Pl.'s Obj. to Aff. of George Balling in Supp. of Mot. for Summ. J. 2, 3, 4.

In response, the defendants argue that plaintiffs "objections are erroneous"

because:

Balling need not qualify as an expert in order to testify about his personal understanding of the differences between a sewer system and a septic system. [] Balling's subjective understanding – which is not based upon scientific, technical, or other specialized knowledge, but merely his personal layman's understanding – is relevant to each of the claims that [p]laintiffs have alleged in this action and is admissible under I.R.E. 701.

Def.' Reply Br. 2. Further, the defendants agree that "Mr. Balling is not qualified as an expert on sewer/septic systems" (*Id.*), stating:

Each of the claims [p]laintiffs have asserted require the [d]efendant to possess personal knowledge of a falsity, inaccuracy, or omission. Mr. Balling's affidavit states that he checked "none/not included" on the disclosure form because, based on his personal, layperson understanding of the differences between sewer systems and septic systems, he did not believe that the Property utilized a septic system. Mr. Balling supported his conclusion with multiple facts, including that he and his wife paid monthly bills to the Hayden Sewer District, there was no drain field or leach field on the Property, and during the nine (9) years that he and his wife lived at the Property, they never had to have waste removed from a tank. Thus, Mr. Balling's understanding was not based upon scientific, technical, or specialized knowledge – but simply his own experiences with the sewage system at the Property.

"all inferences drawn . . . are to be drawn in the [p]laintiffs' favor." See Mem. in Opp'n. 14.

Id. at 2-3.

1. Paragraph 4

The Affidavit of George Balling In Support of Motion for Summary Judgment

Paragraph 4 states:

The reason I feel that the Property does not use a septic system for wastewater disposal is detailed as follows. It is my understanding that a septic system is completely different from a sewer system service in terms of wastewater disposal. With a septic system, wastewater flows from a house located on property into a septic tank located on that same property. Once the wastewater hits the septic tank, the waste in the water separates and essentially falls to the bottom of the septic tank in the form of sludge, while the rest of the remaining water flows out from the septic tank through an outlet pipe to a drain-field or leach-field which is located on the property. With a sewer system, wastewater flows from the house through a sewer connection to a community sewer system which is run by a municipality, or in our case, the Hayden Lake Recreational Water and Sewer District (“Hayden Sewer District”). Through this sewer connection, the wastewater flows from the property into the community sewer line located off the Property. Once the wastewater hits the community sewer line, the wastewater, along with all the other wastewater from the neighboring properties flows to a wastewater treatment plant run by the Hayden Sewer District.

Balling Aff. 2, ¶ 4. In this paragraph, Balling is stating what his understanding is as a layman, and not as an expert. This subjective understanding is material to multiple of plaintiffs’ claims. Paragraph 4 is not be stricken.

2. Paragraph 5

The Affidavit of George Balling In Support of Motion for Summary Judgment

Paragraph 5 states:

Based upon the foregoing, there are several significant differences between a sewer system servicing a property and a septic system servicing a property which ultimately makes them separate and distinct from each other. A sewer system transports wastewater from the property for treatment, while a septic system keeps the wastewater on the property for treatment. With a sewer system connection, a party pays fees to connect to a municipal sewer system and pays monthly fees to the municipality for the ongoing sewer services it provides. In a septic system, you do not pay a municipality any sewage related

fees because a municipality is not involved in the wastewater treatment associated with a septic system. In a septic system, the only costs associated with ongoing wastewater treatment is the periodic need to have the septic tank cleaned and the sludge removed from the tank. Furthermore, a sewer system is a wastewater system that involves multiple properties in a community and their need for wastewater treatment, while a septic system typically only involves wastewater associated with a property where it is located.

Balling Aff. 2-3, ¶ 5. This paragraph, as written, is nothing but Balling's opinion. As Balling has not been qualified as an expert to give an opinion on what the differences between a sewer system and a septic system, paragraph 5 is stricken.

3. First Line of Paragraph 6

The first line of Paragraph 6 of the Affidavit of George Balling In Support of Motion for Summary Judgment states:

From these differences, it is my opinion that the Property does not utilize a septic system, rather it utilizes a sewer system, and that is why I checked the box "none/Not included" on page 2 of the Disclosure Form which is attached hereto as **Exhibit B** -- similar in fashion to the prior owner of the Property who sold us the Property in 2011 referencing that a septic system was "not applicable."

Balling Aff. 3, ¶ 6. This sentence states what Balling's personal opinion is, and does not contain expert testimony. Balling's personal opinion regarding these issues is material and relevant to the plaintiffs' claims. The first sentence of paragraph 6 is not stricken.

B. Defendants' Motion to Strike

Defendants move to strike Declaration of David Howe, Paragraph 9, which states:

"[b]ased on my review of the invoices attached hereto as Exhibit A, it would be very unlikely for George Balling and Mary Lancaster to be unaware that the Subject Property had a septic tank." Howe Decl. 3, ¶ 9. Defendants' claim that Paragraph 9:

contains speculation and conjecture, and it is not based upon personal

knowledge as required by Idaho Rule of Evidence 602. Additionally, Mr. Howe is not qualified as an expert under Idaho Rule of Evidence 702 to testify as to the Defendants' state of mind, nor is he able to offer opinion testimony under Idaho Rule of Evidence 701 due to his lack of personal knowledge of the Defendants and their understanding.

Defendants' Obj. to the Decl. of David Howe in Opp'n to Mot. for Summ. J. 2. This Court agrees with the defendants. Paragraph 9 is stricken.

C. Defendants' Motion for Summary Judgment

The Defendants in this case move this Court for an Order "dismissing the Plaintiffs' Complaint in its entirety and awarding the Defendants their attorneys' fees and costs in defending this matter." Mem. in Supp. of Mot. for Summ. J. 1. The plaintiffs claim that summary judgment cannot be granted because there are genuine disputes as to the material facts regarding: "(1) whether the sewage system at the Subject Property qualifies as a septic system, (2) whether Defendants knew or should have known they had a septic system, and (3) whether the Defendants had knowledge of a material defect with the sewage line which they failed to disclose in the sale."

Mem. in Opp'n. 2.

1. Because There Is an Issue of Material Fact Regarding the Fraud by Misrepresentation Claim, Defendants' Motion for Summary Judgment on this Issue is Denied.

The plaintiffs claim that the defendants made a statement of fact in the course of the real estate transaction "when they checked the 'None/Not Included' box for the Septic System line on the Disclosure Form," which was "false because the [] Property had septic system" and "material because it concerned the [] Property's ability to convey and dispose of sewage." Compl. 3, ¶¶ 12-14. The plaintiffs further claim that the defendants "knew the statement was false because they had the septic system inspected in 2017, were aware the [] Property utilized septic system, and became

aware of the defects in the septic system”, (*Id.* at ¶ 15), and that they “intended to induce reliance on the statement because it was disclosure of the [] Property’s condition made in connection with its sale” to the plaintiffs who were, “not in position to know of the [] Property’s sewage system and was ignorant of the falsity of the Statement” and thus relied on the defendants statement. *Id.* at 4, ¶¶ 16-20.

The defendants argue that the plaintiffs’ fraud claim fails as a matter of law because (1) “the [d]efendants’ selection of ‘not applicable’ regarding a septic system was not false,” (Mem. In Supp. of Mot. for Summ. J. 4), and (2) the “[p]laintiffs cannot establish the ‘speaker’s knowledge of the falsity’ element required for a viable fraud claim.” *Id.* at 5. More specifically, the defendants argue that:

The Property is serviced by the Hayden Sewer District, as evidenced by the monthly service fees and the final closing costs that the [d]efendants paid to the sewer district. Moreover, a septic system cannot exist at the Property because there is no drainfield or leachfield for a septic system to properly operate.

Id. at 4-5. Additionally defendants argue that:

[T]he statement made by the [d]efendants that a septic system was not applicable to the Property was true. Furthermore, even if they were somehow wrong about their conclusion that a septic system did not exist on the Property, at the time they executed the Disclosure System and made the statement that a septic system was not applicable they honestly believed that their Property was serviced by a sewer system and not a septic system as detailed at length in the Affidavit of George Balling which is filed in support of this Motion. When the [d]efendants purchased the Property in 2011, they were similarly informed via a disclosure form that a septic system was “not applicable” to the Property. Throughout the [d]efendants’ nine (9) years living at the Property, they understood that the Property was serviced by the Hayden Sewer District, and they paid monthly bills there for that service.

Defendants did not make a false statement to the [p]laintiffs, and even if they mistakenly did so, the [d]efendants did not know that the statement was false. Based on their understanding of septic systems versus sewer systems, the [d]efendants honestly and reasonably believed that the Property was serviced by a sewer system through the Hayden Sewer District, not a septic system.

Id. at 5-6.

In response, the plaintiffs argue that there are “genuine issues of material fact as to whether the statements made by the [d]efendants were false, and whether they knew they were false.” Mem. in Opp’n. 13. Specifically, the plaintiffs argue that “the statement that the [] Property is not serviced by a septic system is false [or] at the very least what constitutes a ‘septic system’ is a question for the finder of fact.” *Id.* at 10. In support of this assertion, plaintiffs claim that the:

Defendants were specifically aware of the septic tank/system at the Subject Property because they called out The Rooter Guys twice in the three years preceding the sale of the [] Property, once in 2017 and once in 2018. . . Defendants received invoices following both service calls by The Rooter Guys at the [] Property. . . Both invoices state that the sewage line is connected to a tank. . . The invoice from 2018 even states that The Rooter Guys ran a camera in the sewage line, found the belly right before the tank, and that he “showed customer.” . . . When all inferences which may be drawn from these facts are construed in the [p]laintiffs’ favor, a rational fact finder could find that the [d]efendants knew their representation was false. . .

Id. at 11. The plaintiffs additionally argue that it was unreasonable for the defendants to believe that the Property did not have a septic system because

Their argument requires the Court to find that ignorance of the truth defeats the fourth element of fraud. Instead, ignorance of the truth equally satisfies the fourth element. *Budget Truck Sales, LLC*, 163 Idaho at 847, 419 P.3d at 1145 (“(4) the speaker’s knowledge about its falsity or ignorance of its truth....”). . . Assuming *arguendo* that the Defendants lacked knowledge that having a septic tank does not amount to a septic system, there is the inference that they were sufficiently put on notice by their previous experiences with The Rooter Guys so that they should have been conscious of the potential for misrepresentation but turned their heads away and ignored it instead.

Id.

In Reply, the defendants argue that the “essential element” of each of plaintiffs’ claims is “whether the [d]efendants knew that the Property had a septic system or any existing material defects. Mr. Balling’s affidavit states that he did not know the property utilized a septic system, nor was he aware of any existing problems with the system.”

Defs.' Reply Br. 3-4.

The Idaho Supreme Court, in *G & M Farms* 119 Idaho 514, 518, 808 P.2d 851, 855 (1991), stated, "traditional I.R.C.P. 56(c) summary judgment principles and standards govern the granting of summary judgment on the issues of fraud and intentional misrepresentation." 119 Idaho at 518, 808 P.2d at 855. Thus, to prevail, a party need only show that they have presented sufficient evidence to create a material issue of fact as to each element. *Country Cove Development, Inc. v. May*, 143 Idaho 595, 600, 150 P.3d 288, 293 (2006).

Nine elements must be proved to sustain an action for fraud: (1) a statement of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent to induce reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) the hearer's right to rely; and (9) consequent and proximate injury. *Lettunich v. Key Bank Nat'l Ass'n*, 141 Idaho 362, 368, 109 P.3d 1104, 1110 (2005). The party alleging fraud must plead with particularity the factual circumstances constituting fraud, I.R.C.P. 9(b), and ultimately each of the elements must be proven by clear and convincing evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 518, 808 P.2d 851, 855 (1991).

County Cove Development, Inc., 143 Idaho 595, 600, 150 P.3d 288, 293 (2006).

However, the burden of clear and convincing evidence upon a party alleging fraud does not apply at summary judgment; rather, a party must only meet the traditional summary judgment principles and standards. *G & M Farms*, 119 Idaho at 518, 808 P.2d at 855.

The Idaho Supreme Court has held that:

Fraud may be predicated upon an equivocal, evasive or misleading answer calculated to convey a false impression even though it may be literally true as far as it goes. A partial and fragmentary disclosure accompanied by willful concealment of material and qualifying facts is not a true statement and is often as much a fraud as is an actual misrepresentation.

Morrow v. Wm. Berklund Forest Products Co., 81 Idaho 428, 437-38, 346 P.2d 623, 628-29 (1959) (quoting 55 Am. Jur., *Vendor and Purchaser*, § 88, pp. 563-64).

The elements for a Fraud by Misrepresentation claim, as listed above, require a showing of the “falsity” of a statement of fact and “the speaker’s knowledge of its falsity.” It can also be proven if the speaker was unaware whether the statement was true at the time that statement was made. See IDJI 4.6, ¶ 4. Here, there is a dispute between the parties if the defendants, when they sold the property to the plaintiffs, knew if there was a septic tank. While the defendants claim that they did not know, the plaintiffs claim that the defendants did know or should have known. Additionally, there is a dispute of fact as to whether defendants were unaware whether the statement was true at the time the statement was made. There is also a dispute between the parties if there is even a septic tank on the property.

While the Court will be the trier of fact in this matter, the court cannot assess credibility at the summary judgment stage when credibility can be tested in court during the trial. *Hilliard v. Murphy Land Co., LLC*, 158 Idaho 737, 742, 351 P.3d 1195, 1200 (2015), citing *Beus v. Beus*, 151 Idaho 235, 240, 254 P.3d 1231, 1236 (2011). While the Court can make inferences, the Court cannot make inferences which would subsume credibility determinations of witnesses at trial, subject to cross-examination. With such, the issues of material fact preclude the court from ruling on this matter, and the defendants’ motion for summary judgment on this issue is denied.

2. Because there are Genuine Issues of Material Facts Related to the Fraud By Omission Claim, Defendants’ Motion for Summary Judgment on this Claim is Denied.

The plaintiffs claim that while in a position where the defendants had a duty to disclose, the defendants made a partial statement of fact by stating that the Property had a sewage system, not a septic system, but that the defendants did not state what sewage system it did have or the condition of the system. Compl. 4. ¶¶ 11, 21- 26.

The defendants claim that they did not have a duty to disclose because they did not have a fiduciary relationship with the plaintiffs. Mem. in Supp. of Mot. for Summ. J.

6. Additionally, the defendants argue that:

Even if this was a partial statement of fact, it was not misleading. If there is no septic system at the Property, it must have clearly been serviced by a municipal sewer district. The closing documents from the sale indicate this as well. Finally, a duty to disclose could not have arisen . . . because the [d]efendants did not know that the Property allegedly has a septic system. When the [d]efendants purchased the Property in 2011, they were informed that it did not have a septic system, and for the nine (9) years that the [d]efendants lived at the Property, they paid monthly bills to the Hayden Sewer District to utilize municipal sewage services. Because the [d]efendants did not know that the Property allegedly has a septic system, they could not possibly have failed to disclose that fact to the [p]laintiffs.

Mem. In Supp. of Mot. for Summ. J. 6-7. In their Reply Brief, the defendants also point to the last invoice received from The Rooter Guys, which “stated that everything was working fine and there were no further problems with the system” to further show why there was not a duty to disclose. Defs.’ Reply Br. 5.

In response, the plaintiffs argue that there is a dispute as to if there was a duty to disclose the septic tank and sewer line that would preclude the defendants’ motion for summary judgment on this issue. Mem. in Opp’n. 13. ¶ B. The plaintiffs additionally argue that the defendants did have a duty to close, and that:

the [d]efendants had information which needed to be disclosed to prevent a partial statement of facts from being misleading. The [d]efendants made a partial statement of facts when they stated that the [] Property did not have a septic system, but they did not state what the sewage system was or that it was defective due to the presence of a belly that had required at least two clean-outs within just three years prior to the subject transaction. . .

There is sufficient evidence for a fact finder to find that the [d]efendants were aware that the [] Property’s sewage system had a belly in the line causing sewage backups located right before a septic tank, they did nothing to repair the belly, and they omitted that information during that sale to the [p]laintiffs. . . For the same reasons, presented above, there was also a fact known by one party and not the other that was so vital that if the mistake were mutual, the contract would be voidable, and the party knowing the fact also knows that the other does

not know it. The real estate transaction was between an informed seller and an uninformed buyer, and the seller knew that the buyer was uninformed about the issues affecting the property. The [d]efendants knew they had a defective septic system and they failed to disclose it. That is a fact so vital that it could have rendered the contract voidable had there been a mutual mistake. . .

Thus, the facts as alleged by the [p]laintiffs are sufficient to give rise to a duty to disclose and the issue should next go before the fact finder to determine if the disputed alleged facts are proven.

Id. at 13-14. (emphasis in original).

“With respect to fraud, it is the court that determines whether, as a matter of law, the facts asserted would give rise to a duty to disclose.” *Humphries v. Becker*, 159 Idaho 728, 736, 366 P.3d 1088, 1096 (2016) (citing *Printcraft Press, Inc. v. Sunnyside Park Util., Inc.*, 153 Idaho 440, 452, 283 P.3d 757, 769 (2012)). As correctly stated by both parties, a duty to disclose may arise:

(1) if there is a fiduciary or other similar relation of trust and confidence between the two parties; (2) in order to prevent a partial statement of the facts from being misleading; or (3) if a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party knowing the fact also knows that the other does not know it.

Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc., 153 Idaho 440, 452, 283 P.3d 757, 769 (2012) (See also *Humphries v. Becker*, 159 Idaho 728, 736, 366 P.3d 1088, 1096 (2015)). Omission of information may constitute fraud when a duty to disclose exists. *Sowards v. Rathbun*, 134 Idaho 702, 707, 8 P.3d 1245, 1250 (2000). “Whether there is a duty to disclose is a mixed question of law and fact. Whether the circumstances, if proved, would be sufficient to give rise to a duty to disclose is a matter of law. But once the court makes that determination, whether those circumstances were proved is a question of fact.” *Investor Recovery Fund, LLC v. Hopkins*, 167 Idaho 42, 48, 467 P.3d 406, 412 (2020) (citing *Printcraft Press, Inc. v. Sunnyside Park Utils., Inc.*, 153 Idaho 440, 453, 283 P.3d 757, 770 (2012)) (internal citations omitted).

Here, there are issues of material fact that preclude the Court, at this summary judgment juncture, from determining if the circumstances surrounding the alleged omission by the defendants were proven. As laid out above, the parties disagree if there is a septic tank on the property that would have needed to be disclosed. Further, there is an issue of fact if the disclosure, or lack thereof, would have been material. While the Court cannot determine these issues, the Court can determine if, as a matter of law, the circumstances, if proved, would be sufficient to give rise to a duty to disclose.

As stated by the defendants, there was not a fiduciary or other similar relation of trust and confidence between the two parties, as “a vendor-vendee relationship does not, by itself, create a fiduciary or other similar relation of trust and confidence.” *James v. Mercea*, 152 Idaho 914, 919, 277 P.3d 361, 366 (2012). However, a duty to disclose could have arisen here in order to prevent a partial statement of the facts from being misleading. If the plaintiffs were able to prove that the defendants’ indication that there was not a septic tank on the property was a partial statement of fact, and that the defendants did not disclose any further details to clarify this statement of fact from being misleading, then there would have been a duty to disclose.

With such, the Court finds that as a matter of law, there would have been a duty by the defendants to disclose the septic tank to the defendants. However, as stated above, there is an issue of material fact precluding the defendants’ motion for summary judgment on this issue. With such issue of material fact, defendants’ motion for summary judgment on this issue is denied.

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3. Because There Are Genuine Issues of Material Fact Regarding Plaintiffs' claim for Violation of the Idaho Property Condition Disclosure Act, defendants' Motion for Summary Judgment on this Issue is Denied.

The plaintiffs claim that the defendants, “willfully or negligently violated their duties” under the Idaho Property Condition Disclosure Act (“IPCDA”) (Idaho Code 55-2501 *et seq.*) by falsely indicating that there was not a septic system on the property, while they were “aware” one was present and “defective, causing sewage backups,” and by not correcting this false statement after making the disclosure. Compl. 5, ¶¶ III, 27-34.

The defendants argue that they did not breach the IPCDA because, “[d]isclosures under the IPCDA require a seller to disclose *existing problems* that are *known* to the seller,” and “it was not within the personal knowledge of the Defendants that the Property allegedly had a septic tank.” Mem. in Supp. of Mot. for Summ. J. 7. (Italicized emphasis in original). The defendants further argue that they, “in good faith and to the best of their knowledge disclosed that a septic system was ‘not applicable’ to the Property and that there were no issues with the existing sewage system.” *Id.* at 8.

In response, the plaintiffs argue, in part, that there “is a genuine issue of material fact as to whether the defendants made a false statement and failed to disclose a serious defect in the RE-25 Property Condition Disclosure Form.” Mem. in Opp’n. 15, ¶ C. (capitalization altered).

As discussed above, there is an issue of material fact regarding if the defendants knew that the Property contained a septic system. This issue goes to the credibility of the defendants’ testimony, and as such, cannot be decided by this Court at this summary judgment. For that reason, the defendants’ motion for summary judgment on

this issue is denied.

4. Because There Is a Dispute Of Material Fact As To Plaintiffs' Breach Of Implied Covenant Of Good Faith And Fair Dealing Claim, Defendants' Motion For Summary Judgment On This Claim Is Denied.

The plaintiffs claim that the defendants, "breached their duty of good faith and fair dealing by failing to disclose the type and condition of sewage system for the Subject Property." Compl. 6, ¶ 37. The defendants claim that they "could not have breached the covenant of good faith and fair dealing because they had no knowledge of any alleged misrepresentations made in the property condition disclosure form," and that "there is no evidence to show that the [d]efendants did not perform their obligations in good faith." Defs.' Reply Br. 6. Further stating that "Balling's affidavit emphasizes that the property condition disclosure form was answered to the best of their knowledge, and that if they had known of any problems, they would have been disclosed." *Id.*

In response, the plaintiffs assert that, at a minimum, there is a question of material fact regarding if the benefit received by the plaintiff was significantly impaired, arguing that:

Defendants misrepresented the presence of a septic system on the Subject Property and purposefully omitted the issue of the belly in the line when they sold the Subject Property to the Plaintiffs. The benefit to the Plaintiffs in this transaction is receiving the property they believed they were buying. That benefit is frustrated and diminished when the property purchased turns out to have a concealed defect causing raw sewage backups and continuing maintenance costs to pump out a septic tank. Plaintiffs had no desire to purchase a property which was serviced by a septic tank. Fields Decl. ¶ 6. Defendants' deceitful conduct significantly impaired the benefit of Plaintiffs' contract with the Defendants because the property they received is not what they believed they bargained for, it had a defective sewage system requiring repair and recurring maintenance costs. *Id.* ¶ 13; see Jacobson Decl. ¶ 8.

Mem. in Opp'n. 17.

As this Court has previously stated, there is a genuine issue of material fact regarding if the defendants knew of an alleged misrepresentation while selling the Property, to wit: if the Property contained a septic system and if the sewer system was damaged. These issues of material fact preclude the Court from ruling on this issue. With such, the defendants' motion for summary judgment on this issue is denied.

5. The Plaintiffs' Cause of Action for Violation Of The Idaho Consumer Protection Act Is Dismissed Because It Is Barred By The Statute Of Limitations.

The plaintiffs claim that the defendants, "as sellers of residential real property, engaged in unfair or deceptive acts or practices in the conduct of trade and commerce under I.C. 48-603 when they engaged in conduct that was false, misleading, or deceptive to Claudia Fields when they made the Statement." Compl. 6, ¶ 39. The plaintiffs do not include what statement they are referring to, but this Court assumes that it is a statement on the Property Condition Disclosure Form related to the septic system. The Defendants state that this claim must be dismissed because (1) the ICPA does not apply to sale of residential property, and (2) because the knowledge element of ICPA cannot be met. Specially, the defendants argue that:

To the extent a violation of the Idaho Consumer Protection Act ("ICPA") is pled in the [p]laintiffs' Complaint, it must fail because the ICPA is not applicable to the sale of one's residence. In *White v. Mock*, 140 Idaho 882 (2004), the Supreme Court of Idaho made a distinction between the application of the ICPA to the sale of one's residence versus the sale of investment property. The [Idaho] Supreme Court held that the ICPA only applied to the sellers in *White* because they were selling investment property. *Id.* at 891; see also *Tricore Invs., LLC v. Est. of Warren through Warren*, 168 Idaho 596 (2021) (holding the ICPA applicable to an estate selling property in order to repay a loan taken out to cover back taxes). Here, the ICPA is inapplicable because the Defendants were selling their residence that they had formerly lived in and occupied for nine (9) years. No part of the sale was for investment purposes, and the Plaintiffs cannot bring a claim under the ICPA. See *White*, 140 Idaho at 891.

Moreover, the ICPA requires a plaintiff to prove that the defendant

knew, or in the exercise of due care should have known that he was committing an act or practice declared unlawful by the ICPA. *Tricore*, 168 Idaho at 618. As described in depth above, the Defendants did not know, nor should they have known, that the Property had a septic tank connected to the sewage system. The Defendants were only aware that the Property had a properly functioning sewage system, for which they paid fees to the Hayden Sewer District to utilize.

Mem. in Supp. of Mot. for Summ. J. 9.

The plaintiffs respond that:

The relevant provision under which Plaintiffs have stated their claims is Idaho Code 48- 603, which declares that “The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful...” *Id.*

The terms “Trade” and “Commerce” are defined to “mean the advertising, offering for sale, selling, leasing, renting. . . of goods or services or distributing goods or services, either to or from locations within the state of Idaho, or directly or indirectly affecting the people of this state.” I.C. § 48-602(2) (emphasis added). Nothing within the text of I.C. § 48-602(2) adds a requirement that the seller cannot be an individual selling their home because home purchase is not an “investment.”

The Consumer Protection Act further defines “Goods” to “mean any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, including certificates or coupons exchangeable for such goods.” *Id.* at 602(6) (emphasis added). A homeowner who advertises their home, land, and private well system for sale in Idaho obviously qualifies as “any property” under the plain meaning of the statute. There is no statutory limitation that the property must be “investment property” before the CPA applies, and to add such a requirement would directly conflict with the plain meaning of “any” property.

Under the clear definitions of the statute, the Defendants are subject to the act because Defendants “advertised,” “offered for sale,” and “sold” real property “from within the State of Idaho.” Further, the sale of “any property” including “real” property is all that is required to subject a defendant to the CPA. All of the elements of the statutory requirements under the CPA have been pled and demonstrated. As such, Defendants’ Motion for Summary Judgment should be denied.

Defendants have argued that the case of *White v. Mock*, 140 Idaho 882 (2004) held that homeowners who sell their own residence are not subject to the act. However, the language that was quoted in support of Defendants’ argument was *dicta*, and is not a correct interpretation of the White Court’s actual holding. The *White* Court considered arguments based on case law from other jurisdictions that held that “investment property” sales would fall under other states’ consumer protection acts, while people making isolated sales of their own homes would not be covered by those states’ CPA claims. The *White* Court

ultimately rejected the argument that the Consumer Protection Act did not apply to real property transactions, and merely pointed out that even if it were to countenance the arguments based on other states' decisions, the District Court was correct to point out that the Defendant (Mock) had indeed sold "investment property" – thereby shooting down the Defendants' argument either way.

The trial Court in *White distinguished* Tennessee authority it considered, and the Idaho Supreme Court simply agreed that the non-binding authority from Tennessee was correctly distinguished. The White Court did not hold that homeowners selling their own property are not subject to the Act – it merely rejected the Mocks' argument that Idaho's CPA did apply to real property sales, especially where the Mocks were actually selling "investment property."

In Idaho, it would not be a reasonable construction of the CPA to read additional requirements into it that the legislature did not see fit to expressly include itself. Idaho's CPA has always been interpreted to protect businesses and people alike. The idea that a home is also not an "investment" is also questionable logic. Additionally, the recent decision on a summary judgment motion made by Judge Mitchell (in *Bilyard v. Andreola*, CV28-20-7096) denied a motion for summary judgment on a Consumer Protection Act claim in what was undisputedly a purchase of a residential home. *Id.* ¶¶. 28-30. To quote from Idaho Code § 48-601, Idaho's legislature has made it abundantly clear that the purpose of this act is to protect both consumers and businesses against unfair methods of competition and unfair or deceptive acts and practices in the conduct of trade or commerce, and to provide efficient and economical procedures to secure such protection. It is the intention of the legislature that this chapter be remedial and be so construed. I.C. § 48-601 (emphasis added).

This Court should follow the plain meaning of the Idaho Consumer Protection Act statute, and not add an exclusion for individuals selling or buying their own home. Further, even to the extent the Court might agree that selling one's own home—and nothing more—might exclude one from being subject to the [I]CPA, the additional acts undertaken by Defendants should still subject them to the [I]CPA. More specifically, the Defendants advertised the home for sale by listing the home on Realtor.com, they hired a real estate agent to represent them in the advertising, showing, and transaction. There was nothing private or discrete about the sale of the home—it was thrust into the stream of real estate commerce by listing with Realtor.com. There is therefore no dispute that Defendants "advertised," "offered for sale," and "sold" real property "from within the State of Idaho."

Making misrepresentations and concealing material defects in a real estate transaction amount to making a misleading, false, or deceptive representation under the ICPA. Here, Defendants misrepresented and concealed the quality of the Subject Property by concealing the defective sewage system in connection with the PSA as well as misleading the Plaintiffs about what type of sewage system it has.

Therefore, there is a genuine issue of material fact as to whether the Plaintiffs made misleading, false, or deceptive statements in violation of the ICPA and this Court cannot dismiss Plaintiffs' claim for a violation of the Idaho Consumer Protection Act on summary judgment.

Mem. in Opp'n. 17-21. In reply, the defendants claim:

liability cannot be found under the ICPA because the Act requires a plaintiff to prove that the defendant knew, or in the exercise of due care should have known that he was committing an act or practice declared unlawful by the ICPA. *Tricore Invs., LLC v. Est. of Warren through Warren*, 168 Idaho 596, 618 (2021). Plaintiffs have not presented any admissible evidence to rebut the fact that the Defendants did not have knowledge that the Property utilized a septic system because of the monthly bills they paid to the Hayden Sewer District, the lack of a drain field or leach field on the property, and the fact that they never had to have a tank cleared. Moreover, Defendants continue to dispute that the ICPA is even applicable to the sale of a residence.

Defs.' Reply Br. 6.

As a preliminary matter, as laid out above, there is an issue of material fact related to if the defendants knew or should have known that there was a septic tank on the property that precludes the Court from ruling on the defendants motion for summary judgment action. However, this Court will not discuss the merits of this claim further because, though not brought up by the defendants in this action, the Statute of Limitations for the plaintiffs to bring an action under the Idaho Consumer Protection Act has passed.

The statute of limitations for a private action under the ICPA is two years, and it begins to run after the cause of action accrues. I.C. § 48-619. The plain language of the statutory text provides that the clock begins to run upon the claim's accrual—not its discovery. (Compare this “accrue” wording to the “discovery” wording found in other statute of limitations- for example in a misrepresentation claim located in I.C. § 5-218(4).) “A cause of action accrues and the statute of limitations begins to run when a cause of action exists.” *Swafford v. Huntsman Springs, Inc.*, 163 Idaho 209, 212, 409 P.3d 789, 792 (2017) (quoting *Lido Van and Storage, Inc. v. Kuck*, 110 Idaho 939, 942, 719 P.2d 1199, 1202 (1986)). If no disputed issue of material fact exists, the date when

a cause of action accrues is a question of law. *Sommer v. Misty Valley, LLC*, 170 Idaho 413, 511 P.3d 833, 839 (2021) (citing *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 143, 75 P.3d 194, 197 (2003)).

The plaintiffs claim that the night of closing on the Property, or August 10, 2020, raw sewage began to spill back into the Property from a toilet on the lower level of the residence. Mem. in Opp'n. 2; 4, ¶ 6. It additionally seems that the plaintiffs brought this claim under the assertion that the statement made by the defendants on Property Condition Disclosure Report as the basis of the claim for a violation of the ICPA, which would have accrued on or before August 10, 2020.

Upon review of the ICPA claim elements, and without deciding whether the defendants violated the ICPA, the Court finds that, if the defendants did violate the ICPA, that violation occurred the night that the plaintiffs claim they noticed raw sewage leaked back into the Property on August 10, 2020, or, when the defendants allegedly made a misleading or false statement that violated the ICPA, which would have occurred on or before August 10, 2020.⁴ It was then that plaintiffs would have suffered any ascertainable injury, and that any cause of action accrued. The statute of limitations period, therefore, began to run from that date. As a result, plaintiffs' September 1, 2022, complaint was not timely, and their fifth cause of action related to a violation of ICPA must be dismissed.

IV. CONCLUSION AND ORDER.

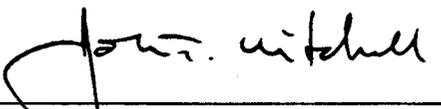
For the reasons stated above,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Strike is granted as to paragraph 5 and denied as to paragraph 4 and the first line of paragraph 6.

IT IS FURTHER ORDERED that Defendants' Motion to Strike is granted.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment is DENIED as to all but Plaintiffs' fifth cause of action. As to plaintiffs' fifth cause of action for violation of the Idaho Consumer Protection Act Summary Judgment is GRANTED as it is barred by the Statute of Limitations and therefore dismissed.

Entered this 23rd day of February, 2023.



John T. Mitchell, District Judge

Certificate of Service

I certify that on the 23rd day of February, 2023, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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<u>Lawyer</u>	<u>Email</u>
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Jeanne Clausen, Deputy Clerk

⁴ The plaintiffs claim that they received the Property Disclosure Form before the closing that occurred on August 10, 2020, but did not provide an exact date received.