STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JOSEPH P. O'NEAL,

Plaintiff,

vs.

ALBERT MUMFORD and MARCIA BELLES MUMFORD, husband and wife,

Defendants.

Case No. **CV 2012 5842**

MEMORANDUM DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION TO STRIKE

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendants' Albert and Marcia Mumford (Mumfords) motion for summary judgment.

On August 7, 2012, plaintiff Joseph O'Neal (O'Neal) filed his Complaint against Albert Mumford and Marcia Belles Mumford, husband and wife (Complaint, p. 1), (hereafter the "Mumfords") requesting rescission of a land sale contract, or in the alternative, damages, as well as pre-judgment interest, under the theory of fraudulent non-disclosure. The basis of O'Neal's complaint is the Mumfords sold him the property at issue, knowing the property was classified as non-buildable and the land itself was sliding, without disclosing this information to O'Neal. Complaint, p. 6. Mumfords filed their Answer on October 23, 2012, denying the pertinent allegations set forth in the Complaint. Answer, pp. 1-3. Mumfords raise various affirmative defenses. *Id.,* p. 3.

On January 15, 2013, Mumfords filed their Motion for Summary Judgment, Memorandum in Support of Summary Judgment, Affidavit of Marcia Mumford and Affidavit of Michael G. Schmidt. In their supporting memorandum, Mumfords state as grounds for granting summary judgment: 1) lapse of the applicable three-year statute limitations, 2) the doctrine of laches is applicable against O'Neal, 3) rescission is impossible as the house on the land has been demolished, 4) O'Neal had contractually assumed the risk concerning buildability issues because the property was sold as "land only." Memorandum in Support of Summary Judgment, pp. 10-19.

On January 29, 2013, O'Neal filed his Plaintiff's Response Memorandum along with the Affidavit of Greg D. Horne, Affidavit of Joseph P. O'Neal and Affidavit of Sherryl Anne Cummings ("significant other" to Joseph P. O'Neal, Cummings Affidavit, p. 2, ¶ 3). O'Neal claims: 1) the statute of limitations has not lapsed because the cause of action for fraudulent non-disclosure is discovery of the facts constituting the fraud and this discovery did not occur at the time of the sale (as the Mumfords claim) but later on, putting this lawsuit within the applicable statute of limitations, 2) the doctrine of laches does not apply because O'Neal did not unreasonably delay in asserting his rights as he did not discover the defects until February 2012, and, additionally, silence alone is not determinative, 3) rescission is an available remedy because there was no value placed on the residence on the property; in fact, it was a liability, removed by O'Neal, to the benefit of Mumfords, and 4) O'Neal did not assume the risk because there was no agreement O'Neal would conduct his own inspection, nor was there a duty to inspect, and the representation by Mumfords that the land was sold "as is" is false, the contractual language was "land only" which is not synonymous with "as is." Plaintiff's Response Memorandum, pp. 8-16.

On February 5, 2013, Mumfords filed their Reply Memorandum in Support of Motion for Summary Judgment in which Mumfords reiterate their positions and further state O'Neal has failed to introduce admissible evidence that would support his claims. Reply Memorandum in Support of Motion for Summary Judgment, p. 1. Further, Mumfords claim they did not have a duty to disclose the geotechnical report already prepared of their own accord because I.C. § 55-2502 (Property Condition Disclosure Act) only applies to residential real property, which is not the type of property at issue. Reply Memorandum, p. 4. Mumfords state O'Neal's subjective belief that the geotechnical issues only included "sinking", and that the issue of "sliding" was never voiced, and as such, O'Neal's silent assumptions should not be held against the Mumfords. Reply Memorandum, pp. 5-6.

On January 31, 2013, Mumfords filed a Motion to Strike any statements to the effect that the entire property is unsuitable for building, alleging that such testimony is expert testimony and there exists no foundation for such testimony and that this testimony is based on hearsay reports, or in the alternative, particular statements based on the foregoing allegations. Motion to Strike, pp. 2-3. With this motion, Mumfords also filed a Motion to Shorten Time so that the Motion to Strike could be heard the same day as the Motion for Summary Judgment. Motion to Shorten Time, p. 1. Mumfords base this motion on the argument that the Motion to Strike is based on statements from affidavits filed by O'Neal, fourteen days before the hearing for the motion for summary judgment. *Id*. On the morning of February 11, 2013, the day before oral argument on Mumfords' Motion for Summary Judgment and Mumfords' Motion to Strike, this Court received O'Neal's "Plaintiff's Response to Motion to Strike", in which O'Neal claims that the Idaho Rules of Evidence support his contention that the

offered evidence is not hearsay and that the record is sufficient to classify O'Neal as an expert. Plaintiff's Response to Motion to Strike, pp. 1-8.

At the February 12, 2013, hearing on Mumfords' motion for summary judgment, this Court scheduled this case for trial on October 7, 2013. O'Neal has requested a jury trial in this case. Complaint, p. 8.

II. STANDARD OF REVIEW.

A. Motion to Strike.

There is an underlying issue that must be primarily addressed; that of Mumfords' Motion to Strike. The Idaho Supreme Court has made it clear that before a motion for summary judgment can be decided, the Court must address the admissibility of expert testimony. *Suhadolnik v. Pressman*, 141 Idaho 110, 114, 254 P.3d 11, 15 (2011). The Supreme Court has also made it clear that the applicable standard of review is an abuse of discretion standard. *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC*, 144 Idaho 219, 221-22, 159 P.3d 856, 858-59 (2007). The "liberal construction and reasonable inferences standard" does not apply in such a case. *Suhadolnik*, 141 Idaho 110, 114, 254 P.3d 11, 15. Mumfords seek to strike portions of the affidavits of O'Neal, Gregory Horne (Horne) and Cummings. Motion to Strike, pp. 1-5.

B. Summary Judgment.

In considering a motion for summary judgment, the Court may properly grant a motion for summary judgment only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*,

145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and conclusions in the non-moving party's favor, and if reasonable people could reach different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

However, if the evidence shows no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2002). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id*.

In ruling on the motion, the Court considers only material contained in the affidavits and depositions which are based on personal knowledge and which would be admissible at trial. *Samuel*, 134 Idaho 84, 88, 996 P.2d 303, 307. Summary judgment is appropriate where a non-moving party fails to make a sufficient showing to establish the existence of an element essential to its case when it bears the burden of proof. *Id.*

III. ANALYSIS.

A. Motion to Strike.

As mentioned above, on January 31, 2013, Mumfords filed their "Motion to Strike", seeking to strike portions of the affidavits of O'Neal, Gregory Horne (Horne) and Cummings. Motion to Strike, pp. 1-5. O'Neal responded on February 11, 2013, by filing "Plaintiff's Response to Motion to Strike." Inexplicably, O'Neal filed this response

on the eve of oral argument on both the Motion for Summary Judgment and the Motion to Strike, and eleven days *after* Mumfords filed their Motion to Strike.

1. Opinions by O'Neal.

With regards to O'Neal's affidavit, Mumfords seek to strike any opinions or assertions by O'Neal regarding the remedial measures taken by Mumfords concerning the residence, including bracing and gabion baskets, and the Mumfords' *purpose* of those remedial measures (O'Neal says such measures would have been used to address *sinking* and not *sliding* forces; Affidavit of O'Neal, p. 2, ¶ 5) as Mumfords argue O'Neal has not set forth any information in his affidavit that would qualify him as an expert in such matters. Motion to Strike, p. 2. Indeed, O'Neal's affidavit does not set forth any information regarding his qualification as an expert. O'Neal argues that the record in its entirety is sufficient to qualify him as an expert. Plaintiff's Response to Motion to Strike, p. 2, ¶ 3. However, this Court finds there is nothing to contradict O'Neal's claim that he is in fact an "experienced builder" and O'Neal has built "hundreds of homes", as O'Neal stated in his response to interrogatories posed by Mumfords (Affidavit of Michael G. Schmidt, Exhibit A, pp. 3-4, Answers to Interrogatories 15 and 17). However, such does not make O'Neal an expert in soils, slides, soil stabilization, and the ability to build on this site. The determination of whether or not a witness is sufficiently qualified to testify as an expert is discretionary with the trial court. *State v. Hopkins*, 113 Idaho 679, 681, 747 P.2d 88, 90 (Ct.App. 1987). Idaho Rule of Evidence 702 sets forth the standard for admissibility of expert testimony and states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or

otherwise." I.R.E. 702. Idaho has interpreted those five qualification areas ("knowledge, skill, experience, training, or education") as disjunctive, and has held that academic training is not always necessary and that practical experience or special knowledge or training in a related field may suffice. *Id*. In this case, in Plaintiff's Answers to Defendants' First Set of Interrogatories, submitted in the record as Exhibit A in Michael Schmidt's (Schmidt) affidavit, Interrogatory 15 asks O'Neal to identify all "homes, structures or other improvements that Plaintiff has constructed as a building during Plaintiff's career as a builder." Schmidt Affidavit, Exhibit A, Plaintiff's Answers, p. 11. O'Neal's answer is, "Plaintiff has built hundreds of homes, many commercial buildings and two R.V. resorts. All were built in Arizona, with the exception of two houses in Idaho." *Id*. In Plaintiff's Responses to Defendants' First Set of Requests for Admission, also submitted in the record as Exhibit A in the Affidavit of Michael G Schmidt, O'Neal admits Request for Admission No. 17, which states "Admit that Plaintiff is an experienced builder." However, the Court finds such admissions are insufficient under I.R.E. 702 to qualify O'Neal as an expert in the areas to which his affidavit is pertinent: soils, slides, soil stabilization, and the ability to build on this site. While practical experience can qualify a witness as an expert witness, O'Neal's admission that he is an experienced builder who has built hundreds of homes does not qualify as practical experience as to the pertinent areas of soils, slides, soil stabilization and the ability to build on this site. O'Neal has not stated one single past occasion where soils were a problem or factor in any of the "hundreds of homes" he has built (regardless of whether in Arizona or in Idaho), and O'Neal has not stated how many homes he has even built on a hillside such as in the present case. Idaho Rule of Evidence 702 has simply not been met. While O'Neal can certainly testify about *what* he observed, O'Neal's testimony on his opinion on the *purpose* of what he observed is not allowed.

2. Kootenai County Documents.

Mumfords next seek to strike portions of O'Neal, Cummings and Horne's affidavits related to documents received from Kootenai County regarding the property being unbuildable, as well as the documents themselves, which have been attached to the affidavits as exhibits. Motion to Strike, p. 2. Mumfords base their motion on the grounds of hearsay and lack of authentication. *Id*. The documents which Mumfords claim are inadmissible hearsay include: the May 19, 1999, Geotechnical Report of Professional Engineer, F.C. Budinger, to Marcia Belles (Mumford) and Al Mumford (O'Neal Affidavit, Exhibit B); the April 19, 2000, Memorandum from David R. Daniel, Building Official to the Kootenai County Assessor (*Id.,* Exhibit C); assessor documents (*Id.,* Exhibit D); the County's Inspection Record regarding the parcel in dispute; the April 4, 2000, David R. Daniels' (Kootenai County Building Department) letter to Albert Mumford; the September 29, 2000, Nik Bently's (Kootenai County Building Department) letter to Marcia Belles; and a December 20, 1999, letter from Marcia Belles and Albert Mumford to the Kootenai County Building Department (Horne Affidvavit, Exhibit A). Motion to Strike, pp. 3-4. Further, Mumfords wish to strike any reference or conclusions drawn from those documents. *Id.*

As to all of the above reports, all are documents which were not generated by any of the affiants. O'Neal claims these are adoptive admissions under I.R.E. 801(d)(2)(B), and thus, not hearsay. Idaho Rule of Evidence 801 deals with hearsay definitions and specifically identifies statements which are not hearsay in I.R.E. 801(d). Idaho Rule of Evidence 801(d)(2) regarding admissions by party-opponents specifically states:

> The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its

> truth, or (C) a statement by a person authorized by a party to make a statement concerning the subject, or (D) a statement by a party's agent or servant concerning a matter within the scope of the agency or employment of the servant or agent, made during the existence of the relationship . . .

I.R.E. 801(d)(2).

O'Neal argues that with regard to statements about the County having determined the entire property to be "unstable and not advisable for future development," such a statement is not hearsay under I.R.E. 801(d)(2)(B), because it is an adoptive admission via a statement of which the party has manifested an adoption or belief in its truth. Plaintiff's Response, p. 3. Idaho appellate case law is not clear on whether reference to statements or documents of another fall under this rule, but federal case law has, and as F.R.E. 801(d)(2)(B) is virtually identical to I.R.E. 801(d)(2)(B), this Court will look to federal case law. The Third Circuit Court of Appeals has held that cross-reference to documents, in answering an interrogatory, adopts the contents of the documents as answers to the interrogatories. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 301 (3rd Cir. 1983), overruled on other grounds by *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 106 S.Ct. 1348 (1986).

A case from the First Circuit Court of Appeals, *Pilgrim v. Trustees of Tufts College*, 118 F.3d 864 (1st Cir. 1997) is instructive. In *Pilgrim*, the plaintiff wished to submit a grievance report (central to his claim) as part of his summary judgment motion but the trial court found it inadmissible as a "collection of multi-level hearsay statements." 118 F.3d 864, 869. Without the report, the plaintiff's claim did not survive summary judgment and he appealed, arguing that the report was not hearsay, but instead an adoptive admission under F.R.E. 801(d)(2)(B). *Pilgrim*, 118 P.3d 864, 869-

70. The Court stated that the correct approach where documents are concerned is asking whether "the surrounding circumstances tie the possessor and the document together in some meaningful way." *Pilgrim*, 118 P.3d 864, 870. The Court held that the plaintiff had carried his burden to the extent that the plaintiff accepted and acted upon the evidence. *Id*. The Court further held that the defendant's acceptance of the contents of the report and his implementation of its recommendations, without disclaimer, served as an adoption of the report for purposes of F.R.E. 801(d)(2)(B). *Id*.

In this case, Marcia Mumford, in her affidavit states that, "By June of 1999 – and at our request – the County determined that the lot was not buildable in its present state. As such the County applied the non-buildable rate for assessment purposes." Affidavit of Marcia Mumford, p. 2, ¶ 3. Marcia Mumford also stated in her affidavit that "[f]rom 1999 forward the property was listed with the county as "Non-Buildable", and the yearly assessments and property valuations reflected this non-buildable rate. This classification was part of the public record . . ." Affidavit of Marcia Mumford, p. 2, ¶ 4. It would appear that Mumfords requested the County determine that the lot was not buildable and that Mumfords made that request of the County with the intent to save on yearly tax assessments. Essentially, Mumfords accepted the contents of the County's report, that their property was not buildable (at least in its present state), and further reaped tax benefits from those findings. Thus, Mumfords have adopted the County's report (O'Neal Affidavit, Exhibit C), and the other documents which were sent by Mumfords to the County or by the County to Mumfords (Horne Affidavit, Exhibit A), as the truth and so it is admissible under I.R.E. 801(d)(2)(B) as an adoptive admission, as well as any reference to such document by O'Neal.

With regard to professional opinions, specifically the Budinger report (O'Neal Affidavit, Exhibit B), Marcia Mumford states that "based upon extensive communication

with geotechnical engineers that I had while attempting to salvage the home we had built on the property, I understood the property was absolutely capable of being made "buildable" with adequate engineering and remedial efforts," and "[i]n trying to save the residence we received a number of professional opinions which were not always in agreement with one another." Affidavit of Marcia Mumford, p. 2, ¶ 5, p. 3, ¶ 8. Again, it appears Mumfords took their geotechnical engineers' report as the truth and acted upon it by 1) attempting to remedy the issue via remedial measures such as floor jacks and retaining walls and 2) deciding to put the property up for sale, as they had determined the residence could not be saved. In adopting those conclusions, Mumfords have adopted the geotechnical report submitted by Budinger & Associates, and as such, the Budinger report is not hearsay under I.R.E. 801(d)(2)(B). Any reference to that report is not hearsay.

There is a hearsay objection regarding documents entered as exhibits under Horne's affidavit, including: 1) a County Inspection Record for the property, 2) a letter dated April 4, 2000, from the Kootenai County Building Department (KCBD), David R. Daniels, to Albert Mumford, 3) a letter dated September 29, 2000, from the KCBD, Nik Bentley, to Marcia Belles, and 4) a December 20, 1999, letter from Mumfords to KCBD. Plaintiff's Response Memorandu, p. 7. As to the letter from Mumfords to the KCBD, it is an admission by a party-opponent under I.R.E. 801(d)(2)(A), as the Mumfords were the authors of the letter. As to the inspection report and letters from the KCBD, they are exceptions to hearsay under the business records exception, as they are documents prepared by KCBD or agents thereof and kept in the course of a regularly conducted business activity because they are simply letters regarding the subject property. However, there is an issue though with regard to authentication under that specific

section (as opposed to authentication under I.R.E. 901, which is a different issue), as I.R.E. 803(6) states:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, *all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11)* . . .

I.R.E. 803(6), emphasis added.

The Idaho Supreme Court has held that:

> Because records of regularly conducted activity are not normally self proving, as public records may be under Rule 803(8), the testimony of the custodian or other person who can explain the record keeping of the organization is ordinarily essential.

Large v. Cafferty Realty, Inc., 123 Idaho 676, 683, 851 P.2d 972, 979 (1993).

In this case, the only information we have as to the authentication of these documents as required under I.R.E. 803(6) is that Horne allegedly received them from KCBD via facsimile. Affidavit of Horne, p. 2. There has been no affidavit submitted by a purported custodian of the records for KCBD. As such, the authentication requirement of I.R.E. 803(6) has not been met and the documents are not admissible under this rule.

There may be an argument that these documents are public records admissible under I.R.E. 803(8). However, no such assertion has been made as to these documents to this Court. It is also unclear from the record, specifically Horne's affidavit, whether these documents are indeed filed as public records. Thus, the Court does not have sufficient information to determine whether these documents can be admitted under I.R.E. 803(8). Additionally, "Unlike the comparable Federal Rule of Evidence, Idaho R. Evid. 803(8) does not provide a hearsay exception for public records of

findings from special investigations of a particular incident. *See e.g., Jeremiah v. Yanke Mach. Shop, Inc.,* 131 Idaho 242, 953 P.2d 992 (1998)." D. CRAIG LEWIS, IDAHO TRIAL HANDBOOK, §19.6, p. 372 (Second Ed. 2005).

However, the Court cannot see why these letters and records by Kootenai County Building Department are not adoptive admissions under I.R.E. 801(c)(2)(B), just as the Budinger report itself is an adoptive admission. The letter dated April 4, 2000, from the Kootenai County Building Department (KCBD), David R. Daniels, to Albert Mumford, references the Budinger report, and the letter dated September 29, 2000, from the KCBD, Nik Bentley, to Marcia Belles, references the April 4, 2000, letter, which reference the Budinger report. The Court is at a loss to explain the relevance of the County Inspection Record; however, relevance is not part of the motion to strike.

As to the authentication of the above documents, that matter is handled by I.R.E. 901(b)(7) which states that evidence that "a purported record, report, statement or data compilation, in any form, is from the public office where items of this nature are kept" is an example of authentication which is in conformity with the Idaho Rules of Evidence. The general rule is whether there is sufficient evidence to support a finding that the matter in question is what its proponent claims. I.R.E. 901(a). In this case, O'Neal states in his affidavit that he went to the County to investigate whether the entire property was classified as unbuildable and that during the course of the investigation discovered copies of the geotechnical report as well as a County memorandum regarding that report. Affidavit of O'Neal, p. 5, ¶¶ 16-17. Though it is implied that these documents were filed with the County, O'Neal's affidavit never expressly states such. Thus, I.R.E. 901(b)(7) is not complied with; O'Neal has not established that the Budinger report is a "public record or report." However, the Budinger report was addressed to the Mumfords; it pertains to the property in dispute; it is unequivocally

what the proponent claims it to be. As to the reports attached to Horne's Affidavit, he identifies those as coming from Kootenai County. Thus, as to those documents, O'Neal has not complied with I.R.E. 901(b)(7).

Finally, there is an objection to O'Neal's statement regarding when O'Neal learned that the entire property was classified as unbuildable from Cummings (O'Neal's significant other). Motion to Strike, p. 4. O'Neal's statement is: "I first learned that the entire property was classified as unbuildable in February of 2012 from Sherryl Anne Cummings." O'Neal Affidavit, p. 5, ¶ 16. Mumfords claim this is two levels of hearsay. Motion to Strike, p. 4. The first portion of that sentence is not hearsay and will not be stricken. The only portion that is hearsay, and must be stricken due to its hearsay nature, is the attribution "…from Sherryl Anne Cummings." O'Neal claims the statement should be admitted as it was not offered for the truth of the matter asserted, but arguably to show the effect on the listener, O'Neal. Plaintiff's Response to Motion to Strike, p. 4. This is a completely circular argument as the only way the effect on O'Neal is relevant is if the statement by Sherryl Anne Cummings was true. Cummings filed an affidavit. Cummings could have testified as to what she told O'Neal, and did not.

O'Neal's "expert opinions" are stricken, and O'Neal's attribution to Sherryl Anne Cummings as to when and what she said are stricken. To that extent only is Mumfords' Motion to Strike granted. In all other aspects, Mumfords' Motion to Strike is denied.

B. Summary Judgment.

1. Further Factual Background.

In this case, it appears undisputed that the Mumfords purchased the property in 1997 (Memorandum in Support of Motion for Summary Judgment, p. 2, ¶ 1; Affidavit of Marcia Mumford, p. 1, ¶ 2), and attempted to build a home on it. Memorandum in Support, p. 2, ¶ 2; Affidavit of Marcia Mumford, p. 2, ¶ 3. Mumfords then state that in

June of 1999, the County determined that the property was not buildable in its present state; thus, it applied the non-buildable rate for tax purposes. *Id*. From 1999 on, Mumfords state that the property continued to be listed with the County as "Non-Buildable" and that such was public record. Memorandum in Support of Motion for Summary Judgment, p. 2, ¶ 3. It is also undisputed that on August 8, 2007, Mumfords sold the property to O'Neal and delivered a warranty deed to that effect. Memorandum in Support, p. 6, ¶ 18; Plaintiff's Response Memorandum, p. 2, ¶ 2. Further, it is undisputed that O'Neal visited the property prior to his purchase, and observed some remedial measures for the residence, including bracing on the house, gabion basket retaining walls and cribbing and floor jacks under the house. Plaintiff's Response Memorandum, pp. 3-4, ¶ 1; Memorandum in Support of Motion for Summary Judgment, p. 4, ¶ 10. O'Neal also admits that he observed a notice on the window that the house had been condemned. Plaintiff's Response Memorandum, p. 4, ¶ 1. Both parties admit that prior to the sale Mumfords and O'Neal met with Loretta Hartman and Karl Hartman (Hartmans), real estate agents, on July 2, 2007, to discuss the status of the property. Plaintiff's Response Memorandum, p. 4, ¶ 2; Memorandum in Support of Motion for Summary Judgment, p. 5, ¶ 12. O'Neal admits Loretta Hartman was the joint real estate agent for Mumfords and O'Neal; Affidavit of Michael G. Schmidt, Exhibit A, Plaintiff's Responses to Defendants' First Set of Reqeusts for Admision, p. 5, Request for Admission No. 20, 22. O'Neal admits he told Mumfords of his plan to place a dock on the property and park his houseboat there. Plaintiff's Response Memorandum, p. 4, ¶ 2; Memorandum in Support of Motion for Summary Judgment, p. 6, ¶ 14. O'Neal also admits that prior to the purchase he saw that the listing of the property stated that "County requires geotechnical report." Plaintiff's Response Memorandum, p. 5, ¶ 7. O'Neal acknowledges that the land was sold as "vacant land" as well. *Id.*, p. 5, ¶ 8.

Finally, O'Neal admits that after purchase of the land he demolished the residence. *Id.,* p. 6. That is where the undisputed facts end.

O'Neal admits he visited the property prior to the sale and saw the remedial measures taken by Mumfords, but O'Neal states he assumed, in his alleged experience as a builder, they were there to fix "sinking" rather than "sliding." Plaintiff's Response Memorandum, pp. 3-4, ¶ 1. The parties also disagree on the matters discussed during the meeting on July 2, 2007. O'Neal admits that Mumfords did explain they had tried to save the house but that they did not discuss such in detail and further never mentioned that the ground was in fact "sliding." *Id.,* p. 4, ¶ 2. While the parties seem to create a factual issue between "sinking" and "sliding", this Court is at a loss to see the relevance of such distinction. At this point, no party has brought forth any expert testimony explaining such difference. What is obvious is there was a soils stability problem when O'Neal purchased, and O'Neal admits he saw all the evidence of such soils stability problem. The soils stability problem obviously involved the structure built on the property, clearly visible when O'Neal purchased. The structure was built on a slope. The most logical movement for soils on a slope is "sliding", not "sinking". O'Neal has not explained the geologic anomaly that would have caused this soil (and the structure built upon it) which exists on a slope to "sink" toward the center of the earth and not "slide" off the slope.

There are additional factual disputes that are perhaps more significant. O'Neal claims Mumfords did not tell him that it was up to him to determine what needed to be done to render the property buildable. *Id*. On the other hand, Mumfords claim they fully advised O'Neal of the remedial measures they had attempted in an effort to save the house and that it was up to O'Neal to determine what needed to be done to make the land buildable. Memorandum in Support of Motion for Summary Judgment, p. 5, ¶ 13.

Mumfords claim that both they and Loretta Hartman stated multiple times that the "land is sliding." *Id*. Mumfords also claim O'Neal gave the impression that the only interest O'Neal had in the land was to park his house-boat there. *Id.,* p. 6, ¶ 14. O'Neal admits that he told Mumfords about the houseboat, but denies that he told Mumfords that was the only reason he wanted the land and further states that he had plans to build a residence, though it appears he did not convey this information to Mumfords. Plaintiff's Response Memorandum, p. 4, ¶ 2. Further, O'Neal claims that Mumfords did not inform O'Neal that geotechnical engineers had been consulted regarding the property and did not disclose that a geotechnical survey existed for the property. *Id.,* pp. 4-5, ¶¶ 3-4. O'Neal also alleges that prior to the sale no one had told him that the entire parcel of land was unbuildable. *Id.,* p. 5, ¶ 6. O'Neal argues this omission of information caused him to believe that the instability of the land only applied to the footprint of the residence, rather than the entire parcel. *Id.*, p. 10.

O'Neal argues that the first he learned that the entire parcel was classified as non-buildable was in February 2012, when his significant other, Sherryl Anne Cummings (Cummings) put the land up for sale and a potential buyer informed Cummings that the entire parcel had been classified as such by the Kootenai County Assessor. *Id.,* p. 2, ¶ 4. O'Neal states that upon learning this, he conducted an investigation at the County, where he found copies of a Geotechnical Report for the property conducted by F.C. Budinger, P.E., dated May 19, 1999, which stated that "the only reasonably safe alternative is very expensive, the cost of which may approach or exceed the value of the property." *Id.*, p. 3, ¶¶ 7-8. O'Neal also discovered a Memorandum dated April 19, 2000, from David R. Daniel, a Kootenai County Building Official, which stated that the house had "begun to slide down the hill and is continuing

to slip, rendering it unsafe. The remaining property is unstable and not advisable for any future development." *Id.,* p. 3, ¶¶ 9-10. Finally, O'Neal states that the assessment notices for the property from 2007-2012 do not disclose that the property was classified as unbuildable. *Id.,* p. 3, ¶ 12.

2. Statute of Limitations.

The applicable statute of limitations for a claim of fraud is three years. I.C. § 5-218. The cause of action for fraud accrues upon "discovery, by the aggrieved party, of the facts constituting the fraud." I.C. 5-218(4). As such, the statute does not begin to run until the plaintiff "knew or reasonably should have known of the facts constituting the fraud." *McCorkle v. Northwestern Mut. Life Ins. Co.,* 141 Idaho 550, 554-55, 112 P.3d 838, 842-43 (Ct.App. 2005). Actual knowledge of the fraud will be inferred if the "allegedly aggrieved party could have discovered it by the exercise of due diligence." *Nancy Lee Mines, Inc. v. Harrison*, 95 Idaho 546, 547, 511 P.2d 828, 829 (1973).

However, later Idaho appellate cases have clarified that "discovery" means the point in time when the plaintiff had actual or constructive knowledge of the facts constituting the fraud. *McCoy v. Lyons*, 120 Idaho 765, 773, 820 P.2d 360, 368 (1991); *McCorkle*, 141 Idaho 550, 555, 112 P.3d 838, 843. It does not depend on when the plaintiff should have been aware that something was wrong. *Id*. Furthermore, Idaho appellate courts have made it clear that the question of when the plaintiff discovered the fraud is generally a question of fact properly submitted to the jury. *McCoy v. Lyons*, 120 Idaho 765, 774, 820 P.2d 360, 369. Idaho appellate courts have stated that summary judgment on the issue of discovery is only appropriate "if there is no factual dispute about when this discovery occurred." *Id*. The Court further stated that determination of when a party reasonably should have discovered the facts constituting

the fraud is a question of material fact, "which by its very nature, is inappropriate for determination on a motion for summary judgment." *Id*. Thus, it is a well-established rule that where there is conflicting evidence as to when the cause of action for fraud accrued, the issue is for the trier of fact. *McCoy*, 120 Idaho 765, 774, 820 P.2d 360, 369; *Full Circle, Inc. v. Schelling*, 108 Idaho 634, 638, 701 P.2d 254, 258 (Ct.App. 1985); *Jones v. Runft, Leroy, Coffin & Matthews, Chartered*, 125 Idaho 607, 615, 873 P.2d 861, 869 (1994).

In *Nancy Lee*, the stockholders were suing the mining company alleging fraud surrounding two assessment sales. 95 Idaho 546, 546, 511 P.2d 828, 828. The central issue in *Nancy Lee* was whether the statute of limitations barred the cause of action under I.C. § 5-218. *Nancy Lee*, 95 Idaho 546, 547, 511 P.2d 828, 829. The Court found against the stockholders, quoting a Washington Supreme Court case, *Davis v. Harrison*, 25 Wash.2d 1, 157 P.2d 1015 (1946):

> [w]e hold that this action was barred by the three year statute of limitations, whether appellants had actual knowledge of the various transactions or not, for the reason that the facts were open and appeared upon the records of the corporation, subject to inspection by stockholders. If the stockholders failed to examine the corporate records, they must have been negligent and careless of their own interests. The means of knowledge were open to them, and means of knowledge are equivalent to actual knowledge.

Nancy Lee, 95 Idaho 546, 547, 511 P.2d 828, 829. The Idaho Supreme Court went on to add that in the case at hand, the stockholders were notified of the assessments and of the subsequent assessment sales and had access to the corporate records pursuant to statute. 95 Idaho 546, 547-48, 511 P.2d 828, 829-30.

The Idaho Supreme Court squarely addressed the holding in *Nancy Lee* in its *McCoy* opinion. The Idaho Supreme Court in *McCoy* acknowledged its holding in *Nancy Lee* that actual knowledge of the fraud can be inferred, but stated that in

subsequent cases, the Court has noted Idaho courts "should hesitate to infer knowledge of fraud." 120 Idaho 765, 773, 820 P.2d 360, 368. Further, the Court in *McCoy* stated the discovery rule applicable to fraud requires more than an awareness that something may be wrong, but instead requires knowledge of the facts constituting fraud. *Id*. It requires more than a mere recognition that something is wrong and the commencement of an investigation. *Id*. Such was consistent with the legislature's policy on the discovery of not inferring fraud too readily. *Id*. *McCoy* was a case in which a legal malpractice action was brought involving the sale of an estate. The Idaho Supreme Court held that numerous factual disputes existed, including conflicting appraisals and allegations inconsistent with depositions; thus, summary judgment was not proper. 120 Idaho 765, 775, 820 P.2d 360, 370.

In *Full Circle, Inc. v. Schelling*, 108 Idaho 634 (Ct.App. 1985), a case involving a fuel contract, the Idaho Court of Appeals held that reasonable minds could differ on the date the fraud was discovered, where the fuel company claimed that the date was when the fuel bills were sent to the farmer and the farmer claimed the date was afterwards, presumably when he discovered there appeared to be a discrepancy between the amount of fuel consumed and the amount of fuel he was billed for. 108 Idaho 634, 638, 701 P.2d 254, 258.

In *Jones v. Runft, Leroy, Coffin & Matthews*, 125 Idaho 607, 873 P.2d 861 (1994), the Idaho Supreme Court held a factual dispute existed when no clear statement was found in the record before the court regarding an alleged fraud by a law firm, as the depositions submitted indicated that the plaintiff could not remember when they became aware of the alleged fraud. 125 Idaho 607, 615, 873 P.2d 861, 869.

A case in which the court found that knowledge of the fraud could be inferred is *DBSI/Tri V v. Bender*, 130 Idaho 796, 948 P.2d 151 (1997). That case involved a real estate sale in which the buyer claimed that though it knew that the representations by the seller were false at an earlier date, they were unable to show the seller's knowledge of the falsity of the representations, an element of fraudulent misrepresentation; thus, the statute of limitations under I.C. § 5-218(4) was tolled until its discovery of the seller's knowledge. *DBSI/Tri V*, 130 Idaho 796, 807, 948 P.2d 151, 162. The Idaho Supreme Court held that the buyer could have stated a cause of action using circumstantial evidence to show intent to defraud, as the auditors in the case had given the buyer detailed information which was held to be sufficient to put anyone on notice of each of the required elements of fraudulent misrepresentation, including the fact that the books and records were incorrect, there were problems with certain account balances, the seller had commingled funds, management fees were excessive, and the lender had warned the seller about improper management. *DBSI/Tri V*, 130 Idaho 796, 807-08, 948 P.2d 151, 162-63. The Court stated that all of this information threw sufficient suspicion on the sale that the buyer should have called for an explanation; thus, it held that the buyer had discovered the facts constituting fraud at the earlier date, and thus, the statute of limitations had run on its claim. *DBSI/Tri V*, 130 Idaho0 796, 808, 948 P.2d 151, 163.

As the above cases indicate, this Court should hesitate to infer knowledge of fraud in this case. *McCoy*, 120 Idaho 765, 773, 820 P.2d 360, 368. While *Nancy Lee* does state that actual knowledge of fraud can be inferred if the aggrieved party could have discovered it by exercising due diligence, that case also involved a fact pattern where the stockholders actually had received notice of both the assessments

themselves and the sales thereof. 95 Idaho 546-547-48, 511 P.2d 828, 829-30. *DBSI* involved a purchaser of a business who had actually received detailed information directly from auditors that certain discrepancies were present. 130 Idaho 796, 807-08, 948 P.2d 151, 162-63.

In this case, it has not been shown, nor has it even been alleged by Mumfords that O'Neal actually received notice directly from them that the entire land parcel was unbuildable. Nor has it been alleged that O'Neal received such information from a third-party source until February 2012, when O'Neal claims to have been informed of the land's classification. The only things the Mumfords allege are: 1) O'Neal saw the condition of the residence, including the remedial measures taken, which should have put O'Neal on notice that something was wrong, 2) assessments sent to O'Neal included the applicable non-buildable rate, which should have put O'Neal on notice, 3) the listing stated that the County required a geotechnical report, which should have put O'Neal on notice of the possible issues with the land, and 4) during the contract negotiations, Mumfords repeatedly told O'Neal that the land was "sliding," and had informed O'Neal of the extensive efforts they had made to save the residence. Memorandum in Support, pp. 11-13.

There are fatal flaws for Mumfords on summary judgment. First, O'Neal denies Mumfords gave him any of the alleged information discussed above. Thus, there is an issue of disputed fact and a conflict in evidence as to what O'Neal may have been informed of at the time of the negotiations. Second, O'Neal also states that the assessments do not have any "non-buildable" classification on them for the property, in direct conflict with Mumfords' allegations. Such conflicts, as *McCoy* clearly states, require the question of discovery to go to the jury. Third, Mumfords claim the above issues should have put O'Neal on notice that something was wrong that perhaps

warranted further investigation. This argument fails under *McCoy*, which states that discovery of fraud requires more than just an awareness that something may be wrong, but requires actual knowledge of the facts constituting fraud. Actual knowledge of the fraud presumably did not occur until February 2012. Thus, under *McCoy*, the statute of frauds under I.C. § 5-218 has not yet run and thus does not bar O'Neal's cause of action.

Mumfords cite foreign case law, *Holland v. Thompson*, 338 S.W.3d 586 (Tex.App. 2010). *Holland* involved a dispute over the sale of mineral rights where the seller claimed that the buyer had misrepresented that the mineral wells were "played out." 338 S.W.3d 586, 590. In analyzing the statute of limitations argument by the buyer, the Texas Court stated that "the discovery rule only applies when the nature of the plaintiff's injury is both inherently undiscoverable and objectively verifiable." *Holland*, 338 S.W.3d 586, 594. The Texas Court went on to say that the existence of public documents made the injury discoverable and so held that the statute of limitations barred the seller's claim.

In this case, Mumfords invite this Court to take on the discovery rule set forth by Texas and apply it here. However, this more stringent take on the discovery rule is simply not the law in Idaho. As noted above, Idaho has chosen to take a more liberal approach to the discovery rule, that mere notice that something is wrong is not enough and that actual discovery, which is not to be found lightly, is the required standard.

3. Doctrine of Laches.

The doctrine of laches is an affirmative defense, one in which the party asserting the defense (Mumfords in the present case) has the burden of proof. *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002). Whether or

not a party is guilty of laches is a question of fact. *Id., Huppert v. Wolford*, 91 Idaho 249, 256, 420 P.2d 11, 18 (1966). The four elements of laches are: 1) defendant's invasion of plaintiff's right, 2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit, 3) lack of knowledge by the defendant that plaintiff would assert his rights and 4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred. *Henderson v. Smith*, 128 Idaho 444, 449, 915 P.2d 6, 11 (1996). Laches is an equitable defense. Thus, in determining whether the doctrine applies, the trier of fact must consider all surrounding circumstances and acts of the parties. *Id*. However, the lapse of time alone is not controlling on whether laches applies. *Id*.; *Thomas*, 137 Idaho 352, 359, 48 P.3d 1241, 1248. Also, silence alone by the plaintiff is not sufficient to lead the defendant to conclude that the plaintiff would not assert his rights, particularly when there are other factors that would lead the defendant to believe that the plaintiff would assert his rights. *Clontz v. Fortner*, 88 Idaho 355, 359, 399 P.2d 949, 953 (1965); *Henderson*, 128 Idaho 444, 449, 915 P.2d 6, 11. Even when the elements of laches have been shown, the court may consider whether a less drastic remedy than dismissal is appropriate. *Winn v. Eaton*, 128 Idaho 670, 676, 917 P.2d 1310 (Ct.App. 1996).

In this case, even if the Court assumed that the first element of laches is met (that of Mumfords' invasion of O'Neal's rights), it is not clear, at least at summary judgment, that Mumfords can conclusively prove the remaining three elements.

The second element is a delay in O'Neal's rights, O'Neal having notice and an opportunity to institute suit. Here, given the above analysis, O'Neal may not have had notice of Mumfords' invasion of his rights until February 2012. This lawsuit was filed on August 7, 2012. Particularly since the statute of limitations is three years, delay cannot

be found, given that only six months passed between O'Neal's claim of "discovery" and the filing of his Complaint. Thus, the Court cannot find on summary judgment that the second element of laches has been met.

Even if the Court could find the second element to be met, Mumfords cannot at summary judgment satisfy the third element of lack of knowledge by Mumfords of O'Neal asserting his rights, because Mumfords had knowledge of the land's condition, and that condition was not likely to change, and because Mumfords stated that they believed O'Neal was simply going to park his houseboat there. Memorandum in Support, p. 6, ¶ 14. Thus, the third element fails, at least at the present time.

Finally, the fourth element, prejudice or injury to Mumfords, is not met on summary judgment, as the Mumfords have stated that they are no longer able to salvage the house as O'Neal tore it down. However, Mumfords have not explained how damages could not be sought to compensate for this.

The Idaho Supreme Court has held that the application of the doctrine of laches is a question of fact. *Huppert v. Wolford*, 91 Idaho 249, 256, 420 P.2d 11, 18 (1966). As such, it is not likely a suitable candidate for summary judgment. Therefore, under the foregoing analysis, the argument by Mumfords regarding application of the doctrine of laches fails at the present time.

4. Rescission.

The remedy of rescission requires that the party seeking to rescind a transaction on the ground of fraud must restore or offer to restore the other party to the status quo before the contract was formed. *Watson v. Weick*, 141 Idaho 500, 507, 112 P.3d 788, 795 (2005). The party seeking rescission must act promptly once the grounds for rescission arise. *White v. Mock*, 140 Idaho 882, 888, 104 P.3d 356, 362 (2004). "Once a party treats a contract as valid after the appearance of facts giving rise to a right of

rescission, the right of rescission is waived." *Id*. (quoting *Farr v. Mischler*, 129 Idaho 201, 205, 923 P.2d 446, 450 (1996). The Idaho Supreme Court noted in *White* that remodeling efforts of a plaintiff on a house rendered rescission an impossibility, as rescission requires restoration to the status quo. 140 Idaho 882, 888, 104 P.3d 356, 362. However, in that case, the contract presumably included the buildings on the land.

In this case, the contract stated multiple times that the contract was a land-only sale. Marcia Mumford in her affidavit states that the contract had a special addendum which stated "PURCHASER IS AWARE PROPERTY IS BEING SOLD AS LAND ONLY." Affidavit of Marcia Mumford, p. 5, ¶ 16. Furthermore, Marcia Mumford states that the Seller's Property Disclosure Form had large, handwritten, all-capitalized letters across the sections of the disclosure that would typically include information about a residence. Affidavit of Marcia Mumford, p. 5, ¶ 17. It is clear from the contract and its attachments that the sale between Mumfords and O'Neal was not contemplated to include the residence, but for the "vacant" land only. It could be argued that the demolition of the house in this case is comparable to the remodeling efforts in *White*.

Improvements made to property prior to rescission of a contract is not always conclusively determinative that rescission is not available. In *Brooks v. Jensen*, 75 Idaho 201, 218, 270 P.2d 425, 437 (1954), the Idaho Supreme Court held that rescission was warranted and that the buyers, in addition, were entitled to payments made as well as the value of the improvements they had made, less the reasonable rental value of the land. The Idaho Supreme Court has also held that the making of minor improvements, such as leveling or the erection of irrigation borders, does not constitute waiver of rescission. *Summers v. Martin*, 77 Idaho 469, 472, 295 P.2d 265, 269 (1956); *Sorensen v. Larue*, 47 Idaho 772, 777, 278 P. 1016, 1018 (1929).

However, in this case, the alleged "improvement" made to the land was the demolition of the house. This appears to be a much larger "improvement" than the construction of an irrigation border or the leveling of part of the land. It is the complete destruction of the residence. While it is true that the house was condemned, there was salvageable material from that house, including the upper floor, which O'Neal stated he had originally planned to use an alternative residence site. Thus, it would appear to be more than just a small improvement as contemplated by *Brooks,* and though the contract was for "land only", the drastic nature of the alleged "improvement" appears to be more akin to the situation in *White*. Furthermore, Mumfords claim that O'Neal has not offered to return them to the status quo, and on that ground alone, the argument for rescission fails. Reply Memorandum, p. 12.

Thus, for the above reasons, O'Neal's claim for rescission as a remedy is not viable. Summary judgment on this ground is appropriate.

5. Assumption of Risk.

Assumption of risk is generally a question of fact for the jury, and becomes a question of law only when the evidence is reasonably susceptible of no other interpretation than that the injured party assumed the risk. *Williams v. Collett*, 80 Idaho 462, 466, 332 P.2d 1032, 1034 (1958). In order to be deemed to have assumed the risk, the injured person must be shown to have: 1) known the facts, and 2) appreciated the danger. *Id.* However, this doctrine has not been adjudicated in Idaho in the arena of land contract disputes or fraud.

Mumfords have submitted foreign case law from the federal courts, *Niecko v. Emro Marketing Company*, 769 F.Supp 973 (E.D.Mich. 1991). The Court in *Niecko* held that a contract for the sale of a former gas station site which contained an "as is"

disclaimer protected the seller from contractual liability and fraudulent concealment as each party in that case represented to each other that the buyers would conduct their own investigation of the property and no warranties were contemplated in the sale. 769 F.Supp. 973, 980.

While the federal court's position on "as is" clauses is well taken, it is not necessary to apply that position at all as the instant case is clearly distinguishable from *Niecko.* Specifically, the contract in this case had no "as is" clause or really anything akin to such a clause. What the contract in this case does state is that the sale is a "land only" sale. Such a representation does not automatically transform the language into an "as is" contract. Thus, it is not necessary to determine whether to apply the holding in *Niecko*.

As stated above, there is conflicting evidence as to what representations were made to O'Neal by Mumfords. Mumfords claim they informed O'Neal many times that the land was "sliding" and that they fully disclosed their efforts regarding the residence. However, O'Neal claims that in fact they did not disclose everything and further did not produce the previous geotechnical reports made on the property or even mention that prior reports existed. Based on the factual discrepancies here, and keeping in mind that under *Partout* inferences must be made in light most favorable to O'Neal, there is no basis to decide the issue of assumption of the risk in favor of Mumfords on summary judgment. The issue must be submitted to the jury for a determination of the facts. Summary judgment on this issue must be denied.

6. Failure to Introduce Admissible Evidence.

In order to establish fraud, nine elements must be shown: 1) a representation of fact, 2) its falsity, 3) its materiality, 4) the speaker's knowledge of its falsity, 5) the speaker's intent that the representation will be acted upon in a reasonably

contemplated manner, 6) the listener's ignorance of its falsity, 7) the listener's reliance on the truth of the representation, 8) the listener's right to rely on the truth of the representation, and 9) the listener's consequent and proximate injury. *McCoy v. Lyons*, 120 Idaho 765, 777, 820 P.2d 360, 372 (1991).

In their Reply Memorandum, Mumfords have submitted the argument that O'Neal has failed to introduce admissible evidence to support his claim of fraudulent non-disclosure, particularly if this Court granted Mumfords' Motion to Strike. Reply Memorandum, p. 1. As mentioned above, the Motion to Strike is denied in most aspects. Also, as stated above, there is contradicting evidence as to what was stated during the sale negotiations between Mumfords, O'Neal, and Loretta Hartman (the joint real estate agent for Mumfords and O'Neal; Affidavit of Michael G. Schmidt, Exhibit A, Plaintiff's Responses to Defendants' First Set of Reqeusts for Admision, p. 5, Request for Admission No. 20). Representations made or not made are at the heart of this action.

7. Duty to Disclose.

Finally, Mumfords argue that no duty to disclose exists in this case because I.C. § 55-2502 (Property Condition Disclosure Act) does not apply here because this sale was for "vacant land only," not residential property, which is what I.C. § 55-2502 seems to contemplate. However, it is not necessary to analyze I.C. § 55-2502 because there may be another duty that can be found under the issue of fraud. *Saint Alphonsus Regional Medical Center, Inc. v. Krueger*, 124 Idaho 501, 508, 861 P.2d 71, 78 (Ct.App. 1992). A duty to disclose may arise when:

> (a) a party to a business transaction is in a fiduciary relationship with the other party; or (b) disclosure would be necessary to prevent a partial or ambiguous statement of fact from becoming misleading; or (c) subsequent information has been acquired which a party knows will make a previous representation untrue or misleading; or (d) a party knows a

> false representation is about to be relied upon; or (e) a party knows the opposing party is about to enter into the transaction under a mistake of fact and because of the relationship between them or the customs of trade or other objective circumstances would reasonably expect a disclosure of the facts.

Saint Alphonsus, 124 Idaho 501, 508, 861 P.2d 71, 78 (Ct. App. 1992).

It can be argued that a duty to disclose in this case arose from: 1) disclosure was necessary to prevent a partial or ambiguous statement of fact from becoming misleading (such as the statements regarding buildability or existence of geotechnical reports), 2) a party knew a false representation is about to be relied upon, or 3) a party knew the opposing party was about to enter into the transaction under a mistake of fact. It is unclear at this point what Mumfords knew O'Neal was relying upon, as there is conflicting testimony on both sides as to what representations were or were not made. Such conflicts necessitate that summary judgment is not proper in this case at this time.

8. Duty in General.

The issue of duty was argued at the February 12, 2013, oral argument. The issue of duty was not brought up in Mumfords' "Memorandum in Support of Motion for Summary Judgment," nor was it directly brought up in O'Neal's "Plaintiff's Response Memorandum." The closest thing to "duty" that is mentioned in O'Neal's responding memorandum is on page 10, where O'Neal claims: "[n]ot only Mumfords should have disclosed the Geotechnical study and County Memorandum in their meeting, but should also have made reference to them in the Seller's Property Condition form." Plaintiff's Response, p. 10. Mumfords then address in their Reply Memorandum the issue brought up regarding the Seller's Property Condition Form. Reply Memorandum, p. 4.

Mumfords argue in their Reply that no duty to disclose exists in this case because I.C. § 55-2502 (Property Condition Disclosure Act) does not apply here because this sale was for "vacant land only," not residential property, which is what I.C.

§ 55-2502 seems to contemplate. However, it is not necessary to analyze I.C. § 55-2502 because there may be another duty that can be found under the issue of fraud. *Saint Alphonsus Regional Medical Center, Inc. v. Krueger*, 124 Idaho 501, 508, 861 P.2d 71, 78 (Ct.App. 1992). A duty to disclose may arise when:

> (a) a party to a business transaction is in a fiduciary relationship with the other party; or (b) disclosure would be necessary to prevent a partial or ambiguous statement of fact from becoming misleading; or (c) subsequent information has been acquired which a party knows will make a previous representation untrue or misleading; or (d) a party knows a false representation is about to be relied upon; or (e) a party knows the opposing party is about to enter into the transaction under a mistake of fact and because of the relationship between them or the customs of trade or other objective circumstances would reasonably expect a disclosure of the facts.

Saint Alphonsus, 124 Idaho 501, 508, 861 P.2d 71, 78 (Ct. App. 1992).

It can be argued that a duty to disclose in this case arose from: 1) the fact that disclosure would be necessary to prevent a partial or ambiguous statement of fact from becoming misleading (such as the statements regarding buildability or existence of geotechnical reports), 2) a party knows a false representation is about to be relied upon or 3) a party knows the opposing party is about to enter into the transaction under a mistake of fact. It is unclear at this point what Mumfords knew O'Neal was relying upon. There is conflicting testimony on both sides as to what representations were or were not made. Such necessitates summary judgment is not proper at this time.

During oral argument, Mumfords made reference to a number of cases regarding duty. Specifically, Mumfords argued during oral argument that they did not breach their duty of disclosure because Mumfords did not mislead in their disclosures. Rather, Mumfords argue there was a unilateral mistake by O'Neal via his "silent" assumptions regarding the quality of the land. Reply Memorandum, pp. 4-7. Counsel for Mumfords indicated that this argument existed in Mumfords' briefing. In reality, the doctrine of

unilateral mistake is mentioned only once in Mumfords' Reply Memorandum and is not the focus of the argument but instead is buried in the memorandum and appears to be tacked on as an afterthought to the conclusion of Mumfords' written argument regarding duty. Reply Memorandum, p. 7. To support their singular mention of unilateral mistake, Mumfords cite one case in the Reply Memorandum, *Posey v. Ford Motor Credit Co.*, 141 Idaho 477, 111 P.3d 162 (Ct.App. 2005). While the Idaho Court of Appeals does address mutual mistake versus unilateral mistake in *Posey*, it is strictly in the context of the parol evidence rule, which is not an issue before this court. 141 Idaho 477, 482, 111 P.3d 162, 167. Specifically, the entirety of the quote, which is provided only in part by Mumfords, states, "[t]he mistake exception makes extrinsic evidence admissible to show that by reason of either mutual mistake or one party's unilateral mistake which is known to the other party, the written agreement does not express the parties' true intent." *Id*. Such a passage is neither helpful nor relevant to the case at hand.

At oral argument, Mumfords also introduced for the first time another case involving unilateral mistake, *Bailey v. Ewing*, 105 Idaho 636, 671 P.2d 1099 (Ct.App. 1983). In *Ewing*, the Idaho Court of Appeals simply defined mistake, both mutual and unilateral, and held that mutual mistake included situations in which the parties labor over differing misconceptions as to the same basic assumptions or vital fact. 105 Idaho 636, 639, 671 P.2d 1099, 1102. In that case, unilateral mistake was held to be not an issue, as it was determined that a mutual mistake had arisen; thus, unilateral mistake was not thoroughly examined. *Ewing*, 105 Idaho 636, 640, 671 P.2d 1099, 1103. This case, like the previous one, is not very helpful to this Court.

In response to Mumfords' argument, counsel for O'Neal introduced, also for the first time, a case, *Janinda v. Lanning*, 87 Idaho 91, 390 P.2d 826 (1964). *Janinda* involved the non-disclosure by seller of contaminants in the water supply to buyers and sets forth the duty of disclosure standard, specifically that "the duty of disclosure is required to be observed in cases involving latent dangerous physical conditions of land." 390 Idaho 91, 96, 390 P.2d 826, 829. The Idaho Supreme Court quoted from the Restatement of Contracts:

> . . . 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, non-disclosure is not privileged and is fraudulent.

Janinda, 87 Idaho 91, 96, 390 P.2d 826, 829. The Idaho Supreme Court went on to state that:

> Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all he must make a fair and full disclosure.

Janinda, 87 Idaho 91, 97, 390 P.2d 826, 830. The Idaho Supreme Court also noted a Washington State case, *Obde v. Schlemeyer*, 56 Wash.2d 449, 353 P.2d 672 (1960), which stated that "the attitude of the courts toward non-disclosure is undergoing a change and . . . it would seem that the object of the law in these cases should be to impose on parties to the transaction a duty to speak whenever justice, equity, and fair dealing demand it." 56 Wash.2d 449, 452, 353 P.2d 672, 675; *Janinda*, 87 Idaho 91, 98, 390 P.2d 826 830. These rules, and the principle behind them, are the current law in Idaho.

In oral argument, Mumfords' counsel pointed to one more case from Maryland, *Polson v. Martin*, 228 Md. 343, 180 A.2d 295 (Ct.App. 1962). In briefing it is not found

under the duty section, but as a footnote in the Mumfords' Memorandum in Support under its statute of limitations argument section. Memorandum in Support, p. 12. Nonetheless, it was argued in oral argument as a duty issue, pertaining to the statute of limitations, and so will be addressed under the duty issue. *Polson* involved a sale of a house which had been built on filled ground, without disclosure of such to the buyer. 228 Md. 343, 345, 180 A.2d 296. The Maryland Court of Appeals held that the buyer had observed the house on a number of occasions and the topographical information available to him should have alerted him to its condition and, as such, the seller did not owe the buyer a duty to disclose. *Polson*, 228 Md. 343, 349, 180 A.2d 295, 349. The relevant passage, on which Mumfords rely, states:

> Unless the seller of real estate, because of fiduciary or other similar relations of trust, is under a duty to disclose facts as to the property known to him but not to the buyer, generally he need not do so, particularly if those facts may be ascertained by the buyer by reasonable inspection or investigation, and the transaction is at arms length . . . In ordinary contracts of sale, where no previous fiduciary relation exists, and where no confidence, express or implied, growing out of or connected with the very transaction itself, is reposed on the vendor, and the parties are dealing with each other at arm's length, and the purchaser is presumed to have as many reasonably opportunities for ascertaining all the facts as any other person in his place would have had, then the general doctrine already stated applied: no duty to disclose material facts known to himself rests upon the vendor; his failure to disclose is not a fraudulent concealment."

Id.

While this may be the state of law in Maryland, it is not the state of law in Idaho. The Idaho Supreme Court's holdings in *Janinda* are contradictory to that of *Polson*, as the Court stated that a duty to disclose can be found, if the party volunteered information without full and fair disclosure. *Janinda*, 87 Idaho 91, 97, 390 P.2d 826, 830. Thus, the holding is *Polson* is not persuasive in this case.

Mumfords argued during oral argument that the holding in *Polson* is relevant because it stands for the proposition if the buyer is put on notice that issues are present and are equipped with the opportunity to determine the extent of those issues, then the clock for the statute of limitations begins running at that time. However, as stated above in *McCoy*, this is not the law in Idaho.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED O'Neal's "expert opinions" are stricken, and O'Neal's attribution to Sherryl Anne Cummings as to when and what she said are stricken. Mumfords' Motion to Strike is granted as to these two aspects only. In all other aspects Mumfords' Motion to Strike is denied.

IT IS FURTHER ORDERED Mumfords' Motion for Summary Judgment on O'Neal's rescission as a remedy is GRANTED.

IT IS FURTHER ORDERED all other aspects of Mumfords' Motion for Summary Judgment are DENIED.

Entered this 5th day of March, 2013.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2013, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Greg D. Horne	`	Michael G. Schmidt	664-4125

_____
Jeanne Clausen, Deputy Clerk