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**HEARING DATE/TIME:** November 18, 2005 at 9:00 a.m.  
before Judge Craddock Verser.

**SUPERIOR COURT OF WASHINGTON FOR KITSAP COUNTY**

**GREGORY P. NORBUT and  
MARGUERITE L. NORBUT, husband  
and wife,**

**NO. 02-2-02636-4**

**Plaintiffs,**

**v.**

**STEVEN JAEGER and SUSAN  
JAEGER, husband and wife, ERIC  
CLEAVER and JILL CLEAVER  
husband and wife, and CLEAVER  
CONSTRUCTION, a Washington  
corporation,**

**CROSS-DEFENDANTS CLEAVER AND  
CLEAVER CONSTRUCTION, INC.'S  
MOTION FOR SUMMARY JUDGMENT  
OR, IN THE ALTERNATIVE, FOR  
PARTIAL SUMMARY JUDGMENT RE:  
JAEGER CROSS-CLAIMS**

**Defendants,**

**[CR 56]**

**AND RELATED CROSS AND  
COUNTER-CLAIMS**

**I. RELIEF REQUESTED**

An Order dismissing Cross-Complainant Steven and Susan Jaegers' claims (Ex. "1" to Decl. of Eric Johnson) seeking recovery of alleged economic losses and emotional distress damages (Ex. "2" to Decl. of Eric Johnson) against Cross-Defendants Eric Cleaver; Jill Cleaver; and Cleaver Construction, Inc. or alternatively, for partial summary judgment on issues

**CROSS-DEFENDANTS CLEAVER AND CLEAVER  
CONSTRUCTION, INC.'S MOTION FOR SUMMARY  
JUDGMENT OR, IN THE ALTERNATIVE, FOR PARTIAL  
SUMMARY JUDGMENT RE: JAEGER CROSS-CLAIMS - 1**

**LAW OFFICES OF  
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1 presented. (Eric Cleaver and Jill Cleaver are referred to herein collectively as “Cleaver” and the  
2 defendant-corporation is referred to as “Cleaver Construction”)

3 **II. FACTS**

4 Cross-complainants Steven and Susan Jaeger purchased their home at 30202 Parcels  
5 Road on high-bank Kingston waterfront from Jill and Eric Cleaver in May 2001 for a contract  
6 sales price of \$383,000. (*Real Estate Purchase and Sale Agreement or “REPSA”*, attached as  
7 Ex. “3” to Decl. of Eric Johnson and separate *Real Property Transfer Disclosure Statement*,  
8 *NWMLS Form 17*, attached as Ex. “4” to Decl. of Eric Johnson. See also, *Appraisal Report*, Ex.  
9 “2” to Decl. of Robert W. Chamberlin and other photos and diagrams of the property attached as  
10 Exs. “-“ and “-“ to Declaration of Eric Johnson). Steven Jaeger although identified on record as  
11 a “married man” nonetheless took title to the property as his “separate estate”. (See *Statutory*  
12 *Warranty Deed recorded May 3, 2001*, Ex. “5” to Decl. of Eric Johnson and *REPSA*). This is  
13 because Susan Jaeger agreed to dissolve any right to a community property share in the subject  
14 property pursuant to Washington Administrative Code Section 458-61-340 by quit claim deed  
15 recorded May 3, 2001. (*Quit Claim Deed*, Ex. “5” to Decl. of Eric Johnson). Steven Jaeger was  
16 often out-of-town during transaction activities and therefore he designated Mrs. Jaeger as his  
17 “attorney-in-fact” so she could execute documents for the parties’ agreement in his absence.  
18 (*Special Power of Attorney*, Ex. “5” to Decl. of Eric Johnson; *Dep. of Susan Jaeger, 23:8-10;*  
19 *21:8-9* attached as Ex. “6” to Decl. of Eric Johnson; *Dep. of Steven Jaeger, 16:1-25; 17:1-15,*  
20 attached as Ex. “7” to Decl. of Eric Johnson).

21  
22 Mr. Jaeger was represented in the subject purchase by real estate agent Penny  
23 McLaughlin of ReMax Unlimited North in Poulsbo. The Cleavers were represented by agent  
24  
25

1 Linda Henry of Shamrock Realty, Inc. in Kingston. The settlement and exchange of title  
2 documents was handled for the parties by closing agent Tina Lucero of First American Title  
3 Insurance Company. (See Exs. "3", *REPSA*; and Ex. "8", *Preliminary Title Report with*  
4 *Recorded Documents* to Decl. of Eric Johnson).

5 The Preliminary Title Report (Ex. "8" to Decl. of Eric Johnson) for the transaction was  
6 issued to the Jaegers by First American Title on or about April 20, 2001 and contained copies of  
7 all recorded documents on title ("A.F. #: 9109110080 and 81) including, among other things, two  
8 geologic studies concerning the property prepared by a geologist named Will Thomas of  
9 Geological Consulting Services. Mr. Thomas had been retained by Cleaver to study the  
10 development potential of the Jaeger lot and two adjacent parcels as a short plat. (*Dep. of Eric*  
11 *Cleaver, 12:20-25; 13:1-25; 14:1-3; 17:1-24*, Ex. "11" to Decl. of Eric Johnson). Mr. Thomas's  
12 reports dated September 5, 1990 (included in Ex. "8" to Decl. of Eric Johnson) and January 1,  
13 1991 (included in Ex. "8" to Decl. of Eric Johnson) concerned two separate studies of the  
14 property over the span of several months.  
15

16 Susan Jaeger has testified that the Jaegers rushed the transaction and just wanted to buy a  
17 property quickly.<sup>1</sup> (*Dep. of Susan Jaeger, 13:1-25; 14:1-25*, Ex. "6" to Decl. of Eric Johnson).  
18 Mrs. Jaeger explains that she and her husband had been looking for a house to buy for about  
19

20  
21 <sup>1</sup> The Jaegers looked at the property the first and second time on a single day in April 2001 and made an offer of  
22 purchase on the same day. (*Dep. of Susan Jaeger, 17:12-16*, Ex. "to the Decl. of Eric Johnson as Ex. "7"). The  
23 sale was made contingent on obtaining a satisfactory inspection. (*Dep. of Susan Jaeger, 17:12-16*, Ex. "7"). The  
24 Jaegers reportedly walked the property with their inspector and Mr. Cleaver, but made no inquires of Mr. Cleaver  
about the property (at least that they could recall) or the Real Estate Property Disclosure Sheet dated April 2, 2001  
prepared by the Cleavers. (*Dep. of Susan Jaeger, 18:1-12*, Ex. "7"). As noted above, Mr. Jaeger was not present at  
the time the sale transaction closed and the transaction was completed by his designated attorney-in-fact, Susan  
Jaeger.

1 “two hours” when they decided to buy the Cleaver residence “on a whim”. (*Dep. of Susan*  
2 *Jaeger, 84:6-14*, Ex. “6” to the Decl. of Eric Johnson). Steven Jaeger has testified that he was  
3 provided with “recorded documents” prior to closing the purchase but could not recollect what  
4 he reviewed. (*Dep. of Steven Jaeger, 16:19-22; 16:23-25; 17:1-15*, attached as Ex. “7” to Decl.  
5 of Eric Johnson). A receipt for records subpoenaed from both Shamrock Realty and First  
6 American Title indicates that Mr. Jaeger picked up several documents from Shamrock’s offices  
7 including a “GEOTECH REPORT”. (*See Receipt*, Ex. “9” to Decl. of Eric Johnson and Decl. of  
8 Eric Johnson).

9  
10 Mrs. Jaeger does not recall ever seeing a title report (claiming they have yet to receive  
11 one); an appraisal report; or any recorded documents prior to closing. (*Dep. of Susan Jaeger,*  
12 *22:5-25; 23:1-17; 87:5-9; 14:6-22; 13:17-25*, Ex. “6” to the Decl. of Eric Johnson). Mrs. Jaeger  
13 apparently believes that she received geological information about the property prior to the  
14 purchase but claims she did not have “a chance” to review it until several weeks after the sale.<sup>2</sup>  
15 (*Dep. of Susan Jaeger, 22:5-25; 23:1-17*, Ex. “6” to the Decl. of Eric Johnson). Mrs. Jaeger  
16 characterizes herself as naive and inexperienced with the subject matter even though she  
17 admittedly participated in at least three prior real estate deals.<sup>3</sup> (*Dep. of Susan Jaeger, 12:2-25;*  
18 *13:1-6; 15:5-25*).

19 In addition to the geological studies (included in Ex. “8” to Decl. of Eric Johnson), the  
20 Jaegers also had other information about the property they planned to purchase including, among  
21

22 <sup>2</sup> Mrs. Jaeger has testified that she “didn’t even know what a geotech was. No. I’m sorry. I would now. But  
23 at that time, I looked at the view and we put a bid in. It was that simple.” (*Dep. of Susan Jaeger, 91:21-23*).

24 <sup>3</sup> Mrs. Jaeger also holds a Master’s Degree in Education. (*Dep. of Susan Jaeger, 5:3-12*)

1 other things, the NWMLS Form No. 17, *Real Property Transfer Disclosure Statement*; as well as  
2 other documents attached to the Preliminary Title Report such as the surveying reports by Adam  
3 & Goldsworthy, Inc. and related maps and diagrams of the property. (See Exs. "4" and "8" to  
4 Decl. of Eric Johnson). Mrs. Jaeger has testified that they did not examine the Form 17 with any  
5 thoroughness prior to the Jaegers' brief inspection of the property and that they did not give it to  
6 their inspector, Ron Perkerewicz. (*Dep. of Susan Jaeger, 19:21-25 and 20:1-5*, Ex. "6" to Decl.  
7 of Eric Johnson). At the time of the transaction, Mrs. Jaeger has testified that she was not  
8 concerned about potential problems with the property because they were having it inspected and  
9 she did not think that their mortgage company would fund the loan if there was anything "bad"  
10 about the property. (*Dep. of Susan Jaeger, 21:4-21*, Ex. "6" to Decl. of Eric Johnson). The Will  
11 Thomas reports, the Form 17, as well as other documents received with the Title Report provided  
12 the Jaegers with a wealth of information about the property, had they only taken the time to read  
13 them.

14  
15 First, Mr. Thomas's September 5, 1990 report (included in Ex. "8" to Decl. of Eric  
16 Johnson) contained, among other things, the following advice and recommendations about the  
17 subject property:

18 *The State of Washington, Department of Ecology, in the Coastal Zone Atlas of Kitsap*  
19 *County, designated the property to be within an area of shoreline that was "unstable*  
20 *and/or within an old slide area" and that "local recent slides" were also indicated.*  
21 *Mr. Thomas noted, however, that "in our opinion", the property lies within an old slide*  
22 *area that is stable at this time noting that: "[i]n our opinion, certain construction and*  
23 *drainage practices can be utilized to mitigate erosion and movement on slope" but*  
24 *cautioned that "where steep slopes are involved there can be no guarantee that*  
25 *conditions will not change, whether by natural processes or caused by man-made*  
*alteration of existing topography."*

1 *Thomas recommended that: "1) Subdrains be installed at the exterior of foundation*  
2 *walls. 2) All surface water feasible be collected and diverted to sub-drains. This*  
3 *includes roof water. 3) Water collected should be tight-lined to the beach. 4) Plant*  
4 *and maintain vegetation on bare slopes. 5) All grading be accomplished with minimum*  
5 *disturbance of natural conditions."*

6 *Thomas further recommended that: "[w]here residences are planned within 25 feet of*  
7 *the top edge of an abrupt slope, we recommend pier and grade-beam foundations for*  
8 *that portion of the foundation nearest the slope edge. Under no circumstance should*  
9 *the foundation be placed over the edge of a steep slope. Piers should be at least 4*  
10 *feet deep and spaced a maximum of 8 feet on center. Fill should not be placed over*  
11 *the edge of the existing steep slopes or otherwise disturbing the slopes in front of the*  
12 *residences."*

13 *Mr. Thomas also noted in this initial report that: "[w]e wish to emphasize that the*  
14 *primary culprit causing earth movement on slopes is water and/or over-excavating.*  
15 *This is true on presently undisturbed slopes, naturally disturbed, or where man has*  
16 *altered the natural drainage or infiltration of water. Therefore, proper construction*  
17 *practices and control of drainage is essential to minimize potential problems."*

18 *(Thomas Report dated 9/5/90, pg. 7, included in Ex. "8" to Decl. of Eric Johnson).*

19 In January 1991, Mr. Thomas revisited the subject property and made "*additional*  
20 *observations that are pertinent to development of the property"*. (*Thomas Report dated*  
21 *1/21/91, pg. 8, included in Ex. "8" to Decl. of Eric Johnson*). Mr. Thomas noted that ADA  
22 Engineering during survey work for the property established reference stations which aided him  
23 in locating and describing sensitive areas. Mr. Thomas reportedly used this information to  
24 make further "*conclusions and recommendations*" about the development potential of both the  
25 lower (near the beach) and upper areas of Lots A (the Jaeger lot); B (the Norbut lot) and C.  
With respect to the Jaeger property, Lot A, Mr. Thomas concluded that both the lower and  
upper portions of the land could be developed but that the lower portion required that an access  
road be constructed as well as a recommended bulkhead to prevent beach erosion. With respect

1 to the upper portion of Lot A, Mr. Thomas concluded that:

2 *"[t]he uplands portion of Lot A can be developed with proper, normal precautions such*  
3 *as installation of drainage collection systems which should be connected to established*  
4 *drainage west of the home sites."*

5 (*Thomas Report dated 1/21/91*, pg. 8, included in Ex. "8" to Decl. of Eric Johnson).

6 In 1992, Mr. Thomas reportedly revisited the site to evaluate whether collected water  
7 from a drainage system designed to serve the three lots should be moved to the Sound via a  
8 ravine or "natural drainage channel" at the north side of the property. In a report dated June  
9 23, 1992, Mr. Thomas recommended the use of the ravine utilizing a tight-line system  
10 because it was cost-effective and eliminated the potential adverse effect created if a tight-line  
11 routed directly over the "high-bank slope" separated. (*Thomas Report dated 6/23/92*, Ex.  
12 "10" to Decl. of Eric Johnson).

13 Cross-defendant Eric Cleaver has testified that in or about 1992, he began development of  
14 the short-platted lots (A, B and C) by installing a drainage system as guided by ADA  
15 Engineering's and Mr. Thomas's input and recommendations. (*Dep. of Eric Cleaver, pgs. 14-19*,  
16 Ex. "11" to Decl. of Eric Johnson). In or about the same year, Cleaver built a house on Lot "A"  
17 (now the Jaegers' property) and in or about 1993 and/or 1994, Cleaver constructed a "sports  
18 court" on the upper bench of Lot "A". (*Photos of Sports Court and Subject Slide Area*, Ex. "22"  
19 to Decl. of Eric Johnson). Surface or drainage waters<sup>4</sup> from the areas of the house and the sports  
20 court were collected and tight-lined to a catch basin on Lot "B" (now Norbuts' property) located  
21 near the Jaeger/Norbut property line and from there moved by tight-line to the Sound via the  
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23 \_\_\_\_\_  
24 <sup>4</sup> "Surface water" has been defined as vagrant or diffuse water produced by rain, melting snow or springs. See King  
25 County v. Boeing Co., 62 Wn.2d 545, 550 (1963).

1 “natural drainage channel” identified by Mr. Thomas. (*Dep. of Eric Cleaver*, pgs. 23-27, Ex.  
2 “11” to Decl. of Eric Johnson. See also, *Diagrams* of the system attached as Exs. “20” and “18”  
3 to Decl. of Eric Johnson).

4 On or about April 10, 2001, the Jaegers had the property they planned to purchase  
5 inspected by Ron Perkerewicz of Inspection & Permit Services of Bremerton who issued a  
6 written report. (*Perkerewicz Report*, included in *RESPA*, Ex. “3” to Decl. of Eric Johnson). Mr.  
7 Cleaver discussed with Mr. Perkerewicz and Mrs. Jaeger drainage issues and the importance of  
8 keeping the sports court sump working. (*Dep. of Eric Cleaver*, 68:9-25; 69:1-25; 70:1-25; 74:1-  
9 25; 75:1-3; 59:16-20, Ex. “11” to Decl. of Eric Johnson). Mr. Perkerewicz noted a few  
10 corrections in his written report including item “four” at the home’s exterior which noted that:  
11 “[t]he downspout at the south west corner needs to be connected to the underground drainage  
12 system.” (*Perkerewicz Report*, pg. 3, included in *RESPA*, Ex. “3” to Decl. of Eric Johnson).

13 On or about April 19, 2001, the Jaegers had the property appraised by Michael Graham  
14 Appraisal of Bainbridge Island who estimated the value of the “site” or land at \$120,000; and the  
15 “cost of reproduction of improvements” at \$280,003 for the house; \$11,734 for the garage and  
16 another \$6,380 for a “wood deck and sports court”. In a second section of the report, Mr.  
17 Graham indicates that the “sports court” was worth \$2,000. Citing comparables in the area and  
18 other calculations, Mr. Graham determined a total appraised value for the property of \$385,000.  
19 (*Appraisal Report*, Ex. “3” to Decl. of Robert W. Chamberlin).

20 In or about September or October 2001, months prior to the subject landslide, plaintiff  
21 and counter-defendant Gregory Norbut (plaintiff and Jaeger’s neighbor to the north) noticed that  
22 the catch-basin on his property serving a shared drainage system appeared to be clogged with  
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1 water and overflowing. (*Dep. of Greg Norbut 36:11-25; 37:1-25*, excerpts attached as Ex. “12”  
2 to Decl. of Eric Johnson; *Diagrams*, Ex. “20” to Decl. of Eric Johnson). Mr. Norbut summoned  
3 Mr. Jaeger and the two men inspected the catch basin and what appeared to be a breach in the  
4 system. In order to gain perhaps further insight about the perceived problem, both the Norbuts  
5 and the Jaegers asked Eric Cleaver to visit and inspect the system. Thereafter, Mr. Cleaver  
6 visited the property on two separate occasions in September and/or October 2001 and again  
7 identified the workings of drainage on the property to both Mr. Norbut and Mrs. Jaeger and again  
8 explained the utility of maintaining the sports court sump pump. (*Dep. of Eric Cleaver, pgs. 71-*  
9 *74:1-4*, Ex. “11” to Decl. of Eric Johnson; *Dep. of Susan Jaeger, 30:4-25; 31:1-24*, Ex. “6” to  
10 Decl. of Eric Johnson). The Norbuts, the Jaegers and Cleaver performed a dye test on the tight-  
11 line crossing the Norbuts’ lot to the north and determined that there was water moving through  
12 the drainage pipe. (*Dep. of Greg Norbut, 37:4-25*, Ex. “12” to Decl. of Eric Johnson).

13  
14 On or about December 17, 2001, the steep slope on Lot “A” sustained a landslide which  
15 party-experts have described as a “surficial slide” largely confined to fill soils (which had been  
16 placed by Cleaver to support the outside edge of the sports court). *Dep. of Thomas Gurtowski,*  
17 *40:13-25; pgs. 41-42; 53:18-25; 54:1-2*, excerpts attached as Ex. “13” to Decl. of Eric Johnson;  
18 *Dep. of Robert Cousins, 119:6-17; 125:17-25; 126:1-19*, excerpts attached to Decl. of Eric  
19 Johnson as Ex. “14”; *Dep. of Eric Cleaver, 86:13-25; 87:1-23*, Ex. “11” to Decl. of Eric  
20 Johnson). The parties’ experts also seem to concur that surface waters flowing off the sports  
21 court appears to have caused the subject slide activity; however, there is some disagreement  
22 about the possible source(s) of the water other than rainfall. (See *Dep. of Thomas Gurtowski,*  
23

1 **42:16-19; pgs. 81-84**, excerpts attached as Ex. "13" to Decl. of Eric Johnson; ***Dep. of Robert***  
2 ***Cousins, 57:23-25; 58:1-22***, excerpts attached to Decl. of Eric Johnson as Ex. "14").

3           Unfortunately, despite expert recommendations to perform testing to determine the  
4 precise source of the water on the sports court, any efforts to investigate various alleged sources  
5 of the water (other than the heavy rainfall that occurred just prior to the slide), were hampered  
6 and delayed by the Norbut/Jaeger dispute concerning Jaegers' claimed easement rights. (See  
7 ***Dep. of Steven Jaeger, 70:1-4; 76:21-25; 77:1-3; 85:22-25; 86:1-20***, attached as Ex. "7" to  
8 Decl. of Eric Johnson; ***Dep. of Thomas Gurtowski, pgs. 74 through 82*** and Ex. "11" to the  
9 Gurtowski deposition, an ***MDE Engineers, Inc. report dated May 13, 2002***, attached as Ex. "17"  
10 to Decl. of Eric Johnson).

11           The Norbuts would not acknowledge that the Jaegers had any right to move  
12 drainage/surface waters across their property and denied the Jaegers' access to their property to  
13 inspect and make necessary repairs. (***Dep. of Steven Jaeger, 70:1-4; 76:21-25; 77:1-3; 85:22-***  
14 ***25; 86:1-20***, attached as Ex. "7" to Decl. of Eric Johnson. See also Pleadings filed re: the  
15 ***Norbuts' and the Jaegers' Cross-Motions for Summary Judgment re: Quiet Title Action***, of  
16 which this court is requested to take judicial notice).

17           In the meantime and for over a year thereafter, the parties engaged in "quiet title"  
18 litigation while any issues concerning the condition of the drainage system, the slide area, and  
19 the recommended tests to determine cause were ignored. (***Dep. of Steven Jaeger, 70:1-4; 76:21-***  
20 ***25; 77:1-3***). After the Jaegers prevailed on cross-motions concerning the easement issue, the  
21 parties in or about March 2003, made a joint exploration of the tight-line crossing Norbuts' lot  
22 and found that it had become obstructed by what appeared to be damage to the tight-line inflicted  
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1 by a backhoe (probably suffered when the Norbuts installed their septic system). (*Dep. of Eric*  
2 *Cleaver, 42:11-24*, Ex. “11” to Decl. of Eric Johnson; *Dep. of Marty McCabe, 39:5-22*, excerpts  
3 attached as Ex. “16” to Decl. of Eric Johnson along with *URS Investigation Report dated March*  
4 *6, 2003*). There was speculation by the Jaegers that the clog in the tight-line located on the  
5 Norbut property had caused the system to back-up possibly into the Jaeger property and possibly  
6 all the way to the sports court via some unknown route. (*Dep. of Thomas Gurtowski, Pgs. 81-84*,  
7 Ex. “13” to Decl. of Eric Johnson) In order to test this hypothesis, the Jaegers’ expert(s)  
8 recommended that the Norbut catch basin be flooded to determine where the water went when  
9 the system’s tight-line on the Norbut property backed up. (*Id. See also Shannon & Wilson*  
10 *reports*, Ex. “18” to Decl. of Eric Johnson and *MDE Engineering (Randy Kent) report*, Ex. “17”  
11 to Decl. of Eric Johnson). For reasons largely unidentified these activities were never  
12 accomplished. Mr. McCabe has testified that there was some sensitivity about adding water to  
13 the system and that Mr. Norbut may not like such testing. (*Dep. of Marty McCabe, 51:6-25; pgs.*  
14 *52-54; 55:1-12*). However, these reasons appear unlikely given what happened next.

16 In or about late 2004 and early 2005, the Jaegers aided by their gardener, Lupe,  
17 completely altered the drainage system and elevations on their property without notifying the  
18 opposing parties and perhaps no one. (*Dep. of Marty McCabe, 110:13-25; pgs. 111-112*, Ex.  
19 “16” to Decl. of Eric Johnson and *E-mail from Counsel for Jaegers dated January 28, 2005*,  
20 Ex. “19” to Decl. of Eric Johnson) For example, the Jaegers removed their footing drains around  
21 their home and rerouted them. In or about 2004 and 2005, Mrs. Jaeger performed various tests  
22 on the system on her own with a hose. (*See Correspondence* between Susan Jaeger and Marty  
23 McCabe and McCabe’s “notes” and diagrams attached as Ex. “20” to Decl. of Eric Johnson). At  
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1 one location near the southeast corner of the Jaeger home, a pipe was reportedly discovered  
2 connected to the footing drain which was traced off the property in a southerly direction by Mr.  
3 McCabe. (*Dep. of Marty McCabe, pgs. 41-42*, excerpts attached as Ex. "16" to Declaration of  
4 Eric Johnson). Mrs. Jaeger attempted to determine whether the pipe was clogged by reportedly  
5 hosing water into it for ten (according to Mr. McCabe's deposition testimony) or twenty  
6 (according to his "notes") minutes and the water never backed up or reappeared, apparently  
7 traveling to parts unknown! (*Dep. of Marty McCabe, 178:15-25; 179:1-15; 181:23-25; 182:1-4*,  
8 Ex. "16" to Decl. of Eric Johnson). Today, the Jaegers' expert(s) contend that water backing up  
9 from the obstructed or damaged tight-line on the Norbut property made its way through the  
10 original footing drains and back to the southeast corner of the Jaeger residence. From that point,  
11 Mr. McCabe speculates that the water made its way to the sports court probably via the pipe that  
12 was unearthed by Mrs. Jaeger. (*Dep. of Marty McCabe, 110:8-11; pgs. 111-112; 123:13-25;*  
13 *pgs. 176-181; 182:1-4*, excerpts attached as Ex. "16" to Declaration of Eric Johnson). However,  
14 rather than collecting evidence to try and support this theory or providing notice to parties of the  
15 new physical evidence unearthed, the Jaegers (apparently with some participation by Mr.  
16 McCabe and/or Jaegers' lawyers) completely destroyed the evidence by removing and replacing  
17 the footing drains and burying the connector pipe which was discovered at the southeast corner  
18 and a similar pipe at the northwest corner. (*Dep. of Marty McCabe, 110:8-11; pgs. 111-112;*  
19 *123:13-25; pgs. 124-139; pg.176-181; 182:1-4*, excerpts attached as Ex. "16" to Declaration of  
20 Eric Johnson). Cleaver did not receive notice of these events and discoveries until Mr. McCabe  
21 was deposed on April 27, 2005. (*Decl. of Eric Johnson*).  
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1 The Jaegers (and others) activities in destroying/hiding evidence is aggravated by the fact  
2 that the Jaegers provided little or no response to Cleaver Construction's very specific written  
3 discovery requests propounded on or about November 15, 2004. (See Jaegers' Responses to  
4 Cleaver Construction First Set of Discovery Requests, Ex. "21" to Decl. of Eric Johnson). The  
5 Jaegers have also never provided any supplementary response despite their abundant discovery  
6 efforts that went on behind the scenes. (*Decl. of Eric Johnson*).

7 The house which Cleaver built (now the Jaegers' residence) is located on what party-  
8 experts have described as an upper plateau which unlike the lower slope area of Lot "A" was not  
9 formed or created by ancient landslide activity. (*Dep. of Thomas Gurtowski, 26:22-25; 27:1-6*,  
10 excerpt attached as Ex. "13" to Decl. of Eric Johnson). Because the house is located above and  
11 outside the slide area, party-experts have concluded that the slide activity in or about December  
12 2001 did not involve, damage or even threaten the Jaeger's residential structure. (See Dep. of  
13 Thomas Gurtowski, 93:2-14, excerpt attached as Ex. "13" to Decl. of Eric Johnson; *Dep. of*  
14 *Robert Cousins, 125:11-25; 126:1-5*, excerpt attached as Ex. "14" to Decl. of Eric Johnson).  
15 The experts also have testified in agreement that the sports court constructed on top of and in the  
16 area of the slide operates to increase the stability of the ground in an area that is otherwise  
17 categorized by its relative instability or proneness to landslide. (See Dep. of Robert Cousins,  
18 128:1-23, excerpt attached as Ex. "14" to Decl. of Eric Johnson; *Dep. of Thomas Gurtowski,*  
19 *35:23-25*, excerpt attached as Ex. "13" to Decl. of Eric Johnson; *Shannon & Wilson Report*  
20 *dated August 20, 2000* (Ex. "17" to Decl. of Eric Johnson).

21  
22 As noted above, although the parties' experts do not agree (at least in all respects) on the  
23 exact cause(s) of the slide and precisely, the source(s) of the water that precipitated it, they all  
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1 concur that the slide damage to the property can be repaired. However, the experts disagree  
2 about the most effective and efficient way to repair the damages, as well as the likely costs. On  
3 the high end of the scale is a large soldier pile wall likely costing in excess of \$291,000<sup>5</sup> (See  
4 *Shannon & Wilson report dated November 12, 2003*, Ex. "17" to Decl. of Eric Johnson) and on  
5 the low end of the scale is the removal of the sports court and any artificial or imported material  
6 and returning the slope to its natural condition, a fix that could cost as little as \$5-10,000. (Dep.  
7 of Thomas Gurtowski, 135:9-25 and pgs. 136-138).

8 The instant motion addresses certain cross-claims of the Jaegers against the Cleavers and  
9 Cleaver Construction, Inc.<sup>6</sup> alleging causes of action for:

10 (1) Fraud, fraudulent concealment, constructive fraud and/or negligent misrepresentation  
11 based upon non-disclosure of alleged "concealed defects in the premises of which Cleaver had  
12 knowledge." (*Cross-claim, pg. 9:18-24; pg. 10:1-17; and pg. 11:10-12* of Ex. "1" to Decl. of  
13 Eric Johnson), and,

14 (2) Cleaver's alleged trespass upon Jaegers' property rights in the form of an easement  
15 (i.e., the drainage line crossing Norbuts' property) by negligently damaging the drainage line  
16 during installation of the Norbuts' septic system. The Jaegers allege that Cleaver Construction's  
17 trespass ultimately caused a "loss of lateral support" on their property by causing drainage water  
18

19  
20 <sup>5</sup> Cleaver submits that the "soldier pile wall" was requested by Jaegers' attorney and designed for litigation, not  
21 reality or need. A soldier pile wall is unnecessary to return the Jaegers to the position they were pre-slide. (*Dep. of*  
22 *Jon Koloski, 54:3-25; pgs. 55-72*, excerpts attached to Decl. of Eric Johnson as Ex. "15"). The cost of a soldier  
23 pile wall also far exceeds the total value of the site or land (excluding the house) which is valued by County  
24 Assessor records at \$156,700. Prior appraisals valued the land at \$125,000 and \$130,000. A soldier pile wall would  
25 create a windfall for the Jaegers and would be inappropriate given the applicable measure of damages (in the event  
the Jaegers prevail on their claims). See Section "3c" *infra*. See also *Pepper v. J.J. Welcome Constr. Co.*, 73  
Wn.App. 523 (1994).

1 to back up in the Jaeger footing drain(s) contributing to the cause of the slide. (*Cross-claim, pg.*  
2 *8:20-24; pg. 9:1-5; and pg. 11:1-4* of Ex. "1" to Decl. of Eric Johnson).

3 Finally, this motion addresses available damages which may be recoverable in the event  
4 the Jaegers are able to survive summary judgment on the above-referenced causes of action.

### 5 **III. STATEMENT OF ISSUES**

6 **1. Whether Jaegers' tort-based claims against Cleaver are barred by the economic loss rule.**

7 *Short Answer:*

8 *The economic loss rule as it is applied in Washington marks a fundamental boundary*  
9 *between the law of contracts, which is designed to enforce expectations created by agreement,*  
10 *and the law of torts, which is designed to protect citizens and their property by imposing a duty*  
11 *of reasonable care on others. The potential recovery of economic losses can only be pursued by*  
12 *contract action where the parties to an agreement have allocated risk and responsibilities*  
13 *concerning subjects in dispute. By application of the economic loss rule, our courts protect the*  
14 *reliability and predictability of business transactions and the ability of parties to limit their*  
15 *potential liability by the bargain struck. In the present case, because the parties to the REPSA*  
16 *(Ex. "3" to Decl. of Eric Johnson) allocated risks and determined remedies associated with*  
17 *inspection(s); disclosures and eventual acceptance of the property and any improvements*  
18 *thereto, the Jaegers' tort-based actions seeking recovery of economic losses are barred by the*  
19 *economic loss rule.*

20 **2. In the event Jaegers are allowed to proceed in tort, whether there is evidence sufficient to**  
21 **support cross-claim(s) alleging fraud, fraudulent concealment, constructive fraud and/or**  
22 **negligent misrepresentation against Cleaver.**

23 *Short Answer:*

24 *Even if the Jaegers were allowed to proceed in tort, there is no evidence that Cleaver*  
25 *acted in a fraudulent manner or has any liability for alleged misrepresentation(s). The*  
*conditions of the land, the manner in which drainage was addressed and the presence of*  
*improvements on the property were visually open, obvious and/or fully disclosed. The Jaegers*  
*did not act diligently to learn about their property either at the time it was purchased or*  
*thereafter when it needed to be maintained. Further, there is no evidence that Cleaver had any*  
*substantive knowledge of the alleged defect(s) cited by Jaegers. In fact the item(s) characterized*  
*as "defects" can more accurately be defined as improvements. Finally, the defect(s) complained*

---

26 <sup>6</sup> Jaegers make no distinction in their claims between Eric Cleaver, Jill Cleaver and Cleaver Construction, Inc. and  
27 refer to them collectively as "Cleaver".

1 about, even if they could be factually supported, do not substantially affect the value of the  
2 Jaeger property nor defeat the purpose of the parties' purchase and sale transaction.

3 **3. Whether the Jaegers' alleged property damage claim is capped and cannot exceed the**  
4 **estimated pre-purchase value of the land at issue and whether alleged emotional distress damages**  
5 **may be recovered.**

6 **Short Answer:**

7 *Even if the Jaegers could survive summary judgment on the above-referenced theories of*  
8 *liability, any monetary damages recoverable by the Jaegers is limited to the cost of repairing the*  
9 *subject landslide, the sports court and damages loss of use (if applicable). In Washington, the*  
10 *proper measure of damages to land turns upon whether the damage is temporary or permanent.*  
11 *If the damage is temporary, the land or property can be restored to its prior condition and the*  
12 *measure of damages is the reasonable cost of restoration and loss of use during the restoration.*  
13 *However, "reasonable repair costs" are not without limits. In Washington, a plaintiff may*  
14 *recover costs of repair in excess of the diminished value of the damaged property; but only so*  
15 *long as the repair costs are less than the total pre-injury value of the property. In the present*  
16 *case, property damages potentially recoverable by the Jaegers (in the event they can establish*  
17 *any bases for liability) are limited to the pre-injury value of the property impacted by the subject*  
18 *landslide which includes an area of slope no greater than 6500 square feet in size and containing*  
19 *a sports court supported by some fill soils.*

20 *The Jaegers have also prayed for the recovery of damages for emotional distress allegedly*  
21 *stemming from an infringement of their property rights and/or property damage caused by cross-*  
22 *defendants. However, emotional distress damages are not recoverable based upon the*  
23 *applicable facts and law in this case.*

24 **4. Whether there is evidence sufficient to support the Jaegers' claim alleging that Cleaver**  
25 **Construction alleging that Cleaver trespassed upon their easement property rights thereby**  
**causing loss of lateral support and the landslide at issue.**

**Short Answer:**

*No. Although there is certain evidence that Cleaver Construction damaged the drainage*  
*tight-line on the Norbut property with a back-hoe during installation of a septic system, there is*  
*no evidence that such damage caused drainage/surface water(s) to back-up to the sports court*  
*causing flooding and subject landslide. The Jaegers' theory that water backed up from the catch*  
*basin on the Norbut property via the Jaeger residence footing drains to or near the sports court*  
*is based upon pure speculation. Further, any chance of testing the Jaegers' attenuated*  
*causation theory was completely destroyed or spoiled when the Jaegers without notice to*  
*Cleaver removed and replaced the subject footing drains and other portions of the original*



1 *drainage system as well as making other changes to the property. The Jaegers should be*  
2 *precluded from asserting their convoluted causation theory, for among other reasons, because of*  
3 *their spoliation of evidence.*

4 **IV. EVIDENCE RELIED UPON**

Declaration of Eric B. Johnson and exhibits attached thereto.

5 **V. AUTHORITY AND ARGUMENT**

6 **SUMMARY JUDGMENT STANDARD.**

7 Summary judgment is properly granted “if the pleadings, depositions, answers to  
8 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
9 genuine issues as to any material fact and that the moving party is entitled to judgment as a  
10 matter of law.” Civil Rule 56(c).

11 After Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989)  
12 (overruled on other grounds by Young v. Key Pharmaceuticals, Inc., 130 Wn.2d 160, 922 P.2d  
13 59 (1996) which adopted the rationale of Celotex Corp. v. Catrett, 447 U.S. 317, 325, (1986), a  
14 defendant may move for summary judgment by simply indicating the plaintiff has failed to  
15 support an element of its case:  
16

17 [A] defendant moving for summary judgment now has a choice: a defendant can  
18 attempt to establish through affidavits that no material fact issue exists or,  
19 alternatively, the defendant can point out to the trial court that the plaintiff lacks  
20 competent evidence to support an essential element of his case or her case. Young,  
21 at 225 and n.1; White at 170. If a defendant chooses the latter alternative, the  
requirement of setting forth specific facts does not apply. The reason for this result  
is that “a complete failure of proof concerning an essential element of a nonmoving  
party’s case necessarily renders all other facts immaterial.”

22 Celotex, 447 U.S. at 323.

1 The whole purpose of summary judgment would be defeated if a case could be forced to  
2 trial by a mere assertion that an issue exists without a showing of evidence sufficient to support a  
3 prima facie case. See Geppert v. State, 31 Wn.App. 33, 40 (1982).

4  
5 **1. WHETHER JAEGER'S TORT-BASED CLAIMS AGAINST CLEAVER ARE**  
6 **BARRED BY THE ECONOMIC LOSS RULE.**

7 The economic loss rule as applied in Washington was developed, in part, to allow parties  
8 to predictably allocate risk by contract, including risk(s) associated with allegations of fraud (and  
9 whatever species alleged) and negligent misrepresentation. See Griffith v. Centex Real Estate  
10 Corp., 93 Wn.App. 202, 212-13 (1998) (applying the economic loss rule to a negligent  
11 misrepresentation claim brought by home purchasers against the builder-seller). See also  
12 Berschauer Phillips Constr. Co. v. Seattle School Dist., 124 Wn.2d 816, 826 (1994).

13 In the instant case, because the parties to the REPSA allocated certain risks and liability  
14 associated with disclosures, inspections and ultimate acceptance of the property and its  
15 improvements, the Jaegers' tort-based actions for recovery of alleged economic losses are barred  
16 by the rule. See Inspection Addendum to REPSA, Ex. "3" to Decl. of Eric Johnson). By  
17 precluding the recovery of economic losses in tort, the economic loss rule limits claims for  
18 damages to the amount of potential future liability negotiated between the parties and set out in  
19 the contract.<sup>7</sup> Id. Simply put, the economic loss rule holds parties to their contractual remedies  
20 and does not allow an overlap of tort remedies into the contract. In this manner the reliability of  
21

22  
23  
24 <sup>7</sup> Otherwise, a party could bring a cause of action in tort to recover benefits that they were unable to obtain in  
25 contractual negotiations. See Berschauer, 124 Wn.2d at 827.

1 business transactions is protected. Id. at 828. See also, Atherton Condominium Assoc. v. Blume  
2 Development, 115 Wn.2d 506 (1990); Stuart v. Coldwell Banker, 109 Wn.2d 406 (1987).

3 Eric and Jill Cleaver made certain disclosures about the subject property they owned on a  
4 Northwest Multiple Listing Agreement Form No. 17, *Real Property Transfer Disclosure*  
5 *Statement dated August 24, 2000* (hereafter “Form 17”) (Ex. “4” to Decl. of Eric Johnson). The  
6 Form 17 provides on page one at the fourth full paragraph that:

7 **“The following are disclosures made by the seller...\*\*\* This**  
8 **information is for disclosure only and is not intended to be part**  
9 **of any written agreement between the buyer and seller.”**

10 (NWMLA Form 17, pg. 1 (emphasis added), Ex. “4” to Decl. of Eric Johnson). See also Section  
11 II. B of the Form 17 at pg. 5.

12 Revised Code of Washington 64.06.02 entitled “Seller’s duty – Format of disclosure  
13 statement – Minimum information” reiterates that the Form 17 is for informational purposes only  
14 and provides that the Form 17 disclosure(s):

15 “...shall not be construed as a warranty of any kind by the seller...”.

16 RCW 64.06.02(3).

17 Revised Code of Washington 64.06.070 entitled “Buyer’s rights or remedies”  
18 provides in pertinent part that:

19 “...nothing in this chapter shall extinguish or impair any rights or remedies of a  
20 buyer of real estate against the seller or against any agent acting for the seller  
21 otherwise existing pursuant to common law, statute, or contract; nor shall  
22 anything in this chapter create any new right or remedy for a buyer of residential  
23 real property other than the right of rescission exercised on the basis and within  
24 the time limits provided in this chapter.”

25 RCW 64.06.050.

1 The crux of the Jaegers' cross-complaint against Cleaver appears to be that  
2 Cleaver failed to make disclosures required by Chapter 64.06 concerning certain alleged  
3 concealed defects in the property and/or that Cleaver made disclosures required by  
4 Chapter 64.06 about the property that they knew were false. (Jaeger Cross-claims, paras.  
5 10 through 15, Ex. "1" to Decl. of Eric Johnson). Based upon these alleged errors and  
6 omissions, Jaegers then plead causes of action sounding in common law tort for alleged  
7 fraud, (intentional and/or negligent); fraudulent concealment, constructive fraud based  
8 upon non-disclosure and/or negligence. The problems with Jaegers' pleading and actions  
9 are multiple.<sup>8</sup>

10  
11 First, the Jaegers make no distinction between the Cleavers individually and  
12 Cleaver Construction, Inc. a Washington corporation and collectively refers to them as  
13 "Cleaver" for all causes of action. Cleaver Construction, Inc., however, was not a  
14 "seller" or party to the subject real estate purchase and sale agreement (REPSA) and  
15 therefore should be dismissed from all causes of action (e.g., fraud and others identified  
16 in Para. 19 of the Cross-complaint) alleging acts or omissions in connection with the sale  
17 of the subject property. (See Jaeger Cross-claims, paras. 10-15 and 19, Ex. "1" to Decl. of  
18 Eric Johnson).

19 Second, as noted above, the Jaegers' tort-based actions for fraud are inappropriate  
20 against Eric and Jill Cleaver as well because the parties to the REPSA specifically  
21

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22  
23 <sup>8</sup> Among other things set forth below, Chapter 64.06 provides no exception to the application of the contract terms  
24 and the economic loss rule which serve to bar Jaegers' tort claims. As stated above, RCW 6.06.070 provides no new  
25 rights or remedies for buyers other than a right of rescission as provided by the statute.

1 negotiated any risk of liability associated with conducting inspection(s); identifying any  
2 defect(s); passing on disclosures and ultimately acceptance or rejection of the property or  
3 Agreement.

4 For example, the “Inspection Addendum to Purchase & Sale Agreement” dated  
5 April 2, 2001 provides that the parties’ “Agreement” is conditioned on the:

6 **“Buyer’s personal approval of a written inspection of the Property and the**  
7 **improvements on the Property.”**

8 (See Inspection Contingency (emphasis added), pg. 1 of Inspection Addendum found at  
9 pg. “5” of the RESPA, Ex. “3” to Decl. of Eric Johnson).

10 The REPSA also contained an “integration” clause which provided that:

11 **“This Agreement constitutes the entire understanding between the parties**  
12 **and superseded all prior or contemporaneous understandings and**  
13 **representations. No modification of this Agreement shall be effective unless**  
14 **agreed in writing and signed by the buyer and Seller.”**

15 REPSA, para. “n” at pg. 4 (Ex. “3” to Decl. of Eric Johnson).

16 Cleavers representations on the Form 17 were provided and signed off on August  
17 24, 2000. Plainly, those representations were not intended to survive the execution of the  
18 REPSA and the inspection contingencies of the parties’ Purchase & Sale Agreement.

19 The Jaegers agreed to conduct whatever inspection(s) they felt were personally necessary  
20 to insure that the property and its improvements were sound including, but not limited to  
21 those inspections, identified in the “Inspection Contingency”, i.e., **“structural,**  
22 **mechanical, and general conditions of the improvements to the Property, an**  
23 **inspection of the Property for hazardous materials, a pest inspection, and a soils/stability**  
24  
25

1 inspection.” (See *Inspection Contingency*, pg. 1 of Inspection Addendum found at pg.  
2 “5” of the RESPA, Ex. “3” to Decl. of Eric Johnson).

3 The Inspection Contingency terms of the REPSA sets out numerous other  
4 provisions concerning the conduct of the inspections including rights and liabilities  
5 associated with assuming personal responsibility for acceptance of the property and all of  
6 its improvements. The document also makes it clear that the inspection procedures do  
7 not revive any remedy provided by the Form 17 as the Agreement specifically provides  
8 that the Buyers waive the right to receive an amended Form 17 based upon any  
9 conditions identified in any inspection report(s). (See para. “4” of Inspection Addendum  
10 found at pg. “5” of the RESPA, Ex. “3” to Decl. of Eric Johnson).

11 The allocation of risk/liabilities pertaining to any defects, the cost of corrections,  
12 past disclosures concerning the property and ultimately acceptance of the property and its  
13 improvements were plainly negotiated and provided for in the parties’ Purchase and Sale  
14 Agreement. The alleged fraudulent representations (on the Form 17) of which the  
15 Jaegers cite and complain and any other acts/omissions allegedly recoverable in tort did  
16 not survive the execution of the REPSA. For these reasons, among others cited above,  
17 the economic losses which the Jaegers now seek to recover in tort are barred by the  
18

1 economic loss rule. All of the Jaegers tort-based actions must be dismissed as a matter of  
2 law.<sup>9</sup>

3 **2. IN THE EVENT JAEGER'S ARE ALLOWED TO PROCEED IN TORT,**  
4 **WHETHER THERE IS EVIDENCE SUFFICIENT TO SUPPORT CROSS-CLAIM(S)**  
5 **ALLEGING FRAUD, FRAUDULENT CONCEALMENT, CONSTRUCTIVE FRAUD**  
6 **AND/OR NEGLIGENT MISREPRESENTATION AGAINST CLEAVER.**

7 The doctrine of *caveat emptor* has been restricted over time as it relates to the sale  
8 and purchase of real property. The doctrine no longer completely excludes any obligation  
9 of a seller of residential property to disclose material facts not readily observable upon  
10 reasonable inspection by the purchaser. See Atherton Condo. Apartment-Owners Assn.  
11 Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 523 (1990). However, the legal  
12 obligation(s) of disclosure which have been carved out from the doctrine are closely  
13 prescribed; especially in the context of an alleged action for fraud.<sup>10</sup> Accordingly, in a  
14 fraudulent concealment claim involving a *dwelling* a builder-vendor's duty to speak  
15 arises in those situations where:

---

16 <sup>9</sup> It should be noted here as further set forth in Section "3" below that had the Jaegers' sued in *contract*  
17 that Mrs. Jaeger would not be an interested or proper party as she withdrew from the purchase and sale  
18 agreement and Steven Jaeger became the lone "buyer" pursuant to an addendum to the REPSA. Mrs.  
19 Jaeger later dissolved her community property interest and quit claimed to Steven Jaeger who now holds  
20 the property as his "separate estate". Under Civil Rule 17(a) "Every action shall be prosecuted in the name  
of the real party in interest...". CR 17(a). Since Mrs. Jaeger holds no interest in the property that is the  
subject of this litigation, she is not a proper party to this case and all actions prosecuted by her should be  
dismissed. In any event, it is clear that Mrs. Jaeger has no contractual rights against Eric Cleaver and Jill  
Cleaver.

21 <sup>10</sup> Fraud and deceit, being so easy to assert, must be proved by clear, cogent and convincing evidence. Baertschi v.  
22 Jordan, 68 Wn.2d 478 (1966). Each element of fraud or intentional misrepresentation must be established by such  
23 evidence and the elements are: 1. representation of an existing fact; 2. materiality; 3. falsity; 4. the speaker's  
24 knowledge of its falsity, 5. intent of the speaker that it should be acted upon by the plaintiff; 6. plaintiff's ignorance  
of its falsity; 7. plaintiff's reliance on the truth of the representation, 8. plaintiff's right to rely upon it; and 9.  
damages suffered by the plaintiff. Id. Claims alleging fraudulent concealment, construction fraud and negligent  
misrepresentation are species of fraud claims but have somewhat different standards of proof.

1           ...there is a concealed defect in the premises of the residential dwelling, the  
2           builder-vendor has knowledge of the defect, the defect is dangerous to the  
3           property, health or life of the purchaser, and the defect is unknown to the  
4           purchaser a careful, reasonable inspection on the part of the purchaser would not  
5           disclose the defect.

6           Id. at 523.

7           In the present case, as is further detailed under Issue number “3” below, the alleged  
8           defect(s) at issue are not allegedly concealed within an “residential dwelling”; but rather the  
9           alleged defects are exterior to the Jaegers’ home which party-experts have testified do not impact  
10          or threaten the home. Consequently, the Jaegers’ cross-claim appears to erroneously cite or  
11          quote the “fraud/concealment” standard or test applied in the above-cited Atherton case  
12          involving “residential dwellings”.

13          To the extent it can be discerned from the Jaegers’ cross-claim and any of their responses  
14          to written discovery requests, the Jaegers appear to contend that Cleaver<sup>11</sup> committed fraud or  
15          misrepresentation by allegedly failing to disclose that land was cleared on the slope below the  
16          Jaeger residence and that a paved sports court with drainage (e.g., a sump pump) was designed  
17          and installed for the clearing which proved defective. (Cross-claims, para. “9”). The Jaegers  
18          allege that these “concealed defects” were “dangerous” to their property, health, and life”.  
19          (Cross-claims, paras. “9” and “10”, Ex. “1” to Decl. of Eric Johnson). They then go on to state  
20          that the alleged defects should have been disclosed citing various species of fraud/negligent  
21          misrepresentation as the bases for liability. (Cross-claims, paras. 11 through 19).

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22  
23          <sup>11</sup> As noted in Section “1” above, Cleaver Construction, Inc. was not involved as a seller or contracting party  
24          concerning the sale to the Jaegers and all claims relating to that transaction pled against Cleaver construction should  
25          be dismissed.



1 As this case has unfolded in discovery, it appears to more accurately resemble an action  
2 where bare land was altered in some fashion causing alleged adverse economic impact (and  
3 without the element of danger to health and life which might be more associated with a  
4 dwelling). The Jaegers seem to suggest that Cleaver should have told them more --- and that any  
5 fraud therefore is constructive in nature. With respect to fraudulent concealment or constructive  
6 fraud by non-disclosure of defect(s), a three-part test has been established for such a case. For  
7 example, where the alleged defect involves landfill, the applicable test reads as follows:

8 *(1) a vendor, knowing that the land has been filled, fails to disclose that fact*  
9 *to a purchaser of the property, and (2) the purchaser is unaware of the existence*  
10 *of the fill because either he has had no opportunity to inspect the property, or the*  
11 *existence of the fill was not apparent or readily ascertainable, and (3) the value of*  
12 *the property is materially affected by the existence of the fill...*

13 Id. at 231 citing Sorrell v. Young, 6 Wn.App. 220, 225 (1971). The same test has been applied  
14 to other types of alleged latent defects in property. See Mitchell v. Straith, 40 Wn.App. 405, 409-  
15 413 (1985) (*water pipes*); Gunnar v. Brice, 17 Wn.App. 819, 922-823 (1977) (*construction*  
16 *defects*); Obde v. Schlemeyer, 56 Wn.2d 449, 452-453 (1960) (*termite infestation*); Luxon v.  
17 Caviezel, 42 Wn.App. 261, 264-265 (1985) (*septic system*); Goldfarb v. Dietz, 8 Wn.App. 464,  
18 470-471 (1973) (*zoning requirements*).

19 However, in the present case, it is apparently undisputed that Cleaver disclosed to the Jaegers  
20 and/or their agent, Mr. Perkerewicz, and prior to the Jaeger purchase, each of the items from  
21 which the alleged “concealed” defects arose (i.e., the sports court, the sump pump and drainage).  
22 There is no evidence that Cleaver had actual knowledge that any of these item(s) contained  
23 concealed defects. The Jaegers’ had both an opportunity (and contractual right) to inspect the  
24 items complained about and both the parties’ contract and the predecessor Form 17 provide  
25 advice about the technical inspections which may be advisable.

1 Further, contrary to the Jaegers' action, Steven Jaeger has testified that he thought that  
2 Cleaver was being truthful in their pre-sale disclosure when Cleaver asserted they were unaware  
3 of any "settling, soil, standing water or drainage problems on the property".<sup>12</sup> (*Dep. of Steven*  
4 *Jaeger, 28:9-24; 62:18-25*, Ex. "7" to Decl. of Eric Johnson). Mr. Jaeger has also stated that he  
5 does not believe that Mr. Cleaver was acting deceptively in his disclosure of facts about the  
6 property prior to the Jaegers' purchase. (*Dep. of Steven Jaeger, 28:9-24; 62:18-25*, Ex. "7" to  
7 Decl. of Eric Johnson).

8 Mr. Jaeger likely came to this conclusion because the sports court and a sump pump  
9 and/or the existence of the drainage at issue were plainly observable to the Jaegers' own eyes.<sup>13</sup>  
10 Further, the Jaegers actually had the property inspected by an expert of their own choosing. (See  
11 Perkerewicz report, attached to REPSA, Ex. "3" to Decl. of Eric Johnson). Finally, the Jaegers  
12 were provided and/or had access to a wealth of expert information to aid their evaluation and  
13 determine what inspections may be warranted pursuant to the parties' contract. Most of these  
14 documents (such as two Will Thomas reports) were recorded on title for the property.

15  
16 In sum, the Jaegers' fraud/misrepresentation claims are sorely lacking in evidence that  
17 the Jaegers relied to their detriment on any acts of fraud or omissions (i.e., alleged non-  
18 disclosure) by Cleaver. The Jaegers' many opportunities to learn about the property and the  
19

20 <sup>12</sup> All the evidence in this case compels the conclusion that the sports court and the drainage and sump pump were  
21 performing as Mrs. Jaeger puts it "beautifully" until it suffered an isolated failed under severe weather conditions in  
22 December of 2001. MDE Engineers, Inc. retained by the Jaegers to examine the Zoeller pump in the catch-basin on  
the sports court found a manufacturing defect in the pump which was thought to have uneven wear of component  
part(s) which was thought to have caused the pump to hang in the "on position resulting in the pump burning out."  
(See MDE Engineers, Inc. report dated 5/13/02, Ex. "18" to Decl. of Eric Johnson.

23 <sup>13</sup> Mrs. Jaeger has testified that she "saw drainage all over" prior to the Jaegers' purchase of the property. (*Dep.*  
24 *of Susan Jaeger, 90:12-18*).

1 information at their disposal at a minimum created a duty upon them of further inquiry (the  
2 breach of which should now preclude Jaegers' action as a matter of law).<sup>14</sup> See e.g., Puget Sound  
3 Serv. Corp. v. Dalarna Mgmt. Corp., 51 Wn.App. 209, rev. den., 111 Wn.2d 1007 (1988);  
4 McMullen v. Rousseau, 40 Wn. 497 (1905).

5 A few examples of the information at their disposal are as follows:

- 6
- 7 • On the NWMLS Form 17 (attached as Ex. "4" to Decl. of Eric Johnson) under  
8 Section "5", Items "A" through "J" entitled "Systems and Fixtures" the following  
9 question is posed: "If the following systems or fixtures are included with the  
10 transfer, do they have any existing defects?"  
11 Under item "F" entitled "Sump Pump", Cleaver wrote in: "The sports court has  
12 a sump pump for storm-water control." In addition, the "no" box indicating that  
13 there were no known "defects" in the "sump pump" is checked. However, this  
14 representation is consistent with the undisputed evidence that the sump pump  
15 prior to the December 17, 2001 landslide, effectively controlled storm-water at or  
16 near the "sports court". The Jaegers' own expert, Thomas Gurtowski, agrees with  
17 this conclusion. (See *Dep. of Thomas Gurtowski*, 87:18-25; 88:1-11. See also  
18 *Dep. of Robert Cousins*, 128:24-25; 129:1-6).
  - 19 • The geological reports of Will Thomas received by the Jaegers prior to their  
20 purchase contained a lot of information about the subject property including that the  
21 State of Washington categorized the Jaeger shoreline slope as "unstable and/or  
22 within an old slide area" and that "local recent slides" were indicated. Mr.  
23 Thomas's reports also contain detailed information concerning mitigation and  
24 control of potential slide activity which, in turn, would have enabled the Jaegers [or  
25 their retained expert(s)/inspector(s)] to evaluate their property in terms of the  
existence or non-existence of the alleged deficiencies of which they now complain.  
Mr. Thomas noted, among other things, in this September 5, 1990 report that "in  
our opinion", the property lies within an old slide area that is stable at this time  
noting that: "[i]n our opinion, certain construction and drainage practices can be  
utilized to mitigate erosion and movement on slope" but cautioned that "where  
steep slopes are involved there can be no guarantee that conditions will not change,  
whether by natural processes or caused by man-made alteration of existing  
topography."

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14 The Will Thomas report(s) discuss potential issues associated with developing the subject property and makes recommendations concerning activities such as clearing, excavating, filling and drainage on the slope areas of the property.

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- With respect to the upper portion of Lot A (the Jaegers' property), Mr. Thomas wrote in his January 21, 1991 report that: "[t]he uplands portion of Lot A can be developed with proper, normal precautions such as installation of drainage collection systems which should be connected to established drainage west of the home sites." Further, the Jaegers inspector Ron Perkerewicz informed the Jaegers that their property included an "underground drainage system". (*Perkerewicz Report*, Ex. "3" to Decl. of Eric Johnson). Mrs. Jaeger has testified that she "saw drainage all over" at the time of Mr. Jerkewitz's inspection.
  - Eric Cleaver has testified that he informed the Jaegers both directly and/or through their inspector that it was important to maintain the sump pump on the sports court to insure that it continued to move any surface or rain water collecting on the court. (*Dep. of Eric Cleaver*, 68:9-25; 69:1-25; 70:1-25; 74:1-25; 75:1-3; 59:16-20).

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There is no question that the Jaegers knew or should have known about the slide-prone slope areas of their property prior to their purchase and that there was a drainage system for them to maintain. It cannot be seriously disputed that the Jaegers had an abundance of information that put them on notice of potential problem(s) with drainage and earth stability prior to their purchase. Fraudulent concealment does not extend to those situations where the alleged defect is apparent or where facts mandate a duty of further investigation by the seller. *Id.* In other words, "in those situations where a purchaser discovers evidence of a defect, the purchaser is obligated to inquire further." *Atherton supra*, 115 Wn.2d at 524. It appears reasonable and prudent that the Jaegers should have been asking questions about the property, but the overwhelming evidence discloses that they took absolutely no time to do so.<sup>15</sup> At the same time, there is no evidence that Cleaver had any actual or subjective knowledge of defect(s), concealed or otherwise, in the property at the time of sale. See *Burbo v. Harley C. Douglass, Inc.*, 125 Wn.App. 684, 698 (2005).

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<sup>15</sup> Mr. Jaeger was gone most of the time and Mrs. Jaeger's deposition testimony speaks volumes – she just completely assumed that others were taking care of the transaction (such as a mortgage company or a realtor with whom she did not communicate) while her mind was obviously on something else.

1 The Jaegers fraud and misrepresentation claims fail for another reason as well.

2 Proof of fraudulent concealment and constructive fraud liability requires that the defect(s)  
3 must have substantially affected the value of the property or operated to materially impair or  
4 defeat the purpose of the parties' transaction. Id. However, in the instant case, it is undisputed  
5 that the alleged defects (i.e., the sports court and provisions for drainage on it) added value when  
6 they were working. Cf. Mitchell v. Straith, 40 Wn.App. 405 (1985); Stewart v. Larkin, 74 Wn.  
7 681 (1913). This conclusion is reinforced by the testimony and writings of the Jaegers own  
8 expert(s), Shannon & Wilson, who have stated that the sports court by its presence served to  
9 increase the stability of the subject slope; that the sump pump on the sports court operated  
10 effectively prior to December 17, 2001 to move surface waters off the court; and that the  
11 property's drainage system functioned well as designed up to the events that caused the  
12 December 17, 2001 slide event. Mrs. Jaeger has testified that the sump pump at the sports court  
13 worked "beautifully" prior to the slide. (*Dep. of Susan Jaeger, 31:12-17*, Ex. "6" to Decl. of  
14 Eric Johnson. See also Dep. of Thomas Gurtowski, 35:23-25; 87:18-25; 88:1-11; excerpts  
15 attached as Ex. "13" to Decl. of Eric Johnson; *Shannon & Wilson Report dated August 20,*  
16 *2000* (Ex. "-" to Decl. of Eric Johnson;). In other words, the Jaegers praise for their value the  
17 same things that they characterize as defects.

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19 As detailed in Section "3" below, the estimated value of the sports court in the context of  
20 the total value of the property is also very minor and the slope on which it sits has very little  
21 utility except as a view corridor to the Sound. (See Declaration of Robert W. Chamberlin). The  
22 Jaegers have also resided in the home since they purchased it and the slide did not impact their  
23 dwelling or otherwise curtail the use of the property as a residence. According to Kitsap County  
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1 tax assessment(s), since the December 17, 2001 landslide, the value of both the Jaeger dwelling  
2 and their land have increased over the years despite the slide. (See Declaration of Robert W.  
3 Chamberlin and Exhibit "4" thereto filed with this motion). If the Jaegers *actually thought*  
4 that the alleged defects substantially reduced the value of their property or defeated their  
5 purpose, they would have likely filed an appeal with the Board of Equalization to have their tax  
6 burden reduced and/or sue Cleaver for rescission of the sale. There is no evidence that the  
7 alleged defects materially impaired or served to defeat the purpose of the parties' real estate  
8 transaction.

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10 Finally, there also must be a causal link between the impaired or reduced value and the  
11 alleged wrongful failure to disclose the alleged defect. See Burbo v. Harley C. Douglass, Inc.,  
12 125 Wn.App. 684 (2005); Mitchell v. Straith, 40 Wn.App. 405, 410 (1985); Luxon v. Caviezel,  
13 42 Wn.App. 261,264-265 (1985). The overwhelming evidence supports the conclusion that the  
14 Jaegers lacked due diligence in learning about their property during the purchase process and  
15 thereafter when it was their obligation maintain it. When the Norbuts and the Jaegers had a  
16 chance to constructively work together to fix both the drainage and any slide damage early on  
17 and economical fashion; they started to fight instead. This case is probably as much about the  
18 litigation and the tendency of warring parties and their attorneys to trump up an otherwise  
19 manageable problem until it spins out of control

20 For all of the foregoing reasons, the Jaegers fraud and negligent misrepresentation claims  
21 fail as a matter of law.  
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1 **3. WHETHER THE JAEGER'S CLAIMS ARE LIMITED OR BARRED BY: a)**  
2 **SUSAN JAEGER'S RELINQUISHMENT OF ANY INTEREST IN THE PROPERTY**  
3 **AND THE PARTIES' CONTRACT. b) THE PRE-INJURY VALUE OF THE**  
4 **PROPERTY IMPACTED BY THE LANDSLIDE AND c) INSUFFICIENT EVIDENCE**  
5 **AND LEGAL BASES FOR RECOVERY OF ALLEGED EMOTIONAL DISTRESS**  
6 **DAMAGES.**

7 **a) Whether the Susan Jaeger's claims are limited or barred by Susan Jaeger's**  
8 **relinquishment of any interest in the subject property and/or the parties' contract.**

9 Civil Rule 17 (a) provides in pertinent part that: "Every action shall be prosecuted  
10 in the name of the real party in interest...". CR 17(a).

11 Susan Jaeger dissolved any right to a community property share in the subject  
12 property pursuant to Washington Administrative Code Section 458-61-340 and by quit  
13 claim deed recorded May 3, 2001. (*Quit Claim Deed*, Ex. "5" to Decl. of Eric Johnson)  
14 Further, the Addendum/Amendment to Purchase and Sale Agreement dated April 1, 2001  
15 provided that Susan Jaeger is "hereby removed from this transaction..." making Steven  
16 Jaeger the sole "purchaser" and contracting party. (*Real Estate Purchase and Sale*  
17 *Agreement and Addendum*, attached as Ex. "3" to Decl. of Eric Johnson). By these  
18 actions, Mrs. Jaeger voluntarily relinquished any right of action or interest in the subject  
19 property and any contract rights against the Cleavers. This Court is requested to enter an  
20 Order declaring that Susan Jaeger is not a real party in interest in this litigation; not a  
21 contracting party with any contractual interests in the REPSA entered into with the  
22 Cleavers and dismissing any claims brought by Mrs. Jaeger against Cleaver as a matter of  
23 contract law and/or pursuant to Civil Rule 17(a).

1  
2 **b) Whether the Jaegers' potential recovery of damages is limited by the pre-injury**  
3 **value of the property impacted by the landslide.**

4 All of the parties' experts have testified that the larger component of value in the Jaegers'  
5 property, namely the residential structure and the site as a whole, were not impacted or  
6 threatened by the slide. (*Dep. of Thomas Gurtowski, 26:22-25; 27:1-6*, excerpt attached as Ex.  
7 "13" to Decl. of Eric Johnson; *Dep. of Robert Cousins, 125:11-25; 126:1-19; 127:1-16; 133:4-5*  
8 excerpt attached as Ex. "14" to Decl. of Eric Johnson and Aspect Engineering (*Cousins*) *Report*  
9 *dated 1/19/05*, also attached as Ex. "14"). Instead, the slide damage appears isolated to fill soils  
10 at and/or beneath the sports court (an approximately 30 by 40 foot dimension) located on a  
11 natural bench on the steep slope. Appraiser Anthony Gibbons used data gathered by geologist  
12 Robert Cousins to determine that an area of steep slope no greater than 6500 square feet was  
13 impacted by the landslide on the Jaeger's property. (*Decl. of Robert W. Chamberlin* and Ex. "2"  
14 thereto). The appraisers who have valued the sports court (\$2000) and the surrounding area of  
15 steep slope (\$6000) have come up with an estimated total value of between \$2,000 to \$8,000 for  
16 the area of land impacted by the slope (and which can be repaired). (*Decl. of Robert W.*  
17 *Chamberlin*). The predominant value of the slide impacted slope is primarily its function as a  
18 "view corridor" to Puget Sound rather than any physical use or utility upon its surface. See  
19 *Declaration of Robert W. Chamberlin* and *Anthony Gibbons Report*, Ex. "2" thereto).

20  
21 In Washington, if the damage is temporary (as in this case), the land or property can be  
22 restored to its prior condition and the measure of damages is the reasonable cost of restoration  
23 and loss of use during the restoration. See *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn.App. 523



1 (1994). However, “reasonable repair costs” are not without limits and the measure of damage  
2 that should be employed is one which makes the injured party as whole as possible without  
3 conferring a windfall. As a means of avoiding windfall recoveries, the applicable rule for  
4 calculating repair cost awards in cases like the present one, is that a plaintiff may recover costs of  
5 repair in excess of the diminished value of the damaged property; but only so long as the repair  
6 costs are less than the total pre-injury value of the property.

7 In the present case, therefore, the Jaegers’ potential economic recovery, if any, should be  
8 capped at the reasonable value of the land comprising the steep slope and any improvement  
9 thereon such as the sports court. This number has been appraised as some fraction of the total  
10 site value of between \$125,000 and \$160,000 and in an estimated appraised value range between  
11 \$2,000 and \$10,000. (See Declaration of Robert W. Chamberlin and Anthony Gibbons Report,  
12 Ex. “2” and Michael Graham Report, Ex. “3” thereto).

13 An Order of Partial Summary Judgment (if necessary) is requested resolving any issue  
14 concerning the proper measure(s) of damage for property damage which is temporary and which  
15 can be repaired in light of other factor(s) such as pre-injury land value.

16  
17 **c) Whether there is insufficient evidence and legal bases for Jaegers’ recovery of alleged**  
18 **emotional distress damages.**

19 The Jaegers apparently claim emotional distress damages against Cleaver even though  
20 they failed to explain the bases for this claim in discovery (other than to refer to prior responses  
21 to Norbut’s requests about an alleged “negligent installation of a drainfield”). (See Jaegers’  
22 Response to Cleaver Construction’s First Set of Interrogatories, Interrogatory No. 1, Ex. “21”  
23 to Decl. of Eric Johnson). The Jaegers’ only specific reference to “emotional distress” appears to

1 be in their response to Norbuts' Request for Statement of Damages where Jaeger lists the amount  
2 of \$100,000, apparently the amount of the claim (Ex. "2" to Decl. of Eric Johnson) and in  
3 Jaegers' complaint(s). (*Cross-claim*, para. 18, Ex. "1" to Decl. of Eric Johnson). In response to  
4 the Norbuts' Second Set of Interrogatories, Interrogatory No. "5", Susan Jaeger responds that she  
5 has been suffering from "insomnia, headaches, and elevated blood pressure since this all began"  
6 while in her next response states that she has not visited any health care provider for these  
7 symptoms. (See Jaeger Response to Norbuts' Interrogatory Nos. "5" and "6", Ex. "22" to  
8 Decl. of Eric Johnson).

9  
10 Jaeger apparently links her claim to a negligent act by Cleaver and perhaps a "drainfield".  
11 However, whatever Jaeger's claim may be, she must establish a duty and breach by Cleaver and  
12 foreseeable risk, threatened danger, and unreasonable conduct in light of the danger on the part  
13 of Cleaver. See Corrigal v. Ball & Dodd Funeral Home, Inc., 89 Wn.2d 959 (1978). Jaeger has  
14 not identified nor produced any evidence which may go to meet these standards/burdens of  
15 proof. Jaeger must also present proof of objective symptoms of emotional distress and she has  
16 not even seen a doctor. There is no admissible or objective evidence of the alleged symptoms.  
17 Jaegers' claim for emotional distress damages against Cleaver should be dismissed for lack of  
18 evidence.

19 **4. WHETHER THERE IS EVIDENCE SUFFICIENT TO SUPPORT THE**  
20 **JAEGERS' CROSS-CLAIM ALLEGING THAT CLEAVER CONSTRUCTION**  
21 **TRESPASSED UPON THEIR EASEMENT PROPERTY RIGHTS THEREBY**  
22 **CAUSING LOSS OF LATERAL SUPPORT AND THE LANDSLIDE AT ISSUE.**

23 The Jaegers' experts Tom Gurtowski (Shannon & Wilson) and Marty McCabe (URS  
24 Corp.) were retained to determine, among other things, whether Cleaver Construction may have  
25

1 contributed to the cause of the December 2001 landslide near the Jaegers' sports court. Cleaver  
2 Construction, Inc. is thought to have damaged a six-inch in diameter drainage tight-line on the  
3 Norbut property with a back-hoe while installing Norbut's septic system. Back-hoe teeth marks  
4 discovered on the uncarthed pipe seem to indicate that such damage may have clogged the pipe  
5 causing it to back-up in or about September-December 2001. Armed with this information,  
6 Messes. Gurtowski and McCabe set out to determine or rather find any causal link between the  
7 broken line and the December 17, 2001 landslide.

8  
9 Although both Mr. Gurtowski and Mr. McCabe have visited the Jaeger and Norbut  
10 properties on occasion over the past three years; neither man has performed a basic test that was  
11 proposed in 2002 by Randy Kent of MDE Engineers, Inc.:

12 "One critical question left to be answered is: once the upper catch  
13 basin filled, where did the water go as it was pumped from the lower  
14 basin? Did the overflow of the system come out an upper open drain  
15 pipe hooked to this basin or did it come out somewhere at a lower  
16 location through the other pipes feeding this basin.\*\*\* A simulation  
17 defining where the water is flowing when the upper basin is plugged,  
18 can also be performed."

19 MDE Engineers, Inc. report dated 5/13/2002, Ex. "18" to Decl. of Eric  
20 Johnson and Ex. "11" to Dep. of Thomas Gurtowski and Ex. "4" to Dep. of  
21 Marty McCabe.

22 On April 26, 2005, Mr. Gurtowski was deposed and admitted that Mr. Kent's proposed  
23 question was left unanswered. Mr. Gurtowski testified: "No, I don't – I'm not certain where the  
24 water went to." (*Dep. of Thomas Gurtowski, pgs. 81 and 82,* ). Mr. Gurtowski had no problem  
25 expressing "his opinion", however, that water backed-up from the break to the sports court (*Dep.  
of Thomas Gurtowski, 119:12-18*); after all his firm recommended videotaping the drainage  
system and creating an "as-built" of the system (See Shannon & Wilson reports, Ex. tasks which

1 Gurtowski testified were performed. Nonetheless, at the end of the day, Mr. Gurtowski testified:  
2 “I don’t have a clear understanding of the drainage system.” (Dep. of Thomas Gurtowski, 121:7-  
3 8, Ex. “13” to Decl. of Eric Johnson).

4 On April 27, 2005, Mr. McCabe was also deposed and was asked this question: “How  
5 much of the water that backed up into the catch basin on the Norbut property would find its way  
6 back down to the sport court?” Mr. McCabe replied: “Probably the vast majority. Better than 98  
7 percent.” (Dep. of Marty McCabe, 12:16-19, Ex. “-“ to Decl. of Eric Johnson). When asked how  
8 he reached such a conclusion, Mr. McCabe admitted that Mr. Kent’s test had not been performed  
9 (Dep. of Marty McCabe, pgs. 180-181); but he explained his conclusion: “Just because the most  
10 convenient place for water to emanate from the backed-up system was a drain that extended from  
11 the southeast corner of the Jaeger property, down the hill, just by the sports court.” (Dep. of  
12 Marty McCabe, 12:24-25; 13:1-23). Upon further questioning, Mr. McCabe testified that in  
13 September 2004 he was notified that Mrs. Jaeger and her gardener had excavated most of the  
14 drainage system and changed out various components. He was unaware if anyone received  
15 notice of the Jaegers’ work or his site investigation. (Dep. of Marty McCabe, pgs. 111-112). Mr.  
16 McCabe said that Mrs. Jaeger had found buried pipes at the northwest and southeast corners of  
17 the house which were connected to the home’s footing drains. Mr. McCabe described these  
18 finds as “mystery pipes”. The pipe at the northwest corner was left in the ground, but he was  
19 reportedly able to trace the pipe at the southeast corner in a southerly direction onto a neighbor’s  
20 property (the Bissonettes) to the south. (Dep. of Marty McCabe, pgs. 135-136 and pg. 157;  
21 165:19-25; 166:1-12). Mr. McCabe “presumed” that what he called the “mystery pipe” at the  
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1 southeast corner must be connected in some manner to the sports court and was depositing water  
2 at or near the court. (Dep. of Marty McCabe, 161:13-25).

3           However, Mr. McCabe testified that he did not personally observe the “mystery pipe”  
4 moving water onto the Jaeger property (at the sports court); but that when Mrs. Jaeger dumped  
5 water into it with a hose, the water did not return.<sup>16</sup> (Dep. of Marty McCabe, 162:14-25). Upon  
6 further questioning, Mr. McCabe admitted that water moving through the mystery pipe at the  
7 southeast (and northwest) corner went to “points unknown” and/or to points that he could not  
8 confirm. (Dep. of Marty McCabe, 176:11-14; 177:23-25; 178:1-4). Surprisingly, the southeast  
9 corner “mystery pipe” was the same vessel which McCabe had earlier testified “probably”  
10 carried up to 98% of any water backing-up from the Norbuts down to the sports court!  
11

12           Although issues of causation are not typically well suited for summary judgment, the  
13 Jaegers’ attenuated theory that in 2001 drainage water made its way (somehow) from the  
14 Norbuts’ clogged tight-line back to the Jaegers’ sports court (and then causing the landslide) is  
15 completely based upon conjecture and pure speculation. If the Jaegers had taken the advice of  
16 retained experts (Shannon & Wilson and MDE Engineers) in 2002 and investigated their  
17 drainage system by blocking the tight-line and flooding the system to confirm the route of the  
18 water, that would be one thing; but instead, the Jaegers, for whatever reason, did not even try to  
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20 <sup>16</sup> Mr. McCabe denied that Mr. Kent’s proposed test was ever performed indicating that it was too risky to “dump  
21 water into the system” because it might “exacerbate” movement of soils in the sports court area and that Mr. Norbut  
22 might not like it. (*Dep. of Marty McCabe, 52:1-17; 20:1-19*, Ex. “16” to Decl. of Eric Johnson). When asked how  
23 much water Mrs. Jaeger had dumped into the “mystery pipe” at the southeast corner of the residence, Mr. McCabe  
24 stated Mrs. Jaeger told him she ran the hose for 10 minutes, “plenty of time for it to allow it to back up.” (*Dep. of  
Marty McCabe, 178:15-25; 179:1-15; 181:23-25; 182:1-4*). Mr. McCabe’s notes of phone conversations with Mrs.  
Jaeger on September 27, 2004 indicate that Mrs. Jaeger on September 7, 2004 “tried running water via hose full  
blast down pipes from footing drain at SE corner dead south onto neighbor property --- ran for 20 minutes without  
any blockage/backflow. (*Record of Conversation dated 9/27/04*, Ex. “20” to Decl. of Eric Johnson).

1 investigate their drainage system until the Fall of 2004! At that point, any attempt to simulate  
2 events allegedly happening years prior are impossible and almost comical. Mr. McCabe testifies  
3 that they are sensitive and cautious about performing the Randy Kent test because it would mean  
4 introducing water to the system; when at same time, Mrs. Jaeger is hosing water “full blast”  
5 down a mystery pipe which heads south but which they speculate may end up at the sports court.  
6 (See *Footnote 16* above and Ex. “20” to Decl. of Eric Johnson).

7  
8 What is perhaps more disturbing is that neither Mrs. Jaeger or her attorney advised  
9 opposing parties that substantial, if not total, changes were being made to the drainage system  
10 (and elevation points on the property) which would render ongoing site investigations and  
11 testing being conducted by defendants meaningless. Further, Cleaver Construction, Inc. has  
12 never received any supplementation from the Jaegers in response to Cleaver Construction’s  
13 interrogatories which request the Jaegers identify facts allegedly supporting causation of  
14 damages. (See Ex. “21” to Decl. of Eric Johnson).

15 The instant case is not unlike Nejin v. City of Seattle, 40 Wn.App. 414 (1985)  
16 where the plaintiff sought to prove that the City had improperly maintained a sewer line  
17 thereby causing a break which in turn allegedly caused a landslide on plaintiff’s property.  
18 In finding for the City on appeal, the Court in Nejin found evidence of negligence on the  
19 part of the City, but could not find liability as the circumstantial evidence provided in the  
20 trial court was, as a matter of law, too speculative. The Court in Nejin stated:

21  
22 In matters of proof the existence of facts may not be inferred from mere  
23 possibilities. Wilson v. Northern Pac. Ry., 44 Wn.2d 122 (1954). Here the evidence  
24 adduced at trial was that under certain conditions, water “could have exfiltrated” and  
25 “conceivably in some manner or fashion” could have reached Nejin’s property.

1 However, proximate cause must be proved by evidence, whether direct or circumstantial,  
2 not by speculation or conjecture or by inference piled upon inference.

3 Nejin v. City of Seattle, 40 Wn.App. 414, 418 (1985).

4 The Jaegers' case against Cleaver is so thin and any trail (which ever existed) so dead  
5 that Mr. Gurtowski's and Mr. McCabe's loss of enthusiasm for the "theory" against Cleaver is  
6 apparent even in their deposition testimony. Both of these experts backed off from conclusive  
7 remarks early on in their testimony to essentially "I don't know". This court should dismiss  
8 Jaegers' claims against Cleaver Construction for two reasons: 1) Jaegers' case against Cleaver is  
9 entirely speculative, and 2) the inference which should be drawn from the Jaegers' spoliation of  
10 evidence (making changes to alleged defective conditions without notifying defendants) is that  
11 the evidence if it survived would be unfavorable to the Jaegers' claims.

12 **5. CONCLUSION.**

13 Eric Cleaver, Jill Cleaver and Cleaver Construction, Inc. respectfully requests that this  
14 Court dismiss the Jaegers' claims against them in their entirety and as a matter of law.  
15 Alternatively, and in the event this Court finds that it cannot grant summary judgment, Cleaver  
16 requests that partial summary judgment be entered concerning issue(s) presented by this motion.  
17

18 Respectfully submitted this 20th day of October, 2005.

19  
20 LAW OFFICES OF ERIC BRIAN JOHNSON

21  
22 By 

23 ERIC B. JOHNSON, WSBA No. 19340  
24 Attorneys for Eric Cleaver; Jill Cleaver and  
25 Cleaver Construction, Inc