IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA 23-0600

BUSCHER CONSTRUCTION AND DEVELOPMENT, INC., a Montana Corporation, BUSCHER CONSTRUCTION, LTD., a Montana Corporation, AVIARA, INC., a Montana Corporation, FALCON RIDGE, LLC, a Montana Limited Liability Company, FALCON RIDGE II, LLC, a Montana Limited Liability Company, DENNIS BUSCHER, LINDA BUSCHER, TRENT BUSCHER, and DOES 1-10,

Defendants/Appellants,

v.

RALPH COOK, BARBARA COOK,
Individually and on behalf of classes or similarly situated Montanans,

Plaintiffs/Appellees.

Appeal from the Thirteenth Judicial District Court, Yellowstone County
Cause No. DV-56-2019-0000575-NE
The Honorable Rodney E. Souza Presiding

APPELLANTS' OPENING BRIEF

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I. STATEMENT OF THE ISSUES

Did the District Court err when it granted class certification, more specifically:

1. Did the District Court err in finding commonalty exists where the lone common issue (a) is not one whose truth or falsity resolves an issue that is central to the validity of each one of the claims and does not generate common answers that will drive the resolution of the litigation, and (b) is dwarfed by issues unique to each potential class member requiring the resolution of owner-specific issues before it could be determined which, if any, of the Defendants, breached a legal duty or caused a homeowner property damage.

2. Did the Court err in finding typicality exists where the representative Plaintiffs had no dealings of any sort with the named Defendants, and the potential class members had dealings of various sorts with only a fraction of the Defendants.

II. STATEMENT OF THE CASE

This case was originally filed on May 15, 2019, by Plaintiffs named Sones and Ciesielski against two engineering firms, Rimrock Engineering, Inc. and Rawhide Engineering, Inc. Dkt. 1. Subsequently, these Plaintiffs and the two engineering firms filed a Joint Motion to approve a class action settlement (Dkt. 25), to which no one objected. It was approved by the Court. Dkt. 34.

Plaintiffs then amended their Complaint adding 69 Plaintiffs (including Ralph and Barbara Cook) and one group of Defendants who had involvement with property in the "Copper Ridge" area of Billings, and a second group who had involvement in property in the "Falcon Ridge" area of Billings. Dkt. 36. The latter group includes Buscher Construction and Development, Inc., Buscher Construction, Ltd., Falcon Ridge, LLC, Aviara, Inc., Dennis Buscher, Linda Buscher and Trent Buscher (the "Falcon Ridge Defendants"). Id.

The Falcon Ridge Defendants answered the Complaint and brought a Third-party Complaint against S.D. Helgeson and SRKM, Inc ("Helgeson Defendants"). Dkt. 60. That Third-Party Complaint alleged, among other things, that the Helgeson Defendants had owned and sold property in Falcon Ridge to the Cooks, and that the damages to the Cooks' home was caused by the Helgeson Defendants' "negligent preparation, layout and design and/or construction of the structures". Dkt. 60. p. ¶¶ 15-19.

The Cooks entered into a settlement with the Helgeson Defendants. Dkt. 78, p. 3. After confirming this was so, the Falcon Ridge Defendants stipulated to dismiss their third-party claim against the Helgeson Defendants. Dkt. 169. The District Court dismissed the Third-Party Complaint, confirming in its order that the Cooks had settled with the Helgeson Defendants. Dkt. 170.

On August 25, 2021, the Plaintiffs (by this time only Sones and Cooks) sought class certification against the Copper Ridge Defendants. Dkt. 90. The Copper Ridge Defendant initially opposed class certification (Dkt. 105), but before the District Court could rule on that issue, Plaintiffs and the Copper Ridge Defendants reached a settlement and obtained Court approval of a class action settlement. Dkt. 144.

On October 8, 2021, Plaintiffs filed a Motion for Class Certification against the Falcon Ridge Defendants as to persons who had purchased property in the Falcon Ridge Area. Dkt. 100. That Motion was fully briefed and argued, and on October 28, 2022, the Parties submitted proposed Findings of Fact and Conclusions of Law. Dkt. 162.1, 163.

On October 6, 2023, the District Court granted the Motion for Class Certification. Dkt. 178; App. 1 - 28. [1] Appellants filed a timely Notice of Appeal on October 11, 2023. Dkt. 180.

III. FACTS

A. The Property.

This case involves residential lots developed in an area known as Falcon Ridge in Billings, Montana. The first filing in Falcon Ridge (commonly referred to

[1] "App ___" refers to the pages in Appellants' Appendix where the relevant document or citation to the record is located.

as "Falcon Ridge I") was made in 2006 and there were 69 lots. App. 32, ¶ 2; App. 35, ¶ 14. The second filing in Falcon Ridge (commonly referred to as "Falcon Ridge II"), was done in 2013, and there were 70 lots. App. 33-34, ¶¶ 6 – 9l App. 35, ¶ 15.

B. <u>The Developers</u>.

The sole developer of Falcon Ridge I was Falcon Ridge, LLC. App. 32, ¶ 2. Falcon Ridge, LLC was the entity that entered into the Subdivision Improvement Agreement with the City of Billings. App. 33, ¶ 5 and App. 59-73. It is also the entity that prepared and filed the Declaration of Restrictions for Falcon Ridge Subdivision and Homeowners Association, dated October 1, 2005. App. 32-33, ¶ 4 and App. 38-58.

The members of Falcon Ridge, LLC were Aviara, Inc. and 4 D's Development, each owning a 50% interest. App. 32, ¶ 2. App. 7, ¶ 13. Neither Buscher Construction and Development, Inc., Buscher Construction, Ltd., Dennis Buscher, Linda Buscher nor Trent Buscher were the members of Falcon Ridge, LLC. Buscher App. 32, ¶ 3. [2] In the District Court, **no** facts or documents were offered which established that any of these entities or individuals were the actual developer of Falcon Ridge I or members of Falcon Ridge, LLC.

The developers of Falcon Ridge II were Falcon Ridge II, LLC, Aviara, Inc. and Rims Development, LLC. App. 3, ¶ 6. These entities entered into the

[2] Dennis and Linda Buscher collectively owned 50% of Aviara, Inc. App. 7, ¶ 13.

Subdivision Improvement Agreement with the City of Billings. App. 33 - 34, ¶ 9; App. 90 - 102. That Agreement in two places advised lot owners that they would need to obtain a specific geotechnical report to get a building permit:

> Lot owners should be aware that a lot specific geotechnical report or specific recommendations from a licensed geotechnical engineer will be required to be submitted as part of any City Building Permit request.

App. 94, 98. The Falcon Ridge II Declarations were executed by Aviara, Inc, and Rims Development, LLC, which are the members of Falcon Ridge II, LLC. App. 3, ¶ 8; App. 74-89.

Neither Buscher Construction and Development, Inc., Buscher Construction, Ltd., Dennis Buscher, Linda Buscher nor Trent Buscher were members of Falcon Ridge II. App. 33, ¶ 7. In the District Court, **no** facts or documents were offered which established that any of these entities or individuals were the developer of Falcon Ridge II, or a member of Falcon Ridge II, LLC.

C. The Terracon Reports.

The District Court described Cooks claim as follows:

> [A]ll of the Buscher Defendants are negligent because they did not disclose the information contained in the Terracon Reports concerning 'the material adverse soil condition' in the Falcon Ridge [S]ubdivsion.

App. 2, ¶ 1.

There are two Terracon Reports, prepared in 2004 and 2005, respectively. Dkt. 102, Exhibits A and B. As to the Terracon reports, the District Court made the following findings of fact:

- Engineering, Inc. was hired by Falcon Ridge, LLC to do engineering work on the Falcon Ridge infrastructure.
- Engineering, Inc. hired Terracon for geotechnical work that it was doing in Falcon Ridge I related to Falcon Ridge I infrastructure.
- Engineering, Inc. did not hire Terracon to provide any home building recommendations.
- The Terracon Report states that it was for the exclusive use of Engineering, Inc., and that it "does not and was not intended to present design level recommendations for residential foundations."

App. 3 - 4, ¶¶ 4 - 5. In the District Court, **no** facts or documents were offered which established that any of the Defendants, except for Falcon Ridge, LLC, hired Engineering, Inc. to do anything in connection with Falcon Ridge, including the Terracon Reports.

Despite stating that its report "does not and was not intended to present design level recommendations for residential foundations," the Terracon Report after a discussion of soils, states:

> That type of behavior is common in the soils on the slopes below the rimrocks. Frequently, structures built with conventional footing foundations on these types of soils have suffered damaging settlements, sometimes many years after construction. Settlement has usually been related to water becoming accessible to the soils below the foundations' We are not aware of an economically, reliable way to prevent water from reaching the foundation soils' ln most areas of the United States, the commonly accepted practice for supporting structures where collapsible soils are present is to use deep foundations, such as drilled piers into the bedrock and construct structural floors, supported on the foundation system. That system has not normally been used in Billings, probably because there is limited ability of contractors in the Billings area to construct drilled piers and because a drilled pier foundation and structural floors are more expensive than footings and slabs on grade.

Dkt. 102, Ex. A, p. 8. The second Terracon Report had similar language. Dkt. 102, Ex. B, p. 7.

Consistent with this, Falcon Ridge, LLC publicly disclosed in the "Property Disclosure" section of its February 10, 2006, Subdivision Improvement Agreement ("SIA") with the City of Billings that:

> Owners of lots within Falcon Ridge Estates Subdivision shall be advised that in accordance with a geotechnical report prepared from actual drilling and field testing by **Terracon Consultants, Inc**., there exists the potential for variable soil conditions within the Subdivision. Assessment and mitigation, if any, of these conditions shall be the responsibility of the lot owner. The City may require the owner of each lot to include a geotechnical investigation report with the building permit submittal.

App. 61, ¶ D. This was and is a public document, filed with the Clerk and Recorder. App. 59 -73.

D. The Non-Developer Parties and Their Business Activities.

The Plaintiffs are Ralph and Barbara Cook (collectively "Cooks"). Cooks did not buy a lot from any of the Defendants, have their home built by any of the Defendants and none of the Defendants acted as their realtor in connection with the purchase of their property. App. 3 - 4; ¶3. Indeed, in the District Court, **no** facts or documents were offered which established that any of the Falcon Ridge Defendants had any dealing of any sort with the Cooks.

Instead, Falcon Ridge, LLC sold the lot now owned by Cooks to S.D. Helgeson, Inc. Dkt. 119, Exhibit "3". S.D. Helgeson, Inc. transferred the property to SRKM, Inc., which in turn transferred it to Cooks. Id. In the deed by which Falcon Ridge, LLC transferred what would become the Cooks' property to S.D. Helgeson, Inc. (Dkt. 119, Exhibit "3"), it stated the property was transferred:

> TO HAVE AND TO HOLD unto the Grantee and to its successors and assigns forever, subject, however, to:
>
> (a) All reservations, covenants, restrictions and exceptions in recorded conveyances or other recorded documents pertaining to said real estate, or any part thereof;

Id. S.D. Helgeson, Inc. transferred the property to SRKM, Inc., which in turn transferred it to the Cooks. Id. In both transfers it was stated:

> TO HAVE AND TO HOLD unto the Grantees and to their heirs and assigns forever, subject, however, to:
>
> (a) All reservations and exceptions of record and in patents from the United States or the State of Montana;

Id. The Falcon Ridge, LLC February 10, 2006, Subdivision Improvement Agreement was a public document "of record". App. 59-73.

There is **no** evidence before the Court as to what either S.D. Helgeson, Inc. or SRKM, Inc., knew or told the Cooks about the soil conditions of the lot. Likewise, there is **no** evidence as to what the builders or realtors for the other 138 property owners knew or were told about the property they bought.

Buscher Construction, Ltd. built homes in Falcon Ridge, (App. 34, ¶ 12), but had dealings with only a fraction of the people who bought lots in Falcon Ridge. Of the 69 lots in Falcon Ridge I, Buscher Construction, Ltd. built only six homes and two duplexes. App. 34, ¶ 14. That is only 11.6% of the properties in Falcon Ridge. Of the 70 lots in Falcon Ridge II, Buscher Construction, Ltd. built only 14 homes, two duplexes, and two fourplexes. App. 35, ¶ 15. That is only 25% of the properties in Falcon Ridge II. Since 2006, when Buscher Construction, Ltd. began building structures on lots in Falcon Ridge I and later in Falcon Ridge II, it has received only one complaint from a buyer about differential settlement on the property. It promptly remedied the issue and received no subsequent complaints. Neither Buscher Construction, Ltd. nor Dennis or Linda Buscher, as realtors, have ever been sued in connection with a house built by Buscher Construction, Ltd. App. 35, ¶¶ 35-36.

Neither Buscher Construction and Development, Inc., Falcon Ridge, LLC, Aviara, Inc., Dennis Buscher, Linda Buscher or Trent Buscher, individually, constructed any structures in Falcon Ridge. App. 34, ¶ 12. As to the other homes

built in Falcon Ridge, there were at least seven other contractors who built homes in Falcon Ridge I. 35, ¶ 14. Likewise, in Falcon Ridge II, there were at least 12 other contractors who also built homes in Falcon Ridge II. App. 35, ¶ 15. None of these contractors are named defendants.

Neither Buscher Construction and Development, Inc., Buscher Construction, Ltd., Falcon Ridge, LLC, or Aviara, Inc. acted as real estate brokers in the sale of any property in Falcon Ridge. App 35, ¶ 16. Dennis Buscher and Linda Buscher, individually, were involved as real estate agents in Falcon Ridge, but only for a very limited number of the properties. Specifically, they acted as real estate agents only for the 26 properties built by Buscher Construction, Ltd. App 35, ¶ 17. That was eight properties in Falcon Ridge I and 18 properties in Falcon Ridge II. App. 34, ¶¶ 14, 15. This is less than 19% of the lots (26 of 139). Other than being an owner of Aviara, the District Court found that Linda Buscher was a listing agent for only 26 properties in Falcon Ridge. App. 8, ¶ 19.

As to Trent Buscher, the District Court found that he acted as a listing agent on only 39 properties sold in Falcon Ridge. App. 8. ¶ 20.

The District Court found that the Falcon Ridge Defendants conveyed every lot in the Falcon Ridge Subdivisions, some more than once, and that Dennis Buscher signed a deed conveying every lot at least once. App. 8, ¶ 18. While the Court did not reference where in the record it derived this finding, the only source of such

information in the record was the Foundational Affidavit of Tucker Gannett and Exhibits D – H (Dkt. 126). This contains a summary of the transactions between various Defendants and others (Exhibit D), followed by the actual deeds (Exhibits E- H). This finding is noteworthy in two respects.

First, there were no deeds in Exhibits E – H (Dkt. 126) by which Linda Buscher either transferred any property in her individual capacity, although she did sign some deeds as an officer in a representative capacity. There is only one deed by which Trent Buscher transferred a property that he owned to any third party. Dkt 126, Ex. I. Other than that, there is not a single deed by which Trent Buscher transferred a property that he owned to any third party, in either his personal capacity or in a representative capacity as an officer or member of some legal entity.

Second, there were no deeds in Exhibits E – H (Dkt. 126) by which Dennis Buscher transferred any property in his individual capacity. With respect to every single deed, they were executed in a representative capacity as an officer or member of some legal entity (Falcon Ridge, LLC, Aviara, Inc, Buscher Construction, Ltd or Buscher Construction & Development. Inc.) This critical fact was not made clear in the District Court's Finding of Fact 18. App. 8, ¶ 18.

Third, the Court failed to scrutinize the grantees of the properties in the deeds. Of the 117 transfers by Falcon Ridge LLC, 74 were to parties directly related to the Falcon Ridge subdivision as either an owner of Falcon Ridge, LLC (Aviara, Four

D's Development) or a person or entity associated with one of the owners (Buscher Construction & Development, Kelly Donovan, Trent Buscher Construction). Of the 117 transfers, not counting the related entities, 18 were to builders (Ban Construction, BTS, Inc., Halton/Nelson Construction, Helgeson, Inc., Shane Fuchs Construction), and only 25 were sold to individuals. Dkt. 126, Ex. E.

Of the 47 properties that Aviara, Inc. transferred to other persons or entities, 39 of them were to parties directly related to the Falcon Ridge subdivision as either an owner of Falcon Ridge, LLC (Falcon Ridge, LLC and Four D's Development) or a person or entity associated with one of the owners (Buscher Construction & Development, Rims Development, Inc. and Trent Buscher Construction). Of the 47 transfers, not counting the related entities, six were to builders (Ban Construction, BTS, Inc., Halton Homes, NDJ Contracting, Inc.), and only three were sold to individuals. Dkt. 126, Ex. F.

Of the 42 properties which Buscher Construction and Development, Inc. transferred, 24 of them were to parties associated with either Falcon Ridge, LLC or Buscher Construction and Development, Inc. (Buscher Construction, Ltd., Trent Buscher or Trent Buscher Construction, Taylor). Of the 42 transfers, not counting the related entities, seven were to builders (Ban Construction, Classic Design Homes, Kracker Properties, Inc., Picard Development, X Bar S Enterprises), and only 11 were sold to individuals. Dkt. 126, Ex. G.

Finally, of the 11 deeds by which Buscher Construction, Ltd. transferred property to other persons or entities, all 11 were sold to individuals. Dkt. 126, Ex. H.

In summary, there were only 50 direct transfers from Falcon Ridge LLC, Aviara, Inc., Buscher Construction and Development, Inc or Buscher Construction, LTD to individual lot owners, which is less than 36% of the potential class members.

E. <u>Critical, Unknown Facts</u>.

Plaintiffs represented to the District Court that there are 35 properties (some owned by the same potential class members) – just 25% of the total potential class – who claim to have sustained some actual damage to their homes. Dkt. 101, pp. 5-6. The information that was not before the Court dwarfs the information that was actually before the Court.

- There was no information before the District Court as to what each property owner, their builder or the realtors knew about soil conditions in Falcon Ridge.
- There is no information before the Court as to whether any potential class member or any of the over 20 builders who built homes for them in Falcon Ridge saw the Terracon Reports or the disclosure about the Terracon reports contained in the Subdivision Improvement Agreement between Falcon Ridge LLC and the City of Billings.

- There was no information before the District Court as to whether the 17 contractors not named "Buscher" performed soils tests or the results of those tests. There is likewise no information as to how they did the excavation, prepared the soils, designed the foundation or constructed the foundation.
- There is no information before the Court concerning whether any of the property owners or the more than 20 home builders in Falcon Ridge hired either an engineering firm or an architect prior to building their home to obtain advice as to the proper design or construction of a foundation system given the soil conditions in Falcon Ridge.
- There is no information before the Court concerning whether any of the property owners or the more than 20 home builders in Falcon Ridge obtained a "lot specific geotechnical report" prior to building their home or, if such a report was obtained, whether it was followed by the builder.
- There is no information before the Court as to how each builder, landscaper or homeowner landscaped the property to address water issues. There is also no information as to what each homeowner had for an irrigation system and how they used that system.
- There was no information as to whether the current property owner is the original owner or bought the property as a resale. In the cases of resale, there

is no information as to what the original owner knew and whether he fully disclosed any issues to the later owner.

- Finally, there was no evidence before the District Court as to the cause of the damages to these property owners' houses, if any, taking into consideration the actions of all persons involved in the property construction and sale, the vast majority of whom are not named defendants in this case.

IV. SUMMARY OF ARGUMENT

A class action can be a useful mechanism when there is a large group of people who have been harmed by the same person or entity in the same way, resulting is similar damages. But this is not such a case.

The nub of Plaintiffs' case is that the Defendants were negligent because they did not affirmatively disclose statements about potentially collapsable soils contained in two reports prepared by Terracon for the exclusive use of Engineering, Inc., an engineering firm hired by Falcon Ridge, LLC, the Developer of Falcon Ridge I. The District Court granted class certification as to Falcon Ridge, LLC, but also included as class defendants the Developer of Falcon Ridge II (Falcon Ridge, LLC II), two businesses (Buscher Construction and Development, Inc, and Buscher Construction, Ltd.) and three individuals (Dennis, Linda and Trent Buscher).

Possibly the oddest fact in this case is that the Class Plaintiffs, Ralph and Barbara Cook, had literally no dealings with any of the Falcon Ridge Defendants.

The District Court determined that they did not buy their lot from any of the named Defendants, did not have their home built by any of the named Defendants, and none of the named Defendants acted as a realtor in connection with the sale. App. 3-4, ¶ 3. This alone dooms their "typicality" claim. *Murer v. Montana State Compensation Mut. Ins. Fund*, 257 Mont. 434, 438, 849 P. 2d 1036 (1993) ("Generally in the application of the typicality requirement of Rule 23(a)(3), the plaintiffs are not entitled to bring a class action against defendants with whom they have had no dealings").

But of equal importance is the fact that the lone common issue raised by the Cooks is not an issue whose "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke", or one that "generate[s] common answers apt to drive the resolution of the litigation". *Chipman v. Northwest Healthcare Corp.,* 2012 MT 242, ¶48, 366 Mont. 450, 288 P.3d 193. This is a case about whether the alleged non-disclosure of an engineering report which, by its terms, "does not and was not intended to present design level recommendations for residential foundations" resulted in damages to the class members homes. The 139 potential class members dealt with different combinations of some or all of the following people -- property sellers, builders, architects, engineers and landscapers. A Court cannot just ignore these basic factual differences and pretend that every property owner's home was damaged because of the alleged non-disclosure of the

Terracon Report. The class member, his builder, his architect or engineer may bear responsibility for the design of the house and foundation, the manner in which the soils were excavated and compacted, the failure to do site-specific soils testing, the failure to properly design and construct landscaping to keep water away from the foundation, the method and frequency of watering by the class member, and, in the case of a resale, what information was given to a new buyer. In such circumstances, commonality does not exist and a class action must be denied.

V. STANDARD OF REVIEW

The Montana Supreme Court reviews class certification orders for an abuse of discretion. *Diaz v. State*, 2013 MT 219, ¶15, 371 Mont. 214, 371 P. 3d 214. It considers whether the district court acted arbitrarily without conscientious judgment or exceeded the bounds of reason. Id. "A court abuses its discretion "if its certification order is premised on legal error,'" *Mattson v. Mont. Power Co.,* 2012 MT 318, ¶ 17, 368 Mont. 1, 291 P.3d 1209 (quoting *Hawkins v. Comparet–Cassani,* 251 F.3d 1230, 1237 (9th Cir.2001) (internal quotation marks omitted)).

VI. ARGUMENT

In order to obtain class certification, a plaintiff must meet all of the requirements of Mont. R. Civ. P 23(a), *Ferguson v. Safeco Ins. Co*., 2008 MT 109, ¶ 16, 342 Mont. 380, 180 P. 3d 1164, and at least one of the requirements of Mont. R. Civ. P. 23(b).

A. Plaintiffs Cannot Satisfy Rule 23(a).

The four prerequisites for a class action under Rule 23(a) are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

A plaintiff seeking class certification bears the burden of showing that each of the requirements of Rule 23 has been met. *Diaz v. Blue Cross & Blue Shield,* 2011 MT 322, ¶ 27, 363 Mont. 151, 267 P. 3d 756. "Certification is proper only if the trial court is satisfied, after a 'rigorous analysis' that all of the prerequisites of Rule 23(a) have been established." *Chipman,* ¶ 44, *citing Wal–Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 339 (2011). While the Court should not make a decision on the merits of a claim at the class certification stage, it may go beyond the pleadings so that it can understand the facts, claims and defenses in order to make the class certification decision. *Mattson v. Mont. Power Co*., ¶¶ 64-67.

In the District Court, Appellants conceded the fourth prong, adequate representation. While numerosity was a close call, this prong is conceded given the standard of review. That leaves the second and third prongs, commonly referred to as commonality and typicality.

1. <u>Commonality</u>.

In *Chipman*, ¶¶ 47-52, the Court adopted and applied the commonality analysis articulated in *Wal–Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 339 (2011). This analysis was a departure from prior Montana law, and it "significantly tightened the commonality requirement". *Chipman,* ¶ 47. The Montana Supreme Court stated:

> To demonstrate that class members "have suffered the same injury," a plaintiff must show more than the fact that all class members were merely employed by the same company and that company violated the same provision of law. *Wal–Mart,* —— U.S. at ——, 131 S.Ct. at 2551. Instead, the class members' claims must depend on a common contention that is capable of classwide resolution, "which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart,* —— U.S. at ——, 131 S.Ct. at 2551. The Court further explained the commonality requirement as follows:
>
> > What matters to class certification ... is not the raising of common "questions"—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers. (citations omitted).

Chipman, ¶ 48. The District Court adopted this standard, but then erred in its application.

The only common issue articulated by Cooks is that the purported class members were homeowners within Falcon Ridge who had their homes built without the benefit of the soils disclosure contained in the Terracon Report. Dkt. 101, p. 10.

The existence of the Terracon Report and potential nondisclosure of this document is exactly the sort of "common fact" that the Montana Supreme Court warned against using to establish the commonality requirement.

> *Wal–Mart* departed from this minimal standard that was often easily satisfied. In *Wal–Mart,* a class of 1.5 million current and former female employees alleged that the company discriminated against them on the basis of their sex by denying them promotions and equal pay in violation of Title VII of the Civil Rights Act of 1964. *Wal–Mart,* —— U.S. at ——, 131 S.Ct. at 2547. In addressing the commonality requirement, the *Wal–Mart* Court recognized that the language requiring "questions of law or fact common to the class" could easily be misread since any competently crafted complaint literally raises the requisite common questions. *Wal–Mart,* —— U.S. at ——, 131 S.Ct. at 2550–51.

Chipman, ¶ 48.

As these cases clearly illustrate, commonality cannot be established just because the Plaintiff can articulate a single common issue. The issue must be one whose "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke", it must "generate common answers apt to drive the resolution of the litigation", and it cannot be the case where dissimilarities within the proposed class "have the potential to impede the generation of common answers". *Chipman*, ¶ 48.

The District Court oddly framed this case as a "bad dirt" case, instead of a "bad house case". App. 3, ¶ 1, App. 17, ¶ 20. It appears to have done so in order to enhance the importance of the Terracon Report and allow it to ignore the myriad of

other issues that have to be resolved on a property-by-property basis in order to determine if the nondisclosure of the Report made the slightest difference to each of the 139 property owners. This places form over substance.

The Cooks are not suing to get "good dirt." They are suing for "property damages to homes" caused by Defendants' alleged negligence as to soils conditions. Dkt. 75, pp. 40-42. The District Court found the Cooks "allege their 'home in Falcon Ridge…was damaged due to differential settling'". App. 3, ¶ 2.

The District Court refused to consider the undisputed fact that the existence of the Terracon Report was disclosed in a publicly available document, finding that this would stray into making a decision on the merits. App. 14, ¶ 14. But then it determined that the "apparent lack of direct notice [of the Terracon Report] binds all purchasers together and establishes commonality." App. 15, ¶ 15. This is just the sort of vacuous commonality that the Courts in *Wal-Mart* and *Chipman* warned against.

First, there is no reason to assume that none of property owners, their builders or real estate agents saw the Terracon Report. That issue itself would have to be resolved on an owner-by-owner basis. Second, the question whether that nondisclosure caused any damage to a particular property owner's home cannot be resolved by addressing this one question. Put another way, a property owner could not come to court, testify that he did not see the Terracon Report and automatically

be entitled to damages for problems in his house. As to each and every property, a jury would have to consider and resolve numerous issues:

1. Would the homeowner have given any consideration to the Terracon Report which expressly stated its analysis was not for the purposes of giving advice for the construction of residential foundations?

2. What language is contained in the deeds of each property owner, such that they may or may not have constructive knowledge of the statements in the Subdivision Improvement Agreement concerning soil issues?

3. What, if anything, did each homeowner know about the soil conditions in west Billings? What did he do with that knowledge to insure a properly built home?

4. What information did each plaintiff's builder have about the soil in Falcon Ridge? Did the builder do soil testing and, if so, what were the results of the soil tests and did the builder take heed of potential issues?

5. How was the plaintiff's property excavated and prepared for the foundation? What was the design of the foundation, and did it take into account the potential for expansive or collapsible soils?

6. Is the builder negligent for failure to properly prepare the soil and design and construct an appropriate foundation? How does that negligence compare with that of any of the Buscher Defendants or the plaintiffs?

7. Did the plaintiff have an architect or engineer hired in connection with the project? If so, what were their recommendations, and would anything stated in the Terracon Report have mattered to these professionals in the design of the foundation and home?

8. Was the property landscaped to keep water away from the foundation? If not, did the design or construction of the landscaping, rather than the soil on site cause damage to the home?

9. Did the current owner purchase the property from prior owners? How in that circumstance would any Defendant have any obligation to a second or third owner to give them the Terracon Report.

10. When did the plaintiff acquire the property? Is their claim barred by the 10-year statute of repose or by knowledge of problems that would bar their negligence claim under the three-year statute of limitations?

The District Court, having adopted the "bad dirt" theory, simply ignored the numerous, owner-specific issues that would have to be resolved as to each property owner before it could be determined which, if any, of the Defendants, breached some duty which caused a homeowner some damage. In doing so, it gave short shrift to *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (Nev. 2005). There, the Nevada Supreme Court considered whether class action certification was appropriate in construction defect case, based on damages caused by expansive soils:

> The homeowners claimed that their houses' foundations and concrete slabs were damaged by expansive soils, a condition in which the soils beneath a house expand when exposed to water and contract when the soil dries. This condition can cause a house's foundation and concrete slab to crack and separate. The homeowners also alleged over 30 additional constructional defects unrelated to the soils condition.

Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 843, 124 P.3d 530, 535 (2005). It held that "single-family residence constructional defect cases will rarely be appropriate for class action treatment," *Shuette*, 124 P.3d at 542, holding:

> Even when the uniqueness of the real property is not substantially implicated, constructional defect cases relating to several different properties are often very complex, involving allegations between

> numerous primary parties and third parties concerning different levels or types of property damages. In many instances, these types of cases present issues of causation, liability defenses, and damages that cannot be determined or presumed through the use of generalized proof, but rather require each party to individually substantiate his or her claims.

Shuette, 124 P.3d at 543.

The same type of factual and causation issues described in *Shuette* are present in the instant case. At bottom, this is a negligence case in which the comparative negligence of the Plaintiffs, Defendants, builders, architects, engineers, and landscapers are at issue. These are deeply fact-intensive issues which can only be resolved on a case-by-case basis. As such, the existence of the single common issue raised by Cooks is grossly insufficient to establish a common issue whose "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke", that will "generate common answers apt to drive the resolution of the litigation", and is not one where dissimilarities within the proposed class "have the potential to impede the generation of common answers". *Chipman,* ¶ 47. The District erred when it held the Plaintiffs had established the requisite commonality.

2. <u>Typicality</u>.

The Montana Supreme Court has articulated the typicality requirement as follows:

> To satisfy the typicality element, a plaintiff must demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." M.R. Civ. P. 23(a)(3). The typicality requirement is designed to ensure that the interests of the named

> plaintiffs align with the interests of the class members, "the rationale being that a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class." *Diaz,* ¶ 35; *McDonald,* 261 Mont. at 402, 862 P.2d at 1156. A named plaintiff's claim is typical if it "stems from the same *event, practice,* or *course of conduct* that forms the basis of the class claims and is based upon the same legal or remedial theory." *Diaz,* ¶ 35 (emphasis in original)(citations omitted).

Chipman, ¶ 53.

While the District Court correctly cited *In re Blue Cross & Blue Shield of Mont., Inc*., 2016 MT 121, ¶ 23, 383 Mont 404, 372 P. 3d 457 for the proposition that "the typicality requirement is not demanding," it failed to cite or consider the balance of the Court's admonition:

> The requirement [of typicality] serves to "prevent[ ] plaintiffs from bringing a class action against defendants with whom they have not had any dealings." *Diaz,* ¶ 35. In a settlement class, typicality "requires proof that the interests of the class representative and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." 2 Newberg & Conte, *Newberg on Class Actions* § 11.28, 11–58 (3d ed.1992). " This is a much simpler proposition than showing typicality in an ongoing litigation context, wherein all elements of liability and damages must be analyzed to determine common questions affecting both the class representative and the class." Newberg & Conte, § 11.28, at 11–58.

Blue Cross, Id.

The District Court cites *Murer v. Montana State Compensation Mut. Ins. Fund*, 257 Mont. 434, 438, 849 P. 2d 1036 (1993), but then ignores its core holding on the typicality issue. The Court stated:

> Generally in the application of the typicality requirement of Rule 23(a)(3), the plaintiffs are not entitled to bring a class action against defendants with whom they have had no dealings.

Murer, 257 Mont. at 438, 849 P. 2d at 1038. **In this case, the Cooks have had no dealings of any sort with any of the Falcon Ridge Defendants.** The District Court determined that they did not buy their lot from any of the named Defendants, did not have their home built by any of the named Defendants, and none of the named Defendants acted as a realtor in connection with the sale. App. 3-4, ¶ 3.

As a substitute for the basic requirement, the District Court determined that the Defendants were "inextricably connected with these lots", App. 20, ¶ 27, but, ironically, it relies on evidence showing that various Defendants were involved only to a limited degree with respect to the 139 lots:

- Linda Buscher listed 25 lots.
- Trent Buscher listed 39 lots.
- Dennis and Linda Buscher, indirectly as members of Aviara, owned 25% of Falcon Ridge, LLC and Falcon Ridge LLC, II.

App. 19 – 20, ¶¶ 24, 26.

The only Defendants who are arguably "inextricably connected with these lots" are the original Developers, Falcon Ridge, LLC and Falcon Ridge LLC, II, by virtue of the fact that they owned all of the lots at one point in time. The remaining

Defendants had various degrees of involvement with only a relatively small portion of the potential class members.

- Buscher Construction, Ltd. built only eight homes/duplexes in Falcon Ridge I (11.6% of the properties) and 18 homes/duplexes/fourplexes in Falcon Ridge II (25% of the properties). None of the other named Falcon Ridge Defendants built any homes.

- There were at least 19 other contractors, unrelated to the Falcon Ridge Defendants, who built homes in Falcon Ridge.

- Dennis Buscher and Linda Buscher, individually, were involved as real estate agents in Falcon Ridge, but only for the 26 properties built by Buscher Construction, Ltd. This is less than 19% of the lots (26 of 139), and none of the other Falcon Ridge Defendants except Trent Buscher, acted as brokers as to any lots. He acted as a listing agent on only 39 properties sold in Falcon Ridge.

In addressing typicality, the District Court found that five of the Falcon Ridge Defendants combined to convey 218 lots, including multiple conveyances of some lots. App. 19, ¶ 24. But it failed to closely examine the nature of the sales. As addressed in the Fact section at pp. 10 - 13, *supra*, the deeds for these sales (found in Dkt. 126, Exhibits E – H) demonstrate that the vast majority of these transfers were to parties related to the Falcon Ridge Defendants or to builders. Indeed, only 50 of the 139 lots were transferred directly to a property owner, which is less than

36% of the potential class (Falcon Ridge – 25, Aviara, Inc. – 3, Buscher Construction and Development, Inc. – 11, Buscher Construction, Ltd. – 11).

A named plaintiff's claim is typical if it "stems from the same *event, practice,* or *course of conduct* that forms the basis of the class claims and is based upon the same legal or remedial theory." *Chipman*, ¶ 53, quoting *Diaz,* ¶ 35 (emphasis in original) (citations omitted). The Cooks circumstances are not typical of any other class member, unless that class member also had absolutely no dealings with any of the Falcon Ridge Defendants. "[T]he plaintiffs are not entitled to bring a class action against defendants with whom they have had no dealings". Murer, 257 Mont. at 438, 849 P. 2d at 1038. The Cooks, having admittedly no dealings with any of the Falcon Ridge Defendants simply cannot meet the typicality requirement.

Finally, the fact that Cooks are the class representative simply illustrates the perniciousness of finding typicality in the case. Plaintiffs are trying to hold all of the Falcon Ridge Defendants liable to all 139 potential class members, despite the fact that each class member will, but for pure coincidence, have had dealings with some unique hodgepodge of Defendants and other persons, such as the 19 non-defendant contractors. For example, Buscher Construction Ltd had no dealings with any potential class members, except for the 26 for whom it built homes, duplexes or

fourplexes. It cannot possibly be the law that it can be held liable to people with whom it has had no dealings of any sort.

The District Court erred when it found the element of typicality existed.

B. Plaintiffs Cannot Establish Rule 23(b)(3) Requirements.

Under Rule 23(b)(3), the Court must find (1) the questions of law or fact common to class members predominate over questions affecting only individual members and (2) a class action is superior to other methods for fairly and efficiently adjudicating the controversy. The Court must conduct a rigorous analysis as to these two elements, commonly referred to as predominance and superiority. *Byorth v. USAA Ca. Ins. Co, 2016 MT 302,* ¶ 41, 385 Mont. 455, 384 P. 3d 455.

"A central concern of the Rule 23(b)(3) predominance test is whether adjudication of common issues will help achieve judicial economy." *Sangwin v. State*, 2013 MT 373, ¶ 31, 373 Mont. 131, 315 P.3d 279 (citations omitted). The predominance requirement is not met when "factual questions must be answered on an individual basis before the plaintiffs will be in a position to establish liability." *Sangwin*, ¶ 37 (citation omitted). As the Ninth Circuit stated:

> If the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate [and if] each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not "superior."

Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180, 1189-92 (9th Cir. 2001) (citation omitted).

Consideration of the Rule 23(b)(3) factors is necessary only if the Court has already concluded that "Rule 23(a) is satisfied." Mont. R. Civ. P. 23(b). This, of course, makes perfect sense. If a Court has found a typical plaintiff with a common issue, it can then grapple with whether the common issue predominates over questions affecting only individual members.

Again, the only common issue articulated by Cooks is that the purported class members were homeowners within Falcon Ridge who had their homes built without the benefit of the soils disclosure contained in the Terracon Report. As discussed in Section (A)(1), *supra*., this issue does not "generate common answers apt to drive the resolution of the litigation." *Chipman*, ¶ 48. And for exactly the same reasons, it does not predominate over individual issues.

At the end of the day, each class member who claims to have damage to his house because of undisclosed soil problems is going to have to prove what caused those damages. A Court cannot just pretend that they were caused by non-disclosure of the Terracon Report. The class member, his builder, his architect or engineer (if he has one) may also bear responsibility for the design of the house and foundation, the manner in which the soils were excavated and compacted, the failure to do site-specific soils testing, the failure to properly design and construct landscaping to keep

water away from the foundation, the method and frequency of watering by the class member, and, in the case of a resale, what information was given to a new buyer. All of the questions set forth on pp. 22-23, *supra*., would have to be considered.

Moreover, all of the issues have to be considered in relation to which, if any, of the Falcon Ridge Defendants had any dealings with a potential class member. If there is a class member who bought a lot from Aviara, had a house built by Buscher Construction, Ltd., which was listed by Linda Buscher, that presents one set of individual issues. If, on the other hand, there is a class member who bought his lot from a non-defendant builder, had that entity construct his home, hired an engineer to do site-specific soil samples, and used Coldwell Banker as a realtor, that presents an entirely different set of individual issues. That is precisely what the Court in *Shuette* observed which respect to cases involving damage to homes because of soil conditions:

> Even when the uniqueness of the real property is not substantially implicated, constructional defect cases relating to several different properties are often very complex, involving allegations between numerous primary parties and third parties concerning different levels or types of property damages. In many instances, these types of cases present issues of causation, liability defenses, and damages that cannot be determined or presumed through the use of generalized proof, but rather require each party to individually substantiate his or her claims.

Shuette, 124 P.3d at 543.

At bottom, this is a negligence case in which the comparative negligence of the Plaintiffs, Falcon Ridge Defendants, builders, architects, engineers, and

landscapers are at issue. These are deeply fact-intensive issues which can only be resolved on a case-by-case basis. As such, the single common issue raised by Cooks does not predominate over the multiple, required individualized determinations.

As to superiority, it is certainly "efficient" to force the Falcon Ridge Defendants into a class action in which they may have had little or nothing to do with the great majority of the class members so they can face joint liability for things they had nothing to do with. But judicial economy can never take the place of justice and due process. At the trial of such a case, the Cooks would take the stand, acknowledge that they had absolutely no dealings with any of the Falcon Ridge Defendants, and then argue that, because they are representative of 139 other property owners, the jury should award damages to everyone. Quick and efficient, but ridiculous on its face.

It is undisputed that, Since 2006, when Buscher Construction, Ltd. began building structures on lots in Falcon Ridge I and later in Falcon Ridge II, it has received only one complaint from any buyer about differential settlement on the property. It promptly remedied the issue and received no subsequent complaints. Neither Buscher Construction, Ltd. nor Dennis or Linda Buscher, as realtors, have ever been sued in connection with a house built by Buscher Construction, Ltd. If there are persons who have actually been damaged by something that one or more of the Falcon Ridge Defendants have done, they can assert whatever claims they

have. Respectfully, whatever inconvenience that may cause to such plaintiffs or the court pales in comparison to the injustice of seeking to hold the Falcon Ridge Defendants responsible to over 100 property owners, the great majority of whom have had no dealings with the Falcon Ridge Defendants.

Cases involving damage to one's home are difficult cases for all involved. They are deeply personal to the plaintiffs since they usually involve their home which is their single biggest asset. But that is not a good reason to throw the Falcon Ridge Defendants under the bus for the sake of expediency.

VII. CONCLUSION

The District Court abused its discretion when it certified this class. Based on undisputed facts, and the applicable law, Plaintiffs did not prove the requisite commonality or typicality. The Falcon Ridge Defendants respectfully request that the Court reverse the District Court's Order (Dkt. 178; App. 1 – 28) and remand the case to the District Court with instructions to resolve only the claim made by Ralph and Barbara Cook.

DATED this 21st day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced (except for footnotes and quoted and indented material which are single spaced); with left, right, top and bottom margins of one inch; and the word count as calculated by Microsoft Word does not exceed 10,000 words, excluding the Table of Contents, Table of Citations and Certificate of Compliance.

DATED this 21st day of December, 2023.

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