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NO. 72939-0-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WGW USA, INC., and TIAN QING GUO,

Appellants,

v.

LEGACY BELLEVUE 530, LLC,

Respondent.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

WASHINGTON CASES

TABLE OF AUTHORITIES

WASHINGTON CASES

STATUTES

OTHER AUTHORITIES

I. LEGACY HAS MADE A NUMBER OF SIGNIFICANT MISSTATEMENTS IN ITS BRIEF OF RESPONDENT.

A. Legacy's reference to the "As-Is" provision is misleading, for that clause only refers to the restaurant building.

Legacy has referred to the "As-Is" provision on pgs. 1 , 7 ("TENANT HAS INSPECTED THE PREMISES AND ACCEPTS THE PREMISES IN AN "AS-IS" CONDITION.") and 15, falsely implying that WGW/Guo had inspected and accepted the overall property "As-Is." But "Premises" is defined in the lease at CP 83 as only the restaurant building:

> "Premises": The space in the Shopping Center consisting of approximately 5,600 square feet known and described on the site plan of the Shopping Center attached as Exhibit B.

Exhibit B shows the "Premises" as just the structure. CP 100.

Because this is Legacy's lease, Legacy had to have known that the "As-Is" provision is not relevant to this case.

B. Legacy falsely states that Attorney Bennett Tse was involved in the lease negotiations; the only evidence on record is that the attorney referred Guo to Maci Lam.

Legacy makes these false statements on p. 2 ("landlord disclosed to ... Bellevue attorney"), and on p. 4. The only reference in the record to attorney Bennett Tse is at CP 265, that he referred Guo to Maci Lam:

> From an ad I saw I believe in the newspaper, but I am not sure, I located attorney Bennett Tse, an attorney who speaks

> Mandarin Chinese, to help me with this lease. I gave him a call and he referred me to Maci Lam of Skyline Properties.

Especially in light of Legacy's misleading reference to the "As-Is" provision, Legacy has attempted to create the false impression that WGW/Guo had a "consultant team," p.5, investigating the Legacy property, when in fact, Guo had chosen the property himself, CP 265, and Maci Lam was brought in just to negotiate the terms of the lease. CP 265, 367:

> ...the focus of my meetings and conversations with Mr. Nelson was on the lease terms...

C. Legacy has created the false impression that Legacy and WGW/Guo were on equal footing in learning about Sound Transit's potential need to acquire the Legacy Property.

Legacy makes this statement on p. 5 ("equal access to all public information"). While this may be literally true, the reality is quite different. During lease negotiations in August and September 2012, Legacy was represented by broker Nelson, who already was an expert on the Legacy Property. Nelson had been the property manager since 2006, CP 45, and had tracked Sound Transit's potential need for the Legacy Property since 2008. CP 246. Prior to lease negotiations, Nelson had reviewed the July 2011 Final Environmental Impact Statement, including Appendix G2, CP 246-248, which designated the Legacy Property as a potential acquisition for route

C9T, Nelson had reviewed the November 2011 Memorandum of Understanding whereby route C9T was chosen, CP 237, meaning that for certain the rail line would cross I-405 at the NE 6th overpass, and Nelson had attended a Cost Savings Process open house in April 2012, involving cost savings design changes, which process would not be completed until 2013. CP 226-27, 201.

WGW/Guo, however, was introduced to the Legacy Property in August 2012, by seeing a "For Lease" sign on a building with ample parking, CP 265, and by information supplied by Nelson, who by negotiating a 10 year lease, necessarily implied that he knew of no reason the property would not be available for the entire lease term. And while Nelson discussed Sound Transit's future proximity, he did no solely in positive terms, that this would be good for Guo's restaurant by increasing foot traffic. CP 46. And had WGW/Guo attempted to learn on its own that Sound Transit may need to acquire the Legacy Property, Legacy has admitted that this process would be "like finding a needle in a hay stack in thousand upon thousands of documents on Sound Transit's website." RP 11-21-14 at p. 16.

D. Legacy incorrectly characterized Sound Transit's depiction of the rail line on the north side of NE 6 as a "Final Plan" when the lease was negotiated. When the lease was signed, the chosen route was at only 30% engineering design.

Legacy erroneously states that Sound Transit had a "Final Plan" on p. 4 ("At the time the lease was negotiated and formed, all available Sound Transit information and documentation affirmed that the Final Plan selected the for the light rail would not adversely affect the Premises."), and on p. 8.

But when the lease was signed on 9-12-12, Sound Transit had no final plan, other than that light rail would cross I-405 at the NE 6th overpass:

> Q: To the best of your knowledge, was there ever a serious discussion about re-routing the alignment to cross 405 at some place other than NE 6th?
>
> Melton: Well, not once C9T was chosen...

CP 220 (Kent Melton, was the senior real property agent for Sound Transit in 2012 and is now the real property deputy director. CP 211-12.) Route C9T was chosen in the 11-15-11 MOU. CP 187, 188, but the exact path by which light rail was to cross I-405 along NE 6th remained uncertain:

> **Current designs** of the Project are included in the East Link final PE Plans... **while detailed design and mitigation will continue through project development...**

CP 195 (Emphasis added) (11-15-11 MOU).

When the lease was negotiated, Sound Transit could not "affirm" an exact path, because the chosen route, C9T, was at only 30% engineering design. CP 223. The final plan could not be determined until 60%

engineering, CP 222, which would not occur until the Costs Savings Process was completed in 2013. CP 226-27, 201.

E. Legacy misstates the risk as only a speculative hypothetical that Sound Transit may need to acquire the Legacy Property. When the lease was negotiated, the true risk was a 50% chance of condemnation.

Legacy erroneously refers to this risk as a remote hypothetical on p. 19 ("the potential for condemnation is exactly that - a hypothetical, evolving, fluid, future, and all together speculative factual situation"). And apparently to dilute this "hypothetical," on p. 8 Legacy listed six other properties designated as potential acquisitions for route C9T, which six properties bear no relevance to the risk to the Legacy property.

Because light rail will cross I-405 at the NE 6th overpass, only two properties on the potential acquisition list for route C9T, CP 184, are relevant to this discussion: the Legacy Property at 530 112th Ave. NE and the Northwest Building at 700 112th Ave. NE. These properties are on opposite sides of NE 6th and immediately west of the NE 6th overpass. CP 185. Appendix A shows the location of these two parcels.

Because the light rail path will for certain cross I-405 along the NE 6th overpass, Sound Transit needed to acquire either the Legacy Property or the Northwest Building. The only question was which one. As Kent Melton

said at CP 225:

> Q: ...how is the final alignment determined as to exactly where the light rail would cross 405? North of NE 6th, the middle of NE 6th, to the south of NE 6th? ...
>
> Melton: ...it is an engineering question and they would just determine where the best place and most efficient place to put light rail alignment would be.

For this reason, at 30% design, when the Final Environmental Impact Statement was prepared, the engineers often designated as potential acquisitions properties on both sides of a street. CP 217, 222. And even if the light rail was in the middle or NE 6th, one of the two properties would be needed for construction staging.

So when Legacy states on p. 3 that "Sound Transit did not know ... during lease negotiations, which property would actually be affected," what that means in relation to this case is that Sound Transit did not know which of the two parcels, the Legacy Property or the Northwest Building, Sound Transit would have to acquire.

F. Legacy misstates that it provided no false information to WGW/Guo. Legacy incorrectly told WGW/Guo that the light rail path would be on the north side of the NE 6th, when no final decision had been made.

Legacy makes this misstatement on p. 4 ("the disclosures made by Mr. Nelson to Guo ... were wholly consistent with the information available to the

public") and on p. 24 ("No false information was provided to WGW.") But as seen at CP 46, Nelson incorrectly told WGW/Guo:

> I informed Ms. Lam and Guo that ... the Train's route was scheduled to travel on the north side of the NE 6th Street overpass to continue over I-405.

Nelson's representations were not at all consistent with the Final Environmental Impact Statement, the MOU and the Costs Savings information at the April 2012 open house, that 1) while Sound Transit had preliminarily depicted the light rail path on the north side of NE 6th, that path was subject to change, 2) properties on both sides of NE 6th, the Legacy Property and Northwest Building, were designated as potential acquisitions, and 3) Sound Transit would not decide until 2013 which of the two properties would be needed. CP 185, 195, 201.

Therefore, telling WGW/Guo that Sound Transit's rail line would be on the north side of NE 6th constituted an affirmative misrepresentation wholly inconsistent with the published material.

G. Legacy falsely states that Sound Transit will only need a small portion of the Legacy property. Sound Transit will require all of the parking area for construction staging.

Legacy made this and related misstatements on p. 14 ("Sound Transit has indicated it will need only a portion of the parking lot to hold a single

support column"), on p. 23 ("At some point, possibly in the near future, Sound Transit might decide to actually construct the rail route on the south side of NE 6th Street."), and on p. 25 ("Even now it is still not clear how or when the Premises may be used to support the construction of light rail track.").

These statements misrepresent the facts , as explained by Kent Melton at CP 228-29, that Sound Transit will be running its light rail line over the northern part of the Legacy Property, and that Sound Transit will require all of the parking area for construction staging purposes for more than a year:

> Q: How much of 530 112th Avenue NE will be required for acquisition and for how long? ...
>
> Melton: ... I know there's a temporary construction easement there that encompasses most ... of the parcel. ... There's a guide-way easement on the north side of the property. ...
>
> Q: How much of the parking lot will be needed?
>
> Melton: Most, if not all. ...
>
> Q: But all of the parking.
>
> Melton: Yeah.
>
> Q: Do you know for how long all of the parking will be needed?
>
> Melton: I don't know exactly how long, but it's more than a year.

And Kent Melton thereafter stated that the Legacy Property must be acquired by the second quarter of 2017. CP 230.

Thus, Legacy's statement on p. 4 that "There is no reasonably certain evidence that Sound Transit's intended possible use would impair WGW's business in any materially adverse way ..." is a misrepresentation of fact.

H. Legacy misrepresents the events leading to Guo's decision to rescind the lease and omits Guo's stated reasons to rescind: 1) that Sound Transit's need to acquire the Legacy Property rendered his business, The Spring Restaurant, unmarketable, and 2) Guo learned that Legacy had failed to disclose during lease negotations that Sound Transit was seriously considering acquisition of the Legacy Property.

Legacy's misleading presentation is based solely on excerpts from Guo's testimony at a deposition in another case, CP 21, involving issues unrelated to the issues before this Court, and only 7 pages of that 100 page deposition are part of the record on appeal. CP 24-31. The actual facts are far different than that "Guo testified that he abandoned the lease because the restaurant sale fell through and he could not save the restaurant." P. 1 of Brief of Respondent.

Within a few weeks of opening The Spring Restaurant, Guo realized that he did not have enough funds to keep it going on his own, and that he needed to bring in additional funds. On 1-22-13, Guo entered into a purchase and sale agreement to sell 90% of WGW stock to Kangdi International

Investment, Inc. CP 29. Guo had invested about $270,000 into the business, and Kandgi had agreed to pay $292,886.88. CP 392. That sale fell through on 5-22-13. CP 386, 393.

Immediately thereafter, Guo retained business broker Christian Kolmodin to help him sell The Spring Restaurant. As Guo said at CP 386:

> Only after the sale of stock to Kangdi fell through did I attempt to sell The Spring Restaurant, which was when I contacted business broker, Christian Kolmodin. I knew and represented to Ms. Kolmodin that The Spring Restaurant was losing money, but I still had a 10 year lease and I had invested about $270,000 into the business.

After looking at the restaurant, not only did Ms. Kolmodin conclude that Guo had a marketable business, she was able to quickly locate three interested buyers, as she states at CP 364:

> After looking at the restaurant I concluded that Mr. Guo had a marketable business, and I set about to market for prospective buyers. Within weeks, I had three interested buyers who knew of the restaurant and were interested enough to want to negotiate a price. Two of the prospective buyers are well established restaurant owners in this area.

However, after meeting with Nelson and learning that Sound Transit may be acquiring at least some of the Legacy Property, Kolmodin realzied that Guo did not have a marketable business. As she said at CP 364:

> When I first spoke with Mr. Nelson, he mentioned that Sound Transit may be acquiring all or a portion of the property, but

> that a final decision had not been made. I obviously had to get to the bottom of this and met with Mr. Nelson in about mid-May 2013. At this meeting, Mr. Nelson again advised in general terms that Sound Transit was looking at the property, but again Mr. Nelson provided no details other than it appeared that Sound Transit's path would cross over a portion of the property.
>
> I realized at this meeting that I could not market The Spring Restaurant. Mr. Nelson tried to assure me that he did not know exactly what would happen, but I could not market a business based on "what ifs." The possibility that Sound Transit would acquire the real property, even if only a portion, was too great a contingency.

Ms. Kolmodin's three perspective purchasers concurred, as Ms. Kolmodin stated at CP 364:

> I notified the three prospective buyers that Sound Transit might be acquiring a portion of the real property, and they immediately lost interest in acquiring The Spring Restaurant.

And contrary to Legacy's representation that Guo claims the "Premises were made unmarketable," p. 5, Sound Transit's need for the Legacy Property rendered Guo's business not marketable, as Kolmodin said at CP 364:

> I had no choice but to advise (Guo) that given the uncertainty regarding Sound Transit's interest in the property, he did not have a marketable business.

Thus, Guo realized that, even though he had invested about $270,000 into The Spring Restaurant, he had nothing to sell. Guo learned this on 5-29-13.

CP 402.

After consulting with counsel, Guo learned that in November 2011 Sound Transit had designated the Legacy Property as a potential acquisition for the chosen route through Bellevue, and that Legacy's failure to disclose this information was grounds for rescission. As Guo said at CP 386-87:

> At this point, did not know what to do. I consulted with legal counsel, explained my situation and asked for their advice. Following my attorneys' investigation, I learned in November 2011 that Sound Transit had designated the Legacy Property as a potential acquisition for the chosen route through downtown Bellevue. I also learned that this was the kind of information Legacy either knew or should have known prior to lease negotiations in August and September 2012. (And during this litigation, I have learned that Legacy had actual knowledge of Sound Transit's designation.)
>
> I also understood that Legacy's failure to disclose Sound Transit's designation of the Legacy Property as a potential acquisition, was grounds for rescission. As I stated in my declaration in support of WGW USA's motion for summary judgment, I never would have entered into a 10 year lease for the Legacy Property or invested $270,000 in that lease had I known there was a good chance Sound Transit would acquire the property during the term of the lease.

Accordingly, on 6-18-13, through counsel, Guo formally notified Legacy that WGW was seeking rescission of the lease, as seen at CP 402:

> Given the magnitude of Spring Restaurant's investment, and the contemplated ten year lease term, the realistic possibility of condemnation of any part of the restaurant property was a critical fact anyone in WGW's position should have been

> advised of. Legacy had the duty to disclose this fact to WGW at the outset of the lease negotiations. Legacy's failure to make this disclosure warrants a rescission of the Shopping Center Lease....
>
> WGW obviously did not know of the possible condemnation of the property, and Legacy wrongfully took advantage of this situation by remaining silent. In such situations and to prevent wrongful advantage, the law imposed on Legacy an affirmative duty of disclosure.
>
> As you know, WGW has not paid any rent since this information was disclosed on May 29, 2013. Due to the imminent nature of the condemnation proceedings, WGW would be foolish to devote further effort or investment into this business.

Legacy received this certified letter on 6-19-13. CP 403. In response, on 6-20-13, Legacy sent to WGW a 3-Day Notice to Pay Rent or Vacate. CP 75. Thus, Legacy's statement on pgs. 12-13 of the Brief of Respondent that:

> On June 20, 2013, Legacy served WGW with a 3-Day Notice to Pay Rent or Vacate ... WGW responded by abandoning the premises and its lease ...

is a misrepresentation of fact.

Legacy's reference to the XO Café lease is misleading, for the XO Café did not purchase The Spring Restaurant. The XO Café became a new tenant in the Legacy Property under a 5 year lease with a relatively small security deposit ($15,757 vs. $124,886) and about a one-third reduction in rent, CP388, 405, 407, and the XO Café had use of all of WGW/Guo's

$124,886 in tenant improvements.

The owner of the XO Café could not have known the true impact of Sound Transit's need for the Legacy Property, for the owner stated at CP 43:

> I understand that any impact from the light rail will likely ... benefit the restaurant business by increasing foot traffic.

Some restaurant might benefit, but the XO Café will have to shut down, for the entire parking area will be required for construction. Therefore, when Legacy states at p. 14 that Sound Transit "will likely benefit their (XO Café's) restaurant business by increasing pedestrian traffic," Legacy is making yet another substantial misrepresentation.

I. Conclusion on Legacy's misrepresentations.

It is difficult for this Court on appeal to properly apply the law, when the facts have been so grossly misstated by Legacy. With the above corrections, this Court should be able to understand that Legacy, by its agent, William Nelson, misrepresented the Legacy property by affirmative misrepresentations, omission of material facts, and misleading half-truths.

II. THROUGH ITS AGENT, NELSON, LEGACY IS LIABLE FOR BOTH NEGLIGENT AND FRAUDULENT MISREPRESENTATION.

A. As Legacy's Leasing Broker, Nelson was Legacy's Agent.

Real estate brokers have an agency relationship with those they

represent. ***Henderson v. Johnson,*** 66 Wn.2d 511, 512, 403 P.2d 669 (1965). Here, broker Nelson acted as Legacy's agent in leasing the Legacy Property to WGW and Nelson received a commission. CP 263. In fact, on p. 20 of its brief, Legacy admits that:

> ... the landlord in this case disclosed ... information about Sound Transit relative to the property.

Since Legacy's owners never spoke with Maci Lam or Guo, Legacy necessarily admits that Nelson was its agent in transmitting information.

Therefore, Legacy is charged both with Nelson's knowledge and negligent/fraudulent misrepresentation. ***State v. Parada,*** 75 Wn. App. 224, 230, 877 P.2d 231 (1984), ***Finney v. Farmers' Insurance Company,*** 92 Wn.2d 748, 754, 600 P.2d 1272 (1979).

B. Through Nelson, Legacy Engaged in Fraudulent/Negligent Misrepresentation, for Nelson withheld from WGW/Guo that Sound Transit had designated the Legacy Property as one of two parcels on either side of NE 6th Sound Transit would need to acquire, and falsely represented as fact that Sound Transit would run its line on the opposite side of the NE 6th overpass.

Because negligent misrepresentation is discussed in the Brief of Appellant, WGW/Guo is focusing now on fraudulent misrepresentation, which as discussed below occurs by affirmative misrepresentation of fact, omission of material information and/or providing misleading half-truths.

1. Legacy had a duty to disclose that Sound Transit had designated the Legacy Property as one of two parcels on either side of NE 6th that Sound Transit would need to acquire.

A duty to disclose exists where a party has a "statutory duty to disclose," or where a property owner knows a material fact that is not "readily obtained by the other." ***Van Dintner v. Orr,*** 157 Wn.2d 329, 333, 138 P.3d 608 (2006). Here, Legacy had such a duty 1) because Legacy was represented by Nelson, a broker required by RCW 18.86.030 "to disclose all material facts known by the (broker) not apparent or readily ascertainable," and 2) because Nelson had actual knowledge of Sound Transit's designation and WGW/Guo discovering this information was like "looking for a needle in a haystack."

While Legacy argues that "there is no such duty in commercial leasing," Legacy has provided no authority for this position, and RCW 18.86.030 does not exempt commercial transactions.

Legacy's argument that "there was no duty to disclose hypotheticals" is rebutted by the Division I case, ***Guarino v. Interactive Objects, Inc.,*** 122 Wn. App. 95, 86 P.3d 1175 (2004). ***Guarino*** involved a majority shareholder's purchase of minority shareholder's stock, where the majority owners failed to disclose pending merger negotiations. At 114, ***Guarino***

rejected the argument that prospective negotiations need not be disclosed:

> When contingent or speculative events are at issue, the materiality of those events depends on a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the ... event.

The question is whether a reasonable person would attach importance to this information in determining his or her choice of action. ***Id.*** at 114.

Here, the risk that Sound Transit would need to acquire the Legacy Property was at 50%, and the effect of such acquisition would be to shut down the restaurant in mid-lease. Therefore, this Court should rule, as a matter of law, that Legacy, through its broker, had a statutory duty to disclose the substantial risk that Sound Transit may need to condemn the Legacy Property.

2. Legacy's omission of the substantial risk meets the first five elements of fraud: Representation of an existing fact, its materiality, its falsity, the speaker's knowledge of the truth, the speaker's intent that the recipient will rely on this fact.

The nine elements of fraud are summarized in ***Williams v. Joslin,*** 65 Wn.2d 696, 697, 399 P.2d 308 (1965), and must be established by clear, cogent and convincing evidence. ***Id*** at p. 697. While each element involves issues of fact, when reasonable minds cannot differ, these factual issues can be resolved as a matter of law. ***Havens v. C & D Plastics,*** 124 Wn.2d 158,

181, 876 P.2d 435 (1994).

Here, the evidence is undisputed that, not only did Legacy fail to disclose Sound Transit's designation of the Legacy Property as one of two parcels on opposite sides of NE 6th that Sound Transit would need to acquire, but Legacy represented Sound Transit's future proximity solely in a positive light. As Nelson said at CP 254:

> I was unaware of any ongoing interest in our property when I viewed the property with Mr. Guo. And when we viewed the property, I represented the fact that there would be a station located up the hill from the site and I believed this would be a positive.

This is exactly the kind of misleading, half-truth that constitutes fraudulent misrepresentation, as explained by both the Restatement (Second) of Contracts and the Restatement (Second) of Torts. Excerpts of both are included in Appendix B.

For example, at Comment b to Restatement (Second) of Contracts Section 159, a "half-truth" is equivalent to a misrepresentation:

> Half-Truths. A statement may be true with respect to the facts stated, but may fail to include qualifying matter necessary to prevent the implication of an assertion that is false with respect to other facts.

And Illustration 3 is remarkably similar to the present case:

> A, seeking to induce B to make a contract to buy land, tells B

> that his title to the land has been upheld in a court decision. A knows that the decision has been appealed but does not tell this to B. B makes the contract. A's statement omits matter necessary to prevent the implied assertion that A's title is clearly established, and this assertion is a misrepresentation.

Similarly, Section 529 of Restatement (Second) of Torts states:

> Representation Misleading Because Incomplete. A representation stating the truth so far as it goes by which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying material is a fraudulent misrepresentation.
>
> Comment a. A statement containing a half-truth may be as misleading as a statement wholly false. Thus, a statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue. ... a statement by a vendor that his title has been upheld by a particular court is a false representation if he fails to disclose his knowledge that an appeal from the decision is pending.

And by Comment b to this section, the Restatement makes clear that the telling of "half-truths" is a fraudulent misrepresentation, even if the person making the misrepresentation believes the omitted information is of no consequence:

> It is immaterial that the defendant believes that the undisclosed facts would not affect the value of the bargain which he is offering. The recipient is entitled to know the undisclosed facts insofar as they are material and to form his own opinion of their effect. Thus, in the example last given, the fact that the vendor has good grounds for believing that the appeal would fail does not prevent his statement from

being a fraudulent misrepresentation.

Thus, that (if) Nelson believed, albeit negligently, that Sound Transit would not need to acquire the Legacy Property, is immaterial. WGW was entitled to know that Sound Transit had designated the Legacy Property as one of two parcels on opposite sides of NE 6th that Sound Transit would need to acquire, and that Sound Transit would not determine which parcel until 2013. Even if Nelson thought there was no risk, Nelson should have provided this information, so WGW/Guo could form its own opinion.

In addition, Comment b to Section 539 of the Restatement (Second) of Torts, shows that Nelson's (Legacy's) represented opinion that Sound Transit's proximity would be a positive for the Legacy Property, was also a fraudulent misrepresentation:

> A statement of opinion may not only imply that the maker knows of no fact incompatible with the opinion, but when the circumstances justify, may also reasonably be understood to imply that he does know facts sufficient to justify him in forming the opinion and that the facts known to him do justify him.

In other words, not only did Legacy commit fraudulent misrepresentation by failing to disclose Sound Transit's designation of the Legacy Property as one of two parcels on opposite sides of the NE 6th Sound Transit would need to condemn, but Legacy's positive representation of

Sound Transit's future proximity, without providing the full picture, also was a fraudulent misrepresentation.

Thus, by arguing on p. 3 "the Landlord's disclosure was framed in a positive way rather than negatively," Legacy is really asking this Court to sanction half-truths and misleading information.

3. WGW's justifiable reliance meets the remaining four elements of fraudulent misrepresentation: Ignorance on the part of the recipient, reliance, the recipient's right to rely, and the recipient's damages.

Justifiable reliance is reliance that was "reasonable under the surrounding circumstances." ***Lawyers Title Ins. Corp. v. Baik,*** 147 Wn.2d 536, 551, 55 P.3d 619 (2002). And while justifiable reliance is a question of fact, when reasonable minds cannot differ, this Court can make that determination as a matter of law. ***Havens,*** supra.

In the present case, WGW/Guo's reliance upon Legacy's misrepresentations is justifiable for several reasons.

First, WGW/Guo was not purchasing the Legacy Property; WGW was leasing the property. As expert Bruce Kahn stated at CP 361:

> When the transaction is a purchase, one can reasonably expect the prospective buyer to diligently investigate the property for possible problems, and almost always, there are contingencies to allow the buyer to conduct a due diligence investigation. But when the transaction is a lease, all the prospective lessee is concerned with, beyond location and physical suitability of

> the property, is whether the landlord can provide peaceful and quiet enjoyment for the lease term. And if the landlord is negotiating a 10 year lease, such as the lease in question, then the landlord has impliedly represented that the landlord can provide peaceful and quiet enjoyment for the full term of the lease.

Thus, by negotiating a 10 year lease, Legacy represented by necessary implication that it knew of no facts that could interfere with WGW's peaceful and quiet enjoyment for a full 10 years.

Second, because Legacy's agent, broker Nelson, had a statutory duty to disclose all material information that "could substantially, adversely affect ... a party's ability to perform its obligations," RCW 18.86.010(9), RCW 18.86.030(1)(d), WGW's justified reliance can be presumed as a matter of law. ***Guarino,*** supra, is directly on point. There, once again, the majority shareholders in a stock purchase contract with a minority shareholder failed to disclose merger negotiations. Just as RCW 18.86.030 requires brokers to disclose material information, RCW 2.21.010 requires any person buying or selling stock to not "omit to state a material fact." On this basis, ***Guarino*** at 123 ruled that the minority shareholders' reliance on the omission was reasonable as a matter of law:

> Therefore, it was not unreasonable as a matter of law for (the minority shareholders) to rely on the omissions made by the (majority shareholders). The (minority shareholders)

> presumed reliance is not unreasonable as a matter of law, and since the presumption of reliance is un-rebutted on the record, the (minority shareholders) have established the right to rely on the omission ...

Jackowski v. Borchelt, 174 Wn.2d 720, 278 P.3d 1100 (2012), is also on point. There, the property seller falsely stated in Form 17, required by RCW 64.06.020, that the property did not contain fill material, when the seller knew otherwise. Because the seller misrepresented information on Form 17, the Washington Supreme Court held at 738 that the buyer was entitled to rely on this omission:

> Because the (sellers) represented on Form 17 that the property did not contain fill material, the (buyers) were entitled to rely on the representation.

Here, and especially in light of Legacy's misleading half-truths about Sound Transit's future proximity being good for WGW's business, Legacy's failure to disclose material information was tantamount to Legacy having represented entirely false information:

> A statement containing a half-truth may be as misleading as a statement wholly false. Thus, a statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all facts stated were untrue.

Restatement (Second) of Torts, Section 521, Comment a.

A third basis for establishing justifiable reliance is the incredible

difficulty WGW/Guo would have had if it had questioned the hypothetical possibility that Legacy was withholding material information. As Legacy has acknowledged, obtaining that information was like finding a needle in a haystack.

And contrary to Legacy's argument, WGW/Guo's broker, Maci Lam, who was retained by Guo because she speaks Mandarin Chinese, was under no obligation to investigate hypothetical problems. RCW 18.86.030(2) quite clearly states:

> Unless otherwise agreed, a (broker) has no duty to conduct an independent inspection of the property ... and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the (broker) to be reliable.

Lawyers Title Ins. Corp., supra, also is on point. There, a title insurance company insured the sale of real property based on an attorney's advice that no estate taxes would be due. Thereafter, the IRS placed a tax lien on the property for over $600,000 for estate taxes owed. The issue was whether the title insurance company reasonably relied on the attorney's advice. The Washington Supreme Court held at 551:

> ... where a plaintiff reasonably reposes some trust in a misrepresentation .... an automatic preclusion of a negligent misrepresentation claim on the grounds that the plaintiff could have done something more would be the sort of "harsh result"

> that the comparative fault statute sought to forestall in tort claims.

In ***Jackowski***, supra, the Washington Supreme Court held that justifiable reliance is not governed by 20/20 hindsight. There, the event leading to the litigation was a landslide which rendered the house uninhabitable, but the action for rescission was based on the seller's failure to disclose fill material on Form 17. After the landslide, the seller commissioned a property evaluation which said that the presence of fill was obvious to any expert. The Washington Supreme Court held at 739 that this report, after the landslide, was marginally relevant to justifiable reliance:

> ... it is significant that this evidence was obtained after the sliding event and therefore, the fill may not have been "obvious" or "apparent" prior to the landslide.

Jackowski also rebuts Legacy's argument that WGW cannot seek rescission merely because the business was doing poorly. First, and as explained above, that is factually untrue. But even if, hypothetically, that were true, at 736-37, the Washington Supreme Court sanctioned rescission for failure to disclose fill material, even though the precipitating event was a landslide unrelated to the fill material.

In conclusion on justifiable reliance, this Court should rule as a matter of law that WGW/Guo justifiably relied on Legacy's affirmative false

representations, on Legacy's misrepresentations by omission of material fact, and on Legacy providing misleading half-truths, because Legacy was only leasing the property, because WGW/Guo was entitled to rely on Nelson fulfilling his statutory duty to disclose material information, because WGW/Guo would have had great difficulty learning on its own that Sound Transit had a 50% need to acquire the Legacy Property, and because 20/20 hindsight should not control.

III. FRAUDULENT AND NEGLIGENT MISREPRESENTATIONS RENDER A CONTRACT SUBJECT TO RESCISSION.

A fraudulent or negligent misrepresentation renders a contract voidable and subject to rescission. ***Yakima City Fire Protection District v. Yakima,*** 122 Wn.2d 371, 390, 858 P.2d 245 (1993), citing Restatement (Second) of Contracts, Section 164(1). One who seeks rescission must act promptly after discovery. ***Johnson v. Brado,*** 56 Wn. App. 163, 166, 783 P.2d 92, **rev. den.** 114 Wn.2d 1022 (1990).

Here WGW/Guo learned on 5-29-13 from business broker Kolomdin that Sound Transit will need to acquire the Legacy property, CP 401, and by 6-18-13, WGW sought rescission of the lease. CP 401-02. During this 3 week period, WGW's preliminary investigation revealed that during lease negotiations, Legacy had failed to disclose that Sound Transit was seriously

considering a light rail route which would require condemnation of the Legacy Property.

That WGW made no payment after learning of the likely condemnation, is not a bar to rescission. In ***Obde v. Schlemeyer,*** 56 Wn.2d 449, 353 P.2d 672 (1960), purchasers of a house stopped payment after learning that the sellers had failed to disclose a termite infestation. The Washington Supreme Court held at 454 that the purchasers' default was not a bar to recovery:

> Contrary to the (sellers') final argument relative to the question of liability, (the buyers') ultimate default and forfeiture on the ... contract does not constitute a bar to the present action. The rule governing this issue is well stated in 24 Am. Jur. 39, Fraud and Deceit, Section 212 as follows:
>
> "Since the action of fraud and deceit in inducing the entering into a contract or procuring its execution is not based upon the contract, but is independent thereof, although it is regarded as an affirmance of the contract, it is a general rule that a vendee is entitled to maintain an action against the vendor for fraud or deceit in the transaction even though he has not complied with all the duties imposed upon him by the contract. His default is not a bar to an action by him for fraud or deceit practiced by the vendor in regard to some matter relative to the contract."

For similar reasons, the eminent domain claused does not prevent WGW from seeking rescission.

> ... where a party has signed a contract, he or she is presumed

> to have objectively manifested assent to its contents. (Citations omitted.) However, that rule will not apply where another contracting party has committed fraud, deceit, misrepresentation, coercion or other wrongful acts. See ***Yakima City Fire Protection District v. Yakima,*** 122 Wn.2d 371, 389, 858 P.2d 245 (1993) (citing ***Skagit State Bank,*** 109 Wn.2d at 381-84, 745 P.2d 37).

Cruz v. Chavez, No. 70741-8-1, 347 P.3d 912, 916 (2015).

When a misrepresentation is made concerning land, the aggrieved party may rescind the contract. ***Johnson v. Brado,*** supra. This Court of Appeals has the authority to "remand for entry of a judgment rescinding" the lease. ***Aspelund v. Olerich,*** 56 Wn. App. 477, 484, 784 P.2d 179 (1990).

IV. CONCLUSION.

This Court should reverse the trial court and rule as a matter of law 1) that broker Nelson was Legacy's agent, 2) that through Nelson, Legacy had a duty to disclose material information not readily apparent regarding Sound Transit, 3) that Legacy breached that duty by failing to disclose that Sound Transit had designated the Legacy Property as one of two parcels on opposite sides of NE 6th as potential acquisitions, 4) that Sound Transit's designation of the Legacy Property was not apparent or readily ascertainable, 5) that Legacy through Nelson committed fraudulent and/or negligent misrepresentation by falsely representing that Sound Transit would run its rail

line on the opposite side of NE 6th from the Legacy Property, by failing to disclose Sound Transit's designation of the Legacy Property as a potential acquisition, and by providing misleading half-truths, 6) that WGW justifiably relied on Legacy's fraudulent and/or negligent misrepresentations, 7) that Legacy's fraudulent and/or negligent misrepresentations rendered the lease voidable and subject to rescission, and 8) that a judgment of rescission should be entered by the trial court, together with a judgment for damages equal to the $124,886 security deposit WGW paid to Legacy plus the $144,744 in tenant improvements, the benefit of which Legacy has received and the figures of which are not contested, and 9) that WGW should be awarded attorney's fees per the attorney's fee provision in the lease.

DATED this 25the day of JUNE, 2015.

Respectfully submitted:

LAW OFFICES OF DOUGLAS W. SCOTT

By: _____

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Third Party Defendants

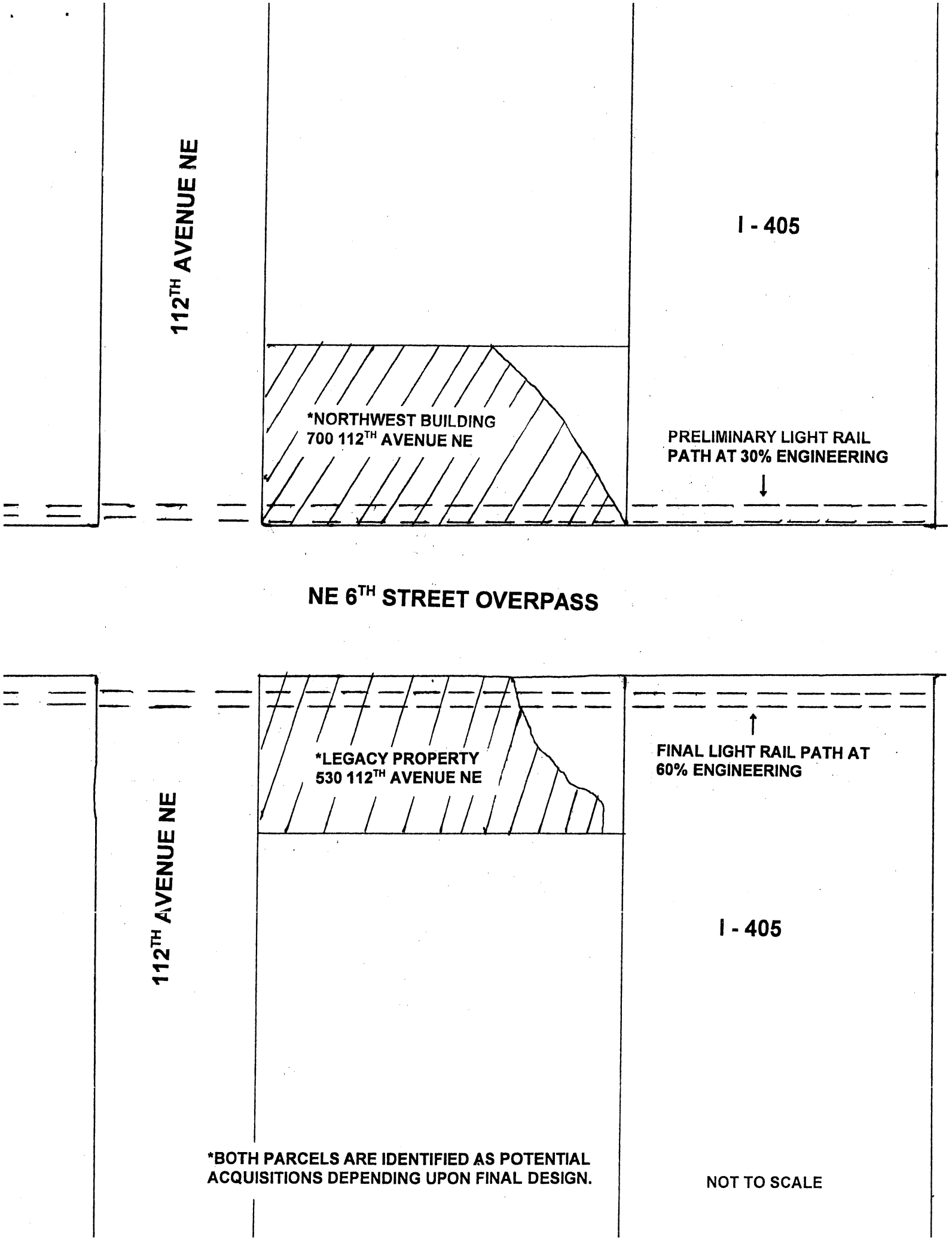
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on this day a copy of the Reply Brief of Appellant was sent to Jennifer T. Karol, Attorney for Respondent by E-Mail transmission to jkarol@cedarriverlaw.com, and to Timothy J. Graham, Attorney for Respondent by E-Mail transmission to tgraham@hansonbaker.com, and to Clare Brown by E-Mail transmission to paralegal@cedarriverlaw.com. and to Cathy L. Anderson by E-Mail transmission to canderson@hansonbaker.com

Ingrid C. Vermehren

Ingrid C. Vermehren
Dated: JUNE 25 , 2015, at Issaquah, Washington

APPENDIX A


112TH AVENUE NE
I - 405
*NORTHWEST BUILDING
700 112TH AVENUE NE
PRELIMINARY LIGHT RAIL
PATH AT 30% ENGINEERING
NE 6TH STREET OVERPASS
*LEGACY PROPERTY
530 112TH AVENUE NE
FINAL LIGHT RAIL PATH AT
60% ENGINEERING
112TH AVENUE NE
I - 405
*BOTH PARCELS ARE IDENTIFIED AS POTENTIAL
ACQUISITIONS DEPENDING UPON FINAL DESIGN.
NOT TO SCALE

APPENDIX B

Because a misrepresentation induces the recipient to make a contract while under a mistake, the rules on mistake stated in Chapter 6 also apply to many cases of misrepresentation. However, a mistaken party who can show the elements required for avoidance on the ground of misrepresentation will ordinarily prefer to base his claim on this ground rather than attempting to establish the additional elements required by the law of mistake.

Special rules of law, applicable to particular types of contracts, also supplement or qualify the rules stated in this Topic. Examples include the provisions of the Uniform Commercial Code relating to warranties in contracts for the sale of goods and those of statutes requiring disclosure in consumer transactions or regulating transactions in securities (see Federal Securities Code, Parts XVI, XVII). These special rules are not dealt with in this Restatement.

REPORTER'S NOTE

This Topic replaces former Chapter 15, Fraud and Misrepresentation. Additions and modifications have been made in the light of the treatment of misrepresentation in the Restatement, Second, Torts. Those matters covered by former §§ 480–90 are now dealt with in Topic 5 of Chapter 16 on remedies. That covered by former § 478 is now dealt with in Chapter 15, Assignment and Delegation. See 12 Williston, Contracts ch. 45 (3d ed. 1970).

An extensive analysis of the general topic, primarily from the point of view of tort, appears in James & Gray, Misrepresentation—Part I, 37 Md. L. Rev. 286 (1977) and Id.—Part II, 37 Md. L. Rev. 488 (1978). For an economic analysis, see Darby & Karni, Free Competition and the Optimal Amount of Fraud, 16 J. Law & Econ. 67 (1973). The differences between duties of disclosure at common law and under the securities laws are discussed in 3 Loss, Securities Regulation 1430–44 (2d ed. 1961) and 6 id. 3534–55 (Supp. 1969). For a discussion of the further adaptation of securities fraud law to trading in commodities, see Note, Reflections of 10b–5 in the "Pool" of Commodities Futures Antifraud, 14 Houston L. Rev. 899 (1977).

§ 159. Misrepresentation Defined

A misrepresentation is an assertion that is not in accord with the facts.

Comment:

a. Nature of the assertion. A misrepresentation, being a false assertion of fact, commonly takes the form of spoken or written words. Whether a statement is false depends on the meaning of the words in all the circumstances, including what may fairly be inferred

from them. An assertion may also be inferred from conduct other than words. Concealment or even non-disclosure may have the effect of a misrepresentation under the rules stated in §§ 160 and 161. Whether a misrepresentation is fraudulent is determined by the rule stated in § 162(1). However, an assertion need not be fraudulent to be a misrepresentation. Thus a statement intended to be truthful may be a misrepresentation because of ignorance or carelessness, as when the word "not" is inadvertently omitted or when inaccurate language is used. But a misrepresentation that is not fraudulent has no consequences under this Chapter unless it is material. Whether an assertion is material is determined by the rule stated in § 162(2). The consequences of a misrepresentation are dealt with in §§ 163, 164 and 166.

Illustrations:

1. A, seeking to induce B to make a contract to buy a used car, turns the odometer back from 60,000 to 18,000 miles. B makes the contract. A's conduct in setting the odometer is a misrepresentation. Whether the contract is voidable by B is determined by the rule stated in § 164.

2. A, seeking to induce B to make a contract to lease a particular generator, writes B a letter with the intention of describing its output correctly as "1200 kilowatts." Because of an error of A's typist, unnoticed by A, the letter states that the output of the generator is "2100 kilowatts." B makes the contract. A's statement is a misrepresentation. Whether the contract is voidable by B is determined by the rule stated in § 164.

b. Half-truths. A statement may be true with respect to the facts stated, but may fail to include qualifying matter necessary to prevent the implication of an assertion that is false with respect to other facts. For example, a true statement that an event has recently occurred may carry the false implication that the situation has not changed since its occurrence. Such a half-truth may be as misleading as an assertion that is wholly false.

Illustrations:

3. A, seeking to induce B to make a contract to buy land, tells B that his title to the land has been upheld in a court decision. A knows that the decision has been appealed but does not tell this to B. B makes the contract. A's statement omits matter necessary to prevent the implied assertion that A's title is clearly established, and this assertion is a misrepresentation. Whether

b. Even though the maker of the statement did not realize the ambiguity of the statement when he made it, if he subsequently becomes aware that as a result of its ambiguity the statement is understood by the recipient in a sense that would make it false, he is under a duty to use reasonable care to disclose to the recipient information to prevent him from being misled by the statement. (See § 551(2)).

c. As to the rules that determine the liability of one who negligently makes an ambiguous statement in a manner which is misleading, see § 552.

§ 528. Representation Erroneously Expressed

A representation that is believed to state the truth but which because of negligent expression states what is false is a negligent but not a fraudulent misrepresentation.

Comment:

a. Since the liability for a fraudulent misrepresentation requires that the maker be conscious that he is misleading its recipient, it follows that a representation of a fact that the maker believes to be true does not become fraudulent by reason of its being so carelessly or incompetently expressed as to be misleading. A representation intended to be truthful may be made misleading by mere carelessness, as when the word "not" is inadvertently omitted, or by the maker's incompetence to use with accuracy the language in which the representation is expressed.

b. As to the rules that determine the liability of one who makes a representation that is misleading because of the negligent manner in which it is expressed, see § 552.

§ 529. Representation Misleading Because Incomplete

A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation.

Comment:

a. A statement containing a half-truth may be as misleading as a statement wholly false. Thus, a statement that con-

tains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue. Thus a prospectus that accurately states the assets, bonded indebtedness and net earnings of a manufacturing corporation but omits any reference to its floating debt is a false representation of the financial position of the company. So, too, a statement by a vendor that his title has been upheld by a particular court is a false representation if he fails to disclose his knowledge that an appeal from the decision is pending.

b. Whether or not a partial disclosure of the facts is a fraudulent misrepresentation depends upon whether the person making the statement knows or believes that the undisclosed facts might affect the recipient's conduct in the transaction in hand. It is immaterial that the defendant believes that the undisclosed facts would not affect the value of the bargain which he is offering. The recipient is entitled to know the undisclosed facts in so far as they are material and to form his own opinion of their effect. Thus, in the example last given, the fact that the vendor had good grounds for believing that the appeal would fail does not prevent his statement from being a fraudulent misrepresentation.

c. Except where it is sold "as is," one who offers land or a chattel for sale on inspection by so doing impliedly asserts that he knows of nothing that makes the appearance of the article deceptive and that cannot be discovered by such an inspection as a purchaser at the sale should make. In this case the vendor knows that the buyer will assume that, except for faults discoverable by the inspection, the thing is as it appears to be and is guilty of actionable fraud if he does not disclose a latent defect known to him.

Illustrations:

1. A, selling a tract of land to B, warns B that plans for city development already drawn show two unopened streets which, if opened, may condemn a part of the tract. A knows, but does not tell B, that the plans show a third unopened street which, if opened, will condemn part of the tract and cut it in half. B buys the land, believing that there are only the two streets. A's statement is a fraudulent misrepresentation.

2. A, selling an apartment house to B, informs B that the apartments in it are all rented to tenants at $200 a

represents a concurrence of the opinion of the interested public as to their value, and therefore justifies the recipient of a statement of market quotations in accepting it as conclusive proof of the value of the article in question. A sale at auction of goods or securities differs in one particular from a sale on an exchange in that there is normally no such attendance of a sufficient number of prospective buyers and sellers as to make the price realized conclusive as to the value of the articles sold. It is, however, evidence of their value; and the recipient of a statement of the price realized at an auction sale may justifiably take it into account in forming his own opinion, although in doing so he should make allowance for the lack of publicity and, in the case of a forced sale, for the exigencies of the vendor. Normally the price realized at a private sale of the article in question or an offer made for it is a fact properly taken into account in determining the value of the article. When, however, the recipient of a representation as to the price realized or offered knows the circumstances of the transaction and the characteristics of the persons engaged therein, the price paid or offered is important primarily as implying the opinion that the parties to the sale or offer had of the value of the article in question. To this extent the question whether the recipient of a misstatement of such a fact is justified in relying upon it as showing the value of the article in question is determined by the rules stated in § 542 if the purchaser or offeror is known to have an interest in the pending transaction antagonistic to that of the recipient and by the rules stated in § 543 when the recipient reasonably believes that the purchaser or offeror is disinterested.

§ 539. Representation of Opinion Implying Justifying Facts

(1) A statement of opinion as to facts not disclosed and not otherwise known to the recipient may, if it is reasonable to do so, be interpreted by him as an implied statement

(a) that the facts known to the maker are not incompatible with his opinion; or

(b) that he knows facts sufficient to justify him in forming it.

(2) In determining whether a statement of opinion may reasonably be so interpreted, the recipient's belief as to whether the maker has an adverse interest is important.

Comment on Subsection (1):

a. Frequently a statement which, though in form an opinion upon facts not disclosed or otherwise known to their recipient, is reasonably understood as implying that there are facts that justify the opinion or at least that there are no facts that are incompatible with it. Thus, when land is bought as an investment, a statement, even by the vendor, that a tenant under a long term lease is a good tenant implies that his conduct has been such that it would not be entirely inappropriate to call him a good tenant. Such a representation is therefore fraudulent if the vendor knows that the tenant has rarely paid his rent except under pressure of legal proceedings, since the vendor is giving a materially false picture of the tenant's conduct. So, too, a statement that a bond is a good investment, even though made by a person attemping to sell it, is a fraudulent misstatement of the actual character of the bond if the vendor knows that the interest on the bond has for years been in default and the corporation that issued it is in the hands of a receiver. Although some allowance must be made for puffing or depreciation by an adverse party, such a statement is so far removed from the truth as to make it a fraudulent misrepresentation of the character of the bond.

Illustration:

1. A, seeking to sell B machinery for the manufacture of ice cream, fraudulently tells B that in his opinion a room in the rear of B's building is suitable for the manufacture. A knows, but B does not, that the room is not at present suitable and can be made so only by changes that would involve prohibitive expense. In reliance on the statement B purchases the machinery. A is subject to liability to B.

b. The statement of opinion may not only imply that the maker knows of no fact incompatible with the opinion, but, when the circumstances justify it, may also reasonably be understood to imply that he does know facts sufficient to justify him in forming the opinion and that the facts known to him do justify him.

This is true particularly when the maker is understood to have special knowledge of facts unknown to the recipient. (See § 542(a)). Thus when an auditor who is known to have examined the books of a corporation states that it is in sound financial condition, he may reasonably be understood to say that