

- 672428-8

672428-8

No. 672428

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TERRY VISSER and DIANE VISSER, husband and wife,

Appellants,

v.

NIGEL DOUGLAS and KATHLEEN DOUGLAS, and the marital
community composed thereof,

Respondents.

APPELLANTS' REPLY BRIEF

Gregory E. Thulin, WSBA #21752
Law Offices of Gregory E. Thulin, PS
119 N. Commercial Street
Suite 660
Bellingham, WA 98225
(360) 714-8599
Attorney for Appellants

2012 MAY 14 AM 11:36
~~COURT REPORTERS DIV
STATE OF WASHINGTON~~

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT.....	2
A. There Is No Substantial Evidence Supporting The Fact That Vissers Discovered Significant Wood Rot And Covered It Up.....	2
B. Douglas Does Not Dispute That Finding Of Fact No. 8 Is Not Supported By Substantial Evidence.....	6
C. There Is No Substantial Evidence In The Record Establishing Douglas Did Not Know Of The Defects And Could Not Have Discovered Them.....	6
D. Since Douglas Had Actual Knowledge Of The Alleged Defects, Or Could Have Discovered Them Upon Reasonable Inspection, The Trial Court Erred By Concluding Visser Fraudulently Concealed Defects; Visser Negligently Misrepresented; Visser Breached Duties of A Real Estate Agent; And Visser Violated The Consumer Protection Act.....	10
1. Douglas Failed To Establish Fraudulent Concealment.....	10
2. Douglas Failed To Establish Negligent Misrepresentation.....	12
3. Douglas Failed To Establish A Breach Of Statutory Duty	13
4. Visser Has Not Violated The CPA.....	14
E. Douglas Failed To Prove Damages Under The	

Benefit Of Bargain Measure Of Recovery.....	16
1. Douglas Did Not Present Evidence Of The Value Of The Home At The Time Of Sale.....	17
2. Douglas Failed To Prove The Value Of The Home With Defects.....	18
3. Douglas Is Not Entitled To A Brand New Home.....	18
F. Douglas Did Not Make Any Effort To Mitigate Damages	19
G. Douglas Has Not Established Emotional Distress	22
H. Visser Is Entitled To Default Interest And Fees On The Promissory Note.....	24
III. CONCLUSION.....	25

TABLE OF AUTHORITIES

a. Washington Supreme Court Cases

<u>Cases</u>	<u>Page</u>
<u>Alejandre v. Bull</u> , 159 Wn.2d 674, 689, 153 P.3d 864 (2007)	11
<u>Cagle v. Burns & Roe</u> , 106 Wn.2d 911, 726 P.2d 434 (1986)	23
<u>Cherberg v. Peoples Nat’l Bank</u> , 88 Wn.2d 595, 564 P.2d 1137 (1977).....	23
<u>Dean v. Mun. of Metropolitan Seattle</u> , 104 Wn.2d 627, 708 P.3d 393 (1985).....	22, 23
<u>Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Company</u> , 105 Wn.2d 778, 719 P.2d 531 (1986)	15
<u>Hughes v. Stusser</u> , 68 Wn.2d 707, 415 P. 2d 89 (1966)	6
<u>Robel v. Roundup Corp.</u> , 148 Wn.2d 35, 59 P.3d 611 (2002)	15, 20
<u>Sullivan v. Boeing Aircraft Company</u> , 29 Wn.2d 397, 187 P.2d 312 (1947)	20
<u>Sunnyside Valley Irrigation District v. Dickie</u> , 149 Wn.2d 873, 73 P.2d 369 (2003)	10
<u>Svendsen v. Stock</u> , 143 Wn.2d 546, 23 P.3d 455 (2001)	14, 15
<u>Wenatchee Sportsman Association v. Chelan County</u> , 141 Wn.2d 169, 176, 4 P.3d 123 (2000)	2

b. Washington Court Of Appeal Cases

Dorsey v. King County, 51 Wn. App. 664,
754 P.2d 1255 (1988) 2

Janda v. Brier Realty, 97 Wn. App. 45,
984 P.2d 412 (1999) 16

Puget Sound Service Corp. v. Dalarna Management
Corp., 51 Wn. App. 209, 752 P.2d 1353 (1988) 11

Ross v. Ticor Title Insurance Company,
135 Wn. App. 182, 143 P.3d 885 (2006) 12

Sloan v. Thompson, 128 Wn. App. 776,
115 P.3d 1009 (2005) 11, 12

Tennant v. Lawton, 26 Wn. App. 701,
615 P.2d 1305 (1980)16, 18

Transpac Development, Inc. v. Oh, 132 Wn. App 212,
130 P.3d 892 (2006)..... 17

STATUTES

RCW 18.86.030(1)(d) 13

RCW 62A.3..... 24

RCW 62A.3-305(a)(1) 25

OTHER AUTHORITIES

RAP 18.1 25

I. INTRODUCTION

The central issue to this appeal is knowledge; what the Vissers knew at the time of selling the Property to Douglas, and what Douglas knew, or could have known, when purchasing the Property from the Vissers. Knowledge, and the degree thereof, determines whether there is substantial evidence to support Findings of Fact Nos. 3, 5 and 17. Knowledge also dictates whether the trial court erred in concluding that Douglas had established by clear, cogent and convincing evidence Vissers were liable for fraudulent concealment, negligent misrepresentation, and in violation of the Consumer Protection Act. It is Vissers' contention that not only did Vissers lack knowledge of the extent of the dry rot and damage to the Property, but that Douglas knew, or could have known and discovered any defects upon reasonable inspection and investigation prior to purchasing the Property.

The secondary issue is damages; whether the trial court's failure to utilize the proper measure of damages was in error, and whether Douglas presented competent and sufficient evidence to support a proper award of damages. The Response Brief of Douglas says little about the failure to produce evidence at trial under the benefit of the bargain measure of damages. Instead, Douglas argues that the damage award was supported by competent and sufficient evidence. However, Douglas ignores the fact that

their argument does not follow the law and, in fact, subjects the trier of fact to speculation and conjecture.

II. ARGUMENT

Findings of fact are reviewed by the Court of Appeals to determine whether they are supported by substantial evidence. Dorsey v. King County, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988). “Substantial evidence means enough evidence to persuade a rationale, fair-minded person that the premise is true.” Wenatchee Sportsman Assoc. v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). In the present case, Douglas has failed to establish that Findings of Fact No.’s 3, 5, 8 and 17 are supported by substantial evidence.

A. There Is No Substantial Evidence Supporting The Fact That Vissers Discovered Significant Wood Rot And Covered It Up.

The second sentence of Finding of Fact No. 3 reads:

During the course of renovating the house, the Vissers discovered significant wood rot to the sill plate and rim joists that connects the concrete foundation to the frame.

CP 27.

Rather than correct these defects, the Vissers or their hired help made superficial repairs to the visible damage and covered up the rest.

Finding of Fact No. 5. CP 27.

Douglas responds by reliance upon the testimony of Kelly Hatch, Terry Visser and Kirk Juneau. The testimony is mostly limited to one corner of the house; specifically the northwest corner, and the rot that was discovered at that area fifteen months after the sale of the Property.

Kelly Hatch testifies about the floors near the bathroom and one corner of the house having “soft spots” and rot. VRP 262-63; 265; 266-67. Testimony about the floors has nothing to do with whether Visser discovered wood rot “to the sill plate and rim joists”, as specified in Finding of Fact No. 3, and whether Visser made superficial repairs to these defects.

Kelly Hatch also testified about rot in the siding at the corner of the house when trying to apply a bellyband. “The siding is rotted.” VRP 265. Again, this does not support that Visser discovered wood rot “to the sill plate and rim joists”, as specified in Finding of Fact No. 3. Kelly Hatch did not testify to any other areas of rot to the sill plate or rim joists.

Terry Visser admitted to placing a piece of wood; specifically a piece of tongue and groove, in a hole at the northwest corner of the house where Kelly Hatch was having a difficult time nailing the bellyband. VRP 311-12; 469. However, he denied any knowledge of rot to the sill plate and rim joist in that corner. VRP 469-70. Douglas does not produce any other direct evidence of what Visser discovered relating to wood rot to the

sill plate and rim joists; instead Douglas relies upon circumstantial evidence through testimony of Kirk Juneau. See, Response Brief pp 17-18.

Mr. Juneau's testimony relied upon by Douglas speaks to the quality of the repairs ("It was poor workmanship quality."). VRP 224. Mr. Juneau's testimony also speaks to the structural integrity due to the amount of rot and decay. VRP 224. These facts do not substantially support the finding that Visser discovered significant wood rot to the sill plate and rim joists, nor does it support that Visser made superficial repairs.

The only testimony relating to potential discovery of rot is Mr. Juneau's opinion that a person installing the bellyband would have direct sight of wood rot. VRP 192, 224. However, Mr. Juneau's testimony does not provide support to the finding that Visser discovered significant wood rot to the sill plate and rim joists. Mr. Juneau inspected the house on September 23, 2008. VRP 186. Mr. Juneau testified that the rot would occur over several years. VRP 194. Mr. Juneau further testified decay would take a year to a year and a half to occur. VRP 222-23.

Visser placed the bellyband on the back of the house in September 2005. VRP 449. At the time of placing the bellyband thereon, Visser did not notice rot. VRP 450. According to the evidence relied upon by Douglas, Mr. Juneau indicated rot is an on-going process and can take

several years. VRP 194. More than three years had passed since Mr. Visser put the bellyband on the back of the house and Mr. Juneau had inspected that area.

Further, nearly a year and a half had passed since Douglas had the house inspected in May of 2007 and Mr. Juneau inspecting the house in September of 2008. The rot and decay, according to the testimony of the time lines given by Mr. Juneau, may have occurred subsequent to Visser viewing the areas. As such, Douglas has failed to establish by substantial evidence Visser discovered significant rot and decay.

Moreover, Mr. Juneau could not testify when repairs took place.

Q. Okay. And can you testify how long ago that was installed?

A. With an exact date, no.

Q. Would it have been installed within the last five years?

A. Possibly.

...

Q. Same with the new sill plate?

A. Correct.

Q. You can't testify to an exact date when that was installed?

A. No, I cannot.

VRP 233-34.

Douglas cannot provide substantial evidence that Visser made the superficial repairs discovered by Mr. Juneau or covered them up. It is undeniable the pictures admitted at trial show substantial rot. However, the fact rot and pest infestation had permeated a large portion of the sill plate and rim joists is not sufficient to establish Visser had knowledge in 2007. See, Hughes v. Stusser, 68 Wn.2d 707, 709-10, 415 P.2d 89 (1966). There were several other owners prior to Visser's purchase of the Property; many of who could have performed the superficial repairs Mr. Juneau has testified about.

B. Douglas Does Not Dispute That Finding Of Fact No. 8 Is Not Supported By Substantial Evidence.

Vissers have alleged the trial court erred in the second sentence of Findings of Fact No. 8 which specified that the inspection report Vissers obtained in 2005 documented structural defects in the Property and contradicted Vissers' assertion that the Property required only minor repairs. CP 28. Douglas has effectively conceded such error by failing to respond in their responsive briefing.

C. There Is No Substantial Evidence In The Record Establishing Douglas Did Not Know Of The Defects And Could Not Have Discovered Them.

Douglas glosses over much of the exhibits and testimony establishing Douglas knew of defects and the defects were discoverable by

a careful and reasonable inspection. Instead, Douglas focuses on the fact that they had no idea that 50 to 70 percent of the sill plate and rim joists were destroyed. However, Douglas was put on notice of the defects and Douglas completely and utterly failed to take any steps to follow up and determine whether the extent of the defects were discoverable by further inquiry. Douglas instead concludes since they had Dennis Flaherty, the Douglas's home inspector, inspect the Property and the report did not uncover hidden damage, that was all they needed to do. VRP 157; Response Brief, P 21. However, not only did Flaherty's inspection put Douglas on notice of defects, it is not the only information that was provided to them prior to purchasing the Property.

First of all, Mr. Flaherty's inspection noted a small area of rot and decay on the exterior siding; noted there had been caulking and damage to the siding, which were indicative of a previous roof leak; noted an area of the sill was rotted along the southwest wall; and a large section of the sill adjacent to the rotted section had been recently replaced. CP 373, PLA EX 12. Moreover, the inspection report had a photo of the rotted sill plate, the replaced sill and pictures showing evidence the floor joists were "sistered" together. CP 373, PLA EX 12, P 11. Despite this actual knowledge, Douglas did not take any steps to follow up or ask any questions or clarifications relating to the rot, the previous leaking and the replacement

of portions of the sill plate as well as the joists that were sistered together.

VRP 120.

Q. But there is existing rot and decay and there is also existing rotted sill right next to a portion, a large section of sill that had been recently replaced?

A. Correct.

Q. And yet you didn't follow up any of that with Mr. Visser as to what was done in that area?

A. No, I did not. If somebody replaces a piece of structure and tells me he has done it, I believe him.

Q. Okay?

A. In retrospect, perhaps not.

VRP 121.

Q. So you didn't ask in this anything about rot, correct?

A. Correct.

Q. Or wood destroying organisms, correct?

A. Correct.

VRP 122.

Second of all, just because Douglas had an inspection performed, it doesn't necessarily follow that the inspection was reasonable. Douglas's own expert, Kirk Juneau, testified that a girder beam had extensive carpenter ant damage, which was out in the open and would have been

visible and discoverable when Douglas had the home inspected in 2007.

VRP 231-232.

Q. In your opinion should this have been visible?

A. Yes.

Q. Is it possible that this type of damage could have been done in just 15 months?

A. Not to this degree.

VRP. 232.

Mr. Juneau also testified he was able to view, without intrusive inspection in a clearly visible fashion, joists that had been sistered together. VRP 252. Viewing of the sistered joists and the damage to the girder beam that was clearly evident would call for further intrusive inspections. VRP 253.

Q. If you saw sistering like that and in photo eight, along with the photo one, um, which is the damage to the girder beam?

A. Correct.

Q. In your experience, would you call for maybe further inspection or more intrusive - -

A. Yes, I would. As a practice for my business, I would.

VRP 253.

Contrary to the Douglas'' assertions, a reasonable inspection as well as follow-up inquiries by Douglas would have alerted Douglas to the

defects. As such, Finding of Fact No. 17 is not supported by substantial evidence and is contrary to the record.

D. Since Douglas Had Actual Knowledge Of The Alleged Defects, Or Could Have Discovered Them Upon Reasonable Inspection, The Trial Court Erred By Concluding Visser Fraudulently Concealed Defects; Visser Negligently Misrepresented; Visser Breached Duties of A Real Estate Agent; And Visser Violated The Consumer Protection Act.

The Court of Appeals reviews conclusions of law *de novo*. Sunnyside Valley Irrigation District v. Dickie, 149 Wn.2d 873, 880, 73 P.2d 369 (2003). In the present case, the trial court erred in concluding that Visser fraudulently concealed defects; negligently misrepresented material fact; violated a statutory duty; and violated the Consumer Protection Act.

The common theme and element that Douglas is required to establish by clear, cogent and convincing evidence in a fraudulent concealment, negligent misrepresentation, violation of real estate agent statutory duties and a Consumer Protection violation is that Douglas did not know or could not have known by a reasonable inspection of the defective condition.

1. Douglas Failed To Establish Fraudulent Concealment.

Among the elements Douglas is required to be proved by clear, cogent and convincing evidence at trial in a fraudulent concealment case is that the defect is unknown to Douglas and the defect would not be

disclosed by a careful, reasonable inspection. See, Alejandre v. Bull, 159 Wn.2d 674, 689, 153 P.3d 864 (2007). In the present case, not only did Douglas have actual knowledge of the defects, Douglas also could have discovered the defects by a careful, reasonable inspection. While Douglas primarily relies upon the Flaherty inspection report as indicative of a “careful, reasonable inspection”, they completely ignore what the law requires of them and the facts of the case.

Being put on notice of defects and potential defects requires the purchasing party to make further inquiries to determine the extensive nature of any alleged damage. See, Sloan v. Thompson, 128 Wn. App. 776, 115 P.3d 1009 (2005)(where purchaser discovers evidence of a defect, and thus the defect is apparent, purchaser is required to inquire further; but notice of unrelated defects do not make actionable defect apparent); Puget Sound Service Corp. v. Dalarna Management Corp., 51 Wn. App. 209, 752 P.2d 1353 (1988)(purchaser’s knowledge of prior water leak required buyer to inquire further to determine extent). In other words, Douglas cannot claim ignorance, but must take affirmative steps to follow up on any inquiries. Douglas failed to do so.

Douglas had actual knowledge from their inspection report of rot, roof leakage, structural repairs and replacement of the sill plate. PLA EX 12. Moreover, Douglas had knowledge of previous pest infestation and

discussed it with their real estate agent. VRP 337-38. Unlike Sloan v. Thompson, supra, these are all defects related to Douglas's claim of fraudulent concealment of rot and decay. Thus, such defects are apparent and Douglas is required to inquire further; Douglas knowingly decided against it. VRP 121-22.

When asked if Douglas had discussed Mr. Flaherty's inspection report with Visser at all, his response was he did not. VRP 120. Further, when asked whether Mr. Douglas had discussed the Flaherty report with the inspector who performed it, his response was "no, I, ah, I let the report speak for itself." VRP 120.

As a matter of law, Douglas is required to inquire further, they did not and in their responsive briefing, Douglas ignores this legal requirement. This notice and inquiry element is also required to be proved under any negligent misrepresentation claim.

2. Douglas Failed to Establish Negligent Concealment

In negligent misrepresentation, one of the elements that must be established by clear, cogent and convincing evidence is justifiable reliance. Ross v. Ticor Title Insurance Company, 135 Wn. App. 182, 192, 143 P.3d 885 (2006). Douglas cannot justifiably rely upon any alleged misrepresentations of Vissers because Douglas had actual knowledge of the alleged defects. By law Douglas had a duty to determine the extent of

the defects upon inquiry and additional inspections. Had Douglas followed up with inquiry, Douglas would have determined the potential extent of the defects, as Douglas's expert, Kirk Juneau, testified. Thus, Douglas could not have reasonably relied upon any alleged misrepresentations of Visser. The trial court's decision relating to both fraudulent concealment and negligent misrepresentation should be reversed.

3. Douglas Failed To Establish A Breach Of Statutory Duty

The duty of a real estate agent, in part, extends to disclosure of all existing material facts known *and not apparent or readily ascertainable to Douglas*. RCW 18.86.030(1)(d)(emphasis added). Again, the provision of "not apparent or readily ascertainable" is completely ignored by Douglas in their responsive briefing. Instead, Douglas focuses on the alleged failure of Visser to disclose a material fact and not the duty of Douglas to inquire and determine whether the defects were apparent or readily ascertainable.

Douglas can't overcome the facts of the case that they had actual knowledge of rot, previous leaking, structural repairs, damage to the sill plate and previous pest infestation. PLA EX 12. These were all disclosed in their own inspection report.

Douglas can't escape the fact that their own expert, Kirk Juneau, testified that there was significant rot to a girder beam that was readily ascertainable upon a reasonable inspection. VRP 231-32. There was also

inadequate sistering of joists that was clearly visible upon a reasonable inspection. VRP 252. Douglas can't overcome the fact that their own expert testified that these facts alone would require more intrusive investigation into the structure of the home. VRP 253. Douglas has a duty to ask those questions. Douglas knowingly failed to follow up and as a result, Douglas fails to satisfy the requirement that Visser's failure to disclose was not apparent or readily ascertainable. Visser didn't breach a statutory duty and the trial court's decision to the contrary should be reversed.

4. Visser Has Not Violated The CPA

In order to establish a claim under the Consumer Protection Act, one of the major elements is an unfair or deceptive act or practice. Svendsen v. Stock, 143 Wn.2d 546, 553, 23 P.3d 455 (2001). In order to meet this element and be an unfair or deceptive act or practice in the present case, Douglas must establish that Visser is liable for the fraudulent concealment, or misrepresentation, or statutory violation. As argued in this brief and the Opening Brief, Douglas has failed to establish liability. Thus, Douglas cannot meet the first element.

Even if Douglas has established that Visser acted in an unfair or deceptive manner, another element Douglas cannot and has not established is the public impact to a CPA violation. Svendsen v. Stock, supra. The

only authority provided is Finding of Fact No. 31 (CP 30), which is actually a conclusion of law. It simply recites the elements required to establish the public interest requirement, without providing any factual support. Any conclusion of law erroneously denominated a finding of fact will be subject to *de novo* review. Robel v. Roundup Corp., 148 Wn.2d 35, 44, 59 P.3d 611 (2002).

The public interest requirement is established by evaluating several factors: (1) whether the acts were committed in the course of Visser's business; (2) whether Visser advertised to the public; (3) whether Visser actively solicited Douglas, indicating other potential solicitation of others; and (4) whether the parties occupied unequal bargaining positions. Svensen v. Stock, 143 Wn.2d at 559; Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Company, 105 Wn.2d 778, 790-91, 719 P.2d 531 (1986). The record is deplete of any findings of fact that support the public interest requirement. CP 26-33.

Moreover, as testified by Douglas in the trial, the only misrepresentations complained of by Douglas arise solely out of the disclosure statement. VRP 128. Agents and brokers are precluded from liability under the Consumer Protection Act for fraudulent concealment arising directly from their conduct in completing the disclosure statement. Svensen v. Stock, 143 Wn.2d at 555. Visser did not violate the Consumer

Protection Act and therefore, the trial court's conclusion should be reversed.

Regardless of the knowledge of matters and whether Visser is found liable on any cause of action, the court erred in failing to utilize the correct measure of damages. Douglas provides no opposition that the correct measure of damages is the benefit of the bargain.

E. Douglas Failed To Prove Damages Under The Benefit Of Bargain Measure Of Recovery.

Douglas does not dispute that the benefit of the bargain is the correct measure of damages in fraudulent concealment and misrepresentation cases. Tennant v. Lawton, 26 Wn. App. 701, 615 P.2d 1305 (1980); Janda v. Brier Realty, 97 Wn. App. 45, 984 P.2d 412 (1999). Douglas also does not dispute that as the plaintiffs, they have the burden of submitting evidence pursuant to the benefit of the bargain measure of damages in establishing a proper award. In the present case, Douglas failed to present sufficient evidence under the benefit of the bargain measure of damages, and therefore even if Vissers are found liable on any of the causes of action, Douglas is not entitled to damages.

The benefit of the bargain measure of damages is the difference in the market value as was represented, and the market value of the property at the time of sale. Tennant v. Lawton, 26 Wn. App. 701, 615 P.2d 1305

(1980). Rebuilding the cottage is not an appropriate measure of damages; it is not what Douglas bargained for and is not what Vissers sold to Douglas.

1. Douglas Did Not Present Evidence Of The Value Of The Home At The Time Of Sale.

Douglas failed to produce any evidence of the value of the improvements at the time of sale. As indicated in Vissers' opening brief, the only actual evidence submitted by Douglas evidencing the value of the improvements at the time of the sale is Plaintiff's trial exhibit No. 70, which is the Whatcom County real property tax assessment. PLA EX 70. Exhibit 70 specifies on its face that the improvements were worth \$45,200 in 2007 and the land was worth \$50,000. PLA EX 70.

Douglas, however, tries to now use exhibit 70 and argue that since the purchase price in 2007 was \$189,000, and the land as set forth in exhibit 70 was only worth \$50,000, the improvements would be worth \$139,000. Response Brief, P 25-26. This goes against the argument by Douglas that a damage award must not object the trier of fact to speculation and conjecture. See, Transpac Development, Inc. v. Oh, 132 Wn. App. 212, 130 P.3d 892 (2006). The argument by Douglas results in speculation and conjecture because it could easily be made in the converse. Since the purchase price in 2007 was \$189,000 and the value of

the improvements as set forth in exhibit 70 is \$45,200; the land was worth \$143,800. Thus, the actual value of the improvements was only \$45,200 and that is the maximum Douglas is entitled to if the improvements are a total loss. Douglas failed to establish the first prong of the benefit of the bargain analysis.

2. Douglas Failed To Prove The Value Of The Home With The Defects.

The other element of the benefit of the bargain is the value of the building with the defects. Tennant v. Lawton, supra. Douglas also failed to establish and submit any evidence of that value. The court is therefore left with the only evidence that Douglas did provide at trial; Exhibit 70.

Plaintiff's Exhibit 70 specifies that the assessed the value of the improvement itself in 2010, after the house was vacated due to mold and rot, is \$31,243. PLA EX 70. Compare that value to what it is assessed at in 2007 of \$45,200, and it leaves a difference in value, under the benefit of the bargain rule, of \$13,957. Based upon the evidence submitted at trial by Douglas, this is the maximum of what they would be entitled to if Visser is found liable. However, Douglas completely ignores these facts in their responsive briefing and instead argues they are entitled to a new home.

3. Douglas Is Not Entitled To A Brand New Home

The fact Douglas had an expert testify that the building was a total loss does not establish that, under the benefit of the bargain, Douglas is entitled to a brand new home. This ignores the requirement to compare the value as represented versus as it is with the defects. On the contrary, when Douglas purchased the home they knew that it was an older place that would need some attention (“...I was neither blind nor oblivious to the fact that a 35 or 40-year-old home is going to need some attention sooner or later...”). VRP 44.

For Douglas to now receive a brand new home, not a 35 to 40-year-old home that exhibited signs of rot, previous leaking, structural repairs and pest damage, is wholly unjustified and not allowed under the benefit of the bargain measure of damages. In essence, Douglas is receiving a windfall. If Visser is found liable, this Court should remand and direct entry of damages not to exceed \$13,957.

F. Douglas Did Not Make Any Effort To Mitigate Damages.

Douglas reserves one paragraph to argue that they did the steps necessary to mitigate damages. Douglas argues that the trial court concluded correctly that because the concealed defects compromised the home’s structure, any repairs would be futile and more expensive than tearing down the house and rebuilding it. Finding of Fact No. 43, CP 31. Finding of Fact No. 43 is actually a conclusion of law and thus, subject to

de novo review. Robel v. Roundup Corp., 148 Wn.2d at 44. Finding of Fact No. 43, being a conclusion of law, is not supported by any findings of fact. Specifically, it is conclusory to specify that any repairs would be futile and more expensive than tearing down the house and rebuilding it. Douglas bases this conclusion upon testimony of the condition of the premises over two years after discovery of many of the problems. Moreover, this ignores the legal obligation placed upon Douglas to take action to mitigate. Douglas does not deny that no action was taken.

It is well established law that one who has sustained damage, by reason of the act of another, must use reasonable efforts to minimize the damages. Sullivan v. Boeing Aircraft Co., 29 Wn.2d 397, 405, 187 P.2d 312 (1947). Visser submitted testimony that the structural issues with the house could be repaired for the total sum of \$38,087.31. DEF EX 75. Douglas at trial tried to establish that this repair would not provide them with a habitable home.

Q. Would you guarantee, if I paid you \$37,000, \$38,087.31, that you would build me a habitable house that I could live in it?

A. I cannot because the heating has been pulled. The cabinets have been pulled. The appliances have been pulled. There are things that are not addressed in this estimate.

VRP 440.

The reason the estimate provided by Visser's expert could not provide a "habitable home", was that it did not include mold abatement and the increased damage to the Property as a result therefrom. It was specifically left out because a reliable estimate was provided to Douglas in 2008 when the mold was first discovered. PLA EX 22. That estimate specified the mold would be completely abated at a cost of \$4,159. PLA EX 22.

However, instead of taking reasonable measures to mitigate their damage and promptly abate the mold in 2008, Douglas removed the heaters, the sink and toilet in the bathroom, allowed water to drip in the house (which soaked the carpeting and floor areas) and allowed the mold to grow and cover the interior of the house for two and a half years. VRP 441-442. Thus, the costs to repair the house and make it habitable greatly increased because mold had spread across the ceilings, the walls, the floor and became damp which made the structure more susceptible to more rot. VRP 442.

Had Douglas mitigated their damages and abated the mold in a timely manner, repairs could have been done for as little as approximately \$38,000, plus the cost of the mold abatement of \$4,159.00. DEF EX 73; PLA EX 22. Instead, Douglas relied upon an expert that viewed the house over two years after damage was first discovered. In Douglas' expert's

testimony, the cost to repair was much higher in order to make the residence habitable mainly because at the time of trial, or just prior, the bathroom was leaking water (VRP 416); there was water pooled on the bathroom floor that had turned to ice (VRP 416; CP 375, DEF EX 72); there was mold all over the bathroom walls and floor (CP 375, PLA EXs 60 & 61; DEF EX 73); there was mold on the walls outside of the bathroom (VRP 426-428; CP 375, DEF EX 74); the ceiling tiles were still in place (VRP 139); and water was pooling on the bathroom floor, migrating to the carpeting in the hallway and leaking through the floor into the crawlspace (VRP 442).

Douglas increased their damage instead of mitigating it in contradiction to law. The trial court erred in concluding and finding that Douglas took reasonable steps to mitigate.

G. Douglas Has Not Established Emotional Distress

The parties agree that courts allow recovery of emotional distress damages in cases involving intentional torts. If the court determines that Visser is liable for fraudulent concealment and/or misrepresentation, it doesn't simply mean Douglas is entitled to emotional distress damages; Douglas still has the burden of proving emotional distress. The court in Dean v. Mun. of Metropolitan Seattle, 104 Wn.2d 627, 641, 708 P.2d 393 (1985) stated "The plaintiff, once having proved discrimination, is only

required to offer proof of actual anguish or emotional distress in order to have those damages included in recoverable costs . . ." See also, Cagle v. Burns & Roe, 106 Wn.2d 911, 920 (1986). In the present case, Douglas failed to offer proof of actual anguish or emotional distress necessary for relief.

Douglas simply relied upon testimony that consisted of Mrs. Douglas claiming lesser people would have divorced; there were sleepless nights; crying and disappointment. VRP 405-06. In cases where courts have allowed recovery of emotional distress damages on intentional torts, there has been more specific showings of emotional distress. Dean v. Mun. of Metro Seattle, 104 Wn.2d at 641 (testimony that while pursuing another position plaintiff exhausted his financial resources; forced to sell furniture, clothing and jewelry to live; moved to California and stayed with his mother; borrowed money from his family and was forced to go on medical assistance); Cherberg v. Peoples Nat'l Bank, 88 Wn.2d 595, 606-607 (1977) (testimony from several witnesses about the effect of respondent's conduct on the petitioners and the mental distress, inconvenience, and discomfort suffered by the petitioners as a result of that conduct).

Douglas does not have any third party testimony about the hardships they may have endured. Further, Mrs. Douglas summed it up in her testimony specifying "Luckily, luckily, we don't have to live in that home

12 months out of the year and raise children in a home like that. Otherwise, we would have been renting or been out on the street.” VRP 406. The Douglases were not living in the home. This was a second home were they spent little time. Further, upon discovery of the issues, they stayed in their new building on the Property or within their recreational trailer. VRP 393-95. They were still able to use the rest of the Property.

Douglas does not offer proof of actual anguish or emotional distress and therefore, isn't entitled to the \$12,000 award. This court should reverse the trial court's award of emotional distress damages.

H. Visser Is Entitled To Default Interest And Fees On The Promissory Note

Douglas in their response brief does not dispute that the promissory note is commercial paper and subject to rules and laws relating to the same; specifically, RCW 62A.3. The Note is an absolute promise to pay a sum certain by a certain date, which was executed by Douglas. Douglas argues that the trial court properly exercised its discretion to craft a remedy for the Vissers' breach. Response Brief, P 35. Douglas then cites a case that is wholly inapplicable; a case that addresses the theories of quantum meruit.

The promissory note is separate and distinct from all other claims of Douglas against Visser. The promissory note is subject to RCW 62A.3. As

an absolute promise to pay, Douglas is required to honor it unless the defenses available under RCW 62A.3-305(a)(1), are met. Douglas, however, does not set forth any applicable defenses to their non-payment.

As a result, this Court should remand this issue to the trial court with instructions to have the principal amount of the promissory note calculated as of September 1, 2008, and interest at 18% per annum accrue from September 1, 2008, until paid.

On appeal, the trial court should be reversed and Visser should be entitled to recover their reasonable attorney's fees and costs related to a valid judgment on the Note and related to prevailing upon the claims pursuant to the Agreement.

The action brought by Douglas was in tort but the purchase and sale agreement was central to their claims. Pursuant to RAP 18.1, Visser is also entitled to recovery of reasonable attorney's fees and costs on appeal, as determined by this Court.

III. CONCLUSION

For the foregoing reasons, Visser respectfully requests this Court to reverse the trial court's ruling, award Visser judgment on the promissory note as well as their attorney's fees and costs incurred at trial and on appeal.

Respectfully submitted this 11th day of May, 2012.

LAW OFFICES OF GREGORY E.
THULIN, P.S.

A handwritten signature in black ink, appearing to read 'Gregory E. Thulin', written over a horizontal line.

Gregory E. Thulin, WSBA #21752
119 N. Commercial St., Ste 660
Bellingham, WA 98225
Attorney for Appellants Visser

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused deliver of Appellants' Reply Brief to:

Philip Buri
Buri Funston & Mumford, PLLC
1601 F Street
Bellingham, WA 98225

DATED this 11th day of May, 2012.



Gregory E. Thulin