

72939-0

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NO. 72939-0-1
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WGW USA, INC., and TIAN QING GUO,

Appellants,

v.

LEGACY BELLEVUE 530, LLC,

Respondent.

BRIEF OF APPELLANTS

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I. INTRODUCTION

WGW USA, Inc., (WGW) brought this action to rescind a 10 year commercial property lease signed in September 2012, due to the property owner's failure to disclose material, negative information about the leasehold property (the Legacy Property) known to the property owner; namely, that Sound Transit had singled out the Legacy Property for possible condemnation for Sound Transit's chosen route through Bellevue. About seven months after signing the 10 year lease, paying the property owner a \$124,866 security deposit, and spending \$144,798 to convert the property to a Chinese restaurant, the property owner advised WGW that Sound Transit likely would be condemning the Legacy Property.

The property owner is Legacy Bellevue 530, LLC (Legacy). Legacy's property manager for the Legacy Property, real estate broker William Nelson (Nelson), had been tracking Sound Transit's potential need to condemn the Legacy Property since 2008.

During lease negotiations, Nelson had actual knowledge that Sound Transit had identified the Legacy Property as among those parcels for possible condemnation for the chosen route, preferred alternative **C9T**. However, Nelson chose not to disclose this

information to WGW and its owner, Tian Qing Guo (Guo). Instead, Nelson told WGW/Guo that Sound Transit planned to build the light rail line on the other side of the NE 6th Street overpass from the Legacy Property and that Sound Transit planned to build a station just two blocks away, explaining that both would be good for Guo's intended restaurant business.

In April 2013, about 7 months into the lease, Guo decided to sell the restaurant, as business had not been as good as expected, and Guo retained business broker Christian Kolmodin (Kolmodin) to locate buyers. After locating 3 interested buyers, in mid-May 2013, Kolmodin met with Nelson, only to learn that Sound Transit would likely be condemning the Legacy Property.

This was the first Guo learned that Sound Transit had any conceivable need to condemn the Legacy Property. Had Guo known during lease negotiations of the risk that Sound Transit may condemn the Legacy Property for the chosen route through Bellevue, Guo would have never decided to sign a 10 year lease or invest nearly \$270,000 in that lease.

While Nelson was short on specifics, Kolmodin's 3 prospective buyers immediately lost interest, and Kolmodin informed Guo that the

risk of Sound Transit condemning any portion of the Legacy Property rendered Guo's business unmarketable.

After retaining present counsel to investigate the situation, Guo learned that since 2008 Sound Transit had designated the Legacy Property as a potential acquisition, depending on the light rail route selected, and that in November 2011, Sound Transit and the City of Bellevue had selected alternative route **C9T**, for which the Legacy Property was listed as at risk for condemnation. On June 18, 2013, WGW formally notified Legacy that, because Legacy had withheld critical information, WGW was vacating the property and demanding rescission of the lease and return of both the \$124,886 security deposit and \$144,798 in tenant improvements.

RCW 18.86.030 places an affirmative burden on brokers, such as Nelson, to disclose to prospective lessees all material information about the leasehold property that may negatively affect the property. Because Nelson did not disclose that the Legacy Property was at risk for condemnation for the chosen route through Bellevue, WGW maintains that Nelson induced Guo/WGW to enter into the lease by negligent/fraudulent misrepresentation. Because Nelson was at all times Legacy's agent, WGW named Legacy as the sole defendant.

Legacy counterclaimed for breach of lease and brought in Guo as a third-party defendant, as guarantor of WGW's leasehold obligations.

During the course of this action, Sound Transit advised that it would run an elevated line over the northern portion of the Legacy Property, that Sound Transit would require all of the parking area of the Legacy Property for construction purposes, and that condemnation must occur by the second quarter of 2017, less than halfway into the WGW lease.

Legacy's primary defenses are that Sound Transit's designation of the Legacy Property as a potential acquisition was not material to the transaction, and even it were WGW/Guo should have discovered this risk on their own.

Legacy's argument that the designation of the Legacy Property as a potential acquisition was not material comes from Legacy's belief that there was no real risk. In Legacy's words:

At no point during the lease negotiations or prior to execution of the Lease Agreement was Legacy aware that the Premises could be placed in jeopardy by the development of the East Link Light Rail System.

(Emphasis added.)

Legacy's belief that there was no risk is based on Nelson's negligent analysis, for Nelson had concluded, without consulting with Sound Transit or anyone else, that Sound Transit's designation of the Legacy Property as a potential acquisition for the chosen route through Bellevue, was in Nelson's words, "no longer accurate or attributable to the process." However, had Nelson consulted with Sound Transit, Nelson would have learned that Sound Transit was not able to make a decision until 2013 as to which properties on the list of designated properties for route **C9T** Sound Transit would actually need to condemn, because substantially more engineering work (from 30% to 60% engineering design) was required.

Legacy's argument that WGW/Guo should have discovered any conceivable risk on their own, ignores both the context of the lease negotiations and the difficulty of obtaining this information. As to context, Legacy's agent, who appeared knowledgeable about Sound Transit's future plans, only portrayed Sound Transit's future proximity in positive terms, stating this would be good for business, as the proposed station would be just two block away. Further, because Nelson is a broker with an affirmative duty to disclose material, negative information, WGW/Guo had every right to rely on the

accuracy of the information Nelson provided, rather than to assume that Nelson was hiding material information.

As to the difficulty of ascertaining and understanding the risk posed by Sound Transit's future proximity, Legacy has characterized this process as finding:

... a needle in a haystack in thousands upon thousands of documents on Sound Transit's website.

None of the material facts in this case are in dispute, and WGW and Legacy filed cross motions for summary judgment. WGW requested rescission of the lease and a judgment against Legacy for \$269,684 representing the \$124,886 security deposit and \$144,798 in tenant improvements. WGW is not seeking return of the rent paid to Legacy through May 2013.

The trial court denied WGW's motion for summary judgment and granted Legacy's motion for summary judgment, ruling that WGW had breached its lease obligations. The trial court awarded a judgment against WGW and Guo, as personal guarantor, for \$27,698 principal plus and \$35,205 attorney's fees. By this appeal, WGW/Guo seeks reversal of the trial court's order granting Legacy's motion for summary judgment and a vacation of the judgment.

By this appeal, WGW/Guo also seeks reversal of the trial court's denial of WGW's motion for summary judgment. WGW seeks a ruling by this Court determining that Legacy had wrongfully induced WGW to enter into the lease by negligent/fraudulent misrepresentation, an order allowing WGW to rescind the lease, and a judgment against Legacy for the \$124,886 security deposit and \$144,798 in tenant improvements.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

Error No. 1. The trial court erroneously ruled that "there is an absence of evidence tending to establish that (Legacy) had actual knowledge of any existing fact or possessed other information that it had a duty to impart to (WGW) prior to entering into the lease in question." CP496.

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Issue No. 8. Did the trial court abuse its discretion in striking portions, not identified, of expert Bruce Kahn's declarations?
Assignment of Error No. 5

Issue No. 9. Should WGW be awarded its attorney's fees per the attorney's fees clause in the lease? Assignment of Error No. 7.

III. STATEMENT OF THE CASE

The following facts are not in dispute.

Beginning in 2008, Sound Transit identified the Legacy Property as a potential acquisition for its light rail project through downtown Bellevue. This is seen by Appendix G-2 to Sound Transit's Draft Environmental Impact Statement (EIS). CP177. The Legacy Property is described as "Coco's," (a restaurant previously located on the premises), by the address 530 112th Avenue NE, and by map ID# 9003. CP177. In 2008, the route description was CIT, CP177, and the Legacy Property was identified as one of several "potentially affected parcels by alternative." CP177.

In Sound Transit's July 2011 Final EIS, the Legacy Property was identified as a "potential property acquisition" for preferred alternative **C9T**, CP184, again described as "Coco's," 530 112th Avenue NE, and map ID #9003. CP184.

In both the Draft EIS and Final EIS, Sound Transit stated that full acquisition would be needed either for the light rail line itself and/or for construction activities:

Full acquisitions include parcels that might not be fully needed for the project but would be affected to the extent existing uses would be substantially impaired (e.g. loss of parking or access). This includes parcels that would be acquired for construction activities...

CP176, 183. Thus, for example, the Legacy Property was listed as a potential acquisition for preferred alternative **C9T**, even though the described path is on the north side of the NE 6th Street overpass, CP181, and the Legacy Property is on the south side of the overpass, just west of I-405 and adjacent to the NE 6th Street overpass over I-405. CP185.

Kent Melton managed property acquisitions for Sound Transit from 2006 to 2014 and is currently the real property director for Sound Transit, CP 211-13. He indicated that it was not unusual that parcels on both sides of a street be designated as potential acquisitions in the Final EIS, when the light rail path is on one side of the street. CP 217. Per Kent Melton, preferred alternative **C9T** was at only 30% engineering design when the Final EIS was published, CP216, and the decision as to which parcels would be needed could not be made

until the route was at about 60% engineering design. CP222. Furthermore, which parcels ultimately would be needed was strictly an engineering decision. CP225.

In November 2011, Sound Transit and the City of Bellevue signed a Memorandum of Understanding (MOU) whereby preferred alternative **C9T** was chosen as the light rail path through downtown Bellevue, CP187-88, 191, 197. The MOU contained an identical route description as in the Final EIS. CP197. Per Kent Melton, route **C9T** remained at 30% engineering design when the MOU was signed. CP218. Per the MOU, Sound Transit and the City of Bellevue agreed to begin a Cost Savings Process to identify design modifications to save the City of Bellevue up to \$60 million dollars. CP189, 194.

Possible design changes, however, were not intended to change the general light rail path described by **C9T**. Once preferred alternative **C9T** was selected by the MOU, there was no serious discussion about light rail crossing I-405 at other than the NE 6th overpass. CP220.

Nevertheless, Sound Transit and the City of Bellevue clearly stated in the MOU that further design would occur:

...detailed design and mitigation will continue through

project development...

CP195. Per Kent Melton, "specific aspects of (that) alignment" might change. CP220.

Regarding the Cost Savings Process, in April and June 2012, Sound Transit and the City of Bellevue held two open houses to inform the public about possible modifications to route **C9T**. CP205, 209. One of the proposed cost savings changes was to relocate the transit station from 110th Avenue NE to NE 6th, about two blocks west of the Legacy Property. CP202, 207. Material presented to attendees made clear that final decision would not be made on the Cost Savings Process until 2013. CP201.

Per Kent Melton, who attended both open houses to answer questions property owners had regarding the real estate acquisition process, CP214-15, Sound Transit's engineers could not make a final decision as to which real estate parcels Sound Transit would in fact condemn, until the Cost Savings Process was completed. CP227. Thus, since the Cost Savings Process would not be completed until 2013, Sound Transit's engineers could not make a final decision until 2013 as to which parcels identified in the Final EIS for route **C9T** as potential acquisitions would actually be required.

At all times from the Draft EIS in 2008 through March of 2013, the Legacy Property remained on the list of potential acquisitions. CP226. Per Kent Melton, until Sound Transit's engineers made a final decision as to which parcels would be needed, which would not occur until 2013, Sound Transit could not advise the owners of the Legacy Property or the owners of any of the other properties listed as potential acquisitions for route **C9T**, that Sound Transit would not need to condemn their property. CP224. Only those parcels listed for the other alternatives, alternatives not chosen by the MOU, were no longer at risk. CP221.

In March 2013, Sound Transit specifically advised Legacy that Sound Transit would likely be running an elevated line over the northern portion of the Legacy Property, rather than on the north side of the NE 6th Street overpass, and that Sound Transit would need to construct a support column on the Legacy Property to support the line. CP47. And at his deposition in October 2014, Kent Melton stated that Sound Transit will require all of the parking area of the Legacy Property for construction purposes, and that Sound Transit will require the parking area for more than a year. CP228-29. Kent Melton also stated that Sound Transit must acquire the Legacy

Property by the second quarter of 2017. CP230.

On 9-17-14, Sound Transit advised Legacy in writing that Sound Transit was beginning the appraisal process to compensate Legacy for the condemnation:

ACQUISITION NOTICE

The process of appraising the required property rights on your property will begin during the Summer and Fall of 2014. It will establish the fair market value which will determine the price Sound Transit will offer...

CP108.

William Nelson (Nelson) is a licensed real estate broker, CP45, employed by Legacy Commercial, LLC. CP44. Since 2006, Nelson has been the property manager of the Legacy Property and responsible for leasing that property. CP45. Nelson's office is located on the same block as the Legacy Property. CP70.

Since 2008, Nelson has been tracking Sound Transit's potential need to condemn the Legacy Property, CP246, including review of both the 2008 Draft and 2011 Final EIS. CP246, 248. Nelson also was aware that in November 2011, Sound Transit and the City of Bellevue selected preferred alternative **C9T** as Sound Transit's route through Bellevue, CP237, meaning that Nelson

necessarily understood that Sound Transit had designated the Legacy Property as a potential acquisition for the chosen route through Bellevue. Nelson also attended the April 2012 open house held by Sound Transit and the City of Bellevue to advise the public of the Cost Savings Process. CP262.

Despite having tracked Sound Transit's designation of the Legacy Property as a potential acquisition since 2008, and despite Nelson's knowledge that Sound Transit had designated the Legacy Property as a potential acquisition for the chosen route through Bellevue, Nelson concluded, by himself, that Sound Transit would not need to acquire the Legacy Property.

It was my understanding that (Appendix G2) was no longer accurate or attributable to this process.

CP255. Nelson's reasoning was that, since the published route of **C9T** in the Final EIS and MOU showed the light rail route on the north side of the NE 6th Street overpass, whereas the Legacy Property was on the south side, CP181, 185, 197, Sound Transit would not require the Legacy Property. CP252.

Nelson formed his opinion without consulting with anyone at Sound Transit or anyone at all, nor did Nelson inquire as to why the

Legacy Property was designated as a potential acquisition in the Final EIS when the proposed rail line was on the north side of the NE 6th overpass and the Legacy Property was on the south side. CP250. In Nelson's words:

... (it) seemed like a rational conclusion; that based on it being on the opposite side of the overpass from us, that they (Sound Transit) were merely covering their bases, obviously subject to change, that it would not require the taking of the asset.

CP252. And Nelson was confident of his opinion. As Legacy stated in its answer and counterclaim:

At no point during the Lease negotiations or prior to execution of the Lease Agreement was Legacy aware that the Premises **could** be placed in jeopardy by the development of the East Link light rail system.

CP241. (Emphasis added.)

Rather than being concerned with Sound Transit possibly having to acquire the Legacy Property, Nelson concluded and advised WGW/Guo that Sound Transit's future proximity, including a proposed station just two blocks away, was "a positive" for the Legacy Property.

CP254.

Tian Qing Guo (Guo), owner of WGW, first learned of the Legacy Property in August 2012, by driving around Bellevue and

seeing a "For Lease" sign on the property. CP265, 366. Guo, who had been in the restaurant business for several years and wanted to open a restaurant in Bellevue, thought the Legacy Property had great potential due to its location and ample parking. CP265.

Guo contacted an attorney who speaks Mandarin Chinese, who then referred him to broker Maci Lam (Lam). CP265. Guo informed Lam that he was interested in leasing the Legacy Property, and Guo asked Lam to help him negotiate a long-term lease. CP265. Guo/Lam explained to Nelson that Guo wanted a 10 year lease and would be making substantial tenant improvements. CP367.

During lease negotiations, Nelson did not inform either Guo or Lam that Sound Transit had identified the Legacy Property as a potential acquisition for the chosen route through Bellevue. CP258-59, 367. Instead, and consistent with his stated belief that Sound Transit's future proximity posed no risk to the Legacy Property, Nelson explained Sound Transit's proposed rail line solely in positive terms:

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 believed that would be a positive.

CP254 (Nelson's testimony at deposition).

I informed Ms. Lam and Guo that a station was planned for the top of the hill at NE 6th Street adjacent to City Hall and the Train's route was scheduled to travel on the north side of the NE 6th Street overpass to continue over I-405. In my opinion, the added pedestrian traffic from the primary downtown light rail station would directly benefit WGW's operation, after all what restaurant would not see upside in the opportunity to have additional foot traffic in the immediate proximity.

CP46 (Nelson's declaration).

As a result of Nelson's positive portrayal of Sound Transit's future proximity, and the fact that Nelson was negotiating a 10 year lease, Guo was steered away from any possibility that Sound Transit may need to condemn the Legacy Property during the term of that lease. Guo stated at CP388:

While Legacy now argues that I should have investigated Sound Transit on my own, Legacy gave me no reason to do so while I was negotiating the lease. William Nelson discussed the location of the proposed rail line only in positive terms - that this would be good for business. Never did he suggest that there was any reason for concern or that maybe, just in case, I should check this out.

I understand from his deposition that William Nelson testified he truly believed, ... that the location of the rail line across the street from the Legacy Property was only a positive for the Legacy Property and that there was no cause for concern. And that is exactly how he represented Sound Transit to me.

So it never occurred to me to check out Sound Transit or to ask Maci Lam to do any investigation about Sound Transit's proposed rail line.

On 9-17-12, Guo's corporation, WGW, signed a 10 year lease for the Legacy Property with an additional 5 year option, which lease required WGW to pay a security deposit of \$124,886.88 and to pay starting rent (after a grace period) of \$16,552.08 per month plus \$1,521.84 per month as common area maintenance fees. CP269-70. Guo/WGW also invested \$144,748 in tenant improvements to convert the property to a Chinese restaurant, CP265, 291-352, for a total leasehold investment of almost \$270,000. None of these figures are contested.

Guo also personally guaranteed the lease. CP287-289.

As the landlord's broker, Nelson received a commission on the lease. CP263.

By April 2013, after just a few months of operation, Guo realized that his restaurant, The Spring Restaurant, was not bringing in the business he had anticipated and he decided to put the restaurant up for sale while continuing the operation of the restaurant. CP265. Guo retained the services of business broker, Christian Kolmodin (Kolmodin), to help him sell his business. CP265. After

looking at the restaurant, Kolmodin concluded that Guo had a marketable business, CP364, the chief assets being the 10 year lease and option, the \$124,866 security deposit, and the \$144,748 of tenant improvements. Within weeks, Kolmodin had located 3 interested buyers who knew of the restaurant and were interested enough to negotiate a price. CP364. Two of the prospective buyers are well established restaurant owners in the area. CP364.

At that point, Kolmodin needed to speak with management of the Legacy Property. CP364. Kolmodin met with Nelson in mid-May 2013, only to learn in general terms that Sound Transit may possibly need to condemn the Legacy Property. CP364.

Though Nelson was somewhat vague and tried to reassure Kolmodin that he did not know exactly what would happen, Kolmodin believed that the possibility Sound Transit would condemn the Legacy Property, even if only a portion, was too great a contingency. CP364. After notifying the three prospective buyers, they immediately lost interest in purchasing the restaurant. CP364.

Kolmodin immediately notified Guo, CP364, who had no prior knowledge of Sound Transit's potential need to condemn the Legacy Property, CP364. Kolmodin advised Guo that due to the possibility

Sound Transit would need to condemn the Legacy Property, his business was not marketable. CP266, 364. Guo was devastated by this news, having invested almost \$270,000 into the lease with no prior knowledge of Sound Transit's potential need to condemn the property. CP266.

Guo would never have signed a 10 year lease or invested nearly \$270,000 in that lease, had he known of Sound Transit's potential need to condemn the Legacy Property during the lease term:

At no time during the lease negotiations did William Nelson inform me that Sound Transit had any potential interest in acquiring the property that was the subject of the lease. ... Had I known this, I never would have made the decision to invest almost \$270,000 in a security deposit and substantial tenant improvements.

CP266.

Guo then contacted present counsel, who after investigation, learned of the history of Sound Transit's designation of the Legacy Property as a potential acquisition. CP267. On 6-18-13, Guo formally notified Legacy that, because of Legacy's failure to disclose material information, WGW was vacating the Legacy Property (meaning shutting down his restaurant) and demanding rescission of the lease and damages equal to the \$124,866 security deposit and \$144,798

tenant improvement investment. CP401-02. In response, on 6-20-13, Legacy served Guo/WGW with a 3 Day Notice to Pay Rent or Vacate. CP75-76.

WGW filed this action naming as the sole defendant Legacy Bellevue 530, LLC (Legacy), the owner and landlord of the Legacy Property. Guo sought rescission of the lease and damages, as above stated. Legacy counter-claimed alleging breach and filed a third-party complaint against Guo as personal guarantor.

Following cross motions for summary judgment, the trial court ruled in favor of Legacy:

Plaintiff's Motion for Summary Judgment is DENIED.

Defendant's Motion for Summary Judgment is GRANTED to the extent that the claims for rescission, negligent misrepresentation and fraudulent misrepresentation against it are dismissed, the Plaintiff, WGW USA, Inc., is found to be in breach of the contract and the Third-Party Defendant Guo is found to be in breach of his guaranty agreement.

CP497. The trial court then entered judgment against WGW and Guo in the principal amount of \$27,698 plus \$35,205 in attorney's fees, with leave to supplement the judgment for additional damages.

CP542. (The trial court did grant WGW's motion to amend its complaint to add Nelson as a defendant, but WGW did not amend its

complaint.)

In its ruling granting Legacy's Motion for Summary Judgment, the trial court stated:

There is an absence of evidence tending to establish that the landlord had actual knowledge of any existing fact or possessed other information that it had a duty to impart to the Plaintiff prior to entering into the lease in question.

CP496. The trial court further stated:

At the time the Lease was entered into, Sound Transit's general intentions as they then existed, had been made public. The remaining options and their internal consideration of them were equally knowable and ascertainable (or not) to both landlord and this sophisticated and well represented commercial tenant.

CP496.

While Nelson, had actual knowledge of Sound Transit's designation of the Legacy Property as a potential acquisition for the chosen route through downtown Bellevue, as part of his responsibilities as property manager, Legacy acknowledged at summary judgment that the sheer volume of material on Sound Transit's website would render extremely difficult any attempt by WGW/Guo to discover a hypothetical need by Sound Transit to condemn the Legacy Property:

The Sound Transit East Transportation Link website is open to all to inspect and has been for many years. It contains everything any citizen or stake-holder would want or need to know about the project from plans, to participation by the public, to input from experts, financing, environmental impact statements, and decision making on alternative routing and construction options. None of this is secret, nor is the information controlled by Legacy. **The volume of information is as staggering as it is as public. There is no way to post it all in a pleading or even a reasonable summary.**

CP422-23 (emphasis added).

During argument at the summary judgment hearing, Legacy characterized the process of locating Sound Transit's designation of the Legacy Property as a potential acquisition for the chosen route through Bellevue, as a search for:

... a needle in a haystack in thousands upon thousands of documents on Sound Transit's website.

RP 11-21-14 at p. 16. (Emphasis added.) Yet Legacy argues and the trial judge ruled that WGW should have so inquired.

IV. ARGUMENT

A. Burden On Appeal: No Issues of Material Fact.

The Court of Appeals reviews summary judgment rulings de novo. ***Lyons v. US Bank National Association***, 181 Wn.2d 775,

783, 336 P.3d 1142 (2014). In reviewing an order of summary judgment, the court on appeal engages in the same inquiry as the trial court. *Id.*, 181 Wn.2d at p. 783. In so doing, all facts and inferences must be interpreted in favor of the non-moving party. *Id.*, 181 Wn.2d at p. 783. Summary judgment is appropriate only if the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*, 181 Wn.2d at p. 783.

Here, the facts set forth in the Statement of the Case are uncontested.

Since these facts are not in dispute, this court on appeal can and should rule, as a matter of law, to resolve the issues for review.

B. The Trial Court Erroneously Excluded Portions of Expert Bruce Kahn's Declaration.

Bruce Kahn is WGW's expert in commercial real estate, and his declarations are found at CP354-362 and 468-470.

The trial court's ruling regarding Bruce Kahn's declaration is found at CP497:

The Court grants Defendant's motion to strike the portions of the declaration of Bruce Kahn that constitute improper legal conclusions and those that are opinions

based on speculation rather than evidence in the case.

The trial court did not specify which portions of Bruce Kahn's declaration were stricken, leaving WGW/Guo guessing.

To the extent portions of Bruce Kahn's declaration are referred to below, WGW/Guo submits that, if they were among the portions stricken, then the trial court abused its discretion in so doing. ER 702, **Miller v. Likins**, 109 Wn. App. 140, 147, 34 P.3d 835 (2001). The standard the trial court must apply in deciding whether to allow expert testimony involves whether the witness is qualified to testify as an expert, whether the expert's opinion is generally based on accepted opinion in the field, and whether the testimony would be helpful to the trier of fact. **Philippides v. Bernard**, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). Furthermore,

Courts generally "interpret possible helpfulness to the trier of fact broadly and will favor admissibility...."

Miller, supra, 109 Wn. App. at p.148. (Citation omitted.)

Here, Bruce Kahn has worked in the commercial brokerage industry since 1988 and since 1998 has been involved in leasing, sales and acquisition of commercial property. CP355. In his declarations, Bruce Kahn set forth his understanding of the facts,

which is identical to that set forth in the Statement of the Case hereinabove, and he rendered opinions as to the custom and usage in the commercial brokerage industry as to the duty to disclose information in leasehold situations. Legacy did not attempt to rebut anything Bruce Kahn said, and his opinions are unchallenged.

C. Per RCW 18.86.030(1)(d) Legacy Was Required to Disclose to WGW/Guo that Sound Transit had Designated the Legacy Property as a Potential Acquisition for the Chosen Route Through Downtown Bellevue.

In the present case, WGW/Guo did not speak directly with members of Legacy Bellevue 530, LLC (Legacy). WGW/Guo and agent Maci Lam only spoke with Nelson, Legacy's broker and property manager. And since Nelson is a real estate broker, his duties of disclosure are governed by statute.

RCW 18.86.030, as the statute read in 2012, states:

(1) Regardless of whether the licensee is an agent, a licensee owes all parties to whom the licensee offers real estate brokerage services the following duties, which may not be waived:

(a) To exercise reasonable care and skill;

(b) To deal honestly and in good faith;...

(d) To disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply a duty to investigate matters that the licensee has not agreed to investigate...

Per the relevant statutory definitions, there can be no doubt that Nelson provided real estate brokerage services to WGW/Guo.

"Real estate brokerage services" is the rendering of services for which a real estate license is required under Chapter 18.85 RCW.

RCW 18.86.010. Per RCW 18.85.331, one must be licensed to act as a real estate broker.

Per RCW 18.85.011(2), a "Broker" performs "real estate brokerage services."

"Real estate brokerage services" means any of the following services offered or rendered directly or indirectly to another, or on behalf of another for compensation...

(a) ... leasing, renting of real estate ...

(b) negotiating ... either direct or indirectly, to... lease... real estate...

(h) performing property management services, which includes with no limitation... leasing...

RCW18.85.011(16).

Here, Nelson, a licensed broker and the property manager of

the Legacy Property, negotiated the lease in question with WGW/Guo on behalf of the property owner, and advised WGW/Guo as to the benefits of Sound Transit's future proximity to the Legacy Property, and Nelson received a commission for his efforts. Therefore, Nelson provided real estate brokerage services either directly or indirectly to WGW/Guo within the meaning of RCW 18.86.030, the statute requiring Nelson to exercise reasonable care and skill, to deal honestly, and to disclose all existing material facts known by him and not readily apparent or ascertainable by WGW/Guo.

Legacy argued at summary judgment that the duty to disclose material information only applies to residential rather than commercial transactions. But RCW 18.86.030 and the relevant definitions quoted above make no such distinction. Furthermore, expert Bruce Kahn stated as to the standard of care in the commercial brokerage industry:

I note that Legacy tries to distinguish between commercial and residential transactions in terms of a broker's duty to disclose material information. There is no such distinction. While a Form 17 disclosure may be required for a residential transaction, an owner's broker's duty to disclose material information to either a prospective buyer or tenant remains the same, whether in a commercial or residential transaction.

CP469.

A "material fact" which Nelson should have disclosed is defined in RCW 18.86.010(9):

"Material fact" means information that substantially adversely affects the value of the property or a party's ability to perform its obligations in a real estate transaction, or operates to materially impair or defeat the purpose of the transaction.

Here, the material facts are (1) that Sound Transit had designated the Legacy Property as a potential acquisition for the chosen route through downtown Bellevue; (2) that Sound Transit's depiction of the light rail line on the north side of the NE 6th Street overpass was subject to change, as much more engineering work was required; (3) that even though Sound Transit had shown the rail line as on the north side of the NE 6th Street overpass and the Legacy Property is on the south side, Sound Transit may need to condemn the Legacy Property for construction purposes; and (4) no final decision would be made until 2013. By his testimony and his review of the Final EIS, MOU and Cost Savings Process documents, Nelson had actual knowledge of these facts.

And these facts created great uncertainty as to the ability of Legacy to provide peaceful and quiet enjoyment of the Legacy

Property for a 10 year lease, and therefore great uncertainty as to whether to invest \$270,000 in such a project, let alone obligate one's self to pay \$18,000 a month in rent and CAM charges.

This uncertainty was a material fact. As Christian Kolmodin, WGW's business broker, stated at CP364, after Nelson advised her in vague terms that Sound Transit may need to acquire all or a portion of the property:

The possibility that Sound Transit would acquire the real property, even if only a portion, was too great a contingency... 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.

Stated another way, would not any prospective tenant want to know the risk, before signing a 10 year lease that obligated him to pay a \$124,866 security deposit and \$144,798 tenant improvements, and \$18,000 a month in starting rent and CAM charges, that Sound Transit had singled out the property for condemnation as a potential acquisition for the chosen route through downtown Bellevue?

Svensen v. Stock, 98 Wn. App. 498, 979 P.2d 476 (1999), illustrates that certainty of a problem is not required before the obligation to disclose is triggered. There, the seller's broker had actual knowledge that flooding had occurred in the past on the seller's

property due to faulty drainage uphill from the seller's property. The broker was advised that the county had repaired the problem, but there remained uncertainty as to whether the flooding would occur again. The broker, who believed the flooding would not occur again, did not disclose the prior flooding. After purchase, the property did flood again. The buyer sued and won at trial, and the court of appeals affirmed.

At summary judgment, Legacy argued that advising WGW/Guo of Sound Transit's potential need to acquire the Legacy Property was too great a burden. But all Nelson had to do was to explain Sound Transit's designation, plus all the reasons Nelson believed condemnation would not occur. Thereafter, with knowledge of a specific possible problem, the burden would have shifted to WGW/Guo to conduct their own investigation. But Nelson chose to remain silent.

The next issue is whether Sound Transit's designation was apparent or readily ascertainable.

D. Sound Transit's Designation of the Legacy Property as a Potential Acquisition for the Chosen Route Through Bellevue was Neither Apparent nor Readily Ascertainable to a

Prospective Tenant Within the Meaning of RCW 18.86.030.

At summary judgment, Legacy argued that WGW/Guo had a due diligence duty to investigate the hypothetical possibility that Sound Transit may need to condemn the Legacy Property. Legacy's position is neither supported by case law nor the context of the lease negotiations.

As to context, the evidence is undisputed that Nelson, who appeared very knowledgeable about Sound Transit's plans, explained Sound Transit's future proximity solely in positive terms, that the increased foot traffic would be good for business, with no words of caution or red flags. The evidence also is undisputed that Nelson negotiated this 10 year lease with a 5 year option to renew.

Furthermore, because Nelson had a statutory duty per RCW 18.86.030 to disclose material facts known by him that "substantially adversely affects ... a party's ability to perform its obligations," WGW/Guo and broker Lam had every right to believe that Nelson had not withheld material information.

Another critical fact is that WGW/Guo leased rather than purchased the Legacy Property, which substantially reduced WGW/Guo's due diligence obligation. As Bruce Kahn said at CP361:

When the transaction is a purchase one can reasonably expect the prospective buyer to diligently investigate the property's potential problems, and almost always, there are contingencies to allow for 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, given the context, WGW/Guo was given no reason to investigate the hypothetical possibility that Nelson had withheld material information about the Legacy Property regarding Sound Transit.

But even if WGW/Guo had sought to investigate Sound Transit's condemnation plans, the task would have been extremely difficult. Legacy described the process of discovering this information as finding a "needle in a haystack in thousands upon thousands of pages on Sound Transit's website." RP 11-21-14 at p. 16.

Two cases illustrate that Sound Transit's designation of the Legacy Property as a potential acquisition was not "readily ascertainable" to a prospective tenant within the meaning of RCW

18.86.030. In *Bloor v. Fritz*, 143 Wn. App. 718, 180 P.3d 805 (2008), the broker failed to disclose that the house had been used for manufacturing drugs. The Court of Appeals noted that a county narcotics task force had issued a press release that drugs had been manufactured in the house and that, therefore, any potential buyer could hypothetically have learned of this problem. However, at p. 729, the Court of Appeals affirmed the trial court ruling:

Had Miller (the broker) revealed his knowledge of the drug activity in the property, the Bloors probably would have made inquiry to law enforcement and the health department, which they did later (after purchase) upon receiving information of the history of the property.

In other words, even though information about drug manufacturing in the house was ascertainable, once the specific problem was known, the purchaser never had a reason to make any investigation, let alone to look for records of drug manufacturing at the house.

Similarly, WGW had no reason to suspect Sound Transit's possible need to condemn the Legacy Property. Furthermore, and unlike the situation in *Bloor*, had WGW chosen to investigate a hypothetical problem involving Sound Transit, the volume of material WGW had to review was in Legacy's words, "staggering."

Another case on point is *Sorrell v. Young*, 6 Wn. App. 220,

491 P.2d 1312 (1997). There, a purchaser of a lot was entitled to rescind the contract because the seller had failed to disclose that the lot had been built up to street level by substantial fill. At p. 225, the Court of Appeals ruled for the purchaser:

... because the purchaser was unaware of the existence of the fill, because either he has had no opportunity to inspect the property, or the existence of the fill was not apparent or readily ascertainable.

Obviously, the purchaser could have had the soil inspected, but the reason to do so was not readily ascertainable.

E. Nelson's Failure to Disclose Sound Transit's Designation of the Legacy Property as a Potential Acquisition Constitutes Negligent and/or Fraudulent Misrepresentation.

The principals of negligent/fraudulent misrepresentation are summarized in ***Richland School District v. Mabton School District***, 111 Wn. App. 377, 385-86, 45 P.3d 580, ***rev. den.*** 148 Wn.2d 1002 (2001):

Washington has adopted the **Restatement (Second) of Torts** Sections 551 and 552 as the standards for claims of negligent misrepresentation. ... The plaintiff must establish, in part, a duty to disclose or provide accurate information. Liability for failure to disclose is set out in Section 551:

(1) One who fails to disclose to another a fact that he

knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the non-existence of the matter that he has failed to disclose...

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated...

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading.

(Emphasis added.) Stated more succinctly:

If there is a special relationship between the parties, such that the law imposes an affirmative duty to disclose material information, silence may be sufficient to establish fraudulent concealment (citation omitted). A duty to disclose material facts exists for a person who, in the course of business, supplies information for the guidance of others in their business transaction.

Giraud v. Quincey Farm & Chemical, 102 Wn. App. 443, 452-53, 6 P.3d 104, ***rev. den.*** 143 Wn.2d 1005 (2000). (Emphasis added.)

Here, Legacy had a special relationship with WGW/Guo, because Legacy was represented by a broker who had an affirmative statutory duty to disclose material information. Here, Nelson, who appeared knowledgeable about Sound Transit's future plans, failed to disclose to WGW/Guo the critical fact, which Nelson knew, or certainly should have known may justifiably induce WGW/Guo to

refrain from entering into a 10 year lease of the Legacy Property and investing \$270,000 into that lease. Here, because Nelson had a statutory duty to disclose that material information, WGW/Guo had every right to rely on the accuracy and completeness of the information Nelson provided.

Here, Nelson provided misleading and inaccurate information to WGW/Guo, by representing Sound Transit's future proximity solely in positive terms, when Nelson knew that Sound Transit had singled out the Legacy Property for possible condemnation for the chosen route through Bellevue, which condemnation could shut down any restaurant in the property during the lease term. Here, Nelson failed to exercise reasonable care, for Nelson concluded, on his own, without any inquiry, that: "At no point during the lease negotiations ... was Legacy aware that the Premises could be placed in jeopardy by the development of the East Link light rail system." CP241. (Emphasis added.) (Legacy's Answer.)

F. Because Nelson is Legacy's Agent, Legacy is Responsible for Nelson's Negligent/Fraudulent Misrepresentation.

By basic rules of agency law, Legacy, the owner of the Legacy

Property, is charged with Nelson's knowledge:

Under agency law, notice given to and knowledge acquired by an agent are implied to its principal as a matter of law.

State v. Parada, 75 Wn. App. 224, 230-31, 877 P.2d 231 (1994).

Further Nelson's negligence/fraudulent misrepresentation is imputed to Legacy as a matter of law:

While the principal and agent are not joint tort-feasors, they are jointly and severally liable for all damages suffered by the plaintiff who has been injured as a result of the agent's negligence.

Finney v. Farmers' Insurance Company, 92 Wn.2d 748, 754, 600 P.2d 1272 (1979).

Therefore, Legacy is charged with the knowledge, during the lease negotiations, that Sound Transit had singled out the Legacy Property for possible condemnation for the chosen route through Bellevue, and Legacy is responsible for Nelson's failure both to exercise due care and to disclose Sound Transit's designation to WGW/Guo.

G. Legacy's Failure to Disclose Justifies WGW's Rescission of Lease.

Rescission is an equitable remedy for fraudulent/negligent

misrepresentation, allowing for repudiation of the contract.

The Plaintiff, on discovering the fraud in connection with the sale of the harvester, had a choice of remedies: damages or rescission. The first involved the affirmance of the contract, the latter a repudiation of the contract.

Fines v. Westside Implement Co., 56 Wn.2d 304, 309, 352 P.2d 1018 (1960).

Thus, in ***Sorrell v. Young, supra***, where the seller did not disclose the significant land fill, the Court of Appeals affirmed the trial court's rescission of the purchase contract.

Just as in ***Sorrell***, WGW seeks rescission of the 10 year lease, for Legacy failed to disclose a known material fact - that Sound Transit had singled out the Legacy Property for possible condemnation for the chosen route through Bellevue. Had WGW/Guo known of this and related facts, WGW/Guo would never have signed the 10 year lease or invested \$270,000 in that lease.

H. Because the Purpose of Rescission is to Restore the Parties to the Pre-Contract Status Quo, as Part of the Remedy of Rescission, WGW Should be Awarded a Judgment Against Legacy for the \$124,866 Security Deposit and \$144,798 in Tenant Improvements.

Simonson v. Fendell, 101 Wn.2d 88, 93, 675 P.2d 1218

(1984), sets forth the relevant law:

The general principal is that rescission contemplates restoration of the parties to as near their former position as possible or practicable.

As part of the remedy of rescission, WGW should be awarded a judgment against Legacy for the \$124,866 security deposit WGW paid Legacy, and for \$144,798 in tenant improvements WGW paid to convert the Legacy Property to a Chinese restaurant. WGW provided receipts for the tenant improvements at CP291-352, which receipts and figures Legacy did not dispute.

Legacy definitely received the benefit of WGW's \$144,798 conversion of the Legacy property to a Chinese restaurant. On 9-12-13, less than 3 months after WGW vacated, Legacy was able to rent the Legacy Property for use as another Chinese restaurant, the XO Cafe. CP 83. (This new lease was for 5 years at a substantially reduced rent without any common area maintenance charges. CP51-52, 83-84.)

And as seen from Exhibit E to the XO Cafe lease, CP103-105, the new tenant acknowledged as belonging to Legacy a 3-page list of "personal property, equipment and fixtures," CP103, that WGW had

purchased and/or installed. Included in this list are several ranges, grills, dishwashers, ovens, refrigerators, fryers, an exhaust hood, four televisions, at least 45 tables/booths, over 70 chairs, etc. In WGW's lease, Legacy had not designated any personal property, equipment or fixtures as belonging to Legacy, CP 51-68, meaning that WGW had purchased/installed everything on the 3-page list in the XO Cafe lease. While the WGW lease references an Exhibit E list, CP51, there was no Exhibit E attached to the WGW lease. CP51-68.

I. The Form Eminent Domain Clause is Not a Bar to WGW's Recovery.

Paragraph 25 of WGW's lease, CP 64, contains a form eminent domain clause, which the trial court ruled was a defense to WGW's request for rescission:

The lease...contained a specific clause providing remedies in the event of condemnation...

CP 496. In so ruling, the trial court misunderstood the entire point of WGW's position - that because of Legacy's negligent/fraudulent misrepresentation, the entire lease should be rescinded.

Further, as expert Bruce Kahn stated at CP361 as to the practice in the commercial brokerage industry:

My final comment concerns the form condemnation clause in the 9-17-12 lease. These clauses are intended to deal with condemnation situations that are unforeseen when the lease was negotiated. They are not meant to provide a shield to allow the property owner to intentionally withhold information that a public agency already has designated the leasehold property as a "potential property acquisition."

That is, in taking the trial court's reasoning to its logical extension, the form condemnation clause would then prevent rescission, even if Sound Transit had advised Legacy, prior to the lease, that in fact Sound Transit would be condemning the Legacy Property in the next few months. Such a result not only makes no sense, but would reward landlords who intentionally withhold information.

And, of course, in accordance with the condemnation provision and as shown by Sound Transit's September 17, 2014 Acquisition Notice, Sound Transit will be compensating Legacy for the fair market value of the acquisition.

The present case is no different, for Legacy intentionally withheld from WGW/Guo that Sound Transit had singled out the Legacy Property for possible condemnation for the chosen route through Bellevue, and that the decision as to which properties Sound

Transit would condemn would be made in 2013.

WGW is seeking rescission of the entire lease, including the condemnation clause.

J. WGW Should be Awarded its Attorney's Fees at Trial and on Appeal.

Paragraph 23.8 of the WGW lease, CP 63, contains an attorney's fees provision. Per this provision, WGW seeks an award of its attorney's fees and costs both at the trial court level and on appeal.

IV. CONCLUSION

Legacy has acknowledged that, through its agent and broker, Nelson, Legacy withheld from WGW/Guo during lease negotiations that Sound Transit had singled out the leasehold property for possible condemnation for the chosen route through Bellevue. Legacy's defense is that the risk associated with Sound Transit's possible condemnation was either not material, or that WGW/Guo should have discovered this risk on their own.

Legacy's argument that the risk of condemnation was not material, is based on Nelson's conclusion that any risk was non-existent, in Legacy's words: "at no time during lease negotiations ...

was Legacy aware that the Premises could be placed in jeopardy." But Legacy's position is based on Nelson's negligent analysis, for had he consulted with Sound Transit, such as at the April 2012 open house he attended, Nelson would have learned that all property on the list of potential acquisitions for the chosen route would remain at risk for condemnation until 2013, when Sound Transit's engineers had concluded 60% design.

Legacy's argument that WGW/Guo should have discovered this risk on their own, ignores both the context of the lease negotiations and the difficulty of obtaining and understanding the pertinent Sound Transit information. Legacy's agent and broker explained that the proximity of Sound Transit's rail line and station was only a positive for the Legacy Property.

Further, because Legacy's agent was a broker, Legacy had an affirmative statutory duty to disclose material information. And because Legacy was negotiating a 10 year lease with an additional 5 year option, Legacy was implying that it knew of nothing that could interfere with Legacy providing peaceful and quiet enjoyment for the full lease term.

Therefore, as to context, WGW/Guo and its leasing agent,

Lam, had no reason to question if Legacy's broker had withheld material information about the risks associated with Sound Transit's future proximity, or to look into the hypothetical possibility of such a risk.

As to difficulty, through his job, Nelson, had been tracking Sound Transit's potential need to condemn the Legacy Property since 2008. But, had WGW/Guo decided to look into hypothetical risks associated with Sound Transit's future proximity, actually learning that Sound Transit had singled out the Legacy Property for possible condemnation for the chosen route through Bellevue was, like finding a needle in a haystack through thousands of thousands of pages.

Because Legacy's broker, Nelson, withheld from WGW/Guo the risks associated with Sound Transit's future proximity, solely explaining Sound Transit's future proximity as being good for business, Nelson engaged in negligent/fraudulent misrepresentation. Because Nelson was Legacy's agent, Legacy is charged both with Nelson's knowledge and negligent/fraudulent misrepresentation.

Therefore, WGW is entitled to rescind the lease and be returned to its pre-contract status, namely return of WGW's \$124,866 security deposit and \$144,798 in tenant improvements, both of which

Legacy received the benefit. And important to remember is that rescission leaves Legacy in a good position:

1. Legacy now claims ownership of the \$144,798 in tenant improvements and restaurant equipment WGW provided.
2. Within 3 months of WGW's notice of rescission, Legacy obtained a new Chinese restaurant as a tenant due to WGW's conversion of the property.
3. Sound Transit will compensate Legacy for the fair market value of the condemnation.

Legacy cannot hide behind the form condemnation clause, because 1) that clause is only intended to cover unknown risks of condemnation, 2) to allow the form condemnation clause to be a defense under these circumstances would reward Legacy for withholding information, and 3) WGW is seeking rescission of the entire lease.

The trial court's order granting Legacy's motion for summary judgment should be reversed, and the judgment against WGW/Guo vacated. The trial court's order denying WGW's motion for summary judgment should be reversed. Because no material facts are in dispute, this Court should order that WGW be allowed to rescind the

lease for negligence/fraudulent misrepresentation, and that a judgment be entered against Legacy in the amount of the \$124,866 security deposit and \$144,798 in tenant improvements, to return WGW to its pre-contract position, plus attorney's fees both at trial and appeal.

DATED this 21st day of APRIL, 2015.

Respectfully submitted:

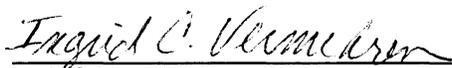
LAW OFFICES OF DOUGLAS W. SCOTT

By: 

MICHAEL TODD DAVIS
WSBA No.: 11794
Attorney for Appellant and
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 Brief of Appellants was sent to Jennifer T. Karol, Attorney for Defendant and Third Party Plaintiff by E-Mail transmission to jkarol@cedarriverlaw.com and to Clare Brown by E-Mail transmission to paralegal@cedarriverlaw.com.



Ingrid C. Vermehren

Dated: APRIL 21st, 2015, at Issaquah, Washington

APPENDIX 1

18.86.030. Duties of licensee

(1) Regardless of whether the licensee is an agent, a licensee owes to all parties to whom the licensee renders real estate brokerage services the following duties, which may not be waived:

(a) To exercise reasonable skill and care;

(b) To deal honestly and in good faith;

(c) To present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase;

(d) To disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the licensee has not agreed to investigate;

(e) To account in a timely manner for all money and property received from or on behalf of either party;

(f) To provide a pamphlet on the law of real estate agency in the form prescribed in RCW 18.86.120 to all parties to whom the licensee renders real estate brokerage services, before the party signs an agency agreement with the licensee, signs an offer in a real estate transaction handled by the licensee, consents to dual agency, or waives any rights, under RCW 18.86.020(1)(e), 18.86.040(1)(e), 18.86.050(1)(e), or 18.86.060(2) (e) or (f), whichever occurs earliest; and

(g) To disclose in writing to all parties to whom the licensee renders real estate brokerage services, before the party signs an offer in a real estate transaction handled by the licensee, whether the licensee represents the buyer, the seller, both parties, or neither party. The disclosure shall be set forth in a separate paragraph entitled "Agency Disclosure" in the agreement between the buyer and seller or in a separate writing entitled "Agency Disclosure."

(2) Unless otherwise agreed, a licensee owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, 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 licensee to be reliable.

[1996 c 179 § 3.]

APPENDIX 2

18.86.010. Definitions

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

- (1) "Agency relationship" means the agency relationship created under this chapter or by written agreement between a licensee and a buyer and/or seller relating to the performance of real estate brokerage services by the licensee.
- (2) "Agent" means a licensee who has entered into an agency relationship with a buyer or seller.
- (3) "Business opportunity" means and includes a business, business opportunity, and goodwill of an existing business, or any one or combination thereof.
- (4) "Buyer" means an actual or prospective purchaser in a real estate transaction, or an actual or prospective tenant in a real estate rental or lease transaction, as applicable.
- (5) "Buyer's agent" means a licensee who has entered into an agency relationship with only the buyer in a real estate transaction, and includes subagents engaged by a buyer's agent.
- (6) "Confidential information" means information from or concerning a principal of a licensee that:
 - (a) Was acquired by the licensee during the course of an agency relationship with the principal;
 - (b) The principal reasonably expects to be kept confidential;
 - (c) The principal has not disclosed or authorized to be disclosed to third parties;
 - (d) Would, if disclosed, operate to the detriment of the principal; and
 - (e) The principal personally would not be obligated to disclose to the other party.
- (7) "Dual agent" means a licensee who has entered into an agency relationship with both the buyer and seller in the same transaction.
- (8) "Licensee" means a real estate broker, associate real estate broker, or real estate salesperson, as those terms are defined in chapter 18.85 RCW.
- (9) "Material fact" means information that substantially adversely affects the value of the property or a party's ability to perform its obligations in a real estate transaction, or operates to materially impair or defeat the purpose of the transaction. The fact or suspicion that the property, or any neighboring property, is or was the site of a murder, suicide or other death, rape or other sex crime, assault or other violent crime, robbery or burglary, illegal drug activity, gang-related activity, political or religious activity, or other act, occurrence, or use not adversely affecting the physical condition of or title to the property is not a material fact.
- (10) "Principal" means a buyer or a seller who has entered into an agency relationship with a licensee.
- (11) "Real estate brokerage services" means the rendering of services for which a real estate license is required under chapter 18.85 RCW.

(12) "Real estate transaction" or "transaction" means an actual or prospective transaction involving a purchase, sale, option, or exchange of any interest in real property or a business opportunity, or a lease or rental of real property. For purposes of this chapter, a prospective transaction does not exist until a written offer has been signed by at least one of the parties.

(13) "Seller" means an actual or prospective seller in a real estate transaction, or an actual or prospective landlord in a real estate rental or lease transaction, as applicable.

(14) "Seller's agent" means a licensee who has entered into an agency relationship with only the seller in a real estate transaction, and includes subagents engaged by a seller's agent.

(15) "Subagent" means a licensee who is engaged to act on behalf of a principal by the principal's agent where the principal has authorized the agent in writing to appoint subagents.

[1996 c 179 § 1.]

APPENDIX 3

Washington Statutes**Title 18. BUSINESSES AND PROFESSIONS****Chapter 18.85. Real estate brokers and managing brokers**

Current through Chapter 7, 2015 Regular Session

§ 18.85.331. License required – Prerequisite to suit for commission

It is unlawful for any person to act as a real estate broker, managing broker, or real estate firm without first obtaining a license therefor, and otherwise complying with the provisions of this chapter.

No suit or action shall be brought for the collection of compensation as a real estate broker, real estate firm, managing broker, or designated broker, without alleging and proving that the plaintiff was a duly licensed real estate broker, managing broker, or real estate firm before the time of offering to perform any real estate transaction or procuring any promise or contract for the payment of compensation for any contemplated real estate transaction.

Cite as RCW 18.85.331

History. 2008 c 23 § 15; 1997 c 322 § 6; 1972 ex.s. c 139 § 9; 1951 c 222 § 8. Formerly: (i) 1941 c 252 § 6; Rem. Supp. 1941 § 8340–29. (ii) 1941 c 252 § 25; Rem. Supp. 1941 § 8340–48. Formerly RCW 18.85.100.

APPENDIX 4

Washington Statutes
Title 18. BUSINESSES AND PROFESSIONS
Chapter 18.85. Real estate brokers and managing brokers

Current through Chapter 7, 2015 Regular Session

§ 18.85.011. Definitions

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Advertising" means any attempt by publication or broadcast, whether oral, written, or otherwise, to induce a person to use the services of a real estate firm, broker, managing broker, or designated broker.
- (2) "Broker" means a natural person acting on behalf of a real estate firm to perform real estate brokerage services under the supervision of a designated broker or managing broker.
- (3) "Business opportunity" means and includes business, business entity, and good will of an existing business or any one or combination thereof when the transaction or business includes an interest in real property.
- (4) "Clear and conspicuous" in an advertising statement means the representation or term being used is of such a color, contrast, size, or audibility, and presented in a manner so as to be readily noticed and understood.
- (5) "Clock hours of instruction" means actual hours spent in classroom instruction in any tax supported, public technical college, community college, or any other institution of higher learning or a correspondence course from any of the aforementioned institutions certified by such institution as the equivalent of the required number of clock hours, and the real estate commission may certify courses of instruction other than in the aforementioned institutions.
- (6) "Commercial real estate" means any parcel of real estate in this state other than real estate containing one to four residential units. "Commercial real estate" does not include a single-family residential lot or single-family residential units such as condominiums, townhouses, manufactured homes, or homes in a subdivision when sold, leased, or otherwise conveyed on a unit-by-unit basis, even when those units are part of a larger building or parcel of real estate, unless the property is sold or leased for a commercial purpose.
- (7) "Commission" means the real estate commission of the state of Washington.
- (8) "Controlling interest" means the ability to control either the operational or financial, or both, decisions of a firm.
- (9) "Department" means the Washington department of licensing.
- (10) "Designated broker" means:
 - (a) A natural person who owns a sole proprietorship real estate firm; or
 - (b) A natural person with a controlling interest in the firm who is designated by a legally recognized business entity such as a corporation, limited liability company, limited liability partnership, or partnership real estate firm, to act as a designated broker on behalf of the real estate firm, and whose managing broker's license receives an endorsement from the department of "designated broker."
- (11) "Director" means the director of the department of licensing.
- (12) "Inactive license" means the status of a license that is not expired and is not affiliated with a firm.
- (13) "Licensee" means a person holding a license as a real estate firm, managing broker, or broker.
- (14) "Managing broker" means a natural person acting on behalf of a real estate firm to perform real estate brokerage services under the supervision of the designated broker, and who may supervise other brokers or managing brokers licensed to the firm.
- (15) "Person" includes a natural person, corporation, limited liability company, limited liability partnership, partnership, or public or private organization or entity of any character, except where otherwise restricted.

- (16) "Real estate brokerage services" means any of the following services offered or rendered directly or indirectly to another, or on behalf of another for compensation or the promise or expectation of compensation, or by a licensee on the licensee's own behalf:
- (a) Listing, selling, purchasing, exchanging, optioning, leasing, renting of real estate, or any real property interest therein; or any interest in a cooperative;
 - (b) Negotiating or offering to negotiate, either directly or indirectly, the purchase, sale, exchange, lease, or rental of real estate, or any real property interest therein; or any interest in a cooperative;
 - (c) Listing, selling, purchasing, exchanging, optioning, leasing, renting, or negotiating the purchase, sale, lease, or exchange of a manufactured or mobile home in conjunction with the purchase, sale, lease, exchange, or rental of the land upon which the manufactured or mobile home is or will be located;
 - (d) Advertising or holding oneself out to the public by any solicitation or representation that one is engaged in real estate brokerage services;
 - (e) Advising, counseling, or consulting buyers, sellers, landlords, or tenants in connection with a real estate transaction;
 - (f) Issuing a broker's price opinion. For the purposes of this chapter, "broker's price opinion" means an oral or written report of property value that is prepared by a licensee under this chapter and is not an appraisal as defined in RCW 18.140.010 unless it complies with the requirements established under chapter 18.140 RCW;
 - (g) Collecting, holding, or disbursing funds in connection with the negotiating, listing, selling, purchasing, exchanging, optioning, leasing, or renting of real estate or any real property interest; and
 - (h) Performing property management services, which includes with no limitation: Marketing; leasing; renting; the physical, administrative, or financial maintenance of real property; or the supervision of such actions.
- (17) "Real estate firm" or "firm" means a sole proprietorship, partnership, limited liability partnership, corporation, limited liability company, or other legally recognized business entity conducting real estate brokerage services in this state and licensed by the department as a real estate firm.

Cite as RCW 18.85.011

History. 2008 c 23 § 1; 2003 c 201 § 1; 1998 c 46 § 2; 1997 c 322 § 1; 1987 c 332 § 1; 1981 c 305 § 1; 1979 c 158 § 68; 1977 ex.s. c 370 § 1; 1973 1st ex.s. c 57 § 1; 1972 ex.s. c 139 § 1; 1969 c 78 § 1; 1953 c 235 § 1; 1951 c 222 § 1; 1943 c 118 § 1; 1941 c 252 § 2; Rem. Supp. 1943 § 8340-25. Prior: 1925 ex.s. c 129 § 4. Formerly RCW 18.85.010.