

No. 74353-8-1

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

JONATHAN DEEGAN and ALICE O'GRADY,

Plaintiffs/Appellants,

v.

WINDERMERE REAL ESTATE/CENTER-ISLE, INC., a Washington
corporation; and ACORN PROPERTIES, INC. dba RE/MAX ACORN
PROPERTIES, INC., a Washington corporation,

Defendants/Respondents.

APPELLANTS' REPLY BRIEF

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I. REPLY INTRODUCTION

Defendants failed to provide Plaintiffs a legally required disclosure with detailed information about the location, frequency and level of noise from military fighter jets, and a map setting forth the zones in which different levels of noise could be expected. Instead, Defendants substituted an industry-crafted disclosure that omitted almost all of these details, and the accompanying map. Defendants' industry disclosure only informed prospective buyers that there may be "a significant noise level as a result of airport operations," which could have implications for "construction of property within airport noise zones," which zones Defendants failed to identify. Defendants misrepresented and failed to disclose material facts that Plaintiffs and the proposed class were entitled to know before they made a decision to purchase their homes.

This Court should reverse because the trial court violated the well-established legal standard that applies on a motion to dismiss. The trial court functioned as judge and jury, concluding that the "noise 'defect' was known by the entire community and it would not be 'fruitless' for plaintiffs to have done reasonable investigation including, for example, knocking on doors of nearby residents or asking around to obtain further knowledge about the frequency and loudness of the noise." Conclusions based on evidence outside the four corners of the complaint have no place

in the consideration of a motion to dismiss. And the idea that a representation is not deceptive because someone, somewhere might know the truth is completely alien to the Consumer Protection Act, RCW 19.86, *et seq.* (CPA).

Whether Defendants' failure to provide the legally required disclosure is unfair or deceptive is a question the trial court can only take up on summary judgment or at trial, after the parties have engaged in discovery. To prevail on a CR 12(b)(6) motion, Defendants must establish that there is *no set of facts* that Plaintiffs could prove that would entitle them to relief. Defendants cannot do so. This case requires an inquiry into multiple fact issues raised by Defendants' failure to disclose, including, for example, Defendants' failure to disclose the level of disturbance caused by the decibel levels described in the Island County disclosure.

As Plaintiffs explained in their opening brief, the CPA provides a much more expansive remedy for unscrupulous business practices than common law remedies. The CPA does not impose a duty on consumers to investigate a misleading statement or omission. "A plaintiff may predicate the first CPA element on 'a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation

of public interest.”¹ A statement only need have the “capacity to deceive” to be actionable.² Actual deception is unnecessary.³ This is not the standard the trial court applied.

It is well-established that in the sale of residential property, sellers are legally required to make disclosures, and it is standard for prospective buyers to conduct a pre-purchase inspection. For that reason, not every representation or failure to disclose may be actionable. No house is perfect. The buyer can choose to take a house, warts and all. But material facts that are known to the seller and not “easily discoverable” by the buyer are actionable.⁴

¹ *Mellon v. Reg'l Tr. Servs. Corp.*, 182 Wn. App. 476, 488, 334 P.3d 1120 (2014) (quoting *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013)). Defendants argue that Plaintiffs have not established a *per se* violation of the CPA. Appellees' Br. at 20-21. While Defendants' violation of applicable disclosure law certainly supports Plaintiffs' case that Defendants' actions constitute a CPA violation, and other states have held that violation of a local ordinance can constitute a *per se* violation of a state consumer protection statute, Plaintiffs have never contended that the violation of the Island County Code constitutes a *per se* violation of the CPA.

² *Id.* at 489, n.2 (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986))

³ See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

⁴ *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 214, 969 P.2d 786 (1998).

Plaintiffs, however, have not brought a “Home Defect CPA Claim,” as Defendants characterize.⁵ Plaintiffs’ claims involve the misrepresentation and omission of material facts concerning conditions in the community, which no home inspection would ever have uncovered. Buyers do not and are not required to perform a pre-purchase investigation of the military’s future plans, any more than a shopper must research false claims on a food label. A representation need only have the “capacity to deceive” a reasonable consumer. Nothing more is required.

Even if one were to accept Defendants’ contention that the industry-crafted disclosure put buyers “on notice” of a defect, triggering a common law duty to inquire, one would also have to conclude that a reasonable investigation would have been “fruitless.” The trial court’s supposition, that Plaintiffs would have learned the truth had they walked around the neighborhood and asked people about it, completely disregards the standard that applies to a motion to dismiss. Moreover, the “home defect” cases Defendants cite only require buyers to make further inquiries with the *seller*. The allegations of the complaint strongly support the conclusion that a reasonable investigation would have been fruitless, because the military as a general matter does not disclose its flight plans.

⁵ Appellees’ Br. at 18.

Defendants contend, “Washington has not abandoned caveat emptor in real estate sales” and seek to impose a “buyer beware” standard to Plaintiffs’ CPA claims.⁶ Defendants’ position could not be more wrong. “Caveat emptor” is **not** the law in the state of Washington, nor is it the law anywhere else in the United States.⁷ Like every other state in the country, Washington enacted a consumer protection statute to give consumers greater protections than were available at common law, and to protect them from misleading statements and omissions by sellers. If Defendants wish to return to the fabled “good old days” of sellers victimizing buyers with no recourse, and repeal the consumer protection law that has been on Washington’s books since 1961, they must prevail upon the legislature, not the courts.

Defendants’ argument regarding the statute of limitations is similarly based on the fact-based conclusions of the trial court. Plaintiffs

⁶ *Id.* at 12.

⁷ *Atherton Condominium Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 523, 799 P.2d 250 (1990) (stating that the doctrine of *caveat emptor* no longer applies to the sale of residential dwellings); *Testo v. Russ Dunmire Oldsmobile*, 16 Wn. App. 39, 51, 554 P.2d 349 (1976) (“trade law has developed along lines intended to eliminate the ‘gamesmanship’ formerly attendant to the tradition of caveat emptor and in so doing has helped equalize the bargaining position of consumers”); *Blewett v. Abbott Labs.*, 86 Wn. App. 782, 787, 938 P.2d 842 (1997) (“[I]ndeed in practice Washington courts have uniformly followed federal precedent in matters described under the Consumer Protection Act.”)

sufficiently plead that they were not aware of the material facts they were entitled to pursuant to the mandated Island County disclosure, and did not become aware of the truth until after they purchased their homes. The trial court's finding that Plaintiff Deegan reasonably should have become aware of the military jet engine noise "no later than a few months after he took ownership" is based on nothing other than supposition. The trial court's decision on that issue merits reversal as well.

II. ARGUMENT

A. The CPA Does Not Impose a Duty of Inquiry.

The law is clear that the CPA does not impose a duty of inquiry on the consumer, but instead imposes a duty on the merchant to disclose facts material to a transaction that are not "easily discoverable" by the buyer.⁸ Similarly, the standard for unfairness under the CPA is the same as that under the Federal Trade Commission Act, 15 U.S.C. § 45(n), which states that a "practice is unfair [if it] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits."⁹

Here, Island County Code § 9.44.050 imposes a duty to disclose

⁸ See Appellants' Opening Br. at 19-25. Plaintiffs addressed how the CPA is a unique remedy, separate and apart from any other remedy available in common law, in its briefing to the trial court. See CP 26-27.

⁹ *Klem*, 176 Wn.2d at 787.

specific information regarding military flight patterns and locations, precisely because this information is not “easily discoverable” by a prospective buyer. The failure to disclose these material facts is both deceptive and unfair under the CPA. Even assuming, arguendo, that the law imposes any obligation on a consumer to investigate in this context, it is error to conclude, on the pleadings, that such an investigation would not have been fruitless.¹⁰

Defendants contend that *Douglas v. Visser* supports the conclusion that Plaintiffs have failed to plead a deceptive or unfair practice under the CPA, because Form 22W put buyers “on notice” of the “defect,” and buyers therefore had a duty to investigate.¹¹ Defendants argue that the only applicable precedent here is a special category of “home defect partial disclosure” cases, *Visser* and *Puget Sound* (a non-CPA case), and all other CPA precedent, such as *Griffith* and *McRae* are inapplicable.¹²

¹⁰ Defendants fault Plaintiffs for not alleging that they made further inquiry about the noise, or that such an inquiry would have been fruitless. Appellees’ Br. at 22. This is not a necessary allegation to state a claim under the CPA. And again, Defendants fail to apprehend the applicable standard that applies to pleadings. Only if the complaint raises no hypothetical situation that could support Plaintiffs’ claims can the court dismiss on the pleadings.

¹¹ Appellees’ Br. at 7 (citing *Douglas v. Visser*, 173 Wn. App. 823, 295 P.3d 800 (2013) (hereinafter, “*Visser*”).

¹² *See id.* at 22-25 (“Plaintiffs’ Authorities are Distinguishable Because they Dealt With Non-Disclosures Instead of Extent of Defect

Defendants further argue that *Visser* stands for the proposition that “Washington has not abandoned caveat emptor in real estate sales.”¹³

First and foremost, this is not a “home defect” case. It does not concern a defect to be found in the property, but conditions *external* to the property, which would not have been disclosed on Form 17, and would not have been discovered in a standard home inspection. So to the extent the CPA inquiry has any specific application in home defect cases, it does not apply here, and the court cannot rule on this matter as a pure question of law. Defendants note, “[d]etermining what is deceptive under the CPA is part of a ‘gradual process of judicial inclusion and exclusion.’”¹⁴ That is in fact a strong argument for reversal here. Where a court can apply the same law to the same facts that arose in prior cases, it may issue a ruling as a matter of law. But this case is not like the cases cited by Defendants. Indeed, there is no other CPA case involving disclosure of military flight patterns. The court cannot rule on this case with no evidentiary record.

Even *Visser* and *Puget Sound* do not support Defendants’ arguments here. *Visser* states, “[w]hen a buyer is on notice of a defect, it

Disclosures”) (citing *Visser*, 173 Wn. App. 823; *Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 752 P.2d 1353 (1988)); see also *McRae v. Bolstad*, 101 Wn.2d 161, 676 P.2d 496 (1984).

¹³ *Id.* at 12.

¹⁴ Appellees’ Br. at 16 (quoting *Klem*, 176 Wn.2d at 785).

must make further inquiries **of the seller.**¹⁵ Defendants do not and cannot contend that the seller would know the information that is set forth in the requisite disclosure. And as Defendants concede, the applicable standard is that the seller must disclose material adverse facts “not easily discoverable by the buyers.”¹⁶ *Douglas* states (on a full evidentiary record), “We caution that the Douglases did not have a duty to perform exhaustive invasive inspection or endlessly assail the Vissers with further questions. They merely had to make further inquiries after discovering rot or at trial show that further inquiry would have been fruitless.”¹⁷ Whether further inquiry would have been fruitless is, without a doubt, a question of fact, and the trial court erred in making findings on this question.¹⁸ The only inquiry these property defect cases contemplate is inspecting the

¹⁵ 173 Wn. App. at 831 (emphasis added).

¹⁶ Appellees’ Br. at 19 (quoting *Griffith*, 93 Wn. App. 202); *see also Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 848, 942 P.2d 1072 (1997) (agent’s misrepresentation of the condition of real property constitutes a deceptive act under the CPA even where the buyer was aware of the condition, but not its extent); *Olmsted v. Mulder*, 72 Wn. App. 169, 178-79 863 P.2d 1355, 1360 (1993) (vague answers to disclosure form may amount to negligent misrepresentation).

¹⁷ *Visser*, 173 Wn. App. at 834 (emphasis added); *see also Dickson v. Kates*, 132 Wn. App. 724, 737, 133 P.3d 498 (2006) (stating that real property purchaser is not required to search for encumbrances outside the chain of title).

¹⁸ *See Jackowski v. Borchelt*, 174 Wn.2d 720, 737-79, 278 P.3d 1100 (2012) (reversing summary judgment where there were material questions of fact concerning whether the defect would have been discovered in a reasonable inspection).

property, and raising any defect issue with the **sellers** -- not exhaustively investigating any potential problem by questioning all potential sources of information in the world.

The analysis in *Visser* is consistent with the CPA standard for misrepresentations generally. The possibility that consumers might learn the truth if they asked the right question of the right people is of no import. If that were the standard, no CPA claim based on false advertising could ever succeed. The standard for deception is not so restrictive. A representation on the front of a label or communication may be deceptive even if the truth is printed on the back.¹⁹ A misrepresentation that requires a buyer to commence an investigation in the community to learn the truth is by definition not “easily discoverable.” The proposition that the failure to provide a legally required disclosure is not actionable, because a consumer can always look up the law,²⁰ stands contrary to countless state and federal disclosure statutes, which require a merchant to inform a consumer of the relevant law and facts regarding a transaction, and to provide a remedy for violations. A disclosure that obscures the truth is

¹⁹ See, e.g., *Fed. Trade Comm'n v. Cyberspace.com*, 453 F.3d 1196 (9th Cir. 2006) (small check labeled “refund” and attached to fake invoice was deceptive even though small print on back disclosed that cashing check committed consumer to purchase of Internet service).

²⁰ Appellees’ Br. at 22, 32-33.

just the sort of “gamesmanship” that the Washington Supreme Court has condemned in prior cases.²¹

The failure to provide a legally required disclosure can form the basis of a CPA claim. In *Anderson v. Wells Fargo Home Mortgage, Inc.*,²² the plaintiff sued Wells Fargo under the CPA for failing to disclose the yield-spread premium on her loan, as required by the Real Estate Settlement Procedures Act (RESPA). The court rejected Wells Fargo’s contention that the disclosure it did make was sufficient, noting that “Wells Fargo does not contend that the document actually disclosed the fact and amount of the YSP as required by RESPA.”²³ Instead, Wells Fargo contended the true facts should have been “deduced” from the disclosure it did make, which the court found “simply ignores the requirement of a factual, intelligible disclosure.”²⁴ Furthermore, the fact that the plaintiff’s RESPA claim was time-barred did not mean that a CPA claim based on that violation was not valid or timely.²⁵ As in *Anderson*,

²¹ *Testo*, 16 Wn. App. at 51 (trade law has developed along lines intended to eliminate the ‘gamesmanship’ formerly attendant to the tradition of *caveat emptor*”).

²² 259 F. Supp. 2d 1143, 1147 (W.D. Wash. 2003).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 1147 n.3; see also *White v. Homefield Fin., Inc.*, 545 F. Supp. 2d 1159 (W.D. Wash. 2008) (“When a plaintiff claims the defendant violated both the TILA and the CPA, violations of the TILA may evidence the

Defendants do not contend that their industry disclosure provided the facts required by ICC 9.44.050. Instead, Defendants make the same argument rejected by the court in *Anderson*, that Plaintiffs should have figured out what the truth was on their own. Also as in *Anderson*, Defendants' partial truth ignores the requirement of the factual and intelligible disclosure required by ICC 9.44.050.

In sum, Defendants are attempting to distort the legal standard that applies to CPA cases where conditions in the property are discovered or disclosed in connection with a pre-purchase inspection, and to apply those cases outside of that context. Such a broad holding would undermine the CPA, and this Court should reject it.

B. The Superior Court Violated the Applicable Legal Standard on a Motion to Dismiss.

Defendants misconstrue the standard that applies to a motion to dismiss a claim under the CPA. They state that whether a particular act or practice is unfair or deceptive is a question of law.²⁶ But a court can only dismiss a CPA claim, as a matter of law, when *no hypothetical situation* posed by the complaint could support a claim.²⁷ That is far from the case

CPA element of an unfair or deceptive act or practice.”).

²⁶ Appellees' Br. at 13.

²⁷ See *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978) (“any hypothetical situation conceivably raised by the complaint defeats a CR

here. The factfinder could reasonably conclude that Defendants' industry disclosure was misleading as to the military aircraft noise described in the legally required notice. A court can only rule on a CPA claim as a matter of law, on a motion for summary judgment or at trial, if there is no dispute as to material facts in the record, or the plaintiff has failed to proffer sufficient evidence.²⁸ This Court has explained the relationship between law and facts as follows: "Whether a party committed an [unfair or deceptive] act is reviewed for substantial evidence; but whether an gives rise to a CPA violation is reviewed as a question of law."²⁹

This Court addressed the fact-based nature of the CPA inquiry in *Holiday Resort Community Ass'n v. Echo Lake Assocs.*,³⁰ where the plaintiff tenants alleged that a rental agreement both violated the law and

12(b)(6) motion if it is legally sufficient to support plaintiff's claim.").

²⁸ See *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007) ("When the issue is whether a party committed a particular act, the court reviews any contested facts under the substantial evidence test." (citing *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997))). While the determination of whether a particular statute applies to a factual situation is a question of law, whether the conduct constitutes an unfair or deceptive act can only be decided by the court where there is no dispute about what the parties did." *Id.* (citing *Leingang*, 131 Wn.2d at 150).

²⁹ *Griffith*, 93 Wn. App. at 214 . The standard CPA jury instructions reflect this distinction as well. See 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 310.01 (6th ed.) (providing the jury decides whether the defendant engaged in an unfair or deceptive act or practice).

³⁰ 134 Wn. App. 210, 135 P.3d 499 (2006).

was misleading as to a tenant's right to automatic renewal of the lease. The trial court dismissed the tenants' case, including their CPA claim. This Court reversed, concluding that the rental agreement violated the state mobile home tenant statute, and thus constituted an unfair practice under the CPA. But it could not decide the question of whether this illegal practice was *deceptive* as a matter of law:

While we conclude the language in the 1997 Rental Agreement contravenes the MHLTA and is an unfair act or practice under the CPA, **whether the 1997 Rental Agreement has the capacity to deceive a substantial portion of the public is a question of fact.** *Hangman Ridge*, 105 Wn.2d at 789-90. Here, the tenants allege the language in the 1997 Rental Agreement not only misstates the law but also has the capacity to deceive a substantial portion of the public because it is available for dissemination to the more than 500 MHCW members who are mobile home park owners or managers.³¹

Defendants acknowledge that the "easily discoverable" standard governs here.³² As the trial court's opinion reflects, there is no way to

³¹ *Id.* at 226-27 (emphasis added); *see also Keithly v. Intelius Inc.*, 764 F. Supp. 2d 1257, 1268 (W.D. Wash. 2011) ("The capacity of a marketing technique to deceive is determined with reference to the least sophisticated consumers among us."); *Mellon*, 182 Wn. App. at 489-90 (refusing to rule whether allegations amounted to an unfair practice under the CPA, finding "[t]his is a summary judgment or trial question, not a CR 12(b)(6) question.").

³² Appellees' Br. at 19.

apply this standard in the absence of a factual record. CP at 2. In this case, the only fair inference at the Rule 12(b)(6) stage is that the military's plans for its jets were not easily discoverable. The purpose of ICC 9.44.050 is to inform prospective buyers of conditions they would not otherwise know, and might not even be observable at all until some later date.

In addition, Plaintiffs claim that Defendants' behavior is *unfair* under the CPA: "[c]urrent federal law suggests a 'practice is unfair [if it] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits.'"³³ Just as with the deceptive prong of the CPA, a court cannot decide what is "reasonably avoidable" at the pleading stage without an evidentiary record.

C. State Law Does Not Bar a CPA Claim Based on False, Misleading and Unfair Statements About Military Airplane Noise.

As an alternative ground for affirmance that the trial court did not address, Defendants argue that the military fighter jet disclosures mandated by ICC 9.44.050 cannot establish the public interest element of

³³ *Klem*, 176 Wn.2d at 787.

Plaintiffs' CPA claim.³⁴ This argument fails as a matter of plain language statutory construction.

Plaintiffs adequately allege that Defendants' failure to provide the required noise disclosure has public interest impact.³⁵ To prove public interest impact, a court analyzes the following factors: (1) whether the acts were committed in the course of defendant's business, (2) whether the defendants advertised to the public, (3) whether the defendant actively solicited the plaintiff, and (4) whether the parties occupied unequal bargaining positions.³⁶ No single factor is dispositive, nor must a plaintiff prove all four factors.³⁷

Plaintiffs' allegations satisfy all four factors. Plaintiffs allege that Defendants' failure to provide the disclosures mandated by ICC 9.44.050 were committed in the course of their business as the listing offices and agents for the homes Plaintiffs' purchased.³⁸ Defendants were using a non-conforming and insufficient form created by the MLS.³⁹ These allegations demonstrate that Defendants were using a database to advertise

³⁴ Appellees' Br. at 26-27.

³⁵ CP at 79 – 80, ¶ 40.

³⁶ *Svensen v. Stock*, 143 Wn.2d 546, 559, 23 P.3d 455 (2001).

³⁷ *Bloor v. Fritz*, 180 P.3d 805 (Wash. Ct. App. 2008).

³⁸ CP at 68, ¶ 5.

³⁹ CP at 68 – 69, ¶ 6; *see also* CP 89 – 91, Ex. B.

homes and solicit the home-buying public. And Defendants, as the listing agents, were in a superior bargaining position and, in fact, had a legal obligation to make the disclosures required by ICC 9.44.050. These allegations, when taken as true, as they must be on a motion to dismiss, are sufficient to meet the public interest impact prong of the CPA.

Defendants argue that Plaintiffs cannot establish public interest impact because to hold otherwise “would run afoul of the Legislature’s policy that real estate disclosure requirements are exempt from the CPA.”⁴⁰ Specifically, Defendants argue the general disclosure requirement in RCW 64.06.020 requires the seller to provide certain information, “at a minimum,” and that any information a seller provides therefore falls within the statute.⁴¹ Defendants make this unsupported argument because a violation of RCW 64.06.020 cannot establish the “public interest” requirement of the CPA, per RCW 64.06.060.

Defendants’ argument can only succeed if one ignores what Form 17 is, which is a disclosure of everything *the seller knows* about the *property*.⁴² Sellers are required to provide the disclosure regardless of

⁴⁰ Appellees’ Br. at 26.

⁴¹ *Id.*

⁴² RCW 64.06.020 states in part: “SELLER MAKES THE FOLLOWING DISCLOSURES OF EXISTING MATERIAL FACTS OR MATERIAL DEFECTS TO BUYER BASED ON SELLER’S ACTUAL

what they know. The military jet engine noise disclosure is not a condition on the property. It is clear that the goal of Form 17 is to elicit disclosure of conditions on the property that the owner of the property is likely to know, but prospective buyers would not. It is not concerned with conditions in the surrounding community.

D. Defendants’ Failure to Disclose Material Facts as Required by Law Can Provide the Basis for CPA Liability.

Defendants argue that ICC 9.44.050 cannot “trigger” liability under the CPA because the ordinance does not expressly provide its own right of action.⁴³ Defendants fail to identify any authority for such a requirement. The Washington legislature has directed that the CPA “shall be liberally construed [so] that its beneficial purposes may be served.”⁴⁴ This liberal construction was recently reaffirmed by the Washington Supreme Court.⁴⁵ Defendants’ argument fails to engage the statutory command of liberal construction.

KNOWLEDGE OF THE PROPERTY” The disclosure goes on to recommend that one hire “QUALIFIED EXPERTS TO INSPECT THE PROPERTY” such as “ARCHITECTS, ENGINEERS, LAND SURVEYORS, PLUMBERS, ELECTRICIANS, ROOFERS, BUILDING INSPECTORS, ON-SITE WASTEWATER TREATMENT INSPECTORS, OR STRUCTURAL PEST INSPECTORS.” *Id.*

⁴³ Appellees’ Br. at 28-30.

⁴⁴ RCW 19.86.902.

⁴⁵ *See Thornell v. Seattle Serv. Bureau*, 184 Wn.2d 793, 799, 363 P.3d 587

Any false, misleading or unfair practice can violate the CPA. The fact that an unscrupulous practice violates applicable law only further supports a claim under the CPA.⁴⁶ The CPA is intended to be flexible, so it may reach any unfair or deceptive acts or practices in the conduct of any trade or commerce.⁴⁷ “A central purpose of the CPA is to provide an efficient and effective method of filling the gaps in the common law and statutes.”⁴⁸ “The CPA is intended to provide broader protection than exists under the common law or statute.”⁴⁹

Defendants would have this court hold that where a law does not expressly provide that a violation is also a violation of the CPA, the law *immunizes* Defendants from CPA liability. Such reasoning lacks any support in applicable law, and ignores the broad remedial purpose of the CPA. This Court should reject it.

(2015) (“The language of the CPA evinces a broad, rather than narrow, lens through which we interpret the statute.”).

⁴⁶ See *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 54, 204 P.3d 885 (2009) (finding debt collection activities that are not regulated by the FDCPA or state statutory collection laws “may constitute unfair and deceptive practices under the broad scope of the CPA”); *Holiday Resort Cmty. Ass’n*, 134 Wn. App. at 226-27 (inclusion of illegal clause in lease may be CPA violation if it has capacity to deceive substantial portion of public).

⁴⁷ *Panag*, 166 Wn.2d at 49.

⁴⁸ *Id.* at 54 (internal quotation marks omitted).

⁴⁹ *Id.*

E. The Statute of Limitations Does Not Bar Mr. Deegan's Claims.

Defendants argue the four-year statute of limitations has run on Plaintiff Jonathan Deegan's claims based on two faulty arguments. Defendants argue that the Island County code was public record and thus "easily ascertainable," so Plaintiff Deegan was on constructive notice of the disclosure when he purchased his home in July 2006.⁵⁰ Defendants are wrong.

Under CR 12(b)(6), dismissal is appropriate only if "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery."⁵¹ In undertaking such an analysis, "a plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record."⁵² Ongoing discovery will demonstrate that the Growler flights began to affect Deegan's property values within four years before the filing of the Complaint. Because it is not beyond doubt that Plaintiff will not be able to establish his claim arose within the applicable limitations period, dismissal without such discovery was improper.

⁵⁰ Appellees' Br. at 33-34.

⁵¹ *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

⁵² *Id.*

Defendants also argue that Plaintiff “was on constructive notice” of Defendants’ unfair and deceptive conduct at the time he purchased his home because ICC 9.44.050 was passed in 1992.⁵³ This argument is also without merit. “Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action.”⁵⁴ “The key consideration under the discovery rule is the *factual*, not the *legal*, basis for the cause of action.”⁵⁵ The authorities Defendants cite, at Appellees’ Br. 33, are inapposite, because they involve filings that are directed to the property owner, not set forth in generally applicable laws. The Island County Code is a statute, not a “written instrument which is placed on the public record.”⁵⁶

Washington law does presume that a plaintiff knows all applicable laws.⁵⁷ Rather, where the law requires the disclosure of the law itself, the

⁵³ Appellees’ Br. at 34.

⁵⁴ *Allen v. State*, 118 Wn.2d 753, 754, 826 P.2d 200 (1992).

⁵⁵ *Id.* (emphasis added).

⁵⁶ *Strong v. Clark*, 56 Wn.2d 230, 232, 352 P.2d 183 (1960).

⁵⁷ See *Samuelson v. Cmty. Coll. Dist. No. 2*, 75 Wn. App. 340, 877 P.2d 734 (1994) (rejecting defendants’ argument that plaintiff should have been presumed to have read published regulations concerning retirement benefits when he first began his job); *Hutson v. Wenatchee Fed. Sav. & Loan Ass’n*, 22 Wn. App. 91, 100, 588 P.2d 1192 (1978), review denied, 92 Wn.2d 1002 (1979) (holding that it would be “excessively harsh and contrary to common sense to presume that people always know the law” so as to bar a claim on statute of limitations grounds).

discovery rule can be applied to toll the statute of limitations until such time as the plaintiff knew or reasonably should have learned about the required disclosure.⁵⁸ A defendant's failure to provide specific disclosures required by law tolls the applicable statute of limitations.⁵⁹

The fact that the noise disclosure ordinance was in existence at the time that Mr. Deegan purchased his property only supports his position that it was reasonable for him to be unaware of the noise impacts at the time he purchased his property. ICC 9.44.050 was passed precisely because the County recognized the military jet noise impacts were not widely known, and it was appropriate to place the burden of disclosure on listing real estate brokers who are supposed to be familiar with the properties they are selling.

The allegations of the complaint do not support an earlier discovery date. Plaintiffs allege that the Navy began a process of phasing

⁵⁸ *Id.*

⁵⁹ *Merritt v. Countrywide Fin. Corp.*, 759 F.3d 1023, 1036-41 (9th Cir. 2014) (one-year RESPA statute of limitations tolled where disclosure form was not provided and buyer did not know about concealed "markup" fees charged or identity of seller); *Fultz v. World S&L Ass'n*, 2008 WL 5246440, at *6 (W.D. Wash. Dec. 17, 2008) (one-year TILA statute of limitations tolled where TILA disclosure failed to disclose specific details required by federal regulations and plaintiff alleged that they could not have known that particular disclosures were missing.).

out a quieter aircraft, the Prowler, in 2005.⁶⁰ The Navy planned to replace the Prowler with the Growler, but that replacement process occurred gradually in the years following 2005.⁶¹ Paragraph 25 of the Complaint references two news stories, both from *June 2013*. The first reports on a 2013 noise study that found the noise levels in 2012 “are much higher than predicted” in a 2005 Navy forecast.⁶² The second reports on residents who are suffering from the dramatic increase in flights from 2005 to 2013: “The jets train year round at a nearby airfield about 15 miles south of the Navy’s main base in Oak Harbor. They train three hours per day, sometimes well past midnight. Neighbors say the Navy’s own numbers show nearly four times as many flights now, almost 10,000 per year, than in 2005. Increasingly the planes are EA-18 Growlers which fly lower than their predecessor the Prowler.”⁶³

The trial court’s factual findings and application of the statute of limitations to Mr. Deegan’s CPA claim on a CR 12(b)(6) motion to

⁶⁰ CP at 75, ¶ 25.

⁶¹ *Id.*

⁶² Justin Burnett, Letter claims jet noise a health hazard, Whidbey News Times, June 28, 2013 (<http://www.whidbeynewstimes.com/news/213487531.html#>) (last visited July 11, 2016).

⁶³ Eric Wilkinson, Navy Growlers ‘too loud’ on Whidbey Island, King5.com, June 28, 2013 (<http://bit.ly/29Af6JG>) (viewed July 11, 2016). The URL listed in the complaint has been taken offline, but is available in the “Wayback Machine” at the URL listed here.

dismiss were erroneous. Whether Mr. Deegan's claim accrued within the four-year period before the Complaint was filed, or whether he learned of the injury to his property during that time, are facts that should be developed during discovery and presented at trial.

F. Leave to Amend Should Be Granted.

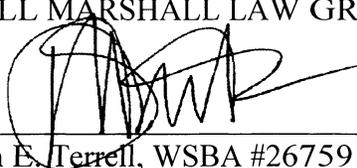
Plaintiffs argued in the alternative below and maintain here that to the extent that amendment could cure any deficiency in the complaint, it should be granted. CP 43.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask that the judgment of the Superior Court be reversed, and the case be remanded for further proceedings.

RESPECTFULLY SUBMITTED AND DATED this 11th day of July, 2016.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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