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Court of Appeals No. 51001-4-II

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

AVH & BJ HOLDINGS 2, LLC, a Washington limited liability
company, Plaintiff - Appellant,

v.

TIMOTHY JOHNSON COMMERCIAL PROPERTIES, a
Washington limited liability company; TIMOTHY N. JOHNSON
and JANE DOE JOHNSON, and their marital community,
Defendant – Appellee.

APPELLANT AVH & BJ HOLDINGS 2, LLC'S

OPENING BRIEF

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I. INTRODUCTION

Affirming the trial court would set a dangerous precedent. It would effectively immunize Washington real estate brokers who conceal known material defects, so long as the broker's client instructed him or her to do so. A broker's knowing concealment would be immunized even where the other party received an express representation that the concealed material defect did not exist. This cannot be the law in Washington. The Court should reverse the trial court's order granting summary judgment in favor of Respondents, and remand this case further proceedings.

Respondents Timothy N. Johnson ("Johnson") and his brokerage company Timothy Johnson Commercial Properties ("TJCP") represented LaClare Investments, LLC ("LaClare") and brokered the sale of LaClare's commercial warehouse, located at 824 East 25th Street, Tacoma, Washington (the "Property"), to Appellant AHV & BJ Holdings 2, LLC ("AVH").

Johnson knew the Property was directly within the preferred alignment for the Central Puget Sound Regional Transit Authority's (hereinafter, "Sound Transit") Tacoma Link Expansion Project and that Sound Transit had earmarked the Property for acquisition in order to expand Sound Transit's Operations and Maintenance

Facility. Leading up to the sale, Johnson wrote to LaClare's Managing Member, Richard Burrows ("Burrows") bemoaning that "we can't sell [the Property] because it is common knowledge that ST [Sound Transit] is buying it and can be condemned [*sic*] so they string us along." Johnson also expressed frustration directly to Sound Transit, writing: "It's been hard for me to sell the property in good faith and we can't sign a long-term lease and ST [Sound Transit] might buy it."

Brokering a sale of the Property knowing what he knew about Sound Transit's plans for it alarmed Johnson enough that he initiated a discussion with Burrows to question whether they should disclose the truth. Burrows instructed Johnson not to disclose Sound Transit's plans and the threat of condemnation and Johnson remained silent. This was despite the fact that in the Commercial & Investment Real Estate Purchase & Sale Agreement ("PSA") LaClare expressly misrepresented to AVH that there were no "pending or threatened condemnation or similar proceedings affecting the Property."

On November 23, 2015, LaClare's sale of the Property to AVH closed. Shortly after closing, AVH learned about Sound Transit's plans for the Property and received a letter via certified

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mail from Sound Transit concerning, *inter alia*, Sound Transit's "right to condemn" it. AVH ultimately agreed to a forced sale of the Property to Sound Transit, under threat of condemnation, and AVH's long-term business plans for the Property were destroyed.

AVH thereafter filed this lawsuit in the Superior Court of Pierce County, Washington against LaClare, TJCP, Johnson and his marital community.¹ On June 30, 2017, the trial court granted the Johnson Parties' Motion for Summary Judgment and dismissed AVH's claims, stating Johnson "had to obey his client when his client instructed him not to do further disclosures." AVH appeals the trial court's June 30, 2017 order and respectfully asks this Court to reverse the trial court's order entering summary judgment in favor of the Johnson Parties and to remand this action for further proceedings.

II. ASSIGNMENTS OF ERROR

The trial court erred when it entered its June 30, 2017 order granting the Johnson Parties' Motion for Summary Judgment (CP

¹ AVH and LaClare have settled all differences concerning their respective claims and defenses. This appeal only concerns AVH's claims against TJCP, Johnson and his marital community (hereinafter, the "Johnson Parties").

862-64). Pursuant to RAP 10.3(b), the issues pertaining to this assignment of error are as follows:

(i) Whether Johnson, a Washington real estate broker, had a duty to disclose a known material fact, *i.e.*, that the Property was under threat of condemnation by Sound Transit as part of its Tacoma Link Expansion Project?

(ii) Whether Johnson is immunized from breaching his duty to disclose a known material fact if he was instructed by his client to conceal that fact?

(iii) Whether that material fact, known by Johnson, was “readily ascertainable”?

(iv) Whether AVH had a right to rely on a distinct, positive, and definite representation in the PSA that there were no pending or threatened condemnation or similar proceedings affecting the Property, or whether AVH was required to make further inquiry?

(v) Whether Johnson, an individual member of TJCP, can be held personally liable on AVH’s misrepresentation and Consumer Protection Act (“CPA”) claims?

(vi) Whether Johnson and TJCP committed unfair or deceptive acts under the CPA?

(vii) Whether Johnson's and TJCP's unfair or deceptive acts impact the public interest?

III. STATEMENT OF THE CASE

This case arises out of the 2015 sale of the Property by LaClare to AVH. (*See* CP 1-9; CP 54-69) LaClare listed the Property with Johnson and TJCP, LaClare's commercial real estate brokers. (CP 60, 64; CP 704-06.) Johnson testified that he initially approached Sound Transit as part of his search for possible buyers for the Property. (CP 76-77 at 23:23-24:2.) Johnson met with Sound Transit representatives who informed him that Sound Transit might acquire the Property as part of the Tacoma Link Expansion Project. (CP 78 at 27:1-7, 27:20-23.) Thereafter, Johnson attended multiple open houses hosted by Sound Transit to discuss its light rail expansion plans. (CP 79-80 at 28:11-29:5.) Johnson learned that Sound Transit had the Property in its sights as part of the Tacoma Link Expansion Project. (CP 80-81 at 29:22-30:4; CP 618 at 33:5-13; CP 619 at 38:11-13, CP 621-24 at 51:19-54:13; *see also* CP 861.) Multiple communications confirm Johnson's knowledge that Sound Transit had earmarked the Property for acquisition as part of its Tacoma Link Expansion Project, and that Sound Transit could

acquire the Property by condemnation if necessary. (CP 626-59.) As

examples:

- In July 2014, Burrows wrote to his bank: “*Tim Johnson recently received an intent to purchase warehouse 4 [the Property] from Sound Transit. I have asked Tim to contact you and discuss this possible sale.*” (CP 89 (emphasis added.)) Johnson followed up on Burrow’s email, writing that by the end of 2014, “*Sound Transit will have completed their due diligence to purchase warehouse 4 [i.e., the Property] for their OMB [Operations and Maintenance Building] expansion of the T-Link. Apparently our site is the only viable option.*” (CP 87 (emphasis added.))
- When a Sound Transit representative asked Johnson for access to the Property for an inspection in December 2014, he responded: “*Please do not tell Roman [LaClare’s former tenant] you are buying the building and kicking him out.*” (CP 92 (emphasis added.))
- When a Sound Transit representative told Johnson that the Sound Transit Board was postponing approval of the Tacoma Link Expansion Project from January 2015 until June 2015, Johnson wrote to Mr. Burrows: “*It’s typical of government. They know we can’t sell because it is common knowledge that ST [Sound Transit] is buying it and can be condemned [sic] so they string us along.*” (CP 95 (emphasis added.))
- On June 29, 2015, Burrows sent a text message to Johnson that “*Sound Transit got the go ahead from the legislature to go to the voters for their transit expansion plan. Please check with your contact to see when a PSA is expected on Warehouse 4 [i.e., the Property].*” (CP 109.)
- On June 30, 2015, Johnson wrote to a Sound Transit representative that: “*It’s been hard for me to sell the property in good faith and we can’t sign a long-term lease and ST might buy it.*” (CP 116 (emphasis added.))

AVH's representatives became interested in purchasing the Property in the Summer of 2015 in connection with a related moving and storage business.² (CP 49-50 at ¶ 3.) Neither LaClare nor Johnson disclosed Sound Transit's plans or interest in the Property. (CP 50 at ¶ 4.) The Property and its proximate location to both Joint Base Lewis-McChord and Naval Base Kitsap in Bremerton were ideally-suited for Jordan River Moving and Storage, which had secured government approvals to provide moving and storage services for the United States military. (*See* CP 664-68.) On July 30, 2015, the parties entered into the PSA. (CP 54-69.) The PSA provided, *inter alia*:

Seller represents to Buyer that, to the best of Seller's actual knowledge, each of the following is true as of the date hereof:

...

There is no pending or threatened condemnation or similar proceedings affecting the Property[.]

(CP 58 at §12(f).)

² The PSA lists the buyer as "Jordan Moving and Storage and/or assigns." (CP 54.) As a requirement of its Small Business Association loan, Jordan Moving and Storage assigned its rights under the PSA to AVH, a real estate holding company. (CP 50 at ¶ 6.) After the sale closed, AVH entered into a 20-year lease of the Property to Jordan River Moving and Storage, but their long-term plans for the Property were destroyed when AVH had to sell the Property to Sound Transit. Unless otherwise noted, AVH and Jordan Moving and Storage will be referred to collectively herein as AVH.

Just one day after the PSA was signed, AVH's broker Billy Moultrie ("Moultrie") immediately began due diligence and wrote to Johnson asking him "what due diligence information" Johnson had on the building. (CP 397 at ¶ 18; CP 407.) Moultrie told Johnson "[t]he more the better." (*Id.*) Johnson and his client, however, provided no documents in their possession concerning the Tacoma Link Expansion Project, Sound Transit's contemplated acquisition of the Property, or Johnson's numerous communications with Sound Transit regarding the issue. (CP 50 at ¶ 7.)

Johnson did not inform AVH that the Property was under threat of condemnation by Sound Transit at any time prior to closing. (CP 40 at ¶¶ 4, 9.) AVH and its representatives received none of Johnson's communications or other documents concerning Sound Transit's plans for the Property, or the Tacoma Link Expansion Project. (*Id.* at ¶ 7.) Instead, Johnson and LaClare intentionally concealed the fact that the Property was under threat of condemnation from Sound Transit, as Johnson testified at deposition:

Q. And what did Mr. Burrows tell you specifically as best you can recall?

A. He said because the property was -- and the Sound Transit issue was in the public and readily understood and marketed,

that we didn't have to tell the buyer's broker that Sound Transit had showed some interest in the property or any other potential buyer that came before.

Q. When? When did he tell you that?

A. Probably somewhere between, maybe a month before closing, six weeks before closing, somewhere around there.

Q. You had had a discussion in which you were questioning whether or not you should disclose the Sound Transit interest?

A. Yes.

Q. Who initiated that conversation?

A. I did.

Q. Was it in person, on the phone, or --

A. On the phone.

Q. Were you instructed not to provide the information to Mr. Moultrie [AVH's broker] or the ultimate buyer?

A. Yes.

(CP 82-83 at 46:13-47:8.)

Johnson admits that he never informed AVH about Sound Transit's Tacoma Link Expansion Project, or Sound Transit's interest in the Property for that project. (CP 14 at ¶ 14.) Johnson's non-disclosure was intentional; it was directed by Burrows. (CP 82-83 at 46:2-47:8.)

AVH and its brokers were left in the dark, believing the express representation in the PSA that there were no threatened condemnation or similar proceedings. (CP 50-51 at ¶¶ 4-10.) AVH did not learn about the Tacoma Link Expansion Project or discover Sound Transit's plans until after closing, when a Sound Transit employee approached a contractor working for AVH and inquired what he was doing because the Property was "our [*i.e.*, Sound Transit's] Property." (CP 51 at ¶ 10.) Shortly thereafter, AVH had discussions with Sound Transit and Sound Transit delivered a letter to AVH via certified mail concerning the Tacoma Link Expansion Project and Sound Transit's intentions, including its right to condemn the Property in the event "an acceptable agreement cannot be reached." (*Id.* at ¶¶ 10-11; CP 70-71.)

AVH's plans for the Property (*i.e.*, to lease it to Jordan River Moving and Storage as part of its moving and storage operations) were destroyed. (CP 664-67 at 96:14-99:16.) AVH reluctantly agreed to an involuntary sale of the Property to Sound Transit under threat of condemnation. (CP 51 at ¶ 12; CP 305-16; CP 318-21.)

In the trial court proceedings, Johnson attempted to downplay his knowledge, claiming that Sound Transit representatives "never told me that Sound Transit planned to acquire

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the Property” and “I did not perceive there to be a threat of condemnation.” (CP 396 at ¶¶ 11, 13.) His pre-litigation written statements, however, demonstrate a very different reality. (CP 626-59.) A mere three days before the PSA was executed, a Sound Transit representative wrote to Johnson to respond to his request for the “latest on the funding to buy the property,” and she told him that “[u]nless something happens with regards to our environmental process in the next 10 hours, I expect the following:

October 2015: Sound Transit Board of Directors selects the alignment to be built

November 2015: Appraisal process

December 2015: Offer to purchase property”

(CP 657.) In other words, while Johnson claimed to the trial court that he had concluded that “Sound Transit was not able to purchase the Property,” Sound Transit had reported to Johnson immediately prior to the execution of the PSA that it expected just the opposite to occur. (CP 396 at ¶ 13; CP 657.)

On June 30, 2017, the trial court heard oral argument on LaClare’s and the Johnson Parties’ motions for summary judgment, as well as AVH’s Motion for Partial Summary Judgment against LaClare. The trial court denied AVH’s Motion for Partial Summary

Judgment, and granted the summary judgment motions of LaClare and the Johnson Parties. (CP 862-64.) In granting the Johnson Parties' Motion for Summary Judgment, the trial court concluded that "[h]e [Johnson] had to obey his client [LaClare/Burrows] when his client instructed him not to do further disclosures." (RP 38.) AVH respectfully submits that Johnson's duty was to disclose, as required by RCW 18.86.030, not to follow his client's instructions to conceal as the trial court held. AVH appeals the trial court's June 30, 2017 order (CP 862-64).

IV. ARGUMENT

A. Standard of Review.

This Court reviews a trial court's order granting summary judgment de novo. *Kitsap Cnty. v. Kitsap Rifle & Revolver Club*, No. 49130-3-II, 2017 WL 5587739, at *3, --- P.3d --- (Wash. Ct. App. Nov. 21, 2017). The Court should view the evidence in the light most favorable to the nonmoving party, in this case AVH, and draw all reasonable inferences in that party's favor. *Id.* The interpretation and application of a statute is a matter of law that the Court also reviews de novo. *Id.*

B. Johnson Breached His Duty to Disclose Known Material Facts.

A broker “owes to *all parties* to whom the broker 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;
- ... [and]
- (d) To disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party....”

RCW 18.86.030 (emphasis added).³

In the trial court proceedings, Johnson argued—incorrectly—that he owed no duties to AVH because he did not render real estate brokerage services to AVH. “Real estate brokerage services” is a broadly defined term in RCW 18.86.010 and RCW 18.85.011(16) and includes, without limitation, any of the following services offered or rendered directly or indirectly to another, or on behalf of another for compensation: (i) listing, or selling real estate (ii) negotiating or offering to negotiate, either directly or indirectly, the sale of real estate; and (iii) advertising or holding oneself out to the public by any solicitation or representation

³ The Court should construe Chapter 18.86 RCW broadly. RCW 18.86.110.

that one is engaged in real estate brokerage services. RCW 18.85.011(16)(b), (d)-(e).

At a minimum, Johnson advertised, represented and held himself out to AVH and the public that he was engaged in real estate brokerage services. A specific disclosure was even made in the PSA that Johnson was engaging in real estate brokerage services. (CP 60 at § 19.) Johnson was also empowered with the exclusive and irrevocable right to sell the Property and assisted in negotiating the sale of the Property. (CP 699-700 at 37:18-38:14; CP 704-06.) In fact, LaClare's Managing Member, Burrows, denies ever even communicating with AVH or its representatives. (CP 701-02 at 56:14-57:9.) All such communications were through Johnson and TJCP.

Johnson argued to the trial court that he owed no duty to anyone other than his client, LaClare, but the duties imposed in RCW 18.86.030 are owed to all parties "to whom" the broker renders real estate brokerage services; they are not restricted to those *for whom* the broker renders such services. *Preview Props., Inc. v. Landis*, 161 Wn.2d 383, 387-88, 165 P.3d 1 (2007) (en banc). Under RCW 18.86.030(1)(g), a duty is imposed even upon a broker who represents "neither party" in a transaction. In short, RCW 18.86.030

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sets forth baseline duties or minimum standards owed by Washington brokers, and those duties are not owed solely to a broker's client. *Landis*, 161 Wn.2d at 387-88. A broker that represents a buyer, or a seller, or both owes his client(s) duties in addition to the baseline requirements of RCW 18.86.030 (*see* RCW 18.86.040-.060), but Johnson cannot escape the basic duties he owed to all parties, including AVH, under RCW 18.86.030.

In addition to RCW 18.86.030, Johnson also owed an independent duty under Washington common law to disclose known material defects. *See, e.g., Svendsen v. Stock*, 143 Wn.2d 546, 556-58, 23 P.3d 455 (2001) (en banc) (recognizing “an agent or broker violates the CPA when they knowingly fail to disclose a known material defect in the sale of real property”); *Robinson v. McReynolds*, 52 Wn. App. 635, 638, 762 P.2d 1166 (1988) (same in commercial real estate context).

Here, Johnson knew the Property was directly within the preferred alignment for Sound Transit's Tacoma Link Expansion Project and that Sound Transit was expected to acquire it. As Johnson wrote prior to closing, “ST is buying it and can be condemned.” (CP 95.) Johnson knew the Property was under threat of condemnation. (*See, e.g., id.*; CP 626-59.) Johnson knowingly

failed to disclose that material fact, even though it was bothering him enough to specifically call Burrows to talk about the issue. (CP 82-83 at 46:2-47:8.) Johnson remained silent—intentionally—even though his efforts to sell the Property had concerned him enough to write that he was having a hard time doing it “in good faith.” (CP 116; CP 651.) Johnson owed AVH a duty to speak up and disclose the fact that the Property was under threat of condemnation and he failed to do so.

C. The Threatened Condemnation was not Apparent or Readily Ascertainable to AVH.

In the trial court proceedings, Johnson argued that Sound Transit’s plans for the Property were “quickly and easily” available to AHV, or “readily ascertainable.” (CP 542-45.) Johnson relied upon an unpublished Division I decision, *WGW USA, Inc. v. Legacy Bellevue 530, LLC*, No. 72939-0-I, 2015 WL 9462096 (Wash. Ct. App. Dec. 28, 2015), to suggest he had no duty to disclose the threatened condemnation because it was publicly available information. (CP 545.) A broker cannot remain silent, however, any time that a known material defect is publicly available somewhere. That is not the law. *See Bloor v. Fritz*, 143 Wn. App. 718, 726, 180 P.3d 805 (2008). As the unpublished *WGW USA, Inc.* opinion

recognizes, facts may be ascertainable generally when publically available, but “[t]he question is whether the information was *readily* ascertainable.” *WGW USA, Inc.*, 2015 WL 9462096, at *5.⁴

In *WGW USA, Inc.*, the court held undisclosed information was readily ascertainable where the plaintiff, a restaurant tenant, had actual knowledge of a light rail expansion close to the property. *Id.* at *1, 7. In *WGW USA, Inc.*, the landlord’s broker notified the plaintiff that Sound Transit intended to build a station two blocks away. *Id.* at *1. At the time, Sound Transit’s “preferred alternative” route planned to cross on the North side of an intersection, while the relevant property was located to the South. *Id.* Armed with the information provided by the landlord’s broker, the plaintiff and its broker nevertheless did no independent research on the light rail project and entered into a ten-year lease. *Id.* at *2. Months later, when the plaintiff’s restaurant was already failing, Sound Transit’s plans changed and it had to place a support column on the leased property, necessitating Sound Transit’s condemnation (at least temporarily). *Id.* The plaintiff stopped paying rent, sought

⁴ AVH cites *WGW USA, Inc. v. Legacy Bellevue 530, LLC*, No. 72939-0-I, 2015 WL 9462096 (Wash. Ct. App. Dec. 28, 2015) as a non-binding authority pursuant to GR 14.1(a).

rescission, and claimed further disclosures should have been made. The court in *WGW USA, Inc.* distinguished cases—like this case—in which plaintiffs had no pre-purchase knowledge of the defect, and found that the plaintiff failed to introduce any evidence of the difficulty of independently discovering any undisclosed information, and concluded that “[o]nce [the plaintiff] knew about the light rail expansion, it had a reason to look into the matter further.” *Id.* at *5-6.

If the Court finds that the unpublished *WGW USA, Inc.* decision has persuasive value, which the Court has no obligation to do under GR 14.1(a), it is a very different and distinguishable case from this one. AVH had no pre-purchase knowledge of the Tacoma Link Expansion Project, or of Sound Transit’s plans to acquire the Property to expand its Operations and Maintenance Building. (CP 50-51 at ¶¶ 4, 9-10.) In addition, here, Johnson knew the Property was directly within Sound Transit’s preferred alignment; there was no subsequent change of plans to implicate the Property only after the transaction was completed, as happened in the *WGW USA, Inc.* case. And critically, in the *WGW USA, Inc.* case, the broker and landlord made no affirmative misrepresentation that there were no

threatened condemnation or similar proceedings affecting the property, as was represented to AVH in the PSA in this case.

The rule is followed at the present time in practically all American jurisdictions, in respect to transactions involving both real and personal property, that one to whom a positive, distinct, and definite representation has been made is entitled to rely on such representation and need not make further inquiry concerning the particular facts involved. This rule is a corollary to the broad principle of a general right of reliance upon positive statements. Under this rule it is sufficient if the representations are of a character to induce action, and do induce it, and the only question to be considered is whether the misrepresentations actually deceived and misled the complaining party. Under such circumstances, it is immaterial that the means of knowledge are open to the complaining party, or easily available to him, and that he may ascertain the truth by proper inquiry or investigation. [23 Am.Jur. 970, Fraud and Deceit, § 161.]

Rummer v. Throop, 38 Wn.2d 624, 633, 231 P.2d 313 (1951) (quoting *Cunningham v. Studio Theatre*, 38 Wn.2d 417, 424, 229 P.2d 890 (1951)); accord *Jenness v. Moses Lake Dev. Co.*, 39 Wn.2d 151, 234 P.2d 865 (1951); *Westby v. Gorsuch*, 112 Wn. App. 558, 575, 50 P.3d 284 (2002). In this case, AVH had a right to rely on the affirmative representation in the PSA that there were no threatened condemnation or similar proceedings. AVH was not required to make further inquiry into that issue.

Even if the law required AVH to disbelieve the positive, distinct and definite representation it received—which the law does

not—the undisclosed information here concerning the threatened condemnation was not readily ascertainable. Scouring through Sound Transit’s website is not something buyers, or their brokers do as an ordinary part of due diligence, or that they have time to do. (CP 712-14 at 38:2-40:3 (discussing due diligence process, including environmental review, title report and review, property inspection, addressing any existing leases and communicating with tenants, asking for due diligence materials from the seller and reviewing those materials, creating a checklist of critical dates, and guiding the transaction to close). Expecting a buyer or its broker to critically review every newspaper article, or the contents of any number of websites for every entity with possible condemnation power is both unreasonable and unrealistic, particularly in the face of an express representation that no pending or threatened condemnation or similar proceeding exists.⁵ As AVH’s broker, Billy Moultrie testified:

⁵ Johnson cited *Central Puget Sound Regional Transit Auth. v. Miller*, 156 Wn.2d 403, 129 P.3d 588 (2006) (en banc), to the trial court to argue that a buyer is not entitled to any disclosure if the information appears on the worldwide web. (CP 545.) While the trial court judge had previously been involved in the *Miller* case, the decision is inapposite. (See RP 40-41.) In *Miller*, the Washington Supreme Court simply held that notice of a public meeting by publication on Sound Transit’s website satisfied RCW 35.22.288, which allows notice by any processes that Sound Transit determines would satisfy the intent of the statutory notice requirement. *Miller*, 156 Wn.2d at 413-16. The Court also noted that, in *Miller*,

Q. Do you have time in your job as a commercial real estate broker to review all available information that may be out there on the worldwide web or otherwise concerning or which could possibly relate to a particular property?

A. I do not.

Q. Do you think it's reasonable to expect someone in your position to do so?

A. I don't think so.

Q. How difficult or time-consuming would that be to go to various agencies, websites, or any governmental entities, counties, city, municipality, otherwise to review all publicly available information and try and determine whether or not any particular piece of information may or may not relate to a property that you're involved in brokering?

A. It's a considerable amount of work, especially if you're working maybe up to six to seven transactions at one time. It's difficult to do that for every deal.

(CP 715-16 at 180:16-181:9.)

Tellingly, even Johnson, who had particular interest in and acquired detailed information about the Tacoma Link Expansion Project and Sound Transit's plans for the Property through (i) his direct communications with Sound Transit, (ii) signing-up for automated email updates from Sound Transit, (iii) attending "lots" of public meetings and open houses on the Project, and (iv) reviewing literature concerning the Project, repeatedly requested personalized updates directly from Sound Transit

the complaining parties could not convincingly argue they lacked notice because there was considerable evidence that they were involved in the site selection process for many years. *Id.* at 413. The *Miller* case actually undercuts Johnson's argument because it recognizes that it is impossible to assure that anyone will look at a particular web site, or purchase, much less read, a newspaper. *Id.* at 415.

representatives. (CP 610-17 at 25:24-30:8, 31:19-32:6; CP 626-59.) Johnson's suggestion to the trial court that he obtained all substantive information about the Tacoma Link Expansion Project solely through publicly available reports ignores reality and the evidentiary record tracking his numerous (undisclosed) communications with Sound Transit. (*Compare* CP 541 *with* CP 626-59.)

As stated above, AVH had no duty to inquire further into any pending or threatened condemnation after receiving the definite, positive and distinct representation in the PSA that there was none. *E.g., Rummer*, 38 Wn.2d at 633. Johnson nevertheless argued to the trial court that unrelated Sound Transit "interaction" compelled further inquiry by AVH. (CP 545-47.) Johnson is incorrect both legally and factually. First, from a legal perspective, knowledge of unrelated, separate issues does not put a prospective buyer on duty of further inquiry into all possible unrelated defects. *Sloan v. Thompson*, 128 Wn. App. 776, 790, 115 P.3d 1009 (2005); *accord Douglas v. Visser*, 173 Wn. App. 823, 831, 295 P.3d 800 (2013).

Here, the Sound Transit "interaction" Johnson relies upon had nothing to do with the Tacoma Link Expansion Project, or the threat of condemnation hanging over the Property. (CP 546; CP 210; APPELLANT AVH & BJ HOLDINGS 2, LLC'S OPENING BRIEF - 22

CP 212-13; CP 215-25.) First, Johnson relies on a survey that indicates minor property line encroachment by light bars and a Plywood Tacoma sign. (CP 210.) Second, Johnson relies on a Construction Agreement between LaClare and Sound Transit allowing Sound Transit to apply and maintain a waterproof sealer to the foundation and to lay and maintain fill dirt up against it. (CP 212-13.) Third, Johnson relies on a temporary Street Occupancy Permit that allows Sound Transit to use a City of Tacoma right of way for construction activities in support of a separate project, the Tacoma Trestle Track and Signal Project. (CP 216-25.) As Johnson knows, the Tacoma Trestle Track and Signal Project is “totally separate.” (*See* CP 641.) None of these so-called “interactions” with Sound Transit had anything to do with the Tacoma Link Expansion Project, or any threat of condemnation by Sound Transit.

D. The Property was Under Threat of Condemnation, a Known Material Fact that Johnson was Required to Disclose.

In the trial court proceedings, Johnson sought to characterize his communications with Sound Transit as routine communications aimed simply at generating Sound Transit’s interest in the Property. (*See* CP 373-75; CP 390.) Johnson’s written communications show

unequivocally, however, that he understood the Property was under threat of condemnation, a material fact that Johnson was duty-bound to disclose.⁶ (*See, e.g.*, CP 86-99; CP 109-110; CP 116-18; CP 626-59); *see also* RCW 18.86.030(1)(d). “A material fact is ‘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.’” *Bloor*, 143 Wn. App. at 733 (quoting RCW 18.86.010(9)). Johnson had a duty to disclose existing material facts, including the fact that the Property was earmarked for condemnation by Sound Transit to expand its Operations and Maintenance Building.

AVH would not have purchased the Property if Johnson had disclosed what he knew about the Tacoma Link Expansion Project, or disclosed his communications with Sound Transit, as the threat of a forced sale or condemnation necessarily destroyed the very purpose for which AVH was acquiring the Property, *i.e.*, to lease it to Jordan River Moving and Storage to operate its moving and

⁶ Johnson specifically told Burrows in writing that “[t]hey know we can’t sell because it is common knowledge that ST is buying it and can be condemned so they string us along.” (CP 95.)

storage business. (CP 664-67 at 96:14-99:16; CP 668-69 at 107:19-108:10; CP 676 at 115:20-23; CP 49-50 at ¶¶ 2-3, 6.) Johnson knew the information he had was material—his non-disclosure bothered him enough to specifically raise the issue with Burrows—and they decided to keep it hidden from AVH and its brokers. (CP 82-83 at 46:2-47:8.)

E. Johnson is Personally Liable for his Own Torts.

Johnson argued to the trial court that he could not be held personally liable because he did not use TJCP's corporate form to violate or evade any duty. (CP 388-89.) An individual member of a limited liability company, however, is personally liable for his own torts. RCW 25.15.126(3); *Chadwick Farms Owner's Ass'n v. FHC LLC*, 166 Wn.2d 178, 200, 207 P.3d 1251 (2009) (en banc); *see also Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 554, 599 P.2d 1271 (1979) (en banc) (holding corporate officer who participated in violation of CPA personally liable). "Incorporation does not in law shield the actor from the legal consequences of his own tort." *Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn.2d 745, 752, 489 P.2d 923 (1971). Here, Johnson directly failed to disclose his communications with Sound Transit, as well as the fact the Property was under threat of condemnation by Sound Transit. Johnson

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directly failed to disclose material facts, and as discussed further below, he also directly committed unfair or deceptive acts.⁷ Johnson's argument that he cannot be held personally liable for acts or omissions of TJCP is flawed. AVH does not need to prove that Johnson used TJCP to violate or evade a duty, or to pierce the corporate veil.

F. Johnson violated the Consumer Protection Act.

Washington's Consumer Protection Act ("CPA") "was adopted to protect the public from unfair or deceptive acts or practices in trade or commerce and is to be liberally construed." *Deegan v. Windermere Real Estate/Center-Isle, Inc.*, 197 Wn. App. 875, 884, 391 P.3d 582 (2017). In the Johnson Parties' Motion for Summary Judgment, they challenged two elements of AVH's CPA claim, *i.e.*, (i) they argue they committed no deceptive act or practice, and (ii) they argue there was no public interest impact.⁸ (CP 389-91.) These arguments fail.

⁷ See *Alexander v. Stanford*, 181 Wn. App. 135, 177, 325 P.3d 341 (2014) (recognizing that when a duty to disclose exists, the suppression of a material fact is tantamount to an affirmative misrepresentation); *Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 731-32, 853 P.2d 913 (1993) (recognizing a duty to disclose arises "where a seller has knowledge of a material fact not easily discoverable by the buyer," or where disclosure is necessary to prevent a party's partial or ambiguous statement of the facts from being misleading) (quoting *Favors v. Matzke*, 53 Wn. App. 789, 796, 770 P.2d 686 (1989)).

⁸ See *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007) (identifying elements of CPA claim).

1. Johnson Committed Unfair or Deceptive Acts.

The CPA broadly prohibits “unfair or deceptive acts or practices” in the conduct of any trade or commerce. RCW 19.86.020; *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009). “The CPA does not define ‘unfair or deceptive act or practice.’” *Holiday Resort Cmty. Ass’n v. Echo Lake Assocs.*, 134 Wn. App. 210, 226, 135 P.3d 499 (2006). A plaintiff need not show that the unfair or deceptive act “was *intended* to deceive, but that the alleged act had the *capacity* to deceive a substantial portion of the public.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986).

Johnson admitted during the trial court proceedings that “[a] ‘knowing failure to reveal something of material importance is “deceptive” within the CPA.’” (CP 389); *see also Deegan*, 197 Wn. App. at 885. “The CPA applies to activities both before and after a sale, and may be violated by failure to disclose material facts.” *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213-14, 969 P.2d 486 (1998). Washington courts have repeatedly recognized a duty to disclose material facts in real estate transactions and imposed CPA liability in cases of failure. *Id.* at 215; *accord McRae v.*

Bolstad, 101 Wn.2d 161, 166, 676 P.2d 496 (1984); *Bloor*, 143 Wn. App. at 735-36.

Here, Johnson committed unfair or deceptive acts. He presented the PSA to AVH's representatives containing the false representation that there were "no pending or threatened condemnation or similar proceedings affecting the Property" when he knew it was not true. Johnson never made any disclosure to AVH, or its representatives concerning the Project, or the threat of condemnation by Sound Transit. (CP 4, 7, 9.) When AVH's broker, Moultrie, asked Johnson what due diligence information he had for the Property and told him "[t]he more the better," Johnson failed to disclose that he had numerous documents concerning his communications with Sound Transit (and Burrows) concerning the Tacoma Link Expansion Project and Sound Transit's plans. (*Id.*; CP 407.) Johnson further failed to make any of those communications available to AVH and its representatives. (*Id.*) Johnson knew what he was doing was unfair and deceptive, so much so that it prompted him to call Burrows specifically to talk about whether they had to disclose the facts. (CP 82-83 at 46:2-47:8.) Johnson then chose to follow Burrows's instruction not to disclose the threatened condemnation even though it violated his statutory duty under

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RCW 18.86.030. The trial court erred when it concluded that Johnson “had to obey his client when his client instructed him not to do further disclosures.” (RP 38:10-13.) Under Washington law, Johnson’s duty was to disclose the known material facts. RCW 18.86.030(1)(d).

The documentary evidence indicates that Johnson was not going to disclose the threatened condemnation to anyone. Johnson broadly marketed the Property to the public through multiple online and other avenues, including using his own website, as well as the Commercial Brokers Association’s website, CoStar, LoopNet and Craigslist (all of which are available to anyone with an internet connection), contacting “[a]lmost all of the brokers in Tacoma,” and “[p]retty much everyone around,” buying mailing lists and providing handwritten envelopes to potential buyers, in addition to posting “[a] very large banner on the west end of the building.” (CP 601-09 at 15:3-23:7.) In Johnson’s marketing and promotional materials, he said nothing about the Tacoma Link Expansion Project, or the fact that he knew the Property was directly within Sound Transit’s preferred alignment and subject to condemnation. (*E.g.*, CP 718-19.) Rather, Johnson deceptively included information concerning the Property’s potential rental income even

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though he understood (and wrote) that a long-term lease was not possible. (*Id.*; CP 116.) Even more tellingly, he admitted that “[i]t’s been hard for me to sell the property in good faith....” (CP 116.) Why was it hard to sell the Property in good faith if Johnson intended to disclose to potential buyers what he knew about the Tacoma Link Expansion Project and Sound Transit’s plans for the Property? It was hard for Johnson to sell the Property in good faith because he was concealing known material facts about the Property. Johnson committed unfair and deceptive acts, plain and simple. *See Bloor*, 143 Wn. App. at 735-36 (listing and showing property without disclosing known material facts has the capacity to deceive any member of the public who sees the listing or expresses interest in the property). The trial court erred when it granted the Johnson Parties’ Motion for Summary Judgment.

2. Johnson’s Unfair and Deceptive Acts Have a Public Impact.

The public interest element of AVH’s CPA claim involves consideration of the following factors: (1) whether the acts were committed in the course of the defendant’s business, (2) whether the defendant advertised to the public, (3) whether the defendant actively solicited the plaintiff, and (4) whether the parties occupied

unequal bargaining positions. *Bloor*, 143 Wn. App. at 736-37. “No single factor is dispositive, nor is it necessary that a buyer prove all factors.” *Id.* at 737.

Johnson admitted in the trial court proceedings that the first factor and the second factor were established. (CP 391.) No reasonable argument could be made to the contrary. (CP 601-09 at 15:3-23:7.) Johnson may not have actively solicited AVH, but it was Johnson’s listing of the Property that caught the attention of AVH’s broker and Johnson thereafter provided information and organized a tour. (CP 710-11 at 30:13-31:18.) Moreover, as the Washington Supreme Court held in *Svendsen*, where a broker conceals his knowledge of material facts impacting a property which he advertises to the public, “it cannot be said that the parties occupied equal bargaining positions.” *Svendsen*, 143 Wn.2d at 559. Through Johnson’s intentional concealment of known material facts, AVH and its representatives were deprived of the very information that would have allowed AVH to stand on equal bargaining power in the transaction. (*See, e.g.*, CP 82-83 at 46:2-47:8.)

Johnson also argued to the trial court that AVH represented in the PSA that it had a high degree of experience, expertise and sophistication in performing pre-closing inspections and

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investigations.⁹ (CP 376, 391.) To make this argument, however, Johnson ignored the contractual language limiting AVH's representation (to LaClare) Johnson relied upon, which provided: "*Except for those representations and warranties specifically included in this Agreement:*" ... "(iv) Buyer represents and warrants to Seller that Buyer has sufficient experience and expertise such that it is reasonable for Buyer to rely on its own pre-closing inspections and investigations." (CP 59 at § 13 (emphasis added).) The representations specifically included in the PSA included the representation that "[t]here is no pending or threatened condemnation or similar proceedings affecting the Property." (CP 58 at § 12(f).) In other words, AVH's representation concerning its experience, expertise and sophistication was qualified by the predicate language Johnson wanted the trial court to miss. AVH made no representation to Johnson (or anyone else) that it was so sophisticated or experienced that it could uncover concealed material facts, misrepresentations, or unfair or deceptive acts like

⁹ The Johnson Parties also cited *Douglas*, 173 Wn. App. at 834, to the trial court to argue that AVH and its agents were "reasonably expected to conduct their own diligence prior to the closing of the purchase and sale." (CP 389.) The *Douglas* case does not further the Johnson Parties' argument. In *Douglas*, it was undisputed that the buyers were on notice of the defect. *Douglas*, 173 Wn. App. at 834. Here, AVH had no notice of Sound Transit's threatened condemnation.

those Johnson committed here. The trial court erred when it granted the Johnson Parties' Motion for Summary Judgment. The Court should reverse the trial court's June 30, 2017 order granting summary judgment in favor of the Johnson Parties, and remand this case for further proceedings.

V. ATTORNEY FEES AND EXPENSES

Pursuant to RAP 18.1 and RCW 19.86.090, AVH requests attorney fees, costs, and expenses incurred in this review proceeding.

VI. CONCLUSION

The trial court erred in granting the Johnson Parties' Motion for Summary Judgment. The Court should reverse the trial court's June 30, 2017 order (CP 862-64) insofar as it granted the Johnson Parties' Motion for Summary Judgment and erroneously dismissed AVH's misrepresentation and CPA claims against the Johnson Parties, and remand this case for further proceedings.

Respectfully submitted, this 27th day of November, 2017 at
Seattle, Washington.

RYAN, SWANSON & CLEVELAND, PLLC

By 

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 27th day of November, 2017, I caused to be served the foregoing document on counsel for Defendant/Appellee, as noted, at the following addresses:

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