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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

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

Appellant,

v.

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

Appellees.

APPELLEES' OPENING BRIEF

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I. INTRODUCTION

Timothy Johnson is an excellent commercial real estate broker. He is diligent—he educates and informs himself as a commercial real estate broker should. He pays attention to the news and other activities within his brokerage market that could impact his clients or his listings. He discusses those things with his clients so they can make educated decisions about their properties, all while keeping in mind his statutory duties. Appellant's commercial brokers, on the other hand, state that they don't have the time to inform themselves of the happenings in their market area and, apparently neither they nor Appellant believe such research to be worthy of their time. It is thus ironic that Appellant now sues Johnson for not sharing information that he gleaned from public sources that were equally available to Appellant.

But the Appellant's failure to open its eyes to the property's surroundings and public information to realize potential risks (and rewards) of becoming Sound Transit's neighbor, does not belong to Johnson. Appellant's argument that it was Johnson's responsibility to disclose information that was *readily ascertainable* information to Appellant and its *two* brokers not only defies common sense, it is contrary to law.

This appeal concerns which party in a commercial real estate transaction properly bears the risk of post-closing condemnation. Despite that neither Appellant nor its sophisticated real estate agents

considered information available to them, Appellant argues that seller's broker is liable for unforeseeable damages because Sound Transit expressed interest prior to Closing (as defined below). Significantly, Appellant sold the property to Sound Transit for a 15% return on its investment. Nonetheless, they seek to wring money out of Mr. Timothy Johnson, seller's *broker*, for not disclosing public information. But Johnson had no duty to disclose such information and this Court should thus affirm the trial court's grant of summary judgment.

II. COUNTER-STATEMENT OF CASE

This dispute stems from Jordan Moving and Storage's (together with AVH & BJ Holdings 2, LLC, "**Appellant**") purchase and sale of real property located at 824 East 25th Street, Tacoma, Washington (the "**Property**"). Appellant filed suit against LaClare Investments, LLC ("**Seller**"), on the one hand, and Timothy Johnson Commercial Properties, LLC ("**TJCP**") and Timothy N. and Margot Johnson (together with TJCP, "**Johnson**"), on the other hand. In the trial court proceedings, Appellant claimed that Johnson, as commercial real estate broker for Seller, negligently failed to disclose that the Property was part of the preferred alignment for Sound Transit's Tacoma Link Expansion ("**T-Link**") and that the Property was expected to be condemned or acquired by Sound Transit in connection with the T-Link. Additionally, Appellant claimed damages arising from an alleged violation of Washington's

Consumer Protection Act, RCW 19.86 (“**CPA**”) resulting from advertising the Property for sale without disclosing Sound Transit’s potential interest. As the trial court correctly concluded, both claims fail as a matter of law.

At the time the parties entered into the purchase and sale agreement (“**PSA**”), information about the T-Link and Sound Transit’s potential interest in the Property was publicly available through Sound Transit’s website, town hall meetings, and countless articles and reports in local news publications. Johnson was aware of Sound Transit’s potential expansion plans but had no knowledge that wasn’t already available to the public. Further, Sound Transit never told Johnson it would purchase/condemn the property nor were condemnation proceedings initiated or threatened prior to when the purchase and sale closed on November 23, 2015 (“**Closing**” or “**Closed**,” as the context provides). Any and all information about Sound Transit’s potential interest in the Property was readily ascertainable prior to Closing.

A. Efforts to Sell the Property

The Property consists of land and a 22,648 square foot warehouse (the “**Warehouse**”), which was originally listed for sale in 2010. (Clerk’s Papers “**CP**” at 395.) The Warehouse is a long narrow building wedged between operating train tracks (Sound Transit’s Tacoma Trestle) to the South, and East 25th Street to the North. The Property’s Westerly neighbor is Sound Transit’s

Operations and Maintenance Facility (the “OMF”), which services Sound Transit’s Tacoma Link light rail.

Because the Warehouse lacked amenities, including an office or bathroom, and was not fully enclosed or secure, the Property generated little interest from potential purchasers or lessees. (CP at 395.) Based upon information from media reports, Sound Transit’s website, and the OMF’s presence next door, in 2013 Johnson asked Sound Transit whether the Property might be suitable for its expansion needs. (CP at 395.) This approach typified Johnson’s role as a listing broker; for example, in December 2014 Johnson contacted Sound Transit to determine whether it was interested in a Puyallup property near a Sounder park and ride. (CP at 395, 405.) Not only were these overtures typical of Johnson’s role as a listing broker but also they are customary among commercial property brokers. (CP at 395.) After all, as Seller’s agent, Johnson was duty-bound to make a “continuous effort to find a buyer for the” Property. RCW 18.86.040(1)(e).

Johnson primarily communicated with Allison Gregg, Community Outreach Corridor Supervisor for Sound Transit, regarding the Property. Johnson and Gregg corresponded only a handful of times during a two-year span, which communication was almost always initiated by Johnson. (CP at 395.) Gregg provided Johnson with informal progress reports and information regarding conditions precedent to Sound Transit’s potential expansion,

whether such expansion was for the T-Link or the OMF. Such conditions precedent included conducting environmental review, procuring funding and multiple Sound Transit board approvals. (CP at 395, 413.)

Over the course of years, Johnson repeatedly asked Gregg whether Sound Transit was interested in purchasing the Property. Gregg never told Johnson that Sound Transit planned to acquire the Property. And despite such efforts, Johnson was unable to elicit a purchase offer from Sound Transit, a letter of intent, or any promise to make an offer; indeed, Sound Transit refused to engage in dialogue regarding potential sale terms. When pressed for updates, Gregg would often report delays or other stumbling blocks preventing further progress. (CP at 396.)

Johnson forwarded these communications with Gregg to Seller's managing member, Richard Burrows. Johnson and Burrows discussed Sound Transit's lack of interest in the Property and became frustrated. (CP at 149-50, 186-190, 396.) Near the end of June 2015, Johnson and Burrows concluded that, despite their two-years of effort, Sound Transit was not able or willing to purchase the Property. (CP at 150, 396.) Among other reasons, no one from Sound Transit, as Allison Gregg admitted in her declaration to the Trial Court, ever told Johnson that Sound Transit would purchase or otherwise acquire the Property. (CP at 396, 414.) Significantly, Sound Transit, again, as Gregg admitted in her declaration to the

Trial Court, never indicated to Johnson or Seller an intention to condemn the Property. (CP at 152, 396.) Accordingly, Johnson perceived no threat of condemnation. (CP at 396.)

B. The Purchase and Sale

In early summer 2015, Billy Moultrie, a real estate broker representing Appellant, approached Johnson about the Property. (CP at 396-97.) Moultrie holds himself out to the public as a “specialist” in South King County and Pierce County commercial real estate. (CP at 471-72.) In addition to Moultrie, Tamir Ohayon also represented Appellant as a commercial real estate broker with respect to the purchase and sale. Both Moultrie and Ohayon worked for NAI-Puget Sound Properties. (CP at 397.)

Following Moultrie’s expression of interest, Johnson provided Moultrie with information about the Property, and Moultrie toured the Property with Appellant. (CP at 396-97.) Johnson was not present for the tour and was never told how Appellant intended to use the Property. (CP at 397.) Indeed, Johnson never had any direct communication with the Appellants. (CP at 397.) On the tour, Appellant, as he admitted in deposition, observed not only the OMF building next door, but also Sound Transit’s equipment and materials stored against the western wall of the Warehouse. (CP at 476-77.) The area between the Property and the OMF, where Sound Transit stored its equipment, was fenced off by Sound Transit—restricting access to one side of the Property. (CP at 395, 403-04.)

On July 30, 2015, Appellant and Seller executed the PSA. (CP at 147-48, 156-76, 397.) Paragraph 27 of the PSA notes that seller's broker makes no representation or warranty regarding the Property's condition or fitness for buyer's intended use. (CP at 165.) Prior to Closing, Jordan Moving and Storage assigned its interest to AVH & BJ Holdings 2, LLC. (CP at 147-48, 397.)

C. Appellant Fails to Conduct Appropriate Due Diligence

The PSA provides that Appellant was responsible for conducting its own pre-Closing due diligence: "Buyer has sufficient experience and expertise such that it is reasonable for Buyer to rely on its own pre-closing inspections and investigations." (CP at 161.) After the parties executed the PSA, Moultrie undertook minimal effort of collecting information about the Property and sent Johnson an email requesting building plans, environmental reports, maintenance records, lease documents for the month-to-month tenant, a parcel boundary survey, and vendor contracts. (CP at 397, 407.) In an August 3, 2015 email, Johnson responded to Moultrie with the requested information. (CP at 397, 409.) Moultrie and Johnson's subsequent emails concerned primarily the condition of the roof and the sprinkler system. (CP at 409.)

On August 4, 2015 Rainier Title emailed the preliminary title commitment to both Appellant and Seller, as well as to the brokers for each. The preliminary title report was presented as an interactive PDF; meaning, the listed recording numbers contained hyperlinks to

copies of the underlying documents. This medium provides readers with the ability to review all supporting documents within the commitment by clicking on each document's recording number. (CP at 150, 192, 397.) Which, of course, means that Appellant had instantaneous and easy access to all documents pertinent to title. Special exceptions to the insurance policy included a 1999 survey depicting an encroachment on the neighboring Sound Transit property and a 2001 Construction Agreement between Seller and Sound Transit, granting Sound Transit the right to apply and maintain a waterproof sealer to the west side of the Warehouse's foundation, as well as place fill-dirt against the same portion of the Warehouse exterior. (CP at 150-51, 210, 212-13.)

Additionally, neither Appellant nor their brokers ever asked Johnson, nor apparently, anyone else, about Sound Transit's visible footprint; *i.e.*, they never inquired about the OMF, the equipment stored on the exterior of the Warehouse, Sound Transit's controlled access to the western side of the Property, or the Sound Transit rail line on the Southern Property boundary. (CP at 397-98.)

On October 27, 2015 Rainier Title emailed a Supplemental Commitment to the parties. (CP at 151, 215-25, 398.) The Supplemental Commitment listed a new exception to the title policy: a street occupancy permit, recorded October 21, 2015, granting Sound Transit the right to occupy the public right of way adjacent to the Property. (CP at 398.)

On November 23, 2015, Appellant and Seller Closed the purchase and sale by recording the statutory warranty deed. (CP at 148, 178-181.) The statutory warranty deed was recorded subject to the 1999 survey, the 2001 Construction Agreement, and the October 21, 2015 street occupancy permit. (CP at 180-81.)

D. Sound Transit Purchases the Property from Appellant, Who Reaps a Profit

Around Closing, Appellant became aware that Sound Transit might be interested in purchasing the Property. Subsequently, Moultrie contacted Johnson to inquire as to Sound Transit's interest in the Property. Johnson responded that although Sound Transit had expressed interest in purchasing the Property, it had never taken any action on that interest by submitting a letter of interest or intent, or by even stating affirmatively that it would acquire the Property. Johnson heard nothing further from Appellant or their agents until receiving a demand letter dated March 8, 2016 from Appellant's counsel. (CP at 398.)

On January 13, 2016, Sound Transit delivered a certified letter informing Appellant that within two weeks of the letter's date, Sound Transit's board of directors would consider at a public meeting whether to acquire the Property. (CP at 435-38.) On January 28, 2016, Sound Transit's board adopted Resolution R2016-02 ("**R2016**"), which authorized Sound Transit to acquire the Property. (CP at 426-33.) On February 3, 2017, Appellant and

Sound Transit entered into a purchase and sale agreement through which Sound Transit would acquire the Property for \$1,265,000.00—which is \$165,000.00 more than what Appellant paid Seller for the Property. (CP at 241-42, 306-16, 318-21; *see also* Verbatim Report of Proceedings at 38:18-23 (Appellant was “able to recover fair market value in excess of what they paid.”))

E. Information Regarding T-Link Expansion Publicly available, but Purchaser and Purchaser’s Brokers Ignored It

In 1992, Washington’s legislature empowered populous counties to create a transportation agency “for planning and implementing a high capacity transportation system within that region.” (RCW 81.112.010.) Subsequently, voters approved a ballot measure creating Sound Transit. Because Sound Transit’s projects necessarily have a broad impact on Pierce, King, and Snohomish Counties, they make all information about proposals and projects public, including through their website.

Sound Transit’s website is replete with information, offering both an overview and comprehensive analysis, regarding the T-Link, as well as other Sound Transit projects. The website contains an archive of all operative planning documents, as well as board resolutions and proposals. By visiting the Sound Transit website, one can sign up for automated updates about various Sound Transit projects, including the T-Link. (CP at 439-40, 446-47, 489-90.)

Prior to adopting Resolutions 2015-22 and 2016-02, Sound Transit engaged in substantial public outreach in an effort to inform the public about the options it was considering for the T-Link and OMF expansion. In addition to publishing information and notices on its website, Sound Transit also published notices in newspapers, press releases, mass postcard mailing, mass emailing, posting notices on “listservs” for professional and community organizations, hosted multiple community meetings, and participated in fairs and festivals. (CP at 412.)

What follows is but a sampling of the information available to the public through Sound Transit’s website and other media:

- On February 28, 2014, the *Tacoma News Tribune* published an article about Sound Transit’s selection of a route for the T-Link. (CP at 440, 449-50.)
- Notification of an Open House Hearing to discuss the T-Link was published in the *Tacoma News Tribune* on May 17, 2014. (CP at 440, 452.)
- In June 2015, Sound Transit issued a Tacoma Link Environmental Evaluation, which identified the Property as a proposed acquisition site for an expanded OMF. (CP at 440.)
- On July 5, 2015, the State of Washington allowed Sound Transit to offer voters a 2016 ballot initiative regarding the ST3 program, which included funding for the T-Link. The

Tacoma News Tribune published an article on the initiative. (CP at 440-41, 454-58.)

- On July 6, 2015 the *Tacoma Daily Index* published a notice regarding a July 15, 2015 Sound Transit Open House on the proposed expansion of the T-Link. This article specifically mentions the potential expansion of the existing OMF building. (CP at 441, 460-62.)
- On July 19, 2015, the *Tacoma News Tribune* published an article concerning Sound Transit's requests for public feedback to assist in its review of the T-Link, including proposed stops. (CP at 441, 466-69.)

All of the above information and articles were available at no cost to the user. (CP at 442.)

At his deposition, Moultrie testified that he had not seen any of the articles or information, above—his status as a specialist in South King County and Pierce County commercial real estate notwithstanding. Moultrie testified further that even if he had seen the articles or information regarding the T-Link, he wouldn't have been interested because "I have a lot of things to do I don't think I would explore that." (CP at 480.) Ohayon, too, testified that he had seen nothing in the news regarding Sound Transit's potential expansion plans in Tacoma (CP at 442, 503-06.) and Appellant's principal also testified that he does not read the news and prefers

Appellant's commercial brokers not read the news, either (CP at 442, 492-94, 761).¹

III. ARGUMENT OVERVIEW

Contrary to Appellant's assertions, Johnson did not "know" that the Property was under threat of condemnation. It would require speculation to conclude there was such a threat. Johnson, likewise, did not possess any unique or closely held information. Concerning condemnation, Sound Transit presented *unrebutted* testimony that, prior to Closing,

- It was uncertain if Sound Transit would purchase the property. (CP at 413)
- Sound Transit did not have authority to make a purchase offer or condemn the Property. (CP at 411-12)
- In none of Sound Transit's email communications with Johnson did Sound Transit make an offer, commit to purchasing the Property at some time in the future or even discuss terms of a potential purchase. (CP at 414)
- In none of Sound Transit's email communications with Johnson did Sound Transit ever use the words "condemn" or "eminent domain." (CP at 413-14)

¹ For ease of reference, a portion of Appellant's 30(b)(6) deposition testimony, in which Sharon Joseph states that he doesn't expect his brokers to "know what's going on in the region" and that he'd be "very disappointed" to learn that his brokers were "reading articles" or reviewing information about their brokerage market, is included as Appendix A. (CP at 757-63.).

- Beyond mass mailings and publications on Sound Transit’s website and in local media, all of which were directed to the general public, Sound Transit’s representative did not initiate any contact with Johnson or the Seller. (CP at 414)
- In its communications with Johnson, Sound Transit did not provide him with any information that was not available on Sound Transit’s website. (CP at 414)
- Over the preceding years, Sound Transit engaged in substantial public outreach to inform the “*public about the options Sound Transit was considering for the Tacoma Link Expansion, including the OMF expansion. [Sound Transit’s] objective was to inform the general public...*” (CP at 412)²

In this context, the issue for the Court to decide is whether, in a commercial transaction, the seller’s broker has a duty to disclose to the buyer that is separately represented by *two* brokers, information that is all ascertainable in the public domain. The answer, is no.

Given that both Appellant and Seller were represented by sophisticated real estate brokers in a commercial real estate transaction, Johnson owed no duty to Appellant under RCW 18.86 or Washington common law. Even if Johnson owed a duty to Appellant, Johnson breached no such duty. As demonstrated above, Sound Transit never provided Johnson with any information that

² For ease of reference, Allison Gregg’s Declaration is included as Appendix B to this brief. (CP at 410-414.)

wasn't readily available to the public. Beyond the information blasted through the region about Sound Transit's expansion plans, Appellants were on notice of Sound Transit's potential to impact the Property through documents on title and Sound Transit's physical incursion onto the Property. Does a buyer and its brokers' willful ignorance of available information create a heightened duty for the seller's broker? Again, the answer is no.

IV. ARGUMENT

A. Johnson Breached No Duty To Appellant

1. Johnson Breached No Duty to Appellant under RCW 18.86. Appellant argues that Johnson, as a licensed real estate broker, owed duties to Appellant because RCW 18.86.030 states that a broker owes duties to all parties to whom the broker renders brokerage services. It's remarkable that Appellant barely acknowledges that it was represented by two brokers. It would appear that Appellant was not well-served by its own brokers, who did not diligently inform themselves of accessible information in the public domain regarding the market area in which they provide brokerage services. But the shortcomings of Appellant's own due diligence do not, and should not, create a seller's broker duty to the buyer.

Appellant supports its assertion that seller's broker owes it that duty by noting that the term "real estate brokerage services" is to be construed broadly—so broadly that by taking Appellant's

argument to the logical endpoint, a broker would be deemed to have rendered real estate services to anyone in the world. To illustrate: Appellant argues that the use of the word “to” in the phrase, “to all parties to whom the broker renders real estate brokerage services,” expands RCW 18.86’s reach, and thus a broker’s duties, to all persons who happen to read the broker’s listings. If Appellant’s misconceptions were true, real estate brokers would be required to provide pamphlets on real estate agency law to each and every person who reads the broker’s listings. See RCW 18.86.030(1)(f). In reality, a broker who lists property for sale on behalf of seller owes duties to seller, who has contracted with the broker to act as seller’s agent, but not to any and everyone who happens to read the listing. And where, as here, buyer and seller were each represented by their own sophisticated brokers in a commercial real estate transaction, seller’s agent’s duties to buyer, if any, are narrow and limited.

Appellant attempts to reshape *Preview Props., Inc. v. Landis*, 161 Wn.2d 383, 165 P.3d 1 (2007) (en banc), to fit the facts of the instant case, but *Landis* is factually distinguishable, inapposite, and predates the 2013 revisions to RCW 18.86. In *Landis*, the issue on appeal was whether buyer’s agent had converted earnest money by misrepresenting to seller that buyer had signed an extension agreement when buyer had not done so. Seller was unrepresented in the transaction and fell victim to buyer’s agent’s fraud in the

inducement. On appeal, the lower court's finding that buyer's agent knowingly misrepresented buyer's actions to seller went unchallenged. Thus, the court's short, unsupported discussion of RCW 18.86.30 is dicta. Importantly, *Landis* was decided six years prior to the 2013 revisions to RCW 18.86.

In 2013, the Washington legislature enacted a revised RCW 18.86 to clarify the terminology and duties of real estate brokers and agents. WA F.B. Rep., 2013 Reg. Sess. S.B. 5352 at 1. Until 1996, a real estate broker/agent's duties to a buyer, seller, landlord or tenant were based on agency common law; *i.e.*, as an agent, a real estate broker owed its principal, whether that be buyer, seller, etc., the duties of loyalty, obedience, and disclosure, among others. *Id.* In 1996, Washington's legislature enacted RCW 18.86, which specifically superseded the common law rules that apply to real estate licensees to the extent the common law rules were inconsistent with RCW 18.86. *Id.* Thus, under RCW 18.86, "An agent is a licensee who has an agency relationship with a buyer or seller"—not buyer *and* seller—and a real estate licensee, when performing real estate brokerage services as an agent owes to her principal statutory duties, including to exercise reasonable skill and care and to disclose all material facts known by the licensee and not easily ascertainable to a party. *Id.* at 1-2. When a real estate licensee represents *both* parties to a transaction, such licensee must, among other things, not take any action that would be adverse to either party. *Id.* at 2.

Finally, the legislature revised RCW 18.86 so that the duties enumerated therein are statutory, rather than fiduciary duties: RCW 18.86 “supersedes all, not just inconsistent, common law fiduciary duties owed by a principal to an agent.” *Id.*

Contrary to Appellant’s argument, Johnson owed no duty to Appellant. Johnson represented the seller, as seller’s agent. Appellant misinterprets the law by stating that every time a broker lists commercial property for sale she owes duties to all parties to the ensuing transaction. If the broker represents both buyer and seller, or buyer is not represented, that may be true; but where, as here, both parties are represented by at least one agent, and seller’s broker lists the property on behalf of seller as seller’s agent, then seller’s broker is rendering real estate brokerage services to seller only. *Accord Moon v. Barr*, 197 Wn. App. 1004, 2016 WL 7106371, No. 33614-o-III (Div. III Dec. 6, 2016) (unpublished).³

There, Division III affirmed summary judgment against a home purchaser who sued seller and their real estate agent for negligent misrepresentation, among other things. In considering the negligent misrepresentation claim, the court noted that RCW 18.86.030(1) defines a real estate broker’s duties and that common law tort is the means to recover damages against a broker. However, RCW 18.86.030(1) clarifies that a broker’s duties are owed “to all

³ Unpublished appellate opinion cited pursuant to GR 14.1 for such persuasive value as the Court deems appropriate. See Appendix D.

parties to whom the broker renders real estate services.” *Moon*, 2016 WL 7106371, at *7 (internal quotations and citation omitted). But there, just as here, seller’s broker did not render real estate brokerage services to buyer, who had hired his own real estate agent. Accordingly, Division III held that RCW 18.86.030(1) did not support buyer’s negligent misrepresentation claim. *Moon*, 2016 WL 7106371, at *7.

Even if, however, Johnson owed duties to Appellant under RCW 18.86, Johnson breached no such duty, as Sound Transit’s potential interest in the Property was readily ascertainable—it could have been easily discovered and investigated with even a meager amount of due diligence by Appellant or its brokers.

2. Johnson Breached No Duty to Appellant under Washington Common Law.⁴ Appellant asserts that Johnson “knew the Property was directly within the preferred alignment for” the T-Link and that Sound Transit “expected to acquire it,” and thus argues that Johnson violated a common law duty to disclose known material defects. Appellant’s Opening Br. at 15. Appellant lacks actual evidence, and legal authority to support its argument. As established above, Johnson did not expect Sound Transit to acquire the Property—not even *Sound Transit*, as stated in the appended declaration, knew whether it would acquire the Property. Appellant,

⁴ For purposes of this appeal, Johnson makes the following arguments. They are in no way meant as an admission that Johnson owed a duty to Appellant.

again, grossly mischaracterizes testimony. Further, Johnson had no information not otherwise publicly available to Appellant and its brokers.

a. Appellant Cannot Establish Tort Liability.

To establish the tort of negligent misrepresentation, a plaintiff must show (i) the defendant supplied information for the guidance of others in their business transactions that was false, (ii) the defendant knew or should have known that the information was supplied to guide plaintiff in his or her business transactions, (iii) defendant was negligent in obtaining or communicating the false information, (iv) plaintiff relied on the false information, (v) plaintiff's reliance was reasonable, and (vi) the false information proximately caused plaintiff's damages. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002); *Bloor v. Fritz*, 143 Wn. App. 718, 734, 180 P.3d 805 (2008).

Generally, an omission should not be deemed negligent misrepresentation; however, when a duty to disclose exists—for example, under RCW 18.86.030—then the failure to disclose a material fact may rise to the level of an affirmative representation. *Alexander v. Stanford*, 181 Wn. App. 135, 177, 325 P.3d 341 (2014), *rev. granted*, 181 Wn.2d 1022, 339 P.3d 635, *dismissed*, No. 90642-2 (May 8, 2015). In a commercial real estate transaction, the duty to disclose arises when the facts are “peculiarly within the knowledge of one person and could not be readily obtained by the other.”

Colonial Imports v. Carlton Northwest, Inc., 121 Wn.2d 726, 731, 853 P.2d 913 (1993) (internal quotations and citation omitted). Accordingly, to prevail “on a claim for negligent misrepresentation, based on a broker’s failure to disclose material information, the complaining party must provide some evidence that the information was not readily ascertainable.” *WGW USA, Inc. v. Legacy Bellevue 530, LLC*, 192 Wn. App. 1002, 2015 WL 9462096, *1 (Div. I, Dec. 28, 2015) (unpublished).⁵

Here, Appellant complains that Johnson had peculiar knowledge—that Sound Transit might be interested in purchasing the Property. But the record shows that such information was not peculiar—it *pervaded* the public sphere and was available to anyone. Moreover, because such information was publicly available it was readily ascertainable. *See* § IV.C, *infra*. Finally, even if the information were not readily ascertainable, Appellant fails to establish that such information was material. *See* § IV.D, *infra*. Finally, in the PSA, which Appellant executed, Johnson expressly made no representation or warranty regarding the Property’s condition or fitness for intended use. Accordingly, Appellant has not and cannot meet its burden of establishing Johnson’s tort liability and cites no case law that supports its untenable position.

⁵ Unpublished appellate opinion cited pursuant to GR 14.1 for such persuasive value as the Court deems appropriate. *See* Appendix E.

b. Appellant's Authorities Do Not Support Its

Position. Appellant supports its common law argument with cites to *Svendsen v. Stock*, 143 Wn.2d 546, 556-58, 23 P.3d 455 (2001) and *Robinson v. McReynolds*, 52 Wn. App. 635, 638, 762 P.2d 1166 (1988), neither of which should be given any weight in this appeal.

At issue in *Svendsen* was seller's agent's fraudulent concealment of a defect in residential property from buyer, who was not represented by a real estate agent. Seller's agent advised seller to conceal drainage issues from buyer in seller's disclosure statement. Passages from the *Svendsen* opinion illustrate just how inapplicable its reasoning and conclusions are to this appeal; e.g., "it is difficult to believe that the Legislature intended to eviscerate preexisting protections afforded to *home buyers* prior to the adoption of the seller disclosure statute[;] A more reasonable interpretation of the legislature's intent is that it expressly reserved all existing remedies for *residential purchasers in RCW 64.06.070.*" *Svendsen*, 143 Wn.2d at 558 (emphasis supplied). Here, by contrast, Johnson did not advise Seller to conceal Sound Transit's potential interest; the Property is commercial in nature; Appellant is a business entity represented by two real estate agents; and Appellant was not buying a home. Accordingly, *Svendsen* is factually distinguishable and its legal conclusions inapplicable.

Robinson is perhaps even more inapposite than *Svendsen*, even though Appellant cites *Robinson* to support its argument that

Johnson violated an independent duty under Washington common law. Appellant's Opening Br. at 15. *Robinson* is another example of a purchase and sale transaction in which buyer was not represented by its own agent. There, after buyers failed to generate revenue from the real property they purchased, they asked seller's agent to re-list the property; but when no offer materialized, seller's agent induced buyers to join him in a partnership under which he would assume property management duties and responsibility for all future capital contributions. Again, Appellant bases meritless arguments on factually distinguishable and inapposite case law. Appellant wishes to convince this Court that it should be treated as an unsophisticated, hapless, unrepresented buyer when the exact opposite is true. Appellant has cited to no case where a similarly situated buyer has prevailed on these grounds against the Seller's broker, and for good reason: Appellant is a sophisticated commercial buyer represented by not one, but *two*, experienced and capable real estate brokers. They were surrounded by information about Sound Transit's presence in the area, Sound Transit's interest in expansion, and its physical impact on the Property. Still, no one investigated. As the trial court aptly concluded, Appellant's "experienced broker should have also known" about Sound Transit's interest in the Property, and that Appellant "may have a claim against the broker for not doing his part, but you don't have it against" Defendants (Verbatim Report of Proceedings; 39:16-20). Appellant's

mischaracterization of the factual record does not alter this conclusion.

c. Johnson Knew of No Pending or Threatened Condemnation. Sound Transit's exercise of its eminent domain powers is subject to RCW 8.12. Sound Transit may not assert its eminent domain power unless and until the Sound Transit Board expressly authorizes acquisition by resolution and the affected owner is provided with individual written notice, by certified mail, at least 15 days before the Board meets to vote on such resolution. RCW 8.12.005, -.040; RCW 8.25.290.

Here, Appellant misstates facts when asserting that Johnson knew of "threatened condemnation." To begin, Appellant uses the terms "threatened" and "condemnation" as if prior to Closing, Sound Transit's acquisition of the Property were a *fait accompli*. In reality, the unrebutted record shows that until Closing, Sound Transit never indicated to Johnson or anyone else that it would, in fact, acquire the Property. Appellant disingenuously presents Johnson's communications with both Sound Transit and his principal as either confessions or admissions or both. Instead, Johnson was, on the one hand, attempting to solicit an offer from a potential purchaser (Sound Transit) and on the other hand, discussing strategic moves with his principal—neither communication leads to the conclusion

that Appellant asks the Court to draw.⁶ Johnson breached no independent common law duty to Appellant, and no argument made on appeal alters the trial court's correct conclusion. Accordingly, this Court should affirm the trial court's judgment for Johnson.

B. Sound Transit's Potential Interest in the Property Was Readily Ascertainable

Assuming *arguendo* that RCW 18.86.030(1)(d) imposes any duty on Johnson to Appellant, that statute states that a broker owes a duty "To disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party[.]"

Appellant never disputes that all of the information known to Johnson was in the public domain. It cannot, since the unrebutted evidence establishes that the sources of Johnson's information were media reports (including the *Tacoma News Tribune*, *Puget Sound Business Journal* and local television), the Sound Transit Website (where he also subscribed to the website notification services to stay informed), professional list services and open houses and public meetings. (CP at 412.) While Johnson also made direct email inquiries, Sound Transit testified, and the testimony was unrebutted, that it provided no information in its email communications that was not also available on the Sound Transit website. (CP at 414.)

⁶ Again, Appellant's brief mischaracterizes the deposition testimony of Johnson, in describing his conversations with the Seller, by including only a portion of the exchange. Appended as Appendix C, is the full exchange concerning the conversation where Johnson correctly notes that there were no Sound Transit "documents" in his possession and all information in his possession was readily ascertainable. (CP at 82-83.)

Instead, Appellant asserts that it had no pre-purchase knowledge of Sound Transit's potential interest in the Property, and its claimed lack of pre-purchase knowledge made the information not readily ascertainable. Appellant seems to argue that it had no reason to explore the publicly available information. The argument fails.

While Appellant may have elected to ignore available information (including news reports), the unrebutted evidence establishes that substantial information was disclosed pre-closing to, at a minimum, put Appellant in inquiry notice. First, there was the physical evidence. Through the pre-closing site visits, Appellant learned:

- Sound Transit's OMF was immediately adjacent to the Property;
- Sound Transit had a rail line adjacent to the Property; and
- Sound Transit's equipment was stored on and near the Property, such that access to one side of the building was restricted. (CP at 395, 403-04, 476-77.)

The title reports delivered to Appellant pre-closing included:

- A survey, recorded by Sound Transit, that revealed that the Property's improvements encroached on Sound Transit's property (CP at 150-51, 210, 212-13.);

- A construction agreement conferring Sound Transit rights to maintain portions of the building on the Property (CP at 151, 210, 212-13.); and
- A Street Occupancy Permit, recorded only a month before closing, to facilitate another Sound Transit project. (CP at 151, 215-25, 398.)

All of the above serves to inform a buyer that Sound Transit's operations are in close proximity to and already impact title to and use of the Property. Appellant cannot avoid the legal impact of the availability of such information by failing to review it. Appellant and its brokers did not need to "scour" the Sound Transit website to become informed of relevant public information. They need only open their eyes to the information already provided to them to be steered to public information that is, indeed, readily ascertainable.

Appellant's position is further undercut by (1) Division I's unpublished but on-point *WGW* decision; and (2) a lack of supporting authority.

1. Persuasive Authority Supports the Trial Court's Grant of Summary Judgment. Appellant attempts first to discredit Division I's *WGW* opinion and then to distinguish it. While unpublished, *WGW* is directly on-point and supports the trial court's ruling.

In *WGW*, plaintiff-lessee sued defendant-lessor for rescission of lease based on defendant-lessor's alleged fraudulent or negligent

misrepresentation in failing to disclose that Sound Transit had identified the leased premises as being within a possible expansion route. During lease negotiations, lessor's agent informed plaintiff that Sound Transit intended to build a station two blocks away from the premises. The parties entered into a ten-year lease. A year after taking possession of the premises, plaintiff learned that Sound Transit had altered its plans and intended instead to condemn all or most of the premises' parking lot. After losing on summary judgment, plaintiff appealed. *Id.* at *2.

The *WGW* opinion notes that failure to disclose material information may constitute negligent misrepresentation. *Id.* at *4 (citing *Alexander*, 181 Wn. App. at 177). Real estate brokers in Washington state are duty-bound to disclose, to parties to whom they render brokerage services, all known material facts unless such facts are readily ascertainable. *Id.* (citing RCW 18.86.030(1)). Plaintiff carries the burden of establishing that information was not readily ascertainable. *Id.* at *5 (citing *Young*, 112 Wn.2d at 225).

Because defendant had no duty to disclose readily ascertainable facts, the *WGW* court considered whether the omitted information was readily ascertainable. Because RCW 18.86 does not define "readily ascertainable," the court looked to Webster's Dictionary; from this review, the court concluded that "information is readily ascertainable . . . if the party could discover it quickly or easily," and "Facts are ascertainable if they are publically available."

Id. As here, the information at issue in *WGW* was a matter of public record. *Id.*

Addressing lessee's argument that the information was not readily ascertainable because there was no reason to investigate, the *WGW* court noted that knowledge or lack thereof may impact whether material facts are readily ascertainable; thus, having a reason to investigate makes such investigation easier and faster. *Id.* Because lessor's broker informed lessee prior to executing the lease agreement that Sound Transit was expanding light rail and was constructing a station in the vicinity, lessee had reason to investigate, bolstering the court's conclusion that such facts were readily ascertainable. "It is obvious that the construction of a light rail station in close proximity to [the premises] could have both negative and positive impacts." *Id.* at *6. Having concluded that defendant had no duty to disclose readily ascertainable information, regardless of materiality, the court affirmed the trial court's dismissal of plaintiff's claim. *Id.* at *6-*7.

The instant case is factually analogous to *WGW* and the undisputed facts support the trial court's summary judgment for Johnson. First, as noted above, there was no pending or threatened condemnation proceeding against the Property, at any time prior to Closing. Second, Sound Transit's potential interest in the Property was publicly available. Third, Appellant had reasons to investigate Sound Transit's potential interest in the Property.

a. There was No Pending or Threatened Condemnation. As the record indicates, at all times prior to Closing, Johnson perceived Sound Transit only as a potential purchaser of the Property. Buyer complains that Johnson failed to disclose that another entity had expressed interest in the Property. But that information was no secret and as Sound Transit testified, it never provided Johnson with any information that was not publicly available. (CP at 414.) Sound Transit never told Johnson that it would purchase the Property and never tendered a term sheet or offer for the Property. At summary judgment, Appellant could supply no evidence showing that Sound Transit invoked its eminent domain powers with respect to the Property prior to Closing. In other words, no condemnation was pending or threatened prior to Closing.

b. Sound Transit's Potential Interest Publicly Available. There can be no dispute that Sound Transit's interest in potentially acquiring the Property was "ascertainable" because facts related to such interest were "publically available." *Id.* at *5. At the time the PSA was executed, Appellant was on notice of a potential acquisition of the Property by Sound Transit's publication of detailed notices on its website. The website published the routes under consideration as well as a link to a document that made public Sound Transit's interest in the Property. The Washington State Supreme Court has held that Sound Transit gives adequate notice to the public and property owners of potential acquisitions and

condemnations by posting notices on its website. *Central Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403, 417, 128 P.3d 588 (2006) (en banc). As held by the Supreme Court, “statements on a web site hardly could be more public.” *Id.* at 415 (internal quotations and citation omitted). If the state Supreme Court determined that a property owner is only entitled to public notice on Sound Transit’s website of a potential acquisition, then it stands to reason that a potential buyer is not entitled to anything more.

Here, notice of the proposed route for the T-Link was not limited to the numerous posts on Sound Transit’s website. Information regarding Sound Transit’s potential expansion plans were widely available through public town hall meetings, by email subscription via Sound Transit’s website, articles in local publications such as the *Tacoma News Tribune* and *The Seattle Times*, by calling Sound Transit, or by simply walking into any Sound Transit office, including the OMF building next door to the Property. Information concerning Sound Transit’s expansion and potential interest in the Property were a matter of public record and thus, “ascertainable”—which Appellant could have discovered “quickly and easily” if Appellant had undertaken even modest diligence efforts.

c. Appellant Had Reasons to Investigate.

Appellant argues that unlike in *WGW*, here, Johnson never disclosed Sound Transit’s potential interest. But the key to Appellant’s

position—that neither it nor its brokers had pre-Closing knowledge of Sound Transit’s potential interest—fails to turn the lock of this case. The undisputed facts establish that Appellant had actual and constructive notice of Sound Transit’s potential interest.

As the *WGW* court noted, knowledge or lack thereof may impact whether material facts are readily ascertainable; *i.e.*, having a reason to investigate makes such investigation easier and faster. *WGW*, 2015 WL 9462096 at *5. Note, however, that in *WGW*, seller’s broker did not disclose that Sound Transit was interested in the property at issue, but instead that Sound Transit was building a station nearby. Here, Sound Transit’s presence was manifest without any explicit comment from Johnson. Appellant, however, appears to conflate reason to investigate with required disclosure. Appellant seems to argue in circular fashion that Appellant had no reason to conduct due diligence because Johnson failed to disclose readily ascertainable information. Even though Buyer was apparently unaware of Sound Transit’s potential interest in the Property, or Sound Transit’s very public potential expansion plans, there was information available to Appellant sufficient to warrant further investigation. Several documents on recorded title showed that Sound Transit had rights that could impact Appellant’s use of the Property. Appellant received notice of these documents through the title report and supplemental commitments, and on the statutory warranty deed transferring the Property from Seller to AVH.

Appellant does not and cannot dispute that it had such documents in its possession, and under Washington law, Appellant is presumed to have knowledge of their contents. *See Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 999 P.2d 54, 60 (Div. III 2000). Each of these items was listed as an *exception* to the title insurance policy, meaning that the title insurance company was not willing to pay a future claim by Appellant for losses or damages related to the rights that Sound Transit had against the Property as listed in these documents. The prevalence of interaction between the Property and Sound Transit as demonstrated in these exceptions should have been reason enough for a potential purchaser to inquire further—especially on a \$1.1 million transaction.

Also undisputed is the fact that an existing Sound Transit OMF sits adjacent to the Property. Sound Transit's logo is emblazoned on the building and in addition to maintaining part of the warehouse's foundation, Sound Transit stored shipping containers and other materials directly against one of the Warehouse's exterior walls. This activity, combined with the exceptions to the title report provided Buyer with more than adequate information to spur further inquiry.

Appellant seeks to use Seller's PSA representation as a "get out of jail free card"—but *WGW* counsels against this. As noted, *supra*, *WGW* held that the presence of Sound Transit activity could have myriad impacts for the lessee—both positive and negative—

and once lessee had knowledge of Sound Transit's activities in the area, they had ample reason to investigate. *WGW*, 2015 WL 9462096, at *6. Here, *Seller's* representation concerning one possible impact does not excuse the Appellant from investigating other possible impacts to the Property. They cannot ignore and fail to investigate the possible impacts to the Property based upon Sound Transit's interactions. The record is clear that Appellants undertook *no* due diligence effort in the face of overwhelming information about Sound Transit's involvement in the area and its ability to directly impact the Property. This failure properly rests at the feet of Appellants and their experienced, commercial brokers—not the Seller's broker.

Finally, in *WGW*, the parties executed and entered into a lease agreement rather than a purchase and sale transaction. A prospective lessee has less reason to conduct due diligence than a prospective buyer in a million-dollar purchase and sale transaction. For example, lessee may assume that lessor's duty to provide quiet enjoyment would be an essential element to limiting any reason to investigate. By contrast, feasibility and due diligence provisions are an important part of purchase and sale agreements, including the PSA. Here, purchaser was responsible for performing its own due diligence, either on its own, or through its two capable and experienced commercial brokers—one of whom is a "specialist" in South Sound real estate. Purchaser represented that it was

sufficiently sophisticated that it could rely on its own inspections and investigations. In sum, Sound Transit’s potential expansion was public knowledge and Appellant had more than adequate information at its disposal to discover quickly and easily those very public plans.

2. Appellant’s cited authority fails to persuade. To support its argument that, RCW 18.86 notwithstanding, Johnson had a duty to disclose readily ascertainable information, Appellant cites to *Bloor*, 143 Wn. App. 718, *Rummer v. Throop*, 38 Wn.2d 624, 633, 231 P.2d 313 (1951), *Sloan v. Thompson*, 128 Wn. App. 776, 115 P.3d 1009 (2005), and *Douglas v. Visser*, 173 Wn. App. 823, 295 P.3d 800 (2013)—none of which supports Appellant’s position.

a. *Bloor* is factually distinguishable and inapposite. Appellant brandishes *Bloor* as authority that a “broker cannot remain silent . . . any time that a known material defect is publicly available somewhere.” Appellant’s Opening Br. at 16. In *Bloor*, the broker in question represented both buyer and seller in a residential purchase and sale. Buyer sued the broker after learning that the purchased home used to be a meth lab. After being sued, the broker did not argue as a defense that the information was readily ascertainable, instead, he argued that he didn’t know. Accordingly, *Bloor* is factually distinguishable and inapposite.

b. *Rummer* and its progeny are factually distinguishable and inapposite. By citing the venerable *Rummer*,

Appellant not only conflates a broker's alleged omission with a *seller's* affirmative representation but also ignores subsequent case history that shows *Rummer's* inapplicability here. There, Washington's Supreme Court addressed the purchase and sale of a farm between unsophisticated vendor and vendee 45 years before RCW 18.86 was enacted. Soon after it issued its opinion in *Rummer*, Washington's Supreme Court took the opportunity to distinguish it: "Appellant cites . . . *Rummer* . . . , as authority for his contention that he was justified in relying on certain alleged representations[.] . . . The present case is quite different. Here we have two experienced hotel owners and operators dealing at arm's length." *Corbett v. Ticktin*, 43 Wn.2d 248, 254-55, 260 P.2d 895 (1953).

In its opening brief, Appellant adds *Westby v. Gorsuch*, 112 Wn. App. 558, 50 P.3d 284 (2002), to its *Rummer* string cite. Appellant's Opening Br. at 19. Even though *Westby* is a fairly recent opinion, its facts are so remote from this matter that it should be given no weight. There, *Westby* sold a Titanic survivor's "inspection card" to an antique dealer who resold the same for a large profit. *Westby* is even less compelling than Appellant's other authorities because no real property was at issue. And again, Appellant cites to an opinion addressing the asymmetry of power in sale transactions—an asymmetry that was not present in the purchase and sale at issue in this appeal. Where, as here, the parties

to a commercial transaction are sophisticated and each represented by an experienced broker—or two—*Rummer* and its progeny are inapplicable.

c. *Sloan* is factually distinguishable and inapposite. Appellant cites to *Sloan* for support of its argument that knowledge of unrelated, separate issues does not impose a duty of further inquiry on a buyer. If Sound Transit's potential interest in the Property was unrelated to its other encumbrances on or near the Property, then *Sloan* might have something to say in this appeal. However, when the issues are distinct only as a matter of degree, the rule in *Sloan* does not apply. *Douglas v. Visser*, 173 Wn. App. 823, 831, 295 P.3d 800 (2013). Here, Sound Transit's potential interest in the Property, and its ability to impact Buyer's use of the same, was manifest in its other encumbrances on or near the Property, and just as in *Douglas*, Appellant was on notice of same. Appellant knew or should have known that Sound Transit had several encumbrances on the Property. Those encumbrances are not separate and distinct from Sound Transit's interest in the Property—as in *Sloan*—rather, a matter of magnitude, as in *Douglas*. Accordingly, Appellant's invocation of *Sloan* is unpersuasive.

Appellant purchased commercial real estate, and by doing so, took upon itself diligence and feasibility duties. Appellant had additional incentive to perform a thorough investigation of Sound Transit's potential interest in the Property because it had pre-

purchase knowledge of Sound Transit's presence on and near the Property and encumbrances on title. Division I's *WGW* opinion, while unpublished, affirms what RCW 18.86 makes explicit: a broker is under no duty to disclose readily ascertainable information. Sound Transit's expansion plans, among other things, are made public through its website and community outreach efforts, and are thus readily ascertainable. Because Appellant had knowledge of Sound Transit's potential interest in, and ability to impact its use of the Property prior to Closing, Appellant had reason to investigate—which may make accessing readily ascertainable information even easier. Appellant failed to produce any evidence to the Trial Court showing that Sound Transit's potential interest in the Property was *not* readily ascertainable—a necessary precondition to establishing its claims against Johnson. Accordingly, this Court should affirm the trial court's judgment dismissing Appellant's negligent misrepresentation and failure to disclose claims.

C. Sound Transit's Potential Interest in the Property Did Not Constitute Pending or Threatened Condemnation, Was Not Material to the Transaction, and Johnson Was Duty-Bound to Seller Not to Disclose Same

Appellant argues, in the face of evidence on record, that Johnson knew that Sound Transit would condemn the Property and because such fact was material, Johnson had a duty to disclose it. The record, which includes a declaration from Sound Transit, shows

that Sound Transit took no pre-Closing affirmative step to acquire or condemn the Property and the necessary preconditions to doing so had not even begun.

Appellant's argument that Sound Transit's potential interest was material is equally unavailing. Under RCW 18.86.010(9), to be material, information must either (1) "substantially adversely affect[] the value of the" Property, (2) "a party's ability to perform its obligations," or (3) "materially impair or defeat the purpose of the transaction." Sound Transit's potential interest in the Property does not meet the statute's definition of material. First, as evidenced by the net gain Appellant realized from selling the Property to Sound Transit, Sound Transit's potential pre-Closing interest in the Property did not adversely affect the Property's value. Second, Sound Transit's potential pre-Closing interest in the Property did not substantially adversely affect any party's ability to perform under the PSA. After all, seller was able to deliver good title and buyer, in turn, took good title to the Property. Third, Appellant never disclosed the purpose of the purchase and sale, and as such, it would have been impossible for Johnson to know what, if any, information would materially impair or defeat same. (CP at 397.) Accordingly, even if this Court were to hold Sound Transit's potential interest in the Property not to be readily ascertainable, such potential interest should not be considered material.

Furthermore, under the same statute that Appellant builds its case upon, Johnson owed Seller the duties of loyalty and confidentiality. RCW 18.86.040(1)(a) (“by taking no action that is adverse or detrimental to seller’s interest”) and .040(1)(d) (“Not to disclose any confidential information from . . . the seller[.]”). This point not only drives home the inconsistency in Appellant’s argument—that Johnson owed duties to both Seller and purchaser—but also shows that Johnson had sound legal reasons not to divulge information Seller explicitly asked Johnson not to disclose.

Because there was no threatened or pending condemnation, because Sound Transit’s potential interest in the Property was not material, and because Johnson was duty-bound not to disclose Seller’s confidential information, this Court should affirm the trial court’s judgment for Johnson.

D. Timothy Johnson Committed No Tort

Appellant argues that Timothy Johnson is liable for his own torts committed against it. Specifically, Timothy Johnson “directly failed to disclose his communications with Sound Transit, as well as the fact that the Property was under threat of condemnation by Sound Transit.” Appellant’s Opening Br. at 25. This passage from Appellant’s Opening Brief is illustrative of Appellant’s case generally: mischaracterize a supposition as fact, use assumptions as building blocks, and repeat. First, Appellant assumes that Timothy Johnson committed a tort when the record has no evidence of any;

second, Appellant states in conclusory fashion that the Property was under threat of condemnation when the record establishes that it was not; third, Appellant alleges with no foundation that Timothy Johnson's communications with Sound Transit was information Timothy Johnson was required to disclose; and fourth, none of the case law cited by Appellant supports its position.

Appellant regurgitates the rule in Washington that a limited liability company's individual members may be personally liable for their own torts. Appellant then fails to tie any fact in the record to the elements required to establish a tort under Washington law. While Appellant notes that Timothy Johnson failed to disclose material facts, there is no evidence that Timothy Johnson failed to disclose any material fact. Similarly, Appellant states that Timothy Johnson committed unfair or deceptive acts, but there is no evidence that Timothy Johnson did so. The missing link in Appellant's argument: even if what Appellant stated as facts were true, Appellant fails to show how such acts and omissions were Timothy Johnson's and not TJCP's.

Appellant's cited authorities are factually distinguishable and should be given little weight, if any, in this appeal. In *Chadwick Farms Owners Association v. FHC LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009) (en banc), the court addressed consolidated appeals regarding dissolved limited liability companies and their capacity to be sued and to sue after dissolution, and whether such limited

liability companies' individual members could be sued in their personal capacities. There, the narrow issue regarding personal liability was whether individual members could be sued personally for their actions in winding up the affairs of the limited liability company during the period between dissolution and the cancellation of the certificate of formation. But here, TJCP remains active and in good standing. There is no issue of whether Timothy Johnson mismanaged the winding up of any limited liability company. *Chadwick Farms* is factually distinguishable and its legal conclusions inapposite to the instant facts.

Grayson v. Nordic Construction Co., 92 Wn.2d 548, 599 P.2d 1271 (1979), involved Consumer Protection Act and breach of contract claims against the corporate officer of Nordic Construction, Inc., a Washington corporation. The trial court found that Nordic's officer participated in wrongful conduct, which included advertising to the public that financing was available for Nordic's projects, when the opposite was true. By contrast, Timothy Johnson did not send a flier to Appellant stating that if Appellant purchased the Property, financing would be available, nor did any TJCP advertisements express that the building was appropriate for any specific purpose. Appellant argues that Timothy Johnson failed to disclose material information, and under *Grayson*, should be liable for his own failure. In reality, Timothy Johnson did not know what information would be material to Appellant and any alleged omission involved

information that was readily ascertainable. Therefore, *Grayson* is factually distinguishable and inapplicable here.

The record establishes that Timothy Johnson committed no tort. At trial, Appellant failed to meet its burden and it cannot meet its burden now on appeal.

E. Neither TJCP nor Timothy Johnson Violated the Consumer Protection Act

Appellant maintains that Johnson violated Washington's Consumer Protection Act.⁷ On appeal, Appellant argues that Johnson (1) committed deceptive acts or practice, and (2) impacted the public by doing so. Appellant's Opening Br. at 26. Moreover, Appellant mischaracterizes Johnson's position as to Appellant's CPA claim—Johnson not only contests whether or not deceptive acts or practices were committed and the alleged public impact of same, but also whether Appellant suffered an injury in fact for which Johnson was the proximate cause.

1. Johnson Committed No Unfair or Deceptive Act or Practice. To satisfy the CPA's first element, Appellant must establish that Johnson committed an act or practice that has the capacity to deceive a substantial portion of the public. A knowing

⁷ To prevail on its CPA claim, Appellant must establish that (1) Johnson engaged in an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacted the public interest, (4) it suffered injury in its business or property, and (5) a causal link exists between the unfair or deceptive act and the injury suffered. See *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Causation is a question of fact. *Deegan v. Windermere Real Estate*, 197 Wn. App. 875, 885, 391 P.3d 582 (Div. I 2017).

failure to reveal something of material importance may be deceptive under the CPA. *Deegan*, 197 Wn. App. at 885. But even given the CPA's liberal construction, the undisputed facts show that Johnson committed no act that had the capacity to deceive a substantial portion of the public. Appellant notes that "Washington courts have repeatedly recognized a duty to disclose material facts in real estate transactions and imposed CPA liability in cases of failure." Appellant's Opening Br. at 27 (citing *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 215, 969 P.2d 486 (1998); *McRae v. Bolstad*, 101 Wn.2d 166, 676 P.2d 496 (1984); and *Bloor*, 143 Wn. App. at 735-36). Johnson, Appellant argues, committed unfair or deceptive acts when presenting Appellant with Seller's representation that there was no pending or threatened condemnation affecting the Property. Appellant asserts that Timothy Johnson knew what he was doing was unfair because he called Seller's principal to discuss disclosing Sound Transit's potential interest. Finally, Appellant attempts to negate Johnson's duties of loyalty and confidentiality to Seller by relying on RCW 18.86.030, which by its own terms imposes no duty to disclose readily ascertainable information. None of these arguments—based upon mischaracterizations and assumptions—establishes that the trial court committed error when holding that Johnson committed no unfair or deceptive act or practice.

Significantly, Appellant has failed and continues to fail to show any threatened or pending condemnation at Closing. Even if the opposite were true, Johnson's alleged acts or omissions were not capable of deceiving the public.

Although Appellant is quick to draw the conclusion that Johnson committed a deceptive act by presenting Seller's boilerplate representations (on Appellant's broker's purchase and sale template no less) to Appellant, there is no explanation as to why Seller's representation in the PSA becomes Johnson's representation. Note that in *Svendson*, a case in which Washington's Supreme Court held a broker to be liable under the CPA, the unfair act at issue was seller's agent's advising seller not to reveal in the seller's residential disclosure form that flooding issues plagued the sale property. *Svendson*, 143 Wn.2d at 550-52. Here, the reverse is true: Seller requested that Johnson not discuss Sound Transit's potential interest in the Property.

Timothy Johnson, to be sure, called Burrows to discuss what information Johnson should make available to Appellant. It's easy for Appellant to cite to these communications and characterize them *ex post* as proof of Johnson's awareness that Johnson was committing unfair acts, but such communications establish, if anything, Johnson's commitment both to Seller and a broker's duties to its principal under RCW 18.86.040. After all, it would be inconceivable that a seller and its agent would not discuss what

information to present and withhold from potential purchasers. And because the information Seller asked Johnson not to disclose was readily ascertainable, Johnson committed no unfair act or practice by obeying a statutory duty to his principal.

Finally, Appellant cites to *Griffith*, 93 Wn. App. at 215, *McRae*, 101 Wn.2d 166, and *Bloor*, 143 Wn. App. at 735-36 for support of its argument that CPA liability should be imposed on Johnson for a failure to disclose material facts in a real estate transaction; however, these opinions do not support such a position. In *Griffith*, home purchasers brought a class-action suit against the builder-vendor; in *McRae*, home purchasers sued sellers for alleged CPA violations; and in *Bloor*, home purchasers sued the broker who represented both seller and themselves alleging CPA violations. Each of these cases involve purchasers of residential property and in the aggregate highlight the purpose of the CPA: to protect Washington consumers. Here, Appellant and its broker agents are sophisticated and pursuant to Appellant's own positive representation in the PSA, capable and obligated to conduct their own due diligence.

Appellant was not purchasing a home from Seller and was not part of the consumer class that the CPA was enacted to protect. Appellant should not be permitted to use the CPA as a sword when (i) it suffered no damage, (ii) failed to conduct its own due diligence,

(iii) and failed to discover readily ascertainable information due to its own diligence failures.

2. The Alleged Acts or Omissions Had No Public Interest Impact. Appellant argues that the CPA's public interest factor has been satisfied because the parties occupied unequal bargaining positions due to Johnson's alleged failure to disclose material information.⁸ Appellant cites to *Svensden* for support: "Under the circumstances, it cannot be said that the parties occupied equal bargaining positions." *Svensden*, 143 Wn.2d at 559. Appellant concludes without detail that the "circumstances" in *Svensden* are the circumstances here, and on that basis, Johnson's alleged acts and omissions had a public interest impact.

As discussed, above, in *Svensden* (a) the purchase and sale of residential property; and (b) the broker facing CPA liability explicitly advised seller not to disclose the home's persistent flooding problems. Those are not the circumstances here. Given the CPA's purpose and liberal construction to protect Washington consumers, the *Svensden* court concluded that seller and buyer did not occupy equal bargaining positions. By contrast, here we have a *commercial* transaction in which the parties and their brokers were sophisticated. The CPA should not be used by sophisticated parties

⁸ The thrust of the public impact inquiry: what is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion as Plaintiff that changes a factual pattern from a private dispute to one that affects the public interest. *Evergreen Moneysource Mortg. Co. v. Shannon*, 167 Wn. App. 242, 274 P.3d 375 (2012).

in commercial real estate transactions to shift risk inherent in their investment.

Johnson did not violate the CPA. Appellant presents no evidence establishing the opposite. Any potential purchaser of commercial property would be under a duty to conduct its own diligence, should be represented by its own broker and/or agent, and thus, should be expected to maintain an equal bargaining position. Because any potential purchaser of the Property should conduct its own diligence and employ its own real estate broker/agent, Johnson did nothing that could have deceived a substantial portion of the public and Johnson is entitled to judgment as a matter of law on Appellant's CPA claim.

F. Appellant Should Not Recover Any Costs of Suit, Including Legal Fees

With nothing more than a single sentence, Appellant requests its attorneys' fees, costs, and expenses incurred in this appeal. Appellant's Opening Br. at 33. As a threshold matter, Appellant appeals entry of a summary judgment dismissing its CPA claim, along with all of its other claims; however, Appellant did not cross move for summary judgment. On this appeal, Appellant seeks no more than reversal of the summary judgment order entered in Johnson's favor. Accordingly, Appellant's best hope (and relief requested) from this appeal is to have the matter remanded at trial. Importantly, the CPA only authorizes attorneys' fees to a party that

actually prevails on their CPA claim. RCW 19.86.090. No authority supports an attorneys' fee award to a party that merely obtains reversal of a summary judgment so as to retain an un-litigated claim and the right to a trial. The trial court's summary judgment should not be reversed. But even if it were, the reversal would not give rise to an attorney fee award.

Moreover, Appellant must argue why it is entitled to fees under RAP 18.1. *E.g., In re Marriage of Foley*, 84 Wn. App. 839, 847, 930 P.2d 929 (Div. III 1997). Presumably, Appellant's cite to RCW 19.86.090 is meant to indicate that Appellant bases its request on the CPA's provision of reasonable attorneys' fees to a person who is injured by a CPA violation. Nevertheless, Appellant fails to make such request explicit. The Court should deny Appellant's present and future requests for fees and expenses.

V. CONCLUSION

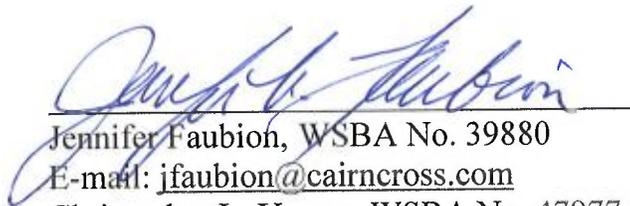
Sound Transit's potential interest in the Property was widely disseminated to the public and could have been found quickly and easily by Appellant and its brokers. Moreover, Appellant had *actual and constructive knowledge* of Sound Transit's presence on or near the Property and its encumbrances on title, giving Appellant notice and reason to look at and consider this readily ascertainable information. It was because the information was available in the public domain that Seller directed Johnson not to disclose Sound Transit's potential interest. Under the circumstances, Johnson had

no duty to disclose the readily ascertainable information and he appropriately complied with his statutory duties of loyalty and confidentiality owed to his client.

Again, as the trial court noted, Appellant may have a claim against its own broker/agents for not doing their job but Appellant's claims against Johnson fail as a matter of law. The trial court's dismissal of claims against Johnson and TJCP should be affirmed.

DATED this 29th day of January, 2018.

CAIRNCROSS & HEMPELMANN, P.S.



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Proof of Service

I, Gail J. Glosser, hereby certify that on January 29, 2018, I caused the following to be filed electronically with the Clerk of the Court using the CM/ECF system:

Appellee's Opening Brief

As a result of filing these document(s) with the Clerk of the Court using the CM/ECF system, electronic notification of such filing was sent to the following recipients:

Bryan C. Graff
Ryan, Swanson & Cleveland, PLLC
1201 Third Avenue, Ste. 3400
Seattle, WA 98101-3034
graff@ryanlaw.com
Attorneys for Appellant
AVH & BJ HOLDINGS 2, LLC

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

DATED this 29th day of January, 2018, at Seattle,
Washington.



Gail J. Glosser Legal Assistant
CAIRNCROSS & HEMPELMANN, P.S.
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Appendix A

**Deposition Selection of Sharon Joseph,
30(b)6 Deponent of AVH & BJ Holdings
CP 757 - 63**

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

AVH & BJ HOLDINGS 2, LLC, a)
Washington limited liability)
corporation,)
Plaintiff,)
vs.) No. 16-2-07620-9
LACLARE INVESTMENTS, LLC, a)
Washington limited liability)
corporation; TIMOTHY JOHNSON)
COMMERCIAL PROPERTIES, a)
Washington limited liability)
corporation; TIMOTHY N. JOHNSON)
and JANE DOE JOHNSON, husband)
and wife and the marital)
community,)
Defendants.)

30(B)(6) DEPOSITION UPON ORAL EXAMINATION

OF

AVH & BJ HOLDINGS 2, LLC

SHARON JOSEPH

9:00 a.m.

June 1, 2017

1201 Third Avenue, Suite 3400
Seattle, Washington

CARRIE L. PUMNEA, RPR, CCR #2130
CARRIE REPORTING, LLC

16212 Bothell-Everett Highway, Suite F-328
Mill Creek, Washington 98012
206.940.6746
carriereportingllc@outlook.com

16212 Bothell-Everett Highway, Suite F-328, Mill Creek, Washington 98012

1 A. And I know after the fact that we lost -- when
2 we were losing the building, Kobi, my business partner,
3 went to tour, because we were actively looking for
4 space, as I said, and he did the tour with Billy. So I
5 guess he's -- you know, he knows the Tacoma area. That
6 was mentioned once by Tamir, I think, but... The point
7 of contact for us from the beginning was Tamir.

8 Q. So it was mentioned by Tamir as, "Billy is
9 involved here because he knows Tacoma"?

10 A. I think. You know, again, it's been a long
11 time, but I don't want to answer something that could
12 not be a hundred percent that I am sure. But I think
13 it had come up once, yeah.

14 Q. Okay. If somebody holds themselves out as a
15 specialist in a particular region, what expectation
16 would you have of them in terms of staying informed on
17 what's going on in that region?

18 MR. GRAFF: Object to form.

19 A. I expect them to know the value. I expect
20 them to answer a question when I ask in regard of
21 property that's specific to the area. What I'm
22 expecting, usually, when I'm working with a broker and
23 ask a question, it's about, "What do you think would be
24 the rent value, the value of the building, what do you
25 think the chance of increase in value," things like

1 that. Because for the matter of if the building is
2 good for me, I would like to personally go take a look
3 and decide the building and then use the professional
4 to help execute a transaction. That's why we're not in
5 house using no owner/buy or something. We use
6 professionals. We looked at Tamir as a professional
7 from our point of view, and that's what we did to
8 secure the transaction.

9 Q. You used a professional broker because you
10 didn't have the expertise in house to handle the
11 commercial real estate transaction?

12 A. That's -- first of all, that's one side of it;
13 second, because I'm not taking my car or van to the
14 moving company doing this because I believe that
15 everybody should do his own part. I'm not representing
16 myself in court because lawyers can do that better than
17 I. They have the expertise. I don't have the time to
18 deal with that. I would expect them to, you know,
19 present for me the paper for me for review and consult
20 me and I sign.

21 Q. Okay. Would you expect a broker with
22 specialized regional knowledge to read the local paper?

23 A. No.

24 Q. Why not?

25 A. I don't read the paper; I don't expect anybody

1 to read the paper.

2 Q. What about watch the local news?

3 A. I don't watch the local news; I don't expect
4 anybody to watch the local news.

5 Q. How about read articles about what's happening
6 in the region online?

7 A. I would be very disappointed if I know that's
8 what my broker does. I think you shouldn't have time
9 searching the market and sit in front of the internet
10 and searching and reading articles. I expect people
11 like me, be hardworking people, you know.

12 So I woke up one day, and across the street
13 from my house, a Redmond building, elementary school.
14 I did not know about it, but it's okay. I'm a working
15 man. I'm not reading the news or watch the news. I'm
16 following in a broad area what's going on. When I do
17 research, I research for my building, my area, what I
18 need for me and what I expect my broker to do. So...

19 Q. I hear what you're saying about what you do.

20 I guess my question is, since you -- you've
21 said you hired a broker to assist in this transaction
22 because they're a professional; is that right?

23 A. Correct.

24 Q. Would you expect more from them?

25 MR. GRAFF: Object to form.

1 A. Expect for them to know more than I do in the
2 form of make sure the transaction is correct, yes;
3 expect for them to know more knowledge than I do of
4 what's going on in the region, I don't.

5 Q. You don't? Even if they hold themselves out
6 as a specialist in a particular region?

7 MR. GRAFF: Same objection.

8 A. Especially in a region, which means they know
9 the value, they know what's the good area, they know
10 what's -- you know, where to look for a building or I
11 tell them what I need they can identify the
12 neighborhood for me, not for them to watch the news. I
13 mean, that's my personal opinion, you know.

14 Q. Okay. So would you be surprised to hear that
15 Billy Moultrie in his deposition admitted that he
16 didn't regularly read local news publications or stay
17 informed about what was going on in the region?

18 MR. GRAFF: Object to form.

19 A. What's the question again?

20 Q. Would you be surprised to hear that Billy in
21 his deposition admitted that he did not regularly
22 review local newspapers or publications or generally
23 stay informed about what was going on in Pierce County?

24 MR. GRAFF: Same objection.

25 A. First of all, I'm happy to hear that, because

1 I want to hear more divest themselves from reading the
2 news, okay? Personally.

3 Q. Okay.

4 A. It's not surprising me because I'm not -- I'm
5 not reading any newspaper. Period. I'm not watching
6 the news as well.

7 Q. So would you expect a Pierce County specialist
8 in real estate to know about a major expansion of Sound
9 Transit in Pierce County?

10 MR. GRAFF: Object to form.

11 A. Not necessarily.

12 Q. Can you explain?

13 A. Well, as I said, and I gave the example of a
14 school next to my house, it's not relevant to his daily
15 basis or worry, you know. It's not going to be a first
16 priority for him to read and note and to be involved if
17 there was any public meeting or anything about it, but
18 it's not. Like you might see the sign of use plan
19 action to something, but you're not going to pay
20 attention to it because it's not something that you're
21 worried about like daily basis stuff.

22 For example, people drive around and see my
23 truck on a daily basis only after they learn of me or
24 know my company they say, "We see your truck every
25 single day, we never noticed." They get the same way.

1 Q. But for somebody like a commercial real estate
2 broker whose business it is presumably to know about
3 things that could affect rates, market, sale prices,
4 condemnation, wouldn't it be important for them to know
5 about a major transit expansion in their region?

6 MR. GRAFF: Object to form.

7 A. But major, if it's transit train or whatever,
8 first of all, project come and go. We've got the
9 monorail here in Seattle, good example for you, I won't
10 bother looking at this project until they're actually
11 done. But you can hear about the project happening,
12 not supposed to assume or know that it's going on a
13 location and you trust the people that you do business
14 with in a fair market that if you project the
15 information in front of them and say, "Do you know any
16 anything about it," and they say, "No," you know, on a
17 signed paper, which is a legal paper, you don't do more
18 investigation than that, you know. You're busy
19 working. That's the way I see it.

20 MS. FAUBION: Can you read the question
21 back?

22 Q. I appreciate everything you said, but I want
23 to remind myself of what the question I asked was and
24 see if I can get a more direct answer.

25 A. Sure.

Appendix B

**Declaration of Allison Gregg, Sound Transit
CP 410 - 414**

June 05 2017 8:30 AM

KEVIN STOCK
COUNTY CLERK
NO: 16-2-07620-9

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

AVH & BJ HOLDINGS 2, LLC, a Washington
limited liability corporation,

Plaintiff,

v.

LACLARE INVESTMENTS, LLC a Washington
Limited Liability Corporation; TIMOTHY
JOHNSON COMMERCIAL PROPERTIES, a
Washington limited liability corporation;
TIMOTHY N. JOHNSON and JANE DOE
JOHNSON, husband and wife and their marital
community,

Defendants.

NO. 16-2-07620-9

DECLARATION OF ALLISON GREGG

ASSIGNED TO THE HONORABLE
KATHERYN NELSON

ALLISON GREGG makes the following declaration.

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

1. I am a Community Outreach Corridor Supervisor employed with the Central
Puget Sound Regional Transit Authority, also known as Sound Transit. I am over the age
of 18, otherwise competent to testify and I make this declaration on personal knowledge.

DECLARATION OF ALLISON GREGG - 1 of 5
(16-2-07620-9)
[4833-5525-3065]

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

1 3. Sound Transit is a regional transit authority created for the Central Puget
2 Sound region, and is authorized by Washington statute to construct and operate a high
3 capacity transportation system within the authority boundaries.

4 4. On November 5, 1996 and November 4, 2008, voters approved local
5 funding to implement a regional high-capacity system for the Central Puget Sound region
6 often referred to as ST2 or Sound Move. I have conducted community outreach and
7 communications on behalf of Sound Transit for multiple ST2 projects, including the Point
8 Defiance Bypass, Sounder Maintenance Base, Sounder Yard Expansion, Tacoma Link
9 Expansion and Tacoma Trestle projects.
10

11 5. ST2 included funding for a partnership to explore options for expanding the
12 Tacoma Link light rail that serves six stations between the Theater District and the
13 Tacoma Dome Station. The Tacoma Link Expansion project arose from that exploration.
14 This expansion project extends the existing Tacoma Link rail 2.4 miles from the Theater
15 District in downtown Tacoma to the Hilltop neighborhood in the City of Tacoma. It includes
16 six new stations, relocates the Theater District Station and expands the existing
17 Operations and Maintenance Facility ("OMF"). In the capacity of my work related to the
18 Tacoma Link Expansion, I am familiar with the real property located at 824 E. 25th Street
19 that was ultimately acquired by Sound Transit for the OMF expansion.
20

21 6. Sound Transit selected the 824 E. 25th Street property for the OMF
22 expansion on November 19, 2015, when the Sound Transit Board voted to adopt
23 Resolution No. 2015-22. A copy of Resolution 2015-22, along with the associated Staff
24 Report is attached to this declaration as Exhibit A. On January 28, 2016, the Sound
25 Transit Board adopted Resolution 2016-02 entitled:
26

1 A RESOLUTION: of the Board of Central Puget Sound Regional Transit
2 Authority authorizing the chief executive officer to acquire
3 or lease certain real property interests, including
4 acquisition by condemnation and to reimburse eligible
5 relocation and reestablishment expenses incurred by
6 affected owners and tenants as necessary for the Tacoma
7 Link Expansion.

8 Resolution 2016-02 authorized Sound Transit to acquire by condemnation 824 E. 25th
9 Street property (also identified as Pierce County Tax Parcel No. 2075320013). At the time
10 Resolution 2016-02 was adopted, the property was owned by AVH & BJ Holdings 2, LLC.
11 A copy of Resolution 2016-02, along with the associated Staff Report is attached to this
12 declaration as Exhibit B.

13 7. Prior to the adoption of Resolutions 2015-22 and 2016-02 Sound Transit
14 engaged in substantial public outreach to inform the public about the options Sound
15 Transit was considering for the Tacoma Link Expansion, including the OMF expansion.
16 Our objective was to inform the general public and include the public in Sound Transit's
17 planning process. For the Tacoma Link Expansion, this public outreach included
18 publication of information and notices on Sound Transit's website and in newspapers,
19 press releases, mass postcard mailing, mass emailing, notifications on list serves for
20 professional and community organizations, multiple community meetings, and
21 participation in fairs and festivals. The public information Sound Transit provided
22 included maps depicting proposed locations and alternatives for the expansion project.
23 The Tacoma Link Expansion also received ongoing news coverage throughout Sound
24 Transit's planning process, including coverage by the Tacoma News Tribune and local
25 television and radio news casts. A description of some of Sound Transit's public outreach
26 efforts for the Tacoma Link Expansion is included in the attached staff reports for
 Resolutions 2015-22 and 2016-12.

DECLARATION OF ALLISON GREGG - 3 of 5
(16-2-07620-9)
[4833-5525-3065]

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TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

1 8. Though Sound Transit engages in considerable public communication
2 about expansion plans and site options and alternatives under consideration, Sound
3 Transit representatives are not authorized to and are careful not to offer to purchase or
4 make any commitment that Sound Transit will purchase any particular property, nor are
5 they authorized to discuss terms of a potential purchase until after the Sound Transit
6 Board passes a Resolution authorizing acquisition.
7

8 9. It is not uncommon for the public information to generate inquiries from
9 realtors and property owners about potential site-specific plans. If members of the public
10 make inquiries about the potential for site acquisition, Sound Transit will provide
11 information about upcoming processes and milestones, such as environmental review,
12 project funding or the Board review process. But in the absence of an acquisition
13 Resolution, it is uncertain that Sound Transit will acquire a particular property. Consistent
14 with Sound Transit's policy and practice, I am very careful not to make commitments
15 regarding purchase or engage in negotiations to purchase a property until the authorizing
16 Resolution is passed. When the Sound Transit Board is ready to consider an acquisition
17 authorizing Resolution, Sound Transit sends by certified mail a letter to the property
18 owner to inform the owner that the Board will consider acquisition of his property.
19

20 10. Again, the Resolution authorizing Sound Transit to acquire 824 E. 25th
21 Street (Resolution 2016-02) was adopted on January 28, 2016. Prior to adopting the
22 Resolution Sound Transit sent by certified mail a letter to the property owner, AVH & BJ
23 Holdings 2, LLC, to notify in advance that the Board would consider the property for
24 acquisition. A copy of the certified letter dated January 13, 2016 sent to AVH & BJ
25 Holdings 2, LLC is attached to this declaration as Exhibit C.
26

Appendix C

**Deposition Selection of Timothy Johnson
CP @ 82 - 83**

1 **different.**

2 Q While we're in this exhibit, will you turn with me to
3 Page 10. And Paragraph 8 on Page 10. It states:
4 "Defendant Johnson justifiably relied on statements made
5 by others that publicly-known information need not be
6 disclosed to plaintiff."

7 Who made any statements to you to that effect?

8 MS. ARCHER: What paragraph is that?

9 MR. GRAFF: Paragraph 8.

10 A **Seller. Rick.**

11 Q (By Mr. Graff) Mr. Burrows?

12 A **Yes.**

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

15 A **He said because the property was -- and the Sound Transit
16 issue was in the public and readily understood and
17 marketed, that we didn't have to tell the buyer's broker
18 that Sound Transit had showed some interest in the
19 property or any other potential buyer that came before.**

20 Q When? When did he tell you that?

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

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

Byers & Anderson Court Reporters/Video/Videoconferencing
Seattle/Tacoma, Washington

1 A Yes.

2 Q Who initiated that conversation?

3 A I did.

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

5 A On the phone.

6 Q Were you instructed not to provide the information to
7 Mr. Moultrie or the ultimate buyer?

8 A Yes.

9 Q Was that part of the reason you didn't provide any
10 documents relating to the Sound Transit issue to the
11 buyer?

12 A No.

13 Q Why didn't you provide any documents related to the Sound
14 Transit issue to the buyer?

15 A There were no documents to provide. There was no offer,
16 there was no letter of intent, there was no...

17 Q There were emails in your possession concerning Sound
18 Transit's interest in acquiring the --

19 A We had a lot of emails -- sorry.

20 (Court reporter clarification.)

21 Q (By Mr. Graff) -- property going back and forth
22 concerning Sound Transit acquiring the property?

23 A Yes.

24 Q Why not provide those?

25 A It would not be appropriate to give a list of all the

Appendix D

Moon v. Barr
192 Wash.App. 1004

197 Wash.App. 1004

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

Noel Moon, a single woman, Plaintiff,
Derald Hauck, a single man, Appellant,
v.

William Barr and Diana Barr, husband and
wife and their marital community; Jeanine
Burns and John Doe Burns, wife and husband
and their marital community; and Soleil
Real Estate of Spokane, LLC., a Washington
limited liability corporation, Respondents.

No. 33614-0-III

FILED DECEMBER 6, 2016

Appeal from Spokane Superior Court, Docket No: 14-2-02397-3, Annette S. Plese, Judge.

Attorneys and Law Firms

Christopher Michael Hogue, Hogue Law Firm, Alan Lynn McNeil, Attorney at Law, Spokane, WA, for Appellant.

Robert Ray Rowley, Attorney at Law, Spokane, WA, Erin J. Varriano, Blue Marble Energy Corporation, Seattle, WA, for Respondent.

UNPUBLISHED OPINION

Lawrence-Berrey, A.C.J.

*1 House purchaser Derald Hauck appeals the summary judgment dismissal of his claims against house sellers William Barr and Diana Barr, their real estate agent daughter Jeanine Burns, and her employer Soleil Real Estate of Spokane LLC (Soleil). The claims arose after Mr. Hauck's daughter, Noel Moon, discovered old animal feces and urine under newly installed carpet.

Circumstantial evidence supports Mr. Hauck's claim that Mr. Barr knew of and fraudulently concealed the animal

feces and urine. Circumstantial evidence also supports Mr. Hauck's claim that Ms. Burns knew of and failed to disclose the concealed problem. Further, a question of fact is presented as to whether Mr. Hauck, through his daughter, made sufficient inquiry about the animal smell before he purchased the house.

We conclude the trial court erred when it summarily dismissed Mr. Hauck's fraudulent concealment and Consumer Protection Act (CPA), chapter 19.86 RCW, claims against the defendants. But we conclude the trial court did not err when it summarily dismissed Mr. Hauck's breach of contract claim against the Barrs and his negligent misrepresentation claims against the defendants. We therefore reverse in part and affirm in part.

FACTS

Because the trial court dismissed this case on summary judgment, we present the facts and all reasonable inferences in the light most favorable to Mr. Hauck, the nonmoving party.

In 1996, the Barrs bought the subject house. The Barrs rented the house to one set of tenants from 1996 to around 2010. Neighbors of the renters said the renters had pets, and for several years allowed their pets to urinate and defecate throughout the house. One of the neighbors said she would wear a different pair of shoes when she visited the renters so she would not track animal urine or feces back into her own house. She said her feet would actually sink in the floor due to the amount of urine and feces.

Mr. Barr visited the house once or twice a year when the renters needed repairs. He was concerned about the condition of the house, and asked the renters to clean the place up. He claims he never saw or smelled any animal feces or urine in the house.

After the renters moved out in 2010, Mr. Barr went into the house and determined it was a mess. There were holes in the wall, tears in the vinyl, and the carpets needed to be replaced. Mr. Barr did a lot of the work himself. He bought new carpet and hired carpet layers. He was in and out of the house after the layers removed the old carpet and padding and before they installed the new carpet.

Mr. Barr's daughter, Ms. Burns, was a real estate agent for Soleil. Mr. Barr asked her to sell the house. Ms. Burns did not help prepare the house for sale. When deposed, she said she went into the house only once while it was under repair. She noticed tarps on the floor. She was inside for about two minutes, handed her father his lunch, and left. The next time she saw the house it was "picture ready," and she took pictures of it to list. Clerk's Papers (CP) at 397. She claims she never noticed any animal smells in the house.

*2 Ms. Burns listed the house in January 2012. The house was on the market for about 12 months. During this time, Ms. Burns held two open houses for brokers only. During one of the two open houses, one broker and one lender told her "they could smell animal." CP at 402. The house was shown about 20 times to potential purchasers.

Mr. Hauck became interested in buying the house for his daughter, Ms. Moon, who lived in Montana. Ms. Moon wanted to move to Spokane so her disabled daughter could be closer to health care facilities in Spokane. Ms. Moon, not her dad, communicated with her dad's real estate agent and with Ms. Burns. This was because the house was intended for her use, her dad's hearing was poor, and her dad had poor telephone reception where he lived.

On October 9, 2012, Mr. Hauck entered into a purchase and sale agreement to purchase the property. The purchase and sale agreement listed Ms. Burns as the listing agent, and Soleil as the listing broker. The agreement also contained an inspection addendum, which conditioned the agreement "on Buyer's subjective satisfaction with inspections of the Property" CP at 240.

On October 18, 2012, Mr. Hauck had the property inspected. The property inspection report noted "[a] **very strong pet urine smell ... in the home.** This smell may be difficult to remove." CP at 23. Another comment noted that cats had accessed the crawl space under the home and used the dirt floor as a litter box. As the sellers' agent, Ms. Burns never received a copy of the home inspection report.

A few days after the inspection, Ms. Moon discussed the entire inspection report with the inspector for over an hour. Among other concerns, Ms. Moon was concerned about the urine smell because she never smelled it. The inspector told her he had a sensitive nose to dogs and cats.

The inspector said the smell could be from cats using the crawl space as a litter box. The inspector also said the smell could be on the painted walls or trapped in the carpet itself from pets previously in the home.

Ms. Moon and the inspector discussed the costs to remove the smell if the smell was in the carpet. The inspector suggested Ms. Moon find out the type and quality of wood that was under the carpet so she could have an idea of what it would cost to refinish the floor if she decided to remove the carpet.

Ms. Moon telephoned Ms. Burns to discuss the inspection report. Ms. Moon discussed the urine smell the inspector noticed, and recapped the discussions she had with the inspector. Ms. Burns claimed she did not notice a urine smell and had not seen any pet stains. Ms. Moon said she was considering removing all of the carpet or repainting the walls. Ms. Moon asked during this call, and later in a different conversation, what kind of wood was under the carpet. In the later conversation, Ms. Burns said the Barrs did not remember.

Neither Mr. Hauck nor his daughter ever spoke with the Barrs prior to the sale of the house. Almost all discussions were between Ms. Moon and Ms. Burns. This was because Ms. Burns "made it clear that she was the only source of communication to her clients." CP at 427.

On November 5, 2012, Ms. Moon called Ms. Burns and explained she had switched lenders and needed a new purchase and sale agreement. On November 10, 2012, the parties entered into a second agreement. Mr. Hauck's agent asked Mr. Hauck to waive the inspection for purposes of the second agreement. Mr. Hauck signed the waiver, agreeing that

*3 Buyer has been advised to obtain a building ... inspection, and to condition the closing of this Agreement on the results of such inspections, but Buyer elects to waive the right and buy the Property in its present condition. Buyer acknowledges that the decision to waive Buyer's inspection options was based on Buyer's personal inspection and Buyer has not relied

on representations by Seller, Listing Broker or Selling Broker.

CP at 75.

This second agreement included a seller disclosure statement. In that statement, the Barrs did not disclose the existence of animal feces and urine under the new carpet. They verified, other than those defects disclosed, there were no “other existing material defects affecting the property that a prospective buyer should know about.” CP at 81. The disclosure statement further provided:

- A. Buyer has a duty to pay diligent attention to any material defects that are known to Buyer or can be known to Buyer by utilizing diligent attention and observation.
- B. The disclosures set forth in this statement and in any amendments to this statement are made only by the Seller and not by any real estate licensee or other party.
- C. Buyer acknowledges that, pursuant to RCW 64.06.050(2), real estate licensees are not liable for inaccurate information provided by Seller, except to the extent that the real estate licensees know of such inaccurate information.

CP at 81.

Ms. Moon visited the house at least two times before closing. Each time, she noticed air fresheners in the house. Mr. Hauck and the Barrs signed closing documents in mid-December 2012.

Before moving into the house, Ms. Moon told Ms. Burns she was going to rent a shampooer to clean the carpets. Ms. Burns said that would not be necessary because the carpets were brand new. Ms. Burns later told Ms. Moon she had been in the house prior to it being cleaned and described the house as “‘trashed.’” CP at 426.

In January 2013, Ms. Moon and Mr. Hauck obtained the keys from Ms. Burns and went through the house with her. Ms. Moon noticed multiple air fresheners inside the home. She described them as “overpowering” and said they “burned [her] nasal passages.” CP at 428. Ms. Burns even sprayed air freshener as they walked through the house. Ms. Burns told Ms. Moon she always sprayed houses that had been sitting closed. Before leaving that day, Ms. Moon turned on the heat.

Ms. Moon next went into the house in February 2013. The heating of the house caused the animal smell to be very noticeable. She determined the smell did not emanate from under the house. Ms. Moon then pulled up the new carpets and saw old animal feces and urine.

Mr. Hauck and Ms. Moon filed suit against the Barrs, Ms. Burns, and Soleil. They asserted fraudulent concealment, negligent misrepresentation, and CPA claims against all defendants. Mr. Hauck also asserted breach of the purchase and sale agreement against the Barrs.

After discovery, the defendants moved for summary judgment. The trial court granted the motion. As to Ms. Moon, the trial court determined she did not have legal or equitable standing because she was never a party to the purchase and sale agreement. As to Mr. Hauck, the trial court determined he failed to make a reasonable inquiry of the sellers concerning the animal smell made known to him by the inspection report.

Only Mr. Hauck appeals.

ANALYSIS

This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 547, 374 P.3d 121 (2016). Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). A material fact is one the outcome of the litigation depends on. *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004). This court views all facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. *Kim*, 185 Wn.2d at 547. Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Id.*

*4 When reviewing a civil case in which the standard of proof is clear, cogent, and convincing evidence, this court “‘must view the evidence presented through the prism of the substantive evidentiary burden.’” *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008)

(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)); see also *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 973, 948 P.2d 1264 (1997). The burden of proof for negligent misrepresentation and fraudulent concealment claims is clear, cogent, and convincing evidence. *Borish v. Russell*, 155 Wn. App. 892, 905 n.7, 230 P.3d 646 (2010); *Stieneke v. Russi*, 145 Wn. App. 544, 561, 190 P.3d 60 (2008). Thus, this court must determine whether, viewing the evidence in the light most favorable to Mr. Hauck, a rational trier of fact could find that he supported his fraudulent concealment and negligent misrepresentation claims with clear, cogent, and convincing evidence. See *Woody*, 146 Wn. App. at 22.

A. FRAUDULENT CONCEALMENT

Mr. Hauck argues the trial court erred in dismissing his fraudulent concealment claim. A buyer of residential property bringing a claim for fraudulent concealment must establish (1) the residential dwelling has a concealed defect; (2) the seller has knowledge of the defect; (3) the defect is dangerous to the purchaser's property, health, or life; (4) the defect is unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser. *Alejandre v. Bull*, 159 Wn.2d 674, 689, 153 P.3d 864 (2007).

1. Concealed defect

Here, Ms. Moon found pet feces and urine under the new carpet. The pet feces and urine were thus concealed.

2. Sellers' and Ms. Burns's knowledge

Mr. Barr was inside the house during and after the time the old carpet and pad were removed and the new carpet was installed. Construing the facts and all reasonable inferences in the light most favorable to Mr. Hauck, a rational trier of fact could find by clear and convincing evidence that Mr. Barr knew that pet feces and urine were under the new carpet. Mr. Barr might have known this in one of at least three ways. First, he may have seen the carpet installers lay the carpet over the floor without the floors being first adequately cleaned. Second, he may have seen the condition of the floors and known that the numerous years of pet urine and feces required the

floorboards to be removed and replaced to adequately remedy the condition. Third, he may have smelled the odor after the new carpet was installed and have known the source of the smell was animal feces and urine still under the new carpet. Although Mr. Barr denies he ever smelled animal feces or urine, this is a fact peculiarly within his knowledge, and cross-examination should be allowed so a jury can determine the credibility of his denial. See *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 661–62, 240 P.3d 162 (2010); *Riley v. Andres*, 107 Wn. App. 391, 395, 27 P.3d 618 (2001).

Ms. Burns and Soleil argue they have no liability because Ms. Burns had no knowledge of the animal feces and urine under the carpet. We agree there is no direct evidence that Ms. Burns knew of the animal feces and urine. But we disagree that there is no circumstantial evidence. Circumstantial evidence may support a finding of direct knowledge. *Waite v. Whatcom County*, 54 Wn. App. 682, 687, 775 P.2d 967 (1989).

Construing the evidence and all reasonable inferences in the light most favorable to Mr. Hauck: (1) Ms. Burns described the house as “trashed,” evidencing that she saw it early, before her father had new carpet installed; (2) the years of excessive animal feces and urine throughout the house would have produced a discernable smell, giving her knowledge that pets had defecated and urinated on the floors and the old carpet; and (3) as evidenced by her consistent and heavy use of air fresheners, she knew the floorboards were not sufficiently cleaned prior to installation of the new carpet.

*5 Ms. Burns, similar to her father, denies ever smelling animal feces and urine. But a trier of fact is not required to believe Ms. Burns, who may have seen and smelled the house when it was in a trashed condition. Courts are reluctant to grant summary judgment when material facts are particularly within the knowledge of the moving party. *Arnold*, 157 Wn. App. at 661–62; *Riley*, 107 Wn. App. at 395. Here, there is circumstantial evidence Ms. Burns knew the floorboards were not adequately cleaned of animal feces and urine prior to being concealed by the new carpet. Although she disputes this knowledge, a trier of fact should have the opportunity to consider her denial under cross-examination to determine whether it believes her denial or the contradictory circumstantial evidence.

3. *Dangerous to purchaser's health*

Mr. Hauck did not purchase the house for his own use—he purchased it for his daughter's use. Ms. Moon made clear to Ms. Burns that she was the intended occupant of the house. The defendants do not assert we should limit this element to Mr. Hauck's health. Because Ms. Burns knew Ms. Moon would be living in the house, we extend our inquiry to whether the defect is dangerous to *Ms. Moon's* health.

Mr. Hauck, through an industrial hygienist, presented evidence that would allow a rational trier of fact to find by clear and convincing evidence that the presence of old animal feces and urine likely cause conditions that would be dangerous to a person's health.

4. *Defect not known to purchaser*

The defect was not the smell. A smell is not dangerous to a person's health. The defect, instead, was the old feces and urine under the carpets. There is no evidence that Mr. Hauck or his daughter knew, before Mr. Hauck purchased the house, that there were old animal feces and urine under the new carpets.

5. *Defect not disclosed by careful, reasonable inspection*

Once a buyer discovers evidence of a defect, the buyer is on notice and has a duty to make further inquiries. *Douglas v. Visser*, 173 Wn. App. 823, 832, 295 P.3d 800 (2013). Here, the home inspector smelled animal feces and urine, and he disclosed this to Ms. Moon. Notice to Ms. Moon was notice to Mr. Hauck.

The evidence is undisputed that Ms. Moon was her father's agent for purposes of purchasing the house. She acted as his agent because the house was intended for her use, her father had difficulty hearing on the telephone, and her father's telephone reception was poor. The law required Mr. Hauck, directly or through his daughter, to make further inquiries about the animal smell.

The question presented here is whether Ms. Moon's discussion with Ms. Burns concerning the inspection report failed, as a matter of law, to fulfill this duty.

Summary judgment is only proper if the question can be answered as a matter of law. To answer this question, we turn to cases that have discussed this duty to inquire.

In *Alejandro*, the home buyers had the septic system pumped before they purchased the house. *Alejandro*, 159 Wn.2d at 679. The septic company employee who pumped the tank noted on the bill that he was unable to inspect the back baffle, and added there was “ ‘[n]o obvious malfunction of the system at time of work done.’ ” *Id.* (alteration in original). After the purchase, the drainfield failed. *Id.* at 680. The failure was due to the back baffle missing, thus allowing sludge to enter the drainfield. *Id.* The buyers brought suit, alleging negligent misrepresentation and fraudulent concealment. *Id.* The trial court granted the seller's motion to dismiss at the end of the buyers' case. *Id.* The Supreme Court affirmed the dismissal of the buyers' fraudulent concealment claim. *Id.* at 691. The Supreme Court noted that trial testimony established an inspection of the back baffle would have been simple, and a careful examination would have led to discovery of the missing baffle. *Id.* at 690. *Alejandro* thus requires a house purchaser to make a reasonable inspection.

*6 In *Dalarna*, an apartment building had chronic water leaks. *Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 210, 752 P.2d 1353 (1988). Because of these leaks, the owner decided to sell the building. *Id.* at 211. The seller had several conversations with the buyer, but never discussed defects or maintenance problems. *Id.* The buyer had the building inspected. *Id.* The inspection revealed stains, cracked plaster, and loose tiles. *Id.* The report stated, “ ‘These leaks are not serious but should be controlled by additional caulking outside and repainting and/or replastering inside.’ ” *Id.* The buyer purchased the building without making any further inquiries. *Id.* at 212.

After spending \$ 118,000 attempting to fix the leaks, the buyer sued for constructive fraud, alleging that the seller failed to disclose “ ‘substantial, chronic, and unresolved water leakage problems.’ ” *Id.* The buyer agreed that it discovered evidence of water leaks, but argued the true defect was the extreme, chronic nature of the leaks. *Id.* at 214. The buyer characterized the extent of the problem as a separate defect. *Id.* The *Dalarna* court held that when “an actual inspection demonstrates some evidence of water penetration, the buyer must make inquiries of the seller.” *Id.* at 215. The court reasoned that the buyer knew there

was a defect, but did not inquire about the defect or establish that inquiries would have been fruitless. *Id.* The court further reasoned that the extent of the damage itself was not a separate defect, and it was no defense that the defect was worse than the buyer anticipated. *Id.* at 214–15. *Dalarna* thus requires a buyer with notice of a defect to make some inquiry of the seller concerning the defect.

In *Douglas*, the buyers learned through their home inspector of an area of wood rot and decay near the roof line. *Douglas*, 173 Wn. App. at 826. The home buyers failed to make any inquiries of the seller concerning possible wood rot. *Id.* After the purchase, the buyers learned that the wood rot was much more extensive. *Id.* at 827. The trial court heard the evidence and entered a verdict in favor of the buyers. *Id.* at 829. In reversing the trial court, we noted:

The Douglasses ... were on notice of the defect and had a duty to make further inquiries. The Douglasses argue that “they had no idea that 50 to 70% of the sill plate and rim joist were destroyed” and that the area of rot that [their inspector] discovered was not unusual. That, however, is the precise argument we rejected in *Dalarna*. Once [buyers] discover[] evidence of a defect, they are on notice and have a duty to make further inquiries. They cannot succeed when the extent of the defect is greater than anticipated, even when it is magnitudes greater.

Id. at 832. *Douglas* thus requires a buyer with notice of a defect to make some inquiry of the seller concerning the defect.

This case is dissimilar to *Dalarna* and *Douglas*. There, the buyers discovered evidence of defects and failed to make any inquiry. Here, Ms. Moon discussed with Ms. Burns the urine smell the inspector noticed and recapped the discussions she had with the inspector. Because Ms. Burns was the Barrs' agent, and did not permit Mr. Hauck or Ms. Moon to talk directly with them, inquiries made to her were inquiries made to the Barrs.

The defendants imply that Ms. Moon was required to pointedly ask Ms. Burns to disclose the location of the smell. But the defendants cite no case that requires such an inquiry. Rather, the law requires the buyer to make further inquiry concerning what he or she knows. Here, Ms. Moon learned that there was an animal smell emanating from somewhere. She discussed what she knew with Ms.

Burns. By discussing what she knew with Ms. Burns, Ms. Burns was required to disclose her knowledge of the defect if she knew, or to discuss Ms. Moon's comments with Mr. Barr so he could disclose his knowledge of the defect. It is the seller's knowledge that a buyer is unaware of a concealed material defect that gives rise to the seller's duty to speak. *Alejandre*, 159 Wn.2d at 689.

*7 This case is also dissimilar to *Alejandre*. There, the buyers did not conduct a careful, reasonable inspection. Here, Mr. Hauck hired a professional inspector. Even the professional inspector failed to find animal feces and urine under the carpet. Whether a careful, reasonable inspection requires a potential buyer to pull up newly installed carpet to look for animal feces and urine is questionable, and surely cannot be answered as a matter of law *against* the buyer. Here, a rational trier of fact could find by clear and convincing evidence that Mr. Hauck, through Ms. Moon, conducted a careful and reasonable inspection.

B. NEGLIGENT MISREPRESENTATION CLAIM AGAINST MS. BURNS AND SOLEIL

Mr. Hauck argues the trial court erred when it dismissed his negligent misrepresentation claim against Ms. Burns and Soleil.¹ More particularly, he argues Ms. Burns failed to uphold her statutory duties under RCW 18.86.030(1) and chapter 64.06 RCW.

RCW 18.86.030(1) defines duties owed by a real estate broker. A common law tort cause of action is the vehicle through which a real estate buyer may recover damages against an agent or a broker. *Jackowski v. Borchelt*, 174 Wn.2d 720, 735, 278 P.3d 1100 (2012). RCW 18.86.030(1) clarifies that the broker's duties are owed “to all parties to whom the broker renders real estate brokerage services.” Here, neither Ms. Burns nor Soleil rendered real estate brokerage services to Mr. Hauck. Mr. Hauck hired his own real estate agent. Thus, RCW 18.86.030(1) does not support Mr. Hauck's cause of action against Ms. Burns or Soleil.

Chapter 64.06 RCW sets forth various required seller disclosures pertaining to different types of real estate sales. That chapter also provides buyers with limited rights and remedies. But because Mr. Hauck did not argue to the trial court that Ms. Burns and Soleil were liable to him under chapter 64.06 RCW, we do not consider his new argument on appeal. *See* RAP 2.5(a).

We conclude the trial court did not err when it dismissed Mr. Hauck's negligent misrepresentations claims against Ms. Burns and Soleil.

C. CPA CLAIMS

Mr. Hauck argues the trial court erred when it dismissed his CPA claim against the Barrs, Ms. Burns, and Soleil. "A violation of the [CPA] exists when there is (1) an unfair or deceptive act or practice (2) occurring in trade or commerce (3) with a public interest impact (4) that proximately causes (5) injury to a plaintiff in his or her business or property." *Douglas*, 173 Wn. App. at 834.

1. CPA liability against the Barrs

The Barrs argue Mr. Hauck cannot establish there was an unfair or deceptive act or practice. We disagree. We must consider the evidence and all reasonable inferences most favorably to Mr. Hauck. Construing the evidence in this manner, Mr. Barr knew the floorboards were badly damaged by animal feces and urine and concealed the damage with new carpets.

The Barrs appear to argue, alternatively, that nothing they did caused Mr. Hauck's harm. They argue Mr. Hauck's failure to inquire and failure to do a careful, reasonable inspection were the causes of Mr. Hauck's damages. But as we discussed previously, such arguments raise genuine issues of material fact best left to the trier of fact.²

2. CPA liability against Ms. Burns and Soleil

a. Unfair or deceptive act or practice

*8 Ms. Burns and Soleil first argue they did not commit any unfair or deceptive act or practice because Ms. Burns had no independent knowledge of the animal feces and urine under the carpet. We have already addressed this argument and have determined that a trier of fact could find she gained such knowledge when she first visited the house and was later aware of the unabated smell. Again, a trier of fact should weigh her denial under cross-examination.

b. Public interest

Ms. Burns and Soleil next argue the public interest element of Mr. Hauck's CPA claim is not met. We disagree.

In *Svensden v. Stock*, 143 Wn.2d 546, 23 P.3d 455 (2001), a real estate agent assisting the seller of residential property had actual knowledge that the property flooded whenever a nearby storm drain became clogged with debris during heavy rains. *Id.* at 552. The real estate agent's knowledge arose independently of her assisting the seller completing the seller disclosure statement. *Id.* When the seller and agent discussed how to complete the disclosure statement, the agent advised the seller not to disclose the problem because the cause—debris in the storm drain—had been (temporarily) fixed. *Id.* at 551. The agent added, there was no obligation to disclose a history of flooding because it "is not happening right now." *Id.* The seller therefore did not disclose the flooding problem. *Id.* After closing, the buyers suffered substantial property damage as a result of water flowing on their property when the nearby storm drain became clogged. *Id.*

A jury returned a verdict in favor of the buyers and against the real estate agent and her employer for fraudulent concealment and violation of the CPA. *Id.* at 552. The jury apportioned 95 percent of the fault to the real estate agent and her employer, and the other 5 percent of fault to the seller. *Id.* We partially affirmed, determining that substantial evidence supported fraudulent concealment. *Id.* We reversed the CPA claim. *Id.* In reversing, we noted that RCW 64.06.060's language explicitly stated "the practices covered by this chapter are not matters vitally affecting the public interest for the purpose of applying the [CPA]." *Id.* at 553–54 (quoting RCW 64.06.060).

The *Svensden* court granted the buyer's petition for review and reversed our dismissal of the CPA claim. *Id.* at 552, 560. In reversing, the *Svensden* court noted three things. First, RCW 64.06.070 did not extinguish a buyer's common law or statutory cause of action. *Id.* at 556. Second, Washington courts had, prior to the enactment of chapter 64.06 RCW, repeatedly held that real estate agents are subject to CPA liability for not disclosing known material defects. *Id.* And third, the real estate agent was liable under the CPA because she had knowledge of the flooding problem independent of her assisting the seller in completing the disclosure statement. *Id.* at 557.

In analyzing the public interest requirement of a CPA claim, the *Svendsen* court noted the four factors that a trier of fact must weigh:

- (1) [W]hether 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, indicating other potential solicitation of others;
- and (4) whether the parties occupied unequal bargaining positions.

Id. at 559. The court explained that none of the four factors are dispositive nor is it necessary that all four factors be present. *Id.* The court noted that the real estate agent's concealment was within the course of her business, and her employer advertised to the public, but there was no unequal bargaining position. *Id.* The *Svendsen* court held that such evidence was sufficient to establish the public interest requirement of the CPA. *Id.*

*9 We similarly hold that the facts presented by Mr. Hauck are sufficient to satisfy the public interest requirement of his CPA claim. Construing the evidence and all reasonable inferences in his favor, Ms. Burns's concealment was within the course of her business, and Soleil advertised the property to the public when it listed the property for sale. Such solicitation resulted in at least 20 potential purchasers, including Mr. Hauck, learning of the property. We conclude the trial court erred in summarily dismissing Mr. Hauck's CPA claim against Ms. Burns and Soleil.

D. BREACH OF CONTRACT CLAIM

Mr. Hauck argues he has shown a genuine issue of material fact as to each of his other claims, and therefore his breach of contract claim survives. He fails to explain what contract clause the Barrs supposedly breached. We will not consider such a vague argument on appeal. *See* RAP 10.3(a)(6) (requiring arguments to contain citations to legal authority and references to relevant parts of the record); *Marin v. King County*, 194 Wn. App. 795, 820, 378 P.3d 203 (2016) (finding that appellant's argument was too vague to permit review).

E. ATTORNEY FEES AND COSTS ON APPEAL

The Barrs request attorney fees on appeal pursuant to a provision in the purchase and sale agreement. The provision provides, "if Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys' fees and expenses." CP at 54. The prevailing party in a contract action shall receive attorney fees and costs when the contract authorizes such an award. RCW 4.84.330. Subject to their compliance with RAP 18.1(d), the Barrs are awarded their reasonable attorney fees. However, the only basis for a fee award is successfully defending against Mr. Hauck's breach of contract claim. For this reason, their fee award is limited to those fees reasonably necessary in defeating the contract claim. *See Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 672, 880 P.2d 988 (1994).

Ms. Burns and Soleil request attorney fees "pursuant to RAP 18.1 and 18.9." Br. of Resp'ts Soleil Real Estate and Burns at 47. They fail to provide any argument in support of their fee request. We therefore deny their request. *See* RAP 18.1(b); *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9 (2012) (single sentence requesting attorney fees, without argument or citation to authority, fails to comply with mandatory requirements of RAP 18.1(b)).

Mr. Hauck requests reasonable attorney fees pursuant to the purchase and sale agreement. We affirm the dismissal of his contract claim. We therefore deny his request.

Because each party partially prevailed on appeal, we determine no party is entitled to an award of statutory costs on appeal.

CONCLUSION

The trial court erred when it summarily dismissed Mr. Hauck's fraudulent concealment and CPA claims against the defendants. The trial court correctly summarily dismissed Mr. Hauck's breach of contract claim against the Barrs and his negligent misrepresentation claim against the defendants. We therefore reverse in part and affirm in part.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

All Citations

Korsmo, J.

Not Reported in P.3d, 197 Wash.App. 1004, 2016 WL 7106371

Footnotes

- 1 Mr. Hauck impliedly concedes the trial court correctly applied the economic loss rule when it dismissed his negligent misrepresentation claim against the Barrs. His concession is correct. See *Alejandre*, 159 Wn.2d at 689.
- 2 The Barrs, both at summary judgment and on appeal, challenged Mr. Hauck's CPA claim only on the basis that he could not establish an unfair or deceptive act or practice. Although we reverse the dismissal of Mr. Hauck's CPA claim against the Barrs, the reversal is limited to the sole issue raised by the Barrs.

Appendix E

WGW USA, Inc. v. Legacy Bellevue 530, LLC
193 Wash.App 1002

192 Wash.App. 1002

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

WGW USA, INC., a Washington
Corporation, Appellant,

v.

LEGACY BELLEVUE 530, LLC, a Washington
Limited Liability Company, Respondent.
Legacy Bellevue 530, LLC, a Washington
Limited Liability Company, Respondent,

v.

Tian Qing Guo, individually and the
marital community of Tian Qing
Guo and Jane Doe Guo, Appellants.

No. 72939-0-I.

|
Dec. 28, 2015.

Appeal from King County Superior Court; Honorable
William L. Downing, J.

Attorneys and Law Firms

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UNPUBLISHED OPINION

TRICKEY, J.

*1 To succeed on a claim for negligent misrepresentation, based on a broker's failure to disclose material information, the complaining party must provide some evidence that the information was not readily ascertainable. Here, given that a commercial tenant had actual knowledge of a light rail expansion close to the property, the undisclosed facts about Sound Transit's

plans were readily ascertainable. Therefore, the tenant is not entitled to rescind a lease based on alleged negligent misrepresentation. We affirm.

FACTS

William Nelson began working for Legacy Commercial, LLC in 2007. Legacy Commercial is the parent company of Legacy Bellevue 530, LLC (Legacy). Legacy owns the property at 530 112th Avenue N.E., in downtown Bellevue, Washington (the Property). Nelson's responsibilities included property management.

For years, Sound Transit and the city of Bellevue have been working together on the East Link Project, which will bring the link light rail, a commuter rail service, through Bellevue. In December 2008, Sound Transit published a draft Environmental Impact Statement (EIS) that identified a number of possible routes and included the Property as a "potentially affected parcel []."¹ The EIS did not specify the likelihood of acquiring any particular parcel, or whether Sound Transit was contemplating a "partial" or "full" acquisition of any specific parcel.²

Sound Transit released its final EIS in July 2011. Sound Transit chose C9T (110th N.E. Tunnel Alternative) as the "preferred alternative" route at that time. That route planned to have the light rail cross the Interstate 405 overpass at the intersection of N.E. 6th Street and 112th Avenue N.E. The light rail would cross at the north side of the intersection; the Property is on the south side. The final EIS also included the Property as a "potentially affected parcel[]."³ It still did not specify whether there would be full or partial acquisitions of specific properties. Later that year, the city of Bellevue and Sound Transit signed a "Memorandum of Understanding," agreeing to route C9T.⁴ All of these documents were available to the public online at Sound Transit's web site.

Nelson was aware of these developments. He attended at least one Sound Transit open house on the subject. He believed that there was not a real threat of Sound Transit needing to acquire the Property because the light rail path was always depicted as crossing the north side of the street and because it would have been very expensive for Sound Transit to acquire all the properties listed as "potential property acquisition[s]."⁵

During the fall of 2012, WGW USA, Inc. expressed interest in leasing the Property for a new restaurant. Tian Qing Guo is the president and sole shareholder of WGW USA, Inc. (WGW). WGW hired real estate broker, Maci Lam, to help with the negotiations. Nelson negotiated on behalf of Legacy.

Nelson notified WGW that Sound Transit intended to build a station two blocks away from the Property. Nelson suggested that the light rail would increase foot traffic, which would be good for business. Nelson did not mention the possibility of Sound Transit acquiring the Property.

*2 Neither Guo nor Lam asked Nelson anything about the possibility of Sound Transit needing to condemn part or all of the Property. Nor did they conduct any independent research on the proposed light rail project.

Representatives from WGW and Legacy signed a 10-year lease in September 2012. The lease commenced on October 1, 2012. Guo personally guaranteed the lease.

In March 2013, Sound Transit contacted Legacy to inform it that an alternative plan for the light rail had been proposed. The new plan relocated the track to the south side of the N.E. 6th Street overpass. The Bellevue City Council approved Sound Transit's new plan in late April 2013. Because the track would run on the south side of N.E. 6th Street, Sound Transit would have to put at least one support column on the Property and, at least temporarily, condemn all or most of the Property's parking lot by the second quarter of 2017.

By this time it was clear that WGW's restaurant was not doing well. Guo decided to "cut [his] losses" and attempted to sell the business in April 2013.⁶ WGW's business broker contacted Nelson in mid-May to discuss the property. Nelson informed the broker of Sound Transit's interest in the property. Because of the potential condemnation, prospective purchasers lost interest in the restaurant. The broker concluded that the business was not marketable. WGW then hired attorneys who discovered the history of Sound Transit's designation of the Property as a "potentially affected parcel []."⁷

WGW failed to make its rent payment for June 2013. WGW notified Legacy that it was seeking rescission of the lease on June 18, 2013. Guo claimed he would never have

entered into the lease if he had known about the Property's designation as a "potentially affected parcel []."⁸ On June 20, 2013, Legacy served WGW with a "Three Day Notice to Pay or Vacate."⁹ WGW abandoned the Property. Legacy, offering better terms (specifically a lower security deposit and lower rent), leased the Property to XO Café, Inc.

WGW filed an action against Legacy for rescission of the lease based on Legacy's alleged fraudulent or negligent misrepresentation. Legacy cross-claimed against WGW for breach of the lease and against Guo for breach of his personal guaranty. The parties filed cross-motions for summary judgment. The court ruled in favor of Legacy on all motions. WGW and Guo timely appeal.

ANALYSIS

Evidentiary Ruling

WGW argues that several passages in Bruce Kahn's declaration, which it relied on in the summary judgment hearing and again in its brief on appeal, are admissible as expert opinions. We disagree.

The trial court granted Legacy's motion to strike portions of Bruce Kahn's declaration because some of his opinions were "improper legal conclusions" and "opinions based on speculation rather than evidence."¹⁰ We conclude that the trial court properly excluded this evidence.¹¹

Expert opinions are admissible if (1) the witness is "properly qualified," (2) the witness "relies on generally accepted theories," and (3) the witness's "testimony is helpful to the trier of fact." *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004); ER 702. An expert may testify as to matters of law, but experts may not testify as to conclusions of law. *Hyatt v. Sellen Const. Co., Inc.*, 40 Wn.App. 893, 899, 700 P.2d 1164 (1985); *Everett v. Diamond*, 30 Wn.App. 787, 791, 638 P.2d 605 (1981). Opinion testimony is improper when it explains what legal duties apply and whether parties have fulfilled them. *Hyatt*, 40 Wn.App. at 899; *Everett*, 30 Wn. App. at 792. Expert testimony is also improper if its only basis is theoretical speculation. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 103, 882 P.2d 703 (1994).

*3 We review a trial court's evidentiary rulings made in conjunction with a summary judgment motion de novo. *Ross v. Bennett*, 148 Wn.App. 40, 45, 203 P.3d 383 (2008).

Here, Kahn is a licensed broker with 15 years of experience. WGW and Guo assert that the following testimony from Kahn's declaration and supplement declaration are admissible:

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 residential transactions, 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. [12]

When the transaction is a purchase, one can reasonably expect the prospective buyer to diligently investigate the property for possible problems, and almost always, there are contingencies to allow 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. [13]

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." [14]

These passages attempt to define the scope of a broker's legal duty to disclose information, a tenant's duty to investigate, and the legal significance of stock language in a lease. This is improper expert opinion testimony about legal matters. Additionally, this testimony is speculative. Kahn speculates about a tenant's interests and what a tenant and landlord meant by certain contractual

language. Because this testimony contains improper legal conclusions and opinions based on speculation, we exclude it as inadmissible.

Summary Judgment

WGW argues that the trial court improperly granted summary judgment in favor of Legacy on the breach of contract, breach of personal guaranty, and rescission claims. We disagree.

Summary judgment is appropriate when the moving party "show[s] that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." CR 56(c). We must "interpret all the facts and inferences therefrom in favor" of the nonmoving party. *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014).

*4 We review summary judgment rulings de novo. *Lyons*, 181 Wn.2d at 783. We engage in the same inquiry as the trial court. *Lyons*, 181 Wn.2d at 783.

Rescission

WGW seeks to rescind its lease with Legacy on the grounds of "negligent and/or fraudulent misrepresentation."¹⁵ Legacy contends that WGW cannot maintain an action for rescission because WGW is in default of the lease.

A tenant in default may maintain an action for rescission if it clearly establishes such facts as would excuse performance. *Eberhart v. Lind*, 173 Wash. 316, 319, 23 P.2d 17 (1933). Negligent misrepresentation provides an excuse for nonperformance and grounds for rescission. *Bloor v. Fritz*, 143 Wn.App. 718, 738, 180 P.3d 805 (2008). Therefore, if WGW is able to sustain its negligent or fraudulent misrepresentation claims, its default would not prevent it from pursuing rescission.¹⁶ We consider those claims next.

WGW argues that Nelson negligently misrepresented facts material to the lease negotiations by failing to disclose them. In general, Nelson did not disclose that Sound Transit had designated the Property as one that it might

need to acquire and that all of these plans would not be final for another couple years. We disagree that it was negligent misrepresentation not to disclose this information.

Failure to disclose material information may constitute misrepresentation of that information. A claim of negligent misrepresentation may rest on an omission by one party when that party has a duty to disclose information. *Alexander v. Sanford*, 181 Wn.App. 135, 177, 325 P.3d 341 (2014), *review granted*, 181 Wn.2d 1022, 339 P.3d 634 (2014), *dismissed*, No. 90642-4 (Wash. May 8, 2015). Failure to disclose that information is treated as if the party “had represented the nonexistence of the matter that [it] has failed to disclose.” *Richland Sch. Dist. v. Mabton Sch. Dist.*, 111 Wn.App. 377, 385, 45 P.3d 580 (2002) (quoting Restatement (Second) of Torts § 551 (1977)). Some statutes create such a duty. *Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 732, 853 P.2d 913 (1993).

Licensed real estate brokers have several mandatory disclosure requirements. Under RCW 18.86.030(1), a “broker owes to all parties to whom the broker renders real estate brokerage services the following duties: ... (d) [t]o disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party.”

Here, Nelson was performing “real estate brokerage services,” because he was negotiating a lease of real property. RCW 18.85.011(2), (16)(b), (17), .331; RCW 18.86.010(11).¹⁷ Nelson did not disclose the following information that WGW alleges is material:

- (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. [18]

*5 As noted above, Nelson did not have a duty to disclose information that was readily ascertainable. Thus,

we must consider whether this information was readily ascertainable.

The statute does not define “readily ascertainable.” We may use a standard dictionary to determine the phrase's plain meaning. *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001). “Readily” means “with fairly quick efficiency: without needless loss of time: reasonably fast” or “with a fair degree of ease: without much difficulty: with facility.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1889 (2002). *Webster's Dictionary* defines “ascertain” as to “find out or learn for a certainty (as by examination or investigation): make sure of: discover.” Webster's at 126. Therefore, information is readily ascertainable to a party if the party could discover it quickly or easily.

Facts are ascertainable if they are publically available. Legacy provided undisputed evidence that all this information was a matter of public record. Therefore, we hold that there is no genuine dispute that the undisclosed information was ascertainable. The question is whether the information was *readily* ascertainable.

WGW offers several reasons for its failure to investigate Sound Transit's potential impact on the Property. These arguments seem to be acknowledgements that WGW could have found the information, but that it was not *readily* ascertainable.

WGW claims that it would have been “extremely difficult” for Guo or Lam to discover Sound Transit's designation of the Property as a potentially affected parcel. It relies on Legacy's characterization of the information as a “needle in a haystack in thousands upon thousands of pages on Sound Transit's website.”¹⁹ But, WGW did not introduce any evidence of the difficulty in independently discovering the undisclosed information over the Internet or with some other method of inquiry. As the plaintiff, it is WGW's burden to produce *some* evidence that the information was not readily ascertainable. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

WGW also contends that the information was not readily ascertainable because there was no reason to investigate. While the statute does not require a reason to investigate, having a reason to investigate a particular subject makes that investigation easier and faster. Therefore, a party's

knowledge, or lack of knowledge, about a subject may impact whether material facts are readily ascertainable.

The two cases WGW cites provide limited support for this interpretation of “readily.” The first, *Bloor*, involved a negligent misrepresentation claim based on a broker's failure to disclose material information under RCW 18.86.030. 143 Wn.App. 718, 733, 180 P.3d 805 (2008). There, the undisclosed information was published in a news article. *Bloor*, 143 Wn.App. at 726. The plaintiffs were able to discover the house's history of drug manufacturing once they heard rumors that the house was known as a “drug house.” *Bloor*, 143 Wn.App. at 726. Thus, the information was likely ascertainable before the plaintiffs purchased the house. But, because the defendant argued solely that he did not know about the defect, the court did not address whether the undisclosed information was readily ascertainable. *Bloor*, 143 Wn.App. at 733.

*6 The second case, *Sorrell v. Young*, analyzes a similar situation, in which the seller of a lot was required to disclose defects that were not “apparent or readily ascertainable.” 6 Wn.App. 220, 225–27, 491 P.2d 1312 (1971). There, the plaintiff did not realize that the lot he was purchasing had fill. *Sorrell*, 6 Wn.App. at 221. The defect was not apparent and the plaintiff did not make any inquiries about the existence of fill. *Sorrell*, 6 Wn.App. at 221. WGW argues that the reason the existence of the fill was not readily ascertainable, even though it could have been discovered by a soil inspection, was that the plaintiffs had no reason to inspect the soil. The court did not say anything to this effect in the opinion. Still, it held that the plaintiff provided sufficient evidence that the existence of fill was not “apparent or readily ascertainable” without discussing how difficult it would have been for the plaintiff to discover the fill before purchasing the property. *Sorrell*, 6 Wn.App. at 225–26.

However, WGW's situation is distinguishable from that of the *Bloor* and *Sorrell* plaintiffs, who had no prepurchase knowledge of the defects in their properties. WGW knew about the light rail expansion. Nelson told Lam and Guo that Sound Transit was expanding the light rail and would be constructing a station just blocks away from the Property. Nelson opined that the station would be good for business because it would increase pedestrian traffic.

WGW argues that it did not have a reason to investigate the effects of the Sound Transit expansion because Nelson

always cast the light rail expansion in a positive light. This is not persuasive. It is obvious that the construction of a light rail station in close proximity to a restaurant could have both negative and positive impacts.²⁰ Once WGW knew about the light rail expansion, it had a reason to look into the matter further.

Finally, WGW contends that the potential for condemnation was not readily ascertainable because WGW was relying on Nelson's statutory duty to disclose material facts. WGW's argument is circular because Nelson did not have a statutory duty to disclose the information if it was readily ascertainable. Therefore, WGW must show that the information was *not* readily ascertainable before it relies on Nelson's statutory duty to disclose it.

In short, Legacy's evidence, that WGW knew about the light rail expansion in general, and that the undisclosed information was a matter of public record, supports its position that all the undisclosed information in this case was readily ascertainable. WGW has not introduced evidence that raises a genuine issue of material fact on this issue.

Thus, Nelson did not have a statutory duty to disclose that information, regardless of whether it was material. Accordingly, we need not address whether the undisclosed information was material. Because Nelson did not have a duty to disclose Sound Transit's designation of the Property as potentially affected, the fact that he did not disclose it does not support a claim of negligent misrepresentation.

*7 WGW next argues that Nelson's partial disclosures are tantamount to fraudulent misrepresentation. Because WGW did not properly raise this argument until its reply brief, we do not consider it.

In its opening brief, WGW refers to its claim as “[n]egligent and/or [f]raudulent [m]isrepresentation.”²¹ But WGW does not discuss the elements of fraudulent misrepresentation until its reply brief.²² In its reply brief, WGW raises the argument that Nelson's “half-truths” and opinions amounted to affirmative misrepresentations for the first time.²³ We do not consider arguments raised for the first time in a reply brief. *Axess Int'l Ltd. v. Intercargo Ins. Co.*, 107 Wn.App. 713, 719, 30 P.3d 1 (2001) (“An

issue raised and argued for the first time in a reply brief is raised too late.”).

Finally, WGW bases its misrepresentation claims against Legacy on the failure of Nelson, Legacy's alleged agent, to disclose material information. Legacy asserts that WGW fails to meet its burden of showing an agency relationship, or that Nelson's knowledge is imputed to Legacy. WGW relies on common law principles of agency. It is not clear that WGW properly pleaded Legacy's vicarious liability to the trial court. WGW's complaint was not designated in the clerk's papers.²⁴ Legacy asserts that WGW did not plead vicarious liability or offer any proof that Nelson was an agent of Legacy in that complaint. Because we hold that Nelson did not violate a statutory duty, we do not need to decide whether he was Legacy's agent.²⁵

We affirm the trial court's dismissal of WGW's claim for rescission because the undisclosed information was readily ascertainable.²⁶

Default and Breach of Personal Guaranty

WGW's only response to Legacy's motion for summary judgment on its claims that WGW defaulted on the

lease and that Guo breached his personal guaranty, is that Legacy negligently or fraudulently misrepresented material facts. As discussed above, we affirm the dismissal of those claims against Legacy. Accordingly, WGW and Guo have no defense to Legacy's claims. We affirm the trial court's granting of summary judgment to Legacy on the claims that WGW defaulted on the lease and Guo breached his personal guaranty.

Attorney Fees

WGW argues that it is entitled to fees on appeal. It relies on its lease with Legacy, which contained a clause that allows the prevailing party to collect attorney fees. Because WGW is not the prevailing party, it is not entitled to attorney fees.

We affirm.

WE CONCUR: APPELWICK and BECKER, JJ.

All Citations

Not Reported in P.3d, 192 Wash.App. 1002, 2015 WL 9462096

Footnotes

- 1 Clerk's Papers (CP) at 176–77, 180.
- 2 WGW asserted in its reply brief and during oral argument that there was, at that time, a 50 percent chance that Sound Transit would need to condemn the property. That claim is not supported by the record.
- 3 CP at 184.
- 4 CP at 187–88.
- 5 CP at 252, 255–56.
- 6 CP at 265.
- 7 CP at 180.
- 8 CP at 401–02.
- 9 CP at 48, 75.
- 10 The trial court did not specify which portions it had stricken.
- 11 We exclude, rather than strike, inadmissible materials submitted for consideration with a motion for summary judgment. *Cameron v. Murray*, 151 Wn.App. 646, 658, 214 P.3d 150 (2009).
- 12 CP at 469.
- 13 CP at 361.
- 14 CP at 361.
- 15 Appellants' Br. at 38 (bold face omitted).
- 16 Legacy contends that the threat of condemnation was not a sufficient basis to rescind the contract. *See Lind*, 173 Wash. at 319–20. However, WGW is not alleging that it is entitled to rescission based on the possibility that the Property will be condemned; it is alleging that Legacy misrepresented that possibility.

- 17 CP at 45.
- 18 Appellants' Br. at 32.
- 19 Appellants' Br. at 36.
- 20 WGW also relied on Kahn's declaration in support of its claim that it had a reduced duty to investigate because WGW was a potential lessee, not a purchaser. As discussed above, this portion of Kahn's declaration is inadmissible because it includes improper legal conclusions and opinions based on speculation. WGW has not offered any legal authority for that distinction.
- 21 Appellants' Br. at 38 (boldface omitted).
- 22 Appellants' Br. at 38; Appellants' Reply Br. at 15–25.
- 23 Appellants' Reply Br. at 18–20. In its opening brief, WGW states that the information Nelson provided was misleading and inaccurate, but the claims it makes are based on his “[f]ailure to [d]isclose.” Appellants' Br. at 38–40 (boldface omitted).
- 24 RAP 9.6(b)(1)(C) requires the party seeking review to include the complaint in the clerk's papers. However, we have a sufficient record to decide the case on other grounds.
- 25 Additionally, both parties appear to assume that common laws of agency apply. Neither party addresses the statutory limitations on vicarious liability and imputed knowledge contained in Washington's Real Estate Brokerage Relationships chapter. RCW 18.86 .090, .100. These statutes depart from the common law of agency.
- 26 WGW initially brought its action for rescission based on both a failure of consideration and the negligent or fraudulent misrepresentation claim argued before this court. CP at 142. We do not consider a failure of consideration argument because WGW has not raised it on appeal.

CAIRNCROSS & HEMPELMANN

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