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No. 54272-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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RICHARD NAU,  
Appellant

v.

NANCY K. VOGEL, as Trustee for the Mark O. Vogel Residency  
Trust; and WEST REALTY, INC.

Respondents

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BRIEF OF RESPONDENT WEST REALTY, INC.

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## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii-iii
A. INTRODUCTION.....	1
B. STATEMENT OF THE CASE.....	3
C. ARGUMENT.....	20
1. Summary of Argument.....	20
2. Summary Judgment Authority.....	20
3. Nau’s Negligent Misrepresentation Claim was Properly Dismissed.....	23
4. Nau’s Breach of Statutory Duties Claims Against West Were Properly Dismissed.....	34
D. CONCLUSION.....	42

TABLE OF AUTHORITIES

	<u>Page</u>
<b>Table of Cases</b>	
<i>AVH &amp; BJ Holdings 2, LLC v. Laclare Investments, LLC</i> , No. 51001-4-II, 2019 WL 1049521 (Wn. App Div. II March 5, 2019).....	28, 29
<i>Baldwin v. Sisters of Providence in Washington, Inc.</i> , 112 Wn.2d 127, 769 P.2d 298 (1989).....	22
<i>Borish v. Russell</i> , 155 Wn. App 892, 230 P.3d 646 (2010), <i>review denied</i> , 170 Wn.2d 1024 (2011).....	25
<i>Chamberlain v. Dept. of Transp.</i> , 79 Wn. App. 212, 901 P.2d 344 (1995).....	22, 31
<i>Condor Enterprises, Inc. v. Boise Cascade Corp.</i> , 71 Wn. App. 48, 856 P.2d 713 (1993).....	27, 28
<i>Douglas v. Visser</i> , 173 Wn. App. 823, 295 P.3d 800 (2013).....	26
<i>ESCA Corp v. KPMG Peat Marwick</i> , 135 Wn.2d 820, 959 P.2d 651 (1998).....	24
<i>Gossett v. Farmers Ins. Co. of Wash.</i> , 133 Wn.2d 954, 948 P.2d 1264 ...	21
<i>Havens v. C &amp; D Plastics, Inc.</i> , 124 Wn.2d 158, 876 P.2d 435 (1994)....	25
<i>Hoffman v. Connall</i> , 108 Wn.2d 69, 75, 736 P.2d 242, 246 (1987).....	36
<i>International Broth. of Elec. Workers, Local Union No. 46 v.</i> <i>TRIG Elec. Constr. Co.</i> , 142 Wn.2d 431, 13 P.3d 622 (2000).....	21
<i>Jackowski v. Borschelt</i> , 174 Wn.2d 720, 278 P.3d 1100 (2012).....	37
<i>Johnson v. Brado</i> , 56 Wn. App. 163, 783 P.2d 92 (1990).....	37

<i>Marshall v. AC &amp; S, Inc.</i> , 56 Wn. App. 181, 782 P.2d 1107 (1989) .....	22
<i>Newton Ins. Agency &amp; Brokerage, Inc. v. Caledonian Ins. Group, Inc.</i> , 114 Wn. App. 151, 52 P.3d 30 (2002), review granted, 148 Wn.2d 1021 (2003).....	22
<i>Pacific Northwest Life Insurance Co. v. Turnbull</i> , 51 Wn. App. 692, P.2d 1262 (1988).....	36, 37
<i>Puget Sound Serv. Corp v. Dalarna Mgmt. Corp.</i> , 51 Wn. App. 209, 752 P.2d 1353, review denied, 111 Wn.2d 1007 (1988) .....	27
<i>Reynolds v. Hicks</i> , 134 Wn.2d 491, 495, 951 P.2d 761 (1998) .....	21
<i>Ross v. Kirner</i> , 162 Wn.2d 493, 172 P.3d 701 (2007).....	25
<i>Van Dinter v. Orr</i> , 157 Wn.2d 329, 138 P.3d 608 (2006) .....	25, 26
<i>Woody v. Stapp</i> , 146 Wn. App. 16, 189 P.3d 807 (2008).....	21
<i>Young v. Key Pharmaceuticals</i> , 112 Wn.2d 216, 770 P.2d 182 (1989) ...	22
<b>Statutes</b>	
RCW 18.86, <i>et seq</i> .....	34, 35, 36
RCW 18.86.030 .....	35
RCW 18.86.030(1)(d).....	35, 37
RCW 18.86.030(2).....	24, 29, 31, 36, 37
RCW 18.86.110 .....	35, 37, 39
<b>Other Authorities</b>	
<i>Restatement (Second) of Torts §552A (1971)</i> .....	24
<b>Rules</b>	
CR 56(c).....	21
CR 9(b) .....	23

## I. INTRODUCTION

This appeal arises from plaintiff Dr. Richard Nau's (hereafter "Nau") purchase of real property located on the Hood Canal (hereafter "property") from co-defendant Nancy K. Vogel, as trustee for Mark O. Vogel Residuary Trust (hereafter "Vogel") in 2016. Defendant West Realty Inc.'s ("West") licensed real estate broker, Patricia Lewallen, ("Lewallen") represented Nau in the purchase of the property. Lewallen is not named as a defendant in Nau's Complaint.

Nau's initial claims against West were that it negligently misrepresented the location of a cemetery on the property and breached statutory duties owed to Nau by failing to ensure that Nau received a complete Form 17 Seller Disclosure Statement ("Form 17") prior to the sale. Those claims were false.

Nau eventually withdrew his claim that West failed to ensure he receive a complete Form 17 after discovering that, in fact, he had received and signed two Form 17s that disclosed the location of the cemetery. He subsequently changed his claims against West.

In opposition to West's Motion for Summary Judgment against Nau, Nau raised for the first time his claims that West breached its statutory duties by failing to assist him in investigating the cemetery and by failing to advise him to consult an expert concerning the location of the cemetery.

Those claims also were false. In its Reply Memorandum, West produced public records demonstrating that, prior to closing, experts advised Nau of issues concerning the cemetery's location and status and that he should seek additional information concerning it, however, Nau apparently ignored those recommendations for over a year. The trial court subsequently dismissed all of Nau's legal theories against West.

Instead of accepting the trial court's decision, Nau elected to pursue this appeal. And, of course, Nau once again has changed his claims.

Nau attempts to claim that, prior to closing, West misrepresented not only the location of the cemetery, but also the status of remains within the cemetery. He now further alleges that West breached its statutory duties by failing to advise him appropriately and by failing to disclose to him the significance of the cemetery and its relationship to the Skokomish Nation. These new claims raise several issues that were not presented by Nau to the trial court on summary judgment against West. Regardless, once again, Nau's claims are false.

Nau's legal theories against West, that it negligently misrepresented the location of the cemetery and breached its statutory duties owed to Nau, lack both factual and legal support. The evidence establishes that Nau knew of the cemetery prior to closing and was provided substantial documentation disclosing its existence. The cemetery's location was a matter of public

record on the plat. Nau admits that he independently researched the property. The trial court properly decided that there was no evidence to support any claim that West misrepresented anything relating to the property prior to closing and Nau could not possibly have justifiably relied on any hypothetical misrepresentation that he claims West made. The trial court also properly dismissed Nau's breach of statutory duty claims on the basis that there was no evidence to support them.

This Court should affirm the trial court's appropriate dismissal of Nau's baseless claims.

## **II. STATEMENT OF THE CASE**

In early 2015, Vogel entered into a Listing Agreement to sell the property. CP 125. A historic cemetery is located on the property.

In October 2015, Nau showed interest in the property and asked Lewallen if he could visit it. CP 286. Lewallen subsequently arranged a meeting between herself, Nau and Vogel at the property. CP 286. At the meeting, Vogel showed Nau and Lewallen the home and surrounding property and advised Nau that there is a cemetery that extends onto it. CP 286-287.

At no time prior to closing of the sale of the property did Lewallen make any independent representations to Nau about the cemetery.<sup>1</sup> *Id.* Nau claims “when I went to view the property as a potential buyer for the first time with Lewallen, she told me there was a cemetery on the property. I believe she pointed it out to me. To the best of my recollection, the area she pointed to was a small cluster of headstones in an area located 40 to 50 feet away from the house and garage.”<sup>2</sup> CP 349. No documentary evidence exists to support this claim. Apart from Vogel telling Nau and Lewallen about the cemetery at their meeting in October 2015, the only other communications between Nau and Lewallen involving the cemetery consisted of Lewallen advising Nau to fully investigate any restrictions that its presence may pose to the property. CP 287. Nau denies that Lewallen advised him to fully investigate the cemetery, CP 348-350, despite uncontroverted documentary evidence to the contrary discussed *infra*.

On November 1, 2015, Lewallen and Nau met to discuss Nau’s potential purchase of the property as he anticipated soon entering into a purchase and sale agreement with Vogel. CP 424. At that meeting, Lewallen

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<sup>1</sup> Lewallen has been a real estate broker for over 30 years and has had no legal or administrative complaints against license. CP 287.

<sup>2</sup> Prior to Nau’s former counsel discovering that Nau failed to timely produce an email and attachment containing Form 17s for the property in response to West’s written discovery requests, *infra*, a prior declaration submitted to the court by Nau used this exact language with the exception of the words “believe” and “to the best of my recollection.” CP 245, CP 300.

reviewed with Nau a Form 17 signed by Vogel in March 2015, CP 126, and fully advised him of the importance of investigating the cemetery, including specifically telling him to inquire with Mason County and consider commissioning a survey of the property. CP 424-425, CP 126. This conversation resulted in Lewallen writing by hand on the bottom of the Feasibility Contingency Addendum (signed by Nau on November 1, 2015) that “buyer will look into shoreline requirements and the graves on the property.” CP 425, CP 457.<sup>3</sup>

On November 2, 2015, Vogel’s broker advised Lewallen that the Form 17 signed by Vogel in March 2015 had been revised<sup>4</sup>, so, later that day, Lewallen sent to Nau an email attaching the revised Form 17 signed by Vogel in August 2015 (hereafter “the Form 17”). CP 126. Lewallen states in that email: “Here you go.<sup>5</sup> Please sign p 5 in the same area as you did

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<sup>3</sup> Nau’s former counsel stated to the trial court on summary judgement: “It is true that the purchase - the notes on the purchase and sale agreement and Ms. Lewallen's declaration do seem to indicate that there was a conversation between the two of them where he indicated to her that he was interested in learning more about whether the cemetery would pose any building restrictions associated with the property....” RP 69.

<sup>4</sup> The Northwest Multiple Listing Service changed its standard Form 17 Seller Disclosure Statement between March 2015 and August 2015, which is why Vogel generated two Form 17s for the property. CP 318.

<sup>5</sup> The phrase “here you go” indicates that an additional oral conversation concerning the Form 17 occurred between Lewallen and Nau after the November 1, 2015 meeting, but prior to Lewallen sending the email.

yesterday. You are signing that you have received the document NOT that you approve the content.”<sup>6</sup> CP 292-298.

The March 2015<sup>7</sup> and August 2015<sup>8</sup> Form 17s each disclose to Nau the cemetery and tribal interest in it, the presence of headstones and the possible remains. CP 318- 329.

On page 6 of both Form 17s, under the “Buyer's Acknowledgment” section, are the following provisions:

- “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.”

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<sup>6</sup> Nau untimely produced this email in response to West’s written discovery requests, *infra*, and then paraphrased it when presenting it to the trial court in opposition to West’s Motion for Summary Judgment by removing the language “please sign p 5 in the same area as you did yesterday”, CP 349-350.

<sup>7</sup> The March 2015 Form 17 states “Potlatch Cemetery. To the best of my knowledge, there is an area approximately 70’x70’ partially on my lot 103 and partially on my neighbor Louis Culik’s lot 102 that was designated “Potlatch Cemetery” on the original plat. The cemetery comprises five gravestones of the Walker missionary dating late 1800’s to 1900’s. The cemetery is excluded from my tax bill. Louis remembers the tribe moving a number of Indian remains from the cemetery and transferring them to a different Indian burial site around mid-1900, leaving the missionary headstones. The tribe surveyed the cemetery in early 2000, but they do not have access to the cemetery, and have only visited once or twice, with my permission, in the last 15 years. Neither the tribe nor the county maintain the grounds. Also visiting twice during the last 20 years was a small South Sound College class studying early settler graves.” CP 329.

<sup>8</sup> The August 2015 Form 17 states “Potlatch Cemetery. To the best of my knowledge, there is a an area approx. 70’x70’ partially on my lot 103 and on my neighbor Louis Culik’s lot 102 that was designated “Potlatch Cemetery” on the original plat. The plot contains 5 gravestones from the Walker family, missionaries deceased late 1800’s to early 1900’s. The area is excluded from my tax bill. Louis Culik remembers the tribe moving Indian remains to a different site around 1950. The tribe surveyed the plot in 2000 but they do not have access, visiting twice in the last 20 yrs, along with a south sound college studying early settler gravesites. Neither tribe nor county maintain the grounds. I weed it, infrequently.” CP 322.

- “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.”
- “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 real estate licensees know such inaccurate information.”

CP 323 and CP 328.

Nau signed the “Buyer's Acknowledgment” section of both Form 17s and dated them November 1, 2015. *Id.* He did not exercise his right to revoke the offer to purchase the property based on the cemetery information. *Id.*

After meeting with Lewallen on November 1, 2015, Nau reviewed a map that identified the tax parcel number for the cemetery as #422216-12-60050. CP 110, CP 350, CP 454, paragraph 4 and Exhibit B at CP 469, CP 456. On November 2, 2015, Lewallen replaced “property” with “tax parcel #42226-12-60050” on the Feasibility Contingency Addendum. CP 215, CP 450, CP 350.”<sup>9</sup>

Around the same time, Nau reviewed the plat map and online parcel map of the property, CP 350, as he now admits. CP 456. The plat map, dedicated by Ernest and Hulda Carlson on July 19, 1941, recorded in Volume 4 of Plats, Page 26, Records of Mason County, Washington shows

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<sup>9</sup> Lewallen’s faded writing on the Feasibility Contingency Addendum signed by Vogel on November 2, 2015, CP 215, matches Nau’s faded signature dated 11/01/15.

an area labeled “Cemet-ery” between lots 102 and 103. CP 61. The Potlatch Cemetery (referred to herein as “the cemetery”) is illustrated with solid lines indicating separate boundaries, with no indication that the boundary line between Lots 102 and 103 does not include any portion of the cemetery. CP 57. As the Title Examiner states below<sup>10</sup>, the clear plat map is confirmed by the description in capital letters on the face of the plat that not only shows the cemetery area on the plat, but also includes a paragraph beginning with the language, “EXCEPTING THEREFROM THE INDIAN CEMETERY<sup>11</sup> TRACK DESCRIBED AS FOLLOWS,” which specifically excluded the cemetery by a metes and bounds description. CP 57, 64.<sup>12</sup>

Shortly after Nau and Lewallen’s meeting on November, 1, 2015, Vogel accepted an offer from Nau to purchase the property. CP 207-224. The Residential Real Estate Purchase and Sale Agreement (“PSA”) contained an Optional Clause Addendum stating that neither broker makes

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<sup>10</sup> “The Plat of Potlatch Beach Tracts consistently and unambiguously provides constructive notice that the “Indian Cemetery” excluded from the Plat by legal description, and which conforms to the location of the “Cemetery” illustrated on the Plat is not included within the Plat, nor within Lots 102 and 103 of the Plat. The Legal description of the “Indian Cemetery” set forth on the plat provides a legal description of the illustrated “Cemetery” sufficient to enable its location by survey.”

<sup>11</sup> The records of the Mason County Assessor identify the “Indian Cemetery” (referenced herein as the cemetery) as tax parcel #422216-12-60050. CP 312.

<sup>12</sup> The deed Vogel ultimately provided to Nau specifically references the plat in its legal description of the property. CP 63-64, 82-83. The plat clearly disclosed the location of the Potlatch Cemetery to anyone who reviewed it.

any representations concerning whether there are any encroachments on the property: “Buyer is advised to verify lot size, square footage and encroachments to Buyer’s own satisfaction within the inspection Contingency period.” CP 207-224. As alluded to above, the PSA also included a Feasibility Contingency Addendum which provided that the PSA would terminate and Nau would get a refund of his earnest money if, during the feasibility contingency period, he determined the property was not suitable for his intended purpose. CP 215.

In early November 2015, Vogel left her property files for Lots 103 and 104 for Nau at the property and they remained there through closing. CP 444. The property files included information that Vogel had about the cemetery, including when Native Americans removed graves and visited the property. CP 64. Lewallen witnessed Vogel tell Nau that Vogel was leaving property files at the property, CP 265, but Nau claims that he did not review them until after the sale closed. CP 351.

On November 7, 2015, Nau noted on the Feasibility Contingency Agreement that he would look into the graves on the adjoining property with a separate tax parcel no. 42226-12-60050 by writing “I’d be surprised if onsite meeting with Mason Co can be scheduled within 15 days, especially with holidays approaching. Interested in building restrictions and impact of graves/cemetery 11/07/15.” CP 450.

A week or two later, Vogel walked the property with Nau and showed him all that she knew about the property and cemetery, including pointing out wooden property line stakes on the outside of her garage and a blue survey cap in front of her garage, CP 443, which Nau denies. CP 453. Lewallen did not attend this meeting. CP 443, CP 453.

On December 2, 2015, over two months before closing, Nau submitted to the Mason County Planning Department a Pre-Inspection Application. CP 414-416. On this Application, which he signed and paid \$255 to submit, Nau states that the purpose of his pre-inspection application was “limitation imposed by graves on site – any other building restrictions.” CP 414-416, CP 331.

On December 11, 2015, Nau signed the Feasibility Contingency Notice acknowledging that he was satisfied with his investigation of the property. CP 309.

Not only did Lewallen advise Nau on November 1, 2015 to consult experts regarding the cemetery, but, on his behalf, she actually contacted an expert, Mason County employee Grace Miller, about the cemetery prior to closing. CP 411-412. Lewallen scheduled Miller’s January 12, 2016 inspection of the property, which resulted in Miller directly advising Nau that “he will need to contact [Washington’s Department of Archaeology and Historic Preservation] with phone numbers below regarding his question of

developing his parcel with graves on it.” CP 411-412.<sup>13</sup> However, Nau failed to call WDAHP until 15 months after closing, CP 380-381, CP 392-395, as he now admits. CP 457.

As part of their agreement, Vogel purchased title insurance for the property. CP 63. Before closing, on February 13, 2016, Nau received a commitment for title insurance. CP 71-81. That commitment excluded losses arising from Indian tribal codes or regulations, Indian treaty or aboriginal rights, including easements or equitable servitudes. CP 76. The Commitment specifically noted that the cemetery was a special exemption: “Possible rights of sepulture, as described by the face of the plat and tax rolls.” CP 78.

Nau requested and received multiple extensions of the deadline on committing to the deal, CP 63-64, and Nau admits that there may have been four extensions. CP 457. On February 18<sup>th</sup>, 2016, Nau and Lewallen met again with Vogel at the property, which is when Lewallen heard Vogel tell Nau that she was leaving property files behind at the property for him to review. CP 302. The sale finally closed on February 19, 2016. CP 340-343.

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<sup>13</sup> Miller further advised Nau that he “must contact [Washington’s Department of Archaeology and Historical Preservation] because human graves and remains are protected under state laws. Applicant should contact Dr. Guy Tasa, State Physical Anthropologist, DAHP, 360-586-3534.” *Id.*

On October 30, 2017, Nau filed a Complaint for Money Damages against West and Vogel in Mason County Superior Court alleging five causes of action. Counts one through four are against only Vogel alleging that she breached statutory warranties under RCW 64.04.030, breached a duty of good faith and fair dealing, negligently misrepresented the property, and fraudulently concealed the existence of the cemetery. CP 1-7. Count Five is titled “Count Five - Negligence (Against West Realty)”, and states several statutory duties of a Washington real estate broker, but does not include the duty of a broker to advise her client to seek an expert concerning matters outside her expertise. CP 6. Nau’s only specific claim against West is that it “failed to meet the standard of care owed to Nau by negligently misrepresenting the location and extent of the Potlatch Cemetery and failing to ensure that Nau received a set of Form 17 disclosures.” *Id.* Nau does not allege that West committed fraud in anyway whatsoever in his Complaint. *Id.*

On this Appeal, Nau argues that West misrepresented the location and status of the cemetery and breached statutory and common law duties owed to him. As to the claims for breach of duty, Nau specifically asserts that West failed its duty to exercise reasonable skill and care by minimizing the importance of the Form 17 and vouching for the accuracy of information contained in it; failed its duty to advise him to seek expert advice on matters

relating to the transaction that were beyond its expertise; failed its duty to deal honestly and in good faith by whitewashing negative information and misrepresenting facts that would have caused Nau to move on from the transaction; and failed its duty to disclose the location of the property within the boundaries of the Skokomish Reservation. Br. of Appellant at 25-28. Nau's claims are contradicted by the physical evidence obvious to him and the public documents known to him.

Nau stated in his March 11, 2019 Declaration:

The County did not provide me with any information suggesting the Cemetery was not in the location pointed out by Lewallen. I told Ms. Lewallen about my investigation. She did not recommend that I consult with an expert to advise me regarding my diligent research of the gravesites. She did not facilitate or encourage my investigation in any way.

CP 350.

Even though Lewallen and Miller explicitly advised Nau that he needed to further investigate issues concerning the cemetery, public records reveal that Nau did not contact DAHP until May 2017, over a year after closing. CP 392-393. Public phone records show that on May 17, 2017, Nau finally contacted the number that Miller provided to him in early 2016. CP 392- 393. On May 18, 2017, DAHP's Records Manager sent an email to Nau that states the following about the cemetery:

“Guy Tasa forwarded your information request to me re: the Potlatch Cemetery and Indian Graveyard. I’ve attached the Cemetery Detail Report for this cultural resource to this email. This report was generated from our cemetery parcel but within your own land. This cemetery and graveyard are adjacent to your parcel of land and the boundaries of the cemetery parcel appear to extend some distance southwest towards your own parcel. Unfortunately historic burial grounds and particularity Native American graveyards are ill-defined geographically and there may be burials and/or archaeology outside of the cemetery parcel but within your own land. Please contact Ms. Gretchen Kaehler, DAHP Local Government Archaeologist, cc’d above, who can provide you with information re: the requirements of Washington State laws that protect archaeology, historic cemeteries and graves, including Indian burials. Generally, these requirements are found in RCW 27.53 and 27.44 and cemetery statutes including RCW 68.50.645 and 68.60.”<sup>14</sup>

CP 395.

The May 18, 2017 email also contains an attachment entitled “Cemetery Detail Report,” which is a document that includes additional information about the “Potlatch Cemetery and Indian Graveyard”, the relocation of graves, and references “Research Report – Cemetery on Skokomish Indian Reservation.” CP 397-398.

Moreover, the existence of the cemetery and the presence of headstones and possible remains all were clearly disclosed to Nau prior to closing. Nau admits now that the cemetery was disclosed to him. Br. of Appellant at 1 (“it is not disputed that the presence of a cemetery was known

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<sup>14</sup> Nau’s March 20, 2018 Declaration states “I submitted a pre-inspection application to the Mason County Planning Department. In it, I asked if it would be feasible to build another building on the property and asked if there were any building restrictions imposed by the graves on the property. The County Planning Department advised there were no building restrictions. CP 110-111.

and disclosed during the transaction.”); at 6 (“The presence of the cemetery was disclosed...”). Nau admits that he was aware of the headstones physically onsite. CP 454, 460-67. The fact that the cemetery is within the Skokomish Reservation is obvious from the plat he received and the physical location of the town of Potlatch in the Reservation.<sup>15</sup> Nau’s contentions are contradicted by his own admissions in his declarations. For example, he further stated in his March 11, 2019 declaration:

After Ms. Lewallen told me about the Cemetery, I investigated it by reviewing that plat map similar to that attached hereto as Exhibit 2.

At some point I also looked at the online parcel map hosted by the Mason County Assessor’s Office, and it showed that only a tiny sliver of the Cemetery overlapped my property.”

On my own accord, I also submitted an application to Mason County prior to purchasing the property on or about December 2, 2015 to find out if there were any building restrictions imposed by the gravestones or the Cemetery. There were not.

CP 350.

In April 2018, Nau responded to West’s discovery requests and produced a substantial amount of written communications, including several emails exchanged by Nau and West agents on and around November 2, 2015, that relate to the Form 17s. CP 288. However, Nau inexplicably

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<sup>15</sup> This Court can take judicial notice of the fact that Potlatch straddles US Highway 101 inside the boundaries of the Reservation.

failed to produce the key November 2, 2015 email which attached the Form 17. CP 292.

On June 11, 2018, the trial court, the Honorable Monty D. Cobb, entered an order dismissing Nau's claims against Vogel relating to breach of the warranty against encumbrances and negligent misrepresentation. CP 176-77.

On December 6, 2018, Nau's former counsel advised that she would be producing additional emails which had not previously been produced. CP 292. Included in those additional emails was the November 2, 2015 email from Lewallen to Nau attaching the Form 17. Nau's former counsel advised that Nau had this email in his possession all along, but failed to tell his counsel about it. *Id.* Nau appears now to be pointing to this email as the main (and potentially only) piece of documentary evidence to support his claims that West failed to appropriately advise him concerning the Form 17. Br. of Appellant Pg. 3-4.

Because Nau finally acknowledged that he actually did receive a complete Form 17 before closing, Nau's former counsel withdrew Nau's claim that West failed to ensure that Nau received Form 17 seller disclosures. CP 300.

The trial court then resolved Nau's claims against both Vogel and West in a series of dispositive motions.

Vogel moved to dismiss Nau's claim of breach of Vogel's duty of good faith and fair dealing for failure to state a claim, CP 225-35, which was granted by the Honorable Amber L. Finlay by an order entered on February 4, 2019. CP 269-70.

West moved for summary judgment on Nau's claims against it. CP 271-85. In Nau's Opposition to West's Motion for Summary Judgment, he claims West negligently misrepresented the location of the cemetery (without claiming that West misrepresented the cemetery's status) based on his speculation that Lewallen may have pointed to the wrong location of the cemetery. CP 356- 366. Nau also alleged in his Opposition for the first time in this litigation that West breached its statutory duty to Nau to exercise reasonable skill and care by failing to advise Nau to seek expert advice regarding the location of the cemetery.<sup>16</sup> CP 356-357. Nau further alleged for the first time that, based on a combination of West's duties to exercise reasonable care, deal honestly and in good faith, and refer a buyer to an expert, West had a duty to investigate the property prior to closing. CP 365-366.

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<sup>16</sup> West's counsel believes Nau's blending of a broker's separate duties to exercise reasonable care and to advise its client to consult an expert concerning matters outside its expertise was for the purpose of hiding from the trial court that Nau did not allege a broker's duty to consult an expert in his Complaint.

On appeal, Nau argues that the trial court apparently dismissed all claims against West simply because it found that Nau's testimony is not credible. Br. of Appellant at 11. In reality, the trial court dismissed Nau's negligent misrepresentation claim because; (1) Nau's speculation that Lewallen misrepresented the location of the property cannot create a factual dispute, and (2) Nau could not have justifiably relied on any hypothetical misrepresentation made by Lewallen given the information he had regarding the cemetery prior to closing. RP 72-73. As to the statutory negligence claims, the trial court found Nau could not prove West failed to meet the standard of care without providing an expert to opine that West, in fact, breached the applicable standard of care, and that no evidence was presented to support that West acted negligently. *Id.*<sup>17</sup> The Honorable

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<sup>17</sup> THE COURT: Okay. Alright, so Court's decision on - there was a summary judgment. The Court went through what it had read prior to this and what evidence the Court considered. As to the negligent misrepresentation, the allegation is that Ms. Lewallen had - might have shown him where the cemetery was, which was not accurate. I think everyone agrees now that the issue is the cemetery, it's under, I believe, a garage. But it is phrased as might have shown, so the Court finds that there is an issue with that element as to whether or not there is a disputed issue of fact as to did she do it or did she not do it, because it sounds like speculation. But even if it's not the concern the Court has is can - does the evidence show that the plaintiff would have - his reliance on that would have been justifiable, and the Court can't find that because of all the evidence that's been presented in the case indicate that the plaintiff - pardon me - knew - was provided the Form 17s that talked about the cemetery. In addition, was told to investigate it, and in fact, was told also - he did contact the County and was told also by Grace Miller to investigate it. So, I would find that the negligent misrepresentation, the Court would grant the defendant's motion. As to the professional negligence claim, there was - in the memorandum produced by the plaintiff she indicated not being able to depose Ms. Lewallen until the 28th of March. The Court did not hear any motion to continue at the particular hearing, so I'm assuming that that wasn't the case. And there's no - for professional negligence there has - there is a standard of care that the Court would have to find that the realtor fell below, and I don't

Amber L. Finlay granted West's Motion for Summary Judgment by an order entered on April 25, 2019.

Vogel then moved for summary judgment on Nau's remaining claims, CP 427-41, and the trial court dismissed Nau's remaining fraudulent concealment count on December 16, 2019. CP 588-89.

Nau also brought a Motion for Leave to Amend Complaint to be heard by the trial court on the same day as Vogel's final Motion for Summary Judgment. CP 510-512. Nau claimed in the Motion to Amend that a statutory duty claim for failing to advise Nau to seek an expert should be added against West, and that Lewallen should be added as a defendant under the same theory. CP 511. He also claimed that the trial court should add these claims because he had hired new counsel and discovered "since filing of this lawsuit" that the property is within the boundaries of the Skokomish Reservation and that the Tribe is claiming general jurisdiction over it. CP 510-512. Prior to hearing the Motion, Nau's counsel advised the trial court that the Motion was a moot issue because Nau's remaining claims had been dismissed earlier that afternoon. RP 109.

Nau appealed to this Court on January 2, 2020. CP 590-604.

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have an expert opining as to a standard of care and that the realtor fell below this, and nor can I find from the evidence produced that that is what happened. Looking at the evidence even in the light most favorable to Mr. Nau, the only thing that he has indicated is that she might have shown him this. And I think that it's - so the Court would have to grant defendant's summary judgment as to that cause of action as well. RP 72-73.

Upon Vogel's motion, CP 615-24, the trial court determined in a June 4, 2020 Memorandum Opinion that Nau's action was frivolous under CR 11 in part, and awarded fees accordingly. CP 694-96.

### **III. ARGUMENT**

#### **1. Summary of Argument**

Nau cannot prove by clear, cogent and convincing evidence all elements of a negligent misrepresentation claim. West did not misrepresent or conceal any information concerning the cemetery. Nau had notice of the cemetery which therefore triggered his duty to discover the extent of the defect by making further inquiries. However, he failed to appropriately do so.

After Nau's former counsel discovered that Nau failed to produce a crucial email that contained the Form 17 for the transaction and disclosed the cemetery to Nau, his case morphed into an attempt to assert that West somehow breached its statutory duties to Nau. There simply is no evidence to support this. At all times relevant to this transaction West complied with the applicable standard of care.

#### **2. Summary Judgment Authority**

Nau's brief wrongly describes the applicable legal standard on summary judgment (Br. of Appellant at 11), for proving his negligent misrepresentation claim against West. Nau wrongfully fails to identify the

higher burden of proof which is applicable to such a claim. Nau's burden was to prove his negligent misrepresentation claim by clear, cogent and convincing evidence, however, he fails to note that anywhere in his brief. On summary judgment, the trial court must apply that burden of proof when it determines whether a jury could find that Nau proved the requisite elements of his negligent misrepresentation claim. *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008). On review, this Court must apply the same heavier burden in its de novo review. *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 973, 948 P.2d 1264.

As for Nau's claims that West breached statutory duties owed to Nau, the standard CR 56(c) analysis applies. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *International Broth. of Elec. Workers, Local Union No. 46 v. TRIG Elec. Constr. Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000). Such a motion will be granted, after considering the evidence in the light most favorable to the non-moving party, only if reasonable persons could reach but one conclusion. *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998).

For both Nau's negligent misrepresentation claim and his claims for breach of statutory duty, the authority cited below applies.

Nau's argument that there is a genuine issue of material fact based on the existence of an issue of credibility or because he cannot recall what happened is baseless. Under the Marshall Rule, *Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 184-85, 782 P.2d 1107 (1989), Nau cannot create a genuine issue of material fact on summary judgment by contradicting unambiguous documentary evidence or prior sworn testimony. Moreover, Nau's vague denials of facts or self-serving statements do not create genuine issues of material fact because, in opposing summary judgment, he was obligated to set forth specific facts. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989); *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 157, 52 P.3d 30 (2002), review granted, 148 Wn.2d 1021 (2003). Similarly, a motion for summary judgment cannot be defeated on speculation, conjecture or mere possibility. *Chamberlain v. Dept. of Transp.*, 79 Wn.App. 212, 215-216, 901 P.2d 344 (1995). This Court may look no farther than to review Nau's claim that "[Lewallen] did not facilitate or encourage [his] investigation in any way" to understand that Nau's alleged statements of "fact" are far from that.

### **3. Nau's Negligent Misrepresentation Claim was Properly Dismissed**

Nau did not allege fraud of any kind against West in his Complaint. Further, even though Nau raised his claims that West breached its statutory duties owed to him for the first time in his opposition to West's Motion for Summary Judgment, he did not allege any claims for fraud at that time either. Moreover, Nau belatedly moved to amend his Complaint to assert statutory negligence claims against West (and to add Lewallen as a defendant under the same theory) long after the trial court had dismissed all of Nau's claims against West on summary judgment. However, even at that time, Nau again did not allege fraud of any kind against West. Despite all this, on appeal, Nau attempts to blur this fact by arguing "misrepresentation" without differentiating between whether it was negligent or intentional. CR 9(b) requires that, in all averments of fraud or mistake, the circumstances shall be stated with particularity. They clearly were not. This Court should not allow such an effort as Nau has clearly failed to preserve a fraud claim for this appeal.

Nau's brief improperly states the law concerning his "misrepresentation" claim in several places, Br. of Appellant at 12-18, including his assertion that "... dissemination of inaccurate facts is an express fraud or negligent misrepresentation." That assertion fails to

account for the fact that a broker may properly rely on statements made by the seller. Br. of Appellant at 13. RCW 18.86.030(2)<sup>18</sup>, *discussed infra*.

Washington has adopted the Restatement (Second) of Torts with respect to the elements of a claim for negligent misrepresentation. *ESCA Corp v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998). The *Restatement* notes that a person is liable for negligent misrepresentation when: “One who, in the course of business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon that information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.” *Id.* A plaintiff must prove they justifiably relied on the information negligently supplied by the defendant. *Id.* “The recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying.” *Restatement (Second) of Torts §552A (1971); ESCA Corp., supra* at 827.

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<sup>18</sup>Unless otherwise agreed, a broker owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the broker to be reliable. RCW 18.86.030(2).

In Washington, to prevail on a claim of negligent misrepresentation, a plaintiff must prove six elements:

The defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew of or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused plaintiff damages.

*Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007).

All six elements must be proven "by clear, cogent, and convincing evidence." *Id.*; *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 180, 876 P.2d 435 (1994); *Borish v. Russell*, 155 Wn. App 892, 905 n.7, 230 P.3d 646 (2010), *review denied*, 170 Wn.2d 1024 (2011). Nau cannot prove the requisite elements of his negligent misrepresentation theory.

A plaintiff cannot establish negligent misrepresentation where the defendant puts plaintiff on notice of an issue and fails to exercise due diligence to follow up on that disclosure. For example, in *Van Dinter v. Orr*, 157 Wn.2d 329, 138 P.3d 608 (2006), the Supreme Court held that a purchaser failed to establish negligent misrepresentation as a matter of law where the sellers stated that they owed nothing on the unimproved property and no encumbrances existed. *Id.* They noted a sewer system was available for the property. *Id.* The sellers had no obligation to disclose the fact that

the buyer would have to pay a capital facility rate if they connected the property to the sewer. *Id.*

In *Douglas v. Visser*, a buyer sued a seller for fraudulent concealment and negligent misrepresentation. 173 Wn. App. 823, 832, 295 P.3d 800 (2013). The buyer learned through his home inspector of an area of wood and rot decay. *Id.* at 826. The buyer failed to make further inquiry of the seller concerning possible wood rot. *Id.* After the purchase, the buyer learned that the wood rot was much more extensive. *Id.* at 827. In reversing the trial court verdict in favor of the buyer, the Court of Appeals reasoned that the buyer was on notice of the defect and had a duty to make further inquiries. *Id.* at 832. The buyer argued that he had no idea that 50 to 70 percent of the sill plate and rim joists were destroyed and the dry rot was extensive. *Id.* The court rejected that argument. *Id.* at 829. The court held that, because the buyer was on notice of the defect, he had a duty to make further inquiry and held that, because the buyer had notice of the defect, he could not have justifiably relied on the seller's misrepresentation. *Id.* at 834. "Once a buyer discovers 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.*

Washington courts routinely reject negligent misrepresentation claims on summary judgment on facts similar to this case.

For example, in *Puget Sound Serv. Corp v. Dalarna Mgmt. Corp.*, 51 Wn. App. 209, 210, 752 P.2d 1353, *review denied*, 111 Wn.2d 1007 (1988), an apartment building had chronic water leaks and the buyer had the building inspected. The buyer's inspection revealed stains, cracked plaster and loose tiles, and his report explained that the leaks were not serious but should be controlled by additional caulking, re-painting and/or re-plastering inside. The buyer purchased the building without making further inquiries. The buyer agreed it discovered evidence of water, but argued the true defect was the extreme chronic nature of the leaks. Division 1 held that, when an actual inspection demonstrates evidence of water penetration, the buyer must make inquiries of the seller, reasoning that the buyer knew there was a defect but did not make sufficient inquiry about the defect or establish that further inquiry would have been fruitless. *Id* at 215.

In *Condor Enterprises, Inc. v. Boise Cascade Corp.*, a lessee brought an action against the lessor and broker for negligent misrepresentation. 71 Wn. App. 48, 856 P.2d 713 (1993). This Court held that a plaintiff suing for negligent misrepresentation must prove that he or she justifiably relied upon information negligently supplied by a defendant. *Id* at 52. If a party to a contract is negligent to ascertain the truth of the other party's representations, that party's own negligence is a defense to a claim of negligent misrepresentation and any contributory negligence of that party

acts as a complete defense to the claim. Id at 53. Our courts have recognized that any contributory negligence is a complete bar to a negligent misrepresentation claim. Id at 53. Because the trier of fact could not find that Condor exercised ordinary care in looking out for its own interests, and therefore Condor was negligent in relying upon what the landlord said, Condor's negligence was a proximate cause. Id. "Because Condor can recover only if it proves justifiable reliance, and because Washington case law presently equates justifiable reliance with lack of contributory negligence, Condor could not recover if this case went to trial." Id at 54.

This paragraph summarizes an unpublished decision from this Court. The buyers brought negligent misrepresentation and consumer protection act claims against a seller's broker. *AVH & BJ Holdings 2, LLC v. Laclare Investments, LLC*, No. 51001-4-II, 2019 WL 1049521, (Wn. App Div. II March 5, 2019). The court found that the seller's broker met his initial burden of showing the absence of a genuine issue of material fact as to buyer's lack of justifiable reliance because he provided evidence that all material information concerning liability for the transaction could have been discovered on a government website. Id at 8. The buyers admitted that they could have found the material information that concerned liability on a government website, or other places, but argued that they did not do so because they assumed that kind of due diligence would be difficult and time

consuming. Id. The buyers also argued that it would have been both unreasonable and unrealistic for them or their broker to scour through the governments website because “it is not something buyers, or brokers do as an ordinary part of due diligence, or that they have time to do.” Id. This Court held that the trial court did not err when it granted summary judgment to the seller’s broker and dismissed the buyers’ negligent misrepresentation cause of action because the buyers did not justifiably rely on any misrepresentation made by seller’s broker. Id at 10.

Nau’s argument on his “misrepresentation” claim misses the mark. Br. of Appellant at 12-17, 25. His claim appears to rest on an “inference” that Vogel communicated to Lewallen the wrong location of the cemetery and that certain bodies had been removed from the cemetery, which Lewallen relayed to Nau. First, Nau’s claim that West misrepresented that certain bodies had been removed from the cemetery was not an issue presented to the trial court against West on summary judgment and should not be considered by this Court. Second, even if Nau’s “inference” that Lewallen repeated to Nau information provided to her by Vogel was correct (which it is not), those facts would not support a claim for negligent misrepresentation against West as Lewallen would have had a right to rely on Vogel’s representations in that circumstance. RCW 18.86.030(2).

Further, Nau argues that his negligent misrepresentation claim against West was improperly dismissed on the basis of Nau's credibility, however, that was a proper basis for dismissal. More to the point, the trial court dismissed Nau's negligent misrepresentation claim because it found Nau's speculation that Lewallen pointed out to him a location other than where the cemetery is located on the property is not sufficient to create a factual dispute. The trial court further decided that, if Nau actually relied on Lewallen's hypothetical misstatement, that reliance could not have been justifiable given the abundance of notice he had regarding the cemetery.

There is no credible evidence that Lewallen provided any information about the cemetery to Nau that she knew or should have known to be false. Moreover, there is no credible evidence that Lewallen made any representation about the cemetery to Nau before closing. The only evidence that Nau can point to in support of his negligent misrepresentation claim is his own unsupported claim that Lewallen misrepresented the location of the cemetery (which is false). Nau stated that he "believes" that Lewallen may have pointed to a small cluster of headstones 40 to 50 feet from the house and garage. CP 350. Nau's statement is not a factual assertion and it constitutes speculation or conjecture as it merely offers the possibility that Lewallen may have misrepresented the cemetery. A motion for summary judgment cannot be defeated on speculation, conjecture or mere possibility.

*Chamberlain v. Dept. of Transp.*, 79 Wn. App. 212, 215-216, 901 P.2d 344 (1995). Lewallen clearly did not make any independent representations about the cemetery. It is not credible that an agent of 30 years with no legal or administrative complaints against her license would fabricate false information in this circumstance. Thus, the trial court properly dismissed Nau's negligent misrepresentation claim against West because Nau did not establish a factual dispute as to whether Lewallen misrepresented the cemetery.

Pursuant to RCW 18.86.030(2), Lewallen had no duty to independently verify the accuracy of defendant Vogel's hypothetical statements and had no duty to conduct an independent inspection of the property or the cemetery. To the contrary, Lewallen was entitled to rely on the veracity of hypothetical statements made by Vogel concerning the property. In addition, Nau never asked Lewallen to verify the location of the cemetery and Lewallen never agreed in writing or otherwise to do so. Thus, Lewallen had no duty to do so.

Nau failed to provide the trial court with any standard of care expert to establish that West violated the applicable standard of care for a real estate broker in the subject transaction. Nau's failure to present any standard of care evidence indicates that Nau was unable to find an expert who would testify that West violated the applicable standard of care. No competent real

estate standard of care expert would opine that Lewallen violated the applicable standard of care in this matter based on Nau's speculation that she may have pointed out to Nau the wrong location of the cemetery. Thus, the trial court also properly dismissed Nau's negligent misrepresentation claim because Nau failed to meet his burden to establish the applicable standard of care or that West violated that standard.

Even if Nau is somehow able to show that Lewallen negligently misrepresented the location of the cemetery (or status of the cemetery, an issue that Nau did not preserve for this appeal), there is no genuine issue of material fact as to whether or not Nau justifiably relied on Lewallen's hypothetical misrepresentation. Nau clearly did not. Nau had both actual and constructive knowledge of the cemetery and he had a duty to make further inquiry. Any reliance that he may have had on the alleged or hypothetical statements of Lewallen is not justifiable.

Nau had clear notice of the cemetery and its dimensions. He made the graves and cemetery a subject of his Feasibility Contingency, and he investigated the cemetery by contacting Mason County Community Development and paying \$255 to review the cemetery's impact on his property.

Even viewing the evidence in a light most favorable to Nau, it is clear that Nau had notice of the cemetery based on the following events that

occurred before closing: defendant Vogel told Nau that the cemetery extended onto the property before entering into a purchase and sale agreement for the property with him; defendant Vogel also told Nau that she was leaving property files behind at the property before closing and those property files contain information that relates to the location and status of the cemetery; Nau saw the cemetery and headstones himself when he walked the property with defendant Vogel and Lewallen before entering into a purchase and sale agreement with defendant Vogel for the property; Nau received and signed two Form 17s for the property which disclosed the existence of the cemetery and the Tribe's awareness of it, headstones and the possibility of remains; Nau also signed a Feasibility Contingency Addendum on November 1, 2015 that states he will investigate restrictions the cemetery may pose; Nau submitted a Mason County Planning Department Pre-Inspection Application over two months before closing that contains the statement "Purpose of Pre-inspection: Limitation imposed by graves on site -any other building restrictions"; Nau had access to county and state information detailing restrictions the cemetery may pose and the Skokomish Nation's interest in the cemetery; and finally Nau admits to reviewing a plat map before closing that a Title Examiner explains "consistently and unambiguously provides constructive notice that the Indian Cemetery excluded from the Plat by legal description, and which

conforms to the location of the Cemetery illustrated on the Plat is not included within the Plat, nor within Lots 102 and 103 of the Plat.”

Because each of the above facts taken on its own establish that Nau had notice of the cemetery before closing, Nau cannot provide any clear, cogent or convincing evidence that he reasonably relied on any hypothetical negligent misrepresentation about the cemetery that he claims West made. With simple inquiry (e.g. interpreting the property’s plat map and/or calling DAHP as suggested by Miller), Nau could have and would have discovered the extent to which the cemetery encroached on the property, its status and the Skokomish Tribe’s interest in it, yet he failed to do so even though he explicitly agreed to investigate the cemetery prior to closing. Based upon the foregoing, it is clear that Nau’s lack of knowledge concerning the cemetery was due to his own negligence. Nau cannot recover as a matter of law if this case goes to trial. The trial court properly dismissed Nau’s negligent misrepresentation claim.

#### **4. Nau’s Breach of Statutory Duties Claims Against West Were Properly Dismissed**

The nature and scope of a real estate broker’s duties are defined in RCW 18.86, *et seq.* This statute, which became effective in January 1997 and was most recently amended effective in July 28, 2013, redefined and in some instances changed, the common law regarding the duties of a real estate

broker. RCW 18.86, *et seq.* explicitly supersedes the common law regarding the duties of a broker to the extent that the common law is inconsistent with this statute. The common law continues to apply in all other respects. RCW 18.86.110.

The duties under this chapter are statutory duties and not fiduciary duties. This chapter supersedes the fiduciary duties of an agent to a principal under the common law. The common law continues to apply to the parties in all other respects. This chapter does not affect the duties of a broker while engaging in the authorized or unauthorized practice of law as determined by the courts of this state. This chapter shall be construed broadly. RCW 18.86.110.

Pursuant to RCW 18.86.030<sup>19</sup>, a real estate agent owes general duties to their client. RCW 18.86.030(1)(d) governs the disclosures that must be made by a real estate broker. Specifically, RCW 18.86.030(1)(d) provides that a broker must:

“. . . [D]isclose all existing material facts known by the broker and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the broker has not agreed

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<sup>19</sup> (1) Regardless of whether a broker is an agent, the broker owes to all parties to whom the broker renders real estate brokerage services the following duties, which may not be waived:

- (a) To exercise reasonable skill and care;
- (b) To deal honestly and in good faith;
- (c) To present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase;
- (d) To disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the broker has not agreed to investigate;.... RCW 18.86.030.

to investigate.”

It is telling that Nau’s brief cites only case law established prior to the enactment of RCW 18.86, *et seq.* to support his breach of statutory duties claims against West. Br. of Appellant at 26. Nau’s brief fails to cite RCW 18.86.030(2), the current controlling law which limits a broker’s duties.

RCW 18.86.030(2) provides that:

Unless otherwise agreed, a broker owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the broker to be reliable.

West anticipates that Nau will use the case law cited in Section 6.6 of his brief to argue that West’s statutory broker duties should be expanded beyond the clear language of RCW. 18.86, *et seq.* Br. of Appellant at 26-28. *Hoffman, Johnson, and Turnbull* were decided prior to the enactment of RCW 18.86 and follow a line of cases that rely on common law rules that clearly conflict with the actual statutory duties of a buyer’s real estate broker in Washington. *Hoffman v. Connall*, 108 Wn.2d 69, 75, 736 P.2d 242, 246 (1987) (“A real estate broker must take reasonable steps to avoid disseminating false information to buyers. The broker is required to make reasonable efforts and use his professional expertise to confirm or refute information from a seller which he knows is pivotal to the buyer”); *Pacific*

*Northwest Life Insurance Co. v. Turnbull*, 51 Wn. App. 692, 754 P.2d 1262 (1988); *Johnson v. Brado*, 56 Wn. App. 163, 783 P.2d 92 (1990). These cases do not apply to the issues presented in this appeal to the extent that they suggest that West had any duty to investigate the cemetery, independently verify the accuracy or completeness of any statement made by Vogel or anyone else, or disclose information that was apparent and readily ascertainable to Nau. RCW 18.86.030(1)(d), RCW 18.86.030(2), RCW 18.86.110.

A real estate broker is not held to a higher standard of care than other professionals. *Jackowski v. Borschelt*, 174 Wn.2d 720, 278 P.3d 1100 (2012).

Nau's claims for breach of statutory duty against West raise several issues on appeal that were not raised in the trial court. A plain reading of Nau's Complaint discloses his real claims against West. He alleged in his Complaint that West negligently misrepresented the location of the property and breached its statutory duties to exercise reasonable skill and care, to deal honestly and in good faith, to take no action adverse to his interest, and to disclose all existing material facts known to it and not apparently or readily ascertainable to Nau by failing to ensure that Nau received a complete set of Form 17 disclosures. Nau's Complaint does not allege that West owed or failed to comply with a duty to advise him to seek expert

advice in anyway. After Nau's former counsel discovered that Nau had been withholding from her the key November 2, 2015 email containing the Form 17, Nau shifted his strategy to pursue his breach of statutory duty claims in connection with different issues.

Nau's Opposition to West's Motion for Summary Judgment was the first time in this litigation that Nau claimed West breached its statutory duty to Nau to advise him to seek expert advice regarding the location of the cemetery. It also was the first time that Nau raised his claim that West had a duty to investigate the property based on a combination of its duties to exercise reasonable care, deal honestly and in good faith, and to refer a buyer to an expert.

On appeal, Nau again has changed his strategy. His specific claims of how West breached its statutory duties go well beyond those issues that were raised in the trial court.

Further, Nau's halfhearted attempt to amend the Complaint long after his claims against West were dismissed on summary judgment should not be considered by this Court. It was simply a ploy by Nau to assist in his effort to present issues to this Court that were not presented to the trial court.

West asks this Court to reject all Nau's claims for breach of statutory duty on the basis that they were not properly pleaded. They were predicated on West allegedly failing to provide Nau with a complete Form 17. Because

Nau admits now that West did, in fact, provide him with the complete Form 17, the trial court should have dismissed these claims prior to hearing argument on the merits.

Alternatively, West asks this Court to at least reject Nau's specific claims of breach of statutory duty to the extent his arguments involve issues beyond those presented to the trial court.

Nau's brief vaguely alludes to an argument that West engaged in the unauthorized practice of law. Br. of Appellant at iii ("... buyer's agent fails to exercise due care and competence, drafts real estate documents that fail to protect buyer from issues that should have been apparent to the agent"). That is a legal theory that clearly was not considered by the legislature as a statutory duty. RCW 18.86.110. On summary judgment, Nau clearly argued that West breached its statutory duties and did not present evidence of any other form of negligence except negligent misrepresentation. Thus, any claim of unauthorized practice of law or any other theory of negligence not already discussed *supra* clearly was not an issue raised in the trial court and should not be considered by this Court.

Nau's claims for breach of statutory duty were properly dismissed by the trial court.

As with Nau's negligent misrepresentation claim, Nau failed to provide the trial court with any evidence or testimony from a standard of

care expert to establish the applicable standard of care or that West violated any statutory duties of a real estate broker in the subject transaction.

Lewallen advised Nau of the importance of the Form 17, went over it with him in detail, and did not vouch for any information provided by Vogel during the transaction. Nau and Lewallen clearly met on November 1, 2015 to discuss the Form 17. This is evidenced by Lewallen's November 2, 2015 email to Nau that references their discussion concerning the Form 17 the day before. At that meeting, they at least discussed the most important issue presented by the Form 17 -- the cemetery. And Lewallen advised him to fully investigate it. This is evidenced by Lewallen writing on the Feasibility Contingency on November 1, 2015 that the buyer would look into restrictions the cemetery may pose to the property. The fact that Nau actually investigated with the County further indicates that he understood the importance of the Form 17 to the subject transaction. Moreover, given that Nau claims he does not recall signing the Form 17s (even though he signed two), his assertion that he specifically recalls what Lewallen did not say at their meeting on November 1, 2015 is not credible.

Lewallen advised Nau to seek expert advice on matters relating to the transaction that were beyond her expertise. She told him to investigate the cemetery with the county and consider surveying the property, and she eventually scheduled for the County to investigate issues the cemetery may

pose. Advising Nau to seek expert help from the county and to consider commissioning a survey was clearly reasonable given the circumstances. Had Nau completed his investigation prior to closing as recommended by Lewallen, the County would have advised him of the issues with the location of the cemetery and Skokomish Nation's interest in it, as Nau discovered when he actually followed through with a reasonable investigation after closing. Moreover, the fact that Nau contacted an expert (Mason County) regarding the cemetery prior to closing inherently indicates that he understood that he should consult experts regarding the cemetery prior to closing.

West did not fail to disclose anything to Nau. Nau clearly had a duty to generally investigate the property and to specifically investigate the cemetery for any issues it may pose. Had he complied with that duty, he would have easily discovered that the property is within the boundaries of the Skokomish Reservation. In contrast, Lewallen had no knowledge prior to closing that the property was located within the Skokomish Reservation and had no duty to generally investigate the property or specifically investigate the cemetery. Even if she did know that the Property was located within the Skokomish Reservation (which she did not), she still would not have had a duty to disclose this as that fact was apparent and readily ascertainable to Nau prior to closing.

There simply is no evidence to support that West acted negligently, inappropriately, or in bad faith during this transaction. Lewallen would not have advised Nau to fully investigate the cemetery and consider performing a survey, and schedule an appointment with Miller to investigate the cemetery on behalf of Nau if she wanted to “whitewash” negative information. The information was there for Nau to find. It is his fault he did not find it.

The trial court correctly found that Nau did not present evidence to support his claims for breach of statutory duty.

#### **IV. CONCLUSION**

In light of the foregoing, Nau’s negligence claims against West were properly dismissed by the trial court on summary judgment.

If this court somehow finds that West breached a duty owed to Nau, it should also find that West cannot possibly be the proximate cause of Nau’s damages given his negligent inspection of the property.

RESPECTFULLY SUBMITTED this 13 day of October, 2020.

LAW OFFICE OF DANIEL P. MALLOVE, PLLC



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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of **Brief of Respondent West Realty, Inc.**, in Court of Appeals, Division II, Cause No. 54272-2-II to the following:

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Original E-filed with:  
Court of Appeals, Division II  
Clerk's Office

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: October 13, 2020, at Seattle, Washington.

  
Marganne Russell, Paralegal  
Law Office of Daniel P. Mallove, PLLC

**LAW OFFICE OF DANIEL P. MALLOVE, PLLC**

**October 13, 2020 - 11:04 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54272-2  
**Appellate Court Case Title:** Richard Nau, Appellant. v Nancy K. Vogel As Trustee for Mark O Vogel,  
Respondent  
**Superior Court Case Number:** 17-2-00645-2

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