

**FILED**

No. 352676

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COURT OF APPEALS OF THE  
STATE OF WASHINGTON, DIVISION III

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DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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QUANAH M. SPENCER and GWEN N. SPENCER,

Appellants,

v.

SAS OREGON, LLC,

Respondent.

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**REPLY BRIEF**

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## I. REPLY

### A. The Trial Court Erred When It Dismissed The Claims Against Respondent SAS Oregon, LLC Because There Are, At Minimum, Questions Of Fact In This Case Relating To Knowledge, Causation And The Nature And Extent Of Injuries And Damages.

On summary judgment, and here on appeal with *de novo* review, each and every material fact presented must be taken in the light most favorable to the non-moving party. Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483, 488 (1992); Griffith v. Centex Real Estate Corp., 93 Wn. App. 202, 209, 969 P.2d 486, 489 (1998); Miller v. Likins, 109 Wn. App. 140, 144, 34 P.3d 835, 837 (2001) (the court should view “*all evidence and draw[] all reasonable inferences in the light most favorable to the nonmoving party*”). In the present case, when scrutinized closely and viewed appropriately, the record shows there are material issues of fact in dispute, and the case was improperly dismissed. The trial court erroneously placed itself in the role of the jury when deciding the evidence presented was not sufficient to defeat summary judgment. In doing so, the court improperly weighed the evidence, rather than applying the

proper standard for considering the facts presented on summary judgment.

The Appellants/Plaintiffs, the Spencers, presented to the trial court evidence of: (1) the representations made and the material omissions; (2) evidence of the falsity of those representations; (3) evidence of their justified and detrimental reliance on the misrepresentations and material omissions; (4) their inducement to purchase based on the misrepresentations and material omissions; (5) SAS Oregon, LLC's ("SAS") knowledge; and (6) evidence of their resulting injuries, harm and damages caused by SAS's unlawful actions and omissions. CP 41-55 and 44. The evidence presented to the trial court was sufficient to preclude summary judgment.

The assertion SAS makes in response characterizing the Spencers' testimony as being "self-serving" underscores and highlights the error in the trial court's grant of summary judgment. See Respondent's Brief, p. 9. SAS is here again arguing for the facts to be inappropriately *weighed* on appeal in the same fashion that the trial court inappropriately *weighed* the facts on summary judgment. On summary judgment, an alleged or perceived bias cannot dispose

of evidence that creates a question of fact for the jury. FDIC v. Uribe, Inc., 171 Wn. App. 683, 688, 287 P.3d 694, 696 (2012) (“[s]ummary judgment will be denied if the reviewing court is required to consider an issue of credibility”); Hill v. Garda CL Nw., Inc., 198 Wn. App. 326, 355, 394 P.3d 390, 406 (2017) (a trial court “will not weigh evidence or resolve issues of credibility[.]”); CR 56.

The Spencers are obviously qualified to offer testimony about their personal knowledge. ER 602. Their personal knowledge and related testimony alone creates questions of fact in this case. Only when there is absolutely no question of fact in dispute, when all of the facts are taken in the light most favorable to the Spencers, can the trial court decide a case as a matter of law. If there is any, even one, material fact in dispute, then the trial court must not supplant the jury. It was improper for the trial court to act as the fact-finder and conclude that what it considered a weak case, or weak evidence, was sufficient to take from the Spencers their right to a jury trial. The Spencers’ personal knowledge about the condition of the house and the defects, and the representations, acts, omissions and promises made by SAS and by SAS’s agent, is sufficient to defeat

summary judgment. The Spencers' personal knowledge, accompanied by the documentary record on file with the trial court, was also sufficient to create questions of fact relating to the knowledge that SAS's agent, Marie Pence (the wife of Joseph Pence, the proprietor of Pence Properties – the contractor that did work on the subject property for SAS), had that is imputed to SAS.

SAS overlooks the law which provides that the acts and omissions of Marie Pence, SAS's agent, are considered the acts and omissions of SAS. "*Generally, a principal is chargeable with notice of facts known to its agent.*" Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn. App. 229, 268, 215 P.3d 990, 1011 (2009); accord Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., 125 Wn. App. 227, 235, 103 P.3d 1256, 1260 (2005). The claim that SAS "*was never aware*" is without merit, because its agent, Marie Pence, was fully aware of the condition of the subject property and the latent defects, and such knowledge was within the scope of her agency relationship.

Contrary to SAS's assertion, and belied by evidence on the record, the Spencers were not "*fully apprised of the condition of the*

*Property when they purchased it,”* because there were concealed, latent defects and problems that were only found after the purchase. Respondent’s Brief, p. 5; CP 41-55. A host of concealed, latent defects known to Marie Pence, and by imputation known to SAS, give rise to the merited claims brought by the Spencers.

**Respondent SAS Oregon, LLC Violated The Consumer Protection Act And, In Doing So, Caused Injury And Damage To The Spencers.**

SAS violated the Contractor Registration Act, Chapter 18.27 RCW and, in doing so, violated the Consumer Protection Act, Chapter 19.86 RCW. The violation caused the Spencers a host of injuries and damages. SAS concedes that it operates a commercial enterprise that is in the business of “flipping” residential properties. To protect consumers like the Spencers, the Washington Supreme Court has recognized the “*statutory mandate to liberally construe the CPA in order to protect the public.*” Panag v. Farmers Ins. Co. of Washington, 166 Wn.2d 27, 55, 204 P.3d 885, 898 (2009). SAS’s business, as it has in the present case, clearly has the effect and potential of injuring and damaging the public by way of residential home purchasers being injured and damaged as a result of

purchasing homes with latent defects known to the seller and the seller's agent.

At minimum, there are questions of fact for the jury in this case relating to the CPA claim.

**1. When The Facts Are Properly Taken In The Light Most Favorable To The Spencers, CPA Causation Was Established On Summary Judgment Creating Questions Of Fact For The Jury.**

The trial court notes in its letter opinion that SAS represented to the Spencers that there were no defects, yet SAS's agent knew of defects and concealed them. The Spencers presented evidence to the trial court of the concealed, latent defects and the injuries and damages caused to them by the deceptive and unlawful practices of SAS. "Causation under the CPA is a factual question to be decided by the trier of fact." Deegan v. Windermere Real Estate/Ctr.-Isle, Inc., 197 Wn. App. 875, 885, 391 P.3d 582, 587 (2017). Reliance is one way to establish this causal link in cases where there is alleged affirmative misrepresentation. Id. Thus, the causal link in the present case is made, because there is evidence of an affirmative misrepresentation and reliance.

Additionally, when there are omissions of material fact “*causation is different[.]*” Id. In such cases “*causation under the CPA for omission of material facts includes a rebuttable presumption of reliance[.]*” Id. In the present case, SAS failed to overcome the presumption of reliance, and thus, there is a causal link for the CPA claim precluding summary judgment.

Notably, a “*seller’s failure to disclose material facts to the purchaser in a real estate transaction may support a CPA claim, even if the circumstances do not establish fraudulent concealment.*” Nguyen v. Doak Homes, Inc., 140 Wn. App. 726, 734, 167 P.3d 1162, 1166 (2007). Under the CPA, “*proof of intent to deceive or defraud is not necessary*” as an element of a claim. McRae v. Bolstad, 101 Wn.2d 161, 167, 676 P.2d 496, 500 (1984); Haner v. Quincy Farm Chemicals, Inc., 97 Wn.2d 753, 759, 649 P.2d 828, 831 (1982). For purposes of the CPA in a claim involving the purchase and sale of real property:

*A buyer and seller do not deal from equal bargaining positions when the latter has within his knowledge a material fact which, if communicated to the buyer, will render the goods unacceptable or, at least, substantially less desirable. Failure to reveal a fact which the seller is in good faith bound to disclose may*

*generally be classified as an unfair or deceptive act due to its inherent capacity to deceive and, in some cases, will even rise to the level of fraud.*

Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wn. App. 39, 51, 554 P.2d 349, 358 (1976); accord McRae, 101 Wn.2d at 166, 676 P.2d at 500 (the failure of a seller, or seller's agent "*to disclose information has long been recognized as the basis for an action under RCW 19.86*"). As such, the "duty to disclose material facts" has been recognized in real estate transactions. Griffith, 93 Wn. App. at 215-18, 969 P.2d at 492-94.

In the present case, the Spencers were induced to act by SAS's deceptive and unlawful business practices, and they had injury and damages as a direct result. The causal link has been established, because the Spencers were injured by SAS's deceptive and unlawful business practices, and there is also a presumption of causation because of SAS's omissions of material fact. At minimum, there are questions of fact precluding summary judgment on causation.

**2. When The Facts Are Properly Taken In The Light Most Favorable To The Spencers, CPA Injury And Damages Were Established On Summary Judgment Creating Questions Of Fact For The Jury.**

Property owners are qualified to testify about the condition and value of their property. Cunningham v. Town of Tieton, 60 Wn.2d 434, 374 P.2d 375 (1962); State ex rel. Bremerton Bridge Co. v. Superior Court for Kitsap Cty., 194 Wn. 196, 198, 77 P.2d 800, 801 (1938). Such testimony is to be weighed by the jury. Ingersol v. Seattle-First Nat. Bank, 63 Wn.2d 354, 358, 387 P.2d 538, 540 (1963). In the present case, the Spencers were qualified to testify about the condition and value, and the diminished value, of the subject property, and the issue of what weight should be given the testimony was for the jury. Thus, the trial court erred in granting summary judgment, because it supplanted the role of the jury by determining what weight to give the Spencers' testimony.

The Washington Supreme Court has held that:

*To establish injury and causation in a CPA claim, it is not necessary to prove one was actually deceived. It is sufficient to establish the deceptive act or practice proximately caused injury to the plaintiff's 'business or property.' If the deceptive act actually induces a*

*person to remand payment that is not owed, that will, of course, constitute injury.*

Panag, 166 Wn.2d at 63–64, 204 P.3d at 902 (2009). Moreover, “*other expenses incurred as a result of the deceptive practice may satisfy the injury element.*” Id. at 65, 204 P.3d at 903. Further:

*There are five elements to a consumer protection act claim. Actual damages is not one of them. Under the Consumer Protection Act, ‘injury’ is broader than ‘damages.’ Monetary damages need not be proved; unquantifiable damages may suffice. The failure to show actual monetary damages only precludes the recovery of treble damages. It does not act as a complete bar to a recovery.*

Handlin v. On-Site Manager Inc., 187 Wn. App. 841, 849, 351 P.3d 226, 230 (2015) (internal quotations and citations omitted). Notably, an “*injury to property occurs when one’s right to possess, use, or enjoy a determinate thing has been affected in the slightest degree.*” Id. A party can also “*satisfy the CPA’s injury requirement with proof that her property interest or money is diminished as a result of [a defendant’s] unlawful conduct, even if the expenses incurred by the statutory violation are minimal.*” Trujillo v. Nw. Tr. Servs., Inc., 183 Wn.2d 820, 837, 355 P.3d 1100, 1108 (2015).

In the present case, the trial court erred by acting as the fact-finder and determining, contrary to the evidence, that the Spencers had not been injured or damaged under the CPA. The Spencers presented evidence of, among other things, the subject property's diminished value, evidence of their inducement to pay money to purchase the property based on SAS's deceptive acts and practices, evidence of expenses to remedy the latent defects only found after the purchase, and evidence of the injury to their rights to use and enjoy. Upon taking residence, the Spencers began to find problems which led to the need to remedy the variety of defective conditions. The defects and associated costs of repair negatively affected the property's value, especially when contrasted with the purchase price. Under Panag, Handlin and Trujillo, it was error for the trial court to conclude that the Spencers did not, at least, create a question of fact for the jury on the issue of injury and damage under the CPA.

C. **There Are Questions Of Fact Relating To The Spencers' Fraud Claim Because The Evidence Presented To The Trial Court Established All Nine (9) Of The Necessary Elements.**

SAS mischaracterizes the facts and the holding of Svensden in its response by arguing that it supported dismissal of the

Spencers' CPA and fraud claims. The Spencers did not narrowly base their fraudulent concealment claim on only the subject seller disclosure statement. CP 26-30, 4-19 and 41-55. In Svendsen, the Washington Supreme Court held that neither a fraudulent concealment claim nor a CPA claim is barred when the allegations and evidence demonstrate that the fraudulent concealment was not limited to only the seller disclosure statement. Svendsen v. Stock, 143 Wn.2d 546, 557, 23 P.3d 455, 460 (2001). The court further held:

*While it appears the seller disclosure statute exempts agents and brokers from liability under the CPA for fraudulent concealment arising directly from the seller disclosure statute, 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. In that regard, our interpretation is in accord with the goal of the CPA that it 'shall be liberally construed that its beneficial purposes may be served.'*

Svendsen, 143 Wn.2d at 558–59, 23 P.3d at 461, internal citations omitted.

As commonly characterized:

*The nine elements of fraud are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.*

Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194, 204 (1996). In

the sale of real estate:

*[A] broker or seller has a duty to disclose all material facts not reasonably ascertainable to the buyer. Failure to disclose a material fact, where there is a duty to disclose is fraudulent. Furthermore, purchasers of property have a right to rely on the sellers' and their agents' representations.*

McRae v. Bolstad, 32 Wn. App. 173, 176–77, 646 P.2d 771, 774

(1982) (internal citations omitted). Fraud in the inducement “*is fraud which induces the transaction by misrepresentation of motivating factors such as value, usefulness, age or other characteristic of the property or item in question.*” Pedersen v.

Bibioff, 64 Wn. App. 710, 722, 828 P.2d 1113, 1120 (1992).

In the present case, SAS has committed fraud, whether characterized as fraudulent concealment or fraud in the inducement. The fraud perpetrated by SAS, and vicariously by SAS's agent,

involved misrepresentation of motivating factors that clearly induced the Spencers to purchase the subject property to the Spencers' detriment. The Spencers have presented evidence of their injuries and damages, to include their emotional distress. Common law fraud is recognized as a valid basis for an emotional distress award. Nord v. Shoreline Sav. Ass'n, 116 Wn.2d 477, 482–85, 805 P.2d 800, 803–05 (1991); see, e.g., CP 144 and 41-55.

In sum, summary judgment dismissal of the Spencers' fraud claim was error, because the subject property contained a host of latent defects that were fraudulently concealed by SAS, both directly and vicariously by SAS's agent. The fraudulent concealment and fraud in the inducement by SAS caused the Spencers to suffer injury and damages, and they should be allowed to exercise their right to have this case presented to a jury.

## **II. CONCLUSION**

Ultimately, the Spencers are entitled to rescission and damages. They have been denied justice as a result of the trial court improperly supplanting the role of the jury. There are material issues of fact in dispute that preclude the proper entry of summary

judgment. The trial court erred by weighing facts that must be presented to the jury and, in doing so, failed to properly review the facts in the light most favorable to the Spencers. Thus, the trial court's grant of summary judgment dismissal to SAS should be reversed.

DATED this 12<sup>th</sup> day of January, 2018.

DUNN & BLACK, P.S.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 12th day of January, 2018, I caused to be served a true and correct copy of the foregoing document to the following:

- |                                     |                  |   |
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| <input type="checkbox"/>            | U.S. MAIL        | Nicholas D. Kovarik                                   |
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