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OCT 23 2017

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

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DIVISION III
STATE OF WASHINGTON
By _____

Case No. 352676

QUANAH M. SPENCER and GWEN N. SPENCER,
Appellant.
v.

SAS OREGON, LLC, Respondent,

APPELLANTS' BRIEF

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I. ASSIGNMENT OF ERROR

1. The Trial Court erred in granting SAS Oregon, LLC's Motion for Summary Judgment.
 - a. Issues related to Assignment of Error No. 1:
 - i. Whether it was error to find the Purchase and Sale Agreement not void and unenforceable due to Illegality.
 - ii. Whether it was error to find that SAS Oregon LLC's failure to register as a contractor under RCW 18.27.020 was not a per se violation of the Consumer Protection Act RCW 19.86 actionable by Plaintiffs.
 - iii. Whether it was error to find that SAS Oregon, LLC did not cause injury to Plaintiffs by failing to disclose that repairs were completed in violation of state law.

II. STATEMENT OF THE CASE.

In the fall of 2013, Quanah and Gwen Spencer, husband and wife, began searching for a new house for their family. Their intention was to live in the new home long term to raise their children and set down roots in the community of Spokane, Washington. (CP 41-42.) When Mr. Spencer and his wife began to look for a home, a friend of theirs recommended the services of a specific broker/agent. The friend was the real estate agent that they had used to purchase our their first home together in 2007. The friend knows Don Hay personally and professionally, so the Spencers trusted their friend's judgment when she recommended using Don Hay as their real

estate agent/broker. To prepare for the potential of buying a new home, Quanah and Gwen Spencer worked with their chosen lender, Alaska Federal Credit Union, regarding pre-approval within the US Department of Housing and Urban Development (HUD) Section 184 Indian Home Loan Guarantee Program. The Section 184 Indian Home Loan Guarantee Program is a home mortgage product specifically designed for qualified American Indian and Alaska Native families, Alaska villages, tribes, or tribally designated housing entities. (CP 42-43).

Quanah and Gwen Spencer obtained the services of Don Hay as Mr. Hay in their upcoming home purchase after meeting with Don Hay in person. Over the course of several months, they spent numerous hours with Don Hay visiting and reviewing homes in the Spokane, WA, area. Mr. Hay did attend each visit of homes in the Spokane, WA, area that was requested. Don Hay provided the Spencers with access to the Multiple Listing Service and Don Hay instructed the Spencers to review the Multiple Listing Service, and to identify homes they wished to visit. Quanah and Gwen Spencer did as instructed and reviewed numerous homes listed on the Multiple Listing Service. Each time a home was selected, the Spencers forwarded the Multiple Listing Service sheet to Don Hay so that he could schedule an in-person visit of each home. (CP 43).

After visiting several properties with Don Hay, Mr. Hay, Quanah and Gwen Spencer became interested in the property located at 4311 South Hogan Street. Don Hay provided the Spencers with the Multiple Listing Service sheet which provided details about the condition, price, and the location of the property. Quanah and Gwen Spencer did review the Multiple Listing Service sheet provided by Mr. Hay Don Hay, before visiting the Hogan Street property in person with Don Hay. (CP 43). The Multiple Listing Service sheet provided to Quanah and Gwen Spencer by Mr. Hay listed several major renovations that had been completed to the property by the seller,

SAS Oregon LLC. There was no statement in the Multiple Listing Service sheet provided to Quanah and Gwen Spencer by Mr. Hay, which stated that the property was a “flip” property or was purchased by the seller because the property was a foreclosure. (CP 43).

Quanah and Gwen Spencer made an in-person visit of the property with Mr. Hay, in early December of 2013. After their visit to the property before December 12, 2013, Quanah and Gwen Spencer decided to place an offer to purchase the home through Mr. Hay. The property appeared to be located in a neighborhood that was safe and secure to raise their children. (CP 43). On December 12, 2013, Don Hay, the broker/agent for Quanah and Gwen Spencer, provided them with a Residential Real Estate Purchase and Sale Agreement. Don Hay completed the Residential Real Estate Purchase and Sale Agreement and Quanah and Gwen Spencer reviewed the document and signed and initialed the document where it was required for them to do so as a buyer of the property. (CP 43-44).

Subsequently, Quanah and Gwen Spencer were provided with a Seller Disclosure Statement by Don Hay, Mr. Hay. They did review the Seller Disclosure Statement provided by Don Hay, broker/agent. Don Hay did not explain in detail the Seller Disclosure Statement to Quanah and Gwen Spencer and did not provide advice and guidance to them in regard to the Seller Disclosure Statement in obtaining additional professional services or in understanding the information provided by the seller. Don Hay, Mr. Hay, did not explain the information contained in the Seller Disclosure Statement that could have been or should have been material to the purchase of the property and that warranted additional or heightened scrutiny. Quanah and Gwen Spencer did extend an offer to purchase the property from the seller on December 12, 2013. The offer had a number of conditions that the Spencers requested before the offer became final. (CP 45).

Don Hay, broker/agent for Quanah and Gwen Spencer did not provide them any indication, based on his professional experience, that they should obtain additional inspections beyond the typical home inspection. Quanah and Gwen Spencer understood that Don Hay lived in the same area of town as the home they wanted to purchase, and that he was familiar selling homes in the area. When Don Hay advised the Spencers that the home they were interested in was a great opportunity, in a great neighborhood, Quanah and Gwen Spencer trusted his professional and personal judgement. The advice Don Hay provided the Spencers included several warnings about the depth of inspection that could be executed during the home inspection, in that they were not allowed to go much beyond a visual inspection of the home with the hired home inspector. Considering that the first and only other home Quanah and Gwen Spencer purchased was new construction, they were not familiar with some of the typical types of additional scrutiny that might be warranted for an older home such as the home at Hogan Street. Quanah and Gwen Spencer trusted Don Hay's counsel, and also trusted that the seller was being forthright in their disclosures. Quanah and Gwen Spencer relied heavily on the expertise and professional judgement offered by Don Hay especially because they were not very experienced in buying or selling real estate and neither Quanah or Gwen Spencer have any professional expertise buying or selling real estate. Don Hay did not explain the information contained in the Seller Disclosure Statement that could have been or should have been material to the purchase of the property and that warranted additional or heightened scrutiny by the Spencers. (CP 45).

One condition that Quanah and Gwen Spencer did request included a request that a home inspection be allowed before the purchase of the property was final. The Spencers were provided with the name and contact information for a home inspector that was recommended and referred to them by their broker/agent. Don Hay had told the Spencers that he had worked with Jeff

Johnson, a home inspector with Stamp of Approval, on several occasions and that Jeff Johnson was a personal friend of Don Hay. Quanah and Gwen Spencer contacted the home inspector, Jeff Johnson, and secured the services of the home inspector to inspect the property based upon Don Hay's referral and recommendation. (CP 44).

The home inspector, Jeff Johnson, did visit the property on December 17, 2013, to conduct an inspection of the property. Quanah and Gwen Spencer were present on the date and time of the home inspection at the property where the home inspector was conducting the home inspection. Don Hay was also present on the date and time of the home inspection at the property. The home inspection was completed by the home inspector and he stated that he would provide a report of his visual inspection of the property to Quanah and Gwen Spencer at a later date. (CP 44-45).

Quanah and Gwen Spencer did receive a report from the home inspector regarding the inspection that he conducted at the property on December 17, 2013. Quanah and Gwen Spencer did review the home inspection report. Don Hay, Mr. Hay did not recommend that the Spencers seek the services of any other home inspection services other than Jeff Johnson or obtain any additional tests after the home inspection was completed by Jeff Johnson. Don Hay, Mr. Hay, did not recommend that the Spencers request that the seller obtain or produce any necessary building permits or building code inspections prior to closing on the property. The home inspector did not recommend that the Spencers seek the services of any other home inspection services other than Jeff Johnson or obtain any additional tests after the home inspection was completed. (CP 45).

After the home inspection was completed, Quanah and Gwen Spencer requested that modifications and repairs be completed as recommended by the home inspector in his report. Don Hay, broker/agent, completed the Inspection Response For Form 35 and the

Addendum/Amendment to Purchase and Sale Agreement. The Spencers reviewed both documents and signed and initialed both documents where required as a buyer of the property. The date on the two documents was December 22, 2013. Don Hay, broker/agent, conveyed the documents to the seller for further review and a response from the seller. Subsequent to December 22, 2013, and before closing on the property on February, 28, 2014, Quanah and Gwen Spencer were advised by Don Hay, Mr. Hay, that he had received communication from Marie Pence that the repairs requested in the Inspection Response For Form 35 and the Addendum/Amendment to Purchase and Sale Agreement, had been completed. (CP 45).

In early January of 2014, Quanah and Gwen Spencer requested that Don Hay, Mr. Hay, provide them with access to do an in-person visit to the property. Mr. Hay, Don Hay, did attend the in-person visit of the property as requested. (CP 46). Prior to this time in early January 2014, during an online search of the address of the property, Gwen Spencer found public records indicating that the property may have been in foreclosure and that the sellers from which Quanah and Gwen Spencer were purchasing the home, had purchased the property during a time of foreclosure on the property. Gwen Spencer mentioned this informally on a phone call with Don Hay, and he also indicated that the information Gwen Spencer found indicated that the property was in foreclosure prior to SAS Oregon purchasing the home and renovating the property. Don Hay never provided additional context to the Spencers about the concerns or additional scrutiny that should be placed on a home that has been in foreclosure and then "flipped." Don Hay never advised the Spencers that the foreclosure and subsequent "flipping" of the home could have been or should have been material to the purchase of the property. (CP 47-48).

During the in-person visit to the home in early January, Quanah Spencer had a conversation with Don Hay, broker/agent, about the Hogan Street property. In this conversation, the Spencers

broker/agent Don Hay did state to Quanah Spencer that he had learned that the property had been in foreclosure recently and that the property was a “flip” property. Don Hay, broker/agent, did not disclose to Quanah Spencer how he knew of such information or that such information could have been or should have been material to the purchase of the property. Don Hay, broker/agent, did not advise Quanah Spencer to exercise additional caution or heightened scrutiny regarding the property due to the information that Don Hay had learned regarding the property’s status as a “flip” property. (CP 47-48).

During the same visit to the property in early January of 2014, Quanah and Gwen Spencer did participate in a conversation with Mr. Hay Don Hay, together, about the property. In the conversation Don Hay, Mr. Hay, stated that Marie Pence had gotten confused about the repairs that were requested to be completed to the property in the Inspection Response Form 35 and the Addendum/Amendment to Purchase and Sale Agreement, signed by the Spencers, and conveyed to the seller of the property. (CP 47-48).

In the conversation that Quanah and Gwen Spencer had with Mr. Hay, Don Hay told the Spencers that Marie Pence had gotten confused about the repairs requested by the Spencers, to be completed at the property, because Marie Pence had been working on approximately 7 or 8 other homes for SAS Oregon LLC that had also been getting repairs. Don Hay, broker/agent, told Quanah and Gwen Spencer that he obtained such information directly from a conversation that he had with Marie Pence. Quanah and Gwen Spencer were not involved directly with the conversation that Don Hay had with Marie Pence when this information was conveyed to Don Hay. Mr. Hay, Don Hay, did not advise the Spencers to seek additional advice from other professionals regarding the purchase of the property based upon such information received from Marie Pence. Don Hay, broker/agent, did not advise the Spencers that such information received

from Marie Pence was information that could have been or should have been material to the purchase of the property and that such information warranted additional or heightened scrutiny by the Spencers. (CP 48).

Quanah and Gwen Spencer have never purchased a foreclosed home or “flip property” so they relied upon the advice and guidance of Don Hay, broker/agent, in the purchase of the property. The Spencers believe that Don Hay failed to adequately advise them on the risks associated with the purchase of a foreclosure or “flip” property that was re-sold so quickly by the seller of the property. Don Hay, broker/agent, at no time provided advice or guidance on any additional professional services or tests that the Spencers should have obtained after the home inspection was completed or after Don Hay had obtained information from Marie Pence, or other sources of information at the disposal of Mr. Hay, on the status and the condition of the property. Mr. Hay, Don Hay, did not recommend that the Spencers request that the seller obtain or produce any necessary building permits or building code inspections prior to closing on the property. Had Don Hay, broker/agent, provided advice and guidance to obtain additional professional services and/or tests of the property and/or require building permits and/or building code inspections by the seller, the Spencers would have likely done as advised and recommended. The Spencers received no advice, guidance, or recommendation directly from Don Hay, Mr. Hay, in that regard so they obtained no additional professional services and/or tests of the property and/or requested building permits and/or building code inspections by the seller. (CP 47-48)

23. In addition to the home inspection conducted by Jeff Johnson, Quanah and Gwen Spencer requested that a radon test be conducted of the home given that the home did have a basement. Quanah and Gwen Spencer made the request to have the radon test to their broker/agent, Don Hay, and Don Hay told the Spencers that he would ensure that their home inspector, Jeff

Johnson, completed the radon test before closing on the property. In an email to Gwen Spencer, received from Don Hay, Don Hay stated that he had reviewed the radon test results and that the radon test results were fine. Don Hay never provided the actual test results to the Spencers prior to closing on the property. Based upon the statement made by Don Hay regarding his review of the radon test results and his statement that the radon test results were fine, the Spencers did not see a reason to request additional radon testing, request mitigation to be completed for radon by the seller, or request that the offer from the Spencers to purchase the property be rescinded. Had Mr. Hay provided advice and guidance to obtain additional professional services and/or tests of the property and/or mitigation of the radon and/or rescission of the agreement, the Spencers would have likely done as advised and recommended by Mr. Hay. Quanah and Gwen Spencer received no advice, guidance, or recommendation directly from Don Hay, broker/agent, in this regard. (CP 48, 52).

At no time in the transaction involving the purchase of the property by Quanah and Gwen Spencer did any of the Defendants advise the Spencers that the seller, SAS Oregon LLC, was not a licensed contractor under Washington State law. Don Hay, Mr. Hay, did not provide any advice or guidance to the Spencers in regard to the legal requirement in Washington State that a seller of a "flip" property must be a licensed contractor pursuant to Washington State law. Quanah and Gwen Spencer received no advice, recommendation, or guidance from Don Hay, Mr. Hay, to obtain additional professional services in this regard. (CP 49).

At no time in the transaction involving the purchase of the property did any of the Defendants advise Quanah and Gwen Spencer that the seller's broker/agent, Marie Pence, had a close kinship relationship to the general contractor who made major renovations to the property. Subsequent to closing on the property on February 28, 2014, and before filing the complaint,

Quanah and Gwen Spencer discovered that Marie Pence is the wife of the owner of Pence Properties. (CP 49-50).

Quanah Spencer learned of the close kinship relationship between Marie Pence and the owner of Pence Properties Inc., after his own independent research preparing a complaint that he submitted to the Washington State Department of Labor and Industries in March of 2015 against SAS Oregon LLC for violation of Washington State law. Pence Properties is owned by Joseph Pence. Pence Properties is the general contractor who performed or supervised the major renovations conducted on the property. Don Hay, SAS Oregon LLC, Marie Pence, and Suzette Alfonso did not disclose the kinship relationship between the seller's broker/agent and Pence Properties. (CP 49).

After closing on the property on February 28, 2014, Quanah and Gwen Spencer moved into the property and began residing in the property as a primary residence. Their two children also began residing in the property. Within a few months after the Spencers began residing in the property, Quanah and Gwen Spencer noticed that there were some problems with the property that required the Spencers to contact general contractors familiar with home remodeling and repair to come to the property to conduct a review and provide estimates to repair the problems. From the early summer of 2014 until the late summer of 2015, Quanah and Gwen Spencer had several general contractors come into the property and review the problems observed since moving into the property beginning in the spring of 2014. The general contractors secured by the Spencers provided estimates of the work that needed to be completed on the property to repair the problems that had been observed. Several of the estimates provided by the general contractors included work to repair and remodel the upstairs and downstairs bathrooms due to faulty plumbing and electrical work, remodeling of the kitchen due to faulty plumbing and

electrical work and other issues with kitchen countertops and cabinets, the absence of heating sources in the upstairs and downstairs bathrooms, a leaking shower in the downstairs bathroom, faulty work completed on the roof of the property, and lack of adequate insulation in the roof of the property. The general contractors who reviewed the problems with the property and provided estimates also stated that the work completed on the property before Quannah and Gwen Spencer had purchased the property had been done in such a manner that the work completed would not have passed inspection and thus, would have been out of compliance with the building code. (CP 50-51).

Despite the statements made by the seller in the Multiple Listing Service sheet, the Seller Disclosure Statement and avowals otherwise, a contractor has found several defects in the sprinkler system that required Quannah and Gwen Spencer to spend hundreds of dollars to make the necessary repairs. Despite the statements made by the seller in the Multiple Listing Service sheet, the Seller Disclosure Statement and avowals otherwise, a contractor has found that the top mounted damper in the main floor fireplace was severely damaged allowing moisture to drain into the home and creating a significant fire hazard. The ash door was broken, creating a fire hazard and risk to the Spencer family, and making the fireplace unusable. Further, the wood stove as it was characterized by the seller in the Seller Disclosure Statement is not a wood stove and is in fact an insert as found to be the case by contractors. Despite the statements made by the seller in the Multiple Listing Service sheet, the Seller Disclosure Statement and avowals otherwise, Quannah and Gwen Spencer have observed that when it rains water pools up around the foundation of the house. This drainage issue will require extensive work to ensure that the drainage issue will be corrected so that water will drain away from the property and thus, mitigate the risk that a flood will occur in the basement. (CP 50-53)

31. Despite the statements made by the seller in the Multiple Listing Service sheet, the Seller Disclosure Statement and avowals otherwise, a contractor has discovered that the air conditioner contained a Freon leak and was not functioning properly. There were no heating systems in either of the two bathrooms, the bathroom exhaust fan in the first level bathroom did not function properly and has had to be replaced, and the insulation level was not up to code. Despite the statements made by the seller in the Multiple Listing Service sheet, the Seller Disclosure Statement and avowals otherwise, a contractor has discovered the hazardous material asbestos in multiple locations of the property. In addition, elevated levels of radon have been found on the property. Quanah and Gwen Spencer conducted their own test for radon in 2015 and the results, which were completed by an independent testing facility, indicated elevated levels of radon on the property. There were also several pounds worth of metal objects that included many nails, straight-edged razors, needles, stakes and files, littered across the exterior areas of the home. Quanah and Gwen Spencer paid for the removal of such materials from the property. Further, animal urine and feces were discovered throughout the basement of the house. All of which is a hazard and risk to the Spencer family. As a result of the presence of animal urine and feces in the basement of the property, Quanah and Gwen Spencer paid several thousand dollars to have the basement carpet removed and new carpet installed by a licensed and bonded company. Despite the statements made by the seller in the Multiple Listing Service sheet, the Seller Disclosure Statement and avowals otherwise, contractors have also informed Quanah and Gwen Spencer that there are severe plumbing related problems in the basement bathroom, first level bathroom, basement laundry area, and kitchen. Contractors have provided estimates for work that must be completed in order to repair the plumbing problems that will bring the plumbing work completed by SAS Oregon LLC up to the building code standards. (CP 50-54).

All of these defects were undiscoverable prior to the purchase of the property, and were not disclosed in the Form 17 Seller Disclosures or were concretely disclosed as having no problems or defects. Quanah and Gwen Spencer have subsequently either personally discovered the defects or have had third party contractors describe them. (CP 53).

In the late spring of 2014, Quanah Spencer contacted Don Hay by telephone to discuss the problems that he and his wife Gwen Spencer were finding with the property. Quanah Spencer did tell Don Hay that the hazardous material asbestos was found at the property. Quanah Spencer asked Don Hay how the seller could get away with selling a property with hazardous materials present and with work done that was not completed in a workmanlike manner. Don Hay told Quanah Spencer that there was no way to get relief from anyone involved in the sale of the property. Quanah Spencer told Don Hay that he disagreed and that he was going to obtain the services of an attorney to rescind the real estate contract. Don Hay told Quanah Spencer on the phone call that he could not sue anyone, including Don Hay, because Quanah and Gwen Spencer had agreed to the real estate contract, that contractors had completed the work on the property, and as a result, the Spencer family had no legal remedies. Quanah Spencer told Don Hay that the Spencer family was going to get an attorney and Quanah Spencer ended the telephone call. (CP 53-54).

Based upon the information that Quanah Spencer received from contractors and the information that he obtained from personal research on SAS Oregon LLC, Marie Pence, Pence Properties, Inc., and Joseph Pence, Quanah Spencer contacted Washington State Department of Labor and Industries via e-mail on March 13, 2015. In an e-mail to the Washington State Department of Labor and Industries, Quanah Spencer submitted a complaint against SAS Oregon LLC for violation of the Revised Code of Washington 18.27.020 and 18.27.010(1). After the e-

mail complaint was filed, Quanah Spencer spoke by telephone with Thomas Berryman, an inspector with Contractor Compliance with the Washington State Department of Labor and Industries. Thomas Berryman spoke with Quanah Spencer regarding the e-mail complaint and notified Quanah Spencer that he was going to investigate the complaint and file a response in regard to the complaint. Thomas Berryman notified Quanah Spencer in the telephone call that Quanah Spencer could make a public records request several months after the investigation was started to obtain records related to the investigation and obtain a copy of the decision by Washington State Department of Labor and Industries in regard to the complaint. (CP 54-55).

Quanah Spencer did file a public records request with the Washington State Department of Labor and Industries and obtained the information that Thomas Berryman obtained as a result of his investigation of the Quanah Spencer complaint along with the statement of the decision based upon Thomas Berryman's investigation. According to the statement of the decision, Thomas Berryman found that SAS Oregon LLC was not a licensed contractor pursuant to the Revised Code of Washington 18.27.200(1)(a)(1). The statement of the decision contained a finding that Thomas Berryman had in fact determined that SAS Oregon LLC had violated the Revised Code of Washington 18.27.200(1)(a)(1), and that he was going to issue a notice of violation against SAS Oregon LLC for the violation, impose a penalty of \$1,000.00 against SAS Oregon LLC, and require SAS Oregon LLC to register as a general contractor. SAS Oregon LLC has violated Washington State law in regard to the property purchased by Quanah and Gwen Spencer, which is the subject of their lawsuit against the Defendants. (CP 54-55).

Because of the condition of the home, and the material defects that have been encountered in the home, Quanah and Gwen Spencer have been advised by real estate professionals that if they were to try and sell the home, they would have to sell the home at a

considerably lesser amount than what they initially paid for it, due to the material defects that are known. In the last several years, the prices of homes in the Spokane market have risen, creating a sellers market. The condition of the home and knowledge of the material defects has prohibited Quanah and Gwen Spencer from enjoying the inherent ability that comes with making real estate investments, which include the opportunity to sell the investment when needed. Additionally, over the time they have owned their home, there has been considerable increases in benchmark 30-year fixed-rate mortgage rates. Quanah and Gwen Spencer will not be able to enjoy the same interest rates that were available to them when they purchased the home in 2014. (CP 55).

Plaintiff-Appellants filed their Complaint in Spokane Superior Court on September 1, 2015. Plaintiff-Appellants filed an Amended Complaint on February 22, 2016. SAS Oregon, LLC filed its Motion for Summary Judgment on January 6, 2017. A hearing was held on February 3, 2017. A Letter Ruling was entered by Judge Moreno on March 16, 2017 and Order Granting SAS Oregon LLC's Motion for Summary Judgment was filed on April 7, 2017. The Notice of Appeal was filed on May 8, 2017.

III. LEGAL ARGUMENT

a. Whether it was error to find the Purchase and Sale Agreement not void and unenforceable due to Illegality.

As a general rule and a matter of public policy, the Washington State courts will not enforce agreements which are illegal and contrary to public policy. *See Red Devil Fireworks v. Siddle*, 648 P. 2d 468 (Div. II 1982); *Sienkiewicz v. Smith*, 30 Wn. App. 235, 633 P.2d 905 (1981); *Golberg v. Sanglier*, 27 Wn. App. 179, 616 P.2d 1239

(1980)). The same principle applies to contracts that grow immediately out of and are connected with an illegal act. *Golberg*, 96 Wn.2d 874, 879, 639 P.2d 1347 (1982). The Court may consider the illegality of a contract at any time, including on appeal. *Wright v. Corbin*, 190 Wash. 260, 67 P.2d 868 (1937). In fact, the court must consider the question of illegality when it is raised or when the fact of its illegality has been made to appear. *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 465 P.2d 657 (1970).

A court “will not knowingly aid in the furtherance of an illegal transaction.” *H.O. Meyer Drilling Co. v. Alton V. Phillips Co.*, 2 Wn.App. 600, 468 P.2d 1008 (Div. 1 1970). Rather, the courts will leave the parties where it finds them. *Hederman v. George*, 35 Wn.2d 357, 212 P.2d 841 (1949); *Reed v. Johnson*, 27 Wash. 42, 67 P. 381 (1901); *Sherwood v. Wise*, 132 Wash. 295, 232 P. 309 (1925); *Waring v. Lohdell*, 63 Wash.2d 532, 533, 387 P.2d 979 (1964) (citing *Hederman v. George*, 35 Wash.2d 357, 212 P.2d 841 (1949); *Sherwood & Roberts-Yakima, Inc. v. Cohan*, 2 Wash.App. 703, 469 P.2d 574 (1970); 14 S. Williston, *Contracts* § 1630A, at 20 (3d ed. 1972)). If a statute is unambiguous “it must be enforced as written.” *Sherwood v. Wise*; *Meyer v. Simpson*, 34 Wash.2d 486, 209 P.2d 294 (1949). When “an instrument is intimately connected with an illegal one, the former becomes tainted with that illegality and is likewise unenforceable.” *Miller v. Myers*, 158 Wash. 643, 291 Pac. 1115 (1930); and cf., *Van Horn v. Kittitas Cy.*, 112 Fed. 1 (WD.Wash. 1901).

RCW 18.27.020 provides:

- (1) Every contractor shall register with the department.
- (2) It is a gross misdemeanor for any contractor to:
 - (a) Advertise, offer to do work, submit a bid, or perform any work as a contractor without being registered as required by this chapter;
 - (b) Advertise, offer to do work, submit a bid, or perform any work as a contractor when the contractor’s registration is suspended or revoked;

- (c) Use a false or expired registration number in purchasing or offering to purchase an advertisement for which a contractor registration number is required;
 - (d) Transfer a valid registration to an unregistered contractor or allow an unregistered contractor to work under a registration issued to another contractor; or
 - (e) Subcontract to or use an unregistered contractor.
- (3) It is not unlawful for a registered contractor to employ an unregistered contractor who was registered at the time he or she entered into a contract with the registered contractor, unless the registered contractor or his or her representative has been notified in writing by the department of labor and industries that the contractor has become unregistered.
- (4) All gross misdemeanor actions under this chapter shall be prosecuted in the county where the infraction occurs.
- (5) A person is guilty of a separate gross misdemeanor for each day worked if, after the person receives a citation from the department, the person works while unregistered, or while his or her registration is suspended or revoked, or works under a registration issued to another contractor. A person is guilty of a separate gross misdemeanor for each worksite on which he or she violates subsection (2) of this section. Nothing in this subsection applies to a registered contractor.
- A contractor was defined as "any person, firm, corporation, or other entity covered by this subsection, whether or not registered as required under this chapter or who are otherwise required to be registered or licensed by law, who offer to sell their property without occupying or using the structures, projects, developments, or improvements for more than one year from the date the structure, project, development, or improvement was substantially completed or abandoned."
- RCW 18.27.010(1)(a) (2007).

Therefore, if a person offers to sell their property, without residing, using, or occupying, it within one-year of its purchase and makes improvements to the property, that person is deemed to be a contractor and required to be registered under Washington law. The law requiring courts to not enforce or validate illegal contracts is clear even though the requirement. This requirement of the law in regard to illegal contracts stands firm even in the event that one party is enriched by the illegal contract. *Alexander v. Neal*, 364 Mich. 485, 110 N.W.2d 797 (1961) noted in 60 Mich.L.Rev. 823 (1962); Restatement of Contracts § 598 (1932). SAS Oregon, LLC was cited for violation of this provision in March 2015. (MSJ). The violation is deemed a misdemeanor and criminal in nature under Washington law. RCW 18.27.020(2).

Moreover, there is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Metropolitan Park Dist. v. Griffith*, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986); *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 357, 662 P.2d 385 (1983); *Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 844, 410 P.2d 33 (1966). If a party has “acted in bad faith, they will be turned away as unworthy of the consideration of such a court.” *Walsh v. Wescoatt*, 131 Wash. 314, 316 (Wash. 1924). They will be left where they are found. In other words, “equity will not help those who have been guilty of serious misconduct in the same transaction concerning which they seek relief.” *Walsh v. Wescoatt*, 131 Wash. 314, 316 (Wash. 1924). Code violations, an expired building permit and the continuing disregard of the stop-work orders, eliminate a contractor’s ability to argue good faith. *Biermann v. City of Spokane*, 90 Wn.App. 816, 822, 960 P.2d 434, (Div. 3 1998). The burden of establishing bad faith is not on the party alleging it, but rather, the contractor must show good faith. *Id.*

In *Biermann*, the Markhams applied for a building permit to build a 1,200 square foot garage in 1989. *Biermann v. City of Spokane*, 90 Wn.App. 816, 818, 960 P.2d 434, (Div. 3 1998). The Markhams' neighbor, Ms. Biermann, agreed to sign a side-yard waiver because the completed garage would encroach on her property. *Id.* at 819. The City denied the permit. *Id.* The City then issued a permit to construct a one-story, 1,008 square foot garage. *Id.* Although the Spokane Municipal Code states that building permits expire after 180 days, the Markhams did not begin construction until over 120 days after the permit expired. *Id.*

During construction, the City conducted a number of inspections of the structure and did not report any code violations. *Id.* Ms. Biermann, however, notified the Markhams and the City Building Department of code violations, as well as the lack of a valid building permit. *Id.* The City issued stop-work orders in July and August 1995 and apprised the Markhams of the several violations, including unprotected openings and lack of parapet and firewalls. *Id.* The Markhams continued construction. *Id.* In response to their disregard of the orders, the City Attorney threatened the Markhams with possible criminal charges if they refused to correct the code violations or apply for a certificate of compliance. *Id.*

The Markhams applied for a certificate of compliance. *Id.* After a hearing, the examiner granted the application and issued the certificate. *Id.* Ms. Biermann appealed to the Superior Court pursuant to the Land Use Petition Act, and the court ruled that Ms. Biermann did not have standing to object to the Markhams' lack of a valid building permit and affirmed the examiner's decision. *Id.* at 819-20. The Court found, however, that Ms. Biermann did have standing as an aggrieved party as defined by the Act. *Id.* They further held that the certificate of compliance was erroneously granted because the Markhams failed to meet the criteria necessary for issuance of a certificate of compliance due to their inability to demonstrate good faith compliance "given the code violations, an expired building permit and the continuing disregard of the stop-work orders." *Id.* at 822.

As in *Biermann*, while the Spencers do not have to demonstrate that SAS Oregon, LLC acted in bad faith it is clear, as it is clear Respondents are unable to show that they acted in good faith. *See id.* SAS Oregon, LLC knowingly violated the requirement to be registered contractors. RCW 18.27.010(1)(a) (2007); RCW 18.27.005. Both knowingly failed to obtain building permits as

required by Washington law and Spokane County and Municipal Codes. Both made renovations in violation of the Washington State Building Code and Spokane County and Municipal Codes. The Spencers did not discover the extent of such violations until moving into the property. *See Johnson v. Brado*, 56 Wn. App. 163, 168, 783 P.2d 92 (Div. 3 1989). The Spencers, however, engaged in good faith throughout the purchase of the property, and did not violate the implied duty of good faith and fair dealing. SAS Oregon, LLC operated in bad faith that prevented the Spencers from obtaining the full benefit of performance, namely, purchasing a home free of renovations or repairs that were violations of the building code due to SAS Oregon, LLC's failure to obtain building permits and inspections. *Metropolitan Park Dist. v. Griffith*, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986). As such, the Contract should not be enforceable against Appellants and Appellants should be placed in the position they were before entering the agreement. *See Hederman v. George*, 35 Wn.2d 357, 212 P.2d 841 (1949); *Red Devil Fireworks v. Siddle*, 648 P. 2d 468 (2nd Div. 1982).

Further, the illegal contract in this case is unenforceable due to public policy. The failure of a contractor to register is a violation of the Consumer Protection Act. RCW 18.27.350 ("consumers of this state have a right to be protected from unfair or deceptive acts or practices when they enter into contracts with contractors). The fact that a contractor is found to have committed a misdemeanor or infraction under this chapter shall be deemed to affect the public interest and shall constitute a violation of chapter 19.86 RCW. As stated above, SAS Oregon, LLC was required to be registered under the contractor registration act 18.27 RCW, they did not register, this was a violation of 18.27 RCW, for which they were cited as a violation of the law by Washington State Department of Labor and Industries. The State Building Code Act states that its purpose is to:

“promote the health, safety and welfare of the occupants or users of buildings and structures and the general public by the provision of building codes throughout the state. Accordingly, this chapter is designed to effectuate the following purposes, objectives, and standards:

- (1) To require minimum performance standards and requirements for construction and construction materials, consistent with accepted standards of engineering, fire and life safety.
- (2) To require standards and requirements in terms of performance and nationally accepted standards.
- (3) To permit the use of modern technical methods, devices and improvements.
- (4) To eliminate restrictive, obsolete, conflicting, duplicating and unnecessary regulations and requirements which could unnecessarily increase construction costs or retard the use of new materials and methods of installation or provide unwarranted preferential treatment to types or classes of materials or products or methods of construction.
- (5) To provide for standards and specifications for making buildings and facilities accessible to and usable by physically disabled persons.
- (6) To consolidate within each authorized enforcement jurisdiction, the administration and enforcement of building codes.

RCW 19.27.020.

Washington State, Spokane County, and the Spokane Municipal building codes make it unlawful for “any person, firm or corporation to erect, construct, install, enlarge, alter, repair, move, improve, remove, convert, demolish, replace, use or occupy any building, structure, mechanical system or plumbing system regulated by this title, unless exempted by the codes adopted by this title, or cause the same to be done without first obtaining a separate permit for each building, structure or system installation from the building official.” Spokane Cty. Code § 3.02.020(a); RCW 19.27.095(1). The failure to obtain a permit “shall be a misdemeanor and shall be punishable, upon conviction, by a fine of not more than one thousand dollars or by imprisonment for not more than ninety days, or by both such fine and imprisonment.” Spokane Cty. Code §3.02.090.

The City of Spokane Municipal Code also adopted the Washington State Building Code and as such, it constitutes the building code of the City of Spokane. Spokane Mun. Code §17F.040.010. Any violation of this code “is a criminal offense punishable as provided in SMC 1.02.950.” Spokane Mun. Code §17I.010.010(D). It further states that “[b]ecause the requirements of this title constitute reasonable and necessary standards for the preservation and promotion of the public health, safety and general welfare, a violation of this title is deleterious to the public interest and is subject to abatement as a public nuisance.” Spokane Mun. Code §17I.010.010(B). A nuisance is “an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.” RCW 7.48.010. Black’s law dictionary defines nuisance as “Anything that unlawfully worketh hurt, inconvenience, or damage. That class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, either real or personal, from his own Improper.” *Nuisance*, Black’s Law Dictionary (2nd ed. online accessed October 17, 2017.)

In an instructional case, *Evans v. Luster*, a contractor, ACI, and client, Evans, reached an agreement to “clear, grade, and install drainage on Evans’ real property in Snohomish County.” *Evans v. Luster*, 84 Wn.App. 447, 449, 928 P.2d 455 (Div. 1 1996). Despite both parties knowing that permits were required, “they agreed to do the work without permits, working quickly and secretly to avoid a county stop-work order.” *Id.* A stop-work order was placed by the county and ACI was not paid for the work performed. *Id.* ACI sued on the Contract. *Id.* Evans argued “that the land improvement contract was illegal at its inception because both parties knew the contract violated county code provisions.” *Id.* at 450. The court agreed, finding that if an agreement

violates a statute or municipal ordinance, it is void, “except when the agreement is not criminal or immoral and the statute or ordinance contains an adequate remedy for its violation.” *Id.* The court went on to find that the exceptions, whether it was not criminal or immoral in nature did not apply, as the “Snohomish County Code (SCC) provides that code violations are a public nuisance and that violators may be cited for a misdemeanor and subject to other judicial or administrative remedies,” thus making it criminal. *Id.* at 451.

In the matter at hand, SAS Oregon, LLC engaged in multiple activities deemed illegal under the Washington State Building Code, Spokane County Code, and Spokane Municipal Code. First, SAS Oregon, LLC purchased and sold the property within a year’s time received a citation and fine for this failure to register under 18.27.255. Such an infraction is a criminal gross misdemeanor under 18.27. RCW 18.27.020(a). Due to the criminal offense, SAS did not possess the legal ability to offer the home for sale to the Spencers and then complete such sale in a contract as they did not possess the legal capacity as a registered contractor to do such activities. *Red Devil Fireworks v. Siddle*, 648 P. 2d 468 (Div. II 1982); *Sherwood v. Wise*, 132 Wash. 295, 232 P. 309 (1925).

Anyone who in the State of Washington engages “in the activities of a contractor is presumed to know the requirements of this chapter.” RCW 18.27.005. The provisions additionally shall be strictly enforced—“the doctrine of substantial compliance shall not be used ... in the application and construction of this chapter.” RCW 18.27.005. Even if an individual or company is unregistered, such as SAS Oregon, LLC, if he/she/it engage in contractor activities, as defined in RCW 18.27.010, then they are presumed to know the requirements of the chapter and have such provisions strictly enforced. RCW 18.27.010; RCW 18.27.005.

In *Red Devil*, the Defendants, appealed a judgment for unpaid amounts claimed on a delivery and acceptance of fireworks. *Red Devil Fireworks Co. v. Siddle*, 32 Wn.App. 521, 648 P.2d 468, (Div. II 1982). The two issues presented for review were whether an agreement for the sale of dangerous fireworks to an Indian licensed by the Puyallup Indian Tribe, but not by the State of Washington, is unenforceable because of violation of the state fireworks law (RCW 70.77), and, if the contract is unenforceable, whether equitable principles of unjust enrichment permit recovery of the fair value of dangerous fireworks delivered and accepted. *Id.* Washington heavily regulates the sale of fireworks, and requires any person attempting to transfer ownership of fireworks to another person, to first determine whether the potential buyer has a valid permit to possess fireworks. *Id.* at 522.

Because it was claimed that the state fireworks law did not apply to Indian trust land, the plaintiff began negotiations with defendants. *Id.* at 523. The proposal was for defendants to gather orders for dangerous fireworks from other Indians in Washington, to receive the fireworks from plaintiff in one transaction, to deliver the fireworks as per the orders, and to retain a 15 percent commission. *Id.* Defendants soon had orders for approximately \$50,000 worth of fireworks. *Id.* During this period of negotiations, defendants requested plaintiff to fill several orders. Plaintiffs only paid a partial amount of their commission. *Id.*

The Court found that RCW 70.77.480 “require[d] that one may only transfer dangerous fireworks to one holding a license issued by the State Fire Marshal.” *Id.* at 525. Both parties, therefore, violated RCW 70.77.480. *Id.* Because this violation is a misdemeanor, the above agreement is illegal. *Id.* Moreover, the court found that the control of dangerous fireworks is for the obvious protection of the public, and any violation of such controlling measure is against the

public policy of promoting the health and safety of this state's citizens. *Id.* The court found that “[q]uite clearly, if the law does not aid plaintiff in the instant situation, defendants will reap an unjust benefit. Such, however, is usually the case with illegal contracts because the court takes into account the interests of society and the state, which demand the complete suppression of illegal agreements.” *Id.*

The Spokane Municipal Code has identified several provisions which make it necessary for a person to obtain a building permit for activities that the person will engage in that are related to “demolition, grading, sign, swimming pool, parking lot, and site preparation, building moving and relocation, street encroachment, boiler installation and operating, electrical, elevator installation, mechanical, plumbing, side sewer installation and connection, water line tapping, shoreline development permits, flood management permits, street address assignment, and a variety of similar approvals for new construction or placement, alteration, repair or demolition of a building, structure or other improvement to land; and for the new installation, alteration, repair or operation of a building’s boiler, electrical, elevator, fire protection, mechanical and plumbing systems.” Spokane Mun. Code § 17G.010.100(A)(1). The list of activities requiring a building permit is quite expansive and additionally requires that a contractor be registered as such with “the state under chapter 18.27 RCW, and such registration is a prerequisite for the issuance of any building permit.” Spokane Mun. Code § 17G.010.100(C)(1.). The Spokane Municipal Code declares that “B. Because the requirements of this title constitute reasonable and necessary standards for the preservation and promotion of the public health, safety and general welfare, a violation of this title is deleterious to the public interest and is subject to abatement as a public nuisance.” Spokane Mun. Code § 17I.010.010(B.). The Spokane Municipal Code provides for both civil and criminal penalties for those persons who commit a violation of the building code

or for those persons who are legally responsible for the conduct of another such as that which may exist between principals and agents. Spokane Mun. Code § 01.02.950.

In *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988), the Supreme Court of Washington recognized that the duty to ensure compliance with building codes and permits “rests with individual permit applicants, builders and developers.” In *Taylor*, the Supreme Court of Washington advanced four public policy reasons which supported its decision to find that the duty to comply with building codes and permits rested solely with the individual permit applicants, builders and developers. *Taylor*, 111 Wn.2d at 168-169. The public policy purposes identified by the Supreme Court of Washington included a consistent level of compliance with applicable ordinances; the budgetary burden of compliance was better placed on individual permit applicants, builders and developers; the approval of construction plans and satisfactory inspections would not relieve a builder from the legal obligation to comply with statutes; and finally, imposing liability for noncompliance with building codes is consistent with the State’s zoning vested rights doctrine. *Id.* “The burden of proving good faith and reasonable efforts to comply rests with the” person undertaking the actions that required a building code or permit. *Biermann v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434 (1998)(quoting *Douglass v. City of Spokane*, 25 Wn. App. 823, 829, 609 P.2d 979, review denied, 94 Wn.2d 1006 (1980)). “Building permits and building code inspections only authorize construction to proceed; they do not guarantee that all provisions of all applicable codes have been complied with.” *Taylor*, 111 Wn.2d at 167 (citing A E. McQuillin, *Municipal Corporations* § 26.200, 26.200.05 (3d ed. 1986); 101A C.J.S. *Zoning and Land Planning* § 218 (1979)).

Without obtaining the legally required building permits and inspections for the renovations completed on the property, the Defendants SAS Oregon LLC and Joseph

Pence did not have legal authorization to undertake the renovations to the property. The renovations in and of themselves were and are illegal. The renovations which induced the Spencers to buy the property were illegal and this was not known to the Spencers, nor did the Spencers engage in or encourage illegal conduct. The renovations, which were in part the subject matter of the Sale and Purchase Agreement were a violation of the building codes cited supra and as such, cannot be the basis for a Washington State Court to validate such a contract as doing so would put the Court in a position of ratifying an explicitly legally prohibited activity that does affect the public and consumer welfare.

SAS Oregon, LLC “flipped” the property in question without obtaining permits or licenses. Both parties have demonstrated actual knowledge of this blatant violation of the various codes cited supra. SAS Oregon, LLC, was required to register as a contractor under RCW 18.27.020, and is required to have knowledge of the laws governing contractors. Through its entry of “no permits” on Form 17, SAS Oregon LLC admits to knowledge of the violation. As a result, the contract between SAS Oregon and Pence Properties, Inc. was illegal and unenforceable as it explicitly was prohibited by and was in violation of the building codes cited supra. *See Evans v. Luster*, 84 Wn.App. 447, 449, 928 P.2d 455 (Div. 1 1996); (CP 28). This Court should not reward those who so blatantly and affirmatively violate Washington State law by finding that the Purchase and Sale Agreement is valid and enforceable.

Additionally, the repairs and renovations were part of the consideration put forth in the Purchase and Sale Agreement made between Appellants and Respondents.

The consideration is illegal and unenforceable because it flows from an illegal act,

the illegal act(s) are the failure of SAS Oregon LLC to register as a contractor to sell the home to the Spencers, the failure of SAS Oregon LLC to obtain permits/inspections on its own accord, and the failure of Pence Properties, Inc. (the agent of SAS Oregon LLC) to also obtain/permits/inspections. Further, the Purchase and Sale Agreement is “an instrument which is intimately connected with an illegal one” and has become tainted with the illegality of SAS Oregon, LLC and Pence Properties, Inc.. *Miller v. Myers*, 158 Wash. 643, 291 Pac. 1115 (1930); and cf., *Van Horn v. Kittitas Cy.*, 112 Fed. 1 (W.D.Wash. 1901). There simply would not have been a transaction without the Purchase and Sale Agreement reducing the transaction into writing as required by the Statute of Frauds in Washington State. The compiled list of illegal act(s) and illegal consideration should serve as a basis for this Court to deem such Purchase and Sale Agreement to be void and unenforceable. This is particularly proper given that the Spencers are the consumers that the law, the Consumer Protection Act and the Building Code, were designed to protect from the illegal and unscrupulous act(s) of actors such as SAS Oregon LLC. The law regarding illegal contracts in Washington State is not designed to punish or work against the party, in this the case the Spencers, who did not engage in illegal act(s).

b. Whether it was error to find that SAS Oregon LLC’s failure to register as a contractor under RCW 18.27.020 was not a per se violation of the Consumer Protection Act RCW 19.86 actionable by Plaintiffs.

In 1963, the Washington legislature enacted the contractor registration act (the “Act”). Chapter 18.27 RCW. The Act was largely enacted as a result of the legislature’s concern that “unregistered contractors are a serious threat to the general public and are costing the state millions of dollars each year in lost revenue.” (LAWS of 1993, ch. 454, § 1). The Act “was

designed to prevent the victimizing of a defenseless public by unreliable, fraudulent and incompetent contractors, many of whom operated a transient business from the relative safety of neighboring states.” *Stewart v. Hammond*, 78 Wash.2d 216, 219, 471 P.2d 90 (1970). To ensure the protection of the public, Washington contractors are required to be registered and bonded. *Id.* (citing RCW 18.27.020-.040). Those who do not comply with the registration and bonding requirements are subject to a criminal penalty, RCW 18.27.020, and are denied access to the courts of the State of Washington for compensation or for breach of contract claims. *Stewart*, 78 Wash. 2d at 219, 471 P.2d 90. *See also Davidson v. Hensen*, 135 Wash. 2d 112, 117, 954 P.2d 1327 (1998) (although the contractor registration statute does not render a contract void ab initio, the contract has limited enforceability). The legislature has also declared that the consumers of Washington State “have a right to be protected from unfair or deceptive acts or practices when they enter into contracts with contractors.” RCW 18.27.350. Any contractor who is found to have violated the provisions of Chapter 18.27 such that the contractor has “committed a misdemeanor or infraction...shall be deemed to affect the public interest and shall constitute a violation of chapter 19.86 RCW.” *Id.*

In general, plaintiffs who assert a claim of a per se violation of the Consumer Protection Act (the “CPA”) must show: “(1) the existence of a pertinent statute; (2) its violation; (3) that such violation was the proximate cause of damages sustained; and (4) that they were within the class of people the statute sought to protect.” *Keyes v. Bollinger*, 31 Wn. App. 286, 290, 640 P.2d 1077 (citing *Dempsey v. Joe Pignataro Chevrolet, Inc.*, 22 Wn. App. 384, 393, 589 P.2d 1265 (1979)). In demonstrating this per se violation and satisfying the elements above, a plaintiff can show proof that a defendant’s conduct was illegal under a statute other than the Consumer Act and that the conduct was against public policy. *State v. Reader’s Digest Ass’n*, 81 Wn.2d

259, 501 P.2d 290 (1972); *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978). In some instances the legislature has declared a statutory violation to be a per se unfair trade practice, against public policy, and a violation of the CPA. *Anderson v. Valley Quality Homes, Inc.*, 84 Wn. App. 511, 519, 928 P.2d 1143 (1997). In *Anderson*, the Washington Court of Appeals noted that the Superior Court in its lower decision, designated RCW 18.27.350, as a statute which the legislature had decided would be in the category of those that defined and governed a per se violation of the CPA. *Id.* The Supreme Court of Washington has found that it is the legislature and “not this court” who is the appropriate entity to set the relationship between a statute defining an unfair trade practice as a per se violation and the CPA, and that the “court will acknowledge that relationship.” *Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 787, 719 P.2d 531 (1986). Thus, it is clear that the legislature has decided that a contractor who has been found to have violated any provision of Chapter 18.27, is also in violation of the CPA. RCW 18.27.350.

In the present case, the plaintiffs assert that the Defendant SAS Oregon LLC has been found to have violated RCW 18.27.200(1)(a). In the notice of violation, Mr. Berryman stated that Defendant SAS Oregon LLC would receive a penalty of \$1,000.00 for the violation of RCW 18.27.200(1)(a) and that Defendant SAS Oregon LLC would be required to register as a contractor. As a result of this decision and notice of violation by the Washington State Department of Labor and Industries against Defendant SAS Oregon LLC, the Plaintiffs have established that the Defendant SAS Oregon LLC has engaged in an infraction under Chapter 18.27. Pursuant to RCW 18.27.350, the Plaintiffs assert that as a result of the infraction by Defendant SAS Oregon LLC, the Defendant SAS Oregon LLC has also violated the CPA, RCW 19.86.

Consequently, the question of whether particular actions gave rise to a violation of the Consumer Protection Act is reviewable as a question of law. *Keyes v. Bollinger*, 31 Wn. App. 286, 289, 640 P.2d 1077 (1982) (quoting *Fisher v. World-Wide Trophy Outfitters*, 15 Wn. App. 742, 743-44, 551 P.2d 1398 (1976); *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 214, 969 P.2d 288 (1998) (Whether an act violates the CPA is a question of law). Thus, in this present case, it was appropriate for the Superior Court to render a decision declaring that the Defendant SAS Oregon, LLC had committed a per se violation of the CPA as a result of the Defendant SAS Oregon's failure to register as a contractor under RCW 18.27.020. "The overriding public policy must not be defeated by an attempt to accommodate one who has violated its specific provisions, albeit unwittingly. The law will be nullified if noncomplying contractors are permitted to evade the statute by a claim of 'unwitting violation' or 'undue loss' or by a claim that the other contracting party will be 'unduly enriched.' Every noncomplying contractor could raise one or all of the suggested defenses." *Stewart v. Hammond*, 78 Wash.2d 216, 220, 471 P.2d 90 (1970). The Plaintiffs are those who are to be protected from the actions of a Defendant like SAS Oregon LLC who violate the law and engage in an unfair or deceptive act from the "relative safety of neighboring states." *Id.* at 219.

SAS Oregon, LLC's violation of RCW 18.27.020 caused direct injury to the Plaintiffs. Under Washington law, "an injury and causation are established if the plaintiff loses money because of the unlawful conduct." *Mason v. Mortgage Am., Inc.* 114 Wn.2d 842, 854, 792 P.2d 142 (1990). The breadth of injury to one's "business or property" compensable under the Consumer Protection Act is demonstrated by the many appellate court decisions construing the Act, which recognize that "mental distress, embarrassment, and inconvenience" which entail pecuniary loss, is compensable under the Consumer Protection Act. *Keyes v. Bollinger*, 31

Wn.App. 286, 640 P.2d 1077 (Div. 1 1982). Moreover, registered contractors are required to “furnish insurance or financial responsibility in the form of an assigned account in the amount of fifty thousand dollars for injury or damages to property, and one hundred thousand dollars for injury or damage including death to any one person, and two hundred thousand dollars for injury or damage including death to more than one person.” RCW 18.27.060. The “presentation of a false property information form is a deceptive and misleading practice” that constitutes a violation of the CPA. *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn.App. 834, 848, 942 P.2d 1072 (Div. 1 1997).

Plaintiffs have asserted in their First Amended Complaint that “Defendant breached the standard of care owed to Plaintiff by inadequately and unsafely conducting repairs and renovations of the plumbing, roofing, and other physical structures...[which] proximately caused Plaintiffs to suffer mental injury, emotional distress, loss of enjoyment of life, lost wages, and other damages to be proven at trial.” (CP 22-23). Mr. Spencer has asserted that he has suffered personal injury due to Pence Properties, Inc.’s negligence, stating that he has “gone and saw a counselor over this. For the first time in my entire life I was nearly admitted to the emergency room in July of 2014 with bronchitis. That was during the timeframe when I was having to juggle both my law firm and handling these issues. So I, I, ya'know, I've suffered.” Mr. Spencer believes this is directly caused by the failure to adequately plumb and failure to use proper materials causing excess moisture in the air as well as the stress caused by the inadequate construction. Ms. Spencer also claims such, stating that “she was sick all last winter because of the stress, so.” Further, Quanah and Gwen Spencer each testified to the damages directly suffered due to SAS Oregon, LLC’s failure to register and adhere to the laws governing contractors. (CP 112).

c. Whether it was error to find that SAS Oregon, LLC did not cause injury to Plaintiffs by failing to disclose that repairs were completed in violation of state law.

The Consumer Protection Act may be violated by the failure to disclose material facts. *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213-214, 969 P.2d 486 (1998). An act or practice is unfair or deceptive for purposes of the CPA if it has the capacity to deceive a substantial portion of the public. *Hangman Ridge*, 105 Wn.2d at 785; *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 561, 825 P.2d 714, *review denied*, 120 Wn.2d 1002 (1992). A misrepresentation made to only one person can have the capacity to deceive many where it is made in a standard form contract. *Henery v. Robinson*, 67 Wn. App. 277, 291, 834 P.2d 1091 (1992), *review denied*, 120 Wn.2d 1024 (1993). Real estate sales clearly constitute "trade" or "commerce for purposes of the second element of a CPA violation." RCW 19.86.010(2); *Edmonds v. Scott Real Estate*, 87 Wn. App. 834, 846, 942 P.2d 1072 (1997); *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987); *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984).

Injury and causation are established if a party suffers a loss of funds due to the unlawful conduct. *Edmonds v. Scott Real Estate*, 87 Wn. App. 834, 847, 942 P.2d 1072 (1997)(citing *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)). "The injury involved need not be great, but it must be established." *Id.* Moreover, the term "injury" is separate from "damages." *See Mason v. Mortgage Am., Inc.*, 114 Wash.2d 842, 854, 792 P.2d 142 (1990). A "nonquantifiable" injury, such as loss of good will, or a nonspecific or relatively minor monetary injury such as some diminution in value of property or money will suffice to satisfy the injury requirement. *Id.*

"Damages" pertains to treble damages based upon "actual damages" awarded under the CPA. *Id.* at 855, 792 P.2d 142.

The fact that purchasers continue to move into and occupy a house after the discovery of misrepresentations does not constitute entering into a new arrangement. *Johnson v. Brado*, 56 Wn. App. 163, 168, 783 P.2d 92 (Div. 3 1989). This is clearly distinguishable from a fact pattern in which the purchasers learn of the fraud or misrepresentation before the consummation of the sale, but proceed with the purchase. *Id.* The Spencers did not learn of the misrepresentation until after closing on the sale and moving into the property.

Appellants, through their declarations and exhibits, have clearly established injury as well as damages. Such declarations establish that the requested repairs were not completed adequately and up to Washington State law. (CP 1-55). This injury is continuous and on-going. Judge Moreno's failure to recognize the causal link between SAS Oregon, LLC's failure to disclose such inadequacy to all parties is clear error.

The CPA applies to activities which occur before and after a sale of a property. *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213-214, 969 P.2d 486 (1998)(citing *Smith v. Sturm, Ruger & Co., Inc.*, 39 Wash. App. 740, 747-748 695 P.2d 600, review denied, 103 Wash.2d 1041 (1985)). The CPA may be violated by the failure to disclose material facts. *Id.* To demonstrate and prevail upon a private right of action under the CPA the plaintiff asserting such claim must show that there is: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his or her business or property, and (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). However, the CPA is to "be liberally construed that its beneficial purposes may be served." *Keyes v. Bollinger*, 31 Wn. App. 286, 294, 640 P.2d 1077

(1982)(citing RCW 19.86.920). An act or practice is unfair or deceptive for purposes of the CPA if it has the capacity to deceive a substantial portion of the public. *Hangman Ridge*, 105 Wn.2d at 785; *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 561, 825 P.2d 714, *review denied*, 120 Wn.2d 1002 (1992). A misrepresentation made to only one person can have the capacity to deceive many where it is made in a standard form contract. *Henery v. Robinson*, 67 Wn. App. 277, 291, 834 P.2d 1091 (1992), *review denied*, 120 Wn.2d 1024 (1993). The misrepresentations in the Spencers' case have occurred in the standard form contracts known as the Residential Real Estate Purchase and Sale Agreement and the Seller Disclosure Statement. These forms are standardized forms provided by the Northwest Multiple Listing Service. (*See* CP 26-32). Further, RCW 64.06.015 provides the minimum information that must be included in the Form 17 Seller Disclosure Statement. RCW 64.06.015. Form 17 requires that a Seller answer certain questions "to the best of Seller's knowledge." The seller disclosure statement was electronically signed by Brian Grocott, and included several misrepresentations about the property, to wit:

1. Represented that there were no defects in the outdoor sprinkler system, when several defects were diagnosed immediately upon the Spencers taking possession, including a broken valve, two broken lines, 14 of 20 heads were broken, and the vacuum breaker was damaged.
2. Represented that there were no defects with the fireplace and chimneys, however, the top mounted damper in the main floor fireplace was severely damaged allowing moisture to drain into the home and creating a significant fire hazard. The ash door was broken, creating a fire hazard and risk to the Plaintiff and their children's safety.
3. Represented that the sidewalk and driveways were free from defect. The driveway's concrete was severely damaged, causing water to pool up around the foundation of the house and needed replacement.
4. Represented that there are no defects with the heating or cooling systems, however, the air conditioner contained a freon leak and was not functioning properly. There were no heating systems in either of the two bathrooms, the bathroom exhaust fan in the first level bathroom did not function properly and has had to be replaced, and the insulation level was not up to code.

5. Represented that there were no environmental concerns, but asbestos has been discovered in multiple locations. There were also several pounds worth of metal objects that included many nails, straight-edged razors, needles, stakes and files, littered across the exterior areas of the home. Further, animal urine and feces were discovered throughout the basement of the house.
6. Represented that there were no plumbing issues. There were plumbing related issues in that plumbing was incorrectly completed in the basement level bathroom, plumbing was incorrectly completed in the kitchen, and the plumbing on the sprinkler system was damaged and faulty.
7. Represented that there were no radon concerns, but elevated levels of radon have been found on the property.

Real estate sales clearly constitute “trade” or “commerce for purposes of the second element of a CPA violation. RCW 19.86.010(2); *Edmonds v. Scott Real Estate*, 87 Wn. App. 834, 846, 942 P.2d 1072 (1997); *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987); *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984). A real estate sale was clearly what occurred in the Spencers case and thus, the Spencers have satisfied the second element of the CPA.

The third element of a CPA violation, public interest impact, is clearly present in the Spencers case. The public interest is impacted by a private dispute if there is a likelihood that “additional plaintiffs have been or will be injured in exactly the same fashion.” *Hangman Ridge*, 105 Wn. 2d at 790. The SAS Oregon, LLC’s conduct occurred in the course of their business of offering residential property for sale to the public. *Bloor v. Fritz*, 143 Wn. App. at 737, 180 P. 3d 805. Defendant SAS Oregon LLC’s instructed its agent to place the listing in the multiple listing service directory with the intent to sell the property. *McRae v. Bolstad*, 101 Wn.2d 161, 166, 676 P. 2d 496 (1984). SAS Oregon, LLC had knowledge of the defects and the illegality in the failure to obtain permits and inspections, yet failed to include this information in the listing. The Defendants have engaged in approximately 7 or 8 other similar transactions on other properties where they bought a distressed home, did renovation of some type and degree on the homes, did

not obtain the required building permits and inspections, offered the homes for sale to the general public through advertisement in the multiple listing service, and then sold the homes. (CP 46).

Further, the Spencers have set forth the fourth and fifth elements of the CPA violation. Injury and causation are established if the plaintiff loses money because of the unlawful conduct. *Edmonds v. Scott Real Estate*, 87 Wn. App. 834, 847, 942 P.2d 1072 (1997)(citing *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)). Here the Spencers have demonstrated that they have lost approximately \$10,592.32 in repairs actually completed and the property has declined in value directly due to the undisclosed defects in an amount of \$52,500.00 and is a recoverable damage. Finally, the Spencers' losses were caused by the SAS Oregon, LLC's unfair practices, namely failure to disclose defects and engaging in illegal conduct by offering a property for sale to members of the public when renovations made to the property were illegal because they were not completed according to the City and County building codes. Therefore, all of the elements necessary to find a CPA violation are present and have been demonstrated with respect to the Defendants' actions in the present case.

IV. CONCLUSION

The foregoing arguments clearly show that Judge Moreno erred in granting SAS Oregon, LLC's Motion for Summary Judgment. It was error to find the Purchase and Sale Agreement not void and unenforceable due to Illegality; it was error to find that SAS Oregon LLC's failure to register as a contractor under RCW 18.27.020 was not a per se violation of the Consumer Protection Act RCW 19.86 actionable by Plaintiffs; and, it was error to find that SAS Oregon, LLC did not cause injury to Plaintiffs by failing to disclose that repairs were completed in violation of state law.

DATED this 23 day of October, 2017.

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7 COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON

8 **SAS OREGON, LLC,**

9 Respondent,

Cause No. 15-2-03564-3

Cause No. 352676

10 v.

11 **QUANAH M. SPENCER and GWEN N.**
12 **SPENCER, husband and wife,**

13 Appellants.

**CERTIFICATE OF SERVICE OF
14 APPELLANTS' BRIEF**

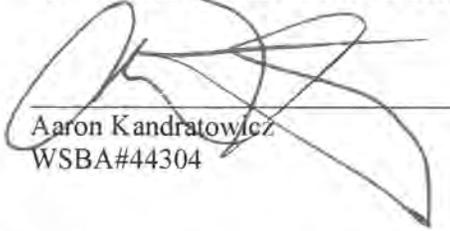
15 **CERTIFICATE OF SERVICE**

16 I, the undersigned, certify that on the 23rd day of October, 2017, I caused a true and correct copy
17 of APPELLANTS' BRIEF filed in this Court on October 23, 2017 to be forwarded, with all
18 required charges prepaid, by the methods indicated below to the following persons:
19

20
21 Nicholas D. Kavorik
22 Whitney L. Norton
23 Piskel Yahne Kovarik, PLLC
24 522 W. Riverside Ave, Suite 410
25 Spokane, WA 99201

VIA U.S. MAIL
 VIA FACSIMILE
 VIA MESSENGER
 VIA HAND DELIVERY

26 **Kandratowicz Law Firm, PLLC**

27
28 
29 Aaron Kandratowicz
30 WSBA#44304