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No. 672428

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TERRY VISSER and DIANE VISSER, husband and wife,

Appellants,

v.

NIGEL DOUGLAS and KATHLEEN DOUGLAS, and the marital
community composed thereof,

Respondents.

APPELLANTS' OPENING BRIEF

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A. INTRODUCTION

Appellants, Terry Visser and Diane Visser (collectively “Visser”) sold real property and improvements to Respondents, Nigel Douglas and Kathleen Douglas (collectively “Douglas”). Approximately one year subsequent to the sale of the real property and improvements, Douglas discovered mold in the ceiling and approximately one month thereafter discovered dry rot around the foundation of the residence.

A trial was held and despite Douglas having knowledge prior to purchasing the property of some rot, previous pest infestation, previous roof leakage and some structural repairs, the trial court ruled that Visser had fraudulently concealed defects; had negligently misrepresented material facts; had breached a statutory duty and violated the Consumer Protection Act. Despite the home purchased being over 36 years old, the trial court awarded Douglas damages equal to the cost of constructing a brand new residence plus emotional distress damages. Visser was entitled to judgment on the remaining amount owing on a promissory note. Visser appeals.

B. ASSIGNMENTS OF ERROR

The following Findings of Fact are not supported by substantial evidence to persuade a rational, fair-minded person that the premise is true:

1. The second sentence of Finding of Fact No. 3;
2. The first sentence of Finding of Fact No. 5;
3. The second sentence of Finding of Fact No. 8;
4. Finding of Fact No. 17;
5. Findings of Fact No. 6, 11, 12, 13, 14, 15, 18, 19, 20, 22, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 40, 41 and 43, as these are conclusions of law reviewed de novo.;
6. The trial court erred in concluding that Douglas proved by clear, cogent and convincing evidence fraudulent concealment when evidence supports that Douglas knew about the defects or could have discovered any defects upon a reasonable inspection prior to purchasing the subject property;
7. The trial court erred in concluding that Douglas incurred damages equal to \$144,500.00, when it failed to utilize the proper measure of damages, benefit of the bargain, in a misrepresentation or fraudulent concealment case;
8. The trial court erred in concluding that Douglas proved by clear, cogent and convincing evidence that Visser, while acting as a real estate agent, negligently misrepresented the condition of the Property and violated Visser's statutory duties, when any material defects existing on

the Property at the time of sale were discoverable upon reasonable inspection;

9. The trial court erred by concluding that Douglas proved by clear, cogent and convincing evidence that Visser violated the Consumer Protection Act, when there is insufficient evidence Visser negligently misrepresented or violated statutory duties as a real estate agent;

10. The trial court erred in concluding that Douglas was entitled to emotional distress damages of \$12,000.00 when there was insufficient evidence to support such a claim;

11. The trial court erred in concluding that Douglas took all reasonable steps to mitigate their damages, when the evidence demonstrates Douglas failed to take any steps to mitigate any damages;

12. The trial court erred in concluding that Douglas's failure to pay under the terms of the Note was not a breach and it did not subject Douglas to default interest and attorney's fees in recovery of the same; and

13. The trial court erred in awarding Douglas attorney's fees and costs when Douglas was not the prevailing party in this action.

C. STATEMENT OF CASE

1. Substantive Facts.

In early 2005, Visser, who previously lived in California and worked as a plumber, decided to move to Whatcom County and purchase some investment property. VRP 277, 280.

In July 2005, Visser purchased the real property and improvements located at 4391 Masterson Road, Blaine, Washington, for investment purposes (“Property”). VRP 280. The purchase price was \$133,500. VRP 287. At the time of the purchase, the main house was not “move in” ready and needed work. VRP 281-282. The Property also had two bungalows attached to the main house that were not permitted and had a lot of issues. VRP 285, 287, 296.

This was the first home that Visser renovated and purchased for investment purposes. VRP 277, 295. Prior to purchasing this Property, Visser had only done minor work on two personal residences. VRP 445. Visser performed some renovation to the Property which consisted of the following: cleaning up the grounds around the residence (VRP 446); painting the exterior (VRP 446); completely renovating the bathroom, which included all new fixtures, new flooring and repair of the floor joists (VRP 297, 448, 471); replaced a portion of the sill plate near bathroom (VRP 298); replaced the bellyband from the back door to southwest corner (VRP 449); patched a portion of the subfloor in the northeast corner (VRP 470); patched and added a nailing block to outside portion of northeast

corner to cover a hole caused by the removal of the bungalows (VRP 470); placed a bellyband on the northeast side of residence (VRP 469); insulated the exterior walls of the living room, dining room and kitchen (VRP 461); installed drywall in the living room, dining room and kitchen (VRP 452); fixed the wall paneling in the two bedrooms (VRP 461-462); installed new cabinets and countertop and appliances in kitchen (VRP 462-463); installed new flooring (VRP 463); installed a new roof (VRP 456); installed insulation at the ceiling (VRP 464) and installed Styrofoam ceiling tile (VRP 465). Visser expended approximately \$22,000.00 in performing the work on the Property, making his total investment approximately \$155,500.00. VRP 292.

But for the rot in the bathroom and the water damage to the sub-floor in the northeast corner of the residence, which Visser repaired, Visser did not notice any other damage while performing the work. VRP 450, 453, 459, 470.

In approximately April 2007, Visser decided to sell the Property. At the time he was licensed as a real estate agent. VRP 279. Visser put together a flyer that advertised the Property and listed all the items that he had done to renovate it. CP 373, PLA EX 1.

In 2007, Douglas was looking for property in the Birch Bay area of Whatcom County. VRP 22. Since they were Canadian citizens residing in

Calgary, they utilized the services of a real estate agent to find and show them properties, including the Property. VRP 22. Douglas had extensive experience in real estate; Mrs. Douglas began selling condominiums in 2000 and Douglas were owners in a company that had purchased vacant land, constructed 16 single family homes and sold them. VRP 31, 32, 383.

In April 2007, Douglas met with their real estate agent and Terry Visser at the Property. VRP 386. Visser showed Douglas and their agent the renovations he made to the Property, which matched the items listed in the real estate flyer. CP 373, PLA EX 1; VRP 476. Since Douglas, as Canadian citizens, were limited to staying within the United States a total of six months during a calendar year, they intended to utilize the Property as a second home or vacation place. VRP 26.

After visiting the Property again, Douglas and Visser executed a Real Estate Purchase and Sale Agreement dated April 17, 2007, with a sale price of \$189,000.00 ("Agreement"). CP 373, PLA EX 14. Douglas agreed to pay \$40,000.00 cash at closing with Visser financing the remaining \$149,000.00 pursuant to a promissory note ("Note") which was secured by a deed of trust on the Property ("Deed of Trust"). CP 373, PLA EX 15, 16. Per the terms of the Note, Douglas was required to pay the principal plus accrued but unpaid interest, in full no later than August 1, 2008. CP 373, PLA EX 15.

Prior to purchasing the Property, Visser provided a Form 17 Seller Disclosure Statement (hereinafter “disclosure statement”). CP 373, PLA EX 10. The disclosure statement was inadequately filled out by Visser, because Visser had put “don’t know” on many items. VRP 329. As a result, Douglas compiled a list of follow-up questions to clarify the missing information from the disclosure form. CP 373, PLA EX 11. Douglas were provided with handwritten responses, authored by Diane Visser, to their follow-up questions. VRP 320; 503.

Douglas and Douglas’ real estate agent believed that the answers were not complete or satisfactory, and the answers were “evasive”. VRP 330; 335; 410. Despite these concerns, and having knowledge that they could rescind the deal, Douglas did not follow up any further with Visser. VRP 403.

Shortly thereafter, Douglas had a home inspector inspect the Property. CP 373, PLA EX 12. The inspector noted areas of rot to the siding and to the sill plate; a potential previous roof leak; and areas where there had been previous structural work (noting the replacement of a portion of the sill plate and photos that depicted floor joists sistered together). CP 373, PLA EX 12. Douglas received the inspection report, read it and knew that there were areas of rot and decay near the roof line; knew there had been some caulking and repair to the siding that indicated

previous roof leaks; knew that there was a portion of the sill that exhibited rot along the south wall; and knew a large portion of the sill plate adjacent to this rotted section had been recently replaced. VRP 119-120.

Douglas knew they had the right to require Visser to do repairs or to respond to certain issues in the inspection report. VRP 122. However, Douglas did not discuss the inspection report, the rot, the replacement of the sill, or any items therein with Visser or with their inspector. VRP 120, 122. Instead, Douglas simply requested that Visser perform some minor modifications and corrections as outlined in the inspection notice Form 35, which Visser immediately performed. VRP 122; CP 373, PLA EX 13.

Despite the concerns about the disclosure statement and despite the items identified in the home inspection report, Douglas opted to purchase the Property. Thereafter, Douglas made improvements by adding a sewer line and constructing a 28' x 34' garage/shop. VRP 51-53. When visiting, Douglas began to notice a damp smell within the residence and eventually discovered potato bugs around the perimeter of the home and in the bathroom. VRP 54, 55.

Approximately a year after Douglas had purchased the Property, Douglas noticed gradual separation of the joints and staining in the decorative ceiling tile in the dining room, the master bedroom and second bedroom. VRP 57. As a result, Douglas removed some of the ceiling tile

and discovered mold in the cavity between the ceiling tile and the car decking (tongue and groove) of the roof. VRP 58. Douglas contacted a mold inspection company and a mold abatement company to visit the site and come up with a plan of action. VRP 66-67. The mold inspector and mold abatement company both determined that the mold was a result of improper ventilation between the Styrofoam ceiling tile and the roof. CP 374, PLA EX 21, 22. The mold abatement company came up with a proposed method to abate the mold, which included completely removing the roof and ceiling, cleaning and replacing all components, for approximately \$5,000. CP 374, PLA EX 22.

At the time of discovery of the mold, the Note between Visser and Douglas was about to mature. CP 373, PLA EX 15. Douglas requested a 30-day extension to pay the Note in full, knowing at that time that the home was allegedly uninhabitable. VRP 134; CP 374, PLA EX 23. Douglas and Visser agreed to extend the maturity date on the promissory note to September 1, 2008, and specifically agreed that the parties did not wish to terminate the Note or the Deed of Trust. CP 374, PLA EX 23.

Despite obtaining a course of action on mold abatement, Douglas did not do anything to abate any mold. VRP 70. At the time mold was discovered it was limited to the ceiling and a small portion in the

southwest corner of the building on the wall. VRP 60-61; CP 373-74, PLA EXs 17-20.

On September 1, 2008, Douglas defaulted on the Note by failing to pay the principal amount, plus accrued interest, owed to Visser in full. VRP 135. Thereafter, Douglas pulled off the bellyband of the residence and discovered areas of rot and pest infestation. VRP 74-76; 76-77. Subsequent inspections obtained by Douglas then led to the discovery of additional rot and decay in the Property. CP 374, PLA EXs 50-51.

Douglas did nothing further with the Property; instead Douglas shut off the water, removed fixtures within the bathroom, drained the lines and turned off the electricity. VRP 139, 395. As of January 2011, the ceiling tiles were still in place, the bathroom had a water leak that was pooling water on the floor therein and the hallway, dripping down into the crawl space and mold had grown over a large portion of the bathroom walls, floor and hallway walls, throughout the house. VRP 395; 426-28; 486-87; CP 375, DEF EXs 72, 73 & 74.

Over two years after the discovery of the rot and mold, Douglas hired a contractor to provide a bid to rehabilitate the place versus a bid to completely tear down the structure and build a new one. VRP 343. The contractor at that point determined the cost to renovate would be greater than the cost to tear down and rebuild. VRP 345, 352. At trial Douglas

sought recovery for the cost to build a new residence as well as damages for an alleged consumer protection violation, emotional distress and other consequential damages, all of which the trial court granted.

2. Procedural Facts.

On April 29, 2009, Douglas filed in the Whatcom County Superior Court a Verified Complaint for Fraud, Misrepresentation, Violation of Statutory Duties, Violation of Consumer Protection Act and Damages against Visser (“Complaint”). CP 856-867. Visser filed an Answer, Affirmative Defenses and Counterclaim against Douglas affirmatively claiming Douglas failed to mitigate their damages, and further specifying Vissers were entitled to judgment on the Note and entitled to foreclose on the Deed of Trust against the Property. (“Counterclaim”) CP 849-855. Later, Douglas was granted leave to amend the Complaint to add a cause of action for breach of contract. CP 611-612.

Thereafter, Douglas filed and was denied a motion for summary judgment in Whatcom County Superior Court. CP 845, 379.

Following a bench trial in January 2011 before the Honorable Ira Uhrig, on February 2, 2011, Judge Uhrig issued a 1-page letter to counsel for Douglas and Visser outlining the court’s decision in favor of Douglas. After unsuccessfully arguing a motion for reconsideration, Visser timely filed a notice of appeal on June 3, 2011. CP 16.

D. LEGAL ANALYSIS

1. Standard of Review.

The Court of Appeals reviews a trial court's decision following a bench trial to determine whether the findings of fact are supported by substantial evidence and whether those findings of fact support the trial court's conclusions of law. Dorsey v. King County, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988). "Substantial evidence means enough evidence to persuade a rationale, fair-minded person that the premise is true." Wenatchee Sportsman Association v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Unchallenged findings of fact are verities on appeal. Davis v. Department of Labor & Industries, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

The Court of Appeals reviews conclusions of law *de novo*. Sunnyside Valley Irrigation District v. Dickie, 149 Wn.2d 873, 880, 73 P.2d 369 (2003). In the present case, the trial court entered numerous findings of fact that are not supported by substantial evidence and do not support the conclusions of law in this case.

2. Numerous Findings of Fact Found By The Trial Court Are Not Supported By Substantial Evidence In The Record.

- a. Finding of Fact No. 3 is not supported by substantial evidence because record fails to establish Douglas knew or discovered rot prior to 2007.

The second sentence of Finding of Fact No. 3, reads as follows:

During the course of renovating the house, the Vissers discovered significant wood rot to the sill plate and rim joist that connects the concrete foundation to the frame.

CP 81.

Douglas presented photos taken of the Property after removal of a bellyband around the exterior of the residence in mid-September 2008 to establish this fact. CP 374, PLA EX's 26, 27 & 28. The photos were taken after Douglas had owned the Property for over a year and therefore, do not support this finding.

Douglas also relies upon a letter from a home inspector dated September 21, 2008, which specified in part that the sill plate around the perimeter exhibited 50% to 70% wet rot and pest damage due to ongoing water intrusion and carpenter ant activity. CP 374, PLA EX 50. Douglas's home inspector also opined in his September 21, 2008, letter that the installation of the pink fiberglass insulation in the crawl space stud bays between the floor joists, which were firmly packed against the rim joists, "...may have been installed to reduce the probability that damaged rim joists and sill would be discovered during a standard home inspection". CP 374, PLA EX 50.

However, the crawl space had pink insulation within the stud bays between the floor joists when Visser purchased the house, as was

photographed in an inspection dated July 4, 2005. CP 375, PLA EX 64. Visser only had insulation placed under the master bedroom area on the west side of the house. VRP 471; CP 373, PLA EX 2. The September 2008 photos and September 21, 2008 inspection letter do not support the trial court's finding pertaining to Visser's knowledge during 2006 improvements.

There was also a September 23, 2008, report from Juneau's Residential Home Inspections that indicated a repair of subfloor in the NE corner of the house would have alerted the person performing the work that there was damage to the sill plate areas. CP 374, PLA EX 51. While Douglas's inspector testified that there was only one layer of subfloor and that the installation of the plywood would have allowed the person installing to see through to the crawl space and the rotted sill, it was established at trial that in actuality there were two layers of subflooring; an upper layer of particle board and a lower layer of plywood. VRP 239. Looking at the NE corner of the house from underneath, the subflooring is existing plywood. VRP 240, CP 375, PLA EX 56. As such, it would not be possible for an individual who patched the upper NE subfloor layer to have seen into the crawl space and noticed visible damage, which is why Visser, when performing improvements in this area, could not see into the crawl space and nailed to a solid subfloor. VRP 470.

Further, the home inspection that Visser obtained in 2005 when they purchased the Property, did not depict any areas of dry rot, active wood boring organisms or carpenter ants in and around the sill plate in contrast to the September 2008 inspections obtained by Douglas. CP 375, PLA EX 64. The facts relied upon by Douglas are speculative in nature and do not relate in relevant time to Visser's knowledge in 2007 when the purchase and sale agreement was executed with Douglas. Therefore, there is insufficient evidence in the record to persuade a rational, fair-minded person that Visser knew or discovered in or prior to 2007, significant wood rot to the sill plate and rim joists that connect the concrete foundation to the frame as set forth in the second sentence of Finding of Fact. No. 3.

b. Finding of Fact No. 5 is not supported by substantial evidence because the record fails to establish Visser made superficial repairs and covered up the alleged defects.

The trial court also erred in entering Finding of Fact No. 5. The first sentence of Finding of Fact No. 5 by making the following finding:

Rather than correct these defects, the Vissers or their hired help made superficial repairs to the visible damage and covered up the rest.

CP 27.

The defects that are alluded to in the first sentence of Finding of Fact No. 5, are alleged to be the water damage and rot to the joists that hold up the house's floor, identified in Finding of Fact No. 4, and presumably the wood rot to the sill plate and rim joists identified in Finding of Fact No. 3. The uncontroverted evidence submitted at trial does not support this finding.

The only work performed by Visser on any rim joists within the Property was underneath the bathroom floor. VRP 299. Visser completely tore up the bathroom floor, removed the existing bathtub, and installed two new floor joists in that area. VRP 297. A new subfloor was installed and a portion of the rim joist was replaced. VRP 299. On top of that, tile flooring was installed, a new bathtub and drywall installed in the bathroom, with tile along the walls. CP 373, PLA EX 1. No other work was performed by Visser in the crawl space or to the structure of the Property. VRP 471. Visser admits a portion of the sill plate was missing in the northeast corner and he replaced that and then covered it with a bellyband. VRP 470. Therefore, this finding is not supported by substantial evidence in the record.

c. Finding of Fact No. 8 is not supported by substantial evidence because the 2005 inspection report did not disclose structural defects.

The trial court erred in the second sentence of Finding of Fact No. 8, which reads as follows:

This inspection report documented structural defects in the property and contradicted the Vissers' assertion that the property required only minor repairs.

CP 28.

The inspection report referred to in Finding of Fact No. 8 is the John Wagner House to Home Inspection Report dated July 4, 2005. CP 375, PLA EX 64. The inspection report speaks for itself. A review of the inspection report reveals there were no structural defects in the main house. CP 375, PLA EX 64. The inspection does note that the overall condition of the bungalows is poor and that the both have damaged siding, floors, walls, sheeting and roofing. CP 375, PLA EX 64. However, this only relates to the bungalows, which were never a part of the purchase and sale agreement between Douglas and Visser and were in fact, torn down by Visser shortly after they purchased the Property. VRP 451-452. Therefore, a close inspection of the 2005 inspection report demonstrates Finding of Fact No. 8 is not support by substantial evidence in the record. There is no substantial evidence contained in Exhibit No. 64 which would persuade a rationale, fair-minded person the trust of this assertion.

d. Finding of Fact No. 17 is not supported by substantial evidence because the record established that Douglas knew of the defects prior to purchasing the Property

and could have discovered them upon a reasonable inspection.

Finding of Fact No. 17 reads as follows: “The defects were unknown to the Douglasses and were not discoverable by a careful and reasonable inspection.” CP 29. This finding of fact is not supported by substantial evidence and is contrary to the record which demonstrates defects were known to Douglas when they purchased the Property and such defects were discoverable in 2007.

i. The record established Douglas had actual knowledge of the defects

Prior to purchasing the Property, Douglas had a house inspection performed where the inspector reported in May 2007, the exterior siding exhibited a small area of rot and decay; that there has been caulking and damage to the siding, which were indicative of a previous roof leak; an area of the sill is rotted along the southwest wall; and a large section of the sill adjacent to the rotted section had been recently replaced. CP 373, PLA EX 12. Further, the inspection report had a photo of the rotted sill plate and the replaced sill and pictures showed evidence the floor joists were “sistered” together. CP 373, PLA EX 12, pg. 11.

Douglas obtained and read this May 2007 inspection report and were therefore aware of these defects prior to purchasing the Property and

certainly was “not oblivious to the fact that a 35- or 40-year-old home is going to need some attention sooner or later.” VRP 43, 44.

Prior to their purchase of the Property, Douglas also had knowledge of potential pest infestation of the Property having asked Visser for the 2005 John Wagner inspection report to see what pest infestation had been remedied by Visser. VRP 117; CP 373, PLA EX 11.

ii. The record established that the alleged defects were discoverable by Douglas upon a reasonable inspection

Douglas’ own expert, Kirk Juneau, during an inspection of the Property in September 2008, discovered a girder beam with extensive carpenter ant damage which he thought was concerning because girder beams are a major structural component of a home. VRP 198; CP 375, PLA EX 63, Photo #1. This beam was out in the open and would have been visible and discoverable when Douglas inspected the home in 2007. VRP 231-232. Further, the damage was so significant, it had to be present in 2007 when Douglas had the Property inspected. VRP 232.

Moreover, Mr. Juneau was able to view, without any intrusive inspection, the sistering of joists in the crawl space which were worthless because many of the joists that were sistered together did not reach the girder beam. VRP 212 - 213. Exhibit 63, photo 10, identifies the sistered joists and the fact that they could be viewed in a regular inspection

without being intrusive and thus were discoverable to anyone who looked. VRP 252. In fact, sistered joists were depicted in Douglas's May 2007 home inspection report prior to purchasing the Property. CP 373, PLA EX 12. Moreover, Mr. Juneau testified that if he saw sistered joists and the damage to the girder beam evident in this particular situation, he would call for further intrusive inspections. VRP 253.

Douglas' own real estate agent knew there was concern about previous pest infestation and remembered discussing rot with Douglas before Douglas actually closed on the house in 2007. VRP 337 - 338.

Moreover, Douglas received the disclosure statement and follow-up information from Visser prior to closing. CP 373, PLA EX 10. Douglas sought clarification of the disclosure statement and provided specific requests that Douglas wanted Visser to clarify. CP 373, PLA EX 11. Despite Douglas believing the Visser's responses were "evasive" and that their realtor had concerns about Visser's inadequate responses to the request for clarification of the disclosure statement, and advice that Douglas should seek more clarification, Douglas refused and chose to purchase the Property without any further investigation. VRP 330, 335.

e. Many Findings of Fact entered by the trial court are actually conclusions of law reviewed de novo.

Visser also objects to Findings of Fact No. 11 & 15 as these findings are conclusions of law erroneously labeled findings of fact. Finding No. 11 specifies that Visser “had full knowledge” of the property’s condition; and No. 15 specifies “Visser had a duty to disclose the concealed defects and failed to do so”. CP 28. Because a conclusion of law is a conclusion of law wherever it appears, any conclusion of law erroneously denominated a finding of fact will be subject to *de novo* review. Robel v. Roundup Corp., 148 Wn.2d 35, 44, 59 P.3d 611 (2002).

Visser also objects to Finding of Fact Nos. 12, 13, 15, 18, 19, 20, 22, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 40, 41 and 43. These findings of fact are also actually conclusions of law that must be reviewed *de novo*. Any conclusion of law erroneously denominated a finding of fact will be subject to *de novo* review. Robel v. Roundup Corp., 148 Wn.2d 35, 44, 59 P.3d 611 (2002). These conclusions of law are not support by any findings of fact and therefore, are in error.

3. The Trial Court Erred In Concluding Visser Fraudulently Concealed Defects When Douglas Did Not Prove By Clear, Cogent And Convincing Evidence That Visser Had Knowledge Of Defects, That The Defects Were Unknown to Douglas and That The Defect Would Not Have Been Discoverable.

Under the theory of fraudulent concealment, Visser’s duty to disclose arises when Douglas has established by clear, cogent and

convincing evidence, each of the following elements: (1) the residential dwelling has a concealed defect; (2) Visser has knowledge of the defect; (3) the defect presents a danger to the property, health, or life of Douglas; (4) the defect is unknown to Douglas; and (5) the defect would not be disclosed by a careful, reasonable inspection by Douglas. Alejandro v. Bull, 159 Wn.2d 674, 689, 153 P.3d 864 (2007). Douglas failed to establish by clear, cogent and convincing evidence that Visser had knowledge of the defects, that the defects were unknown to Douglas and that the defects could not have been discovered by a careful, reasonable inspection.

a. The Record Does Not Demonstrate That Visser Had Actual Knowledge Of The Alleged Defects At The Time Of Sale.

The fact that rot and pest damage had permeated a large portion of the sill plate and rim joists in September 2008 is not sufficient to establish knowledge of the existence of rot and pest infestation by Visser in 2007. Hughes v. Stusser, 68 Wn.2d 707, 709-710, 415 P. 2d 89 (1966)(plaintiffs allegations that defendants must have known of existence of termites since they had so permeated the walls, insufficient to establish knowledge).

Further, the fact that Visser performed some repairs on the Property between 2005 and 2007, standing alone, is also not sufficient to establish knowledge of the existence of rot and pest infestation as discovered in

2008, by clear, cogent and convincing evidence. Hughes v. Stusser, 68 Wn.2d at 709 (despite fact that defendants did discover and replace rotted wood from portions of the house and garage; at the time of the sale they were totally unaware of any existing dry-rot condition).

As in Stusser, Douglas did not demonstrate Visser had actual knowledge at the time of the 2007 sale, by clear, cogent and convincing evidence. In fact, one of Douglas's experts testified based upon a September 2008 inspection that the windows installed on the Property by Visser's predecessor, were likely the cause of much of the water intrusion, leading to the moisture ants and rot. VRP 188-189; 223; 251. The windows were not installed by Visser as demonstrated by the 2005 inspection report Visser obtained prior to purchasing the Property that has photos demonstrating the windows were already installed prior to Visser's ownership. VRP 485; CP 375, PLA EX 64.

Visser testified that the only structural work he performed underneath the house was replacing two joists and a portion of the sill plate; no other joists were replaced. VRP 471. This is consistent with the remaining evidence offered at trial. Douglas's expert could not testify when the "sistered" floor joists, or other areas of the sill plate that were "fixed", were done or who performed the work, only that it was substandard. VRP 243.

There is no evidence of mold in the ceiling prior to the time of closing on the Property or that Visser had knowledge of mold in the ceiling prior to the time of closing, only that the mold issue was caused by the improper installation of ceiling tiles by Visser; but this mold did not present itself until nearly a year after Douglas purchased the Property. VRP 21, 22. Consequently, the trial court's conclusion of law that Visser fraudulently concealed these defects is not supported by clear, cogent and convincing evidence in the record.

Nothing demonstrates that at the time of sale, Visser had actual knowledge of the concealed rot, mold or pest infestation. The evidence does establish, however, that Douglas had knowledge.

b. Douglas Had Actual Knowledge Of The Defects In 2007 Prior To Purchasing The Property.

Douglas received an inspection report from an inspector that they hired in May 2007. CP 373, PLA EX 12. That inspection report identified areas of rot and recent changes to the structure; including the sill being replaced. CP 373, PLA EX 12. Douglas also knew extensive work had been done in the bathroom and a new roof had been installed by Visser because of previous leaks. VRP 110. Douglas also knew and had knowledge of previous pest infestation prior to purchasing the Property. VRP 117; CP 373, PLA EX 11.

Douglas' expert, Kirk Juneau, testified that a main girder beam in the crawl space, which was out in the open and clearly visible without an intrusive inspection, had extensive carpenter ant damage. VRP 198; 231 - 232. He also identified floor joists, which were structural components, sistered to existing ones that were readily visible upon a basic inspection. VRP 252, see also, CP 373, PLA EX 12, pg. 11. Douglas therefore had knowledge of rot, pest infestation and that there had been structural repairs that were performed prior to their purchase of the Property. VRP 120. Moreover, despite notice of these issues, Douglas purchased the property.

c. The Defects Were Discoverable By A Reasonable Inspection By Douglas At The Time Of Purchasing The Property.

Douglas' actual knowledge of rot, replacement of a large portion of the sill plate, the sistering of existing joists and previous pest infestation made the extensive nature of any further rot, pest infestation or damaged areas readily ascertainable by simply making further inquiries at the time of or prior to purchasing the Property. Sloan v. Thompson, 128 Wn. App. 776, 789, 115 P.3d 1009 (2005); *citing* Puget Sound Service Corp. v. Dalarna Management Corp., 51 Wn. App. 209, 215, 752 P.2d 1353 (1988). In Dalarna, *supra*, the buyers knew the purchased property had experienced previous water leakage but claimed that the sellers had concealed the extensive nature of the leakage. The court held that the

buyers' knowledge that the property had experienced water leakage prior to their purchase made the extensive nature of the alleged damage readily ascertainable by simply following up on this information prior to making the purchase.

As in Dalarna, *supra*, Douglas had knowledge of rot, of previous pest infestation, of roof leakage, of structural repairs to the Property (replacement of sill plate and photo showing sistered joists pictured in the inspection report) in 2007, prior to purchasing the Property. Nonetheless, Douglas claims Visser fraudulently concealed the extensive nature and damage of the rot, the pest infestation and the structural work performed. However, as explained in Dalarna, the law imposes on Douglas a duty to make further inquiries as to the extent of rot, leakage, structural repair and pest infestation. Dalarna, 51 Wn. App. at 215. As in Dalarna, Douglas knowingly failed to make further inquiry and instead chose to purchase the Property. VRP 120. Once the buyer's inspection uncovers evidence of the defect, he or she has a duty to inquire of the alleged defects with the seller. Puget Sound Serv. Corp., 51 Wn. App. at 215. "Through such questioning, the extent of the problem could have been readily ascertained." *Id.* Moreover, under such circumstances, the seller is not under an affirmative duty to further report the defect. *Id.*

Douglas' expert testified that the observed sistered joists and damage to the girder beam that he saw out in the open without an intrusive inspection, were indicative that further, intrusive inspections were warranted. VRP 253. His observation is consistent with the May 2007 home inspection received by Douglas prior to purchasing the Property. Under these circumstances, Douglas is required as a matter of law to inquire further; they did not. Further, under such circumstances, Visser is not under an affirmative duty to disclose. Puget Sound Serv. Corp., 51 Wn. App. at 215. The court's conclusion is not supported by the findings of fact and as a matter of law, this Court should reverse the trial court's decision and rule that Douglas failed to establish by clear, cogent and convincing evidence that Visser fraudulently concealed known defects.

4. The Trial Court Erred By Concluding Visser Is Guilty Of Negligent Misrepresentation When, As A Matter Of Law, The Economic Loss Rule and The Disclosure Statement Prevent Such A Recovery and Douglas Failed To Establish Each Element By Clear, Cogent and Convincing Evidence.

It is presumed that the trial court's conclusion of negligent misrepresentation stems from the representations made in the disclosure statement and Visser's allegedly misrepresenting the nature and extent of repairs performed to the Property. However, as a matter of law the trial court erred by concluding Visser was liable for negligent

misrepresentation when the economic loss rule, as well as the disclosure statement, bars such theory.

a. The Economic Loss Rule As A Matter Of Law Prevents Recovery Under Negligent Misrepresentation.

While Washington recognizes a tort claim for negligent misrepresentation under the Restatement (Second) of Torts, § 552, this claim is not available when the parties have contracted against potential economic liability. Allejandre v. Bull, 159 Wn.2d 674, 685-686 (2007). In Allejandre v. Bull, *supra*, the seller made representations about the condition of the septic system that the buyer, after purchasing, later discovered to be false. A claim was brought for negligent misrepresentation. The appellate court dismissed the claim based upon the economic loss rule; a party can't recover in tort for claims based upon contract. In this instance, since Douglas and Visser had a written contract, much like Allejandre, the misrepresentation claim fails as a matter of law. This court should reverse the trial court's decision.

b. Seller's Disclosure Statement Is For Disclosure Only And Douglas Cannot Sue For Misrepresentation Based On The Contents Therein.

The sole basis for the claim of misrepresentation derives from representations Vissers made in the 2007 disclosure statement. VRP 128. The sole remedy of Douglas for any inaccuracy or insufficiency of the

disclosures on the disclosure statement is a rescission of the purchase and sale agreement. RCW 64.06.020.

The purpose of the disclosure statement is for disclosure only and is not construed as a warranty of any kind by Visser. RCW 64.06.020(3). The disclosure statement provides in capital lettering that the disclosures are not representations that are part of a written agreement; they cannot be relied upon. CP 373, PLA EX 10. Douglas received the disclosure statement and knew that their only remedy was rescission. VRP 112. Thus, any misrepresentations, if made, were made pursuant to the disclosure statement that Douglas is precluded in law from suing Visser upon. RCW Chap. 64.06.

c. As A Matter Of Law Douglas Cannot Sue Visser As A Real Estate Agent For Disclosures In The Disclosure Statement

The misrepresentations allegedly relied upon by Douglas were those contained in the disclosure statement. VRP 128. The disclosure statement specifically represents in upper-case lettering that it is filled out only on behalf of the seller and not by real estate agents. CP 373, PLA EX 10. The representations and disclosures are not that of a real estate agent, licensee or broker.

The seller disclosure statement *shall be only a disclosure made by the seller, and not any real estate licensee involved in the transaction*, and shall not be construed as a warranty

of any kind by the seller or any real estate licensee involved in the transaction.

RCW 64.06.020 (emphasis added). The disclosure statement was provided in Visser's capacity as the seller, not as a real estate agent.

Additionally, upon receiving the disclosure statement in 2007, Douglas' agent, Kay West, believed that the disclosure statement raised a lot of red flags about the Property and what Visser know or didn't know. VRP 329. Despite advising Douglas to seek more information and clarification at this time, and despite Douglas being aware of rot, structural repair, pests and roof leaks, Douglas did not follow up further with Visser and did not rescind the contract but instead chose to purchase the Property. VRP 120-121; 335; 410.

The handwritten answers to Douglas' request for clarification relating to the disclosure statement, were provided solely by Diane Visser. VRP 320, 503. Diane Visser was not a real estate agent and if those comments were somehow misrepresentations, they did not come from Terry Visser as a real estate agent.

In fact, the only representations made by Visser as a real estate agent were contained in the real estate flyer advertising the sale of the Property. CP 373, PLA EX 1. Douglas admits that the representations in that document are all true. VRP 407. The only other representations Terry

Visser made to the Douglas, besides the real estate flyer, were that he totally renovated the place. VRP 386. This representation is not false.

The trial court erred as a matter of law concluding that Visser made misrepresentations as a real estate agent and therefore, this court should reverse.

d. The Record Is Deplete Of Clear, Cogent And Convincing Evidence That Establishes Douglas Could Justifiably Rely Upon Any Alleged Misrepresentation.

Under the theory of negligent misrepresentation, Douglas must establish by clear, cogent and convincing evidence that Visser made (1) a false statement; (2) to induce a business transaction; and (3) on which Douglas justifiably relied. Ross v. Ticor Title Insurance Company, 135 Wn. App. 182, 192, 143 P.3d 885 (2006). Douglas could not justifiably rely upon any alleged misrepresentations of Visser.

Even if, for some reason, Douglas could pursue Visser for misrepresentation, for the reasons previously established, Douglas had actual, if not constructive, knowledge of potential defects. Douglas knew there was rot, previous pest infestation, structural repair, and previous leaks in the roof, prior to purchasing the Property. VRP 110; 120-121. Any representation by Visser to the contrary (none in the record), could not be reasonably or justifiably relied upon by Douglas. The findings of fact, nor the record support the trial court's conclusion. To the contrary,

Douglas failed to establish each element by clear, cogent and convincing evidence. This Court should reverse the trial court's decision concluding that Visser negligently misrepresented material facts.

5. The Trial Court Erred As A Matter Of Law In Determining Damages When It Failed To Utilize The Benefit Of The Bargain Remedy.

Even if Visser is guilty of fraudulent concealment or negligent misrepresentation (which Visser does not concede), the measure of damages utilized by the trial court was incorrect as a matter of law.

“Where property is sold and the purchaser subsequently brings an action charging fraudulent representations, the measure of damages is the difference between the value of the property transferred at the time of the sale and what its value would have been if it had been as represented.” Hunt v. Allison, 77 Wash. 58, 61, 137 P. 322 (1913)(misrepresentation of the strength of walls of a building sold). This measure of damages is commonly referred to as the "benefit of bargain." McInnis & Co. v. Western Tractor & Equip. Co., 63 Wn.2d 652, 388 P.2d 562 (1964); *see also* Obde v. Schlemeyer, 56 Wn.2d 449, 455, 353 P.2d 672(fraudulent concealment of termites in the lease of premises). The benefit of the bargain measure of damages is the difference in the market value as was represented, and the actual market value of the property at the time of sale. Tennant v. Lawton 26 Wn. App. 701, 615 P.2d 1305 (1980); Janda v.

Brier Realty, 97 Wn. App. 45, 984 P.2d 412 (1999). In this case, however, Douglas requested damages relevant to the cost to reconstruct the Property to what was represented, which measure was summarily dismissed in Hunt v. Allison, *supra*. See, VRP 350, 353.

In Hunt v. Allison, *supra*, the defendant seller constructed a building and made representations to the plaintiff buyer that the walls were of sufficient strength to sustain two additional stories. Subsequently the plaintiff buyer discovered that the walls were not of sufficient strength and sued for misrepresentation. At trial, the plaintiff offered evidence on the cost to reconstruct the walls and make them of the strength which the defendant claimed and represented them to be. The jury instruction utilized specified that if the representations by defendant were untrue, then the plaintiff is entitled to recover such sum as necessary to be expended at the time of sale in order to make the walls carry two additional stories. Hunt v. Allison, 77 Wash. at 60. On review the court determined “The instruction given does not contain the correct statement of the law.” Hunt v. Allison, 77 Wash. at 61. The correct measure of damages is the difference between the value of the property transferred at the time of the sale and what its value would have been if it had been as represented. *Id.*

The present case is not unlike Hunt v. Allison, *supra*. Douglas provided evidence of the cost to remodel the home to make it habitable

versus the cost to tear down and rebuild the home. VRP 350; 353. This is the incorrect manner to calculate recoverable damages as a matter of law. Hunt v. Allison, 77 Wash. at 61. To calculate the benefit of the bargain measure of damages, Douglas was required to provide evidence of the value of the property at the time of sale versus the value of the property as represented. Hunt v. Allison, 77 Wash. 58, 137 P. 322 (1913); Obde v. Schlemeyer, 56 Wn.2d 449, 353 P.2d 672); McInnis & Co. v. Western Tractor & Equip. Co., 63 Wn.2d 652, 388 P.2d 562 (1964).

The record does establish the value of the property as represented, which is the sale price of \$189,900. CP 373, PLA EX. 14. This value not only includes the improvements, but the land value as well. By Douglas only presenting evidence of the cost to repair and/or the cost to replace the home, they are completely ignoring the value of the land and the correct measure of damages. Douglas did not bargain for a brand new home, as the court has erroneously awarded them. They bargained for a 900 square foot cottage that was 36 years old. Damages, if any, should be accurately calculated pursuant to the correct benefit of the bargain measure.

The only other valuation of the Property in the record provided by Douglas is the tax assessment. CP 375, PLA EX 70. In 2007 when Douglas purchased the Property, the value assessed to the “improvements” (house), was \$45,200. VRP 418; CP 375 PLA EX 70. The value of the

“improvements” in 2010 after the house was vacated due to mold and rot, was assessed at \$31,243. VRP 418; CP 375, PLA EX 70. That leaves a difference in value of \$13,957. Further, the valuation of the cost to repair versus replace provided by Douglas is skewed because it was done over two years after discovery of the rot and the mold; not at the time of sale as required. The damage to the Property by that time had increased exponentially due to Douglas failing to mitigate their damage. If Visser is guilty of fraud and/or misrepresentation, the court should vacate the judgment and remand this portion of the case to the trial court and direct it to enter damages at most in the total amount of \$13,957, being the difference in value established by Douglas.

6. The Trial Court Erred By Concluding Douglas Mitigated Their Damages When The Record Established Douglas Actually Increased The Damage To The Property.

The trial court concluded that Douglas took all reasonable steps to mitigate their damages because any repairs would be futile. CP 31. This is contrary to facts in this record and erroneous as a matter of law.

One who has sustained damage, by reason of the act of another, must use reasonable efforts to minimize his damages. Sullivan v. Boeing Aircraft Company, 29 Wn.2d 397, 405, 187 P.2d 312 (1947). Mitigation of damages is what the expression imports, a reduction of their amount, the result of facts that show the plaintiff's cause of action does not entitle him to as large an

amount as the proof would otherwise justify that the trier of facts allow. Snowflake Laundry Company v. McDowell, 52 Wn.2d 662, 674, 328 P.2d 684 (1958). The whole concept turns on the idea that a damaged party should pursue a course, after a breach, which is designed to assist the party in breach. *Id.*

The trial court ruled that any repairs would be futile and more expensive than tearing down the house and rebuilding. CP 31. However, this conclusion is based upon the condition of the Property over two years after discovering the alleged defects. VRP 350. By that time, the damage to the Property had greatly increased as a direct result of the inaction of Douglas.

In July of 2008, Douglas first discovered the mold issue. VRP 65. They immediately had a mold expert and a mold abatement company come out, evaluate the situation and come up with a proper course of action. VRP 68. In July 2008, the mold was limited to the ceiling/roof area and a small amount on the SW corner wall; nowhere else. VRP 62; 137; CP 373-74, PLA EX's 17 – 22. It was determined by the mold abatement company that the best course of action to abate and remediate the mold was to:

...remove all roofing materials from outside with removing all roofing and felt paper and tongue and groove [sic] from outside and sealing all inside ceilings with 6 mil to contain all inside area's [sic]. This would have to be done with cordination [sic] of a roofers [sic] to replace at the same time.

CP 374, PLA EX 22. The bid to perform this task was \$4,159.00. CP 374, PLA EX 22. Douglas did not remove any tile or perform the work despite learning the cause of the mold on the ceiling was improper installation of the ceiling tiles. VRP 139. Instead, Douglas shut off the water to the Property, turned off the electricity and drained the water lines. VRP 395. The heaters were removed from the Property. VRP 405. The house was essentially vacant except for being used as a storage unit. VRP 393-394.

At the time of trial, or just prior, the bathroom was leaking water. (VRP 416); there was water pooled on the bathroom floor that had turned to ice (VRP 416; CP 375, DEF EX 72); there was mold all over the bathroom walls and floor (CP 375, PLA EXs 60 & 61; DEF EX 73); there was mold on the walls outside of the bathroom (VRP 426-428; CP 375, DEF EX 74); the ceiling tiles were still in place (VRP 139); and water was pooling on the bathroom floor, migrating to the carpeting in the hallway and leaking through the floor into the crawlspace (VRP 442). All of this extensive damage could have been mitigated by Douglas. Instead, Douglas vacated the premises and left it rotting/molding for two additional years. VRP 393-394.

With the water leaking and the heaters removed, the mold continued to grow and rot increased. VRP 441. At the time of discovery, Douglas had a legal obligation to mitigate and they failed to do so. The damage estimate provided by Douglas took into account the extensive rot and extensive mold

throughout the premises caused in large part by their own inaction. VRP 345. Douglas may not, and should not, recover for those damages that he could have avoided by reasonable efforts taken after discovering the problems. Bernsen v. Big Bend Elec., 68 Wn. App. 427, 433, 842 P.2d 1047 (1993). The trial court erred as a matter of law. The conclusion is not support by the record and this Court should reverse the decision of the trial court.

7. Trial Court Erred By Concluding That Visser Breached A Duty Of A Real Estate Agent When Douglas Did Not Establish By Clear, Cogent And Convincing Evidence That Visser Misrepresented Material Facts.

The court erred in finding that Visser breached his statutory duties as a real estate agent for failing to disclose known defects. It is undisputed that Visser, at the time of this transaction, was a real estate agent and was the listing agent for the sale of the Property.

Under RCW 18.86.030(1)(d), a real estate agent has a duty to disclose “all existing material facts known by the [agent] and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the [agent] has not agreed to investigate.”

First, as previously argued, Douglas did not prove by clear, cogent and convincing evidence Visser made specific misrepresentations while acting in his capacity as real estate agent. *See*, Brief of Appellant at pp. 28

– 30. Second, the alleged misrepresentations of defects related to the non-disclosure statement were apparent and readily ascertainable to Douglas in 2007 prior to the purchase of the Property.

Douglas received a home inspection report in May 2007 that identified rot and areas of prior leakage. CP 373, PLA EX 10. The home inspection report identified structural work had been recently performed, when it specified a large portion of the sill plate had recently been replaced. CP 373, PLA EX 10. It identified in pictures that floor joists had been sistered together. CP 373, PLA EX 10. Douglas received this report, which also acknowledged previous issues with the roof leaking, previous pest infestation, and decided not to inquire further of Visser for any explanation. VRP 118-120; 338. Thus, even if Visser made misrepresentations, Douglas did not have a legal right to rely on those misrepresentations and ignore readily apparent defects.

Douglas possessed knowledge that material facts complained of were apparent and/or readily ascertainable with follow-up to disclosures or inspection reports. As such, Douglas failed to establish by clear, cogent and convincing evidence that Visser has violated his real estate agent duties. This Court should reverse the trial court's conclusion that Visser violated the statutory duties of a real estate agent.

8. The Trial Court Erred In Concluding That Douglas Established A Violation Of The Consumer Protection Act.

To establish a claim under the Consumer Protection Act, five elements must be established: (1) 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; (5) causation. Svensen v. Stock, 143 Wn.2d 546, 553, 23 P.3d 455 (2001). In the present case, the findings of fact relating to the CPA claim, specifically Findings of Fact number 28-33, are conclusions of law subject to de novo review and do not provide factual basis to support the trial court's conclusion. Robel v. Roundup Corp., 148 Wn.2d 35, 44, 59 P.3d 611 (2002).

The misrepresentations complained of by Douglas arise solely out the disclosure statement. VRP 128. RCW 64.06.060 reflects the intent of the legislature to preclude agents and brokers from liability under the Consumer Protection Act for fraudulent concealment arising directly from their conduct in completing the disclosure statement. Svensen v. Stock, 143 Wn.2d at 555. Since Douglas complained that the misrepresentations arose from the Visser's incomplete or nondisclosures contained in the disclosure statement, the consumer protection violation against Visser, acting as real estate agent, is not available. RCW 64.06.060. Even if

Douglas asserts this violation is available predicated on common law, Douglas's claim should be rejected. Svendsen v. Stock, 143 Wn.2d at 556.

An agent's failure to disclose a known material defect in the sale of real property may be a violation of the Consumer Protection Act. Svendsen v. Stock, 143 Wn.2d at 556; McRae v. Bolstad, 101 Wn.2d 161, 676 P.2d 496 (1984) (holding that a real estate agent's failure to disclose chronic sewage and drainage problems violated the CPA); Robinson v. McReynolds, 52 Wn. App. 635, 762 P.2d 1166 (1988) (holding that a real estate agent's failure to disclose a property's lack of income potential was a violation of the CPA). In this case, Douglas failed to prove, based upon substantial evidence in the record, Visser fraudulently concealed defects and/or such defects were not discoverable at the time of the purchase of the Property. Therefore, the CPA claim fails. *See*, Brief of Appellant at pp. 21 – 27. Moreover, Douglas did not establish the public interest impact element of the alleged CPA violation.

The public interest requirement is established by evaluating several factors: (1) whether the acts were committed in the course of Visser's business; (2) whether Visser advertised to the public; (3) whether Visser actively solicited Douglas, indicating other potential solicitation of others; and (4) whether the parties occupied unequal bargaining positions. Svendsen v. Stock, 143 Wn.2d at 559; Hangman Ridge Training Stables,

Inc. v. Safeco Title Insurance Company, 105 Wn.2d 778, 790-91, 719 P.2d 531 (1986). The record is deplete of any findings of fact that support the public interest requirement. CP 26-33

Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the private interests. Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Company, 105 Wn.2d at 792. In the present case, when looking at the four factors, it can be argued that the first two elements are met; Visser was a real estate agent at the time of the sale and was the listing agent for the Property. He also advertised the sale of the home in the multiple listing service. However, there are no findings that demonstrate Visser actively solicited Douglas or that Visser enjoyed unequal bargaining position. Douglas has their own real estate agent representing them that discovered the Property for sale and directed Douglas to the house. VRP 22-23. Moreover, the record reflects Douglas had a history of experience in the buying and selling of real estate and are far more sophisticated than Visser in real estate transactions. *See*, VRP 31; 383; 445.

Lastly, there was no causation. Douglas had actual knowledge of defects consisting of rot, previous pest infestation, previous water leakage and of structural repairs performed on the premises. VRP 120. Knowing such information, Douglas proceeded with the purchase of the Property.

Any alleged disclosure or nondisclosure by Visser as a real estate agent did not cause the harm alleged to have been incurred by Douglas since Douglas assumed any risk.

This Court should reverse the decision of the trial court concluding that Visser violated the Consumer Protection Act. The findings of fact are not support by substantial evidence and the conclusions of law relating to a CPA violation are not supported by any findings of fact.

9. Douglas Did Not Provide Sufficient Evidence To Support An Award Of Emotional Distress Damages.

Washington courts have ruled that a party is entitled to recover damages for mental suffering only upon proof of an intentional tort. *See, White River Estates v. Hiltbruner*, 134 Wn.2d 761, 768, 953 P.2d 796 (1998)(emotional distress damages are not recoverable for violation RCW 59.20.073, because the conduct doesn't amount to an intentional tort). Emotional distress damages are not recoverable for violation of the Consumer Protection Act. *White River Estates v. Hiltbruner*, 134 Wn.2d at 764. Therefore, Douglas can only recover emotional distress damages for prevailing upon either his fraudulent concealment or the misrepresentation claim. Regardless, in the present case, the evidence and findings of fact do not support a conclusion that Douglas suffered from emotional distress relating to those claims.

The only testimony offered relating to emotional distress suffered, was by Ms. Douglas:

Q. ... Could you briefly describe for the judge what having to deal with this house in the last two and a half years has done to your husband and you?

A. How do you explain emotional? Lesser people would have divorced. My husband and I have a very good relationship and, um, short of sleepless nights, lots of crying and, um, disappointment, I can't, you can't describe what we went through. Luckily, luckily, we don't have to live in that home 12 months out of the year and raise children in a home like that. Otherwise, we would have been renting or been out on the street. So, um, like the family we gave the three heaters to that didn't have heat in their home, so it was very stressful.

VRP 404, ll 20-23; 406, ll19-25; VRP 407, ll 1-5.

Even upon the finding of an intentional tort, Douglas are required to offer proof of actual anguish or emotional distress to receive those damages. Cagle v. Burns & Roe, 106 Wn.2d 911, 920, 726 P.2d 434 (1986). The isolated, conclusory statement of Mrs. Douglas is insufficient particularly where the record reflects that upon discovering that the Property was allegedly "uninhabitable", Douglas closed it up and when visiting, either lived in their trailer or in their brand new 28' x 34' shop. VRP 393, 395. They did not expose themselves to the Property on a daily basis, and in fact, had no right to reside there since by law as a Canadian

citizen, they can only spend a maximum of six months per year in the United States. VRP 26.

Instead, Douglas, after discovery of the mold and rot, still made use of the house by storing their materials there. VRP 402-403. Only if Douglases been exposed to the mold and rot on a daily basis by living within the residence for the two and a half years leading up to the trial, could there have been grounds for emotional distress damage. *See, McRae v. Bolstad*, 32 Wn. App. 173, 178-179 (Wash. Ct. App. 1982) *aff'd on other grounds*, 101 Wn.2d 161, 676 P.2d 496 (1984) (while actually living in the house, septic efflux was discovered in the backyard, the toilets in the house erupted with raw sewage, and standing water under the house all posed a serious health risk, entitling them to emotional distress damages). In contrast, here Douglas did not expose themselves to such hazards. Simply stated, Douglas has not established emotional distress damages. This Court should reverse the decision of the trial court granting \$13,000 in emotional distress damages.

10. Visser Is Entitled To The Full Principle Amount, Plus Default Interest, On The Promissory Note And The Trial Court Erred By Concluding Otherwise.

The Note is commercial paper and subject to rules and laws relating to the same; specifically, RCW 62A.3. The Note is an absolute promise to pay a sum certain by a certain date, which was executed by

Douglas. The date was mutually extended to September 1, 2008, at the request of Douglas, for payment in full of all principal and accrued interest. CP 374, PLA EX 23. However, despite a maturity date of September 1, 2008, Douglas readily admit at trial that they had not paid the principal balance or accrued interest owing on the Note; and specifically, have not made any payments since August 2008. VRP 135. Pursuant to RCW 62A.3-305(a)(1), there are only a few defenses to Visser's right to enforce the payment terms of the Note. Those defenses are as follows:

- (i) infancy of the obligor to the extent it is a defense to a simple contract,
- (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor,
- (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or
- (iv) discharge of the obligor in insolvency proceedings.

RCW 62A.3-305(a)(1). Douglas does not meet any of these defenses.

Douglas is not an infant or minor. Douglas did not plead nor claim that they were under duress, or that they lacked the legal capacity to execute the Note. On the contrary, Douglas knew what they were executing and took it seriously. VRP 123. Douglas did not claim fraud that

induced them to sign the Note. They read the Note, its terms and understood that if they did not pay, they would be in default and interest would accrue at 18% per annum. VRP 123. Finally, Douglas did not seek a discharge in bankruptcy of the Note.

Therefore, the Court's decision to only allow recovery of 6.5% interest on the Note is contrary to law and is not supported by the evidence. Moreover, the Court, by its ruling, has essentially reformed the Note which was not a cause of action brought by Douglas. This Court should remand this issue to the trial court with instructions to have the principal amount of the Note calculated as of September 1, 2008, and interest at 18% per annum accrue from September 1, 2008, until paid. The principal amount, plus interest and fees and costs, shall be an off-set to any proper award of damages provided to Douglas.

11. Visser Is Entitled To Recover Attorney's Fees & Costs At Trial And On Appeal Pursuant To The Terms Of The Note And The Agreement.

The trial court erred by refusing to award Visser any recovery of fees and costs, despite having prevailed on enforcing the Note and Deed of Trust against Douglas. CP 30, 32. Instead, the trial court awarded Douglas all their fees and costs, including the fees incurred in defending against the enforcement of the Note and Deed of Trust. CP 32. On appeal, the trial court should be reversed and Visser should be entitled to recover their

reasonable attorney's fees and costs related to a valid judgment on the Note and related to prevailing upon the claims pursuant to the Agreement.

The Agreement, at paragraph "q" reads:

If Buyer or Seller, institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorney's fees and expenses.

CP 373, PLA EX 14. If an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees. Brown v. Johnson, 109 Wn. App. 56, 58, 34 P.3d 1233 (2001)(the purchase and sale agreement was central to the claims for misrepresentation). An action is "on a contract" if (a) the action arose out of the contract; and (b) if the contract is central to the dispute. Brown v. Johnson, 109 Wn. App. at 58; citing Edmonds v. John L. Scott Real Estate, Inc., 87 Wn. App 834, 855, 942 P.2d 1072 (1997).

The action brought by Douglas was in tort but the purchase and sale agreement was central to their claims. Pursuant to RAP 18.1, Visser is entitled to recovery of reasonable attorney's fees and costs on appeal, as determined by this Court.

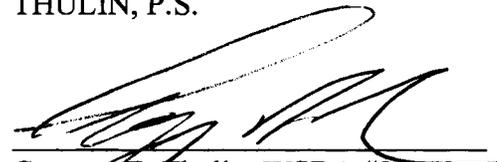
E. CONCLUSION

For the foregoing reasons, Visser respectfully requests that this Court reverse the decision of the trial court concluding that Douglas proved by clear, cogent and convincing evidence Visser fraudulently

concealed defects; negligently misrepresented material facts; violated a statutory duty and violated the Consumer Protection Act. The matter should then be remanded to the trial court for entry of an award in favor of Visser for the principal amount of the Note, plus interest at 18% per annum from September 1, 2008, until paid, along with recovery of Visser's reasonable attorney's fees and costs incurred therein.

Dated this 20th day of January, 2012.

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