

72939-0

72939-0

NO. 72939-0-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

WGW USA INC. and TIAN QING GUO,
Appellants,

v.

LEGACY BELLEVUE 530, LLC,
Respondent.

OPENING BRIEF OF RESPONDENT

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I. INTRODUCTION

WGW USA Inc. (“WGW”) signed a Lease Agreement (“Lease”) with Legacy Bellevue 530, Inc. (“Landlord”) in 2012, to open and operate a restaurant known as the Spring Restaurant on the leased premises (“Premises”) which are located at the southeast corner of 112th Avenue and NE 6th Street in Bellevue. Tian Qing Guo (“Guo”), WGW’s President, retained a Bellevue lawyer and a Bellevue real estate broker and together they successfully negotiated the terms of the Lease with the Landlord to include a grace period of eight months starting on October 1, 2012 of free and reduced rent to WGW and a specific clause which addressed the potential for condemnation of the Premises. WGW affirmed in the Lease that it had inspected the Premises and accepted the Premises “As Is.” Guo guaranteed WGW's obligations under the Lease.

WGW and Guo concede the opening of the restaurant in December 2012 was not properly launched by WGW, it was poorly managed, and as a result the restaurant did not attract enough customers to survive. WGW and Guo soon realized the business was failing. Guo tried to recoup its losses by secretly selling WGW and its restaurant in January 2013. A purchase and sale agreement was executed, and the new owners took control of WGW and began operating the restaurant but WGW's new owners later backed out due to a dispute with Guo and litigation ensued between Guo and WGW's new owners. In that litigation, Guo testified that he abandoned the Lease because the restaurant sale fell through and he could not save the restaurant.

At approximately the same time as Guo's sale of WGW fell through, the free and reduced rental grace period under the Lease

expired and full monthly rent became due and owing. Rather than pay monthly rent and other charges as required under the Lease, WGW defaulted, vacated the Premises, and refused to honor its obligations under the Lease. When demand for payment was made by the Landlord, WGW ignored the condemnation provisions in the Lease and initiated this litigation, suing the Landlord to rescind the Lease, claiming that the Landlord had failed to disclose material information about Sound Transit's *potential* plans at or near the Premises. The Landlord counterclaimed for breach of the Lease and underlying Guaranty.

The trial court heard cross motions for Summary Judgment from the parties, found there was no genuine issue of material fact regarding whether WGW materially breached the Lease, and correctly determined that WGW's breach of the Lease precluded its rescission claims against the Landlord. The trial court also correctly found that there was no evidence that the Landlord had actual knowledge of any material facts regarding Sound Transit's potential plans for its Bellevue operations which the Landlord failed to disclose to WGW when the parties negotiated the Lease. The trial court correctly granted the Landlord's motion and entered judgment against WGW and Guo. WGW's motion was correctly denied in its entirety by the trial court.

WGW's sole argument in support of rescission is that William Nelson, the Landlord's employee who held a real estate broker license and handled the Lease negotiations on behalf of the Landlord, failed to disclose to WGW during lease negotiations enough of the public information about Sound Transit's potential plans for Bellevue's light rail. WGW concedes that the Landlord disclosed to WGW and its Bellevue attorney and Bellevue real estate broker during lease

negotiations that the Sound Transit Light Rail track was at the time of negotiations planned to be built across the street from the Premises, running east/west on NE 6th Street and that a station would be built just blocks away. Nevertheless, because the Landlord's disclosure was framed in a positive way rather than negatively, WGW seeks rescission by claiming it was induced to enter into a Lease it never would have had it known that the Premises might possibly be condemned by Sound Transit in the future. WGW also claims that information Nelson had regarding Sound Transit's earlier public, preliminary, evolving, and unofficial acquisition plans which suggested the Premises as well as numerous high end recently constructed Bellevue commercial and public properties may have to be potentially acquired by Sound Transit depending on what Sound Transit later and finally decided it wanted to do in Bellevue and what property it needed for its Bellevue light rail operations was a material fact known by the Landlord that should have been disclosed during negotiations.

By way of history, in 2011, more than a year before the Lease was executed, Sound Transit published the East Link Light Rail Project Final Impact Statement. In that document, Sound Transit identified the Premises along with many other properties as a "Potential Property Acquisition" in conjunction with its East Link rail project. Sound Transit defined a Potential Property Acquisition as a property that might possibly be affected in some way during the construction of the rail line. It is undisputed Sound Transit did not know at the time of the publication of its Final Impact Statement or during the Lease negotiations, which properties would actually be affected. In addition to the Premises, Sound Transit listed properties such as the Coast Bellevue Hotel, Whole

Foods Market, Bravern, and Bellevue's City Hall as properties that it might have to acquire as part of the light rail track construction.

It is also undisputed Sound Transit never gave the Landlord any formal notification of any potential acquisition of the Premises before the Lease was executed. In fact, no formal notification of potential acquisition was given at any time while WGW occupied the Premises. It was not until September, 2014 -- long after Guo and WGW gave up on their failed restaurant, secretly sold control of the restaurant and breached and abandoned the Lease and vacated the Premises -- that Sound Transit changed its plans and provided the Landlord with formal notice that it would need some portion of the Premises in conjunction with the construction of the rail line. Specifically, after WGW had abandoned the Lease, Sound Transit formally confirmed new plans for the location of the East Link rail. It stated its track would run east/west on NE 6th but it would run on the south side of NE 6th, not the north side. As a result, Sound Transit notified the Landlord it may need to use a small portion of the parking lot on the north side of the Premises to hold one support column for the newly designed rail track. There is no reasonably certain evidence that Sound Transit's intended possible use would impact WGW's business in any materially adverse way, or when, or to what degree. At the time of the Lease was negotiated and formed, all available Sound Transit information and documentation affirmed that the Final Plan selected for the light rail would not adversely affect the Premises.

The disclosures made by Mr. Nelson to Guo, WGW, and their Bellevue broker and Bellevue attorney during lease negotiations were wholly consistent with the information made available to the public by

Sound Transit about the location of the rail line. Guo was an experienced businessman, who had owned and operated several restaurants previously. Guo employed leasing and legal professionals from Bellevue to advise and assist him with the Lease negotiations. Guo and WGW and their consultant team had equal access to all public information regarding the Sound Transit link rail. They claim they never investigated how Sound Transit's plans could potentially affect WGW's plans for the Premises. They did agree in the Lease to protect WGW against potential condemnation by negotiating the Lease with its condemnation clause.

WGW breached the Lease because its business failed and because its attempts to secretly sell its business failed. It did not breach the Lease through, or as a result of, any legitimate concern about a potential taking of any portion of the Premises or any misrepresentation by the Landlord. WGW's breach significantly damaged the Landlord, but the Landlord immediately and appropriately mitigated its damages by securing another Lease with a restaurant tenant at the Premises. WGW's claim that the Premises were made "unmarketable" by Sound Transit's potential condemnation plans is belied by the undisputed evidence that the new restaurant's business is doing very well, and its owners are excited at the prospect of Sound Transits station and rail line being in close proximity and drawing more customers for its business.

II. ISSUES PRESENTED

1. The trial court correctly held that there is an absence of evidence tending to establish that the Landlord had actual knowledge of any existing fact or possessed other information that it had a duty to impart to (WGW) prior to entering into the lease in question.

2. The trial court correctly held that there is no evidence of any misrepresentation made by the Landlord.
3. The trial court correctly held that Sound Transit's intentions were equally knowable and ascertainable by both the Landlord and the sophisticated and well-represented commercial tenant.
4. The trial court correctly held that the eminent domain clause in the lease contained remedies in the event of condemnation.
5. The trial court appropriately struck portions of the Declaration of Bruce Kahn.
6. The trial court correctly granted the Landlord's summary judgment motion.
7. The trial court correctly denied WGW's summary judgment motion.

III. STATEMENT OF THE CASE

Tian Qing Guo is the President of WGW, and an experienced businessman and restaurateur. CP 45. WGW's lawsuit is based upon its contention that Mr. Nelson and the Landlord, as his employer, failed to disclose material facts about Sound Transit's plans in negotiating a lease to the Premises to WGW in the late summer of 2012. CP 132. Throughout the negotiations, WGW was represented by Bellevue legal counsel Bennett Tse and a licensed Bellevue real estate broker, Maci Lam of Skyline Properties Inc. CP 45.

Legacy Bellevue 530, LLC is controlled by Legacy Capital, LLC and owns the property located at 530 NE 112th Street, Bellevue, WA 98004. CP 45. William Nelson is employed by Legacy Capital LLC. CP 45. His supervisor is Walter Scott. CP 133. As part of Mr. Nelson's employment, he is responsible for property management and leasing. CP 45. WGW and Guo successfully moved for leave to amend

their Complaint to add claims against Mr. Nelson, Mr. Scott and Legacy Capital LLC, but they never did and they are not parties to this action – the Landlord is the only defendant. CP 495.

Mr. Nelson handled the lease negotiations for the Landlord. CP 45. Mr. Nelson was an employee of the Landlord and was a licensed real estate broker. CP 45. Mr. Nelson had a minimum of thirty separate interactions with Ms. Lam while negotiations were ongoing. CP 45. At no time during the context of the negotiations did Ms. Lam indicate that her duties to WGW and Guo were limited in any capacity. CP 45. Ms. Lam received a substantial commission for her services. CP 70-71.

The Lease was executed by WGW and the Landlord on September 17, 2012. CP 51-68. The Premises had been used successfully by previous tenants as restaurants and WGW's intended use was the same. CP 45. The Lease stated in capital letters: "TENANT HAS INSPECTED THE PREMISES AND ACCEPTS THE PREMISES IN AN "AS IS" CONDITION." CP 84. It also states in the same paragraph: "Landlord makes no representations or warranties with respect to the Premises except as may be expressly set forth in this Lease." CP 84. The Lease commenced on October 1, 2012, and was to run for ten years to its terminating date of September 30, 2022. CP 51. WGW successfully negotiated free rent through the end of January 2013, and significantly discounted rent through the end of May 2013. CP 51. Starting in June 2013, base rent was \$16,552.08 per month, with periodic increases throughout the term of the lease. CP 51. Common Area Management ["CAM"] charges, taxes, and insurance were also due on a monthly basis. CP 51-52.

In 2011, the Premises had been identified in the East Link Project Final Environmental Impact Statement as a Potential Property Acquisition, along with such high end recently constructed commercial properties as The Bravern, Meydenbauer Center, Whole Foods Market, Coast Bellevue Hotel, City Center Plaza and Key Center. CP 46, CP 184. Mr. Nelson was aware of this Sound Transit 2011 Impact Statement. CP 46. However, he also knew that corresponding information from Sound Transit showing the location of Sound Transit stations and a rail route map depiction indicated the Premises would not be adversely affected. CP 46. He also knew prior to and during the lease negotiations with WGW and Guo, Sound Transit had not provided any information to the Landlord that the leased Premises would be adversely affected by the East Link expansion, and in fact all available public documentation affirmed that the Final Plan selected for the light rail would not adversely affect the Premises. CP 46. There was no available or known information to Nelson or the Landlord prior to the commencement of the Lease that there was any certainty that the Premises, or any portion of it, were going to be acquired by or adversely affected by Sound Transit. CP 46.

Sound Transit confirms, and it is undisputed, that just because a property is listed as a potential property acquisition does not mean it will be acquired. CP 37. In fact, at the time of the Final Impact Statement Sound Transit's design was only at 30% completion overall. CP 37.

The Premises are two blocks from the existing transit station in Bellevue. CP 46. During lease negotiations, the Landlord notified Ms. Lam and Guo of Sound Transit's plans for the East Link light rail project and of the ongoing planning process. CP 46. All information available

to the Landlord regarding the light rail project was found on Sound Transit's website. CP 46. This is public information and was also available to Ms. Lam and Guo. CP 46. Specifically, Mr. Nelson informed Ms. Lam and Guo that a station was planned for the top of the hill at NE 6th Street adjacent to City Hall and the track was scheduled to travel on the north side of the NE Sixth Street overpass to continue over I-405. CP 46. This was viewed as a benefit to and by WGW, as the added pedestrian traffic from the primary Bellevue light rail station would increase potential business for WGW's restaurant. CP 46.

Mr. Nelson did not specifically discuss the potential for a hypothetical taking of the property by Sound Transit or any other condemning authority. CP 49. However, such a scenario was specifically addressed in the Lease where after extensive negotiations the Lease was signed and included the following provision:

EMINENT DOMAIN:

- (a) If a portion of the Premises is condemned (which term shall include a conveyance given under the threat of condemnation) and neither subparagraph (b) nor subparagraph (c) applies, this Lease shall continue in effect. Landlord shall be entitled to all the proceeds of condemnation, and Tenant shall have no claim against Landlord or the condemning authority as a result of condemnation. Landlord shall proceed as soon as reasonably possible to make such repairs and alterations to the Premises as are necessary to restore the remainder of the Premises to a condition as comparative as reasonably practical to that existing at the time of condemnation. Minimum Rent shall be abated to the extent that the Premises are untenable during the period of alteration and repair. After the date on which title vests in the condemning authority, Minimum Rent shall be reduced commensurably with

the reduction in value of the Premises as an economic unit on account of the partial taking.

- (b) If any substantial part of the Premises are located is condemned, this Lease shall, at the option of Landlord, terminate as of the date title vests in the condemning authority. In such event, all rights and obligations of the parties shall cease as of the date of termination. Landlord shall be entitled to all of the proceeds of condemnation, and Tenant shall have no claim against Landlord or the condemning authority as a result of the condemnation.
- (c) If all of the Premises or a portion sufficient to render the remaining Premises reasonably unsuitable for Tenant's use is condemned, this Lease shall terminate as of the date title vests in the condemning authority. In such event, all rights and obligations of the parties shall cease as of the date of termination. Landlord shall be entitled to all of the proceeds of condemnation, and Tenant shall have no claim against Landlord or the condemning authority as a result of the condemnation.
- (d) Notwithstanding the foregoing, Tenant reserves any right it may have against the condemner in any condemnation action for its personal property and for moving expenses.

CP 64.

On September 17, 2012, at the same time the Lease was executed, Guo signed a personal guaranty in which he unconditionally guaranteed the full and prompt payment of rent and all other sums and charges payable by WGW under the Lease, and the full and timely performance and observance of all the obligations, liabilities, duties, terms, covenants, conditions, agreements, and provisions under the Lease. CP 72-74.

Not long after the lease commenced, and just after the restaurant opened for business Guo secretly decided to sell WGW's business. CP 7. Guo did not inform the Landlord of his decision, but did contact Mr. Nelson on several occasions to report the restaurant was not performing well and to voice concerns over the rent consideration. CP 48. Guo has admitted that at the time of the sale, the restaurant was in poor shape. CP 48, 77-82. Too many employees had been hired, and the restaurant had very little business. CP 26-27. Guo did not have money to put into advertising and acknowledged WGW's marketing strategy needed to be changed. CP 28-29. Guo determined it would cost too much to get the restaurant to operate successfully and did not want to spend the required funds. CP 29.

On January 22, 2013, without notice to or consent from the Landlord, Guo sold Kangdi International Investment Inc. ("Kangdi") a 90% stake in WGW. CP 9, 49. Kangdi took control of WGW, its restaurant and the Premises. Id. A dispute between Guo and Kangdi arose, and Kangdi abandoned WGW and the Premises on May 22, 2013. CP 13, 49. Guo and Kangdi later litigated their dispute.

On March 14, 2013, six months after the Lease commenced and about two months after Guo secretly sold 90% of WGW to Kangdi, Sound Transit called a meeting with the Landlord and proposed an alternative plan whereby the then planned light rail station at the Southeast corner of 110th and 6th Street was to be brought above grade and the track relocated to the south side of the NE 6th Street overpass with support columns to run on the edge of the Property. CP 47. It is undisputed that this was the first time the Landlord was made aware that Sound Transit was considering changing its plans to include an

alternative route of the light rail track on the south side of the NE 6th Street overpass after what was believed to be the "final" selection of the Downtown Bellevue Station and route plan. CP 47. Immediately upon receiving notice, the Landlord expressed its opposition to Sound Transit's new plan, and vocalized the desire to retain the currently approved plan for a below grade station and the light rail track running along the north side of the 6th Street overpass. CP 47. Thereafter, the Landlord also informed WGW and Guo of Sound Transit's change in plans, and held a follow up meeting with Sound Transit to emphasize its objection to the new alternative above grade plan. CP 47.

Bellevue's City Council met on April 22, 2013, and unanimously approved Sound Transit's plan to relocate the downtown station to the SW corner of 6th Street and 112th, forcing the light rail track, and associated support columns, to be located over the Landlord's property where the Premises are located. CP 47. The rationale for the approval was a significant cost savings that would be achieved by the modifications. CP 47, 226. On or about April 24, 2013, Sound Transit confirmed the approved plan. CP 47. On May 20, 2013, the Bellevue City Council adopted an ordinance authorizing and providing for the acquisition of interests in land to complete the East Link light rail. CP 47.

By this time, WGW fell behind on its rent obligations. CP 75. It had enjoyed the free and reduced grant on the premises since the Lease commenced in October 2012, but it never made any rent payments when full rent became due on June 1, 2013. CP 75. On June 20, 2013, Legacy served WGW with a Three Day Notice to Pay or Vacate. CP 75. The notice arose from WGW's \$24,062.18 monetary default under

the Lease. CP 75. WGW responded by abandoning the Premises and its Lease. CP 48. Sound Transit's plans had nothing to do with WGW's abandonment of the Premises and the Lease. CP 30-31. This is confirmed by the fact that Guo secretly sold 90% of WGW to Kangdi – two months after opening WGW's restaurant because the restaurant was failing. CP 9-10. Later, the Kangdi sale fell through too. CP 13-16. Guo admitted in a deposition that he gave in WGW's lawsuit against Kangdi that he “left [the Premises] because he [Kangdi] broke the [purchase] contract and I couldn't continue. I was not doing it anymore.” CP 30.

WGW filed this lawsuit for Rescission of the Lease on August 6, 2013, and made a specific decision to sue only the Landlord. CP 132. Guo claims that he would have never leased the premises if he had known about the potential for condemnation, yet he specifically negotiated, signed, and guaranteed the Lease which included a condemnation provision. CP 51-68.

Immediately after WGW abandoned the Lease and the Premises, the Landlord began marketing the property. CP 48. A new restaurant tenant for the property was secured on September 12, 2013. CP 83-107. Despite being aware of Sound Transit's potential plans, XO Café, elected to enter into a five year lease agreement for the Premises, and to invest a considerable amount of capital into renovations for the Premises. CP 42-43. To date, Sound Transit's light rail project has not impacted XO Café in any fashion. CP 43. XO Café's business is doing very well, and their business sales have been increasing steadily since they opened their doors. CP 43. XO Café understands that any impact from

the light rail will not impact the premises anytime soon, and will likely benefit their restaurant business by increasing pedestrian traffic. CP 43.

On September 17, 2014, fifteen months after WGW breached the lease, the Landlord received formal notice from Sound Transit that the Premises are subject to potential acquisition. CP 39, 108. No valuation of the property has occurred, no determination of just compensation has been made, and no money has exchanged hands. CP 49. Sound Transit has indicated that it will need only a portion of the parking lot to hold a single support column for the track. CP 49. The Landlord continues to negotiate with Sound Transit with regard to the extent of any taking that may actually be required by Sound Transit, and has proposed granting a lease or license to Sound Transit to use the property. CP 49, 232.

IV. SUMMARY OF THE ARGUMENT

The trial court correctly held that WGW's claims of rescission of the Lease are legally barred because WGW never cured its payment defaults, and its payment defaults were a material breach of the Lease. WGW made the business decision not to pay rent and to vacate the Premises. There was no legal excuse or appropriate justification for this decision. As such, there is no genuine issue of material fact regarding WGW's rescission claim and it was appropriately dismissed on summary judgment.

WGW also failed to meet its CR 56 burden to present admissible clear, cogent, and convincing evidence to support each of the elements of its misrepresentation claims. As the trial court found, the only defendant is the Landlord. There is no evidence that the Landlord had actual knowledge of any existing fact or possessed other information that it had a duty to disclose to WGW prior to entering into the lease in question.

WGW and Guo simply failed present essential admissible evidence to support their claims all of the elements of their claims of misrepresentation by the Landlord. WGW and Guo were sophisticated and well represented at all relevant times. WGW and its team negotiated the Lease and agreed to accept the Premises "AS IS." WGW's reliance on real estate broker statutes is misplaced. Those statutes do not apply to the Landlord. Even if the personal knowledge of William Nelson that the Premises were listed as a potential property acquisition could constitute a material fact relating to the Premises which was not disclosed, WGW failed to present any evidence that Nelson was an agent of the Landlord who had the authority and Landlord's approval to conceal material facts from WGW and Guo in a manner that somehow imputes knowledge to the Landlord and binds the Landlord on an agency theory which was never pleaded.

As the trial court correctly found, at the time the Lease was negotiated, Sound Transit's general intentions, as they then existed, had been made public. Sound Transit's plans were fluid, and the situation had evolved over many years, and many changes in plans. Sound Transit had many remaining options available and its internal consideration of those options was equally knowable and ascertainable to both the Landlord and WGW, and Guo, and their Bellevue real estate broker and Bellevue attorney. There is no evidence any effort was taken by or on behalf of WGW and Guo to investigate what Sound Transit's plans were before entering the Lease.

The inescapable conclusion is that WGW and Guo knew they were protected by the Lease they had negotiated. The potential for condemnation was specifically identified and addressed in the Lease,

which sets forth an agreed process and specific remedies for both parties in the event condemnation of the Premises were to occur during the Lease term. Rather than engage that process, and exercise the remedy provided for in the Lease (to the extent the situation ever ripened to trigger that remedy), WGW chose to abandon and materially breach the Lease because Guo had already decided he could not make his business successful for reasons unrelated to Sound Transit. For all of these reasons, the trial court correctly entered summary judgment in favor of the Landlord.

V. ARGUMENT

The Appellate Court reviews summary judgment decisions de novo. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003).

1. The Trial Court Correctly Held That WGW's Rescission Claims Are Precluded Because Of Its Uncured Material Breach Of The Lease.

A tenant in default may not maintain an action for rescission unless it tenders performance, shows a willingness to perform, or clearly establishes such facts as would excuse performance. Hansen v. Ahrens, 171 Wn.500, 506, 18 P.2d 43 (1933). Eberhart v. Lind, 173 Wn.316, 319, 23 P.2d 17 (1933). WGW did not and cannot meet this burden.

WGW defaulted under the Lease and the Premises as early as January, 2013 when Kangdi purchased 90 percent of WGW. By June 1, 2013, WGW had failed to make \$24,062.18 in required payments, and on June 20, 2013, the Landlord served WGW with a Three Day Notice to Pay or Vacate. WGW failed to cure the rental deficiency. WGW's

failure to pay rent constituted a default and material breach of the Lease. WGW can set forth no evidence of any willingness by WGW or Guo to perform under the Lease. It is undisputed that Guo admits WGW was unwilling to perform its lease obligations because WGW's mismanagement had caused its restaurant business to fail. Guo and WGW's efforts to sell control of WGW also failed. There is no excuse available to WGW for its nonperformance.

In Eberhart v. Lind, 173 Wn. 316, 23 P.2d 17 (1933) a purchaser attempted to rescind a real estate contract based upon the potential for condemnation of the property. The real estate contract was signed and six months later when the first payment was due, the parties learned the property might be condemned. Rather than make the required payment, the buyer sued for rescission. The Court held that the buyer's performance was not excused by the potential for condemnation. Id. at 321. The Court determined that the real estate contract included adequate remedies available to the buyer in the event of condemnation, and the buyer's failure to exercise those remedies and choice to default on the real estate contract precluded the buyer's rescission action. The Court went further to hold that when the contract was executed the sellers had good title because condemnation was not imminent. Id. at 320-21.

Eberhart eviscerates WGW's argument that the potential for condemnation of the premises excused its performance under the Lease. At the time the Lease was executed, the Landlord had received no formal notice of actual condemnation. To date, the situation remains fluid and evolving and dependent on any number of factors, known and unknown. For certain, no condemnation has occurred, no decision has been made

as to how much of the property may be condemned, no valuation has been happened, and no condemnation award has been tendered or received. There is simply no reasonable certainty that any actual adverse impact upon the Premises will ever occur. If it does, that adverse impact was exactly what the condemnation provision WGW negotiated in the Lease was designed to address. WGW's breach of the Lease was material and the product of a calculated business decision which was based upon the poor performance of its restaurant, and that breach has never been cured and precludes WGW from proceeding with any claim of rescission.

WGW's reliance on Fines v. West Side Implement Co., 56 Wn.2d 304, 352 P.2d 1018 (1960) is misplaced. It is apparently cited for the proposition that rescission is a remedy that may be available when the elements of fraudulent or negligent misrepresentation are proven with admissible evidence. Legacy does not dispute that such a remedy exists for those causes of action. However, Fines has no impact herein, as the case simply requires one to operate reasonably quickly to exercise the right of rescission. It does not excuse WGW's material breach of the Lease, provide justification that would excuse WGW's performance under the Lease, or allow WGW to proceed with its claims of rescission while in breach of the Lease.

2. The Trial Court Correctly Held That There Was No Genuine Issue of Material Fact on Whether The Landlord Had Actual Knowledge Of Any Material Fact Relating To the Property That Was Not Disclosed.

The Landlord, Legacy Bellevue 530, LLC, is the only defendant in this case. WGW has cited no authority, nor is there any, which

required the Landlord to do anything but precisely what was done in this case: affirmatively put WGW on notice that Sound Transit had plans to install its East Link light rail track in close proximity to the Premises and the Bellevue light rail station would be nearby. WGW has also not set forth any facts showing that the Landlord had actual knowledge of any material fact relating to the property that it did not disclose.

WGW admits that it did no investigation and asked no questions with regard to the East Link light rail, and even goes so far as to admit that, “had WGW chosen to investigate a hypothetical problem involving Sound Transit, the volume of material WGW had to review was in Legacy’s words, ‘staggering.’” See Appellant’s Brief at 37. WGW is absolutely right – the *potential* for condemnation is exactly that – a hypothetical, evolving, fluid, future, and all together speculative factual situation which in no way shifted WGW’s burden of investigation from WGW to the Landlord. Nor does it justify or support WGW’s breach of the Lease, or does it go to show any material information about the Premises that Legacy failed to disclose.

In Mitchell v. Straith, purchasers of real property sued the sellers for misrepresentation. They argued that the sellers made a material misrepresentation when they failed to disclose the fact that the property was served by an unusual water piping arrangement which after the purchase resulted in a large monetary assessment to the purchasers. Mitchell v. Straith, 40 Wn.App. 405, 412, 698 P.2d 609 (1985). The Court found that the sellers disclosed the unusual water system and that there were discussions in the neighborhood to improve it. Id. The Court found that the allegedly misleading facts were not material, and therefore

no actionable. Id. “Materiality” was not shown because the purchasers failed to prove that the assessment that occurred after the purchaser adversely affected the value of the property. Id. The Court specifically found that the sellers had no specific knowledge that they failed to disclose and that there was no “undisclosed defect substantially affecting the value and usefulness of the property.” Id.

Just like the sellers in Mitchell, the Landlord in this case disclosed all material information about Sound Transit relating to the Property. That the information was disclosed in a positive manner has no relevance. It is undisputed and the trial court correctly found that Guo was put on notice of all information relative to the Property that the Landlord knew about.

WGW hinges its arguments on Bloor v. Fritz, 143 Wash.App. 718, 180 P.3d 805 (2008). Bloor is factually distinguishable. It involved a residential purchase and sale transaction and not a commercial lease. The issue was whether the failure of the seller and the broker, who represented both sides of the transaction, and actually knew and failed to disclose, that the home had actually been previously used as a methamphetamine lab supported the buyer's negligent misrepresentation claims.

WGW cites Bloor simply because in it there was one press release issued by a law enforcement agency about prior drug use in the home. WGW agrees that the one press release indicated that information about the drug manufacturing was ascertainable to potential purchasers, but the Bloor court purchasers had no affirmative duty to investigate

because of the broker's failure to disclose that the house had been used for drug manufacturing. See Appellant's Brief at 37.

WGW misses the essential difference between Bloor and WGW's claims. The undisclosed information in Bloor involved then existing facts known to the seller and the dual agent about the history of the property as a drug house.¹ Here, this involves claims of a *potential* action by Sound Transit which may adversely affect the Premises in a material way. It involves a commercial lease transaction where the complaining tenant WGW had its own team comprised of a local real estate lawyer and a local real estate broker. The light rail system was discussed by both the Landlord and WGW's broker, Maci Lam. There was not just one press release about the East Link Light Rail track—there is a multitude of information that is available on Sound Transit's website about it. The website contains everything any citizen or stakeholder would want or need to know about the project from plans, to participation by the public, to input from experts, financing, environmental impact statements, and decision making on alternative routing and construction options. None of the information is secret or private, and it is not controlled in any manner by the Landlord. WGW had just as much access to the information as the Landlord, and freely admits that it did no investigation with regard to Sound Transit's plans even though it was obvious the situation was fluid, evolving, potentially unfunded, and a political football that affected Bellevue's downtown

¹ This is the same reason Sorrell v. Young, 6 Wn.App. 200, 491 P.2d 1312 (1971) and Obde v. Schlemeyer, 56 Wn.2d 449, 353 P.2d 672 (1970) are distinguishable. See discussion in Mitchell at 40 Wn.App. 409.

core.² Most importantly, the Lease itself indicates that the parties contemplated the potential for condemnation. Absolutely no affirmative misrepresentations were made to WGW by the Landlord regarding the certainty of Sound Transit's evolving plans.

There is no legal duty to disclose not-yet-existent encumbrances, or "hypotheticals" as WGW puts it, on a property. Austin v. Ettl, 171 Wn.App. 82, 89-90, 286 P.2d 85 (2012). The duty to disclose in a business transaction arises when the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other; or where, by the lack of business experience of one of the parties, the other takes advantage of the situation by remaining silent. Colonial Imports v. Carlton Northwest, Inc., 121 Wn.2d, 731, 853 P.2d 913 (1993). The Landlord had no special relationship with WGW that somehow imposed a higher duty of disclosure to WGW. WGW was represented by its own Bellevue real estate broker and Bellevue lawyer. At the time this lease was signed, the Landlord had no specific, certain information from Sound Transit that the leased premises would be adversely affected by Sound Transit's evolving plans. All information relating to the impact of the light rail on the leased premises was public record. Such information was equally available to Legacy, WGW, Maci Lam, and any other potential tenants of the property. Furthermore, Guo was an experienced restaurateur and sophisticated businessman.

² The Washington Supreme Court has held that Sound Transit gives adequate notice to the public and property owners of potential acquisitions and condemnations by posting notices on its website. Cent. Puget Sound Reg'l Transit Auth. v. Miller, 156 Wn.2d 403, 128 P.3f 588 (2006).

WGW's beef is clearly with a nonparty and not the Landlord. WGW argues a special relationship arises between the Landlord and WGW simply because Mr. Nelson had a brokerage license and is therefore subject to brokerage laws. See Appellant's Brief at 39. However, this argument meets none of the factors set forth in Colonial Imports. It is especially frustrated by the fact that Mr. Nelson is not even a party to this legal action.

Commercial leasing is a business to business world in which the participants are treated as equally sophisticated with equal bargaining power. WGW can point to no citation to support the proposition of a duty to disclose matters which are a matter of public record, or at all. That is because there is no such duty in commercial leasing. Merchants, traders, and business people are left to do their own due diligence regarding matters of public record, and to which one could easily turn for data if one chose to do so. Such "due diligence" embodies the same concepts as "adequate lookout" when operating a vehicle, or "reasonable care" for one's own interests in nearly all cases.

At some point, possibly in the near future, Sound Transit might decide to actually construct the rail route on the south side of NE 6th Street. That plan is not set and no final determination as to the effect upon the Premises has yet been made. If actual condemnation does happen, WGW had specific remedies which it negotiated for in the Lease. WGW was not free as a business participant in this commercial lease transaction to simply stick its head in the sand, or expect someone else's broker to conduct investigations for it. WGW was and is bound

by the contract it signed. This record is absolutely devoid of any evidence that the Landlord violated any duties it owed to WGW.

3. The Trial Court Correctly Held That There Was No Genuine Issue of Material Fact Regarding Whether The Landlord Misrepresented Any Material Fact Relating To The Property.

A plaintiff claiming negligent misrepresentation must prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. An omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation. Moreover, the plaintiff must not have been negligent in relying on the representation.³

No false information was provided to WGW. The first official Acquisition notice from Sound Transit that the Premises would be needed for Sound Transit's light rail project was not sent to the Landlord until nearly two years after the Lease was signed. When the Lease was negotiated, WGW was put on notice about Sound Transit's then plans and how close the track and the local station were expected to be to the Premises and WGW's restaurant. WGW was represented by a Bellevue attorney and Bellevue licensed real estate broker. All information regarding Sound Transit's plans was in the public record and freely available to all parties. WGW and its representatives admit they chose

³ See Ross v. Kirner, 162 Wn. 2d 493, 499-500, 172 P.3d 701 (2007) (citations omitted).

not to investigate Sound Transit's plans. Even now it is still not clear how or when the Premises may be used to support the construction of the light rail track. There is no clear, cogent, and convincing evidence that false information was provided to WGW by the Landlord.

Proof of an "omission" is insufficient. WGW's "failure to disclose" claims speak to an "omission" by the Landlord that does not constitute negligent misrepresentation, since WGW and Guo must show they justifiably relied on a misrepresentation by the Landlord to support a negligent misrepresentation action.⁴

There was no fiduciary or special relationship between WGW and Guo, and the Landlord. In order to sustain its claim, WGW must somehow show a special relationship by proving with admissible evidence that the omitted facts were peculiarly within the knowledge of the Landlord and could not have been readily ascertained by WGW, or WGW and Guo must show they lacked business experience and the Landlord took advantage of the situation by remaining silent and holding back material facts that it knew about. WGW offers no evidence the Landlord had any knowledge the Premises was on Sound Transit's potential property acquisition list during negotiations in 2012, and WGW certainly has not shown that Mr. Guo lacked business experience given his history of owning and operating restaurants and his negotiation team of legal and real estate consultants. No special relationship existed, and absent a special relationship, there is no heightened duty in Washington to disclose speculative and uncertain information as WGW first claimed

⁴ See Ross at 499-500 . ("An omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation.") The reality is the only cause of action pleaded by WGW and Guo is for rescission. The allegations of misrepresentation are necessary to support the rescission claim and do not stand alone as separate causes.

it was entitled to during the 2012 lease negotiations when the Landlord declared default in June 2013 after WGW defaulted on its payment obligations to the Landlord.⁵

No fraud claim was properly pleaded or proven.⁶ WGW must either show by clear, cogent, and convincing evidence that the Landlord breached an affirmative duty to disclose a material fact or WGW must plead and prove the nine elements of fraud.⁷ All material information about the leased premises was disclosed in this case, nothing was intentionally withheld, and under no stretch can WGW prove the Landlord's actions amounted to fraud.

WGW was negligent in failing to investigate Sound Transit's plans and its negligence bars a negligent misrepresentation claim. Sound Transit's light rail project in Bellevue did not vest the Landlord with any special knowledge about Sound Transit or its evolving and highly fluid plans. Nor did this commercial transaction require the Landlord to guess what WGW and Guo and their consultants needed to know about Sound Transit and its plans (or any condemning authority and its plans) particularly regarding an uncertain and potential condemnation of some portion of the Premises at some unspecified date in the future. WGW and Guo and their experienced representatives were put on notice of Sound Transit's light rail line construction plans and their proximity to the Premises. They chose not to investigate whether condemnation by Sound Transit was possible or likely. This is negligence by WGW which bars any negligent misrepresentation claim. See Ross at 499-500. The Landlord and WGW chose to specifically negotiate for protection against

⁵ Colonial Imports, Inc. v. Carlton Northwest, Inc., 121 Wn.2d 726, 853 P.2d 913 (1993).

⁶ See CR 9(b)(fraud must be pleaded with particularity).

⁷ Crisman v. Crisman, 85 Wn.App. 15, 21, 931 P.2d 163 (1997).

condemnation in the Lease in the event a condemnation was to occur. Nothing more was required. No clear, cogent or convincing evidence of each element of misrepresentation has been presented by WGW.

4. WGW Failed To Meet Its Burden To Present Admissible Evidence Showing Genuine Issues of Material Fact Regarding William Nelson's Alleged Apparent Authority Not to Disclose Material Facts.

Although no agency theory is pleaded in the Complaint, and William Nelson is not a party to this case, WGW and Guo assert on appeal Nelson had "apparent" agency authority in attempt to do an end run around their inability to establish a genuine issue of fact precluding summary judgment regarding what the Landlord knew about Sound Transits plans for the Premises while the lease was negotiated. They assert that William Nelson was an agent of the Landlord who was somehow apparently authorized by the Landlord not to disclose to Guo and WGW during negotiations what he knew about Sound Transits plans for the premises. The burden of establishing apparent authority of an alleged agent rests with the one asserting its existence. Costco Wholesale Corp. v. World Wide Licensing Corp., 78 Wn.App. 637, 646, 898 P.2d 347 (1995). Here, WGW's agency theory, is based entirely on its counsel's conclusory allegations that because Mr. Nelson may have had additional information about the leased premises, *that WGW admits the Landlord did not know*, the Landlord is somehow "charged" with the knowledge that Nelson had by virtue of an agency relationship which authorized Nelson not to disclose that information.

WGW sets forth no facts and no evidence demonstrating the scope or extent of any agency relationship between the Landlord and Mr.

Nelson. There are simply no facts or admissible evidence to impute or charge to the Landlord what Nelson allegedly knew, or to justify any conclusion that Nelson was authorized by the Landlord to conceal information from WGW and Guo and their representatives. Again, this is in the main a rescission case not a fraud case. Nor is it a claim based on an agency theory. WGW and Guo have failed to present admissible evidence raising a genuine issue of material fact regarding Mr. Nelson's alleged apparent authority.

5. The Trial Court Correctly Excluded Portions Of The Khan Declaration.

Evidentiary rulings in the course of summary judgment are reviewed by the appellate court under a de novo standard of review. Ross v. Bennett, 148 Wn.App. 40, 45, 203 P.3d 383 (2008) review denied, 166 Wn.2d 1012 (2009). A trial court has wide discretion in ruling on the admissibility of expert testimony. Miller v. Likins, 109 Wn.App. 140, 34 P.3d 835 (2001) (citation omitted). The trial court's decision is to be given particular deference where there are fair arguments to be made both for and against admission. Davidson v. Municipality of Metropolitan Seattle, 43 Wn.App. 569, 572, 719 P.2d 569 (1986) (citation omitted).

An expert's testimony is admissible under ER 701 only if (1) the witness qualifies as an expert, and (2) the expert's opinion would be helpful to the trial of fact. "[T]here is no value in an [expert] opinion where material supporting facts are not present." Davidson v. Metropolitan Seattle, 43 Wn.App. 569, 575-78, 719 P.2d 569 (1986). An expert may not offer an opinion if he has inadequately familiarized

himself with the facts and data essential to forming a reasonable opinion. In Davidson, the court held that “there is no value in an opinion where material supporting facts are not present” and held inadmissible an expert opinion lacking factual bases in the record and based on assumed facts in conflict with the evidence. The court also warned that an expert may not “pyramid” presumptions upon presumptions or inference. *Id.*

Mr. Kahn, like the expert in Davidson, reaches his opinions by drawing absolute inferences from facts not in evidence, by assuming facts actually conflicting with undisputed facts, and by ignoring undisputed facts. He then uses the inferences, piled together, to reach the ultimate conclusion that the Landlord violated its legal duties of disclosure to WGW. The trial court correctly held that there is simply no value in Mr. Kahn’s opinion particularly his opinions regarding the scope and extent of the duties that may have been owed to WGW and Guo.

Further, Mr. Khan had no first-hand knowledge of any import. His conclusions rely on "oral summaries" of witness testimony which were provided to him by counsel for WGW. CP 356, 436-437. Mr. Kahn’s opinion is that Legacy Commercial had evidence that the property was listed as a potential property acquisition, but he admits that he has no direct information that the Landlord had any actual knowledge. Instead, he assumes the Landlord had knowledge based upon the testimony of Mr. Nelson. CP 438, 439, 444, 445. Mr. Kahn testified in deposition that:

Q. And from your previous testimony I understand you’re assuming that Mr. Nelson, Mr. Nelson’s purported knowledge of this, flows to Legacy Commercial, is that

correct? You don't have any other independent evidence that Legacy Commercial had potential knowledge?

A. Legacy Commercial, the owners?

Q. Correct.

...

A. Legacy, the owners, I would find it hard to believe that the owners of this property did not have knowledge. Whether you can prove it on a paper trail, I don't know. But I would be shocked.

Q. But you don't have any evidence in front of you?

A. I don't.

CP 446-447.

The lack of factual foundation for Mr. Kahn's declaration, and the uselessness of the opinions in the declaration are also shown by the important factual evidence ignored by him. Mr. Kahn ignores (1) that formal notice of acquisition did not come from Sound Transit until September 2014, (2) the parties specifically negotiated an eminent domain provision in the lease agreement, (3) no final decision has been made by Sound Transit with respect to the actual quantity of the property to be taken, if any, and (4) Mr. Guo admitted that he abandoned the lease because his sale of the restaurant fell through. CP 440-443, 448-450. Mr. Khan's failure to account for the foregoing evidence completely makes his testimony unhelpful. He not only fails to provide critical factual support for any of his critical factual assumptions, he fails to offer any meaningful analysis or explanation of how or why he arrived at his assumptions.

An expert may not offer an opinion which amounts to no more than conjecture, speculation, or questions. Queen City Farms, Inc. v. Central National Insurance Company, 126 Wn.2d 50, 882 P.2d 703 (1994). Mr. Kahn's conclusion that the Landlord breached its legal duties to WGW is unsupported, baseless and improper. This opinion is certainly outside the scope of Mr. Kahn's personal knowledge and leads to an improper legal conclusion given the absence of any factual support or explanation for the conclusion. Mr. Kahn's opinions are not helpful to the trier of fact, are based upon conjecture and speculation, and constitute legal conclusions which only this Court has the right to make. As such, the trial court correctly held that his opinions and conclusions are inadmissible as a matter of law.

6. WGW Has Failed To Show The Landlord Proximately Caused Its Damages.

Where the facts of a tort claim are undisputed, causation is a question of law for the court. Hartley v. State, 103 Wash. 2d 768, 690 P.2d 77 (1985). The Landlord was neither the cause in fact nor the legal cause of WGW's alleged tort damages. WGW's tort claims are circumstantial; there is no evidence of any tortious behavior by the Landlord. When circumstantial evidence is relied upon to prove proximate cause, the circumstances "must with reasonable certainty lead to the conclusion for which they are adduced." Grobe v. Valley Garbage Service, 87 Wash. 2d 217, 221-222, 55 P.2d 748(1976). There is no precision or certainty to the conclusions WGW wants the Court to accept. WGW simply offers a vague and ambiguous theory as to how the Landlord allegedly failed to disclose material facts. But, a verdict cannot

be founded on mere theory or speculation. Marshall v. Bally's West, Inc., 94 Wn. App. 372, 379, 972 P.2d 475 (1999). At best, WGW and Guo have shown their subjective suspicions about a relationship between the Landlord and Mr. Nelson, without any proof of any actionable knowing and intentional wrongdoing by the Landlord. Contrary to WGW's bald and vague assertions, the circumstances presented by WGW are not supported by clear, cogent, and convincing evidence and are not reasonably consistent with only fraudulent concealment or negligent misrepresentation and damages proximately caused by the Landlord. WGW and Guo conveniently ignore that their restaurant business failed, and, when it did, they then failed in their attempt to sell the restaurant business, and just abandoned the Lease and breached the contract. This lawsuit is an after the fact contrivance to avoid debt owed by WGW and Guo. As stated above, WGW and Guo's negligent misrepresentation claims fail due to their own negligent failure to investigate Sound Transit's activities and evolving plans. Any damages suffered by Guo and WGW resulted solely from their poor restaurant launch, mismanagement of the restaurant, and business decision to breach the Lease rather than invest money into its failing enterprise. The potential placement of Sound Transit's placement of light rail track at some unknown future date after the Lease commenced had no bearing on WGW's decision to abandon its investment in its restaurant operations. This is clearly seen by comparing XO Café's successful restaurant operations in the Premises.

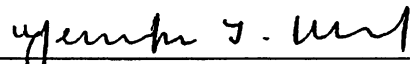
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VI. CONCLUSION

The trial court's November 24, 2014, Order on Cross Motions for Summary Judgment and December 15, 2014, Judgment should be affirmed.

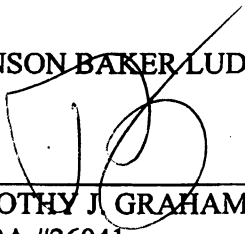
DATED this 21st day of May 2015.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Opening Brief of Responding on the following individuals specified below on May 21, 2015. Service was made by U.S. Mail and email on:

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Cathy L. Anderson

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