IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PAUL BRANTLEY, an individual, and JENNIFER BRANTLEY, an individual, and the marital community comprised thereof; and KIRSTEN JENSON, an individual, Appellants, v. LIN HAN, an individual, and ALESSANDRO CONTENTI, an individual, wife and husband, and the marital community comprised thereof; HEATON DAINARD, LLC, a Washington limited liability company; JAMES DAINARD, an individual, and JANE/JOHN DOE DAINARD, an individual, and the marital community comprised thereof; WILL HEATON, an individual, and JANE DOE HEATON, an individual, and the marital community comprised thereof, Respondents.	No. 80874-5-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — After purchasing a Seattle duplex (Property), Lin Han and Alessandro Contenti sold one of its units to Paul and Jennifer Brantley and the other to Kirsten Mendez (f/k/a Jenson). The Brantleys and Mendez (Buyers) sued Han, Contenti, Will Heaton, James Dainard, and Heaton and Dainard's brokerage firm, Heaton Dainard, LLC (HD), after discovering that a party wall between the units was not soundproof. The Buyers alleged negligent

misrepresentation, fraudulent concealment, Consumer Protection Act (CPA) violations, and requested declaratory relief. The trial court dismissed the Buyers' claims against Han, Contenti, Heaton, and Dainard on summary judgment, and proceeded to a bench trial for the negligent misrepresentation, fraudulent concealment, and CPA claims against HD. After trial, the court ruled in HD's favor. It also awarded attorney fees to Han and Contenti and entered final judgment. The Buyers appeal. We affirm and grant an award of attorney fees and costs to Han and Contenti.[1]

I. BACKGROUND

Han is a real estate investor and is married to Contenti. HD is a real estate brokerage firm owned by Dainard and Heaton. In 2015, Han and Contenti bought the Property. HD assisted Han by preparing an estimated remodeling budget, and made recommendations about paint colors, cabinets, and flooring. Han also obtained remodel plans for the Property. The Property was a single legal parcel, and Han later subdivided it into two separate legal parcels.

Todd Karam worked for Limelite Development, LLC, which Dainard and Heaton also owned. In 2016, on behalf of Han and Contenti, Karam submitted a permit application and remodel plans for the Property to the Seattle Department of Planning and Development. Neither HD nor Karam prepared the construction

[1] Han and Contenti moved to modify the Clerk's December 21, 2020 ruling granting Mendez's motion for voluntary withdrawal of review. We have considered Han and Contenti's motion under RAP 17.7 as well as Mendez's response, and have determined that the motion to modify should be granted. Thus, the Brantleys and Mendez are liable to Han and Contenti on this award of attorney fees, subject to Han and Contenti's compliance with RAP 18.1.

plans for the remodel, performed the construction work, or managed the contractors who did the construction work. Ponce Construction remodeled the Property.

After the remodel, HD acted as the listing agent for the two duplex units. An informational flier and MLS listing written by HD described the duplex units as follows: "Old world charm meets today's modern amenities with this attractive bungalow made into two townhomes," which led the Brantleys to believe that the Property was originally a single-family residence. But neither the Brantleys nor Mendez investigated the history of the Property; and according to an unchallenged finding of fact by the trial court, "[h]ad they done so, publicly available records would have revealed that the [Property] had been a duplex. Publicly available records would have revealed that the remodel did not involve bringing the party wall up to the current code."

The Brantleys offered to purchase a duplex unit and waived inspection against the advice of their agent. They entered into a Real Estate Purchase and Sale Agreement (REPSA) with Han and Contenti, which provided:

> [A]ll representations and information regarding the [unit] and the transaction are solely from the Seller or Buyer, and not from any Broker. . . . Brokers do not guarantee the value, quality or condition of the [unit] and some properties may contain building materials, including siding, roofing, ceiling, insulation, electrical, and plumbing, that have been the subject of lawsuits and/or governmental inquiry because of possible defects or health hazards. Some properties may have other defects arising after construction. . . . Brokers do not have the expertise to identify or assess defective products, materials, or conditions.

An addendum to the REPSA stated that HD did not perform any of the work on

the unit before sale and that HD bore no responsibility for the unit's condition. Mendez offered to purchase the other duplex unit, waived inspection, and entered into a substantially identical REPSA with Han and Contenti. Han and Contenti provided the Buyers with Form 17 disclosures, which disclosed Han and Contenti's actual knowledge of the condition of the units.

Shortly after taking possession of their units, the Buyers discovered that they could hear conversations in the adjoining unit. Jennifer Brantley looked on Google Earth and discovered that the building had been a duplex even before the remodel. Later testing of the party wall[2] showed that it did not meet minimum sound attenuation or fire code requirements.

The Buyers sued Han, Contenti, Heaton, Dainard, and HD. They alleged negligent misrepresentation and fraudulent concealment by all the defendants and alleged breach of contract under the REPSA by Han and Contenti. They also alleged breach of statutory duties under RCW 18.86.030 and CPA violations by Heaton, Dainard, and HD, and alleged that Heaton and Dainard had alter ego liability for HD. Finally, they requested a declaratory judgment stating that the purported disclaimer of HD's liability in the REPSA is nonbinding.

The defendants moved for summary judgment. The trial court dismissed the negligent misrepresentation and fraudulent concealment claims against Han, Contenti, Heaton, and Dainard, but not as to HD. It dismissed the breach of statutory duty claim and the alter ego liability claim against Dainard, Heaton, and HD. And it dismissed the CPA claim against Dainard and Heaton but not against

[2] The "party wall" separates the two units on the main floor and in the basement.

HD. Finally, it dismissed the claim for declaratory relief.

The parties proceeded to a bench trial for the remaining negligent misrepresentation, fraudulent concealment, and CPA claims against HD. The trial court concluded that the Buyers had not borne their burden of proving any of these claims against HD. It also awarded Han and Contenti attorney fees and costs under the REPSA and entered final judgment against the Buyers.

II. ANALYSIS

The Buyers say the trial court erred by dismissing their negligent misrepresentation and breach of contract claims against Han and Contenti on summary judgment, and also assert the trial court erred by concluding that HD did not negligently misrepresent the condition of the Property or commit CPA violations. The Buyers request that we reverse the trial court's grant of attorney fees and costs to Han and Contenti. Han and Contenti request an appellate award of attorney fees under the REPSA.[3]

We conclude the trial court properly granted summary judgment on the negligent misrepresentation and breach of contract claims against Han and Contenti. We also conclude the trial court did not err in ruling against the Buyers on their negligent misrepresentation and CPA claims against HD. Finally, we conclude the trial court did not abuse its discretion by awarding Han and Contenti attorney fees and costs at trial, and grant their request for appellate attorney fees

[3] The Buyers do not say the trial court erred by dismissing on summary judgment the fraudulent concealment claims against Han, Contenti, Heaton, and Dainard, the breach of statutory duty claim, the alter ego liability claim, the claim for declaratory relief, or the CPA claim against Heaton and Dainard. Nor do they claim the trial court erred by dismissing after trial the fraudulent concealment claim against HD.

and costs.

A. Summary Judgment

We review de novo summary judgment rulings. Messenger v. Whitemarsh, 13 Wn. App. 2d 206, 210, 462 P.3d 861 (2020). "Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law," and we construe all facts and inferences in favor of the nonmoving party. Id. (quoting Strauss v. Premera Blue Cross, 194 Wn.2d 296, 300, 449 P.3d 640 (2019)). "A genuine issue of material fact exists when reasonable minds could differ on the facts controlling the outcome of the litigation." Id. (quoting Dowler v. Clover Park Sch. Dist. No. 400, 172 Wn.2d 471, 484, 258 P.3d 676 (2011)).

1. Summary judgment - negligent misrepresentation

To establish negligent misrepresentation, a plaintiff must show:

> (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 [their] 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.

Merriman v. Am. Guar. & Liab. Ins. Co., 198 Wn. App. 594, 613, 396 P.3d 351 (2017) (quoting Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007). When reviewing a negligent misrepresentation claim dismissed on summary judgment, we "must determine whether, viewing the evidence in the light most favorable to the nonmoving party, a rational trier of fact could find that the

nonmoving party supported its negligent misrepresentation claims with clear, cogent and convincing evidence." RockRock Grp., LLC v. Value Logic, LLC, 194 Wn. App. 904, 914, 380 P.3d 545 (2016).

The trial court dismissed the negligent misrepresentation claim against Han and Contenti because the plaintiffs did not present evidence that Han knew the party wall had not been rebuilt to code.

The Buyers say that Han knew or should have known they would rely on the representations she provided in the seller disclosure, MLS listing, informational fliers, and REPSA, but point to no evidence or specific portions of those documents containing false information about the party wall's structural integrity. Still, an omission of information can constitute negligent misrepresentation if a party has a duty to disclose that information. Merriman, 198 Wn. App. at 614. Here, RCW 64.06.020 describes the disclosures a seller must give a buyer in a real property transfer, and specifically requires the seller to disclose if they know of any structural defects with interior walls. A seller has no liability for any error, inaccuracy, or omission in the disclosure statement if they have no actual knowledge of the error, inaccuracy, or omission. RCW 64.06.050(1). The Form 17 disclosure that Han and Contenti provided the Buyers stated that they had no actual knowledge of structural defects in any interior walls. And as noted by the trial court, no other evidence suggests that Han and Contenti knew of any structural defect in the party wall.[4]

[4] The trial court determined that "there's nothing in the record in front of me that suggests that [Han] knows that that wall was not rebuilt to code when they redid it."

Without evidence of such knowledge—much less clear, cogent, and convincing evidence—there is no genuine issue of material fact as to whether Han and Contenti misrepresented the condition of the party wall to the Buyers. Thus, the trial court did not err in dismissing this claim on summary judgment.

2. Summary judgment - breach of contract

The Buyers also say the trial court erred by dismissing their breach of contract claim against Han and Contenti on summary judgment.

The Buyers specified that their breach of contract claim stemmed from the Form 17 disclosure submitted by Han and Contenti, stating "under the Seller's Disclosure, Han and Contenti had a duty to disclose any defects in structure of the interior walls." But a breach of contract claim cannot rest on this form, since it is "for disclosure only, and shall not be considered part of any written agreement between the buyer and seller of residential property." RCW 64.06.020(3); see also Austin v. Ettl, 171 Wn. App. 82, 87 n.6, 286 P.3d 85 (2012) ("[B]y the statute's express terms, a seller disclosure statement . . . is not part of the real estate contract between the parties. . . . Any claims derived from possible defects in the disclosure . . . therefore sound in tort."). The Buyers did not establish a genuine issue of material fact as to whether Han and Contenti breached the REPSA under this theory.[5] The trial court did not err by dismissing

[5] For the first time on appeal, the Buyers say that Han and Contenti breached their implied duty of good faith and fair dealing. We need not consider this assertion since, under RAP 9.12, "[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." But even if we considered this claim, it would fail. The Buyers point to Rekhter v. Dep't of Soc. & Health Servs., in which our Supreme Court held the Department of Social and Health Services (DSHS) breached the implied duty of good faith and fair dealing. 180 Wn.2d 102, 113, 323 P.3d 1036 (2014). The implied

their breach of contract claim on summary judgment.

B. Trial

The Buyers say the trial court erred in concluding that HD did not commit negligent misrepresentation or CPA violations. We disagree.

"We review the trial court's findings to determine whether they are supported by substantial evidence in the record." West Coast, Inc. v. Snohomish County, 112 Wn. App. 200, 207, 48 P.3d 997 (2002). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the declared premise." Douglas v. Visser, 173 Wn. App. 823, 829, 295 P.3d 800 (2013). "We then determine whether those findings of fact support the trial court's conclusions of law." West Coast, 112 Wn. App. at 207. We review de novo conclusions of law. Id.

1. Trial - negligent misrepresentation

The trial court concluded that the plaintiffs did not establish by clear, cogent, and convincing evidence that HD supplied them with false information, that HD was negligent in communicating that information, or that their reliance on any alleged misrepresentation was reasonable.

The Buyers say HD failed to exercise reasonable care in obtaining and communicating the information in the REPSA, HD's MLS listing, the Form 17 disclosure, and informational fliers. They do not specify which information in

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duty of good faith and fair dealing applies when a contract gives one party discretionary authority to determine a contract term, such as quantity, price, or time. Id. The Buyers claim that the REPSA provided Han and Contenti with such discretion but point to no specific provision over which Han and Contenti had sole discretionary authority. And there appears to be none.

those documents was false. But preliminarily, HD cannot be liable for negligent misrepresentation for any information transmitted in the REPSA because of its Property Condition Disclaimer:

> Buyer and Seller agree, that except as provided in this Agreement, all representations and information regarding the [unit] and the transaction are solely from the Seller or Buyer, and not from any Broker. The parties acknowledge that the Brokers are not responsible for assuring that the parties perform their obligations under this Agreement and that none of the Brokers has agreed to independently investigate or confirm any matter related to this transaction except as stated in this Agreement, or in a separate writing signed by such Broker. In addition, Brokers do not guarantee the value, quality or condition of the [unit].

Nor can HD be liable for negligent misrepresentation based on the Form 17 disclosure, since such documents are "disclosure[s] made by the seller, and not any real estate licensee involved in the transaction." RCW 64.06.020(3). And the trial court's conclusions on negligent misrepresentation did not address any representations made in the REPSA or Form 17 disclosure.

In concluding that the Buyers did not establish by clear, cogent, and convincing evidence that HD supplied false information, the trial court stated: "The 'bungalow' marketing statement was not a false statement. The property was a bungalow-style duplex, which had been recently subdivided into two separate legal units. Moreover, [HD] did not make direct representations about the party wall to the [Buyers], let alone false statements about the party wall." This conclusion is supported by the trial court's finding that "[n]o employee of [HD] made any express or direct representations to the [Buyers] about the condition of the party wall or implied that the party wall was newly built."

Substantial evidence supports this finding. Paul Brantley testified that he did not communicate with anyone about the state of the party wall. And because Han had legally subdivided the duplex into two separate units, the statement that the bungalow had been "made into two townhomes" was not false.

Substantial evidence supports the trial court's finding that no HD employee made representations to the Buyers about the condition of the party wall, which in turn supports its conclusion that the Buyers did not establish by clear, cogent, and convincing evidence that HD supplied them with false information. The trial court properly dismissed the Buyers' negligent misrepresentation claim against HD. See Merriman, 198 Wn. App. at 613.

Still, we address the remaining factors challenged by the Buyers. As to negligent transmission of information, the trial court found:

> [HD] acted as the listing agent for the Subject Property. Katie Kepler was the [HD] agent who handled the sale of the units. The first time that Kepler saw the inside of the units was after the walls had been painted and cabinets installed. She had no knowledge about what work was done on the party wall during the remodel.

This unchallenged finding of fact supports the trial court's conclusion that the Buyers did not establish by clear, cogent and convincing evidence that HD negligently transmitted false information to the Buyers, and that "[t]here is no evidence that an employee of [HD] had knowledge about the state of the party wall when the units were sold to the Plaintiffs."[6]

As to whether the Buyers' reliance on any alleged misrepresentation was reasonable, the trial court found:

[6] Unchallenged findings of fact constitute verities on appeal. See Cummings v. Dep't of Licensing, 189 Wn. App. 1, 10, 355 P.3d 1155 (2015)

> 31. Both [REPSAs] contain an addendum which states that [HD] did not do any of the work on the property prior to sale and [that HD] had no responsibility for the condition of the property.
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> . . .
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> 34. Neither the Brantleys nor Mendez investigated the history of the Subject Property. Had they done so, publicly available records would have revealed that the Subject Property had been a duplex. Publicly available records would have revealed that the remodel did not involve bringing the party wall up to the current code.

These unchallenged findings of fact support its conclusion that the Buyers did not establish by clear, cogent, and convincing evidence that their reliance on any alleged misrepresentation was reasonable. They also support its other conclusion that

> [t]o the extent that the [Buyers] assumed the party wall was newly constructed based upon the "bungalow" description used by [HD], they were advised that [HD] had not done any of the work on the property prior to sale. Moreover, a careful, reasonable investigation would have revealed that the property had been a duplex and that the remodel did not involve reconstructing the party wall and bringing it up to the 2012 [code].

Because the Buyers did not establish any of these three elements of the tort by clear, cogent, and convincing evidence, the trial court did not err in concluding that HD did not engage in negligent misrepresentation.

2. Trial - CPA

To establish a CPA violation, a plaintiff must show by a preponderance of the evidence "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation." Young v. Toyota Motor Sales, U.S.A., 196 Wn.2d 310, 316, 472 P.3d 990 (2020) (quoting Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 37, 204 P.3d 885 (2009)); State Farm Fire and Cas. v. Huynh, 92 Wn.

App. 454, 470–71, 962 P.2d 854 (1998).

To establish an unfair or deceptive act or practice, "[a] plaintiff need not show that the act in question was *intended* to deceive, but that the alleged act had the *capacity* to deceive a substantial portion of the public." Hangman Ridge Training Stables, Inc., v. Safeco Title Ins. Co., 105 Wn.2d 778, 785, 719 P.2d 531 (1986). "'[D]eception exists if there is a representation, omission or practice that is likely to mislead' a reasonable consumer." Rush v. Blackburn, 190 Wn. App. 945, 963, 361 P.3d 217 (2015) (quoting Panag, 166 Wn.2d at 50). An act can be unfair without being deceptive. Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). Our legislature instructs courts to look for federal law for guidance regarding application of the CPA; "[c]urrent federal law suggests a 'practice is unfair [if it] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits.'" Id. (second alteration in original) (quoting 15 U.S.C. § 45(n)). We review de novo whether an alleged act constitutes an unfair or deceptive act or practice. State v. LA Investors, LLC, 2 Wn. App. 2d 524, 538–39, 410 P.3d 1183 (2018).

The trial court concluded that the Buyers had not shown HD engaged in any unfair or deceptive practice:

> The [Buyers] have not met their burden to prove that [HD] had actual knowledge or should have known about the state of the party wall when the units at issue were sold. As set forth above, the [Buyers] have not met their burden to show that [HD]'s actions were deceptive or had the capacity to deceive.

The trial court made no conclusions about any of the other CPA elements.

The Buyers say that the trial court erred in reaching this conclusion but provide little to no citation to relevant portions of the record in doing so. For instance, the Buyers say, without citation to the record, that HD was more than a listing agent in the transaction. They assert that HD "engaged in consulting services with Han, including 'renovation, design, budgeting, referral of experienced contractors and material suppliers, construction monitoring, and overall project completion' services." But it appears this list of HD's duties in the transaction comes from the Buyers' counsel's own oral argument at trial. The Buyers also make vague allusions to HD's statutory duties of disclosure under chapter 18.86 RCW, but do not say the trial court erred by dismissing that claim on summary judgment. And they say that knowledge attributable to Limelite Development should be attributable to HD, but they point to no portions of the record establishing the scope of Limelite's knowledge about the party wall.

It appears the crux of their claim is that HD's description of their property—"attractive bungalow made into two townhomes"—could deceive members of the public that HD had converted a single-family home "into two adjoining townhomes through the addition of a party wall between the two." This argument fails. First, as shown in our analysis of negligent misrepresentation, substantial evidence supports the trial court's finding that HD made no direct representation about the condition of the party wall. Next, had the Buyers investigated the history of the Property and accessed its publicly available records, they would have learned that the remodel did not involve bringing the party wall up to code. And against advice of their agent, the Brantleys waived

inspection before purchasing their unit, stating that they were willing to bear the risk attendant to waiver; Mendez also waived inspection. Given these facts, the Buyers did not show by a preponderance of the evidence that a deception existed, since there was no representation or omission likely to mislead a reasonable consumer. And they did not show by a preponderance of the evidence that HD acted unfairly, since the injury the Buyers now allege was reasonably avoidable.

Since the Buyers did not show any unfair or deceptive practice by a preponderance of the evidence, the trial court did not err in dismissing their CPA claim.[7]

C. Attorney Fees and Costs

The Buyers say we should vacate the trial court's award of attorney fees and costs. Han and Contenti disagree and request an appellate award of attorney fees and costs. We conclude the trial court did not abuse its discretion by granting Han and Contenti the award, and grant Han and Contenti an award of appellate attorney fees and costs.

A party "may not recover attorney fees except under a statute, contractual obligation, or some well-recognized principle of equity." Quality Food Ctrs. v. Mary Jewell T, LLC, 134 Wn. App. 814, 817, 142 P.3d 206 (2006). We review for abuse of discretion a decision to award or deny attorney fees. Gander v. Yeager,

[7] The Buyers also say that they established the remaining elements of a CPA claim, but since we conclude they have not shown any unfair or deceptive practice or act, we need not reach those issues. And we note the trial court made no rulings on the remaining CPA elements.

167 Wn. App. 638, 647, 282 P.3d 1100 (2012). Here, the REPSA states that "if Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys' fees and expenses." Since we conclude the trial court properly dismissed on summary judgment the negligent misrepresentation and breach of contract claims against Han and Contenti, we conclude the trial court did not abuse its discretion and affirm the trial award. And we grant an award of appellate attorney fees and costs to Han and Contenti subject to their compliance with RAP 18.1.

We affirm.

Chun, J.

WE CONCUR:

Coburn, J.

Schindler, J.