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**No. 336140**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

COURT OF APPEALS, <sup>by</sup> DIVISION III  
OF THE STATE OF WASHINGTON

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DERALD HAUCK and NOEL MOON,

Appellants,

v.

WILLIAM and DIANA BARR, JEANNINE BURNS, and SOLEIL REAL  
ESTATE,

Respondents.

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BRIEF OF APPELLANTS

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## **A. ASSIGNMENTS OF ERROR**

### **Assignments of Error**

1. The Trial Court erred in granting Respondent Barrs' and Respondent Burns and Soleil's two Motions for Summary Judgment, dismissing Appellant Hauck's fraudulent concealment claim and ruling that Appellant Hauck chose no further follow up after the inspection report revealed evidence of a defect.
2. The Trial Court erred in granting Respondent Burns and Soleil's Motion for Summary Judgment, dismissing Appellant Hauck's negligent misrepresentation claim against them.
3. The Trial Court erred in granting Respondent Barrs' and Respondent Burns and Soleil's two Motions for Summary Judgment, dismissing Appellant Hauck's claim for failing to establish an unfair or deceptive act or practice.
4. The Trial Court erred in granting Respondent Barrs' Motion for Summary Judgment, dismissing Appellant Hauck's breach of contract claim.
5. The Trial Court erred in granting Respondent Barrs' Motion for Summary Judgment, foreclosing the equitable remedy of rescission.

### **Issues Pertaining to Assignments of Error**

1. Did Appellants Hauck and Moon conduct sufficient inquiry to create a genuine issue of material fact after the inspection report revealed a pet urine smell? (Assignment of Error 1.)
2. Should Appellant Hauck have the opportunity to present to a jury that any reasonable inquiry into the pet urine smell would have been fruitless and not have revealed the tangible urine-and-feces-soaked floors hidden beneath the new carpeting? (Assignment of Error 1).
3. Did Appellant Hauck present evidence to create a genuine issue of material fact as to Respondent Burns and Soleil's failure to exercise reasonable skill and care, deal honestly and in good faith, and disclose their knowledge of the urine and feces hidden beneath the new carpeting? (Assignment of Error 2.)
4. Did Appellant Hauck present evidence to create a genuine issue of material fact that Respondents' actions were unfair or deceptive acts or practices? (Assignment of Error 3.)
5. Does one of Appellant Hauck's other claims against Respondent Barr survive and allow his breach of contract claim to also proceed to trial? (Assignment of Error 4.)

6. Does one of Appellant Hauck's other claims against Respondent Barr survive and allow him the opportunity to unwind the deal through rescission? (Assignment of Error 5.)

### **B. STATEMENT OF THE CASE**

Appellants Derald Hauck ("Hauck") and Noel Moon ("Moon") commenced this action in Spokane County Superior Court, alleging claims against the Respondents arising from a real estate transaction. Appellants alleged that the sellers of the home, Respondents William and Diana Barr ("Barr"), breached the purchase and sale agreement, concealed animal urine and feces beneath new carpeting throughout the home, and violated the Consumer Protection Act. CP at 441-49. Appellants alleged that the real estate agent, Respondent Jeannine Burns ("Burns"), and the brokering agency, Respondent Soleil Real Estate ("Soleil"), concealed evidence of the urine and feces, failed to disclose their knowledge of the urine and feces beneath the new carpeting, and violated the Consumer Protection Act. *Id.* Respondents moved for summary judgment and the Honorable Annette S. Plese granted their motions, dismissing all of Appellants' claims and leading to this appeal. CP at 483-84.

Moon desired to move to Spokane, Washington from Missoula, Montana to be closer to better medical facilities for her handicapped daughter. CP at 424, 443. She wanted to purchase a home herself but

could not afford to pay down her own medical debt in order to be approved for a loan. CP at 425. Because of this her father, Hauck, intended to purchase a home for her in Spokane, while Moon provided money to her father for the purchase. CP at 425, 429-30, 443.

Prior to Hauck and Moon's interest in the home, the Barrs rented it to one set of tenants for twelve to fourteen years. CP at 374. According to acquaintances of these former tenants, the tenants allowed their pets to urinate and defecate throughout the inside of the home while they resided there. CP at 416, 420. One of these acquaintances wore a different pair of shoes inside the home because she did not want to track any animal urine or feces back to her own home. CP at 420. Her feet would actually sink down when she stepped on the floors because of the amount of animal urine and feces that were deposited and layered upon them. CP at 420.

While these tenants occupied the home, Mr. Barr visited approximately one to two times a year. CP at 375. He had concerns about the messy condition of the home while he was their landlord and relayed those concerns to the tenants by asking if they could clean the place up a little bit. CP at 376.

After the tenants vacated the premises, Mr. Barr went inside the home and discovered a mess. CP at 375. The carpeting, vinyl, and walls

were filthy. Id. The carpeting was stained and needed to be replaced. CP at 375-76. He then proceeded to make repairs to the home. CP at 376.

Mr. Barr did a lot of work on the home, working mostly on his own. CP at 377, 382. He measured, picked out, and bought the new carpet for the home. CP at 381. And he had a third party help install the carpet and vinyl flooring. Id. He walked on the exposed subflooring during his work on the home. CP at 382-83. He was in and out of the house after the old carpeting and padding were removed and before the new carpeting was in. Id. Moon's pictures of the condition of the floors immediately after pulling up the new carpets show urine-and-feces-soaked floors throughout the home. CP at 406-08.

Mr. Barr claims to have never noticed any animal feces on the floor or smelled anything during his visits to his tenant-occupied home. CP at 376. He also stated that he would have cleaned up any filth and would not have intentionally laid carpet over it. CP at 383.

Burns is the Barrs' daughter. CP at 401. She was working for Soleil as a real estate agent and listed the home for her parents. CP at 379, 396. Burns stated that she visited the home while her dad and others were painting inside and saw tarps on the floors. CP at 396. She stated that this was the only time she saw the home during the remodel and that the next time she saw the home it was picture ready. CP at 397. But Moon claims

that Burns told her after the purchase that she was in the home prior to it being cleaned and it was “trashed.” CP at 426.

Burns took pictures for Multiple Listing Service purposes and had a lot of showings. CP at 396-97. When she did a brokers open, a few people mentioned to her that they could “smell animal.” CP at 397. But Burns stated that she did not notice any smells. *Id.* She never told Hauck or Moon that other people noticed these animal smells. CP at 398, 402.

Mr. Barr recalled there being a few air fresheners in the home while it was on the market. CP at 384. The Barrs purchased at least ten (10) air fresheners or refills, and Mr. Barr put “one” in the home because he smelled an odor that “could have been” an animal urine smell. CP at 384, 393-94. During Moon’s visits prior to closing, she noticed air fresheners in the home. CP at 428.

Hauck had the property inspected on October 18, 2012. CP at 430. One of the comments in the inspection report noted that cats had accessed the crawl space under the home through large openings and were using the dirt floor as a litter box. CP at 405. Another comment noted that a very strong pet urine smell was observed in the home. CP at 404.

When Moon purchased her current home in Montana, it had a similar problem as the Spokane home at issue in this litigation with respect to gaps in the foundation allowing cats to access the crawl space and use it

as a litter box. CP at 425. The interior of that Montana home had the same characteristics as the Spokane home at the time of sale – freshly painted walls, new wooden flooring, and new carpet. Id. She received occasional whiffs of urine and feces inside that Montana home when she looked at it, but noticed it emanated from the cats using the crawl space as a litter box. Id. They cleaned the crawl space and eliminated the smell. Id.

Neither Hauck nor Moon ever noticed a pet urine smell or any pet urine stains on any carpets, floors, or walls in the Spokane home. CP at 425, 430. But because the inspection report indicated a pet urine smell, they wanted to discuss their concerns with the other parties. CP at 425-27, 430. Moon did all of the communication and inquiry regarding the home because Hauck's hearing is poor, his cell phone reception in Montana was inadequate, and the home was intended for Moon. CP at 430.

After discussing the inspection report with Hauck, Moon relayed their concerns to the inspector. CP at 425-26, 430. She had multiple phone calls with the inspector about safety issues and defects, including the pet urine smell. CP at 425-26. She was concerned with the pet urine smell. Id. He suggested that the smell could be emanating from the crawl space, walls, or carpet. CP at 425-26. He told Moon that he did not see any pet stains anywhere. CP at 425. They discussed the costs to remove the potential smell and the need to find out what type of wood was under the

carpet for refinishing estimates in the event that the carpet needed to be replaced. CP at 426.

Moon told Burns that they were contemplating the potential need to remove the carpet or repaint the walls and asked her to find out from the Barrs what type of wood was under the carpet. CP at 426. Moon claims that Burns had trouble finding out from the Barrs what type of wood it was and that the Barrs did not remember. Id. Burns denies that she spoke to Moon about the condition of the home. CP at 400.

Moon reviewed the home inspection with Burns during her initial call and discussed the pet urine smell, though Burns claims to have never discussed this. CP at 401, 426. Moon recapped her discussions with the inspector and Hauck and the issues that they had with it. CP at 426. Burns stated that she did not notice any urine smell and did not see any pet stains. Id.

Moon and Hauck never contacted the Barrs directly during this transaction. CP at 427. They believed that it was an arm's-length transaction and Burns made it clear that she was the only source of communication to the Barrs. Id. All communications regarding the home transaction were between Moon and Burns, including the repairs needed to make the home safe, her daughter's medical condition, and the need for a new contract. Id.

On November 10, 2012, the Barrs completed a Seller Disclosure Statement, making representations concerning their actual knowledge of existing material facts or material defects in the property. CP at 77-81. The Barrs stated that there were no substances, materials, or products in or on the property that may be environmental concerns. CP at 80. After four pages of disclosure, none of which revealed any animal urine or feces or any floor defects, they stated that there were no other existing material defects affecting the property that a prospective buyer should know about. CP at 81. The parties closed on the home in mid-December. CP at 82, 84-85.

In January 2013, when picking up the keys, Moon and Hauck noticed multiple air fresheners placed in the home. CP at 428, 430. Hauck claims that Burns was spraying air freshener while they were walking through the home. CP at 430. Moon thought the air freshener smell was overpowering. CP at 428. Moon claims that Burns told them that she sprayed the home before they arrived and that she always sprays homes that have been sitting closed up for a while. Id. Before leaving for Montana, Moon turned the heat on in the home because it was non-winterized. CP at 426.

Moon returned to the home in Spokane about a month later, intending to clean the crawl space. CP at 427. When she went inside to

store some supplies prior to cleaning the crawl space, she noticed a fowl smell that had never been present in previous visits. Id. She believed that turning on the heat a month prior had caused this. Id. She cleaned out the crawl space, but the smell still lingered in the home. CP at 444. She later decided to pull up the carpets, discovering that animal urine and feces had been concealed underneath all throughout the home. CP at 427, 444.

### C. ARGUMENT

Higher courts typically review orders on summary judgment *de novo*, engaging in the same inquiry as the trial court. Mohr v. Grantham, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). Summary judgment is appropriate when “there is no genuine issue as to any material fact...and the moving party is entitled to judgment as a matter of law.” CR 56(c). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. Dowler v. Clover Park Sch. Dist. No. 400, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). This Court should reverse the summary judgment dismissals of Appellant Hauck’s claims and remand for further proceedings.

**1. Hauck Presented Evidence that He Conducted Reasonable Inquiry After the Inspection Report Noted Evidence of a Defect.**

The Trial Court erred when it dismissed Hauck's fraudulent concealment claims on the basis that Hauck chose *no* further follow up or inquiry after the inspection report revealed a pet urine smell in the home. Hauck and Moon's declarations establish that they did make further inquiry. They discussed the inspection report with each other and relayed their concerns about the pet urine smell to both the inspector and Burns, who was acting as the lone source of communication to the Barrs. Because the "further inquiry" and "fruitless" analyses are intertwined, this Court should also consider any relevant inquiry facts or circumstances that are addressed in the "fruitless" analysis *infra* as part of this "further inquiry" analysis.

A claim for fraudulent concealment exists when: (1) the residential dwelling has a concealed defect; (2) the seller has knowledge of the defect; (3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect is unknown to the buyer; and (5) the defect would not be disclosed by a careful, reasonable inspection by the buyer. Alejandre v. Bull, 159 Wn.2d 674, 689, 153 P.3d 864 (2007). Once a buyer discovers evidence of a defect, they are on notice and have a duty to

make further inquiries. Douglas v. Visser, 173 Wn.App. 823, 832, 295 P.3d 800 (2013).

In Douglas, the buyers' inspector conducted a pre-purchase inspection and found a small area of rot and decay. 173 Wn.App. at 826. The buyers did not discuss the inspection report, which was the source of notice of the defects, with the inspector or the sellers before purchasing the home. Id. at 832. They never asked any questions about the rot that the inspector identified. Id. Instead, they were content to let the report speak for itself. Id.

In this case, Hauck was not content to let the report speak for itself. Unlike in Douglas, there is evidence that Hauck made inquiries about the pet urine smell noted in the inspection report before purchasing the home.

Hauck and Moon discussed the inspection report with each other and noted their concerns. CP at 430. Hauck established Moon as the person who would conduct the communication and inquiry concerning the home due to his poor hearing and cell phone reception, and also because Moon was the intended beneficiary of his purchase. Id. Moon then relayed their concerns and inquiry to the other parties. CP at 425-27.

Moon discussed the entire inspection report with the inspector multiple times. CP at 425. She specifically discussed the pet urine smell with the inspector because she never smelled it during her visits to the

property and never saw any pet urine stains on any carpets, floors, or walls (neither did Hauck). CP at 425-26, 430. They discussed the source of the smell and the inspector indicated the crawl space (where cats were using the dirt floor as a litter box), the walls, or the carpet as potential sources. CP at 425-26. But the smell could not be in the carpet or walls because the carpet was brand new and the walls were freshly painted. CP at 381-83.

Moon also spoke with Burns about her discussions with the inspector and Hauck. CP at 426. Moon spoke directly with Burns throughout the process, as she and Hauck never considered contacting the Barrs directly due to their belief that it was not allowed. CP at 427. Burns made it clear that she was the only source of communication to the sellers. Id. Moon told Burns the issues that she and Hauck had with the pet urine smell. CP at 426. Moon even attempted to have Burns ask questions of the Barrs about what type of wood was under the carpet, but Burns supposedly had trouble finding out from her client-parents and said the Barrs did not remember. Id. Eventually, Moon found out that it was animal-urine-and-feces-soaked wood that was hidden under the new carpet.

These facts and the “fruitless” circumstances discussed *infra* show that Hauck satisfied his duty to make further inquiries after evidence of a defect, a pet urine smell, was noted in the inspection report. The Douglas

Court cautioned that buyers do not have “a duty to perform exhaustive invasive inspection, or endlessly assail the [sellers] with further questions. They merely [have] to make further inquiries after discovering [a defect]...” 173 Wn.App. at 834. This Court should heed that caution and allow Hauck’s fraudulent concealment claim to proceed to trial. Viewing Hauck and Moon’s declarations in the light most favorable to Hauck, it is clear that Hauck has presented evidence to create a genuine issue of material fact that he performed reasonably diligent inquiry.

**2. The Respondents’ Evasive Actions and Concealing Efforts, Along with the Circumstances Surrounding the Transaction, Made Any Inquiry Fruitless and Prevented Hauck from Discovering the Urine-And-Feces-Soaked Floors.**

The Trial Court erred when it failed to consider whether any inquiry by Hauck would have been fruitless. As discussed *supra*, Hauck conducted reasonable further inquiry into the pet urine smell. That inquiry failed to discover the hidden urine and feces beneath the brand new carpeting due to Respondents’ concealment of the defect and their evasiveness and deception.

Further inquiry is not necessary where it would have been fruitless. Douglas v. Visser, 173 Wn.App. 823, 833; see also Puget Sound Service Corp. v. Dalarna Management Corp., 51 Wn.App. 209, 215, 752 P.2d 1353 (1988)). In Douglas, the Court stated that “the [sellers’] overt

attempts to cover up the defects prior to listing the property and their pre-inspection evasiveness may support an inference, if not a conclusion, that such inquiry would have been fruitless.” 173 Wn.App. at 833.

Mr. Barr discovered a “mess” after his tenants vacated the premises, so he replaced the filthy, stained carpeting. CP at 375-76. He walked on the exposed subflooring during his work on the home. CP at 382-83. And he was in and out of the house after the old carpeting and padding were removed and before the new carpeting was installed. Id. Moon took pictures of the floors almost immediately after pulling up the carpets and discovering the hidden urine and feces. CP at 406-08. After observing these pictures, it defies belief for the Barrs to assert that they had no knowledge of this hazard when Mr. Barr in fact walked on these exposed floors and was in the home after the old carpets were removed. At the very least, Hauck has presented a genuine issue of fact as to the Barrs’ actual knowledge of the concealed urine and feces.

The Barrs provided Hauck with a Seller Disclosure Statement, making representations about existing material defects in the property. CP at 77-81. They had ample opportunity to disclose the urine and feces hazard beneath the new carpets in their Seller Disclosure Statement, but did not. They failed to disclose it in at least three instances. They failed to note any structural defects concerning the floors. CP at 79. They failed to

note any substances, materials, or products in or on the property that may have been environmental concerns. CP at 80. And, in full disclosure, they failed to note any other existing conditions or material defects that a prospective buyer should know about. CP at 81.

During the remodel, Burns claims to have only seen tarps on the floors. CP at 396. Yet, Moon claims that Burns told her after the transaction that she was in home before the cleanup and it was “trashed.” CP at 426. This dispute alone makes it clear that there is an issue of fact as to Burns and Soleil’s knowledge of the urine-and-feces-soaked floors and whether they overtly attempted to conceal it from prospective buyers.

Moon asked Burns at least twice what type of wood was under the carpet. CP at 426. Burns apparently had trouble finding out from her client-parents what type of wood it was. Id. Eventually, she said that her client-parents did not remember. Id. While it could be difficult to remember that fact in a typical home buying situation, the more reasonable inference is that the Barrs and Burns were being evasive because they knew of the urine and feces hidden beneath the new carpeting.

Moon noticed air fresheners in the home during her visits to the home prior to closing. CP at 428. The Barrs purchased at least ten (10) air fresheners or refills for the home. CP at 393-94. Mr. Barr stated that there were a few air fresheners in the home while it was on the market and that

he had put “one” of them in there. CP at 384. He put it there because he smelled an odor that “could have been” an animal urine smell. CP at 384. Also, Burns told Moon and Hauck that she sprays air freshener in homes that sit closed up for a while. CP at 428. In hindsight, Respondents’ actions were obviously intended to mask the pet urine smell and prevent any inquiry or discovery of what was hidden beneath the new carpets. Any reasonable inquiry was hindered by the actions of the Respondents.

In Dalarna, the inspector noted readily observable water leakage, including stains, cracked plaster, and loose tiles. 51 Wn.App. at 211. The plaintiff attempted to draw a distinction between the apparent water leakage and the historical, chronic water leakage, which was not apparent. Id. at 214-15. But the Court found that the seller had no duty to report its historical experience with water penetration problems because the water leakage was already apparent. Id.

In Douglas, the inspector noted areas of rot and decay near the roofline, an area of rotted sill plate, and sistered floor joists in his inspection report. 173 Wn.App. at 826. The plaintiffs later discovered that fifty to seventy percent of the sill plate and rim joists were destroyed, among other hidden rot issues. Id.

These two cases highlight the importance of inquiry after noticing a tangible, visible defect. In Dalarna, the buyer, who failed to conduct *any*

further inquiry, could not complain that there was more water damage than let on after their inspector noted visible water damage. 51 Wn.App. at 215. In Douglas, the buyer, who failed to conduct *any* further inquiry, could not complain that there was more rot damage than let on after their inspector noted visible rot damage. 173 Wn.App at 832-33.

As discussed *supra*, Hauck did conduct reasonable inquiry. But that inquiry failed to reveal the hidden urine and feces. Apart from the alleged evasiveness and deception of the Respondents, Hauck's inquiry failed because a smell can be fleeting. A visible, tangible defect cannot. This distinction is important to the fruitless and further inquiry analyses. The buyers in Dalarna and Douglas knew where to look. They could see the water damage and rot defects and know precisely what the issue was and where to investigate further. A smell is only *evidence* of a defect, not the *actual* defect.

In this case, the inspection report does not note any visible pet urine or feces stains in the interior of the home. CP at 404. Neither Hauck nor Moon ever noticed any pet urine stains on any carpet, floors, or walls during their visits to the home. CP at 425, 430. Burns never saw any stains either. CP at 426.

Thus, it was completely reasonable for Hauck and Moon to focus on the tangible evidence before them. The inspection report noted that cats

were using the dirt floor of the crawl space as a litter box. CP at 405. That was the only place where there was an actual, “visible defect” of urine and feces. It made sense that the “evidence of a defect,” a pet urine smell, was coming from this area. Moon’s previous experience with those smells in her Montana home dissipating once she cleaned the crawl space further reinforced this logical conclusion. CP at 425. A reasonable person with this information would not conclude that they needed to rip up brand new carpets in order ensure that the seller did not hide any animal urine and feces beneath it.

This Court should find that summary judgment dismissal of Hauck’s fraudulent concealment claims was inappropriate and allow them to proceed to a jury. Hauck’s reasonable inquiry did not find the true source of the problem. The lack of apparent surface defects inside the home because of the cover-up, and evidence of Respondents’ evasive and deceptive behavior make it clear that there is at least an inference, if not a conclusion, that any inquiry by Hauck would have been fruitless.

**3. Hauck Presented Evidence that Burns and Soleil Violated Their Chapter 18.86 RCW and 64.06 RCW Statutory Duties.**

The trial court erred in when it dismissed Hauck’s negligent misrepresentation claim against Burns and Soleil. Burns and Soleil failed to uphold their statutory duties to exercise reasonable skill and care, deal

honestly and in good faith, and disclose all material facts within their knowledge that were not apparent or readily ascertainable to Hauck. They also violated their statutory duty to inform Hauck of their actual knowledge of any errors, inaccuracies, or omissions made by the Barrs in their disclosure statement.

***a. Burns and Soleil Failed to Uphold Their Chapter 18.86 RCW Statutory Duties.***

An agent owes duties to all parties to whom the agent renders real estate brokerage services. RCW 18.86.030(1). Those duties include: exercising reasonable skill and care; dealing honestly and in good faith; and disclosing all existing material facts known by the [agent] and not apparent or readily ascertainable to a party. RCW 18.86.030(1)(a)(b) and (d). A principal is not liable for an act, error, or omission by an agent unless “the principal participated in or authorized the act, error, or omission,” or to the extent that “the principal benefitted from the act, error, or omission” and the court determines that “it is highly probable that the claimant would be unable to enforce a judgment against the agent.” RCW 18.86.090(1)(a) and (b). Chapter 18.86 RCW is to be construed broadly. RCW 18.86.110.

Common law tort causes of action remain the vehicle through which a party may recover for a breach of statutory duties set forth in

chapter 18.86 RCW. Jackowski v. Borchelt, 174 Wn.2d 720, 735 (2012).

In Bloor v. Fritz, a real estate agent was found liable for negligent misrepresentation after violating RCW 18.86.030 by failing to disclose his knowledge of the history of illegal drug manufacturing in a home. 143 Wn.App. 718, 734, 180 P.3d 805 (2008).

In this case, a few people mentioned to Burns at a broker's open that they could smell "animal," though she claims to have never smelled it. CP at 397. Under RCW 18.86.030(1)(d), Burns does not have to disclose facts that are apparent or readily ascertainable to a party. Thus, it would seem that she would have no obligation to disclose the animal smell that other people noticed because the inspection report put Hauck on notice of the pet urine smell.

However, it certainly seems that Burns was derelict in her duty to exercise reasonable skill and care. When Moon inquired on Hauck's behalf about the pet urine smell, Burns simply stated that she did not notice it. CP at 426. She failed to mention that others had smelled it. The prospective buyer was attempting to determine whether the smell was actually an issue. All of the information Hauck had pointed to the inspector being the *only* person who smelled it. Hauck never noticed a urine smell. CP at 430. Moon never noticed a urine smell. CP at 425. Burns allegedly never noticed a urine smell. CP at 397. Burns told Moon

that she never noticed a smell. CP at 426. This points to a failure of Burns and Soleil to exercise reasonable skill and care.

On top of that, Moon has stated that Burns told her after the purchase that she was in the home prior to it being cleaned and it was “trashed.” CP at 426. Combining this information with Burns being told about the smell, and viewing it in the light most favorable to Hauck, it becomes more evident that she knew or should have known where that smell emanated from. She knew or should have known that the many air fresheners in the home were masking the smell from prospective buyers. These facts point to an agent that failed to disclose a known material fact and failed to deal honestly and in good faith. At the least, this was a failure to exercise reasonable skill and care.

This Court should find that there is a genuine issue of material fact as to Burns’ failure to uphold her statutory duties in this transaction. As Soleil benefitted from this transaction, this Court should also find that they can face vicarious liability for Burns’ actions.

***b. Burns and Soleil Failed to Uphold Their Chapter 64.06 RCW Statutory Duties.***

“Any real estate licensee involved in a real property transaction is not liable for any error, inaccuracy, or omission in the real property

transfer disclosure statement if the licensee had no actual knowledge of the error, inaccuracy, or omission.” RCW 64.06.050(2).

Hauck presented evidence that Burns and Soleil had knowledge of the urine and feces concealed beneath the new carpeting. See discussion *supra*, C.2, C.3.a. Based upon that knowledge, Burns and Soleil had a duty to inform Hauck that the information represented as truth by the Barrs was in fact false. They failed to do so. This Court should find that there is a genuine issue of fact as to Burns and Soleil’s liability for failing to correct the Barrs’ Seller Disclosure Statement inaccuracies and omissions.

**4. Hauck Presented Evidence that Respondents’ Actions Were Unfair or Deceptive Acts or Practices that Violated the Consumer Protection Act.**

The Trial Court erred when it determined that Hauck failed to establish the unfair or deceptive act or practice element, ruling that he failed to conduct any inquiry after the inspection report put him on notice of a pet urine smell. As discussed *supra*, Hauck presented evidence that he did conduct reasonable inquiry after receiving the inspection report. Thus, Respondents’ actions could be unfair or deceptive within the meaning of the Consumer Protection Act.

Under the Consumer Protection Act, “unfair or deceptive acts or practices in the conduct of any trade or commerce” are unlawful. RCW 19.86.020. To prevail in a private claim under the act, a plaintiff must

establish five elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his or her business or property, and (5) causation. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). To show that a party has engaged in an unfair or deceptive 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. Id. at 785.

Hauck presented evidence that the Barrs fraudulently concealed urine and feces under brand new carpeting, failed to disclose it in their seller disclosure statement, and further prevented discovery by masking any evidence of the smell by placing air fresheners in the home. See discussion *supra*, C.1-2. He also presented evidence that Burns and Soleil failed to disclose their knowledge of the urine and feces and took steps to conceal evidence of the defect. See discussion *supra*, C.1-2, C.3.

The Respondents advertised to the public through the Multiple Listing Service (MLS). CP at 396, 411. Burns took pictures of the inside of the home for MLS purposes. CP at 396. She stated that there were a lot of showings for the home. CP at 397. Respondents' actions had the capacity to deceive anyone who viewed the listing or visited the home.

Burns even took steps to prevent discovery of the smell and the underlying defect well past the December closing date. When Hauck and Moon picked up the keys in January, they went through the home with Burns one more time. CP at 428. Moon noticed a nauseating, overpowering smell of air fresheners and saw them placed immediately inside the front door, front closet, bathroom, and kitchen. *Id.* Hauck noticed Burns spraying air freshener as they were walking through the home, as well as the air fresheners in the front of the house. CP at 430. Burns attempted to conceal evidence of the defect even after the transaction was complete.

This Court should find that Hauck did conduct reasonable inquiry, which allows him to establish that a genuine issue of material fact exists as to Respondents committing unfair or deceptive acts or practices.

**5. Hauck's Breach of Contract Claim Should Survive.**

The Trial Court erred when it determined that Hauck's breach of contract claim failed, ruling that he failed to show any material facts in dispute as to his other claims. As discussed *supra*, Hauck has shown genuine issues of material fact with respect to each of those claims. This Court should find that there are material facts in dispute with respect to Hauck's other claims against the Barrs, which allows his breach of contract claim to survive.

**6. Hauck Should Have the Opportunity to Rescind the Contract.**

The Trial Court erred when it foreclosed the equitable remedy of rescission by dismissing all of Hauck's claims against the Barrs. This Court should find that there are material facts in dispute with respect to Hauck's other claims against the Barrs, which allows him to keep the remedy of rescinding the contract.

**7. As a Prevailing Party, Hauck is Entitled to an Award of Costs and Fees.**

The Purchase and Sale Agreement between the Barrs and Hauck provides for reasonable attorneys' fees and expenses to the prevailing party. CP at 54. A contractual provision authorizing attorney fees is authority for granting fees incurred on appeal. Mike's Painting, Inc. v. Carter Welsh, Inc., 95 Wn.App. 64, 71, 975 P.2d 532 (1999). Pursuant to RAP 18.1, Hauck requests that this Court award him costs and reasonable attorney's fees consistent with the Purchase and Sale Agreement.

**D. CONCLUSION**

The Trial Court erred when it dismissed Hauck's claims against the Barrs, Burns, and Soleil. Viewing the facts and inferences in the light most favorable to Hauck, it is clear that summary judgment dismissal of his claims was inappropriate.

Hauck presented evidence that he conducted reasonable, diligent inquiry after the inspection report noted evidence of a defect. He was not content to purchase the home without first attempting to conduct inquiry and discover the full scope of the issue.

Unfortunately for Hauck, his reasonable inquiry could not uncover the well-hidden urine and feces beneath the new carpeting in the home. His inquiry was rendered fruitless because of Respondents' evasive and deceptive actions.

Hauck presented evidence that Respondents concealed all the tangible aspects of the defect, masked any evidence and smell with air fresheners, and failed to uphold their duties of informing prospective buyers of the hidden danger. There were no stains anywhere in the home and, to Hauck's knowledge, no one besides the inspector ever noticed a urine smell. With these actions and circumstances in mind, it was reasonable for Hauck to conclude that the smell emanated from the only place where tangible urine and feces was found – the crawl space.

Hauck also presented evidence that Burns and Soleil failed to exercise reasonable care, deal honestly and in good faith, and to disclose information about material defects within their knowledge. Burns' nondisclosures and the issue of whether she saw the home in a "trashed"

state prior to renovation present material factual disputes. Soleil can face liability because it benefitted from this transaction.

Respondents' actions are unfair and deceptive acts or practices. Hauck's claim for violations of the Consumer Protection Act is not foreclosed because he presented evidence that he did conduct reasonable, diligent inquiry. His breach of contract claim and rescission remedy should also survive because he has presented genuine issues of material fact with respect to his other claims.

Based upon the legal authorities and arguments presented herein, Hauck respectfully requests that this Court reverse the Trial Court's summary judgment dismissal of his claims and remand with instructions.

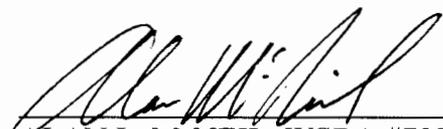
DATED this 22nd day of March, 2016.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the **23<sup>rd</sup> day of March, 2016**, at Spokane, Washington, I caused to be served the foregoing *Brief of Appellants* on the following in the manner indicated:

|   |  |
|---|--|
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