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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 336140-III

COURT OF APPEALS STATE OF WASHINGTON
DIVISION III

NOEL MOON and DERALD HAUCK,

Appellants,

v.

WILLIAM BARR and DIANA BARR, husband and wife;
JEANINE BURNS and JOHN DOE BURNS, husband and wife;
SOLEIL REAL ESTATE OF SPOKANE, LLC,

Respondents.

**BRIEF OF RESPONDENTS
SOLEIL REAL ESTATE AND BURNS**

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I. INTRODUCTION

This appeal arises from a real estate transaction wherein Appellant, Derald Hauck, purchased a house for his daughter, Noel Moon, in Spokane County. William and Diana Barr were the sellers of the Property. Mr. Hauck was represented in the purchase by real estate broker Steve Hagen of Keller Williams Realty Spokane dba The Legacy Group. Jeannine Burns of Soleil Real Estate of Spokane, LLC was the listing agent for the Property.

Despite a pre-purchase inspection alerting Mr. Hauck to a "very strong pet urine smell" in the home, Mr. Hauck failed to conduct further inquiry or additional inspections to determine the source and extent of the issue. After closing, Mr. Hauck alleges that evidence of pet excrement was found concealed underneath the carpet. He then sued the Barrs, Ms. Burns, and Soleil alleging that the parties knew of and concealed from Mr. Hauck the allegedly unsanitary conditions at the Property.

The trial court properly dismissed Mr. Hauck's claims for fraudulent concealment, negligent misrepresentation, and violation of Washington's Consumer Protection Act on summary judgment because Mr. Hauck lacked the requisite evidence to support each essential element of his claim. Most notable, Mr. Hauck received notification of the defect he claims was concealed from him, and he would have discovered it again

had he conducted further inquiry or conducted the full inspection to which he was contractually entitled under the purchase and sale agreement.

In seeking to reverse the trial court's well-reasoned decision, Mr. Hauck requests that this Court abandon established law of inquiry notice and adopt the very arguments that our courts have repeatedly rejected. It is the law of our state that when a buyer is on notice of a defect, he has a duty to engage in further inquiry. A failure to engage in such inquiry bars that buyer from later bringing a claim for damages based on defects that would have been disclosed by a diligent inspection.

This Court should affirm the trial court's summary judgment decision.

II. ASSIGNMENTS OF ERROR

Assignments of Error

The trial court properly granted summary judgment in favor of Soleil and Ms. Burns because Mr. Hauck lacks the requisite evidence to support each essential element of his claims. Soleil and Ms. Burns assign no error to the trial court's decisions.

Issues Pertaining to Assignments of Error

Soleil and Ms. Burns acknowledge Mr. Hauck's assignments of error, Br. of Appellant at 2, but believe the issues pertaining to those assignments of error are more appropriately formulated as follows:

1. Was the trial court correct in concluding that a real estate buyer failed to state a prima facie case against the listing broker for fraudulent concealment, negligent misrepresentation, and violation of the Consumer Protection Act where:

- a. The buyer presented no evidence that the broker knew of the alleged defect or that the broker negligently relayed false information to the buyer;
- b. The defect would have been disclosed by a reasonably careful inspection;
- c. The buyer was on notice of the defect and failed to make further inquiry or investigate further and instead proceeded to closing despite a contractual right to conduct additional inspections; and
- d. There was no unfair or deceptive act or practice on the part of the listing broker.

III. STATEMENT OF THE CASE

A. Factual Background.

In approximately 1996, the Barrs purchased the real property commonly known as 1718 E. 1st Avenue in Spokane, Washington (the "Property"). CP 373, Dep. of D. Hauck at 19:16-18. The Property was

used as a rental home from 1996 to 2011 when the Barrs decided to list it for sale. CP at 378, Dep. of D. Hauck at 39:16-40:9.

The Barrs' daughter, Jeannine Burns, a real estate broker associated with Soleil, was contacted to list the Property for sale. CP at 396, Dep. of J. Burns at 6:21-24. Prior to this time, Ms. Burns had never been to the Property and was not even aware that the Barrs owned the Property. CP 384, Dep. of D. Hauck at 61:2-8; CP 396, Dep. of J. Burns at 6:21-24.

In order to prepare the Property for sale, the Barrs hired contractors to perform cosmetic updates including replacement of the carpet and painting of the interior. CP at 382, Dep. of D. Hauck at 53:16-23; 56:6-9. After the carpeting was installed and the painting was underway, Ms. Burns visited the Property for the first time to deliver lunch to Mr. Barr. CP at 384, Dep. of D. Hauck at 61:1-8. When Ms. Burns arrived at the Property, the painters were working on the interior and tarps were covering the floor. CP at 396, Dep. of J. Burns at 7:3-7-25. Ms. Burns did not enter the Property other than to step inside the front door to briefly speak with Mr. Barr, and then she left. *Id.* In total, Ms. Burns spent less than two minutes at the Property. *Id.*

Ms. Burns did not visit the Property again until January 2012, at which time the work was complete and the Property was "picture ready." CP 396, 397, Dep. of J. Burns at 8:19-21; 10:20-22. Ms. Burns did not

notice anything unusual that would have alerted her to alleged issues at the Property. CP 397, Dep. of J. Burns at 10:23-84.

During the approximately ten months the Property was on the market, Ms. Burns held two brokers opens, but otherwise did not show the home to potential buyers. CP 397, Dep. of J. Burns at 11:2-14. Ms. Burns recalls that one broker and a lender commented on an animal smell at the Property. CP 401-402; Dep. of J. Burns at 28:22-29:5. However, because of her extensive experience listing and viewing other properties, including ones with pets, she did not find this particularly alarming. CP 397, Dep. of J. Burns at 11:24-25.

On October 9, 2012, Mr. Hauck, through his real estate broker, submitted a Real Estate Purchase and Sale Agreement ("REPSA") to purchase the Property for \$60,000. CP 220. Although Ms. Moon was going to live at the Property, she was not a party to the REPSA. *Id.* Included with the REPSA was an Inspection Addendum that conditioned the sale on Mr. Hauck's approval of the Property:

This Agreement is conditioned on Buyer's subjective satisfaction with inspections of the Property and the improvements on the Property. Buyer's inspections may include, at Buyer's option and without limitation, the structural, mechanical and general condition of the improvements to the Property, compliance with building and zoning codes, and inspection of the Property for hazardous materials, a pest inspection, and a soils/stability inspection.

CP 240. The Inspection Addendum further provided Mr. Hauck the option to conduct additional inspections and further evaluations by specialists, and allowed Mr. Hauck to terminate the REPSA should he disapprove of the condition of the Property. *Id.* The REPSA further provided Mr. Hauck with the right to reinspect the Property five days prior to closing. CP 242.

Mr. Hauck was provided with the Form 17, or Seller Disclosure Statement, which the Barrs completed pursuant to RCW 64.06.020. Mr. Hauck received the Form 17 and acknowledged that it contained only statements by the sellers, not any real estate brokers:

THE FOLLOWING ARE DISCLOSURES MADE BY SELLER AND ARE NOT THE REPRESENTATIONS OF ANY REAL ESTATE LICENSEE OR OTHER PARTY. THIS INFORMATION IS FOR DISCLOSURE ONLY AND IS NOT INTENDED TO BE PART OF ANY WRITTEN AGREEMENT BETWEEN BUYER AND SELLER.

CP 230. Page 5 of the Form 17 contains Mr. Hauck's Acknowledgment that:

- A. Buyer has a duty to pay diligent attention to any material defects that are known to Buyer or can be known to Buyer by utilizing diligent attention and observation.
- B. The disclosures set forth in this statement and in any amendments to this statement are made only by the Seller and not by any real estate licensee or other party.

C. Buyer acknowledges that, pursuant to RCW 64.06.050(2), real estate licensees are not liable for inaccurate information provided by Seller, except to the extent that the real estate licensees know of such inaccurate information.

...

CP 234.

While the sale was pending, Mr. Hauck had a routine buyer's inspection of the Property and was notified that "**[a] very strong pet urine smell was observed in the home.** This smell may be difficult to remove." CP 19-23 (emphasis in original). In addition to the Inspection Report, Mr. Hauck received information from the inspector regarding possible sources of the urine smell, including the walls and the carpet, and the costs to correct those conditions. CP 426, Br. of Appellants at 8.

Mr. Hauck discussed the results of the inspection with his real estate broker and created a list of requested repairs that was submitted to the Barrs. CP 179, 186-189. There was no mention of the urine smell and no inquiry as to the source of the smell. *Id.* The Barrs agreed to the repairs requested by Mr. Hauck. CP 189.

At some point, Mr. Hauck rescinded the first REPSA due to financing issues and a second REPSA was entered into on approximately November 10, 2012. CP 51-76. At the request of Mr. Hauck's broker, Mr. Hauck signed a waiver of the inspection contingency which provided that

"Buyer elects to waive the right [to an inspection] and buy the Property in its present condition. Buyer acknowledges that the decision to waive Buyer's Inspection options was based on Buyer's personal inspection and Buyer has not relied on representations by Seller, Listing Broker of Selling Broker." CP 75; CP 171.

The sale closed on or about December 12, 2012. Despite a contractual right to reinspect the Property prior to closing, Mr. Hauck did not perform a final walk-through. CP 399, Dep. of J. Burns at 19:2-7. In February 2013, Ms. Moon went to the Property and noticed an odor inside the home. CP 427. Ms. Moon alleges that she decided to pull up the carpets and underneath found evidence of animal urine and feces (the "defect"). *Id.*

It is undisputed that Ms. Burns never spoke with Mr. Hauck other than on one occasions to confirm receipt of an email. It is also undisputed that Ms. Burns never received a copy of Mr. Hauck's Inspection Report.

B. Trial Court Proceedings.

Mr. Hauck and Ms. Moon filed a complaint against the Barrs, Ms. Burns and Soleil alleging claims against Ms. Burns for fraudulent concealment, negligent misrepresentation, and violation of the Consumer

Protection Act.¹ CP 441-449. Ms. Burns filed a motion for summary judgment asserting that Ms. Moon did not have standing to assert claims against Ms. Burns and that Mr. Hauck lacked evidence necessary to establish each essential element of his claims. CP 86-106, 331-339.

Following oral argument on the motion, the trial court, the Honorable Annette S. Plese, entered an Opinion on Summary Judgment setting forth the court's findings and conclusions. CP 472-478. The trial court found: (1) Ms. Moon did not have standing, legal or equitable, to pursue claims against the defendants and the defendants had no duty owing to Ms. Moon; (2) Mr. Hauck failed to present evidence to show that the defect would not have been discovered through further reasonably diligent investigation and had not provided sufficient evidence to support his claim of fraudulent concealment; (3) Mr. Hauck had notice of the defect and failed to make the necessary inquiry; (4) Mr. Hauck failed to show any false information or misrepresentation supplied to him by Ms. Burns; (5) Mr. Hauck failed to show that he justifiably relied on any misrepresentations supplied by Ms. Burns; and (6) Mr. Hauck failed to establish an unfair or deceptive act necessary to support a CPA claim. CP 472-478.

¹ The claims against Soleil are based on a theory of vicarious liability for the acts of Ms. Burns. For ease of reference, the remainder the Brief of Respondents will refer to Ms. Burns only.

An order was entered granting Ms. Burn's motion and Mr. Hauck subsequently filed the present appeal assigning error to the dismissal of his claims. CP 479-481, 482-486, 492-495. Ms. Moon did not appeal dismissal of her claims or challenge the trial court's ruling that she lacked standing to assert claims against Ms. Burns and that Ms. Burns had no duties owing to Ms. Moon. *Id.*

IV. SUMMARY OF ARGUMENT

The trial court's June 4, 2015 Order Granting Defendants' Motions For Full Summary Judgment Dismissal of Complaint and Award of Attorney Fees and Costs should be affirmed. Mr. Hauck failed to establish the necessary elements of his claims against Ms. Burns for fraudulent concealment, negligent misrepresentation, and violation of the Consumer Protection Act as a matter of law.

The undisputed facts are as follows: Mr. Hauck had no communications with Ms. Burns or anyone from Soleil regarding the condition of the Property; Ms. Burns made no representations to Mr. Hauck or anyone else regarding the condition of the Property or the possible source of the pet smell; Mr. Hauck, through his own inspection report was on notice of the condition he now complains about. Despite this knowledge, Mr. Hauck never inquired further and never conducted additional inspections despite his contractual right and legal duty to do so.

As he did below, Mr. Hauck seeks to defend against summary judgment with a time honored technique resorted to when a claimant cannot present evidence to support each essential element of his or her claim. He sets forth a barrage of peripheral, non-material facts in hopes of obscuring the absence of factual probative evidence to support his case. The trial court saw through this subterfuge, and this Court should do the same.

V. ARGUMENT

A. **The Trial Court's Decision Dismissing the Claims of Ms. Moon for Lack of Standing is Not an Issue Presented on Appeal.**

Washington's Rules of Appellate Procedure require "[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4). No issue is presented on appeal where no error is pointed out under the assignments of error. *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959). Appellant has the burden of drafting proper assignments of error and appellate courts may not redraft assignments of error to cure their deficiencies. *Jones v. National Bank of Commerce*, 66 Wn.2d 341, 402 P.2d 673 (1965).

Neither Mr. Hauck nor Ms. Moon have assigned error to the trial court's decision dismissing Ms. Moon's claims for lack of standing. Nor

have they raised any argument or authority as to whether Ms. Moon has standing to assert claims in this lawsuit or whether the defendants owed any duty to Ms. Moon.

Without error being assigned or argument made, this Court cannot properly consider the issue and "more importantly, the other party is unable to present argument on the issue or otherwise respond and thereby potentially suffers great prejudice." *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 504 (1995). Therefore, this Court must not consider the issue regarding dismissal of Ms. Moon's claims. *Id.*

Accordingly, the only appellant is Mr. Hauck and the only issue on appeal is whether the trial court properly dismissed his claims.

B. The Standard of Review is De Novo, But This Court May Affirm on Any Ground the Record Supports.

Higher courts typically review orders on summary judgment *de novo*, engaging in the same inquiry as the trial court when reviewing a summary judgment order, *see Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982), and may affirm on any basis supported by the record. *Hadley v. Cowan*, 60 Wn. App. 433, 444, 804 P.2d 1271 (1991).

On a motion for summary judgment, the moving party bears the initial burden of showing the absence of a material issue of fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A

defendant can meet its burden merely by pointing to the absence of evidence to support the nonmoving party's case. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619,624, 818 P.2d 1056 (1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The burden then shifts to the plaintiff to set forth evidence to support each essential element of his or her claim.

If, at this point, the plaintiff [as nonmoving party] “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial”, then the trial court should grant the motion “In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.”

Hiatt v. Walker Chevrolet, 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

Consequently, the plaintiff “must do more than express an opinion or make conclusory statements”; the plaintiff must set forth specific and material facts to support each element of his prima facie case. *Id.*

Finally, while “[t]he nonmoving party is entitled to have the evidence viewed in a light most favorable to him,” the standard on summary judgment does not relieve the nonmoving party of his burden to adduce competent, admissible evidence sufficient to support a jury's verdict. *Seiber v. Poulsbo Marine Center. Inc.*, 136 Wn. App. 731, 736, 150 P.3d 633 (2007). “[I]f the plaintiff, as the nonmoving party, can offer

only a “scintilla” of evidence, evidence that is “merely colorable,” or evidence that “is not significantly probative,” the plaintiff will not defeat the motion.” *Id.* (citing *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987)).

The issue of Mr. Hauck's burden to come forward with evidence on summary judgment is an important one in this case. As pointed out in Ms. Burn's Motion for Summary Judgment, Mr. Hauck's burden to avoid dismissal of his claims was to offer clear, cogent, and convincing evidence to establish each essential element of his claims for fraudulent concealment and negligent misrepresentation. He further had the burden to set forth evidence to support each element of his CPA claim, including the existence of an unfair or deceptive act on the part of Ms. Burns. As the trial court correctly concluded, Mr. Hauck cannot meet his burden and dismissal of his claims is proper.

C. The Trial Court Correctly Dismissed Mr. Hauck's Fraudulent Concealment Claim.

Mr. Hauck spends the majority of his brief arguing that the trial court erred in dismissing his fraudulent concealment claim because he conducted a reasonable inquiry after receiving notice of the defect and that further inquiry would have been fruitless. Br. of Appellants. at 11-19.

However, Mr. Hauck cannot maintain his claims for fraudulent concealment and negligent misrepresentation simply by stating he met his duty to further inquire. Indeed, inquiry notice defeats an essential element of Mr. Hauck's claims and bars his claims for fraudulent concealment and negligent misrepresentation. Rather, in order to prevent dismissal, Mr. Hauck was required to set forth clear, cogent and convincing evidence to support each essential element of his claim. *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996); *Hughes v. Stusser*, 68 Wn.2d 707, 709, 415 P.2d 89 (1966) (emphasis added).

The significance of this standard of proof cannot be overstated. It is not enough for Mr. Hauck to assert vague "questions of fact" or unspecified "inferences from the evidence" that might overcome summary judgment in other cases:

The term clear, cogent and convincing denotes a quantum or degree of proof greater than a mere preponderance of the evidence. It is the equivalent of saying that the ultimate facts in issue must be shown by evidence that is highly probable.

Alexander Myers & Co., Inc. v. Hopke, 88 Wn.2d 449, 465, 565 P.2d 80 (1977) (citations omitted)(emphasis added).

Under the theory of fraudulent concealment, "the vendor's duty to speak arises (1) where the residential dwelling has a concealed defect; (2) the vendor 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 purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser." *Alejandre v. Bull*, 159 Wn.2d 674, 689-90, 153 P.3d 864 (2007) (citations omitted). The absence of any one element is fatal to recovery. *Puget Sound National Bank v. McMahon*, 53 Wn.2d 51, 54, 330 P.2d 559 (1958); *Baertschi v. Jordan*, 68 Wn.2d 478, 482-83, 413 P.2d 657 (1966).

This Court need only look to three cases to decide this matter, *Dalarna*, *Alejandre*, and *Douglas*, discussed below. These cases mandate dismissal of Mr. Hauck's claims because he was on notice of the defect and failed to conduct additional inquiry or inspections.

1. Ms. Burns did not have knowledge of the pet excrement under the carpet.

The facts asserted by Mr. Hauck are not sufficient to establish by clear, cogent and convincing evidence, that Ms. Burns had actual knowledge of the pet excrement under the carpet, which is a necessary element of his claim. *See Sloan v. Thompson*, 128 Wn. App. 776, 787, 115 P.3d 1009 (2005) (what is important is not the mental state of the vendor, but his or her actual, subjective knowledge of the defect).

The fact that two other people mentioned the smell of "animal" in the home is not sufficient to establish actual knowledge of the existence of

pet excrement under the carpet at the time of sale to Mr. Hauck. Nor does the fact that Ms. Burns was spraying air freshener in the Property after it had been closed up for a month make it highly probable that she had knowledge of the defect at issue. *Hughes*, 68 Wn.2d at 709-10 (allegations that defendants must have known of termites because they had so permeated the walls, insufficient to establish knowledge).

Even assuming Ms. Burns was in the Property prior to it being prepared for sale and described it as "trashed," which Ms. Burns disputes, this is not sufficient to establish knowledge of the existence of pet excrement under the carpet as discovered after the sale closed, by clear, cogent, and convincing evidence, where the next time she was at the Property it was "picture perfect." *Id.* at 709 (fact that defendants observed defects during ownership did not establish knowledge of the defect at the time of sale).

There is no evidence that Ms. Burns saw animal urine and feces on the subfloor when it was exposed and knew that the subfloor was not cleaned or replaced prior to laying down new carpet and therefore knew of the defect alleged here. Consequently, Mr. Hauck's assertion that Ms. Burns fraudulently concealed this defect is not supported by clear, cogent, and convincing evidence and his claim fails for this reason alone.

2. Mr. Hauck was on notice of the defect.

Mr. Hauck must also present clear, cogent, and convincing evidence that he did not have knowledge of the claimed defect. Mr. Hauck claims that he did not see excrement under the carpets or stains on the walls, and thus he had no knowledge of the defect. This misstates the standard. Where a buyer is on notice of the defect and has a duty to make further inquiry, it cannot be said that the defect was unknown to that buyer, even if the buyer may be unaware of the extent of the defect or resulting damage. *See Douglas v. Visser*, 173 Wn. App. 823, 800, 832, 834, 295 P.3d 800 (2013).

Mr. Hauck received an inspection report from his own inspector that identified "[a] **very strong pet urine smell was observed in the home.** This smell may be difficult to remove." CP 23. Mr. Hauck received additional information from his home inspector that the smell could be emanating from the walls or the carpet. CP 426, Br. of Appellants at 8. In fact, Mr. Hauck admits that he was on notice of the defect: "**the inspection report put Hauck on notice of the pet urine smell.**" Br. of Appellants at 21 (emphasis added).

Mr. Hauck may try to argue that while he had knowledge of the pet urine smell, he did not have knowledge of the "true defect," i.e., the pet excrement under the carpet. This is the exact argument the court rejected

in *Puget Sound Service Corp. v. Dalarna Management Corp.*, 51 Wn. App. 209, 753 P.2d 1353, *review denied*, 111 Wn.2d 1007 (1998).

In *Dalarna*, the purchaser of an apartment complex had an inspection that revealed "evidence of water penetration, including stains, cracked plaster, and loose tiles." *Dalarna*, 51 Wn. App. at 211. However, the report downplayed the significance of the problem: "These leaks are not serious but should be controlled by additional caulking outside and repainting and/or plastering inside." *Id.* The buyer made no inquiries and failed to further investigate.

In opposing summary judgment dismissal of his fraudulent concealment claim, the buyer conceded that some water leakage was apparent, but argued that the "true defect" at issue was not merely "water leakage," but "extreme, chronic water leakage." *Id.* at 214. The buyer claimed that he did not have knowledge of the actual defect because the extent of the leakage was so extreme as to constitute a defect qualitatively different from the mere water leakage that the buyer had notice of. *Id.*

The court of appeals acknowledged the appeal of that argument, but also recognized that adopting it would mean no rule at all as far as a buyer's duty to inquire. *Id.* at 214-15. In affirming summary judgment dismissal of the fraudulent concealment claim, the court reasoned that even accepting the buyer's argument that the apparent defect was not the

true defect, the "extreme, chronic water leakage" was closely related to the apparent surface problems. Because the buyer was on notice and failed to make inquiry, his claim for fraudulent concealment failed. *Id.* at 216.

Mr. Hauck not only had notice, he had evidence of the alleged defect, even if he claims to not have notice of the "true defect" the pet excrement was directly related to the apparent surface defect – here, the strong odor of pet urine. Like the buyer in *Dalarna*, Mr. Hauck had knowledge of the defect. Despite this notice, Mr. Hauck chose to make no further inquiry, did not conduct additional inspections, and purchased the Property. Given the facts in this case, Mr. Hauck cannot prove by clear, cogent, and convincing evidence that he did not know of the defect and he cannot support his claim for fraudulent concealment.

3. The defects were discoverable by a reasonably diligent inspection of the Property, Mr. Hauck's failure to further inquire is fatal to his claim.

In the present case, not only did Mr. Hauck have knowledge of the defect, he could have discovered the extent of the defect through an additional inspection. In fact, his own inspector told him where to look – the walls and carpet. Mr. Hauck relies on arguments that our courts have found unpersuasive, namely that he did in fact make further inquiry and additional inquiry would have been fruitless. He completely ignores what the law and the facts of this case require of him.

Being put on notice of defects and potential defects requires the buyer to make further inquiries to determine the extensive nature of any alleged damages. *See, Sloan*, 128 Wn. App. 776. A failure to further inquire precludes recovery for damages for defects that could have been discovered by a diligent inspection. *See, e.g., Dalarna*, 51 Wn. App. 209; *Alejandre*, 159 Wn.2d 674.

In *Alejandre* the evidence plainly demonstrated that the seller knew of defects in the septic system, but failed to disclose them. *Id.* at 677-78. The Alejandres had an inspection, which included inspection of the defective septic system. The septic report stated that "the septic system's back baffle could not be inspected but there was '[n]o obvious malfunction of the system at the time of work done.'" *Id.* at 679. The appraiser also inspected the property and included that "the septic system 'Performs Intended Function' and stated that 'everything drains OK.'" *Id.* at 679. The buyer conducted no further investigation of the septic system and proceeded to close on the sale. *Id.*

Weeks after closing, the system failed. *Id.* at 680. The Alejandres sued the seller for fraud and the case proceeded to trial. After the Alejandres rested, the court dismissed their claims as a matter of law. *Id.* at 677.

In affirming the trial court's decision regarding dismissal of the fraud and fraudulent concealment claims, the Washington State Supreme Court held that the Alejandres' failure to inquire further after being informed that part of the septic system could not be inspected barred their fraud claim.

The "right to rely" element of fraud is intrinsically linked to the duty of the one to whom the representations are made to exercise diligence with regard to those representations. As explained, the Alejandres were on notice that the septic system had not been completely inspected but failed to conduct any further investigation and indeed, accepted the findings of an incomplete inspection report. Having failed to exercise the diligence required, they were unable to present sufficient evidence of a right to rely on the allegedly fraudulent representations.

Id. at 690 (internal citations omitted). The Court further concluded that the Alejandres failed to meet their burden that the defect in the underground septic system would not have been disclosed by a reasonably diligent inspection because the system was relatively shallow and easily accessible for inspection. *Id.*

The facts here are even more persuasive. Here, the alleged defect *was* disclosed by the Inspection Report and through follow-up conversation with the inspector. The burden is on Mr. Hauck to prove by clear, cogent, and convincing evidence that the defect would not have been disclosed by a diligent inspection. Comparing the defect in

Alejandro within a septic system to the defect here, existing under a carpet, it is unreasonable to conclude that a diligent inspection would not have disclosed this particular condition. This is even more apparent where according to Mr. Hauck, his inspector pointed to the walls and carpet as possible sources of the odor, which is exactly the defect Mr. Hauck is alleging – evidence of pet excrement in the flooring and walls.

Accordingly, Mr. Hauck cannot show by clear, cogent, and convincing evidence that the defect would not have been disclosed by a careful, reasonable inspection.

Moreover, the record is devoid of any evidence that Mr. Hauck requested additional information from the Barrs or Ms. Burns regarding the defect, or requested that additional inspections be allowed. If the *Alejandres* were required to conduct further investigations despite assurances that the system was working properly, Mr. Hauck surely had a duty to further inquire based on an inspection report that flatly called out the defect and pointed to the source of the defect. As the trial court aptly noted, "[i]f a plaintiff on notice of a potential defect with a septic system can be expected to expose it via excavation, it is not unreasonable that the Plaintiff in this case who was on notice of the smell of animal urine in the house be required to conduct further investigation into its source." CP 475.

Hauck's position is no different than that of the Alejandres and the trial court properly dismissed his claim for fraudulent concealment.

b. Mr. Hauck's argument that further inquiry would have been fruitless does not save his claim.

The law in Washington has long been that "what the purchaser knew is, indeed, a question of fact, but the legal significance of what he knew is a question of law." *Peoples Nat. Bank of Washington v. Birney's Enterprises, Inc.*, 54 Wn. App. 668, 674, 775 P.2d 466 (1989). With regard to inquiry notice, the factual question is whether the buyer received "some evidence" of the defect. *Dalarna*, 51 Wn. App. at 215.

Here, there is no factual issue as to what evidence of the defect Hauck received. Hauck received the inspection report and reviewed the findings. CP 426, Br. of Appellants at 8. According to Hauck, the potential sources of the strong odor of pet urine were discussed with the home inspector and included the possibility that it was emanating from the walls or the carpet. *Id.* The question then remains, what duty arose from that information. According to overwhelming authority, including *Dalarna*, *Alejandre*, and *Douglas v. Visser, infra*, it could not be more clear that Mr. Hauck had an affirmative duty to further investigate and that his failure to do so precludes recovery.

Mr. Hauck makes the same arguments the court of appeals found unpersuasive in *Douglas*, 173 Wn. App. at 832, namely that he did in fact make further inquiry and additional inquiry would have been fruitless. The *Douglas* Court declined to reach the issue: "[w]e need not decide whether that constitutes substantial evidence to support a finding that he conducted a reasonable inspection, because the inspection did, in fact, provide notice of the defect." *Id.* at 832, fn.1. (emphasis added).

Faced with egregious conduct on the part of the seller, who was also a real estate broker, the court refused to overlook well-settled case law or make its own finding that inquiry would have been fruitless. The court was still bound by law requiring that a buyer who is on notice of a defect further inquire.

Real estate broker Visser purchased a property with the intent of renovating and renting it and quickly discovered that the home required more work than anticipated, including rot so severe that screws could not be installed, and put the property up for sale. *Id.* at 825. When Visser's laborer told him that the floor joists were too soft to screw the flooring down, Visser instructed him to "find a way to attach the wood." *Id.* at 828-29. When Visser was notified of rotted wood underneath the bellyband, Visser told the laborer "cover it with trim ... cover it in caulking, use a bunch of nails, paint and seal it." *Id.*

Visser put the property on the market and the Douglasses submitted an offer to purchase. *Id.* at 825. Visser provided the Douglasses with a Seller Disclosure Statement that was not completed with most of the items marked as "don't know." The Douglasses sent Visser a series of follow-up questions and requested a copy of the inspection report from Visser's purchase. Although the Douglasses thought the responses received from Visser were inadequate, and an inspection report was not provided, they made no further inquiry.

The Douglasses had an inspection performed and the report identified two small areas of rot, the significance of which was downplayed in the report:

Dennis Flaherty performed a prepurchase inspection for the Douglasses. He discovered a small area of rot and decay near the roof line, and caulking that suggested a previous roof leak in the area. Beneath the home, he found an area of rotted sill plate that sat below the section of water damages exterior siding. A portion of sill adjacent to the rotted section had recently been replaced. Floor joists adjacent to the rotted area had been sistered. In his inspection report, he noted that those areas did not pose a structural threat, but should be repaired if the condition degraded rapidly.

Id. at 826. The Douglasses did not investigate the rot or inquire of Visser about it and the transaction closed. *Id.*

Shortly after taking possession of the home, the Douglasses discovered the extent of the problems. The Douglasses hired a mold specialist who informed them that it would cost less to demolish the house and rebuild rather than repair the existing structure. The Douglasses sued Visser for fraudulent concealment, negligent misrepresentation, violations of the Consumer Protection Act, breach of contract, and breach of Visser's duties as a real estate broker. After a bench trial, the court found that Visser had discovered significant defects and instead of correcting the conditions, made superficial repairs and concealed the defects and ruled in favor of the Douglasses on all claims. *Id.* at 829. Visser appealed arguing that the Douglasses' claim was barred by their failure to investigate after obtaining evidence of rot in the house.

Although the court of appeals was appalled by Visser's conduct, calling it "egregious" and "reprehensible," it still applied the law to the facts and reversed the lower court's ruling. *Id.* at 833-84. In doing so, the court noted:

Nonetheless, the law retains a duty on a buyer to beware, to inspect, and to question. We caution that the Douglasses did not have a duty to perform exhaustive invasive inspection, or endlessly assail the Vissers with further questions. They merely had to make further inquiries after discovering rot or at trial show that further inquiry would have been fruitless. The only evidence of when the Douglasses first learned of rot in the house is the report issued after Flaherty conducted his prepurchase inspection. Despite that

discovery, on top of the Vissers' previous evasive and incomplete answers and the Vissers' on-going failure to provide their own prepurchase inspection report, either of which should have caused concern and further inquiry, there is no evidence that the Douglasses made any inquiries whatsoever after the inspection. They obtained no finding from the trial court that further inquiry would have been fruitless. Under *Dalarna*, the Douglasses' failure means they were not entitled to maintain these claims.

Id.

The legal significance of the information Mr. Hauck received cannot be downplayed. "The law requires one to take some reasonable steps to ascertain the facts for himself. In short, one cannot close his eyes to facts that surround him and proceed blindly proclaiming 'I have a right to rely.'" *Alexander Myers & Co., Inc.*, 88 Wn.2d at 466. Hauck had a contractual right, and a legal duty, to further inquire, failed to do so, and now seeks to blame Ms. Burns for his failure.

Faced with a legally identical but far less egregious set of facts, Mr. Hauck is asking this Court to ignore *Dalarna*, *Alejandre*, and *Visser* and established law of inquiry notice and adopt the very arguments that Washington courts have rejected. Mr. Hauck had notice of the defect yet never requested further information from the person with the most knowledge of the Property, Mr. Barr. Instead, Mr. Hauck discussed the inspection report with his daughter and his own home inspector who in fact gave Mr. Hauck additional reason to further inquire. It is

disingenuous for Mr. Hauck to now argue that he believed the crawlspace was the only possible source of the odor when his own inspector suggested that it could be coming from the walls or the carpet. Once on notice of the defect, Mr. Hauck was required as a matter of law to inquire further; he did not, and the trial court properly dismissed his claim.

D. The Trial Court Properly Dismissed Mr. Hauck's Claim for Negligent Misrepresentation.

Mr. Hauck's argument in support of his negligent misrepresentation claim is equally as flawed as his claim alleging fraudulent conduct. As with his claim for fraudulent concealment, Mr. Hauck focuses on an argument that lends support to only one discrete element of his claim, and refuses to acknowledge that each element of his claim based on negligence needs to be supported with clear, cogent, and convincing evidence. Like the claim for fraudulent concealment and violation of the CPA, the absence of any one element of a negligent misrepresentation claim is fatal to recovery. *McMahon*, 53 Wn.2d at 54; *Baertschi*, 68 at 482-83.

To sustain his burden on summary judgment, Mr. Hauck was required to present evidence that (1) Ms. Burns supplied information for the guidance of Mr. Hauck in this transaction that was false, (2) Ms. Burns knew or should have known that the information was supplied to guide

Mr. Hauck in the transactions, (3) Ms. Hauck was negligent in obtaining or communicating the false information, (4) Mr. Hauck relied on the false information, (5) his reliance was reasonable, and (6) the false information proximately caused Mr. Hauck damages. *Ross v. Kirner*, 162 Wn.2d 493, 499-500, 172 P.3d 701 (2007).

The trial court dismissed his negligent misrepresentation claim because Mr. Hauck failed to show any false information or a misrepresentation supplied to him by Ms. Burns and Mr. Hauck further failed to show that he justifiably relied on any misrepresentations made by Ms. Burns. The trial court was correct in dismissing the claim based on a lack of evidence.

On appeal, Mr. Hauck asserts that the trial court erred in dismissing his claim for negligent misrepresentation because Ms. Burns failed to uphold her statutory duties under RCW 18.86 and RCW 64.06. However, no independent cause of action exists for breach of RCW 18.86 or RCW 64.06. Rather, a breach of these statutory duties is evidence of negligence and Mr. Hauck must still prove a common law tort claim.

1. Mr. Hauck improperly raises new arguments for the first time on appeal.

Mr. Hauck improperly raises for the first time on appeal the argument that Ms. Burns failed to uphold her statutory duties under RCW

64.06. This was not an argument presented to the trial court and is not an allegation in this Complaint. Mr. Hauck cannot offer arguments for the first time on appeal and the court should ignore these assertions. RAP 2.5(a)(3); *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996). Because this is a review of summary judgment, the court confines its review to the issues that the parties raised and the trial court considered. *Steiner v. State*, 104 Wn. App. 393, 398, 16 P.3d 655 (2001) (citations omitted).

a. RCW 64.06 does not create an independent cause of action against a real estate broker.

Even if this Court were to consider this issue, RCW 64.06.050(2) provides that "[a]ny real estate licensee involved in a real property transaction is not liable for any error, inaccuracy, or omission in the real property disclosure statement if the licensee *had no actual knowledge of the error, inaccuracy, or omission.*" (emphasis added).

To the extent Mr. Hauck bases his negligent misrepresentation claim on RCW 64.06.050(2), he must show actual knowledge, as the statute indicates. *Jackowski v. Borchelt*, 174 Wn.2d 720, 737, 278 P.3d 1100 (2012); *see also Svendsen v. Stock*, 98 Wn. App. 498, 979 P.2d 476 (1999); *review granted* 140 Wn.2d 1028, 10 P.3d 407, *reversed on other grounds* 143 Wn.2d 646 ("actual knowledge," as required before a real

estate broker may be held liable for an error, inaccuracy, or omission in a seller disclosure statement, does not encompass fact which the broker should have known).

The record is devoid of any evidence of an error in the Form 17, any evidence that Ms. Burns had knowledge of the contents of the Form 17 through review of the form or assisting the Barrs with completing the Form 17, or any evidence that Ms. Burns had actual knowledge that a statement within the Form 17 constituted an error, inaccuracy, or omission. There simply is no evidence to support a claim against Ms. Burns based on RCW 64.06.050.

Even if Mr. Hauck could show that Ms. Burns had actual knowledge of an error, inaccuracy, or omission in the Form 17, Mr. Hauck would still need to prove the remaining elements of negligent misrepresentation by clear, cogent, and convincing evidence. As discussed below, and as the trial court correctly concluded, this is a burden he cannot meet.

2. No independent cause of action exists for breach of RCW 18.86.030, Mr. Hauck must still prove the elements of his common law tort claims.

Like most statutory duties, to the extent Ms. Burns owed duties to Mr. Hauck under RCW 18.86 *et seq.* a violation of those duties would constitute evidence of the breach element of a negligence claim, but would

not establish negligence *per se* or become a separate claim. As RCW

5.40.050 provides:

A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence *per se*, but may be considered by the trier of fact as evidence of negligence ...

Thus, breach of a statutory duty is admissible, but not in itself sufficient, to prove negligence. *Estate of Templeton v. Daffern*, 98 Wn. App. 677, 684, 990 P.2d 968 (2000). However, this is exactly what Mr. Hauck attempts here, presenting a separate claim under the belief that RCW 18.86.030 creates an independent cause of action.

Mr. Hauck wrongly relies on *Jackowski*, 174 Wn.2d at 733-36, in which the Washington Supreme Court decided the issue to the contrary. The *Jackowski* Court recognized that chapter 18.86 RCW imposes duties on real estate professionals but in absence of briefing on the test set forth in *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990), the court declined to find that the statute created a cause of action:

Chapter 18.86 RCW does not indicate the creation of a new statutory cause of action, but it does state that the common law continues to apply where it is not limited or inconsistent. *See* RCW 18.86.110. Therefore, 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, 174 Wn.2d at 735 (emphasis added).

Similarly here, Mr. Hauck has not presented any argument under the *Bennett* factors that suggest the legislature intended to create an independent cause of action. Therefore, Mr. Hauck's claims must be pursued as a common law tort cause of action, i.e., fraudulent concealment and negligent misrepresentation and any alleged breach of RCW 18.86 is not sufficient in itself to prove negligence.

a. Ms. Burns did not breach any duties owing under RCW 18.86.030.

RCW 18.86.030 sets forth the duties owed by a real estate broker, regardless of the party they represent. A broker has a duty to disclose only those material facts "*known* by the broker and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the broker has not agreed to investigate." RCW 18.86.030(1)(d) (emphasis added). The subjective standard set forth in the statute explicitly rejects Mr. Hauck's argument that Ms. Burns had a duty to disclose facts that she should have known. Absent proof that Ms. Burns had actual knowledge of the defect, she did not violate her statutory duty of disclosure under RCW 18.86.030.

Mr. Hauck appears to assert that because Burns was on notice of the issue, she was required to further investigate. However, the law clearly states otherwise that unless agreed, a real estate broker owes no

duty to conduct an independent inspection of the property. RCW

18.86.030(2). RCW 18.86.030 further limits a broker's duties in that "[u]nless otherwise agreed, a broker ... owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the broker to be reliable." RCW 18.86.030(2).

Ms. Burns never undertook a duty – orally or in writing – to conduct an inspection of the Property or to investigate the source of the pet odor. Nor did she have a duty to verify the accuracy of any statements by the Barrs, or Mr. Hauck's home inspector, regarding the Property. There is no bona fide basis for Mr. Hauck to argue that Ms. Burns was negligent in not independently verifying what Mr. Hauck's home inspector said about the Property and the possible source of the urine smell.

Mr. Hauck further argues that Ms. Burns failed to exercise reasonable care when Ms. Moon inquired about the pet urine smell by stating that she had never noticed it and further claims that because Ms. Burns allegedly stated the Property was "trashed" that Ms. Burns knew or should have known where the smell emanated from. Br. of Appellant at 21-22. This again assumes that Ms. Burns should have investigated the source of the smell, or investigated the completeness of the repairs

performed at the Property, an alleged duty that Washington law clearly does not impose.

What Mr. Hauck essentially seeks to do is make real estate brokers the guarantors of the condition of a property they are selling and impose additional duties upon a listing agent even when the buyer is represented by his own agent. However, the law does not impose such a duty.

3. Ms. Burns was not negligent in obtaining or communicating false information.

Despite the wide-ranging assertions in Mr. Hauck's opening brief, conspicuously absent is any allegation that Ms. Burns *affirmatively* represented some fact to Mr. Hauck that ultimately proved to be untrue. Indeed, Mr. Hauck fails to cite the record to substantiate that Ms. Burns made any representations whatsoever about the condition of the Property. This is because Mr. Hauck never had any conversations with Ms. Burns regarding the condition of the Property. This is undisputed.

The factual premise of Mr. Hauck's claim is that Ms. Burns was silent about material facts and material defects despite her duty to speak. Mr. Hauck's claim for negligent misrepresentation fails as a matter of law on this basis alone, because silence alone can never constitute an actionable negligent misrepresentation. *Havens v. C & D Plastics, Inc.*,

124 Wn.2d 158, 180-81, 876 P.2d 435 (1994) (an omission alone cannot constitute negligent misrepresentation because the plaintiff must justifiably rely on the false information).

Further undermining his claim is the fact that Mr. Hauck repeatedly received and/or acknowledged documentation stating that Ms. Burns was making no representations about the Property's condition whatsoever. CP 55, CP 61, CP 75, CP 77, CP 81. Absent clear, cogent, and convincing evidence that Ms. Burns knowingly supplied false information to Mr. Hauck, the claim for negligent misrepresentation fails.

4. Mr. Hauck did not rely on information that Ms. Burns supplied.

To prove negligent misrepresentation, Mr. Hauck must prove by clear, cogent, and convincing evidence that he actually relied on the allegedly false statement. The overwhelming proof shows that Mr. Hauck did not rely on any information from Ms. Burns. Mr. Hauck, who was represented by his own broker, signed the REPSA wherein he contractually agreed he was not relying on any statement by Ms. Burns regarding the condition of the Property. CP 55, CP 75 ("Buyer has not relied on representations by Seller, Listing Broker, or Selling Broker").

The results of the inspection, and the urine odor, was discussed with Brick Kicker whose only recommendation was to determine the

subflooring material. CP 426. Mr. Hauck, after discussing the Inspection Report with his broker, decided what issues needed to be addressed by the Barrs. Noticeably absent from that list is anything regarding the strong smell of pet urine. CP 179. Mr. Hauck acknowledged that he made an assumption that the odor was coming from underneath the Property based on prior experience with animals in the crawl space and his assumption that the odor could not be coming from the carpet because it was new. Br. of Appellant at 7. There is no indication, and no allegation, that he relied on any information supplied by Ms. Burns to reach a conclusion regarding the condition of the Property.

If Mr. Hauck was not advised or did not understand the condition of the Property, such is a reflection on his own responsibilities and the responsibilities of his broker and home inspector, not evidence that Ms. Burns intentionally misrepresented a condition of the Property and Mr. Hauck relied on that information when moving forward with the sale.

5. Any reliance by Mr. Hauck on alleged misrepresentations was not reasonable.

Even if, for some reason, Mr. Hauck could prove Ms. Burns provided him with false or misleading information and that he relied on that information when proceeding with his purchase of the Property, he still must establish by clear, cogent, and convincing evidence that he

justifiably relied upon that information. *Condor Enters., Inc. v. Boise Cascade Corp.*, 71 Wn. App. 48, 52-53, 856 P.2d 713 (1993). "The recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying." *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998) (quoting Restatement (Second) of Torts § 552A (1977)).

The "right to rely" requirement is intertwined with the duty to further investigate once a buyer is on notice of a defect. *See Douglas*, 173 Wn. App. at 834 (once a buyer is on notice of a defect, it cannot be said that the buyer justifiably relied on any misrepresentations by the seller).

As discussed above, a property buyer is bound by facts that a reasonable inspection would disclose. *Hoel v. Rose*, 125 Wn. App. 14, 20, 22, 105 P.3d 395 (2004) (no legal right to rely on representations where buyer "had a full opportunity to inspect"); *Atherton Condo. Apartment-Owners Assn. v. Blume Dev. Co.*, 115 Wn.2d 506, 524, 799 P.2d 250 (1990). If purchasers investigate for themselves and nothing is done to prevent their investigation from being as full as they choose, they cannot say that they relied on any representations. *Atherton*, 112 Wn.2d at 525; *see also Hoel*, 125 Wn. App. at 20, 22.

Thus, Mr. Hauck's negligent misrepresentation claim against Ms. Burns fails as a matter of law. Mr. Hauck's contractual right to additional

inspections, and his failure to exercise that contractual right fully, eliminated his negligent-misrepresentation claim, just as it did in

Alejandre:

As explained, the Alejandres were on notice that the septic system had not been completely inspected but failed to conduct any further investigation and, indeed, accepted the findings of an incomplete inspection report. Having failed to exercise the diligence required, they were unable to present sufficient evidence of a right to rely on the allegedly fraudulent representations.

Alejandre, 159 Wn.2d at 690. The *Douglas* Court reached the same conclusion. *Douglas*, 173 Wn. App. at 834 (because the buyers were on notice of the defect and had a duty to make further inquiry, it cannot be said that the buyer justifiably relied on the sellers' misrepresentation).

That circumstance parallels the present case. As in *Alejandre*, an element of the claim requires proof of a right to rely by clear, cogent, and convincing evidence. *Ross*, 162 Wn.2d at 499. As in *Alejandre*, Mr. Hauck knew the inspection was less than he was contractually entitled and knew that the source of the urine odor was undetermined but could be emanating from the walls or the carpet. As in *Alejandre*, Mr. Hauck "failed to exercise the diligence required ... [and was] unable to present sufficient evidence of a right to rely[.]" Indeed, here, Mr. Hauck had even **less** right to rely than the Alejandres did because he received and read the Inspection Report that notified him of the exact defect he complains about.

It does not matter whether Hauck's inspection failed to inspect the source of the odor, Hauck had the contractual right to do so. In light of clear notice of an issue with pet excrement in the Property, Mr. Hauck completely failed to present the requisite clear, cogent, and convincing evidence that his supposed reliance on alleged misrepresentations by Ms. Burns was reasonably justified and therefore cannot sustain his negligent misrepresentation claim. This Court should affirm the trial court's grant of summary judgment to Ms. Burns on this claim.

E. The Trial Court Properly Dismissed Hauck's Claim for Violation of the Consumer Protection Act.

Mr. Hauck's alleged CPA claim is derivative of his alleged fraudulent concealment and negligent misrepresentation claims against Ms. Burns. Because Mr. Hauck cannot establish fraudulent concealment or negligent misrepresentation on the part of Ms. Burns, Hauck's CPA claim must also fail. *See, e.g., Douglas*, 173 Wn. App. at 834 (because buyers on notice of the defect it cannot be said the sellers committed an unfair or deceptive act). However, even if this Court finds that Mr. Hauck presented clear, cogent, and convincing evidence to support each element of fraudulent concealment and misrepresentation claims, his CPA claim still fails.

To establish a claim under the CPA, a plaintiff must prove five distinct 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 business or property; (5) causation. *Svendsen*, 143 Wn.2d at 553. "Whether a particular act is unfair or deceptive is reviewable as a question of law." *Potter v. Wilbur-Ellis Co.*, 62 Wn. App. 318, 327, 814 P.2d 670 (1991). An act is "unfair or deceptive" only if it had the "capacity to deceive a substantial portion of the public." *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 30, 948 P.2d 816 (1997).

1. There can be no unfair or deceptive act when Ms. Burns had no independent knowledge of the urine and feces under the carpet.

Washington courts have found liability under the CPA on the part of real estate professionals *only* when the professional had actual, independent knowledge that a representation was false. *See, e.g., Svendsen*, 143 Wn.2d 546 (sellers' real estate broker found to have violated CPA where broker failed to disclose independent knowledge of chronic drainage problems on uphill property); *Robinson v. McReynolds*, 52 Wn. App. 635, 762 P.2d 1166 (1988) (seller's agent violated CPA by misrepresenting property's income potential when agent had independent knowledge that the property had not historically generated income). Thus,

in the absence of actual knowledge that a representation is false, a CPA claim against Ms. Burns fails.

As a threshold matter, Hauck's CPA claim fails because there is no evidence to support a finding that Soleil had *actual knowledge* of any issues with pet excrement under the carpet. Ms. Burns testified that she never personally observed any signs related to pet urine. CP 397, 10:23-24. Ms. Burns had only been to the Property one time prior to it being "picture ready." During that visit, the interior was being painted and tarps were covering the floor. CP 384, 61:1-8. The Barrs never made any representations to Ms. Burns regarding the condition of the Property that would have been shielded from disclosure to Hauck. CP 384, 62:18-21.

Mr. Hauck bases this claim on the same argument that defeats his other claims – that because the Barrs allegedly concealed the excrement under the carpet, Ms. Burns must have had knowledge of the concealment, and is therefore engaging in a deceptive act or practice. Mr. Hauck fails to provide the missing link – how it can be presumed that Ms. Burns knew of information that Mr. Hauck claims the Barrs had. It is not enough to simply declare that Ms. Burns is liable for failing to disclose information or somehow concealed the defect, absent a showing that Ms. Burns actually had that information.

2. There is no public interest impact arising out of this dispute.

The purpose of the CPA is to "protect the public." RCW 19.86.920. "[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest." *Michale v. Mosquera-Lacy*, 165 Wn. 2d 595, 604-05, 200 P.3d 695, 700 (2009), *citing, Hangman Ridge*, 105 Wn.2d 778, 790, 719 P.2d 531 (1986).

To show that that an act impacts the public, a plaintiff must show that (1) the alleged acts were "part of a pattern or generalized course of conduct," and (2) "there is a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff." *Eifler v. Shurgard Capital Management Corp.*, 71 Wn. App. 684, 697, 861 P.2d 1071 (1993). *See also, Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 52, 686 P.2d 465 (1984) (plaintiff must show a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act's being repeated).

Mr. Hauck has not even alleged any of the factors determinative of whether the public interest element of a CPA claim has been met. A misrepresentation to only one person, for instance, could deceive many if communicated in a standard form contract or to a salesperson who later

relays it to many individual buyers. *Henry v. Robinson*, 67 Wn. App. 277, 290-291, 834 P.2d 1091 (1992). Generally, however, disputes between real estate professionals and property buyers are private rather than public. *See, e.g., Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 702 (1988).

In a case arising out of a private dispute, like this one, a plaintiff may prove the public-interest-impact element by proving a likelihood that “additional plaintiffs have been or will be injured in exactly the same fashion.” *Hangman Ridge*, 105 Wn.2d at 791. Post-*Hangman Ridge* reported decisions have correctly applied the factors in answering the central question whether additional plaintiffs would be injured in exactly the same fashion. *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 847, 942 P.2d 1072 (1997) (public-interest impact turned on proof of “dozens, if not hundreds” of other, identical wrongs); *Sing*, 83 Wn. App. at 66 (defendant's procedures expressly permitted misconduct to recur; public-interest impact factors showed other consumers would suffer identical harm). The very purpose of the court's consideration of the factors is to decide whether additional plaintiffs have been or will be injured in exactly the same fashion.

Here, there is simply no evidence that additional plaintiffs could be injured in the same fashion that Mr. Hauck was allegedly injured. There is

no evidence of "identical wrongs" by Ms. Burns. Perhaps most importantly, this CPA claim relates not to a general advertisement that misrepresented the condition of the Property, but to alleged statements and conduct during the negotiation of a real estate sale, unique to that transaction. There is no public interest impact. Accordingly, no "deceptive act" occurred. Because no basis exists to establish a CPA claim, the trial court properly dismissed Mr. Hauck's claim.

F. Mr. Hauck is Not Entitled to Contractual Attorneys' Fees From the Ms. Burns.

Mr. Hauck requests attorneys' fees and expenses pursuant to his contract with the Barrs. Br. of Appellants at 26. However, Ms. Burns is not a party to the contract and no fees should be granted against Ms. Burns. *See Boguch v. Landover Corp.*, 153 Wn. App, 595, 224 P.3d 795 (2009) ("[i]f a party alleges breach of a duty imposed by an external source, such as a statute or the common law, the party does not bring an action on the contract, even if the duty would not exist in the absence of a contractual relationship."). Negligent and fraudulent misrepresentation claims against real estate professionals rely on common law duties and statutory duties of the real estate agents, irrespective of the listing or agency agreements. *Jackowski*, 174 Wn.2d 720; *Boguch*, 153 Wn. App. at 615-618. Accordingly, claims against a real estate broker for violations of

common law duties are independent tort claims, and the prevailing party is not entitled to attorneys' fees thereon based upon a contractual agency agreement. *Boguch*, 153 Wn. App. at 615-618.

Mr. Hauck's fraudulent concealment, negligent misrepresentation, and CPA claims were not "on the contract." While the contractual relationship between Mr. Hauck and the Barrs may have given rise to the claims, the claims against Ms. Burns were based on common law and statute, not the contract. Thus, Hauck is not entitled to an award of fees against Ms. Burns.

V. ATTORNEY FEES ON APPEAL

Ms. Burns requests an award of attorney fees and costs on appeal, pursuant to RAP 18.1 and 18.9.

VI. CONCLUSION

The trial court dismissed Mr. Hauck's fraudulent concealment claim based on the well settled principal that, in regards to residential real property, a buyer has his or her own independent duty to investigate the property before purchase. A buyer is held to the facts that would be disclosed by a diligent inspection and cannot later bring a claim for damages based on defects that would have been disclosed through that inspection. The law retains a duty on a buyer to beware, to inspect, and to question.

Mr. Hauck's failure to exercise due diligence after receiving the Inspection Report, which gave him notice of the very defect he now asserts resulted in damages, bars any tort recovery against Ms. Burns. The overwhelming case authority reaffirms that result.

RESPECTFULLY SUBMITTED this 25th day of April, 2016.

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Of Attorneys for Respondents Soleil Real Estate of
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CERTIFICATE OF SERVICE

The undersigned declares under penalty or perjury under the laws of the State of Washington, that on the below date, I caused to be served, via First Class Mail, a true and accurate copy of Brief of Respondents Soleil Real Estate and Burns to the following:

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