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No. 62034-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SHU-CHIN WANG and WEN-SHYAN WANG,
husband and wife; and MOUNTLAKE INVESTMENT, LLC,
a Washington limited liability company,

Appellants,

vs.

BUSINESS PLANS & STRATEGIES, INC., a Washington
corporation; and ROSE M. CHISHOLM and TONY CHISHOLM,
husband and wife, and their marital community,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JAY WHITE

REPLY BRIEF OF APPELLANTS

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I. REPLY ARGUMENT

A. “Deliver” Does Not Mean “Make Available,” Even If A Real Estate Broker Says it Does.

Respondent sellers expressly represented under paragraph 12(b) of the purchase and sale agreement (PSA) that they had delivered “all material documents in seller’s possession or control regarding the operation and condition of the property.” (Ex. 50, ¶ 12(b); Ex. 52) In fact, sellers *delivered* to appellants only the \$175,000 DOM bid/report, leaving in their files the \$620,000 Tatley-Grund report and estimate that indisputably dealt with the “condition of the property.” Sellers’ failure to affirmatively disclose the Tatley-Grund report and estimate also breached its promise that it was “not aware of any concealed material defects in the Property except as disclosed to Buyer in writing during the Feasibility Period.” (Ex. 50, ¶ 12(h))

Respondents assure this court that these failures, which undermined Buyer’s examination of the property (App. Br. 21-26), were “industry standard,” based on the testimony of their broker expert Arvin Vanderveen that the term “deliver” in the PSA really meant “make available.” (5/20 RP 32-33, 68, 70-71) But they cite nothing in support of that proposition but their expert’s own

testimony. (Resp. Br. 16) It is true that the only case cited by respondent for the admissibility of such “expert” testimony states that “[t]rade usage and course of dealing are relevant to interpreting a contract and determining the contract’s terms.” ***Puget Sound Financial, LLC v. Unisearch, Inc.***, 146 Wn.2d 428, 434, 47 P.3d 940 (2002) (*quoted at* Resp. Br. 32) But expert testimony cannot be used to make a word mean something it does not; “black” does not mean “white” even if an “expert” is willing to testify that it does.

It was improper for the trial court to allow the jury to consider “expert” testimony on the meaning of the term “delivered” in excusing respondents’ conduct under the PSA. “Experts have a proper (if confined) role in litigation, but it is not to supply parol evidence to vary or contradict the terms of unambiguous contracts.” ***Dynegy Midstream Services, Ltd. Partnership v. Apache Corp.***, ___ S.W.3d ___, 2009 WL 2667507 (Tex. Aug. 28, 2009). “Absent any need to clarify or define terms of art, science, or trade, expert opinion testimony to interpret contract language is inadmissible.” ***TCP Industries, Inc. v. Uniroyal, Inc.***, 661 F.2d 542, 549 (6th Cir. 1981); see e.g. ***Kelly v. Aetna Casualty & Surety Co.***, 100 Wn.2d

401, 407, 670 P.2d 267 (1983) (expert witness testimony not necessary to define the term “owner” in an insurance contract).

And the court should be clear that the import of Mr. Vanderveen’s testimony here was indeed that “black” means “white.” The consequence of his “interpretation” of the sellers’ otherwise clear obligation under the parties’ agreement to *deliver* “all material documents” cannot be underestimated, especially given the trial court’s erroneous instruction to the jury that the parties were bound by their brokers’ conduct, contrary to RCW 18.86.090 and 100. (App. Br. 32-33) Sellers’ counsel relied upon that testimony in closing argument, with explicit reference to Instruction No. 6, in arguing that appellants were responsible for their broker’s conduct and the “standard” for “delivery” of critical documents in the commercial real estate market. (5/27 RP 130-31)

Respondents attempt to evade the consequence of these statutes to the court’s erroneous Instruction No. 6, drafted and given over *all* parties’ objection, by proposing for the first time on appeal a supposed distinction between “notification” and “notice” based on *Restatement (Third) of Agency* § 5.01 and an exegesis on when “verbal acts” are not hearsay. (Resp. Br. 38-40)

Although it is difficult to follow the thrust of respondents' argument, it cannot be that respondent sellers did not intend appellants to rely on their representations of the condition of the property in marketing the Building. Under the parties' contract, in fact, appellants clearly had the right to and did rely on the respondent sellers' representations and disclosures in fulfilling their due diligence. (App. Br. 25-26)

Respondents' argument that appellants were not prejudiced by the court's evidentiary and instructional errors because Instruction No. 6 allowed appellants to argue that the knowledge of property manager Wayman¹ could be imputed to respondents (App. Br. 42) in fact demonstrates why the trial court erred in refusing to give an instruction based on the statutes limiting a principal's responsibility for the knowledge and conduct of its agent in a real estate transaction. The court at trial, and respondents on appeal,

¹ Earl Wayman was the GVA Kidder Matthews property manager who obtained and faxed to respondent Tony Chisholm the \$175,000 DOM siding bid, two days before Mr. Chisholm caused the bid to be posted online when he put the Building on the market again through the brokerage side of GVA Kidder Matthews. (5/15 RP 113; Exs. 44, 45) Mr. Wayman had also been responsible for obtaining the Tatley-Grund estimates of repair costs of \$620,000 to \$653,000 a month earlier. (5/15 RP 68; 5/12 RP 156; Exs. 35, 38) As Mr. Wayman exclaimed in his fax cover sheet forwarding the DOM bid to Mr. Chisholm: "Tony – This is much better!" (Ex. 44)

utterly failed to distinguish between the parties' agents in the sale of the Building and respondent's liability for its *managing* agents' knowledge and conduct. (App. Br. 32-34)

Black is not white, and making critical documents available is not the same as delivering them. The result in this case, premised on the fiction that they were the same, compels reversal.

B. Touting A Low Partial Repair Bid As A Marketing Tool While Burying A Report And Estimate Documenting Far More Serious Structural Damage In Management Files Constitutes Bad Faith And Fraudulent Concealment.

Even if respondents could have complied with their obligations under the PSA by "making available" their property management files containing information about the structural deficiencies in the Building, that is indisputably not what they did. Instead, respondent affirmatively used one bid for partial repairs as a marketing tool, delivering it to the appellants as part of a claimed "due diligence" disclosure (Ex. 52), while failing to deliver similar reports and estimates. Such partial disclosures violate both the duty of contractual parties to act in good faith toward one another and constitute fraudulent concealment. (App. Br. 20-29)

Respondents do not address, much less distinguish, many of the cases appellants rely upon for these propositions, including

Weaver v. Fairbanks, 10 Wn. App. 688, 519 P.2d 1403 (1974) (App. Br. 21), **Carlile v. Harbour Homes, Inc.**, 147 Wn. App. 193, 194 P.3d 280 (2008), *rev. granted in part*, 166 Wn.2d 1015 (2009) (App. Br. 21-22), **Frank Coluccio Constr. Co., Inc. v. King County**, 136 Wn. App. 751, 150 P.3d 1147 (2007) (App Br. 22), and **Petersen v. Turnbull**, 68 Wn.2d 231, 412 P.2d 349 (1966) (App. Br. 29). Further, respondents misplace their reliance on **Badgett v. Sec. State Bank**, 116 Wn.2d 563, 807 P.2d 356 (1991) to excuse their misconduct. (Resp. Br. 23-26)

In **Badgett**, the Court rejected the argument that a bank could be required to *renegotiate* the terms of its loan because “the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract.” **Badgett**, 116 Wn.2d at 569. But appellants do not ask that the PSA be rewritten; they only argue that the agreement as written requires, in good faith, that like be treated as like in respondent sellers’ disclosures. The duty to act in good faith indisputably exists “in relation to performance of a specific contract term,” **Badgett**, 116 Wn.2d at 570 – in this case, respondents’ obligation to deliver to appellants all material documents regarding the condition of the property and

respondents' representation that it was not aware of any concealed material defects except as disclosed in writing. (Ex. 50, ¶¶ 12(b), (h))

Given their deliberate conflation of "delivery" and "availability," it is especially ironic that respondents go on to distinguish between "representations" and "warranties" in parsing the parties' responsibilities to act in good faith under the PSA. (Resp. Br. 26-27) "The difference in legal effect between a warranty and a representation is that the falsity in a warranty in any particular is fatal to a recovery upon the policy, whilst a representation to have that effect must refer to some fact material to the insurance, and it must be false or fraudulent." **Miller v. Commercial Union Assur. Co.**, 69 Wash. 529, 535, 125 Pac. 782 (1912) (insurance policy voided by misrepresentation of material fact concerning nature of risk); see **Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Development Co.**, 115 Wn.2d 506, 535, 799 P.2d 250 (1990) (representations of workmanship or materials created express oral warranty).

property and respondents' representation that it was not aware of any concealed material defects except as disclosed in writing. (Ex. 50, ¶¶ 12(b), (h))

Given their deliberate conflation of "delivery" and "availability," it is especially ironic that respondents go on to distinguish between "representations" and "warranties" in parsing the parties' responsibilities to act in good faith under the PSA. (Resp. Br. 26-27) "The difference in legal effect between a warranty and a representation is that the falsity in a warranty in any particular is fatal to a recovery upon the policy, whilst a representation to have that effect must refer to some fact material to the insurance, and it must be false or fraudulent." **Miller v. Commercial Union Assur. Co.**, 69 Wash. 529, 535, 125 Pac. 782 (1912) (insurance policy voided by misrepresentation of material fact concerning nature of risk); see **Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Development Co.**, 115 Wn.2d 506, 535, 799 P.2d 250 (1990) (representations of workmanship or materials created express oral warranty).

Respondents cannot seriously contend that the “condition of the property” was not material. The trial court’s error in taking the fraudulent concealment claim from the jury (CP 1206-08) was exacerbated by its instruction to the jury that the court had dismissed the negligent misrepresentation claims. (CP 1021; 5/27 RP 28) The jury had no reason to know the negligent misrepresentation claims were in the case until the judge informed them they were dismissed; this comment on the evidence was double prejudicial because it was made only after the court allowed respondents to submit extensive evidence of the supposed propriety of their conduct based on the existence of those claims. (App. Br. 34-36)

Nor do respondents effectively distinguish *Liebergesell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980) (App. Br. 23, Resp. Br. 26), *Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 393 P.2d 287 (1964) (App. Br. 28, Resp. Br. 31-32), or *Ikeda v. Curtis*, 43 Wn.2d 449, 261 P.2d 684 (1953) (App. Br. 24, Resp. Br. 31). In each of these cases, a party with superior knowledge attempted to get away with selling a “pig in the poke” by withholding material information from the party with whom he was contracting, disclosing

just enough information to make the other party believe full disclosure had been made. And in each instance, the courts prevented this injustice, recognizing contracting parties' responsibilities to deal with one another in good faith. These cases also demonstrate that, contrary to respondents' argument (Resp. Br. 28 n. 7), the duty not to prevaricate about the condition of property or the nature of an investment does not run only to residential home buyers.

Whether cast as the contractual duty of good faith or tort liability for fraudulent concealment, the courts of this state have never allowed a party to rely on partial disclosure to evade its responsibilities to treat the other party to its contract fairly. Touting a low partial repair bid as a marketing tool while burying a report and estimate documenting far more serious structural damage in management files constitutes bad faith and fraudulent concealment.

II. CONCLUSION.

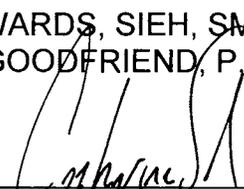
Respondents affirmatively misrepresented the cost of repairing the commercial building they sold to appellants, hiding in their management files estimates of the cost for critical structural repairs that were over three times the bid for a fraction of the

needed repairs that they posted on the website marketing the property. Respondents then justified their deception to the jury by having a broker testify as an “expert” that the obligation in the sale agreement to “deliver” all material documents related to the condition of the property really meant that documents had to be “made available” in respondents’ files. No legal ledgermain can change these facts, and neither law nor equity can countenance respondents being absolved of the consequences of their misconduct in a trial that was fraught with instructional and evidentiary error. For the reasons set out in the opening brief and this reply, this court should reverse, remand for trial before a properly instructed jury that considers only admissible evidence, and award appellants their fees on appeal.

Dated this 28th day of October, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: _____


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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 28th, 2009, I arranged for service of the Reply Brief of Appellants, to the court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 28th day of October, 2009.



Carrie O'Brien