

No. 74353-8-I

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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JONATHAN DEEGAN and ALICE O'GRADY,

Plaintiffs/Appellants,

v.

WINDERMERE REAL ESTATE/CENTER-ISLE, INC., a Washington  
corporation; and ACORN PROPERTIES, INC. dba RE/MAX ACORN  
PROPERTIES, INC., a Washington corporation,Defendants/Respondents.

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**APPELLANTS' OPENING BRIEF**

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## I. INTRODUCTION

Plaintiffs Jonathan Deegan and Alice O'Grady filed a class action complaint against Defendants Windermere Real Estate/Center-Isle, Inc. ("Windermere") and Acorn Properties, Inc., d/b/a RE/MAX Acorn Properties Inc. ("RE/MAX Acorn") in November 2014. Island County law requires sellers and their agents to give prospective home purchasers specific, detailed disclosures concerning engine noise from tactical military jet aircraft facilities, including a noise zone map. Plaintiffs allege that Defendants' failure to provide these disclosures violates Washington's Consumer Protection Act, RCW 19.86, *et seq.* (hereinafter "CPA").

Among other things, the required disclosure identifies specific "active airport facilities" and "tactical military jet aircraft facilities," and shows zones for different levels of expected noise on a map that must be given to potential purchasers. The required disclosure also identifies locations where "field carrier landing practice" will be "routinely" conducted, and discloses that "the noise from a single flyover of a military jet may exceed the average noise level depicted by the airport noise zones and may exceed 100 (one-hundred) [decibels]." Indeed, an auditory study found noise readings at several Whidbey locations that exceeded *134 decibels*. These extraordinarily high noise levels may result in adverse

health effects, impair learning in children, and increase the risk of hospitalization or death from cardiovascular disease and stroke.

The only disclosure Defendants provided was an industry-crafted disclosure, based on a separate code provision, which stated only that “the premises may be exposed to a significant noise level as a result of airport operations,” which might result in “restrictions on construction of property.” Furthermore, Defendants only provided this disclosure after the property was already under contract and either at or immediately prior to closing, well beyond the time that the information could be useful in making a purchase or price decision. The Court simply had no factual basis on which to conclude a reasonable buyer could have been on notice of the intense and disruptive noise to which Plaintiffs and the Class are now subjected.

Recent years have seen increased activity at the Naval Air Station Whidbey Island, including the introduction of a new, much noisier, aircraft, the EA-18G “Growler jet.” The introduction of the Growlers led community members to question why they had never been given notice of such disruptive activity at the time they purchased their homes. In response, Island County authorities investigated the matter and discovered that Defendants’ disclosures did not, in fact, comply with the law, and required them to correct their disclosures. This order came too late for

Plaintiffs and the Class, who bring this action to recover for the economic injuries they suffered in connection with Defendants' unfair and deceptive behavior.

The Superior Court dismissed this case on the pleadings. The court erred in several respects. First, the Superior Court violated the well-established principle that on a motion to dismiss pursuant to CR 12(b)(6), the court construes the allegations of the complaint in favor of the pleader. Indeed, the Superior Court treated the motion to dismiss hearing as a bench trial, and made its own *findings of fact*. Based on those "findings," the court concluded that the entire community knew about the noise defect, that plaintiffs should have done their own investigation, and that Plaintiff Deegan should have become aware of the problem a few months after he purchased his home. The Superior Court had no evidentiary record on which to base such "findings," which are, in fact, refuted by the well-pled allegations of the complaint.

Second, the Superior Court erred in ruling that the CPA includes a "duty of inquiry" that Plaintiffs must satisfy to state a claim. This requirement appears nowhere in the CPA, a statutory remedy that was enacted precisely to expand consumer protections beyond the common law. The CPA asks whether the alleged behavior has the capacity to deceive a substantial portion of the public, using an objective "reasonable

consumer” test. It does not ask whether the plaintiffs themselves were deceived. The court’s ruling is fundamentally inconsistent with this standard. Indeed, the CPA serves to remedy misrepresentations of defects that are not “easily discoverable” by the reasonable person, *at the time the representation is made*. The CPA puts the duty on the *seller* to be accurate and honest in its dealings. It does not penalize a buyer for the misleading behavior of the seller. Allowing the Superior Court’s ruling to stand would return consumers to the days of “*caveat emptor*.”

Third, the Superior Court erred in ruling that the statute of limitations has run as to Plaintiff Deegan’s claims. Again, the Superior Court made its own findings of fact as to when Mr. Deegan “reasonably should have become aware of the frequency and loudness of airport operations,” which finding had no basis in the allegations of the complaint.

The order of the Superior Court should be reversed and the case remanded for further proceedings.

## **II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO**

### **Assignment of Error No. 1**

The trial court erred in ruling that the Washington CPA imposes a duty of inquiry.

Issues Pertaining to Assignment of Error No. 1

Whether the trial court correctly applied the objective reasonableness standard for false or misleading conduct.

Whether the CPA requires a consumer to investigate a misleading act or omission where the truth is not easily discoverable at the time of the act or omission.

**Assignment of Error No. 2**

The trial court erred by making factual findings in Defendants' favor, instead of construing all well-pleaded facts in favor of Plaintiffs.

Issues Pertaining to Assignment of Error No. 2

Whether the trial court erred when it found that a reasonable buyer would have inquired of his neighbors, in the absence of any discovery or other evidence to support such finding.

Whether the trial court erred when it found that the community as a whole knew about the alleged jet engine noise in the area.

**Assignment of Error No. 3**

The trial court erred in ruling that the statute of limitations as to Plaintiff Deegan has run.

Issues Pertaining to Assignment of Error No. 3

Whether Plaintiff Deegan's cause of action under the CPA did not begin to run until he suffered injury.

Whether the trial court erred when it found that Plaintiff Deegan should have discovered the jet engine noise soon after purchasing his home.

### **III. STATEMENT OF THE CASE**

Plaintiffs Jonathan Deegan and Alice O'Grady purchased homes on Whidbey Island, in Island County, in 2006 and 2011, respectively. CP 70 (¶¶ 9, 10). Defendants were the listing offices and agents for homes Plaintiffs purchased. CP 70 (¶¶ 11, 12). Island County law requires that sellers of property provide a specific written disclosure, set out explicitly in the Code, of severe jet noise from US Navy airplanes in the area. CP 71 (¶¶ 16-23). Island County Code § 9.44.050, titled "Disclosure Statement," provides:

No person shall sell, lease, or offer for sale or lease any property within an airport environs mapped impacted areas unless the prospective buyer or lessee has been given notice substantially as follows: TO: The property at \_\_\_\_\_ is located within airport environs mapped impacted area. There are currently five (5) active airport facilities in Island County. The Oak Harbor Airpark, the South Whidbey Airpark, and the Camano Airpark are general aviation facilities and are identified on the attached map. Ault Field and OLF Coupeville are tactical military jet aircraft facilities and are also identified on the attached map. Both Ault Field and OLF Coupeville are used for field carrier landing practice (FCLP)

purposes. Practice sessions are routinely scheduled during day and night periods.

Property in the vicinity of Ault Field and OLF Coupeville will routinely experience significant jet aircraft noise. As a result airport noise zones have been identified in the immediate area of Ault Field and OLF Coupeville. Jet aircraft noise is not, however, confined to the boundaries of these zones.

Additionally, the noise generated by the single flyover of a military jet may exceed the average noise level depicted by the airport noise zones and may exceed 100 DBA.

More specific information regarding airport operation and aircraft noise can be obtained by calling the Community Planning Liaison Office at NAS Whidbey Island and the Island County Planning and Community Development Department.<sup>1</sup>

The Code expressly states the legislative purpose of this disclosure requirement:

The Board of County Commissioners of Island County has considered, among other things, the character of the operations conducted and proposed to be conducted at airports within Island County, the current uses of surrounding property and the uses for which it is adaptable; the Board of County Commissioners finds:

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<sup>1</sup> CP 87-88 (emphasis added). The attached map allows a buyer to identify the property's proximity to the aircraft facilities. CP 88.

- A. There exist airports within Island County whose operations may impact the health, safety and general welfare of the citizens of Island County.
- B. The purpose of this chapter is to protect the public health, safety and general welfare by providing for the full disclosure of the noise associated with the operation of aircraft from the existing airports.

CP 85 (Island County Code 9.44.010 (“Legislative intent”)).

Defendants failed to provide the legally required disclosure, or the required map. CP 68, 70 (¶¶ 6, 9, 10). Instead, Defendants only supplied a form created in 2001 by a real estate industry group, the Northwestern Multiple Listing Service (“MLS”), called Form 22W, based on a different code provision:

The Property is located within an Airport Noise Zone 2 or 3 Impacted area. Persons on the premises may be exposed to a significant noise level as a result of airport operations. Island County has placed certain restrictions on construction of property within airport noise zones. Before purchasing or leasing the above property, you should consult the Island County Noise Level Reduction Ordinance to determine the restrictions which have been placed on the property, if any.

CP 73-74 (¶¶ 21-23).

The two disclosures are as different as night and day. Defendants' disclosure contains none of the specificity about the decibel-level of the noise, not just from "airport operations," but from military jets that one could expect to hear "routinely," "day and night."<sup>2</sup> The noise of a *single* jet could exceed 100 decibels, and indeed they have. Defendants' industry form fails to mention decibel levels at all. It is not just noise from planes somewhere in the sky, as Defendants' disclosure suggests: it is noise from takeoff and landing, which are particularly noisy.<sup>3</sup> The emphasis of Defendants' disclosure is not on how disruptive the noise will be, but on its implications for "restrictions on construction of property," which Island County Code Section 9.44.050 does not even mention.<sup>4</sup>

Defendants moved to dismiss pursuant to Civil Rule 12(b)(6). First, they argued that Defendants committed no unfair or deceptive act under the CPA, because (a) Form 22W discloses some airport noise, and (b) Plaintiffs failed to reasonably investigate Island County Code 9.44.050 and the Code itself. *See* CP 52. Second, Defendants argued that the disclosure forms do not constitute matters affecting the public interest. CP 53. Third, Defendants argued that Plaintiffs failed to allege that

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<sup>2</sup> *See* CP 72-73 (¶ 19).

<sup>3</sup> CP 68 (¶ 6); CP 72 (¶ 19).

<sup>4</sup> CP 68, 69, 73, 74 (¶¶ 2, 6, 7, 21, 22, 23); CP 48-51 (Dennett Decl., Ex. 1 & 2).

Defendants had actual knowledge of any error, inaccuracy, or omission in the disclosure statement, and thus failed to state a claim under the CPA.

CP 53. Last, Defendants argued that the statute of limitations had run for Plaintiff Deegan.

Ruling on the motion to dismiss, the Superior Court made several “findings”:

The disclosure statements provided by Defendants on Form 22W did not provide the Code Section 9.44.050 disclosure statement required by the county in 1992.

The Form 22W that was provided to plaintiffs was a generic airport notice indicating a significant noise level as a result of airport operations. However, it did disclose that (i) the subject property was within Airport Noise Zone 2 or 3 impacted area; (ii) persons on the premises may be exposed to significant noise level as a result of airport operations, and (iii) before purchasing the property, the buyer should consult the Island County Noise Level Reductions Ordinance.

Plaintiffs, by receipt of Form 22W, were put on notice of a “defect” in the form of possible extreme noise levels that could be present at the location of the subject property.

This noise “defect” was known by the entire community and it would not be “fruitless” for plaintiffs to have done reasonable investigation including, for example, knocking on doors of nearby residents or asking around to obtain further knowledge

about the frequency and loudness of the noise.

Plaintiff Jonathan Deegan purchased his home in 2006. He reasonably should have become aware of the frequency and loudness of the airport operations no later than a few months after he took ownership.

CP 2. Based on these “findings,” the Court then concluded:

Based on *Douglas v. Visser*, 173 Wn. App. 823 (2013), the plaintiffs had a legal duty to investigate the extent of the significant noise level disclosed in the Form 22W. Once plaintiffs have been put on notice of the potential defect, no valid Consumer Protection Act claim can be based on that defect not being disclosed.

The statute of limitations as to Plaintiff Deegan has run.<sup>5</sup>

CP 2.

The Superior Court dismissed the case, without granting leave to amend. CP 3 (Order at 3). Plaintiffs timely appealed.

#### IV. ARGUMENT

##### A. Standard of Review.

This Court reviews *de novo* a trial court's order granting a

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<sup>5</sup> At the hearing, the Superior Court concluded, “...what we have here is an outside defect that is known to the entire community and broader than that, and what reasonable further inquiry I just cannot imagine a scenario where someone in a manner of either a couple of knocking on doors or chamber or anybody else just wandering around the community for a very short period of time couldn’t either firsthand experience the so-called defect or find people that would give them some knowledge about that.” RT at p. 42:3-11.

CR 12(b)(6) motion to dismiss.<sup>6</sup> The court “accept[s] as true the allegations in a plaintiff’s complaint and any reasonable inferences therein.”<sup>7</sup> A court may dismiss a complaint under CR 12(b)(6) only if it concludes that the complaint alleges no facts that could justify recovery.<sup>8</sup> Indeed, “any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff’s claim.”<sup>9</sup> Civil Rule 12(b)(6) motions should be granted “sparingly and with care” and “only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.”<sup>10</sup>

**B. The Trial Court Erred In Ruling That The Washington CPA Imposes A Duty Of Inquiry on the Consumer.**

The CPA has long served to remedy a wide range of unfair and deceptive acts and practices in the marketplace that common law remedies do not reach. The CPA recognizes that in a broad range of transactions, merchants know more about what they are selling than consumers know about what they are buying. Imposing a “duty of inquiry” on the

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<sup>6</sup> *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781 (1988).

<sup>7</sup> *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

<sup>8</sup> *Wright v. Jeckle*, 104 Wn. App. 478, 481, 16 P.3d 1268 (2001).

<sup>9</sup> *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978).

<sup>10</sup> *Hoffer*, 110 Wn.2d at 421 (quoting 5 C. Wright & A. Miller, *Federal Practice* § 1357, at 604 (1969)).

consumer, even in situations like this one where the seller has breached a *legal obligation* to disclose, would reduce the CPA to just another name for a common law fraud claim. Such a holding is contrary to the letter and spirit of the CPA, renders the disclosure requirement meaningless, and it must be reversed.

1. The CPA Uses an Objective, “Reasonable Consumer” Test of Unfair and Deceptive Behavior.

The Washington legislature enacted the CPA in 1961, to protect the public from “unfair or deceptive acts or practices in the conduct of any trade or commerce.”<sup>11</sup> Its purpose is to “protect the public and foster fair and honest competition.”<sup>12</sup> The CPA reflects a legislative determination that common law remedies did not sufficiently protect consumers from unfair and deceptive acts and practices.<sup>13</sup> The legislature amended the CPA to provide a private right of action in 1971, to further serve the remedial purposes of the CPA.<sup>14</sup> The purpose of the CPA is to replace the

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<sup>11</sup> RCW 19.86.020.

<sup>12</sup> *Id.*

<sup>13</sup> *See Note, Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 Harv. L. Rev. 1621, 1621 n.1 (1983).

<sup>14</sup> *Lightfoot v. MacDonald*, 86 Wn.2d 331, 333, 544 P.2d 88 (1976).

outmoded standard of “*caveat emptor*” with a standard of fair and honest dealing.<sup>15</sup>

The legislature modeled the CPA on the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (“FTC Act”). Such state statutes are often called “Little FTC Acts.”<sup>16</sup> The CPA was among the first state consumer protection statutes to describe illegal conduct in substantially the same language as the FTC Act. The CPA expressly states that courts should construe its language in accordance with the FTC Act and final orders of the Federal Trade Commission.<sup>17</sup> Washington courts have

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<sup>15</sup> See generally Reed, Consumer Protection in Washington: An Overview, 10 Gonz. L. Rev. 391 (1975); *Hangman Ridge Training Stable, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 783-85, 719 P.2d 531 (1986).

<sup>16</sup> See *Hangman Ridge*, 719 P.2d at 534 (“[i]n the 1950’s and 1960’s, individual states began to enact consumer protection laws. These acts were generally modeled after section five of the Federal Trade Commission Act (codified in 1938 as 15 U.S.C. § 45(a)(1)), which was adopted by Congress to protect United States citizens against unfair trade practices.”).

<sup>17</sup> RCW 19.86.920 provides:

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

consistently followed federal precedent in construing and applying the CPA.<sup>18</sup>

The FTC Act has always defined deception broadly, and does not require that the *plaintiff* be deceived, only that the act or practice has the capacity to deceive a *reasonable consumer*.<sup>19</sup> Activity can violate the FTC Act even where the plaintiff later commences an inquiry and learns the truth of the matter.<sup>20</sup> Washington law is no different: an act or practice may still be deceptive even if the seller corrects or clarifies the matter at a later date.<sup>21</sup> The plaintiff does not have to prove that the deceit was

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<sup>18</sup> See *Blewett v. Abbott Labs.*, 86 Wn. App. 782, 787, 938 P.2d 842 (1997); *Short v. Demopolis*, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984).

<sup>19</sup> See *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009).

<sup>20</sup> See *Marietta Mfg. Co. v. FTC*, 50 F.2d 641, 642 (7th Cir. 1931) (finding that seller could not defend on grounds that purchasers of article knew of falsity of representation); *Charles of The Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944) (“The important criterion is the net impression which the advertisement is likely to make upon the general populace”); *In re Bristol-Myers Co.*, 102 F.T.C. 1325, 1975 F.T.C. LEXIS 218, \*82-83 (finding that the critical issue is not whether Federal Trade Commission is misled by the commercial, but whether general viewing public, including credulous and gullible members, might be misled); *Carter Prod., Inc. v. FTC.*, 186 F.2d 821, 824 (7th Cir. 1951) (finding that FTC Act is violated if advertising induces first contact through deception, even if buyer later becomes fully informed before entering contract). *FTC v. Debt Sol., Inc.*, Case No. C06-298JLR, 2006 U.S. Dist. LEXIS 34403, \*9 (W.D. Wash. Apr. 3, 2006) (finding telemarketers’ script, which made specific, unrealistic claims for debt consolidation plans, “likely to mislead consumers”).

<sup>21</sup> *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) (“[T]he public is not under any duty to make reasonable inquiry into the truth of advertising. The Federal Trade Act is violated if it induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract”); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1046 (C.D. Cal. 1999); *In the Matter of MacMillian, Inc.*, 96 F.T.C. 208, 1980 FTC LEXIS 33, \*185 (1980).

intentional, or that he or she relied on the unfair or deceptive practice, only that the conduct has the capacity or tendency to deceive.<sup>22</sup>

2. Violation of the CPA.

To prevail on a CPA claim, a plaintiff must prove: (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) which causes injury to the party in his business or property, and (5) which injury is causally linked to the unfair or deceptive act. This case involves the first requirement, and specifically, what allegations are sufficient to support a claim of an unfair or deceptive act at the pleading stage.

Whether conduct as a whole gives rise to a claim under the CPA is a question of law, but only if the underlying facts are not in dispute.<sup>23</sup>

Whether a disclosure is false and misleading almost always requires an examination of the factual context, and whether an act or practice has the capacity to deceive is a question of fact.<sup>24</sup> For example, in *McRae v.*

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<sup>22</sup> *State v. Ralph Williams' N. W. Chrysler Plymouth*, 87 Wn.2d 298, 317, 553 P.2d 423 (1976).

<sup>23</sup> *Leingang v. Pierce Cty. Med. Bureau*, 131 Wn.2d 133, 149-50, 930 P.2d 288 (1997); *Smale v. Celco P'ship*, 547 F. Supp. 2d 1181, 1188 (W.D. Wash. 2008).

<sup>24</sup> *Jackowski v. Borchelt*, 174 Wn.2d 720, 737-39, 278 P.3d 1100 (2012) (reversing summary judgment of fraud and fraudulent concealment claim for buyers where there were material questions of fact as to whether the fill material would have been discovered in a reasonable inspection); *Hangman Ridge*, 105 Wn.2d at 785 (stating that an unfair or deceptive act or practice need not be intended to deceive; it need only have “the capacity to deceive a substantial portion of the public”); *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 226-27, 135 P.3d 499 (2006) (“While we conclude the language in the 1997 Rental Agreement contravenes the MHLTA and is an unfair act or

*Bolstad*,<sup>25</sup> the sellers withheld the fact that they had chronic problems with sewage spilling over from their neighbor's property. The question of whether the sellers' agents' behavior was unfair and deceptive was put to the jury, which answered "Yes." Even where a plaintiff establishes that an act is deceptive "as a matter of law," such a determination can only occur on a motion for summary judgment or at trial, where there is an evidentiary record, and there can be no dispute whether the representation has the capacity to mislead.<sup>26</sup> Such a dispute exists here.

Among the facts that are necessary to determine a violation of the CPA are those concerning the specific timing of the disclosure. In *Robinson v. Avis Rent a Car Sys.*,<sup>27</sup> the Court of Appeals observed that quoting a car rental price that did not include a concession fee that was later added "would have the capacity to deceive the purchasing public,

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practice under the CPA, whether the 1997 Rental Agreement has the capacity to deceive a substantial portion of the public is a question of fact."); *Mellon v. Reg'l Tr. Servs. Corp.*, 182 Wn. App 476, 490-91, 334 P.3d 1120 (2014) (finding claim that behavior was "unfair" for purposes of CPA was a question to be decided on summary judgment or at trial, not on a motion to dismiss); see also *Elliot Knitwear, Inc. v FTC*, 266 F.2d 787, 789 (2d Cir. 1959) (stating that deception must be shown by substantial evidence).

<sup>25</sup> 101 Wn.2d 161, 676 P.2d 496 (1984).

<sup>26</sup> See, e.g., *Indoor Billboard/Washington, Inc. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 64, 170 P.3d 10, 13 (2007).

<sup>27</sup> 106 Wn. App. 104, 116, 22 P.3d 818 (2001).

absent disclosure of that fee.”<sup>28</sup> It would not matter if consumers were later given clarifying information. The court explained:

We also note that the relevant time period for purposes of analyzing whether full disclosures are made is when the car rental companies give potential customers a quotation. It is not later at the airport car rental counter when customers sign the car rental agreement containing information about the concession fee and pick up their cars. That is because a practice is unfair or deceptive if it induces contact through deception, even if the consumer later becomes fully informed before entering into the contract.<sup>29</sup>

One need look no further than the Order of the Superior Court to see the types of evidence that Plaintiffs intend to gather in support of their claims. Plaintiffs intend to prove that the military jet engine noise described in the Island County Code, exceeding 100 decibels -- and the frequency of that noise -- is on a completely different level from generic airport noise, such that Defendants’ merely disclosing a “significant noise level” from “airport operations” constitutes a false and misleading statement. Plaintiffs also intend to discover the circumstances under which Defendants provided the disclosure. They allege that Defendants

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<sup>28</sup> *Id.* However, the Court sustained summary judgment for the defendants, ruling that there was no genuine issue of fact over whether defendants disclosed the fee along with the price quote. *See id.* at 116.

<sup>29</sup> *Id.* Contrast this view with the Superior Court’s view that Plaintiff Deegan “reasonably should have become aware of the frequency and loudness of the airport operations no later than a few months after he took ownership.” CP 2 (¶ 5).

provided the industry disclosure at or immediately prior to closing, well past the time required by the Ordinance and too late for any investigation, even if the disclosure could be said to put them on notice of anything. *See* CP 68-69 (¶ 6). In sum, Plaintiffs have pleaded and will be able to prove that Defendants failed to disclose material facts regarding jet engine noise, and that this failure had the capacity to deceive a substantial portion of the public.

3. The CPA Does Not Impose A “Duty of Inquiry.”

A duty of inquiry, of the kind the Superior Court imposed on Plaintiffs here, does not appear among the five elements of a CPA claim. The Superior Court erred when it concluded at the pleading stage that a representation is not unfair or deceptive based on its own intuitions about what a reasonable consumer should know or could discover through an investigation in the community. The case law supports a different proposition: a representation has the capacity to mislead as to a defect unless that defect is “readily observable” or “easily discoverable” to the consumer at the time the representation was made, which Plaintiffs here allege was not the case.

The notion that the consumer has an affirmative duty of inquiry under the CPA gets matters precisely backward. The CPA, like the FTC Act and other Little FTC Acts, imposes a duty to disclose on the *seller*, not

a duty to investigate on the consumer.<sup>30</sup> For example, in *Griffith v. Centex Real Estate Corp.*,<sup>31</sup> plaintiff homebuyers brought a CPA claim against a builder-vendor for defects in their homes that appeared after the one-year warranty expired. While this Court sustained dismissal of the warranty and negligence claims, it reversed in favor of plaintiffs on the CPA claim: “Our cases establish a general duty on the part of a seller to disclose facts material to a transaction when the facts are known to the seller but *not easily discoverable* by the buyer.”<sup>32</sup> Whether withheld facts are “easily discoverable” is a question of fact. In the context of a home purchase, it may be reasonable to expect that a prospective buyer would conduct a standard home inspection, but the burden of disclosing defects that are not readily apparent remains with the seller.

This case is similar to others in which the defect was not “easily discoverable.” For example, *McRae* involved a seller’s failure to disclose sewer and drainage problems on neighboring property that a home inspection would not have detected. The Supreme Court determined that the seller’s failure to disclose material facts about the property was an

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<sup>30</sup> See *Svensden v. Stock*, 143 Wn.2d 546, 558, 23 P.3d 455 (2001) (citing cases that “have uniformly held that an agent or broker violates the CPA when they knowingly fail to disclose a known material defect in the sale of real property”).

<sup>31</sup> 93 Wn. App. 202, 969 P.2d 486 (1998).

<sup>32</sup> *Griffith*, 93 Wn. App. at 214 (citing *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wn. App. 39, 51, 554 P.2d 349 (1976)) (emphasis added).

unfair and deceptive act or practice.<sup>33</sup> The court also noted that the “failure of a salesman to disclose information has long been recognized as the basis for an action under RCW 19.86.”<sup>34</sup> Defendants’ duty to disclose is only clearer here, where local law expressly required that disclosure.

Similarly, in *Testo v. Russ Dunmire Oldsmobile, Inc.*,<sup>35</sup> an automobile dealer failed to disclose that a used car had been modified for racing, thereby increasing the costs of repairs and maintenance. The trial court observed that there was an information imbalance between the salesman, who sold cars for a living and knew where the car came from, and the buyer, who was not familiar with racing vehicles. This Court observed, “Clearly, trade law has developed along lines intended to eliminate the ‘gamesmanship’ formerly attendant to the tradition of *caveat emptor* and in so doing has helped equalize the bargaining position of consumers.”<sup>36</sup> The court held that the dealer’s act of withholding facts material to the sale was a deceptive act under the CPA.<sup>37</sup> The evidence in this case is likely to support a general information imbalance, and the

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<sup>33</sup> *Id.* at 165-66.

<sup>34</sup> *McRae*, 101 Wn.2d at 166 (citing *Testo*, 16 Wn. App. at 51-52).

<sup>35</sup> 16 Wn. App. 39, 554 P.2d 349 (1976).

<sup>36</sup> *Id.* at 51.

<sup>37</sup> *Testo*, 16 Wn. App. at 51-52.

conclusion that the facts contained in the Island County Code were material to the sale.

Even more clearly, the Ordinance itself requires full disclosure at the time of offering a property for sale, specifically because the issue involves facts not readily discoverable including warning about possible permitted activities not currently in operation or subject to investigation. The very reason for the Ordinance and the disclosure is: ... “to protect the public health, safety and general welfare by providing for the full disclosure of the noise associated with the operation of aircraft from the existing airports.”<sup>38</sup> Here, Plaintiffs allege that the disclosure was only provided shortly prior to closing.<sup>39</sup>

The sole authority on which the Superior Court based its imposition of a “duty of inquiry” is *Douglas v. Visser*,<sup>40</sup> an appeal of a bench trial verdict based on extensive findings of fact.<sup>41</sup> The plaintiffs made an offer on the defendants’ house, after which they conducted a pre-purchase inspection revealing significant issues of leaking, rot and decay,

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<sup>38</sup> CP 85 (Island County Code 9.44.010(B)).

<sup>39</sup> CP 7.

<sup>40</sup> 173 Wn. App. 823, 295 P.3d 800 (2013).

<sup>41</sup> Indeed, the relevant authorities, including the authorities on which Defendants and the Superior Court rely, all examine trial court rulings on summary judgment, or after a trial verdict. *See generally*, CP 2 (Order); CP 52-66 (Motion); CP 4-10 (Reply).

as well as recent repairs.<sup>42</sup> Yet the plaintiffs closed on the house without discussing the inspection report any further, with either the home inspector or the sellers.<sup>43</sup> The plaintiffs later realized that the condition of the house was far worse than they had thought, including the presence of mold, and would cost more to repair than it would to tear it down and rebuild.<sup>44</sup> However, facts in the record supported the trial court’s conclusion that “there was *readily observable* damage that warranted further inspection or inquiries.”<sup>45</sup>

*Douglas* addressed the CPA in the context of a concealed defects in the home itself. It is standard practice to conduct a pre-purchase inspection, and to inquire further as to problems that the inspection of the house and the property reveals. It is not standard practice to canvass one’s prospective neighbors, or to put questions to the military about their planned flight operations, as the court demanded of Plaintiffs. That is why Island County imposed a legal obligation on the sellers and their agents to provide a specific disclosure about the potential for highly disruptive flight operations in the vicinity.<sup>46</sup> The defect here was *not* “readily observable,”

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<sup>42</sup> See *Douglas*, 73 Wn. App. at 823.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 827.

<sup>45</sup> *Id.* at 829 (emphasis added).

<sup>46</sup> See CP 85 (Preamble).

as it was in *Douglas*. Indeed, the very reason the Island County disclosure requirement exists is to provide information to prospective homeowners that they would not otherwise know, so they can make an informed purchasing decision.

Imposing a “duty of inquiry” on a plaintiff who has been deceived or misled would undermine the remedial goals of the CPA. Many deceptive practices, by their very nature, are designed to deter their victims from asking questions or discovering the truth.<sup>47</sup> The allegations in this case offer strong support for the conclusion that the defect was not “easily discoverable.” But the ultimate decision on that question requires evidence, which Plaintiffs have not been allowed to gather.

Indeed, even if it were proper to impose a duty of inquiry here, that is not the end of the matter. A court then asks if a reasonable investigation would have been “fruitless.”<sup>48</sup> The allegations of the complaint, construed in favor of Plaintiffs, compel the conclusion that such an investigation would have been fruitless. This case is not like *Douglas*, where the plaintiffs would have discovered the defective condition had they done a reasonable investigation. In this case the allegations support the conclusion that had Plaintiffs done a “reasonable investigation,” they

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<sup>47</sup> *Resort Car Rental Sys., Inc., supra*, 518 F.2d 962.

<sup>48</sup> *See Douglas*, 173 Wn. App. at 833.

would have not have learned about the possibility of day and night flights of military planes at levels over 100 decibels. It would be unjust and illogical to conclude, as a matter of law, that buyers are responsible for not knowing about a disclosure that the sellers were legally obligated to provide to them.

**C. The Trial Court Made Impermissible Factual Inferences in Granting the Motion to Dismiss.**

In its order of dismissal, the Superior Court explicitly made what it called “findings,” as if this were a bench trial, not a motion to dismiss. CP 2. This is a fundamental error. As this Court has recently observed, “A motion to dismiss a complaint pursuant to CR 12(b)(6) does not call upon the trial court to determine issues of fact, and we review its decision de novo. Findings of fact and conclusions of law are therefore superfluous.”<sup>49</sup>

Nevertheless, the trial court made several impermissible (and baseless) findings of fact:

- Plaintiffs were put on notice of “possible extreme noise levels.”
- The “noise ‘defect’ was known by the entire community.”
- It would not be fruitless for plaintiffs to have

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<sup>49</sup> *Friends of N. Spokane Cty. Parks v. Spokane Cty.*, 184 Wn. App. 105, 124 n.2, 336 P.3d 632 (2014).

done reasonable investigation including, for example, knocking on doors of nearby residents or asking around to obtain further knowledge about the frequency and loudness of the noise.<sup>50</sup>

The Superior Court's "findings" contradict the well-pled allegations that Plaintiffs intend to prove in this case. The only fair inference from the complaint is that the community did *not* know about this noise that would be produced by the Growlers, and took action when they did learn about it. CP 68-69. The trial court's dismissal, based on its mistaken suppositions about what the community "knows," displays a complete disregard of the applicable legal standard, and the allegations of the complaint.

Moreover, the CPA requires one to consider not what the community knew, but what a reasonable prospective homebuyer would know, at the time the representation was made. The Court of Appeals explained, in *Halvorson v. Dahl*,<sup>51</sup> that even a *hypothetical* situation raised by a complaint satisfies the permissive Rule 12(b)(6) standard. It is certainly plausible that a substantial portion of the public did not know about the potential for highly disruptive and even health-threatening aircraft noise, and it would not have been easy for a prospective

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<sup>50</sup> CP 2.

<sup>51</sup> 89 Wn.2d 673, 574 P.2d 1190 (1978).

homebuyer to find this out without the appropriate disclosure. Plaintiffs allege that flight patterns at the time they purchased their homes were not indicative of the much louder and disruptive military jet flights that were introduced later.<sup>52</sup> The only fair inference from the complaint is that the views of neighbors on current conditions would *not* have been an accurate prediction of the future, when the much louder jets were introduced. The purpose of the disclosure was to assure that everyone would be on notice of this possibility *before* deciding to purchase a home. But Defendants made sure that no one received it.

Again, courts do not dispose of questions of whether an act or practice has the capacity to deceive on a motion to dismiss, without the benefit of an evidentiary record.<sup>53</sup> Discovery in this case will reveal the context in which the disclosure was made, how close in time it was to the closing, and what a reasonable buyer would have understood in this situation.

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<sup>52</sup> CP 68-69 (¶¶ 6, 7).

<sup>53</sup> At oral argument, the court asked about a duty of further inquiry: “simply go to the next door neighbor and just, can I talk to you? How often do planes fly over?” *See* RT 29:15-19. The judge then spoke to his “personal experience” living in Mount Vernon, although he acknowledged that “my personal experience doesn’t matter.” *See id.* at p. 30:13-19. Counsel for Plaintiffs pointed out, “I think that you’re getting into kind of a lot of speculation, frankly.” *See id.* at p. 31:9-14. The court responded, “I agree. It’s just very different from saying: Have you had any wood rot problems or do you have termites.” *See id.* at p. 31:15-17.

**D. Statute of Limitations.**

Plaintiffs claim that Defendants violated the CPA by failing to inform them that military planes could be flying, day and night, at sound levels in excess of 100 decibels, levels that would not just be annoying, but could result in adverse health effects. They were not on notice of Defendants' false and misleading conduct until the Growler flights began taking place, in 2013. *See* CP 68-69 (§ 6).

The Superior Court made the following "finding": "Plaintiff Jonathan Deegan purchased his home in 2006. He reasonably should have become aware of the frequency and loudness of the airport operations no later than a few months after he took ownership." CP 2 (§ 2). The Superior Court concluded, without any further analysis or comment, "[t]he statute of limitations as to Plaintiff Deegan has run." *Id.*

The Superior Court's ruling on the statute of limitations runs afoul of the discovery rule. "Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action."<sup>54</sup> When a plaintiff discovered the elements of their

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<sup>54</sup> *Allen v. State*, 118 Wn.2d 753, 757-78, 826 P.2d 200 (1992).

claim and whether the plaintiff exercised reasonable diligence in investigating the claim, are *questions of fact* to be determined at trial.<sup>55</sup>

The CPA statute of limitations only begins to run “when all elements necessary to the claim exist and the plaintiff has a right to seek relief in the courts.”<sup>56</sup> The complaint does not support the conclusion that Mr. Deegan should have discovered the existence of highly disruptive flight activity, of the kind described in the Island County disclosure, at any point before the Growlers were introduced, in 2013. When a seller omits a material fact, the statute of limitations is tolled until the plaintiff discovers or has reason to discover that fact.

In addition, one of the elements of a CPA claim is injury.<sup>57</sup> The injury Deegan sustained is the devaluation of his property.<sup>58</sup> This injury did not manifest itself until the Navy started flying the Growler jets, and Growler flights increased dramatically, triggering a 2013 auditory study of the Growler’s noise impacts.<sup>59</sup> An investigation by the Island County Director of Planning and Community Development followed, which

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<sup>55</sup> *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995); *see also Samuelson v. Cmty. Coll. Dist. No. 2*, 75 Wn. App. 340, 346, 877 P.2d 734 (1994) (“The point at which the plaintiff should have discovered the injury is a question for the trier of fact.”).

<sup>56</sup> *Murphey v. Grass*, 164 Wn. App. 584, 589, 267 P3d 376 (2011).

<sup>57</sup> *Hangman Ridge*, 105 Wn.2d at 784-85.

<sup>58</sup> CP 80 (¶ 42).

<sup>59</sup> CP 75-76 (¶ 26).

resulted in a finding that the disclosure forms being used in the area by real estate brokers failed to include the disclosure language required by ICC 9.44.050.<sup>60</sup>

Defendant Acorn effectively concedes that the statute of limitations issue is not appropriate for disposition on a Rule 12(b)(6) motion, given its contention that Deegan should have discovered his injury “[a]t some point during the four years after he purchased his home, had he used *reasonable diligence*.” CP 65 (Mot. at 14:6-8) (emphasis added). The question of *reasonableness* is one for the factfinder. Deegan is entitled to present evidence at trial showing that reasonable diligence would not have discovered the injury to his property until a date within the four years prior to the filing of this suit.

## V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask that the judgment of the Superior Court be reversed, and the case be remanded for further proceedings.

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<sup>60</sup> CP 68-69 (¶ 6).

RESPECTFULLY SUBMITTED AND DATED this 11th day of

April, 2016.

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**CERTIFICATE OF SERVICE**

I certify that on April 11, 2016, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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