Judge Catherine Shaffer
Hearing: Friday 6-21-2013 9:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

HARTLEY McGRATH,

Plaintiff,

v.

VESTUS LLC; WINDERMERE REAL ESTATE/EAST, INC., and CHRISTOPHER HALL and JANE DOE HALL and the Marital Community of CHRISTOPHER AND JANE DOE HALL,

Defendants.

NO. 12-2-08537-4 SEA

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON NEW LEGAL AUTHORITY AND NEW EVIDENCE

I. Relief Requested / Introduction

Introduction. Plaintiff bought a property "sight unseen" at a foreclosure auction. Defendants, in the business of assisting investors buying at foreclosure, had given plaintiff an information packet that disclosed "settling issues" in the property. The day after her purchase, plaintiff, observing the back of the house from an adjoining public area, immediately noticed foundation problems. Plaintiff sued, asserting six causes of action.

Relief sought. In this motion, defendants ask only for dismissal of plaintiff's claim for fraudulent concealment, since the defects complained of were readily ascertainable pre-purchase.

Procedural posture. In a January 11, 2013 ruling on defendants' motion for summary judgment (attached Appendix 2), the court dismissed plaintiff's claims of intentional fraudulent

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misrepresentation but held there were triable issues on plaintiff's claims of fraudulent concealment, breach of contract, breach of RCW 18.86 (agency statute), negligent misrepresentation, and Consumer Protection Act. On February 4, 2013, defendants' Motion for Partial Reconsideration (on the issue of fraudulent concealment) was denied.

Why this new motion after relief previously denied. On February 25, 2013, the Court of Appeals issued a decision in Douglas v. Visser (copy attached as Appendix 3) that has far reaching implications for all fraudulent concealment cases. In addition, new evidence supports the conclusion that plaintiff received written disclosure of "settling issues". The essence of this case is professional negligence, not fraudulent concealment.

II. Summary of Facts

Defendants assisted plaintiff in the search for and purchase of an investment property at a foreclosure sale. Plaintiff was also assisted by her boyfriend Mark Cooley, by her father who is an experienced engineer with extensive experience in construction issues, and by a John L. Scott agent. McGrath Dep. pp. 10-14 (Exh. 1 to Declaration of Philip T. Mattern). *See also* Cooley Dep. (Exh. 2 to Mattern Decl.)

Plaintiff became aware of the subject property as a possible investment property at least four days before she bought it at a foreclosure sale. McGrath Dep. 27:23-25[1]. Yet, she never looked at the property before she bought. *Id.* 62:10-14.

Plaintiff admits that defendants never claimed to have looked at the back of the subject house, never said they walked all the way around the property, never said they looked inside the house, and never said they talked to any occupants of the house. McGrath Dep. 63:17-23; Cooley Dep. 37:2-22. Plaintiff and Mr. Cooley also knew before plaintiff's purchase that Vestus's observations of a given property tended to be less extensive if the home was occupied than if it was vacant and that the subject property was occupied at the time of the foreclosure sale. Cooley Dep. 35:23 to 36:3; 37:23-25.

[1] "27:23-25" means "page 27, lines 23-25".

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The evening before purchasing the property at a foreclosure sale, plaintiff attended a weekly informational meeting put on by Vestus. McGrath Dep. pp. 42, 44-45; Cooley Dep. pp. 38-39; Declaration of Jim Melgard ¶ 13 (and see also ¶¶ 10-12). All attendees at the meeting, including the plaintiff, were given two packets, including a 51 page packet with information about foreclosure properties that would be auctioned at a Bellevue site the next day, including the subject property in Federal Way. Melgard Decl. The 34th page of this packet included the following notations in the "Agent Remarks" section about the subject property the plaintiff bought the next day: "settling issues & sprinkler system repairs needed". Melgard Decl. ¶ 14, and see Declaration of David P. Stenhouse and Exhibit B thereto. (The 34th page of the subject auction packet within that Exhibit B is also attached to this Motion as Appendix 1.) The process by which the packets were assembled, photocopied, emailed as an electronic PDF file to certain customers, and hard copies distributed to Thursday meeting attendees is described in exhaustive detail in Jim Melgard's Declaration. Computer forensics expert David P. Stenhouse has looked at the computer records and confirmed that the electronic PDF file generated and emailed out on Thursday, April 7, 2011 included the 34th page (Appendix 1) that includes the notation "settling issues". Stenhouse Decl.

The day after purchasing the subject property, plaintiff physically looked at the property for the first time. McGrath Dep. pp. 14-15, 62:10-14. In looking at the house from a public area to the rear of the home (outside the property line), plaintiff immediately saw serious problems with the house structure including the foundation. McGrath Dep. pp. 14-15. Plaintiff has admitted that if she had made this observation before the sale, she would not have bought this property. *Id.*

III. Issues

1. Does a house buyer have a fraudulent concealment claim for a defect of which she had notice at the time of purchase?

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2. If a house buyer immediately recognizes a defect upon observing the house at a distance from a vantage point outside of the lot on the day after her purchase, and was aware of the house as an investment possibility four days before her purchase, was the buyer "on notice of" the defect at the time of purchase, precluding a fraudulent concealment claim?

3. If a house buyer, prior to purchase, is given an information packet that includes a previous agent's notes about the house that includes the phrase "settling issues", is the buyer thereby given notice of foundation problems arising from settling, precluding a fraudulent concealment claim?

4. Is there "concealment" supporting a fraudulent concealment claim where evidence of the defects complained of was readily visible to the plaintiff, and plaintiff admits she does not believe defendants intentionally withheld key information?

5. Is a fraudulent concealment claim sustainable where the defendant is not a seller / vendor?

IV. Evidence Relied Upon

Declaration of Philip T. Mattern (signed December 2012 and used in previous Motion for Summary Judgment) and attached Exhibits:

1. Complete Deposition of Hartley E. McGrath
2. Excerpts of Deposition of Mark R. Cooley

Declaration of Jim Melgard

Declaration of David P. Stenhouse and attached Exhibits:

A. *Curriculum vitae* of David P. Stenhouse

B. Foreclosure Auction Packet produced by Vestus

Declaration of Brian Jessen (signed December 12, 2012 and used in previous Motion for Summary Judgment) and attached Exhibits:

A. Agreement (contract) between the parties

B. "7 Critical Mistakes" presentation

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V. Authority and Argument

5.1 Under new case authority, plaintiff buyer's "notice" of defect precludes her fraudulent concealment claim even if there was flagrant concealment, and plaintiff buyer had no actual knowledge of the defect, and the buyer was given false information.

The only legal claim at issue in this motion is fraudulent concealment. One of the elements of fraudulent concealment that plaintiff must prove is that "the defect would not be disclosed by a careful, reasonable inspection by the purchaser". Alejandre v. Bull, 159 Wn.2d 674, 689, 153 P.3d 864 (2007). Now, a new Court of Appeals case has held that a plaintiff house buyer "on notice of" a defect has no claim for fraudulent concealment even when defendant seller / real estate agent was guilty of an intentional "egregious nondisclosure and concealment", and even when the buyer's inspector specifically denied the existence of the structural problem later found to exist. Douglas v. Visser, No. 67242-8-I, ___ Wn.App. ___, 295 P.3d 800, ¶¶ 5, 27, 30, 32 (2013), decided February 25, 2013 (copy attached as Appendix 3).

In Douglas, defendant seller, who was also a licensed real estate agent, intentionally covered up structural rot before selling to the plaintiffs. Douglas, ¶¶ 1, 12, 15, 17, 22. Plaintiff's pre-purchase inspector found and reported to plaintiffs that there was some rot that "**did not pose a structural threat**, but should be repaired if the condition degraded rapidly". *Id.*, ¶ 5 (boldface added). After closing, plaintiffs discovered that the structure was so badly damaged by rot that it would cost more to repair the home than to tear it down and rebuild. *Id.*, ¶ 13. Nevertheless, the court of appeals held:

> Because the Douglases were on notice of the defect and had a duty to make further inquiry, it cannot be said that the defect was unknown to the Douglases, that it could not have been discovered by a reasonable inspection, that the Douglases justifiably relied on the Vissers' misrepresentations, or that the Vissers committed an unfair or deceptive act that caused the Douglases' injury.

Id., ¶ 32.

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Note that the issue is not whether the Douglas's had actual knowledge of any particular information, but whether they were "on notice" of the defect. Likewise, it is not enough for a buyer to prove that they had no *actual* knowledge of a defect after a "careful, reasonable inspection" but that the defect *would not have been* disclosed by such an inspection. *Id.*; Alejandre, *supra*, 159 Wn.2d at 674. In Douglas, buyer's inspector found some rot that he said "did not pose a structural threat", yet the court considered that rot to be "notice" to the buyer of the actual situation which was that the entire house needed to be torn down and replaced. Douglas, ¶ 5. In short, Douglas is significant because it holds that a buyer has notice of a defect, precluding fraudulent concealment, even in the face of (a) brazenly intentional concealment by a seller and (b) faulty information from the buyer's own inspector.

5.2 Ms. McGrath was "on notice" because the defects were in plain sight and she had the opportunity to see them; and there was no "concealment".

Defects in plain sight put a buyer "on notice", precluding a claim against the seller. Bailey for Bailey v. Gammell, 34 Wn.App. 417, 661 P.2d 612 (1983). Here, by plaintiff's own admission, the foundation defects now complained of were plainly apparent even from a vantage point outside the property lines. Therefore, the defects were not "concealed", nor can plaintiff deny that a "careful, reasonable inspection" would have revealed the defects because her own brief, visual inspection from outside the property lines behind the house a day after her purchase readily revealed the defects. McGrath Dep. 14:12 to 15:7; and 66:21 to 67:8. Notably, plaintiff admitted that she does not believe Vestus intentionally withheld the "Agent Remarks" information for the subject property. McGrath Dep. 87:1-11.

Plaintiff may complain that she had no "genuine" opportunity to look at the property because Vestus's presentation that focused on the particular subject property did not occur until the evening before the auction. But plaintiff has admitted that she became aware of the subject

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property through Vestus four days before it was auctioned. McGrath Dep. 27:23-25. At that time, the property was one of "10 to 20" properties Ms. McGrath was considering. McGrath Dep. 29:1-5. Yes, it would have been time consuming to look at all those properties before buying. But she managed to look at three properties just in the evening prior to the auction, after the conclusion of the Thursday meeting with Vestus. McGrath Dep. 100:17 to 101:9. Surely she could have looked at the other 7 to 17 properties between Monday and the Friday sale. No reasonable person could conclude that it was "impossible" or "impractical" for Ms. McGrath to look at the subject property before paying $333,000 cash for it at the auction.

5.3 The parties' business relationship does not vitiate the effect of Ms. McGrath's notice.

Ms. McGrath may complain, "I hired Vestus to tell me all about the property so I would not have to do my own investigation". However, the present motion only concerns fraudulent concealment -- not professional negligence, breach of contract, or breach of agency duties, all of which are still on the table. Moreover, nothing in the law, the parties' contract, or actual practices as known by Ms. McGrath supports the above-quoted conclusion.

Washington's agency statute, RCW 19.86.030(2) states:

> Unless otherwise agreed, a licensee owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and 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 licensee to be reliable.

The parties' contract, a "Compensation/Confidentiality Client Agreement" signed by the plaintiff, includes the following (boldface added):

> Vestus, LLC collects and compiles information on properties in foreclosure in the State of Washington and Oregon. This information is provided to interested bidders by VESTUS, LLC, a real estate licensee associated with Windermere Real Estate/ East, Inc. in Washington (collectively referred to as "Broker"). This Agreement sets forth the terms under which the information is provided and defines the terms

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of the relationship of the parties.

> 1. No Agency Relationship. The parties agree that they shall have **no agency relationship** unless otherwise agreed in writing. Client has received and read a copy of the pamphlet "The Law of Real Estate Agency." . . . .
>
> 2. Broker will make available to Client Information that VESTUS, LLC has compiled about properties in foreclosure. VESTUS, LLC attempts to obtain information from trustees, tax records, multiple listing service records and other public sources. The information is available for Client to pick up at Broker's office. **VESTUS, LLC and Broker do not have physical access into the properties and do not guarantee the accuracy or completeness of the information it makes available. VESTUS, LLC and Broker do not make any representations about the quality or condition of the properties or the fitness of any property for Client's needs. Client will independently assess any properties and will seek independent advice from the appropriate professionals.**

Exhibit A to Jessen Decl. (Emphasis added.)

And plaintiff was well aware of -- and did not complain about -- the limitations of the scope of information Vestus was supplying. In particular, before the foreclosure auction she and her boyfriend Mark Cooley knew that:

* No Vestus person claimed to have inspected the subject house.
* No Vestus person to her knowledge were trained or licensed inspectors.
* No Vestus person had looked at the back of the subject house (it was the back of the house where plaintiff saw foundation problems).
* No Vestus person had walked all the way around the property.
* No Vestus person had looked inside the house. And,
* No Vestus person had talked to any occupants of the house.

McGrath Dep. 39:15-18; 40:10-13; 63:17-23; Cooley Dep. 37:2-22. In addition, plaintiff and her boyfriend knew that the subject house was occupied, and that Vestus's practice was to avoid going onto occupied properties. Cooley Dep. 35:23 to 36:3; 37:23-25. If plaintiff wants to claim Vestus *should have* taken any of these steps, that goes to issues of professional negligence,

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not fraudulent concealment which is the only issue presented in this motion. Finally on this point, defendants did give plaintiff written information that the property had "settling issues" as explained in the following subsection.

5.4 Ms. McGrath was also "on notice" because she was given a packet of information that included previous Agent Remarks stating "settling issues".

Plaintiff herself has made a point of stating that if she had seen this information, she would not have purchased the property (McGrath Dep. 54:18 to 55:3). Therefore, if reasonable minds cannot doubt this information was given, plaintiff was thereby on notice.

That Vestus customers who came to the Thursday, April 7, 2013 meeting were given a 51 page packet including the 34th page with the comment "settling issues" is exhaustively documented in Jim Melgard's Declaration, and is supported also by the Declaration of David P. Stenhouse. Although Ms. McGrath has claimed in a conclusory fashion that she did not receive this page, she admitted in her deposition:

* That the packet she received at the meeting was "very thick" (48:14).
* That she believed each packet she received had about "50 to 100 pages" (21:14) (the actual packet at issue was 51 pages).
* That she threw away most of the packet sometime in May 2011 (22:17-22, 48:5-20).
* That the parts thrown out included the pages about the subject property (*Id.*).
* That the packet she received included more than one page (i.e. "pages") about the subject property (22:12-20).
* That she did not notice while at the meeting that the information about the subject property did not include the "Agent Remarks" section (that's the section that included the "settling issues" language) (51:13-16).
* That some of the properties in the packet *did* have "Agent Remarks" (53:6-8).
* That she could not remember whether the subject property was the only property in the packet that did not include "Agent Remarks" (51:9-12).

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5.5 Even if the court accepts plaintiff's conclusory claim that she did not get the "Agent Remarks" for the subject property, she was "on notice" of that information because she knew that "All listings have agent remarks".

The following interchange at plaintiff's deposition is highly significant:

> Q. So at the time you were at the Thursday meeting on April 7, 2011, you were aware that some listings had agent remarks and others didn't, correct?
>
> A. I was aware that I didn't see all of the agent remarks. All listings have agent remarks, but I wasn't made aware of them or they were not in the packet for all of the properties.

McGrath Dep. 47:20 to 48:1.

In other words, even if we accept plaintiff's conclusory statement that she was not given the "Agent Remarks" for this property, her testimony is an admission that she knew that she did not have in hand all the information that she knew was available concerning this property. This is identical to the situation in Alejandre, *supra*, where our Supreme Court rejected a claim for fraudulent concealment:

> The Alejandres failed to meet their burden of showing that the defect in the septic system would not have been discovered through a reasonably diligent inspection. In fact, the Alejandres accepted the septic system even though the inspection report from Walt's septic Tank Service disclosed, on its face, that the inspection was incomplete because the back baffle had not been inspected.

In our case, regardless of what was or was not stated on the "face" of the packet, Ms. McGrath insists she *knew* that not all properties identified in the packet had "Agent Remarks" and that she *knew* that "All listings have agent remarks" and that "I was aware that I didn't see all of the agent remarks". So, whether Ms. McGrath received the sheet with "Agent Remarks" or not, she was on notice of the information on this sheet, including the notation of "settling issues".

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5.6 Visibility of defects plus lack of intentional withholding equals no "concealment".

The first element that must be proved in a fraudulent concealment claim is "(1) the residential dwelling has a concealed defect". Douglas, *supra*, ¶ 31. Since evidence of the foundation problems were readily visible to plaintiff when she first viewed the house from a public area to the rear, she cannot claim that the defects were "concealed". Further supporting lack of "concealment" is that plaintiff has admitted she does not believe defendants intentionally withheld key information about the property. McGrath Dep. 87:1-11.

5.7 Fraudulent concealment is a claim available against a vendor, not professionals assisting a buyer.

As stated by our Supreme Court in Alejandre, *supra*:

> [T]he **vendor's** duty to speak arises (1) where the residential dwelling has a concealed defect; (2) the **vendor** has knowledge of the defect ... .

159 Wn.2d at 689. *See also* Douglas, *supra*, ¶ 31 (using the word "seller"). No case has been found where a fraudulent concealment claim has been sustained against one who is not a seller or seller's agent and who is in the business of providing information to a buyer. In its essence, Ms. McGrath's lawsuit is a claim of professional negligence, not of fraudulent concealment.

5.8 Summary judgment standard: plaintiff must establish her claims with evidence.

In resisting a motion for summary judgment, it is no longer sufficient to just present evidence of "issues of material fact". Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989); Tegland, 4 Washington Practice: Rules Practice, p. 383 (2006). Instead, once a moving defendant meets its initial burden by showing a lack of evidence to sustain plaintiff's case, plaintiff then must produce admissible facts sufficient to establish the essential elements to its claims or they must be dismissed. *Id.* In other words, once defendant moving party has presented its *prima facie* evidence, "summary judgment should be denied only 'if the evidence is

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such that a reasonable jury could return a verdict for the nonmoving party'". Tegland, *supra*, at p. 383, quoting from Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

VI. Conclusion

New evidence and new case law make abundantly clear that plaintiff was "on notice" of the defects now complained of prior to her purchase of the property. Since plaintiff's own admissions preclude her from proving that the defects in question would not have been disclosed by a careful, reasonable inspection, and are inconsistent with "concealment", the court should enter partial summary judgment dismissing plaintiff's fraudulent concealment claim. This motion does not address issues of negligence, agency statute liability, breach of contract, or Consumer Protection Act. A proposed Order is attached as Appendix 4.

DATED this 24th day of May, 2013

DEMCO LAW FIRM, P.S.

By_____
Lars E. Neste, WSBA #28781
Philip F. Mattern, WSBA #16986
Attorneys for Defendants

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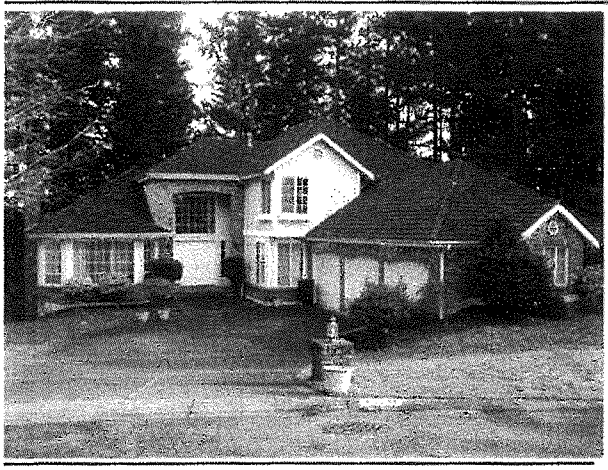
APPENDIX 1

Residential Agent Detail Report for Subject Property

This is 34th page of Exhibit B to Stenhouse Declaration, and referred to in Melgard Declaration

Arrow has been added to highlight key provision

Listing # 175275 | 33130 2nd Place SW , Federal Way 98023 | STAT: Pending BU Requeste | LP: $325,000
County: King | LT: 20 | BLK: | CMTY: Federal Way | PRJ: The Ridge



Type: Residential | CDOM: 23
AR: 110 | TAX: 7298000200 | OLP: $325,000
MAP: 744 | GRD: H-5 | Internet: Yes
DD: I5 take 320th or 348th St Exit head W to 1st Ave. Fr 320th head South to SW 330th St/fr 348th head N to SW 330th St, W on 330th to 3rd Ave SW, S on 3rd to SW 322nd St, N to home on Right in Cul-d-sac | FIN:
LD: 01/24/2011
XD:
OMD: 02/02/2011

LAG: Joni C. Kemmer (31777) | PH: (253) 307-1847
FAX: (253) 835-4550 | PH Type: Cellular
LO: Keller Williams Realty Fed Way (9861) | PH: (253) 835-4500
SOC: 3 | Cmnts: subject to lien holder approval
CLA: Barb Weller (59644) | PH: (253) 224-2092
CLO: Keller Williams Realty Fed Way | PTO: Yes | F17: Provided
OTVP: Owner | OCC: Theresa and Gemma
OWN: Theresa Njoku | OPH: (206) 218-9024
KEY: MLS Keybox, Owner-Call First, Pet in House, Security System, See
PTS: (206) 218-9024 | OAD: Federal Way, WA
POS: Closing
TRM: Cash Out, Conventional, FHA, VA
HOD: $45
TX$: $6,525 | TXY: 2010 | SNR: No | MOR:

SFF: 4,510 | SFU:
ASF: 4,510 | SFS: Realist.com
Community Feat: CCRs

SPA: | SAA: | AFH:

BR: 5 | BDA: 5 | BTH: 3.50 | FBT: 3 | QBT: 0 | HBT: 1 | FP: 3 | TOF:

	G	L	M	U
BR:		2	0	3
FUL:	0	1	0	2
3/4:	0	0	0	0
1/2:	0	0	1	0
1/4:				
FP:				

Master Bedroom	Upper
Den Office	Main
Dining Room	Main
Entry	Main
Family Room	Main
Kit w Eat Spc	Main
Living Room	Main
Rec Room	Lower
Utility Room	Main

ACR: 0.263 | LSF: 11,456
VEW: | LSZ:
WFT: | WFG:
LTV: Partial Slope, Wooded
LDE: Cul-de-sac, Paved Street | POL:
SIT: Deck, Gas Available, Sprinkler System

GR: Garage-Attached | GAR: 3 | STY: 12 - 2 Story
BLD: | YBT: 1987 | NC: Completed | FND: Poured Concrete
BDI: Built On Lot | ARC: NW Contemporary
BDC: Good | RF: Cedar Shake
EXT: Brick, Wood | BSM: Fully Finished
MHM: | MHS: | MHN:

ENS: Electric, Natural Gas | HTC: Forced Air
WHT: Gas | LSD: None | FLS: Hardwood, Vinyl, Wall to Wall Carpet
FEA: Bath Off Master, Built-In Vacuum, Ceiling Fan(s), Dbl Pane/Storm Windw, Dining Room, Fireplace in Mstr BR, French Doors, Jetted Tub, Security System, Skylights, Vaulted Ceilings, Walk-in Closet
APS: Garbage Disposal, See Remarks, Trash Compactor

WAS: Public | WAC: Lake Haven | SD: Federal Way | EL:
SWR: Sewer Connected | SWC: King county | JH: | SH:
E-Cert: | POC: PSE | BUS: | BUS RTE:
Zoning Jur: County | Zoning Code: | 3rd Party Aprvl Req: Short Sale | Bank/REO Owned Y/N: No

Agent Only Remarks: DO NOT let dog out, PLZ remove shoes, settling issues & sprinkler system repairs needed. Owner received notice of foreclosure for April so hurry w/your Buyers so they don't miss out! Seller recently lost husband & very sensitive...plz be gentle!

Marketing Remarks: Extraordinary Opportunity in The Ridge! Always wanted to live here?? Now's your chance to own over 4500 square feet of Living Large! Tile Counters, Hardwood Floors, Spindle Staircase, Huge Kitchen with Double Ovens and Double Pantry, A Recreation Room for Hosting a Giant Party, 3 Car Garage and Much More! This is a MUST SEE!

APPENDIX 2

Order on Motion for Summary Judgment
Signed January 11, 2013

Judge Catherine Shaffer

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

HARTLEY McGRATH,

Plaintiff,

v.

VESTUS LLC; WINDERMERE REAL ESTATE/EAST, INC., and CHRISTOPHER HALL and JANE DOE HALL and the Marital Community of CHRISTOPHER AND JANE DOE HALL,

Defendants.

NO. 12-2-08537-4 SEA

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. Hearing

This matter duly came on for hearing before the undersigned Judge on January 11, 2013 at 10:00 a.m., on Defendants' Motion for Summary Judgment of Dismissal.

Each party appeared through such party's counsel of record.

The Court considered the following materials:

Defendant's Motion and supporting documents:

Declaration of Brian Jessen and attached Exhibits:

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A. Compensation/Confidentiality Client Agreement

B. PowerPoint slides - "7 Critical Mistakes You Do Not Want To Make When Buying Foreclosures"

Declaration of Philip T. Mattern and attached Exhibits:

1. Transcript of Deposition of Harley McGrath

2. Excerpts from transcript of Deposition of Mark R. Cooley

Plaintiff's Response and supporting materials:

Declaration of Sylvia Luppert in Opposition, and attached Exhibits:

1. Excerpts from Deposition of Hartley McGrath

2. Excerpts from Deposition of Mark Cooley

3. Excerpts from Deposition of Christopher Hall

4. Excerpts from Deposition of Chris Nelson

5. "Vestus Fact Sheet" from "Deposition Exhibit 8"

6. "Agent Report" from "Deposition Exhibit 8"

7. Pages from Vestus Website from "Deposition Exhibit 9"

Defendants' Reply Supporting Motion for Summary Judgment

The Court also considered the oral arguments of counsel and the records and files herein.

LGN

II. Order

~~After considering the foregoing, the Court finds no genuine issue as to any material fact by which the defendants could be found liable. Therefore, it is~~ PLAINTIFF'S CLAIMS FOR FRAUD & INTENTIONAL MISREPRESENTATION,

ORDERED, ADJUDGED and DECREED that ~~all claims~~ herein against defendants Vestus, LLC; Windermere Real Estate/East, Inc.; Christopher Hall and Jane Doe Hall and the BUT NOT FRAUDULENT CONCEALMENT, AND CLAIMS OF AGENCY PURSUANT TO RCW 18.86 DLH

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marital community of Christopher and Jane Doe Hall, be and hereby are dismissed with prejudice by way of summary judgment.

DEFENDANTS' MOTION IS DENIED AS TO PLAINTIFF'S BREACH OF CONTRACT, FRAUDULENT CONCEALMENT, NEGLIGENT MISREPRESENTATION, CONSUMER PROTECTION ACT, AND BREACH OF RCW 18.86. SIL LEN

DONE IN OPEN COURT this 11 day of January, 2013.

Judge Catherine Shaffer

Presented by:

Demco Law Firm, P.S.

By_____
Lars E. Neste, WSBA #28781
Attorney for Defendants

Approved for entry by:

By_____
Sylvia Luppert, WSBA #14802
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APPENDIX 3

Douglas v. Visser
Court of Appeals, Division I, February 25, 2013

295 P.3d 800
Court of Appeals of Washington,
Division 1.

Nigel and Kathleen DOUGLAS, and the marital community thereof, Respondents,
v.
Terry VISSER and Diane Visser, and the marital community thereof, Appellants.

No. 67242–8–1. | Feb. 25, 2013.

Synopsis

Background: Purchasers of home brought action against vendors, alleging fraudulent concealment, negligence misrepresentation, violation of Consumer Protection Act, breach of contract, and breach of vendor's statutory duties as real estate agent. The Superior Court, Whatcom County, Ira J. Uhrig, J., entered judgment in favor of purchasers. Vendors appealed.

[Holding:] The Court of Appeals, Appelwick, J., held that purchasers were on notice of rot and decay defect in home and thus had duty to make further inquiries.

Reversed.

West Headnotes (6)

[1] **Fraud**
Duty to Investigate

Home purchasers were on notice of rot and decay defect in home and thus had duty to make further inquiries in order to support fraudulent concealment action against vendors, even if extent of defect was greater than anticipated, where purchasers' own home inspector had identified an area of rot and decay near the roofline, an area of rotted sill plate, and sistered floor joints.

[2] **Fraud**
Duty to Investigate

When a buyer is on notice of a defect, it must make further inquiries of the seller.

[3] **Fraud**
Duty to Investigate

Home purchasers did not make sufficient further inquiries, following notice of rot and decay defect in home, as to support claims for fraudulent concealment and negligent misrepresentation against vendors, after pre-purchase inspection report identified areas of rot and decay, where, after report had been issued, purchasers did not ask vendors or inspector any questions about the rot that inspector identified.

[4] **Fraud**
Fraudulent Concealment

A claim for fraudulent concealment regarding a purchase of residential real estate exists when: (1) the residential dwelling has a concealed defect; (2) the seller has knowledge of the defect; (3) the defect presents a danger to the property or health or life of the buyer; (4) the defect is unknown to the buyer; and (5) the defect would not be disclosed by a careful, reasonable inspection by the buyer.

[5] **Fraud**
Statements recklessly made; negligent misrepresentation

A claim for negligent misrepresentation exists when the seller makes a false statement to induce a business transaction, and the buyer justifiably relies on the false statement.

[6] **Costs**
Contracts

When an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees.

Attorneys and Law Firms

***800** Gregory Earl Thulin, Attorney at Law, Bellingham, WA, for Appellants.

Philip James Buri, Buri Funston Mumford PLLC, Bellingham, WA, for Respondents.

Opinion

APPELWICK, J.

¶ 1 When prospective homebuyers discover evidence of a defect, the buyers must beware. They are on notice of the defect and have a ***801** duty to make further inquiries. Prior to listing a house for sale, the Vissers made superficial repairs that concealed significant rot damage and made no disclosure of the defect to the buyers. During a prepurchase inspection, the Douglases discovered areas of rot but nevertheless purchased the house without making further inquiries about the rot. The trial court did not find that further inquiry would have been fruitless. The Douglases cannot now obtain relief by asserting that the defect was worse than anticipated. We reverse.

FACTS

¶ 2 In 2007, Nigel and Kathleen Douglas were looking for a home in Blaine, Washington. They are Canadian citizens and wanted a second home in the area. In the course of the search, they discovered a property owned by Terry and Diane Visser. Visser is a licensed real estate agent and listed the property himself.

¶ 3 The Vissers purchased the property in 2005. At the time, it needed significant work. The Vissers intended to renovate and rent the property. They demolished bungalows that were located on the property. In the main house, they renovated the bathroom, repaired portions of rot, insulated the exterior walls, fixed wall paneling, insulated the ceiling, installed Styrofoam ceiling tiles, and replaced the exterior bellyband. During the course of repairs, the Vissers realized that the renovations would take more time and money than they expected and decided to sell the house.

¶ 4 After the **Douglases** made an offer, the **Vissers** filled out a seller disclosure statement. But, they answered, "don't know" or simply failed to respond at all to many questions that the Douglases felt should have had a clear "yes" or "no" answer. Perplexed, the Douglases sent a list of follow-up questions. In addition to seeking clarification, they requested a copy of the inspection report prepared before the Vissers purchased the property. Diane **Visser** handwrote responses to the questions, but the **Douglases** continued to think the answers were inadequate. The Vissers never provided a copy of the inspection report. Nevertheless, the Douglases did not ask for any further clarification.

¶ 5 Dennis Flaherty performed a prepurchase inspection for the Douglases. 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 damaged 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.

¶ 6 The **Douglases** did not discuss the report with Flaherty or the **Vissers**. They purchased the house without discussing the issue of rot with the Vissers. The sale closed in April 2007. The parties agreed on a purchase price of $189,000. The **Douglases** paid $40,000 cash, and gave the **Vissers** a promissory note secured by a deed of trust for the remaining $149,000. The total amount was due on August 1, 2008.

¶ 7 After purchasing the house, the Douglases began to notice a damp smell and a constant presence of potato bugs around the perimeter of the house and in the bathroom. In an effort to keep out the potato bugs, they caulked the baseboards in the bathroom. Eventually, they noticed that the ceiling tiles were gradually separating in the living room, master bedroom, and second bedroom.

¶ 8 Flaherty returned to inspect the home again. When he removed a ceiling tile, insulation and water came down from behind it. In response to what they found, the Douglases requested a bid from a mold abatement company. The company was unable to guarantee the removal of all mold because of the house's pristine mold-growing conditions. Without a guarantee, the Douglases elected to take no action.

¶ 9 In July 2008, the pay-in-full date was quickly approaching. Because it was uninhabitable, they requested an additional month to investigate the extent of the mold. The promissory note's due date was pushed back to September 1.

***802** ¶ 10 In the meantime, the Douglases removed the bellyband. They discovered substantial rot and pest issues underneath. In fact, there was virtually nothing behind the bellyband and they did not encounter any resistance in removing the boards. The Douglases defaulted on the promissory note.

¶ 11 In September 2008, Flaherty returned to the house a third time. He determined that the rim joists had 50 percent to 70 percent wet rot and pest damage that could not be seen from the crawl space without removing insulation. Similarly, he concluded the sill plate had 50 percent to 70 percent wet rot and pest damage. He opined that "installation of the siding was within the last two years and the extent of damage to the sill and rim joist could not have occurred since the installation of the skirt boards siding. Therefore, whoever installed the skirt board siding would have known that structurally damaged portions of the framing would have been concealed." He further stated, "It is my professional opinion that the installation of the pink fiberglass insulation in the crawl space stud bays between the floor joists and firmly packed against the rim joists may have been installed to reduce the probability that damaged rim joists and sill would be discovered during a standard home inspection."

¶ 12 Another inspector, Kirk Juneau, also inspected the damage. He determined that a new trim was used on the house's exterior that is only intended for interior use. The trim covered and concealed damage, and had been installed within the previous two to three years. In the house's interior, he noted that where subflooring had been replaced the person who made the patches should have discovered the damage beneath. Beneath the house, he determined that some joist damage was visible, because it was not covered by insulation, and that once insulation was removed more damage was visible.

¶ 13 The Douglases shut off the water, drained the lines, and turned off the electricity. They obtained a bid from a contractor who determined it would cost more to repair the home than to tear it down and rebuild.

¶ 14 The **Douglases** sued the **Vissers**. They claimed fraudulent concealment, negligent misrepresentation, violation of the Consumer Protection Act, ch. 19.86 RCW, breach of contract, and violation of Terry Visser's statutory duties as a real estate agent.

¶ 15 Kelly Hatch, who assisted Visser with some of the repairs, testified that he had difficulty fixing the floors in the bathroom, because the wood was too soft to install screws. When he advised Terry Visser to rip out the plywood to inspect the joists underneath, Visser said he could not put any more into it and told Hatch to find a way to attach the wood. On the house's exterior, Hatch discovered that wood underneath the bellyband was rotted. Visser instructed him to cover it up with trim. Specifically, Visser said they could cover it in caulking, use a bunch of nails, paint it, and seal it. When Hatch nailed the trim up, it was so rotted that he could not get the nails to stay in. Visser himself testified that he added a new piece of wood to a rotted joist, although he asserted he could not see the rot.

¶ 16 Flaherty explained that the rot he discovered in the first inspection was "[n]ot necessarily" a sign that the building's whole sill plate was rotted. He testified that the concealed rot he discovered in his last inspection was the worst he had ever seen. Juneau testified that at the time of the Douglases' purchase there was readily observable damage that warranted further inspection or inquiries.

¶ 17 The trial court found that the Vissers discovered significant wood rot to the sill plate and rim joist, as well as to the floor joists. It determined that, instead of correcting the defects, the Vissers made superficial repairs and concealed the damage. It ruled in favor of the Douglases on all claims. The court awarded the Douglases $103,000 to tear down and rebuild the house, $3,000 to cover the cost of inspections, $1,500 in moving expenses, $12,000 for emotional distress, and $25,000 as treble damages pursuant to the Consumer Protection Act. It also awarded the Douglases their fees and costs in the amount of $49,838. It offset those damages against the principal and interest the Douglases still owed on the promissory note. ***803** Judgment was entered for the Douglases in the amount of $24,245.

DISCUSSION

[1] ¶ 18 When the trial court enters findings of fact and conclusions of law, review is limited to determining if the findings of fact are supported by substantial evidence and if the findings of fact support the conclusions of law. *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wash.App. 422, 425, 10 P.3d 417 (2000). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the declared premise. *Hegwine v. Longview*

Fibre Co., 132 Wash.App. 546, 555–56, 132 P.3d 789 (2006), *aff'd*, 162 Wash.2d 340, 172 P.3d 688 (2007).

¶ 19 The Vissers challenge several of the trial court's findings that are central to its conclusions. Specifically, they argue that there is no substantial evidence to support findings that the **Vissers** discovered and concealed defects before selling the home, or a finding that the defects were unknown and undiscoverable to the **Douglases**.

¶ 20 The trial court found:

> During the course of renovating the house, the Vissers discovered significant wood rot to the sill plate and rim joist that connects the concrete foundation to the frame.

¶ 21 It further found:

> Rather than correct these defects, the Vissers or their hired help made superficial repairs to the visible damage and covered up the rest.

¶ 22 Two inspectors independently concluded that extensive damage was covered up during the period of time that the Vissers owned the house. Flaherty determined that the damage could not have occurred after the repair work, and Juneau determined that damage beneath the flooring should have been discovered when the subflooring was repaired. Hatch corroborated the inspectors' reports. He testified that he and Terry Visser covered rot with new trim and new subflooring. The inspection reports, together with Hatch's testimony, amply support the trial court's findings that the Vissers discovered and concealed rot.

¶ 23 The trial court also found:

> The defects were unknown to the Douglases and were not discoverable by a careful and reasonable inspection.

[2] ¶ 24 When a buyer is on notice of a defect, it must make further inquiries of the seller. In *Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp.*, an apartment building had chronic water leaks. 51 Wash.App. 209, 210, 752 P.2d 1353 (1988). Despite the owner's repeated attempts to fix the leaks, the problem persisted. *Id.* at 210–11, 752 P.2d 1353. Eventually, the owner decided to sell the building. *Id.* at 211, 752 P.2d 1353. The seller had several conversations with the buyer, but never talked about defects or maintenance problems. *Id.* The buyer's prepurchase inspection revealed evidence of water penetration including stains, cracked plaster, and loose tiles. *Id.* In other words, evidence of water leaks was readily observable. *Id.* Nevertheless, the buyer purchased the building without making further inquiries and later sued alleging that the seller failed to disclose " 'substantial, chronic, and unresolved water leakage problems.' " *Id.* at 212, 752 P.2d 1353.

¶ 25 The buyer agreed that it discovered evidence of water leaks, but argued that the true problem was the extreme, chronic nature of the leaks. *Id.* at 214, 752 P.2d 1353. It characterized the extent of the problem as a separate defect. *Id.* We concluded that where "an actual inspection demonstrates some evidence of water penetration, the buyer must make inquiries of the seller." *Id.* at 215, 752 P.2d 1353. The buyer knew there was a defect, but did not make any inquiries or establish that inquiries would have been fruitless. *Id.* The extent of the damage itself was not a separate defect, and it was no defense that the defect was worse than the buyer anticipated. *Id.* at 214–15, 752 P.2d 1353. Accordingly, its claim could not proceed. *Id.* at 215, 752 P.2d 1353.

¶ 26 In contrast, in *Sloan v. Thompson* the buyers had extensive knowledge of various defects. 128 Wash.App. 776, 781, 115 P.3d 1009 (2005). Before they purchased it, the Sloans rented the home for three years and ***804** discovered that the roof leaked, the decks were rotted, some electrical outlets did not work, and the toilets did not flush properly. *Id.* at 781, 115 P.3d 1009. After the sale was completed, an earthquake revealed that the septic tank was defective and the foundation was structurally unsound due to " 'extremely faulty construction.' " *Id.* at 782, 786, 115 P.3d 1009. Because the defective septic tank and structurally unsound foundation were separate defects from the extensive problems the buyers knew of, the buyers succeeded on their claim for fraudulent concealment. *Id.* at 789, 791, 115 P.3d 1009.

¶ 27 Here, Flaherty identified an area of rot and decay near the roofline, an area of rotted sill plate, and sistered floor joists. The Douglases and their inspector were on notice of the defect and had a duty to make further inquiries. The Douglases argue that "they had no idea that 50 to 70% of the sill plate and rim joist were destroyed" and that the area of rot that Flaherty discovered was not unusual. That, however, is the precise argument we rejected in *Dalarna*. Once a buyer discovers evidence of a defect, they are on notice and have a

duty to make further inquiries. They cannot succeed when the extent of the defect is greater than anticipated, even when it is magnitudes greater.

[3] ¶ 28 The Douglases suggest, without citation to the record, that they did in fact make further inquiries, asserting that "[n]either a reasonable inspection, [1] *nor the Douglases' reasonable questions,* put them on notice" of the extent of damage. (Emphasis added.) But, Nigel **Douglas** explicitly testified that after the prepurchase inspection report, which was the source of notice of the defects, he did not ask the **Vissers** or Flaherty any questions about the rot that Flaherty identified. Instead, they were content to let the report speak for itself.

¶ 29 Prior to the inspection, the **Douglases** asked follow-up questions to the **Vissers**' perplexing responses in the seller disclosure statement. But none of those questions expressly addressed the rot issue, and the Douglases did not ask any specific questions about rot or the house's foundation. More significantly, both the seller disclosure statement and the **Vissers**' responses to the **Douglases**' inquiries predate the prepurchase inspection report. Inquiries made before the prepurchase inspection cannot be construed as inquiries regarding the rot discovered during the inspection.

¶ 30 As in *Dalarna*, there is no evidence that the Douglases made further inquiries once they were on notice of the defect. *Dalarna* recognizes that further inquiry is not necessary where it would have been fruitless. 51 Wash.App. at 215, 752 P.2d 1353. While the Vissers' overt attempts to cover up the defects prior to listing the property and their preinspection evasiveness may support an inference, if not a conclusion, that such inquiry would have been fruitless, the trial court did not enter any such findings. Accordingly, despite the egregious nondisclosure and concealment by the **Vissers**, an essential element of each of the **Douglases**' claims is not satisfied. [2]

[4] [5] ¶ 31 A claim for fraudulent concealment exists when (1) the residential dwelling has a concealed defect, (2) the seller has ***805** knowledge of the defect, (3) the defect presents a danger to the property or health or life of the buyer, (4) the defect is unknown to the buyer, and (5) the defect would not be disclosed by a careful, reasonable inspection by the buyer. *Alejandre v. Bull,* 159 Wash.2d 674, 689, 153 P.3d 864 (2007). A statutory claim for breach of a real estate agent's duties exists when the agent does not disclose all material facts known to the agent that are not apparent or readily ascertainable. RCW 18.86.030(1)(d). A claim for negligent misrepresentation exists when the seller (1) makes a false statement, (2) to induce a business transaction, and (3) the buyer justifiably relies on the false statement. *Amtruck Factors v. Int'l Forest Prods.,* 59 Wash.App. 8, 18, 795 P.2d 742 (1990). A violation of the Consumer Protection Act exists when there is (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) with a public interest impact, (4) that proximately causes, (5) injury to a plaintiff in his or her business or property. *Svendsen v. Stock,* 143 Wash.2d 546, 553, 23 P.3d 455 (2001); *Indoor Billboard/ Wash., Inc. v. Integra Telecom of Wash., Inc.,* 162 Wash.2d 59, 83–84, 170 P.3d 10 (2007).

¶ 32 Because the **Douglases** were on notice of the defect and had a duty to make further inquiry, it cannot be said that the defect was unknown to the **Douglases**, that it could not have been discovered by a reasonable inspection, that the **Douglases** justifiably relied on the **Vissers**' misrepresentations, or that the **Vissers** committed an unfair or deceptive act that caused the **Douglases**' injury. [3]

¶ 33 The Vissers efforts in concealing the defects of the house they were selling are reprehensible, even more so because Visser is a licensed real estate agent. Nonetheless, the law retains a duty on a buyer to beware, to inspect, and to question. We caution that the **Douglases** 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 Douglases 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 **Douglases** 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 Douglases' failure means they were not entitled to maintain these claims.

[6] ¶ 34 The Douglases defaulted on the promissory note. The interest rate in the event of default is 18 percent. The Douglases owe the principal and interest at 18 percent. Further, the purchase and sale agreement provides an attorney fee provision. When an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees. *Brown v. Johnson,* 109 Wash.App.

56, 58, 34 P.3d 1233 (2001). We award the Vissers their reasonable attorney fees.

WE CONCUR: VERELLEN, J., and SPEARMAN, A.C.J.

¶ 35 We reverse.

Footnotes

1 When Juneau inspected the home in September 2008, he discovered an exposed girder beam with extensive carpenter ant damage. He also observed exposed sistered joists that were essentially worthless, because they did not reach the girder beam. Juneau testified that the damaged girder beam together with the sistered joists, all of which were visible without further intrusion, should have been cause for further inspection when Flaherty conducted his prepurchase inspection. In contrast, the only evidence that Flaherty conducted a reasonable inspection is Flaherty's own testimony that he conducted *an* inspection. We 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.

2 The Vissers also argue that the economic loss rule precludes recovery for negligent misrepresentation, that Terry Visser could not be held liable for representations made in his capacity as real estate agent, and that statements in the seller disclosure statement cannot be construed as a warranty. They further challenge the trial court's damages award. They argue that the Douglases did not mitigate damages, that the Douglases were not entitled to emotional distress damages, and that the trial court used an improper measure of damages. Because we reverse, we do not reach these issues.

3 The Douglases breach of contract claim was based upon fraudulent concealment and negligent misrepresentation claims. When those claims fail, so does the breach of contract claim.

APPENDIX 4

Proposed Order

Judge Catherine Shaffer

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

HARTLEY McGRATH, Plaintiff, v. VESTUS LLC; WINDERMERE REAL ESTATE/EAST, INC., and CHRISTOPHER HALL and JANE DOE HALL and the Marital Community of CHRISTOPHER AND JANE DOE HALL, Defendants.	NO. 12-2-08537-4 SEA **Proposed** ORDER ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Hearing

This matter duly came on for hearing before the undersigned Judge on Defendants' Motion for Partial Summary Judgment Based on New Legal Authority and New Evidence.

Each party appeared through such party's counsel of record.

The Court considered the following materials:

Defendant's Motion and supporting documents:

Declaration of Philip T. Mattern and attached Exhibits:

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1. Excerpts of Deposition of Hartley E. McGrath

2. Excerpts of Deposition of Mark R. Cooley

Declaration of Jim Melgard

Declaration of David P. Stenhouse and attached Exhibits:

A. *Curriculum vitae* of David P. Stenhouse

B. Foreclosure Auction Packet produced by Vestus

Declaration of Brian Jessen (signed December 12, 2012) and attached Exhibits:

A. Agreement (contract) between the parties

B. "7 Critical Mistakes" presentation

The Court also considered the oral arguments of counsel and the records and files herein.

II. Order

After considering the foregoing, the Court finds no genuine issue as to any material fact by which the defendants could be found liable. Therefore, it is

ORDERED, ADJUDGED and DECREED that plaintiff's claims of fraudulent concealment against defendants Vestus, LLC; Windermere Real Estate/East, Inc.; Christopher Hall and Jane Doe Hall and the marital community of Christopher and Jane Doe Hall, be and hereby are dismissed with prejudice by way of partial summary judgment.

DONE IN OPEN COURT this ___ day of _____, 2013.

_____

Judge Catherine Shaffer

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