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CASE NUMBER: 12-2-08537-4 SEA

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

HARTLEY McGRATH,

No. 12-2-08537-4 SEA

Plaintiff,

DEFENDANTS' PROPOSED
JURY INSTRUCTIONS

-v-

VESTUS LLC, et al,

Defendants

Instruction ____

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses [, and the exhibits that I have admitted,] during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark,

statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

Instruction ____

The following is a summary of the claims of the parties provided to help you understand the issues in the case. You are not to take this instruction as proof of the matters claimed. It is for you to decide, based upon the evidence presented, whether a claim has been proved.

Plaintiff Harley McGrath is a leadership and team development consultant who decided to invest in foreclosed real estate. Defendant Windermere Real Estate/East, Inc. is a real estate firm. Defendant Vestus is a limited liability company associated with Windermere under a written agreement. Defendant Christopher Hall is a real estate broker who is part owner of Vestus and associated with Windermere under a written agreement.

Plaintiff entered into a Compensation/ Confidentiality Client Agreement with Vestus. Vestus provides information about foreclosure properties for a fee. Plaintiff purchased a foreclosure property after receiving information about it from defendant Christopher Hall. Plaintiff alleges that the foundation of the property was cracked and settling, but that Hall did not inform him about the defects. Plaintiff further alleges that she incurred expenses to repair the problems with the foundation.

First, Plaintiff claims that defendants breached the agreement in one or more of the following respects: (1) Failing to disclose all information in Defendants' possession; and (2) Failing to adequately obtain and communicate information.

Second, Plaintiff claims that Defendants negligently misrepresented that they had disclosed all information in their possession and that they had diligently obtained certain information about the property.

Third, Plaintiff claims that Defendants were negligent by violating duties required by statute.

Fourth, Plaintiff claims that Defendants violated the Consumer Protection Act.

Plaintiff claims that she sustained damages as a result of these actions or inactions by Defendants and she seeks a judgment against Defendants for these damages.

Defendants deny these claims and further deny that plaintiff suffered any damage. In addition, defendants assert that plaintiff's losses were caused by her own negligence and her failure to use reasonable efforts to avoid or minimize her damages.

Instruction ____

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

WPI 1.03

Instruction ____

Windermere Real Estate/East, Inc. is sued as the principal and Vestus LLC as the agent. Windermere denies that any agency existed. An agent is a person employed under an express or implied agreement to perform services for another, called the principal, and who is subject to the principal's control or right to control the manner and means of performing the services.

A principal is liable for the negligence of its agent for conduct within the scope of the agent's authority. If you find that Vestus LLC was the agent of Windermere, and if you find Vestus LLC is liable for negligence or negligent misrepresentation, then both are liable. If you do not find that Vestus LLC is liable for negligence or negligent misrepresentation, then neither is liable.

A principal is liable for breach of an agreement entered into by an agent in the principal's name. A principal is not liable for breach of an agreement entered into by an agent in the agent's own name. An employee who signs a contract for a corporate entity is not personally liable for the corporation's breach of the contract.

WPI50.01, 50.06 (combined); *see* Answer at ¶ 5.

Instruction ____

Vestus and Windermere are corporate entities. A corporation can act **only** through its officers and employees. Any act or omission of an officer or employee is the act or omission of the corporation.

WPI 50.18

Instruction ____

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts. You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

Only expert witnesses may offer opinion testimony. Whether a witness is an expert entitled to offer opinion testimony is a determination for the court. You will be advised when the court determines that a witness is an expert.

WPI 2.10; ER 701, 702.

Instruction ____

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

A party who alleges negligent misrepresentation has the burden of proving each of the elements of negligent misrepresentation by clear, cogent, and convincing evidence. However, this burden of proof is applicable only to the proof of negligent misrepresentation. All other allegations of the respective parties must be proved by a preponderance of the evidence.

Proof by clear, cogent, and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. Clear, cogent, and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

WPI 21.01. 160.03

Instruction ____

To prevail on her claim for breach of contract, plaintiff must prove the following by a preponderance of the evidence:

1. The plaintiff entered into a contract with the defendant. Only a party to a contract can be liable for its breach;
2. That the defendant breached a specific term of the contract, without reference to the legal duties imposed by law on that relationship;
3. That plaintiff was harmed as a result; and
4. That the plaintiff's damages were proximately caused by the breach of the contract.

G.W. Const. Corp. v. Prof'l Serv. Indus., Inc., 70 Wash. App. 360, 364, 853 P.2d 484, 486 (1993)

Instruction ____

A plaintiff who sustains damage has a duty to minimize her loss. Plaintiff is not entitled to recover for any part of the loss that she could have avoided with reasonable efforts. The defendants have the burden to prove plaintiff's failure to use reasonable efforts to minimize her loss, and the amount of damages that could have been minimized or avoided. Plaintiff may recover expenses connected with reasonable efforts to avoid loss.

WPI 303.06 Contract—Mitigation of Damages

Instruction ____

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

WPI 10.01 Negligence—Adult—Definition

Instruction ____

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

WPI 11.01 Contributory Negligence—Definition

Instruction ____

The term “proximate cause” means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.

WPI 15.01 Proximate Cause—Definition

Instruction__

To establish a claim for negligent misrepresentation, plaintiff must prove by clear, cogent, and convincing evidence each of the following:

1. That defendants supplied information for the guidance of others in their business transactions that was false. And,
2. That defendants knew or should have known that the information was supplied to guide plaintiff in business transactions. And,
3. That defendants were negligent in obtaining or communicating the false information. And,
4. That plaintiff relied on the false information supplied by defendants. And,
5. That plaintiff's reliance on the false information supplied by defendants was justified, that is, that plaintiff's reliance was reasonable under the surrounding circumstances. And,
6. That the false information was the proximate cause of damages to plaintiff.

If you find that each of the foregoing six points has been established by clear, cogent, and convincing evidence, you must find for plaintiff on her claim of negligent misrepresentation. If you do not find that each of the foregoing six points has been established by clear, cogent, and convincing evidence, you must find for defendant on the claim of negligent misrepresentation.

ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 827-28, 959 P.2d 651 (1998); *Douglas v. Visser*, 173 Wn.App. 823, 295 P.3d 800 (2013); *Hoel v. Rose*, 125 Wn.App. 14, 105 P.3d 395 (2004).

Instruction ____

A claim negligent misrepresentation fails if the misrepresented information was readily ascertainable to the plaintiff or could have been discovered through a reasonable inspection.

Douglas v. Visser, 173 Wn.App. 823, 295 P.2d 800 (2013); *Hoel v. Rose*, 125 Wn.App. 14, 105 P.3d 395 (2004); *Bailey for Bailey v. Gammell*, 34 Wn.App. 417, 661 P.2d 612 (1983).

Instruction ____

The statute covering real estate brokers provides that:

A real estate broker owes to all parties to whom the broker renders real estate brokerage services the following duties, which may not be waived:

- (a) To exercise reasonable skill and care;
- (b) To deal honestly and in good faith;
- (c) To disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party; provided that the broker has no duty to investigate matters that the broker has not agreed to investigate. A “material fact” means information that substantially adversely affects the value of the property or a party's ability to perform its obligations in a real estate transaction, or operates to materially impair or defeat the purpose of the transaction. Any act, occurrence, or use not adversely affecting the physical condition of or title to the property is not a material fact;
- (d) Unless otherwise agreed by the broker and a party, a broker owes no duty to conduct an independent inspection of the property, 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 broker to be reliable.

RCW 18.86.030; 18.86.010.

Instruction ____

The violation of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence.

WPI 60.03

Instruction ____

Elements of a Violation of the Consumer Protection Act

Plaintiff claims that Defendants have violated the Washington Consumer Protection Act. To prove this claim, Plaintiff has the burden of proving each of the following propositions:

- (1) That defendants engaged in an unfair or deceptive act or practice. Plaintiff does not need to show that the act or practice was intended to deceive, but mere negligence or an inadvertent mistake is not an unfair or deceptive act or practice that supports a Consumer Protection Act claim.
- (2) That the act or practice occurred in the conduct of defendants' trade or commerce. The Consumer Protection Act applies to only the business activities that are part of a professional service business, and not to the professional services themselves.
- (3) That the act or practice affects the public interest. An act affects the public interest if it: (a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.
- (4) That plaintiff was injured in either her business and property. Injuries to business or property do not include physical injury to a person's body, or pain and suffering.
- (5) That defendants' act or practice was a proximate cause of plaintiff's injury.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for Plaintiff on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for Defendants.

WPI 310.01 Elements of a Violation of the Consumer Protection Act

Ramos v. Arnold, 141 Wn.App. 11, 169 P.3d 482 (2007) "Since this claim amounts to an allegation of negligence, the trial court properly dismissed the Consumer Protection Act claim on summary judgment." 141 Wn.App. at 20-21. _____

Douglas v. Visser, 173 Wn.App. 823, 834, 295 P.3d 800 (2013) ("Because the Douglasses were on notice of the defect and had a duty to make further inquiry, it cannot be said ... that the Vissers committed an unfair or deceptive act that caused the Douglasses' injury.")

Bailey for Bailey v. Gammell, 34 Wn.App. 417, 661 P.2d 612 (1983) (a plaintiff is "on notice" of a defect that is in plain sight).

Instruction ____

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff on her claims, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the acts or failure to act by the defendants, apart from any consideration of fault by the plaintiff.

If you find for the plaintiff, you should consider the economic or actual claimed, including the reasonable cost of repairing the foundation of the subject house. You may not award plaintiff for noneconomic damages.

Actual damages are those losses that were reasonably foreseeable as a probable result of a breach of defendant's duty. A loss may be foreseeable as a probable result of a breach because it follows from the breach either

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

In calculating the plaintiff's actual damages, you should determine the sum of money that will put the plaintiff in as good a position as she would have been in if both plaintiff and defendant had performed all of their duties.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

WPI 30.02.01 (modified)

Instruction ____

Concluding Instruction—For Special Verdict Form

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

WPI 1.11