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' TRIAL BRIEF

I. Introduction

In this jury trial, plaintiff claims that defendants, in the course of their business of advising customers on properties available for purchase at foreclosure auctions, failed to disclose that the property plaintiff bought "sight unseen" at an auction had settling issues leading to foundation problems. Defendants will present evidence showing that such "settling issues" were disclosed to plaintiff, that they taught and plaintiff understood that foreclosure purchases have inherent risks, that plaintiff sold the property for a profit, and that the problems were readily visible to plaintiff when she first looked at the property the day after her purchase and therefore would have been seen by her had she only looked at it pre-purchase.

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II. Summary of Facts

Defendant Vestus LLC ("Vestus") is a group of individuals, including defendant Christopher Hall, operating under the real estate brokerage license of defendant Windermere Real Estate/East, Inc. Vestus provides assistance to investors who seek to purchase properties at foreclosure sales or from lenders who have obtained properties through foreclosure.

Plaintiff Hartley McGrath, together with her boyfriend Mark Cooley, researched to find an investment property to fix up and "flip", that is, resell quickly for a profit. Plaintiff was assisted by her father, an experienced construction engineer. Plaintiff enlisted Vestus' assistance. She signed a "Compensation/Confidentiality Client Agreement" which stated Vestus would collect and compile information on foreclosure properties, stated there would be no agency relationship with plaintiff as customer, stated Vestus does not have physical access into the properties, and that Vestus does not guarantee the accuracy or completeness of information it makes available, and that plaintiff was to "independently assess any properties and will seek independent advice from the appropriate professionals".

The evidence will show that the Vestus website and other materials made certain claims about the service it would provide, but it also contained words of caution to prospective customers about the nature and risks of purchasing foreclosure properties.

On the evening before the auction at which plaintiff bought the subject property, plaintiff and Mr. Cooley attended a Vestus presentation focused on particular properties that were being auctioned the next day. Vestus representatives gave all the prospective buyers at the meeting, including plaintiff, a packet with information on the properties going to auction the next day. Plaintiff will claim she did not get it, while defendants' witnesses will testify that she had to have received it.

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Although plaintiff knew it would be prudent to look at the property before buying, and although the property was one of 10 to 20 properties she was considering fully four days before the auction, she went ahead and bought the property "sight unseen" for $333,300. The next day, plaintiff looked at the subject property for the first time and, before even setting foot on the property, saw serious foundation problems from the back.

Plaintiff is expected to present evidence that she spent a considerable sum to fix up the property. If this trial gets to a damages phase, close attention will need to be paid to how much of the money expended was related to foundation repair and settling issues, since those are the matters plaintiff claims should have been disclosed to her. It is expected the evidence will show that the plaintiff spent considerable sums on repair and remodeling that had nothing to do with foundation or settling.

Plaintiff sold the property for $500,000, or $166,700 more than her purchase price.

II. Legal Authority

Plaintiff is claiming liability on the basis of breach of contract; breach of RCW 18.86, the Washington agency statute governing real estate brokers and agents; negligent misrepresentation; and violation of the Consumer Protection Act. Defendants deny all of the claims. In addition, plaintiff's Complaint alleged violation of RCW 18.85, and since this is easily disposed of, it is treated first.

2.1 RCW 18.85, the Broker Licensing Statute.

Plaintiff complains that the actions of defendants "violate the laws intended to protect parties in real estate transactions, including Chapters 18.85 and 18.86 RCW." Complaint ¶ 22. RCW 18.85 (to be distinguished from RCW 18.86, the agency statute) authorizes the licensing of real estate brokers and brokerage firms. It establishes a professional code and public disciplinary remedy for violations, but it does not authorize a private right of action. *Woodhouse v. Re/Max*

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Northwest Realtors, 75 Wn.App. 312, 878 P.2d 464 (1994). Therefore, if plaintiff is making any claims under RCW 18.85, they should be dismissed without being submitted to the jury.

2.2 Breach of Contract Claim.

The parties' written contract will be Exhibit 6. A key provision is paragraph 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 access any properties and will seek independent advice from the appropriate professionals.

Plaintiff will claim defendants had in their possession an "Agent Remarks" sheet (Exhibit 11, p. 34) which identified "settling issues" on the subject property and that they breached the contract by failing to give that information to her. Defendants will present evidence and testimony showing that plaintiff in fact did receive that sheet as part of an information packet.

Plaintiff is also expected to claim that defendants breached the contract by failing to adequately investigate and discover information about the property. It is expected that plaintiff may testify to claimed "promises" made orally or in defendants' advertising that she will contend became part of the parties' "contract". However, the language in the signed Agreement (Exhibit 6) and the circumstances in which it was presented and signed point towards the written Agreement containing the essence of the parties' contract. The opening paragraph of the document (prior to the numbered paragraph) ends with the words, "This Agreement sets forth ***the*** terms under which the information is provided and defines ***the*** terms of the relationship of the parties." (Emphasis added.) The article "the" makes clear that the terms as stated in the written Agreement were to be the exclusive essential terms. It should also be noted that the statute of

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frauds, RCW 19.36.010(5) states that one of several types of agreements that is void unless in writing is "an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission".

Of course, pertinent evidence extrinsic to the written agreement may be relevant in discerning the parties' manifest intent, where the evidence gives meaning to the words used in the written contract. *Hollis v. Garwall*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999), citing and explaining *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). "However, admissible extrinsic evidence does *not* include:

* Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term;
* Evidence that would show an intention independent of the instrument; or
* Evidence that would vary, contradict or modify the written word."

Id. (emphasis the court's). In other words, "extrinsic evidence illuminates what was written, not what was intended to be written". *Id.*, citing *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 189, 840 P.2d 851 (1992). Although without doubt plaintiff will emphasize defendants' statements concerning the profit potential of buying and reselling foreclosure properties, there will also be evidence that plaintiff was well aware of the limitations of the scope of defendants' services and the advisability of seeing the property for herself before buying -- as consistent with the limitations stated in paragraph 2 of the Agreement she signed. If extrinsic evidence is admitted to explain this contract, the extrinsic evidence supporting the limitations of defendants' duties under the contract will need to be included.

A contractual allocation of risk is presumed valid and enforceable and is not negated by one party's mistaken assumptions: "A party who incurs an obligation with limited knowledge,

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conscious disregard of surrounding circumstances and awareness of uncertainty must bear the consequences of its decision." *Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn.2d 353, 363, 705 P.2d 1195 (1985). *See also Scott v. Pettet*, 63 Wn.App. 50, 57-59, 816 P.2d 1229 (1991) (feasibility contingency allowing prospective buyer to investigate the property was held to allocate to the buyer the risk of mistake concerning zoning, precluding the buyer's claim for rescission).

Plaintiff cannot be heard to complain that she did not read or understand the language in the written Agreement she signed. As pointed out in *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987), citing and quoting an earlier case:

> The relevant principles are summarized in *National Bank of Washington v. Equity Investors,* 81 Wash.2d 886, 912-13, 506 P.2d 20 (1973):
>
> It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents. *Perry v. Continental Ins. Co.,* 178 Wash. 24, 33 P.2d 661 (1934). One cannot, in the absence of fraud, deceit or coercion be heard to repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand. [The plaintiff], being not only a person of ordinary understanding but one with more than ordinary experience in land transactions and instruments of conveyance and security, and with time and opportunity both to consult with an attorney and to inspect the instruments before signing, cannot now be heard in law to repudiate his signature. The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs.

2.3 Agency Statute, RCW 18.86.

RCW 18.86 governs the relationships between real estate brokers / agents / firms on the one hand and customers and clients dealing with them on the other. The parties' contract (Exhibit 6) in paragraph 1 makes clear that defendants did not represent plaintiff as her agents. Accordingly, the only agency duties defendants had were those owed to all persons to whom defendants rendered real estate brokerage services. RCW 18.86.030 states in pertinent part:

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> (1) Regardless of whether the licensee is an agent, a licensee owes to all parties to whom the licensee 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;
>
> . . .
>
> (d) To disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the licensee has not agreed to investigate;
>
> . . . .
>
> (2) 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 statute (1) emphasizes that there is no duty to disclose facts that are "apparent or readily ascertainable" to the buyer; (2) twice states that licensees have no duty to investigate; and (3) disclaims any duty to verify the statements of others that are reasonably believed to be reliable.

Here, the parties' contract explicitly disclaimed any representations concerning the "quality or condition" of the property and allocated to plaintiff the responsibility to conduct her own investigation, using "appropriate professionals". The duty of "reasonable care and skill" is limited to the scope of a real estate broker's expertise. *See Hoffman v. Connall*, 108 Wn.2d 69, 75 (holding that members of each profession are only responsible for meeting the standard of care pertinent to that particular profession). For purposes of RCW 18.86, "real estate brokerage services" are as defined in RCW 18.85. RCW 18.86.101(11). RCW 18.85.011 lists several possible functions of real estate brokers, none of which come anywhere near structural inspection. In fact, home inspectors are licensed and regulated under RCW 18.280.

Nothing in RCW 18.86 eliminates the need to establish the usual elements such as proximate causation and damages in a private cause of action. *Boguch v. Landover Corp.*, 153

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Wn.App. 595, 224 P.3d 795 (2009) (defendant real estate agent posted inaccurate aerial photograph of plaintiff's property; plaintiff claimed the photographs caused the property to sell for less than it would have otherwise; held, dismissed on summary judgment because plaintiff failed to put forth evidence from which a jury could reasonably infer that the brokers' negligence proximately caused the claimed financial loss).

With regard to the duty of "disclosure", RCW 18.86.030(1)(d) only requires a broker to disclose material facts "known by the licensee" **and** "not apparent or readily ascertainable to a party". Plaintiff must prove that defendants had actual knowledge of the problems she now complains of and that such problems were not apparent or readily ascertainable to her. Plaintiff will testify that, contrary to defendants' advice, she did not look at the subject property prior to her purchase, and that when she did finally look at the property, she immediately noticed foundation problems from her vantage point to the rear of the lot.

2.4 Negligent Misrepresentation.

To establish a claim for negligent misrepresentation based on a false statement, 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,

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6. That the false information was the proximate cause of damages to plaintiff.

ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 827-28, 959 P.2d 651 (1998).

Even if a defendant gives plaintiff property buyer blatantly false information, if a plaintiff real estate buyer is on notice of the problem later complained of, plaintiff cannot sustain a claim of negligent misrepresentation since plaintiff's reliance on defendants' representation was not reasonable and justified. *Douglas v. Visser*, 173 Wn.App. 823, 295 P.3d 800 (2013); *Hoel v. Rose*, 125 Wn.App. 14, 105 P.3d 395 (2004). In other words, the right to rely on a representation is inseparably connected with plaintiff's duty to use diligence with respect to the representations made. *Williams v. Joslin*, 65 Wn.2d 696, 698, 399 P.2d 308 (1965). *See also Bailey for Bailey v. Gammell*, 34 Wn.App. 417, 661 P.2d 612 (1983) (tort claim not involving misrepresentation, held that a plaintiff is "on notice" of a defect "in plain sight", precluding relief).

Ms. McGrath is also claiming "negligent misrepresentation by omission". For this, she has submitted as a proposed jury instruction the following portions of WPI 165.03:

> A party to a business transaction has a duty to disclose to the other party, before the transaction is completed, the following information under [any of] these circumstances:
>
> (a) matters known to him or her that the other is entitled to know because of a relationship of trust and confidence between them;
>
> (b) matters known to the party that he or she knows to be necessary to prevent his or her partial or ambiguous statement of the facts from being misleading[.]

However, our Supreme Court has held that "An omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation. [Citations omitted.] Moreover, the plaintiff must not have been negligent in relying on the representation." *Ross v. Kirner*, 162 Wn.2d 493, 499-500, 172 P.3d 701 (2007). *See also Austin v. Ettl*, 171 Wn.App. 82, 87-91, 286 P.3d 85 (2012), where the court discussed at great length that a failure

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to disclose cannot be the basis of a negligent misrepresentation action. Accordingly, notwithstanding the recently published WPI 165.03, any theory of "negligent misrepresentation by omission" is not recognized in this State and should not be submitted to the jury.

Even under a past court formulation that appeared to entertain "negligent misrepresentation by omission", it was under strictly limited circumstances. If plaintiff was going to claim it on the basis of the relationship of the parties, it had to be a "special relationship", a "quasi-fiduciary relationship". *Van Dinter v. Orr*, 157 Wn.2d 329, 334, 138 P.3d 608 (2006). Recall that the parties' Agreement (Exhibit 6) disclaimed any agency relationship between the parties and limited the scope of information to be provided by defendants to plaintiff. Also it must be borne in mind that Ms. McGrath was acting as a businessperson, intending to buy real estate for speculative resale profit, and that she had more ready access to engineering expertise -- her father -- than the defendants.

In addition, *Van Dinter* held that where the plaintiff "could easily have discovered" the matter now complained of, plaintiff has no "negligent misrepresentation by omission" claim. *Id.* Ms. McGrath did in fact "easily discover" the problems now complained of when she looked at the property for the first time the day after her purchase. *See also Bailey, discussed supra in this subsection.*

Since *Ross v. Kirner,* however, there is no "negligent misrepresentation by omission" and the jury should not be given an instruction on it.

2.5 Consumer Protection Act (CPA) claim.

RCW 19.86.020 provides:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

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To establish a claim under the CPA, plaintiff must prove five elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his or her business or property and (5) causation. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 30, 948 P.2d 816 (1997) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986)). The failure to establish any of these elements will defeat a CPA claim. *Hangman*, 105 Wn.2d at 793, 719 P.2d 531.

To establish the first element, that a party has engaged in an unfair or deceptive act, plaintiff must show that "the alleged act had the capacity to deceive a substantial portion of the public". *Sing v. John L. Scott, Inc.*, 134 Wash. 2d 24, 30, 948 P.2d 816 (1997). The question of whether an act is unfair or deceptive in violation of the CPA is generally a question of law. *Keyes v. Bollinger*, 31 Wn. App. 286, 289, 640 P.2d 1077 (1982). Note that in *Douglas v. Visser*, *supra*, the court held that because the plaintiffs were "on notice of" the defects complained of, the defendants did not commit an "unfair or deceptive act" within the meaning of the CPA. Defects "in plain sight" put a plaintiff on notice, precluding a legal claim. Defects in plain sight put a buyer "on notice", precluding a claim against the seller. *See Bailey for Bailey v. Gammell*, 34 Wn.App. 417, 661 P.2d 612 (1983).

Negligence, malpractice, or an inadvertent mistake standing alone do not support a CPA claim -- numerous cases have made this point, and one could either say such acts are not "unfair or deceptive" within the meaning of CPA or that such acts are not "trade or commerce" within the meaning of the CPA if they do not go to the "entrepreneurial aspects" of defendants' business. *Ramos v. Arnold*, 141 Wn.App. 11, 20-21, 169 P.3d 482 (2007).

With regard to the third element, public interest impact, RCW 19.86.093 provides:

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> In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it:
>
> (1) Violates a statute that incorporates this chapter;
>
> (2) Violates a statute that contains a specific legislative declaration of public interest impact; or
>
> (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

Ms. McGrath has not alleged that defendants violated any statute that incorporates RCW 19.86 or that contains any specific legislative declaration of public interest impact. Accordingly, she will need to prove that defendants' alleged wrongful acts had or have "the capacity to injure other persons". To date, no evidence has surfaced of another person complaining that these defendants withheld pertinent information about a property that they had in hand, or otherwise potentially or actually causing others to be injured in the same fashion.

Finally, Ms. McGrath must establish the fifth element, causation. The cases establish that a CPA plaintiff must establish "proximate cause" as in other torts, and that "plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007).

2.6 Damages.

2.6.1 Under all claims and theories, damages must be proved with sufficient certainty

As held by our Court of Appeals:

> Sufficiency of the evidence to prove damages must be established with enough certainty to provide a reasonable basis for estimating it. Although the precise amount of damages need not be shown, damages must be supported by competent evidence in the record. To be competent, the evidence or proof of damages must

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> be established by a reasonable basis and it must not subject the trier of fact to mere speculation or conjecture.

ESCA Corp. v. KPMG Peat Marwick, 86 Wn.App. 628, 639, 939 P.2d 1228 (1997), *affirmed with regard to a different issue*, 135 Wn.2d 820, 959 P.2d 651 (1998) (defendant accounting firm falsely reported plaintiff had big earnings when in truth it suffered big loss; jury awarded cost of maintaining extra employees; Court of Appeals reversed and dismissed because plaintiff failed to provide evidence, beyond speculation and conjecture of residual value of the extra employees).

See also Bennett v. Maloney, 63 Wn.App. 180, 817 P.2d 868 (1991) (defendant escrow provided second position security interest when first position security was promised; held, plaintiff's claim dismissed for failure to introduce value of the second position security that was provided). The same principle has been applied to CPA claims. *Brotherson v. Professional Basketball Club, LLC*, 604 F.Supp.2d 1276 (W.D. Wash. 2009) (applying Washington State law, court acknowledged defendant acted deceptively toward Seattle SuperSonics season ticket holders in promising benefits while secretly working to relocate the team, but dismissed CPA claim because plaintiffs failed to provide evidence of a CPA injury from which damages could flow; for example, no evidence of difference in value between benefits plaintiffs received and value of same benefits had they been accompanied by full disclosure of plan to move the team). 604 F.Supp.2d at 1295-96.

Also of great importance to our case is *Boguch v. Landover Corp.*, 153 Wn.App. 595, 224 P.3d 795 (2009), also discussed *supra* in subpart 2.3. There, the defendant real estate agent posted inaccurate aerial photograph of plaintiff's property; plaintiff claimed the photographs caused the property to sell for less than it would have otherwise; and the court dismissed the case on summary judgment because plaintiff failed to put forth evidence from which a jury could reasonably infer that the brokers' negligence proximately caused the claimed financial loss.

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2.6.2 Claim for forfeiture of commission should not go to the jury. Ms. McGrath's claim for $13,800 for refund of Vestus commission -- in effect asking for a forfeiture -- is not legally sustainable. "In most situations, an agent's negligence renders him or her liable only for the actual damages it causes the principal." *Monty v. Peterson*, 85 Wn.2d 956, 959, 540 P.2d 1377 (1975). There is a "limited exception" to this rule where agents "fail to disclose to their principals facts bearing on their interests in the matters in which they are employed and their ability to maintain undivided loyalty to the principal." *Id.* In that instance, the court may forfeit the agent's commission even in the absence of proof of damages. *Id. See also Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658, 667, 648 P.2d 875 (1982) (held, forfeiture of compensation where agent has been disobedient or disloyal is discretionary with the court; in this instance, commission was forfeited). Here, there is no evidence or even allegation that Vestus failed to disclose facts bearing on their ability to maintain undivided loyalty. There is a clear, unambiguous disclosure in the contract that Vestus was not acting as McGrath's agent. McGrath is limited to damages she can prove were caused by Vestus's breach of duties, and this precludes forfeiture of the commission paid.

2.6.3 Claim for Mark Cooley labor should not go to the jury. Mark Cooley is Ms. McGrath's boyfriend. He is not a party to this action. No documentation or itemization of Mr. Cooley's work, or Ms. McGrath's payment for it, has been supplied, despite discovery requests asking for this type of material. Certainly there is no proof that all of this was for items directly related to settling or foundation issues. In addition, public records show Mr. Cooley has not been a licensed general contractor for several years and did not have this status in 2011. If as appears Mr. Cooley is not a licensed contractor, by law he could not bring an action to compel

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McGrath to pay him. RCW 18.27.080. If McGrath paid or now pays him anyway, she is doing so as a volunteer and should not be able to charge Vestus for his work.

2.6.4 Limits of contract damages. In Washington, a plaintiff can recover for breach of contract only to the extent "the losses were reasonably foreseeable, at the time the contract was made, as a probable result of the breach". DeWolf and Allen, 25 Washington Practice: Contract Law and Practice (2007), § 14:8, pp. 339-340, citing WPI 303.01. "A loss may be foreseeable as a probable result of a breach because it follows from the breach either in the ordinary course of events, or as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know." *Id.*, p. 340.

2.6.5 Limits of negligent misrepresentation damages. Damages recoverable by a successful plaintiff for negligent misrepresentation include:

> (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
>
> (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation

Janda v. Brier Realty, 97 Wn.App. 45, 50, 984 P.2d 412 (1999), quoting Restatement (Second) of Torts § 552B (emphasis added). Note a plaintiff may *not* recover difference between the value of what was represented and the value received, i.e. no lost profits can be recovered. In *Janda*, plaintiff buyer alleged that seller's agent falsely understated the cost to subdivide the two properties purchased. The court held plaintiff had no damages because he sold the properties for more than he paid for them -- he was not entitled to the greater profit he might had garnered had the misrepresentations not been made. Accordingly, Ms. McGrath cannot recover "lost profits" under a negligent misrepresentation theory.

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2.6.6 Lost profits and opportunities. As seen in *Janda*, no "lost profits" may be recovered in a negligent misrepresentation action. Although lost profits are sometimes allowed in other causes of action, the scope is strictly limited. It is well settled in Washington that lost profits may only be recovered if plaintiff either (a) has an established track record in the particular business to provide a benchmark for legitimately measuring lost profits, or (b) appropriate expert testimony: *Farm Crop Energy, Inc. v. Old National Bank of Washington*, 109 Wn.2d 923, 927, 760 P.2d 231 (1988), quoting *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 16, 390 P.2d 677, 396 P.2d 879, 32 A.L.R. 125 (1964). In our case, Ms. McGrath has been making a point of this being her first venture in house-flipping, and her witness list does not include any expert on valuation or profits. Her claim for "lost profits" should not even go to the jury. Even more speculative than "lost profits" is the "lost opportunities" Ms. McGrath claims -- that because her money and credit were tied up in fixing up the subject property, she lost out on the opportunity to buy and profit from other properties. This presents so many unknown and unforeseeable events, it is simply impossible to assess a damage amount with any reasonable certainty.

2.6.7 Emotional distress. This element of damages was not pleaded, and was only claimed in response to plaintiff's responses to defendants' Third Discovery Requests, months after plaintiff's deposition was taken. It would be unfair to allow this claim now.

The latest major pronouncement on emotional distress from our Supreme Court was the 6 to 3 decision *Bylsma v. Burger King Corp.*, 176 Wn.2d 555, 293 P.3d 1168 (2013). In *Bylsma*, the Court held that emotional distress damages could be recoverable where a fast food restaurant customer discovered an employee's spittle on his hamburger. In doing so, the Court reaffirmed the historical limitations on emotional distress claims:

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> In negligence cases, however, we allow claims for emotional distress in the absence of physical injury only where emotional distress is (1) within the scope of foreseeable harm of the negligent conduct, (2) a reasonable reaction given the circumstances, and (3) manifest by objective symptomatology. *Hunsley v. Giard,* 87 Wash.2d 424, 433, 436, 553 P.2d 1096 (1976).

176 Wn.2d at 560. The court then cited some examples where our courts have allowed recovery for emotional distress:

> We have permitted recovery in the absence of physical injury, for example, where undertakers improperly buried an infant child, *Wright v. Beardsley,* 46 Wash. 16, 89 P. 172 (1907), where a defendant inadvertently printed plaintiff's telephone number on its sales slips causing the plaintiff to be harassed by telephone calls, *Brillhardt v. Ben Tipp, Inc.,* 48 Wash.2d 722, 297 P.2d 232 (1956), and where a funeral home failed to provide ashes in a burial urn and the decedent's mother handsifted through the ashes, mistaking them for packing material, *Corrigal v. Ball & Dodd Funeral Home, Inc.,* 89 Wash.2d 959, 962, 577 P.2d 580 (1978)

Id. The Court then pointed out that each such case involved "emotionally laden personal interests" and in each, "emotional distress was an expected result of the objectionable conduct". *Id.* The Court then stated that "Common sense tells us that food consumption is a personal matter and contaminated food is closely associated with disgust and other kinds of emotional turmoil." *Id.* Therefore, the six member Court majority concluded that emotional distress was "within the scope of foreseeable harm" and "a reasonable reaction". The Court did not specifically discuss "objective symptomatology" (the third element) as related to this case, but did note that the plaintiff's claimed symptoms included vomiting and nausea. 176 Wn.2d at 558.

In our case, Ms. McGrath's dealings with Vestus were not a "personal matter" and her claim does not involve "emotionally laden personal interests". Ms. McGrath was acting as a business person seeking defendants' services to help her find a suitable property to resell for monetary profit. In the context of an economic relationship, emotional distress damages generally are not recoverable. *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991). There was no "special" or "fiduciary" relationship here -- the contract between

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McGrath and Vestus explicitly disclaimed any agency relationship. The gravamen of Ms. McGrath's entire case is that Vestus failed to give her information, and that failure cost her dollars and cents -- not that the defendants committed disgusting or revolting acts that attacked her personal interests outside the financial realm. Nor has Ms. McGrath so far put forward any evidence of "objective symptomatology".

2.6.8 Theories for diminishing damages. The principle in contract law is, "The law does not permit a party to recover in a breach of contract action those damages which he could have avoided without undue risk, burden or humiliation. This requires that a party exercise reasonable efforts to mitigate damages." 25 Washington Practice Contract Law, *supra*, § 14:10, p. 341. In tort law, contributory fault chargeable to the plaintiff diminishes proportionally the amount awarded as compensatory damages for an injury attributable to the plaintiff's fault. RCW 4.22.005, discussed in 16 Wash. Practice: Tort Law and Practice, *supra*, § 8.2, pp. 252-53. The same principles apply to Consumer Protection Act claims. *Young v. Whidbey Island Board of Realtors*, 96 Wn.2d 729, 638 P.2d 1235 (1982) (plaintiff had duty to mitigate damages and to make a reasonable attempt to avoid the consequences of the injury). Once plaintiff has proved that damages are recoverable, the defendants have the burden of proving that such damages are to be diminished through one of these theories.

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III. Conclusion

Defendants, as business people, are never happy when a customer expresses dissatisfaction with their service. At the same time, the law imposes limits on liability and on damages, and it does so for a reason. The defendants hope for a fair and civil trial and a just and well reasoned conclusion.

DATED this 5th day of August, 2013

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