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Court of Appeals Division I
State of Washington

Opinion Information Sheet

Docket Number: 58533-9
Title of Case: Camano Island Realty, Et Al., App./cross-resp. V. G. Thomas & Diane E. Ruebel, Resp./cross-app.
File Date: 10/01/2007

SOURCE OF APPEAL

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Docket No: 03-2-00516-3
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Date filed: 06/08/2006
Judge signing: Honorable Vickie I Churchill

JUDGES

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

G. THOMAS RUEBEL AND DIANE E. RUEBEL, Respondents, v. CAMANO ISLAND REALTY, INC., a CORPORATION, AND SONYA EPPIG, Appellants.	)	No. 58533-9-I
	)	UNPUBLISHED OPINION
	)	FILED: October 1, 2007

SCHINDLER, A.C.J. ? Based on the failure to disclose inspection and

permitting problems with the house they purchased, Thomas and Diane E. Ruebel (the Ruebels) sued Windermere/Camano Island Realty, Inc. (Camano Realty) and its real estate agent, Sonya Eppig, for breach of fiduciary duty, negligence, fraudulent concealment, misrepresentation, and violation of the Consumer Protection Act, chapter 19.86 RCW (CPA). At the conclusion of a two-week trial, the jury rejected the Ruebels? claim for fraudulent concealment, but found in their favor on negligence, breach of fiduciary duty, and violation of the CPA. The jury awarded the Ruebels approximately $126,300 for the CPA claim and approximately $34,000 for the negligence and breach of fiduciary duty claims, attributing 30 percent of the fault to Camano Realty. Camano Realty and Eppig appeal the trial court?s decision denying

their motion for judgment as a matter of law on the CPA claim and the court?s entry of judgment on the verdict against them. Camano Realty and Eppig also challenge the trial court?s award of approximately $311,000 in attorney fees on the CPA claim. In their cross appeal, the Ruebels challenge the court?s decision to not include the amount the jury awarded for the negligence and breach of fiduciary duty claims.

Because substantial evidence supports the jury?s determination that Camano Realty and Eppig violated the CPA and the jury?s decision to attribute fault to Camano Realty and Eppig, we affirm the court?s denial of the motion for judgment as a matter of law and entry of the judgment on the verdict. We also affirm the trial court?s decision to not include the amount awarded on the negligence and breach of fiduciary duty claims. But because the trial court did not enter findings of fact and conclusions of law to support the award of attorney fees, we reverse the attorney fee award and remand.

FACTS

Mike and Marilyn Hovis (Hovis) owned a Victorian-style waterfront house on Camano Island with a detached three car garage and loft apartment on a four acre parcel of property. In 1995, Hovis obtained a permit from the Camano Island County Building Department (Building Department) to remodel the main house. Mike Hovis acted as the general contractor for the remodel.

In January 1996, the Building Department told Hovis that he needed to address several framing issues and the structural engineering requirements for the two-story house. The Building Department told Hovis he needed to submit approved engineering plans and framing specifications. Without submitting the requested

information, Hovis proceeded with the installation of the interior wallboard and exterior siding. In 1997, the building permit expired.

From 2000 to 2001, Hovis listed the property for sale with Windermere/Camano Island Realty (Camano Realty). Camano Realty advertised the property as a Victorian waterfront estate with an unfinished interior. During the two years that Camano Realty listed the Hovis property for sale, two offers were made and then rescinded. In the spring 2001, Hovis, one of the potential buyers, and a Camano Realty agent met with the Building Department about the status of the expired building permit. The Building Department examiner, Ben VanDuine, described the outstanding inspections that still needed to be done, including the framing, plumbing, and electrical inspections. In addition, VanDuine told Hovis, the prospective buyer, and the Camano Realty agent that the work had to comply with the Uniform Building Code (UBC) and approved plans and updated engineering calculations had to be submitted to the Building Department.

In late 2001, Hovis hired a contractor, Stephen Redmond, to finish the remodel. Redmond applied for a new building permit for the remodel. Although Hovis had not obtained the necessary inspections or submitted engineering plans and calculations, in December 2001, the Building Department issued a new building permit to Redmond.

In 2002, Hovis listed the property for sale with Preview Realty and real estate agent Roger Nelson. In early spring, the Ruebels contacted their Seattle neighbor, Rene Stern, a Windermere real estate agent, about their interest in purchasing the Hovis property. Stern agreed to act as the Ruebels? agent for the Seattle house but

referred them to Sonja Eppig, a Windermere real estate agent with Camano Realty, for the Hovis property. In April 2002, Eppig met with the Ruebels. At the meeting she gave them a copy of the Real Property Transfer Disclosure Statement for the Hovis Property, Puget Sound Multiple Listing Form 17 (Form 17). In Form 17, Hovis states that they had been remodeling the house since 1996 and all the building permits are current. Hovis also states that they did not know if there were any restrictions on the property that would affect future construction or remodeling or any other material defects affecting the property that a prospective buyer should know about. On April 16, the Ruebels made an offer to purchase the Hovis property contingent on an inspection and study to determine the feasibility of the floor plan and the cost of finishing the remodel.

In the April 27 addendum to the Purchase and Sale Agreement, Hovis represented that: ?[t]o the best of seller?s knowledge, seller states that all work performed to date has passed all inspections. Any work that has not passed

inspection will be corrected, reinspected and approved prior to closing at sellers [sic] expense. Purchaser to verify to own satisfaction within feasibility time.?

The inspection report raised a number of concerns, including questions about the status of the building permit and inspections for the remodeling work. The report specifically notes that there was no framing inspection certificate and recommended checking with the Building Department.

On April 29, the Ruebels met with Eppig to go over the inspection report. According to Tom Ruebel, Eppig agreed to check with the Building Department on the status of the permit and the inspections. Eppig denied agreeing to check on the

status of the permit and the inspections, but admitted that she met with VanDuine and learned that the Building Department needed building and engineering plans.

Hovis? contractor, Redmond, testified that at approximately 11:15 a.m. on May 6, Eppig called to tell him that the Building Department was going to send him a letter suspending the building permit because updated building and engineering plans were never submitted.1 Tom Ruebel testified that Eppig unexpectedly called him on May 6 to recommend extending the deadline for the feasibility study because the Building Department needed some engineering plans, which she agreed to obtain.

On May 6, the Building Department suspended the permit. In the May 6 letter to Redmond, the Building Department states that the permit was erroneously issued. The letter also states that the permit will not be reinstated unless Hovis addressed the issues identified during the framing consultation in 1996 and provided updated engineering plans that complied with the 1997 UBC. Eppig did not tell the Ruebels that the Building Department had suspended the building permit. Sometime after May 6, Eppig obtained some engineering information from Preview Realty and requested building plans from Hovis? architect.

On May 7 or 8, Eppig sent the Ruebels an extension until May 15 for the feasibility study and assured them that there was no problem with complying with the Building Department?s request for the engineering information.

> Enclosed are copies of the engineers [sic] report. I talked with Ben at County. They are okay. He does want the engineer?s stamp and license number, so I will get that. Also included are the signatures from the seller re: the extension of the feasibility study. Sincerely, Sonya.

1 Redmond?s phone log was introduced as an exhibit and the log showed an incoming call from Eppig on May 6, 2002, at 11:16 a.m.

Contrary to Eppig?s assurances, VanDuine testified that he told Eppig the engineering data she provided was inadequate and that before reinstating the permit,

the Building Department needed additional data, including lateral engineering calculations.

Tom Ruebel testified that Eppig called him before May 14 to tell him that the issues with the Building Department were resolved and they could release the feasibility contingency. On May 15, the Ruebels waived the feasibility contingency.

Nelson testified that sometime after May 15, Eppig told him the Building Department had identified problems with the building permit and the required inspections on the house. She asked Nelson to meet with the Building Department because the Ruebels were concerned about the status of the building permit and they were going to refuse to close on June 17 unless the problem was solved.

On June 7, Nelson faxed a proposed addendum to Eppig. According to Nelson, the purpose of the addendum was to notify the Ruebels that the construction was not approved by the Building Department. The addendum states that the engineering work is not complete, the building plans may not meet the 1997 UBC requirements, and the seller is not responsible for meeting the UBC requirements.2 Eppig told Nelson the addendum was unacceptable and helped draft a revised addendum. The revised addendum states that the ?framing inspection consultation

2 The addendum states:
Seller and Purchaser acknowledge that plan engineering work for Island County Building Dept. is not complete regarding wall sheer and lateral calculations, and the plans may not meet all of 1997 Uniform Building Code (U.B.C.) requirements. Purchaser intends to complete further remodeling before completion, which will require additional/new calculations. Purchaser is responsible to complete such work as part of home completion process. Seller is not required to bring existing improvements on premises to meet 1997 U.B.C.

are not complete according to Island County,? and that engineering calculations of structure were still needed, but that Hovis agreed to pay the Ruebels $1,000? for costs related to additional lateral engineering calculations.? The revised addendum also notes that ?intended changes by purchaser . . . may require additional work to comply with current UBC requirements.?3

Tom Ruebel testified that Eppig called about the addendum and told him that it would benefit them because Hovis agreed to set aside $1000 at closing for any future engineering necessary in finishing the remodel. But the Ruebels did not see the written addendum until closing on June 17. Tom Ruebel testified that from May 15 until closing on June 17, he was not aware of any permitting or inspection concerns. The Ruebels purchased the property on June 17. The Ruebels signed the revised addendum as part of the paperwork at the closing, but did not carefully read it.

After purchasing the property, the Ruebels? contractor, Richard King, identified a number of problems, including the framing work, which undermined the structural integrity of the house. The Ruebels also learned for the first time that on May 6 the

Building Department had suspended the building permit for failure to submit the necessary engineering plans, obtain necessary inspections or comply with the UBC. Rather than proceed with remodeling, the Ruebels decided it was less costly to demolish the house and build a new house.

3 The revised addendum states:
Seller and Purchaser acknowledge that the framing inspection/consultations are not complete according to Island County. Engineered lateral calculations of structure are needed. Seller and Purchaser agree that closing agent shall hold back $1,000 from seller?s proceeds of closing. This money shall pay for costs related to additional lateral engineering calculations of existing structure and will be returned to seller if not spent within six months from date of closing. Seller and Purchaser acknowledge that the structure, along with intended changes by purchaser as part of the completion process, may require additional work to comply with current UBC requirements. Any future work and engineering costs (excepting the $1,000 described above) to complete the structure, is the responsibility of the purchaser.

In July 2003, the Ruebels sued Hovis alleging negligent and fraudulent misrepresentation and constructive fraud. In April 2004, the Ruebels sued Washington Builders and its owner, Terry Moran for negligent and defective construction. In addition, the Ruebels sued Preview Realty, Nelson, Camano Realty, and Eppig alleging negligent and fraudulent misrepresentation and fraud. The Ruebels also alleged Camano Realty and Eppig breached their fiduciary duty and Preview Realty and Nelson breached their duty of good faith and fair dealing. In an amended complaint, the Ruebels alleged breach of fiduciary duty, negligence, fraudulent concealment, misrepresentation of material facts, and violation of the Consumer Protection Liability Act, chapter 19.86 RCW (CPA), as against Camano Realty and Eppig. Camano Realty denied the existence of an agency relationship with Eppig and denied liability.

Shortly before trial, the Ruebels settled with all the defendants except Camano Realty and Eppig. During the 9-day trial, a number of witnesses testified, including the Ruebels, Eppig, Nelson, Redmond and VanDuine. Contrary to the testimony of Nelson, Redmond, VanDuine, and Tom Ruebel, Eppig unequivocally denied that she knew the building permit was suspended or that she agreed to check on the status of the permits.

At the conclusion of the trial, the jury found that the Ruebels proved an agency relationship between Camano Realty and Eppig. While the jury concluded the Ruebels did not prove fraudulent concealment, the jury found the Ruebels proved a violation of the CPA, breach of fiduciary duty and negligence. As to negligence and

breach of fiduciary duty, the jury attributed 10 percent of the fault to Eppig and 30

percent to Camano Realty. Camano Realty and Eppig filed a motion for judgment as a matter of law to set aside the jury verdict on the CPA violation. The trial court denied the motion and the court entered a final judgment on the jury verdict of approximately $145,000. The trial court also awarded the Ruebels $311,304.67 in attorney fees, $3,561.49 in costs, and $10,000 in exemplary damages under the CPA.

ANALYSIS

Camano Realty and Eppig contend the trial court erred in denying their motion for judgment as a matter of law, arguing that substantial evidence does not support the jury verdict that Camano Realty and Eppig violated the CPA.

Standard of Review

Viewing the evidence most favorable to the nonmoving party, a trial court should grant a motion for judgment as a matter of law when the court concludes there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. Sing v. John L. Scott, 134 Wn.2d 24, 948 P.2d 816 (1997). Substantial evidence exists if the evidence is ?sufficient to persuade a fair-minded, rational person of the truth of the declared premise.? Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (quoting Brown v. Superior Underwriters, 30 Wn. App. 303, 306, 632 P.2d 887 (1980)). We apply the same standard as the trial court when reviewing a motion for judgment as a matter of law. Guijosa, 144 Wn.2d at 915.

CPA

Under the CPA, unfair or deceptive acts or practices in the conduct of any trade

or commerce are unlawful. RCW 19.86.020. To prove a CPA violation, a plaintiff must establish five elements: (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. Guijosa, 144 Wn.2d at 917; Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784, 719 P.2d 531 (1986).

The CPA does not define the term ?deceptive,? but implicit in that term is ?the understanding that the actor misrepresented something of material importance.? Hiner v. Bridgestone/Firestone, Inc., 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), rev?d on other grounds, 138 Wn.2d 248, 978 P.2d 505 (1999). For an unfair or deceptive act, ?plaintiff need not show that the act in question was intended to deceive, but that the alleged act had the capacity to deceive a substantial portion of the public.? Hangman, 105 Wn.2d at 785. Whether a party committed an unfair or

deceptive act is reviewed for substantial evidence. Whether an act violates the CPA is a question of law. Griffith v. Centex Real Estate Corp., 93 Wn. App. 202, 214, 969 P.2d 486 (1998) (citing Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997)). It is well-established that a real estate agent who knowingly fails to disclose known material defects in the sale of real property violates the CPA. Svendsen v. Stock, 143 Wn.2d 546, 23 P.3d 455 (2001).

Unfair or Deceptive Act or Practice

Relying on Guijosa, Camano Realty and Eppig argue that the jury?s rejection of the Ruebels? fraudulent concealment claim requires setting aside the jury?s CPA verdict because the Ruebels did not allege or prove an unfair or deceptive act or

practice other than fraudulent concealment.

In Guijosa, the plaintiffs did not allege or prove any act or practice that violated the CPA other than discrimination. While the jury rejected the plaintiffs? claims for false imprisonment, battery, malicious prosecution, and discrimination, the jury found Wal-Mart violated the CPA. Guijosa, 144 Wn.2d at 912-913. The trial court granted Wal-Mart?s motion for judgment as a matter of law to set aside the jury?s verdict on the CPA claim because the record presented ?no substantial evidence or reasonable inference to support the jury?s verdict that Wal-Mart violated the CPA.? Id. at 913. On appeal, the supreme court affirmed the trial court?s decision to set aside the jury verdict on the CPA claim. While the court concluded the jury instructions did not prevent the jury from finding a CPA violation separate and apart from discrimination, because the plaintiffs only presented evidence of discrimination practice, there was insufficient evidence to support a violation of the CPA.

Here, as in Guijosa, the jury instructions allowed the jury to find that Camano Realty and Eppig violated the CPA by failing to disclose known material problems with the Hovis house separate and apart from fraudulent concealment.4 But unlike in

4 Jury Instruction No. 16 provides:

> The Ruebels claim that Ms. Eppig and Camano Island Realty violated the Washington Consumer Protection Act. To prove this claim, the Ruebels must prove by preponderance of the evidence each of the following propositions:
>
> (1) That Ms. Eppig engaged in an unfair or deceptive act or practice;
> (2) That the act or practice occurred in the conduct of Ms. Eppig?s trade or commerce.
> (3) That her act or practice affected the public interest;
> (4) That the Ruebels were injured with respect to their property, and
> (5) That Ms. Eppig?s acts or practices were a proximate cause of the Ruebels? 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 the Ruebels on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for defendants on this claim.

Guijosa, the evidence supports the jury?s finding that Camano Realty and Eppig engaged in unfair and deceptive acts that violated the CPA. Both Eppig and Camano Realty knew the necessary inspections and permits were not obtained and failed to disclose that information to the Ruebels. And even though Eppig denied seeing the May 6 letter or knowing that the permit was suspended, her testimony was contradicted by Redmond and Nelson. Redmond testified that Eppig contacted him on May 6 and told him that ?Ben? at the Building Department was going to send a letter suspending the building permit. Nelson testified that Eppig referred to the May 6 letter during conversations with him. Eppig also admitted obtaining and submitting the engineering reports and assuring the Ruebels that the Building Department was ?okay.? In addition, Eppig did not tell the Ruebels about the addendum Nelson prepared disclosing that the engineering work was not complete and that the building plans did not meet the UBC requirements. Instead, Eppig helped draft a revised addendum that did not so unequivocally set forth the permitting and inspection problems. And when Camano Realty listed the Hovis property for approximately two years, Camano learned about the permitting and inspection problems but did not inform the Ruebels.

Camano Realty and Eppig also argue that, as a matter of law, only the listing agent for the seller has a duty to disclose material facts related to the purchase and sale of property under the CPA. We disagree. The duty also applies to a buyer?s agent who knows and fails to disclose material adverse facts.[5] Edmonds v. Scott Real

5 Camano Realty?s and Eppig?s attempt to distinguish Robinson v. McReynolds, 52 Wn. App. 635, 762 P.2d 1166 (1988), is unpersuasive. Here, the evidence supports the jury?s finding that Camano Realty and Eppig knew about the problems with the Hovis house.

Estate, 87 Wn. App. 834, 848, 942 P.2d 1072 (1997). In Edmonds, this court held that where the buyer?s agent knew the seller?s assertions in the property information form were false but failed to disclose that information, as a matter of law, the buyer?s agent violated the CPA. Edmonds, 87 Wn. App. at 848-49.

Public Interest Impact

In the alternative, Camano Realty and Eppig contend that the evidence fails to support the jury?s finding that the Ruebels proved an act or practice that impacted the public interest. Specifically, Camano Realty and Eppig assert the Ruebels did not prove that there is a likelihood other buyers would be harmed in exactly the same fashion.

A private dispute has an impact on the public interest where there is a likelihood that ?additional plaintiffs have been or will be injured in exactly the same fashion.? Hangman, 105 Wn.2d at 790. Whether the act complained of has an impact

on the public interest is determined based on several nonexclusive factors that are considered in the context in which the alleged acts were committed. Id. at 789-90.

> (1) Were the alleged acts committed in the course of defendant?s business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?

Hangman, 105 Wn.2d at 790-791. None of the factors is dispositive and not all of the factors need be present. The factors ?represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact.? Hangman at 791. Consistent with Hangman, the court instructed the jury that:

> An act or practice affects the public interest if it is likely that additional plaintiffs have been or will be injured in exactly the same fashion. In deciding whether Ms. Eppig?s actions affected the public interest in this case, you may consider, among other things:
> (1) whether her acts or practices were done in the course of her business;
> (2) whether Ms. Eppig advertises to the public in general;
> (3) whether Ms. Eppig actively solicited the Ruebels, indicating potential solicitation of others.
> (4) Whether Ms. Eppig and the Ruebels had unequal bargaining positions, which can be shown by inequality of knowledge about the property.
> In reaching your decision no one factor is decisive; you do not need to find that all factors are present, and you are not limited to considering only these factors.

Camano Realty and Eppig do not challenge the jury instruction. Rather, they assert that the Ruebels did not prove Eppig?s acts have an impact on the public interest because the Ruebels did not prove that Eppig ?did or will commit any similar act.? But the instructions do not require the jury to find plaintiffs ?have been or will be injured in exactly the same fashion? before considering the four nonexclusive factors.

Here, substantial evidence supports the jury?s determination that Eppig?s acts impacted the public interest.6 There is no dispute that Eppig?s failure to disclose that the building permit was suspended, that inspections were not done, and the information provided to the Building Department was incomplete and inadequate, occurred in the course of business. There is also no dispute that Camano Realty and

6 Camano Realty and Eppig rely on several cases holding the plaintiff failed to establish the public interest element. But because the determination of whether there is a public interest impact turns on the circumstances and facts specific to each case, Camano Realty?s and Eppig?s reliance on these cases is not persuasive. Sloan v. Thompson, 128 Wn. App. 776, 115 P.3d 1009 (2005), rev. denied, 157 Wn.2d 1003 (2006) (sale of home did not occur within course of seller?s business); Cashmere Valley Bank v. Brender, 128 Wn. App. 497, 116 P.3d 421 (2005), aff?d, 158 Wn.2d 655 (2006) (no evidence that bank advertised loans to the public); Goodyear Tire & Rubber Co. v. Whiteman Tire, 86 Wn. App. 732, 935 P.2d 628 (1997) (tire dealer, a franchisee, did not have unequal bargaining power); Pac. Northwest Life Ins. Co. v. Turnbull, 51 Wn. App. 692, 754 P.2d 1262 (1988) (sophisticated land investor did not have unequal bargaining power with real estate agent); and Broten v. May, 49 Wn. App. 564, 744 P.2d 1085 (1987) (no evidence that defendant solicited plaintiff?s business and the two parties occupied equal bargaining positions).

Eppig advertised to the general public and solicited and obtained referrals through membership in the Windermere referral network.7 And while Eppig knew about the permitting, inspection and engineering problems with the Hovis? house, Eppig did not disclose these problems to the Ruebels.8

Apportionment of Fault

Camano Realty and Eppig also claim the jury instructions did not permit the jury to attribute 30 percent fault to Camano Realty and the trial court erred in entering judgment on the jury verdict. Relying on the jury instruction defining vicarious liability, Camano Realty and Eppig argue that was the only basis that allowed the jury to find Camano Realty liable. But Camano Realty?s and Eppig?s argument ignores the jury instruction on apportionment of fault, the Special Jury Verdict form, and the evidence that supported the jury?s attributing 30 percent fault to Camano Realty.

A party has a duty to propose an appropriate verdict form and failure to object precludes consideration of issues concerning the verdict form on appeal. Lahmann v. Sisters of St. Francis of Philadelphia, 55 Wn. App. 716, 723, 780 P.2d 868 (1989); Wickswat v. Safeco Ins. Co., 78 Wn. App. 958, 966-67, 904 P.2d 767 (1995).

Jury Instruction 23 tells the jury that it must apportion fault for the Ruebels? negligence and breach of fiduciary duty claim:

7 Citing Jackson v. Harkey, 41 Wn. App. 472, 704 P.2d 687 (1985), Camano Realty and Eppig also argue that this factor requires proof of false advertisement. Because Jackson was decided before Hangman, the court did not expressly consider whether the construction company advertised to the general public. In addition, the act complained of in Jackson was misleading advertisement whereas, here, the act complained of is failure to disclose material facts in a real estate transaction.

8 In supplemental briefing, Camano Realty and Eppig contend that under Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007), the Ruebels? CPA claim fails as a matter of law because as a tort-based claim, the economic loss rule bars the Ruebels from recovering economic damages. But here, the CPA is a statutory based remedy that allows a plaintiff to recover damages. See e.g. Griffith, 93 Wn. App. 202; Sign-O-Lite v. DeLaurenti Florists, Inc., 64 Wn. App. 553, 825 P.2d 714 (1992).

> If you find for plaintiffs for their claims for negligence or breach of fiduciary duty (other than fraudulent concealment or violation of the Consumer Protection Act), you must apportion fault to other persons who you find are at fault.
>
> First, you must determine the dollar amount of damages caused by Ms. Eppig?s negligence or breach of fiduciary duty. The court will provide you with a special verdict form for this purpose.
>
> Before you determine that another person is at fault for such damages, defendants must prove each of the following propositions by a preponderance of the evidence:
>
> First, that the person is at fault; and
>
> Second, that the person?s fault was a proximate cause of the plaintiffs? damages.
>
> Third, that those damages are in addition to damages caused by Ms. Eppig?s fraudulent concealment or violation of the Consumer Protection Act.
>
> The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion liability, if any.

Consistent with Instruction 23, the Special Jury Verdict form also tells the jury to determine whether anyone else is at fault for the negligence and breach of fiduciary

duty damages and if so, to attribute a percentage of fault. The Special Jury Verdict form states:

> QUESTION 5: Did the Ruebels prove their claim for negligence or breach of fiduciary duty?
>
> ANSWER: (Write ?yes? or ?no?) Yes
>
> (INSTRUCTION: If you answered ?No? to Question No. 5, then sign this verdict and notify the bailiff. If you answered ?Yes? to Question 5, proceed to Question No. 6.[)]
>
> QUESTION 6: What is the total amount of damages proximately caused to the Ruebels by Ms. Eppig?s negligence or breach of fiduciary duty?
>
> ANSWER: $33,750.00
>
> QUESTION NO. 7: Was any one else at fault and did that fault proximately cause part or all of the Ruebels? damages?
>
> ANSWER: (Write ?yes? or ?no?) Yes

> QUESTION NO. 8: Assume that 100% represents the total combined fault which proximately caused the plaintiffs? damages. What percentage of this 100% is attributable to Sonya Eppig and other persons whose fault proximately caused plaintiffs? damages? Your total must equal 100%.
>
> Answer:

Sonya Eppig	10%
Other (list names and percentage)	
Camano Island Realty/Windermere Realty	30%
Rene Stern	5%
Steve Redmond	15%
Watson Mike Hovis	20%
Roger Nelson	15%
Island County Building Division	4%
Thomas and Diane Ruebel	1%

Substantial evidence also supports the jury?s finding attributing fault to Camano Realty. Camano Realty was the listing agent for the Hovis property from 2000 to 2001. VanDuine testified that in April 2001 he had a meeting with Hovis, a Camano Realty agent, and the potential buyers. At the meeting, VanDuine described the permitting problems including inadequate framing inspections and incomplete engineering information. The trial court did not err in entering judgment on the jury verdict against Camano Realty.

Attorney Fees

Last, Camano Realty and Eppig challenge the trial court?s decision to award approximately $311,300 in attorney fees on the CPA claim because the court did not segregate and deduct the fees incurred on unrelated legal theories and claims and did not enter findings and conclusions to support the award of attorney fees. They also argue the trial court failed to take into account time spent on unsuccessful claims and duplicative and wasted effort.9

9 Specifically, Camano Realty and Eppig contend the trial court failed to properly segregate and deduct fees for time spent (1) prior to amending the complaint in April 2004

To reverse an attorney fee award, an appellate court must find that the trial court manifestly abused its discretion. Pham v. City of Seattle, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). The trial court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. Pham, 159 Wn.2d at 538. Trial courts must create an adequate record for review of fee award decisions. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Findings of fact and conclusions of law are required to establish such a record. Mahler, 135 Wn.2d at 435. ?Failure to create an adequate record will result in a remand of the award to the trial court to develop such a record.? Mayer v. City of Seattle, 102 Wn. App. 66, 79, 10 P.3d 408 (2000).

Under the CPA, a successful plaintiff is entitled to recover reasonable attorney fees and costs. RCW 19.86.090. If attorney fees are only reasonable for certain claims, the court must segregate the time spent on other theories and claims on the record, even if the other theories and claims are interrelated or overlap. Hume v. Am. Disposal Co., 124 Wn.2d 656, 673, 880 P.2d 988 (1994) (quoting Travis v. Washington Horse Breeders Ass?n, Inc., 111 Wn.2d 396, 411, 759 P.2d 418 (1988)). An attorney fee award must properly reflect the segregation of time spent on other claims, except when the trial court finds that ?no reasonable segregation of successful and unsuccessful claims can be made.? Hume, 124 Wn.2d at 672.10 ?The burden of

and in March 2005; (2) pursuing claims against the other defendants; and (3) pursuing unsuccessful claims against Camano Realty and Eppig.

10 See also Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 692, 132 P.3d 115 (2006) (not an abuse of discretion when trial court did not segregate based on its finding that the plaintiffs ?requested CPA fees could not realistically be separated from time spent pursuing their Product Liability Act claims?). But see Loeffelholz, 119 Wn. App. at 692 (holding that the record does not show that the claims were so interrelated as to excuse segregation and the case embodied many claims and issues and an award of nearly half the total fees incurred represents too high a proportion to be reasonable); Mayer, 102 Wn. App. 66 (abuse of discretion when court awarded fees for time spent on discovery that was not relevant to plaintiff?s Model Toxics Control Act claim which provided attorney fees).

segregating, like the burden of showing reasonableness overall, rests on the one claiming such fees.? Loeffelholz, et. al v. Citizens for Leaders with Ethnic and Accountability Now (C.L.E.A.N), 119 Wn. App. 665, 690, 82 P.3d 1199 (2004); Katanis v. Educ. Employees Credit Union, 122 Wn.2d 483, 501-502, 859 P.2d 26 (1993).

Here in June 2003, the Ruebels sued Hovis for negligent and fraudulent misrepresentation and constructive fraud. In April 2004, the Ruebels added Windermere Real Estate, Camano Realty, Sonja Eppig, Preview Realty, Roger Nelson, Washington Builders and its owner Terry Morgan. In addition to negligent and fraudulent misrepresentation, the amended complaint alleges breach of fiduciary duty against Camano Realty and Eppig, breach of good faith and fair dealing against Preview and Nelson, and negligent and defective construction against Washington Builders and Morgan. Yet the Reubels? attorney stated that only approximately $7,200

could be deducted for time spent on the unrelated CPA claims and theories. The trial court agreed but did not enter written findings of fact and conclusions of law in support of the attorney fee award of $311,305.11

Relying on the trial court?s oral ruling and a recent supreme court decision, Mayer v. Sto Industries, Inc., 156 Wn. 2d 677, 692, 132 P.3d 114 (2006), the Ruebels argue that the court did not abuse its discretion in deciding segregation was not reasonable. But here, unlike in Mayer, the trial court?s oral decision does not provide ?a clear explanation that the CPA work could not be segregated from the WPLA work,?

11 The cases the Ruebels cite to argue that oral findings are sufficient are not persuasive. Neither Goodman v. Darden, Doman & Stafford Assoc., 100 Wn.2d 476, 670 P.2d 648 (1983) nor Malfait v. Malfait, 54 Wn.2d 413, 341 P.2d 154 (1959) address the need for findings to support an award of attorney fees.

Mayer, 156 wn.2d at 693.12

> On attorney?s fees, there is no challenge to the loadstars being reasonable. The only challenge is to the segregation. I am somewhat concerned about the attorney?s fees before Ms. Eppig or Camano Island Realty were included in the -- included in the complaint, however, there was a great deal of work at the time about the damages, about what -- what happened to the house, the house left, and whether or not we were going to have pictures and what that -- would happen. And those were obviously questions and -- and I?m not sure if I?m correct on that. Those -- those things may have come up once the realty defendants were entered into the action. But I can see that it was a record that was being built on this CPA claim. I don?t see how these could be segregated myself and I believe that the court cases say that if it?s not reasonable to be segregated then it will not be segregated.

Because the trial court failed to enter findings of fact and conclusions of law to support the award of attorney fees, we reverse and remand.13 On remand, the Ruebels have the burden to segregate the time spent on the CPA claim from the time spent on the unrelated legal theories and claims and the court must enter written findings to support an award of attorney fees.

Cross Appeal

On cross appeal, the Ruebels claim the trial court erred by not including the $13,500 the jury awarded for the negligence claim. Specifically, the Ruebels argue that the stipulation to not award negligence damages was void because it was based on misrepresentation and mutual mistake.

12 See also Brand v. Dep?t of Labor & Indus., 139 Wn.2d 659, 674, 989 P.2d 1111 (1999) (while the court concluded that the trial court properly refused to segregate the fees attributable to plaintiff?s unsuccessful claim, because the ?trial court failed to enter written findings or to articulate specific reasons supporting the amount of the attorney fees award,? the court remanded for it was unable to judge whether the trial court abused its discretion). And in Pham, 159 Wn.2d 527, the trial court entered thirty-five findings of fact justifying its fee award, including the court?s reason for segregating and deducting hours that were unproductive or not sufficiently related to the successful claim. Pham, 159 Wn.2d at 539-40.

13 On remand, the court should also consider whether there was any duplicative or wasted effort and the reasonableness of the fee award.

During deliberations, the jury asked whether it should answer Question 5 ? ?Did the Ruebels prove their claim for negligence or breach of fiduciary duty??, if it answered Question 4 ? ?What is the amount of damages proximately caused to the Ruebels by Ms. Eppig?s fraudulent concealment and/or violation of the Consumer Protection Act?.? The attorney for Camano Realty and Eppig expressed the concern that the jury could award double damages. In response, the Ruebels? attorney agreed that if the jury awarded damages under the negligence claim that were not greater than the amount under the fraudulent concealment and CPA claims, the damages should not be included in the award.

> . . . that I only argued one theory of damages, so maybe the best way of dealing with this is to do this. I really do think this is going to be confusing to the jury if we add this double damages stuff because we haven?t talked about it and it?s not in the instructions.
>
> I agree that if there are any damages that are awarded under the negligence count and they?re not greater than the amount under the fraud and Consumer Protection Act counts, then they will be subsumed within the first one, and that will settle the matter, I would think.

Based on the stipulation of Ruebels? attorney, the court responded to the jury question by answering, ?yes?.

In the Special Jury Verdict form, the jury found the amount of damages proximately caused by Eppig?s violation of the CPA was $126,319.51. The jury also found the amount of damages proximately caused by Eppig?s negligence and breach of fiduciary duty was $33,750. Based on the stipulation, the trial court did not include the damages for the negligence and breach of fiduciary claims in the award.

A valid stipulation is binding unless fraud, mistake, or misunderstanding is established. De Lisle v. Fmc Corp., 41 Wn. App. 596, 597, 705 P.2d 283 (1985)

(citing Baird v. Baird, 6 Wn. App. 587, 494 P.2d 1387 (1972).

To support their claim that the stipulation is void, the Ruebels cite to a criminal case, State v. Schaupp, 111 Wn.2d 34, 757 P.2d 970 (1988) concerning entry of a plea agreement based on an alleged misrepresentation. In Schaupp, the court rejected the State?s claim that the plea agreement was void because there was no evidence of misrepresentation. Schaupp, 111 Wn.2d at 38-39. Here, as in Schaupp, the record does not support misrepresentation. Based on a concern about awarding double damages, Ruebels? attorney agreed with the concern and suggested a means to avoid it.

To support their claim that the stipulation is void based on mutual mistake, the Ruebels cite several cases for the general proposition that contract principles apply to determine whether a stipulation is enforceable.14 But a party with constructive knowledge of the facts giving rise to an alleged mistake cannot claim mistake as a

basis to avoid a stipulation. Denaxas v. Sandstone Court of Bellevue, LLC, 148 Wn.2d 654, 668, 63 P.3d 125 (2003). Because Ruebels? attorney had constructive knowledge of the jury instructions, the claim that the stipulation is void based on mutual mistake also fails.

Conclusion

We affirm the trial court?s entry of judgment on the jury verdict but reverse and

14 Wm. Dickson Co. v. Pierce County, 128 Wn. App. 488, 493, 116 P.3d 409 (2005) (?Contract principles govern final judgments entered by stipulation or consent.?); Haller v. Wallis, 89 Wn.2d 539, 546, 573 P.2d 1302 (1978) (trial court?s decision not to vacate a stipulated order under CR 60(b) affirmed where there was no evidence of fraud or collusion and none of the irregularities charged is attributable to the respondent); and Harford v. Harford, 86 Wn. App. 259, 266, 936 P.2d 48 (1997) (trial court?s decision to vacate a stipulated order under CR 60(b) reversed where court found only that a unilateral mistake was made).

remand on the attorney fees award. Because the Ruebels prevailed as to the merits of their CPA claim, upon compliance with RAP 18.1, the Ruebels are entitled to attorney fees on appeal. RCW 19.86.090; Sevendson v. Stock, 143 Wn.2d at 250.

WE CONCUR: