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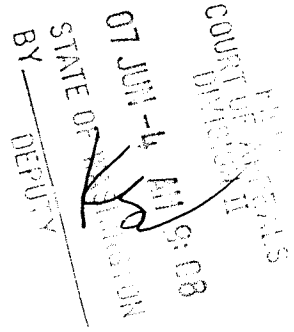

No.: 35740-2-II

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

EDDIE BLOOR and EVA BLOOR, husband and wife,

Plaintiffs/Respondents,

v.

ROBERT A. FRITZ and CHARMAINE A. FRITZ, and the marital community comprised thereof, et al,

Defendants/Appellants.

APPELLANTS' OPENING BRIEF

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pm 5/31/07

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a real estate agent has no knowledge of a material fact is he liable for negligent misrepresentation and failure to disclose pursuant to RCW 18.86? (Assignment of errors 8, 11, 15)

2. When a real estate agent has knowledge marijuana was grown at a property is it considered a material fact and is he required to disclose it pursuant to RCW 18.86.030? (Assignment of Error 12)

3. Does a single, isolated real estate transaction and no evidence the alleged act was repeated or is likely to be repeated in exactly the same fashion satisfy the public interest impact element required for a Consumer Protection Act claim? (Assignment of errors 10, 13, 14, 17, 20)

4. Does a simple real estate misrepresentation case warrant a multiplier to the award of attorney fees? (Assignment of error 18)

STATEMENT OF THE CASE

This is an appeal of an action initiated in Lewis County Superior Court involving a real estate transaction. The respondents claimed the seller and real estate agent failed to disclose methamphetamine ("meth") manufacturing occurred at the property. Additionally, the respondents alleged the Cowlitz/Wahkiakum Joint Narcotics Task Force did not comply with RCW 64.44 by failing to report the meth manufacturing it discovered during the arrests of the tenants. (CP 1540-1551)

In September of 2002, Robert Fritz entered into a property management agreement with LAM Management for property located at 3409 Spirit Lake Highway, Silverlake, Washington. ("property") (RP 523, 524, 1158, 1160)

On January 30, 2004, the tenants residing at the property were arrested by Cowlitz-Wahkiakum Narcotics Task Force. (RP 655, 656) On February 2, 2004, Lance Miller, a real estate agent with LAM Management, was informed by an agent in his office there had been a marijuana bust at the property. (RP 1163)

Jayson Brudvik is a real estate agent with LAM Management who assisted Miller with managing the property. During this time, Brudvik believes he read about the marijuana drug bust in the newspaper. (RP 714) He recalls very little about the article except the name and address of the

property coinciding with marijuana. (RP 715) Brudvik does not recall the date he viewed the article. (RP 716)

After learning about the arrests, Miller called the sheriff's department to inquire about the nature of the arrests and if the property was going to be seized. (RP 1165) Miller talked to who he believes was a police officer familiar with the arrests. (RP 773) During the conversation, Miller asked why the tenants had been arrested. He was told they were arrested for a marijuana grow operation. (RP 1166) Miller asked if there was any type of meth manufacturing or anything that would cause the house to be seized. (RP 1166) Miller was told there was no meth manufacturing and again told the arrests were for a marijuana grow operation. (RP 1166) Following this conversation, Miller informed Brudvik what he learned from the sheriff's department. (RP 1166) Brudvik contacted Robert Fritz and told him there was a drug bust at the property for growing marijuana. (RP 719, 1086, 1087) Mr. Fritz instructed Brudvik to evict the tenants. (RP 1086)

Miller and Brudvik consulted with their attorney and began eviction proceedings. (RP 1166) Miller and Brudvik went to the property to serve the eviction papers on the tenants. (RP 1169) When they went to the property they discovered the tenants including a young child were residing at the property. (RP 1169)

On February 23, 2004, the tenants came to Miller's office and turned in the keys to the property. (RP 1170) Miller did not discuss any details regarding the arrests with the tenants. (RP 1170) Miller went to the property and found it to be vacated, clean and in good condition. (RP 1172) Miller hired a professional housekeeper to clean the home and prepare it for future tenants. (RP 1174)

After the tenants vacated the property, Miller and Brudvik rented the property to the Longs. (RP 1172, 1113) However, the Longs were evicted after a few months for non-payment of rent. (RP 1113) Following the Longs' eviction, the Fritzes visited the property to clean. (RP 1114-1116) Following the drug arrests, Miller visited the property on numerous occasions as part of his property management duties. (RP 1171) On one occasion his ten year old daughter accompanied him. (RP 1172, 1173) During this time, Miller hired a housekeeper and a handy man to perform services at the property. (RP 1174) During his visits, Miller did not notice anything unusual about the property. (RP 1173) Similarly, the service providers did not report any problems with the property. (RP 1175)

Robert Fritz decided to sell the property. (RP 728, 729) In July of 2004, Windermere Real Estate/Allen & Associates ("Windermere") listed the property for sale. (RP 1176) Miller provided Robert Fritz with the seller's disclosure statement for completion. (RP 1179) Mr. Fritz did not

ask Miller any questions about the disclosure statement. Miller did not assist Mr. Fritz with completing the statement. (RP 1084, 1179, 1180)

The Bloors were driving around the Silverlake area looking for homes when they noticed the property. (RP 819) There was no for sale sign in the yard. (RP 819, 1177) The neighbor told the Bloors to contact Windermere. (RP 819) A few days later, the Bloors contacted Miller and told him they were interested in viewing the property. (RP 820, 1177) Miller was not available to show the property. (RP 1178) Brudvik was going to the property to install the for sale sign and agreed to meet the Bloors at the property. (RP 1179) The Bloors viewed the property. (RP 820, 821) The Bloors decided to make an offer on the property using Miller as their real estate agent. (RP 822) Miller explained that he represented the seller and talked to them about being a dual agent. (RP 1179) He told them they could have their own agent assist with the transaction and he offered to refer another agent to them. (RP 1179) The Bloors declined and stated they wanted Miller to represent them in the transaction. (RP 1179)

Miller provided the Bloors with a copy of the disclosure statement. (RP 823, 824) The purchase and sale agreement included an inspection addendum. (EX. 41) The agreement was contingent on the Bloors'

subjective satisfaction of a structural inspection. The addendum included the following provision:

> **Neighborhood Review.** Buyer's inspection includes Buyer's verification in Buyer's sole discretion that the conditions of the neighborhood in which the Property is located are consistent with Buyer's intended use of the Property (the "Neighborhood Review"). The Neighborhood Review includes Buyer's investigation of the schools, proximity to bus lines, availability of shopping, traffic patterns, noise, parking and investigation of other neighborhood, environmental and safety conditions the Buyer may determine to be relevant in deciding to purchase the Property. If Buyer does not give notice of disapproval of Neighborhood Review within 5 working days (3 days if not filled in) of mutual acceptance of this Agreement then Neighborhood Review condition shall conclusively be satisfied (waived).

The Bloors declined to conduct an inspection in accordance with the purchase and sale agreement. (RP 1185) The Bloors were not concerned about the condition of the property and felt comfortable purchasing the property without an inspection since Mr. Bloor was a contractor. (RP 1185) Miller discussed having a septic system and well inspection conducted on the property as part of the inspection contingency. (RP 1185) The Bloors declined to conduct these inspections but did have a pest and dry rot inspection. (RP 1184) The parties reached mutual agreement and subsequently closed the transaction.

Following the purchase of the property, the Bloors' son was told he lived in the "drug house". (RP 842) Later, a woman at the hardware store told Mr. Bloor he lived in the "house with the drugs." (RP 842) After receiving this information, Mrs. Bloor began to investigate the statements. She made several telephone calls to the sheriff's department and the health department. (RP 843, 844) She also searched the internet and located information in the Longview Daily News regarding the arrests at the property. (RP 843, 844) The Bloors met with a health department representative and detectives from the Cowlitz-Wahkiakum Narcotics Task Force. (RP 845) The Bloors learned during the arrests components of a meth lab were discovered on the property and the County did not properly report this information to the health department. Subsequently, the health department posted an unfit for use order on the property. (EX. 3)

Miller was on an office tour and passed by the property. He noticed two pieces of paper posted on the door of the property. (RP 1186) He also noticed the home looked vacant. One of the agents who lived near the property offered to go by the home and look at the posting. The agent informed Miller the house had been posted by the health department. (RP 1187) Miller immediately contacted the health department and was informed the house had been seized due to possible meth contamination.

(RP 791, 792) Following this conversation, Miller attempted to contact the Bloors by calling their cell phone and the person they were staying with in Silverlake. (RP 1196, 1197) Miller was unable to contact the Bloors and this action was initiated.

SUMMARY OF ARGUMENT

The findings of facts entered by the trial court are not supported by substantial evidence. Thus, the findings do not support the trial court's conclusions of law. The court found Miller and Windermere had knowledge of the meth manufacturing at the property. Yet, the evidence supporting this conclusion is lacking. The Bloors conceded at trial they had no evidence to support their claims against Miller and Windermere.

This case presents an issue of first impression: when a real estate agent has knowledge marijuana was grown at a property is it considered a material fact and is he required to disclose it pursuant to RCW 18.86.030? Without substantial evidence the court concluded growing marijuana is "illegal drug manufacturing" and real estate agents have a duty to disclose the information. This conclusion is in direct contradiction with the law which clearly defines a real estate agent's duty to disclose and the definition of a material fact.

This court should reverse the trial court's conclusions that Miller and Windermere failed to disclose prior drug manufacturing that occurred

on the property; the failure of Miller and Windermere to disclose the history of illegal drug manufacturing was a negligent misrepresentation; the production of marijuana is illegal drug manufacturing; Miller and Windermere violated the Consumer Protection Act; and the attorney's fee award should be enhanced. Finally, the court should reverse the award of attorney fees and costs to the petitioners. Additionally, the Appellants request attorney's fees and costs on appeal if their request for relief is granted. RAP 18.1

1. THERE IS A LACK OF SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS OF FACT IDENTIFIED IN ASSIGNMENTS OF ERROR 1-6.

Appellate court review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether those findings of fact support the trial court's conclusions of law. *Ridgeview Properties v. Starbuck,* 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Ridgeview Properties,* 96 Wn.2d at 719. A trial court's findings not supported by substantial evidence will be stricken on appeal. *Miles v. Miles,* 128 Wn. App. 64, 69-70, 114 P.3d 671 (2005). Findings mislabeled as conclusions of law are reviewed for substantial evidence. *Willener v. Sweeting,* 107 Wn.2d 388, 394, 730 P.2d 45 (1986)

Finding of Fact No. 10

The court found Brudvik saw the article published in the Longview Daily News on Sunday, February 1, 2004. There is no evidence in the record that suggests Brudvik read this specific article or read it in its entirety. The only evidence about a newspaper article is that Brudvick read an article in the Longview Daily News. (RP 714-722) Brudvik's testimony was limited to reading his deposition transcript on the trial record. During Brudvik's deposition, counsel did not ask him the date of the article he read or provide him with a copy of the article to determine if he had in fact read the February 1, 2004 article. The article was admitted at trial. (EX. 38) However, Brudvick did not testify in person at trial and was never asked if EX. 38 is the article he read or if he read it in its entirety. The Bloors presented no evidence that suggests the February 1, 2004 article is the only article written about the drug arrests in the Longview Daily News.

Finding of Fact No. 16

The court found law enforcement informed Miller of the discovery of a meth lab. There is no evidence in the record that suggests any law enforcement officer or employee informed Miller of the meth lab on the property. The only evidence on this matter is Miller contacted the sheriff's department to ask if the property was going to be seized due to the drug

arrests. Miller specifically asked if there was meth manufacturing on the property or anything that would cause the house to be seized. Miller was told there was no meth manufacturing on the property and the arrests were for a marijuana grow operation. (RP 785, 786, 787, 790, 791, 1165, 1166)

The court found Miller's testimony not credible. This finding is not supported by the record. Miller's testimony is supported by the fact law enforcement also failed to report the meth lab to the health department as required by law. (CP 1540-1551) The law enforcement witnesses that testified on behalf of the Bloors stated they did not inform Miller, Brudvik or Windermere about the presence of the meth lab. (RP 630, 670, 704, 705) The Bloors did not present any law enforcement witness to testify he/she informed Miller of the meth lab. The Bloors admitted they have no evidence that shows Miller received a police report stating illegal drug manufacturing occurred on the property. (RP 899, 488) The Bloors did not present any evidence that shows any law enforcement representative informed Miller illegal drug manufacturing occurred on the property. (RP 900, 489)

Finding of Fact No. 59 and No. 61

The court found Miller knew about the history of the illegal drug manufacturing on the property from his contact with Brudvik and Charmaine Fritz relative to her contacts with law enforcement. There is no

evidence in the record that Brudvik or Charmaine Fritz informed Miller about the illegal drug manufacturing. The record shows Brudvik did not have knowledge of the illegal drug manufacturing. (RP 714, 717, 718, 727, 728) Charmaine Fritz testified she did not inform Brudvik or Miller there was meth activity on the property. (RP 591-592)

There is no evidence in the record to support Miller had knowledge of the illegal drug manufacturing. Miller's testimony is contrary to the court's findings. (RP 1165, 1166, RP 776) The Bloors did not produce one witness or document that shows Miller had knowledge of the meth lab located on the property. The Bloors conceded at trial there was no evidence to support their claims against Miller or Windermere. They admitted there was no evidence that anyone informed Miller of the meth lab on the property including law enforcement, the health department or neighbors. (RP 899, 900, 488, 489)

The court found Miller's testimony that he had no knowledge of the illegal drug manufacturing not credible. Additionally, the court found Miller knew from his prior involvement with property that had been contaminated by meth of the danger of contamination with toxic chemicals (FF 59). Following the drug arrests, Miller visited the property personally several times and allowed his ten year old daughter, colleagues and service providers to enter the property on numerous occasions. (RP 1171-1175)

Miller understood from previous experience that if a meth lab was found the house would be seized by law enforcement and/or the health department. (RP 1191, 1192) Miller witnessed the tenants and a young child living at the property following the drug arrests. (RP 1169-1170) Since the tenants were still residing in the property he knew the house had not been seized for meth contamination. This fact affirmed law enforcement's statement that there was no meth manufacturing on the property. (RP 785, 786) All of these facts lend credibility to Miller's testimony that he did not have knowledge of the meth lab.

Finding of Fact No. 61

The trial court found that Miller knew the Fritzes did not disclose the history of illegal drug manufacturing on their disclosure statement. There is no evidence on the record to support Miller knew the information in the disclosure statement was inaccurate. The only evidence on this matter is Miller and Robert Fritz's testimony that Miller did not assist Mr. Fritz with completing the disclosure statement and Mr. Fritz did not ask him any questions regarding the statement. (RP 765, 766, 789, 790, 1084, 1179, 1180) Further, the Bloors admitted they have no evidence that shows Miller assisted Mr. Fritz with the disclosure statement or that he knew the information contained in the statement was inaccurate. (RP 900, 489, 491)

Finding of Fact No. 62

The trial court found the Bloors were damaged by Miller's failure to disclose the history of drug manufacturing at the property. The evidence on the record shows Miller did not have knowledge of the meth drug manufacturing on the property as discussed in the preceding findings of fact.

The court found Miller's failure to disclose his knowledge of the drug activity misled the Bloors and deprived them of essential information needed by them to learn the true condition of the property. The evidence shows an inspection addendum was included in the Bloors' purchase and sale agreement. (EX 41) The agreement was conditioned on the Bloors' subjective satisfaction that the conditions of the neighborhood are consistent with Buyer's intended use of the property. This inspection included the investigation of environmental and safety conditions. The drug arrests were public record and were easily accessible to the Bloors after they purchased the property. After learning about the drug arrests, Eva Bloor conducted a thorough investigation. She searched the internet and located the Longview Daily Times article regarding the drug arrests. (RP 844) She made several telephone calls to law enforcement and the health department. (RP 843, 845) She met with a representative from the health department. (RP 845) Ed Bloor met with law enforcement officers.

(RP 333, 334) This information was available to the Bloors before they purchased the property.

The court found that if Miller revealed his knowledge of the drug activity on the property the Bloors probably would have made inquiry to law enforcement and the health department. The evidence on the record does not support this finding. Eva Bloor testified that if the disclosure statement stated illegal drug manufacturing occurred at the property she might have wanted to know what kind of drugs were involved. (RP 825) However, she didn't know what other action she would have taken. (RP 825)

Finding of Fact 65, 73, 74, and 82

The court found that some of the issues involved in the Bloors' claims were novel. The only evidence presented on this claim is a declaration submitted by Mark Sheibmeir on behalf of the Bloors. (CP 267-279) Sheibmeir states, "the case appears to have presented at least two novel theories of law by the Plaintiffs; damages to the plaintiffs' credit reputation and the County's liability for violation of its statutory reporting responsibilities." (CP 275) Apparently, Sheibmeir believes these issues are novel because "I have not had any prior experience with either of these theories." (CP 275) The Bloors failed to provide any evidence that shows these issues are novel. There is no evidence on the record that other

counties in Washington have not been sued for failure to report under RCW 64.44.

The court found the case was complex. The only evidence on this finding is the Sheibmeir declaration. (CP 267-279) He testified the Bloors' attorneys faced multiple, complex theories against three separate defendants. (CP 278) There is no evidence on the record that shows it is uncommon for several defendants to be named in a lawsuit regarding a real estate transaction. The Bloors' claims included: breach of contract; fraud; misrepresentation; breach of statutory duties; and consumer protection act violation. (CP 1540-1551) There is no evidence on the record to support the finding these claims are uncommon or complex.

The court found the above factors, the uncertainty of recovery and the contingent nature of the representation all support an enhancement of the attorney fees based on a multiplier of 1.2. Again, the only evidence on this issue is the Sheibmeir declaration. (CP 267-279) The evidence shows recovery against Cowlitz County was almost certain. Sheibmeir refers to the County as a "much needed deep pocket." (CP 275) The law enforcement officer involved with the drug arrests who was responsible for reporting the meth lab to the health department admitted he failed to properly report the meth lab. (RP 658, 659) Since RCW 64.44 imposes an affirmative duty on law enforcement to report any meth lab activity

discovered at a property liability and recovery against this "deep pocket" party was inevitable.

According to Sheibmeir this case was difficult due to the Bloors' request for rescission. Sheibmeir testified rescission cases are some of the most difficult cases attorneys have to deal with. (CP 276) Rescission was plead as an alternative remedy. (CP 1548) The Bloors claimed they incurred numerous damages including: decontamination of the property; restore or replace personal property; lost wages; lost business opportunity; storage; rent; moving and living expenses; pain, suffering and emotional distress; loss of value of property; and treble damages under the Consumer Protection Act against Miller and Windermere. (CP 1547, 1548)

Sheibmeir testified most contingency fee cases are premised upon there being an assurance of payment of the judgment for example through an insurance carrier. (CP 278) Miller, Windermere and the County were insured for these claims. Therefore, according to Sheibmeir payment was assured.

Finding of Fact 76

The court found the many hours expended on the prosecution of the Bloors' claims necessarily precluded the Bloors' attorneys from other employment opportunities that would have been available. There is no evidence on the record regarding this finding.

Conclusion of Law 10 (Finding of Fact)

The court found Miller's knowledge of the condition of properties he managed was and is likely greater than the owner of the property. There is no evidence on the record regarding this finding.

2. THE EVIDENCE ON THE RECORD DOES NOT SUPPORT THE FINDING MILLER HAD KNOWLEDGE OF METH MANUFACTURING THUS, THE TRIAL COURT ERRED IN CONCLUDING HE FAILED TO DISCLOSE UNDER 18.86 AND NEGLIGENTLY MISREPRESENTED THE PROPERTY

A. Miller Did Not Fail to Disclose Meth Manufacturing.

The court concluded Miller had knowledge of the meth manufacturing on the property and therefore he failed to disclose the information to the Bloors. (CL 8) This court reviews conclusions of law de novo and determines if the conclusions are supported by the evidence. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 556, 132 P.3d 789 (2006). There is no evidence on the record to support Miller's knowledge of meth manufacturing on the property and without knowledge the failure to disclose claim fails.

The law necessary to decide the issues before the court is contained in two recent statutes that govern real estate agents and residential real estate transactions. First, in 1996, the Legislature enacted

comprehensive reform of the law governing real estate agents. The Legislature defined the duties of real estate agents in RCW 18.86.

The Act supersedes inconsistent prior common law. In addition to imposing affirmative duties, the agency statute also sets limits on those duties. Relevant to this case, the legislature clearly defines an agent's duty to disclose and ended once and for all the argument that real estate agents have a duty to inspect or investigate the property, or to ensure the accuracy of their principal's representations.

Second, RCW Chapter 64.06 requires sellers to complete Real Property Transfer Disclosure Statements, but expressly provides that real estate agents are not liable for any error, inaccuracy or omission in the disclosure unless the agent has "actual knowledge" of the inaccuracy.

Questions of statutory interpretation are questions of law reviewed de novo. *Fluor Hanford, Inc. v. Hoffman*, 154 Wn.2d 730, 737, 116 P.3d 999 (2005). The court's goal is to effectuate the legislature's intent. *State v. Jacobs,* 154 Wn.2d 596, 600, 115 P.3d 281 (2005) If the statute's meaning is plain, the court on appeal gives effect to that plain meaning as the expression of the legislature's intent. *Jacobs*, 154 Wn.2d at 600.

A real estate agent's duty to disclose is limited to the duties set forth in RCW 18.86. In accordance with RCW 18.86.030 (1) (d) an agent has the duty 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.

There is no evidence in the record to support Miller had knowledge of the meth manufacturing. Miller's testimony is contrary to the court's findings. (RP 1165, 1166, 776) Miller contacted what he believes was the sheriff's department to ask if the property was going to be seized due to the drug arrests. Miller specifically asked if there was meth manufacturing on the property or anything that would cause the house to be condemned. Miller was told there was no meth manufacturing on the property and the arrests were for a marijuana grow operation. (RP 785, 786, 787, 790, 791, 1165, 1166)

Miller witnessed the tenants including a young child living at the property following the drug arrests. (RP 1169-1170) Since the tenants were still residing in the property he knew the house had not been seized for meth contamination. This fact affirmed the sheriff department's statement that there was no meth manufacturing on the property. (RP 785, 786, 787, 790, 791, 1165, 1166)

Miller had previous experience with property that was condemned for meth contamination. Miller took over management of a house that had been decontaminated and subsequently deemed safe by the health department. (RP 1191-1192) Based on this experience he was aware of the dangers of meth contamination. Following the drug arrests, Miller visited the property personally several times. During one visit, Miller's ten year

old daughter accompanied him. (RP 1172-1173) Further, Miller allowed a house cleaner and handyman who he had known for many years to enter the property on numerous occasions. (RP 1174, 1175)

There is no evidence on the record that shows Brudvik informed Miller about the meth manufacturing. In fact, the record shows Brudvik did not have knowledge of the meth manufacturing. (RP 714, 727, 728) Further, Brudvik never had any discussions with Miller, the Fritzes or the tenants regarding the meth manufacturing. (RP 550, 717, 718, 727, 728, 732)

There is no evidence on the record that the Fritzes informed Miller there was meth manufacturing on the property. Charmaine Fritz testified she did not inform Brudvik or Miller there was meth manufacturing on the property. (RP 591-592) Robert Fritz testified he did not discuss the arrests with Miller. (RP 541)

The lack of evidence regarding Miller's knowledge is vast. The Bloors did not produce one witness or document that shows Miller had knowledge of the meth manufacturing. The Bloors conceded at trial there was no evidence to support their claims against Miller or Windermere. They admitted there is no evidence that shows anyone informed Miller of the meth manufacturing including law enforcement, the health department or neighbors. (RP 899, 900, 488, 489) The Bloors testified there is no evidence that shows Miller received a police report stating meth

manufacturing occurred on the property. (RP 899, 488) They did not present evidence that shows any law enforcement representative informed Miller meth manufacturing occurred on the property. (RP 900, 489) In fact, the law enforcement witnesses that testified on behalf of the Bloors stated they did not inform Miller, Brudvik or Windermere about the presence of the meth lab. (RP 630, 670, 704, 705)

In order to prevail on a failure to disclose claim, the Bloors must prove Miller had actual knowledge of the meth manufacturing. The Bloors have produced no evidence that fulfills this legal requirement therefore the trial court's conclusion should be reversed.

B. Miller Had No Knowledge of Inaccuracies in Disclosure Statement.

Robert Fritz completed a seller disclosure statement and Miller provided it the Bloors. (RP 823, 824, 1179, 1180) The statement asks, "Has the property ever been used as an illegal drug manufacturing site?" (EX. 40) Mr. Fritz answered no. The court found Miller knew the Fritzes did not disclose the history of illegal drug manufacturing on their disclosure statement. (FF 61) Both the disclosure statute and the form mandated by the statute emphasize that the disclosures are made by the seller only.

> The real property transfer disclosure statement shall be only a disclosure made by the seller, and not any real estate

> licensee involved in the transaction, and shall not be construed as a warranty of any kind by the seller or any real estate licensee involved in the transaction.

RCW 64.06.020(2); *see* RCW 64.06.020(1) (setting forth the form). This provision plainly permits real estate agents to repeat and disseminate the seller's disclosures without liability. Since the disclosures are made by the seller only, the statute further insulates real estate agents from any liability for the seller's false disclosures unless the agent has actual knowledge of the inaccuracy.

> Any licensed real estate salesperson or broker involved in a residential real property transaction is not liable for any error, inaccuracy, or omission in the real property transfer disclosure statement if the licensee had no actual knowledge of the error, inaccuracy, or omission.
> RCW 64.06.050(2).

Miller did not assist Robert Fritz with completing the disclosure statement. In fact, Robert Fritz did not have any discussions with Miller regarding the information in the disclosure statement. (RP 550, 765, 766, 789, 790, 1179, 1180) Both the Bloors and Miller's real estate experts testified agents should not assist with the disclosure statement since it is the seller's statement. (RP 389, 398, 1246) Further, the Bloors' expert testified agents are not liable for the information contained in the statement. (RP 389)

The Bloors admitted they have no evidence that shows Miller assisted Mr. Fritz with the disclosure statement or that he knew the information contained in the statement was inaccurate. (RP 900, 489, 491)

There is no evidence that supports Miller had actual knowledge of any error, inaccuracy or omission in the disclosure statement.

C. Miller Did Not Negligently Misrepresent Property.

The Washington courts have adopted the definition set forth in Section 552 of the Restatement (Second) of Torts to govern claims of negligent misrepresentation. *Condor Enterprises v. Boise Cascade,* 121 Wn.2d 726, 731, 853 Pl2d 913 (1993). Section 552 (1) describes negligent misrepresentation as follows:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Id. at 51.

In order to prevail on the negligent misrepresentation claim, the Bloors have to show Miller failed to exercise reasonable care in obtaining or communicating information regarding the subject property. This standard of care has already been established. Real estate agents' duty to disclose is limited to actual knowledge of material facts. *RCW 18.86.030* The evidence on the record does not support the finding that Miller had

knowledge of the meth manufacturing therefore, he did not supply false information and did not fail to exercise reasonable skill and care.

Further, real estate agents are not guarantors of the seller's statements and they do not have a duty to investigate or confirm the seller's statements. Prior to enactment of RCW 18.86, a number of cases had held that real estate agents had a duty to "employ a reasonable degree of effort and professional expertise to confirm or refute information from the seller which he knows, or should know, is pivotal to the transaction from the buyer's perspective." *Brock v. Tarrant*, 57 Wn.App. 562, 569, 789 P.2d 112, 116 (1990); *Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn.App. 692, 697, 754 P.2d 1262, 1265 (1988); *Hoffman v. Connall*, 108 Wn.2d 69, 75, 736 P.2d 242, 245 (1987). Those cases led to a great number of difficulties because agents could not know what was "pivotal" to a buyer unless the buyer specifically asked about the subject. However, when a problem arose after a transaction, buyers invariably contended that the issue was pivotal to them, even if it was never mentioned.

The courts partially addressed this issue by holding that real estate agents are not liable for repeating the representations of their principals. The facts in *Hoffman v. Connall* 108 Wn.2d 69, 736 P.2d 242 (1987), are instructive. The seller showed the listing agent a stake or piece of pipe and identified it as the southeast corner of the property. *Id.* at 70. The broker saw no indication that the boundary was other than represented. *Id.* at 70-71. The broker then showed the property to a prospective buyer and pointed out the boundaries in accordance with the seller's representations.

Id. at 71. In fact, the boundary identified by the seller and then represented by the broker was inaccurate by 18 to 21 feet. *Id.* The trial court dismissed the case against the broker because the buyer had failed to prove that the broker had any reason to doubt the seller's representations. *Id.*

The Court of Appeals reversed the lower court's decision in *Hoffman* and the Supreme Court reversed the Court of Appeals, repudiating the argument that a real estate broker can be held liable for the accuracy of a seller's representations in the absence of evidence that the broker knew or should have known that the seller was wrong.

> Absent a legislative directive to the contrary, we do not consider it appropriate to impose liability on a real estate broker without a similar requirement of knowledge. Knowledge, or any reasonable notice, that the boundaries pointed out by the seller were incorrect is absent in this case, as the trial court found in its findings of fact.
>
> If a broker willfully or negligently conveys false information about real estate to a buyer, the broker is liable therefore. We decline, however, to turn this professional into a guarantor. Real estate agents and brokers are not liable for innocently and nonnegligently conveying a seller's misrepresentations to a buyer.

Hoffman v. Connall 108 Wn.2d 69, 76, 77-78, 736 P.2d 242, 246 (1987).

When the Legislature enacted RCW 18.86, it codified the *Hoffman* rule in two separate provisions. First, the statute reaffirms that real estate agents are not required to independently investigate or verify the accuracy of the seller's representations, unless, they expressly agree to do so.

> . . . a licensee 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.
>
> *RCW 18.86.030 (2)*

Second, a real estate agent is required to disclose only material facts of which they have actual knowledge. *Id. at (1) (d)* The real estate experts in this case testified an agent is not required to verify the information provided by the seller in the disclosure statement. (RP 400, 1246) Additionally, they testified agents do not have a duty to investigate a property's history of police activity. (RP 400, 1243, 1244) If an agent does investigate and contact the police department the experts testified the agent is permitted to rely on the department's representations and have no duty to verify the information. (RP 400, 1244, 1245) In this case, Miller had no knowledge of the inaccuracies in the disclosure statement and was allowed to rely on the sheriff's department's representation that there was no meth manufacturing on the property and the house would not be seized.

3. THE TRIAL COURT FAILED TO FIND THAT A MARIJUANA GROW OPERATION IS A MATERIAL FACT UNDER RCW 18.86, THUS THE TRIAL COURT ERRED IN CONCLUDING MILLER AND WINDERMERE VIOLATED STATUTORY DUTIES

The court's ruling on this issue is unclear. The court found Miller failed to disclose the prior drug manufacturing on the property (CL 8) and that Miller's failure to disclose the history of illegal drug manufacturing was a negligent misrepresentation (CL 13). However, the court does not clarify if the failure to disclose and negligent misrepresentation was based on the meth manufacturing or the marijuana grow operation. The court's following conclusions suggest the claims are partially based on the fact that marijuana was grown at the property: the production of marijuana was also illegal drug manufacturing; Miller, Windermere and other members of the real estate industry have historically denied that production of marijuana is illegal drug manufacturing; the denial by Miller and Windermere that production of marijuana is illegal drug manufacturing is indication of their willingness to interpret the law in favor of the seller without regard to the risks to the buyer of property; and such conduct is a threat to the health and safety of the public, unless it is corrected, is likely to result in future losses similar to that suffered by the Bloors (CL 14).

A. Marijuana is Not a Material Fact Pursuant to RCW 18.86

Whether or not growing marijuana at a property is considered a material fact under RCW 18.86 is an issue of first impression. The statute provides a definition of the term material fact.

> "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. The fact or suspicion that the property, or any neighboring property, is or was the site of a murder, suicide or other death, rape or other sex crime, assault or other violent crime, robbery or burglary, illegal drug activity, gang-related activity, political or religious activity, or other act, occurrence, or use not adversely affecting the physical condition of or title to the property is not a material fact.
>
> *RCW 18.86.010 (9)*

1. Marijuana Did Not Adversely Affect Value of Property

There is no evidence on the record to suggest the marijuana grow operation discovered during the drug arrests affected the value of the property. All of the evidence offered at trial showed the contamination and resulting damage was caused by the meth manufacturing. An environmental consultant, Lori Hall, testified on behalf of the Bloors regarding the meth contamination. (RP 36-121) Ms. Hall is a project manager that inspects and remediates meth contamination. (RP 36) She inspected the property, analyzed various samples and produced several reports regarding the meth contamination. (EX. 2, 4, 5, 6, 7, 8, 10) The

reports do not mention the marijuana grow operation and contribute the contamination to the presence of meth. Ms. Hall testified that during her career she has never been involved with sampling and/or cleaning a property due to marijuana contamination. (RP 111) Further, she has never known a property to be posted by the health department due to marijuana. (RP 113)

2. Marijuana Did Not Adversely Affect Parties' Ability to Perform Obligations

There is no evidence on the record that shows the marijuana grow operation discovered during the drug arrests in any way affected the parties' ability to perform their obligations in the real estate transaction.

3. Marijuana Did Not Materially Impair or Defeat Purpose of Transaction

There is no evidence on the record that shows the marijuana grow operation discovered during the drug arrests impaired or defeated the purpose of the real estate transaction. Again, all of the damage and resulting losses were a direct result of the meth manufacturing.

4. Marijuana Did Not Adversely Affect Physical Condition of Property

There is no evidence on the record that shows the marijuana grow operation discovered during the drug arrests adversely affected the physical condition of the property. The Bloors' environmental expert

testified all of the damages were a direct result of meth contamination. (RP 36-121) (EX. 2, 4, 5, 6, 7, 8, 10)The Bloors did not once state any of the damages were caused from the marijuana grow operation.

5. Marijuana Did Not Affect Title to Property.

There is no evidence on the record that shows the marijuana grow operation discovered during the drug arrests affected the title to the property. The property was posted by the Cowlitz County Health Department for the illegal meth drug lab that was confiscated by the Cowlitz County Narcotics Task Force. (EX. 3) The posting does not mention the marijuana grow operation.

6. Fact Property was Site of Illegal Drug Activity is Not a Material Fact.

The statute answers the question of whether or not illegal drug activity is considered a material fact. The statute excludes illegal drug activity from the definition of a material fact. The fact that marijuana was grown at the property is not a material fact. Additional facts must be present to deem the marijuana grow operation a material fact such as an impact on the physical condition of the property or the parties obligations in the transaction. Those facts are absent in this case. If the statute's meaning is plain, the court on appeal gives effect to that plain meaning as the expression of the legislature's intent. *Jacobs,* 154 Wn.2d at 600.

B. Experts Testified Regarding Standard of Care.

The court found Miller, Windermere and other members of the real estate industry have historically denied that production of marijuana is illegal drug manufacturing. (CL 14) The only testimony on this issue was presented by the real estate expert witnesses. The Bloors' expert witness, Horner, testified a real estate agent has no duty to disclose a marijuana grow operation because it is not a material fact. (RP 392, 400) Based on Horner's experience in the real estate industry, he testified the term "illegal drug manufacturing" in the disclosure statement relates to something that has a physical impact on the property. (RP 402, 403) Further, he does not believe marijuana is considered illegal drug manufacturing. (RP 400, 402, 403) During his years in the real estate industry, he has never known marijuana to contaminate or affect the condition of the property. (RP 397, 403) In accordance with the definition of material fact in RCW 18.86, Horner testified the fact that property is the site of illegal drug activity is not a material fact and a real estate agent is not required to disclose the information. (RP 403)

Miller's expert witness, Bowlds, testified "illegal drug manufacturing" applies to the manufacturing of drugs that produce dangerous chemicals or anything that would cause physical harm to the property. (RP 1246, 1247) He testified marijuana does not have to be

disclosed on the disclosure statement because illegal drug activity is excluded from the statute's definition of material fact. (RP 1248) Similar to Horner, Bowlds is not aware of any property being condemned for marijuana. Additionally, the real estate industry does not consider growing marijuana "illegal drug manufacturing" in relation to the disclosure statement or an agent's duty to disclose. (RP 1247)

The Bloors claim Miller breached his duty to exercise reasonable skill and care pursuant to RCW 18.86. The agency statute does not define the term "reasonable skill and care." In professional malpractice cases, the standard of care is based on proof of customary and usual practices within the profession. *Douglas v. Freeman*, 117 Wash. 2d 242, 248, 814 P.2d 1160 (1991) Expert testimony is necessary to prove whether a particular practice is reasonably prudent under the applicable standard of care. The standard of care must be established by expert testimony. *Harris v. Groth*, 99 Wash. 2d 438, 449, 663 P.2d 113 (1983) In a professional malpractice action, the plaintiff must introduce expert testimony to establish the standard of care by which the defendants' conduct must be measured. *Peterson v. State*, 100 Wash.2d 421, 437, 671 P.2d 230 (1983) The trial court should have accepted the experts' testimony regarding the standard of care of a real estate agent and whether marijuana is considered a material fact in the real estate industry. Instead the court decided to

impose its own standards on the real estate industry. The court made this conclusion despite the experts' testimony and the fact the Bloors presented no evidence that suggests growing marijuana constitutes "illegal drug manufacturing." This conclusion is not supported by the evidence on the record and should be reversed.

C. Court Fails to Identify Threat to Public Health and Safety.

The court found the denial by Miller and Windermere that production of marijuana is illegal drug manufacturing is indication of their willingness to interpret the law in favor of the seller without regard to the risks to the buyer of property and such conduct is a threat to the health and safety of the public, unless it is corrected, is likely to result in future losses similar to that suffered by the Bloors (CL 14). The court does not identify how the failure to disclose marijuana poses a threat to the public's health and safety. Further, the court does not identify the losses the Bloors suffered from the non-disclosure of the marijuana grow operation and what future losses the public may suffer due to non-disclosure of marijuana. The record does not support these conclusions. To the contrary, the record shows the Bloors' health and safety was not at risk and they did not suffer any losses related to the marijuana grow operation.

Perhaps the court bases this finding on the assumption that the disclosure of marijuana would have led to the Bloors discovery of the

meth manufacturing. If this is the case the court is assuming facts not in evidence. To the contrary, Eva Bloor testified that if the disclosure statement disclosed the property was the site of illegal drug manufacturing it "might" have changed her decision to purchase the property. She would have asked what kind of drugs but doesn't know what else she would have done. (RP 825) Further, she testified if she knew just marijuana was grown on the property she would have purchased the property. (RP 908) This theory is relevant only if every seller that grew marijuana also manufactured meth.

4. THE BLOORS FAILED TO SATISFY ELEMENTS OF CONSUMER PROTECTION ACT CLAIM THUS, THE TRIAL COURT ERRED IN CONCLUDING WINDERMERE AND MILLER VIOLATED CONSUMER PROTECTION ACT

In order to establish a claim under the Consumer Protection Act the following elements must be proven: the existence of an unfair or deceptive act or practice, which occurred in trade or commerce, public interest impact, injury to plaintiff's business or property and causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986)

The court found although the sale of the property was a single transaction there is a real and substantial potential of repetition of the denial by Miller and Windermere of their duty to disclose the history of

illegal drug manufacturing to prospective purchasers. (CL 13) It is important to state Miller and Windermere did not deny their duty to disclose illegal drug manufacturing if it is deemed a material fact under RCW 18.86. The record shows Miller and Windermere did not deny a duty to disclose meth manufacturing if they had knowledge. It appears this conclusion is related to the court's belief that marijuana is a material fact and must be disclosed. This issue has been addressed in preceding sections.

In order to show a party has engaged in an unfair of deceptive act or practice a plaintiff need not show that the action in question was intended to deceive, but 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, 948 P.2d 816, 819 (1997)* Miller's actions did not have the capacity to deceive a substantial portion of the public. The transaction was an isolated, single incident that did not affect anyone other than the parties to the contract.

Further, the Bloors can not establish a public interest impact. Real estate transactions are generally considered private affecting only the parties involved, not the public interest and should not give rise to a Consumer Protection Act claim. The public interest is impacted by a private dispute where there is a likelihood that additional plaintiffs have

been or will be injured in exactly the same fashion. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986)

Whether a public interest impact exists is a question of fact. This court reviewed the issue for substantial evidence as with any factual question. *Sloan v. Thompson*, 128 Wn.App. 776, 791, 115 P.3d 1009, 1016 (2005) ("Substantial evidence supports the superior court's finding that this is a private dispute that had no impact on the public interest and therefore the consumer protection act does not apply."); *see Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn.App. 777, 799, 6 P.3d 583, 595 (2000). In *Cotton v. Kronenberg* 111 Wn.App. 258, 275, 44 P.3d 878, 887 (2002), the Court reversed summary judgment because of questions of fact regarding the public interest element.

When an action arises from a single transaction, proving a public interest impact is difficult. Decision after decision uses exactly the same language from the *Hangman Ridge* decision: "it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes the factual pattern from a private dispute to one that affects the public interest." *Sloan*, 128 Wn.App. at 792; *Cotton*, 111 Wn.App. at 274; *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn.App. 834, 847, 942 P.2d 1072, 1079 (1997) (all quoting *Hangman Ridge*

Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash.2d 778, 790, 719 P.2d 531 (1986).

To satisfy the public interest element the Bloors must provide evidence that shows the act was repeated or is likely to be repeated, and then in "exactly the same fashion." For example, in *Edmonds*, the court found a public interest impact because the defendant admitted that it had "followed this policy dozens, perhaps hundreds, of times in a period of four years." *Edmonds*, 87 Wn.App. at 834. In *Cotton*, the plaintiff presented evidence that other clients had been victims of a similar scheme. *Cotton*, 111 Wn.App. at 274-75. In *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 406, 759 P.2d 418, 423 (1988), the Supreme Court found a public interest impact under this test because "the sellers had routinely made such representations without knowing whether physical examinations had been given; physical examinations were not routinely given; the selling practices were the custom and usage of the trade; and unsound horses had been sold as a result." Conduct in an isolated transaction, no matter how egregious, does not affect the public interest unless it is likely to be repeated. *Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn.App. 692, 702, 754 P.2d 1262, 1268 (1988) ("A private dispute can affect the public interest if it is likely that additional plaintiffs have been or will be injured in exactly the same fashion."). The Bloors'

claims are unique to the subject transaction. They can not prove additional people have been or will be affected in "exactly the same fashion."

In an attempt to find a public interest impact the court found the denial by Miller and Windermere that production of marijuana is illegal drug manufacturing is indication of their willingness to interpret the law in favor of the seller without regard to the risks to the buyer of property and such conduct is a threat to the health and safety of the public, unless is corrected, is likely to result in future losses similar to that suffered by the Bloors (CL 14). However, the court does not support this conclusion with any evidence. The court does not identify how the failure to disclose marijuana poses a threat to the public's health and safety. Further, the court does not identify the losses the Bloors suffered from the non-disclosure of the marijuana grow operation and what future losses the public may suffer due to non-disclosure of marijuana. The record does not support these conclusions. To the contrary, the record is absent on any evidence that shows the Bloors' health and safety was at risk or they suffered losses related to the marijuana grow operation.

If the Consumer Protection Act violation is reversed the treble damages award (CL 23) and the fee award for additional fees spent on Consumer Protection Act (38) should be reversed.

5. THE TRIAL COURT IMPROPERLY APPLIED A 1.2 MULTIPLIER TO THE AWARD OF ATTORNEY FEES

The court concluded the attorneys' fee award should be enhanced by employing a multiplier of 1.2 and the enhancement is warranted because of the contingent risk assumed by the attorneys, the difficulties, burdens and lost opportunities, the uncertainty of recovery and the skills and abilities demonstrated by the Bloors' attorneys. (CL 35)

Adjusting the lodestar amount upward or downward is only appropriate "in rare instances." *Mahler v. Szues*, 135 Wn. 2d 398, 434, 957 P.2d 632 (1998) This is a simple real estate misrepresentation case affecting no one but the parties. It advanced no unpopular cause, and it imposed no unusual hardship on the attorneys. There is nothing groundbreaking or extraordinary about this case. The result was approximately 20% of Bloors' demand. The case did not affect public policy or raise issues affecting the public. Even thought it was taken on a contingent basis, the lodestar amount will equal or exceed the amount of the contingent fee, and therefore will already include an enhancement over the amount set forth in the fee agreement.

The court found that some of the issues involved in the Bloors' claims were novel. The only evidence presented on this claim is a declaration submitted by Mark Sheibmeir on behalf of the Bloors. (CP

267-279) Sheibmeir states, "the case appears to have presented at least two novel theories of law by the Plaintiffs; damages to the plaintiffs' credit reputation and the County's liability for violation of its statutory reporting responsibilities." (CP 275) Apparently, Sheibmeir believes these issues are novel because "I have not had any prior experience with either of these theories." (CP 275) The Bloors failed to provide any evidence that shows these issues are novel other than the statement by one attorney that he has never dealt with these issues. There is no evidence on the record that other counties in Washington have not been sued for the failure to report under RCW 64.44.

The court found the case was complex. The only evidence on this finding is the Sheibmeir declaration. (CP 267-279) He testified the Bloors' attorneys faced multiple, complex theories against three separate defendants. (CP 278) There is no evidence on the record that shows it is uncommon for several defendants to be named in a lawsuit regarding a real estate transaction. The Bloors' claims included: breach of contract; fraud; misrepresentation; breach of statutory duties; and consumer protection act violation. (CP 1540-1551) There is no evidence on the record to support the finding that these claims are uncommon or complex.

The court found the above factors, the uncertainty of recovery and the contingent nature of the representation all support an enhancement of

the attorney fees based on a multiplier of 1.2. Again, the only evidence on this issue is the Sheibmeir declaration. (CP 267-279) The evidence shows recovery against Cowlitz County was almost certain. The law enforcement officer involved with the drug arrest who was responsible for reporting the meth lab to the health department admitted he failed to properly report the meth lab. (RP 658, 659) With this admission, proving the County's liability was simple and recovery from what Sheibmeir calls a "much needed deep pocket" was inevitable. (CP 275)

According to Sheibmeir, this case was difficult due to the Bloors' request for rescission. Sheibmeir testified rescission cases are some of the most difficult cases attorneys have to deal with. (CP 276) Rescission was plead as an alternative remedy. (CP 1548) The Bloors requested numerous damages including: decontamination of the property; restore or replace personal property; lost wages; lost business opportunity; storage; rent; moving and living expenses; pain, suffering and emotional distress; loss of value of property; and treble damages under the Consumer Protection Act against Miller and Windermere. (CP 1547, 1548)

Sheibmeir testified most contingency fee cases are premised upon there being an assurance of payment of the judgment for example, through an insurance carrier. (CP 278) Miller, Windermere and the County were insured for the claims brought by the Bloors. Therefore, according to Sheibmeir payment was assured and not uncertain as the Bloors' attorneys claim. The evidence on the record does not support an enhancement of fees under the lodestar method therefore, the multiplier applied to the fee award should be reversed.

Dated this 31st day of May, 2007.

Brandi L. Adams, WSBA#31214
Attorney for Appellants

COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

EDDIE BLOOR AND EVA BLOOR, husband and wife, Plaintiffs/Respondents, v. ROBERT A. FRITZ and CHARMAINE A. FRITZ, and the marital community comprised thereof; et al., Defendants/Appellants.	NO. 35740-2-II DECLARATION OF MAILING

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I am an employee of the Demco Law Firm and on this date, actual notice was made by me to all known parties of the above-entitled action by mailing a copy of the Appellants' Opening Brief and Declaration of Mailing addressed to each parties' last known address, postage prepaid, as follows:

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