NO. 35740-2-II

COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

ED BLOOR AND EVA BLOOR

Respondents

v.

ROBERT A. FRITZ and CHARMAINE A. FRITZ, *et. al.*

Appellants.

BRIEF OF RESPONDENTS

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ABANDONED ASSIGNMENTS OF ERROR

Both the Fritzes and Windermere made assignments of error for which they failed to present argument in their Briefs. The assignments of error for which no argument is made should be deemed abandoned. Specifically, the Windermere assignments of error without argument in their brief that should be deemed abandoned are numbered 10, 14 and 15. The Fritz assignments of error that should be deemed abandoned are numbered in their brief as 9, 10 and 11. *Lutz v. Longview,* 83 Wn.2d 566, 571, 520 P.2d 1374 (1974). All other assignments of error are without basis and are addressed below.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is there substantial evidence in the record supporting the contested findings of fact? Short answer: Yes.

2. Are the conclusions of law supported by the findings of fact and the law? Short answer: Yes.

3. Did the court exercise proper discretion in granting equitable relief to the Bloors and was the relief granted appropriate in the circumstances? Short answer: Yes.

4. Should the Bloors be awarded their reasonable attorney fees and costs on appeal from both Windermere and the Fritzes? Yes, the contract with the Fritzes provides for recovery of attorney fees by the prevailing party,

and under RCW 19.86.090, and RAP 18.1, the Bloors are entitled to recover their reasonable attorney fees and costs on appeal from Windermere.

I. STATEMENT OF THE CASE

Ed and Eva Bloor resided in Missouri prior to moving to Washington in August 2004. (CP 18-FF XX). While in Missouri, Eva was employed as a Nursing Assistant (RP 803-804) and Ed owned and operated his own siding business. (CP 20-FF XXVIII). The Bloors decided to relocate to the Northwest. (RP 284). The Bloors sold their home in Missouri and a parcel of property in Spokane that Eva had inherited. (CP 18-FF XX; RP 808-809). Ed planned to obtain a contractor's license and do business as a siding contractor. (CP 19-FF XXI). Ed had the experience and owned the tools, worth many thousands of dollars, which were needed for his siding business. (CP 20-FF XXVIII, RP 278-281, EX. 53).

Upon arrival in Washington, the Bloors learned that a house at 3409 Spirit Lake Highway, near Silver Lake in Cowlitz County (referred to as the "Property") was for sale. (CP 18-FF XXI). They contacted a neighboring property owner, who told them that the Fritzes owned the Property and that Windermere Allen & Associates (Windermere) was the agency selling the Property. (CP 18-FF XXI). The Bloors contacted Windermere. (CP 18-FF XXI). After Jayson Brudvik gave the Bloors a

tour of the Property, they decided to make an offer. (CP 18, 19-FF XXII, XXIV).

On July 10, 2004, the Seller's agent, Lance Miller, prepared a Real Estate Purchase and Sale Agreement (the "REPSA"). (CP 19-FF XXIV). On the REPSA, Miller indicated that he was acting as a dual agent, and he advised the Bloors that he would be representing both the Bloors and the Fritzes in the transaction. (CP 19-FF XXIV). In the REPSA the Bloors made an offer to purchase the Property for $135,000. (RP 823).

After they signed the REPSA, they were advised that there was a competing offer and were asked by Miller if they wanted to make a full price offer. (CP 19,20-FF XXVII). The Bloors wanted the Property, so they increased their offer to the asking price of $149,000. (CP 19,20-FF XXVII). Within a couple of days the Fritzes accepted the full price offer. (RP 304).

The Bloors applied for financing through a local mortgage company. (RP 825). They obtained loan approval and were able to arrange one hundred percent financing of the purchase price. (RP 444). At this time Ed and Eva had mid-range credit scores of 666 and 647, respectively. (EX. 12, 39, RP 239).

At the time of, or prior to, the preparation of the REPSA, the Bloors received a Seller's Disclosure Statement (Form 17). (CP 19-FF

XXVI). Among the representations they made on the disclosure statement, the Fritzes answered that the residence had never been the site of illegal drug manufacturing. (CP 19-FF XXV). The Form 17 was signed by Robert Fritz. (CP 19-FF XXV). Miller looked over the Form 17 and specifically noticed that the question as to whether the property had ever been used as an illegal drug manufacturing site had been checked "no". (RP 1218).

The Bloors met with Miller in his office to review the Form 17. (RP 304, 824). Miller specifically went over the Form 17 with the Bloors and answered questions they had with respect to the hot tub and other things. (RP 304, 824). He did not mention to the Bloors that there had been prior illegal drug manufacturing on the property. (CP 19-FF XXVI).

The property was listed with the Multiple Listing Service (CP 18, 19-FF XXIII), and another offer was made on the property after the Bloor's initial offer. (CP 19, 20-FF XXVII). The other potential buyers were given the same Form 17 that was given to the Bloors. (CP 18, 19-FF XXIII; RP 1198-99).

The Bloor's offer was accepted and the sale closed on or about August 13, 2004. (CP 19, 20-FF XXVII) The Bloors moved in on or about August 18, 2004. (CP 19, 20-FF XXVII).

After residing in the home for roughly six weeks, the Bloor's son advised Eva that they lived in "the drug house." (CP 20-FF XXIX). Eva investigated on the internet and discovered that the property had been the site of police activity, and that implements of a meth lab had been confiscated from the property. (CP 20-FF XXX). Eva contacted the local Health Department who eventually posted the property as unfit for use, forcing the Bloors to abandon the residence and leave all of their belongings behind. (CP 20, 21, 22-FF XXXI, XXXIV, XXXV).

The evidence at trial showed that prior to the sale to the Bloors, the Fritzes had rented the Property using the services of LAM Management, Inc. dba Allen & Associates Property Management to manage the Property. (CP 13, 14-FF III). Allen & Associates Property Management was owned by and had two employees, Lance Miller and Jayson Brudvik. (CP 13, 14-FF III). During January 2004, the Property was rented to Jason Waddington, Charles Waddington, Pam Jackson and Sarah Holton. (CP 14-FF IV).

On January 30, 2004, a search warrant was executed by the Cowlitz Wahkiakum Joint Narcotics Task Force (the "Task Force") at the Property. (CP 14-FF V). Members of the Task Force discovered a marijuana manufacturing operation and paraphernalia associated with production of methamphetamines. (CP 14-FF V). Implements of a meth

lab were discovered on and under the rear deck of the house and inside of the hot tub adjacent to the house. (CP 14-FF V). The tenants were arrested and charged with various controlled substance violations, including manufacturing methamphetamines. (CP 14-FF V).

A press release was issued on Saturday, January 31, 2004 that outlined the results of the search of the Property. (CP 14-FF VI). The Longview Daily News ran a story on the following day, Sunday, February 1, 2004, that identified the location, the people arrested, and that marijuana was found and a meth lab was discovered. (CP 14, 15-FF VII).

Jayson Brudvik saw and read the newspaper article, recognized the names and address, and contacted the Fritzes by telephone to inform them. (RP 714-715; 1086; 1107-1108). A family friend had already advised Charmaine Fritz of the search and arrests. (CP 15, 16-FF XI). Charmaine Fritz made several telephone calls over the first few days in February of 2004. (CP 15, 16-FF XI). She contacted the State Patrol, Cowlitz County Sheriff and local police before she was finally referred to the Joint Narcotics Task Force. (RP 1109).

On Monday February 2, 2004, Charmaine Fritz contacted Judy Conner, a receptionist for the Task Force. (CP 16-FF XII). The officers do not work on Mondays so Ms. Conner took a message. (RP 198). Charmaine Fritz called the following day, February 3, 2004 and spoke

with Ms Conner again, who advised Charmaine Fritz that components associated with a meth lab were found on the Property. (RP 199, 200).

The same day Charmaine Fritz again contacted the Task Force and spoke for more than 14 minutes with Detective Darren Ullmann, one of the detectives who was at the Property the night of the arrests, and one of the officers who assisted in dismantling the meth lab. (CP 15, 16-FF VIII; XIV). Detective Ullmann told Ms. Fritz that components of a meth lab had been found. (CP 16-FF XIV). Ms. Fritz was told that there had been bottles with chemicals in them found at the Property. (RP 57-558).

Miller also contacted local law enforcement in the days immediately following the arrests. (RP 1165). He spoke with someone he thought had knowledge of the arrests. (RP 1219-1221). He asked specifically whether anything associated with meth had been found on the Property. (RP 1166). None of the task force officers recall this telephone conversation. (RP 630, 670, 704-705). The officers would not have advised there was no meth found on the Property under the circumstances. (RP 608, 625, 680).

After the search warrant was served and arrests were made, Miller and Brudvik contacted the Fritzes to discuss how to proceed. (RP 1164). Thereafter, tenants were evicted and the Property was prepared to re-rent. (CP 17-FF XVII). The Property was re-rented for a short time, and then

prepared for sale by the Fritzes. (CP 17-FF XVIII) During this preparation, Charmaine Fritz had a discussion with the neighbors John and Denae Cyr wherein Charmaine Fritz told the Cyrs that they (the Fritzes) "were lucky the tenants had only cooked the meth on the back porch and not in the house." (CP 17-FF XIX).

II. ARGUMENT

A. Scope and Standard of Review: Issues not raised

An issue, theory, argument or claim of error not presented to the trial court will generally not be reviewed by the Court of Appeals. *Lindblad v. Boeing Co.,* 108 Wn.App. 198, 207, 31 P.3d 1 (2001). In order to raise an issue or error for the first time on appeal, the error must be "manifest" and truly of constitutional dimension. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (*citations omitted*).

A reviewing court may consider an issue, theory or argument if the record reveals that the issue was presented to the trial court, and the trial court was both aware of and had an opportunity to consider it. *Washburn v. Beatt Equipment Co.* 120 Wn.2d 246, 291, 840 P.2d 860, (1992). *reconsideration denied.* The purpose of RAP 2.5 is to give the trial court the opportunity to hear and consider all of the issues and arguments and to correct any errors as necessary. *Washburn,* 120 Wn.2d at 291, 840 P.2d 860. To raise the issue or theory for the first time on appeal, "the precise

point on which appellant relies for reversal must have been brought to attention of trial court and passed upon". *State v. Reano*, 67 Wn.2d 768, 771, 409 P.2d 853, (1966) (*citations omitted*).

An appellate court will not disturb findings of fact supported by substantial evidence. *Davis v. Dept. of Labor and Industries,* 94 Wn.2d 119, 123, 615 P.2d 1279 (1980) (*citations omitted).* The party challenging a finding of fact bears the burden of showing that it is not supported by the record. *Brin v. Stutzman*, 89 Wn.App 809, 824, 951 P.2d 291 (1998). Substantial evidence is that quantum of evidence sufficient to convince a rational and fair-minded person of the truth of the premise it is offered to support. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). An unchallenged finding of fact is treated as a verity on appeal. *Cowiche*, 118 Wn.2d at 808, 828 P.2d 549 (citing *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 818, 792 P.2d 500 (1990)).

An assignment of error as to a conclusion of law does not challenge or bring for review the underlying findings on which the conclusion is based. *Le Cocq Motors, Inc. v. Whatcom County*, 4 Wn.2d 601, 603, 104 P.2d 475 (1940); *West Coast Airlines, Inc. v. Miner's Aircraft and Engine Service, Inc.*, 66 Wn.2d 513, 518, 403 P.2d 833 (1965); *English (J.D.) Steel Co. v. Tacoma School Dist.*, 57 Wn.2d 502, 504, 358 P.2d 319 (1961). Assignments of Error based on a conclusion

that is supported by unchallenged findings of fact, which have become established facts of the case, are meritless. *Wygal v. Kilwein,* 41 Wn.2d 281, 284, 248 P.2d 893 (1952).

Conclusions of law are reviewed de novo to determine if they are supported by the findings of fact. *Bingham v. Lechner*, 111 Wn.App 118, 127, 45 P.3d 562 (2002) *review denied,* 149 Wn.2d 1018, 72 P.3d 761 (2003). A reviewing court may look to the trial court's oral ruling to interpret findings of fact and conclusions of law. *State v. Hescock*, 98 Wn.App 600, 606, 989 P.2d 1251(1999) *citing State v. Bynum*, 76 Wn.App 262, 266, 884 P.2d 10 (1994).

III. ARGUMENT IN RESPONSE TO WINDERMERE BRIEF

A. Substantial evidence supports the Findings of Fact.

The following citations to the record show that substantial evidence supports the Findings of Fact challenged by Windermere:

1. Finding of Fact 10: Jayson Brudvick saw the article published in the Longview Daily News on Sunday, February 1, 2004. (RP 714-717). He read the entire article over the weekend, he believes on a Sunday. (RP 715, 717, EX. 37, 38). The incident occurred on Friday January 30, 2004. (EX. 52). A press release was issued by the Joint Narcotics Task Force on Saturday January 31, 2004, identifying the persons, address and the fact that implements of a meth lab had been

confiscated from the Property. (CP 14-15-FF VII). An article was published in the Longview Daily News on Sunday February 1, 2004. (EX. 37, 38). Brudvik contacted the Fritzes to advise them on Monday, February 2, 2004. (RP 763-64, 1095-96). When Brudvik spoke with the Fritzes on Monday, the Fritzes already knew of the police activity. (RP 714-15). The Fritzes learned of the police activity from their son on either Saturday the 31st or Sunday the 1st. (RP 1085-86). Brudvik contacted the Fritzes on Monday to advise them of what he had read about the police activity and to discuss how to move forward with eviction of the tenants. (RP 715-716, 763, 1086).

2. **Finding of Fact 16:** Lance Miller contacted law enforcement in the first days after the police activity on the property. (RP 1165). He specifically asked whether any meth manufacturing had occurred on the Property. (RP 773, 775, 785-87, 790-91, 1165-66). Miller alleges he was not told of any meth activity despite specifically asking whether any meth activity had occurred. (RP 773, 775, 785-87, 790-91, 1165-66). The detectives would not have told him this when in fact, implements of meth manufacturing had been confiscated from the Property. (RP 608, 625, 680). Miller concedes he was told of the marijuana grow operation. (RP 791). The trial Judge found that Miller's testimony that he was not told of the meth implements found on the Property when he specifically inquired with law

enforcement was not credible, and that law enforcement would be much more impressed with the meth than with the marijuana, making the testimony suggested by Miller incredible. (RP 1387, 1388).

3. **Finding of Fact 59:** Lance Miller listed the Property and entered it on the multiple listing service. (RP 1230; CP 18, 19-FF XXIII). He showed the Property to another prospective buyer. (RP 1198-99; CP 18, 19-FF XXIII). Miller did not reveal the history of illegal drug manufacturing at the Property. (RP 333; CP 18, 19-FF XXIII). Miller knew of the history of illegal drug manufacturing at the Property from one or all three of his contacts with Jayson Brudvik from his report of the article in the newspaper (RP 714-715, 721, 763, 768, 1164, 1197), from Charmaine Fritz relative to her contacts with the Task Force (RP 1164, 1166) and from his personal contact with law enforcement. (RP 772-775, 1197). Miller also knew from his prior involvement with property that had been contaminated by meth manufacture of the danger of contamination with toxic chemicals from such operations. (RP 771). The denial by Miller of his knowledge of the history of illegal drug manufacturing at the Property is not credible. (RP 1388).

4. **Finding of Fact 61:** Though Miller denied he had knowledge of the meth activity on the Property, that testimony was found to be not credible. (RP 1388). Miller did not disclose the meth activity in

the listing of the Property in the MLS. (CP 18, 19-FF XXIII). Miller did not disclose the meth activity to the Bloors. (RP 333). Miller knew of the history of illegal drug manufacturing and of the potential contamination (RP 714-15, 721, 763, 768, 771-73, 775, 785-87, 790-91, 1164-66, 1208, 1388), knew that the Fritzes had not disclosed it on their Disclosure Statement (RP 765-66, 1218), and failed to disclose his personal knowledge of the history of use of the Property for illegal drug manufacturing, or of the potential contamination of the Property to the public (CP 18, 19-FF XXIII), to a prospective buyer that was interested in the Property at the same time as the Bloors (CP 18, 19, 20-FF XXIII, XXVII; RP 1198-99; EX. 40), or to the Bloors. (CP 19-FF XXVI; RP 304, 824).

5. **Finding of Fact 62:** The Bloors were damaged by Miller's failure to disclose the history of drug manufacturing at the Property. (CP 21-27-FF XXXIV, XXXV, XXXVI, XXXIX, XL, XLIII, XLV, XLVI, XLIX, L, LI). As shown by the investigation made by Eva Bloor upon receiving information that drug activity had occurred at the Property, Miller's failure to disclose his knowledge of the drug activity on the Property to the Bloors misled the Bloors and deprived them of essential information needed by them to learn of the true condition of the Property. (RP 907-908). Had Miller revealed his knowledge of the drug activity on

the Property, the Bloors would have probably made inquiry to law enforcement and the health department, which they did upon receiving information of the history of such activity at the Property. (RP 907-908).

6. **Finding of Fact 65:** The Bloors' attorneys expended over 800 hours in the prosecution of the Bloor's claims. (CP 197, 234-236, 238-39). The Bloors' attorneys accepted the case on a contingent fee basis. (CP 189, 278). The Bloors' attorneys assumed significant business risk that they would not be paid. (CP 277-79). Although the Bloors paid the filing fee and some of the service fees, they were unable to pay any of the remaining expenses, and had they not prevailed at trial, the Bloors' attorneys faced substantial risk that they would not be paid their fees or the significant expenses and costs they advanced. (CP 118, 277-79).

7. **Finding of Fact 73:** The claim of damage to the Bloors' credit was a novel issue presented by the Bloors' attorneys (RP 1439; CP 275). and the claim against Cowlitz County based on its failure to comply with the requirements of reporting under RCW 64.44 *et seq.,* the contaminated properties statute, was unusual and was apparently the first such claim against a governmental entity made under that statute. (RP 1439; CP 275).

8. **Finding of Fact 74:** Plaintiffs' case was legally complex with multiple legal theories presented against multiple Defendants. (RP

1438; CP 278). Plaintiffs' case was complicated by having to prove that the Fritzes and Miller had knowledge of the use of the Property for illegal drug manufacturing using circumstantial evidence. (CP 32 –FF LXVI; CP 278).

9. **Finding of Fact 76:** The many hours expended on the prosecution of the Bloors' claims necessarily precluded the Bloors' attorneys from other employment opportunities that would have otherwise been available. (RP 1439-40).

10. **Finding of Fact 82:** Some of the issues involved in the Bloors claims were novel. (RP 1439; CP 275-76). Cowlitz County is a member of the task force that conducted the search and arrests leading to the discovery of the meth lab at the Property, and task force members failed to report the discovery to the Cowlitz County Health Department, as required by law. (CP 15-FF IX). The case was complex in that the Bloors had to prove multiple acts and omissions of the four defendants, and the Fritzes and Miller steadfastly denied their commission of such omissions and acts. (CP 278; CP 32-FF LXVI; RP 1438). The persistent resistance of the Fritzes and Miller to acknowledge liability, the time and labor required to prosecute the claims, the necessity of an expeditious resolution and the time sensitivity of the claims required diligent and determined prosecution of the Bloors claims. (CP 276-278; RP 1438). The Bloors claims were also

undesirable because of their inability to pay their attorneys, their residence in Spokane, the relative difficulty of communication with them, and the resources the defendants were willing to expend to defend against the claims. (CP 276-278). These factors, the uncertainty of recovery and the contingent nature of the representation all support an enhancement of the attorney fees to be awarded. (RP 1437-40). An enhancement based on a multiplier of 1.2 should be made to the hourly rates applied to the allowed hours expended by the Bloors' attorneys prior to date the Court announced its oral ruling. (RP 1437-40).

11. **Conclusion of Law 10:** Lance Miller, as an agent for LC Realty, Inc., d/b/a Windermere Allen & Associates, had actual knowledge of the prior drug manufacturing that occurred on the Property (RP 714-715, 721, 763, 768, 771-775, 1164, 1197) and failed to disclose this fact to the Bloors. (CP 19-FF XXVI). Illegal drug manufacturing on the Property is a material fact that Miller had a duty to disclose under RCW 18.86.030. (RP 390-391, 758, 1208, 1251).

B. Substantial evidence in the record supports the trial court's findings that Miller had knowledge that meth manufacturing had been conducted on the Property and failed to disclose that fact to the Bloors.

The basis for Windermere's claim that substantial evidence does not support the trial court's finding that Miller had knowledge of meth

manufacturing on the Property is that "Miller's testimony is contrary to the court's findings". (Appellant's Brief at 25).

Determining the credibility of a witness is the unique province of the trier of fact. *In re Marriage of Lutz*, 74 Wn.App 356, 372, 873 P.2d 566 (1994); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A trier of fact may believe one parties' testimony and disbelieve the other party entirely. *Delegan v. White*, 59 Wn.2d 510, 512, 368 P.2d 682 (1962). When there is conflicting evidence, the reviewing court is only required to determine whether substantial evidence exists viewing only the evidence most favorable to the prevailing party. *Pilcher v. State Dep't of Revenue,* 112 Wn.App. 428, 435, 49 P.3d 947 (2002); *Thomas v. Ruddell Lease-Sales, Inc.*, 43 Wn.App 208, 212, 716 P.2d 911(1986). Reviewing findings made by the trial court entitles the respondent to the benefit and reasonable inferences of all evidence in support of the judgment. *Shultz v. Halpin*, 33 Wn.2d 294, 305, 205 P.2d 1201 (1949). In *Shultz* the court also stated "the appellate court will consider only the evidence most favorable to the respondent, and will eliminate from consideration all evidence contrary thereto or in conflict therewith". *Id.*

The trial court specifically found that Miller's testimony was not credible. (RP 1388; CP 29, 30-FF LIX). Jayson Brudvik read the newspaper article and discussed the situation with Miller. (RP 714-15,

721). Miller testified that he contacted law enforcement and specifically asked if there had been any meth manufacturing on the Property to which he was told no. (RP 1166). Detective Ullmann does not recall speaking to Miller, but recalled being told by Charmaine Fritz that she had been informed of the meth lab by her property management company. (RP 608). Detective Ullman further testified that he wouldn't tell someone that meth had not been found on the Property as Miller suggests he was told. (RP 625). Sergeant Kevin Tate also testified that he is not aware of any situation where someone calling and inquiring about a documented meth lab would not be told of it. (RP 680). Charmaine Fritz made multiple attempts to contact law enforcement to inquire about the arrests. (CP 15, 16-FF XI). She was referred around until she was put in contact with the Narcotics Task Force. (RP 1109). Although Miller testified that he contacted law enforcement and was specifically told that no meth manufacturing was found on the Property, (RP 773, 775, 785-87; 790-91; 1165-66), his testimony was disbelieved by the trial court. Considering all of the other contacts Miller had with people who had actual knowledge, the trial court determined that Miller also knew that meth manufacturing had occurred on the Property. (RP 1388).

Windermere presents a lengthy discussion of real estate agency law in Washington. However, their position can only be maintained absent

actual knowledge of the meth manufacturing that took place on the Property. If the trial court's finding that Miller had actual knowledge is sustained, then, necessarily, all of Windermere's arguments must fail. Even Miller acknowledges, as did the experts called by Windermere and the Bloors, that meth manufacturing is a material fact, and failure to disclose that fact would be a breach of an agent's duties. (RP 390-391, 758, 1208, 1251).

1. Miller failed to disclose:

Miller knew, and had a duty to disclose, that meth manufacturing had occurred on the Property. Windermere's argument regarding the statutory duties of Real Estate Agents is inapposite. Windermere apparently concedes that if Miller had actual knowledge of the meth manufacturing then he had a duty to disclose that information to the Bloors. (Appellant's Brief at 25).

Since it is undisputed that Miller did not disclose the history of meth manufacturing on the Property to the Bloors (CP 19-FF XXVI), the only question is whether Miller had actual knowledge. The trial court found that he did, and that finding was supported by substantial evidence

2. Miller had actual knowledge of inaccuracies made by the Fritzes in the disclosure statement given to the Bloors:

Miller had actual knowledge that the Fritzes answered no to the question on the Seller's Disclosure Statement whether illegal drugs had been manufactured on the Property. (RP 766). Windermere agrees that although the disclosures on the Form 17 are those of the seller only, a real estate agent must disclose any inaccuracy contained in a disclosure statement if they have actual knowledge of the inaccuracy. (Appellant Brief at 27-28). Miller had actual knowledge (RP 1388) of the false statement by the Fritzes and had the duty to disclose his knowledge to the Bloors.

3. Miller negligently misrepresented the condition of the Property:

Miller's failure to disclose to the Bloors that there had been a meth lab on the Property was, at least, a negligent misrepresentation. Windermere agrees that the standard governing such disclosures is codified in RCW 18.86 *et seq* (Appellant's Brief at 29-32).

Hoffman v. Connall, 108 Wn.2d 69, 736 P.2d 242 (1987), cited by Windermere, is inapposite. There, the real estate agent took the word of the seller as to the location of the property line, which turned out to be inaccurate. *Id* at 70-72. The Supreme Court in *Hoffman* held that absent a

broker willfully or negligently conveying false information, a broker cannot he held liable for conveying a seller's misrepresentation to the buyer. *Id* at 77.

Here, the trial court found that Miller had actual knowledge of drug manufacturing on the Property, and that the Fritzes had answered that question on the Form 17 falsely. Miller did not innocently pass on information provided by the Fritzes. He aided in their concealment of a very material fact.

The case of *Svendson v. Stock*, 143 Wn.2d 546, 23 P.3d 455 (2001) was referred to by the trial court, and is persuasive and analogous. In *Svendson* an agent had independent knowledge of a flooding problem on an uphill property. *Id* at 550-52. When the agent became involved in the sale of the downhill property, she advised the seller to not disclose the fact as it had been corrected. *Id* at 550-51. The property sold and subsequently flooded. *Id* at 551. In the lawsuit that followed, the jury found the agent liable for fraudulent concealment notwithstanding the statutory language purportedly insulating brokers from any liability relating to the completion of a seller's disclosure form. *Id* at 552. The Supreme Court held that because the broker had independent knowledge of the misrepresented fact, the duty to disclose that fact was separate from the completion of the

seller's disclosure form, and therefore, the broker had a duty to disclose. *Id* at 557-58.

Here, Miller had independent knowledge of the meth manufacturing that occurred on the Property[1] and had an affirmative duty to disclose that fact to the Bloors. Methamphetamine contamination is dangerous to the health and safety of persons who are exposed to it. RCW 64.44.005 (EX. 3). When Miller noticed the Fritzes answered that the Property had never been used as an illegal drug manufacturing site on their disclosure statement, (RP 765-766). and then went over the disclosure statement with the Bloors and made no mention of the fact that methamphetamine manufacturing had occurred on the Property (CP 19-FF XXVI), he concealed a material fact which he was duty bound to disclose. RCW 18.86.

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[1] Miller's business partner read the newspaper with the article that identified the property, tenants and the meth lab. (RP 714-15). Another colleague of Millers advised him that there had been police activity at the property. (RP 1163). Robert Fritz spoke with Jayson Brudvik about the situation (RP 1086) and advised his wife Charmaine (RP 1108), who advised Detective Ullmann that her property management company had told her that there had been a meth lab found on the Property, (RP 608) and Detective Ullmann confirmed this. (RP 608). Judy Conner advised Charmaine Fritz that implements of a meth lab had been found on the Property. (CP 16-FF XIII). The Fritzes and Brudvik and Miller discussed how to proceed with evicting the tenants directly after the arrests. (RP 1164). Miller contacted law enforcement and specifically asked if any meth manufacturing had occurred at the property. (RP 773, 775, 785-87, 790-91, 1165-66). The detectives would not have told Miller that there was no meth manufacturing when a lab had been processed. (RP 608, 625, 680). Miller's testimony to the contrary was found to be not credible by the trial court. (RP 1388). Proof of Miller's independent knowledge established his duty to disclose the meth manufacturing to the Bloors as it was a material fact under RCW 18.86.

The real estate experts called by both parties testified that there was no duty to independently investigate the police activity on the Property. (RP 400, 1243, 1244). However, even Miller's expert testified that if an agent knows of a newspaper article that identifies the Property and states that evidence of a small meth lab was discovered on the Property that knowledge would constitute actual knowledge and require disclosure. (RP 1257).

C. The trial court did not rule that the manufacture of marijuana was a material fact or that it was the basis of a statutory violation.

Contrary to the argument of Windermere, the trial court did not rule that manufacture of Marijuana on the Property was a material fact, that disclosure of the actual knowledge of a marijuana grow operation was required under RCW 18.86, or that the failure to disclose the marijuana grow operation was the basis for the finding of negligent misrepresentation. The Conclusions of Law state that meth manufacturing is illegal drug manufacturing and was a material fact that was required to be disclosed by Miller. (CP 39-CL 6). The court then concluded that Miller had actual knowledge of the prior drug manufacturing and was required to disclose that fact as it was material. (CP 39-CL 8). Next the court concluded that the failure to disclose this fact was a negligent misrepresentation. (CP 40-CL 13). After the above conclusions, the court

concluded that the production of marijuana is also illegal drug manufacturing. (CP 40-41-CL 14).

Growing marijuana is illegal drug manufacturing.[2] An extended discussion took place regarding the definition of marijuana and whether growing marijuana is considered manufacturing. (RP 1040-1046). However, the court did not conclude that marijuana manufacturing was a material fact, that the fact was required to be disclosed, or that the failure to disclose that fact was a negligent misrepresentation. (RP 1389). This is evident from Judge Hunt's statements in his oral ruling at the end of closing arguments. After finding that the testimony by the defendants that they did not have actual knowledge of the meth manufacturing on the Property was not credible, and the failure of the defendants to disclose that was the basis for finding liability, Judge Hunt stated: "That resolution does away with the issue that we debated at some length about whether marijuana constitutes illegal drug manufacture". (RP 1389).

The balance of Windermere's arguments as to whether manufacturing of marijuana is a material fact under RCW 18.86 are superfluous and have no bearing on the central issue and findings, which are that methamphetamine had been manufactured on the Property, Miller

[2] RCW 69.50.204(c)(14) defines marijuana as a Schedule I narcotic. RCW 69.50.101(d) defines a Schedule I narcotic as a controlled substance and RCW 69.50.101(p) defines manufacturing as the propogation of a controlled substance. RCW 69.50.401(1) makes it a crime to manufacture a controlled substance.

and the Fritzes had actual knowledge that it had been, they were required by law to disclose this fact to the prospective purchasers, including the Bloors, and they failed to disclose the fact to prospective purchasers, including the Bloors.

D. Substantial evidence supports the conclusion that Windermere's failure to disclose a material fact was a violation of the Washington Consumer Protection Act.

Unfair or deceptive acts or practices in the conduct of any trade or business are unlawful. RCW 19.86.020 (the "CPA"). **Five elements** must be shown to establish a claim under the CPA. 1) An unfair or deceptive act or practice; 2) occurring in trade or business; 3) impact to the public interest; 4) injury to the claiming person or property; and 5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

The **first element** is established if the conduct, act or practice has the capacity to deceive. *Id.* at 785. In this case, the willful concealment of a material fact not only had the capacity to deceive, it actually did deceive the Bloors. They did not detect the contamination of the Property until weeks after the purchase. (RP 825, 831-32, 842).

Windermere cites a number of cases attempting to support the position that the public impact element has not been satisfied. They fail, however, to cite or attempt to distinguish the case the trial court relied

upon, *Svendson v. Stock, supra,* a case with very similar facts. The agent there had knowledge of a history flooding of the property from a source that was not obvious, yet failed to disclose the history or potential source of flooding. *Svendson,* 143 Wn.2d at 550-52, 23 P.3d 455. The court in *Svendson* held that an independent cause of action under the CPA was preserved when the knowledge that formed the basis of the concealment was obtained independently from the seller's disclosure form. *Id* at 556-557.

As stated in *Svendson,* when, as here, a broker or agent has knowledge of a material defect in property, and that knowledge was obtained independently of the seller disclosure form, and the broker or agent fails to disclose that fact to the purchaser, that failure constitutes a violation of the CPA. *Id* at 558. In *Svendson,* the defect was similar in that the residence showed no obvious effects from the defect. It only showed up when a flood occurred. Here, the contamination is only detectable when someone becomes ill or tests are conducted to determine the presence of toxins.

It is significant that Windermere did not cite as error Conclusion of Law No. 17, which states:

> The Failure of Miller and LC Realty, Inc. to disclose to the Bloors, the other prospective purchaser of the Property, and the public the known fact that illegal drug manufacturing

> had occurred at the Property was a deceptive practice in violation of the Consumer Protection Act.

Windermere's reliance on *Sing v. John L. Scott*, 134 Wn.2d 24, 948 P.2d 816 (1997) is misplaced. Though the statement of the law is correct, later cases have found unfair and deceptive practices in the context of a real estate agent's failure to disclose a material defect.

The court in *Svendson* provides guidance on this issue:

> ...cases that predated the seller disclosure statute have uniformly held that an agent or broker violates the CPA when they knowingly fail to disclose a known material defect in the sale of real property.

143 Wn.2d at 558, 23 P.3d 455.

By Windermere's logic, the real estate agent in *Svendson* could not have violated the CPA as that was also a real estate transaction, that incident was also a single and isolated transaction, and did not affect anyone other than the parties. The argument has no merit. The fact that Miller concealed from the Bloors that implements of a meth lab had been confiscated from the Property is sufficient to satisfy this element, but that wasn't the only fact proven.

Significantly, there was another offer on the property in addition to the offer made by the Bloors. (CP 17-FF XXVII). The other potential purchasers were given the same seller's disclosure statement. (RP 1198-99). Miller did not disclose to the other prospective purchasers the

existence of illegal drug manufacturing on the Property. (RP 1198-99). The actions of Miller in concealing the illegal drug manufacturing from not only the Bloors, but also the other potential purchasers, not only had the potential for repetition, *it was repeated.* The parties also had unequal bargaining positions as Miller held information that the Bloors should have received. The Bloors were thus at a disadvantage and could not make a fully informed decision.

The **second element** is satisfied when the conduct, act or practice occurs in a trade or business. *Hangman Ridge*, 105 Wn.2d at 785, 719 P.2d 531. A real estate agent and agency both are in a trade or business and provide services to the public for compensation, clearly falling within the definition.

The **third element** requires a showing of impact on the public interest. This can be shown by either a statutory violation that constitutes a per se violation of the CPA or by establishing any number of relevant but not dispositive factors. *Hangman Ridge*, 105 Wn.2d at 789-91, 719 P.2d 531. Those factors as stated by the *Hangman* court are:

> Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many

consumers affected or likely to be affected by it? *Id* at 790.

In situations such as this, the public interest element can be met when the alleged acts were committed in the course of defendant's business, the defendant advertised to the general public, the defendant actively solicited the particular plaintiff that might indicate solicitation of others, and the parties occupied unequal bargaining positions. *Id.* at 790-91.

The court in *Svendson* found this element satisfied where the conduct occurred in the course of business and where the property at issue was advertised to the public through listing it in the multiple listing service. 143 Wn.2d at 559, 23 P.3d 455. The court concluded that under those circumstances, the parties did not occupy equal bargaining positions. *Id.*

Similarly in this case, the unchallenged Findings of Fact establish these same facts. The concealment of the material defect occurred in the course of Miller's business. (CP 17-FF XXII, XXIII) The listing of the Property was advertised to the public through entry of the listing in the multiple listing service. (CP 17-FF XXIII) Under the circumstances, it cannot be said that the parties occupied equal bargaining positions.

As to the **fourth and fifth elements** relative to damages and causation, it is undisputed that the Bloors have been damaged by the acts

complained of, and it is equally clear that the concealment of the material facts and the breach of the statutory duty by Miller was a proximate cause of the damages. Had Miller disclosed the history it is clear that the Bloors would have investigated the condition of the Property prior to completion of the purchase. (RP 825).

IV. ARGUMENT IN RESPONSE TO FRITZ BRIEF

The economic loss rule was never raised or argued to the trial court, and the trial court had discretion to fashion a reasonable remedy for the Bloors given the equitable relief requested and the evidence presented.

A. The Economic Loss Rule was not raised at the trial court level and should not now be considered.

Issues, arguments or questions not raised at the trial court will not be considered on appeal. RAP 2.5. The Fritzes state in their opening brief, at page 15, that *Alejandre v. Bull,* 159 Wn.2d 674, 153 P.3d 864 (2007) reversed "the Court of Appeals decision cited by plaintiffs as authority for the contrary argument to the trial court". Despite this allegation, the Fritzes fail to make any citation to the record showing that they presented any argument to the court on the economic loss rule or that the Court of Appeals decision in *Alejandre v. Bull,* 123 Wn.App 611, 98 P.3d 844 (2004) was cited or relied upon by the Bloors to support any opposition to

the application of the economic loss rule. The Fritzes assertion to the contrary misrepresents the record.

The case of *Alejandre v. Bull,* 123 Wn.App 611, 98 P.3d 844 (2004) was cited once in Plaintiffs' trial memorandum as authority for the premise that when there is an affirmative duty to disclose a material fact, proof of non-disclosure of that fact will support a claim of fraudulent concealment and misrepresentation. (CP 1963). The case was again referred to during the course of trial in a memorandum of points and authorities (CP 1781). and in oral argument opposing the Fritzes motion to dismiss the breach of contract claim. (RP 1150). In both of these instances the citation to the case was for the premise that common law causes of action could be maintained for a failure to disclose information on a Seller's Disclosure Statement. (RP 1149, 1150; CP 1781).

Contrary to the Fritz's contention, the 'precise issue' (economic loss rule) was **never** raised at trial of this matter. The Bloors **never** argued that *Alejandre* stood for the proposition that the economic loss rule did not prohibit recovery under a theory of negligent misrepresentation, and the Fritzes **never** argued that the economic loss rule applied in this case.

The only mention of the economic loss rule was made by the Bloors in their memorandum in opposition to the Fritzes motion to dismiss. At page 4 of Plaintiffs' memorandum, a footnote indicated that

the Supreme Court had heard oral argument and that a decision was expected, but Plaintiffs did not believe it would affect the outcome as *Alejandre* had been cited only as support for recognition of a common law cause of action arising out of the Seller's Disclosure Form, and the decision was expected to address the applicability of the economic loss rule. (CP 1781-82).

Despite reciting these facts in the memorandum and advising again during trial that a decision after oral argument to the Supreme Court was expected, the Fritz's never once alleged, argued, briefed or even mentioned the economic loss rule as a basis for their defense. Since this argument and theory was never raised at the trial court, the court of appeals should decline to consider it now. RAP 2.5. The application of the economic loss rule for the first time on appeal is improper as it does not raise any important constitutional questions. *See Kirkman,* 159 Wn.2d at 926, 155 P.3d 125.

Further, the Fritzes cannot claim that the *Alejandre* decision had not been issued and therefore there existed no authority on the matter. Numerous cases over the past several years have addressed application of the economic loss rule, including the decision of the Court of Appeals in *Alejandre v. Bull,* 123 Wn.App 611, 98 P.3d 844 (2004). Had the Fritzes raised the issue at the trial court, the trial court could have made an

informed decision based on the briefing of the parties. Instead, the Fritzes argued that rescission and damages are inconsistent remedies, *arguments which they have not argued in their appeal brief and should be deemed abandoned.*

B. The Economic Loss Rule does not apply to preclude non-economic damages.

Should this court choose to consider the Fritz arguments, the judgment should still be affirmed as the court awarded damages for damage to property, damage to credit, and emotional distress, in addition to "economic losses."

The Fritzes cite *Alejandre,* 159 Wn.2d 674, 153 P.3d 864 as the most recent statement on the issue and state that no further authority is necessary. (Fritz Brief at 15-16). The *Alejandre* case is clearly distinguishable. In *Alejandre*, Ms. Bull, the seller, stated on the seller disclosure form that there were no defects in the septic system because she thought the problems with it had been repaired. *Id* at 678-79. The purchasers experienced problems with the septic system, ultimately paid to connect to the city sewer system, and then sued their seller, Ms. Bull, for $30,000.00 in damages to compensate them for the cost to hook up the new system. *Id* at 680-81.

The Supreme Court reversed the Court of Appeals and affirmed the

trial court's dismissal of the claim based on the application of the economic loss rule. *Id* at 677. The court in *Alejandre* stated that the purpose behind the economic loss rule "is to bar recovery for alleged breach of tort duties where a contractual relationship exists *and* the losses are economic losses". *Alejandre,* 159 Wn.2d at 683, 153 P.3d 864. (emphasis added). This is stated in the conjunctive requiring both to be present in order for the economic loss rule to apply. The court also said:

> The key inquiry is the nature of the loss and the manner in which it occurs, i.e., are the losses economic losses, with economic losses **distinguished from personal injury or injury to other property**. If the claimed loss is an economic loss, and no exception applies to the economic loss rule, then the parties will be limited to contractual remedies. *Id at* 684. (emphasis added).

The Bloor's losses included damage to their personal property and loss of use of that property, lost income, emotional distress damages, damage to credit, and contract losses for which the court ordered rescission and restitution.[3] These non-contract losses are not barred by the economic loss rule.[4] Because these damages are distinguishable from economic losses, recovery is not barred by the economic loss rule. The

[3] Although the trial court ordered rescission, the Fritzes failed to pay off the underlying mortgage debt and allowed the Bloor's interest to be foreclosed by their lender, and purchased the property at the foreclosure sale, making rescission impossible as the Bloors no longer have any interest in the property to convey in return for repayment of the purchase price. The Fritzes also paid off a second lien mortgage holder at a compromised amount.

[4] The Bloors were awarded $35,000 in emotional distress damages, $10,000 for damage to credit, $30,000 for loss of personal property, $9,000 for loss of use of the property, and $7,500 for loss of work income.

Alejandre court discussed this very point and stated:

> ...economic losses are generally distinguished from physical harm or property damage to property other than the defective product or property. The distinction is drawn based on the nature of the defect and the manner in which damage occurred. *Id* at 685.

Numerous cases in this state have consistently made the same distinction. [5]

The court in *Griffith v. Centex Real Estate Corp.*, 93 Wn.App. 202, 969 P.2d 486 (1998), *review denied,* 137 Wn.2d 1034, 980 P.2d 1283 (1999) is particularly instructive and expanded upon this distinction stating:

> defects in materials evidenced by deterioration are characterized as economic losses, for which claims sounding in tort are barred; defects causing physical injury or harm to other objects are not characterized as economic losses, and actions for such damage are not barred by the rule. *Id* at 213.

C. The record supports a finding that the Fritzes committed fraudulent concealment.

[W]hile the general rule is that parties may not raise a new issue for the first time in a petition for review, '[a] party may present a ground

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[5] See *Alejandre v. Bull*, 159 Wn.2d at 683-84, 153 P.3d 864. *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 420-22, 745 P.2d 1284 (1987); *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 526, 799 P.2d 250 (1990); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 350-51, 831 P.2d 724 (1992); *Berschauer/Phillips Construction Co. v. Seattle School Dist. No.1*, 124 Wn.2d 816, 825-26, 881 P.2d 986 (1994); *Staton Hills Winery Co. v. Collons*, 96 Wn.App. 590, 595-96, 980 P.2d 784 (1999); *Carlson v. Sharp*, 99 Wn.App. 324, 328-29, 994 P.2d 851 (1999); *Griffith v. Centex Real Estate Corp.*, 93 Wn.App. 202, 211-13, 969 P.2d 486 (1998).

for affirming a trial court decision that was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.'" *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003) *amended on denial of reconsideration, quoting RAP 2.5(a),* (internal citations omitted).

RAP 2.5(a) does not prevent the appellate court from considering an issue if the record shows that the issue was advanced to the trial court and the trial court was aware of and had the opportunity to consider the issue. *Washburn,* 120 Wn.2d at 291, 840 P.2d 860. A correct judgment will not be reversed when it can be sustained on any theory, even though different from the one relied upon by the finder of fact. *Piper v. Dept. of Labor and Industries,* 120 Wn.App 886, 890, 86 P.3d 1231 (2004); *Whidbey Environmental Action Network v. Island County,* 122 Wn.App 156, 93 P.3d 885 (2004).

Generally, an appellate court may affirm a trial court on any theory supported by the pleadings and the record even if the trial court did not consider that theory. Nevertheless, a correct judgment will not be reversed when it can be sustained on any theory, even though different from the one relied upon by the finder of fact. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027,(1989) *cert. denied*, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989).

If the Court decides that the economic loss rule bars recovery of damages by the Bloors, the Court should consider whether the actions of the Fritzes amounted to fraudulent concealment and affirm on that basis. Since the Fritzes failed to raise the economic loss rule argument, Judge Hunt determined that he did not need to reach the issue of fraudulent concealment. Judge Hunt, in announcing his oral decision, did not find fraudulent concealment specifically leaving it aside "because I think we get to the same place." (RP 1388). In fact, Judge Hunt stated that he would hear argument on that precise issue if anyone thought he was wrong about that application. There was no response. (RP 1388). Judge Hunt again mentioned this in the presentation of the findings and conclusions when he stated "I didn't reach fraud because I got to negligent representation and that was as far as I felt I needed to go." (RP 1504).

Ignoring for the moment the failure of the Fritzes to raise the economic loss rule, this court can affirm the trial court by finding that the Fritzes committed fraudulent concealment based on the undisputed findings of fact, which are now verities on appeal. The undisputed findings of fact and the record provide ample basis to affirm the award of damages caused by the Fritzes fraudulent concealment.

A vendor under a contract to sell real property has a duty to disclose to a purchaser material defects in the property, and a failure to do

so constitutes fraudulent concealment. *Atherton,* 115 Wn.2d at 524, 799 P.2d 250, *citing Obde v. Shleymeyer*, 56 Wn.2d 449, 452, 353 P.2d 672 (1960). Fraudulent concealment is established when:

> ...there is a concealed defect in the premises of the residential dwelling, the builder-vendor has knowledge of the defect, the defect is dangerous to the property, health or life of the purchaser, and the defect is unknown to the purchaser and a careful, reasonable inspection on the part of the purchaser would not disclose the defect. (Id).

Additionally, the defect must "'substantially affect [ ] adversely the value of the property or operate to materially impair or defeat the purpose of the transaction.'" *Atherton,* 115 Wn.2d at 524, 799 P.2d 250, *quoting Mitchell v. Straith,* 40 Wn.App. 405, 411, 698 P.2d 609 (1985). As shown below, all five elements have been established and the defect both adversely affected the Property's value and defeated the purpose of the transaction.

1. <u>Concealed defect in premises of residential dwelling</u>:

Evidence that a meth lab was confiscated on the Property. (CP 14, 15, 20-FF V, VIII, XXX). The Property contained levels of meth contamination above the thresholds allowed in the State of Washington and was contaminated. (CP 21, 22, 23, 24, 27-FF XXXIV, XXXVI, XLI, LII). The Property is a residential dwelling. (CP 13-FF I, II).

2. Vendor has knowledge of defect:

The Fritzes knew of the prior meth manufacturing activity. (CP 16, 17, 23, 24-FF XIII, XIV, XV, XIX, XLI). The prior evidence of meth manufacturing at the Property was concealed by the Fritzes. (CP 19, 20-FF XXV, XXVII).

3. Defect is dangerous to property/health or life of purchaser:

The contamination of the residence made it unsafe to live in and unfit for occupancy; and occupancy of such buildings is dangerous to the health and safety of the occupants. (CP 21, 22, 27-FF XXXIV, XXXVI, LII).

4. Defect was unknown to purchaser:

When the Bloors purchased the Property, they did not know of the contamination of the Property or the prior illegal drug manufacturing that had occurred on the Property. (CP 19, 20-FF XXVII, XXIX, XXX;RP 825, 831, 832, 842).

5. Careful and reasonable inspection by the purchaser would not reveal the defect:

The Bloors had no knowledge of the existence of the meth lab on the Property. (RP 842, 843). Once they discovered that a meth lab was confiscated from the Property, they began to research and confirm what they had learned. (RP 843-45). No amount of inspection, aside from a

decontamination contractor physically sampling and testing the house would have revealed the defect. (RP 98-99, 101-102, 452). Meth labs have no specific smell. (RP 629). Lance Miller testified that inspections would not have revealed the meth contamination (RP 1212), and that none of the inspections performed by the Bloors would have revealed the presence of meth contamination. (RP 1212). A careful and reasonable inspection by the Bloors would not have revealed the existence of the meth contamination.

6. Defect substantially affects adversely the value of property or operates to materially impair or defeat the purpose of the transaction:

The meth contamination created a situation where the Property was unusable, and in fact the owners were prohibited from using the Property or removing any personal property from the residence or garage. (CP 21, 22, 28-FF XXXIV, XXXVI, LVI). The purpose of the underlying transaction was to purchase a residence. That purpose was materially defeated when the residence was posted as unfit for human habitation.

Every element to support a finding of fraudulent concealment is established by the unchallenged findings of fact and the record. The trial court judgment can and should be sustained on this alternative theory if it is determined that *Alejandre v. Bull,* 159 Wn.2d 674153 P.3d 864, applies and requires reversal of the finding of negligent misrepresentation.

D. The remedy of rescission was not an abuse of discretion.

A trial court's authority to fashion equitable remedies is reviewed for an abuse of discretion. *Sac Downtown Ltd. Partnerships v. Kahn*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). Courts of equity are vested with broad discretion in devising equitable remedies to fit the particular facts, circumstances, and equities of a case, and the exercise of that discretion is afforded great weight by the appellate court. *Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986). Rescission of a contract is a remedy that puts the parties in the position they would have been in had the contract not been entered into. *Vacova Co. v. Farrell*, 62 Wn.App 386, 404, 814 P.2d 255 (1991). Generally, rescission of a contract requires mutual consent to rescind. *Woodruff v. McCellan*, 95 Wn.2d 394, 397, 622 P.2d 1268 (1980). However, fraud or even a material misrepresentation innocently made can be the basis for rescission. *Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 390, 858 P.2d 245 (1993). In such circumstances the contract is voidable by the party to whom the misrepresentation was made. *Id.*

Regardless of whether there was a complete failure of consideration, rescission was appropriate and within the trial court's discretion. The Fritzes stated to the trial court that they actually preferred and requested rescission instead of damages, yet they now argue that it

was improper for the trial court to order rescission. (RP 1462). The Fritzes should not be heard to challenge a remedy they themselves requested[6].

Common law rescission is a broad remedy designed to put the parties in as close a position as possible to pre-contract positions. *Hornback v. Wentworth,* 132 Wn.App 504, 513, 132 P.3d 778 (2006), *cert. granted*, 158 Wn.2d 1025, 152 P.3d 347 (2007). The case of *Capital Sav. & Loan Ass'n v. Convey,* 175 Wn. 224, 27 P.2d 136 (1933)[7] cited by the Fritzes, is easily distinguished.

First, in *Capital,* there was no finding of fraud or misrepresentation, as there was here.

Second, the Fritzes misstate the holding in *Capital.* In *Capital* the claim was that the failure of a floor in a cold storage plant building justified rescission, which the trial court granted. *Id* at 226. The Supreme Court reversed based on its finding that the cost of restoration of the floor represented only 4% of the purchase price, which would not justify rescission. *Id* at 228-29. Instead, the court allowed damages of $1,500 to the buyer. *Id* at 230. The issue was whether the amount of damage to the building was sufficient to support rescission based on failure of

[6] Although rescission was ordered, rather than pay the mortgage lender, the Fritzes allowed the property to be foreclosed, and purchased the property at non-judicial foreclosure sale for less than the complete payoff, resulting in additional damage to the Bloors credit history.

[7] The Fritzes improperly cited this as 175 Wn.2d 224, rather than 175 Wn. 224.

consideration. *Id* at 227-28. The Supreme Court found that since the floor could be easily repaired at a relatively nominal price rescission wasn't justified. *Id* at 228-230. This argument was not made by the Fritzes to the trial court, and even if it had been, the fact that the property was uninhabitable when sold, would have justified rescission anyway.

Finally, the Fritzes make several incorrect statements about the costs involved. Even if the relative cost to cure formula was appropriate in this case, the Fritzes completely ignore the substantial restoration costs that will be required to make the Property even legally habitable (CP 1877), not to mention the cost to clean the personal property, or the value of the personal property that could not be cleaned without destruction. (CP 25, 26-FF XLVI, XLVII).

E. The award of damages for wage loss and damage to credit were supported by substantial evidence.

The Fritzes challenge the award of damages for loss of income opportunity and damage to credit.[8] This argument is surprising since none of the defendants objected to the amount of damages the Bloors requested for the loss of income suffered. In their closing arguments the defendant each conceded that the amount of $7,500.00 was appropriate. (RP 1338, 1357, 1372, 1384). Nonetheless, the record is substantial on the loss of

[8] At page 20 of the Fritzes brief they argue that these damages are not recoverable as a matter of law, but they fail to make any argument as to the proper measure of damages or cite any authority supporting this contention.

income suffered by the Bloors. Ed Bloor testified that he earned $65,000.00 in the year prior to moving into the Property. (RP 493). He earned $51,255 in 2001 and $41,892 in 2002. (EX 76). There was no evidence introduced to dispute that amount. Ed Bloor continued to average $2,500.00 per month in income after he relocated to Spokane and that amount is undisputed. (CP 24-FFXLIV). Ed Bloor lost at least three months of income. (RP 224-26).

Also, the Fritzes fail to recognize or acknowledge the testimony of the economist called by the Bloors, Dr. Robert Moss, regarding the losses the Bloors suffered. Dr. Moss testified that the average unemployment period in the state of Washington is 3 months. (RP 225). The minimum number of months that Mr. Bloor was displaced from employment due to the fact that he was forced to vacate his home, lost the use of his tools, and relocate, was a minimum of three months. (RP 224-225). The economic term used for this displacement is involuntary frictional unemployment. (RP 224).

There was no contradictory evidence presented or offered by any defendant. Despite the Fritz's futile attempts to demonize the Bloors, the facts recited are irrelevant to the analysis. The uncontroverted evidence, and the unchallenged finding of fact, shows that Ed Bloor earned at least $2,500 per month in the three years prior to the dislocation (RP 493; EX

76), that his average monthly wage was $2,500.00 after the dislocation. (CP 24- FF XLIV), and that he lost a minimum of three months of employment. (RP 224-225).

Similarly, no contradicting evidence or opinion was presented to rebut the expert opinions of Dr. Moss with respect to the damage to credit suffered by the Bloors. The testimony established the credit scores for both Ed and Eva at the time of the purchase of the home from the Fritzes in July of 2004, and also just prior to trial in the Summer of 2006. (RP 239). The expert testimony of Dr. Moss provided the only evidence regarding the effect lower credit scores have on a person's ability to borrow and how lower credit scores translate to increased borrowing costs. (RP 232-36). The evidence supporting Dr. Moss's opinions is uncontested and his opinions were not challenged. Substantial evidence is the amount 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). The evidence supporting the award and the amounts awarded is substantial.

F. Despite the order of rescission, the award of damages was appropriate and within the trial court's discretion.

Rescission is an equitable remedy that requires the court to fashion equitable relief. *Hornback*, 132 Wn.App at 513, 132 P.3d 778.[9] The Fritzes misstate the context in which the rescission remedy was granted. The Fritzes, not the Bloors, advised that they would be unable to complete a rescission remedy and that fact was communicated to the court. (RP 1399-1400, 1404-05, 1468-1470). The problems with the rescission remedy were described as being a potentially hollow remedy. (RP 1516). The parties were instructed to come back to court with proposed findings removing rescission and including a damages calculation. (RP 1443-44). Windermere and Cowlitz County raised concerns about participating in an award of damages instead of a rescission. (RP 1405-1410). At the next hearing the Fritzes advised that they were now prepared to proceed with rescission and did not want the court to calculate a damages remedy. (RP 1462). The Fritzes actually asked for the rescission remedy to be put back in place. (RP 1462). At the final hearing on the Findings of Fact, the Bloors expressed concern that the Fritzes would simply not pay off the underlying debt and that is why the Clerk's office was named to serve as

[9] As stated in footnote 1 above, the issue of the propriety of the rescission remedy may be moot as the Fritzes failed and refused to pay off the underlying encumbrance and allowed the Bloor's interest in the property to be sold to them at a trustee's sale. An issue is moot if it is purely academic. *State v. Turner,* 98 Wn.2d 731,733, 658 P.2d 658 (1983) *quoting Grays Harbor Paper Co. v. Grays Harbor County,* 74 Wn.2d 70, 73, 442 P.2d 967 (1968). At issue now may be whether the Fritzes purchase of the property at the trustee's sale frustrated the rescission ordered by the court and entitles the Bloors to other relief, such as for the further damage to their credit that has been suffered due to the foreclosure.

escrow of the funds the Fritzes were ordered to pay to complete the rescission. (RP 1517-18).[10]

The Fritzes completely ignore the fact that they were paid $149,000 by the Bloors when they sold the property to them, and that the Bloors became indebted to their lender for the funds they paid to the Fritzes. Rescission does contemplate restoring the parties to their pre-contract positions. *Hornback,* 132 Wn.App at 513, 132 P.3d 778. Had the Fritzes not concealed the history of meth manufacturing at the Property, the Bloors would now have all of their personal property, would have a credit rating sufficient to purchase a home, would not have suffered the terrible emotional distress they have endured, and would not have been foreclosed upon. The trial court intended that the Bloors receive this relief. It carefully and reasonably fashioned an equitable remedy based on the unusual facts and circumstances.

The Fritzes claim that prejudgment interest is inappropriate is equally shallow. After the Bloors paid the purchase price, the Fritzes made use of the money paid to them; and the Bloors received a property that could not be occupied. The principle that interest is allowable in circumstances such as these has been the law in this state for nearly one

[10] As it turns out the Bloors fears were valid. The rescission remedy did turn out to be hollow because the Fritzes did not pay off the underlying encumbrance to prevent the foreclosure. This failure further damaged the Bloors credit, and caused their second position lender to accept a discounted pay off by the Fritzes.

hundred years. In the case of *Gray v. Reeves*, 69 Wn. 374, 379, (1912), the court held:

> The allowance of interest like the recovery itself, depends upon the equities of the case. If the character of the property be such that its use or occupation is of value while in the vendee's possession, interest will not ordinarily be allowed upon rescission, but where the recovery is allowed upon *the ground of fraud or deceit, and the property sold is of no value to the vendee, if the consideration be money, interest will be allowed almost as a matter of course. Where money is wrongfully obtained, it is proper to allow interest as a measure of damages*. (emphasis added).

The court concluded that the sellers and the agents misrepresented the condition of the Property, thereby committing, at the very least, negligent misrepresentation, if not fraud. (CP 39-CL 7, 8). The Property was of no use as it was posted as unfit, (EX. 3) the consideration was money, (CP 19, 20-FF XXVII) and that money was wrongfully obtained as a misrepresentation made by the Fritzes induced the Bloors to borrow the money and make the payment. The amount was certain and the award of pre-judgment interest was proper. The Fritzes didn't claim a set off for the rental value of the property. An award of prejudgment interest is reviewed for an abuse of discretion. *Curtis v. Security Bank*, 69 Wn.App 12, 20, 847 P.2d 507 (1993). Undisputed facts support the award of prejudgment interest.[11]

[11] The fact that the Fritzes purchased the Property at a foreclosure sale conducted months after judgment was entered should have nothing to do with the award of prejudgment

G. Emotional distress damages supported by substantial evidence.

The Fritzes negligent misrepresentation was a proximate cause of the emotional distress the Bloors suffered. (RP 1528). Judge Hunt found negligent misrepresentation rather than fraudulent concealment as he felt it led to the same result. (RP 1388, 1504). The unchallenged findings and the record support the award of damages for emotional distress because the Fritzes conduct amounted to fraudulent concealment. RAP 2.5.

1. Emotional distress damages may be recovered in tort separate from the rescission of the purchase contract:

The fact that the Bloors suffered emotional distress is unchallenged. (CP 26-FF XLIX, L). The case of *Wilkinson v. Smith*, 31 Wn.App 1, 639 P.2d 768 (1982) cited by the Fritzes is distinguishable. In that case the court held that one cannot seek emotional distress damages under the contract and also seek to rescind the contract. *Id* at 13. The Bloors were awarded damages based on tort separate from the rescission of the contract. The Fritzes misrepresentation caused the Bloors to occupy a contaminated home, caused them to be forced from their home without their personal property, caused them to lose the tools needed by Ed Bloor for his business, and caused an economic crisis that resulted in damage to the Bloors' credit ratings. These losses were separate from the contractual

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interest. The purchase by the Fritzes was in derogation of the judgment and provided the Bloors little relief. The foreclosure sale extinguished the debt to the lender, RCW 61.24.100, but added to the damage to the Bloors' credit rating and borrowing abilities.

losses suffered by the Bloors. Judge Hunt was clear in his view of this precise issue.

> I don't agree with you that there is a bar to any kind of damages in this situation because it seems to me ... my recollection is that the cases that you cited were damages that arose directly from the lack of performance of a contract. It was not a real estate contract. My recollection is that the case you cited and here we have damages that are not really contractual damages. They are resulting from a negligent misrepresentation which formed the basis of the contract, but those damages were a direct result of the failure to disclose. I just can't agree that well, rescission and the heck with whatever happened to them; the Fritzes aren't responsible for it. I just – I don't agree with that. ... I think that they are entitled to rescission and then some consequential damages that resulted out of the contamination of the property. (RP 1470-71).

Judge Hunt further expressed his position when he stated:

> I don't see the damages that they are claiming here as being an affirmance of the contract which has now been rescinded, and that is the general proposition that I get from reading the cases that are submitted by both sides here. They are not trying to get the benefit of the contract. They are trying to recover the consequences of the tort of the misrepresentation here. At least that's the way I interpreted it, that's the way I found it, and that's the way it's going to remain. (RP 1527-28).

2. **Emotional distress damages may be recovered under these facts:**

The case cited by Fritz, *Gaglidari v. Denny's Restaurant*, 117 Wn.2d 426, 815 P.2d 1362 (1991) is an employment contract case. *Gagliardi* sued claiming a breach of an employment contract and one of

the issues was whether emotional distress damages may be recovered for breach of an employment contract. *Id* at 431. The facts here are distinguishable. The emotional distress damages arose from and were awarded for the tort, not the breach of contract. (RP 1470-71, 1527-28). As Fritz concedes, damages for emotional distress may be recovered when the damages are reasonably foreseeable, or where the conduct or behavior of the defendant constitutes a tort that supports emotional distress damages. (Fritz brief at 31). That reasoning is applicable here.

The Fritzes had actual knowledge that meth manufacturing had occurred at the Property. (CP 16, 17-FF XIII, XIV, XV, XIX). Charmaine Fritz discussed the fact with law enforcement (CP 16-FF XIV), Jayson Brudvik and Lance Miller (RP 1164), and their neighbors the Cyrs (CP 17-FF XIX). They didn't discuss the matter with the Bloors. (CP 20-FF XXVIII). Under these circumstances, it was foreseeable that the misrepresentation by the Fritzes would result severe financial difficulties, loss of personal effects and memorabilia of emotional significance, and disruption in the Bloors lives. The emotional distress suffered by the Bloors was foreseeable, and was proximately caused by the Fritzes misrepresentation. But for the misrepresentation by the Fritzes, the Bloors would have either not purchased or they would have required as a condition of purchase that the Cowlitz County Health Department confirm

that the home was habitable, much as they tried to do after they learned of the history of meth manufacturing at the Property.

H. Expenses are separate from costs.

The purchase and sale agreement provided for the recovery of reasonable attorney fees *and expenses*. (EX. 41). Additionally, the prevailing party in any action on a contract is entitled to their statutory costs. The relevant portion of RCW 4.84.010 reads:

> ...there shall be allowed to the prevailing party upon the judgment certain sums by way of indemnity for the prevailing party's expenses in the action, which allowances are termed costs, including, *in addition to costs otherwise authorized by law,* the following expenses: (emphasis added).

The statutory costs are recoverable whether there exists a contractual arrangement or not. The contract allows for expenses above and beyond those explicitly allowed pursuant to RCW 4.84, as such expenses are "otherwise allowed by law." *Ernst Home Centers, Inc. v. Sato,* 80 Wn.App 473, 490-91, 910 P.2d 486 (1996), addresses this exact issue. In that case a commercial lease agreement provided for the recovery of attorney fees and costs by the prevailing party. *Id.* The trial court awarded expenses of litigation beyond those enumerated in the statute and an appeal followed. The Court of Appeals stated as follows:

> The landlord asserts that the trial court erred in awarding Ernst costs beyond those statutory costs allowed in RCW

> 4.84.010. RCW 4.84.010 provides, in relevant part: The measure and mode of compensation of attorneys and counselors, shall be left to the agreement ··· of the parties, but there shall be allowed to the prevailing party ··· certain sums by way of indemnity for the prevailing party's expenses in the action, which allowances are termed costs, including, *in addition to costs otherwise authorized by law,* the following expenses (Italics added). The right to costs, generally, is statutory. *See Gerken v. Mutual of Enumclaw Ins. Co.,* 74 Wn.App. 220, 231, 872 P.2d 1108, *review denied,* 125 Wn.2d 1005, 886 P.2d 1134 (1994). However, this is true only in the absence of an agreement concerning costs between the parties. *See Washington Asphalt Co. v. Boyd,* 63 Wn.2d 690, 388 P.2d 965 (1964). Thus, where the parties have entered into an agreement regarding costs, the costs are "otherwise authorized by law". RCW 4.84.010. Here, the parties bargained for a provision in the lease stating that the prevailing party to any litigation shall receive all costs associated with the litigation. This proviso would be superfluous if interpreted to mean the equivalent of statutory costs. The trial court did not abuse its discretion. *Id* at 490-91.

The same reasoning applies here. The contract provides for recovery of "attorney fees and *expenses*" to the prevailing party. If that were to mean the equivalent to statutory costs to which the Bloors would be entitled in any event, then the use of the term "expenses" would have no meaning. Contracts are to be interpreted to give the provisions meaning.

The portion of the case of *Paradiso v. Drake*, 135 Wn.App 329, 143 P.3d 859 (2006) as cited by Fritz is unpublished and improperly

cited.[12] The same case was cited for the same premise during post-trial proceedings by the Fritzes (CP 138), and the Fritzes were advised at that time that the case was unpublished and improperly cited (CP 94-95), yet they still attempt to use it as authority for a premise that the case does not contain. The case makes absolutely no mention of expenses versus statutory costs in any section, published or unpublished. The case simply affirms the trial court award of fees and costs and there is absolutely no reference to what was included in costs. The Fritzes statement that "the court implicitly interpreted the word expenses to mean costs that are statutorily authorized" (Fritz Brief at 34) is without basis or merit.

A more blatant misrepresentation, and an apparent indication that the Fritzes did not read the trial court transcripts, or chose to ignore certain portions, is the argument that "Plaintiffs have made no attempt to prorate the portion of the transcripts used at trial". (Fritz Brief at 35). Each line of each deposition transcript was counted and the percentage of the total transcript that was read into the record was calculated. (RP 1506-1507). The court asked if there was any objection to the calculation (Id), which was presented in an affidavit filed with the court and given to the parties. (CP 86). Amazingly, the Fritzes had no objection at that point, yet raise it on appeal.

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[12] *RAP 10.4(h); State v. Fitzpatrick,* 5 Wn.App 661, 491 P.2d 262 (1971), *rev. denied, at 80 Wn.2d 1003 (1972); RCW 2.06.040.*

Finally, the Fritzes failed to challenge the Finding that outlines the factual basis for the court's ruling, therefore it is a verity on appeal. (CP 31-FF LXIII). The award of expenses is separate from statutory costs, and the trial court award of expenses of suit should be sustained.

V. ATTORNEY FEES

In Washington, the preferred method for determining reasonable attorney fees is the lodestar method. *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632, 966 P.2d 305 (1998); *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 124, 786 P.2d 265 (1990). "Under this method, there are two principal steps to computing an award of fees." *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 847, 9 P.3d 948 (2000). "First, a 'lodestar' fee is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit." *Id.* "Second the 'lodestar' is adjusted up or down to reflect factors, such as the contingent nature of success in the lawsuit or the quality of legal representation, which have not already been taken into account in computing the 'lodestar' and which are shown to warrant the adjustment by the party proposing it." *Id.* (citing *Bowers v. Transamerica Title Ins. Co.,* 100 Wn.2d 581, 593-94, 675 P.2d 193 (1983) (quoting *Miles v. Sampson,* 675 F.2d 5, 8 (1st Cir.1982)). An award of attorney fees is discretionary with the trial court and will only be reversed for a manifest abuse of discretion. *Hsu Ying Li v. Tang,* 87 Wn.2d

796, 801, 557 P.2d 342 (1976). The power to award attorney fees is inherent in the court's equitable powers, and the court may set the boundaries of its exercise of that power as it sees fit. *Hsu Ying Li,* 87 Wn.2d at 799, 557 P.2d 342; *Weiss v. Bruno,* 83 Wn.2d 911, 914, 523 P.2d 915 (1974).

A. The Respondents were properly awarded attorney fees by the trial court.

Attorney fees are authorized in this case against the Fritzes pursuant to the terms of the purchase and sale agreement executed between the Bloors and the Fritzes. (EX. 41). The contract provides for recovery of attorney fees and expenses by the prevailing party. (Id). "A prevailing party is generally one who receives judgment in his favor" *Scoccolo Construction Inc., v. City of Renton,* 158 Wn.2d 506, 521, 145 P.3d 371(2006) *citing Schmidt v. Cornerstone Invs., Inc.,* 115 Wn.2d 148, 164, 795 P.2d 1143 (1990). If there is no wholly prevailing party, then he who is substantially prevailing will be entitled to attorney fees. *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). Determining how much relief constitutes substantial depends on the extent of the relief awarded. *Id.*

The Fritz appear to argue that because the Bloors plead different causes of action they should only be entitled to a pro-rata portion of their

attorney fees. Once again, it appears that the Fritzes misrepresent the record. Contrary to the Fritz's argument, the Bloors were the substantially prevailing party after trial. The trial court discounted unproductive and duplicative time. (CP 32,33-FF LXVII, LXIX). Also, contrary to the Fritz's argument, the record shows that the Bloors attorneys did segregate the time they spent litigating against Defendant Cowlitz County to the extent possible. For example, all of the time spent on responding to the Cowlitz County summary judgment motion and responding to its interlocutory appeal was segregated and was not claimed. (CP 33,34-FF LXIX, LXX).

In the Fritz's reference to *Kastanis v. Education Employees Credit Union*, 122 Wn.2d 483, 859 P.2d 26 (1994) they fail to recognize a key portion of the court's holding. In *Kastanis* at page 502 the court cited *Blair v. WSU*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987), and acknowledged that an attorney fee award could include fees earned on both successful and unsuccessful claims where the work was inseparable. Where successful and unsuccessful claims are so related that no reasonable segregation can be made, no segregation of attorney fees is required. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 693, 132 P.3d 115 (2006).

Here the trial court did segregate out 10% of the time expended related to the CPA claim, and found that the balance of attorney fees were

the joint and several responsibility of Fritz and Windermere. (CP 37, 38-FF LXXXIII). Neither party has challenged this finding. The court in the presentation on attorney fees stated:

> The unsuccessful claim against LAM Management, I don't think that can really be segregated too much from what was claimed here. It would be virtually impossible to segregate that out in my view (RP 1440).

The court also discussed and considered the request for fees as a whole and required segregation on fees other than those spent on pursuing the claims against the County. (RP 1437).

The Fritz's misstate the import of the holding in the case of *C-C Bottlers, Ltd. V. JM Leasing, Inc.*, 78 Wn.App 384, 896 P.2d 1309 (1995). The factual posture of that case is completely different from this case. First, that case involved a permissive counterclaim. *Id* at 387. No counter claims or cross claims were brought in this case. Second, the fee provision in *C-C Bottlers* provided for fee recovery to collect on the promissory notes. *Id* at 386. In this case the prevailing party is entitled to the recovery of fees if they institute suit against the other concerning the agreement. (EX. 41).

The more appropriate inquiry is whether the Bloors are the substantially prevailing party. RCW 4.84.330 defines prevailing party as the party in whose favor final judgment is rendered. There can be no

dispute that the Bloors were the substantially prevailing party. The Bloors made claims for negligence against the County, on which they prevailed, but the fees for those claims were segregated as there was no basis for recovery of fees from the County. (CP 1547, 38- FF LXXXIV). Claims were made against Windermere for fraud or in the alternative negligent misrepresentation, breach of statutory duty and violation of the consumer protection act. (CP 1545-46). The Bloors were successful on the alternate theory of negligent misrepresentation (CP 40-CL 13), breach of statutory duty (CP 39-CL 8) and violation of the CPA (CP 41-CL 17). The claims made against the Fritzes were for breach of contract and fraud or in the alternative negligent misrepresentation. (CP 1545-46). The Bloors were successful in achieving a rescission of the contract (CP 43-CL 24) and were also successful in their claim for negligent misrepresentation (CP 39-CL 7). It is unknown what unsuccessful claims should be segregated other than what has already been discussed as impractical above.

B. The Trial Court considered proper factors in applying a 1.2 multiplier to the fee award.

It is undisputed that the hourly rates charged by the Bloor's attorneys were reasonable, (CP 33-FF LXVIII) and that the number of hours reasonably expended on the lawsuit was also reasonable and necessary (CP 38-FF LXXXV). These findings are unchallenged.

Adjustments to fees are considered in two categories: (1) the risk or contingent nature of success; and (2) the quality of the work performed. *Bowers,* 100 Wn.2d at 598, 675 P.2d 193. However, to the extent, if any, that the hourly rate underlying the lodestar fee comprehends an allowance for the risks of contingency or for the quality of work performed, a further adjustment duplicating that allowance should not be made. *Id.* at 599.

The contingent adjustment is designed to compensate an attorney for the possibility that the litigation would be unsuccessful and no fee would be obtained. *Id* at 598-99. That is, "the [contingent] risk factor should apply only where there is no fee agreement that assures the attorney of fees regardless of the outcome of the case." *Id.* at 599. "[T]he appropriate incremental factor should be determined, not by the percentage of contingent fee work performed by the attorney, but by reference to the chances of success in the litigation." *Id.* at 601. "In exercising its discretion, a trial court is entitled to consider the risk borne by the attorney of recovering objectively inadequate compensation, not just the risk of recovering no compensation whatsoever." *Tribble v. Allstate*, 134 Wn. App. 163, 172, 139 P.3d 373, 377 (2006). "The risk factor should be applied only to time expended before recovery is assured." Bowers, 100 Wn.2d at 599, 675 P.2d 193.

The quality of the work supports an adjustment to the lodestar figure "only when the representation is unusually good or bad, taking into account the skill level normally expected of an attorney with the hourly rate used to compute the 'lodestar.'" *Id* at 599 (citing *Copeland v. Marshall,* 641 F.2d 880, 893 (D.C.Cir.1980)). "In exceptional cases, however, the lodestar might be adjusted, either up or down, to reflect the quality of work." *Bowers,* 100 Wn.2d at 599, 675 P.2d 193. In the present case, it is undisputed that the quality of representation on both sides was high. (CP 35-FF LXXV).

Enhancing the lodestar is within the trial court's discretion. *Bowers,* 100 Wn.2d at 598, 675 P.2d 193. Generally, the trial court is required to enter findings of fact and conclusions of law supporting its award of attorney fees and enhancements, because without such, the reviewing court is unable to determine whether the exercise of the trial court's discretion was manifestly unreasonable or based upon untenable grounds. *Brand v. Dep' t of Labor & Indus.,* 139 Wn.2d 659, 674, 989 P.2d 1111 (1999). A trial court's determination as to what constitutes reasonable attorney fees or a justifiable enhancement will not be reversed absent an abuse of discretion. See *Allard v. First Interstate Bank,* 112 Wn.2d 145, 148, 768 P.2d 998, 773 P.2d 420 (1989) (reasonable attorney fees); *Bowers*, 100 Wn.2d at 601, 675 P.2d 193 (enhancement).

The Bloors' attorneys were hired under a contingency fee arrangement. The Bloors' attorneys were not assured recovery of any of the fees they earned. There was a significant risk that the Bloors would not recover any damages at all if the various defenses prosecuted by able counsel were successful, and the burden of proving the actual knowledge of the Fritzes and Miller was not met.. Courts have upheld application of a contingent-risk enhancement under similar circumstances.

In *Fisons*, the trial court applied a 1.5 multiplier to enhance the award of attorneys' fees, which was upheld by the appellate court. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 335-36, 858 P.2d 1054 (1993) (remanded to determine fee reasonableness). The Supreme Court commented:"The trial court found that the likelihood of success was low because Dr. Klicpera's attorneys did not initially have access to what turned out to be the determinative 'smoking gun' documents." *Id.* at 336. The court declined to reverse the trial court in its finding that this was sufficient to justify an enhancement for contingent risk of success. *Id.* Similarly, here, there was significant risk that the denials of the Fritzes and the Windermere agents of knowledge there had been a meth lab on the property would be accepted by the court.

In *Tribble*, the trial court applied a 1.5 multiplier to increase Tribble's award of reasonable attorney's fees for a number of reasons, including the contingency fee arrangement and the risk of no recovery. *Tribble*, 134 Wn. App. at 171-73, 139 P.3d 373. The court disagreed with Allstate's "assertion that there was no possibility that Tribble would not be awarded an amount sufficient to compensate her attorney for all work he reasonably performed." *Id* at 172. The court reasoned that "Allstate contested Tribble's claims and, had the jury agreed with Allstate, the jury could have awarded nothing to Tribble or awarded her an amount that was insufficient to allow her to adequately compensate her attorney after paying other trial expenses and costs incurred." *Id.* Hence, the court concluded "[t]he risk assumed by Tribble and her attorney in pursuing Tribble's claims is a tenable basis for employing an attorney fee multiplier." *Id.* However, the court overturned the attorney fee enhancement and remanded for further inquiry because it could not determine whether the trial court would still find that the work by the plaintiff's lawyer was of exceptional quality when the judgment amount had been reduced on appeal, and upon considering that making the plaintiff whole was not a tenable basis for applying the enhancement. *Id* at 173. The Bloors' claims were contested and there was a chance that there would be no damages awarded, or the award would not be adequate to

sufficiently compensate the Bloors' attorneys for the work performed, after paying other trial expenses and costs incurred.

Mayer v. City of Seattle, 102 Wn. App. 66, 81, 10 P.3d 408 (2000) is also distinguishable. In *Mayer*, the plaintiff sought an enhancement to reasonable attorney fees for his successful Model Toxic Control Act (MTCA) claim. *Id.* However, the court found that "there was no basis to adjust the lodestar figure upward on account of the contingent fee agreement between Mayer and his attorneys." *Id.* "Mayer's attorneys faced little risk in pursuing the MTCA claim [because] MTCA is a strict liability statute." *Id.* One defendant "admitted all but one element of Mayer's claim in its answer and abandoned the last issue before trial." *Id.* Another defendant's "liability as a current owner of the contaminated site was straightforward." *Id.* Thus, "Mayer was essentially assured of a recovery under MTCA." *Id.*

Here, neither the breach of contract, nor the CPA claims are "strict liability" tort actions. Neither the Sellers nor the Agents admitted substantially all of the elements of the Bloors' claims; nor was the liability of either defendant "straightforward." Neither was the claim against Cowlitz County assured[13]. Cowlitz County resisted liability throughout, including in a petition to this court for discretionary review of the denial

[13] And it shouldn't be forgotten that the recovery from Cowlitz County benefited the other defendants by adding another party to pay the compensation due the Bloors.

of its summary judgment motion. (CP 1974-1984). In fact, the defendants were all "steadfast in their denial of responsibility both before and at trial". (CP 32-FF LXVI). The Bloors' claims, unlike Mayer's MTCA claim, were inherently risky claims deserving of the risk enhancement.

Washington courts have upheld enhancements of attorney fee awards under the Consumer Protection Act. In *Bowers,* 100 Wn.2d 581, 675 P.2d 193, fees were awarded under the Consumer Protection Act and the court upheld a 50% enhancement for the contingent nature of the case. (*See also*, *Sing v. John L. Scott, Inc.*, 83 Wn.App. 55, 74-75, 920 P.2d 589 (1996) *reversed on other grounds* (Affirmed the trial court application of a 1.5 multiplier for the contingent nature of the plaintiff's CPA claim). The damages suffered by the Bloors are more egregious and the misconduct more shocking than the damages suffered in *Bowers.* Enhancement is warranted.

The Bloors' claims involved a high degree of risk that they would recover nothing and that the Bloors' counsel would go without any compensation. Like the cases stated above, the trial court's lodestar enhancement, based on the risk involved, the quality of representation and the complexity of the issues, was not an abuse of discretion.

1. Neither Windermere nor the Fritzes offered any competing evidence, and the Bloors' expert's opinion was unrefuted.

Windermere, and the other defendants were given ample opportunity to provide independent expert opinion, declarations or other testimony to dispute the opinions provided by attorney Marc Scheibmeir. No competing evidence was provided by any defendant as to the appropriateness of the lodestar enhancement. The court found that the case was complex, (RP 1438) as Windermere acknowledged. (Windermere's Brief at 21) After trial,Judge Hunt stated:

> This was a complicated case, at least from my perspective. I find it a little unusual that the defense would say this isn't complex now when it was pretty complicated at the time. There were numerous issues here and a liability and damages portion between several parties. I viewed it as a complex case, presenting a number of issues versus different parties. So that factor weighs in favor of a lodestar award. (RP 1438).

The only evidence presented as to the complexity of the case, aside from the trial court's first hand account, was the expert opinion of Scheibmeir. (CP 267-279). That expert opinion testimony went unchallenged by any Defendant. Windermere should not now be heard to complain that the trial court accepted the only expert opinion in the record. It is also significant that Scheibmeir opined that a multiplier of 1.5 should be awarded, (CP 267-269). Plaintiffs requested a 1.5 multiplier. (CP 251),

but the trial court granted a multiplier of 1.2. (RP 1437-1440). The trial court weighed the factors and exercised reasonable discretion. (Id).

The undisputed facts are that all defendants denied responsibility at every turn, and liability was established largely based upon circumstantial evidence. (CP 32-FF LXVI). Contrary to Windermere's position, the risk of no recovery was very real, and the case was quite complex, another undisputed fact. (CP 32, 33-FF LXVI, LXXVII).

VI. ATTORNEY FEES ON APPEAL RAP 18.1

A. Respondents should be awarded their attorney fees on appeal.

The Bloors should also be awarded attorney fees on appeal. The Appellants seem to be asking this Court to weigh the evidence and replace the trial court's decision, which this Court should not do. An award of attorney fees on appeal is appropriate, and the award should be for the full amount of the fees and costs incurred by the Bloors if they prevail.

Numerous decisions have held that where a statute or contract allows for the recovery of attorney fees at the trial court level the appeal court has inherent authority to award attorney fees. *Standing Rock Homeowners Association v. Misich,* 106 Wn.App. 231, 247, 23 P.3d 520 (2001); *Brandt v. Impero,* 1 Wn.App. 678, 683, 463 P.2d 197 (1969). The trial court awarded fees to the Bloors against Windermere pursuant to

statute, RCW 19.86.090 and against the Fritzes pursuant to the contractual attorney fees clause contained in the purchase and sale agreement the parties signed. The Bloors are entitled under RAP 18.1 to an award of fees and costs on appeal.

The policy of awarding attorney fees on appeal in claims made under the Consumer Protection Act was succinctly stated in *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn.App 553, 825 P.2d 714 (1992), where the court stated at page 568:

> The policy behind the statutory award of fees is aimed at helping the victim file the suit and ultimately serves to protect the public from further violations. In keeping with that policy, we award DeLaurenti her fees on appeal.

The Bloors suit has brought to light a dangerous practice of covering up a contaminated property. The outcome of their suit has sent notice to agents and sellers, and Cowlitz County, that disclosure of a history of drug manufacturing on a property is mandatory. A significant public service has been accomplished. The Bloors are entitled to an award of their reasonable attorney fees on appeal as they were at trial. *Nguyen v. Glendale Const. Co., Inc.*, 56 Wn.App 196, 782 P.2d 1110 (1989).

In *Banuelos v. TSA Washington, Inc.*, 134 Wn.App 607, 141 P.3d 652 (2006), attorney fees on appeal were awarded under RCW 46.70.190 (actual damages caused by vehicle dealer unfair practices) and RCW

19.86.090. The opinion does not indicate whether one or the other citation controlled the award. Evidently, the court awarded attorney fees, under both statutes, because the party that prevailed on appeal was awarded attorney fees on the appeal. Likewise, if the Bloors prevail on this appeal they should be awarded their reasonable attorney fees on appeal under both the REPSA and RCW 19.86.090, against all appellants, jointly and severally, as was done in the trial court.

Finally, Windermere appears to request fees on appeal if they are successful. Windermere raises this issue briefly in their summary of argument section of their brief. Even if they are successful, they should not be awarded attorney fees pursuant to RAP 18.1, as they have failed to dedicate a separate section of their brief to the issue. *Denaxas v. Sandstone Court of Bellevue, L.L.C.,* 148 Wn.2d 654, 671, 673 P.3d 125 (2003).

VII. CONCLUSION

The Fritzes and Windermere both fail to make valid challenges to the well-reasoned judgment fashioned by the trial court. The Fritzes chose to not comply with that judgment and instead have made misrepresentations and false arguments to this court. Windermere challenges findings despite volumes of evidence in the record *supporting* the findings it challenges. The trial court judgment should be affirmed and

the Bloors should be awarded their reasonable attorneys fees and expenses incurred in this appeal.

Dated: August 30, 2007.

OLSON ALTHAUSER LAWLER
SAMUELSON & RAYAN
Attorneys for Respondents

By: _____
Todd S. Rayan, WSBA #34090

By: _____
T. Charles Althauser, WSBA #6863

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EDDIE BLOOR AND EVA BLOOR, husband and wife,

Plaintiffs/Respondents,

vs.

ROBERT A. FRITZ and CHARMAINE A. FRITZ, and the marital community comprised thereof; LANCE MILLER, a single person; LAM MANAGEMENT, INC., a Washington Corporation, dba ALLEN & ASSOCIATES PROPERTY MANAGEMENT; LC REALTY, INC., a Washington corporation, dba WINDERMERE REAL ESTATE/ALLEN & ASSOCIATES,

Defendants/Appellants,

and

COWLITZ COUNTY, a political subdivision of the State of Washington,

Defendant.

Case No. 35740-2-II

Trial Court Case No. 05-2-00628-3

CERTIFICATE OF SERVICE

I, **TODD S. RAYAN**, hereby certify under penalty of perjury under the laws of the State of Washington that I delivered, via the method specified below, a true and correct copy of *Respondents' Brief* to the following individuals at the following addresses:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of August, 2007, at Centralia, Washington.

Todd S. Rayan WSBA #34090

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