

Ethics, Professional Conduct, and Legal Aspects of Real Estate

Real estate professionals in California are constantly faced with decisions that require ethical and professional responses; and this is not an easy task. Every real estate transaction is unique, and real estate professionals must be "fast on their feet" in order to consummate real estate transactions and institute real estate loans. In so doing, real estate professionals must create these "deals" within an ethical framework. This framework is delineated through Business and Professions Code Sections 10176 and 10177. It is also covered within relevant case law that will be presented at the end of this course.

Business and Professions Code Section 10176

The commissioner may, upon his own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

- (a) Making any substantial misrepresentation.
- (b) Making any false promises of a character likely to influence, persuade or induce.
- (c) A continued and flagrant course of misrepresentation or making of false promises through real estate agents or salesmen.
- (d) Acting for more than one party in a transaction without the knowledge or consent of all parties thereto.
- (e) Commingling with his own money or property the money or other property of others which is received and held by him.
- (f) Claiming, demanding, or receiving a fee, compensation or commission under any exclusive agreement authorizing or employing a licensee to perform any acts set forth in Section 10131 for compensation or commission where such agreement

does not contain a definite, specified date of final and complete termination.

(g) The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission or profit or the failure of a licensee to reveal to the employer of such licensee the full amount of such licensee's compensation, commission or profit under any agreement authorizing or employing such licensee to do any acts for which a license is required under this chapter for compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of such agreement, whether evidenced by documents in an escrow or by any other or different procedure.

(h) The use by a licensee of any provision allowing the licensee an option to purchase in an agreement authorizing or employing such licensee to sell, buy, or exchange real estate or a business opportunity for compensation or commission, except when such licensee prior to or coincident with election to exercise such option to purchase reveals in writing to the employer the full amount of licensee's profit and obtains the written consent of the employer approving the amount of such profit.

(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

(j) Obtaining the signature of a prospective purchaser to an agreement which provides that such prospective purchaser shall either transact the purchasing, leasing, renting or exchanging of a business opportunity property through the broker obtaining such signature, or pay a compensation to such broker if such property is purchased, leased, rented or exchanged without the broker first having obtained the written authorization of the owner of the property concerned to offer such property for sale, lease, exchange or rent.

10176.1. (a)

(1) Whenever the commissioner takes any enforcement or disciplinary action against a licensee, and the enforcement or disciplinary action is related to escrow services provided pursuant to paragraph (4) of subdivision (a) of Section 17006 of the Financial Code, upon the action becoming final the commissioner shall notify the Insurance Commissioner and the Commissioner of Corporations of the action or actions taken. The purpose of this notification is to alert the departments that enforcement or disciplinary action has been taken, if the licensee seeks or obtains employment with entities regulated by the departments.

(2) The commissioner shall provide the Insurance Commissioner and the Commissioner of Corporations, in addition to the notification of the action taken, with a copy of the written accusation, statement of issues, or order issued or filed in the matter and, at the request of the Insurance Commissioner or the Commissioner of Corporations, with any underlying factual material relevant to the enforcement or disciplinary action. Any confidential information provided by the commissioner to the Insurance Commissioner or the Commissioner of Corporations shall not be made public pursuant to this section. Notwithstanding any other provision of law, the disclosure of any underlying factual material to the Insurance Commissioner or the Commissioner of Corporations shall not operate as a waiver of confidentiality or any privilege that the commissioner may assert.

(b) The commissioner shall establish and maintain, on the Web site maintained by the Department of Real Estate, a database of its licensees, including those who have been subject to any enforcement or disciplinary action that triggers the notification requirements of this section. The database shall also contain a direct link to the databases, described in Section 17423.1 of the Financial Code and Section 12414.31 of the Insurance Code and required to be maintained on the Web sites of the Department of Corporations and the Department of Insurance, respectively, of persons who have been subject to enforcement or disciplinary action for malfeasance or misconduct related to the escrow industry by the Insurance Commissioner and the Commissioner of Corporations.

(c) There shall be no liability on the part of, and no cause of action of any nature shall arise against, the State of California, the Department of Real Estate, the Real Estate Commissioner, any other state agency, or any officer, agent, employee, consultant, or contractor of the state, for the release of any false or unauthorized information pursuant to this section, unless the release of that information was done with knowledge and malice, or for the failure to release any information pursuant to this section.

10176.5. (a) The commissioner may, upon his or her own motion, and shall upon receiving a verified complaint in writing from any person, investigate an alleged violation of Article 1.5 (commencing with Section 1102) of Chapter 2 of Title 4 of Part 4 of Division 2 of the Civil Code by any real estate licensee within this state. The commissioner may suspend or revoke a licensee's license if the licensee acting under the license has willfully or repeatedly violated any of the provisions of Article 1.5 (commencing with Section 1102) of Chapter 2 of Title 4 of Part 4 of Division 2 of the Civil Code.

(b) Notwithstanding any other provision of Article 1.5 (commencing with Section 1102) of Chapter 2 of Title 4 of Part 4 of Division 2 of the Civil Code, and in lieu of any other civil remedy, subdivision (a) of this section is the only remedy available for violations of Section 1102.6b of the Civil Code by any real estate licensee within this state.

Business and Professions Code Section 10177

10177. The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

(a) Procured, or attempted to procure, a real estate license or license renewal, for himself or herself or any salesperson, by fraud, misrepresentation, or deceit, or by making any material misstatement of fact in an application for a real estate license, license renewal, or reinstatement.

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime involving moral turpitude, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.

(c) Knowingly authorized, directed, connived at, or aided in the publication, advertisement, distribution, or circulation of any material false statement or representation concerning his or her business, or any business opportunity or any land or subdivision (as defined in Chapter 1 (commencing with Section 11000) of Part 2) offered for sale.

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.

(e) Willfully used the term "realtor" or any trade name or insignia of membership in any real estate organization of which the licensee is not a member.

(f) Acted or conducted himself or herself in a manner that would have warranted the denial of his or her application for a real estate license, or has either had a license denied or had a license issued by another agency of this state, another state, or the federal government revoked or suspended for acts that, if done by a real estate licensee, would be grounds for the suspension or revocation of a California real estate license, if the action of denial, revocation, or suspension by the other agency or entity was taken only after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections comparable to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and only upon an express finding of a violation of law by the agency or entity.

(g) Demonstrated negligence or incompetence in performing any act for which he or she is required to hold a license.

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

(i) Has used his or her employment by a governmental agency in a capacity giving access to records, other than public records, in a manner that violates the confidential nature of the records.

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

(k) Violated any of the terms, conditions, restrictions, and limitations contained in any order granting a restricted license.

(l) Solicited or induced the sale, lease, or listing for sale or lease of residential property on the ground, wholly or in part, of loss of value, increase in crime, or decline of the quality of the schools due to the present or prospective entry into the neighborhood of a person or persons of another race, color, religion, ancestry, or national origin.

(m) Violated the Franchise Investment Law (Division 5 (commencing with Section 31000) of Title 4 of the Corporations Code) or regulations of the Commissioner of Corporations pertaining thereto.

(n) Violated the Corporate Securities Law of 1968 (Division 1 (commencing with Section 25000) of Title 4 of the Corporations Code) or the regulations of the Commissioner of Corporations pertaining thereto.

(o) Failed to disclose to the buyer of real property, in a transaction in which the licensee is an agent for the buyer, the nature and extent of a licensee's direct or indirect ownership interest in that real property. The direct or indirect ownership interest in the property by a person related to the licensee by blood or marriage, by an entity in which the licensee has an ownership interest, or by any other person with whom the licensee has a special relationship shall be disclosed to the buyer.

(p) Violated Section 10229. If a real estate broker that is a corporation has not done any of the foregoing acts, either directly or through its employees, agents, officers, directors, or persons owning or controlling 10 percent or more of the corporation's stock, the commissioner may not deny the issuance of a real estate license to, or suspend or revoke the real estate license of, the corporation, provided that any offending officer, director, or stockholder, who has done any of the foregoing acts individually and not on behalf of the corporation, has been completely disassociated from any affiliation or ownership in the corporation.

10177.1. The commissioner may, without a hearing, suspend the license of any person who procured the issuance of the license to himself by fraud, misrepresentation, deceit, or by the making of any material misstatement of fact in his application for such license. The power of the commissioner under this section to order a suspension of a license shall expire 90 days after the date of issuance of said license and the suspension itself shall remain in effect only until the effective date of a decision of the commissioner after a hearing conducted pursuant to Section 10100 and the provisions of this section. A statement of issues as defined in Section 11504 of the Government Code shall be filed and served upon the respondent with the order of suspension.

Service by certified or registered mail directed to the respondent's current address of record on file with the commissioner shall be effective service. The respondent shall have 30 days after service of the order of suspension and statement of issues in which to file with the commissioner a written request for hearing on the statement of issues filed against him. The commissioner shall hold a hearing within 30 days after receipt of the request therefor unless the respondent shall request or agree to a continuance thereof. If a hearing is not commenced within 30 days after receipt of the request for hearing or on the date to which continued with the agreement of respondent, or if the decision of the commissioner is not rendered within 30 days after completion of the hearing, the order of suspension shall be vacated and set aside. A hearing conducted under this section shall in all respects, except as otherwise expressly provided herein, conform to the substantive and procedural provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code applicable to a hearing on a statement of issues.

10177.2. The commissioner may, upon his or her own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any licensee, and he or she may suspend or revoke a real estate license at any time where the licensee in performing or attempting to perform any of the acts within the scope of Section 10131.6 has been guilty of any of the following acts:

(a) Has used a false or fictitious name, knowingly made any false statement, or knowingly concealed any material fact, in any application for the registration of a mobilehome, or otherwise committed a fraud in that application.

(b) Failed to provide for the delivery of a properly endorsed certificate of ownership or certificate of title of a mobilehome from the seller to the buyer thereof.

(c) Has knowingly participated in the purchase, sale, or other acquisition or disposal of a stolen mobilehome.

(d) Has submitted a check, draft, or money order to the Department of Housing and Community Development for any

obligation or fee due the state and it is thereafter dishonored or refused payment upon presentation.

10177.4. (a) Notwithstanding any other provision of law, the commissioner may, after hearing in accordance with this part relating to hearings, suspend or revoke the license of a real estate licensee who claims, demands, or receives a commission, fee, or other consideration, as compensation or inducement, for referral of customers to any escrow agent, structural pest control firm, home protection company, title insurer, controlled escrow company, or underwritten title company.

A licensee may not be disciplined under any provision of this part for reporting to the commissioner violations of this section by another licensee, unless the licensee making the report had guilty knowledge of, or committed or participated in, the violation of this section.

(b) The term "other consideration" as used in this section does not include any of the following:

(1) Bona fide payments for goods or facilities actually furnished by a licensee or for services actually performed by a licensee, provided these payments are reasonably related to the value of the goods, facilities, or services furnished.

(2) Furnishing of documents, services, information, advertising, educational materials, or items of a like nature that are customary in the real estate business and that relate to the product or services of the furnisher and that are available on a similar and essentially equal basis to all customers or the agents of the customers of the furnisher.

(3) Moderate expenses for food, meals, beverages, and similar items furnished to individual licensees or groups or associations of licensees within a context of customary business, educational, or promotional practices pertaining to the business of the furnisher.

(4) Items of a character and magnitude similar to those in paragraphs (2) and (3) that are promotional of the furnisher's business customary in the real estate business, and available on a similar and essentially equal basis to all customers, or the agents of the customers, of the furnisher. (c) Nothing in this section shall relieve any licensee of the obligation of disclosure otherwise required by this part.

10177.5. When a final judgment is obtained in a civil action against any real estate licensee upon grounds of fraud, misrepresentation, or deceit with reference to any transaction for which a license is required under this division, the commissioner may, after hearing in accordance with the provisions of this part relating to hearings, suspend or revoke the license of such real estate licensee.

As you may have noticed, many of the regulations under B&P Code 10176 and 10177 can relate to the same actions by the broker or salesperson. The following three cases relate many of the ethical issues presented in the Business and Professions Code 10176 and 10177.

CASE #1: BRIAN GALLOP, ET AL., Plaintiffs and Appellants, v. CASA GRANDE, ET AL. (Called Broker A), Defendants and Respondents. B143366, COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE, filed February 28, 2002. Judges: Croskey, with Klein and Kitching concurring.

This case arises from the sale of residential real property. Plaintiffs Laurie Gallop and Brian Gallop ("plaintiffs") are the buyers. They sued the seller, the real estate agency that represented both seller and plaintiffs, and the home inspection company that inspected the property on behalf of plaintiffs. Plaintiffs appeal from a judgment entered against them and in favor the seller, Betty Caldwell ("Caldwell"), after a jury trial. Plaintiffs contend the trial court should have granted their motions for new trial and partial judgment notwithstanding the verdict as to Caldwell because the jury found in favor of plaintiffs on all elements of their cause of action against Caldwell for breach of contract. Plaintiffs contend she breached the sale contract by failing to disclose to them that there were foundation, structural and other defects in the house that make it worth substantially less than the price they paid for it.

Plaintiffs' complaint, which was filed on November 6, 1998, asserted causes of action for breach of contract, fraud, negligent misrepresentation, and negligence against all defendants, as well as breach of fiduciary duty against Broker A. The home inspection defendants entered into a good faith settlement with plaintiffs in the amount of \$ 63,000. That settlement, however, did not specify how much of it was attributable to plaintiffs' claimed economic damages and how much, if any, to their claimed non-economic damages.

The case was tried to a jury and concluded on May 4, 2000. On the various causes of action against Caldwell, the jurors found that

- (1) plaintiffs and Caldwell entered into a contract for the purchase of Caldwell's home,
- (2) plaintiffs performed under the contract,
- (3) Caldwell concealed or suppressed a material fact,
- (4) she did not intentionally conceal or suppress it with the intent to defraud plaintiffs,
- (5) she did not breach the sale contract, and
- (6) she was not negligent.

The jurors found Broker A was negligent and its negligence was a cause of damage to plaintiffs. Plaintiffs were found to be damaged in the amount of \$ 110,000. The jury also found that plaintiffs were contributorily negligent (43%) and their negligence was *a* cause of their damages. Collectively, the Broker A defendants were found to be 57% negligent.

On the fraud and concealment cause of action against Broker A, the jury found that defendant agent Joseph D. did not conceal or suppress a material fact, but defendant Broker A did. The jury found, however, they did not do so with an intent to defraud plaintiffs.

Plaintiffs' appeal and Broker A's cross-appeal followed.

ISSUES

Plaintiffs contend:

- (1) their motions for JNOV (judgment notwithstanding the verdict) and new trial should have been granted,
- (2) the trial court erred in applying their settlement with the home inspection defendants as an offset to the jury's award of damages against Broker A,
- (3) because they prevailed in their suit against Broker A, they are entitled to their costs, and
- (4) the trial court erred in not instructing the jury on their cause of action against Broker A for breach of fiduciary duty.

In its cross-appeal, Broker A contends there is insufficient evidence to support the jury's finding that it was negligent in the sale transaction.

Broker A also contends its motion for new trial should have been granted because:

- (1) it was error to permit plaintiffs to assert personal injury in an "economic injury" case such as this,
- (2) Broker A should have been permitted to present evidence about an arbitration clause,
- (3) Broker A was entitled to costs, and
- (4) the special verdict form for the negligence count was prejudicially harmful because it named a fictitious entity as a defendant.

Plaintiffs engaged the services of defendant Joseph D. to help them locate a home in La Mirada. Joseph D. told plaintiffs about Caldwell's house, which had been listed for sale by another agent in Joseph D's office. Plaintiffs offered Caldwell \$ 220,000 for her house and she accepted the offer. She had lived in the house for 22 years.

Caldwell signed a transfer disclosure statement. In it, she listed two things in the house that were problems--a crack in the floor of the garage and the fact that the spa was not working. She testified the crack appeared while she lived at the house and it got larger over the course of time. She herself filled it in with cement because "it was where you walk and it didn't look good," however, "over time it reappeared again." Caldwell said it would be hard to not see the crack if you went into the garage. She

considered it a significant defect in the garage.

The transfer disclosure statement asked Caldwell whether she was "aware of any significant defects/malfunctions in any of the following," and then listed interior walls, ceilings, floors, exterior walls, insulation, roofs, windows, doors, foundation, slab, driveways, sidewalks, walls/fences, electrical system, plumbing/sewer/septic/ and other structural components. Caldwell answered "no." She also answered "no" to the question, on the transfer disclosure statement, whether she was aware of "any settling from any cause, slippage, sliding, or other soil problems." At trial, Caldwell was asked whether she was aware, when selling her house, that she would have to "disclose items that she felt might have some impact on the house." She answered that she was aware of that obligation.

She also testified she showed her agent, that the sunroom she had added onto the house in the late 1980's had separated from the house, but she did not list the separation on the disclosure statement. Asked if she believed, when she was selling the house, that the separation was something she should disclose to her agent, given her disclosure obligations, she answered "yes." She stated her agent told her not to worry about it because it was not attached to the foundation. Her agent testified he did not recall any conversation with Caldwell about the sunroom. He stated the sunroom is at the rear of the house. Caldwell testified the separation was visible from the outside, and while plants covered up the separation, "you could see it up above that." She never spoke to plaintiffs about the sunroom.

The trial court asked her whether she had ever detected a slant in any of the floors in her house, and she stated she had not, but when the court asked if she had ever dropped anything on the floor and had it roll to a corner, she stated that had happened "in that washroom where the water ran down," apparently meaning the laundry room when the washer overflowed.

Caldwell testified that right after she moved into the house in 1996, she had "shims" (wedges of wood) installed so that the floors in two rooms towards the rear of her house (living room and dining room) would stop squeaking. She also had some of the doors in the house shaved because she had carpet installed throughout the house and some doors would not close because the carpet "was too high." Additionally, the dining room door would

not stay open. It moved towards the rear of the house. She testified at her deposition that water in the laundry room ran "towards the door." Asked if she felt the floor was uneven, she stated that most floors are uneven and if you spill water, the water runs one way or another and she did not believe the floors were uneven in her house.

Kip Kennedy, a building inspector for the city of Los Angeles who had been employed in that position since December 1988, and who had been a general contractor before assuming that position, testified at trial that he had inspected in excess of 10,000 homes, that he can tell old damage from new damage, and he believed the shims in the subject house had been in place from one to eight years, not the 20-some years that Caldwell stated they had been there.

Regarding the plaintiffs' damages, Tallas Margarve testified he is an engineering and building contractor and a licensed land surveyor and his company stabilizes and levels buildings that have failed. He testified it would cost approximately \$ 108,000 to do such work on plaintiff's house and then replace the concrete areas of the house that had to be removed. Plaintiff Brian Gallop testified that if he had known of the things he was not told about by Caldwell or her agents (shims under the house, water running toward rear of house, separation of sunroom from rest of house) he would not have purchased the house.

Appellate Court Opinion:

As noted above, the jurors specifically found that:

- (1) plaintiffs and Caldwell entered into a contract for the purchase of Caldwell's home,
- (2) plaintiffs performed under the contract, and
- (3) Caldwell concealed or suppressed a material fact. The first two findings were in the special verdict for the breach of contract cause of action, the third was in the special verdict for the fraud cause of action.

Based on these findings, and on the fact that the jury found plaintiffs suffered damages in connection with the purchase of the house, plaintiffs contend on appeal that the elements of a cause of action for breach of the purchase agreement were found by the jury and therefore the jury's additional finding that Caldwell did not breach the contract is not supported by the evidence. We agree. In the purchase agreement, there is an

implied promise by Caldwell that she would not conceal material information about the house she was selling to plaintiffs.

Paragraph 9 of the purchase agreement signed by Caldwell states in part: "Whether or not seller warrants any aspect of the property, seller is obligated to disclose known material facts and to make other disclosures required by law." By this express acknowledgement of her duty to disclose known material facts, Caldwell impliedly promised to do so. Moreover, paragraph 6 of the purchase agreement required Caldwell to disclose to plaintiffs, prior to close of escrow, any material inaccuracies in disclosures made to them, including making disclosures in the transfer disclosure statement. Caldwell's testimony shows that when she sold the house to plaintiff she had personal knowledge of the many facts that indicated the house might not be level. Caldwell admitted at trial she knew she had to disclose "items that [she] felt might have some impact on the house itself." Whether Caldwell intentionally concealed information to defraud plaintiffs (and the jury found she did not), is of no relevance to the cause of action for breach of contract. Plaintiffs note that when a breach of contract is alleged, the law does not require that the breach be intentional before a plaintiff may recover. (*Linden Partners v. Wilshire Linden Partners* (1998) 62 Cal.App.4th 508, 531-532.)

Civil Code section 1102 et seq. also required Caldwell to provide plaintiffs with a transfer disclosure statement that disclosed the matters addressed in such statement, including settling, soil problems and slippage and sliding. Section 1102.4 provides that a seller such as Caldwell is not liable "for any error, inaccuracy, or omission of any information delivered pursuant to [the transfer disclosure statement statutes] if the error, inaccuracy, or omission was not within the personal knowledge of the [seller]." Section 1102.13 states that a "person who willfully or negligently violates or fails to perform any duty prescribed by any provision of [the transfer disclosure statutes] shall be liable in the amount of actual damages suffered by a purchaser."

Thus, the trial court should have granted plaintiffs' motion for a partial JNOV (judgment notwithstanding the verdict) as to Caldwell on the breach of contract cause of action against her. We shall remand this case and direct that a judgment notwithstanding the verdict be entered against Caldwell, and in favor of

plaintiffs, in the amount of \$ 110,000, together with costs. Setoff from the good faith settlement between plaintiffs and the home inspection defendants is not an issue with Caldwell because such defendants are not co-obligors on the contract between plaintiffs and Caldwell. (Code Civ. Proc., §§ 877 & 877.6.)

The jury found Caldwell was not negligent. On appeal, plaintiffs assert that the very conduct of Caldwell that gives rise to a breach of contract cause of action against her also supports their cause of action against her for negligence.

One of plaintiffs' causes against Broker A was for breach of fiduciary duty, wherein they alleged that by acting as plaintiffs' agent for purposes of purchasing the subject property, Broker A assumed a fiduciary relationship with plaintiffs and thus owed plaintiffs the duties of a fiduciary. Plaintiffs alleged that Broker A breached its fiduciary duty by advising plaintiffs to purchase property that contained numerous defects and had a value far less than what plaintiffs paid, and by advising plaintiffs to hire an inspection company that lacked the expertise to properly inspect the subject property and discover those defects. Plaintiffs alleged that by this breach of duty, Broker A caused them to pay substantially more for the property than it was worth and to incur future considerable expense when plaintiffs make the necessary repairs and modifications to the property.

Initially, the trial court rejected plaintiffs' request to have the jury instructed on breach of fiduciary duty, saying breach of fiduciary duty is not a separate cause of action but rather is "the result of the violation of some other right where there is a relationship of confidence and trust." Caldwell's attorney asked: "So wouldn't it just be a standard negligence verdict with a higher standard of care that can be argued?" The court responded that it did not believe the standard of care was higher but the duty of a fiduciary is higher. The court said that "whether it's an ordinary duty or a fiduciary duty, a breach is a breach and the consequential damages are the consequential damages. Breach of a fiduciary duty could lead to the imposition of exemplary damages. But, here, there is a total absence of any willful, reckless disregard, any of the horrors that are paraded in 13.95 . . . oppression, malice. That's totally absent." Plaintiffs' attorney replied that "it can lead to recovery of general damages though." The court agreed. Plaintiffs' attorney then stated he believed

breach of fiduciary duty is a separate cause of action and plaintiffs were entitled to instruction on a different standard, namely an obligation to use "utmost care, honesty and integrity." Broker A's attorney stated that if "we can get an instruction on what a fiduciary duty is, that can instruct the jury as to what that item is or that concept is, and then they could apply that to either negligence or fraud." The court stated that "without an instruction of what it is, it's hard to find a remedy. " Plaintiffs' counsel stated he would find an instruction because he had "all the cases here." The court suggested he look in BAJI.

On appeal, plaintiffs argue the jury was not permitted to consider whether the Century 21 defendants breached their fiduciary duties to plaintiffs. Plaintiffs cite cases wherein the courts at least impliedly recognized causes of action for breach of fiduciary duty (*Field v. Century 21 Klownen-Forness Realty* (1998) 63 Cal.App.4th 18, 20-23 [suit against real estate broker for negligence, negligent misrepresentation and breach of fiduciary duty, and the "case was submitted to the jury with instructions regarding negligence, and negligent misrepresentation based on fiduciary relationship]; *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 157 Cal. Rptr. 392, 598 P.2d 45).

In *Wyatt*, the court stated real estate agents have the same obligations towards their clients as trustees have towards their beneficiaries to exercise undivided service and loyalty, to act in the highest good faith, to not obtain any advantage over the client, and to make the fullest disclosure of material facts about the real estate transaction such as might impact the client's decision. (*Wyatt*, at p. 782.)

In *Field*, the court said this common law *fiduciary* duty of brokers towards their clients was not changed by the duties towards prospective buyers that section 2079 of the Civil Code places on a seller's agent and broker, and that the common law duty is "substantially more extensive than the *nonfiduciary* duty codified in section 2079."

Plaintiffs cite trial evidence which they contend demonstrates Broker A's breach of fiduciary duty, and they contend that if the jury had been given the opportunity to render a verdict on a breach of fiduciary claim, "the issue of apportioned fault would likely have been significantly different." Broker A responds that there was no conflict of interest in its dealings with plaintiffs because:

- (1) plaintiffs signed the portion of the purchase agreement where it stated that Broker A represented both Caldwell and plaintiffs, and
- (2) Caldwell and plaintiffs had separate agents from Broker A who were skilled realtors. Broker A also argues that plaintiffs did not present expert testimony on the standard of care of a reasonably prudent realtor, and that there was no failure to disclose defects. Plaintiffs respond by arguing that a separate disclosure of dual agency was required, that expert testimony was not needed, and that defects in the property were not disclosed.

While it is possible that resolution of this issue might have rested on the facts of Broker A's dual representation of the buyer and seller, a procedural matter will actually decide the issue. That procedural matter is plaintiffs' failure to *pursue* the issue of a jury instruction on breach of fiduciary duty after the trial court left the door open to them. The discussion about that issue ended with the court indicating it needed an instruction on what a fiduciary duty is from the common law.

" 'Where a duty is found to exist, a real estate agent must fulfill it by exhibiting the degree of care and skill ordinarily exhibited by professionals in the industry. [Citations.] The degree of care and skill required to fulfill a professional duty ordinarily is a question of fact and may require testimony by professionals in the field if the matter is within the knowledge of experts only. (*Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1279.)

Duties to Seller:

Caldwell, the seller in this real estate transaction, was represented by Broker A, which acted as both listing agent and selling agent. Under the Civil Code, as Caldwell's agent, Broker A had several duties to plaintiffs. They are as follows.

Section 2079 of the Civil Code requires a seller's broker to "conduct a reasonably competent and diligent visual inspection of the property," and to "disclose to [the] prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal." Section 2079.2 states the broker's standard of care "is the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination, required to obtain a license." The broker is not

required to inspect areas "that are reasonably and normally inaccessible to such an inspection." (§ 2079.3.)

Section 2079.17 required Broker A to disclose to plaintiffs that it was acting as agent for both plaintiffs and Caldwell. Broker A complied with this disclosure duty by filling in necessary information in the residential purchase agreement. Subdivision (d) of section 2079.17 states that such disclosure "shall be *in addition to* the disclosure required by Section 2079.14." (Italics added.) Section 2079.14 required Broker A to give plaintiffs a document that sets out the nature of the obligations of agents who represent only the seller, only the buyer, and both the buyer and seller, *as such obligations are described in section 2079.16* (discussed next). Section 2079.14 states the form is to be both given to, and signed by, the buyer and the seller. Caldwell testified she signed the section 2079.16 form. However, the form was not given to plaintiffs . The broker for the Broker A office stated he did not believe his office was required to use that form for Caldwell's sale of her house because the form is dated 1997 and the sale occurred in February 1998. (These statutes were enacted in 1995.)

Plaintiffs contend they were also not given page six of the six-page residential purchase agreement, which is the "buyer's inspection advisory" form. This form advises buyers to "conduct a thorough inspection of the Property, personally and with professionals." It is mentioned in the purchase agreement under "other terms and conditions." Each of the six pages of the purchase agreement indicates it is "page 1 (or 2, 3, 4, 5 or 6) of 6 pages." Asked whether he told his agent that page six was missing from the purchase agreement, plaintiff Brian Gallop testified he did not and he "never read the documents." This was in contrast to defendant Joseph D's testimony that he went over each page of the purchase agreement with the plaintiffs, including page six, the buyer's inspection advisory form/page, which comes after the signature page of the purchase agreement. This form is the only page in the purchase agreement that was not signed or initialed by plaintiffs.

This form also sets out the section 2079 duties of a seller's agent and identifies them as duties of a "broker," thus giving the false impression that a broker who acts as both the seller's agent and buyer's agent has only section 2079 duties and not fiduciary duties to the buyer. The companion portion of the purchase

agreement also gives such impression. As discussed above, such is not the case. Under both case law and Civil Code section 2079.16, Broker A owed plaintiffs certain fiduciary duties.

Duties Owed to a Real Estate Purchaser by His or Her Own Broker

Broker A also acted as the plaintiffs' own agent. Section 2079.16 states that in such a dual capacity, Broker A owed to plaintiffs (and Caldwell) "a fiduciary duty of utmost care, integrity, honesty and loyalty in its dealings with plaintiffs," together with the "diligent exercise of reasonable skill and care in performance of its duties," "a duty of honest and fair dealing and good faith," and "a duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties."

We note that section 2079 appears to conflict with section 2079.16. The former states the seller's agent has a duty to prospective purchasers "to conduct a reasonably competent and diligent visual inspection of the property" *and* "to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal." The latter section imposes on the seller's agent a duty to the buyer to "disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties." Perhaps the conflict is resolved, at least for our purposes, by the admonition in section 2079.16 that "an agent is not obligated to reveal to either party any confidential information obtained from the other party that does not involve the affirmative duties set forth above," and one of those duties is a fiduciary duty to exercise the "utmost care, integrity, honesty and loyalty in his or her dealings with the buyer and seller. As discussed, we find that the separation of the sunroom from the house fits within the description of matters that Broker A had to disclose to plaintiffs.

Under the common law, which was not changed by section 2079, the buyer's agent "is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. [*He must] disclose reasonably obtainable material information.*" (*Field v. Century 21 Klowden-Forness Realty, supra*, 63 Cal.App.4th at p. 25, italics added.) He must also " 'refrain from making representations of facts material to the client's decision to buy the property without advising the client that he is merely passing on information received from the seller without verifying its accuracy.' " (*Id.* at p. 26.)

In *Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 414, the court stated that a dual agent (broker acting on behalf of both seller and buyer) has fiduciary duties to both, and that *Field's* discussion of fiduciary duties is "informative as to the scope of fiduciary duty."

Liability can be imposed on an agent or broker for both an affirmative and intentional misrepresentation of material facts, and for nondisclosure of them, since not disclosing information " 'amounts to a representation of the nonexistence of the facts which he has failed to disclose [citation].' " (*Padgett v. Phariss, supra*, 54 Cal.App.4th at p. 1286.)

The Issue of the "As Is" Provision in the Purchase Agreement

Broker A contends there is insufficient evidence to support a finding favorable to plaintiffs on the first two elements of a cause of action for negligence--duty and breach of duty. It relies on certain language in the purchase agreement.

The purchase agreement states that buyer and seller agree that the broker does not guarantee the condition of the property and will not be responsible for defects that are not known to the broker and not visibly observable in reasonably accessible areas of the property. The purchase agreement also states that the property was being sold "as is" in its present physical condition and there were no warranties "except as specified below, and elsewhere in this agreement." Broker A contends that when there is an "as is" sale, "there can be no negligence verdict." Broker A relies on *Loughrin v. Superior Court* (1993) 15 Cal.App.4th 1188.

In *Loughrin*, the real estate sale contract stated the property was being sold in an "as is" condition, the seller made no warranty with respect to the condition of the property, and the buyer relied solely on his inspection or his contractor in determining the condition of the property. The *Loughrin* court stated that except in cases of fraud or misrepresentation where the seller intentionally conceals material defects not otherwise observable or visible by the buyer, a sale of property in an "as is" condition is a sale of it in its present condition and relieves the seller of liability for defects in that condition. (At p. 1192.) Later, the court stated that "an added provision in the waiver clause, such as contained in this case, indicating the buyer relies on his own inspection of the property, presumably waives any obligation the seller or his broker may otherwise have to inspect the property for defects, and hence may avoid a claim for negligent failure to know of and advise of such defects." (At p. 1195.)

While Broker A relies in this analysis in *Loughrin* to support its assertion that there is no substantial evidence to support a jury's findings in favor of plaintiffs on the first two elements of a cause of action for negligence, Broker A neglects to mention certain things. First, the *Loughrin* court *also stated* in its very next breath that augmenting an "as is" clause with a clause that the buyer relies on his own inspection of the property, "does not address the issues of:

- (1) intentional misrepresentation,
- (2) fraudulent concealment, or even
- (3) negligent concealment not related to failure to inspect."

Second, the Legislature stated in Civil Code section 1102.1 that "the delivery of a real estate transfer disclosure statement may not be waived in an 'as is' sale, as held in *Loughrin v. Superior Court* (1993) 15 Cal.App.4th 1188."

Third, section 1102.1 states that agents should place their section 2079 disclosures in the transfer disclosure statement.

Fourth, section 1102 states that waivers of the requirements of the transfer disclosure statement statutes are void as against public policy.

Therefore, "as is" clauses and "buyer relies on his own inspection" are not effective to relieve sellers and their agents from their duties under the transfer disclosure statement statutes. Here, of course, Broker A did not disclose, in the transfer disclosure statement, the fact of the sunroom separation.

Broker A's citation to *Assilzadeh v. California Federal Bank, supra*, 82 Cal.App.4th 399, 417 wherein the court stated that a buyer purchasing residential property in an "as is" condition has "a duty to investigate to determine the actual condition of the property," adds nothing to the discussion. Plaintiffs do not deny that they were under a duty to investigate. Their duty does not affect Broker A's own obligations. Plaintiffs' duty just forms the basis of the comparative negligence findings that the jury made, holding plaintiffs 43% negligent.

The Finding That Broker A Was Negligent Is Supported by Substantial Evidence

Caldwell's agent had a duty to plaintiffs to inspect the subject property and disclose to plaintiffs facts materially affecting its value or desirability. Caldwell told her agent that the sunroom had separated from the house. Caldwell's agent breached his duty to plaintiffs.

Plaintiffs' agent, defendant Joseph D., had a duty to disclose, to plaintiffs, reasonably obtainable information. Given that the seller's agent was from the same real estate office as Joseph D., Joseph D. had ready access to information that Caldwell's agent knew about the subject property, such as the sunroom separation. From the fact that Joseph D. did not tell plaintiffs about the separation, it can reasonably be inferred that he did not ask Caldwell's agent whether there were any material facts about the property that he should convey to plaintiffs, or that he asked Caldwell's agent but the agent did not tell him about the sunroom separation, or that Caldwell's agent told Joseph D. but the latter did not pass the information on to plaintiffs. All three scenarios represent a breach of duty by Broker A.

Such information was certainly material, as it would indicate there might be a problem with the foundation, settlement, soil compaction, etc. Broker A does not cite us to evidence that such separations are ordinary events. Clearly Broker A's failure to disclose the fact of the separation is a material breach of its statutory and common law duty. No expert testimony was required to help the jury draw such a conclusion. This breach of duty, coupled with plaintiffs' evidence that had they known the true facts about the condition of the house, they would not have purchased it, comprise sufficient evidence to support finding of negligence.

Broker A argues that plaintiffs knew the sunroom door was not operable because the inspection report provided by the house inspection defendants revealed that problem. However, that is not the same thing as knowing that a structure that had been attached to the house was now unattached. Moreover, Broker A is not relieved of its statutory and common law duties of disclosure merely because a professional inspection of the house was undertaken by plaintiffs.

Plaintiffs and Broker A raise other matters which they assert impact the question of Broker A's negligence. These include the effect of the El Nino rains on the crack in the garage floor, discrepancies found by plaintiff's expert witness geotechnical engineer respecting the depth of compacted fill reported in the "original reports" made when the house was built in or about 1960, and whether California regulations required Broker A's broker to inspect the subject purchase agreement. Given that the nondisclosure to plaintiffs of the sunroom separation constitutes sufficient evidence to support the jury's finding that Broker A was negligent, we decline to address the significance of any of these other matters.

The judgment in favor of Caldwell and against plaintiffs is reversed and the trial court is directed to enter a judgment notwithstanding the verdict, in favor of plaintiffs and against Caldwell, in the amount of \$ 110,000, together with an award of costs for plaintiffs. The trial court is further directed to amend the judgment in favor of plaintiffs and against the Broker A defendants in the amount of zero dollars by deleting the directive that the Century 21 defendants and the plaintiffs "shall bear their own costs and disbursements on the negligence claim," and inserting, in its place, an award of costs for plaintiffs. Plaintiffs shall recover costs on appeal from the Broker A defendants and Caldwell, who shall all bear their own costs on appeal.

CASE #2: FSR BROKERAGE, INC. et al. (called Broker F), Petitioners, v. The Superior Court of Los Angeles County, Respondent; Michael Chernuchin et al., Real Parties in Interest. B156982, COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE, filed April 16, 2002. Judges: Vogel, with Spencer and Mallano concurring.

In June 1998, Michael Chernuchin and Janis Diamond purchased real property on Benedict Canyon Drive from Jordan Ostrow. Plaintiffs, as buyers, were represented by Broker F; Ostrow, as seller, was represented by Broker C.

In May 2001, Plaintiffs filed an amended complaint against Ostrow, Broker C, Broker F, and others included in our references to Broker C and Broker F, alleging nine separate causes of action for breach of contract, fraud, breach of fiduciary duty, and negligence. Among other things, Plaintiffs allege that Ostrow failed to disclose that:

- a gate was broken and in need of replacement (which allegedly cost more than \$ 10,000),
- that the heater didn't work and had to be repaired (which allegedly cost about \$ 770),
- that the swimming pool and a koi pond leaked and the pool heater was broken (which together cost about \$ 9,900 to repair), and
- that the chimney had suffered earthquake damage (which allegedly cost about \$ 6,900 to repair).

As against Ostrow, Plaintiffs claim damages for these alleged non-disclosures on theories of breach of contract, fraud, and negligent misrepresentation. As against Broker F, Plaintiffs claim damages for breach of fiduciary duty and fraud based on alleged misrepresentations about an easement and about construction on adjacent property.

As against Broker F and Broker C, Plaintiffs also claim damages for fraud based on the Realtors' alleged failure to disclose all known defects in the property, including the fact that there "was a significant amount of dirt touching wood on the side wall adjacent to the retaining wall buttressing against the hillside slope of the property." According to Plaintiffs' first amended complaint, "real estate agents in Los Angeles know, or should know, that dirt touching wood is a serious problem, because it

permits destructive pests and organisms to attack the structure." With regard to damages, Plaintiffs allege that Diamond "has experienced extreme health problems due to asthma and allergies. Her problems became so severe that she had to be hospitalized. Since her hospitalization, she has experienced chronic asthma and allergy problems that require her to take steroids and other medication. Prior to purchasing the property, Diamond never experienced any episodes of asthma or allergies."

More specifically, Plaintiffs allege that Diamond's "condition seemed to be exacerbated when she entered the side corner room, which has as its outside wall, the place where the dirt was touching wood" A contractor hired by Plaintiffs discovered a dirt-filled "hole between the outside and the inside of the house" which was a "conduit for pests and organisms to enter into the inside of the house from the outside." The contractor found "mold, spores, fungus, rat excrement and other detritus." Had Plaintiffs known about this problem, they would not have purchased the house. Based on the mold problem, Plaintiffs claim damages for fraud, constructive fraud, negligent misrepresentation, and negligence.

At some point, Plaintiffs moved out of the Benedict Canyon house and into a furnished apartment on Ocean Avenue.

Defendants answered and discovery ensued, including a request by Broker F to inspect and test both the Benedict Canyon Drive residence and Plaintiffs' current Ocean Avenue apartment. In its demand to inspect the two residences, Broker F explained that its purpose was "to photograph and inspect the property, test for the presence of mold and other contaminants at the property . . . and also to sample the air both inside and outside the improvements on the property. The testing will be non-destructive." Plaintiffs objected to the demand to inspect the Ocean Avenue residence, claiming the inspection would be "irrelevant and not capable of leading to relevant evidence," that it would constitute an invasion of privacy, and that it would be burdensome and harassing.

Broker F filed a motion for an order compelling Plaintiffs to allow the inspection of the Ocean Avenue property. Broker F explained that since Diamond's "injuries have substantially abated since she left the Benedict Canyon residence, if testing of Plaintiffs new residence also finds mold, their claims that mold was the cause of Diamond's symptoms will be substantially

discredited." Elsewhere in its motion, Broker F put it this way: "Broker F is attempting to establish the possible sources of Plaintiffs' alleged injuries, either by exclusion of the . . . Ocean Avenue residence as a potential source or other means. Clearly, it is highly relevant if the same sorts of mold are present at Plaintiffs' current residence that are alleged to have caused their injuries at their former residence. Plaintiffs say their symptoms have improved since they left the prior residence. Needless to say, if they are still being exposed to the same molds, then there is another source for their problems."

Plaintiffs opposed the motion, contending that Broker F wanted to impose on their privacy by conducting tests on property that is not the subject of this litigation. Plaintiffs claimed, without authority, that Broker F's motion fails because it does not show "any probability that Plaintiffs' current residence contains the same type of mold" as the Benedict Canyon property.

Neither side offered any expert testimony about mold.

The trial court denied Broker F's motion, commenting that "there are so many different kinds of mold" that the proposed inspection of the Ocean Avenue property was not relevant, and that there had to "be some reason to do it other than just a mere statement that there might be mold there."

The appellate court stated the Broker F's motion should have been granted.

Broker F had only to show that its proposed inspection was relevant, which it is if the results of the inspection would themselves be admissible or if the inspection appears reasonably calculated to lead to the discovery of admissible evidence. As FSR explained, an inspection that reveals mold at the Ocean Avenue apartment that is similar to the mold allegedly present at the Benedict Canyon house is relevant to Plaintiffs' claim that her symptoms were caused by mold -- particularly since her condition has improved since she moved out of the Benedict Canyon house. At a minimum, such evidence would tend to persuade the trier of fact that Diamond's condition was not caused by the mold. (See *Manzetti v. Superior Court* (1993) 21 Cal.App.4th 373.)

If no mold is found, Broker F may decide to reevaluate its case.

In short, fishing expeditions *are* permissible, and the discovery statutes must be liberally construed.

Finally, we reject Plaintiffs' suggestion that the inspection and testing will invade their privacy. They have not explained how this would occur, and they have not offered any authority to support their conclusory assertions. As a result, they have abandoned this objection. (*People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 284.)

The petition is granted, and a peremptory writ shall issue commanding the trial court (1) to vacate its order of February 27, 2002, insofar as that order denies FSR's motion to compel inspection and testing of the Ocean Avenue property, (2) to enter a new order granting FSR's motion to inspect and test, (3) to schedule the inspection for a time mutually convenient for FSR's expert and Plaintiffs, and (4) to set a new trial date. Our stay order, dated March 15, 2002, is vacated. Broker F was awarded its costs of these writ proceedings.

CASE #3: STEVEN LARNER AS Co-Trustee, etc., et al., Plaintiffs and Appellants, v. VIRGINIA CLINE, Et Al., Defendants and Respondents. B148497, COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX, filed December 10, 2001. Judges: Coffee, with Gilbert and Yegan concurring.

Appellants purchased property which they later learned was adjacent to an abandoned landfill. They filed a complaint against the realtors who sold them the property for allegedly failing to disclose this defect. The realtors moved for summary judgment on the ground that they had no knowledge of the landfill, thus were under no duty of disclosure. The trial court granted the motion. We affirm.

Stevan and Christine Larner as trustees of the Larner Family Trusts (appellants), filed a complaint for damages against realtors Ken K., Virginia C., Jim B. and Broker B (respondents).

All three realtors were employed by Broker B. Appellants were represented in the transaction by Ken K. The seller, John Grimes, was represented in the transaction by Virginia C. and Jim B.

Appellants purchased a 133-acre cattle ranch from Grimes, intending to convert it to a vineyard and winery. One month after escrow closed, an article appeared in the Santa Barbara News Press concerning an abandoned landfill located across the road from appellants' property. The article suggested that the landfill, which was closed in 1969, might be polluting the groundwater.

One year before appellants purchased the property, Grimes had listed it with Kent T. of Broker C and another agent, T. H. That transaction failed for reasons unrelated to the landfill. At that time, Grimes had filled out a transfer disclosure statement that revealed the existence of the abandoned landfill.

Grimes showed Virginia C. a copy of the transfer disclosure statement from the failed transaction. It was an illegible carbon copy that had little writing on it. Grimes called his previous listing agent, Kent T., to obtain a better copy, but Kent T. indicated that he had lost the file. Virginia C. gave Grimes a blank transfer disclosure statement, which he completed without disclosing the existence of the landfill. After appellants had purchased the property, the original disclosure statement was recovered. It was in the possession of the buyer's agent in the failed transaction.

The existence of the landfill could not be determined by visual inspection because the property looked like a field covered with grass. The real estate purchase agreement signed by the parties specified that the realtors would not investigate the existence of environmental hazards and nuisances, including water and soil contamination. The parties were advised to conduct their own investigations. After consulting with a wine expert, appellants conducted water and soil tests and ordered a physical inspection of the property. After the inspections, they released all contingencies in the purchase agreement.

Following publication of the newspaper article, appellants filed their complaint. They contended that respondents had failed to disclose that the property was located adjacent to a former solid waste dump. This information, they argue, should have been discovered by respondents in the course of the performance of

their fiduciary duties.

Respondents moved for summary judgment or, in the alternative, summary adjudication. The trial court granted the motion, ruling that it was undisputed that none of the realtors were aware of the existence of the landfill. Thus, they had no duty to investigate its existence or obtain the prior disclosure statement.

Motion for Summary Judgment (Appellate Court response)

In their motion for summary judgment, respondents argued that a realtor is only required to make disclosures based on a visual inspection of the property. They contended that there were no facts that would have triggered a duty to investigate a previous listing and obtain a prior transfer disclosure statement.

Attached to respondents' motion were the declarations of Ken. K., Virginia C. and Jim B. They gave detailed descriptions of the real estate transaction and disavowed any knowledge of the closed landfill. Ken K. declared that the multiple listing concerning the Grimes' property did not mention a landfill. Virginia C. was unaware of any communications from the County of Santa Barbara to the real estate community disclosing the presence of a landfill. Also attached was the declaration of Marvin B. Starr, co-author of Miller and Starr's treatise on California Real Estate law. It was Starr's expert opinion that respondents were not required to obtain the prior transfer disclosure statement.

In their opposition to the motion for summary judgment, appellants claim that respondents breached their fiduciary duty because Virginia C. failed to inform them that she had seen the carbon copy of the prior transfer disclosure statement. Because this information was in existence, appellants reason, respondents were under a duty to question their fellow agents concerning the contents of the prior disclosure.

Duty of Disclosure

A real estate broker is under a duty to conduct a reasonably competent and diligent inspection of the property. He must disclose to the purchasers any facts revealed by the investigation that materially affect the value or desirability of the property. (

Easton v. Strassburger (1984) 152 Cal. App. 3d 90, 102, 199 Cal. Rptr. 383.) There is no duty of disclosure, however, where a realtor lacks knowledge of a defect or of facts giving rise to a duty to inquire further. (*Padgett v. Phariss* (1977) 54 Cal.App.4th 1270, 1286 realtor had no knowledge of pending litigation concerning construction defects.)

In opposition to the motion for summary judgment, appellants filed a separate statement of disputed and undisputed facts, challenging respondent's allegations. Following are three of the disputed statements:

1) Respondents alleged they had never seen a completed copy of a transfer disclosure statement from the previous listing agent that disclosed the presence of a landfill. Appellants disputed this statement, claiming that Virginia C. testified she knew where the disclosure from the previous escrow might be located. They contend that she did not tell them about the illegible disclosure statement and failed to explain that it could lead to a complete disclosure by Kent T. and the buyer's agent in the failed transaction.

Virginia C. recounted in her deposition that Grimes had attempted to obtain a more legible copy of the disclosure statement from Kent T., but he had lost the file. Virginia C. testified that she had not asked Grimes if there were other realtors who might have had a copy of the completed Transfer Disclosure Statement. Although she was aware that T. H. was a co-listing agent with Kent T., it did not occur to her to contact him. Contrary to appellants' characterization of this evidence, Cline did not testify that she knew the possible location of the previous disclosure statement, only that she had seen an illegible copy.

2) Respondents alleged that Virginia C. and Jim B. (listing agents at Broker B) had no knowledge of the landfill before the close of escrow. Appellants disputed this statement, asserting that Virginia C. held herself out as knowing the Santa Ynez Valley because she was born and raised there. They claimed that Becker testified at his deposition that he could not remember when he learned of the previous disclosure statement, but that Virginia C. had informed him of its existence.

The portion of Virginia C's deposition included in the record does not contain any reference to her background or her knowledge of the Santa Ynez Valley. Becker testified that Virginia C. told him of an incomplete and illegible statement from the failed transaction. He did not recall when this conversation occurred. There is no factual support for appellants' allegation that Virginia C. had special knowledge of the Santa Ynez Valley. Jim B's knowledge of an illegible disclosure statement does not show that he had knowledge of the landfill.

3) Respondents alleged that there was no evidence that Ken K. (appellants' agent at Broker B), knew about the landfill. Appellants disputed this statement, contending that this information was "common knowledge in the Real Estate Community and had been put into the Multiple Listing Book and Data Base by Wayne N."

Real estate agent Wayne N. testified that he provided information concerning the landfill to the Santa Ynez Multiple Listing Service (MLS). The statement, "Contact agent regarding landfill" was inserted in the MLS data sheet. At that time, T. H. was the listing agent for the ranch. Wayne N. did not communicate with T.H. concerning the landfill. Appellants fail to allege facts to show that Ken K. had direct or imputed knowledge of the contents of the MLS or information in the real estate community concerning the landfill.

Respondents had no fiduciary duty to investigate the circumstances surrounding the previous disclosure statement. In short, they were not required to obtain a prior disclosure statement from a different agent relating to a separate transaction. Appellants have failed to raise a triable issue of fact that respondents knew of the existence of the landfill before the close of escrow. We need not reach appellants' arguments concerning dual agency, the fee dispute or their objections to the declaration of respondents' expert.

Trial court's order granting summary judgment is affirmed. Costs on appeal are awarded to Respondents.

Ethics in real estate transactions are an important part of the practice of real estate in California. The previous cases emphasize the urgency regarding disclosure of both physical defects as well as agency relationships.