NO. 305465

COURT OF APPEALS STATE OF WASHINGTON
DIVISION III

THELMA, KARL, LORI, and KAREN KLOSTER,

Appellants

v.

SCHENECTADY ROBERTS; PACIFIC RIM BROKERS, INC., a corporation; AMERI-TITLE, INC., a corporation; MICHAEL MOORE; FIRST AMERICAN TITLE INSURANCE COMPANY, a corporation; and DOES ONE through FIFTY, inclusive,

Respondents

BRIEF OF RESPONDENTS PACIFIC RIM BROKERS, INC., AND SCHENECTADY ROBERTS

Jeffrey P. Downer, WSBA No. 12625
Christine A. Slattery, WSBA No. 39783
Of Attorneys for Respondents
Pacific Rim Brokers, Inc. and Roberts

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I. INTRODUCTION

In April 2005, plaintiffs-appellants, Thelma, Karl, Lori, and Karen Kloster (the Klosters), bought 2.5 acres of raw land in Pacific Rim Estates in Klickitat County. When Alvin Fred Heany, Jr., had developed the property in 1978-81, he meant to create two side-by-side, 30-foot-wide access easements across neighboring properties to provide 60-foot-wide access to the Kloster parcel. Mr. Heany inadvertently failed to obtain the signature of Michael Fester, one of those neighbors on the plat. Based on this error by Mr. Heany decades earlier, the Klosters allege (1) that the Fester easement is not legally valid; (2) that the seller, respondent Schenectady Roberts Raney, negligently misrepresented the property to them; (3) that Ms. Raney and her real estate broker, Pacific Rim Brokers, Inc. (hereinafter PRB), fraudulently misrepresented or concealed, or negligently misrepresented, the easement's status; (4) that the Klosters were not negligent in failing to determine the status of the easements for themselves; and (5) that the Klosters suffered damages as a result.

The Klosters failed to present the legally required clear, cogent, and convincing evidence of any of these allegations. The trial court correctly dismissed on summary judgment: (1) the Klosters' claims against Ms. Raney, because she knew nothing of the easements' status and never made any representations to the Klosters; (2) the Klosters'

emotional-distress damage claims, because no proof of them existed; and (3) many items of the Klosters' claimed damages, because the law does not permit their recovery, they were unproven, or both. The trial court correctly determined that PRB was the successor in interest to Pacific Rim Properties only, not Mr. Heany individually. The trial court correctly limited the trial testimony of the Klosters' expert to the damages the Klosters could properly recover. The trial court correctly dismissed their fraudulent-concealment and fraudulent-misrepresentation claims after the Klosters rested their case, as no proof of these torts existed. The trial court correctly quashed the summons and complaint served on Mr. Heany.

Most damning to all of the Klosters' claims is the jury's verdict. The jury decided the Klosters' negligent-misrepresentation claim against PRB. The jury unanimously found that **the Klosters' property suffered no difference in market value** as a result of the easement issue:

> QUESTION 1: Do you find by clear, cogent, and convincing evidence that there was any difference between the price the Klosters paid for the property and its actual market value? If yes, state the dollar amount.
>
> **ANSWER:** **YES** **(NO)**
>
> **ANSWER:** **$**_____

CP 3714-16. The jury found that **the Klosters were 100% at fault**:

QUESTION 4: Do you find by clear, cogent, and convincing evidence that Pacific Rim Brokers, Inc., committed the following cause of action concerning the validity of the disputed easement running along the northern 30 feet of WS-146?

Negligent Misrepresentation: **ANSWER:** **YES** (**NO**)

INSTRUCTION: Circle "Yes," or "No." Answer Question 5.

QUESTION 5: Do you find by a preponderance of the evidence that the Klosters' conduct constituted failure to minimize their loss?

ANSWER: (**YES**) **NO**

INSTRUCTION: Circle "Yes," or "No." Answer Question 6.

QUESTION 6: As to each party as to which you answered "Yes" to any part of Questions 4 or 5, set forth those parties' percentage shares of fault. The total percentage shares of fault must equal 100%.

Klosters: 100 %

Pacific Rim Brokers, Inc.: Ø %

TOTAL: 100%

Id. **These jury findings trump all of the Klosters' assignments of error relating to their claims against Ms. Raney and PRB.**

The trial court's award of attorney fees and costs to Ms. Raney and PRB was correct. The Vacant Land Purchase and Sale Agreement (VLPSA) entitles both to the full amount of the fees they sought. For seven and a half years, the Klosters' counsel tilted at windmills and needlessly ran up defendants' litigation expenses. The trial court held that defense counsel's proof of the amount and reasonableness of fees was "the very model of how it should be done." CP 4209.

The Klosters' brief violates the Rules of Appellate Procedure. It raises many issues for the first time on appeal; fails to cite the record properly; asserts facts that are demonstrably false; fails to cite governing law and standards of review; and confuses the law that it discusses. The Klosters' brief is haphazard and in many instances a work of fiction.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Ms. Raney and PRB assign no error to the trial court's decisions.

Issues Pertaining to Assignments of Error

The Klosters misstate the issues on appeal that pertain to Ms. Raney and PRB. Those issues are more correctly stated as follows.

1. Whether the superior court correctly entered summary judgment of dismissal of the Klosters' claims against Ms. Raney for negligent misrepresentation, innocent misrepresentation, fraudulent misrepresentation, and fraudulent concealment regarding the status of access easements serving the property, where:

a. Ms. Raney possessed no knowledge about the easements;

b. Ms. Raney made no representations about the easements;

c. The Klosters never pleaded innocent misrepresentation;

d. As a matter of law, Ms. Raney was not vicariously liable for PRB's alleged misrepresentation regarding the easements; and

e. The jury found that the alleged easement problem caused no damages, so that even if the superior court had denied summary judgment, the Klosters would have recovered nothing at trial against Ms. Raney.

2. Whether the trial court properly quashed service of the complaint served on Mr. Heany when it lacked personal jurisdiction.

3. Whether the trial court properly refused to substitute Mr. Heany as "Doe One" when the Klosters had long known Mr. Heany's identity.

4. Whether the trial court properly dismissed the Klosters' fraud and fraudulent-concealment claims against PRB, where:

a. Not a scintilla of proof existed to show any intent to mislead; and

b. The jury found zero damages, so that the Klosters would have recovered nothing even had the jury considered these intentional torts.

5. Whether the trial court correctly found that PRB had no successor liability for the negligent acts of Mr. Heany in his development activities, and refused to instruct the jury on that issue, where:

a. Any successor liability of PRB was as the successor in interest to Mr. Heany's real estate brokerage, not his development activities;

b. Unrebutted trial testimony showed that Pacific Rim Properties and PRB each was a real estate brokerage only, not a developer;

c. Mr. Heany developed Pacific Rim Estates in his development activities, not through Pacific Rim Properties; and

d. The jury found that the alleged easement problem had caused zero damages, so that even if the superior court held PRB had successor liability, the buyers would have recovered nothing.

6. Whether the trial court correctly awarded reasonable attorney fees against the Klosters, where:

a. The VLPSA's fee provision provides for a fee award in favor of the prevailing party in "any dispute relating to this transaction";

b. The Klosters opposed the fee award based solely on *Boguch v. Landover Corp.*, 153 Wn. App. 595, 215 P.3d 990 (2009), which involved a much narrower fee provision in a listing agreement;

c. The Klosters' new argument that the fee provision merged into the deed is raised for the first time on appeal; and

d. Washington law squarely authorizes an award of attorney fees and costs for tort claims that arise out of such an agreement.

III. STATEMENT OF THE CASE

This action arises from the Klosters' receiving an access easement serving their property that is 30 rather than 60 feet wide. The following history of the dispute is needed to understand the Klosters' claims.

A. Mr. Heany inadvertently failed to obtain all of the required signatures for the easement.

In 1978, Mr. Heany applied to subdivide a parcel of land consisting of approximately 23 acres in Klickitat County, Washington.

Ex. 107; RP 574-75. Short plat 146 was later approved, and consisted of four tracts, each subject to various use reservations and easements. *Id.* In 1979, Mr. Heany filed the long plat subdivision application, incorporating the short plat map, which showed an easement across the northern border of Tract 2 for the benefit of the owners of Lots 1 and 2 (formerly Tract 1). Ex. 98; RP 574-75. In 1981, while awaiting approval of the long plat application, Mr. Heany sold Tract 2 to Mr. Fester. Ex. 52. That sale was subject to the easement reservations under the short plat. *Id.* In 2000, the Rickeys bought Tract 2. Ex. 107. They later sold Tract 2 to the Rohans. RP 606-07. The Kingsford-Smiths purchased Lot 2. RP 620. The Rickeys, Rohans, and Kingsford-Smiths are not parties to this action.

Mr. Heany was a licensed real estate broker, RP 569-70, 855, and operated Pacific Rim Properties, a sole proprietorship, as a real estate brokerage. *Id.*; RP 575. By 1981, Robert Blades was a real estate salesperson at Pacific Rim Properties. RP 855-56. In November 1981, Mr. Blades notarized the signatures of four property owners involved in the short plat as part of the long plat application. RP 868-69; Ex. 98. Mr. Fester's signature was omitted. RP 566-67; Ex. 98. In December 1981, the long plat application for Pacific Rim Estates was approved and recorded. Ex. 98. The long plat map shows an easement across the northern boundary of Tract 2, even without Mr. Fester's signature. *Id.*

Mr. Heany testified that his omission of Mr. Fester's signature was his honest mistake. RP 566-67. This testimony was unrebutted. When the plat application was approved, no Klickitat County agency involved in that process noted that Mr. Fester's signature was omitted. RP 577-79. Mr. Heany believed the County Planning Commission would approve the application only if all requirements, including signatures, were met. *Id.*

B. Pacific Rim Properties was incorporated as PRB.

In April 1982, Mr. Blades and Mr. Heany incorporated Mr. Heany's sole proprietorship, Pacific Rim Properties, as Pacific Rim Brokers, Inc. RP 573. PRB's articles of incorporation state that PRB's purpose was "to engage in the general business of brokering and development of real estate," but neither Pacific Rim Properties nor PRB ever engaged in development; both always acted as real estate brokerages only. RP 574-75. The language regarding "development" was added on the advice of an attorney in the event PRB wanted to expand its business practices. RP 858. Mr. Heany conducted his development business separately, not as part of his real estate brokerage. RP 574-75. One year later, Mr. Heany gave his share of PRB to Mr. Blades, RP 574, and has not been involved with PRB since. RP 574. PRB succeeded only Mr. Heany's real estate brokerage, not his development activities. RP 575.

C. Ms. Raney knew nothing of the easements and made no representations to the Klosters.

Before 2003, Ms. Raney inherited Lots 1 and 2. CP 1569-71. PRB listed both lots for sale on her behalf. *Id*; RP 620-21; RP 872-73. She never discussed easements or access to Lots 1 and 2 with Mr. Blades. CP 1569-71. She had no knowledge of the easement across Tract 2 shown on the plat map or whether the easement had been properly dedicated. *Id.* Until the Klosters sued her, Ms. Raney had never seen this plat map. *Id.*

D. The Klosters' oral statements and contractual agreements in the VLPSA refute their claims.

In January 2005, Karl Kloster called PRB to inquire about Lot 1. RP 987; Ex. 27. Thereafter, real estate agent Adrian Palmer of PRB showed him the lot. RP 613; RP 987. The Klosters allege that Mr. Palmer misrepresented that the property had a 60-foot-wide access easement that was only 30 feet wide. *See* Complaint; RP 988-89. But the Klosters' words and deeds refute this liability theory.

1. The Klosters and their counsel contend that PRB's representations were not false but true.

The Klosters' lawyer, Lance Stryker, in April 2005, and Mr. Kloster in his trial testimony in November 2011, insisted that the easement indeed was 60 feet wide. In short, the Klosters contended that **PRB's representations about the easement were true.**

Mr. Stryker wrote to the Rickeys' lawyer on April 5, 2005,

asserting that Mr. Fester had agreed to the easement in 1981; that "[t]his fact is the undeniable basis on which my clients [the Klosters] are entitled to the existing easements and access to their property," Ex. 107; and that:

> Mr. Fester's signature was not required on the final plat approval because he purchased the property *subject to the final plat approval* and because *he was not one of the original proposers and filers of the preliminary plat.*

Id. (emphasis in original). He called the Rickeys' locked gate across the disputed easement "a malicious nuisance," reiterated that the easement on the Rickeys' land was valid, and threatened to sue them. *Id.* The Klosters never sued the Rickeys to quiet title or otherwise tried to resolve whether they did have a legal right to the easement. RP 1032. They simply abandoned that issue and instead filed this action 17 days later. CP 1-17.

At trial, Mr. Kloster testified that the disputed easement is enforceable. RP 1005-06, 1032, 1044. Asked whether the 60-foot easement was "live, good, and enforceable," Mr. Kloster testified, "Absolutely." RP 1032. He testified that he "didn't feel it was possible that [the Rickeys] could be correct that there was no easement there based on [the Klosters] having the short plat map that showed a recorded easement in Klickitat County." RP 1005. He considered the easements valid because "they're recorded with the county." RP 1006.

2. The VLPSA's terms defeat the Klosters' claims.

When the Klosters decided to buy the property, they executed the

VLPSA with Ms. Raney, Ex. 27, which contained several provisions that defeat their current misrepresentation claims. (1) The VLPSA was expressly contingent on the Klosters' conducting a feasibility study to ensure that the land suited their needs and provided that the Klosters were responsible for contacting all state, county, and city agencies, as well as utility districts and conducting any necessary utility studies. Ex. 27 at ¶ 6. (2) The Klosters agreed in the VLPSA "they are not relying on any representations or advice by the real estate licensees involved in this transaction ... and ... have satisfied themselves as to the terms and conditions of this sale." *Id.* at ¶ 20. (3) The VLPSA urged the Klosters to retain an attorney to advise them concerning all aspects of the transaction, which involved legal issues that were beyond a real estate agent's or broker's expertise. *Id.* (4) The VLPSA contained an integration clause, which confirmed there were no verbal (*i.e.*, oral) agreements or understandings that modified its written terms. *Id.* at ¶ 21(c).

The VLPSA also provided for an award of attorney fees:

> ATTORNEYS' FEES/COSTS AND MEDIATION. If the Buyer, Seller, or any real estate licensee or broker involved in this transaction is involved in any dispute relating to this transaction, any prevailing party shall recover reasonable attorneys' fees and costs (including those for appeals) which relate to the dispute.
>
> ...

> All terms of this Agreement, which are not satisfied or waived prior to closing, shall survive closing. These terms shall include, but not be limited to, representations and warranties, **attorney[']s fees and costs**, disclaimers, repairs, rents and utilities, etc.

Id. at ¶¶ 16, 21(g).

The Klosters ignored the cautionary language in the VLPSA to which they had contractually agreed. RP 1046-50. They contacted no state, county, or other governmental agencies. RP 1048-49, 1108. They did not retain a lawyer. RP 1050-51. They did not obtain a survey, RP 1049, or a hazardous-waste inspection, or an appraisal, or engineering and soil studies. *Id.* They did not investigate the easement issue whatsoever. *See* RP 1046-51. They did not ask that the VLPSA provide for the alleged 60-foot-wide easement. *Id.* They now claim that the 60-foot width of the easement was crucial to their purchase of the property, yet they did nothing to investigate its status or protect their alleged right it.

Only after the Klosters bought the property, and the Rickeys disputed the Klosters' right to use the easement across the Rickeys' property, did the Klosters investigate the property as the VLPSA had provided. RP 1081, 1094. After searching the records at the county clerk's office, the Klosters learned that while they had a 30-foot easement over the Kingsford-Smiths' property, Mr. Fester's signature had not been obtained for the 30-foot easement over the Rickeys' property, bringing the

validity of that easement into dispute. RP 1081, 1094-95, 1098; Ex. 98.

E. The Klosters sued PRB, Ms. Raney, First American Title Company, and AmeriTitle.

On April 22, 2005, the Klosters sued Ms. Raney and PRB for negligent misrepresentation, fraudulent misrepresentation, and fraudulent concealment, based on the Klosters' new assertion that the easement was not valid. CP 1-17. They alleged that ¶ 16 of the VLPSA entitled them to attorney fees. CP 10. The Klosters also sued First American Title Company and AmeriTitle on several legal theories. CP 1-17. First American counterclaimed for declaratory judgment on coverage. CP 27.

F. The trial court quashed the summons and complaint the Klosters served on Mr. Heany.

In September 2007, the Klosters served a summons and complaint on Mr. Heany. CP 1056-63. Mr. Heany moved to quash, arguing that the trial court lacked personal jurisdiction over him because he had not been named in the complaint. *Id.* The court granted the motion. CP 1083. The Klosters then moved to amend their complaint to substitute Mr. Heany as "Doe One." CP 1084-97. The trial court denied the Klosters's motion.

G. The trial court dismissed on summary judgment the claims against Ms. Raney and several damage claims.

1. The Klosters failed to prove any claim against Ms. Raney.

On September 12, 2007, the Klosters moved for summary

judgment as to their claims again Ms. Raney, arguing that she was liable as a matter of law under a theory of innocent misrepresentation and vicarious liability, regardless of her knowledge of the nonrecorded access easement. CP 973. The trial court denied the Klosters' motion. CP 1050.

On August 4, 2010, Ms. Raney moved for summary judgment of dismissal of all claims against her. CP 1558. She argued that because she did not have any knowledge of the plat map or its contents, and did not communicate with the Klosters, she could not have misrepresented any information as to easements. CP 1561-67. In response, the Klosters offered no proof that Ms. Raney knew anything about the easement dispute, CP 1695-96, but maintained that she was liable for innocent misrepresentation and vicarious liability. CP 1695-96. The trial court granted Ms. Raney's motion. CP 1809-10.

2. The trial court held that PRB was successor in interest to Pacific Rim Properties only, not Mr. Heany as a developer.

On December 8, 2008, the Klosters moved in limine to preclude PRB from offering testimony or argument denying that it is the successor in interest to Pacific Rim Properties and faces successor liability. CP 1124-26. The trial court granted the Klosters' motion. Its order provided:

> Defendant PACIFIC RIM [Brokers, Inc.] is the successor-in-interest to PRP [Pacific Rim Properties] as the continuation and incorporation of the business of PRP's

> principals Blades and Heany, and is subject to successor liability herein.

CP 1307. Significantly, this order imposed successor liability on PRB, a corporation, **only** as to Pacific Rim Properties, a sole proprietorship. *Id.*

3. The trial court dismissed the Klosters' claims for emotional distress.

Mr. Kloster alleged that this dispute arising from his purchase of Lot 1 caused him anxiety and depression. *See* Complaint; CP 2037. But he suffered anxiety and depression before buying Lot 1. CP 1856; CP 2037. None of Mr. Kloster's treatment records associated his symptoms of anxiety and depression with his purchase of Lot 1. *Id*; CP 1870. Both his physician and his psychologist testified they could not attribute Mr. Kloster's symptoms of anxiety and depression to his purchase of Lot 1. *Id.* The other Klosters did not seek treatment for emotional distress.

On October 05, 2010, PRB moved for partial summary judgment of dismissal of all of the Klosters' claims for emotional distress, because the Klosters failed to present any evidence of objective symptomatology linking emotional distress to the purchase of Lot 1. CP 1824-25. In opposition, the Klosters argued that Mr. Kloster's deposition testimony and the broad testimony of his doctors regarding his general anxiety was enough to prove objective symptomatology. CP 1974-79. The trial court disagreed and dismissed the emotional-distress claims. CP 2246.

4. The trial court dismissed several damage items.

The Klosters itemized the damages they sought from PRB:

1. Purchase price of the property: $39,530.91.

2. Cost of Acquisition of the Property: Approximately $1,911.70.

3. Ongoing Cost of Ownership of the Property: Not Determined.

4. Time and Expense of Property Location: Approximately $2,500.00.

5. Loss of Interest on Funds to Purchase Property: Not Determined.

6. Loss of Business Opportunity in Property Purchase: Approximately $40,000 on land purchase/sale, and approximately $120,000 on building construction development/sale.

7. Loss of Time and Expense in Attempts to Develop Property: $287.05 for easement survey, approximately $3,250.00 for 50 hours of skidder use, approximately $2,500.00 for labor for 100 hours of land clearing and preparation, and $1,300.00 for unusable water connection.

...

10. Being defrauded into purchase of property: $25,000.00 per person.

11. Loss of Consortium: $25,000.00 per person.

12. Attorney's Fees: In an amount according to proof.

13. Triple damages: In an amount according to statute and proof.

14. Costs of Suit: In an amount according to proof.

CP 2326-28. PRB moved for summary judgment of dismissal of these items of damages because the law did not permit them, they lacked supporting proof, or both. CP 2308-21. The trial court dismissed all of these items of damages except the cost of cure, the cost of the easement survey, and the cost of an allegedly unusable water connection, CP 2753-58, and reserved ruling on loss of consortium. CP 2757. Finally, the trial court held that the claims for attorney fees and costs were not damages, but rather are properly issues for the court following the jury's verdict. *Id.*

H. The trial court properly limited expert testimony to damages that were legally recoverable, dismissed lingering unsupported claims, and dismissed claims at the close of the Klosters' case.

1. The trial court dismissed the Klosters' claims for loss of consortium.

Shortly before trial, PRB asked the court to dismiss the Klosters' claim for loss of consortium. RP 504. Because the Klosters had failed to present any proof of this claim, the trial court dismissed it. *See* RP 593.

2. The trial court limited Darren Eckman's testimony to the cost of cure.

At trial, the Klosters offered testimony of expert Darren Eckman as to the cost to create a public or private roadway, complete with an emergency-vehicle turnaround. RP 941. PRB argued that the Klosters

were limited to testimony regarding the cost to cure the alleged access problem by making the properly recorded 30-foot easement on the Kingsford-Smith property usable, rather than to improve it. *Id.* The trial court had previously held that the easement on the Kingsford-Smith property gave the Klosters legal and physical access to their property. CP 2908. PRB and First American argued that because this undisputed easement served a single lot, the correct standard was the cost to create a driveway. RP 941. The trial court agreed that Mr. Eckman was relying on the wrong standard for his calculations of damages, RP 948, 954-55, but permitted Mr. Eckman to testify to the cost to build an improved gravel driveway over the undisputed easement running across Lot 2, RP 950, which Mr. Eckman testified would cost $16,640. RP 966.

3. The trial court dismissed the Klosters' intentional-tort claims at the end of their case.

At the end of the Klosters' case in chief, PRB moved for a directed verdict as to all claims against it. RP 1118-29. The trial court granted PRB's motion as to the Klosters' claims for fraudulent misrepresentation and fraudulent concealment, finding that the Klosters had not produced a "scintilla" of proof of either intentional tort. CP 1135-36.

4. The trial court held that PRB was the successor in interest to Pacific Rim Properties only.

PRB moved to dismiss any claim that PRB had successor liability

for anything other than Pacific Rim Properties, because there was no proof that PRB was a successor to Mr. Heany in his capacity as a developer. RP 1137-38. The Klosters argued that the trial court had held on December 8, 2008 that PRB was liable for Mr. Heany's mistake. RP 1139-41. This argument misstated that ruling. *Id.* The trial court held that PRB was not liable for Mr. Heany's error. RP 1141. Even if that holding differed from the previous ruling, the court noted that it was permitted to reconsider its previous position and had learned additional, dispositive facts. *Id.*

I. The jury found for PRB as to liability and damages.

The remaining claim against PRB, for negligent misrepresentation, went to the jury. CP 3714-16. The jury found that the Klosters had not proven negligent misrepresentation; that the Klosters were 100% at fault; and that **the property suffered no difference in market value**. In short, the Klosters suffered no damages. *Id.*

J. Based on the VLPSA, the trial court awarded PRB and Ms. Raney reasonable attorney fees.

After the verdict, PRB and Ms. Raney moved for attorney fees and costs under the VLPSA. CP 3720-32. Collectively, PRB and Ms. Raney had incurred $258,816.50 in fees and $11,101.58 in costs defending this action for seven and a half years. *Id.* The Klosters conceded that those fees and costs were reasonable, CP 4193-98, and argued only that Ms. Raney and PRB were not entitled to a fee award at all, because the

Klosters had not sued to enforce the terms of the VLPSA. *Id.* The trial court disagreed and granted PRB's and Ms. Raney's motion for attorney fees and costs in full, CP 4207-11; noted that the Klosters' own complaint had sought fees pursuant to the VLPSA, *id.*; found that PRB's and Ms. Raney's fees were reasonable; and stated that their proof of their fees was "correct — in fact, the very model of how it should be done." CP 4209.

IV. SUMMARY OF ARGUMENT

The trial court correctly (1) quashed the summons and complaint served on Mr. Heany; (2) dismissed the Klosters' claims against Ms. Raney, because she knew nothing of the condition of the easements and never made any representations to the Klosters; (3) dismissed the Klosters' emotional-distress claims, because there was no proof of these damages; (4) held that PRB was the successor in interest to Pacific Rim Properties brokerage only, not Mr. Heany as developer; (5) dismissed the Klosters' intentional-tort claims against PRB for lack of proof; (6) limited Mr. Eckman's testimony to damages the Klosters could properly recover; and (7) awarded PRB and Ms. Raney their full attorney fees and costs.

V. ARGUMENT

This court may affirm on any ground supported by the record. *Syrovy v. Alpine Res., Inc.*, 80 Wn. App. 50, 54-55, 906 P.2d 377 (1995). Here, the jury found that the Klosters suffered zero damages. CP 3714-16.

A. The Klosters never proved that any defendant made a false representation of fact.

As to all of the Klosters' claims — innocent misrepresentation, negligent misrepresentation, fraudulent misrepresentation, and fraudulent concealment — they first must prove that either Ms. Raney or PRB made a false statement of fact. The Klosters have failed at this fundamental level. Mr. Stryker in April 2005, and Mr. Kloster in his November 2011 trial testimony, insisted that the easement was 60 feet wide. Ex. 107; RP 1005-06, 1032, 1044. Mr. Kloster testified that he "absolutely" has a valid 60-foot easement because it is recorded with the county. Similarly, just prior to filing this action, Mr. Stryker asserted that because Mr. Fester purchased the property subject to final plat approval, his signature was not required on the plat map; that the easement was valid; and that the Rickeys were illegally interfering with the Klosters' full use of it. Ex. 107.

Thus both Mr. Kloster and Mr. Stryker contended that **PRB's representations about the easement were true.** They thereby undermined the required proof by clear, cogent, and convincing evidence that any defendant made a false statement. Accordingly, their claims against Ms. Raney and PRB must fail.

B. The trial court properly quashed the summons and complaint served on Mr. Heany.

The Klosters argue that the trial court erred when it quashed the

summons and complaint served on Mr. Heany. A complaint must name a defendant for the court to acquire personal jurisdiction over the defendant. *Prof'l Marine Co. v. Underwriters at Lloyd's*, 118 Wn. App. 694, 705, 77 P.3d 658 (2003). When the Klosters served Mr. Heany, he was not named as a defendant in the complaint. The trial court properly quashed the summons and complaint.

The Klosters then moved to amend their complaint and substitute Mr. Heany for defendant "Doe One." The designation of "John Doe" is used "as a fictitious name to designate a party until his real name can be ascertained." *State v. Rossignol*, 22 Wn. 2d 19, 25, 153 P.2d 882 (1944). Here, Mr. Heany's involvement regarding the nonrecorded easement was long known by the Klosters, as his name appeared as the developer of the short plat, the long plat, and the seller of record for the lots. His name was not unknown to the Klosters when they filed the complaint and, thus, he could not be properly substituted for "Doe One." The Klosters did not seek to join Mr. Heany as a necessary party under CR 19 or 20 below and they are not permitted to do so for the first time on appeal. RAP 2.5.

C. The trial court properly dismissed all claims against Ms. Raney.

The Klosters argue that the trial court erred when it dismissed their claims against Ms. Raney, arguing that she: (1) is vicariously liable for

Mr. Blades's alleged misrepresentations; (2) is liable for innocent misrepresentation; and (3) failed to convey clear title due to the nonrecorded access easement in violation of RCW 64.04.030. App. Br. at 24-28. These arguments fail as a matter of law.

This court reviews a summary judgment order de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The Klosters' vicarious-liability claim fails as a matter of law, because a seller is not vicariously liable for the representation of her real estate agent. RCW 18.86.090(1)(a). The Klosters' innocent-misrepresentation fails because they (1) never pleaded it, (2) failed to identify any misrepresentations by Ms. Raney, (3) never met nor spoke with Ms. Raney, and (4) did receive clear, marketable title to their property.

1. Under RCW 18.86.090(1)(a) Ms. Raney cannot be vicariously liable.

RCW 18.86.090 defeats the Klosters' vicarious-liability theory:

> (1) A principal is not liable for an act, error, or omission by an agent or subagent of the principal arising out of an agency relationship:
>
> (a) Unless the principal participated in or authorized the act, error, or omission.

RCW 18.86.090(1)(a). Ms. Raney never discussed access to the property or the disputed easement with Mr. Blades, CP 1570, and did not participate in or authorize any representations PRB may have made

regarding the disputed easement and is not liable for any such representations. The one letter Mr. Blades wrote to Ms. Raney describing the property and the condition of a road along the southern border of Lot 1 does not amount to her "participation." CP 991.

2. Ms. Raney made no representations.

The Klosters argue that Ms. Raney is liable for innocent misrepresentation. App. Br. at 26. This argument fails as a matter of law.

First, **the Klosters never pleaded innocent misrepresentation**. Innocent misrepresentation is a cause of action distinct from negligent misrepresentation, fraud, and fraudulent concealment. Restatement (Second) of Torts, § 552C(1) (1977). A complaint must identify the legal theories on which plaintiff seeks to recover. *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 25, 974 P.2d 847 (1999). A party who fails to plead a cause of action may not "finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along," *id.*, or "amend his complaint through arguments in his brief in opposition to a motion for summary judgment." *Kirby v. City of Tacoma*, 124 Wn. App. 454, 472, 98 P.3d 827 (2004) (citation omitted).

Second, **the Klosters never proved innocent misrepresentation.** To do so, they must show: (1) a misrepresentation of material fact; (2) to induce the other to act or to refrain from acting; and (3) plaintiff's reliance

on the misrepresentation. *Hoffman v. Connall*, 108 Wn.2d 69, 72-73, 736 P.2d 242 (1987). But Ms. Raney made no representations. She never met or spoke to the Klosters or discussed access to either lot with PRB. CP 93-95, 1570. She made no misrepresentations, innocent or otherwise. Moreover, the information regarding the easement was readily available to the Klosters. Absent a "special relationship," a seller does not have a duty to disclose information easily discoverable by the buyer. *Austin v. Ettl*, WL 4510867 at *8-9 (Oct. 2, 2012).

3. Ms. Raney conveyed clear and marketable title.

The Klosters argue that the easement problem renders Ms. Raney liable for failure to convey good title in violation of RCW 64.04.030. They are wrong as a matter of law. They have clear and marketable title.

The law observes an important distinction between economic lack of marketability, which relates to physical use of the property, and title marketability, which relates to legal rights and incidents of ownership. *Dave Robbins Const., LLC. v. First Am. Title Co.*, 158 Wn. App. 895, 901, 249 P.3d 625 (2010) (citation omitted). A landowner can hold perfect title to land that is without value and can have marketable title to land while the land itself is not marketable. *Id.* Here, no one else has a recorded ownership interest in the Klosters' property. No defects affect the Klosters' legal rights and incidents of ownership. No one has made any

claim against the property that impairs its clear title. The Klosters have both legal access and physical access to the property. CP 2908; RP 493. That the Klosters have an access easement 30 rather than 60 feet wide is not a title defect and does not render title unmarketable.

D. PRB is not liable for Mr. Heany's failure to obtain Mr. Fester's signature.

The Klosters' brief is unclear, but they appear to argue that the trial court erred in refusing to impose successor liability on PRB for Mr. Heany's failure to obtain Mr. Fester's signature, in dismissing their intentional-tort claims against PRB, or both. *See* App. Br. at 33. On both issues, they are wrong as a matter of law.

1. The Klosters fail to assign error or present substantive argument on this issue.

If the Klosters seek to appeal the trial court's dismissal of their fraud and fraudulent-concealment claims at the end of their case in chief, they fail to assign error to that decision. Argument unsupported by an assignment of error does not present an issue for review. *Petition of Port of Seattle v. Port of Seattle*, 80 Wn.2d 392, 399, 495 P.2d 327 (1972).

Moreover, the Klosters' argument is fatally deficient on its merits. They fail to cite CR 50(a) or a single case addressing either intentional tort. App. Br. at 28-33. They must provide "argument in support of the issues presented for review, together with citations to legal authority and

references to relevant parts of the record." RAP 10.3(a)(5). This court may ignore arguments that the Klosters fail to support with authority or meaningful analysis. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (inadequate authority); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (inadequate argument); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (both).

2. PRB is successor in interest to Pacific Rim Properties only, not Mr. Heany as a developer.

The Klosters seem to argue that the trial court erred by dismissing their successor-in-interest liability theory seeking to impose liability on PRB for fault of Mr. Heany. RP 1137-41. The Klosters base their argument on their continued misreading of the trial court's September 9, 2009 Order. That Order is narrower than they assert. It provides only:

> Defendant PACIFIC RIM [Brokers, Inc.] is the successor-in-interest to PRP [Pacific Rim Properties] as the continuation and incorporation of the business of PRP's principals Blades and Mr. Heany, and is subject to successor liability herein.

CP 1307. Significantly, this Order imposes successor liability on PRB, a corporation operating as a real estate brokerage, **only** as the successor in interest to Pacific Rim Properties, a sole proprietorship operating as a real estate brokerage. Any successor liability for the conduct of Mr. Heany or Mr. Blades was solely for their conduct as principals of Pacific Rim Properties. The order did **not** impose successor liability on PRB for any

and all conduct of Mr. Heany, in any capacity. The Klosters' reading of this Order overstates and misstates that Order.

But even if the Klosters' were right, the trial court may reverse or modify a pretrial ruling at any time prior to the entry of final judgment. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 37, 864 P.2d 921, 934-35 (1993). And the grant or denial of a motion in limine is within the discretion of the trial court. *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976).

The Klosters cite *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 482-83, 209 P.3d 863 (2009), for the notion that PRB is successor in interest not only to Pacific Rim Properties but also to Mr. Heany's development activities. PRB does not quarrel with *Cambridge Townhomes*. Unfortunately, the Klosters try to stretch the *Cambridge Townhomes* rule far beyond the Court's holding.

In *Cambridge Townhomes*, the Court determined that an entity had successor liability because "the undisputed facts show that [the successor corporation] is a mere continuation of the sole proprietorship." *Id.* at 483. This holding does not help the Klosters. Regardless of whether PRB is the mere continuation of the Pacific Rim Properties real estate brokerage, it is not the successor in interest to Mr. Heany as a real estate developer. Mr. Heany testified that he developed Pacific Rim Estates in his individual

capacity as a real estate developer, not as part of his brokerage activities at Pacific Rim Properties. RP RP 574-75. That testimony was unrebutted. To get around Mr. Heany's unrebutted testimony, the Klosters cite *Freehe v. Freehe*, 81 Wn.2d 183, 184, 500 P.2d 771 (1972), *overruled by Brown v. Brown*, 100 Wn.2d 729, 731, 675 P.2d 1207 (1984). *Freehe* is wholly irrelevant; it addresses interspousal tort immunity and has been overruled.

PRB was a continuation of **Pacific Rim Properties** only. Pacific Rim Properties and PRB have always been real estate brokerages only. Mr. Heany acted not as a real estate broker for a principal, but in a separate business as a developer who was the principal himself, when he created this plat in 1981. The trial correctly held that PRB had no successor liability for Mr. Heany's development activities.

Even if the Klosters are correct that PRB was liable for Mr. Heany's actions, any error is harmless. The jury found that the Klosters suffered zero damages. CP 3714-16. Had this theory been presented to the jury, the Klosters still would have recovered nothing.

3. PRB did not have imputed or constructive knowledge of the nonrecorded access easement.

Conflating issues of successor liability and constructive knowledge, the Klosters contend that the trial court erred when it held that

> imputed/constructive knowledge [was] insufficient to hold Pacific Rim Brokers liable for failing to disclose the

> nonrecorded access easements even though it found sufficient evidence to show actual knowledge of the nonrecorded easement[.]

App. Br. at 31 (emphasis in original). This assertion grossly misstates the ruling. The trial court never held that either Mr. Heany or Mr. Blades had actual knowledge of the defective easement. The Klosters rely on the trial court's ruling, 10 months before trial, denying PRB's motion for partial summary judgment of dismissal of the Klosters' intentional-tort claims. App. Br. at 32; Dec. 10, 2010 RP 10-11. The court emphasized that it was denying PRB's motion "on the thinnest of reeds," so that the Klosters could prove these claims at trial. *Id.* But at trial, the Klosters failed, and the claims were properly dismissed after the Klosters rested. RP 1135-36.

The Klosters argue that PRB had imputed or constructive knowledge of the defective easements because it is the successor to Mr. Heany, not just Pacific Rim Properties. But PRB is not the successor to Mr. Heany as a developer. Moreover, Mr. Heany testified that he did not know about the nonrecorded access easement until 2005 when the Klosters called him and informed him of the dispute with the Rickeys. RP 597. PRB could not have imputed knowledge of something that Mr. Heany himself did not know.

Furthermore, constructive or imputed knowledge is inconsistent with the Klosters' allegations. It addresses potential liability between a

principal and its agent, not a principal and a third party. Generally, a principal is chargeable with notice of facts known to its agent. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 268-69, 215 P.3d 990, 1011 (2009). For an agent's knowledge to be imputed to the principal, an agent must have actual or apparent authority in connection with the subject matter "either to receive it, to take action upon it, or to inform the principal or some other agent who has duties in regard to it." *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn. 2d 654, 665-66, 63 P.3d 125, 130 (2003) (citation omitted).

4. The trial court properly refused the Klosters' instruction on constructive knowledge.

The Klosters assert that the trial court should have instructed the jury on constructive knowledge. App. Br. at 32. This court should ignore that assertion because the Klosters fail to assign error to the trial court's ruling and fail to offer any argument or citation to authority. RAP 10.3(a)(5); *Petition of Port of Seattle*, 80 Wn.2d at 399.

The Klosters proposed the following instruction:

> Constructive or Imputed Knowledge: Constructive or imputed knowledge is knowledge which a person does not actually know but objectively should know or has reason to know. If a person exercising reasonable care could have known a fact, he or she is deemed to have knowledge of that fact.

RP 1205-06. That proposed instruction did not accurately state the law,

was confusing, and was properly refused. *Suriano v. Sears, Roebuck & Co.*, 117 Wn. App. 819, 825-26, 72 P.3d 1097, 1100 (2003) (proper jury instructions allow the parties to argue their theories, are not misleading, and when read as a whole properly inform the jury of the applicable law).

Again, any error the Klosters perceive was harmless. The jury found that the Klosters suffered zero damages. Even had this instruction gone to the jury, the Klosters would have recovered nothing.

E. The trial court properly dismissed several items of damage.

1. Mr. Kloster failed to prove emotional distress.

The Klosters argue that the trial court erred when it dismissed the Klosters' claims for emotional distress, including Mr. Kloster's claims. App. Br. at 53. But Mr. Kloster failed to produce any evidence that his anxiety and depression were caused by, or aggravated by, the nonrecorded easement. The other Klosters' claims fail because they did not seek medical care for their alleged emotional distress.

To prove negligent infliction of emotional distress, a plaintiff must show that the defendant's conduct fell below the standard of care, that there was a foreseeable risk of harm resulting from the defendant's breach, and that the plaintiff suffered damages as a result of the defendant's breach. *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976). While mental and emotional harm are compensable, plaintiff must show

objective symptomatology. *Id.* at 436. To meet this proof requirement, the "emotional distress must be susceptible to medical diagnosis and **proved through medical evidence**." *Berger v. Sonneland*, 144 Wn.2d 91, 113, 26 P.3d 257, 269 (2001) (citation omitted; emphasis added).

The Klosters' conclusory emotional-distress claim is the very type of evidence the objective-symptomatology requirement seeks to prevent:

> *Hunsley*'s objective symptomatology limitation is valuable as corroborating evidence to fend off fraudulent claims. However, uncorroborated allegations of physical manifestations cannot serve to further this goal. Rather, they are the epitome of subjective symptoms: unverified assertions of pain that have not been supported by outside evidence or authoritative testimony.

Hegel v. McMahon, 136 Wn.2d 122, 133-34, 960 P.2d 424 (1998). This comports with settled Washington law that medical testimony is necessary to prove causation of a physical symptom. *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1969); *Miller v. Staton*, 58 Wn.2d 879, 886, 365 P.2d 333 (1961) (medical causation testimony must rise to more-likely-than-not standard).

Mr. Kloster suffered emotional distress long before this 2005 real estate transaction, wholly unrelated to this dispute. CP 1856; CP 2037. Mr. Kloster may not offer his own self-reporting; he is not qualified to testify as to the medical cause of his emotional distress. *O'Donoghue*, 73 Wn.2d at 824. The Klosters offered no medical testimony of objective

symptomatology or that Mr. Kloster's symptoms more likely than not resulted from this dispute. The trial court properly dismissed these claims.

The Klosters argue that they are subject to a lower standard because they allege emotional distress as a form of damages, as opposed to liability for negligent infliction of emotional distress. App. Br. at 55. Below, the Klosters had argued that Mr. Kloster's self-serving testimony and his physicians' equivocations were enough to meet the objective-symptomatology requirement. They now argue that they simply sought emotional-distress damages, as opposed to making a claim for negligent infliction of emotional distress. App. Br. at 55. This issue is raised for the first time on appeal. Thus, this court must disregard it. RAP 2.5.

Moreover, the Klosters' argument fails on its merits. Had they pursued mere emotional-distress damages, rather than a claim for negligent infliction, they still must prove an intentional or willful tort before they may recover such damages. *Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 482, 805 P.2d 800, 803 (1991) (citation omitted). The trial court properly dismissed the Klosters' intentional-tort claims at the end of the Klosters' case in chief. Proof of an intentional tort, the premise for emotional-distress damages, is entirely absent.

Finally, the Klosters attribute emotional distress not to PRB's conduct, but to that of their neighbors, First American, and AmeriTitle.

App. Br. at 55; CP 1837-38. PRB has no legal duty to control the actions of third parties over which it had no control. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997).

2. The trial court properly dismissed Mrs. Kloster's claim for loss of consortium.

The Klosters assert, in a single, unsupported sentence, that the trial court erred in dismissing Mrs. Kloster's loss-of-consortium claim before trial. App. Br. at 56. Because the Klosters fail to support this argument with any argument or citation to authority, it should be ignored. RAP 10.3(a)(5); *Cowiche Canyon*, 118 Wn.2d at 809; *Elliott*, 114 Wn.2d at 15.

This argument also fails on its merits as a matter of law. Loss of consortium generally refers to loss of love, affection, and companionship between the plaintiff and the injured person due to a tort committed against the impaired spouse. *Burchfield v. Boeing Corp.*, 149 Wn. App. 468, 494, 205 P.3d 145 (2009) (citation omitted). While most claims arise out of physical injury, a physical injury is not required. *Id.* at 494. In *Burchfield*, The Court of Appeals permitted a loss-of-consortium claim arising from disability discrimination. *Id.* Because Washington's law against discrimination did not limit recovery to damages arising from bodily injury and involved strong public-policy implications, loss-of-consortium damages could be properly awarded to the spouse. No such

liberality or public-policy considerations arise here. The trial court correctly dismissed the loss-of-consortium claims of all plaintiffs.

On this issue as well, any perceived error is harmless. The jury found that PRB did not commit negligent misrepresentation and that the Klosters suffered no damages. Had this claim gone to the jury, the Klosters would have recovered nothing.

F. The trial court correctly followed Washington's settled measure of damages.

The Klosters argue that the trial court erred when it limited the Klosters' damage claims. App. Br. at 56-57. They fail to clarify whether they appeal the trial court's decision to limit their potentially recoverable damages against all defendants, or just those against First American/AmeriTitle. They cite only cases involving title insurers. App. Br. at 56-57. They fail to cite the key Washington cases in Washington addressing the measure of damages for the causes of action the Klosters alleged against PRB. *See Janda v. Brier Realty*, 97 Wn. App. 45, 50, 984 P.2d 412 (1999) (negligent misrepresentation); *Tennant v. Lawton*, 26 Wn. App. 701, 704, 615 P.2d 1305 (1980) (fraud); *Lyall v. DeYoung*, 42 Wn. App. 252, 260, 711 P.2d 356 (1985). If the Klosters appeal the trial court's rulings on the measure of damages as against PRB, their argument fails as a matter of law. The Klosters' Statement of Damages itemized

damages they claimed against PRB. Their damages included the purchase price of the property, the cost of acquiring the property, the ongoing cost of ownership, the cost of locating the property, and being subjected to fraud. The trial court properly dismissed most of these items because the law does not permit their recovery, or they were unproven, or both.

1. The measure of the Klosters' damages is clear, specific, and narrow.

One who proves negligent misrepresentation is entitled to the difference between the price paid and the market value of the property in its actual condition, *Janda*, 97 Wn. App. at 50, plus pecuniary loss. One who proves fraudulent concealment or misrepresentation is entitled to "benefit of the bargain" damages, *Tennant*, 26 Wn. App. at 704, *i.e.*, the difference between the property's value as represented, and its value in its actual condition. *Id.* Where benefit-of-the-bargain damages do not make plaintiff whole, plaintiff may recover actual damages that follow as a reasonable and ordinary consequence of the harm. *Id.* Under either *Janda* or *Tennant*, where the cost to cure is less than the plaintiff's claimed damages, the court awards the lesser sum. *Lyall*, 42 Wn. App. at 260.

This measure of damages is **fixed as of the time of the sale**. *Tennant*, 26 Wn. App. at 703-04; *Dixon v. MacGillivray*, 29 Wn.2d 30, 185 P.2d 109 (1947). Thus, the meter does not continue to run over time.

2. The Klosters may recover only specific and narrow types of out-of-pocket pecuniary loss.

Under Washington law, the Klosters may recover out-of-pocket expenses only if (1) the foregoing measures of damages fail to make them whole **and** (2) those pecuniary losses are a "natural and ordinary consequence of the wrong." *Tennant*, 26 Wn. App. at 705; *see also Janda,* 97 Wn. App. at 52-53. Because Washington law permits difference-in-market-value damages, it rejects most consequential damages as duplicative. *Salter v. Heiser*, 39 Wn.2d 826, 833-34, 239 P.2d 327 (1951).

The trial court correctly limited the Klosters' potential damages to **only** that portion of their purchase price that represents the **difference** between the price they paid and the actual value of the property as of this 2005 purchase. And if the jury found the cost of cure to be less, the Klosters could recover the **lesser** sum. Their other items of damages were duplicative or specifically prohibited under *Tennant*, *Janda*, and *Lyall*.

G. The trial court properly limited Mr. Eckman's testimony to those damages the Klosters could seek.

The Klosters argue that the trial court erred in limiting the testimony of their expert, engineer Darren Eckman, regarding the cost to provide access to the Lot 1. The Klosters fail to support this argument with any citation to authority or meaningful argument, and it should be ignored. RAP 10.3(a)(5); *Saunders*, 113 Wn.2d at 345. But even if this

court considers this argument, it fails as a matter of law.

Whether a person is qualified to testify as an expert witness is within the sound discretion of the trial court, and the trial court's decision will be affirmed absent a manifest abuse of discretion. *Oliver v. Pac. Northwest Bell Tel. Co.*, 106 Wn.2d 675, 683, 724 P.2d 1003 (1986). Mr. Eckman's original opinion as to the cost to create drivable access to Lot 1 included the cost to create a turn-around for emergency vehicles, based on his interpretation of Title 12 of the Klickitat County Code. RP 940-42. He clearly relied on the wrong code section, the Klickitat County Code Road Standards for a public or private **roadway**. RP 941; KCCRS 12.30.020(2). This disputed easement is by no means a roadway; it is a **driveway** only. RP 942; KCCRS 12.30.050(2).

Moreover, the Klosters sue based on an alleged misrepresentation that there was a valid easement over Tract 2, Short Plat WS-146 benefitting Lot 1. They claim they should have received a 60-foot-wide, partly graveled driveway to their property. Even if this were a "roadway," the Klosters would never be entitled to Mr. Eckman's original design because no one ever represented to them that they would be buying a paved public roadway with an ambulance turnaround. The Klosters offered expert testimony for damages that went beyond mere "cost of cure" and amounted to **improvements**. The trial court properly limited

Mr. Eckman's testimony to comport with the correct measure of damages.

The Klosters baldly state, without citation to authority or supporting argument, that the trial court's decision to limit Mr. Eckman's testimony "was another violation of the Klosters' rights to due process and a fair trial." App. Br. at 57. This grandiose assertion should be ignored. This court will not review constitutional claims absent considered argument. "Such 'naked castings into the constitutional sea' do not command judicial consideration and discussion." *Fria v. Dep't of Labor & Indus.*, 125 Wn. App. 531, 535, 105 P.3d 33 (2004) (citation omitted).

Again, even if the court's limitation on Mr. Eckman's testimony were error, it is harmless. The jury found in favor of PRB and that the Klosters suffered no damages. Had Mr. Eckman testified as the Klosters wished, the Klosters still would have recovered nothing.

H. The trial court acted within its discretion in awarding PRB and Ms. Raney their full attorney fees and costs.

The Klosters contend that the trial court erred when it awarded Ms. Raney and PRB their full attorney fees and costs below. They make two arguments. First, *citing Boguch v. Landover Corp.*, 153 Wn. App. 595, 215 P.3d 990 (2009), the Klosters argue that Ms. Raney and PRB may not recover attorney fees based on a contract when the claim sounds in negligence. This argument contravenes settled case law and basic tenets

of contract law. Second, the Klosters argue that the VLPSA "merged" into the statutory warranty deed at closing and was extinguished. This argument is also legally wrong, and since the Klosters offer it for the first time on appeal, it should be ignored. RAP 2.5.

This court reviews a trial court's award of attorney fees for an abuse of discretion. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 415-16, 157 P.3d 431, 435 (2007) (citing *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996)). Trial courts exercise their discretion on articulable grounds and on a record that is adequate to permit appellate review of the fee award. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Thus, the trial court must enter findings of fact and conclusions of law to support the award. *Id.* at 435.

Ms. Raney and PRB offered extensive and detailed findings of fact and conclusions of law to support their motion for attorney fees. The Klosters assign error to the trial court's conclusions of law regarding the reasonableness of the hourly rate charged by PRB's and Ms. Raney's attorneys, the number of hours defense counsel worked, and the segregation of fees and costs between Ms. Raney and Pacific Rim Brokers. But the Klosters offer no argument or citation to authority in support of these assignments of error. They should be ignored. RAP 10.3(a)(5); *Saunders*, 113 Wn.2d at 345. Moreover, the Klosters did not

object on any of these bases below, and this court should ignore an issue raised for the first time on appeal. RAP 2.5. Thus, the only question is whether Ms. Raney and PRB receive 100% of the attorney fees and costs awarded to them below, or zero. Because, as shown below, the Klosters' attempts to avoid this fee award are groundless, this court should affirm the trial court's award of fees and costs.

1. The VLPSA entitles Ms. Raney and PRB to an award of attorney fees and costs.

The VLPSA that the Klosters and Ms. Raney executed provides at ¶ 24: "If the Buyer, Seller, or any real estate licensee or broker involved in this transaction is involved in any dispute relating to this transaction, any prevailing party shall recover reasonable attorneys' fees and costs." Ex. 27. "Under Washington law, for purposes of a contractual attorneys' fee provision, an action is on a contract if the action arose out of the contract and if the contract is central to the dispute." *Seattle-First Nat'l Bank v. Wash. Ins. Guar. Assn.*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991); *see also Stryken v. Panell*, 66 Wn. App. 566, 572, 832 P.2d 890 (1992) (reasonable attorney fees awarded under contract, even though contract held to be void). This VLPSA used equally broad language by awarding attorney fees in "any dispute relating to this transaction." *See also Brown v. Johnson*, 109 Wn. App. 56, 58-59, 34 P.2d 1233 (2001),

accord; *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855, 942 P.2d 1072 (1997) (fees awarded under REPSA in tort claim).

The Klosters' claims clearly arose out of the VLPSA in which Ms. Raney sold Lot 1 to them. They contractually agreed to pay Ms. Raney and PRB their reasonable attorney fees and costs if she prevailed in a lawsuit arising out of the sale of Lot 1. Ms. Raney was a prevailing party: All claims against her were dismissed on summary judgment. PRB was a prevailing party: At the close of the Klosters' case, the trial court dismissed their claims of fraudulent concealment and fraudulent misrepresentation against PRB, and the jury found in favor of PRB on the Klosters' sole remaining claim, for negligent misrepresentation.

2. *Boguch* involved a much narrower fee provision than this VLPSA contained and does not apply.

The Klosters' attempt to avoid this fee award rests solely on *Boguch*. But the fee provision in *Boguch* was strict and narrow, enforceable only in an action "to enforce any of the terms of this Agreement" – in other words, in a breach-of-contract action only. *Boguch*, 153 Wn. App. at 607. In contrast, the fee provision in this VLPSA applies broadly to "any dispute relating to this transaction," CP 3744, whether in tort or contract.

In *Boguch*, a vendor sued a real estate brokerage firm and its

agents for common law negligence and professional negligence. *Boguch*, 153 Wn. App. at 603. The plaintiff lost, and the broker sought attorney fees under the terms of the listing agreement, set out above. *Id.* at 606-07. The trial court awarded the broker attorney fees and costs, including some time devoted to the defense of the negligence claim. *Id.* The *Boguch* court reversed the fee award because this specific fee provision applied only if a party brings a breach-of-contract claim regarding a specific provision of the contract, not merely a negligence claim. *Id.* at 615-16. Contrary to the Klosters' argument, the *Boguch* court did not hold that any prevailing party may recover fees only for breach of contract. The *Boguch* court held only that where the fee provision allows a fee award only for actions to "enforce the terms of the contract," that is the type of claim that is needed to support a fee award. *Id.* at 615. *Boguch* does not, and cannot, stand for the proposition that a contractual fee provision applies only to a party who prevails on a breach-of-contract claim. Any such reading of *Boguch* contravenes settled Washington law. *See, e.g., Seattle-First Nat'l Bank*, 116 Wn.2d at 413; *Deep Water Brewing, LLC v. Fairway Resources*, 152 Wn. App. 229, 277, 215 P.3d 990 (Div. III 2009); *Brown*, 109 Wn. App. at 59; *Hudson v. Condon*, 101 Wn. App. 866, 877, 6 P.3d 615 (Div. III 2000); *Stryken*, 66 Wn. App. at 572.

The Klosters make no effort to distinguish *Brown*, a case factually

on all fours with Ms. Raney's and PRB's fee award. In *Brown*, the same court that later decided *Boguch* held that a property buyer's misrepresentation claim, a tort, was properly a basis for an attorney-fee claim under a REPSA. *Id.* at 59; *see also Edmonds*, 87 Wn. App. at 855 (fee award under REPSA in tort claim of broker's breach of fiduciary duty). The fee provision in *Brown* applied to any "suit concerning this Agreement." *Brown*, 109 Wn. App. at 59. The *Brown* court held that the buyer's misrepresentation claim was "on the contract" because "it arises out of the parties' agreement to transfer ownership of the property to [the buyer]," and because the REPSA was central to the buyer's claims. *Id.* at 59. If the Klosters' interpretation of *Boguch* were accurate, *Boguch* would have necessarily overruled *Brown*. It did not. A property buyer's tort claim of misrepresentation supports a fee award under a fee provision like this one because it expressly so provides. *Id.* at 58.

The Klosters's claims of negligent and fraudulent misrepresentation and fraudulent concealment arose out of the parties' agreement to sell Ms. Raney's property to the Klosters. The VLPSA was central to this dispute. This action is "a dispute relating to this transaction." Thus this action is "on the contract." *Id.* at 59. The Klosters' own complaint, which explicitly prayed for an award of attorney fees under the VLPSA, defeats their position. CP 10-11. Ms. Raney and

PRB are entitled to all of the fees and costs the trial court awarded.

3. The deed Ms. Raney provided to the Klosters did not extinguish the VLPSA's fee provision.

The Klosters next argue that the statutory warranty deed Ms. Raney provided to the Klosters superseded the VLPSA and extinguished the enforceability of the attorney fee provision. Because the Klosters raise this issue for the first time on appeal, it should be ignored. RAP 2.5. The Klosters cite only one case to support this argument, *Barber v. Peringer*, 75 Wn. App. 248, 877 P.2d 223 (1994). The Klosters' entire argument on this point is a single, conclusory assertion that "the VLPSA is merged into the statutory warranty deed was extinguished – as was the enforceability of the attorney fee clause." App. Br. at 59. This court may refuse to consider an assignment of error on appeal if it is not supported by adequate argument or authority. *Saunders*, 113 Wn.2d at 345.

On its merits, this argument fails as a matter of law. The Klosters agreed to an anti-merger clause, which specifically provides that the attorney fee provision of the VLPSA **survives closing**. CP 3745.

In *Failes v. Lichten*, 109 Wn. App. 550, 37 P.3d 301, 303 (2001), the buyer sued the seller after closing for fraudulent concealment, misrepresentation, and/or mutual mistake of fact. *Id.* at 553. As here, the complaint prayed for attorney fees and costs pursuant to the REPSA. *Id.*

Defendants prevailed and sought an attorney-fee award based on the REPSA. *Id.* The plaintiff argued that the REPSA had merged into the deed and was unenforceable. *Id.* The trial court agreed; defendants appealed. *Id.* The *Failes* court reversed, because the parties had agreed to an anti-merger clause in the REPSA that provided that "all terms of this [REPSA], which are not satisfied or waived prior to closing, shall survive closing," including "attorney's fees and costs." *Id.* at 555. The same is true here. The Klosters contractually agreed that "All terms of this Agreement which are not satisfied or waived prior to closing," explicitly including the term for "attorneys fees and costs," "shall survive closing." Ex. 27. This fee provision was neither "satisfied nor waived prior to closing"; it was not even mentioned in the deed. *See* CP 517. Like the plaintiff in *Failes*, the Klosters wrongly rely on *Barber*. *Barber* is easily distinguishable; the REPSA there did not contain an anti-merger clause. *Barber*, 75 Wn. App. at 253-54. The VLPSA here does. This fee provision did not merge into the deed and remains fully enforceable.

I. The trial court's Findings of Fact and Conclusions of Law must stand as verities on appeal.

Unchallenged findings of fact are verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8-9, 93 P.3d 147, 151 (2004). Even challenged findings of fact, if supported by substantial evidence, are verities on

appeal. *Id.* Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding. *Id.* This court reviews conclusions of law de novo. *Id.*

First, the Klosters argue that the trial court erred generally when it entered findings of fact and conclusions of law following the jury's verdict. App. Br. at 5. But the court did not simply enter findings of fact and conclusions of law following the jury's verdict; it entered these findings and conclusions specifically to support its award of attorney fees and costs to Ms. Raney and PRB. *Mahler*, 135 Wn.2d at 435 (trial court must enter findings and conclusions to support an attorney-fee award.)

Moreover, the Klosters present argument regarding only three of the 12 findings of fact to which they assign error: findings 12, 13 and 13. (Two findings were numbered 13 due to a typographical error.) The Klosters also refer to finding of fact 23, but they did not assign error to that factual finding. The Klosters appear to base their objections on their arguments that the trial court erred when it (1) dismissed their claims against Ms. Raney, (2) dismissed their fraudulent-misrepresentation and fraudulent-concealment claims, and (3) refused to impose successor liability on PRB for Mr. Heany's failure to perfect the easement. But the Klosters misunderstand the purpose of these findings and conclusions; they were entered because the law requires them to reflect the basis of the

trial court's fee award, *Mahler*, 135 Wn.2d at 435, and they did so.

The Klosters assign error to the entry of findings of fact 14, 15, 16, 17, 18, 19, 20, 21, and 22, but they offer no argument or authority as to those findings, so those assignments of error should be ignored. RAP 10.3(a)(5); *Saunders*, 113 Wn.2d at 345. Again, the record fully supports these findings. The Klosters' real quarrel with these findings appears to be that they lost on the issues these findings discuss, not that the findings fail to state accurately what happened. These findings are accurate and are verities on appeal. *In re Estate of Jones*, 152 Wn.2d at 8-9.

J. This court should award fees to Ms. Raney and PRB.

Pursuant to RAP 18.1(a), Ms. Raney and PRB ask that this court assess against the Klosters, all attorney fees and expenses Ms. Raney and PRB have incurred since the superior court's entry of the fee award. The VLPSA's fee provision expressly provides that "any prevailing party shall recover reasonable attorneys' fees and costs (including those for appeals) which relate to the dispute." CP 27 at 16. A contractual provision for an award of attorney fees at trial, such as the VLPSA here, supports an award of attorney fees on appeal. *West Coast Stationary Engineers Welfare Fund v. City of Kennewick*, 39 Wn. App. 466, 694 P.2d 1101 (1985).

VI. CONCLUSION

The trial court correctly (1) quashed the summons and complaint

against Heany; (2) dismissed the Klosters' claims against Ms. Raney; (3) dismissed the Klosters' emotional-distress claims; (4) held that PRB was the successor in interest to Pacific Rim Properties brokerage only; (5) dismissed the Klosters' intentional-tort claims against PRB; (6) limited Mr. Eckman's testimony to damages the Klosters could properly recover; and (7) awarded PRB and Ms. Raney their full attorney fees and costs. PRB respectfully requests that this court affirm the trial court's decision below, and award PRB its attorney fees on appeal.

Respectfully submitted this 5th day of October, 2012.

LEE SMART, P.S., INC.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on October 8, 2012, I caused service of the foregoing pleading on each and every attorney of record herein:

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