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STATE OF WASHINGTON
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NO. 98346-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALAN MARGITAN AND GINA MARGITAN, husband and wife,

Petitioners,

v.

RISK MANAGEMENT, INC., a Washington Corporation, ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent Allstate Property and Casualty Insurance Company ("Allstate"), the Defendant in the trial court and Respondent in this Court, files this Answer to the Petition for Review filed by Allen and Gina Margitan ("Appellants" or "Margitans").

II. COURT OF APPEALS DECISION

The unpublished Court of Appeals decision was filed on March 3, 2020. (Appendix 1)

III. ISSUES PRESENTED FOR REVIEW

Allstate acknowledges the issues that Appellants present for review, but believes they are more appropriately formulated as follows:

1. When the Petition does not raise an issue of substantial public interest should review be denied under RAP 13.4(b)(4)?

2. When the Petition fails to demonstrate that there is a conflict with a decision of the Washington Supreme Court should review be denied under RAP 13.4(b)(1)?

3. Should this Court decline to consider new issues raised for the first time in Appellants' Petition for Review when the issues were never raised in the trial court or the Court of Appeals and this Court is limited to the

questions and theories presented before and determined by those courts?

IV. STATEMENT OF THE CASE

A. Introduction

Unlike the Statement of the Case in Appellant's Petition, the recitation of the facts in the Court of Appeals opinion is an accurate and fair description of the facts and procedure in this case. Op. at Pgs. 3-5. The Appellants' Petition glosses over the facts for the alleged claims of misrepresentation and fails to mention that no claim for misrepresentation was pleaded in the Complaint or raised in the Response to Allstate's Motion for Summary Judgment. CP 3, 1021 – 1043. An argument that was neither pleaded nor argued to the superior court on summary judgment cannot be raised for the first time on appeal." *Johnson v. Lake Cushman Maint. Co.*, 5 Wn. App. 2d 765, 780, 425 P.3d 560 (2018), *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008).

B. Background of the Case

Allstate prevailed in the trial court on a summary judgment motion regarding insurance coverage for a quiet title lawsuit involving an easement. CP 1200-1201. The Margitans were insured under an Allstate Homeowners and Personal Umbrella Policy. CP 174.

There was no basis for coverage under the Allstate polices. There

was no "occurrence" or "property damage" as defined under the policies. CP 1200-1201, TR 45. The Margitans argued that there is coverage under the "Additional Protection" section of the Allstate Homeowners Policy. This section does not apply when there is no coverage under the policy. The trial court determined that there was no duty to defend or indemnify under the policies, and found that the Additional Protection" section of the Allstate Homeowners Policy was only applicable when there was coverage under the policy. CP 1200-1201, TR 44-45.

The Margitans argued in their supplemental briefing that Clifford Walton, an Allstate agent, misrepresented the "Additional Protection" provision of the Homeowners Policy by stating that this section would provide coverage for their attorney fees that they incurred. CP 1022. This issue was not properly reserved for review as the Margitans did not include any legal argument on the "Additional Protection" provision in their Response brief (wrongly titled "Reply Brief) to the Summary Judgment Motion. CP 1021 – 1043.

The Margitans failed to submit any proof of harm in their Summary Judgment Response for the consumer protection and bad faith claims. CP 1021 – 1043. The Court of Appeals found that there were no admissible facts in the record supporting their contentions they suffered a

compensable loss resulting from Mr. Walton's misstatement of coverage. Opinion, Pg. 5.

Allstate acted reasonably in all respects and the claims for breach of contract, breach of insurance policy, bad faith pursuant to RCW 48.01.030, the CPA, and WAC 284-30-330 claims were properly dismissed. CP 1200-1201. TR 36 – 45.

C. Court of Appeals Decision

The Court of Appeals decision set forth the following key facts:

> In 2012, the Margitans' neighbors, Mark and Jennifer Hanna, brought a quiet title action to resolve an easement dispute. The Hannas sought a declaratory judgment that two access easements across their property in favor of the Margitans were invalid. The Margitans advised Mr. Walton of the lawsuit and asked him to contact Allstate to provide a defense.
>
> When deposed, Mr. Walton recalled meeting Mr. Margitan in 2012 and Mr. Margitan asking if his policy covered the Hannas' claim. Mr. Walton did not recall what he told Mr. Margitan or whether he called Allstate. Instead, he testified about his practice: If he cannot answer an insured's coverage question, he calls an Allstate claims advocate. If the advocate says there is coverage, he opens a file. He testified he did not open a file for the Margitans. So either he did not call Allstate in 2012 or the claim advocate said there was no coverage.
>
> In 2013, the Hannas amended their complaint to allege the Margitans' rental house on their property violated a building restriction and should be torn down. The Margitans advised Mr. Walton about the amended claim

and again asked him to contact Allstate to provide a defense.

When deposed, Mr. Walton recalled meeting Mr. Margitan at some point and discussing coverage for the tear-down claim. Mr. Walton did not recall what he told Mr. Margitan. Mr. Walton explained that a tear-down claim is not something he would consider the policy to cover. He said he probably would not have called Allstate to ask about coverage, but he "may have." CP at 1115.

The Margitans successfully defended against the Hannas' claims and recovered a sizeable judgment against them.

In 2016, the Hannas filed an action in bankruptcy court to remove the Margitans' judgment lien against them. In 2017, the Margitans called Allstate from Mr. Walton's office. The Margitans then informed Allstate about the Hannas' 2012 lawsuit to declare their two access easements invalid and the 2014 tear-down claim.

Allstate responded promptly with two letters. The first denied it had a duty to defend any of the claims under the homeowners' policy. The second, sent five days later, explained why none of the claims were covered under the "Additional Protection" section of the policy. CP at 263.

The Margitans brought suit against RMI and Allstate. They alleged the same causes of actions against both defendants: breach of contract, breach of insurance policy, and bad faith pursuant to RCW 48.01.030, the CPA, and WAC 284-30-330. About one year later, RMI and Allstate moved for summary judgment. The trial court reviewed the submitted materials and granted the defendants' motions. The Margitans moved for reconsideration, and the trial court denied their motion.

Opinion, Pgs. 3-5.

The claims alleged in the Complaint against Allstate were breach of contract, breach of insurance policy, and bad faith pursuant to RCW 48.01.030, the CPA, and WAC 284-30-330. CP 3. Notably, and contrary to the facts set stated forth in Appellants' Petition, there was no claim for misrepresentation in the Complaint.

Breach of Contract

The Court of Appeals found that there was no breach of contract under the policy because the claims did not allege property damage arising from an occurrence. Opinion, Pgs. 4-5. The Court explained that that the claims asserted against the Margitans were not an "occurrence" and not "property damage" – rather the claims asserted a declaration of easement rights, injunctive relief to tear down a rental building, and removal of a lien, as shown below:

> Allstate was not obligated to provide a defense. Even construed liberally, none of the claims asserted by the Hannas were covered under the insurance policy. Under the policy, Allstate promised to pay damages that the Margitans become legally obligated to pay because of bodily injury or property damage arising from an occurrence. The simplest reason the Hannas' claims never invoked policy coverage is because the claims did not seek damages. Rather, the claims sought a declaration of easement rights, injunctive relief to tear-down a rental building, and removal of a lien. An

> additional reason why the Hannas' claims never invoked policy coverage is because the claims did not describe "property damage" arising from an "occurrence," within the policy definitions of those terms.

Id.

No Misrepresentation Claim Pleaded

The Court of Appeals emphasized that there was no misrepresentation claim in the complaint, and therefore no claim for misrepresentation against Clifford Walton, the insurance agent for Risk Management, Inc., as shown below:

> D. Negligent Misrepresentation by RMI
>
> ¶29 During oral argument on appeal, the ***Margitans*** argued RMI was liable for negligently misrepresenting the scope of the policy's coverage. The ***Margitans*** did not assert this theory in their complaint or in their summary judgment response. The trial court explicitly determined this. *See* CP at 1239, para. 4.
>
> ¶30 "An argument that was neither pleaded nor argued to the superior court on summary judgment cannot be raised for the first time on appeal." *Johnson*, *5 Wn. App. 2d at 780*; *accord Sourakli*, 144 Wn. App. at 509. For this reason, we decline to consider the argument.

Opinion, Pg. 5.

There Was No Harm Established By The Margitans and No Vicarious Liability for Allstate

The Court of Appeals found that Allstate was not vicariously

liable for any acts of the agent because there was no evidence of harm. Opinion, Pg. 5. The Margitans argue that the agent told them that their policy would cover their legal expenses if they were sued except for business, fraud, or criminal matters. Opinion, Pg. 3. The Court found that they established no harm, and wryly noted that there is no evidence they would have sought different coverage and certainly no evidence they would have found it, as shown below:

> b. Not vicariously liable because no evidence of harm
>
> ¶27 For the Margitans to prevail on their extra-contractual bad faith claims, they must show they were harmed by the insurer's purported bad faith. Coventry Assocs. v. Am. States Ins. Co., 136 Wn.2d 269, 276, 961 P.2d 933 (1998).
>
> ¶28 The Margitans argue they were harmed because they relied on Mr. Walton's representation of what the policy covered. They contend, had they known the representation was untrue, they (1) would have sought different insurance coverage or (2) defended differently against the Hannas' claims. In support of these two contentions, they cite clerk's papers at 143, line 6 and clerk's papers at 1152 lines 4-13. The first citation is to a page in Allstate's motion for summary judgment; the second citation is to a page in a deposition word index. We find no admissible facts in the record supporting the Margitans' contentions they suffered a compensable loss resulting from Mr. Walton's misstatement of coverage. *There is no evidence they would have sought different coverage and certainly no evidence they would have found it*.

Opinion, Pgs. 9-10 (emphasis supplied)

V. ARGUMENT AGAINST REVIEW

A. Standard of Review

The considerations governing acceptance of discretionary review by this Court are identified in RAP 13.4(b). Appellants have based their petition on RAP 13.4(b)(1) and (4).

B. Review Should Not Be Granted Under RAP 13.4(b)(4)

Appellants argue that review should be granted for this case under RAP 13.4(b)(4) for the reason that it is a matter of public importance to establish that an insurer is required to act in good faith and may be bound by the acts of its agents.

A misrepresentation claim was not pleaded in the complaint or raised in the response to the motion for summary judgment. CP 3, CP 1021 – 1043. This issue was, at best, an afterthought, and the case was not brought on this basis.

The Court considers three factors to decide whether an issue involves substantial public interest: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is

likely to recur." *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994).

For the first factor in *Westerman*, this dispute involves a private matter. It involves coverage for an easement dispute between two neighbors. It is not a decision of great public importance.

For the second factor in *Westerman*, this Court has recently addressed the issue of the insurer being bound by the acts of the agent in *T-Mobile USA, Inc. v. Selective Ins. Co. of Am.*, 194 Wn.2d 413, 450 P.3d 150 (2019). This case was decided in October of 2019 in response to a certified question from the Ninth Circuit. The Washington Supreme Court held that an insurer is bound by representations regarding a party's additional insured status contained in a certificate of insurance issued by the insurer's authorized agent, even where the certificate contains language disclaiming any effect on coverage.

This Court in *T-Mobile* stated the general rule for an insurance company being bound by the acts of its agents, is that "[A]an insurance company is bound by all acts, contracts, or representations of its agent, whether general or special, which are within the scope of [the agent's] real or apparent authority notwithstanding they are in violation of private instructions or limitations upon [the agent's] authority, of which the

person dealing with [the agent], acting in good faith, has neither actual nor constructive knowledge." *Id*. at 240. The Opinion cited *Pagni v. N.Y. Life Ins. Co*., 173 Wash. 322, 349-50, 23 P.2d 6 (1933) and *Chi. Title Ins. Co. v. Office of Ins. Comm'r*, 178 Wn.2d 120, 136, 309 P.3d 372 (2013) in support. *Id*. The facts in this case will add nothing to established Washington law under the second factor in *Westerman* - whether an authoritative determination is desirable to provide future guidance to public officers.

For the third factor in *Westerman*, the issue of the insurance agent allegedly stating that the policy would cover private legal fees is remote. As previously explained, the Complaint did not include a claim of misrepresentation and this issue was not properly presented in the record before the trial court. CP 3.

Further, as a practical matter, an unpublished appellate court opinion, hinging on the specific evidentiary facts of a case, does not constitute a matter of public concern to the same degree as a published case in light of GR 14.1, which states that, "[a] party may not cite as an authority an unpublished opinion of the Court of Appeals." RAP 13.4(b)(4) therefore provides no support for accepting discretionary review.

There is nothing novel or new presented by the facts in the record of this case for review to be accepted in this case under RAP 13.4(b)(4). This is to be contrasted to the *T-Mobile* decision which was of wide public importance due to the widespread use of certificates of insurance.

There are additional reasons to deny review. This easement dispute has generated multiple appeals to the Court of Appeals and Federal Bankruptcy Courts requiring considerable judicial resources, time, and expense. See for example *Margitan v. Spokane Reg'l Health Dist.*, 192 Wn. App. 1024 (2016), *Hanna v. Margitan*, 193 Wn. App. 596, 373 P.3d 300 (2016), and *In re Hanna*, 2018 Bankr. LEXIS 1146 (B.A.P. 9th Cir., Apr. 13, 2018). The Margitans are frequent litigants and it is simply not reasonable for them to believe that a homeowners insurance policy will cover the costs of private legal defense when there is not a covered loss under the policy terms.

C. Review Should Not Be Granted Under RAP 13.4(b)(1)

Appellants fail to satisfy the standard set forth under RAP 13.4(b)(1). Appellants fail to show any conflict with a decision of the Supreme Court. The Margitans in their brief fail to provide the court with any citations to the record showing that there is a conflict and

make little argument under this section of RAP13.4. There is no conflict with any Washington Supreme Court decision on the record before the court.

D. The Court Should Not Consider the New Issues that Appellants Are Raising For the First Time on Appeal or In the Petition for Review

Appellants raise several issues in their Petition for Review that were never addressed in their complaint or the response to the summary judgment proceeding. Review of these issues and questions is not merited because they are not properly before the Court.

The Margitans did not allege a claim for misrepresentation in their complaint. CP 3. This cause of action was not at issue in the summary judgment proceedings. The Margitans did not prove damages as a result of Allstate's alleged regulatory violations in their response to the motion for Summary Judgment.

The Declaration that Alan Margitan submitted in response to Allstate's Motion for Summary Judgment does not provide any specific evidence that the Margitans suffered any specific harm as a result of Allstate's alleged regulatory violations. CP 1046-1086. Both the bad faith claim and the CPA claim require actual damages to be proven. In *Coventry Associates v. American States Ins. Co.,* 136 Wn.2d 269, 277,

961 P.2d 933 (1998) the court stated that to succeed on a claim of bad faith, an insured must show he was harmed by the insurer's bad faith conduct. To succeed on a CPA claim, a plaintiff must show (1) an unfair or deceptive act or practice in trade or commerce that impacts the public interest, and (2) resulting injury to the claimant's business or property. *Am. Mfrs. Mut. Ins. v. Osborn*, 104 Wn. App. at 697.

The Court of Appeals decision found that the Margitans did not prove their damages in response to the motion for summary judgment. Opinion Pg. 5. They cannot supplement their damages argument in the Petition for Review with arguments unsupported by citations to the record.

It is well established in Washington law that new issues cannot be raised for the first time in a petition for review. RAP 2.5(a); *Heg v. Alldredge*, 157 Wn.2d 154, 162, 137 P.3d 9 (2006) (noting this Court will not review an issue raised for first time in a petition for review, citing RAP 2.5(a)); *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) (same).

Thus, the Court is limited to the questions and theories presented before and determined by the Court of Appeals, and to claims of error directed to that court's resolution of such issues. *People's Nat'l Bank v.*

Peterson, 82 Wn.2d 822, 829-30, 514 P.2d 159 (1973) (declining to review issues and theories raised for the first time in a petition for review where they were not presented in the trial court or the Court of Appeals).

Since Appellants did not raise these issues or pose these questions in a timely fashion at the trial court or in the Court of Appeals, it is too late for them to do so in his petition. The Court should decline to address them.

VI. CONCLUSION

Appellants mislead the Court on the facts of this case and seek to distort Washington law. The Court of Appeals correctly affirmed the trial court. Review should be denied.

Dated this 22nd day of May 2020.

FOLEY SAMPSON AND NICHOLES, PLLC

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I. APPENDIX

Margitan v. Risk Mgmt., Inc., No. 36517-4-III, 2020 Wash. App. LEXIS 525 (Ct. App. Mar. 3, 2020)

CERTIFICATE OF SERVICE

I, Douglas F. Foley, certify that I mailed, or caused to be mailed, a copy of the foregoing Answer to the Petition for Review, postage prepaid, via U.S. Mail and by email, to the following counsel of record at the following address:

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DATED this 22nd day of May, 2020.

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Document (1)

1. *Margitan v. Risk Mgmt., Inc., 2020 Wash. App. LEXIS 525*
   Client/Matter: -None-
   Search Terms: Allstate Margitan Risk Management
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	Court: State Courts > Washington

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Margitan v. Risk Mgmt., Inc.

Court of Appeals of Washington, Division Three

December 4, 2019, Oral Argument; March 3, 2020, Filed

No. 36517-4-III

Reporter
2020 Wash. App. LEXIS 525 *; 2020 WL 1027968

ALLAN **MARGITAN** ET AL., *Appellants*, v. **RISK MANAGEMENT** INC., ET AL., *Respondents*.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *Margitan v. Risk Mgmt., Inc., 2020 Wash. App. LEXIS 626 (Wash. Ct. App., Mar. 3, 2020)*

Prior History: [*1] Appeal from Spokane Superior Court. Docket No: 17-2-04653-6. Judge signing: Honorable John O. Cooney. Judgment or order under review. Date filed: 11/29/2018.

***Margitan** v. Spokane Reg'l Health Dist., 192 Wn. App. 1024, 2016 Wash. App. LEXIS 355 (Jan. 21, 2016)*

Core Terms

coverage, summary judgment, trial court, insurance policy, bad faith, promptly, property damage, tear-down, costs

Counsel: For Appellants: J. Gregory Lockwood, J Gregory Lockwood PLLC, Spokane, WA.

For Respondents: Kathleen Anne Nelson, Lewis Brisbois Bisgaard & Smith LLP, Seattle, WA; Douglas Fredrick Foley, Foley Sampson & Nicholes, PLLC, Vancouver, WA.

Judges: Authored by Robert Lawrence-Berrey. Concurring: Laurel Siddoway, George Fearing.

Opinion by: Robert Lawrence-Berrey

Opinion

¶1 LAWRENCE-BERREY, C.J. — Allan and Gina **Margitan** brought a lawsuit against **Risk Management**, Inc. (RMI) and **Allstate** Property and Casualty Insurance Company (**Allstate**) for breach of contract, breach of insurance policy, and bad faith under RCW 48.01.030, the Consumer Protection Act (CPA) chapter 19.86 RCW, and *WAC 284-30-330*. RMI and **Allstate** successfully moved for summary judgment dismissal of the claims. We affirm.

FACTS

¶2 The **Margitans** are homeowners. Cliff Walton operates and partly owns RMI. RMI sells insurance for **Allstate** as its "captive agency," which means **Allstate**

has the right to prevent RMI from selling policies for other insurers.

¶3 In June 2010, Mr. Walton advised the ***Margitans*** to purchase homeowners' insurance offered by ***Allstate*** that would **[*2]** provide legal representation in the event they were sued, provided it did not involve business, criminal issues, or fraud. The ***Margitans*** decided to purchase this recommended insurance.

¶4 The terms of the policy include the following provisions: … .

> ***Section II—Family Liability and Guest Medical Protection***
>
> **Coverage X**
>
> ***Family Liability Protection***
>
> ***Losses We Cover Under Coverage X*:**
>
> Subject to the terms, conditions and limitation of this policy, **we** will pay damages which an **insured person** becomes legally obligated to pay because of **bodily injury** or **property damage** arising from an **occurrence** to which this policy applies, and is covered by this part of the policy.
> … .
>
> 8. **Occurrence**—means an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in **bodily injury** or **property damage**.
>
> 9. **Property damage**—means physical injury to or destruction of tangible property, including loss of its use resulting from such physical injury or destruction.
> … .
>
> ***Additional Protection***
>
> **We** will pay, in addition to the limits of liability:
>
> 1. **Claim Expense**
>
> **We** will pay:
>
> a) All costs **we** incur in the settlement of any claim or the defense **[*3]** of any suit against an **insured person**;

Clerk's Papers (CP) at 262, 242, 263 (underlining added).

¶5 In 2012, the ***Margitans***' neighbors, Mark and Jennifer Hanna, brought a quiet title action to resolve an easement dispute. The Hannas sought a declaratory judgment that two access easements across their property in favor of the ***Margitans*** were invalid. The ***Margitans*** advised Mr. Walton of the lawsuit and asked him to contact ***Allstate*** to provide a defense.

¶6 When deposed, Mr. Walton recalled meeting Mr. ***Margitan*** in 2012 and Mr. ***Margitan*** asking if his policy covered the Hannas' claim. Mr. Walton did not recall what he told Mr. ***Margitan*** or whether he called ***Allstate***. Instead, he testified about his practice: If he cannot answer an insured's coverage question, he calls an ***Allstate*** claims advocate. If the advocate says there is coverage, he opens a file. He testified he did not open a file for the ***Margitans***. So either he did not call ***Allstate*** in 2012 or the claim advocate said there was no coverage.

¶7 In 2013, the Hannas amended their complaint to allege the ***Margitans***' rental house on their property violated a building restriction and should be torn down. The ***Margitans*** advised Mr. Walton about the amended claim and again asked him to contact **[*4]** ***Allstate*** to provide a defense.

¶8 When deposed, Mr. Walton recalled meeting Mr. ***Margitan*** at some point and discussing coverage for the tear-down claim. Mr. Walton did not recall what he told Mr. ***Margitan***. Mr. Walton explained that a tear-down claim is not something he would consider the policy to cover. He said he probably would not have called ***Allstate*** to ask about coverage, but he "may have." CP at 1115.

¶9 The ***Margitans*** successfully defended against the Hannas' claims and recovered a sizeable judgment against them.

¶10 In 2016, the Hannas filed an action in bankruptcy court to remove the ***Margitans***' judgment lien against them. In 2017, the ***Margitans*** called ***Allstate*** from Mr. Walton's office. The ***Margitans*** then informed ***Allstate*** about the Hannas' 2012 lawsuit to declare their two access easements invalid and the 2014 tear-down claim.

¶11 ***Allstate*** responded promptly with two letters. The first denied it had a duty to defend any of the claims under the homeowners' policy. The second, sent five days later, explained why none of the claims were covered under the "Additional Protection" section of the policy. CP at 263.

¶12 The ***Margitans*** brought suit against RMI and ***Allstate***. They alleged the same causes of actions against both **[*5]** defendants: breach of contract, breach of insurance policy, and bad faith pursuant to RCW 48.01.030, the CPA, and *WAC 284-30-330*. About one year later, RMI and ***Allstate*** moved for summary judgment. The trial court reviewed the submitted materials and granted the defendants' motions. The ***Margitans*** moved for reconsideration, and the trial court denied their motion.

¶13 The ***Margitans*** timely appealed.

ANALYSIS

A. STANDARD OF REVIEW

¶14 On review of a summary judgment order, we engage in the same inquiry as the trial court. *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co., 165 Wn.2d 679, 685, 202 P.3d 924 (2009)*. All facts and reasonable inferences are considered in a light most favorable to the nonmoving party. *Berger v. Sonneland, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001)*. Summary judgment is appropriate only when there are no disputed issues of material fact and the prevailing party is entitled to judgment as a matter of law. *CR 56(c)*. A fact is material when the outcome of the litigation depends on it, in whole or in part. *Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990)*. Summary judgment is appropriate if reasonable persons could reach but one conclusion from all the evidence. *SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 140, 331 P.3d 40 (2014)*.

¶15 This court "may affirm summary judgment on any grounds supported by the record." *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc., 163 Wn. App. 449, 453, 266 P.3d 881 (2011)*. However, "[a]n argument that was neither pleaded nor argued to the superior court on summary judgment cannot be raised for the first time on appeal." *Johnson v. Lake Cushman Maint. Co., 5 Wn. App. 2d 765, 780, 425 P.3d 560 (2018)* (citing **[*6]** *Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008)*; *see also RAP 2.5(a)* (appellate courts generally will not review a claim of error not raised in the trial court).

B. BREACH OF CONTRACT/INSURANCE POLICY

¶16 The ***Margitans*** argue that ***Allstate*** is required to pay its defense costs under the terms of the insurance policy.[1] We disagree.

¶17 Interpretation and construction of an insurance policy, which is a contract, is a question of law. *N. Pac. Ins. Co. v. Christensen, 143 Wn.2d 43, 48, 17 P.3d 596 (2001)*. Interpretation "'is giving meaning to the symbols of expression used by another person.'" *Int'l Marine Underwriters v. ABCD Marine, LLC, 179 Wn.2d 274, 281-82, 313 P.3d 395 (2013)* (internal quotation marks omitted) (quoting *Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990))*. "The contract will be given a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective." *Wash. Pub. Util. Dists.' Utils. Sys. v. Pub. Util. Dist. No. 1 of Clallam County, 112 Wn.2d 1, 11, 771 P.2d 701 (1989)*. Any undefined terms will be given their plain, ordinary, and popular meaning. *Int'l Marine Underwriters, 179 Wn.2d at 284*.

¶18 Here, the "Additional Protection" section requires ***Allstate*** to pay for costs "**we** incur in the … defense of any suit against an **insured person**." CP at 263 (underline added). The language is clear. It obligates ***Allstate*** to pay only *its* legal costs, not the ***Margitans***'.

¶19 ***Allstate*** acknowledges it could be required **[*7]** to pay the ***Margitans***' legal costs if it had a duty to defend. The ***Margitans*** argue that ***Allstate*** had such a duty. We disagree.

¶20 "'The duty to defend arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.'" *Expedia, Inc. v. Steadfast Ins. Co., 180 Wn.2d 793, 802-03, 329 P.3d 59 (2014)* (internal quotation marks omitted) (quoting *Am. Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 404-05, 229 P.3d 693 (2010))*. This duty is determined from the "eight corners" of the insurance contract and the underlying complaint. *Id. at 803*.

¶21 ***Allstate*** was not obligated to provide a defense. Even construed liberally, none of the claims asserted by the Hannas were covered under the insurance policy. Under the policy, ***Allstate*** promised to pay damages that the ***Margitans*** become legally obligated to pay because of bodily injury or property damage arising from

[1] The ***Margitans*** do not argue the trial court erred in dismissing their claims against RMI for breach of contract/breach of insurance policy.

an occurrence. The simplest reason the Hannas' claims never invoked policy coverage is because the claims did not seek damages. Rather, the claims sought a declaration of easement rights, injunctive relief to tear-down a rental building, and removal of a lien. An additional reason why the Hannas' claims never invoked policy coverage is because the claims did not describe "property damage" arising from an "occurrence," **[*8]** within the policy definitions of those terms.

C. BAD FAITH (UNDER *RCW 48.01.030*, THE CPA, AND *WAC 284-30-330*)

1. RMI

¶22 The ***Margitans*** argue RMI is liable for bad faith under *RCW 48.01.030*, the CPA, and WAC 284.30.330. They argue RMI is liable for failing to promptly notify ***Allstate*** of its request to pay for their defense of the Hannas' claims.

¶23 The ***Margitans*** did not make this argument in their pleadings or in their summary judgment response.[2] For this reason, we do not consider the ***Margitans***' new argument on appeal. *Johnson, 5 Wn. App. 2d at 780*; *Sourakli, 144 Wn. App. at 509*.

*2. **Allstate** and RMI*

¶24 The ***Margitans*** argue ***Allstate*** and RMI are liable for bad faith under *RCW 48.01.030*, the CPA, and *WAC 284-30-330*. They argue ***Allstate*** is liable for not promptly responding to RMI's requests for a defense. Alternatively, if RMI did not call ***Allstate*** in 2012 or 2014, the ***Margitans*** argue ***Allstate*** is vicariously liable for RMI's failure to forward their requests to ***Allstate***. We disagree.

*a. **Allstate** promptly responded to the **Margitans**' claims*

¶25 Reasonable minds can reach only one conclusion from the evidence—***Allstate*** promptly responded to the ***Margitans***' claims once it received those claims, and ***Allstate*** did not receive those claims before February 2017.

¶26 The sole "evidence" that ***Allstate*** did not promptly respond comes from Mr. Walton's **[*9]** deposition where he said he probably did not ask ***Allstate*** whether the 2014 tear-down claim was covered, but "may have." CP at 1115. Speculation of what might have happened is insufficient to defeat summary judgment. *Meyer v. Univ. of Wash., 105 Wn.2d 847, 852, 719 P.2d 98 (1986)*.

b. Not vicariously liable because no evidence of harm

¶27 For the ***Margitans*** to prevail on their extra-contractual bad faith claims, they must show they were harmed by the insurer's purported bad faith. *Coventry Assocs. v. Am. States Ins. Co., 136 Wn.2d 269, 276, 961 P.2d 933 (1998)*.

¶28 The ***Margitans*** argue they were harmed because they relied on Mr. Walton's representation of what the policy covered. They contend, had they known the representation was untrue, they (1) would have sought different insurance coverage or (2) defended differently against the Hannas' claims. In support of these two contentions, they cite clerk's papers at 143, line 6 and clerk's papers at 1152 lines 4-13. The first citation is to a page in ***Allstate***'s motion for summary judgment; the second citation is to a page in a deposition word index. We find no admissible facts in the record supporting the ***Margitans***' contentions they suffered a compensable loss resulting from Mr. Walton's misstatement of coverage. There is no evidence they would have sought different coverage and certainly no evidence **[*10]** they would have found it.

D. NEGLIGENT MISREPRESENTATION BY RMI

¶29 During oral argument on appeal, the ***Margitans*** argued RMI was liable for negligently misrepresenting the scope of the policy's coverage. The ***Margitans*** did not assert this theory in their complaint or in their summary judgment response. The trial court explicitly determined this. *See* CP at 1239, para. 4.

¶30 "An argument that was neither pleaded nor argued to the superior court on summary judgment cannot be raised for the first time on appeal." *Johnson, 5 Wn. App. 2d at 780*; *accord Sourakli, 144 Wn. App. at 509*. For this reason, we decline to consider the argument.

E. INABILITY TO AMEND COMPLAINT

[2] The ***Margitans*** did make this argument in their reconsideration motion. But a party may not assert a new theory on reconsideration after summary judgment dismissal. *Int'l Raceway, Inc. v. JDFJ Corp., 97 Wn. App. 1, 7, 970 P.2d 343 (1999)*.

¶31 The ***Margitans*** contend that the trial court erred by not affording them leave to amend their complaint against RMI.

¶32 Under *RAP 2.5(a)*, we generally do not review any claim of error not raised in the trial court. *In re Adoption of T.A.W., 188 Wn. App. 799,807,354 P.3d 46 (2015)*, *aff'd*, *186 Wn.2d 828, 383 P.3d 492 (2016)*. "This rule exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond." *State v. Blazina, 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015)*. The ***Margitans*** never requested leave or made a motion to amend their complaint. Because this issue was never before the trial court, and the trial court did not rule on it, it is not properly before us for review.

¶33 Affirmed.

¶34 A majority of the panel has determined this **[*11]** opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to *RCW 2.06.040*.

SIDDOWAY and FEARING, JJ., concur.

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DOUGLAS FOLEY & ASSOCIATES, PLLC

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