Supreme Court No. 98346-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 365174
Spokane County Superior Court No. 172046536

Allan Margitan, Gina Margitan, husband and wife,

Appellant,

v.

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

Respondents.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONERS.

The Petitioners are Allan and Gina Margitan (husband and wife)

II. DECISION REQUESTED TO BE REVIEWED.

Petitioners seek review of the Opinion entered March 3, 2020

(attached as Appendix "A")

III. ISSUES REQUESTED REVIEWED.

Does Allstate and the captive Allstate Agent, who misrepresents the coverage of the insurance policy to the insured, owe an actionable duty of good faith under the Consumer Protection Act to the insured?

Is the insured party damaged when required to pay costs incurred for the very issue that the insurance agent claimed that the insurance policy would cover?

Is an "insurance producer" exempt from complying with the Consumer Protection Act of Washington State?

Each of these issues warrants review under RAP 13.4(b)(1) and (4) and are great concerns to consumers of Washington State.

IV. STATEMENT OF THE CASE.

This dispute resulted because an insurance company denied coverage for the same exact circumstances the insurance agent described to the insured as being covered at the time the insurance policy was sold.

In June 2010, Mr. Walton, an insurance agent for Allstate, advised the Margitans to purchase homeowners' insurance offered by Allstate. This policy provided legal representation to the couple in the event they were sued, provided it did not involve business, criminal issues, or fraud. The Margitans relied on Mr. Walton's explanation of the coverage that the policy would cover legal representation and decided to purchase this recommended insurance. (CP 1089, #7)

In 2012, the Margitans' neighbor brought against them a quiet title action to resolve an easement dispute. Margitans complied with Allstate's claim filing requirement. (CP1234) Allstate denied the claim for the exact coverage that the insurance producer stated at the time of sale that the policy would cover. (CP 263).

The Margitans brought suit against the insurance agent Mr. Walton of RMI and Allstate. Margitans alleged the same causes of actions against both defendants: breach of contract, breach of insurance policy, bad faith pursuant to RCW 48.01.030, violation of the Consumer Protection Act and WAC 284-30-330. (CP 1-9) RMI and Allstate moved for summary judgment. The trial court granted both defendants' motions.

Margitans timely appealed to The Court of Appeals of the State of Washington Division III. The Court of Appeals upheld the Superior Court.

V. ARGUMENT SUPPORTING THAT REVIEW SHOULD BE ACCEPTED.

a. This Court has consistently held that the duty of good faith exists because of the special relationship between an insurer and its insured.

For years the Washington Courts have undisputedly imposed a duty of good faith on the insurance industry under both common law and statute. This Court has long held that this duty is established due to the special relationship between the insurer and insured.

An insurer's agent is subject to liability to an insured in tort if the agent personally owes the insured a duty. *Annechino v. Worthy*, 175 Wn.2d 630, 638, 290 P.3d 126 (2012) The duty of good faith in the insurance context exists because of the quasi-fiduciary relationship between an insurer and its insured. *St. Paul Fire & Marine*, 165 Wn.2d at 130 n.3. This Court has consistently ruled that an insurer has a duty to the insured because of the special relationship between insurer and insured. *Tank, 105 Wn.2d at 385-86; Murray v. Mossman*, 56 Wn.2d 909, 912, 355 P.2d 985 (1960). This Court has held that the duty of the insurer to act in good faith toward the insured is the same as the fiduciary relationship that the insurer has to the insured. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385, 715 P.2d 1133 (1986)

A principal company like Allstate who retains control over their agent's performance of work is liable for the agent's acts and omissions within the scope of the employment. *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 573, 320 P.2d 311

(1958). This rule is abundantly reasonable in the insurance context, where insurers necessarily are corporate entities that can operate only through their captive agents and employees.

This Court observed that "[s]uch a relationship exists not only because of the contract between insurer and insured, but because of the high stakes involved for both parties and the elevated level of trust underlying insureds' dependence on their insurers." Tank, 105 Wn.2d at 385. This dependence and heightened level of trust exists not only where the insurer and the insured's interests are aligned, as in the third-party context, but also, and perhaps even more so, in the first-party context, where the insurer's interests might be opposed to the insured's and the insured is particularly vulnerable and dependent on the insurer's honesty and good faith. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 787, 16 P.3d 574 (2001)

This Court first recognized the common-law duty of good faith back in 1941, the legislature enacted the insurance code, including the declaration of public interest in RCW 48.01.030, which codifies the duty of good faith:

> Public interest. The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

The insurance code was to establish a comprehensive code to govern the insurance industry. *Kueckelhan v. Fed. Old Line Ins. Co. (Mut.)*, 69 Wn.2d 392, 402, 418

P.2d 443, 451 (1966). This Court generally has continued citing the common law as the source of the good-faith duty for purposes of tort liability. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003); *Murray*, 56 Wn.2d at 911; *Evans v. Continental Cas. Co.*, 40 Wn.2d 614, 628, 245 P.3d 470 (1952); but see *Ellwein v. Hartford Accident & Indem.* Co., 142 Wn.2d 766, 780, 15 P.3d 640 (2001), overruled on other grounds by Smith, 150 Wn.2d 478 ("RCW 48.01.030 imposes a duty to act in good faith upon insurers, and violation of that duty provide cause for a tort action for bad faith").

The statutory duty is enforced by the insurance commissioner and a violation is deemed a per se unfair trade practice for purposes of liability under the CPA. *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 12, 206 P.3d 1255 (2009).

b. An insurance company is bound by its agents.

Margitans purchased an insurance policy after Mr. Walton explained that it provided legal representation in the event they were sued, provided it did not involve business, criminal issues, or fraud. The Margitans relied on Mr. Walton's explanation of coverage and purchased this recommended insurance. (CP 1089, #7)

In 2012, Margitans' neighbor brought a quiet title action against Margitans. Margitans complied with Allstate's claim filing requirement to recover attorney fees which Mr. Walton stated the policy would cover. (CP1234) Allstate denied Margitan's claim stating that the policy did not provide the coverage that Mr. Walton state it did. (CP 263).

This Court has consistently held that the good-faith duty arises from the special relationship between insurer and insured. The insurer must ensure that its agents act consistent with its duty of good faith. Because an insurer's duty to its insured, the insurer is subject to liability for its agents' failure to satisfy the duty when acting on its behalf. *Carabba v. Anacortes Sch. Dist. No. 103*, 72 Wn.2d 939, 957, 435 P.2d 936 (1967) (citing RESTATEMENT (SECOND) OF AGENCY § 214 (1957)). More generally, a principal who retains control over the agent's performance of work is liable for the agent's acts and omissions within the scope of the employment. *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 573, 320 P.2d 311 (1958). This rule is abundantly reasonable in the insurance context where insurers necessarily are corporate entities that can operate only through their employees.

RCW 48.01.030 holds persons in the insurance industry to a good faith standard and has been frequently applied when an insurer denies claim coverage or acts unreasonably when processing a claim. *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 543, 39 P.3d 984 (2002)

An insurance company is bound by all acts, contracts, or representations of its agent, whether general or special, which are within the scope of his real or apparent authority. *Chi. Title Ins. Co. v. Office of Ins. Comm'r*, 178 Wn.2d 120, 135-36, 309 P.3d 372 (2013) (quoting Pagni v. N. Y Life Ins. Co., 173 Wash. 322, 349-50, 23 P.2d 6 (1933));

Just recently the Ninth Circuit Court of Appeals addressed the very same issue present in this case. In *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, 908 F.3d 581, 586 n.5 (9th Cir. 2018) the Ninth Circuit certified the following very straightforward question to the Washington State Supreme Court:

> Under Washington law, is an insurer bound by representations made by its authorized agent in a certificate of insurance with respect to a party's status as an additional insured under a policy issued by the insurer, when the certificate includes language disclaiming its authority and ability to expand coverage?

The undisputed issue, that Mr. Walton offered the policy to the Margitans because it provided legal representation in the event they were sued, requires Allstate to be held responsible. Failing to hold Allstate responsible in this case would allow dishonesty, whether intentional or through simple error, thereby destroying the honesty and competency that has been required for countless years in the insurance industry. This very reason warrants review under RAP 13.4 (b)(4).

c. Consumer Protection Act (CPA) Violations.

Five elements must be established for a CPA claim to be successful. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 38, 204 P.3d 885 (2009). To establish a CPA claim, a plaintiff must prove five elements; (1) an unfair or deceptive act or practice that (2) affects trade or commerce and (3) impacts the public interest, and (4) the plaintiff sustained damage to business or property that was (5) caused by the unfair or deceptive act or practice. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d

778, 785-793, 719 P.2d 531 (1986) The legislature intends the CPA to "be liberally construed so that its beneficial purposes may be served. *William Merriman, et ux v. American Guarantee & Liability Insurance Co.*, 33929-7 (Wash. Ct. App. 2017)

The first two elements of a CPA claim are established where a statute declares that a violation is a per se unfair trade practice. *Hangman Ridge*, 105 Wn.2d at 786. WAC 284-30-330 (1) prohibits Mr. Walton from "misrepresenting pertinent facts" or insurance policy provisions in order to make the sale of a policy. A violation of WAC 284-30-330 is a per se unfair trade practice, *Indus. Indem. Co. of Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 922-23, 792 P.2d 520 (1990). Allstate and Mr. Walton admit that the misrepresenting took place so the first two elements of a CPA claim are established.

The third element may be established on a showing that a statute has been violated that contains a specific legislative declaration of public interest impact. *Hangman Ridge*, 105 Wn.2d at 791. The third element is satisfied since RCW 48.01.030 contains a specific legislative intention of "public interest" impact. It states:

> **Public Interest.**
> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

Allstate and Mr. Walton admit that the insurance policy was sold under the terms that "Allstate that would provide legal representation in the event they were sued, provided it did not involve business, criminal issues, or fraud" (CP 1089 – 1095) but

years after the sale when a claim was filed Allstate denied the coverage that Mr. Walton stated the policy provided.

Margitan's issues in their complaint (CP 1-9) are violations of RCW 48.01.030. In *Indus, Indem. Co. of Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 922-23, 792 P.2d 520 (1990) this Court found a violation of WAC 284-30-330 is an unfair trade practice. In *Merriman v. Am. Guar. & Liab. Ins. Co.*, 198 Wn. App. 594, 627-28, 396 P.3d 351, review denied, 189 Wn.2d 1038 (2017), this Court found WAC 284-30-330 prohibits misrepresenting insurance policy coverage.

Since the statute Mr. Walton violated contains the specific legislative declaration of public interest impact, the third element is satisfied.

The fourth element, sustaining injury to business or property, is satisfied by the undisputed fact that Margitan's paid for years for an insurance policy that would not cover what they were informed it would cover. (CP 1090 - 1095) Margitans have incurred large legal expenses which they had been told the insurance policy would provide coverage. (CP 1-9)

Allstate's failure to provide the coverage that Margitans were told they were purchasing has damaged Margitans' property. This damage is the direct amount of the years of useless premium payments. These premiums directly damaged Margitan's property in the amount of the premiums. Then when Allstate did not provide the coverage that Margitans were told they were getting, Margitan's property was further damaged by

the legal expenses incurred at Margitan's expense. Something for which they thought they had coverage.

In *Ambach v. French*, 216 P.3d 405 (Wash. 2009) this court cited to Clayton Act, 38 Stat. 731, 15 U.S.C. § 15 (1914), stating:

> to hold that "'business or property'" necessarily excludes "some category of injury" (emphasis omitted), for example, personal injuries, **but nonetheless retains its restrictive significance when construed to encompass injury to a consumer "whose money has been diminished by reason of an antitrust violation")).** (emphasis added)

In *Ambach v. French*, 216 P.3d 405 (Wash. 2009) this court cited to Erickson v. Upjohn Co., 78 F.3d 592, 1996 WL 95249, at *3 (1996) (unpublished) and stated: "(allowing plaintiffs to "salvage" their previously dismissed CPA claim by narrowing their claim to recovery of money spent on "'excessive, useless, and ultimately dangerous'" medication)"

Margitan's premiums were paid with monies from Margitan's property funds. There is no dispute that the premiums depleted the Margitan's net property value. The worth of Margitan's net property value was damaged by Allstate colleting premium costs for a policy that was sold based upon undisputed misleading statements. The fourth element is satisfied.

The fifth element is satisfied by Mr. Walton's deceptive act of misrepresenting the coverage. Mr. Walton of RMI owed Margitans a duty under that regulation because that regulation defines unfair acts or practices of the insurer. Mr. Walton was the insurer and Margitans seek to enforce the regulation against Mr. Walton. Addressing alleged

CPA violations in *Tank v. State Farm Fire & Gas. Co.*, 105 Wn.2d 381, 394-95, 715 P.2d 1133 (1986) this court stated:

> It is established that insureds may bring a private action against their insurers for breach of duty of good faith under the CPA. It is also established that breach of an insurer's duty of good faith constitutes a per se CPA violation. However, only an insured may bring a per se [CPA] action.

The fifth element is satisfied by Mr. Walton's deceptive act of misrepresenting the policy coverage. Margitans were deprived by Allstate of the coverage that Mr. Walton stated Margitans had purchased. Since Mr. Walton misrepresented the policy, Margitans thought they were covered and had no reason to shop for a different policy. If there had been no misrepresentation, Margitans could have protected themselves by finding coverage elsewhere. Clearly this was an unfair or deceptive act or practice. Review is warranted under RAP 13.4 (b)(4) to prohibit misrepresenting pertinent facts or insurance policy provisions.

d. An "insurance producer must complying with the Consumer Protection Act of Washington State

Mr. Walton (RMI) and Allstate successfully argued that an insurance producers" is except from complying with RCW 48.01.030, WAC 284-30-330 and the CPA. (CP 1057 line 11) Margitan finds no case law in Washington State that addressed the issue of "an insurance producer" is exempt from complying with RCW 48.01.030, WAC 284-30-330 and the CPA. The Allstate policy cites to Mr. Walton as an "agent", (CP 1241) and RMI as an agency. (CP 1059)

This petition for review should be granted since in reality is insurance industry is attempting to establish that an insurance producer is except from complying with RCW 48.01.030, WAC 284-30-330 and the CPA, which would result in a free for all in deception in the insurance industry in Washington State.

Review is thus warranted under RAP 13.4(b)(1),(4).

VI. CONCLUSION

This Court should grant review to address if an insurance agent (insurance producer) is permitted to mislead the insured regarding the coverage being sold. The court should address the issue of whether an agent for the insurance company can misrepresent the policy coverage being sold to the consumer in order to cause the purchase of the policy.

GR 14.1 allows citations to unpublished opinions. The business of insurance must be held to a high standard of honesty and reliability on which the public can rely. If an insurance agent (insurance producer) is permitted to mislead the insurer on what coverage is being sold, the insurance industry will become an industry of dishonesty and scamming. For this very reason this pettion should be granted so the insurance industry is not permitted to mislead the public in Washington State. Granting review will serve the public interest.

Review is thus warranted under RAP 13.4(b)(4).

Respectfully submitted this 31th day of March 2020.

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APPENDIX

"A"

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

ALLAN MARGITAN, GINA MARGITAN, husband and wife,	)	No. 36517-4-III
Appellants,	)	
v.	)	UNPUBLISHED OPINION
RISK MANAGEMENT INC., a Washington corporation and ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,	)	
Respondents.	)	

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

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.

In June 2010, Mr. Walton advised the Margitans to purchase homeowners' insurance offered by Allstate that would 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.

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 of any suit against an **insured person**;

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

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.

The Margitans timely appealed.

ANALYSIS

A. STANDARD OF REVIEW

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).

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 *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

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

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

[1] The Margitans do not argue the trial court erred in dismissing their claims against

(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.

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'.

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

"'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

RMI for breach of contract/breach of insurance policy.

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.

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.

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

1. RMI

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.

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

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.

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[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).

a. Allstate promptly responded to the Margitans' claims

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.

The sole "evidence" that Allstate did not promptly respond comes from Mr. Walton's 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

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).

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.

D. NEGLIGENT MISREPRESENTATION BY RMI

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.

"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

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

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.

Affirmed.

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

Lawrence-Berrey, C.J.

WE CONCUR:

Siddoway, J.

Fearing, J.

ALLAN MARGITAN - FILING PRO SE

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