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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By________

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. ____________

(Court of Appeals No. 30546-5-III)

THELMA, KARL, LORI, and KARIN KLOSTER,

Petitioners,

vs.

SCHENECTADY ROBERTS, et al.,

Respondents.

PETITION FOR REVIEW

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III. INTRODUCTION AND IDENTITY OF PETITIONERS

Petitioners Thelma, Karl, Lori and Karin Kloster (Klosters), appellants/cross-respondents below, petition for review of the court of appeals' decision designated in Part IV of this petition.

This case presents several issues of first impression involving title insurance, liability of title insurer's agents, title, and liability of developers, sellers and brokers. The court of appeals' decision conflicts with many of this court's decisions and runs counter to other court of appeals' decisions.

The record shows that the Klosters purchased an undeveloped lot in 2005 in a surveyed subdivision, the plat for which was recorded in Klickitat County in 1981. An easement, which was shown on the recorded plat and which provided access over the adjoining property, was never recorded by the developer. Consequently, the Klosters did not acquire the legal access to their lot to which they are entitled.

This court should accept review under RAP 13.4(b)(1), (b)(2) and (b)(4) to determine: 1) whether there is coverage for the unrecorded access easement of record under the ***undefined*** access coverage of the standard American Land Title Association (ALTA) title insurance policy and decide who bears responsibility: 2) for the failure to record the access easement shown in the surveyed and recorded plat, and 3) to research title

and discover whether the access easement shown in the surveyed and recorded plat has been properly created. These and the related issues raised by the Klosters are ones of first impression and the resolution of which are of vital importance to all persons and entities who buy or sell real estate and/or insure real estate transactions in Washington.

IV. CITATION TO COURT OF APPEALS OPINION

The Klosters seek review of the February 6, 2014, decision of Division III of the Washington Court of Appeals, No. 30546-5-III, upholding judgment against them and reversing the Klosters' judgment against the title insurer ("Opinion," Appendix A).

V. ISSUES PRESENTED FOR REVIEW

1. Whether the ***undefined*** access coverage in the standard ALTA title insurance policy utilized in most retail land sale transactions in Washington should be interpreted in accord with the understanding of the average person. (***Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 638, 762 P.2d 1141 (1988)** and ***Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 424, 38 P.3d 322 (2002)**).

2. Whether the ***undefined*** access coverage in the standard ALTA title policy is made ***illusory*** when title insurers and/or their agents follow the industry practice of excluding coverage for all easements of record in the Schedule B exclusions of the standard ALTA title policy. (***Taylor v.***

***Shigaki*, 84 Wn.App. 723, 730, 930 P.2d 340, (1997), review denied, 132 Wn.2d 1009** and ***Quadrant Co. v. American States Ins. Co.*, 154 Wn.2d 165, 184, 110 P.3d 733 (2005)**).

3. Whether a negligence cause of action exists against a title insurer and its agent for the agent's negligent failure to discover that access easements were not recorded against the adjoining property pursuant to the ***assumed duty*** doctrine established in ***Sheridan v. Aetna Casualty & Surety Company*, 3 Wn.2d 423, 439, 100 P.2d 1024 (1940).**

4. Whether the implicit invocation by the court of appeals of the discredited doctrine of ***caveat emptor*** applies to retail purchasers of real estate and places a duty on them to search title to determine whether access easements shown on recorded plats are properly created.

5. Whether access easements shown on a recorded plat are attributes of title covered by title insurance access coverage and protected by the warranties of title provided by a statutory warranty deed.

6. Whether a title insurer's agent is a co-insurer of title when the agency agreement between the title insurer and the agent provides that the agent is responsible for the first $3,500.00 of loss on every title policy the agent issues in the title insurer's name.

7. Whether demonstrated proof of violations of the Unfair Claims Settlement Practices Act (UCSPA) by a title insurer is an independent

basis of liability regardless of whether or not coverage exists. (***Rizzuti v. Basin Travel Serv. Of Othello, Inc.*, 125 Wn. App. 602, 615, 105 P.3d 1012 (2005)**).

8. Whether there is an exception created to this court's ruling in ***Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 482-483, 209 P.3d 863 (2009)** when an incorporated sole proprietor's uncorroborated, self-serving testimony directly contradicts the incorporation documents and business records and the sole proprietor thereby escapes successor liability for his prior acts.

9. Whether the developer who failed to record the access easements on the adjoining property is a necessary and indispensable party to the underlying lawsuit.

VI. STATEMENT OF THE CASE

The Klosters bought Lot 1 of Pacific Rim Estates from defendant/ respondent Schenectady Roberts (Roberts). Defendant/respondent Alvin Fred Heany, Jr. (Heany) was the developer. Robert Blades (Blades) was the former business associate of Heany and is the principal of defendant/ respondent Pacific Rim Brokers, Inc. (Pacific Rim). Pacific Rim is the incorporation of Pacific Rim Properties, the developer Heany's sole proprietorship. Pacific Rim was Roberts' real estate agent. Defendant/ respondent Ameri-Title, Inc. (Ameri-Title) was the local agent for

defendant/respondent/cross-appellant First American Title Insurance Company (First American), the title insurer.

In creating the subdivision in which the Klosters' lot is located, the developer Heany did not record the easement against the adjoining property which provided access as shown on the recorded plat. (Opinion, 4-5). Consequently, the Klosters have been denied legal access since they purchased the lot. As the court of appeals noted, Klickitat County requires a 60-foot width for all easement right-of-ways. (Opinion, 4).

The incorporation of Heany's sole proprietorship, Pacific Rim, acted as the real estate agent on the sale. (Opinion, 5).

The title insurer, First American, instructed its agent, Ameri-Title, to determine whether access easements are properly created before issuing a preliminary commitment and/or a title policy, and if not, to note a special exception in the preliminary commitment and/or the title policy. Ameri-Title did not do so and the fact that the access easement was unrecorded was not discovered until after the Klosters purchased the lot. (Opinion, 8). The Klosters' efforts to use the easement were blocked by the adjoining property owners. (Opinion, 10).

The Klosters brought suit against all involved parties. After pretrial motions, the trial court dismissed most of the Klosters' case and the remainder was tried to a jury. The jury awarded damages to the Klosters

which the trial court imposed against the title insurer. The court of appeals affirmed the dismissals and reversed the judgment that the Klosters obtained against the title insurer.

VII. ARGUMENT

Issue No. 1 - *Undefined* Title Insurance Access Coverage

Where a provision in a policy of insurance is capable of two or more meanings or constructions, the meaning or construction that is most favorable to the insured must be employed as this court's insurance interpretation standards provide. (***Shotwell v. Transamerica Title Ins. Co.*, 91 Wn.2d 161, 167-168, 588 P.2d 208 (1978)**). Unlike the other three standard coverages in the standard ALTA title policy, the access coverage is ***admittedly undefined*** (Ex 95, RP 773-774) and therefore ***ambiguous***. (The Klosters' opening brief, 41-44). One meaning or construction is that the ***undefined*** access coverage includes the easements by which access is provided. ***This is what the average person would understand***. Another meaning or construction is that of First American and the court of appeals whereby the access coverage does not include the easements which provide the access. ***This is not what the average person would understand***.

Judge Reynolds, the superior court judge who presided over pretrial matters prior to his retirement, entered an order which contained

his ruling that First American's access coverage is ***undefined***, thus ***ambiguous***, and must be interpreted in accordance with the understanding of the average person (CP 1296). As more fully explained below, the court of appeals treated this and a related ruling as preliminary and declined to consider these rulings of ***ambiguity*** in its analysis of title insurance coverage issues. (Opinion, 37-38).

Rather, the court of appeals only considered the later ruling by the judge who assumed control of the litigation after Judge Reynolds retired, Judge Brian Altman. His ruling on the question of ambiguity was based on a sketch attached to the policy and ***not*** on a theory asserted by any party to this case or validated by Judge Reynolds' previous rulings. Nevertheless, it was the only one considered by the court of appeals. (The Klosters' opening brief, 46-47). The Klosters believe that their interpretation of the ***undefined*** and ***ambiguous*** access coverage as validated by Judge Reynolds is correct and provides a basis for granting review. This and the related issue of ***illusory*** title insurance access coverage are matters of substantial public interest which should be resolved by this court so that real estate buyers and sellers and the real estate industry know what constitutes access and what is covered as access under the standard ALTA title policy. (RAP 13.4(b)(1) and (b)(4)).

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<u>Issue No. 2</u> - *Illusory* Title Insurance Access Coverage

Access is most often provided pursuant to recorded easements. On the one hand, access is a specified, enumerated and ***undefined*** coverage in the standard ALTA title policy, and on the other, the means by which such access is created and exists – easements – are excluded and not covered. This is the basis on which Judge Reynolds granted the Klosters' motion for summary judgment and ruled that First American's title policy access coverage was ***ambiguous*** as a matter of law and must be interpreted in the Klosters' favor. RP 245-246; CP 1446-1447. The court of appeals acknowledged that the First American title policy excluded coverage for all easements "three times over." (Opinion, 39).

This "three times over" exclusion swallows ***all*** covered occurrences and makes the ***undefined*** access coverage under the standard ALTA title policy ***illusory***. (***Taylor, supra*, 84 Wn.App. 723, 730, 930 P.2d 340, (1997), review denied, 132 Wn.2d 1009** and ***Quadrant Co., supra*, 154 Wn.2d 165, 184, 110 P.3d 733 (2005)**). In accord with this court's insurance interpretation standards, the ***undefined*** access coverage in the standard ALTA title policy ***must be construed*** in accord with the understanding of the average person and provide coverage for all access easements regardless of the Schedule B exclusions in the standard ALTA title policy because the access coverage is ***undefined, ambiguous*** and

illusory.

Inasmuch as the court of appeals failed to address this fundamental flaw in the ***undefined*** access coverage of the standard ALTA title policy, and did not follow the court of appeals' decision in ***Taylor, supra***, and this court's decision in ***Quadrant, supra***, this issue of ***undefined*** title insurance access coverage and exactly what it covers will vex retail real estate buyers and sellers who face this issue until this court resolves it. This is an issue of first impression and of undeniable interest to the entire real estate industry. (RAP 13.4(b)(1), (b)(2) and (b)(4)).

Issue No. 3 - Negligence Of A Title Insurer's Agent

The court of appeals recognized that the record showed that the title insurer instructed its local agent to determine whether access easements are properly created before issuing a preliminary commitment and/or a title policy, and if not, to note a special exception in the preliminary commitment and/or the title policy. The local agent failed to do so. (Opinion, 8). The court of appeals nevertheless declined to extend ***Sheridan, supra*, 3 Wn.2d 423, 439, 100 P.2d 1024 (1940)** to title insurance because of "remoteness" (Opinion, 31-32) even though this court has held that title insurance is subject to the same legal principles as other insurance. (***Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 470-471, 209 P.3d 859 (2009)**). This court extended the assumed duty doctrine

in other contexts and did not limit its application to a specific type of insurance as the court of appeals did herein. (***Burg v. Shannon & Wilson, Inc.*, 110 Wn.App., 798, 808-809, 43 P.3d 526 (2002)**, and ***Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 298-300, 545 P.2d 13 (1975)**).

The decision in ***Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 39 P.3d 984 (2002)** is not a bar to the extension of a ***Sheridan*** negligence cause of action to title insurance. Although this court declined in ***Barstad*** to find a ***general*** duty of disclosure in preliminary title commitments, it noted that instances may arise when a duty to disclose exists. (***Barstad, supra*, 145 Wn.2d at 543-544**.) ***This is one of those instances.***

This is an issue of first impression and of undeniable interest to the entire real estate industry. The court of appeals' refusal to extend a ***Sheridan*** negligence cause of action to title insurance appears to conflict not only with this court's decision in ***Sheridan, supra***, but also with this court's decisions in ***Burg, supra***, and ***Brown, supra***. This issue must be resolved by this court. (RAP 13.4(b)(1), (b)(2) and (b)(4)).

<u>Issue No. 4</u> - *Caveat Emptor*

The court of appeal implicitly invoked the discredited doctrine of ***caveat emptor*** when it faulted Karl Kloster for not doing his own title search and discovering that the access easement was not properly recorded

(Opinion, 21) even though the seller gave a statutory warranty deed. The court of appeals' decision is contrary to this court's decision in ***Edmondson v. Popchoi*, 172 Wn.2d 272, 283-284, 256 P.3d 1223 (2011)** which held that warranties of title in a statutory deed are not waived ***even if*** the grantee takes title ***with knowledge of the title defects***, citing ***Foley v. Smith*, 14 Wn.App. 285, 292, 539 P.2d 874 (1975)**. Thus, whether Karl Kloster did or did not discover that the access easement was not properly recorded was ***irrelevant*** and not a basis for implicitly invoking the discredited legal doctrine of ***caveat emptor***. (*See*, ***Chandler v. State, Office of Ins. Com'r*, 141 Wn.App. 639, 659-660, 173 P.3d 275 (2007)** which held that ***caveat emptor*** does not apply in the context of insurance).

This is especially true when the title insurer's agent failed to determine that the access easement was not properly recorded even though it was specifically tasked to do so by the title insurer ***before*** issuing the Klosters a title policy. Determining whether the access easement in a recorded subdivision plat was properly recorded is ***not*** the duty of a retail buyer of a subdivision lot such as Karl Kloster. ***It was the assumed duty of First American and Ameri-Title to do so.*** (***Sheridan, supra*, 3 Wn.2d 423, 439, 100 P.2d 1024 (1940)**). The discredited doctrine of ***caveat emptor*** cannot be resurrected in the context of real estate title searches.

This is an issue of first impression and of undeniable interest to the

entire real estate industry as well as the legal profession which must be resolved by this court. (RAP 13.4(b)(1), (b)(2) and (b)(4)).

Issue No. 5 - Lack Of Recorded Access Is A Title Defect

In ***Santos v. Sinclair*, 76 Wn.App. 320, 322, 324-328, 884 P.2d 941 (1994)** the court of appeals held that once an easement is shown of record, then it is covered under standard title insurance. The trial court, per Judge Altman, held that the lack of a recorded access easement is a defect in title. The court of appeals reversed Judge Altman's determination, holding that the warranties of title in a statutory warranty deed do not extend to an access easement shown on a recorded plat. (Opinion, 18-19).

Even a property owner abutting a public street has a ***vested*** right to an easement for reasonable ingress and egress to his property. (***State v. Williams*, 64 Wn.2d 842, 844, 394 P.2d 693 (1964)**). A property owner also has a right under the Washington Constitution, Article I, Section 16, of ***eminent domain*** to obtain such an easement. Recorded access should be an attribute of title protected under a statutory warranty deed and under the ***undefined*** access coverage of the standard ALTA title policy. (***Edmondson, supra*, 172 Wn.2d 272, 283-284, 256 P.3d 1223 (2011)**).

In ***Lawyers Title Ins. Co. v. McKee*, 354 S.W.2d 401, 407-408 (Tex.Civ.App., 1962)**, the Texas court held that whenever an attribute of title is challenged, the title insurer is duty bound to defend regardless of

whether an action is brought against the insured. In this case the Klosters were essentially evicted from their property by the lack of adequate and legally required access and thus do not have full title. Without this access, the Klosters do not have full enjoyment of their land.

This is an issue of first impression and of undeniable interest to the entire real estate industry as well as the legal profession. This is a policy judgment which should be made by this court. (RAP 13.4(b)(1), (b)(2) and (b)(4)).

Issue No. 6 - Title Insurer's Agent As Co-Insurer

Pursuant to the agency agreement between First American and Ameri-Title (Ex 11), Ameri-Title bore responsibility for the first $3,500.00 of loss on every policy of title insurance which it issued in First American's name and retained 90% of the premium. (Opinion 29-30, RP 662; CP 715-716, Deposition 42, 45).

RCW 48.29.170 exempts licensed title insurance agents from the title insurer's licensing requirements of RCW 48.17.180. These statutes exempt Ameri-Title from the requirement to have its own title insurance license and brought Ameri-Title "under the umbrella of a title insurance company" according to Judge Reynolds. RP 173.

RCW 48.01.040 defines insurance as "a contract whereby one undertakes to indemnify another or pay a specified amount upon

determinable contingencies." RCW 48.01.050 defines an insurer as including "every person engaged in the business of making contracts of insurance." RCW 48.01.070 defines "person" as any individual, company, insurer, association, organization, reciprocal or inter-insurance exchange, partnership, business trust, or corporation. Ameri-Title qualifies under these definitions.

RCW 48.01.030 specifies that the business of insurance is affected by the public interest and requires that all persons so engaged "must act in good faith, abstain from deception, and practice honesty and equity" in all insurance matters. Based on this and other relevant statutes, the Washington Insurance Commissioner adopted WAC Chapter 284-30, the Unfair Claims Settlement Practices Act - UCSPA.

In addition to qualifying as an insurer under the RCW, Ameri-Title qualified pursuant to the applicable WAC regulations. WAC 284-30-310 defines its scope as applying to all insurers, to all insurance policies and insurance contracts, and non-exclusive in that other acts may also be deemed to be violations of specific provisions of the insurance code or other regulations. WAC 284-30-320 defines insurer as any legal entity "engaged in the business of insurance, authorized or licensed to issue or who issues any insurance policy or insurance contract in this state." Ameri-Title was engaged in the business of insurance, was authorized and

licensed to issue and did issue insurance policies. Ameri-Title was an insurer as defined by the UCSPA and the RCW.

The trial court, per Judge Reynolds, so held but his successor, Judge Altman, reversed Judge Reynolds' holding and the court of appeals upheld Judge Altman. The court of appeals essentially made a policy decision that in spite of the foregoing statutes and regulations, the obligation to pay the first $3,500.00 on claims made on policies issued by the agent does not obligate the agent to pay such sums to the insureds. The distinction the court of appeals relied on is that although the agent is licensed to sell its principal's policies, it is not licensed to sell its own policies. (Opinion, 30). However, being jointly liable for the first $3,500.00 on claims made on policies issued by the agent is no basis for negating that very same joint liability. This argument is a ***non-sequitur***. It exonerates the agent from the liability it assumed on becoming an agent.

This is an issue of first impression and of undeniable interest to the real estate industry as well as to the legal profession. This is a policy determination which must be made by this court. (RAP 13.4(b)(1), (b)(2) and (b)(4)).

Issue No. 7 - Violations Of UCSPA

The court of appeals held that the Klosters had shown violations of the Unfair Claims Settlement Practices Act - UCSPA - by the title insurer

(Opinion, 35-36) but declined to hold that they were actionable. The court of appeals noted that the Klosters established that First American violated UCSPA in at least two respects by ***not*** adopting and implementing standards for the prompt investigation of claims and ***not*** informing or training its employees in UCSPA requirements (Opinion, 35-36). The court of appeals further noted that such violations of UCSPA would also constitute violations of the Consumer Protection Act (CPA - RCW Chapter 19.86).

The court of appeals held that these UCSPA and CPA violations were nevertheless ***not*** actionable. This is a departure from ***Rizzuti, supra*, 125 Wn. App. 602, 615, 105 P.3d 1012 (2005)** and similar decisions in that such violations are actionable even in the absence of a finding of coverage. This is the first such holding that insurers may ignore the basic requirements of UCSPA without liability, and as such, is a matter of first impression and of general interest to all in the legal community. This determination is contrary to all other court of appeals' decisions and is a policy judgment error which must be corrected on review by this court. (RAP 13.4(b)(1), (b)(2) and (b)(4)).

<u>Issue No. 8</u> - Exception To Successor-In-Interest Liability

The court of appeals acknowledged that the developer is responsible for his failure to record the access easement against the

adjoining property (Opinion, 23-24) as the developer conceded at trial. (RP 566-567). However, the court of appeals did ***not*** follow this court's decision in ***Cambridge Townhomes, LLC, supra*****, 166 Wn.2d 475, 482-483, 209 P.3d 863 (2009)**. Rather, it held that the successor-in-interest to the developer's sole proprietorship which acted as the broker in the sale of the lot to the Klosters and was responsible for the failure to record the access easements was ***not*** legally responsible.

As the court of appeals acknowledged, the incorporation and business licensing documents of the developer's sole proprietorship stated that the developer was incorporating ***both*** his real estate brokerage ***and*** development businesses. (Opinion, 27). Nevertheless, the court of appeals carved out an unprecedented and unwise exception to successor-in-interest liability based on the developer's uncorroborated testimony that it was only on the drafting attorney's advice that both the real estate brokerage and development businesses were incorporated. (Opinion, 25-27).

The incorporator and present principal of the developer's sole proprietorship, Blades, testified that upon incorporation, the offices, furniture, files and other business possessions of the sole proprietorship were utilized in the incorporated sole proprietorship. (RP 573, 857; CP 892-894, 905-909; Ex 137). There was ***no distinction*** between the sole proprietorship and its incorporation. Most importantly, the development of

the faulty subdivision was ***before*** the incorporation of the sole proprietorship and ***not after***. The successor-in-interest liability is for what ***already*** transpired, rather than what ***might*** transpire in the future.

Whether an incorporated sole proprietorship may escape liability under ***Cambridge Townhomes, LLC, supra*****, 166 Wn.2d 475, 482-483, 209 P.3d 863 (2009)** based on uncorroborated, self-serving testimony which contradicts the incorporation documentation is a determination which should by made by this court and not an exception created by the court of appeals. This is a policy judgment which must be made by this court on review. (RAP 13.4(b)(1), (b)(2) and (b)(4)).

<u>Issue No. 9</u> - Necessary And Indispensable Party

The developer continued to insist to the Klosters, even after suit was filed, that the access easement had been properly recorded against the adjoining property. (Opinion, 21-22). As previously stated, the court of appeals accepted that the developer was responsible for the failure to record the access easements against the adjoining property (Opinion, 23-24) as the developer testified at trial. (RP 566-567). However, the Klosters' attempts to add the developer as a party at the suggestion of Judge Reynolds (RP 185) were denied by a visiting judge and another. Thus the Klosters did not have the opportunity to proceed against the single most responsible person who created their predicament.

Inexplicably, the court of appeals held that the developer was not a necessary and indispensable party (Opinion, 23) because the Klosters did "not explain their basis for recovery against Heany personally (the developer) or how they were prejudiced by his absence as a party." (Opinion, 24). This holding conflicts with this court's decision in ***Burt v. Washington State Dept. of Corrections*, 168 Wn.2d 828, 832, 231 P.3d 191 (2010)**. A responsible party who is liable for another party's damage is necessary and indispensable in order for the damaged party to obtain relief for that damage.

Pursuant to RAP 13.4(b)(1), this is an issue which must be reviewed to correct the court of appeals' failure to follow this court's decision in ***Burt, supra*, 168 Wn.2d 828, 832, 231 P.3d 191 (2010)**. The party most responsible for the Klosters' lack of a recorded access easement is indispensable for them to obtain complete relief.

VIII. ATTORNEY FEES AND COSTS ON APPEAL

The Klosters respectfully request that this court award them attorney fees and costs on review pursuant to **RAP 18.1(b)** not only against First American pursuant to **Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991);Axess Int'l v. Intercargo Ins., 107 Wn.App. 713, 720-721, 30 P.3d 1 (2001);Erickson v. Chase, 156 Wn.App. 151, 158-159, 231 P.3d 1261 (2010)**; and

American Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 408, 411, 413, 229 P.3d 693 (2010), but also against Roberts pursuant to **RCW 64.04.030** and **Edmonson, *supra*, 256 P.3d at 1229** for her failure to defend the Klosters' title.

The Klosters pursued this case to obtain full title insurance coverage and to defend their title to Lot 1. First American has the responsibility to indemnify them for all costs and expenses incurred based on its refusal to provide coverage for the Klosters' claim, and along with Roberts, for the bad faith refusal to defend the Klosters' title.

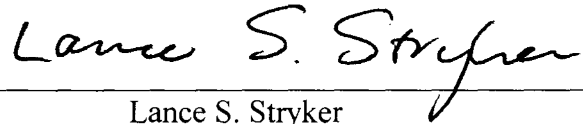
IX. CONCLUSION

The proper interpretation of the ***undefined*** access coverage set forth in the standard ALTA title insurance policy and the applicability of title insurance coverage for access easements shown on recorded plats as well as the related issues set forth above are ones which affect the entire real estate industry, including retail buyers, sellers, brokers, and title insurers and their agents which merit consideration by this court. The court of appeals' decision presents multiple conflicts with this court's precedent and other court of appeals' decisions and presents issues of first impression which substantially affect the real estate industry and are of significant public importance. This court should accept review.

///

June 2, 2014 Respectfully Submitted,

Lance S. Stryker, WSBA No. 35005



Lance S. Stryker
Attorney for Petitioners, Appellants and Cross-Respondents Thelma, Karl, Lori and Karen Kloster

PROOF OF SERVICE

The undersigned certifies that he served a true copy of the Klosters' Petition for Review by placing the same in an envelope which was sealed and thereafter deposited in the United States mail with first class postage thereon fully prepaid; such deposit taking place at White Salmon, Washington, on the date set forth below, and addressed as follows:

Donald Jeffrey Courser
Stoel Rives, LLP
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Vancouver, WA 98660

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L. Eugene Hanson, Esq.
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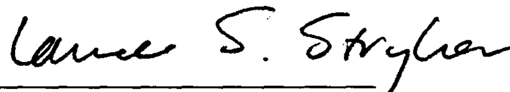
111 North Grant Street
Goldendale, WA 98620

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

Executed on June 2, 2014, in White Salmon, Washington.



Lance S. Stryker

APPENDIX

FILED
FEB. 6, 2014
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

THELMA, KARL, LORI, and KARIN KLOSTER, Appellants, v. SCHENECTADY ROBERTS, PACIFIC RIM BROKERS, INC., a corporation, AMERI-TITLE, INC., a corporation, and DOES ONE through FIFTY, inclusive, Respondents, FIRST AMERICAN TITLE INSURANCE COMPANY, a corporation, Respondent and Cross Appellant. MICHAEL MOORE, Defendant.	No. 30546-5-III UNPUBLISHED OPINION

FEARING, J. — Karl and Thelma Kloster, and Karl's parents, Lori and Karin Kloster (Klosters) bought a vacant lot (Lot 1) in rural Klickitat County thinking they held an access easement over property bordering to the south. The easement, however, was not signed by the grantor, and the parties to this suit assume the easement does not bind the neighboring property. When the neighboring property owner blocked use of the easement, the Klosters, despite having an alternate access route, filed suit for

misrepresentation, against their seller of Lot 1, the real estate broker, their title company, and the title company's local agent. They sought additional damages from the title company and its agent and underwriter for breach of the insurance contract, breach of the duty to defend and indemnify, bad faith, and violation of the Consumer Protection Act (CPA) chapter 19.86 RCW. The title company counterclaimed for a declaratory judgment that its policy provided no coverage. After a series of summary judgment dismissals of some defendants and a jury trial on the remaining claims, judgment was entered for all defendants except the title company, which was ordered to pay the cost to cure the lack of an easement and some of the Klosters' attorney fees related to the title insurance coverage issue.

The Klosters appeal most of the trial court rulings. Among other assignments of error, the Klosters contend the trial court erred (1) in dismissing their claim, on summary judgment, against the seller of the property; (2) in denying their motion to include the developer in his individual capacity as a necessary party; (3) in dismissing the broker as successor in interest of the developer; (4) in concluding that the title company's agent was not a coinsurer of their title; (5) in ruling that there was insufficient evidence that the agent was negligent; (6) in concluding that the title company did not breach the title policy, the unfair claims settlement practices regulations, or the CPA; (7) in dismissing the Klosters' claims for noneconomic damages and all economic damages except "cost of cure"; (8) in awarding the broker and the seller attorney fees; and (9) in denying the

Klosters' full claim for attorney fees from the title company. The title company cross appeals, contending the trial court erred (1) in ruling that the Klosters had coverage under the title policy for a purported access easement, (2) in allocating $9,000 against the title company as a cost of cure, and (3) in awarding attorney fees to the Klosters.

In a marathon opinion necessitated by the many issues raised on appeal, we affirm the trial court's rulings in favor of the seller, real estate broker, and developer principally on the ground that no representation was given to the Klosters concerning an access easement. We reverse the judgment entered against the title company on the ground that its policy did not cover the loss.

FACTS

Since the trial court dismissed some of the Klosters' claims on summary judgment and the jury ruled on other claims of the Klosters, this outline of facts contains, where respectively appropriate, testimony from summary judgment affidavits and from trial.

In 1978, Alvin (Fred) Heany created short plat WS-146 on a 23-acre parcel he owned in Klickitat County.[1] The short plat consisted of four tracts, each subject to easements and use reservations. Tract 1, north of Tract 2, was divided into Lots 1 and 2. In addition to owning the land, Heany was a real estate broker, who operated under the name of Pacific Rim Properties (Pacific Rim), a sole proprietorship.

[1] A copy of the short plat is appended to the opinion.

In 1979, Fred Heany filed an application for a long plat subdivision called Pacific Rim Estates, which included land found within short plat WS-146. The map attached to the long plat application showed a 30-foot wide access easement along the northern border of Tract 2 for the benefit of the owners of Lots 1 and 2, Tract 1, as well as a 30-foot wide easement along the southern border of Lots 1 and 2 for the benefit of Tract 2. The 30-foot wide easement across the southern border of Lot 2 also benefited Lot 1. A 60-foot width is required by Klickitat County for a public right-of-way.

Klickitat County insisted, for a long plat, that all property owners affected by rights-of-way sign the plat and join in the dedication of their property for roads. In 1981, pending final approval of the long plat application, Heany sold, on contract, Tract 2 to Michael Fester, subject to "[t]hose easements and reservations of record" on the short plat. Ex. 52. Fester agreed with Heany to permit an access easement across the northern 30-feet of Tract 2.

In November 1981, owners of property within the Pacific Rim subdivision signed the long plat application, which included a dedication of access easements. The owner of Lot 2, Tract 1, signed the application acknowledging his dedication of an easement along his southern border for the benefit of Lot 1 and other land. Robert Blades, a real estate salesperson for Pacific Rim, notarized the signatures, including Fred Heany's signature. The signature of Michael Fester, owner of Tract 2, however, was inadvertently omitted.

Klickitat County approved the long plat application and Heany recorded the plat in December 1981 without Fester's signature.

In 1982, Fred Heany and Robert Blades incorporated Pacific Rim Properties as Pacific Rim Brokers, Inc. (PRB). Heany transferred his ownership interest in PRB to Blades one year later.

Fred Heany's fulfillment deed to Michael Fester, for Tract 2, was recorded in 1983 without mention of the long plat or the easement across the northern boundary of the land. Fester sold Tract 2 to Larry and Rhonda Rickey in 2000. The map attached to the Rickeys' title insurance policy did not show an easement encumbering the northern 30 feet of their land. The Rickeys constructed and used a road, along their northern boundary, as a driveway.

Defendant Schenectady Roberts inherited Lots 1 and 2, Tract 1, from her father, who purchased the lots from Fred Heany. In 2005, Roberts sold, for $38,000, Lot 1 to the Klosters. Karl and Thelma Kloster had previously bought and sold multiple properties. PRB served as listing agent for the sale of Lot 1. Adrian Palmer, an agent of PRB, acted as buying agent of the Klosters.

At the time of the sale and during the events leading to the sale, Roberts resided in California. She had no direct contact with the Klosters. Roberts had no knowledge of any easements or the lack of easements, nor was she aware of any representations made by PRB.

PRB agent Adrian Palmer showed the land to Thelma and Karl Kloster. During the showing, according to deposition testimony of Palmer, he "shared his feelings with both Karl and Thelma that there was an easement." Palmer provided to Karl Kloster a copy of the plat map that showed a 30-foot access easement along the northern edge of Tract 2, and Palmer represented to Karl Kloster that the plat map was accurate.

During the showing, the Klosters and Adrian Palmer noticed a barbed wire fence along the boundary of Tract 2 and Lot 1 that blocked access to the easement on the north end of Tract 2. Palmer still believed an easement existed across the northern part of Tract 2 and extended across the fence line, but he stated to the Klosters that the fence might be a problem. The Klosters were then still contemplating whether to purchase the property. The Klosters never thereafter asked Palmer about the fence.

Adrian Palmer shared his concern about the barbed wire fence with PRB's Robert Blades. Blades told Palmer that he would contact the Rickeys. Blades left the Rickeys a telephone message, but never spoke with them. Palmer did not tell the Klosters of his conversation with Blades.

As part of the sale, Schenectady Roberts and the Klosters signed, in January 2005, a Vacant Land Purchase and Sale Agreement (VLPSA). The agreement provided for attorney fees and costs to the prevailing party "[i]f the Buyer, Seller, or any real estate licensee or broker involved in this transaction is involved in any dispute relating to this transaction." Clerk's Papers (CP) at 3744. The VLPSA also read that "[a]ll 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, attorneys fees and costs, . . . etc." CP at 3745.

Defendant Ameri-Title, Inc., serving as First American Title Insurance Company's agent, conducted a title search for Lot 1 and issued a preliminary commitment for title insurance. The preliminary title commitment included an appended partial plat map. The map showed a 30-foot access easement along the northern border of Tract 2 and 30-foot access easements along the southern borders of Lots 1 and 2. As may be surmised, neither Michael Fester nor his successors in interest, the Rickeys, signed a document agreeing to the easement across Tract 2, and the lack of written approval gives rise to this suit. Also, if the Klosters deemed the 30-wide easement across the southern end of Lot 2, Tract 1, to be sufficient, this suit may not have ensued, despite the lack of an easement across the northern boundary of Tract 2.

Printed across the top of the map attached to the commitment was a disclaimer:

> ANY SKETCH ATTACHED HERETO IS DONE SO AS A COURTESY ONLY AND IS NOT PART OF ANY TITLE COMMITMENT OR POLICY. IT IS FURNISHED SOLELY FOR THE PURPOSE OF ASSISTING IN LOCATING THE PREMISES AND FIRST AMERICAN EXPRESSLY DISCLAIMS ANY LIABILITY WHICH MAY RESULT FROM RELIANCE MADE UPON IT.

Ex. 94, at 34. At trial, Karl Kloster testified, "I know the difference between a sketch and a short plat map, and I know that is a sketch. That's provided as a courtesy to locate the

property, and that's it." Report of Proceedings (RP) at 1074. Mr. Kloster was asked if he relied on the short plat sketch attached to his title policy as a representation of what was covered in the policy. He explained that he did not rely on the sketch of the plat because it had a disclaimer at the top.

The agency contract between Ameri-Title and First American Title provided that Ameri-Title was responsible for the first $3,500 of any loss on any First American policy issued by Ameri-Title. Ameri-Title was instructed by First American to verify whether access easements are properly created for any property on which title insurance was requested, and if they were not, to so note in the preliminary commitment and in the title policy by use of a special exception. Ameri-Title did not determine whether access easements were properly created for Lot 1 and did not note in the preliminary commitment or in the title policy issued to the Klosters that the purported access easement across Tract 2 was defective.

The First American Title insurance policy provided coverage for loss due to a lack of a right of access to Lot 1, but did not provide coverage for any specific easement. The policy language read, in part:

> FIRST AMERICAN TITLE INSURANCE COMPANY . . . insures . . . against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:
>
> . . . .
>
> 4. Lack of a right of access to and from the land.
>
> The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided

in the Conditions and Stipulations.

Ex. 95. Schedule A identified only Lot 1. The amount of insurance was $38,000.

Schedule B of the title policy listed exclusions from coverage, including this general exception: "Easements, claims of easement or encumbrances which are not shown by the public records." Ex. 95, at 5. Specific exceptions related to the unrecorded easement on the northern 30 feet of Tract 2 are:

> 5. Easements, Conditions, Restrictions and Reservations, including the terms and provisions thereof, as contained in Short Subdivision filed as Auditor's File No. 167997, Klickitat County Short Plat Records.
> . . . .
> 8. Conditions, Restrictions, Easements for roadways and Utilities and disclosure regarding maintenance of roads, including the terms and provisions thereof, as shown on the Plat recorded December 1, 1981 in Book 5, Pages 31 and 32, Klickitat County Plat Records.

Ex. 95, at 6. The plat sketch attached to the title policy is a portion of the short plat map in Auditor's File No. 167997. Exclusion 8 refers to easements for roadways as shown on the plat in Book 5, pages 31 and 32, of the county records, which is the same plat referred to in Schedule A's description of the property.

Under Section 4 in the title insurance policy, First American agreed to defend against third party claims adverse to the title as follows:

> Upon written request by the insured . . . , the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy . . . . The Company will not pay any fees, costs

> or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

Ex. 95.

When the Klosters began using the Rickeys' driveway to drive to Lot 1, the Rickeys blocked access over Tract 2 and reported the Klosters for trespass. Karl Kloster conceded that he could build an access road to his property across land not found in Tract 2. Nevertheless, he would not have bought the property if he knew he needed to build the road in an alternate location, because the terrain would render the road costly. Karl Kloster, who has experience in building roads, testified the costs could approach $20,000.

The Klosters complained to Ameri-Title about the missing easement and Ameri-Title recommended that the Klosters consult an attorney. On March 25, 2005, the Klosters submitted a claim to title insurer, First American Title. The Klosters made a demand upon Ameri-Title and First American to defend their interest in the unrecorded easement across Tract 2 from the adverse claims of the Rickeys, who were also insured by First American.

First American began its investigation immediately. On its initial claim report, First American wrote that the Klosters allege an "irregularity/omission-agent." Ex. 107. The description referenced an attached letter from the Rickeys' attorney describing the conflicting maps shown on the Klosters' and the Rickeys' title policies. The employee

who prepared the initial claim report testified that the appellation "irregularity/omission" best fit the situation. She explained that the only choices she had for describing the claim were "error omission by employee, error omission by agent, or company practice risk," and it appeared the Klosters were claiming that an agent was responsible. RP at 758.

On March 31, 2005, First American Title sent a letter to the Klosters' attorney, announcing its decision to deny the claim. In the letter, First American explained that the legal description of the insured property did not include appurtenant easements. The company wrote that the policy covered loss by reason of a lack of a right of access, but the Klosters had a right of access over the south 30 feet of Lot 2, and the policy did not cover an easement over Tract 2.

The Klosters filed suit in April 2005. The complaint caption included a listing of defendants "DOES ONE through FIFTY." CP at 1. On September 10, 2007, more than two years after filing of the complaint, the Klosters served a summons and complaint on Fred Heany as "Doe One." CP at 1056, 1059. Heany moved to quash the summons, asserting that he was known by name and capacity by the Klosters even before the suit was filed, that it was therefore inappropriate to consider him a recently discovered party, and that the Klosters had not properly moved to amend the complaint, citing CR 4(h), CR 10(a)(2), and CR 15. The summons was quashed in April 2008. Thereafter the Klosters moved pursuant to CR 10(a)(2), CR 15(c), and CR 21 to substitute Fred Heany as Defendant Doe One. The trial court also denied this motion.

During the pendency of suit, the parties filed multiple motions, including motions for summary judgment and for limitation of damages. The trial court dismissed Michael Moore, the agent of Ameri-Title, with prejudice, dismissed the claims against seller Schenectady Roberts on summary judgment, and dismissed the claims against Ameri-Title as a matter of law under CR 50(a). Finding that the map appended to the preliminary commitment and the final title insurance policy created an ambiguity concerning coverage of the apparent easement over Tract 2, the trial court concluded as a matter of law that the title insurance policy covered the unrecorded easement.

The jury trial began October 31, 2011. After conclusion of the Klosters' case, the trial court dismissed the claims against PRB and First American for fraudulent misrepresentation, fraudulent concealment, and bad faith. The court also concluded as a matter of law that PRB did not have successor liability for Fred Heany's actions as developer of Pacific Rim Estates. First American and PRB rested without presenting additional testimony.

The jury concluded that PRB was not liable for negligent misrepresentation, that the Klosters failed to minimize their loss, and that the Klosters were 100 percent at fault. The jury also found, however, that the cost to cure the defect was $9,000. The trial court entered judgment against First American for the $9,000 "cost of cure." The trial court entered an additional judgment against First American for the Klosters' presettlement offer of attorney fees and costs related to their insurance coverage claims, offset by First

American's costs incurred after the settlement offer expired, pursuant to CR 68, for a total of $33,715.35. The Klosters were ordered to pay Roberts and PRB $269,918.08 in attorney fees and costs.

ROBERTS LIABILITY

In their complaint, the Klosters alleged that Schenectady Roberts affirmatively represented, through her real estate agent PRB, that the acreage was suitable for residential development and without impairment of access easements. In the alternative, the Klosters allege that Roberts held an obligation to affirmatively disclose the existence of the "defective" access easement. CP at 9. In support of the allegations and in opposition to summary judgment motions, Thelma Kloster and Karl Kloster filed nearly identical affidavits stating that real estate agents at PRB never warned her or him of any defect in an access easement. The plat map that Adrian Palmer gave to Karl Kloster, when walking the property, is attached to the Klosters' counsel's affidavit. The plat showed an access easement across the north 30 feet of Tract 2.

The Klosters sued Schenectady Roberts for negligent and intentional misrepresentation and fraudulent concealment, three species of misrepresentation. In response to a summary judgment motion, the Klosters added a claim of innocent misrepresentation, another species of misrepresentation. Claims of misrepresentation are no longer barred by the rejected economic loss rule, but permitted by the independent duty doctrine. *Austin v. Ettl*, 171 Wn. App. 82, 87 n.6, 286 P.3d 85 (2012). Because the

duty to refrain from fraud is independent of the contract, the independent duty doctrine permits a party to pursue a fraud claim even if a contract exists. *Jackowski v. Borchelt*, 174 Wn.2d 720, 738, 278 P.3d 1100 (2012). A party's misrepresentation renders a contract defective, such that tort remedies are appropriate. *Austin*, 171 Wn. App. at 87 n.6.

The trial court dismissed all claims against Roberts on summary judgment, because facts submitted by the Klosters could not sustain any claim of misrepresentation. We review the trial court's grant of summary judgment de novo, viewing the facts and inferences in the light most favorable to the nonmoving party. *Jackowski*, 174 Wn.2d at 729. Summary judgment is appropriate if there is no genuine issue regarding a material fact and if the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c).

Innocent misrepresentation. The elements of innocent misrepresentation are innocent misrepresentation of a material fact for the purpose of inducing the other to rely on the misrepresentation, and pecuniary loss caused by justifiable response on the misrepresentation. *Hoffman v. Connall*, 108 Wn.2d 69, 72-73, 736 P.2d 242 (1987) (quoting RESTATEMENT (SECOND) OF TORTS § 552C(1) (1977)). The Klosters fail to present a factual issue on this claim, because they forward no evidence that Roberts supplied false information, a defect in most of the Klosters' misrepresentation claims. Schenectady Roberts' assertion that she never communicated with the Klosters or knew

of any purported easement across Tract 2 is unrebutted and conforms to the Klosters' version of the facts.

Negligent misrepresentation. To establish negligent misrepresentation, a plaintiff must "prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages." *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007); *Austin*, 171 Wn. App. at 88. Moreover, "[a]n omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation." *Ross*, 162 Wn.2d at 499. Since negligent misrepresentation carries a higher burden for the plaintiff than a claim of innocent misrepresentation, it follows that, if the Klosters' claim of innocent misrepresentation cannot survive a summary judgment motion, the claim of negligent misrepresentation also loses.

Intentional (fraudulent) misrepresentation. Intentional misrepresentation or fraud carries an even higher burden for the plaintiff. "A plaintiff claiming fraud must prove each of the following nine elements: '(1) representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker

that it should be acted upon by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely upon it, and (9) damages suffered by the plaintiff.'" *Stieneke v. Russi*, 145 Wn. App. 544, 563, 190 P.3d 60 (2008) (quoting *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996)). As with their claim of negligent misrepresentation, the Klosters fail to show that Roberts made any representations at all or that she participated in or authorized any misrepresentations of material fact to the Klosters.

Fraudulent concealment. Fraudulent concealment, another species of fraud, is sometimes considered a form of negligent misrepresentation. *See Van Dinter v. Orr*, 157 Wn.2d 329, 333, 138 P.3d 608 (2006). On a claim for fraudulent concealment, "the seller's duty to speak arises[:] where (1) the residential dwelling has a concealed defect; (2) the vendor has knowledge of the defect; (3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect is unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser." *Stieneke*, 145 Wn. App. at 560. Failure to disclose a material fact when there is a duty to disclose is fraudulent. *Id.* A duty to disclose in a business transaction typically arises under a fiduciary relationship. *Austin*, 171 Wn. App. at 90. The duty may also arise, however, "when the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other," or when the seller takes advantage

of the buyer's lack of business experience by remaining silent. *Van Dinter*, 157 Wn.2d at 334.

The Klosters provide no evidence that Schenectady Roberts knew that the easement depicted on the short plat map was invalid, that the unrecorded easement presented some kind of danger, or that the Klosters could not have discovered that the easement was unrecorded with an inspection of the county records. Roberts had no special relationship of trust or confidence with the Klosters and had less experience with real estate transactions than the Klosters. Summary dismissal of this claim was also appropriate.

Vicarious liability for real estate agent's representations. The Klosters contend Adrian Palmer, a PRB agent, told them that the easement on Tract 2 served Lot 1, and that Roberts, as principal, is vicariously liable for PRB's false representation. A principal is not liable, however, for any act, error, or omission by her real estate agent unless the principal participated in or authorized the act, error, or omission. RCW 18.86.090. Thus, PRB's statements may not be attributed to Roberts unless the Klosters could show that Roberts participated in or authorized those representations. The Klosters made no such showing. Their failure to raise a factual issue on this essential element supports dismissal of this claim on summary judgment. *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 170, 810 P.2d 4 (1991). The nonmoving party's failure to provide evidence to support an essential element of that party's case renders all other facts immaterial. *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001).

Warranty of clear title. Finally, the Klosters contend Roberts is liable under the statutory warranty deed given to the Klosters. Statutory warranty deeds are governed by RCW 64.04.030. *Edmonson v. Popchoi*, 172 Wn.2d 272, 278, 256 P.3d 1223 (2011). A warranty deed covenants against both known and unknown title defects. *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 162, 951 P.2d 817 (1998); *see Foley v. Smith*, 14 Wn. App. 285, 292, 539 P.2d 874 (1975). Under RCW 64.04.030, a grantor conveying land by statutory warranty deed makes five covenants against title defects:

> "(1) that the grantor was seised of an estate in fee simple (warranty of seisin); (2) that he had a good right to convey that estate (warranty of right to convey); (3) that title was free of encumbrances (warranty against encumbrances); (4) that the grantee, his heirs and assigns, will have quiet possession (warranty of quiet possession); and (5) that the grantor will defend the grantee's title (warranty to defend)."

Mastro, 90 Wn. App. at 162 (quoting 17 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 7.2, at 447 (1995)).

The Klosters contend the trial court found that the title was defective due to the unrecorded access easement. On the contrary, the trial court ruled on more than one occasion that, as a matter of law, the Klosters have legal and physical access to Lot 1. The court refused to rule that the unrecorded easement was a defect on the title.

After trial, the court entered findings of fact and conclusions of law to support the awards of attorney fees. The Klosters seize upon one of these findings, which states, "The '"cost of cure"' is a covered loss under FIRST AMERICAN's title policy issued to

the KLOSTERS because the title policy is a contract of indemnity which insures against actual loss from the existence of a title defect." CP at 4452. As will be discussed below, this finding is erroneous. More importantly, the finding was not entered in the context of any claim against Schenectady Roberts.

At any rate, the Klosters' title in Lot 1 is unencumbered. Generally, an easement is an encumbrance on the *servient* property, and the failure to disclose an easement on the servient property breaches the warranty of clear title. *See Hebb v. Severson*, 32 Wn.2d 159, 167, 201 P.2d 156 (1948). But the Klosters claim the opposite—that their seller of the dominant property failed to pass title to an easement on the adjoining servient land. No case or statute demands that the warranty of clear title extend to an interest off the sold land.

No other party has a recorded ownership interest in Lot 1. Accordingly, no defects or encumbrances affect the Klosters' legally recognized rights in their property. *See Dave Robbins Constr., LLC v. First Am. Title Co.*, 158 Wn. App. 895, 902, 249 P.3d 625 (2010). The trial court did not err in concluding as a matter of law that Ms. Roberts is not liable under the statutory warranty deed.

JOINDER OF DEVELOPER HEANY

More than two years after filing of the complaint, the Klosters served a summons and complaint on Fred Heany as "Doe One." CP at 1059. The summons was quashed in April 2008, since Heany had not been joined as a defendant. Thereafter the Klosters

moved pursuant to CR 10(a)(2), CR 15(c), and CR 21 to substitute Fred Heany as Defendant Doe One. The trial court also denied this motion. From these rulings, the Klosters appeal.

Service on Heany. Under CR 10(a)(2), if a plaintiff does not know the name of a defendant, the pleading must indicate that there is an unknown defendant, and when the "true name" is discovered, the pleading may be amended accordingly. The Klosters attempted to substitute Fred Heany as Doe One by merely serving him with a summons and complaint. The Klosters, in turn, impliedly argue on appeal that the trial court committed error by refusing to consider service of process as successfully joining Heany as a defendant.

We agree with the trial court that the Klosters "placed the cart before the horse." The "cart" was service of process and the "horse" to be placed in front was a formal amendment to the complaint. CR 10(a)(2) directs the plaintiff to "amend" the complaint upon discovering a Doe's true name. Substitution of a true name for a fictitious party constitutes an amendment substituting or changing parties. *Kiehn v. Nelsen's Tire Co.*, 45 Wn. App. 291, 295, 724 P.2d 434 (1986). Thus, the rule is read in conjunction with CR 15(a), which provides that a party seeking to amend a pleading after the responsive pleading must do so only by leave of the court or by consent of the adverse party.

Amendment of complaint. The Klosters next contend the trial court erred in denying their CR 15 motion to amend their complaint to substitute Fred Heany as

"Defendant Doe One." CP at 1099. We review the trial court's application of the rules for abuse of discretion. *See Burt v. Dep't of Corr.*, 168 Wn.2d 828, 832, 231 P.3d 191 (2010); *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006).

The trial court did not abuse its discretion when later denying the Klosters' motion to amend their complaint to join Fred Heany as a new defendant. The Klosters filed the motion on May 1, 2008, after the running of the three-year statute of limitations for suits alleging fraud and misrepresentation. RCW 4.16.080. The statute of limitations commences to run when the plaintiff knows, or in the exercise of due diligence should have known, all the essential elements of the cause of action. *See In re Estates of Hibbard*, 118 Wn.2d 737, 752, 826 P.2d 690 (1992). If the statute of limitations bars the claim against Heany, the amendment serves no purpose. In determining a motion to amend, the trial court may consider the futility of the amendment. *Watson v. Emard*, 165 Wn. App. 691, 699, 267 P.3d 1048 (2011).

The Klosters bought Lot 1 in February 2005 and filed suit in April 2005. Before filing the original complaint in April 2005, the Klosters could have researched the record title of Lot 1 and Pacific Rim Estates to determine if they held an enforceable easement. The public record shows Heany as the developer of Pacific Rim Estates and the creator of the easements on Lots 1 and 2 and Tract 2. The Klosters should have then known of the failure of Heany to obtain the signature of Michael Fester on the plat.

The Klosters admit that, shortly after the filing of suit, they approached Fred

Heany, who claimed the easement was properly recorded. The Klosters either had or should have had information then to know that Heany was wrong. The trial court could reasonably conclude that the Klosters knew of any claim against Fred Heany by April 2005.

The Klosters argue that any amendment joining Fred Heany should survive the statute of limitations since the lawsuit was commenced timely. Under CR 15(c), an amendment adding a party may avoid the statute of limitations and relate back to the date of filing the suit, when the plaintiffs show that they timely sought an amendment, once they gained relevant knowledge. *Teller v. APM Terminals Pac., Ltd.*, 134 Wn. App. 696, 705, 142 P.3d 179 (2006). The moving party must also prove that any mistake in failing to timely amend was excusable. *Id.* at 705-06. Conversely, when the amendment is to add an additional defendant, inexcusable neglect alone is a sufficient ground to deny the motion. *Id.* at 706 (quoting *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 174, 744 P.2d 1032 (1988)). "If the parties are apparent or are ascertainable upon reasonable investigation, the failure to name them will be inexcusable." *Id.* "For example, failure to name a party in an original complaint is inexcusable where the omitted party's identity is a matter of public record." *Id.* at 707. The plaintiff's attorney is presumed to have researched and identified all potential parties with verifying information in the public record. *Id.*

Although the trial court did not indicate the basis for denial in the order denying the motion to substitute, this court may affirm on any basis supported in the record. *Deep Water Brewing, LLC v. Fairway Res., Ltd.*, 170 Wn. App. 1, 11, 282 P.3d 146 (2012). The evidence is more than sufficient to support the trial court's decision on the basis that the failure to name Heany in the original complaint was inexcusable. *Teller*, 134 Wn. App. at 706.

Necessary party. For the first time on appeal, the Klosters contend Fred Heany should have been joined under CR 19 as a necessary party because he was responsible for failing to record the access easement. "Necessary party" may be raised for the first time on appeal because a trial court lacks jurisdiction if all necessary parties are not joined. *DeLong v. Parmelee*, 157 Wn. App. 119, 165, 236 P.3d 936 (2010). A person must be joined as a necessary party if (1) a complete determination of the controversy cannot be made without that party and (2) the party claims an interest in the subject of the case that would be impeded by a judgment. CR 19(a); *DeLong*, 157 Wn. App. at 165. In determining whether a party is necessary, the court asks to what extent a judgment rendered in the party's absence might be prejudicial to him or to those already parties, and whether a judgment rendered in his absence will be adequate. *Gildon*, 158 Wn.2d at 495.

Fred Heany was not a necessary party. His participation in this suit was unnecessary for a complete determination of the controversy, which involves claims of

fraud, concealment, and misrepresentation. Heany transferred his interest in PRB to Blades in 1983 and made no representations at all to the Klosters. He testified at trial that he intended to create an easement over Tract 2 when he sold that tract to the previous owner. The trial court instructed the jury to consider Heany's intent in determining whether an easement was created. Although the Klosters claim Fred Heany admitted to fault for failing to obtain Michael Fester's signature on the plat, the Klosters do not explain their basis for recovery against Heany personally or how they were prejudiced by his absence as a party.

PRB SUCCESSOR LIABILITY

The Klosters seek to impose liability upon Pacific Rim Brokers, Inc., as the successor to Fred Heany and Heany's sole proprietorship, Pacific Rim Properties. The Klosters argue that the issue of PRB's successor liability should have gone to the jury and the trial court should have adopted their proposed special jury instruction 16 on constructive or imputed knowledge. The Klosters wish to employ the jury instruction to argue that PRB, when acting as the broker during the sale from Roberts to the Klosters, knew of the defect in the easement, because knowledge held by Fred Heany is imputed to PRB.

Before trial, Judge Reynolds entered an order indicating that PRB was the successor in interest to Pacific Rim as the continuation and incorporation of Fred Heany and his associate, Robert Blades, doing business as Pacific Rim. During trial, Judge

Altman set aside Judge Reynolds' decision and entered an order dismissing PRB as a matter of law. In granting PRB's motion, Judge Altman addressed the effect of the previous ruling:

> Rulings were made previously based on a certain status of the file, which, as I indicated earlier, has changed in subtle ways now that we finally have the evidence of live under-oath witnesses.
>
> I'm not going to allow Mr. Heany's error to be attributed to the defendant [PRB] in this case, so to the extent that that's a previous ruling based on the facts as I knew them at the time, or Judge Reynolds did, that has changed.

RP at 1141.

A trial court's order or ruling may be revised at any time before final judgment. *Owens v. Kuro*, 56 Wn.2d 564, 566, 354 P.2d 696 (1960). Anyway, Judge Altman did not alter Judge Reynolds' finding that PRB was the successor in interest of Heany's *brokerage* business. Judge Altman ruled that PRB is not liable for mistakes Heany made in his separate business as a *developer* of Pacific Rim Estates. The Klosters contend the court erred in finding a distinction between Heany's brokerage business, known as Pacific Rim Properties, and his separate business as developer of Pacific Rim Estates. They argue that PRB is liable as a continuation of Heany's sole proprietorship, including his activities as developer and as broker.

The Klosters cite *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 209 P.3d 863 (2009). *Cambridge* noted the general rule that a corporation purchasing the assets of another corporation does not take on the liabilities of the selling

corporation. *Id.* at 481-82. One exception to this rule, however, is when the purchaser is a "mere continuation" of the seller. *Id.* at 482. Factors used by the court to determine whether a successor business is really just a continuation of the former business include whether there is a common identity between the officers, directors, and stockholders of the selling and buying companies, and the sufficiency of the consideration for the sale. *Id.* In the case of a sole proprietorship, which has no officers, directors, or shareholders, the court considers "the continuity of individuals in control of the business." *Id.* at 483. The objective of the test is to discern whether the purchasing company is merely a "'new hat'" for the selling company. *Id.* at 482 (quoting *Cashar v. Redford*, 28 Wn. App. 394, 397, 624 P.2d 194 (1981)).

The Klosters assert that while Fred Heany developed Pacific Rim Estates, he represented to the world that he acted for Pacific Rim Properties. They emphasize that Heany's letters to Klickitat County Commissioners, regarding the requirements for the long plat, were written on Pacific Rim Properties letterhead. Additionally, they note that the articles of incorporation for PRB state its purpose is "[t]o engage in the general business of brokering *and development* of real estate." Ex. 137, at 1 (emphasis added). These facts are not conclusive, however.

Mere use of a company's letterhead generally is insufficient to show that the letter writer is acting on behalf of the company. *See Griffin v. Union Sav. & Trust Co.*, 86 Wash. 605, 610-11, 150 P. 1128 (1915). The intent of the parties controls whether the

letter in effect "binds" the company. *Bailie Commc'ns Ltd., v. Trend Bus. Sys.*, 53 Wn. App. 77, 80, 765 P.2d 339 (1988); *see Griffin*, 86 Wash. at 610.

In this case, Fred Heany signed his name to these letters without any reference to representation of Pacific Rim Properties, and the letters themselves do not mention Pacific Rim Properties. Other letters written by Heany regarding development of the long plat were not sent on Pacific Rim Properties letterhead. At trial, he testified that he conducted his development activities independent of his brokerage activities for Pacific Rim Properties. Heany further testified that, despite language in the articles of incorporation, PRB never developed real estate. After he formed PRB with Robert Blades, his development activities prevented him from carrying out his brokerage duties for PRB, and that is why he sold his interest in PRB a year later to Blades. According to Robert Blades, the articles of incorporation were drawn up by an attorney who recommended including "development of real estate" in the purpose section "in case anybody wanted to do anything down the road," not because he and Heany intended to develop property for PRB. RP at 858.

The "continuity of individuals" test supports a conclusion that PRB is a continuation of the former brokerage sole proprietorship. *Cambridge*, 166 Wn.2d at 483. But the evidence also conclusively supports the trial court's conclusion that Heany's development activities were not performed for Pacific Rim Properties and were not intended to be incorporated in PRB. Consequently, the trial court did not err in rejecting

the Klosters' argument that PRB had successor liability for Heany's development activities for Pacific Rim Estates.

Any error in dismissing PRB was harmless. The jury ruled that the Klosters suffered no damages from any defect in the easement.

AMERI-TITLE LIABILITY

Coinsurer. Evidence showed that Ameri-Title was a local agent for First American and sold the First American title insurance policy to the Klosters. In the agency agreement with First American, Ameri-Title retained 90 percent of the premiums paid for a First American title policy and agreed to bear the first $3,500 of risk of loss on some policies written for First American. Ameri-Title prepared the preliminary commitment for title insurance that was supplied to the Klosters.

The Klosters contend Ameri-Title qualifies as an insurer under RCW 48.01.040, .050, and .070 and WAC 284-30-320. In 2009, Judge Reynolds granted a motion in limine preventing argument that Ameri-Title did not act as a title insurer. After presentation of the Klosters' evidence, however, the trial court granted First American's and Ameri-Title's motion to revise this interlocutory issue on summary judgment or under CR 56(d) (partial summary judgment). The trial court ruled that the Klosters could not assert a claim against Ameri-Title as an insurer, and therefore all claims on that basis were dismissed, including claims for breach of contract, breach of the duty to defend and indemnify, bad faith, and violations of the CPA.

Review of an order of summary judgment is de novo. *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 470, 209 P.3d 859 (2009). Summary judgment is appropriate if there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). We also review a trial court's ruling on a CR 50(a) motion for judgment as a matter of law de novo, using the same standard applied by the trial court. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003); *Hawkins v. Diel*, 166 Wn. App. 1, 13, 269 P.3d 1049 (2011).

Real estate title insurers in Washington are regulated under Title 48 RCW. *See* ch. 48.29 RCW. An "insurer" is defined generally in the statute as "every person engaged in the business of making contracts of insurance." RCW 48.01.050. A more detailed definition of "insurer" is supplied by former WAC 284-30-320(5) (1978): any individual or legal entity "engaged in the business of insurance, authorized or licensed to issue or who issues any insurance policy or insurance contract in this state." "Insurance" is defined as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040. A title insurance agent is "a business entity licensed under the laws of this state and appointed by an authorized title insurance company to sell, solicit, or negotiate insurance on behalf of the title insurance company." RCW 48.17.010(16).

The difference between a title insurer and its agent, therefore, is that the title insurer enters into the contract with the insured to indemnify for certain losses, while the

agent enters into a separate contract with the insurer to sell, solicit, or negotiate insurance on behalf of the insurer. An agent, such as Ameri-Title, is not licensed to issue an insurance policy on its own behalf. *Id.* Ameri-Title's agreement to be compensated with a percentage of the premiums and to indemnify a portion of the loss paid by First American was negotiated with First American, not with the Klosters. *See Title Ins. Co. of Minn. v. State Bd. of Equalization*, 4 Cal. 4th 715, 842 P.2d 121, 126-27, 14 Cal. Rptr. 2d 822 (1993). First American remained solely liable to the Klosters for any covered loss. *Id.*, at 127. Consequently, the trial court did not err in concluding as a matter of law that Ameri-Title was not a coinsurer with First American on the Klosters' title insurance policy.

Negligent misrepresentation. At the conclusion of the Klosters' evidence, the trial court found "no evidence whatsoever" to support the claims against Ameri-Title, and dismissed them all. The Klosters contend Ameri-Title had a duty to investigate and disclose to them that the access easement shown on the short plat had not been recorded, and that the breach of this duty constituted negligence.

To support a prima facie case of negligent misrepresentation, the Klosters had to produce evidence that Ameri-Title negligently supplied them false information to induce a business transaction and that the Klosters justifiably relied on that false information. *Douglas v. Visser*, 173 Wn. App. 823, 833-34, 295 P.3d 800 (2013). The Klosters contend the "false information" here was the failure to inform them that the easement on

Tract 2 shown in the preliminary commitment document was unrecorded. Ameri-Title had no duty, however, to inform the Klosters of this fact.

A preliminary commitment does not represent the condition of the title, but is merely a statement of the terms and conditions by which the insurer is willing to issue its title policy. *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 536, 39 P.3d 984 (2002); *Courchaine v. Commonwealth Land Title Ins., Co.*, 174 Wn. App. 27, 36, 296 P.3d 913 (2012). Neither a preliminary commitment nor a title policy serves the purpose of an "'abstract of title'" which is a written representation, intended to be relied upon by the party who requested it, that gives constructive notice of all recorded conveyances or documents in the chain of title. *Courchaine*, 174 Wn. App. at 36 (quoting RCW 48.29.010(3)(b)). Because the preliminary commitment here was not an abstract of title, Ameri-Title had no duty to inform the Klosters that one of the easements on the attached short plat map had not been recorded. Furthermore, the preliminary commitment specifically excluded from coverage any easements shown on the short plat map.

The Klosters rely on *Sheridan v. Aetna Casualty & Surety Company*, 3 Wn.2d 423, 440, 100 P.2d 1024 (1940), when arguing that Ameri-Title voluntarily assumed the obligation to warn the Klosters of the inability to use an easement across the Rickeys' land. *Sheridan* was a personal injury accident against a liability insurer, who agreed with the owner of a building to inspect the premises and report the condition of the premises to the government authority. Any relevance to duties of a title insurer is distant. Whereas

First American Title may have wanted its agent to be more careful in researching easements, this want created no duty to the Klosters, particularly when the commitment excluded coverage for easements shown on the plat map.

FIRST AMERICAN TITLE INSURANCE COMPANY
EXTRACONTRACTUAL LIABILITY

The Klosters seek recovery against the title insurance policy issuer, First American Title, for breach of a duty to defend, bad faith, violations of the unfair claims settlement practices regulations, violations of the CPA, and breach of the title insurance contract. In this context, the claims of bad faith, violations of the regulations, and violations of the CPA are coextensive.

After the Klosters rested their case, the trial court granted First American's CR 50(a) motion for judgment as a matter of law and dismissed the claims. Our review of a CR 50(a) judgment is de novo, viewing the evidence in the light most favorable to the nonmoving party. *Hawkins*, 166 Wn. App. at 13. Judgment as a matter of law is appropriate if we can say that there is neither substantial evidence nor reasonable inference to sustain a verdict for the nonmoving party. *Id.* (quoting *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)). We address each claim in the order above.

Breach of duty to defend. Under Section 4 in the title insurance policy, First American agreed to defend, at its own costs, against third party claims "adverse to the title" to the Klosters. Ex. 95, at 3. The Klosters contend First American had a duty to

defend their claim that they had an access easement across Tract 2 and that First American held a conflict of interest since it also insured the purchase of Tract 2 by the Rickeys. First American responds that no duty to defend arose because the Rickeys never filed suit against the Klosters, and because the Klosters had no coverage for the purported easement.

The duty to defend is triggered whenever an insurance policy conceivably covers the allegations of a complaint filed against the insured. *Campbell*, 166 Wn.2d at 471. "The duty to defend arises whenever a lawsuit is filed against the insured alleging facts and circumstances arguably covered by the policy." *Kirk v. Mount Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998). "The triggering event is the filing of a complaint alleging covered claims." *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 138, 29 P.3d 777 (2001).

The Rickeys have not filed a lawsuit against the Klosters and have not sued to quiet title. The Klosters contend the duty to defend extends, however, to any legal action necessary to establish title. Although unclear in their brief, they may contend First American had a duty under Section 4 to file an action to quiet title in the unrecorded easement. The Klosters cite no case that supports their assertion and we find no case. We will not rewrite the insurance contract to impose a duty on the title insurer to "clear title" when the title policy imposes no such obligation but merely obliges the insurer to

indemnify for losses not exceeding the policy limits. *Sec. Serv., Inc. v. Transamerica Title Ins. Co.*, 20 Wn. App. 664, 669-70, 583 P.2d 1217 (1978).

Moreover, the duty to defend does not arise if the alleged claim clearly is not covered by the policy. *Kirk*, 134 Wn.2d at 561. As we discuss below, the title policy here excludes coverage of any road easement on Tract 2.

Bad faith/violations of the unfair claims settlement practices regulations. An insurer has a duty of good faith to its insured, and violations of that duty may give rise to tort actions for bad faith. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003); *Rizzuti v. Basin Travel Serv. of Othello, Inc.*, 125 Wn. App. 602, 615, 105 P.3d 1012 (2005). Under RCW 48.30.010(1), an insurer "shall not engage in unfair methods of competition or in unfair or deceptive acts or practices" as defined by the statute and its regulations, found in WAC 284-30-300 through -800. Violations of these standards constitute a breach of the insurer's duty of good faith. *Rizzuti*, 125 Wn. App. at 616.

WAC 284-30-330 identifies specific unfair claims settlement practices. The Klosters allege the following violations: misrepresentation of pertinent facts or policy provisions (WAC 284-30-330(1)) and denial of coverage without a reasonable and prompt investigation (WAC 284-30-330(3), (4), (6)). According to the Klosters, First American misrepresented facts when it failed to reveal until a year after it filed its claim report that its first investigation of the Klosters' claim indicated agent "irregularity/omission" caused the dispute between the Klosters and the Rickeys.

Ex. 154. Nevertheless, the claim report drew no such conclusion, but only characterized the claim of the Klosters.

The Klosters also argue that First American's initial claim report did not deny coverage, and thus First American's eventual denial of coverage is evidence of bad faith. Nevertheless, whether the initial internal report failed to document a denial of coverage is immaterial. First American, from the inception of the dispute, consistently informed the Klosters that it denied coverage, in part because the Klosters had access over other land. An insured does not establish bad faith when the insurer denies coverage based on a reasonable interpretation of the policy. *Am. Best Food, Inc., v. Alea London, Ltd.*, 168 Wn.2d 398, 412, 229 P.3d 693 (2010).

"To prevail on a claim of bad faith denial of coverage, the insured must come forward with evidence that the insurer acted unreasonably." *Rizzuti*, 125 Wn. App. at 616. Once the insurer shows a reasonable basis for its action, the insured can raise an issue of fact by presenting evidence that the insurer's alleged basis was not the real reason for its decision to deny coverage. *Id.* at 616-17; *see also Smith*, 150 Wn.2d at 486. First American provided a reasonable basis for denial, and the Klosters failed to show that First American's stated reasons for denial were not the actual reasons.

The Klosters established at trial that First American employees did not receive training on specific regulations of the unfair claims settlement practices regulations. Nor did First American maintain internal rules regarding the handling of claims. These facts

could support a claim that First American did not adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies in violation of WAC 248-30-330(3). Ultimately they did not show, however, that this lack of training led to any delay in a prompt investigation, nor that any delay harmed the Klosters.

Violations of the Consumer Protection Act. The Klosters contend that violations of the unfair claims settlement practices regulations also violate the CPA, chapter 19.86 RCW. To prevail on a CPA claim, the plaintiff must show (1) an unfair or deceptive act, (2) in trade or commerce, (3) impacting the public interest, and that (4) the plaintiff suffered a business or property injury (5) caused by the unfair or deceptive act. *Courchaine*, 174 Wn. App. at 44-45. A violation of the unfair claims settlement practices regulations can constitute a violation of the CPA. *Shields v. Enter. Leasing Co.*, 139 Wn. App. 664, 675, 161 P.3d 1068 (2007). Since the Klosters failed to show violations of the unfair claims settlement practices regulations and otherwise failed to present evidence of First American's breach of the duty of good faith, the trial court did not err in dismissing their claims of violations of the CPA as a matter of law.

TITLE INSURANCE POLICY COVERAGE

In its cross appeal, First American Title Insurance Company contends the trial court erred when ruling, as a matter of law, that the Klosters had coverage under the title policy for an incomplete access easement. We agree and reverse.

The trial court agreed with First American that (1) its title policy insured against loss resulting from the right to access or legal access from a public road; (2) the title policy did not insure any specific easement; (3) the Klosters have legal access to their land across the southern 30 feet of Lot 2 and the eastern 30 feet of Lots 5, 6, and 7 of Pacific Rim Estates; (4) Schedule A to the policy, which includes the description of the land insured by the policy, does not include any property beyond its bounds; (5) the unrecorded purported easement over the northern 30 feet of short plat Tract 2 is outside the Pacific Rim Estates plat; and (6) Schedule B excludes all specific easements in the Pacific Rim Estates and short plat Tract 2. The trial court, nonetheless, ruled that the partial plat map attached to the policy created an ambiguity. The court reasoned that the average person purchasing insurance would not reasonably glean that the additional access easement was not within the definition of access contained elsewhere in the policy. Therefore, the trial court ruled as a matter of law that the policy insured against the unavailability of the easement across the Rickey property, since it had to read any ambiguity in favor of the insured.

Waiver of cross appeal. Before we reach the merits of First American's cross appeal, we must address the Klosters' contention that First American waived its appeal since it did not assign error to the trial court's finding that the Klosters' title to Lot 1 was defective or to Judge Reynolds' order that the title policy access coverage was ambiguous. According to the Klosters, First American has appealed only the trial court's

denial of its motion to set aside Judge Reynolds' pretrial order that the title policy access coverage was ambiguous, and First American is appealing only from the second of the trial court's orders refusing to set aside Judge Reynolds' pretrial order, not the third and final ruling.

We read First American's brief as assigning error to the findings of fact, in addition to the legal ruling that the policy covered the missing easement because of the attached map. We know of no rule that requires an appellant to challenge each time a trial court repeats the same ruling. We may also excuse a party's failure to assign error to specific findings if the briefing makes the challenge clear. *Noble v. Lubrin*, 114 Wn. App. 812, 817, 60 P.3d 1224 (2003). We know what First American is appealing and, thus, we reach the merits of the cross appeal.

Title policy coverage. Interpretation of an insurance policy is a matter of law and is reviewed de novo. *Butzberger v. Foster*, 151 Wn.2d 396, 401, 89 P.3d 689 (2004); *Courchaine*, 174 Wn. App. at 43. The policy is construed as a whole, giving effect to each clause. *Id.* Policy language must be interpreted so that it is consistent with the way an average person would understand it. *Greer v. Nw. Nat'l Ins., Co.*, 109 Wn.2d 191, 198, 743 P.2d 1244 (1987); *Courchaine*, 174 Wn. App. at 43. If a clause in the policy is ambiguous, the clause will be interpreted in the insured's favor. *Capitol Specialty Ins. Corp. v. JBC Entm't Holdings, Inc.*, 172 Wn. App. 328, 335, 289 P.3d 735 (2012). "That is especially so in the context of exclusionary clauses." *Id.* A clause is ambiguous if it is

fairly susceptible of two reasonable interpretations. *Greer*, 109 Wn.2d at 198. When the language is clear and unambiguous, however, the court may not create an ambiguity. *Courchaine*, 174 Wn. App. at 43.

The First American title policy insured against loss or damage sustained or incurred by the insured by reason of a "[l]ack of a right of access to and from the land." Ex. 95, at 1. Schedule A describes the "land" covered as "Lot 1, PACIFIC RIM ESTATES." Ex. 95, at 4. Since the Klosters gained, upon their purchase, legal and actual access to their land, regardless of the absence of an easement across the Rickeys' land, their claim does not fulfill the policy inclusory language.

The First American policy also excluded coverage three times over. Schedule B excluded from coverage, "Easements, claims of easement or encumbrances which are not shown by the public records." Ex. 95, at 5. Specific exceptions related to the unrecorded easement on the northern 30 feet of Tract 2:

> 5. Easements, Conditions, Restrictions and Reservations, including the terms and provisions thereof, as contained in Short Subdivision filed as Auditor's File No. 167997, Klickitat County Short Plat Records.
>
> . . . .
>
> 8. Conditions, Restrictions, Easements for roadways and Utilities and disclosure regarding maintenance of roads, including the terms and provisions thereof, as shown on the Plat recorded December 1, 1981 in Book 5, Pages 31 and 32, Klickitat County Plat Records.

Ex. 95, at 6. The map sketch attached to the title policy is a portion of the short plat map in Auditor's File No. 167997 and shows various easements, over the short subdivision known as WS-146, including the unrecorded easement on Tract 2. Also, exclusion 8 referred to easements for roadways as shown on the plat in Book 5, pages 31 and 32, of the county records, which is the same plat referred to in Schedule A's description of the property.

The trial court concluded that the "unfortunate plat map appended to the policy" created an ambiguity of coverage because an "average person could reasonably conclude that the title policy for Lot 1, Pacific Rim Estates, covers access outside the plat across the northern 30-feet of the Rickey parcel, Tract 2," and the policy "both references the mistaken easement by attachment and guarantees coverage to 'access.'" CP at 4613. The Klosters' own testimony contradicts this conclusion. Karl Kloster was asked at trial if the title policy exceptions included the property containing Tract 2 and he replied, "I guess." RP at 1072. He was also asked if he relied on the short plat sketch attached to his title policy as a representation of what was covered in the policy. He replied that he would never rely on a sketch because he knew the difference between a sketch and a recorded short plat. Karl Kloster further explained that he did not rely on the sketch of the plat because it had a disclaimer at the top. This disclaimer noted the map was provided as a courtesy and does not constitute a part of the title policy. We wonder how the title company could have more clearly communicated to the reader that any easements

depicted on the sketch are not guaranteed. We assume that Karl Kloster agrees he is a reasonable person capable of reading and understanding the language of the policy.

With the inclusory language, the exclusionary clause, and the disclaimer on the map, the average person would not assume that easements shown on the plat sketch were covered in the Klosters' title policy. With the disclaimer, the map is not sufficient to rebut what the trial court recognized is the unambiguous language of the policy.

A decision of limited relevance is *Havstad v. Fidelity National Title Insurance Company*, 58 Cal. App. 4th 654, 68 Cal. Rptr. 2d 487 (1997). The Havstads, upon purchasing the insured property, began use of a strip of neighboring land for access. The strip was delineated on a subdivision map as "not a public street." One of the neighbors sued the Havstads for trespass and the Havstads tendered the defense of the suit to the title company. The California Court of Appeals affirmed a summary judgment ruling in favor of the title company on the ground that the title company has no duty to defend when a claim is not covered.

Fidelity National Title Insurance Company's policy read similarly to the First American Title Insurance Company's policy. The policy insured against loss by reason of "lack of a right of access to and from the land." *Id.* The insured property was the property purchased by the insured and did not extend to land outside its boundaries. Nevertheless, the policy referenced the subdivision map that contained the "not a public street" notation across a portion of the neighboring lands. *Id.* The Havstads argued that

coverage extended to an easement for the street because of the reference. The court disagreed, stating that the insured's position contradicted the plain language of the policy that described the covered property as only that within the legal description of the insured's land.

Our trial court erred in concluding that the title policy was ambiguous and therefore covered a "defect" in the title caused by the Klosters' inability to use the unrecorded easement on Tract 2. The judgment against First American is therefore reversed.

First American Title also cross appeals the jury award of the cost of cure as damages, contending the measure of damages should be the decrease in the Klosters' property value resulting from the missing easement. In turn, the Klosters appeal the trial court's decision limiting their damages to the cost to cure. Finally, First American Title also cross appeals the trial court's award of reasonable attorney fees and costs to the Klosters, and the Klosters appeal the limited amount of fees awarded them. Because we hold judgment should have been entered in favor of First American Title, not the Klosters, we reverse the jury award and need not address the correct measure of damages or the elements of damages available. We also reverse the award of reasonable attorney fees and costs in favor of the Klosters against First American Title and do not address whether the trial court's award should have been higher.

ATTORNEY FEES

The sale agreement between Schenectady Roberts and the Klosters stated, "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." CP at 3744 (emphasis added). The Klosters contend the trial court erred when awarding PRB and Roberts fees because their claim was not for a breach of contract but for misrepresentation and concealment. They rely on *Boguch v. Landover Corp.*, 153 Wn. App. 595, 609-10, 618-19, 224 P.3d 795 (2009), for the proposition that there is no right to recover attorney fees based on contract when the claim is based on negligence. The Klosters do not object to the high amount of the fees and costs.

When determining whether to award fees under a contract clause, the court must focus on the language of the clause. *See Belfor USA Grp., Inc., v. Thiel*, 160 Wn.2d 669, 671, 160 P.3d 39 (2007); *Hindquarter Corp. v. Prop. Dev. Corp.*, 95 Wn.2d 809, 815, 631 P.2d 923 (1981). The fee provision in *Boguch* was narrow and limited to actions "to enforce any of the terms of this Agreement." *Boguch*, 153 Wn. App. at 607. The Klosters' contract clause was broader.

An analogous case is *Brown v. Johnson*, 109 Wn. App. 56, 58-59, 34 P.2d 1233 (2001). In *Brown*, the court held that a property buyer's tort misrepresentation claim was properly a basis for an attorney fees claim under a real estate purchase and sale

agreement. *Id.* at 59. The fee provision in the agreement applied to any "suit concerning this Agreement." *Id.* The court held that the buyer's misrepresentation claim was "on [the] contract" because it arose "out of the parties' agreement to transfer ownership of [the property]" and the sale agreement was central to the buyer's claims. *Id.* at 59. The Klosters' misrepresentation and concealment claims also arose out of the agreement by which Roberts sold property to them. The Klosters' own complaint prayed for an award of attorney fees under the sale agreement.

The Klosters also contend the trial court could not award Roberts and PRB fees because the statutory warranty deed that Roberts gave the Klosters superseded the sale agreement. Therefore, they argue that the sale agreement merged into the statutory warranty deed and the attorney fees clause was extinguished. The sale agreement specifically read, however, that "[a]ll 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, attorneys fees and costs, . . . etc." CP at 3745. Thus, the trial court properly awarded reasonable attorney fees and costs to Roberts and PRB as provided in the sale agreement.

We also award reasonable attorney fees and costs, on appeal, to Roberts and PRB. RAP 18.1 permits the prevailing party to recover reasonable attorney fees incurred on appeal if the party was entitled to attorney fees at trial. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001).

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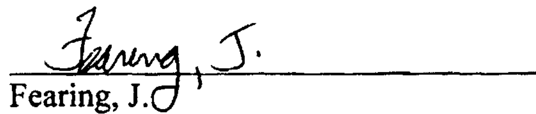
CONCLUSION

We reverse the judgment entered against First American and affirm the remaining decisions of the trial court. We award Schenectady Roberts and PRB reasonable attorney fees and costs incurred on appeal.

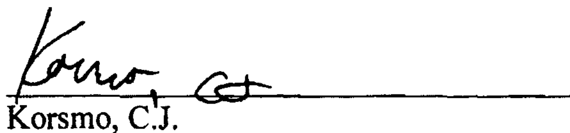
Reverse and affirm.

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.

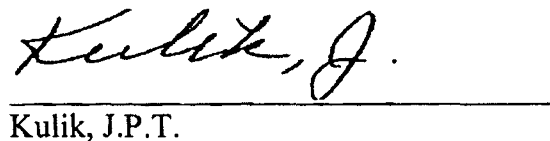


Fearing, J.

WE CONCUR:



Korsmo, C.J.



Kulik, J.P.T.

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