FILED

AUG 05 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

Court of Appeal Cause No. ~~32568-7-III~~

SC#93469-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROCKROCK GROUP, LLC, a Washington limited liability company, and RUSSELLROCK GROUP, LLC a Washington limited liability company

Appellants,

vs.

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WASHINGTON STATE
SUPREME COURT

VALUE LOGIC, LLC, a Washington limited liability company, TERRY SAVAGE and JANE DOE SAVAGE, a married couple, and JENNY BENSON and JOHN DOE BENSON

Respondents/ Cross-Appellants.

PETITION FOR REVIEW

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TABLE OF CONTENTS

Table of Cases

Statutes, Administrative Rules and Constitution

I. Identity of Petitioner

The petitioners are RockRock Group, LLC, and RussellRock Group, LLC (called "LLCs" from here on out) and are the plaintiffs in this action.

II. Decision for Review

The appellate court's final decision in *RockRock et. al. v. Value Logic et. al*, attached here in and rendered on July 7, 2016. Here after referred to as "*RockRock* Decision" and cited as "Op."

III. Issues Presented for Review

A. Did the Defendants, Jenny Benson, Terry Savage, and Value Logic (hereafter "Appraisers") owe a the LLCs a duty?

i. This Court in *Schaaf v. Highfield*, 127 Wn2.d 17, 26-27 (1995) held that under Restatement of Torts 2d §552, an appraiser owes a duty to all parties involved in the transaction that triggers the appraisal, including but not limited to the buyer and seller. The *RockRock* Decision found this not to apply; the issue is whether or not the *Schaaf* duty still exists.

ii. If *Schaaf* does not apply to appraisers today, does an appraiser owe a duty under Restatement 2d §552 to those the appraiser "knew or should have known" would rely on the appraisal as stated by this Court in both *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820 (1998) and *Lawyers Title Ins. Corp v. Baik*, 147 Wn.2d 536 (2002), or did this Court

"hint" in *Lawyers Title* that "should have known" is not the proper standard, thus overruling prior precedent?

iii. Can a duty be stated under negligence since *Ramos v. Arnold* 141 Wn. App. 11, 19 (2007) analyzed that claim?

B. Was there sufficient evidence under CR 56 that the LLCs justifiably relied on the appraisals when they proceeded to purchase the appraised land? This was not addressed by the *RockRock* Decision, but was a basis for summary judgment by the trial court.

IV. Statement of the Case

This case starts when RockRock Group, LLC took out a loan from RiverBank and purchased a seventy- five percent (75%) interest in 51 acres November 9, 2006. CP 307-309; 330-332. Shortly after that RussellRock Group, LLC[1], in January of 2007, took out a from RiverBank and purchased a seventy-five percent (75%) interest in the adjacent 39 acres. CP 391-393; 395-397.

Prior to these purchases RiverBank, the lender on these transactions, engaged the Appraisers to appraise the 51 and 39 acre parcels. The Appraisers issued an appraisal (an estimate of value under RCW 18.140.010) of $4,500,000 ($2 per square foot) on the 51 acres,

[1] RockRock Group, LLC and RussellRock Group, LLC shared the same manager during these transactions, and some of the same members.

purchased by RockRock Group, and on the 39 acres purchased by RussellRock Group a value of $4,250,000 ($2.50 per square foot). These appraisals were issued for "[f]inancing purposes and to facilitate a sale." CP 241; 256. RiverBank used these appraisals to support its loans to the LLCs, so the LLCs could purchase the respective land. CP 266-268; 399-405.

Prior to the LLCs purchasing the land, the fact of the appraisals and their estimates of value were communicated to members of the LLCs. CP 664-669; 687; 635-637; 670-671. Based on the expectations of each property being worth $4 million or more the members of the LLCs allowed the transaction to move forward, and personally guarantied the loans. CP 307-309; 331; 391-33; 395-397. The appraisals were negligently done, and the land was worth far less than the appraised values. This is testified to by an expert CP 639-663.

The transaction leading up to the LLCs purchase is a complicated real estate scheme of Mr. Jeffreys, through his entity Sundevil Development LLC. Mr. Jeffreys entered into purchase and sale agreements on the land but never funding them. Mr. Jeffreys had the right to buy the 51 acres for $475,000 and the 39 acres for $300,000. CP 218-227; 229-234. These rights were assigned first to a realtor, Brian Main, and then to the LLCs both by the realtor and Mr. Jeffreys' company (one

through a 1041 exchange). CP 311; 326-328; 387; 389. While this portion may go to the standard of care, which is not at issue here, the record is clear that Mr. Jeffreys did not apply for a loan with RiverBank that could have triggered these appraisals, and the only loan taken out on the land that uses these appraisals was done by the LLCs. CP 715.

The evidence shows that the Appraisers were engaged for the Rothrock, LLC project, which was the prior name of RockRock Group, LLC. CP 211-213; 604. The record shows the Appraisers reviewed the RockRock Group, LLC transaction as a comparable transaction. CP 647; 705. The record shows these appraisals were done for the LLCs to borrow money to purchase this land.

In November of 2009 some of the members of RussellRock discovered the land was worth far less than the appraised values. CP 635-637. New appraisals gave the 51 acres a value of $1,220,000 from the previous $4,500,000 and the 39 acres a value of $520,000 from $4,250,000. CP 590; 600. Ms. Benson had testified the market impact should only have been twenty-five percent (25%) based on her second appraisals of both parcels in September of 2009. CP 721.

Procedural History

Suit was filed on this matter on June 1, 2011. CP 1-3. The Appraisers brought a summary judgment motion to dismiss this case claiming the Appraisers did not owe a duty of care to the LLCs, the LLCs did not justifiably rely on the appraisals, and the statute of limitations had run. CP 489-510. The trial court granted summary judgment on the duty of care, and justifiable reliance, but denied summary judgment upon the statute of limitations. CP 888. After resolving this matter with the other defendants the LLCs appealed the dismissal to Division III. CP 883.

In reviewing the summary judgment, the appellate court found the Appraisers owed no duty to the LLCs since there was no evidence the Appraisers either intended the LLCs to benefit from the appraisal or knew RiverBank would pass the appraisal to the LLCs. Op. p.6 The appellate court did not rule on justifiable reliance, but did rule there was no duty under regular negligence. Op. p.6, 7.

V Argument

This matter warrants review under RAP 13.4(b) because (A) the *RockRock* Decision conflicts with the decision of this Court in *Schaaf v. Highfield*, 127 Wn2.d 17 (1995), (B) the *RockRock* Decision conflicts with the appellate court Division I decision in *Bolser v. Clark*, 110 Wn. App. 895 (2002), and (C) this matter involves a substantial public interest on an

appraiser's duty when the appraisal is issued to support a bank loan for real estate.

A. The *RockRock* Decision conflicts with this Court's holding in *Schaaf v. Highfield.*

This Court stated in *Schaaf v. Highfield*, 127 Wn2.d 17 (1995), (1) that an appraiser owed a duty to all parties involved in the transaction that triggered the appraisal, and (2) no privity is required for a buyer in a transaction to bring a claim against the appraiser in the transaction. The court of appeals, in the *RockRock* Decision, directly conflicts clear statements of law by this Court. (3) The case law relied upon by the appellate court does not show the this Court overruled *Schaaf* or changed the duty of an appraiser.

1. An appraiser owes a duty to all parties involved in the transaction that triggers the appraisal, and the court of appeals conflicted with this

The appraiser owes a duty to those involved in the transaction that triggered the appraisal. *Schaaf*, 127 Wn.2d at 26-27. In *Schaaf* the appraiser was hired by the lender, the VA, to do an appraisal on a home Schaaf was buying. Schaaf had no evidence that the lender or the appraiser intended him to benefit from the appraisal. *Id.* at 21, fn. 5. After analyzing negligent misrepresentation under Restatement 2d §552, this Court ruled that a third party may state a claim against an appraiser under

Restatement 2d 552 if the third party was involved in the transaction that triggered the appraisal. Id. at 26-27. The following is the summary of their analysis:

> In summary, under § 552, lack of privity is no defense to a claim of negligent misrepresentation. In Washington, however, only those in a limited class may advance such claims. [The purchaser] is a member of that limited class. [The plaintiff] was a prospective home buyer who had applied to the [bank] for a loan guaranty. The [bank] hired [the appraiser] to do the appraisal solely because of [the purchaser's] application. [The purchaser] is, therefore, the most proximal third party there will ever be to [appraiser's] appraisal. It is possible that subsequent potential purchasers of the real estate, or others with some interest in it, will have access to [the appraiser's] appraisal, and rely on it. These people will all be more distal to the appraisal than [the purchaser], however. Thus, if [the appraiser's] liability does not extend at least to [purchaser's] claim, no other third party will ever have a cause of action against the appraiser.
>
> We conclude that a third party in Washington may state a claim for negligent misrepresentation against a real estate appraiser pursuant to Restatement (Second) of Torts § 552. The liability of a real estate appraiser in these circumstances extends only to those involved in the transaction that triggered the appraisal report, including, but not necessarily limited to, the buyer and the seller."

Schaaf, 127 Wn.2d at 26-27, emphasis added.

In direct conflict with *Schaaf* the RockRock decision requires the plaintiff to not only prove he/she is part of the transaction that triggered the appraisal, but also to prove that the appraiser intended to communicate the appraisal to the buyer, or knew the lender would communicate the appraisal to the buyer. Op. p. 6. The *RockRock* Decision tries to get around *Schaaf* by saying *Schaaf* did not address the fact pattern of the

appraiser did not intending to supply the appraisal to the buyer or the appraiser did not know the lender intended to supply it to the buyer. Op. p. 6. This ignores huge swaths of the *Schaaf* opinion, and conflicts with *Schaaf.*

There are several items in *Schaaf* that shows *Schaaf* only required proof of being part of the transaction that triggered the appraisal, including being the buyer, in order to be owed a duty by the appraiser. These are (a) *Schaaf* starts with the premise that there is no evidence that either the lender or appraiser intended the buyer to benefit from the appraisal, (b) the appraiser in *Schaaf* tried to argue he was hired solely by the lender (VA) and owed duties solely to the lender (VA), and (c) *Schaaf* rejected California's holding on duty which was similar to the *RockRock* Decision

a. Schaaf started with the proposition that the plaintiff could not prove that either the lender or the appraiser intended the buyer to benefit from the appraisal

In *Schaaf*, the plaintiff could not prove from the record that the appraisal was intended to benefit the buyer. *Schaaf*, 127 Wn.2d at 21 fn.5. It was based upon this record that the *Schaaf* court still found the duty to exist and set that duty to run as far as those involved in the transaction that triggered the appraisal, including but not limited to the buyer and seller. *Id.* at 26-27.

b. The appraiser in *Schaaf* tried to claim he was hired solely to benefit the VA, and not the buyer, and the *Schaaf* court rejected this

The appraiser in *Schaaf* argued that he owed no duty to Schaaf since his appraisal was designed to protect the lender (VA), and not the borrower (veteran). *Id.* at 27-28. Throughout the portion of the VA analysis the appraiser in *Schaaf* maintained that his appraisal was solely done for the lender (VA). This is much the same as the Appraisers' arguments accepted in the *RockRock* Decision, that the Appraisers solely intended to benefit the lender.

Schaaf looks at this argument even deeper, when it agrees that the function of the appraisal is to protect the lender. *Schaaf*, 127 Wn.2d at 28. Even with that acknowledgment, this Court had no problem stating that the appraiser owed Schaaf a duty since Schaaf was part of the transaction that triggered the appraisal. *Id.* at 27, 29.

c. The *RockRock* Decision improperly adopted law from a jurisdiction the *Schaaf* opinion clearly stated Washington would not follow.

The *Schaaf* court looked specifically at California law and rejected it as not applying to Washington. *Schaaf* ,127 Wn.2d at 29, fn. 11. In particular the *Schaaf* court looked at *Gay v. Broder*, 109 Cal.App.3d 66, 167 Cal.Rptr. 123 (1980) and stated that this did not apply in Washington. *Schaaf*, 127 Wn.2d at 29. The decision in *Gay* had stemmed from

California's main case on third party duties, *Biakanja v. Irving* 49 Cal.2d 647, 320 P.2d 16(1958). It was this analysis based on *Biakanja* that the *Schaaf* court found unpersuasive when it set the duty of an appraiser.

In their brief the Appraisers asked the court to consider a California case, *Willemsen v. Mitrosillis*, 230 Cal. App. 4th 622 (2015), which aligned exactly with how the *RockRock* decision came out in this opinion. See the following cite from the Appraisers' brief to *Willmensen*:

> "True, ... Defendants knew [the plaintiff] was the borrower, **but they did not intend to influence him in deciding whether to purchase or not purchase the property. The purpose of the appraisal report was to influence the bank in its decision whether to lend or not."**

Respondents' brief p. 30, quoting *Willemsen v. Mitrosillis*, 230 Cal. App. 4th at 632, emphasis by Respondents.

The *RockRock* decision is almost exactly the same as this quote, since the court of appeals found the purpose of the appraisal was to influence the lender and not the buyer. It was based on that finding that the appellate court declared the Appraisers owed no duty to the buyer. Op. p. 6. Having found California law not persuasive in *Schaaf*, it is a conflict for the appellate court to mirror its decision to California law now.

It is clear that there was substantial evidence that the LLCs were the buyers in the transaction that triggered the appraisal. The most

compelling evidence is that RiverBank, the lender, only used these appraisals to lend money to the LLCs. It is also clear that even the appellate court considered the LLCs the buyers in the transaction that triggered the appraisal.[2] The appellate court conflicts with *Schaaf's* ruling that the appraiser's duty extends to those involved in the transaction that triggered the appraisal.

2. The Appellate Court conflicts with Schaaf's clear statement that privity, including being a third party beneficiary is not required to bring a claim against an appraiser

Here the appellate court functionally required privity despite this Court holding in *Schaaf* that privity was not required. *Schaaf*, 127 Wn.2d at 26. In analyzing privity this Court started with the assumption that the privity included, contract relationships, agency relationships, and the third party beneficiary relationship. *Id.* at 21. Of particular importance in this matter, the *Schaaf* court referenced a third party beneficiary to a contract and said the duty of an appraiser in *Schaaf* was being analyzed outside such privity. *Id.* at 21, fn. 5. A third party beneficiary requires the third party beneficiary to show the parties to the contract (bank and appraiser) intended the appraisal to directly benefit the buyer of the property. *Id.*

[2] In rejecting the argument about Schaaf providing the duty, the appellate court states Schaaf did not analyze the situation where the appraiser did not intend to supply the appraisal to the buyer, thus acknowledging it considered the LLCs the buyer under the facts. Op. p6.

As this Court noted in *Schaaf*, such evidence cannot be proved when the bank (in *Schaaf* the VA) hires the appraiser, and the buyer relies on the appraisal. See *Id.* at 21, fn. 5.

The *RockRock* Decision required the LLCs to prove the Appraisers intended the LLCs to rely on the appraisal, or in the alternative that the Appraisers knew RiverBank was going to supply the appraisal to the LLCs. Op. p.6 This is functionally no different than proving the LLCs were intended beneficiaries of the appraisal contract, which is the third party privity that *Schaaf* states is not required.

The *RockRock* Decision's sole basis of evidence is what was written in the appraisal as contract language of the appraisal. This is the exact evidence that would be used in the analysis of trying to determine if a party is a third party beneficiary.

While the appellate court may not have said privity in form, the *RockRock* Decision clearly required it in substance. This is in direct contrast to this Court's ruling in *Schaaf* that privity is not required to state a third party claim against an appraiser. *Schaaf*, 127 Wn.2d 27.

3. *Schaaf* was not made meaningless by later Supreme Court Cases

If this Court intends to overrule a case, it will state so explicitly, and not do it sub silentio. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 345, 160 P.3d 1089, 1094 (2007), aff'd, 166 Wn.2d 264, 208 P.3d 1092 (2009). Overruling a prior decision is not a step the this Court takes lightly. *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588, 593 (1997).

The *RockRock* Decision found that the duty of an appraiser to those involved in the transaction that triggered the appraisal was modified by two Supreme Court cases following *Schaaf.* These cases were *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820 (1998) and *Lawyers Title Ins. Corp v. Baik*, 147 Wn.2d 536 (2002). Neither of these cases involve appraisers, explicitly overrules *Schaaf*, or limited duties under negligent misrepresentation.

In *ESCA Corp.* this Court approved a jury instruction that listed six elements of negligent misrepresentation. The second element is that the defendant "knew or should have known" about the information being supplied to the plaintiff. *ESCA Corp.*, 135 Wn.2d 820,827-28. These elements, including the "known or should have known," were restated in *Lawyers Title*, where this Court noted that under the facts of the of that case the defendant had no basis for arguing he did not know the use to

which the information would be put. *Lawyers Title*, 147 Wn.2d at 549-550.

According to the *RockRock* Decision, this Court "hinted" in *Lawyers Title* that the "should have known" element is not valid, when this Court cited to another case. Op. p.6. This "hint" was the basis for the appellate court requiring a showing that the Appraisers directly intended the LLCs to rely on the appraisal or knew RiverBank was to pass on these appraisals to the LLCs. Op. p.6. This was the basis upon which the *RockRock* Decision finds *Schaaf* is not applicable to establishing the duty of an appraiser under Restatement of Torts 2d §552. *Id.*

The *RockRock* Decision either conflicts with this Court's holdings in *Schaaf*, *ESCA Corp.* and *Lawyers Title*, which the decision clearly holds differently than those cases, or this Court overrules itself by "hints" to the lower courts. The LLCs maintain this is a direct conflict with this Court's previous rulings.

B. Conflict with other court of appeals divisions

Despite the *RockRock* Decision saying it relied on *Bolser v. Clark*, 110 Wn. App. 895 (2002), the decision clearly conflicts with *Bolser v. Clark*. The *RockRock* Decision improperly used *Bolser* to limit the duty of established by this Court in *Schaaf* when *Bolser* did not limit that duty.

The appellate court in *Bolser* started with the foundation that *Schaaf* defined the group of those who could rely on the appraisal as those involved in the transaction that triggered the appraisal. *Bolser*, 110 Wn. App. at 901-902. The defendant in *Bolser* tried to argue that Schaaf limited the duty under Restatement of Torts 2d §552 to only those involved in the transaction that triggered the appraisal, since it was clear the plaintiff was not part of the transaction that triggered the appraisal. The *Bolser* court found that when there was evidence that the appraiser actively encouraged others outside the transactionto rely on the appraisal Schaaf was not the limitation of the duty. *Id.* at 902.

Bolser clearly extended the duty under Restatement of Torts 2d §552 beyond *Schaaf*, and did not try to limit *Schaaf* or add new evidence requirements as the *RockRock* Decision did. This shows a conflict in the appellate divisions on to whom an appraiser owes a duty.

C. Substantial Public Interest Supports This Court Reviewing This Matter

Substantial public interest supports an appraiser owing a duty to all those involved in the transaction that triggered the appraisal because (1) the industry and the process already expect parties outside the lender to rely on the bank acquired appraisal, (2) the purpose of the appraisal is to protect everyone in the transaction from fraud, and (3) tort liability on

appraisers helps further the policy of well done appraisals and reducing fraud.

1. The industry and the process already expect parties outside the lender to rely on the appraisal

"[Appraisers'] objectivity, experience and ethics help participants in residential and commercial transactions to know property values and to understand the risks inherent in collateral lending." CP 690. The President of the Appraisal Institute made this statement in front of Congress in 2009.[3] In this statement the President laid out the views of the industry, these statements show an expectation that at least the borrower will rely on the appraisal. Included in these statements, "[t]he best advice Americans may obtain for the biggest financial transaction in their lives is an accurate real estate appraisal." CP 695.

The source of these appraisals is to come from the bank engaging the appraiser, which those involved in the transaction are expected to rely on. This can be seen by the federal regulations that require appraisals on most real estate loans over $250,000 done by Federal Deposit Institute Corporation (FDIC) backed banks. 12 C.F.R 323.3. Title XI of the Financial Institutions Reform Recovery and Enforcement Act (FIRREA)

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[3] The Appraisal Institute is the largest professional appraisal organization in the United States, CP 690, and issues the MAI designation that Mr. Savage put in his appraisal.

requires these appraisals. One of the three purposes of this act was to "provide consumers with independent reliable opinions of the market value of residential properties they are financing." CP 691.

Not only is the consumer relying upon the appraisal expected by the industry, but the bank engaged appraisal also produces a much more reliable appraisal that the consumer would naturally rely on. Unlike the consumer, any bank that regularly lends over $250,000 on real estate would engage appraisers on a regular basis. 12 CFR 323.3. During the engagement of an appraiser in the transaction for a particular loan the bank must take actions to ensure the appraiser's independence 12 CFR 323.5. Along with this the bank must verify the appraiser is state certified (or licensed) and the appraiser is competent "based upon the individual's experience and educational background as they relate to the particular appraisal assignment." 12.CFR 323.6(b).

Take the fact that the banks have resources and processes to verify independence and competence that are not possessed by most consumers and the bank appraisal will be more reliable than any engaged by a regular consumer. The borrower also may reimburse the bank for the appraisal at closing, as was done here. CP 405. Why would any person pay a second time for an appraisal, when the bank already has an appraisal by an independent and competent appraiser that is justifying the transaction?

Its clear the industry and the process put the duty of getting a good appraisal on the party best suited verify competency and independence, the bank. It is also clear that at least the industry expects the consumer to benefit from the appraisal, and rely on it. This well supports the holding in *Schaaf*, that those involved in the transaction that triggered the appraisal are owed a duty by the appraiser. *Schaaf* even references this expectation of the borrowers reliance, by referencing a Wisconsin case, *Costa v. Nimon*, 366 N.W.2d 869, 900 (Ct.App.185) where reliance on the appraisal was inferred by the lender accepting the appraisal. *Schaaf*, 127 Wn.2d at 31.

2. The purpose of the appraisal is to protect everyone in the transaction from fraud

Professional appraisals should help fight scams by "real-estate rogues." CP 698. While this system breaks down by collusion, black listing, and faulty appraisals, it is clear the appraisal's role in the transaction is to give an independent view of the real estate value in order to stop scams and fraud. *Id.* While professional organizations and regulation help fight to protect the public, these are simply not enough. CP 692; 696-698. This failure helped create the mortgage problems in our economy, and that have ravaged our state with foreclosures.

3. The tort system can provide some solution

One of the reasons the Supreme Court imposes tort duties is to deter reckless and negligence conduct, as well as to provide a fair distribution of the risk. *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 407, 241 P.3d 1256, 1271, J Chambers concurrence (2010). *Eastwood* even called out *Schaaf* as the independent tort of "real estate appraiser negligence" separate from regular negligent misrepresentation as defined by *ESCA Corp. Id.* at 388. Despite real estate appraisal negligence being defined over 20 years ago in *Schaaf*, it has been seldom used to uphold the appraisal standards. This can be seen by the fact that since *Schaaf*, this Court has not considered any real estate appraisal negligence case, and our appellate courts have only published three opinions besides this one. *Bolser v. Clark*, 110 Wn. App. 895, 43 P.3d 62 (2002), *Ramos v. Arnold*, 141 Wn. App. 11, 169 P.3d 482, (2008), *Borish v. Russell*, 155 Wn. App 892 (2010).

According to the *RockRock* Decision, *Schaaf* did not set the record straight on to whom an appraiser owed a duty. It is clear that the industry, or at least the President of the Appraisal Institute, believes the appraisals acquired by banks are meant for the borrower. It is also clear that banks are qualified and required to get an independent and competent appraiser, and banks may even pass the costs of an appraisal to the borrower at the end. This system needs accountability, and substantial public interest

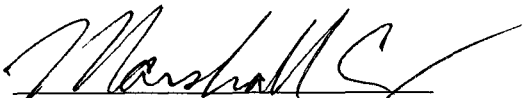
supports this Court reviewing the *RockRock* Decision to re-affirm the policy in *Schaaf*: an appraiser owes a duty to all the parties involved in the transaction that triggered the appraisal. In the alternative, if a buyer and borrower are not allowed to rely on the independent and competent appraiser, obtained by the bank, and that borrower may have paid for, this Court should announce that loud and clear.

VI. CONCLUSION

This Court stated the duty of "Real Estate Appraiser Negligence" in *Schaaf*, and the RockRock Decision eviscerates that duty. It is clear that borrowers rely on appraisals done for lenders, and this is expected by the industry. If this reliance is not correct, this Court should let buyers and all involved in the transaction know that *Schaaf* does not allow that reliance. Otherwise it would be beneficial for this Court to re-affirm it's holding in *Schaaf* and make the appraisal a protection for all those involved in the transaction that triggered the appraisal.

Respectfully submitted this 5th day of August, 2016.

M Casey Law, PLLC



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

ROCKROCK GROUP, LLC, a Washington limited liability company, and RUSSELLROCK GROUP, LLC, a Washington limited liability company,	)	No. 32568-7-III
Appellants,	)	
v.	)	
VALUE LOGIC, LLC, a Washington limited liability company, TERRY SAVAGE and JANE DOE SAVAGE, a married couple, and JENNY BENSON AND JOHN DOE BENSON, a married couple,	)	OPINION PUBLISHED IN PART
Respondents and Cross-Appellants,	)	
ERIC SATCHJEN, WORKLAND WITHERSPOON, a domestic professional liability company, RIVERBANK, a domestic financial institution,	)	
Defendants.	)	

LAWRENCE-BERREY, A.C.J. — An appraiser's liability for negligent misrepresentation is limited to the person or one of a limited group of persons for whose

benefit and guidance he or she intended to supply the appraisal report or knew the recipient intended to supply it. Here, Value Logic appraised two properties and negligently reported the values of those properties to be much greater than their true values. The members of two LLCs relied on the reports. However, the reports were intended only for the benefit and guidance of RiverBank, the lender in the transactions. There was no evidence Value Logic intended to supply the reports for the benefit and guidance of the LLCs or their members. And there was no evidence Value Logic knew RiverBank would supply the reports to the LLCs or their members for their benefit and guidance.

In the published portion of this opinion, we conclude the trial court properly dismissed the LLCs' negligent misrepresentation claims. In the unpublished portion of this opinion, we affirm the trial court's summary dismissal of the LLCs' negligence and Consumer Protection Act (CPA), chapter 19.86 RCW, claims and we decline to address a constitutional argument raised for the first time on appeal.

FACTS

The two appraised properties are a 51-acre property and an adjacent 39-acre property. The properties are located near Airway Heights, Washington. Both properties are vacant, and both are zoned partially rural traditional and partially light industrial.

A. *Sundevil initiates purchases*

Gregory Jeffreys and his wife Kimberly Jeffreys operated a real estate development company called Sundevil Development, LLC. In mid-2006, Mr. Jeffreys began negotiations to buy the two properties. Mr. Jeffreys contacted Brian Main, a Spokane realtor. Mr. Jeffreys told Mr. Main he had the two properties under purchase, knew someone who wanted to buy them, and the project would turn quickly and not financially expose Mr. Main. Mr. Jeffreys said he would find financing for the purchases and put the documents together, and asked Mr. Main to find investors. Mr. Jeffreys selected RiverBank to finance the purchases.

On September 20, 2006, Sundevil executed a purchase and sale agreement to purchase the 51-acre property for $475,000. On September 25, 2006, Sundevil executed a purchase and sale agreement to purchase the 39-acre property for $300,000.

B. *RiverBank retains Value Logic to appraise the properties*

In September 2006, RiverBank contacted Value Logic to request a bid to appraise both properties. Value Logic bid $3,000 to appraise the larger property and $2,000 to appraise the smaller property. RiverBank accepted the bids and directed Value Logic to appraise the properties. Value Logic employee Jenny Benson inspected the properties on September 28.

On October 9, 2006, Value Logic sent RiverBank the appraisal for the 51-acre property. Value Logic reported the value of the larger property was $4,500,000, or $2.00 per square foot. On November 16, 2006, Value Logic sent RiverBank the appraisal for the 39-acre property.[1] Value Logic reported the value of the smaller property was $4,250,000, or $2.50 per square foot.

In its appraisal reports, Value Logic stated, "[t]he function of this appraisal is to provide the client [RiverBank], with a value estimate as a basis on which to provide financing and to facilitate a purchase." Clerk's Papers (CP) at 243, 258. The appraisal reports identified the clients as RiverBank and its employee, Rachel Pulis. The appraisal reports contained the following limitations of use:

> **Your attention is directed to all the Assumptions and Limiting Conditions on Pages 11 through 13.**
>
> . . . .
>
> This report is prepared for the sole use and benefit of the client . . . . Neither this report, nor any of the information contained herein shall be used or relied upon for any purpose by any person or entity other than the client. The appraiser is not responsible for the unauthorized use of this report.
>
> . . . .

[1] According to Value Logic, it submitted both appraisals on October 9, but then re-submitted the appraisal for the 39-acre parcel with a corrected property description in November.

> Unless otherwise stated, this appraisal report is made expressly subject to the following conditions and stipulations:
>
> 1. This appraisal report is considered confidential between the appraiser and the client.
>
> . . . .
>
> 13. The liability of [Value Logic] is limited to the client only and only up to the amount of the fee actually received for the assignment. Further, there is no accountability, obligation, or liability to any third party. If this report is placed in the hands of anyone other than the client, the client shall make such party aware of all limiting conditions and assumptions of the assignment and related discussions.
>
> . . . .
>
> 17. Without prior written approval from the author, the use of this report is limited to internal decision making and financing. All other uses are expressly prohibited. Reliance on this report by anyone other than the client, [or] for a purpose not set forth above, is prohibited. The author's responsibility is limited to the client.

CP at 237-49, 252-64.

C. *Mr. Jeffreys and Mr. Main solicit investors*

Mr. Jeffreys and Mr. Main solicited investors to buy memberships in the LLCs. They intended one LLC—RockRock Group, LLC—to purchase an interest in the 51-acre property. They intended another LLC—RussellRock Group, LLC—to purchase an interest in the 39-acre property.

Mr. Jeffreys called John Bart Johnson, who later agreed to be the manager of both LLCs. Mr. Jeffreys told Mr. Johnson he was getting a group of people together to buy some property near Airway Heights. He told Mr. Johnson, "with the appraisals I got,[2] we should be able—an idiot could come into these properties and make a quarter million dollars." CP at 451. Mr. Jeffreys explained he was going to get 10 people to be partners, and he would acquire the land and sell 75 percent to these 10 people, and keep 25 percent for himself. He said he would get the financing. Mr. Jeffreys described the venture as "short-term, get in, buy it, turn around and sell it." CP at 453.

Mr. Johnson visited the properties with Mr. Jeffreys. Mr. Jeffreys had copies of both appraisal reports with him and showed them to Mr. Johnson.[3] Mr. Johnson "look[ed] at an appraisal which was for four-point-some million." CP at 456. However,

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[2] There is no evidence how Mr. Jeffreys came into possession of the appraisal reports.

[3] Mr. Johnson sent a co-investor an e-mail in September 2011 in which Mr. Johnson said, "They now are questioning if all the investors saw the appraisal before joining in? I personally did not see the appraisal I was just told by Jeffreys that they came in with large values." CP at 470. When deposed, Mr. Johnson nevertheless insisted he saw the appraisals: "I remember going into his pickup, looking at something, and then, five years later, I said that I did not see it. So I don't know." CP at 457.

In reviewing a summary judgment motion, this court views all facts in the light most favorable to the nonmoving party. *Borish v. Russell*, 155 Wn. App. 892, 900, 230 P.3d 646 (2010). In this case, RockRock and RussellRock are the nonmoving parties, so we present the facts as if Mr. Jeffreys showed the appraisals to Mr. Johnson.

Mr. Johnson "didn't [review the appraisal report for details]," but "just saw the bottom line." CP at 456.

In September 2006, Mr. Main called Kelly Hubbell, who was a friend of his from high school. Ms. Hubbell was a manager at Stan & Hubbs, LLC. Mr. Main asked Ms. Hubbell and other members of Stan & Hubbs to invest in the 51-acre property. Mr. Main pitched the investment to Ms. Hubbell with a prospectus. The prospectus stated the "[e]stimated current value equals $2.00 per sq. ft. *minimum* equals $4,443,120." CP at 668. Before the sale closed, Mr. Main told Ms. Hubbell that the appraised price of the 51-acre property was $4,500,000. Ms. Hubbell wrote this appraised value on her prospectus. Ms. Hubbell invested in RockRock, the eventual purchaser of the larger property.

Several weeks before the closing, Mr. Main also called David Largent. Mr. Main told Mr. Largent the appraisal came back, and the 51-acre property was worth what they expected—around $4,000,000. Mr. Largent and his wife both invested in RockRock.

In December 2006, Mr. Jeffreys held a meeting at his home to pitch the sale on the 39-acre property. Many potential investors attended. Mr. Jeffreys said the investors would purchase the parcel at one-half the price and would be able to sell it shortly for a very high profit. Mr. Jeffreys emphasized the 39-acre property was appraised for a very

high amount, and the appraisal report verified the property's value. Alan Cummins and Keith Watkins both attended this meeting and both eventually invested in RussellRock, the eventual purchaser of the smaller property.

D. *RockRock is formed and buys 75 percent of the 51-acre property*

On October 2, Sundevil assigned to Mr. Main 75 percent of its right to purchase the 51-acre property. Mr. Main agreed to pay $1,630,000 for a 75 percent interest in the property. The following day, RockRock was formed. Mr. Main then assigned his purchase right in the property to RockRock. To finance the purchase, RockRock executed promissory notes in favor of RiverBank for $1,025,000, and in favor of Sundevil for $800,000. RockRock's members personally guaranteed the loans, and RockRock executed a deed of trust in favor of RiverBank to secure the loan. The sale closed on November 8.

E. *RussellRock is formed and buys 75 percent of the 39-acre property*

On November 15, 2006, RussellRock was formed. Sundevil assigned to Mr. Main 75 percent of its right to purchase the 39-acre property. Mr. Main agreed to pay $1,630,000 for a 75 percent interest in this property. Mr. Main assigned his right to RussellRock.

Before signing the loan and personal guaranty documents, some of RussellRock's members asked to see Value Logic's appraisal with the loan documents. In particular, Mr. Cummins called Eric Sachtjen, the closing agent, and asked for a copy of the appraisal that Mr. Jeffreys had discussed at the December 2006 investor meeting. Mr. Sachtjen e-mailed Rachel Pulis at RiverBank and asked her for the appraisal. Mr. Sachtjen then e-mailed Mr. Johnson and RussellRock's members. Mr. Sachtjen's e-mail stated,

> I have been asked to include the appraisal for this project with each of your set [sic] of documents and I will do so. For now, I have attached the cover letter on the appraisal, which shows the appraised value at $4.25 million. The purchase price is $1.63 million.

CP at 467. Later that day, Mr. Sachtjen e-mailed the actual appraisal to all of RussellRock's members and Mr. Johnson. Mr. Cummins and Mr. Watkins both viewed the appraisal, and assert they would not have continued in the transaction had the appraised value been less than $4,250,000.

RussellRock financed the $1,630,000 purchase price by executing promissory notes to RiverBank for $990,000 and to Sundevil for $800,000. RussellRock's members personally guaranteed the loans, and RussellRock executed a deed of trust in favor of RiverBank to secure the loan. The sale closed on January 12, 2007.

F. *Litigation begins*

RockRock and RussellRock (the LLCs) were not successful in selling the properties. By late 2009, balloon payments on the various notes were becoming due. For this reason, the LLCs applied to Coastal Community Bank to refinance at least a portion of the obligations. In September 2009, Coastal Community Bank retained Value Logic to re-appraise the two properties. Ms. Benson issued two new appraisal reports on September 25. This time, she appraised the 51-acre property at $3,375,000 and the 39-acre property at $2,550,000. Ms. Benson attributed the reduction in values mostly to a depressed real estate market.

In November 2009, RiverBank had an appraiser review Value Logic's 2009 appraisal report for the larger property. The review appraiser e-mailed RiverBank's vice president and alerted him to a problem with Value Logic's report. He stated Ms. Benson was correct that the light industrial portion of the property was worth $1.50 per square foot. However, he stated most of the acreage is zoned rural traditional, and that portion of the acreage was worth only $0.28 per square foot.

The review appraiser concluded the property was actually worth $1,427,100. He noted that RockRock bought the property in 2006 for $1,630,000, and the drop in the real estate market was consistent with his opinion of the property's current value.

RiverBank's vice president forwarded this e-mail to Mrs. Jeffreys and stated, "Our review appraiser didn't like the analysis that Jenny Benson did on RockRock." CP at 634. He then asked to discuss the issue with Mr. Jeffreys.

In late February 2010, RiverBank retained another appraisal company to appraise both properties. This company was separate from both Value Logic and the previous review appraiser. This new appraiser agreed the light industrial portions of the properties were worth $1.50 per square foot. However, the new appraiser believed the rural traditional portions of the properties were worth roughly $0.15 per square foot. The new appraiser concluded the 51-acre property was worth $1,220,000, and the 39-acre property was worth $520,000.

On June 16, 2011, RockRock and RussellRock sued Value Logic, Mr. Savage, and Ms. Benson. The gravamen of the complaint was Value Logic negligently overvalued the properties in its 2006 appraisal reports, and the LLC members relied on those values when they authorized Mr. Johnson to proceed with the purchases. The legal theories asserted in the complaint were negligent misrepresentation, negligence, and violation of the CPA.

Value Logic moved for summary judgment, arguing the statutes of limitations barred the LLCs' claims, it did not owe the LLCs a duty, and the LLCs did not justifiably

rely on its appraisal reports. The trial court granted Value Logic's summary judgment motion. The trial court determined, as a matter of law, Value Logic did not owe the LLCs a duty, and the LLCs did not justifiably rely on the appraisal reports. The trial court also dismissed the CPA claims because the LLCs' claims centered on Value Logic's actions in its professional capacity, not its entrepreneurial capacity. The LLCs appeal.

ANALYSIS

A. *Summary judgment standard of review*

This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014) (quoting *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000)). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). This court views all facts and reasonable inferences in the light most favorable to the nonmoving party. *SentinelC3*, 181 Wn.2d at 140. Summary judgment is appropriate only if reasonable

persons could reach but one conclusion from all the evidence. *Id.* (quoting *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993)).

When reviewing a civil case in which the standard of proof is clear, cogent, and convincing evidence, this court "'must view the evidence presented through the prism of the substantive evidentiary burden.'" *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)); *see also Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 973, 948 P.2d 1264 (1997). The burden of proof for negligent misrepresentation claims is clear, cogent, and convincing evidence. *Lawyers Title Ins. Corp. v. Soon J. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002). Thus, we must determine whether, viewing the evidence in the light most favorable to the nonmoving party, a rational trier of fact could find that the nonmoving party supported its negligent misrepresentation claims with clear, cogent, and convincing evidence. *See Woody*, 146 Wn. App. at 22.

B. *Negligent Misrepresentation*

The LLCs argue Value Logic's appraisal reports negligently misrepresented the true values of the properties, and their members justifiably relied on the reported values in making their decisions to authorize the purchase of the properties.

In *Schaaf v. Highfield*, 127 Wn.2d 17, 22-23, 896 P.2d 665 (1995), the Supreme Court held that a real estate appraiser's liability for negligent misrepresentation is defined by *Restatement (Second) of Torts* § 552 (Am. Law Inst. 1977). That section provides in relevant part:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their *justifiable reliance upon the information*, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except [for one under a duty to provide public information], the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance *he intends to supply the information or knows that the recipient intends to supply it*; and
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

RESTATEMENT § 552 (emphasis added).

In applying § 552, courts have set forth the following six elements, each which must be proved by clear, cogent, and convincing evidence: (1) the defendant supplied false information to guide others in their business transactions, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in a business transaction, (3) the defendant was negligent in communicating false information, (4) the

plaintiff relied on the false information, (5) the plaintiff's reliance on the false information was justified, that is, reasonable under the surrounding circumstances, and (6) the false information was the proximate cause of damages to the plaintiff. *See Lawyers Title*, 147 Wn.2d at 545; *ESCA v. KPMG Peat Marwick*, 135 Wn.2d 820, 827-28, 959 P.2d 651 (1998). The only elements at issue here are the second and the fifth—the duty of care element and the justifiable reliance element.

The particular duty, if any, owed by a defendant to a plaintiff is a question of law. *Schaaf*, 127 Wn.2d at 21-22 (quoting *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992)). Washington courts analyze a real estate appraiser's duty of care under the framework of the law of negligent misrepresentation. *Id.* at 21.

The *ESCA* trial court originated the six-element test set forth above in its jury instruction. *ESCA*, 135 Wn.2d at 827-28. In that case, the Supreme Court approved the jury instruction, but analyzed only the fifth element, justifiable reliance. *Id.* at 828-33. The Supreme Court in *Lawyers Title* analyzed the first, second, and fifth elements. *Lawyers Title*, 147 Wn.2d at 546-54. There, the Supreme Court hinted the second element might be inaccurate when it quoted the "knew or should have known" jury instruction the *ESCA* trial court gave and added: "*see also Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 162, 744 P.2d 1032, 750 P.2d 254 (1987) (*observing*

that the duty element is met 'where . . . the defendant has knowledge of the specific injured party's reliance')." *Lawyers Title*, 147 Wn.2d at 549 (emphasis added).

In *Bolser v. Clark*, 110 Wn. App. 895, 43 P.3d 62 (2002), we described the duty element consistent with the language of § 552. There, we quoted § 552 and defined the defendant's liability as being limited to persons for whose benefit and guidance the defendant intended to supply the appraisal report or knew the recipient intended to supply it. *Id.* at 901-03. We take this opportunity to reiterate this standard to clarify the second element of the negligent misrepresentation test. In accordance with § 552, adopted by our Supreme Court, a defendant's duty is limited to a loss suffered by a person or one of a limited group of persons for whose benefit and guidance the defendant intended to supply the information or knew that the recipient intended to supply it.

To defeat summary judgment, the LLCs must present evidence sufficient for a reasonable trier of fact to find by clear, cogent, and convincing evidence they have established the six elements of their negligent misrepresentation claims. The second element requires the LLCs to establish they were a limited group of persons for whose benefit and guidance Value Logic intended to supply the appraisal report or knew RiverBank intended to supply the appraisal report.

Here, Value Logic supplied the appraisal reports only for RiverBank's benefit and guidance. The reports state:

> Purpose and Function
>
> The purpose of this appraisal estimate is to estimate the market value of the subject property as it existed on September 28, 2006, the last date on which the proper was inspected. The function of this appraisal is to provide the client [RiverBank], with a value estimate as a basis on which to provide financing and to facilitate a purchase.

CP at 243, 258. Also as evidenced by the reports, Value Logic did not intend for anyone other than RiverBank to be guided by the reports—the reports define RiverBank as the client, state they were prepared for RiverBank's sole use and benefit, prohibit any person other than RiverBank from using or relying on them, and state the appraisals were confidential between Value Logic and RiverBank.

The LLCs argue that under *Schaaf* a real estate appraiser's duty of care extends "to those involved in the transaction that triggered the appraisal report." *Schaaf*, 127 Wn.2d at 27. However, *Schaaf* did not address the situation where a real estate appraiser did not intend to supply the appraisal reports for the buyer's benefit or guidance and also did not know the lender intended to do so.

The LLCs also argue Value Logic may not insulate itself from third-party tort liability with disclaimer language in its appraisal report. This precise issue was squarely

addressed in *Bolser v. Clark.* In *Bolser*, Jerry Bolser was in the midst of a marriage dissolution when he hired Stewart Clark to appraise property owned by Bolser Enterprises. *Bolser*, 110 Wn. App. at 898. Bolser Enterprises consisted of Jerry Bolser, his brother Tom Bolser, and their mother Ellen Bolser. *Id.* The purpose for the appraisal was to value Jerry Bolser's interest in Bolser Enterprises for purposes of dividing marital property. *Id.*

Prior to the appraisal's completion, Bolser Enterprises began a partnership dissolution. *Id.* Mr. Clark eventually completed his appraisal report. *Id.* The cover letter to the report contained limiting language, stating its purpose was for the marriage dissolution, and purported to restrict its use to that purpose. *Id.* The Bolser Enterprises partners settled their litigation, with Jerry Bolser and Ellen Bolser buying out Tom Bolser. *Id.* at 898-99. In determining a fair value for Tom Bolser's partnership interest, Bolser Enterprises relied on Mr. Clark's appraisal report. *Id.* It was later determined the report significantly overvalued the appraised property. *Id.* Bolser Enterprises sued Mr. Clark for negligent misrepresentation.

At trial, substantial evidence supported the trial court's finding that Mr. Clark knew his report would be used by Bolser Enterprises in the partnership dissolution case. *Id.* at 900. The evidence included testimony that Bolser Enterprises paid Mr. Clark for

the appraisal, and a letter confirming Mr. Clark's availability to testify in the partnership dissolution case. *Id.* at 899-900.

On appeal, Mr. Clark argued that the limiting language in the cover letter to his appraisal report insulated him from liability. We stated,

> [D]uty is not negated by the language in the appraisal cover letter restricting the report's use to the dissolution proceedings. Although such express limitations in an appraisal can limit an appraiser's duty to unknown plaintiffs and transactions, here [Mr.] Clark knew of and acquiesced in Bolser Enterprises' intent to rely on his appraisal in partnership decisions. *Cf. Pahre v. Auditor*, 422 N.W.2d 178, 181 (Iowa 1988) (holding defendant did not owe duty to plaintiff where title report specifically limited its use and coverage *and* there was no evidence that title company knew third party would see report).

Bolser, 110 Wn. App. at 902-03.

We agree with the LLCs that limiting language in an appraisal report is not dispositive. But here there is no evidence Value Logic either intended to supply the appraisal reports for the LLCs' benefit or guidance, or knew RiverBank intended to do so. The LLCs thus have failed to establish that Value Logic owed them a duty. We conclude the trial court did not err by dismissing the LLCs' negligent misrepresentation claims. Because we conclude Value Logic did not owe the LLCs a duty, we need not determine whether the LLCs justifiably relied on the appraisal reports or whether the LLCs brought their causes of action within the applicable period of limitations.

Affirmed.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with RCW 2.06.040, the rules governing unpublished opinions.

C. *Negligence claim*

The LLCs argue the trial court erred in dismissing their negligence claims against Value Logic. They fail to explain what duty, apart from the duty set forth in § 552(1), Value Logic supposedly breached. We fail to see any either and conclude the trial court did not err by dismissing the LLCs' negligence claims.

D. *CPA claims*

The LLCs argue the trial court erred when it dismissed their CPA claims against Value Logic. Value Logic responds the CPA claims were properly dismissed because Washington's CPA does not apply to professional services of real estate appraisers.

The CPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct *of any trade or commerce* are hereby declared unlawful." RCW 19.86.020 (emphasis added). Accordingly, to prevail in a private CPA action, the plaintiff must establish five elements: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his

or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). A plaintiff suing under the CPA must establish all five elements, and a CPA claim fails if a plaintiff fails to establish any one element. *Id.* at 793.

In *Short v. Demopolis*, the Washington Supreme Court considered whether the practice of law falls within the CPA's definition of "trade or commerce." 103 Wn.2d 52, 55, 691 P.2d 163 (1984). In that case, Mr. Demopolis retained a law firm to represent him in dissolving a real estate partnership and in a real estate forfeiture action. *Id.* at 53. Mr. Demopolis claimed that he specifically hired the partner with whom he consulted to represent him in the cases, and the partner gave the actual legal work to a junior partner and an associate. *Id.* at 53-54. The court held that certain entrepreneurial or business aspects of the practice of law fall within the CPA's definition of "trade or commerce"; for example, how the price of legal services is determined, billed, and collected, and the way a law firm obtains, retains, and dismisses clients. *Id.* at 60-61.

However, *Short* further held that the substantive quality of services an attorney provides does not fall within the definition of "trade or commerce." *Id.* at 61. And claims "directed to the competence of and strategy employed" by attorneys constitute allegations of negligence or malpractice, and as such, are not actionable under the CPA.

Id. at 61-62. *Short* concluded Mr. Demopolis's claims that his attorneys failed to gather essential facts, pursue certain claims, and file a timely judgment were all exempt from the CPA. *Id.* at 61.

In *Ramos v. Arnold*, Division One extended *Short*'s holding to real estate appraisers. *Ramos v. Arnold*, 141 Wn. App. 11, 14, 169 P.3d 482 (2007). In *Ramos*, Mr. and Mrs. Ramos filed a CPA claim against Debbie Arnold for failing to include residential defects in the appraisal report. *Id.* at 16. Citing *Short*, the *Ramos* court determined the complaint targeted the alleged inadequacy of the appraisal rather than the entrepreneurial aspect of the appraiser's business. *Id.* at 20. Because the CPA claim described an allegation of negligence, the *Ramos* court affirmed the trial court's summary dismissal of the CPA claim. *Id.* at 21.

Here, the gravamen of the complaint is that Value Logic was negligent in reporting the values of the properties, and the members of the LLCs relied on the values reported in authorizing the managing member to purchase the properties. As in *Ramos*, the LLCs' complaint targets the alleged inadequacy of the actual appraisals rather than any entrepreneurial aspect of Value Logic's business. We conclude Value Logic's actions do not fall within the CPA's definition of "trade or commerce." Because the LLCs have

failed to establish this element, the trial court properly dismissed their CPA claims on summary judgment.

E. *Invitation to lower the evidentiary standard for negligence actions against real estate appraisers*

The LLCs invite this court to re-examine the clear, cogent, and convincing standard of proof that applies to negligence actions against real estate appraisers. They argue the higher standard of proof "gives appraisers a special privilege in violation or [sic] Article I, section 12 of the Washington Constitution." Appellants' Br. at 39. The LLCs did not raise this issue below. We generally decline to address issues not raised below. RAP 2.5(a).

One exception to this general rule involves a manifest constitutional error. RAP 2.5(a)(3). "A constitutional error is manifest where there is prejudice, meaning a plausible showing by the appellant that the asserted error had practical and identifiable consequences . . . ." *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015), *review denied*, No. 92191-1 (Wash. Feb. 10, 2016). Here, the LLCs' negligent misrepresentation claims were not dismissed because of the high evidentiary burden of proof, but because there was *no* evidence Value Logic (1) provided the appraisal reports for the LLCs' benefit or guidance, or (2) knew RiverBank intended to supply the appraisal reports to the

LLCs. Because the alleged constitutional error is irrelevant due to how we decided this appeal, it is not manifest and we decline to address it.

Lawrence-Berrey, A.C.J.

WE CONCUR:

Korsmo, J.

Pennell, J.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROCKROCK GROUP, LLC, a Washington limited liability company, and RUSSELLROCK GROUP, LLC a Washington limited liability company

Appellants,

vs.

VALUE LOGIC, LLC, a Washington limited liability company, TERRY SAVAGE and JANE DOE SAVAGE, a married couple, and JENNY BENSON and JOHN DOE BENSON

Respondents/ Cross-Appellants.

CERTIFICATION OF SERVICE

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ORIGINAL

CERTIFICATE

I certify that I hand delivered a copy of the Petition to Review on this matter. filed on August 5, 2016, to the office of Workland Witherspoon in Spokane, WA on August 5, 2016, asking the receptionist to deliver it to Samuel Thilo, attorney for the Respondents.

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

Done this 15th day of August, 2016 in the County of Spokane, Washington.

Marshall W Casey, WSBA 42552
Attorney for Petitioners

OFFICE RECEPTIONIST, CLERK

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Josalyn,

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Thanks of your help,
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