



JAN 04 2012

CLERK OF COURTS
DIVISION III
STATE OF WASHINGTON
By _____

No. 301656

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Lance J. Gonzales and Diana D. Kassap,

Petitioners,

v.

Pacific Northwest Title Company of Spokane, Inc., and First American
Title Insurance Company,

Respondents.

SECOND AMENDED BRIEF OF APPELLANTS

Alan L. McNeil, WSBA #7930
Attorney for Petitioners/Appellants
721 N. Cincinnati St.
P.O. Box 3528
Spokane, WA 99220-3528
(509) 313-5791



JAN 04 2012

CLERK OF COURT
COURT OF APPEALS
STATE OF WASHINGTON
By _____

No. 301656

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Lance J. Gonzales and Diana D. Kassap,

Petitioners,

v.

Pacific Northwest Title Company of Spokane, Inc., and First American
Title Insurance Company,

Respondents.

SECOND AMENDED BRIEF OF APPELLANTS

Alan L. McNeil, WSBA #7930
Attorney for Petitioners/Appellants
721 N. Cincinnati St.
P.O. Box 3528
Spokane, WA 99220-3528
(509) 313-5791

TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR3

 No. 1.....3

 No. 2.....3

 No. 3.....3

Issues Pertaining to Assignments of Error3

 No. 1.....3

 No. 2.....3

 No. 3.....4

III. STATEMENT OF THE CASE.....4

A. Factual Statement4

B. Procedure Below.....7

IV. SUMMARY OF ARGUMENT8

V. ARGUMENT10

A. The Trial Court Erred When it Granted Summary Judgment on Petitioners’ Breach of Contract Claim Because the Title was not Eliminated10

 1. Because the Title was not Properly Eliminated, Respondents were in Breach of Their Contract with Petitioners12

 2. Respondents’ Breach of Contract Resulted Petitioners’ Damages13

B. The Trial Court Erred When it Granted Summary Judgment on Petitioners’ Professional Negligence Claim Because the Claim Meets All of the Essential Elements of a Professional Negligence Claim.....14

 1. The Standard of Care of a LPO is that of a Practicing Attorney ..14

2. <u>Respondents’ LPO Breached the Standard of Care of a Practicing Attorney</u>	15
3. <u>The Breach of the Standard of Care was the Proximate Cause of Petitioners’ Damages</u>	16
C. The Trial Court Erred When it Granted Summary Judgment on Petitioners’ Consumer Protection Act Claim Because Petitioners’ Claim Meets All the Criteria for a CPA Claim	17
1. <u>Respondents’ Conduct was an Unfair or Deceptive Act or Practice Occurring in Trade or Commerce</u>	17
2. <u>Respondents’ Conduct Affects the Public Interest</u>	19
3. <u>Respondents’ Conduct Caused Injury to the Petitioners</u>	21
4. <u>Petitioners are entitled to Treble Damages, Attorney’s Fees, and Costs, Pursuant to RCW 19.86.090</u>	21
VI. CONCLUSION.....	21
VII. APPENDIX	A-1

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bishop v. Jefferson Title Co.</i> , 107 Wn. App. 833, 28 P.3d 802 (2001).....	8, 15, 18, 19
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 675 P.2d 193 (1983).....	17, 18, 19
<i>Bushbeck v. Chicago Title Ins. Co.</i> , 632 F. Supp. 2d 1036 (2008)	9, 19, 20
<i>City of Seattle v. Blume</i> , 134 Wn.2d 243, 947 P.2d 223 (1997)	13
<i>Estep v. Hamilton</i> , 148 Wn. App. 246, 201 P.3d 331 (2009)	15
<i>Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.</i> , 86 Wn. App. 732, 935 P.2d 628 (1997).....	9, 17
<i>Hangman Ridge Training Stables Inc., v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	9, 17, 18, 19, 20
<i>Jones v. Allstate Ins. Co.</i> , 146 Wn.2d 291, 45 P.3d 1068 (2002)	10
<i>Ketchum v. Albertson Bulb Gardens, Inc.</i> , 142 Wn. 134, 252 P. 523 (1927).....	12
<i>Kim v. Budget Rent A Car Sys., Inc.</i> , 143 Wn.2d 190, 15 P.3d 1283 (2001)	13
<i>Matson v. Weidenkopf</i> , 101 Wn. App. 472, 3 P.3d 805 (2000)	14
<i>Nielson v. Eisenhower & Carlson</i> , 100 Wn. App. 584, 999 P.2d 42 (2000)	13

<i>Smith v. Safeco Ins. Co.</i> , 150 Wn.2d 478, 78 P.3d 1274 (2003).....	10
<i>Versuslaw, Inc. v. Stoel Rives, LLP</i> 127 Wn. App. 309, 111 P.3d 866 (2005).....	13, 16
<i>Walker v. Banks</i> , 92 Wn.2d 854, 601 P.2d 1279 (1979).....	15, 16

STATUTES

RCW 19.86.090	3, 21
RCW 65.20.030	1, 8, 10, 12
RCW 65.20.040	1, 8, 10, 11, 12
RCW 65.20.040 (3).....	11
RCW 65.20.050	1, 8, 10, 11, 12
RCW 65.20	5, 12,
RCW 19.86	2

OTHER AUTHORITIES

16 David K. DeWolf & Keller W. Allen, <i>Washington Practice: Tort Law & Practice</i> § 15.44 (West 2006).....	15
APR 12.....	14, 15, 18
APR 12(a)	14
APR 12(g)(5)	14
WAC 308-56A-505.....	1, 8, 11, 12
WAC 308-56A-505(a)-(b)	11

I. INTRODUCTION

This case involves the Petitioners' purchase of property and Respondents' failed elimination of title for a manufactured home necessary to convert the structure to real property. *See* RCW 65.20.040, RCW 65.20.050, and WAC 308-56A-505. The only way for Petitioners to obtain financing for the purchase of the property was to have the manufactured home converted to real property. In order to convert a manufactured home to real property, the title of the manufactured home as personal property must be eliminated from the manufactured home pursuant to RCW 65.20.030.

The manufactured home and land in question was purchased by Petitioners in 2006. Petitioners engaged the services of Respondent Pacific Northwest Title of Spokane (PNTS) to take the necessary steps to ensure the elimination of the certificate of title to the manufactured home, thus converting it to real property. This was necessary to enable Petitioners to qualify for any conventional financing as real property.

PNTS's Limited Practice Officer (LPO) prepared a Department of Licensing application to eliminate title to the manufactured home. Respondents' LPO erroneously inserted an invalid building permit number that had been expired since the 1970's. This resulted in an ineffective elimination of title and an inability to refinance the property. Petitioners

only became aware that no building permits were ever issued for the manufactured home and the septic system on the property was also unpermitted when they sought to refinance. Petitioners would have become aware of this prior to the purchase if Respondents' LPO had not erroneously inserted a long expired building permit number and failed to verify its accuracy.

Respondents breached their contract entered into with Petitioners to eliminate the certificate of title. As a result, the title was not eliminated, causing Petitioners damages and preventing them from being able to refinance the property.

Additionally, LPOs are subject to Washington APR 12, and the standard of care of a practicing attorney. Respondents' LPO breached this standard of care. Furthermore, the Washington Consumer Protection Act (CPA), RCW Chapter 19.86, applies to this case because it Respondents' conduct affects the public interest.

As a result of Respondents' breach of contract, professional negligence, and CPA violations, Petitioners are burdened with an unpermitted manufactured home that has not been converted to real property and thus does not qualify for refinancing. Petitioners are also burdened with an unpermitted septic system and thus cannot occupy or sell the property without a loss.

Based on Respondents' error, Petitioners are entitled to damages, costs, and attorney's fees for breach of contract, professional negligence, and treble damages and attorney fees under the CPA as provided in RCW 19.86.090.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of July 11, 2011, granting Defendant's motion for summary judgment on Plaintiff's claim for breach of contract.
2. The trial court erred in entering the order of July 11, 2011, granting Defendant's motion for summary judgment on Plaintiff's claim of professional negligence.
3. The trial court erred in entering the order of July 11, 2011, granting Defendant's motion for summary judgment on Plaintiff's claim of Consumer Protection Act violations.

Issues Pertaining to Assignments of Error

1. Did Respondents' error in failing to eliminate the title on the manufactured home breach the contract with Petitioners?
2. What is the standard of care of a Limited Practice Officer, the breach of which allows for a professional negligence claim?

3. Does the Washington CPA allow for a cause of action arising from a transaction involving an LPO?

III. STATEMENT OF THE CASE

A. Factual Statement

Petitioners, Lance Gonzales and Diana Kassap, are both residents of Spokane County, Washington. (CP at 3). On January 29, 2006, Petitioners, as buyers, executed a purchase agreement (“Agreement”) to buy real property located at 4326 South Harrison Road in Spokane, Washington from Fred and Joy Lockard (“Sellers”). (CP at 4).

At the time of the sale, the property consisted of a 1976 Sequoia 60’ x 24’ (double-wide) manufactured home situated upon approximately five acres of land. (CP at 4). In August 27, 1974, the Sellers had been issued a Land Use or Structure Permit by the Spokane County Building Department, number K5625, for a previous 12’ x 60’ (single-wide) trailer (‘Land Use Permit’). (CP at 83). That permit was for a 12’ x 60’ (single wide) manufactured home that existed on the property at that time (CP at 62). The Land Use Permit issued in 1974 expired on August 27, 1975. (CP at 83). Later, Sellers replaced the smaller mobile home with a larger one. No building permit was ever issued for the 1976 Sequoia 60 x 24 manufactured home that currently sits on the property. (CP at 72).

Subsequent to December 12, 1975, Sellers installed a septic tank on the property without first obtaining a permit. (CP at 6). The installation of the septic system was in violation of Spokane County Building Codes and Spokane County Health District Rules and Regulations. (CP at 6). The existence of the unpermitted septic system was a matter of record with the Spokane County Building Department and Spokane County Health District. (CP at 6). The expired permit bears notations about this issue. This information was never given to Petitioners prior to their purchase of the property. (CP at 72).

The 2006 Sales Agreement named PNTS as closing agent for the real estate transaction between Petitioners and Sellers. (CP at 4). Respondent, First American Title Insurance Company (First American), is the successor to PNTS. (CP at 4). On January 30, 2006, PNTS issued a Commitment for Title Insurance (“Title Commitment”) for Petitioners’ purchase of the property. (CP at 5).

The Title Commitment, Special Exception 12, provided that PNTS would take the necessary steps to eliminate the certificate of title to the manufactured home and convert it to real property, as required by RCW 65.20, *et seq.* (CP at 5). It was necessary for title to be eliminated on the manufactured home in order for Petitioners to receive financing on it as real property. (CP at 71). Pursuant to this Special Exception, PNTS

prepared a manufactured home application to eliminate title to the manufactured home. (CP at 5).

In preparing the manufactured home application PNTS's LPO inserted the correct year, make, and size of the manufactured home, the seller's information, and the buyer's information. (CP at 5). However, the LPO inserted a permit number for the manufactured home where none existed by inserting Building Permit K5625, the Land Use or Structure Permit issued for the prior trailer, which had expired on August 27, 1975. (CP at 5; CP at 83). Due to the erroneous building permit number used, the manufactured home application failed to eliminate title for the manufactured home on the property. The failed title elimination has prevented Petitioners from refinancing the property. (CP at 6). Had Petitioners known that the septic system was illegal, they would not have purchased the property.

The conveyance of the property to Petitioners closed in the office of PNTS on June 6, 2006. (CP at 5). The manufactured home application, containing the erroneous permit number, was approved by Spokane County on August 10, 2006, and recorded by the Spokane County Auditor on August 10, 2006, under recording number 5418876. (CP at 5). A Title Elimination Certificate Was Issued by the Department of Licensing. (CP at 31). However, the certificate was issued relying on the incorrect

building permit number. (CP at 31). There is no permitted sewer system on the property.

Petitioners subsequently became aware of the incorrect building permit number on the manufactured home application and the lack of permits on the septic system when they attempted to refinance the property. (CP at 72). Due to the lack of proper permitting, Petitioners have been unable to refinance or sell the property without a loss. (CP at 6). Furthermore due to the unpermitted septic system, Petitioner cannot occupy the property, (CP at 6), without the expense of installing a new septic system.

B. Procedure Below

This matter began as an action initiated on September 16, 2010, in Spokane County Superior Court by Petitioners, Lance Gonzales and Diana Kassap, against Pacific Northwest Title Company of Spokane, Inc., Pacific Northwest Title Insurance Company, Inc., and its successor, First American Title Insurance Company. (CP 3-10). Plaintiffs agreed to dismiss their claims against Pacific Northwest Title Insurance Company, Inc., on April 4, 2011, retaining their claims against Pacific Northwest Title Insurance Company, Inc., and its successor First American Title Company. (CP 29-30). An Order was granted on the agreed dismissal by Judge Eitzen in Spokane County Superior Court. (CP at 29). Subsequently, Respondent filed a Motion for Summary Judgment on

Petitioners' remaining claims for Breach of Contract, Professional Negligence, and Consumer Protection Act violations on May 5, 2011. (CP 25-27). A hearing on the motion was held on June 9, 2011, and the Summary Judgment Motion was granted by Judge Eitzen on July 11, 2011. (CP 141-142).

IV. SUMMARY OF THE ARGUMENT

Effective title elimination on a manufactured home requires a certification that the manufactured home is affixed to the land as reflected through the presence of a building permit. *See* RCW 65.20.040, RCW 65.20.050 and WAC 308-56A-505. Title elimination is necessary to convert a manufactured home to real property. *See* RCW 65.20.030. In this case, Respondents' LPO negligently inserted an expired permit number on the title elimination form for the 1976 Sequoia Manufactured Home and thereby observed the fact that no building permits existed. As a result, the title elimination was ineffective and this breached the contract between Petitioners and Respondents in which Respondents were to eliminate the title.

Furthermore, the standard of care of a LPO acting under the scope of their authority in closing a real estate transaction is that of a practicing attorney. *See Bishop v. Jefferson Title Co.*, 107 Wn. App. 833, 846, 28 P.3d 802, 809 n. 13 (2001). By negligently inserting an expired permit

number on the title elimination form for the 1976 Sequoia Manufactured Home and failing to verify its accuracy, Respondents' LPO breached the standard of care causing Petitioners financial damage. As a result, the Petitioners completed the purchase of a home that no one can occupy.

A Consumer Protection Act claim requires the following elements: “(1) an unfair or deceptive act or practice; (2) occurring in the conduct of trade or commerce; (3) affecting the public interest, and (4 and 5) causing injury to the plaintiff in his business or property.” *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 744, 935 P.2d 628 (1997). When a transaction is essentially a private dispute between a professional and a client, it may be more difficult for the plaintiff to show that the public interest is affected, but it is not impossible. *Hangman Ridge* at 790, 719 P.2d at 537. “[T]he likelihood that additional plaintiffs have been or will be injured in exactly the same fashion changed a factual pattern from a private dispute to one that affects the public interest.” *Bushbeck v. Chicago Title Ins. Co.*, 632 F. Supp. 2d 1036, 1043 (W.D. Wash. 2008). Although the transaction as essentially a private professional transaction, Respondents' negligent actions rose to the level affecting the public interest. Petitioners have a valid CPA claim against Respondents.

V. ARGUMENT

“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.”

Smith v. Safeco Ins. Co., 150 Wn.2d 478, 483, 78 P.3d 1274, 1276 (2003)

(citing *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068, 1073 (2002)).

A. The Trial Court Erred When it Granted Summary Judgment on Petitioners’ Breach of Contract Claim Because The Title Was Not Eliminated.

Respondents argued in their Memorandum in Support of their Second Motion for Summary Judgment that summary judgment should be granted because title was eliminated by the issuance of a Title Elimination Certificate by the Department of Licensing. (CP at 31). The Trial Court erred by granting summary judgment, because although the title elimination certificate was issued by the Department of Licensing, the title was not properly eliminated according to the requirements for title elimination set forth in RCW 65.20.040, RCW 65.20.050 and WAC 308-56A-505. RCW 65.20.030 requires title to be eliminated from a manufactured home in order to convert it to real property. Therefore, Petitioners have been unable to sell or refinance their property as real property since the conversion to real property was not effective as there was no valid septic system.

RCW 65.20.040 addresses the elimination of title to manufactured homes and lists what the application package shall consist of. Among those requirements is the requirement that “A certification by the local government indicating that the manufactured home is affixed to the land”, found in RCW 65.20.040 (3). This requires a valid septic system. Furthermore, RCW 65.20.050 states that the Department of Licensing shall approve the application for the elimination of title when **all** the requirements in RCW 65.20.040 have been satisfied. WAC 308-56A-505(a)-(b) further explains the requirement for title elimination found in RCW 65.20.040(3) in that the manufactured home must be affixed as illustrated by the issuance of a building permit for that purpose. If the property requirements are not satisfied, the manufactured home is not been converted to real property, with a valid septic system, preventing the Petitioners from refinancing it or selling it without a loss.

Here, a valid building permit had never been issued for the manufactured home. The building permit used in the application was for the previous manufactured home on the property and was erroneously inserted in the title elimination application by the LPO. It is clear that title elimination cannot be effective without a valid building permit being issued , showing that the manufactured home is affixed to the land pursuant to RCW 65.20.040; RCW 65.20.050, and WAC 308-56A-505.

Although the Department of Licensing issued a Certificate of Title Elimination, that certificate was based on erroneous information and was clearly invalid because the statutory requirements set out in RCW 65.20.040, RCW 65.20.050 and WAC 308-56A-505 were not met. This has prevented the Petitioner from having their property refinanced as the manufactured home has not been converted to real property pursuant to RCW 65.20.030, one of the requirements of their original financing.

1. Because the Title was not Properly Eliminated, Respondents were in Breach of their Contract with Petitioners.

To prevail on a contract claim, a party must prove (1) a contractual duty; (2) a breach of that duty; and (3) substantial damage suffered by reason of the breach. *See Ketchum v. Albertson Bulb Gardens, Inc.*, 142 Wn. 134, 138, 252 P. 523 (1927).

Respondents had a contractual duty to Petitioners in the Title Commitment, Special Exception 12. The Title Commitment, Special Exception 12, provided that PNTS would take the necessary steps to eliminate the certificate of title to the manufactured home and convert it to real property, as required by RCW 65.20, *et seq.* By negligently inserting the expired building permit number on the Title Elimination Application, Respondents submitted an application that resulted in an invalid

elimination of title, thus breaching the Title Commitment Contract between Respondents and Petitioners.

2. Respondents' Breach of Contract Resulted in Petitioners' Damages.

Proximate cause consists of two elements: cause in fact and legal causation. *City of Seattle v. Blume*, 134 Wn.2d 243, 251, 947 P.2d 223 (1997). Cause in fact refers to the 'but for' consequences of an act, that is, the immediate connection between an act and an injury. *Blume*, 134 Wn.2d at 251-52. The "but for" test requires a party to establish that the act or omission complained of probably caused the subsequent injury. *Nielson v. Eisenhower & Carlson*, 100 Wn.App. 584, 591, 999 P.2d 42 (2000). Legal causation rests on considerations of policy determining how far a party's responsibility should extend. *Blume*, 134 Wn.2d at 252. It involves the question of whether liability should attach as a matter of law, even if the proof establishes cause in fact. *Id.* Proximate cause may be determined as a matter of law only when reasonable minds could reach but one conclusion. *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 203-04, 15 P.3d 1283 (2001).

Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 328, 111 P.3d 866, 876 (2005).

Respondents' breach resulted in an invalid elimination of title for the manufactured home on the property. This has prevented Petitioners from refinancing their property and selling it without a loss. Furthermore, had the LPO realized the erroneous nature of the building permit number, the lack of a building permit on the 1976 Sequoia Manufactured Home and the unpermitted septic system would have become known to Petitioners.

Petitioners would not have purchased the property if they had known of this. Petitioners' current damages include the cost of remedying the manufactured home so that it is properly permitted with a valid septic system. Major damages include remedying the unpermitted septic system. These damages would not have occurred, but for the Respondents' negligence.

B. The Trial Court Erred When it Granted Summary Judgment on Petitioners' Professional Negligence Claim Because the Claim Meets All Of the Essential Elements of a Professional Negligence Claim.

The elements of a professional negligence claim are duty, breach, and damages. *See Matson v. Weidenkopf*, 101 Wn. App. 472, 478, 3 P.3d 805 (2000). Here, Respondents' LPO had the duty of a practicing attorney. This duty was breached when the LPO inserted an expired building permit number and failed to verify its accuracy. Petitioners' damages flow from that breach.

1. The Standard of Care of a LPO is that of a Practicing Attorney.

Admission to Practice Rule 12 authorizes LPOs to "...prepare and complete legal documents incident to the closing of real estate and personal property transactions..." APR 12(a). APR 12(g)(5) specifically states that Rule 12 shall not expand, narrow, or affect, "...the standard of care which a limited practice officer must practice when carrying out the

functions permitted by this rule.” The Washington Court of Appeals, Division II, took note of this rule when holding that “...the standard of care for a non-attorney closing a real estate transaction is that of a practicing attorney. APR 12 initially promulgated in 1983, did not change this standard.” *Bishop v. Jefferson Title Co.*, 107 Wn. App. 833, 846, 28 P.3d 802, 809 n. 13 (2001).

Here, Respondents’ LPO was assisting in closing the real estate transaction of Petitioner by filling out the DOL form for Elimination of Title. This was pursuant to APR 12. Per the holding in *Bishop*, Respondents’ LPO is subject to the standard of care of a practicing attorney.

2. Respondents’ LPO Breached the Standard of Care of a Practicing Attorney.

The Standard of Care of a practicing attorney is of one who “...must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in Washington.” *Estep v. Hamilton*, 148 Wn. App. 246, 256, 201 P.3d 331 (2009). Whether a professional breached the standard of care typically requires expert testimony. 16 David K. DeWolf & Keller W. Allen, *Washington Practice: Tort Law & Practice* § 15.44 (West 2006). However, where the error is obvious, no such expert

testimony is required. *Walker v. Banks*, 92 Wn.2d 854, 601 P.2d 1279 (1979). In this case, the insertion of a building permit number for a permit that expired 25 years previously is an obvious error.

Here Respondents' LPO is held to the standard of care of a practicing attorney. That standard of care was breached when the LPO negligently and erroneously inserted the incorrect building permit number and failed to verify its accuracy.

Even if the LPO is held to the standard of ordinary negligence, she breached that standard. The insertion of false information into a simple form is ordinary negligence, which lead to damages.

3. The Breach of the Standard of Care Was the Proximate Cause of the Petitioners' Damages.

“General principles of causation are no different in a legal malpractice action than in an ordinary negligence case. To recover, the plaintiff must demonstrate that he or she would have achieved a better result had the attorney not been negligent.” *Versuslaw* at 328, 111 P.3d at 876.

Here, had the LPO not breached the standard of care by inserting an expired permit number and failing to verify its accuracy, the lack of a building permit on the 1976 Sequoia Manufactured Home and the unpermitted septic system would have become known to Petitioners. Petitioners would not have purchased the property if they had known of

this. Petitioners' current damages include the cost of reconstructing the septic system so that it is properly permitted and meets the structural requirements of the Spokane County Building Code. These damages would not have occurred, but for the Respondents' conduct.

C. The Trial Court Erred When it Granted Summary Judgment on Petitioners' Consumer Protection Act Claim Because Petitioners' Claims Meet all the Criteria for a CPA Claim.

A consumer protection act claim requires the following elements: "(1) an unfair or deceptive act or practice; (2) occurring in the conduct of trade or commerce; (3) affecting the public interest, and (4 and 5) causing injury to the plaintiff in his business or property." *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 744, 935 P.2d 628 (1997).

Petitioners' claim meets all of these elements.

1. Respondents' Conduct was an Unfair or Deceptive Act or Practice Occurring in Trade or Commerce.

To show an unfair or deceptive act, a plaintiff need not show that the act in question was intended to deceive, but that the alleged act had the capacity to deceive a substantial portion of the public. *See e.g. Hangman Ridge Training Stables Inc., v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531, 535 (1986); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 592, 675 P.2d 193, 200-01 (1983). The purpose of the capacity to deceive test is to deter deceptive conduct before the injury

occurs. *Hangman Ridge*, at 785, 675 P.2d at 535. Furthermore, the trade or commerce prong is broadly construed and has been found to include commercial transactions such as loan closings. *Bowers* at 592, 675 P.2d at 201.

In *Hangman Ridge*, the court found that the actions of an escrow closer failing to warn of potential tax consequences did not constitute an unfair or deceptive practice. *Hangman Ridge* at 793, 675 P.2d at 539. However, the court in *Bowers* noted that an escrow agent engaging in the practice of law "... certainly has the capacity for such deception. Potential clients might readily and quite reasonably believe that Transamerica's closing agents were qualified to provide the expertise that could be expected from a lawyer. Such a belief, though reasonable, is not well founded." *Bowers* at 591-92, 657 P.2d at 200-01. Although the escrow agent in *Bowers* was found to have engaged in the unauthorized practice of law, the court in *Bishop v. Jefferson Title Co.* suggested that the mere negligent practice of law could satisfy the deceptive practices prong. *Bishop v. Jefferson Title Co.*, 107 Wn. App. 833, 850, 28 P.3d 802, 812 (2001). It is important to note that the LPO in *Bishop* had exceeded the scope of APR 12 and was similarly engaged in the unauthorized practice of law. *Id.*

Here, the LPO did not engage in the unauthorized practice of law. However, the LPO was engaging in the authorized practice of law by filling out the title elimination form, implicating the capacity for deception discussed in *Bowers*. *Bowers* at 591-92, 657 P.2d at 200-01. Petitioners reasonably believed that the LPO would use the expertise to be expected of a lawyer in filling out the title elimination form. Because the LPO negligently inserted the expired permit number, the act had the capacity to deceive Petitioners, and indeed resulted in such deception. As alluded to in *Bishop*, the negligent practice of law has the capacity to deceive, and that was what occurred here. *Bishop*, at 850, 28 P.3d at 812. Furthermore, per the holding in *Bishop*, the acts of the LPO in closing the real estate transaction occurred in the sphere of trade and commerce. *Bowers* at 592, 675 P.2d at 201.

2. Respondents' Conduct Affects the Public Interest.

When a transaction is essentially a private dispute between a professional and a client, it may be more difficult to show that the public interest is not affected, but it is not impossible. *Hangman Ridge* at 790, 719 P.2d at 537. The United States District Court for the Western District of Washington in *Bushbeck v. Chicago Title Ins. Co.* noted that many courts have misinterpreted this holding in *Hangman Ridge* to bar a CPA claim for professional transactions, when in fact it not impossible to

demonstrate a public interest in such transactions. *Bushbeck v. Chicago Title Ins. Co.*, 632 F. Supp. 2d 1036, 1043 (W.D. Wash. 2008). “[T]he likelihood that additional plaintiffs have been or will be injured in exactly the same fashion changed a factual pattern from a private dispute to one that affects the public interest.” *Id.*

The court in *Hangman Ridge* used a four prong test to establish a public interest for essentially private disputes involving professional transactions. *Hangman Ridge* at 791-92, 719 P.2d at 538. “(1) Were the alleged acts committed in the course of defendant’s business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?” *Id.* The court stressed that it is not necessary for all of these factors to be present, and not one of these factors is dispositive. *Id.* Rather, “...[t]he factors in both the consumer and private dispute contexts represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact.” *Id.*

Here, the title elimination was part of the services that Respondent PNTS offered. Respondent maintains a website that lists closing as one of its services offered. Respondents’ conduct affects the public interest.

3. Respondents' Conduct Caused Injury to Petitioner.

Respondents' conduct resulted in an ineffective elimination of title for the manufactured home on the property. Furthermore, had the LPO realized the erroneous nature of the building permit number, the lack of a building permit on the 1976 Sequoia Manufactured Home and the unpermitted septic system would have become known to Petitioners. Petitioners would not have purchased the property if they had known of this. Petitioners are unable to refinance their property or sell it without a loss. Petitioners' current damages include the cost of constructing a septic system that it is properly permitted and meets the structural requirements of the Spokane County building code. These damages would not have occurred, but for the Respondents' conduct.

4. Petitioners are Entitled to Treble Damages, Attorney's Fees and Costs, Pursuant to RCW 19.86.090.

Treble damages, attorney's fees, and costs are allowed in civil actions brought under the CPA under RCW 19.86.090. Petitioners are entitled to these treble damages, attorney's fees, and costs.

VI. CONCLUSION

In conclusion, Petitioners request that the decision of Spokane County Superior Court be reversed, and the matter be remanded for trial. There are genuine issues of material facts that exist regarding Petitioners' claims

of Breach of Contract, Professional Negligence, and Consumer Protection
Act violations.

Respectfully submitted on this 4th day of January, 2012.

UNIVERSITY LEGAL ASSISTANCE


ALAN L. MCNEIL, WSBA #7930
Attorney for Petitioners

VII. APPENDIX

1. RCW 19.86.090. Civil action for damages—Treble damages authorized—Action by governmental entities.

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

2. RCW 65.20.030. Clarification of type of property and perfection of security interest.

When a manufactured home is sold or transferred on or after March 1, 1990, and when all ownership in the manufactured home is transferred through the sale or other transfer of the manufactured home to new owners, the manufactured home shall be real property when the new owners eliminate the title pursuant to this chapter. The manufactured home shall not be real property in any form, including fixture law, unless

the title is eliminated under this chapter. Where any person who owned a used manufactured home on March 1, 1990, continues to own the manufactured home on or after March 1, 1990, the interests and rights of owners, secured parties, lienholders, and others in the manufactured home shall be based on the law prior to March 1, 1990, except where the owner voluntarily eliminates the title to the manufactured home by complying with this chapter. If the title to the manufactured home is eliminated under this chapter, the manufactured home shall be treated the same as a site-built structure and ownership shall be based on ownership of the real property through real property law. If the title to the manufactured home has not been eliminated under this chapter, ownership shall be based on chapter 46.12 RCW.

For purposes of perfecting and realizing upon security interests, manufactured homes shall always be treated as follows: (1) If the title has not been eliminated under this chapter, security interests in the manufactured home shall be perfected only under chapter 62A.9A RCW in the case of a manufactured home held as inventory by a manufacturer or dealer or chapter 46.12 RCW in all other cases, and the lien shall be treated as securing personal property for purposes of realizing upon the security interest; or (2) if the title has been eliminated under this chapter, a separate security interest in the manufactured home shall not exist, and the manufactured home shall only be secured as part of the real property through a mortgage, deed of trust, or real estate contract.

3. RCW 65.20.040. Elimination of title—application.

If a manufactured home is affixed to land that is owned by the homeowner, the homeowner may apply to the department to have the title to the manufactured home eliminated. The application package shall consist of the following:

(1) An affidavit, in the form prescribed by the department, signed by all the owners of the manufactured home and containing:

- (a) The date;
- (b) The names of all of the owners of record of the manufactured home;
- (c) The legal description of the real property;

- (d) A description of the manufactured home including model year, make, width, length, and vehicle identification number;
 - (e) The names of all secured parties in the manufactured home; and
 - (f) A statement that the owner of the manufactured home owns the real property to which it is affixed;
- (2) Certificate of title for the manufactured home, or the manufacturer's statement of origin in the case of a new manufactured home. Where title is held by the secured party as legal owner, the consent of the secured party must be indicated by the legal owner releasing his or her security interest;
- (3) A certification by the local government indicating that the manufactured home is affixed to the land;
- (4) Payment of all vehicle license fees, excise tax, use tax, real estate tax, recording fees, and proof of payment of all property taxes then due; and
- (5) Any other information the department may require.

4. RCW 65.20.050. Elimination of title—approval.

The department shall approve the application for elimination of the title when all requirements listed in RCW 65.20.040 have been satisfied and the registered and legal owners of the manufactured home have consented to the elimination of the title. After approval, the department shall have the approved application recorded in the county or counties in which the land is located and on which the manufactured home is affixed.

The county auditor shall record the approved application, and any other form prescribed by the department, in the county real property records. The manufactured home shall then be treated as real property as if it were a site-built structure. Removal of the manufactured home from the land is prohibited unless the procedures set forth in RCW 65.20.070 are complied with.

The department shall cancel the title after verification that the county auditor has recorded the appropriate documents, and the department shall maintain a record of each manufactured home title eliminated under this

chapter by vehicle identification number. The title is deemed eliminated on the date the appropriate documents are recorded by the county auditor.

5. WAC 308-56A-505. Elimination of manufactured home certificate of ownership (title)—Eligibility.

(1) May I eliminate the certificate of ownership (title) on my manufactured home? You may eliminate the certificate of ownership (title) on your manufactured home provided you own or are purchasing the manufactured home and the land to which it is affixed as defined in RCW 65.20.020 and 65.20.030.

(2) How do I apply to eliminate the certificate of ownership on my manufactured home? You must complete, record and submit a manufactured home application. The application to eliminate the certificate of ownership issued under chapter 46.12 RCW, and record ownership as real property under chapter 65.20 RCW or to transfer ownership in real property to a title under chapter 46.12 RCW, must be signed by all persons having an interest in the land and the manufactured home as defined in RCW 65.20.020.

(3) What conditions must be met before the certificate of ownership can be eliminated? The following conditions must be met before the certificate of ownership will be eliminated:

(a) The manufactured home must be affixed or be in the process of being affixed to the land.

(b) The building permit office certification box on the elimination application must be completed by the issuing authority stating that the home was affixed or that a building permit has been issued for this purpose as described in RCW 65.20.040(3).

(c) If a title company is involved in the elimination transaction, they must certify that the legal description of the land is true and correct per real property records.

(d) The completed application must be recorded with the county auditor's office in the county where the manufactured home and land are located.

(e) After recording, the original or a certified copy of the elimination application and any other documents required by the department must be submitted to a vehicle licensing office to complete the elimination process with the appropriate fees. A confirmation letter is sent from the department confirming the elimination of the certificate of ownership.

(f) Failure to finalize the elimination process with a vehicle licensing office will render the elimination incomplete until such time the original or certified copy of the recorded application and any other documents required by the department are submitted to a vehicle licensing office with the appropriate fees.

(4) How do I complete the elimination of my manufactured home certificate of ownership with the department? After recording the original or a certified copy of the elimination application and any other documents required, it must be submitted to the department for processing with payment of the applicable fees. After the application has been processed, you will receive a confirmation letter from the department that your manufactured home certificate of ownership has been eliminated.

(5) What are the fees for elimination of a manufactured home title?
The fees for elimination of a manufactured home title are as follows:

(a) Fees as provided in RCW 46.01.140 for each application.

(b) Fees as provided in RCW 46.12.040 for each application.

(c) A fee for each application to transfer a new or used manufactured home as provided in RCW 59.22.080.

(d) A fee of twenty-five dollars for each application to cover the cost of processing documents and performing services as described in RCW 65.20.090.

6. APR 12. Limited Practice Rule for Limited Practice Officers.

a) Purpose. The purpose of this rule is to authorize certain lay persons to select, prepare and complete legal documents incident to the closing of real estate and personal property transactions and to prescribe the conditions of and limitations upon such activities.

(b) Limited Practice Board.

(1) Establishment. There is hereby established a Limited Practice Board (referred to herein as the "Board") consisting of nine members to be appointed by the Supreme Court of the State of Washington. Not less than four of the members of the Board must be admitted to the practice of law in the State of Washington. Four of the members of the Board shall be business representatives, one each of the following four industries: escrow, lending, title insurance, and real estate. Appointments shall be for 4-year terms. No member may serve more than two consecutive terms. Terms shall end on December 31 of the applicable year. The Supreme Court shall designate one of the members of the Board as chairperson.

(2) Duties and Powers.

(i) Applications. The Board shall accept and process applications for certification under this rule.

(ii) Examination. The Board shall conduct the examination for certification required by this rule. The examination shall consist of such questions as the Board may select on such subjects as may be listed by the Board and approved by the Supreme Court. The Board shall establish the number of examinations to be given each year and the dates of the examinations.

(iii) Investigation and recommendation for admission. The Board shall notify each applicant of the results of the examination and shall recommend to the Supreme Court the admission or rejection of each applicant who passes the examination. The Supreme Court shall enter an order admitting to limited practice those applicants it deems qualified, conditioned upon each applicant taking an oath that he or she will comply with this rule and paying to the Board the annual fee for the current year. Upon the entry of such order, the taking and filing of the oath, and payment of the annual fee, an applicant shall be enrolled as a limited practice officer and shall be entitled to perform those services permitted by this rule. The oath must be taken before a court of record in the State of Washington.

(iv) Education. The Board shall approve individual courses and may accredit all or portions of the entire educational program of a given organization which, in the Board's judgment, will satisfy the educational

requirement of these rules. It shall determine the number of credit hours to be allowed for each such course. It shall encourage the offering of such courses and programs by established organizations, whether offered within or outside this state.

(v) Grievances and discipline. The Board shall adopt hearing and appeal procedures and shall hear complaints of persons aggrieved by the failure of limited practice officers to comply with the requirements of this rule and of the Limited Practice Officer Rules of Professional Conduct. Upon a finding by the Board that a limited practice officer has failed to comply in any material manner with the requirements of this rule, the Board shall take such action as may be appropriate to the degree of the violation, considering also the number of violations and the previous disciplinary record of the limited practice officer. Disciplinary action may include admonitions, reprimands, and recommendations to the Supreme Court for the suspension or revocation of the limited practice officer's certification.

(vi) Investigation. Upon the receipt of a complaint that a limited practice officer has violated the provisions of this rule and in other appropriate circumstances, the Board may investigate the conduct of the limited practice officer to determine whether the limited practice officer has violated the requirements, conditions or limitations imposed by this rule.

(vii) Approval of forms. The Board shall approve standard forms for use by limited practice officers in the performance of services authorized by this rule.

(viii) Fees. The Board shall establish and collect examination and annual fees in such amounts as are necessary to carry out the duties and responsibilities of the Board.

(ix) Regulations. The Board shall propose regulations to implement the provisions of this rule for adoption by the Supreme Court.

(3) Expenses of the Board. Members of the Board shall not be compensated for their services. For their actual and necessary expenses incurred in the performance of their duties, they shall be reimbursed by the Board in a manner consistent with its rules. All such expenses shall be

paid pursuant to a budget submitted to and approved by the Washington State Bar Association on an annual basis. Funds accumulated from examination fees, annual fees, and other revenues shall be used to defray all expenses of the Board. The administrative support to the Board shall be provided by the Washington State Bar Association.

(c) Certification Requirements. An applicant for certification as a limited practice officer shall:

(1) Age. Be at least 18 years of age.

(2) Moral Character. Be of good moral character.

(3) Examination. Satisfy the examination requirements established by the Board.

(4) Oath. Execute under oath and file with the Board two copies of his or her application, in such form as may be required by the Board. Additional proof of any fact stated in the application may be required by the Board. In the event of the failure or refusal of an applicant to furnish any information or proof, or to answer any interrogatories of the Board pertinent to the pending application, the Board may deny the application.

(5) Examination Fee. Pay, upon the filing of an application, the examination fee.

(d) Scope of Practice Authorized by Limited Practice Rule. Notwithstanding any provision of any other rule to the contrary, a person certified as a limited practice officer under this rule may select, prepare and complete documents in a form previously approved by the Board for use by others in, or in anticipation of, closing a loan, extension of credit, sale or other transfer of interest in real or personal property. Such documents shall be limited to deeds, promissory notes, guaranties, deeds of trust, reconveyances, mortgages, satisfactions, security agreements, releases, Uniform Commercial Code documents, assignments, contracts, real estate excise tax affidavits, bills of sale, and powers of attorney. Other documents may be from time to time approved by the Board.

(e) Conditions Under Which Limited Practice Officers May Prepare and Complete Documents. Limited practice officers may render services

authorized by this rule only under the following conditions and with the following limitations:

(1) Agreement of the Clients. Prior to the performance of the services, all clients to the transaction shall have agreed in writing to the basic terms and conditions of the transaction. In the case of a power of attorney prepared in anticipation of a transaction, the principal(s) and attorney(s)-in-fact shall have provided the limited practice officer consistent written instructions for the preparation of the power of attorney.

(2) Disclosures to the Clients. The limited practice officer shall advise the clients of the limitations of the services rendered pursuant to this rule and shall further advise them in writing:

(i) that the limited practice officer is not acting as the advocate or representative of either of the clients;

(ii) that the documents prepared by the limited practice officer will affect the legal rights of the clients;

(iii) that the clients' interests in the documents may differ;

(iv) that the clients have a right to be represented by lawyers of their own selection; and

(v) that the limited practice officer cannot give legal advice as to the manner in which the documents affect the clients.

The written disclosure must particularly identify the documents selected, prepared, and/or completed by the limited practice officer and must include the name, signature and number of the limited practice officer.

(f) Continuing Certification Requirements.

(1) Continuing Education. Each limited practice officer must complete a minimum number of credit hours of approved or accredited education, as prescribed by regulation of the Board, during each calendar year in courses certified by the Board to be appropriate for study by clo limited practice officers providing services pursuant to this rule; provided, that the limited practice officer shall not be required to comply with this subsection during the calendar year in which he or she is initially certified.

(2) Financial Responsibility. Each limited practice officer or employer thereof shall show proof of ability to respond in damages resulting from his or her acts or omissions in the performance of services permitted by this rule. The proof of financial responsibility shall be in such form and in such amount as the Board may by regulation prescribe.

(3) Annual Fee. Each limited practice officer must pay the annual fee established by the Board.

(g) Existing Law Unchanged. This rule shall in no way expand, narrow or affect existing law in the following areas:

(1) The fiduciary relationship between a limited practice officer and his or her customers or clients;

(2) Conflicts of interest that may arise between the limited practice officer and a client or customer;

(3) The right to act as one's own attorney under the pro se exception to the unauthorized practice of law including but not limited to the right of a lender to prepare documents conveying or granting title to property in which it is taking a security interest;

(4) The lack of authority of a limited practice officer to give legal advice without being licensed to practice law;

(5) The standard of care which a limited practice officer must practice when carrying out the functions permitted by this rule.

(h) Treatment of Funds Received Incident to the Closing of Real or Personal Property Transactions. Persons admitted to practice under this rule shall comply with LPORPC 1.12A and B regarding the manner in which they identify, maintain and disburse funds received incidental to the closing of real and personal property transactions, unless they are acting pursuant to APR 12(g)(3).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

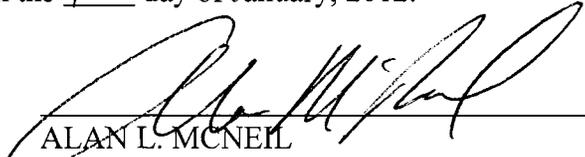
LANCE J. GONZALES, a single person and DIANA D. KASSAP, a single person,)	APPELLATE NO: 301656
)	
Plaintiffs,)	CERTIFICATE OF SERVICE OF SECOND AMENDED BRIEF OF APPELLANTS
v.)	
)	
PACIFIC NORTHWEST TITLE COMPANY OF SPOKANE, INC., a Washington Corporation, and PACIFIC NORTHWEST TITLE INSURANCE COMPANY, INC., a Washington Corporation; and FIRST AMERICAN TITLE INSURANCE COMPANY, its successor,)	
)	
Defendants.)	

I, ALAN L. MCNEIL, declare as follows:

That I am a citizen of the United States; that on the 4th day of January, 2012, I hand delivered a true and correct copy of: Amended Brief of Appellants to: Mr. Thomas T. Bassett, K & L Gates, LLP, 618 W. Riverside Ave., Ste. 300, Spokane, WA 99201-5102.

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

Signed at Spokane, Washington on the 4th day of January, 2012.


ALAN L. MCNEIL

CERTIFICATE OF SERVICE OF AMENDED BRIEF
OF PETITIONERS/APPELLANTS- Page 1 of 1
Kassap, Diana\Pleadings\Certificate of Service of 2nd Amended Brief
of Appellants/010312/alm/tlc

UNIVERSITY LEGAL ASSISTANCE
721 North Cincinnati Street - P.O. Box 3528
Spokane, Washington 99220-3528
(509) 313-5791 Telephone
(509) 313-5805 Facsimile
(509) 313-3796 TTY