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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 301656

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LANCE J. GONZALES and DIANA D. KASSAP,

Appellants,

v.

PACIFIC NORTHWEST TITLE COMPANY OF SPOKANE, INC.,
PACIFIC NORTHWEST TITLE INSURANCE COMPANY, INC., and
FIRST AMERICAN TITLE INSURANCE COMPANY,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

In 2006, the Appellants, Lance J. Gonzales and Diana D. Kassap (“Investors”), decided to speculate in the real estate market by purchasing an investment property at 4326 South Harrison Road, Spokane, Washington (“Investment Property”). However, the Investors failed to do their due diligence, settling for an “informal walk-through” rather than a formal inspection. Not surprisingly, prior to closing the purchase, the Investors failed to discover the existence of an unpermitted septic system on the Investment Property. Rather than accept responsibility for any unrealized loss on their investment, the Investors blame others, reaching a settlement with Fred Lockard and Joy Lockard (“Sellers”) and suing the Respondents.

While thinly disguised as a case about an alleged error in the Building Permit Office Certification section of a Department of Licensing (“DOL”) form, this case is clearly about the unpermitted septic system. As the Investors’ counsel stated to the trial court, “[w]ell obviously, our claims are that [Respondents’] LPO [Limited Practice Officer] should have found out about these forms, about this fact that there was a discrepancy between the year of the mobile home and the year that the septic system was put in and what that septic system was rated for.” (RP at 36:5-11 (emphasis added); 36:12-19 (trial court clarifying that the Investors alleged that the LPO should have found out that the 1974 septic permit did not cover the 1976 mobile home); *see also* RP at 37:4-15.) Likewise, their alleged damages are all related to

the speculative cost of remedying/replacing the unpermitted septic system.

However, the Investors have sued the wrong party.¹ The Respondents (“First American” collectively) had no contractual or legal duty to discover or alert the Investors of the unpermitted status of the septic system on the Investment Property. First American, through its predecessors, served as the closing agent for the Investors’ purchase of the Investment Property. As part of the closing, First American selected and completed portions of a DOL Manufactured Home Application necessary to “eliminate title” to the manufactured home located on the Investment Property. Once the DOL eliminated title, the Manufactured Home became part of the real property. Here, the necessary steps were taken and title was eliminated. Since title was eliminated, the Investors’ breach of contract claim for failure to eliminate title was properly dismissed by the trial court.

The Investors cloak their unpermitted septic claim in an allegation that First American is liable for an alleged error in the Building Permit Office Certification section of the Manufactured Home Application. However, the Building Permit Office, or permit issuing authority, not First American, was responsible for certifying the accuracy

¹ The Investors have already settled their claims against the Sellers for the unpermitted septic system in return for the Sellers forgiving the outstanding balance of the \$43,520.00 (less payments made by the Investors) Seller-financed portion of the Investment Property sale. (CP at 265-270 (Mutual Release and Settlement Agreement).)

of the Building Permit Office Certification. First American had no independent duty to verify the veracity of the Building Permit Office Certification. Again, if the Investors suffered damages as a result of an error in the Building Permit Office Certification, they should have sued the issuing authority that certified the accuracy of that section. Since First American had no duty to verify the accuracy of the Building Permit Office Certification, the Investors' professional negligence claim fails as a matter of law and the trial court properly dismissed this claim on summary judgment.

Before the trial court, the Investors built their Consumer Protection Act ("CPA") claim on the erroneous argument that First American's LPO was engaged in the unauthorized practice of law. On appeal, they abandon their unauthorized practice of law argument, acknowledge that the LPO was engaged in the authorized practice of law, and erroneously aver that the negligent practice of law is sufficient to support a CPA claim. However, the Washington State Supreme Court expressly exempted professional negligence claims from the CPA over twenty-five years ago in *Short v. Demopolis*, 103 Wn.2d 52, 61-62, 691 P.2d 163 (1984), so this claim fails as a matter of law. Even if this claim had not been expressly exempted, summary judgment was still appropriate because the Investors also fail to satisfy the unfair and deceptive practice, public interest, and damages elements of a CPA claim.

Finally, the Investors have failed to establish that the damages they allege, the cost to remedy the unpermitted septic system, had any proximate relationship to First American's conduct. Their failure to discover the unpermitted septic system was theirs alone, just as any damages flowing therefrom were proximately and solely caused by their own failure to exercise due diligence prior to purchasing the Investment Property.

The Investors' Second Amended Brief ("Sec. Am. Br.") is replete with factual allegations unsupported by the record and legal arguments unsupported by the law. As such, the Investors have failed to demonstrate that either the law or the facts support their claims. Summary judgment in favor of First American should be affirmed, and First American should be awarded its attorney's fees and costs incurred in responding to this frivolous appeal.

II. ISSUES ON APPEAL

1. Whether title was eliminated to the Manufactured Home situated on the Investment Property.
2. Whether First American had an independent legal duty to verify the Building Permit Office Certification provided, pursuant to statute and DOT regulation, by the building permit "issuing authority," Spokane County Building and Planning Department.
3. Whether the Investors' Consumer Protection Act claim based on alleged professional negligence is exempted as a matter of law by

Short v. Demopolis, 103 Wn.2d 52, 691 P.2d 163 (1984) and its progeny.

4. Whether the Investors' failure to establish the five required elements of their Consumer Protection Act is fatal to their Consumer Protection Act claim.
5. Whether the Investors' failure to present any evidence that First American's conduct proximately caused their alleged damages is fatal to their three remaining claims (Breach of Contract, Professional Negligence, and Consumer Protection Act).

III. STATEMENT OF THE CASE

A. Factual Statement

1. The Purchase of the Investment Property and the Elimination of Title.

In early 2006, Appellants, Lance J. Gonzales and Diana D. Kassap ("Investors"), entered into an agreement with Fred Lockard and Joy Lockard ("Sellers"), to purchase real property located at 4326 South Harrison Road, Spokane, Washington ("Investment Property"). (CP at 4, 236.) The Investors purchased the Investment Property for investment purposes and not as their primary residence. (CP at 193 (RFA #7).) The Investment Property consisted of approximately five acres of land and a 1976 Sequoia 60' x 24' manufactured home ("Manufactured Home") situated upon the real property. (CP at 4.) The Investors completed the purchase of the Investment Property without obtaining a Multiple Listing Service Seller Disclosure Statement from the Sellers or completing a

formal inspection for the purpose of ascertaining structural defects and deficiencies. (CP at 191, 192-93 (RFA Nos. 1, 2, & 6).) Rather than perform due diligence on their investment, the Investors did only an informal walk-through of the Investment Property prior to the June 6, 2006 closing. (CP at 191 (RFA Nos. 1&2); CP at 5 ¶ 3.9.)

Pursuant to the agreement between the Sellers and the Investors, Respondent Pacific Northwest Title of Spokane (“PNTS” or “First American”) was named as the Closing Agent for the transaction. (CP at 4.) According to the Complaint, First American agreed to take the necessary steps to eliminate title to the Manufactured Home. (CP at 5 ¶ 3.5.) Elimination of title to the Manufactured Home was necessary in order to convert the Manufactured Home to real property. RCW 65.20.030. To facilitate the title elimination process, First American completed certain portions of the Department of Licensing (“DOL”) Manufactured Home Application. (CP at 13 ¶ 3.6.)

The Manufactured Home Application (“Application”) contains a “Building Permit Office Certification” section at the bottom of the first page. (CP at 47.) Here, the Building Permit Office Certification was signed by Faith Hintz, Building and Planning Services Coordinator II at the Spokane County Building and Planning Department, certifying that “a building permit has been issued for this purpose and the attachment will be inspected upon completion” citing permit number K5625. (CP at 47.) Permit number K5625 was issued for 4326 South Harrison Road,

Spokane, Washington, the Investment Property at issue in this case. (*Compare* CP at 83 (Permit) *with* CP at 4 ¶¶ 2.1, 3.1 (Compl.).)

The Application was approved and recorded by the Spokane County Auditor on August 10, 2006. (Sec. Am. Br. at 6; CP at 47-49.) The DOL subsequently issued a Title Elimination Certificate for the Manufactured Home. (CP at 53.) According to Spokane County and DOL records, title to the Manufactured Home has been eliminated. (CP at 47-50, 53.)

2. The Unpermitted Septic System at the Center of this Lawsuit.

According to the Investors, sometime prior to their June 2006 purchase of the Investment Property, the Sellers installed a septic tank on the property without first obtaining a permit. (CP at 3.14.) According to the Complaint, the Sellers' installation of the unpermitted septic system violated Spokane County Building Codes and Spokane County Health District Rules and Regulations. (CP at 6 ¶ 3.14.) Although they allege that the unpermitted septic system was a matter of record with the Spokane County Building Department and Spokane County Health District, the Investors failed to discover the unpermitted septic system prior to purchasing the Investment Property. (CP at 6 ¶ 3.15, CP at 72.)

Other than filing this lawsuit, the Investors have taken no steps to remedy the unpermitted septic system, but they have reached a settlement with the Sellers. (RP 39:4-40:14; CP at 265-270 (Mutual Release and Settlement Agreement).) The Investors now seek to recover

additional damages from First American arising from the alleged/speculative cost of remedying the unpermitted septic system. (CP at 6 ¶ 3.17; Sec. Am. Br. at 14, 17, 21.) However, the record lacks any evidence of the actual cost of remedying the unpermitted septic system.

B. Procedure Below

The Investors filed this action on September 16, 2010, alleging five different causes of action. (CP at 1-10.) The damages allegations for these claims are all related to the unpermitted septic system. (CP at 6 ¶ 3.17.)

1. First Motion for Summary Judgment and the Investors' Voluntary Dismissal of Several Causes of Action.

On March 16, 2011, First American filed a Motion for Partial Summary Judgment and accompanying memorandum (“Memorandum”) seeking dismissal of the Investors’ second, third, fourth, and fifth claims to the extent that they alleged a duty to discover code violations or the failure to pay a claim under the Investors’ Title Insurance Policy. (CP at 150-52 (Mot.); 153-68 (Mem. in Supp. of MSJ); 184-270 (Kuhl Aff. in Supp. of MSJ and Exs.)) Rather than respond substantively to these arguments, the Investors filed an Agreed Motion to Dismiss all of the claims addressed in First American’s Motion for Partial Summary Judgment. (CP at 271-72.) In offering this relief, the Investors effectively conceded that First American had no duty to discover code

violations. (CP at 271-72, 273-75.) On April 4, 2011, the trial court granted the Investors' Agreed Motion to Dismiss, ordering the following causes of action dismissed with prejudice:

- (1) Investors' Second Cause of Action (Breach of Contract) to the extent it presumed a duty to discover code violations;
- (2) Investors' Third Cause of Action (Breach of Contract);
- (3) Investors' Fourth Cause of Action (CPA Violations) to the extent it relied upon the denial of the Investors' claim for insurance coverage; and
- (4) Investors' Fifth Cause of Action (Insurer Fair Conduct Act).

(CP at 276-77.)

In the April 4, 2011 Order's wake, only the following claims related to title elimination remained:

- Breach of contract, based on First American's alleged breach of "a duty to take the necessary steps to eliminate the certificate of title to the Manufactured Home" (CP at 7-8 ¶¶ 5.3, 5.5);
- Professional negligence, based on breach of the alleged duty of First American to confirm the accuracy of the building permit number listed on the Manufactured Home Application (CP at 6-7 ¶¶ 4.3-4.7); and
- Consumer Protection Act claim, based on First American's "breach of the standard of care in preparing the

Manufactured Home Affidavit and/or failing to confirm the validity of the Permit” (CP at 9 ¶ 7.2).

2. First American’s Second Motion for Summary Judgment to Dismiss the Investors’ Remaining Claims and Motion to Strike Inadmissible Portions of Kassap Declaration.

On May 5, 2011, First American filed its Second Motion for Summary Judgment seeking summary dismissal of the Investors’ remaining claims for professional negligence, breach of contract, and CPA violations. (CP at 25-41.) On May 27, 2011, the Investors filed their Brief in Opposition to Motion for Summary Judgment, supported only by the Declaration of [Plaintiff] Diana D. Kassap and exhibits attached thereto. (CP at 61-83.) On June 2, 2011, First American moved to strike inadmissible portions of the Declaration of Diana D. Kassap. (CP at 87-94.) Four days later, First American filed its Reply in Support of its Second Motion for Summary Judgment. (CP at 96-111.)

Oral argument on First American’s Motion for Summary Judgment and Motion to Strike Inadmissible Portions of Declaration of Diana D. Kassap was held before the trial court on June 9, 2011. (RP at 3.) At the beginning of oral argument, the trial court ruled on the Motion to Strike Inadmissible Portions of Declaration of Diana D. Kassap. (RP at 8.)

The trial court specifically ruled that the following portions of the Kassap Declaration would be stricken/not considered:

(1) **“This [First American’s job] includes ensuring that the documents were properly filled out and the information was verified before it was used.”** (RP at 8:10-14; CP at 72 ¶ 3 (Kassap Declaration) (emphasis added));

(2) **“At this time, we cannot occupy the property nor can we sell it.”** (RP at 8:14-15; CP at 72 ¶ 6 (Kassap Declaration) (emphasis added)); and

(3) **“We cannot sell it without defrauding the buyers.”** (RP at 8:14-15; CP at 72 ¶ 7 (Kassap Declaration) (emphasis added).)

On July 11, 2011, the trial court granted First American’s Second Motion for Summary Judgment on all remaining claims. (CP at 141-42.)

3. The Investors Appeal the Order Granting Summary Judgment.

The Investors filed their Notice of Appeal on August 10, 2011, seeking review of the July 11, 2011 Order Granting Defendant’s Motion for Summary Judgment on Remaining Causes of Action. (CP at 143.) On January 9, 2012, the Investors filed their Second Amended Brief of Appellants (“Sec. Am. Br.”). The Investors have neither appealed nor assigned error to the trial court’s June 9, 2011 ruling striking inadmissible portions of the Declaration of Diana D. Kassap.

IV. ARGUMENT

A. **The Investors Have Not Met Their Burden to Survive Summary Judgment.**

In order to survive summary judgment, “the nonmoving party must set forth specific facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue as to a material fact.” *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601-02, 200 P.3d 695 (2009) (emphasis added) (quoting *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986)). The party opposing summary judgment “may not rely on speculation or argumentative assertions” to overcome summary judgment. *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 507, 182 P.3d 985 (2008), *rev. denied* 165 Wn.2d 1017, 199 P.3d 411 (2009) (quoting *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 824, 976 P.2d 126 (1999)). Likewise, pursuant to CR 56(e), the party opposing summary judgment may “not rest upon the mere allegations or denials in his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” (emphasis added). The Investors have offered only speculation, unsupported factual allegations, argumentative assertions, and citations to their Complaint (CP at 3-10), and have thus failed to meet their burden for surviving summary judgment. First American is entitled to summary judgment on all claims as a matter of law and the trial court should be affirmed.

Furthermore, the Investors' opposition to summary judgment before the trial court failed to address their breach of contract claim and promoted a completely different argument in support of their CPA claim than they now offer on appeal. According to Rule of Appellate Procedure 9.12, "[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." (emphasis added). Accordingly, "[a]n argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Sourakli*, 144 Wn. App. at 509 (declining to consider new arguments raised for the first time on appeal).

Regardless of whether this Court considers their novel arguments or factual allegations for the first time on appeal, the Investors have failed to establish that the trial court's order granting summary judgment should be reversed.

B. The Trial Court Did Not Err in Granting Summary Judgment on the Investors' Breach of Contract Claim Because the Title Was Eliminated.

1. Title Was Eliminated Pursuant to RCW 65.20 et seq.

The Manufactured Home Real Property Act ("MHRPA") governs the elimination of title for manufactured homes. *See* RCW 65.20.010 *et seq.*; WAC 308-56A-505. Under the MHRPA, the Department of Licensing ("DOL") has the power to eliminate manufactured home titles

and presides over this process. RCW 65.20.100. Pursuant to RCW 65.20.030, “once 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 the ownership of the real property through real property law.” In other words, once the DOL approves an application for title elimination and the application is recorded, the manufactured home becomes part of the real property just as if it were built on the site. RCW 65.20.050.

In order to eliminate title, the applicant must provide the information and documents required under RCW 65.20.040. The DOL has created a “Manufactured Home Application” or “elimination application” for this purpose. (*See* CP at 47-48; *see also* RCW 65.20.080; WAC 308-56A-505(2).) Upon satisfaction of the elimination of title requirements of RCW 65.20.040 and the consent of the registered owners of the manufactured home, the DOL “shall approve the elimination of the title” and record the approved Manufactured Home Application in the county where the real property is located. RCW 65.20.050 (emphasis added). Once the Manufactured Home Application is recorded by the county auditor, “title is deemed eliminated [and] [t]he manufactured home shall then be treated as real property as if it were a site-built structure.” *Id.*

Here, DOL approved the Manufactured Home Application and recorded it with the Spokane County Auditor, recording number 5418876, on August 10, 2006. (CP at 47-49.) The DOL subsequently

issued a “Manufactured Home Title Elimination Certificate” for the Manufactured Home. (CP at 53; Sec. Am. Br. at 6.)

It cannot be seriously disputed that the DOL eliminated title to the Manufactured Home. The MHRPA provides no procedure or authority for the DOL to “un-eliminate” title. Likewise, the Investors have cited no authority supporting their allegation that the “elimination was ineffective” or that the DOL-issued Manufactured Home Title Elimination Certificate was invalid. Nor have they provided any authority suggesting that an unpermitted septic system renders title elimination ineffective, despite DOL approval of the elimination application. In short, the uncontroverted facts demonstrate that the title elimination was effective and the Manufactured Home was converted to real property regardless of the unpermitted septic system. Since the Investors’ contract claim damages – along with the alleged damages for all their other causes of action – are based on the erroneous argument that First American failed to eliminate title to the Manufactured Home, the trial court correctly granted summary judgment in First American’s favor.

2. Since Title Was Eliminated, First American did not Breach its Contract with the Investors.

According to the Investors, First American breached its alleged contractual duty to “take the necessary steps to eliminate the certificate of title to the Manufactured Home and convert it to real property.” (CP

at 7 ¶ 5.3; Sec. Am. Br. at 12-13.) It is undisputed that the DOL issued its title elimination certificate almost six years ago on August 10, 2006. (CP at 63; Sec. Am. Br. at 10.) As stated above, the Investors have cited no legal authority or evidence in the record demonstrating that the DOL-approved title elimination was ineffective or invalid. Accordingly, First American has satisfied its alleged contractual obligation and no breach occurred.

Breach of a contractual duty is an essential element of a breach of contract claim. *See Ketchum v. Albertson Bulb Gardens, Inc.*, 142 Wash. 134, 138-39, 252 P. 523 (1927) (holding that proof of damages as a result of a breach are essential to breach of contract claim); *N.W. Indep. Forrest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995) (listing elements of breach of contract claim). Since the Investors have failed to establish a breach, their breach of contract claim was properly dismissed on summary judgment.

Furthermore, the alleged contract the Investors rely upon, "Title Commitment, Special Exception 12," was not part of the record before the trial court nor is it before this Court. (Sec. Am. Br. at 12.) While "Special Exception 12," was cited in their Complaint, as noted in First American's Answer, the Commitment for Title Insurance does not include a "Special Exception 12," because it identifies only eleven Special Exceptions. (*Compare* CP at 5 ¶¶ 3.5-3.6 *with* CP at 13, ¶¶ 3.5-3.6.) The Investors have failed to submit anything in the record showing that a Special Exemption 12 exists. Accordingly, the Investors have

failed to produce the very contract provision upon which they base their breach of contract claim. This further demonstrates the complete lack of a basis for their breach of contract claim.

In addition to failing to admit the “contract” into evidence before the trial court, the Investors provided no argument to the trial court in their brief in opposition to summary judgment in support of their breach of contract claim. (*See* CP at 61-70 (Pls’ Br. in Opp. to Mot. for S.J).) Based on the fact that title was eliminated and the Investors’ failure to establish that Special Exemption 12 even exists, the trial court appropriately granted summary judgment to First American on the Investors’ breach of contract claim.

C. Summary Judgment Was Appropriate on the Investors’ Professional Negligence Claim Because they have Failed to Establish that First American Had Any Duty to Verify the Accuracy or Validity of the Building Permit Referenced in the Manufactured Home Application.

The Investors’ professional negligence claim rests on the erroneous allegation that First American had a duty to confirm the accuracy or validity of the building permit referenced in the “Building Permit Office Certification” section of the Manufactured Home Application. The Investors’ Professional Negligence claim fails for at least three reasons. First, the Manufactured Home Application, as well as the statute and regulations governing the elimination of title, demonstrate that this duty is statutorily delegated to the Building Permit Office, not the title company. Second, the Investors have failed to

demonstrate that First American had an independent duty to verify the accuracy or validity of the permit. Finally, since First American had no duty to verify the accuracy/validity of the permit number, even if the Investors could prove damages resulting from the alleged inaccurate permit number, those hypothetical damages were proximately caused by the party certifying the accuracy of the information, not First American.

The elements of a claim for professional negligence related to the practice of law are duty, failure to perform the duty, and damages proximately caused as a result of the failure to perform the duty. *Matson v. Weidenkopf*, 101 Wn. App. 472, 478, 3 P.3d 805 (2000). Whether a duty exists is a question of law. *Sourakli*, 144 Wn. App. at 507.

Regardless of whether First American's Limited Practice Officer² ("LPO") had the duty of a practicing attorney or an LPO, the issuing authority, not First American, was the statutorily-designated party tasked with certifying the accuracy of the permit number noted in the Manufactured Home Application. Here, the Investors have failed to establish both the duty and damages elements.

² APR 12 authorizes "certain lay persons ("LPOs") to select, prepare and complete legal documents incident to the closing of real estate and personal transactions." Admission to limited practice includes application, examination, and continuing education requirements. *Id.* The First American Employee who completed portions of the Manufactured Home Application was an LPO. (Sec. Am. Br. at 1.)

1. The Duty to Certify the Accuracy of the Building Permit on the DOL Manufactured Home Application is Statutorily Delegated to the Issuing Agency **Not** the Closing Agent.

The Investors' professional negligence claim is based on an alleged error in the Building Permit Office Certification section of the Manufactured Home Application. (CP at 47.) Despite the fact that this section is to be certified by the Building Permit Office, the Investors argue that First American is liable for alleged errors contained in that section. This argument contradicts express statutory and regulatory delegation of this duty.

One of the requirements for elimination of title is certification that the manufactured home is "affixed to the land." RCW 65.20.040. The MHPRA and the DOL expressly delegate the duty of certifying that the manufactured home is affixed to land, or that a permit has been issued for this purpose, to the local government or "issuing authority." RCW 65.20.040(3); WAC 308-56A-505(3)(b). The DOL Manufactured Home Application provides a section for the required Building Permit Office Certification. (CP at 47.) Pursuant to DOL regulation, "[t]he 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)." WAC 308-56A-505(3)(b).

Here, the Building Permit Office Certification section of the Manufactured Home Application was certified by Faith Hintz, Building

and Planning Services Coordinator II at the Spokane County Building and Planning Department. (CP at 47.) In doing so, Ms. Hintz certified that “a building permit has been issued for this purpose and the attachment will be inspected upon completion.” (CP at 47.) Accordingly, as prescribed by the MHRPA and the DOL regulation, the issuing authority-Spokane County, not First American-certified the validity of the building permit. In fact, the Application lacks any certification requirement for the LPO or closing agent. (CP at 47-50.)

Regardless of whether First American may have typed in the building permit number, it was the issuing authority that certified its accuracy for purposes of eliminating title. This is appropriate because the issuing authority is in the best position to determine the validity, scope, accuracy, and duration of the permits it issues. Any mistake regarding the Building Permit Office Certification should be taken up with the Building Permit Office.

Finally, the DOL regulations also expressly define the title company’s duty in the title elimination process: “[i]f a title company is involved in the elimination transaction, they must certify that the legal description of the land is true and correct per property records.” WAC 308-56A-505. The Investors have made no allegation that First American failed to “certify that the legal description of the land is true and correct per the property records.” Since the duty to certify the accuracy/validity of the building permit was statutorily delegated to the Building Permit Office, First American had no duty to certify its

accuracy, and therefore cannot be held liable for any alleged error in the Building Permit Office Certification.

2. The Investors Provided No Evidence Regarding the Standard of Care Allegedly Breached.

The Investors' professional negligence claim fails as a matter of law because they have failed to present any authority or evidence that the LPO's standard of care extended to the independent verification of permit information certified by the Building Permit Office. As noted above, the Investors' case rests on the allegation that inaccurate information was entered on the Building Permit Office Certification section of the Manufactured Home Application.

Regardless of whether the LPO's standard of care is that of an LPO or an attorney, the Investors have admittedly presented no evidence regarding the LPO's standard of care. (Sec. Am. Br. at 15-16.) In other words, the Investors seek to show a breach of a standard of care without providing any evidence of the actual standard of care they allege was breached. Specifically, they have presented no evidence that the LPO's standard of care includes independently verifying the accuracy of the Building Permit Office Certification.

Typically, expert testimony is required to determine whether a professional breached the duty of care. D. DeWolf and K. Allen, Wn. Practice, vol. 16, § 15.44 (Thomson/West 2006). Instead of presenting evidence of the duty of care, the Investors argue, "where the error is

obvious, no such testimony is required.” (Sec. Am. Br. at 15-16 (*citing Walker v. Banks [sic]*, 92 Wn.2d 854, 601 P.2d 1279 (1979).)

Contrary to their assertion, the *Walker* case states in *dicta* that, “[w]hile expert testimony is not necessary when the negligence charged is within the common knowledge of lay persons, we believe that expert testimony was both proper and necessary in this instance.” *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979) (emphasis added). There, like here, the plaintiffs were pursuing a professional negligence claim. *Id.* However, the issue in that case was the trial court’s exclusion of an expert, not whether plaintiffs could sustain a professional negligence claim without expert testimony. *Walker*, 92 Wn.2d at 856-57.

Here, even if this Court were to follow this *dicta* from *Walker*, the Investors have failed to establish that “the negligence charged is within the common knowledge of lay persons.” While they claim that the alleged “error is obvious,” it was the issuing authority, not the LPO, that actually certified the accuracy of the permit number. (CP at 47.) The fact that the legislature and the DOL delegated the building permit certification to the permit issuing authority suggests that knowledge regarding the accuracy, scope, application, and duration of building permits is outside the “common knowledge of lay persons.” Furthermore, that the building permit office certified the alleged erroneous permit number demonstrates that the error was not so “obvious” as to excuse the Investors from their obligation to produce

expert evidence regarding the LPO's standard of care to support their professional negligence claim. Since the Investors have failed to establish that the LPO possessed an independent duty to verify the Building Permit Office Certification, their professional negligence claim fails as a matter of law.

3. First American Had No Obligation to Discover the Unpermitted Septic System.

At the heart of the Investors' claims is the belief that the LPO had a duty to alert them to the unpermitted septic system. However, they have produced no evidence or authority to suggest that the LPO or First American had a duty to discover the allegedly unpermitted septic system. In fact, it was the Investors, not the LPO, that had the duty to discover the unpermitted septic system. The unpermitted septic system is essentially a code violation. By voluntarily dismissing their breach of contract claim to the extent it presumed a duty to discover code violations, the Investors conceded that First American had no duty to discover or alert them of the unpermitted septic system. Accordingly, to the extent that their professional negligence or any other claim suggests a duty to discover code violations, those claims fail as a matter of law.

D. The Trial Court Did Not Err When it Granted Summary Judgment on the Investors' Consumer Protection Act Claim Because the Investors' Claims Fail to Meet all the Criteria for a CPA Claim.

On appeal, the Investors raise an entirely new CPA theory. In their Opposition to Motion for Summary Judgment, the Investors stated, “[t]his is not a case about attorney malpractice. It is a case about the unauthorized practice of law where the LPO is held to the standard of an attorney at law or at the least, to the standard of an LPO.” (CP at 66 (emphasis added).) The entire basis of the Investors’ CPA argument before the trial court was the LPO was not authorized under APR 12 to complete the Manufactured Home Application. (CP at 66-67.) Specifically, the Investors claimed the LPO engaged in the unauthorized practice of law because, “[h]ere, the LPO used certain Department of Licensing forms that are not on the list included or in the list on the WSBA website.” (CP at 66 (emphasis added).) In fact, the WSBA website specifically lists Department of Licensing forms. (CP at 121-22.) The fact that the Investors have now abandoned their “unauthorized practice of law” claim confirms that the trial court properly granted First American’s Summary Judgment on the Investors’ CPA claim.

Now, however, the Investors acknowledge that, “[h]ere, the LPO did not engage in the unauthorized practice of law,” and argue instead that the LPO “negligently” inserted an “expired” permit number in the Application. (Sec. Am. Br. at 19.) However, their novel CPA theory

fails on appeal because professional negligence claims like this are expressly exempted from the CPA. *Short*, 103 Wn.2d at 61, 66.

Even if the Investors are allowed to raise entirely new arguments for the first time on appeal, they have still failed to demonstrate questions of material fact exist on at least three essential elements of their CPA claim: (1) unfair or deceptive act or practice, (2) occurring in the conduct of trade or commerce; and (3) affecting the public interest.

A CPA claim consists of the following five elements: (1) an unfair or deceptive act or practice; (2) occurring in the conduct of trade or commerce; (3) affecting the public interest; (4) injury to the plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986). Each element is essential; where a plaintiff fails to adduce evidence as to even one element, entering summary judgment against a plaintiff on a CPA claim is proper. *Michael*, 165 Wn.2d at 602; *see also Hangman Ridge*, 105 Wn.2d at 793. The determination of “[w]hether a particular act or practice gives rise to a CPA violation is a question of law.” *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 743-44, 935 P.2d 628 (1997) (*citing Leingang v. Pierce Cnty. Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997)).

1. Pursuant to Twenty-Five Year-Old Washington State Supreme Court Precedent, the Investors' Claims are Exempt from the CPA.

The Investors' one-sentence analysis of the "trade or commerce prong" (Sec. Am. Br. at 18), ignores the fact that the Washington State Supreme Court, over twenty-five years ago, explicitly exempted claims of professional negligence or legal malpractice, like the one alleged here, from the Consumer Protection Act. *Short*, 103 Wn.2d at 61, 66 (affirming 12(b)(6) dismissal of CPA claims "which purely allege negligence or legal malpractice [as] exempt from the CPA"). The *Short* professional negligence or legal malpractice exemption has been applied repeatedly by Washington State courts, and includes other "professionals" in addition to attorneys. See, e.g., *Michael*, 165 Wn.2d at 602-03; *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 169-70, 744 P.2d 1032 (1987); *Ramos v. Arnold*, 141 Wn. App. 11, 20-21, 169 P.3d 482 (2007); *Manteufel v. Safeco Ins. Co.*, 117 Wn. App. 168, 177 and n. 6 (citing additional cases), 68 P.3d 1093 (2003); *Quimby v. Fine*, 45 Wn. App. 175, 180, 724 P.2d 403 (1986). Accordingly, the Investors cannot satisfy the "trade or commerce" element as a matter of law and summary judgment on their CPA claim must be affirmed.

Under the CPA, "'Trade' and 'commerce' shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). In *Short*, the Washington State Supreme Court was squarely faced with the

question of “whether the practice of law falls within ‘trade or commerce’ as that term is defined by RCW 19.86.” 103 Wn.2d at 54. Following a review of cases from the federal and other state courts, the *Short* court sorted the claims into two categories: (1) “**entrepreneurial aspects**”- “how the price of legal services is determined, billed, and collected and the way the law firm obtains, retains, and dismisses clients,” which are subject to the CPA; and (2) “**negligence or malpractice**” – claims “directed to the competence of and strategy employed by the plaintiffs’ lawyers,” which are exempt from the CPA. *Id.* at 61-62 (emphasis added); *see also Manteufel*, 117 Wn. App. at 174 (affirming summary judgment in favor of attorney-defendant in CPA claim). The negligence or malpractice claims, including claims that the lawyer “neglected [to] properly gather essential facts,” are “exempt from the CPA.” *Short*, 103 Wn.2d at 61-62.

The Washington State Supreme Court recently affirmed this exemption in *Michael v. Mosquera-Lacy*, stating that, “[t]he term ‘trade’ as used by the Consumer Protection Act includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided.” 165 Wn.2d at 602-03 (emphasis added) (*quoting Ramos*, 141 Wn. App. at 20 (internal quotation marks omitted).) As noted by the Washington State Supreme Court, “claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from

the Consumer Protection Act.” *Id.* (emphasis added) (*quoting Ramos*, 141 Wn. App. at 20) (internal quotation marks omitted).

The *Ramos* case is particularly instructive because the plaintiffs there made similar claims to the Investors’ CPA claims. In *Ramos*, the plaintiffs alleged that the defendant-appraiser violated the CPA by “failing to include major defects in the residence in the appraisal report which kept the paperwork ‘clean’ on the residence, prevented further investigation, and caused the Ramoses to enter into the purchase and sale agreement for the residence.” 141 Wn. App. at 20 (internal quotations omitted). Likewise, here, the Investors claim that if the LPO had discovered that the building permit was expired, the Investors would have discovered the unpermitted septic system, and not purchased the investment property. (Sec. Am. Br. at 21.) Just as the appraiser’s alleged failure to include major defects on the appraisal report was not subject to the CPA, the Investors’ claim that the LPO “negligently inserted [an] expired permit number” in the Application is also exempted from the CPA. *Ramos*, 141 Wn. App. at 20; (Sec. Am. Br. at 19.)

The Investors concede that here the LPO was “engaged in the authorized practice of law by filling out the title elimination form.” (Sec. Am. Br. at 19.) Furthermore, their CPA claim is undeniably a negligence claim, as they repeatedly cite “Respondents’ negligent actions” as the basis for their CPA claim. (Sec. Am. Br. at 9, 18, 19 (stating that “the LPO negligently inserted the expired permit

number”).³ Likewise, their professional negligence claim is based on the very same factual allegations and is undistinguishable from their CPA claim. (Sec. Am. Br. at 16.) Accordingly, the Investors’ CPA claim is exempted by *Short* and its progeny.

The Investors have offered no explanation why *Short* is not dispositive here. Instead, they rely on *Bowers* and *Bishop*, which both considered the availability of a CPA claim in the context of the unauthorized practice of law, not the negligent practice of law. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 583, 585-86, 591-92, 675 P.2d 193 (1983); *Bishop v. Jefferson Title Co.*, 107 Wn. App. 833, 843, 850-51, 28 P.3d 802 (2001). As noted above, the Investors now concede that here “the LPO was engaged in the authorized practice of law.” (Sec. Am. Br. at 19.) Accordingly, *Bowers* and *Bishop* do not apply.

The Investors’ reliance on *Bowers* is further unfounded because it was issued in 1983, one year prior to *Short*, and therefore cannot be construed to limit or expand the *Short* court’s holding. Likewise, the Investors’ “suggestion” that Division II’s *Bishop* opinion supports the proposition that the “mere negligent practice of law⁴” is sufficient to support a CPA claim squarely contradicts the Washington State Supreme Court’s holding in *Short* that “allegations of negligence or malpractice

³ Investors have provided no evidence that the alleged negligent completion of the Application had any “entrepreneurial motive.” See *Michael*, 165 Wn.2d at 604.

⁴ (Sec. Am. Br. at 18 (citing *Bishop*, 107 Wn. App. at 850).)

are exempt from the CPA” and the long line of subsequent cases applying the exemption. See, e.g., *Michael*, 165 Wn.2d at 602-03; *Haberman*, 109 Wn.2d at 169-70; *Ramos*, 141 Wn. App. at 20-21; *Manteufel*, 117 Wn. App. at 177 and n. 6 (listing additional cases); *Quimby*, 45 Wn. App. at 180. Accordingly, the Investors’ appeal of their CPA claim directly contradicts long-standing Washington law and completely lacks merit.

2. First American’s Conduct Did Not Affect the Public Interest.

Where, as here, the CPA claim is based on a private transaction, as opposed to a consumer transaction, establishing the public interest element is “more difficult.” *Goodyear Tire & Rubber Co.*, 86 Wn. App. at 744. In order to prevail, there must be a “likelihood that additional plaintiffs have been or will be injured in exactly the same fashion.” *Hangman Ridge*, 105 Wn.2d at 790. In the context of a private dispute, whether the public interest is affected is determined by considering the following factors: “(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.* at 790-91. While no one factor is dispositive, “[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. at 791.

The Investors’ three sentence analysis, quoted here in total, on the public interest prong is: “Here, the title elimination was part of the services that Respondent PNTS offered. Respondent maintains a website that lists closing as one of the services it offers. Respondents’ conduct affects the public interest.” (Sec. Am. Br. at 20.)

Accordingly, the Investors are relying on the “course of defendant’s business” and apparently the “advertise to the public in general” factors to support its argument that the “public interest” element is satisfied. Satisfaction of the “course of defendants’ business” factor alone is not enough to satisfy the public interest element. *See Michael*, 165 Wn.2d at 605 (finding course of business factor alone not enough to satisfy public interest element); *Hangman Ridge*, 105 Wn.2d at 794 (same).

Therefore, the question the Investors pose to this Court, but did not pose to the trial court, is whether the unsupported allegation that “Respondents maintain a website” alone is sufficient to satisfy the public interest element. The website allegation is nothing more than novel argument raised for the first time on appeal, and should be disregarded. RAP 9.12. Nowhere before the trial court did the Investors argue that the existence of a website satisfied the public interest element. (*See* CP at 66-68 (CPA Argument Section of Plaintiffs’ Brief in Opposition to Motion for Summary Judgment).) Likewise, the Investors did not admit

the Respondents' website into evidence for the trial court to consider. In fact, the Investors' CPA argument below was based solely on the erroneous and now-abandoned claim that the LPO had engaged in the unauthorized practice of law. (See CP at 66-67.) The unsubstantiated general statement that "[t]itle companies actively solicit closings as part of their business" was insufficient to place this issue squarely before the trial court. So, like in *Hangman Ridge*, "there are no facts in the record to indicate widespread advertising of loan closings," therefore, this factor does not support a finding that the Investors have satisfied the public interest element. 105 Wn.2d at 794 (emphasis added).

In addition, the record demonstrates additional facts contradicting a finding that this private transaction affects the public interest. First, the Investors have produced no evidence that First American "actively solicited them." In fact, according to the Complaint, the purchase agreement between the Investors and the Sellers listed PNTS as the closing agent for the real estate transaction. (CP at 4, ¶ 2; see also CP at 230-33; Cf. *Hangman Ridge*, 105 Wn.2d at 794 (noting fact that lender, not the plaintiff, chose defendant as closing agent contradicted finding that public interest was implicated). The Investors could have chosen any title company as the closing agent for the real estate transaction. Cf. *Michael*, 165 Wn.2d at 605 (holding that plaintiff failed to satisfy the public interest element noting that she could have "chosen any dentist").

Furthermore, the fact that the Investors were purchasing this property as an investment property suggests the Investors were "not

representative of bargainers vulnerable to exploitation.” *See Goodyear Tire & Rubber Co.*, 86 Wn. App. at 745 (holding as a matter of law that alleged unfair and deceptive acts did not affect the public interest based, in part, on experience of that plaintiff). The Investors were explicitly notified that the Respondents were “not acting as the advocate or representative of either of the parties” and expressly informed of their “right to be represented by lawyers of their own selection.” *See Goodyear*, 86 Wn. App. at 745 (CP at 75 (acknowledged by the Investors Lance Gonzales and Diana Kassap).) Accordingly, the Investors have failed to establish the public interest prong.

Finally, contrary to the Investors’ suggestion, the *Bushbeck v. Chicago Title Insurance Co.* case did not criticize a single case interpreting *Hangman Ridge* or offer any opinion “that many courts have misinterpreted this holding in *Hangman Ridge* to bar a CPA claim for professional transactions.” (Sec. Am. Br. at 19 (citing *Bushbeck v. Chicago Title Ins. Co.* 632 F. Supp. 2d 1036, 1043 (W.D. Wash. 2008); *see* 632 F. Supp. 2d at 1042-43 (CPA analysis).) Rather, the *Bushbeck* court merely acknowledged that in limited circumstances, where “additional plaintiffs have been or will be injured in exactly the same fashion,” a private transaction may implicate the public interest. *Bushbeck*, 632 F. Supp. 2d at 1043 (emphasis added) (*quoting Hangman Ridge*, 105 Wn.2d at 790-91).) In addition, due to the fact that the *Bushbeck* court was considering a 12(c) motion on the pleadings, rather than a motion for summary judgment, it has little, if any, value here,

because that court was looking simply to the sufficiency of the pleadings. *Bushbeck*, 632 F. Supp. 2d at 1038, 1042-43. Therefore, the Investors' reliance on *Bushbeck* is misguided and insufficient to warrant reversal of summary judgment.

3. The Investors Failed to Establish that the Respondents' Conduct Constituted an Unfair or Deceptive Act or Practice.

In order to prove the unfair or deceptive act or practice element,⁵ the plaintiff must show “that the alleged act had the *capacity* to deceive a substantial portion of the public.” *Hangman Ridge*, 105 Wn.2d at 785 (emphasis in original). This element received very little attention by the parties before the trial court, and the extent of the Investors' record on this element is the allegation in their Complaint that First American “breach[ed] the standard of care in preparing the Manufactured Home Application and/or breach[ed] a duty to confirm the validity of the Permit.” (CP at 9, ¶ 7.2; *see also* CP at 66-68 (CPA argument of Pl's Br. in Opp. to Mot. for S.J. lacking any analysis on the “unfair or deceptive” element).) As noted above, the Investors have failed to establish that the LPO had an independent duty to confirm the validity of the permit.

⁵ The first two elements may also be established by showing that a “*per se*” unfair trade practice exists. *Hangman Ridge*, 105 Wn.2d at 786. “A *per se* unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated.” *Id.* The Investors have not alleged a *per se* unfair trade practice here.

Now on appeal, the Investors rely on the *Bowers* and *Bishop* cases and the unsupported allegation that the LPO's "authorized practice of law by filling out the title elimination form, implicat[ed] the capacity for deception discussed in *Bowers*." (Sec. Am. Br. at 18-19.) Again, neither *Bowers* nor *Bishop* apply here, because both dealt with the unauthorized, not negligent, practice of law. *Bowers*, 100 Wn.2d at 583, 585-86, 591-92; *Bishop*, 107 Wn. App. at 843, 850-51. The Investors have cited no authority supporting the argument that the negligent practice of law satisfies the "unfair or deceptive" prong, because no such authority exists, likely because a CPA claim based on the negligent practice of law is expressly exempted from the CPA as a matter of law. *Short*, 103 Wn.2d at 61-62.

Furthermore, the *Bishop* citation relied upon by the Investors misstates the holding of the *Bowers* court in stating that the *Bowers* court ruled that "the escrow company, Transamerica, negligently engaged in the practice of law." (Sec. Am. Br. at 19 citing *Bishop* at 850; *Bishop*, 107 Wn. App. at 850 (citing *Bowers* generally without providing a pinpoint cite for the proposition).) Contrary to the *Bishop* court's suggestion, the *Bowers* court found that it was the "unauthorized [not negligent] practice of law [that] was unfair and deceptive." 100 Wn.2d at 591-92.

It should also be noted that, in *Bowers*, it was the escrow agent's failure to inform the sellers of the advisability of consulting independent counsel, rather than the substance of the documents she drafted, that was

found to be a breach of duty and basis for the CPA claim. *Id.* at 590, 592. It was “Transamerica’s engaging in the unauthorized practice of law [that] induced plaintiffs to proceed without consulting independent legal counsel.” *Id.* at 592. Unlike the plaintiffs in *Bowers*, the Investors were explicitly informed of the limits of the LPO’s duties and their right to be represented by their own lawyer. (CP at 75.)

In concluding that the “unfair and deceptive” CPA element was met, the *Bowers* court stated that “Transamerica’s conduct in engaging in the [unauthorized] 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.” *Bowers*, 100 Wn.2d at 592. On the contrary, here, the “Disclosures to the Parties Under APR 12 (“APR 12 Disclosures”) signed by the Investors” precluded any “such deception.” The APR 12 Disclosures, signed by the Investors, expressly informed them that: (1) “[t]he Closing Officer is only permitted to select and complete documents;” and (2) “The Closing Officer is not permitted to practice law.” (CP at 75.) The APR 12 Disclosures further informed the Investors that the Closing Officer was “not acting as an advocate or representative of either party,” and the parties had the right to select their own lawyer to represent them in the transaction. (CP at 75.) The APR 12 Disclosures contain no indication that the LPO was authorized or intended to independently verify the accuracy of the Spokane County Building Permit Office Certification.

The Investors argue that they “reasonably believed that the LPO would use the expertise to be expected of a lawyer in filling out the title elimination form.” (Sec. Am. Br. at 19.) As demonstrated by their failure to cite to the record, this statement is nothing more than the unsubstantiated argument of counsel. There is no evidence in the record that the Investors “believed that the LPO would use the expertise expected of a lawyer in filling out the title elimination form.” Accordingly, this argument fails to justify reversal of the summary judgment.

4. The Investors are Not Entitled to Attorney’s Fees and Costs Because They Have Not Established Each of the Essential Elements of Their CPA Claim.

A CPA plaintiff is only entitled to attorney’s fees under RCW 19.86.090, if they are successful on their CPA claim. *Hangman Ridge*, 105 Wn.2d at 795-96. A plaintiff who cannot establish all of the required elements is not successful and therefore not entitled to recover attorney’s fees. *Id.* Since the Investors have failed to establish facts and law supporting their CPA claim, they are not entitled to recover their attorney’s fees and costs.

E. Summary Judgment Was Appropriate Based on the Investors' Failure to Show Damages Proximately Caused by First American's Conduct.

1. The Investors Have Presented No Evidence That They Cannot Sell, Occupy, or Refinance the Investment Property.

In addition to their inability to satisfy the other substantive elements of their claims, the Investors have a complete failure of proof on the damages element of each of their claims. Damages are an essential element to each of the Investors' remaining claims. *Hangman Ridge*, 105 Wn.2d at 784-85 (CPA claim elements); *Ketchum*, 142 Wash. at 138-39 (proof of damages resulting from breach of contract essential); *Matson*, 101 Wn. App. at 478 (professional negligence elements).

Before the trial court and now on appeal, the Investors have offered no evidence to substantiate their damages claims. Instead, they offer self-serving allegations that: (1) they cannot refinance the property; (2) they cannot occupy the property; and (3) they cannot sell the property without a loss (Sec. Am. Br. at 1, 2, 6, 7, 9, 10.) With the exception of a couple citations to the Complaint, these argumentative assertions lack any reference to evidence in the record before the trial court or this Court. As stated above, surviving summary judgment requires more than speculation, argumentative assertions, or reliance on the allegations in the Complaint. *Sourakli*, 144 Wn. App. at 507; CR 56(e).

First, the Investors have presented nothing more than their own self-serving conclusory assertions to support their claim that they cannot

refinance the property. They have presented no evidence of a loan denial or details regarding any actual attempt to refinance the home. Due to the complete lack of evidence in the record, any allegations regarding the Investors' inability to refinance the Investment Property should be completely disregarded.

Likewise, allegations that they cannot occupy or sell the property should also be disregarded based on the complete lack of evidence substantiating these factual allegations. As noted above, during oral argument, the trial court struck the following sentences from the Declaration of Diana D. Kassap:

“At this time, we cannot occupy the property nor can we sell it.” (RP at 8:14-15; CP at 72 ¶ 6 (Kassap Declaration) (emphasis added); and

“We cannot sell it without defrauding the buyers.” (RP at 8:14-15; CP at 141; CP at 72 ¶ 7 (Kassap Declaration) (emphasis added).)

The trial court's decision to strike the first sentence of paragraph 6 is particularly relevant to the Investors' appeal due to the fact that this is the only “evidence” they presented to the trial court regarding their ability to occupy or sell the property. Notwithstanding their failure to challenge the court's evidentiary ruling, the Investors rely repeatedly on this stricken statement in support of their damages claims. (*See, e.g.*, Sec. Am. Br. at 2, 7, 9, 10.) Due to the lack of evidence substantiating these allegations, they cannot support a claim for damages allegedly

resulting from their inability to refinance, occupy, or sell the Investment Property.

2. The Investors Have Failed to Demonstrate a Causal Connection Between the Cost to Remedy the Unpermitted Septic System and First American's Conduct.

For purposes of this appeal, First American was engaged to take the steps necessary to eliminate title and title was eliminated. First American had no duty to discover or alert the Investors to the existence of an unpermitted septic system on the Investment Property they wished to purchase. Since title was eliminated and First American had no duty with regard to the unpermitted septic system, any damages based on the cost to remedy the unpermitted septic system are not First American's liability.

Review of the Investors' damages claims in their Complaint and their Second Amended Brief demonstrates that each of their claims is based on the unpermitted septic system. Appellants' "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." (Sec. Am. Br. at 14 (Breach of Contract); *see also* CP at 6 ¶ 3.17; Sec. Am. Br. at 17 (Prof Neg. claim); Sec. Am. Br. at 21 (CPA Claim).) In addition to these damages being completely unrelated to First American's conduct, the Investors have failed to produce any evidence that they have actually incurred

these damages. As noted above, with the exception of filing this lawsuit and obtaining a settlement from the Sellers, the Investors have done nothing to remedy the unpermitted septic system. Any damages alleged are purely speculative based on the complete lack of evidence. The Investors' complete lack of evidence of damages, let alone a proximate connection to the actions of First American, is fatal to all of their remaining claims.

F. First American is Entitled to Attorney's Fees and Costs, Pursuant to RAP 18.7 and 18.9(a), Because the Investors' Appeal is So Devoid of Merit There is No Possibility of Reversal.

Pursuant to RAP 18.1, 18.7, and 18.9(a), First American requests an award of its attorney's fees and costs incurred in responding to the Investors' frivolous and meritless appeal of the trial court's summary judgment. Such sanctions are appropriate due to the Investors' failure to address essential elements of their claims with anything more than factual allegations unsupported by the record, novel arguments raised for the first time on appeal, and legal claims clearly contradicting controlling case law. "An appeal is frivolous if, considering the entire record and resolving all doubts in favor of the appellant, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that it is so devoid of merit that there is no possibility of reversal." *Layne v. Hyde*, 54 Wn. App. 125, 135, 773 P.2d 83 (1989). Civil Rule 11 is made applicable to appeals through RAP 18.7.

Accordingly, upon the requisite finding, sanctions, including some or all of the reasonable expenses and attorney's fees incurred by the party opposing the appeal, are available. CR 11; *Id.* at 135-36.

In determining whether an appeal is frivolous and brought for delay under RAP 18.9, the Court of Appeals is "guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal." *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983) (finding appeal frivolous and awarding fees or "compensatory damages"). In finding that appeal frivolous and without merit, the *Briggs* court noted that "[t]he authorities, within and without this state, clearly dictated that the trial court be affirmed." *Briggs*, 100 Wn.2d at 15.

Likewise, here, established Washington State authority "clearly dictate[s] that the trial court be affirmed" at the very least on the Investors' CPA and contract claims. As stated above, the Investors' professional negligence CPA claim was expressly exempted by Washington State Supreme Court over twenty-five years ago in *Short v. Demopolis*, 103 Wn.2d 52, 61-62, 691 P.2d 163 (1984). A reasonable inquiry into the Washington case law would have revealed this

exemption – it was also raised by First American in support of its motion for summary judgment. (CP at 36-37, 107-08.) Furthermore, the Investors’ statement in their brief to the trial court that the LPO was “not entitled to the protections of cases limiting liability for legal malpractice” because she was allegedly engaged in the unauthorized practice of law, suggests that the Investors were well aware that a CPA claim based on legal malpractice was not allowed in Washington, but chose to pursue this frivolous appeal anyway. (CP at 37.) The subsequent affirmation and application of *Short*’s holding by the Washington State Supreme Court and the Courts of Appeals demonstrate that the Investors’ appeal of the dismissal of their CPA claim is “so totally devoid of merit that there is no reasonable possibility of reversal.”

In addition, the Investors’ appeal of the dismissal of the breach of contract claim is also totally devoid of merit, because they cannot prove a breach. Their breach of contract claim is based on the meritless allegation that the elimination of title was invalid. Title was indisputably eliminated by the DOL. However, the Investors have produced no evidence or legal authority supporting this claim or their speculative suggestion that the DOL could un-eliminate title. The lack of merit is emphasized by the fact that the Investors have failed to make the contractual provision that they allege was breached, Special Exception 12, part of the record, and the fact that the Investors completely disregarded their breach of contract claim in their brief opposing summary judgment. As such, the Investors have failed to raise a single

debatable issue on their appeal of the dismissal of the breach of contract claim.

Furthermore, the Investors' complete failure to present evidence supporting their professional negligence claim clearly dictates that the trial court be affirmed. The Investors have produced no evidence or legal authority to substantiate their claim that First American had an independent duty to verify the accuracy of the building permit. This duty was statutorily delegated to the issuing authority and the Investors' appeal has failed to raise a single debatable issue upon which reasonable minds could differ.

Finally, the Investors' repeated reliance on factual allegations unsupported by the record, legal arguments unsupported by the law, and novel arguments raised for the first time on appeal demonstrates the frivolity of their appeal. Despite the meritless nature of the Investors' appeal, First American was still forced to incur attorney's fees and costs to respond to the various factual and legal allegations just as they would if the appeal had merit, because a proper response required a discussion of the record and controlling law ignored by the Investors' Second Amended Brief. Pursuant to RAP 18.7 and 18.9(a), First American is entitled to recover its compensable damages, *i.e.* attorney's fees and costs, incurred in responding to the Investors' meritless appeal. First American defers to the Court to distribute these sanctions between the Investors and their counsel as the Court sees fit. RAP 18.9 (allowing the

Court to order a party or counsel to “pay terms or compensatory damages”).

V. CONCLUSION

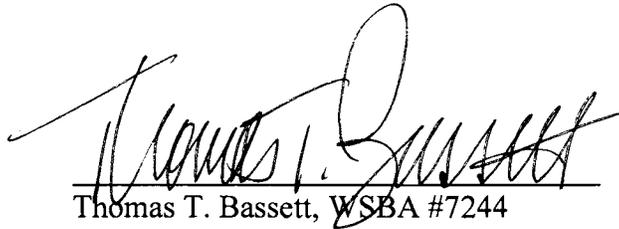
Investing in real estate has proven a risky endeavor over the last decade. Without exercising due diligence, the Investors purchased an Investment Property that included an allegedly unpermitted septic system. Through this lawsuit, they seek to insulate themselves from their own failure to discover the unpermitted septic system prior to closing on the purchase. Any loss that results from the Investors’ failure is theirs alone. First American had no obligation to discover the unpermitted septic system or protect the Investors from themselves.

On appeal, the Investors’ unsupported factual allegations and legal arguments fail to justify reversal of the trial court’s order granting summary judgment. According to the Investors, First American was contractually obligated to take the necessary steps to eliminate title to the manufactured home. Even if this were true, First American did so and title was eliminated. Likewise, any claims related to erroneous information in the Building Permit Office Certification should be directed to the Building Permit Office. First American had no duty to independently verify the accuracy of this information. Finally, the Investors’ CPA claims are expressly exempted by Washington State Supreme Court precedent. Accordingly, summary judgment should be affirmed and First American should be awarded its attorney’s fees and

costs in responding to this frivolous appeal pursuant to RAP 18.7 and 18.9(a).

Respectfully submitted on February 2, 2012.

K&L Gates LLP

A handwritten signature in black ink, appearing to read "Thomas T. Bassett", written over a horizontal line.

Thomas T. Bassett, WSBA #7244
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K&L Gates LLP

A handwritten signature in black ink, appearing to read "Thaddeus J. O'Sullivan", written over a horizontal line.

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APPENDIX

1. **RCW 65.20.010. Purpose.**

The legislature recognizes that confusion exists regarding the classification of manufactured homes as personal or real property. This confusion is increased because manufactured homes are treated as vehicles in some parts of state statutes, however these homes are often used as residences to house persons residing in the state of Washington. This results in a variety of problems, including: (1) Creating confusion as to the creation, perfection, and priority of security interests in manufactured homes; (2) making it more difficult and expensive to obtain financing and title insurance; (3) making it more difficult to utilize manufactured homes as an affordable housing option; and (4) increasing the risk of problems for and losses to the consumer. Therefore the purpose of this chapter is to clarify the type of property manufactured homes are, particularly relating to security interests, and to provide a statutory process to make the manufactured home real property by eliminating the title to a manufactured home when the home is affixed to land owned by the homeowner. [1989 c 343 § 1.]

2. **RCW 65.20.030. Clarification of Type of Property and Perfection of Security Interests.**

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. [2000 c 250 § 9A-836; 1989 c 343 § 3.] Notes: Effective date -- 2000 c 250: See RCW 62A.9A-701.

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.

[2010 c 161 § 1155; 1989 c 343 § 4.]

Notes: Effective date -- Intent -- Legislation to reconcile chapter 161, Laws of 2010 and other amendments made during the 2010 legislative session -- 2010 c 161: See notes following RCW 46.04.013.

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.

[1989 c 343 § 5.]

5. RCW 65.20.100. Eliminating Title – General Supervision.

The department shall have the general supervision and control of the elimination of titles and shall have full power to do all things necessary and proper to carry out the provisions of this chapter. The director shall have the power to appoint the county auditors as the agents of the department.

[1989 c 343 § 11.]

6. 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.

[Statutory Authority: RCW 65.20.090. 05-01-209, § 308-56A-505, filed 12/21/04, effective 1/21/05. Statutory Authority: RCW 46.01.110. 04-08-081, § 308-56A-505, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 65.20.110. 01-11-069, § 308-56A-505, filed 5/14/01, effective 6/14/01; 00-06-004, § 308-56A-505, filed 2/18/00, effective 3/20/00; 90-11-091, § 308-56A-505, filed 5/18/90, effective 6/18/90.]