

FILED
Court of Appeals
Division III
State of Washington
6/5/2019 4:32 PM
No. 36517-4

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ALLAN MARGITAN and GINA MARGITAN, husband and wife,

Appellants,

v.

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

Respondents.

BRIEF OF RESPONDENT RISK MANAGEMENT, INC.

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

Respondent Risk Management, Inc. (“RMI”) acknowledges Appellants’ assignments of error but believes they are more appropriately stated as follows:

1. Did the trial court correctly grant summary judgment to RMI when Appellants’ Consumer Protection Act (“CPA”) claims are predicated solely on alleged Washington Insurance Fair Conduct Act (“IFCA”) violations, which is only applicable to insurers, and not producers?

2. Did the trial court correctly grant summary judgment to Respondent RMI when it dismissed Appellants’ complaint without leave to amend?

B. Issues Pertaining to Assignment of Error

Whether this Court should affirm the Superior Court’s: a) dismissal of Appellants Allan and Gina Margitan’s (“Margitan”) causes of action against RMI on summary judgment and b) denial of Appellants’ Motion for Reconsideration, where:

1. Appellants never sought leave of the Superior Court to amend their Complaint but improperly seek to raise this issue for the first time on appeal;

2. Appellants did not previously raise the issue of whether RMI timely notified Respondent Allstate Property and Casualty Insurance Company (“Allstate”) of their coverage and defense claims but improperly seek to raise this issue for the first time on appeal;

3. The Superior Court exercised its sound discretion to dismiss Appellants’ claims against RMI without leave to amend;

4. Appellants’ CPA claim against RMI fails because it is predicated solely on RMI’s alleged violation of IFCA, which does not apply to insurance producers like RMI;

5. Appellants include in their appellate brief arguments and authorities raised for the first time on reconsideration that cannot properly be considered on appeal; and

6. Appellants did not assign error to the Superior Court’s dismissal of their breach of contract claim against RMI and are therefore precluded from raising the issue here.

II. COUNTERSTATEMENT OF FACTS

A. Relationship of the Parties

Appellants have been insured with Allstate since 1988. *See* Complaint for Damages (“Complaint”) ¶ 2.2, CP 4. In 1999, Clifford Walton became an insurance producer for Allstate. Declaration of Clifford C. Walton, Jr. in Support of Defendant Risk Management, Inc.’s

Motion for Summary Judgment (“Walton Decl.”) ¶ 4, CP 139; Deposition of Clifford C. Walton, Jr., dated April 25, 2018 (“Walton Dep.”), Ex. A to Declaration of Ethan A. Smith in Support of Defendant Risk Management, Inc.’s Motion for Summary Judgment (“Smith Decl.”), at 7:5-7:7, CP 44. In approximately 2001, Mr. Walton joined RMI. Walton Decl. ¶ 5, CP 140. Appellants became Mr. Walton’s clients shortly thereafter. Walton Decl. ¶ 7, CP 140; *see also* Walton Dep., Smith Decl. Ex. A, at 9:20-10:11, CP 46-47. RMI and Mr. Walton are licensed as “insurance producers” by the Washington State Insurance Commissioner. *See Risk Management Inc.*, Office of the Insurance Commissioner Washington State¹ and *Clifford C Walton Jr*, Office of the Insurance Commissioner Washington State.² RMI is an independent contractor of Allstate. Walton Decl. ¶ 6, CP 140. Mr. Walton is both part-owner and an employee of RMI. *Id.*; Walton Dep., Smith Decl. Ex. A, at 8:4-5, CP 45.

In 2010, Appellants purchased, through Mr. Walton and RMI, Allstate Homeowners Policy number 964571633 (“homeowners policy”), which was effective beginning July 29, 2010. *See* Excerpts of Allstate Certified Homeowners Policy No. 964571633, Smith Decl. Ex. B, CP 49-

¹<https://fortress.wa.gov/oic/consumertoolkit/Licensee/AgencyProfile.aspx?WAOIC=195784> (last visited June 3, 2019)

²<https://fortress.wa.gov/oic/consumertoolkit/Licensee/AgentProfile.aspx?WAOIC=150213> (last visited June 3, 2019)

69. Appellants' claims arise from a coverage dispute related to this policy.

See generally, Complaint, CP 3-9.

B. Procedural History

1. The Complaint

On November 28, 2017, Appellants filed a complaint against RMI and Allstate, alleging causes of action against RMI for breach of contract, bad faith, Consumer Protection Act ("CPA") violations, and Insurance Fair Conduct Act ("IFCA") violations. *See generally*, Complaint, CP 3-9.

The Complaint did not allege that RMI failed to communicate Appellants' coverage and defense claims to Allstate as a basis for RMI's liability or otherwise address this issue. *See id.* At no point during this litigation did Appellants seek leave of the Superior Court to amend their Complaint.

2. Discovery

The only discovery undertaken by Appellants during the litigation was the deposition of Mr. Walton. *See generally*, Walton Dep., Smith Decl. Ex. A, CP 41-48. Appellants never served any written discovery requests on either Respondent. *See generally, id.* Nor did Appellants seek to depose any representative of Allstate. *See generally, id.*

3. Summary Judgment

On September 7, 2018, RMI and Allstate both filed motions for

summary judgment, noted for hearing on October 5, 2018, seeking dismissal of Appellants' claims against them. *See* Defendant Risk Management, Inc.'s Motion for Summary Judgment ("RMI MSJ"), CP 27-37.

Neither in their opposition to summary judgment, nor during oral argument, did Appellants raise RMI's alleged failure to communicate their coverage and defense claims to Allstate as a claimed basis for RMI's liability. *See generally*, Plaintiffs' Reply [sic] to Defendants' Risk Management Inc., and Allstate Property and Insurance Company Motions for Summary Judgment ("MSJ Response"), CP 1021-45. *See also, generally*, Verbatim Report of Proceedings, Honorable John O. Cooney, Oct. 5, 2018 ("Verbatim Report").³

Appellants' opposition also did not request leave to amend their Complaint. *See generally*, MSJ Response, CP 1021-45. Nor did Appellants seek leave to amend during oral argument on Respondents' summary judgment motions. *See generally*, Verbatim Report.

On October 5, 2018, the Superior Court granted RMI's motion in full, dismissing all of Appellants' claims against RMI. *See* Order Granting Defendant Risk Management, Inc.'s Motion for Summary

³ The Verbatim Report was filed in this Court by Korina Krebs, certified court reporter/transcriber, on March 21, 2019.

Judgment (“RMI Summary Judgment Order”), CP 1202-05. The dismissal was with prejudice and without leave to amend. *See id.*, CP 1203.

4. Reconsideration

Appellants subsequently moved for reconsideration. *See* Plaintiffs’ Request for Reconsideration of the Court’s Decision Granting Summary Judgment to Risk Management Inc. and Allstate Property and Casualty Insurance Company (“Motion for Reconsideration”), CP 1207-22.

In their Motion for Reconsideration, Appellants raised for the first time two new theories of RMI’s liability: 1) that RMI violated RCW 48.30.090⁴; and 2) that RMI breached its “special relationship” duty to Appellants. *See id.* Appellants did not raise these theories, or the authority cited in support, in their Complaint or their summary judgment opposition briefing. *See generally*, Complaint, CP 3-9; MSJ Response, CP 1021-45.

Appellants’ Motion for Reconsideration also notably did not raise RMI’s alleged failure to communicate their coverage and defense claims to Allstate as a basis for RMI’s liability. *See generally*, Motion for

⁴ RCW 48.30.090 provides: “No person shall make, issue or circulate, or cause to be made, issued or circulated any misrepresentation of the terms of any policy or the benefits or advantages promised thereby, or the dividends or share of surplus to be received thereon, or use any name or title of any policy or class of policies misrepresenting the nature thereof.”

Reconsideration, CP 1207-22; Plaintiffs' Response to Defendant Allstate Property and Casualty Response to Plaintiffs' Motion for Reconsideration ("Reconsideration Reply to Allstate"), CP 1243-46; Plaintiffs' Response to Defendant Risk Management, Inc.'s Opposition to Plaintiffs' Motion for Reconsideration ("Reconsideration Reply to RMI"), CP 1247-52. In fact, Appellants asserted the opposite, stating: "Allstate does not deny that coverage was requested in 2012 and 2014." Reconsideration Reply to Allstate, CP 1243-46.

Nor did Appellants' request leave to amend their Complaint in their reconsideration briefing. *See generally*, Motion for Reconsideration, CP 1207-22; Reconsideration Reply to Allstate, CP 1243-46; Reconsideration Reply to RMI, CP 1247-52.

On November 29, 2018, the Superior Court denied Appellant's Motion for Reconsideration. *See Order Denying Motion for Reconsideration ("RMI Reconsideration Order")*, CP 1400-02.

III. SUMMARY OF ARGUMENT

In their Complaint, Appellants asserted only two causes of action against RMI, both of which were dismissed on summary judgment: 1) breach of contract, and 2) violation of the CPA predicated solely on RMI's alleged violation of IFCA. Appellants do not assign error to the dismissal of their breach of contract claim and have therefore waived appeal of that

portion of the Superior Court's decision. Rather, Appellants only assign error to dismissal of their CPA/IFCA claim. As the Superior Court properly concluded on summary judgment, this claim fails as a matter of law, as IFCA only regulates the conduct of *insurers*. The statute's plain language makes clear that IFCA does not apply to *insurance producers* like RMI. Because RMI cannot violate IFCA as a matter of law, Appellants' CPA claim, based solely on an alleged IFCA violation, must fail. This is the fundamental issue before the Court on appeal.

Notwithstanding, Appellants seek to obfuscate and complicate the matter in an effort to manufacture claimed issues of fact that might resuscitate their claims. These arguments are entirely unavailing.

Appellants also assign unwarranted significance to the dismissal of their claims against RMI, erroneously asserting that the Superior Court's decisions leave all insurance consumers without any remedy against insurance producers. This is, of course, not the case. As Appellants acknowledge in their brief, Washington recognizes a well-established cause of action for the professional negligence of insurance producers, including a cause of action predicated on the producer's "special relationship" with the plaintiff. Appellants also admit they could have based their CPA claims against RMI on other provisions of the statute (namely, RCW 48.30.090). However, as the Superior Court recognized,

Appellants failed to plead these alternative causes of action, despite having ample opportunity to do so. Nor did Appellants ever seek to amend their Complaint to add these causes of action. Instead, they rested solely on breach of contract and IFCA claims, which fail as matter of law. However, in an attempt to sidestep the deficiency of their causes of action, Appellants make a litany of other unavailing and mostly procedurally improper arguments.

Specifically, Appellants raise the following new issues for the first time on appeal: 1) amendment of their Complaint, which Appellants never sought from the Superior Court; and 2) whether RMI timely notified Allstate of their coverage and defense claims, upon which Appellants seek to base entirely new CPA and negligence claims against RMI. Because these issues were never raised before the Superior Court, they cannot be considered on appeal.

Because Appellants never sought to amend their Complaint, the Superior Court did not deny them leave. However, the Superior Court did grant RMI's motion for summary judgment *without leave to amend*. To the extent this constitutes a denial of leave, it was clearly within the Superior Court's sound discretion. Appellants argue that amendment is warranted by "new" facts that Appellants learned from Allstate's summary judgment submissions—specifically, that Allstate disputes receiving

notice of Appellants' 2012 and 2014 insurance claims from RMI. However, Appellant obtained this information prior to oral argument on summary judgment and prior to filing their Motion for Reconsideration—yet did not seek leave to amend at oral argument or in their reconsideration briefing. Moreover, during the preceding 10 months that this litigation was pending, the only discovery sought by Appellants was the deposition of Mr. Walton. Appellants did not submit any written discovery requests to either Respondent. Nor did they seek to depose any representative of Allstate. If Appellants were in fact unaware that Allstate disputes receiving notice of their claims in 2012 and 2014, it was because of their own undue delay. Accordingly, it was well within the Superior Court's discretion to deny amendment of the Complaint.

Appellants also base their appeal in part upon new arguments and authorities raised for the first time on reconsideration: 1) that RMI was in violation of RCW 48.30.090; and 2) that RMI violated its "special relationship" duty to Appellants. These arguments, and the authorities cited in support, were not raised on summary judgment, and therefore they must be disregarded on appeal.

IV. ARGUMENT

A. Standard of Review

On appeal, a summary judgment order is reviewed de novo, and

the appellate court engages in the same inquiry as the trial court. *Citizens All. for Prop. Rights Legal Fund v. San Juan Cty.*, 181 Wn. App. 538, 542, 326 P.3d 730, 732 (2014).

“The purpose of summary judgment is to avoid a useless trial” when there is no real factual dispute. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299, 301 (1975). If “there is no genuine issue as to any material fact,” summary judgment will be granted. CR 56(c); *see also id.*; *Regan v. Seattle*, 76 Wn.2d 501, 458 P.2d 12(1969); *Hughes v. Chehalis Sch. Dist.*, 61 Wn.2d 222377 P.2d 642 (1963); *Jolly v. Fossum*, 59 Wn.2d 20, 365 P.2d 780 1961); *Bates v. Bowles White & Co.*, 56 Wn.2d 374, 375, 353 P.2d 663, 663 (1960); *Preston v. Duncan*, 55 Wn.2d 678, 679, 349 P.2d 605, 605 (1960).

The court will “construe all evidence and reasonable inferences in the light most favorable to the nonmoving party.” *Keck v. Collins*, 181 Wn. App. 67, 79, 325 P.3d 306, 312 (2014). However, the nonmoving party “may not rest on mere allegations in the pleadings but must set forth specific facts showing that there is a genuine issue for trial.” *LaPlante*, 85 Wn.2d at 158; *see also* CR 56(e).

Questions of law are properly decided on summary judgment. *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253, 1257 (2006); *Tanner Elec. v. Puget Sound*, 128 Wn.2d 656, 674, 911 P.2d 1301,

1310 (1996). “The interpretation of a statute is a question of law.”
Qualcomm, Inc. v. Dep't of Revenue, 171 Wn.2d 125, 131, 249 P.3d 167,
169 (2011).

B. Appellants' CPA Claim Against RMI Fails Because It Is Predicated Solely on RMI's Alleged Violation of IFCA, which Does Not Apply to Insurance Producers Like RMI

As Appellants admit, their CPA claim against RMI is predicated solely on RMI's alleged violation of WAC 284-30-330:

Respondent RMI violated WAC 284-30-330(1) by “Misrepresenting pertinent facts or insurance policy provisions” by indicating coverage extended to any lawsuit other than criminal or business lawsuits.

Brief of Appellants Margitan (“Appellants’ Brief”) at 22. This is the only “unfair or deceptive act or practice” by RMI that Appellants have alleged. *See id.* at 20-22.

However, WAC 284-30-330 is a regulation that defines certain minimum standards that may be deemed to constitute unfair claims settlement practices. It is part of a body of regulations referred to as the Unfair Claims Settlement Practices Regulation—implementing regulations for IFCA. *See* WAC 284-30-330 (listing RCW 48.30.010 as “Statutory Authority” for the regulation); *Insurance Fair Conduct Act (IFCA) Laws and Rules*, Office of the Insurance Commissioner Washington State,

(listing RCW 48.30.010 and WAC 284-30-330 as a provisions of IFCA).⁵ IFCA only regulates the conduct of *insurers*. WAC 284-30-330 defines specific “unfair methods of competition and unfair or deceptive acts or practices of *the insurer* in the business of insurance.” See WAC 284-30-330; see also *Lease Crutcher Lewis WA, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. C08-1862RSL, 2009 U.S. Dist. LEXIS 97899, at *10 (W.D. Wash. Oct. 20, 2009) (finding that in enacting IFCA, “the legislature intended to create a private cause of action for damages and attorney’s fees against only *the insurer*”) (emphasis added).

Washington’s insurance statute defines “insurer” as “every person engaged in the business of making contracts of insurance, other than a fraternal benefit society.” RCW 48.01.050; see also RCW 48.17.010(7). Washington law distinguishes between “insurers” and “insurance producers,” who “sell, solicit, or negotiate” insurance but do not actually insure anyone. See RCW 48.17.010(6); RCW 48.01.050.

Insurance brokers or agents are not “insurers,” within the meaning of the RCW, because they are not “engaged in the business of making contracts of insurance.” *Id.* Rather, an insurance broker is considered an “insurance producer”: “a person required to be licensed under the laws of

⁵ <https://www.insurance.wa.gov/insurance-fair-conduct-act-ifca-laws-and-rules> (last visited June 3, 2019).

this state to *sell, solicit, or negotiate insurance.*” RCW 48.17.010(6) (emphasis added). “‘Sell’ means to exchange a contract of insurance by any means, for money or its equivalent, *on behalf of an insurer.*” RCW 48.17.010(13) (emphasis added). “‘Solicit’ means attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance *from a particular insurer.*” RCW 48.17.010(14) (emphasis added). And “negotiate” means:

the act of conferring directly with, or offering advice directly to, a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms, or conditions of the contract, *provided that the person engaged in that act either sells insurance or obtains insurance from insurers for purchasers.*

RCW 48.17.010(11) (emphasis added). Taken together, these definitions make clear that “insurance producers” do not contract to insure anyone. Rather, they facilitate contracts between their clients and insurers. *See* Walton Decl. ¶ 3, CP 139.

There is no question that both RMI and Mr. Walton are licensed as “insurance producers” by the Washington State Insurance Commissioner. *Id.*; *Risk Management Inc.*, Office of the Insurance Commissioner Washington State⁶; *Clifford C. Walton Jr.*, Office of the Insurance

⁶<https://fortress.wa.gov/oic/consumertoolkit/Licensee/AgencyProfile.aspx?WAOIC=195784> (last visited June 3, 2019)

Commissioner Washington State.⁷ As an insurance producer, RMI does not insure; it sells, solicits, and negotiates insurance, facilitating insurance contracts between its clients and insurers. Walton Decl. ¶ 3, CP 139; *see also* RCW 48.17.010(6). As such, RMI merely facilitated the insurance contract between Appellants and Allstate. Walton Decl. ¶ 8, CP 140. As such, RMI is not “engaged in the business of insurance” as defined by IFCA, and thus IFCA is inapplicable to RMI. RCW 48.30.010(1).

Violations of “regulations that apply only to insurers” do not give rise to liability for non-insurers like RMI. *Merriman v. Am. Guarantee & Liab. Ins. Co.*, 198 Wn. App. 594, 627, 396 P.3d 351, 367 (2017) (construing WAC 284-30-310, which defines the scope of the Unfair Claims Settlement Practice Regulation, including WAC 284-30-330).

Because IFCA—including WAC 284-30-330—applies only to “insurers,” it cannot give rise to any liability for RMI, which is not an “insurer” but rather an “insurance producer.” *See* RCW 48.01.050; RCW 48.17.010(6), (7), (11), (13), (14); RCW 48.30.010(1). That is, RMI cannot, as a matter of law, violate IFCA. Because, Appellants CPA claim against RMI is predicated solely on RMI’s alleged violation of IFCA (*See*

⁷<https://fortress.wa.gov/oic/consumertoolkit/Licensee/AgentProfile.aspx?WAOIC=150213> (last visited June 3, 2019).

Appellants' Brief 20-22), it fails as a matter of law, and the Superior Court correctly granted summary judgment in favor of RMI.

Nor can Appellants manufacture issues of fact to undermine the Superior Court's decision because "interpretation of a statute is a question of law" properly determined on summary judgment. *Qualcomm, Inc.*, 171 Wn.2d at 131. Accordingly, dismissal of Appellants' CPA/IFCA claim should not be disturbed on appeal.

C. Appellants Cannot Raise New Issues for the First Time on Appeal

"On 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." RAP 9.12; *see also Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 701-02, 222 P.3d 785, 787 (2009) (appellate courts "review only those issues raised by the parties and considered by the trial court"). "Failure to raise an issue before the trial court generally precludes a party from raising it on appeal." *Wilcox v. Basehore*, 187 Wn.2d 772, 788, 389 P.3d 531, 540 (2017); *see also* RAP 2.5(a); *State v. Nitsch*, 100 Wn. App. 512, 519, 997 P.2d 1000, 1003 (2000); *Fuqua v. Fuqua*, 88 Wn.2d 100, 105, 558 P.2d 801, 804 (1977). This rule "encourages parties to make timely objections, gives the trial judge an opportunity to address an issue before it becomes an error on

appeal, and promotes the important policies of economy and finality.”
Wilcox, 187 Wn.2d at 788.

1. Because Appellants Never Sought Leave to Amend Their Complaint from the Superior Court, They Are Precluded from Raising this Issue on Appeal

In their appellate brief, Appellants assert that “[t]he trial court erred in it [sic] its order granting summary judgment to Respondent RMI, holding that the Margitans could not amend their Complaint.” Appellants’ Brief at 2.

However, Appellants never sought the Superior Court’s leave to amend their Complaint. They did not file a motion for leave to amend. Nor did they request leave to amend in their response to Respondents’ motions for summary judgment. *See generally*, MSJ Response, CP 1021-58. They did not seek leave to amend during oral argument on the summary judgment motions. *See generally*, Verbatim Report. Nor did they raise the issue in their Motion for Reconsideration briefing. *See generally*, Motion for Reconsideration, CP 1207-22; Reconsideration Reply to Allstate, CP 1243-46; Reconsideration Reply to RMI, CP 1247-52. In failing to raise this issue earlier, Appellants denied both the Superior Court and Respondents an opportunity to address the propriety of amendment. Considering this issue for the first time on appeal would frustrate “the important policies of economy and finality.” *Wilcox v.*

Basehore, 187 Wn.2d 772, 788, 389 P.3d 531, 540 (2017). Thus, Appellants are precluded from raising amendment of the Complaint on appeal. *Id.*

2. Because Appellants Did Not Previously Raise the Issue of Whether RMI Timely Notified Allstate of Their Insurance Claims, Appellants Are Precluded from Raising the Issue on Appeal

According to Appellants:

The trial court erred in failing to find material issues of fact are in dispute regarding the Respondent RISK MANagements [sic] failure to notify the Respondent ALLSTATE of the Margitan's [sic] claim for coverage and defense of the amended 2012 litigation in Bad [sic] faith pursuant to RCW 48.01.030.

Appellants' Brief at 12. That is, Appellants assert that there are issues of fact regarding whether and when RMI passed along Appellants' coverage and defense claims to Allstate. *See id.* 12-13. Appellants argue that RMI's alleged failure to notify Allstate provides a new and independent basis for bad faith and CPA claims against RMI. *See id.*

However, this constitutes an entirely new theory of RMI's liability, one that Appellants never pled or otherwise raised before the Superior Court. *See generally*, Complaint, CP 3-9; Motion for Summary Judgment Response, CP 1221-45; Motion for Reconsideration, CP 1207-22; Reconsideration Reply to Allstate, CP 1243-46; Reconsideration Reply to RMI, CP 1247-52. Appellants had ample opportunity to obtain this

information through routine discovery prior to summary judgment. However, they chose to conduct no discovery whatsoever from Allstate for the entire 10 month pendency of the action. Nor did Appellants raise the issue on reconsideration, although that would have also been too late, as new arguments and authorities raised for the first time on reconsideration will generally be disregarded. In fact, on reconsideration, Appellants asserted the exact opposite: “Allstate does not deny that coverage was requested in 2012 and 2014.” Reconsideration Reply to Allstate, CP 1244.

Appellants make no attempt to explain why they are raising this entirely new issue on appeal. *See generally*, Appellants’ Brief. In fact, Appellants admit that they were aware of the factual basis for this new argument *prior to filing their Motion for Reconsideration*:

As indicated above Melissa Hunt of Allstate indicated in her declaration [in support of Allstate’s Motion for Summary Judgment] that the first time Alan and Gina Margitan filed a claim was on February 27, 2017 when a phone call was made to Allstate.

Appellants’ Brief at 13 (citing Declaration of Melissa Hunt in Support of Defendant Allstate Property and Casualty Insurance Company’s Motion for Summary Judgment (“Hunt. Decl.”), CP 1170).

By their own admission, Appellants had ample opportunity to raise this issue before the Superior Court in their Motion for Reconsideration.

They failed to do so, which denied the Superior Court and Respondents an opportunity to address this entirely new theory of liability. Considering this new argument on appeal would frustrate both judicial economy and the finality of trial court decisions. *Wilcox*, 187 Wn.2d at 788.

Accordingly, Appellants are precluded from raising this issue on appeal. See RAP 2.5(a); *Wilcox v. Basehore*, 187 Wn.2d 772, 788, 389 P.3d 531, 540 (2017) *Ducote*, 167 Wn.2d at 701-02. *Nitsch*, 100 Wn. App. at 519; *Fuqua*, 88 Wn.2d at 105.

D. Denial of Leave to Amend the Complaint Was within the Superior Court's Sound Discretion

A trial court's denial of leave to amend a pleading will be disturbed only for "manifest abuse of discretion." *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, Etc*, 100 Wn.2d 343, 351, 670 P.2d 240, 244 (1983); see also *Del Guzzi Constr. Co. v. Glob. Nw.*, 105 Wn.2d 878, 888, 719 P.2d 120, 126 (1986); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 737, 837 P.2d 1000, 1006-07 (1992). "A court abuses its discretion if it exercises that discretion for untenable reasons, or based upon unreasonable grounds." *CKMS II, Inc. v. Ho*, No. 53354-1-I, 2004 Wash. App. LEXIS 3090, at *18 (Ct. App. Dec. 27, 2004).

"A motion to amend can be denied in the face of prejudice to the nonmoving party." *McDonald*, 119 Wn.2d at 737. Pursuant to CR 15, a

complaint must provide a defendant with “adequate notice of the basis of the claims or defenses asserted against him.” *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 165, 736 P.2d 249, 253 (1987). Accordingly, “[t]he factors a court may consider in determining prejudice include undue delay and unfair surprise.” *Id.* “When a motion to amend is made after the granting of summary judgment, the trial court should consider whether the motion could have been timely made earlier in the litigation.” *Capps v. Gregoire*, No. 50306-5-I, 2003 Wash. App. LEXIS 30, at *21 (Ct. App. Jan. 13, 2003).

As a preliminary matter, Appellants never asked the Superior Court for leave to amend their Complaint. They did not file a motion amend; nor did they raise the issue on summary judgment or in their motion for reconsideration. *See generally*, MSJ Response, CP 1021-45; Verbatim Report; Motion for Reconsideration, CP 1207-22; Reconsideration Reply to Allstate, CP 1243-46; Reconsideration Reply to RMI, CP 1247-52. Rather, the Superior Court’s summary judgment order was issued “with prejudice and without leave to amend.” RMI Summary Judgment Order, CP 1203. Nonetheless, Appellants argue that they should now be allowed to amend because they learned new facts in Allstate’s summary judgment submissions that support a negligence claim against RMI. *See* Appellants’ Brief at 26-27. Specifically, Appellants

assert that they first learned through Melissa Hunt's October 1, 2018 declaration that RMI may not have timely notified Allstate of their coverage and defense claims. *See id.*

Appellants commenced this lawsuit on November 28, 2017. *See* Complaint, CP 3-9. Thus, when Appellants learned the "new" information that they claim justifies amendment, this litigation had already been pending for more than 10 months. During that time, the only discovery sought by Appellants was the deposition of RMI's Clifford Walton. Appellants never served any discovery requests on either Respondent. Appellants never sought to depose any representative of Allstate. If Appellants were unaware that Allstate disputed receiving notice of their claims in 2012 and 2014, it was entirely because of Appellants' own undue delay; they sat on their hands for 10 months, never attempting any discovery on what they now claim is a key issue.

Given Appellants' extreme and inexplicable delay, and the prejudice that adding a new cause of action so late would cause to RMI, the Superior Court was well within its discretion to deny leave to amend—particularly since the first request to amend was made on appeal after summary judgment had been granted. *See CKMS II, Inc.*, 2004 Wash. App. LEXIS 3090, at *18; *Capps*, No. 50306-5-I, 2003 Wash. App. LEXIS 30, at *21; *McDonald*, 119 Wn.2d at 737; *Herron*, 108 Wn.2d at

165; *Del Guzzi Constr. Co.*, 105 Wn.2d at 888; *Caruso*, 100 Wn.2d at 351. Accordingly, the Superior Court’s summary judgment order should not be disturbed, and Appellants’ should not now be allowed to amend their Complaint.

E. The Superior Court Properly Exercised Its Discretion to Disregard Arguments and Authority Raised for the First Time on Reconsideration

Reconsideration is not intended to provide a party with a second bite at the apple—a chance to reargue issues that have already been addressed and adjudicated. “CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision.” *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729, 732 (2005); *see also In re Parentage of X.T.L.*, No. 31335-2-III, 2014 Wash. App. LEXIS 2056, at *27 n.3 (Ct. App. Aug. 19, 2014); *River House Dev., Inc. v. Integrus Architecture, PS*, 167 Wn. App. 221, 231, 272 P.3d 289, 294 (2012). Accordingly, new authority and argument raised for the first time on reconsideration will generally not be considered. *See Linth v. Gay*, 190 Wn. App. 331, 342 n.11, 360 P.3d 844, 850 (2015); *Wilcox*, 130 Wn. App. at 241.

Likewise, an appeal will be denied if relies upon arguments raised for the first time in its reconsideration motion. *Mut. of Enumclaw Ins. Co. v. OneBeacon Ins. Co.*, No. 64063-1-I, 2010 Wash. App. LEXIS 2291, at

*8 (Ct. App. Oct. 11, 2010) (“OneBeacon appeals, primarily relying on . . . arguments raised for the first time in its unsuccessful reconsideration motion. CR 59 does not allow this.”).

Appellants raised two new theories of RMI’s liability for the first time in their Motion for Reconsideration: 1) that RMI violated RCW 48.30.090; and 2) that RMI breached its “special relationship” duty to Appellants. *See* Motion for Reconsideration, CP 1210-17. Appellants did not raise these theories, or the authority cited in support, in their Complaint or their summary judgment briefing. *See generally*, Complaint, CP 3-9; MSJ Response, CP 1021-45.

Both these legal theories and the authority cited in support could have been raised long before Appellants’ Motion for Reconsideration. These theories are not based on any new evidence or a change in law. *See* Motion for Reconsideration, CP 1210-17. Rather, they are premised entirely on statutes and case law that were readily available to Appellants throughout this litigation. *See id.* Accordingly, the Superior Court properly exercised its discretion to disregard these arguments. *See Linth*, 190 Wn. App. at 342 n.11; *In re Parentage of X.T.L.*, No. 31335-2-III, 2014 Wash. App. LEXIS 2056, at *27 n.3; *River House Dev., Inc., PS*, 167 Wn. App. at 231; *Wilcox*, 130 Wn. App. at 241.

Likewise, because they were first raised on reconsideration, these arguments are not a proper basis for appeal. *See Mut. of Enumclaw Ins. Co.*, No. 64063-1-I, 2010 Wash. App. LEXIS 2291, at *8.

F. Because Appellants Did Not Assign Error to the Superior Court’s Dismissal of their Breach of Contract Claim Against RMI, They Are Precluded from Raising the Issue

RAP 12.1 provides that “the appellate court will decide a case *only* on the basis of issues set forth by the parties in their briefs.” RAP 12.1(a) (emphasis added). Issues must be raised in an appellant’s opening brief; “[an appellate] court does not consider issues raised for the first time in a reply brief.” *In re Marriage of Sacco*, 114 Wn.2d 1, 5-6, 784 P.2d 1266, 1268 (1990); *see also In re Pers. Restraint of Rhem*, 188 Wn.2d 321, 327, 394 P.3d 367, 370 (2017). Issues that were not briefed will not be considered even if they are subsequently raised at oral argument. *1515-1519 Lakeview Boulevard Condo. Ass’n v. Apartment Sales Corp.*, 102 Wn. App. 599, 610, 9 P.3d 879, 885 (2000).

Here, Appellants have not assigned error to the Superior Court’s dismissal of their breach of contract claim against RMI. *See* Appellants’ Brief at 1-2. Nor is this issue addressed in their appellate brief. *See generally, id.* Accordingly, Appellants are precluded from raising this issue in their reply or at oral argument, and the Superior Court’s dismissal of their breach of contract claim should not be disturbed.

V. CONCLUSION

The Superior Court properly granted RMI's motion for summary judgment in full and denied Appellants' Motion for Reconsideration because Appellants' claims fail as a matter of law. Appellants have attempted to revive their claims by arguing entirely new theories of RMI's liability, first on reconsideration and now on appeal. However, new issues raised after summary judgment has been granted must be disregarded. Appellants further appeal the Superior Court's denial of leave to amend—which is fundamentally misleading because Appellants never sought the leave to amend from the Superior Court. Even if they had, the Superior Court would have been well within its sound discretion to deny amendment, given that Appellants failed to engage in almost any discovery and now seek to add new causes of action that were available to them when this litigation commenced.

Accordingly, the Superior Court's decision should not be disturbed.

RESPECTFULLY SUBMITTED this 5th day of June, 2019.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I caused to be served on the following a true and accurate copy of the BRIEF OF RESPONDENT RISK MANAGEMENT, INC. in Court of Appeals Cause No. 365174 in the manner set forth below:

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

EXECUTED this 5th day of June, 2019 at Seattle, Washington.

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June 05, 2019 - 4:32 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36517-4
Appellate Court Case Title: Allan Margitan, et ux v. Risk Management, Inc., et al
Superior Court Case Number: 17-2-04653-6

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