No.325687

(Spokane County Superior Court No. 11-2-02470-3)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

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

Respondents/ Cross-Appellants.

APPELANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. Introduction 1

II. Argument.....4

A. Statement of the claims.....4

1. The false and misleading information communicated was the expert opinion of value on the land that the Appellants purchase, and took loans out on.....4

2. The members have no claims against the Respondents outside of the Appellants.....6

B. Standard of Review.....7

C. There is clear evidence that the Respondents are liable to the Appellants for the misleading expert opinion they gave on the real estate.....7

1. The Respondents show no law or facts that they can contract with RiverBank to not be liable in tort to the Appellants.....9

a. Barnes does not support the Respondents argument that they can use a contract to avoid tort liability to a third party.....11

b. Our law requires evidence of contract privity before tort liability can be limited with a contract.....11

2. The Appellants were part of the transaction that triggered the appraisal, and thus owed duties by the Respondent.....13

a. When the Appellants came into being does not preclude the Appellants from being involved in the transaction that triggered the appraisal.....13

b. The Respondents are patently wrong in their claim

that the law requires them to know of the recipient of the information, and since they did not know they owed no duty.....14

3. The Appellants justifiably relied on the misleading appraisal values of the Respondents.....17

a. The Appellants relied upon the misleading appraisal values to take out the loan and complete purchase.....17

i. Reliance on the misleading values is a question of fact that can be established through the members.....18

ii. The Respondents misinterpret and remove *Schaff* and *Ramos* from their facts by claiming they establish that the appraisals must be looked at as matter of law.....19

b. Reliance here was reasonable under the circumstances.....21

4. There is no reason or justification to look to California law or any other law on how it deals with real estate appraiser negligence.....21

D. The statute of limitations is based on the discovery rule, and the only evidence of discovery puts the statute starting at the earliest in November of 2009, meaning the statute did not run until November of 2012.....21

E. Giving appraisers the clear cogent and convincing standard of proof before their liable grants appraisers as a class of citizens a special immunity or privilege in violation of Washington's Constitution.....23

III. Conclusion.....25

Table of Cases

Barnes v. Cornerstone Investments, Inc.,54Wn.App. 474 *(1989..*9, 10

Borisch v. Russell, 155 Wn.App. 892 (2010).....9, 10, 15, 18, 20

Commodore v. University Mechanical Contractors, Inc., 120 Wn.2d 120 (1992).....12, 13

Costa v. Neimon, 123Wis.2d N.W.2d 896 (Ct. App.1985).....20

Donatelli v. D.R. Strong Consulting Engineers, Inc.,179 Wn.2d 84(2013).....12

Eastwood v. Horse Harbor Foundation, 170 Wn.2d 380 (2010).....10, 12

Hardee v. DSHS, 172 Wn.2d 1 (2011).....24

Hubbard v. Spokane County, 146 Wn.2d 699 (2002).....7

Kent v. Cox,__ Wn. 2d__ (May 28, 2015).....7

Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536 (2002).....17

Michaels v. CH2M Hill, Inc., 171 Wn.2d 587 (2011)..... 10, 12

Miller v. U.S. Bank, 72Wn. App. 416 (1994).....7

Ramos v. Arnold, 141 Wn.App. 11 (2007).....19

Richland Sch. Dist. v. Mabton Sch. Dist., 111 Wn. App. 377(2002).....18

Sabey v. Howard Johnson & Co., 101 Wn. App. 575 (2000).....6, 21

Schaaf v. Highfield, 127 Wn.2d 17 (1995)..... 9,10,11,12,13,14,18,19,20,24

Schroeder v. Weighall, 179 Wn.2d 566 (2014).....23, 24
*Woods View II, LLC v. Kitsap County*__Wn.App. ___Case 44404-6-II, June 9 2015).....6

Statutes, Administrative Rules and Constitution

CR 30(b)(6).....6

I. Introduction

The crux of the complaint is that the Respondents provided misleading information, in the form of expert opinions of value in the Appellant's transaction to purchase land. CP 5, 6 (Alleging this in the Complaint). The complaint alleges that the members received the information, and the transactions would not have been able to go through but for the appraisals of the Respondents. CP 5, 6.

In the summary judgment motion, and opening brief the Appellants produced evidence to support these allegations, in the following form:

- The expert opinion of value on the land was false or misleading information. "The value opinion rendered in this appraisal is not reliable and the conclusion is misleading," was the conclusion of the Appellants expert report. CP 648, 656. [1]

- The misleading information the expert opinion of value on the land was conveyed to members of the Appellants. The appraised value on the properties was communicated to several members prior to the Appellants borrowing the money from RiverBank and Sundevil Development to purchase the land. CP 635-37; 664-669; 670-1; 687.

[1] This note was removed

- The Appellants could not have done these transactions without the active participation and approval of the members. For RockRock Group the members were required to sign the promissory note for the loan from RiverBank. CP 307-309. For RussellRock Group the members were required to give unanimous consent for the loan from RiverBank. CP 407-420. In the loans to purchase this land the members were required to give their personal guaranties. CP 307, 331, 396. These actions occurred at closing, after the Respondents misleading information was communicated.
- The Appellants were the purchasers in the transactions that triggered the appraisals. According to the Respondents the appraisals were engaged by RiverBank for the intended use of "[f]inancing and to facilitate a sale." CP 241, 256. RiverBank relied on these appraisals to make a loan for the purchase of this land, and the Appellants are the only purchasers to which RiverBank leant money on this land. CP 266-268; 399-405.

This evidence supports the complaint and was produced in summary judgment and the Appellants initial brief. Despite this clear evidence supporting the elements of the claim and allegations of the complaint, the Respondents ask this Court to render summary judgment on the following grounds:

1. The Respondents contracted with RiverBank to not be liable to the Appellants in tort even though the Appellants were not part of that contract.

2. Despite our Supreme Court stating in 1995 that a real estate appraiser owes a duty of care to all parties involved in the transaction that triggered the appraisal, the Respondents argue a party must trigger the appraisal, or the Respondents must have knowledge of the misleading information was being communicated to a party.

3. Despite the statement that justifiable reliance is a factual question, as a matter of law the only factual scenario that allows justifiable reliance is when the manager of an entity reads the appraisal, and the appraisal states the entity can rely on it.

4. Despite the discovery rule applying to the statute of limitations, and clear evidence of what brought about the discovery of the Appellants' claims, this Court should infer from certain documents that either the manager or the attorney[2] knew the expert opinion values were misleading and wrong.

The Respondents request this Court to ignore the rule that in summary judgment all facts and reasonable inferences must be viewed in the light of the non-moving party (the Appellants). Each of the

[2] Appellants do not concede that Mr. Sachtjen was operating within his function as the Appellants' attorney when he received certain information.

Respondents arguments requires this Court to view the evidence in the best light of the non-moving party. The Appellants clearly pled the misleading information as the Respondents expert opinion of value, that they were part of the transaction that triggered this expert opinion of value, that the information was communicated to members of the Appellants, and that those members moved forward with approving the loans and purchases that the expert opinion of value was meant to support. CP 5,6. The Appellants have now presented evidence of this, and that is sufficient for a jury to look at these claims and determine the truth of the facts and claims. The Appellants ask this Court to deny summary judgment in this matter.

II. Argument

A. Statement of the claims

Because the Respondents try to reframe the Appellants' claims as (1) the false information communicated to them was not the expert opinion of value, but rather the price Sundevil Development paid for the land, and (2) that these claims are actually investor or member claims the Appellants take this opportunity to restate the claims from the record.

1. The false and misleading information communicated was the expert opinion of value on the land that the Appellants purchase, and took loans out on

The Appellants put in their complaint that it was the expert opinions of value on the land that were communicated to their members. CP 5-6. The Appellants then produced evidence of members testifying that this is what was communicated to them. CP 635-37; 664-669; 670-1; 687.

The Appellants pled that these expert opinion of values was false and misleading. CP 5-6. The Appellants produced this evidence through an expert opinion. CP 648, 656. The expert does not even note that Sundevil's real contract was for $475,000 on the Rothrock land versus the $775,000 the Rothrock land appraisal states. CP 647. Instead the expert assumes the Respondents got it correct and then determines that even so the value and conclusion produced are unreliable and misleading. CP 648.

The Appellants pled that its members relied upon the expert opinion of value to approve the purchases of the land. CP 5-6. The Appellants supported this with evidence of the members taking an active role in approving the loans that were secured by the land and used to purchase the land. CP 307-309; CP 407-420; CP 307, 331, 396.

However the Respondents wish to reframe these claims to be that the actual complaint is that Jeffreys paid so little for the land and the Appellants paid him too much. They wish to reframe the false and misleading information as what Jeffreys paid for the land, rather than the

expert opinion of value the Respondents conclude. The only evidence they have for this is a separate case filed by individual members, and later dismissed, and the "bitch"[3] of one of the members in his deposition. Respondent's brief p. 45. This reframing the argument is wrong because it ignores the actual complaint, gives them the best view of the evidence, and equally important we are not sure how the law deals with a person's "bitch" versus a complaint, claim or duty. We ask the Court not to be persuaded by their re-framing of the false information outside the what the Appellants put in the complaint and evidence; the expert opinions of value on the land are the misleading statements.

2. The members have no claims against the Respondents outside of the Appellants

The Respondents have tried to reclassify this as more proper to be the claims of the members, and not the Appellants. The Respondents ignore the fact that the proper redress for the members of an entity is through the entity and not individually. *Woods View II, LLC v. Kitsap County*, ___ Wn. App. _____ (Case 44404-6-II, June 9 2015); *Sabey v. Howard Johnson*, 101 Wn. App. 575, 584-585 (2000). Likewise a guarantor cannot assert the rights of a principal other than as defenses.

[3] A review of the quote will show that Respondents' counsel phrased Mr. Largent's "bitch" using a leading question, and the Respondents chose this term.

Miller v. U.S. Bank, 72 Wn. App. 416, 424-425 (1994). The only proper redress for the members' reliance is through the Appellants in this case.[4]

B. Standard of Review

The Respondents leave out of their brief, and later ignore, the clear law holding that all facts and any reasonable inferences therefrom must be considered in the light most favorable to the non-moving party (here the Appellants). *Hubbard v. Spokane County*, 146 Wn.2d 699, 706-707 (2002), Respondents brief p. 11-12. This is a de novo summary judgment review. Summary judgment does not concern degrees of likelihood or probability, but rather requires legal certainty: the material facts must be undisputed and the Respondents prevail as a matter of law. *Kent v. Cox*, ___ Wn.2d ____, p. 10 (May 28, 2015). Every argument made by the Respondents requires that the Appellants evidence be ignored, and that the Respondents receive the deference of having all facts and reasonable inferences viewed in their best light, even though the Respondents are the moving party.

C. There is clear evidence that the Respondents are liable to the Appellants for the misleading expert opinion they gave on the real estate.

[4] While individual members did bring individual claims against Mr. Jeffreys, these were not brought against the Respondents and no ruling on their propriety as individual members was given before they were dismissed.

The Appellants laid out in their complaint claims that the Respondents issued a false or misleading opinion of value for the transaction that the Appellants completed as the Purchaser. CP 5, 6. The Appellants laid out in their complaint that these false opinions of value were communicated to the members of the entities, and that in reliance on these opinions of value the members authorized their managers to complete the purchases. CP 5. In support of this the Appellants have offered the following evidence:

- An expert that the values were misleading CP 648, 656;
- The Appellants were the purchasers in the transaction that triggered the appraisal opinions;[5]
- That prior to closing members were told of the misleading value opinions CP 635-37; 664-669; 670-1; 687; and
- That the members approved the loans that funded the transactions, by singing the promissory note (RockRock Group), giving unanimous consent for the manager to take out the loans (Russell Rock Group), and giving their personal guaranties. CP 307-309; 407-420; 331; 396

The essence of a this claim is the defendant communicating false information, and the plaintiff relying on it. *Borish v. Russell*, 155 Wn.

[5] This is analyzed and supported in the record in detail later.

App. 892, 905 (2010). The Respondents do not refute the false information was communicated to the members or that the members relied on it.

1. The Respondents show no law or facts that they can contract with RiverBank to not be liable in tort to the Appellants

Real estate appraisal negligence is a tort in Washington. *Eastwood v. Horse Harbor Foundation*, 170 Wn.2d 380, 388 (2010). It was articulated 20 years ago by our Supreme Court that a third party could state a claim against a real estate appraiser, and privity is not part of the tort. *Schaaf v. Highfield*, 127 Wn.2d 17, 26-27 (1995); "Tort duties are imposed by our society for a variety of reasons." *Eastwood, 170 Wn.2d* at 408, J Chambers concurrence. "Once a duty is cognizable in tort it is for the [Supreme Court] to decide if the duty should no longer apply under certain circumstances." This duty was imposed based on the compelling policies of Washington's common law. *Schaaf, 127 Wn.2d* at 29.

As a matter of common law, backed by compelling policy, this duty is owed by appraisers to all parties involved in the transaction that triggered the appraisal. *Schaaf*, 127 Wn.2d at 27. The definition of the duty was left to later courts. *Id.* at *fn.* 7. In 2011 our Supreme Court articulated that professionals owe a duty to "exercise the degree of skill,

care, and learning possessed by members of their profession in the community. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 606 (2011).

The Supreme Court showed a clear policy that an appraiser should owe duties to a third party. *Id.* at 26 ("[I]f [the appraiser's] liability does not extend at least to Schaaf's claim, no other third party will ever have a cause of action against the appraiser.") The policy objectives of this liability are "compelling." *Id.* at 29. I n determining this duty the Supreme Court started with the assumption that those who triggered the appraisal were already owed duties under contract privity. *Id.* at 21.

The Respondents argue they can contract with RiverBank to limit their duty to the parties involved in the transaction that triggered their appraisal. Respondents brief p. 14. They claim the terms of the agreement between the Respondents and RiverBank preclude a third-party from making any claim for damages based upon the appraisal. Respondents' brief p. 14-15. Their sole legal basis for ignoring the Supreme Court's imposition of common law duty is *Barnes v. Cornerstone Investments, Inc.*, 54 Wn. App. 474 (1989). *Barnes* cannot support this argument first because our Supreme Court in *Schaaf* stated six years later that a duty exists to a third party in tort, and secondly because this misinterprets *Barnes* as shown below.

a. Barnes does not support the Respondents argument that they can use a contract to avoid tort liability to a third party

Barnes stands for the fact that you cannot rely on a less than complete appraisal, or an appraisal that has extraordinary assumptions you do not confirm are correct. *Barnes,* 54 Wn. App. at 478. In *Barnes* the appraiser issued less than a full and complete MAI appraisal, which was based upon an assumption of the building being given certain repairs. *Id.* 476, 478. The *Barnes* court considered those items when it found reliance on that appraisal to guaranty the loan in a different transaction to not be justified. *Id.*

Barnes did mix justifiable reliance with the defendants' duty, and relied upon statements as part its reliance analysis. See *Barnes*, 54 Wn. App. at *fn.* 2 for the discussion of those interactions. However, to the extent this ever limited tort duties, six years later the Supreme Court in *Schaaf* looked at *Barnes* and declined to follow it for the tort duties. *Schaaf*, 127 Wn.d at 22-23. Instead *Schaaf* declared that an appraiser owes a duty to a third party who is involved in the transaction that triggered the appraisal. *Schaaf*, 127 Wn.2d at 27.

b. Our law requires evidence of contract privity before tort liability can be limited with a contract

One of the first requirements for a contract to preclude a tort duty is that the parties be in privity of contract. *Borish*, 155 Wn. App. at 904

(Finding that in order for the "economic loss rule," the precursor to the "independent duty doctrine" to apply there must be a contract between the parties). That requirement did not change when the *Eastwood* articulated the "independent duty doctrine." The term independent duty doctrine describes how a court determines "whether one contracting party can seek tort remedies against another party to the contract." *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 91 (2013), emphasis added. With no showing of a contractual privity the Respondents cannot use contract principles to limit their tort duties to the Appellants.

The Respondents are flat out wrong when they argue that *Eastwood* allows them to contract away tort duties under the "independent duty doctrine," which was formerly the "economic loss rule." Respondents brief p. 17-19. The Respondents also use the "independent duty doctrine" to claim that under *Donatelli* to claim that the Appellants must show what independent duty exists separate from the contract. *Id.* at 18. These arguments are completely wrong because require a contract to exist between the Appellants and Respondents.

To say otherwise would create havoc with tort law in many areas including, manufacturer liability to the end user, engineering liability to the public (*Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 606 (2011)), or even wrongful interference with a contract (*Commodore v. University*

Mechanical Contractors Inc., 120 Wn.2d 120 (1992)). Every contract would contain language stating the parties are not liable in tort to anyone else.

2. The Appellants were part of the transaction that triggered the appraisal, and thus are owed duties by the Respondent

An appraiser owes tort duties to all parties involved in the transaction that triggered the appraisal. *Schaaf*, 127 Wn.2d at 27. The Respondents try to get around this by arguing (a) that because the Appellants are entities that came into existence after the appraisals they cannot have the appraisals, and (b) that the Appellants must show the Respondents specifically knew the Appellants were receiving the information. As shown below, neither of these are correct, and the law is clear that the Respondents owe a duty to the parties involved in the transaction that triggered the appraisal, including the purchaser.

a. When the Appellants came into being does not preclude the Appellants from being involved in the transaction that triggered the appraisal

Schaaf specifically states that the purchaser is part of the transaction that triggered the appraisal. *Schaaf*, 127 Wn.2d at 27. However, *Schaaf* goes even further and states that the appraisers duty is owed to all those involved in the transaction that triggered the appraisal report, including the purchaser. *Id.* The Respondents' argument is based

upon an assumption that the appraisal must be created for the party. Respondents brief p. 17 ("It is illogical to assume that a completed appraisal was prepared for a non-existent party with no members (only a manager) until closing.") *Schaaf* however is clear that it starts with the assumption that those who retain the appraiser, and then extends a tort duty to those involved in the transaction that triggered the appraisal report. *Schaaf*, 127 Wn.d at 21-22, 27.

The evidence is that the Appellants were part of the transaction that triggered these appraisals, which were intended to be used for "financing and to facilitate a sale." CP 241, 256. The Respondents claim they were hired by RiverBank to do these reports.[6] The engagement letter states it is for the Rothrock, LLC project. CP 212. In the appraisal reports the Respondents analyze the sale of Sundevil to Rothrock Group, later RockRock Group, as a pending sale and use it as a comparative value. CP 705. RiverBank accepted the appraisals to support loans. CP 266-268. RiverBank issues loans, secured by the appraised property to the Appellants so the Appellants can purchase the land. CP 399-405.

b. The Respondents are patently wrong in their claim that the law requires them to know of the recipient of the information, and since they did not know they owed no duty

[6] The fact that the Respondents show up at the land to meet with Greg Jeffreys the day before RiverBank sends over the engagement letter could give a different inference, but the Appellants will go with this motion.

Without any citation to law the Respondents set out the position "[u]less the recipient of the information is made known to the defendant or to whom the recipient will provide the information, no liability can exist." Respondents brief p. 16. The Respondents go on to cite S*chaaf*'s review of the *Habermann* dissent to support the statement that the Appellants must prove the Respondents were aware that the Appellants were receiving the misleading information. Respondents' brief p. 16; *Schaaf*, 127 Wn.2d at 24. Nowhere though does the *Schaaf* court require the appraiser to know who the buyer is, or that the information will be sent to the buyer, instead it holds that because a transaction triggered the appraisal the buyer is part of the group that can rely on the appraisal. *Id.* at 27.

The *Schaaf* court spent a lot of time trying to determine the boundaries of how far the duty of an appraiser ran. *Id.* 22-27. In this the *Schaaf* court acknowledged the need to limit the class of third parties that could make a claim against an appraiser, and it is to this portion that the Respondents quote. *Id.* at 24. The *Schaaf* court goes on to look at the claim of misrepresentation for bond investors and concluded the general investing public was too large a group, but as long as the plaintiffs constitute a distinct smaller class then there is a public policy to extend liability. *Id.* at 24-27. It was here that the *Schaaf* court declared the class to be those are involved in the transaction that triggered the appraisal

report, thus giving notice as far back as 1995 that as a matter of law this class to make a claim based on reliance. *Id.* at 27.

While not legally required the Appellants still have evidence that the Respondents at least knew of the intended existence and sale of the land to the Appellants. RiverBank specifically put "Rothrock, LLC" as the project on the engagement letter for the RockRock Group appraisal (Rothrock Group was its former name). CP 212. The Respondents specifically call out the sale of the land from Sundevil to Rothrock Group as a pending transaction that they use as a comparative sale to give them a value. CP 705. There was an engagement letter for RussellRock Group, but this was lost by the Respondents so we do not know what it says. CP 718. In her appraisal notes Ms. Benson had, Ted Miller and Dave Largent listed, who were members of both Appellants. CP 181.

The Respondents try to argue that RussellRock Group's amendment of its complaint to add RiverBank is a clear showing that RussellRock Group was not part of the transaction. Respondents' brief p. 17 *fn.* 17. This is a misrepresentation of the evidence since RussellRock Group pled RiverBank's liability as an alternative in case the fact finder found Ms. Benson's testimony that she was engaged for Sundevil's purchase of the land credible. CP 53. As stated previously Mr. Jeffreys

testified in the complete opposite. This is again the Respondents asking for the best light of the evidence in violation of the law.

3. The Appellants justifiably relied on the misleading appraisal values of the Respondents

"[W]here a plaintiff reasonably reposes some trust in a misrepresentation and shows that that reliance proximately caused some damages" there is evidence of justifiable reliance. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 551 (2002)(Rejecting the harsh result of precluding the claim based upon the fact the plaintiff being contributory negligent under Restatement 2d of Torts 552A). Key to the question of justifiable reliance is first whether or not the plaintiff relied upon the false information, and second that the reliance was reasonable under the surrounding circumstances. *Id.* at 545. An opinion can be false information, and an appraisal value is appropriate to rely on. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 547 (2002), *Borish*, 155 Wn. App. at 906.

a. The Appellants relied upon the misleading appraisal values to take out the loan and complete the purchase

Members testify to receiving the misleading opinions of value. CP 635-37; 664-669; 670-1; 687. RiverBank required those members to approve the Appellants' loans that fulfilled this purchase. CP 307-309; CP

407-420; CP 307, 331, 396. Those members signed those documents after receiving those opinions of value. This shows reliance on the misleading appraisal values to complete these purchases.

Respondents argue that (i) as a matter of law only the manager can create reliance, and (ii) as a matter of law only seeing the appraisal creates reliance. Reliance is a question of fact based upon the surrounding circumstances, and case law does not establish the matters of law the Respondents argue.

i. Reliance on the misleading values is a question of fact that can be established through the members

Richland Sch. Dist. v. Mabton Sch. Dist., 111 Wn. App. 377 (2002) does not hold or state what the Respondents represent to this Court in their brief on page 22, that only the officer or agent making the decision can create reliance. The *Richland Sch. Dist.* court looked at all the facts presented of reliance and found no evidence that the individuals responsible for taking the harmful action (hiring an alleged sex offender) testified to relying on the information that was claimed to be false. *Id.* at 386.

In direct opposition to the facts in *Richland Sch. Dist.* the Appellants have presented evidence that the individual members were required to approve the loan prior to closing, and give their personal

guaranties and these members did rely upon the expert opinions of value to move forward with the transaction.

ii. The Respondents misinterpret and remove *Schaaf* and *Ramos* from their facts by claiming they establish that the appraisals must be looked at as a matter of law.

The complaint in *Schaaf* was that the appraiser failed to tell Schaaf that he had a bad roof. *Schaaf*, 127 Wn.2d at 20 ("[Schaaf] contended that Olson's appraisal was negligent because it failed to note the defective roof.") The *Schaaf* court noted that when Schaaf purchased the home he had offered a lower price because he knew it would need a new roof, and did not see the appraisal to rely on it to tell him otherwise. *Id.* at 30-31. *Ramos* is the exact same scenario as *Schaaf* of complaining the appraisal did not warn of a bad roof but never seeing the appraisal to know whether or not it talked about the roof. *Ramos v. Arnold*, 141 Wn. App. 11, 16 (2007) ("The Ramoses claimed that Arnold was negligent by failing to note the sagging portion of the ceiling in her appraisal report). *Schaaf* however was a review of the facts where the court found no facts of reliance. *Schaaf*, 127 Wn.2d at 30. This difference in relying on the appraisal value versus the appraisal for a warranty of construction was noted by the *Borish* court, with reliance on appraisal value stated as correct. *Borish*, 155 Wn. App. 906.

In particular though the *Schaaf* court went out of its way to clarify that there were other ways to prove reliance outside of reviewing the report. Right after referencing another jurisdiction finding no reliance based on not reviewing the appraisal, the court stated "*but* see *Costa v. Neimon*, 123 Wis.2d 410, 416, 366 N.W.2d 896, 900 (Ct.App. 1985) (reliance on appraisal report inferred from VA's acceptance of the loan amount)." *Schaaf*, 127 Wn.2d at 31, emphasis by the court. If *Schaaf* intended the only form of reliance to be based on seeing the appraisal then it did not need to put this "*but*" statement in there. Instead the *Schaaf* court pointed out other reliance and ended by stating there are other fact scenarios besides *Schaaf* that could state a claim. *Id.*

Here the Appellants pled they relied upon the appraised value that was communicated to their members in order to complete the loans and transactions. The Appellants have produced evidence of this misleading appraised value being communicated to members who were required to approve the loan that completed this transaction. If the *Schaaf* court was serious that reliance on the report could be inferred by loan approval like *Costa v. Nimons*, then the Appellants have produced more than this with them actually knowing of the appraised value before they agreed to take out the loans the appraisals supported.

b. Reliance here was reasonable under the circumstances

This test is based upon the surrounding circumstances. Here even the lender RiverBank relied on these appraisals to complete and secure the loan to the Appellants. CP 266-268. This is evidence of that reliance is justified.

4. There is no reason or justification to look to California law or any other law on how it deals with real estate appraiser negligence

When our Supreme Court formulated the tort duty of an appraiser to a third party in *Schaaf* and stated that no privity was required, it specifically noted California had held that privity was required for a third party claim against an appraiser. *Schaaf*, 127 Wn.2d at 29, *fn.* 11. Why should this change and this Court look to California now, or Georgia if it is similar to the rejected case law of California? There is no reason for this.

D. The statute of limitations is based on the discovery rule, and the only evidence of discovery puts the statute starting at the earliest in November of 2009, meaning the statute did not run until November of 2012.

Under the discovery rule the statute of limitations does not run until the plaintiff knows, or in the exercise of due diligence should have known, all essential elements of the cause of action. *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 593-4 (2000). This specifically

applies to these claims. *Id.* In particular it is the discovery of the misrepresented information. *Id.*

As stated earlier the Appellants claims and evidence is that the misrepresented information was expert opinion of value on the land they took out loans on and purchased. The question is when did the Appellants discover this misrepresented information of the expert opinion of value was false or misleading.

The facts showing the discovery of the misleading information are (1) the Respondents reappraised the land in 2009 using a similar method to 2006 (CP 627-628, 721), (2) RiverBank's review of this raised concerns and an e-mail about these was sent to Mr. Jeffreys on November 2, 2009 (CP 634), and (3) Mr. Jeffreys then called Mr. Cummins, a member of RussellRock and tried to sell him the RussellRock deed of trust for "dirt cheap (CP 637). This is clear evidence of the misleading information being discovered in November of 2009 and that the statute of limitations would have ran in November of 2012, but the Appellants filed over a year earlier in June of 2011.

The Respondents try to argue around this though by reframing the claimed misrepresented information as the price Sundevil paid for the land. Respondents' brief p. 45. As discussed this is inappropriate for several reasons.

To accept the Respondents arguments the Court must assume the price Sundevil/Jeffreys paid would trigger a non-expert to determine that the Respondents were not the experts they claim, and their appraisals were so terrible that everyone knew it. This cannot be assumed because RiverBank did rely on them in 2006 and only discovered their unreliable method in 2009.

The Court must also infer a lot of items in the factual record here that does not exist. For example that the HUD-1s and closing statements were actually clear, or that the attorney relationship was established and covered a duty to give advice on MAI appraisal values. None of this is allowed under the summary judgment standard.

E. Giving appraisers the clear cogent and convincing standard of proof before they are liable grants appraisers as a class of citizens a special immunity or privilege in violation of Washington's Constitution

Article 1 section 12 prohibits laws that grant a class of citizens privileges or immunities upon terms that do not belong to all citizens or corporations. It was under this section that our Supreme Court invalidated a limitation on the tolling of medical negligence claims for minors, since it granted as special immunity to the medical community that was not available to the general public. *Schoeder v. Weighal*, 179 Wn.2d 566, 573 (2014).

The Respondents argue that this issue was raised as a "constitutional" issue as a way to sneak this in on review under RAP 2.5(a)(3) exception for issues not raised at the trial court. In candor, I as counsel did not see this as a constitutional issue until I read *Schoeder* in 2014 and put it in here in hopes that this Court would take it under advisement, but knowing the Court "may decline to hear it." That said, whether the Court declines to hear it or not it has merit.

The function of the standard of proof is to instruct the fact finder concerning the degree of confidence our society thinks he/she should have in the correctness for a particular adjudication. *Hardee v. DSHS*, 172 Wn.2d 1, 8 (2011). The significance of the private interest at stake should directly correspond to the rigor of the burden. *Id.*

As pointed out in the Appellants' opening brief, an appraiser like an attorney gets the benefit of their professional opinion not being subject to the consumer protection act. However, unlike an attorney, an appraiser gets sued on that opinion under the standard of clear cogent and convincing evidence merely because the original duty of an appraiser started in negligent misrepresentation. Our Supreme Court has provided a statement that "real estate appraiser negligence" under *Schaaf* is a separate identifiable tort than negligent misrepresentation. *Eastwood*, 170 Wn.2d at 388. It appears that the clear, cogent, and convincing standard is more a

remnant of how negligent misrepresentation gave birth to real estate appraiser negligence. Like in life, in law it is wise to declare independence from a parent when a legal idea has begin to identify as its own family of claims.

There is simply no compelling significant interest in the outcome of appraisal negligence that is different than the professional interest of an attorney or an engineer. Without that, having a higher standard of proof for real estate appraiser negligence than for engineer or attorney negligence creates a special privilege for appraisers when they go before a fact finder. This violates Art. I Sec. 12 of our constitution.

III. Conclusion

The Appellants ask this Court to deny summary judgment in this matter and remand it for trial. The Appellants pled their claims and then supported those claims by evidence, this is a proper matter for a jury to decide and the Appellants ask this Court to allow it to go to the jury.

Respectfully submitted this 4 day of November, 2015.

Marshall W. Casey, WSBA 42552
Attorney for the Appellants

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 4th day of November, 2015, I cause a true and correct copy of the foregoing document, "Appellant's Statement of Arrangement," to be delivered in the manner indicated below to the following court reporter and counsel of record:

Counsel for Defendant: Ross White Witherspoon Kelley Davenport & Toole 422 W Riverside Ave, Suite 1100 Spokane, WA 99201		SENT VIA: / Hand Delivery __Eastern WA Attorney Services __U.S. Mail __Email

Dated this on 4th of November, 2015.

Larisa Yukhno

Larisa Yukhno-Legal Assistant
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