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.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

Respondents/Defendants Terry Savage, Jenny Benson, and their company Value Logic (collectively "Value Logic") were retained by RiverBank, a Spokane lending institution, to prepare summary appraisal reports for two parcels of raw land in Airway Heights, Washington in late September 2006. The adjacent parcels are referred to as the Rothrock Land (51 acres) and Sundevil Land (39 acres). The sole purpose of the appraisals was to assist the bank in determining if it had adequate security to finance a sale. RiverBank signed an agreement with Value Logic which limited Value Logic's responsibilities to RiverBank only and its exposure to the amount paid for each appraisal.

Appellants/Plaintiffs RockRock Group, LLC ("RockRock") and RussellRock Group, LLC ("RussellRock") (collectively "Plaintiffs") are manager-managed limited liability companies formed after Value Logic was retained by RiverBank to perform the appraisals. In November 2006 RockRock and Sundevil Development, LLC, an entity owned by Spokane real estate developer Greg Jeffreys, purchased the Rothrock Land. RussellRock and Sundevil Development purchased the adjacent Sundevil Land in January 2007. Both purchases were financed by RiverBank.

Plaintiffs' claims arise out of the Value Logic summary appraisals for the Rothrock Land and Sundevil Land. They allege that the two

appraisals were inadequate and reflected an inflated opinion of value which they allegedly relied on in making their investment and pled three causes of action: 1) negligent misrepresentation, 2) negligence, and 3) a violation of the Consumer Protection Act ("CPA"), RCW 19.86.020.

Value Logic moved for summary judgment, arguing that Plaintiffs failed to establish a *prima facie* case on any of the aforementioned theories and that the claims were time-barred by the statute of limitations. The trial court granted summary judgment after it found that Plaintiffs had failed to establish a *prima facie* case. The trial court declined to grant dismissal on the basis of the statute of limitations. Plaintiffs now appeal the trial court's summary judgment of dismissal. Value Logic cross-appeals on the trial court's failure to dismiss on the statute of limitations.

II. RESPONSE TO AND ASSIGNMENT OF ERROR

1. Did the trial court properly conclude that RockRock and RussellRock were not third-party beneficiaries of Value Logic's appraisals and therefore not owed a duty of care?

2. Did the trial court properly conclude that RockRock and RussellRock failed to raise a material issue of fact that the Plaintiff-Entities had justifiably relied on the Value Logic appraisals?

3. Did the trial court properly conclude that there was no issue of fact precluding dismissal of Plaintiffs' negligence claim?

4. Did the trial court properly conclude that Plaintiffs' claims were based on the professional services provided by Value Logic and, therefore, not covered under the CPA?

5. Did the trial court properly conclude that even if Plaintiffs' claims arose under the CPA, Plaintiffs failed to raise a material issue of fact as to each element of a CPA claim?

6. Did the trial court err in finding that Plaintiffs' claims were not time-barred by the applicable statute of limitations?

III. STATEMENT OF THE CASE

A. RiverBank retains Value Logic to perform summary appraisals.

In late September 2006, RiverBank contacted Value Logic to request a bid to appraise the undeveloped Rothrock Land (51 acres) and Sundevil Land (39 acres) parcels in Spokane's West Plains. (CP 4, ¶6; 5, ¶9; 209; 213) The appraisals were triggered after Greg Jeffreys, a local developer, contacted and informed RiverBank that his company, Sundevil Development, intended to purchase the properties.[1] (CP 209)

The purpose of the appraisals was to provide RiverBank with a summary report for each parcel so that it could determine if it had adequate security to finance the transaction. (CP 211-12) Value Logic

[1] At deposition, Jeffreys testified that he never intended to personally be a borrower in purchasing the parcels. (CP 715) However, it is undisputed that at the time the appraisals were requested, "Rothrock LLC" and Plaintiff RockRock (or RussellRock) did not exist. (CP 275) No agent of Plaintiffs triggered the appraisal as no entity existed at the time.

submitted a successful bid of $3,000 to appraise the Rothrock Land and $2,000 to appraise the Sundevil Land. (CP 209; 215; 217) The parties executed a Professional Services Agreement defining and limiting Value Logic's liability to RiverBank. (CP 212)

B. Sundevil Development executes purchase and sale agreements.

On September 20, 2006, Greg Jeffreys and Sundevil Development executed a purchase and sale agreement with F. Wallace "Rocky" Rothrock and trustees of the James S. Porter Trust to buy the 51 acres of Rothrock Land for $475,000. (CP 219-27) The purchase and sale agreement was signed by Eric J. Sachtjen, Member of Workland & Witherspoon, PLLC. (CP 227) On September 25, 2006 Sundevil Development executed a purchase and sale agreement with Rocky Rothrock to buy the adjacent 39 acres of Sundevil Land for $300,000. (CP 229-34) Both purchase and sale agreements identify Workland & Witherspoon as closing agent and purchaser's attorney. (CP 221, 230)

C. Value Logic appraises the Rothrock Land and Sundevil Land.

On September 28, 2006, Value Logic appraiser Jenny Benson visited the two parcels to inspect and collect information required for the Appraisals. (CP 238) Value Logic submitted two appraisals on October 9,

2006.[2] (CP 238-39; 252)

Value Logic's opinion of value for the Rothrock Land was $4,500,000. (CP 237) RiverBank performed a Commercial Appraisal Review of the appraisal, concluding that it "led logically to the same or similar conclusion as those reached by the appraiser" and agreed "with the appraiser's analyses and conclusions, including the value estimate. . . " (CP 266-67) The opinion of value provided by Value Logic for the Sundevil Land was $4,250,000. (CP 253)

The two-page cover letter of each appraisal directed the client, RiverBank, to the limiting terms and conditions of the appraisal in bold-faced font. (CP 237; 252) Each appraisal's "Introduction" states its intended use and identifies the client as "Rachel Pulis, Riverbank." (CP 241; 256) The Assumptions and Limiting Conditions limit the appraisal's scope and use, including the liability of Value Logic. (CP 247-49; 262-64)

D. Rothrock Land transfer to Brian Main; Main transfers Rothrock Land to Newly-Formed RockRock Group, LLC.

On October 2, 2006, Brian Main, a Spokane realtor and real estate developer, entered into a purchase and sale agreement with Sundevil Development, by which he was assigned 75% of Sundevil Development's right to purchase the Rothrock Land for $1,630,000. (CP 270-73)

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[2] Value Logic resubmitted the Sundevil appraisal on November 16, 2006 with a corrected property description. (CP 252)

On October 3, 2006, Plaintiff RockRock Group, LLC was formed and Bart Johnson was appointed manager. (CP 275-76; 301) The LLC operating agreement and filing documents were prepared by attorney Eric Sachtjen. (CP 276) As a manger-managed LLC, RockRock designated the authority and duties of the manager Bart Johnson in acting on its behalf and limited the exposure of the LLC's members. (CP 278-79; 344-45) Mr. Johnson was authorized "to acquire property from any Person as the Manager may determine" and "to borrow money from financial institutions . . . as the Manager deems appropriate." *Id.* "Unless authorized to do so by [the] Agreement or by the Manager, no member, employee, or other agent of the Company shall have any power or authority to bind the Company in any way, to pledge its credit or to render it liable for any purpose." (CP 279; 345)

On November 3, 2006, RockRock executed a promissory note to RiverBank for $1,025,000 to purchase the Rothrock Land. (CP 307-09) On November 6, 2006, Brian Main assigned his purchase rights to RockRock with Bart Johnson signing as manager. (CP 311) On November 8, Bart Johnson signed RockRock's Closing Instructions with closing attorney Eric Sachtjen. (CP 323; 326-28) Mr. Johnson "agree[d] that Seller shall pay real estate taxes on the $475,000 purchase price ($8,455), and Purchaser, RockRock Group, LLC shall pay any additional

real estate excise taxes due as a result of RockRock Group, LLC's payment of consideration for the right to purchase the property." (CP 320-21) Mr. Johnson executed an $800,000 promissory note from RockRock to Sundevil Development. (CP 330-32)

Mr. Johnson did not speak with any of the members regarding their reasons to invest (CP 453-54), he had not reviewed the Value Logic appraisal (CP 470), he was unaware of the appraisal amount (*Id.*), and he relied only on Greg Jeffreys in finalizing the transaction. (CP 456)

E. Sundevil Land transfer to Main; Main transfers to RussellRock.

On November 15, 2006, RussellRock Group, LLC was formed and Bart Johnson was again appointed manager. (CP 336; 338) No members were identified. *Id.* On November 17, Brian Main entered into a purchase and sale agreement with Sundevil Development to acquire a 75% ownership in the Sundevil Land for $1,630,000. (CP 381-85) The agreement identified Workland & Witherspoon as the closing agent. (CP 383) On November 29, RussellRock members were ascertained. (CP 339)

On January 10, 2007, Brian Main assigned his rights to RussellRock, with Bart Johnson signing as manager. (CP 387) On January 12, 2007, Mr. Johnson executed two promissory notes on behalf of RussellRock for the Sundevil purchase – one to RiverBank for $990,000 and another to Sundevil Development for $800,000. (CP 391-

97) Mr. Johnson signed two HUD-1 Settlement Statements which identified the contract sale price of $300,000 to be paid to the seller, Rocky Rothrock, by RockRock Group, LLC. (CP 399-401; 404-405)

As part of the loan agreement with RiverBank, Mr. Johnson was designated as the sole individual who could act on behalf of RussellRock to purchase the Sundevil Land. (CP 407) As with the prior RockRock transaction, Mr. Johnson performed no due diligence (CP 453-54), did not review any appraisal (CP 470), and he relied only on Greg Jeffreys. (CP 456) No member of either entity read the appraisals prior to closing.

F. <u>After unsuccessful attempts to sell the parcels, RussellRock members sue Jeffreys alleging negligent misrepresentation/fraud</u>

Plaintiffs attempted to sell the parcels for a several years, but were unsuccessful. (CP 3, ¶16) Certain members of RussellRock blamed the inability to sell the Sundevil Land on Greg Jeffreys and filed a separate lawsuit based on their own individual claims in January 2010 against Jeffreys and Sundevil Development alleging fraud and negligent misrepresentation. (CP 422-33) Mr. Jeffreys and his entity eventually settled all claims of both RussellRock and RockRock against them. (CP 434-35; 437-39; 444-48; 460) On June 1, 2011, the Plaintiff-Entities filed suit against Value Logic alleging three causes of action regarding the Rothrock and Sundevil Land appraisals: negligent misrepresentation,

negligence, and a violation of the CPA.

IV. SUMMARY OF ARGUMENT

Value Logic was retained by RiverBank to perform summary appraisals of undeveloped land. (CP 237; 252) The only purpose of the appraisals was to assist the bank in internal decision making and financing. (CP 264) Value Logic neither committed to influence the purchaser's decision to buy the land nor performed the appraisals to guarantee the purchaser's sale price on a future "flip" of the properties. *Id.*

The plaintiff-entities were undisputedly formed as manager-managed LLCs to specifically shield and protect their members. The only business purpose of each entity was to buy and "flip" land as quickly as possible for substantial profits. (CP 671; 843; 853; 855) Plaintiffs designated a single individual to act as manager, Bart Johnson. (CP 278, 301; 376; 407) Mr. Johnson testified that he did not review the appraisals, rely on the appraised amounts, speak to any members prior to closing about their reasons for investing, and had performed no due diligence. (CP 453-54, 470) Mr. Johnson has never claimed that this information was a prerequisite to his decision to purchase the parcels. (CP 456)

The unequivocal statements of Bart Johnson, the sole person authorized to act (and rely) on RockRock and RussellRock's behalf mandated dismissal, which the court correctly did on summary judgment.

Faced with undisputed facts and clear law, Plaintiffs request that the corporate structure and law be ignored because some members were aware of the appraised values before making their personal decision to buy shares in the plaintiff-entities and this knowledge and alleged reliance should flow to the entities. The trial court rejected these arguments because Value Logic owed no duty to Plaintiffs under specific language in the cover letter and appraisal which identifies its intended recipient, its purpose, and limits the scope of its use. (CP 237; 252) Moreover, Plaintiffs do not fall into a limited class of individuals/entities which would be contemplated by Value Logic when performing the appraisals as neither entity legally existed at the time the appraisals were requested.

Even if Value Logic owed Plaintiffs a duty as potential buyers of real estate, there are no facts that Plaintiffs reviewed the appraisals prior to closing. Washington case law is unequivocal that a party alleging negligent misrepresentation by an appraiser must have reviewed the appraisal prior to closing. *Schaaf v. Highfield*, 127 Wn.2d 17, 27 (1995). As manager, Mr. Johnson was the sole individual authorized to act on the LLCs' behalf in buying land. (CP 278-79; 344-45) The trial court did not err in finding that Plaintiffs failed to meet their burden on summary judgment of producing material facts to support each element of a

negligent misrepresentation claim.[3]

Neither Plaintiffs' negligence nor CPA claims have application in this case. Plaintiffs' allegations of negligence relate to the performance of the appraisal. As third parties suing an appraiser for a prepared appraisal, Plaintiffs must demonstrate that they were owed a duty and justifiably relied on the appraisal – the same elements needed to satisfy a negligent misrepresentation claim. *Ramos v. Arnold*, 141 Wn. App. 11, 19 (2007). The CPA does not apply to professional services performed, only the entrepreneurial aspects of a trade or business. *Id.* at 20. Even if the CPA applied, Plaintiffs failed to satisfy the five elements of a CPA claim.

V. ARGUMENT

A. Appellate Courts Review Summary Judgment Orders *De Novo*.

The review of a summary judgment decision is *de novo*; the appellate court engages in the same inquiry as the trial court and only considers evidence that would be admissible at trial. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359 (1988). At summary judgment, the moving party bears the initial burden of showing the absence of a

[3] On appeal, Plaintiffs go to great lengths to argue the quality and performance of the appraisals, even introducing testimony of an expert appraiser. For purposes of summary judgment, whether the appraisals were performed below the standard of care or contained false information was not at issue. Plaintiffs' claims failed as a matter of law regardless of the substance of the appraisals because Plaintiffs were not owed a duty by Value Logic and had not, in any event, relied on the appraisals. Had the case proceeded to trial, Value Logic was prepared to fully defend the quality and performance of the appraisals and had identified experts to support the appraisals (despite Plaintiffs' false assertions).

genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party is a defendant, that initial showing requires nothing more than pointing out that there is an absence of evidence to support the plaintiff's case. *Id.* at 325 (*cited by Young v. Key Pharm. Inc.*, 112 Wn.2d 216, 225, n.1 (1989)).

The burden then shifts, and if the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," the trial court should grant the motion. *Celotex*, 477 U.S. at 322. A plaintiff opposing summary judgment must create more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "When a non-moving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established." *Lipscomb v. Farmers Ins. Co.*, 142 Wn. App. 20, 27 (2007).

B. Plaintiffs Failed to Establish a Negligent Misrepresentation Claim.

To establish a claim of negligent misrepresentation, a plaintiff "must show by clear, cogent, and convincing evidence that the defendant negligently supplied false information the defendant knew, or should have known, would guide the plaintiff in making a business decision, and that the plaintiff justifiably relied on the false information." *Baddeley v. Seek*,

138 Wn. App. 333, 339-40 (2007), *citing Lawyers Title Ins. Corp. v. Baik,* 147 Wn.2d 536, 545 (2002); Restatement (Second) of Torts § 552(1) (1977). In addition, a plaintiff must show that the false information was the proximate cause of the claimed damages. *Id.*

As set forth below, there is no evidence that Value Logic made any representations to Plaintiffs, knew Plaintiffs were buyers who intended to rely on the appraisal value for investment purposes (rather than for financing), or that Plaintiffs, in fact, justifiably relied on Value Logic's information.

1. The Professional Services Agreement, Appraisal Cover Letter, and Appraisal Report Expressly Limited the Use of the Appraisals, a Third Party's Right to Rely, and Value Logic's Liability.

As a matter of law, the terms and limiting conditions of the Appraisals and Professional Services Agreement between Value Logic and RiverBank preclude any claim for damages by a third-party based on Value Logic's opinion of value. In *Barnes v. Cornerstone Investments, Inc.*, 54 Wn. App. 474, 478 (1989), the court found that reliance could not be justified for an appraiser's opinion of value where the Letter of Opinion contained "numerous explicit disclaimers and conditions to its use." *Id.* The *Barnes* plaintiffs had taken the Letter of Opinion home with them and read it. Although they were aware the appraised value of the property assumed completion of the remodeling, they did not look at the property,

contact the appraiser, or ask anyone about the property or the appraisal.

Here, Value Logic's appraisal and the accompanying cover letter directed the client and recipient, RiverBank, to the limiting terms and conditions of the summary appraisal report in bold-faced font:

> **Your attention is directed to all the Assumptions and Limiting Conditions on Pages 11 through 13.**

(CP 237; 252)(emphasis in original). The Introduction section of each summary appraisal set forth the intended use of the appraisal:

> This report is . . . for the sole use and benefit of the client . . . Neither this report, nor any of the information contained herein shall be used or relied upon for any purpose by any person or entity other than the client. The appraiser is not responsible for the unauthorized use of this report.

(CP 241; 256). The Summary of Salient Facts of the appraisal identified the client the report was intended for as "Rachel Pulis, Riverbank." *Id.*

The Assumptions and Limiting Conditions of the appraisal limited its scope and use as well as liability. In pertinent part, the appraisal set forth the following conditions and stipulations:

> 1) This appraisal is considered confidential between **the appraiser and the client.**
>
> . . .
>
> 13) The liability of [Value Logic] **is limited to the client only and only up to the amount of the fee actually received for the assignment. Further, there is no accountability, obligation, or liability to any third party.** If this report is placed in the hands of anyone other than the client, the client shall make such party aware of all limiting conditions and assumptions of the assignment and related discussions.

...

17) Without prior written approval from the author, **the use of this report is limited to internal decision making and financing. All other uses are expressly prohibited. Reliance on this report by anyone other than the client, for a purpose not set forth above, is prohibited. The author's responsibility is limited to the client.**

...

(CP 247-49; 262-64)(emphasis added).

Plaintiff RockRock never received the Rothrock Appraisal or cover letter. RockRock, therefore, had no context as to the scope of the appraisal, intended recipient, or how it was performed. Some members of RussellRock claim to have reviewed the Sundevil *cover letter* but not the appraisal prior to closing. Based on Plaintiffs' incorrect theory that a member's reliance can flow to the entity, the review of the cover letter by members would establish that RussellRock was on notice of the appraisal's limitations. Like *Barnes*, where the plaintiffs only received a Letter of Opinion, members only received a cover letter, not the full appraisal.

The cover letters directed the client and recipient, RiverBank, to the limitations and conditions within the appraisal in bold-faced font. (CP 252) Had RussellRock members actually reviewed the appraisal (which they did not), they would have read on the first page that use was limited to the client, RiverBank. (CP 256) Unauthorized use of the information contained in the appraisal was not permitted. *Id.* Specifically, the

appraisal was "limited to internal decision making and financing" for RiverBank. (CP 264) "Reliance on this report by anyone other than the client, for a purpose not set forth above, is prohibited. The author's responsibility is limited to the client." *Id.*

2. Plaintiffs Were Not Owed a Duty as Third-Party Beneficiaries.

The Washington Supreme Court has held that a third-party may state a claim for negligent misrepresentation against a real estate appraiser in special circumstances pursuant to Rst. (2d) of Torts § 552. *Schaaf v. Highfield*, 127 Wn.2d 17, 27 (1995). "The liability of a real estate appraiser in these circumstances extends only to those involved in the transaction that triggered the appraisal report, including, but not necessarily limited to, the buyer and the seller." *Id.* Plaintiffs contend that as purchasers of the property, they relied on the appraisal report supplied by Value Logic and were owed a duty despite a lack of privity of contract.

Unless the recipient of the information is made known to the defendant or to whom the recipient will provide the information, no liability can exist. "The policy reason for attempting to limit the class of potential plaintiffs claiming negligent misrepresentation is deference to legitimate fears of indeterminate liability to third persons." *Schaaf*, 127 Wn.2d at 24 (internal quotations omitted). Plaintiffs are unable to show that they fall within a limited class of intended beneficiaries or that Value

Logic was aware RiverBank would supply the appraisal to the investors in LLCs formed *after* the appraisers were retained. The appraisals and cover letters reveal that Value Logic only intended to share the documents with RiverBank. (CP 237; 252) It was not aware of Plaintiffs, their investing members, or that certain members would use the opinion of value from the cover letter as a factor for buying shares in the plaintiff-entities.

A plain reading of the appraisal cover letter which RussellRock members claim to have relied on shows the report was prepared before they even became members. (CP 252) The valuation date was September 28, 2006 and the appraisal was dated November 16, 2006. *Id.* No mention of RussellRock is in the appraisal.[4] It is illogical to assume that a completed appraisal was prepared for a non-existent party with no members (only a manager) until closing. It cannot be argued that Value Logic should have anticipated that unknown individuals would choose to rely on the cover letter *for investment purposes to buy shares* in an unformed LLC when Value Logic only prepared the report for a bank.

Plaintiffs ask the Court to expand the appraiser's duty beyond what it bargained for. An independent duty does not exist where Plaintiffs' members used the appraisal for something other than the stated use. "The

[4] RussellRock amended its Complaint to add RiverBank as a defendant as the appraisal on the Sundevil Land was not for RussellRock. RussellRock effectively concedes that it was not a third-party beneficiary under Rst. (2d) of Torts § 522 by suing RiverBank.

analytical framework provided by the independent duty doctrine is only applicable when the terms of the contract are established by the record. To determine whether a duty arises *independently* of the contract, we must first know what duties have been assumed by the parties *within* the contract." *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 92 (2013). Value Logic expressly contracted to conduct the appraisal for financing purposes as stated in the RiverBank service agreement. Under *Eastwood v. Horse Harbor Found., Inc.*, the exculpatory clauses contained in an appraisal are not nullified:

> we do not disturb the general rule that a party to a contract can limit liability for damages resulting from negligence. Exculpatory clauses are strictly construed and must be clear if the exemption from liability is to be enforced.

170 Wn.2d 380, 393 n.3 (2010)(internal citations omitted). Clauses in purely commercial dealings, such as the one at hand, are *per se* conscionable and the burden of establishing unconscionability is on the party attacking it. *See Schroeder v. Fageol Motors, Inc.,* 86 Wn.2d 256, 262-63 (1975); *see also Am. Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 223 (1990).

No appraiser would ever agree to perform an appraisal if its exposure could not be limited, especially to an unknown, non-existent third party who never reviewed the appraisal. Certain members apparently

relied on the appraised value not as to purchase price, but as to its flipping price in a *future* transaction. (CP 636; 671) Value Logic did not guarantee the sale price in a future transaction and it expressly disclaimed such use in each appraisal. (CP 241; 256) It makes no sense that the party that entered into the appraisal agreement, RiverBank, was more limited on the use of the appraisal and had substantially fewer remedies than entities that came into existence after the appraiser was retained and whose members (but not manager) used the opinion of value for unauthorized purposes.

3. Plaintiffs Did Not and Could Not Rely on the Appraisals.

To establish their claim, Plaintiffs must show that they justifiably relied on the allegedly negligent misrepresentations by Value Logic in the appraisals. *See Schaaf*, 127 Wn.2d at 30. "Ordinarily, whether reliance was justifiable is a question of fact, but when reasonable minds could reach but one conclusion, summary judgment is appropriate." *Id.* The issue of reliance requires a fact specific determination as to whether the party had contact with the appraiser and the extent to which the party reviewed the appraisal report. *Id.* at 27. Generally, reliance on an appraisal beyond its stated function will often be unreasonable unless a finding of justifiable reliance is supported by substantial evidence.

Washington courts are resolute that as a matter of law a third-party purchaser, whether or not a duty of care even exists, must have reviewed

and relied on the appraisal to avoid summary judgment dismissal:

- *Schaaf*, 127 Wn. 2d at 30-31 (emphasis added) (citations omitted):

> Even more compelling evidence that Schaaf did not rely on the appraiser's report is his admission in a letter that he did not even see the appraisal report until some time after April 1991, more than a year *after* he bought the house. Thus, he could not possibly have directly relied on the report at the time of purchase. . . **Schaaf failed to prove a case as he did not rely on Olson's appraisal report**. We affirm the trial court's summary judgment.

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

> Under *Schaaf,* if the Ramoses did not see the appraisal report before they purchased the home, they could not have relied on it. . . in [plaintiff's] deposition testimony, she denied knowledge of the representations made by the appraiser in her report, stating, "I haven't seen it." . . .The Ramoses' claim fails under the negligent misrepresentation analysis detailed in *Schaaf.*

Bart Johnson, manager of both manager-managed entities, was undisputedly the only person authorized to act on Plaintiffs' behalf. (CP 278; 344 §§4.1-4.12) In purchasing the parcels, Mr. Johnson testified that he did not speak with any members regarding their reasons to invest (CP 453-54), he had not reviewed the Value Logic appraisals (CP 470), he was unaware of the appraised amounts (CP 457), and he relied only on Greg Jeffreys in the transactions having been told that "even an idiot could come into these deals and make a quarter million dollars."[5] (CP 451) Mr. Johnson relied *only* on Jeffreys when deciding to purchase the properties:

[5] Johnson's confidence in the deal was based on Jeffreys' net worth, prior successful deals with Jeffreys, and the "booming" real estate market in Airway Heights. (CP 453; 456)

> Q. Did you rely on anyone else with respect to the story of how this project was going to start and turn out to be this great thing where you can double your money within a very short period of time?
>
> A. (Johnson) Basically, it was Greg.
>
> Q. And what I am saying is, do you claim you relied on anyone else?
>
> A. No.

(CP 453-54) As the sole individual authorized to act on Plaintiffs' behalf, Mr. Johnson performed no due diligence, did not hire a realtor to look at the property or assess value, did not hire an independent appraiser, did no online research or market analysis, and did not pay attention to the tax-assessed values. (CP 454) He testified that he only relied on Greg Jeffreys.

> Q. So, again, my understanding of your testimony -- and you correct me if I am wrong -- is, you were relying on, and dependent upon, what Greg Jeffreys was telling you, correct?
>
> A. (Johnson) Right.
>
> Q. It doesn't sound like you blame anyone else, in terms of the purchasing of the property, than Jeffreys. Would that be fair?
>
> A. Blame? I don't know if that's a -- yeah.
>
> Q. Who you claim is responsible?
>
> A. Yeah.
>
> Q. It's Greg Jeffreys, right?
>
> A. Yeah.

(CP 454; *see* CP 456) Most significantly, in e-mailing a fellow RockRock

member, Mr. Johnson stated that he had never seen the Value Logic appraisals:

> They are now questioning if all the investors saw the appraisal before joining in? **I personally did not see the appraisal I was just told by Jeffreys That they came in with large values.** Did you see the appraisal before joining RockRock?

(CP 470)(emphasis added). He never saw the appraisals and was not even told the actual opinion of value, just that the values were "large". Mr. Johnson confirmed those statements in his deposition:

> Q. You had never seen the appraisals before, correct?
>
> A. Yeah. That's what I told Scott Burden in this e-mail.

(CP 457; *see also* CP 458) Every Washington negligent misrepresentation case against an appraiser has been dismissed on summary judgment where it is undisputed the plaintiff did not review the appraisal prior to closing. This case is no different and the trial court did not err in finding that Plaintiffs had not relied on the appraisal and dismissing Plaintiffs' claim.

a. Plaintiffs' Manager Bart Johnson Is the Only Person Who Can Establish Reliance.

As a matter of law, the sole individual who could act on behalf of Plaintiffs at each closing was Bart Johnson, the manager. Justifiable reliance cannot be established unless the officer or agent making the decision for the entity relied on the alleged misrepresentation. *Richland Sch. Dist. v. Mabton Sch. Dist.*, 111 Wn. App. 377, 386 (2002). Mr.

Johnson was the delegated decision-maker and was authorized to act independently.[6] He testified that he did not read any appraisal or know the specific amount and relied only on the representations of Greg Jeffreys. (CP 453-54, 456, 458)

Washington's LLC Act, the LLC operating agreements, banking documents signed by the Plaintiffs and their members, and Plaintiffs' counsel's communications unequivocally state that the manager was the exclusive authority of Plaintiffs. "If the certificate of formation vests management of the limited liability company in a manager or managers, no member, acting solely in the capacity as a member, is an agent of the limited liability company." RCW 25.15.150(3). The Operating Agreements are explicit that the manager is the sole individual authorized to act on behalf of the LLCs. (CP 278; 344 §§ 4.1-4.12)

In response to Value Logic's interrogatories, Bart Johnson as manager was the sole person identified who was "a witness to the decisions of the entity made at the time of its investment in the property." (CP 817) No other witnesses were identified to testify as to the decisions of either entity to purchase the parcels, only the reliance of its members.

In discovery, Plaintiffs were unwavering in their position that a

[6] Mr. Johnson exclusively signed over eight documents at both closings which bound the entities including assignments of purchase & sale agreements (CP 311; 326-28; 387; 389); closing instructions (CP 316-24); promissory notes with Sundevil Development (CP 330-32; 395-97); and promissory notes with RiverBank. (CP 391-93)

member's knowledge, beliefs, and understanding are not binding on the Plaintiffs. Members were not parties to the action and the only individual with authority to act on Plaintiffs' behalf was the manager, Bart Johnson:

- *Plaintiffs' Answers to Defendants' First Set of Interrogatories*

  General Objections:

  Objection to the extent the interrogatories ask questions of the members of RockRock Group, LLC [and RussellRock Group, LLC]. CR 33 only allows interrogatories on parties or a party's agent, RockRock Group [and RussellRock Group], LLC is a manager-managed limit liability company under the laws of the State of Washington, and its members are not its agents. RCW 25.15.150; See *Dragt v. Dragt/Detray*, 139 Wn. App. 560, 575 (2007) (In a manager-managed company members owe no duties to the company by reason of being a member)

(CP 817, 826)

- *Plaintiffs' Counsel's letter to Value Logic's Counsel*:

  The objection based upon members not being under the entities' control . . . Since these entities are manager-managed limited liability companies, and their members are not by their nature agents, nor do they owe any legal duties to the entities based on their membership, the members are not covered by CR 33(a), nor is the members' information under control of the LLCs. To the extent that you would like to discover information about the members I believe that third party discovery requests are appropriate.

(CP 829-30)

- *Plaintiffs' Counsel's letter to Value Logic's Counsel*:

  I want to clear up that Mr. Watkins and Mr. Cummins are my clients. I represent them both in several matters, and have given them legal advice. My objections on the

> interrogatories and requests for admissions however has been that they are members of a manager managed LLC, and just like shareholders of a corporation, members of a manager managed LLC have no duties to the LLC. As such I can advise them as their attorney, but my other clients of RussellRock and RockRock cannot compel them to act or respond. . .

(CP 832)

Significantly, Mr. Johnson never stated knowing the appraisal amount was a prerequisite to complete the transaction or that in acting on behalf of and binding the Plaintiffs he relied on another member's impressions or representations. Simply possessing documents (such as an appraisal cover letter) or information supporting a claim of negligent misrepresentation does not establish the reliance element. In *Richland Sch. Dist.*, the Richland School District sued the Mabton School District for making negligent misrepresentations about a former employee who was an alleged child molester. 111 Wn. App. at 380. Richland claimed to have relied on Mabton's positive letters of recommendation for the employee when deciding to hire him. *Id.* Mabton was aware of the molestation allegations, but nevertheless offered a positive review for its former employee. However, Richland's misrepresentation claim was dismissed as a matter of law because none of the school district officers who made the decision to hire the employee testified that they had relied on the letters of recommendation. *Id.* at 386. Despite possessing the letters, the entity did

not rely on them in its decision-making.

There is no authority for Plaintiffs' position that a member's "knowledge can flow into the decision to invest." Plaintiffs' proffered declarations of certain members raise no issue of fact to block summary judgment. Further, the testimony itself is inconsistent and contradictory. Kelly Hubbell, a member of manager-managed Stan & Hubbs, LLC, signed a declaration stating she wrote down the appraisal number for her investment in RockRock. Stan & Hubbs, LLC is a RockRock member. (CP 838) Steve Stanek, Stan and Hubbs' current manager, has stated that he did not know or rely on the appraisal amount or read the appraisal. (CP 837) In fact, Stanek does not even know who Bart Johnson is. (CP 836)

For RussellRock, Plaintiffs submit the declarations of Alan Cummins and Keith Watkins. Both Watkins and Cummins signed a "Limited Liability Company Resolution to Borrow" on January 12, 2012 which ceded all authority to Bart Johnson to act on their behalf. (CP 407-20) Even if Mr. Johnson had relied on Mr. Watkins' participation based on his financial stability, there are no facts that Johnson knew that Watkins relied on the reported appraisal amount as a reason to invest. In fact, Mr. Watkins declaration is inconsistent with prior statements he made in communications with other members and in his lawsuit against Greg

Jeffreys. (CP 853, 855; s*ee, generally* CP 422-33)[7]

Bart Johnson could only rely on what he knew personally or was told by other members and no single member entered into the transaction or relied on information the same way. What the members relied on in deciding to purchase their individual shares would only relate to the signing of personal guaranties, not the LLCs' actual claims against Value Logic related to the purchase of the properties. Plaintiffs have seemingly shown that individual members claim causes of action that have never been pled and are not before any court. Plaintiffs were unaware of any member's reliance at the time Plaintiffs purchased the properties.

b. Member Reliance on the Appraisal Amount Was Not Justified.

"Under *Schaaf,* if the [buyer] did not see the appraisal report before they purchased the home, they could not have relied on it." *Ramos*, 141 Wn. App. at 19 citing *Schaaf*, 127 Wn.2d 17. It is undisputed that no member read the actual appraisal for either transaction. Some RockRock members claimed to have been told the appraisal amount by Brian Main and RussellRock members Messrs. Watkins and Cummins claim to have

[7] In June 2008, Watkins stated "When we originally got into the investment we thought we had [RussellRock] sold on a no brainer basis, and as we know it just fell through." (CP 853) Almost a year later in May 2009, Watkins wrote, "Initially all of us only got involved because Greg [Jeffreys] had a buyer on the hook he was reasonably sure was buying both [RussellRock] and Rock Rock." (CP 855)

read at least part of the two-page cover letter to the Sundevil appraisal.

Plaintiffs now ask the Court to expand appraiser liability to third party manager-managed LLCs *if even one of its members* were aware of the appraised value of the property. Plaintiffs' sole authority in support of this contention, *Costa v. Neimon*, 123 Wis.2d 410, 366 N.W.2d 896 (1985), is not precedent in Washington and does not disrupt Washington law that a party must have reviewed the appraisal in order to have justifiably relied on it. It does not involve a commercial real estate transaction, rather, the case relates to a homebuyer who, as condition precedent to the purchase, needed to secure financing which was included in the purchasing agreement. *Id.* at 900. The plaintiff never had the opportunity to review the appraisal because it was not given to the plaintiff even upon request.

The inference drawn in *Costa* was that because the VA had accepted the appraisal, the plaintiff could rely on the accuracy of the *purchase price*. 366 N.W.2d at 900. Here, Watkins' and Cummins' claimed reliance on the appraisal value was substantially different. Their alleged reliance on the appraisal amount was to establish what the potential profit they could make in the *flip price* of the properties, not the purchase price. ("If the appraisal had not been what I was led to believe it was, at least twice the purchase price, I would not have continued in the

transaction."[8](CP 671)) There is no support in any agreement between Value Logic and RiverBank or RiverBank and Plaintiffs that as a condition precedent to the purchase, the properties had to be appraised at double the purchase price. Value Logic did not agree to do the appraisal to assist an investment group in determining the benefit of their bargain, but to assist the bank in a financing decision.

c. Other Jurisdictions Are in Accord with the Trial Court's Ruling.

Although not binding, other courts have considered an appraiser's duty to third parties subsequent to Value Logic's dismissal finding that an appraiser cannot be liable to a third party where 1) the appraisal was conducted for the purposes of financing on behalf of a bank; 2) express language in the appraisal and cover letter defined its use; and 3) the plaintiffs had relied on the appraisal for reasons other than that use.

1. California

In *Willemsen v. Mitrosilis*, 230 Cal. App. 4th 622, 624, 178 Cal. Rptr. 3d 735 (2014), *review denied* (Jan. 14, 2015) the court held that the purchaser of vacant land had failed to raise a triable issue of material fact to show that the appraiser intended to supply information to him to influence his decision whether to buy the property. The purchaser alleged

[8] Note that the transaction that Mr. Watkins is referring to is his $10,000 purchase of a share in RussellRock and signature on a personal guaranty. Mr. Watkins had no authority to act on behalf of RussellRock as he was not a manager or authorized agent.

that he relied on the appraisal to determine whether or not the property was suitable for a recycling facility, not just for the purposes of the bank having adequate collateral. *Id.* at 631-32.

In support of summary judgment, the appraisers provided a copy of the bank's request for appraisal services. *Id.* at 628. The request named the plaintiff on the subject line and identified the bank as the client and intended user of the appraisal. The court found that "the bank's determination that the collateral was of adequate value for its purpose was not a guarantee that the property was suitable for [the plaintiff's] needs." *Id.* at 629. "Whether the lender conducts the appraisal in house or hires an outside appraiser, the considerations are the same. The appraisal ordered by the lender is for its own protections and the borrower has his or her own means of ascertaining the desirability of the property." *Id.*

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

Id. at 632 (emphasis added).

2. Georgia

The court in *Wingate Land, LLC v. ValueFirst, Inc.*, 314 Ga. App. 24, 25, 722 S.E.2d 868 (2012), considered a similar scenario to the *Willemsen* court. In *Wingate*, the appraiser was hired by the lender to do

the appraisals for the purpose of allowing the lender to determine the fair market value of each property to be used as security for the loans.

> It is reasonable to infer that as to each appraised property ValueFirst and Smith were aware of the existence of a seller and a buyer who could be affected by the information provided in the appraisals. **That is not evidence, however, that ValueFirst or Smith did the appraisals for the purpose of inducing the seller or the buyer to justifiably rely and act upon the appraisals.**

Id. at 26 (emphasis added). The court concluded that even if the appraisal negligently included a false fair market value, there was no evidence that the appraisers had appraised the properties "for the purpose of inducing [the purchaser] to rely and act on the information, nor any evidence that [the purchaser] did rely and act on the information." *Id.*

Following the *Wingate* decision, Georgia then considered whether a developer and his LLC (in which he was the sole member) could assert a claim of negligent misrepresentation against an appraiser. *Adams v. DeWitt*, 327 Ga. App. 576, 760 S.E.2d 191 (2014). The appraisal stated it was intended only for the bank and was not to be used for any other purpose. The appraisal included a cover letter which stated that the appraisal was subject to specific limiting conditions. *Id.* at 578.

The evidence established that the appraiser knew that a borrower existed, but it could not support an inference that appraiser "actually was aware that the borrower received the appraisal much less actually relied on

it." *Id.* at 579. The evidence also failed to raise an inference that the appraiser intended for the borrower to rely on his appraisal. *Id.* Even if the appraiser knew the appraisal could affect the borrower by, for example, influencing the amount of credit extended, that is not evidence that the appraiser did the appraisal "for the purpose of inducing the [borrower] to justifiably rely and act upon the appraisal[ ]." *Id.*

The appraisal report, on its face, negated any such intention that the borrower would be influenced by the appraisal, stating expressly: "This report is intended for use by . . . [the bank]. Use of this report by others is not intended by the appraiser. This report is intended only for use in providing data upon which the client may analyze the property as collateral for a mortgage loan. This report is not intended for any other use." *Id.* Such language constitutes an "appropriate disclaimer which would alert those not in privity with [the appraiser] that they may rely upon [his appraisal] only at their peril." *Id.* at 579-80.

C. <u>The Trial Court Did Not Err in Dismissing the Negligence Claim</u>.

A claim which fails under negligent misrepresentation with no proof of reliance "would fare no better under a pure negligence analysis" because there would be no basis upon which to find any breach of duty by the appraiser proximately causing damages. *Ramos*, 141 Wn. App. at 19. The claim of "pure negligence" by Plaintiffs is indistinguishable from

Plaintiffs' negligent misrepresentation claim which Plaintiffs acknowledge in Appellant's Initial Brief, p. 36. The elements of a negligence claim could only arise in the appraiser context if the plaintiff has relied on the information provided by the appraiser and could show that he or she was owed the same third-party duty set forth in Rst. (2d) of Torts § 522:

> Plainly, a real estate appraiser has a duty of care to the person or entity who retained the appraiser. That duty may arise from law if the appraiser is an agent; it may arise from contract if the appraiser is an independent contractor. **We analyze an appraiser's duty of care to third parties under the framework of the law of negligent misrepresentation.**

Schaaf, 127 Wn.2d at 21 (emphasis added). The same analysis of duty and reliance regarding Plaintiffs' negligent misrepresentation claim applies here. Value Logic owed no duty to Plaintiffs as the appraisal limited the scope of use and Plaintiffs were not a third party triggering the appraisals. There was no evidence of reliance on the appraisal prior to closing. The trial court appropriately dismissed Plaintiffs' negligence claim.

D. <u>The Trial Court Did Not Err in Dismissing Plaintiffs' CPA Claim</u>.

1. <u>Washington's CPA Does Not Apply in Actions Against Appraisers for Professional Services Rendered</u>.

Plaintiffs' CPA claim is derived from the professional services performed by Value Logic for the benefit of RiverBank. This is contrary to the purpose of the CPA and is not actionable as a matter of law. "The

term 'trade' as used by the [CPA] includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided." *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602-03 (2009) *quoting Ramos,* 141 Wn. App. at 20. "Claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the [CPA]." *Id.*

Washington has declined to extend CPA liability to the performance of appraisals. In *Ramos*, the plaintiffs alleged the appraiser had failed to identify major defects affecting the value of a residence and breached duties under USPAP. 141 Wn. App. at 16. The court found that the plaintiffs' complaint was "targeted at the alleged inadequacy of the actual appraisal rather than the entrepreneurial aspect of [the appraiser's] business" which amounted to an allegation of negligence, not a CPA claim and dismissed the action. *Id.* at 20-21. Here, Plaintiffs' allegations are derived from the content and value contained in the appraisals.

2. Even if the CPA Applied, Plaintiffs Failed to Establish a Material Issue of Fact as to Each Element.

To prevail in a private CPA action, a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. *Hangman Ridge Training*

Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780 (1986). A plaintiff alleging injury under the CPA must establish all five elements. *Id.*

a. Value Logic's Opinion of Value Was Not Unfair or Deceptive.

There is no evidence of an unfair or deceptive practice. First, Value Logic never intended that its appraisal be shared with anyone other than RiverBank. *See supra* Sect. V.B.1. Value Logic did not seek to influence or induce Plaintiffs with regard to the decision to purchase property or contemplate that the appraisals would be used for more than financing purposes by RiverBank.[9] Second, the opinion of value itself could not be "false," as it was an *opinion*, not a stated fact. An opinion can be wrong, i.e., negligent, but it cannot be false. The test to determine whether a representation pertains to an existing fact or is a mere expression of opinion is set forth by the court in *Shook v. Scott*:

> Where the fulfillment or satisfaction of the thing represented depends upon a promised performance of a future act, or upon the occurrence of a future event, or upon particular future use, or future requirements of the representee, then the representation is not of an existing fact.

56 Wn.2d 351, 356 (1960). Plaintiffs argue that they were injured because they could not flip the property at the appraised value. Value Logic did

[9] It makes little sense that Plaintiffs could claim that allegedly inflated appraisals constituted an unfair or deceptive practice when members failed to review the appraisal reports and ignored the assumptions and limiting conditions.

the appraisal to assist the bank in financing an initial sale, not to guarantee the sales price for the Plaintiffs' future "flip" of the parcels.

b. The Trade and Commerce Element Does Not Apply.

As set forth above, the quality of the professional services performed by Value Logic cannot establish a cause of action under the CPA. *See Michael*, 165 Wn.2d at 602-03; *see also Wright v. Jeckle,* 104 Wn. App. 478, 485 (2001) (entrepreneurial aspects do not include a doctor's skills in examining, diagnosing, treating, or caring for a patient). At the trial level, the only evidence Plaintiffs argued satisfied the trade and commerce element was the deposition testimony of Plaintiffs' member Dave Largent. Mr. Largent claims to have visited the parcels in September (before Plaintiffs existed) and overheard Greg Jeffreys on a cell phone call. The trial court properly declined to consider this inadmissible evidence. Now, on appeal, Plaintiffs argue four new "points" without foundation, evidence, and based on pure supposition and speculation.

- Mr. Largent's testimony of an alleged call is inadmissible.

Mr. Largent claims to have overheard Greg Jeffreys on a phone call[10] where he suggested Value Logic be hired as the appraisers, nothing

[10] Facts opposing summary judgment must be made on personal knowledge, be admissible in evidence, and show that the declarant of such facts is competent to testify to the matters stated therein. *Lane v. Harborview Med. Ctr.*, 154 Wn. App. 279, 286-87 (2010) ("A plaintiff may not defeat summary judgment by relating conclusions, allegations, or speculations.")

more. Jeffreys is not a party opponent and Mr. Largent's recollection of Jeffreys' statements is inadmissible as hearsay and speculation. Mr. Largent does not know who Jeffreys was speaking with or that person's authority. (CP 681, ln. 15-19) None of the statements attributed to Value Logic were made by anyone associated with Value Logic. (CP 682, ln. 12-19) There is no testimony from RiverBank that they relied on a phone call from Jeffreys or that Jenny Benson made any phone call to solicit business for Value Logic. Plaintiffs' entire CPA claim is based on Mr. Largent overhearing Jeffreys on the phone. His testimony is blatant hearsay and inadmissible as evidence.[11]

- Jenny Benson visited sites 3 days after Sundevil Development received rights and one day prior to engagement letter.

It is unclear what Plaintiffs are attempting to infer. Ms. Benson testified that she had received a phone call from RiverBank to visit the subject matter sites and the engagement letter came after. (CP 209) It is further undisputed that Ms. Benson never received information about Sundevil Development's rights to buy the property, just that RiverBank

[11] The trial court exposed the issue with Plaintiffs' only evidence as to a CPA claim at oral argument. The Court: "How is this going to be admissible if we have a trial? I don't see how you get it in. Somebody hears somebody else making a phone call to somebody on the other end of the phone." Mr. Casey: "Okay, under hearsay?" The Court: "Yes." Mr. Casey: "I think that does become difficult. I think what would come in, though, is that all the same, there was a phone call, too." The Court: "How does the person overhearing it know who the person IS on the other end?" Mr. Casey: "I guess that's where we need more testimony, Your Honor, and I probably should have done a 56(f) request based on that." The Court: "You see the difficulty." *Verbatim Report*, p. 119.

had been approached about financing a sale of the property. The rights Sundevil Development received were never recorded in the public record.

- Prospectus expected property to appraise at $2.00 a square foot and the appraisal came in at $2.00 square foot.

Again, it is unclear what Plaintiffs are asking the Court to infer or speculate about. The Prospectus, which does not have an identified author, was distributed to some of the members, and its purpose was apparently to induce certain individuals to join the yet to be formed LLCs. It was not reviewed, drafted, or distributed by Value Logic.

- Sales history and comparison allegedly inaccurate.

Plaintiffs offer no evidentiary support for this contention, nor do they distinguish this apparent inference from the professional services exception to the CPA. It is undisputed that Plaintiffs' manager never actually read the appraisals or even knew their amounts. Whether or not the sales history and comparisons were accurate did not affect Plaintiffs' transactions. Plaintiffs' unsupported inference goes to professional services performed which is not actionable under the CPA.

- Terry Savage testified that he once changed an appraisal.

Plaintiffs again attempt to mislead the Court. Mr. Savage testified that appraisals could be changed from time to time if new, verifiable information was provided. (CP 727) No such conversation occurred in

this case, and it is inappropriate to consider mischaracterized information from a totally unrelated appraisal.

c. Plaintiffs Cannot Satisfy the Public Interest Element.

Plaintiffs are required to show that their lawsuit would serve the public interest. *Michael*, 165 Wn.2d at 605 *citing Lightfoot v. MacDonald,* 86 Wn.2d 331 (1976). "The purpose of the public interest requirement is to limit actions under the Act to those which are the consequence of a generalized course of conduct by a seller, and to exclude actions arising from **single transactional disputes**." *Eastlake Const. Co., Inc. v. Hess*, 102 Wn.2d 30, 51 (1984)(emphasis added). For private disputes, "it may be more difficult to show that the public has an interest in the subject matter." *Hangman Ridge,* 105 Wn.2d at 790. A court evaluates four factors to determine whether or not the public has an interest in private disputes, none of which are dispositive nor must all factors be present. *Id.* at 791. The factors are:

> 1) whether the alleged acts were committed in the course of defendant's business; 2) whether the defendant advertised to the public in general; 3) whether the defendant actively solicited this particular plaintiff, indicating potential solicitation of others; 4) whether the plaintiff and defendant have unequal bargaining positions. *Id.*

Michael, 165 Wn.2d at 605 *citing Hangman Ridge,* 105 Wn.2d at 790. It is undisputed Value Logic was acting in its course of business by preparing the appraisals. However, the other factors are absent entirely:

- There is no evidence that Value Logic advertised to the general public with regard to financing appraisals for land purchases in Spokane's West Plains. Value Logic was on a list prepared by banks of approved appraisers. (CP 846) RiverBank contacted Value Logic, not the other way around, and it was only RiverBank who decided to retain an appraiser.

- There is no evidence that Value Logic solicited Plaintiffs. In fact, *neither Plaintiff existed at the time that Value Logic was retained.* Again, if Plaintiffs' individual members felt that they were personally solicited by Value Logic, these would be individual claims that they should have asserted. Instead, only Plaintiffs have asserted claims and neither entity existed when Value Logic was retained.

- There was no bargaining position between the parties. RiverBank and Value Logic independently negotiated a flat fee for each of the appraisals. Plaintiffs had no participation or input into the transaction between RiverBank and Value Logic.

Plaintiffs cannot show that the public has any interest in this matter where the dispute centers on Value Logic's performance of an appraisal for RiverBank. An LLC member's indirect reliance does not establish a nexus for a CPA claim and the trial court properly dismissed the claim.

E. Plaintiffs' Constitutional Claim Lacks Merit

1. The "Constitutional" Claim Is Unnecessarily Raised on Appeal.

For the first time on appeal, Plaintiffs argue that the burden of proof for appraiser negligence should be based on a "preponderance of the evidence" standard rather than the "clear, cogent, and convincing" evidentiary standard which exists for negligent misrepresentation claims. RAP 2.5(a) provides that an "appellate court may refuse to review any claim of error which was not raised in the trial court." "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 (emphasis added). "Naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *Crystal Ridge Homeowners Ass'n v. City of Bothell*, _ Wn.2d _, 2015 WL 600640, at *6 (Feb. 12, 2015)(internal citations omitted)("Because the City failed to raise [the constitutional] issue below, we decline to address it now.") Plaintiffs' failure to raise the issue at the trial court level should preclude the "constitutional" issue's consideration.

Further, the trial court arrived at the legal conclusion that no duty was owed to Plaintiffs and no reliance existed because Plaintiffs' manager unequivocally stated that he did not rely on the appraisals. Plaintiffs failed to satisfy the *prima facie* elements of the misrepresentation and negligence

claims. Plaintiffs' new theory would not disrupt the trial court's ruling.

2. The Current Evidentiary Standard Is Appropriate Based on the Nature of Plaintiffs' Claim Against Real Estate Appraisers.

Even if the Court were to consider Plaintiffs' new argument on appeal, the argument fails. As in their claim of negligent misrepresentation, Plaintiffs would also have to show justifiable reliance in support of their claim for pure negligence. "We analyze an appraiser's duty of care to third parties under the framework of the law of negligent misrepresentation." *Schaaf*, 127 Wn.2d at 21. If Plaintiffs did not rely on the appraisal, then any of the underlying alleged defects contained within the appraisal could not have influenced their decision to purchase the property. Plaintiffs have not distinguished how their negligent misrepresentation claim differs from their negligence claim. *Ramos* squarely addresses this issue. "The Ramoses' claim fails under the negligent misrepresentation analysis detailed in *Schaaf.* And the claim would fare no better under a pure negligence analysis**, because without proof of reliance there is no basis upon which to find that any breach of duty** by Arnold proximately caused their damages." *Ramos*, 141 Wn. App. at 19 (emphasis added). Why should the evidentiary standard as to reliance be lessened for a third party under a claim of negligence versus as a negligent misrepresentation when the considerations are the same?

Plaintiffs are asking for a lower burden of proof on the same element of reliance in order to show negligence. Regardless of the burden of proof, Plaintiffs failed to satisfy the requisite elements of a *prima facie* case; as a matter of law, Value Logic owed Plaintiffs no duty and there was no evidence that any individual authorized agent relied on the appraisals.

F. The Trial Court Erred in Not Dismissing Plaintiffs' Complaint Due to the Statute of Limitations

Value Logic asserts that the trial court erred in not finding that Plaintiffs' claims were barred by the statute of limitations. In a separate lawsuit against Greg Jeffreys and through testimony in this action, Plaintiffs' members have testified that they were injured because underlying "sham" transactions related to sales of the Rothrock and Sundevil Lands were not presented at closing or in the appraisals. (CP 422; 851) It is undisputed that Plaintiffs' manager Mr. Johnson had this information (CP 320-21; 399-401), the transactions were documented in the closing documents provided to all members (*Id.*; CP 462-63), and Eric Sachtjen knew of the "sham" transactions as he signed off on closing documents containing the pertinent information. *Id.* In fact, Plaintiffs sued Mr. Sachtjen in this action for failing to disclose this material information to them, including a Broker's Price Opinion. (CP 168; 182-83; 192-94) Both the separate Broker's Price Opinion and the underlying purchase and

sale agreements were in Mr. Sachtjen's possession prior to closing. (CP 168; 182-83) The material facts of Plaintiffs' claims were known by Mr. Sachtjen and were disclosed to Plaintiffs' manager at the time of closing on the property over four years before Plaintiffs filed their suit against Value Logic. The knowledge of the manager and the attorney are imputed to the client-entity. Plaintiffs' claims against Value Logic are time-barred.

1. The Statute of Limitations Expired as to All Claims.

A three-year statute of limitations applies to claims for misrepresentation and fraud. RCW 4.16.080(4); *Davidheiser v. Pierce County*, 92 Wn. App. 146, 156 n. 5 (1998) (negligent misrepresentation is subject to limitations period for fraud). A four-year statute of limitations applies to CPA claims. RCW 19.86.120. The RockRock and RussellRock transactions closed in October 2006 and January 2007. Over four years passed before Plaintiffs filed their complaint against Value Logic on June 1, 2011, well after the statute of limitations ran. The trial court, therefore, erred in failing to dismiss the time-barred Complaint as a matter of law.

2. Facts Giving Rise to Plaintiffs' Claims Were Known to Its Agents.

Plaintiffs claimed they were unaware of underlying transactions regarding the property, in particular, the purchase and sale agreement between Rocky Rothrock and Sundevil Development of the Rothrock Land for $475,000 and the Sundevil Land for $300,000. Dave Largent, a

member of both Plaintiffs, testified that had he known that Sundevil Development purchased the properties for significantly lower sums than the amounts paid by the Plaintiff-Entities, he would not have participated in the transactions. (CP 462-63) Largent stated that once he learned that a purchase and sale agreement was in place between Sundevil Development and Rocky Rothrock and sold months later to Plaintiffs, he believed that both Plaintiffs had causes of action:

> Q. At some point in time, did you come to a conclusion that there was information that you should have been told, that you weren't?
>
> A. Yes.
>
> Q. Can you even tell me what that is?
>
> A. [] Jeffreys agreed to purchase the properties at a much lower value, and then, assign them to us at a much higher value.
>
> . . .
>
> Q. And what you are saying, I guess, is, this one issue, you said, occurred was that Jeffreys had purchased it at a much lower value, and then, assigned -- and you guys purchased it at a much higher value. That's what your bitch is. Is that right?
>
> A. My bitch is that I was not told that.

(CP 462-63) It is undisputed that this information was disclosed to Plaintiffs at closing as Mr. Johnson signed Closing Instructions and HUD-1 settlement statements which identified the contract sales price of $475,000 (CP 320, 323) and $300,000 (399-402; 404-05) to be paid to the original sellers. That Mr. Johnson chose not to convey these facts to the members cannot inure to their benefit. Further, Defendant Sachtjen signed

off on these documents as closing attorney. *Id.* He was aware of this information but apparently chose not to disclose it to Plaintiffs.

Curiously, both Mr. Watkins and Mr. Cummins have made the same allegations as Mr. Largent in filing their individual action against Greg Jeffreys. (*See generally,* CP 422-33; 851) Now both argue that it was not the sham transactions, but the appraisals themselves that they feel were deceptive. (CP 635-38; 670-72) In Mr. Cummins' and Mr. Watkins' individual lawsuit against Jeffreys filed June 4, 2010, the basis of their claim was as follows:

> . . . Unbeknownst to the investors, it is believed that Defendant Jeffreys and Main[12] had previously entered into sham transactions in relation to those investments as well as other comparable neighboring properties which each **knew or should have known would have the effect of artificially inflating values of the investments.**

(CP 851)(emphasis added) These "sham" transactions were disclosed to Plaintiffs at closing and ratified by their manager. (CP 320; 323; 399-402; 404-05) Just as Mr. Watkins declares that he would not have invested had he been concerned about the appraisal, Mr. Largent has stated he would not have invested if he had been aware of the underlying transactions. (CP 362-63) However, it is undisputed that the information was available to

[12] Brian Main was, in fact, a member of both plaintiff-entities at closing. Under Plaintiffs' legal theory of member reliance, his knowledge would flow to the Plaintiffs and they should have been on notice of the underlying transactions and appraisals.

Mr. Largent, yet he ignored it, and Mr. Watkins and Mr. Cummins have already filed (and settled) a lawsuit based on those same facts.

3. Plaintiffs' Attorney Was on Notice of Plaintiffs' Claims at Closing.

In their suit against him, Plaintiffs alleged that Mr. Sachtjen was their attorney at the time of the purchases and committed legal malpractice in failing to communicate lower appraised values of the property and to investigate this issue.[13] "Knowledge by the attorney is imputed to the client." *Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279 (1978) citing *Yakima Fin. Corp. v. Thompson*, 171 Wash. 309, 318 (1933); *Stubbe v. Stangler*, 157 Wash. 283 (1930). It is an accepted cause of action for a plaintiff to bring a legal malpractice claim against her attorney for failing to timely file a lawsuit in connection with a claim against a third party. Plaintiffs alleged that Mr. Sachtjen breached his fiduciary duty to them as their attorney as he "was aware of material facts on [the RockRock and RussellRock] transactions." (CP 193) Plaintiffs' alleged he, "breached this duty by not disclosing material facts to the Plaintiffs." (CP 193)

The fact that Plaintiffs' alleged attorney did not disclose this material information to them does not toll the statute of limitations in their

[13] "Mr. Sachtjen was the attorney for the plaintiffs' at the time of these purchases. The Plaintiffs allege that Mr. Sachtjen's actions in this transaction breached the standard of care of a reasonable and prudent attorney under the same or similar circumstances. In particular, but not by way of limitation, Plaintiffs allege that Mr. Sachtjen's failure to communicate and investigate the lower appraised value he was aware of to the members was a breach of the standard of care and violation of his duty to Plaintiffs." (CP 192)

favor. Instead, Plaintiffs' claims against Value Logic survive against their attorney for legal malpractice and breach of fiduciary duty, precisely the claims asserted in Plaintiffs' Second Amended Complaint. (CP 190-195)

In adding Mr. Sachtjen as a defendant, Plaintiffs correctly argued that a legal malpractice claim does not arise until the client discovers, or in the exercise of reasonable diligence should have discovered, the facts which give rise to the cause of action. *Matson v. Weidenkopf*, 101 Wn. App. 472, 482 (2000). ("The injury to the Matsons was caused by Weidenkopf's failure to sue the Shafers before the statute of limitations ran. Therefore, the question is when did the Matsons know or should have known that they were injured by their lawyer's inaction."); *see also, Huff v. Roach*, 125 Wn. App. 724, 730 (2005).

The statute of limitations must be strictly applied. *Huff*, 125 Wn. App. at 732 citing *Bennett v. Dalton,* 120 Wn. App. 74, 85-86 (2004). Plaintiffs' allegations in their Complaint are admissions that 1) Mr. Sachtjen was their attorney; 2) he should have been aware of the allegedly negligent appraisals; and 3) he failed to act on his clients' behalf. Plaintiffs properly sought their remedy against Mr. Sachtjen as the statute of limitations ran against Value Logic due to his alleged negligence.

VI. CONCLUSION

Value Logic did not owe any duty to the plaintiff manager-managed LLCs. Under the circumstances that exist in this case an appraiser should not be subjected to millions of dollars of claims without some form of a meeting of the minds to suggest that the appraiser understands that its exposure extends beyond the bank that requested the appraisal. Furthermore, in a commercial setting such as this, a party claiming that it relied on the appraisal should at least be expected to read the appraisal, not because certain individuals heard a number or reviewed part or all of a transmittal letter exclusive of the appraisal, particularly when the party utilized the appraisal amount for an unanticipated purpose.

The reliance required must be by the person who has the authority to rely on behalf of an entity. Here, Mr. Johnson did not rely on the appraisals. The required reliance cannot be established by an entity coming forward with 11th hour declarations of a few members claiming that they heard a number or that they saw a transmittal letter. Those same members set up the entities so that they had the protections afforded to them individually by having a manager-managed LLC. Now a few members want to avoid the structure they committed to and suggest that if even one member relies on an appraisal that reliance is somehow imputed to, and becomes sufficient reliance of, the entity, even if that reliance is

not communicated to the manager acting on their behalf. The trial court was correct in dismissing both the negligent misrepresentation and negligence claims on summary judgment.

Plaintiffs' new constitutional argument proposing a different burden of proof for the same element (reliance) is both untimely and illogical and has no impact on this matter as the trial court concluded Plaintiffs failed to raise an issue of material fact in support of their *prima facie* case. Plaintiffs' CPA claim was appropriately dismissed as Washington courts have clearly found that an appraiser cannot be liable under the CPA for services rendered and Plaintiffs nevertheless failed support a *prima facie* case. Finally, the trial court erred in denying the dismissal of Plaintiffs' claims on the basis of the status of limitations as Plaintiffs' own allegations establish that both their manager and alleged attorney had the relevant information to be on notice of a claim.

Based on the foregoing, Value Logic requests that this Court affirm the trial court in dismissing Plaintiffs' claims.

RESPECTFULLY SUBMITTED, this 15th day of October, 2015.

WITHERSPOON • KELLEY, P.S.

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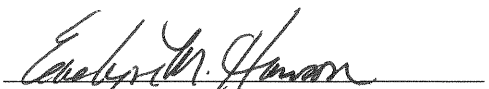
Counsel for Respondents

CERTIFICATE OF SERVICE

On the 15th day of October, 2015, I caused to be served a true and correct copy of the within document described as BRIEF OF RESPONDENTS/CROSS-APPELLANTS on all interested parties to this action as follows:

M. Casey Law, PLLC Marshall Casey, WSBA #42552 1318 W. College Spokane, WA 99201 Counsel for Appellants	Via United States Mail Via Federal Express Via Hand Delivery Via Facsimile Via Electronic Mail	[ ] [ ] [x] [ ] [ ]
M. Casey Law, PLLC J. Gregory Casey, WSBA #2130 1318 W. College Spokane, WA 99201 Counsel for Appellants	Via United States Mail Via Federal Express Via Hand Delivery Via Facsimile Via Electronic Mail	[ ] [ ] [x] [ ] [ ]



EVELYN M. HANSON
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