

**FILED**  
**SEPTEMBER 6, 2012**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

LANCE J. GONZALES, a single person, and DIANA D. KASSAP, a single person,	)	No. 30165-6-III
	)	
Appellants,	)	
	)	
v.	)	
	)	
PACIFIC NORTHWEST TITLE COMPANY OF SPOKANE, INC., a Washington Corporation, and PACIFIC NORTHWEST TITLE INSURANCE COMPANY, INC., a Washington Corporation; and FIRST AMERICAN TITLE INSURANCE COMPANY, its successor,	)	UNPUBLISHED OPINION
	)	
Respondents.	)	
	)	

Sweeney, J. — The trial court dismissed this suit against a title company on summary judgment. The parties disputed whether the title company, which acted as closing agent for the sale of real property, took the necessary steps to “eliminate the title” to a mobile home situated on the property. The Spokane County Building Department

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certified the application to eliminate title even though it contained a permit number for a mobile home that had been on the property but had been replaced. The home currently on the property and its septic system were installed without permits. The record does not show that the title company was responsible for these errors or that it had a duty to discover them. We therefore affirm the summary dismissal of the suit.

#### FACTS

In January 2006, Lance J. Gonzales and Diana D. Kassap agreed to purchase from Fred Lockard and Joy Lockard real property located at 4326 South Harrison Road in Spokane, Washington. The property consisted of a 1977 Sequoia 60-foot by 24-foot (double wide) manufactured home situated on approximately five acres of land. They agreed that Pacific Northwest Title of Spokane would act as the closing agent. Pacific Northwest Title Insurance Company, Inc., issued the commitment for title insurance. First American Title Insurance Company is the successor to Pacific Northwest Title of Spokane.

The sellers had received a Land Use or Structure Permit (No. K5625) from the Spokane County Building Department for a 12-foot by 60-foot (single wide) manufactured home in August 1974. That permit expired in August 1975. When the sellers replaced the single wide home with the double wide, no building permit was ever

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issued. The sellers also had installed a septic system on the property in 1976 without any permit and in violation of Spokane County Building Codes and Spokane County Health District Rules and Regulations. The buyers did not discover the problem until after closing.

Pacific Northwest Title took the necessary steps to “eliminate the title” to the double wide manufactured home that was currently situated on the property. Elimination of the title to the manufactured home was required to convert the double wide to real property and thus enable the buyers to obtain financing. RCW 65.20.030. Pacific Northwest Title’s Limited Practice Officer (LPO) signed and prepared the application to eliminate title. The LPO inserted the correct year, make, and size of the manufactured home, and the sellers’ and buyers’ information. The Building Permit Office Certification section of the application was certified by Faith Hintz, Building and Planning Services Coordinator II at the Spokane County Building and Planning Department. The section signed by Ms. Hintz certifies that “a building permit has been issued for this purpose and the attachment will be inspected upon completion.” Clerk’s Papers (CP) at 47.

The sale of the property closed on June 6, 2006. The manufactured home application was approved and recorded by Spokane County on August 10, 2006. The Department of Licensing subsequently issued a title elimination certification for the

manufactured home. Spokane County and Department of Licensing records show that title to the manufactured home has been eliminated.

The buyers later discovered the unpermitted septic system. In September 2010, they sued Pacific Northwest Title and First American Title in Spokane County, alleging five causes of action: (1) professional negligence in preparing the manufactured home application; (2) breach of contract in failing to properly eliminate the certificate of title and discover existing code violations; (3) breach of contract in failing to insure against any loss incurred by reason of unmarketable title; (4) violation of the Consumer Protection Act (CPA), RCW 19.86.020, in failing to confirm the validity of the permit; and (5) violation of the insurer fair conduct act, RCW 48.30.015, in denying their claim for payment. The buyers essentially claimed that the title elimination was ineffective and, but for the error, the unpermitted septic system would have been discovered. They claimed that they could not occupy, sell, refinance, or otherwise convey the property.

In March 2011, First American moved on behalf of all the defendants for summary dismissal of the buyers' second, third, fourth, and fifth claims to the extent that they alleged a duty to discover code violations or the failure to pay a claim under the title insurance policy. In April 2011, the buyers moved for an agreed dismissal of all of the claims addressed in First American's motion for partial summary judgment. The trial

court granted the motion and dismissed the following numbered causes of action with prejudice: (2) breach of contract—to the extent it presumed a duty to discover code violations; (3) breach of contract—failing to insure; (4) CPA violations—to the extent it relied upon the denial of the buyers’ claim for insurance coverage; and (5) insurer fair conduct act violation. The following claims then remained:

- Breach of contract, based on the breach of “a duty to take the necessary steps to eliminate the certificate of title to the Manufactured Home.” CP at 7-8.
- Professional negligence, based on breach of the alleged duty to confirm the accuracy of the building permit number listed on the Manufactured Home Application. CP at 6-7.
- CPA claim, based on “breach of the standard of care in preparing the Manufactured Home Affidavit and/or failing to confirm the validity of the Permit.” CP at 9.

In May 2011, First American again moved for summary dismissal of the buyers’ remaining claims for breach of contract, professional negligence, and CPA violations. The buyers filed a brief in opposition supported by the declaration of Diana D. Kassap. First American moved to strike portions of Ms. Kassap’s declaration. In June 2011, the court heard argument and struck the following portions of Ms. Kassap’s declaration:

(1) “[First American’s job] includes ensuring that the documents were properly filled out and the information was verified before it was used.” Report of Proceedings (RP) at 8; CP at 72.

(2) “At this time, we cannot occupy the property nor can we sell it.” RP at 8; CP at 72.

(3) “We cannot sell it without defrauding the buyers.” RP at 8; CP at 73.

In July 2011, the trial court granted First American’s second motion for summary judgment and dismissed the remaining claims. The buyers appeal that July 2011 order.

#### DISCUSSION

The buyers first contend that the court erred when it granted summary judgment on the breach of contract claim because title was not actually eliminated. They contend that even though the Department of Licensing issued a title elimination certificate, title was not properly eliminated according to state law. They contend that a valid building permit was never issued for this manufactured home. And title elimination cannot be effective without a valid building permit being issued that shows that the manufactured home is affixed to the land. The buyers argue that Pacific Northwest Title breached the contract by not properly eliminating title.

The buyers also argue that Pacific Northwest Title breached the contract by failing

to eliminate the title to the manufactured home because the contract called for the elimination of title at closing and it did not eliminate the title until well after closing. CP at 231, 236. The date of closing was June 6, 2006. The application to eliminate title is dated August 10, 2006. The buyers contend that is prima facie evidence of a breach of contract.

The buyers also contend that the court erred when it granted summary judgment on the professional negligence claim because Pacific Northwest Title and its LPO had the duty of a practicing attorney and breached that duty. They contend that the LPO should have verified the accuracy of the permit number. They also contend that they would have discovered the lack of a building permit for the double wide and the unpermitted septic system if the correct number had been inserted.

The buyers also contend that Pacific Northwest Title failed to notify them before closing that the home had no building permit and this was professional negligence. They contend that the LPO had a duty to notify them. The buyers contend that a prudent attorney would likely have stopped the process, called the county to verify that there was no building permit, and advised both the buyers and sellers of the fault in the home. They contend that a prudent attorney would have also examined other associated permits, such as the septic permit. Regardless, they claim that ignoring the absent building permit

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problem for weeks and then closing the contract violated a fiduciary duty.

Finally, the buyers contend that the court erred when it granted summary judgment on the CPA claim because all the elements were met. First, they contend that the LPO's act of negligently inserting the expired permit number had the capacity to deceive and occurred in the sphere of trade and commerce. Second, they contend that Pacific Northwest Title's conduct affected the public interest because it maintains a website that lists closing as one of its services. Third, they contend that the conduct of Pacific Northwest Title caused them injury in that they would have discovered the lack of a building permit for the double wide and the unpermitted septic system.

Pacific Northwest Title responds that the Department of Licensing approved the application and recorded it with the Spokane County Auditor (No. 5418876) and title was eliminated on the manufactured home. It contends that the department then issued a manufactured home title elimination certificate. It contends that there is no way to "un-eliminate" title and that the buyers have failed to provide any evidence that the elimination certificate was invalid. The title company contends that the buyers have not even produced the contract they allege was breached, nor have they produced Special Exception 12 that they allege contains the provision requiring title elimination.

The title company contends that the buyers failed to prove professional negligence



because they have made no showing that it had any duty to verify the accuracy or validity of the building permit referenced in the manufactured home application—a section completed and certified to by the county. It contends that the duty to confirm the accuracy or validity of the building permit is statutorily delegated to the building permit office, not the closing agent. It contends that Ms. Hintz certified, on behalf of Spokane County, the validity of the building permit. The application lacks any certification requirement for the LPO or the closing agent. It also contends that the buyers have failed to present evidence regarding the LPO's standard of care. And any error, even assuming error, was not obvious. Pacific Northwest Title contends it had no obligation to discover the unpermitted septic system. It contends that the buyers have not shown that they cannot sell, occupy, or refinance the property. It further contends that the buyers cannot show any causal connection between the cost to remedy the unpermitted septic system and Pacific Northwest Title's conduct.

The title company further responds that the buyers failed to meet all the criteria for a CPA claim. It contends that professional negligence claims are expressly exempted from the CPA. *Short v. Demopolis*, 103 Wn.2d 52, 61, 66, 691 P.2d 163 (1984). It contends that the practice of law does not fall within trade or commerce when addressing claims of negligence or malpractice. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602-

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03, 200 P.3d 695 (2009); *Ramos v. Arnold*, 141 Wn. App. 11, 20, 169 P.3d 482 (2007).

It contends that its advertising via the Internet is insufficient to satisfy the public interest element and the negligent practice of law is insufficient to support the unfair or deceptive act element.

We review summary judgments de novo and therefore perform the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The court properly grants summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Morin v. Harrell*, 161 Wn.2d 226, 230, 164 P.3d 495 (2007) (citing CR 56(c)). We consider all the facts submitted and the reasonable inferences from them in the light most favorable to the nonmoving party. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). We resolve any doubts about the existence of a genuine issue of material fact against the party moving for summary judgment. *Id.* “Summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion.” *Lilly v. Lynch*, 88 Wn. App. 306, 312, 945 P.2d 727 (1997).

#### *Breach of Contract—Elimination of Title*

The buyers contend that Pacific Northwest Title breached the purchase agreement

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when it negligently inserted an expired building permit number on the title elimination application for the double wide manufactured home and when it failed to eliminate title at closing. But there is no showing on this record that the title company supplied the wrong number only an allegation in the buyers' complaint that it did so.

The agreement that named Pacific Northwest Title as the closing agent provided that the agreement was: "Subject to title elimination on 1977 Sequoia manufactured home on real property." CP at 230. The contract for sale and purchase also contained a handwritten provision stating:

Title on 1977 Sequoia manufactured home has been searched, all liens and/or clouds are not present, elimination of title on manufacture [sic] home at PNWT will be done at closing, and real property has been found clear of any encumbrances, per PNWT

CP at 236. Pacific Northwest Title then had a duty under the contract to eliminate title to the double wide manufactured home.

The Manufactured Home Real Property Act (MHRPA) governs the elimination of title for manufactured homes. *See* chapter 65.20 RCW; WAC 308-56A-505. Under the MHRPA, the Department of Licensing has the power to eliminate manufactured home titles and presides over the process. RCW 65.20.100. Once "title to the manufactured home is eliminated under this chapter, the manufactured home shall be treated the same as a site-built structure and ownership shall be based on ownership of the real property through real property law." RCW

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65.20.030. After the Department of Licensing approves an application for title elimination and the application is recorded, the manufactured home becomes part of the real property just as if it were built on the site. RCW 65.20.050.

In order to eliminate title to a manufactured home, an applicant must provide certain information and documents under RCW 65.20.040. The Department of Licensing has created a “Manufactured Home Application” or “elimination application” for this purpose. CP at 47-48; RCW 65.20.080; WAC 308-56A-505(2). The Department of Licensing “shall approve the application for elimination of title when all requirements listed in RCW 65.20.040 have been satisfied and the registered and legal owners of the manufactured home have consented to the elimination of the title.” RCW 65.20.050. After approval, the Department of Licensing “shall have the approved application recorded in the county . . . in which the land is located and on which the manufactured home is affixed.” RCW 65.20.050. “[T]itle is deemed eliminated on the date the appropriate documents are recorded by the county auditor.” RCW 65.20.050.

Here, Pacific Northwest Title prepared the Manufactured Home Application. The expired building permit number (K5625) for the prior single wide manufactured home was entered in the section titled “Building Permit Office Certification,” apparently by the Building and Planning Department, since that section of the form must be filled out by

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the county official responsible for eliminating title. That section of the application was certified by Faith Hintz, Building and Planning Services Coordinator II at the Spokane County Building and Planning Department. The section certified that “a building permit has been issued for this purpose and the attachment will be inspected upon completion.” CP at 47. The Department of Licensing then approved the Manufactured Home Application and recorded it with the Spokane County Auditor, recording number 5418876, on August 10, 2006. CP at 47-49. The Department of Licensing subsequently issued a “Manufactured Home Title Elimination Certificate” for the double wide manufactured home. CP at 53.

The buyers contend that the reliance on the expired building permit number rendered the title elimination ineffective. However, they have provided no evidence or authority that the error automatically rendered the elimination ineffective or invalid. RCW 65.20.050 (once the application is recorded by the auditor, title is deemed eliminated). Nor have they provided any authority suggesting that an unpermitted septic system renders title elimination ineffective. In fact, the evidence before us indicates that title elimination was effective, the manufactured home was converted to real property, and Spokane County recognized as much. Title was eliminated and Pacific Northwest Title accordingly did not breach any duty required by the contract.

The buyers contend, in the alternative, that even if Pacific Northwest Title did eliminate title to the manufactured home, it failed to do so at the time of closing. The contract closed on June 6, 2006. The Manufactured Home Application was approved and recorded by Spokane County on August 10, 2006. It is unclear when the application was submitted or even if time was of the essence. The only indication that title would be eliminated at closing was the handwritten note on the contract for purchase and sale. CP at 236. That provision does not require that title be eliminated on a specific date.

The trial court then did not err in summarily dismissing the claimed breach of “a duty to take the necessary steps to eliminate the certificate of title to the Manufactured Home.” CP at 7.

*Professional Negligence—Invalid Manufactured Home Application*

The buyers next contend that Pacific Northwest Title’s LPO engaged in professional negligence by inserting the expired building permit number in the Manufactured Home Application. They contend that the LPO owed the standard of care of a practicing attorney and had a duty to verify the accuracy of the permitting number.

First on this record there is no showing that the title company supplied the permit number. Moreover, to make out a prima facie case, the plaintiff must show the standard of care, a breach of that standard of care, and damages that proximately resulted from that

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breach. *Geer v. Tonnon*, 137 Wn. App. 838, 844, 155 P.3d 163 (2007) (quoting *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992)). Summary dismissal is required absent a showing of any of these requirements. *Eakins v. Huber*, 154 Wn. App. 592, 598, 225 P.3d 1041 (2010). This generally requires expert opinions.

Admission to Practice Rule (APR) 12(a) authorizes “certain lay persons [LPOs] to select, prepare and complete legal documents incident to the closing of real estate and personal property transactions.” Admission to limited practice includes application, examination, and continuing application requirements. APR 12. “Nonlawyers are held to the standard of care equivalent to that of a lawyer.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 33 Wn. App. 129, 131, 652 P.2d 962 (1982). “The standard to which a lawyer is held in the performance of professional services is that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction.” *Id.* at 132.

Here, there is no showing of any breach of the standard of care that contributed to any loss or damages. There is no expert opinion suggesting a breach of the standard of care. The buyers contend that expert testimony is not required because the error here (insertion of expired building permit number) was so obvious. *See Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979). Again, there is no showing that the closing agent

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inserted that number. And they fail to show how the negligence charged would be within the common knowledge of lay persons. Nor do they show that the LPO even had a duty to verify the accuracy of the information in the application.

The statutory scheme suggests that the Department of Licensing has the final responsibility to certify the accuracy of the application, including the building permit for the unit. *See* RCW 65.20.050. That portion of the form the LPO was required to complete was properly completed. There also is little support for the claim that the LPO had a duty to discover the unpermitted septic system in that portion of the form that the county had to complete. Moreover, the buyers have failed to show any effect/damages from the alleged defect other than unsupported claims of an inability to refinance or occupy the property. More is required to avoid summary dismissal. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 739, 261 P.3d 119 (2011) (“[A] mere assertion of bad faith, alone, is not sufficient to overcome a motion for summary judgment.”).

The trial court then properly dismissed the professional negligence claim.

*CPA—Breach of Standard of Care*

Mr. Gonzales and Ms. Kassap contend that Pacific Northwest Title’s LPO breached the standard of care in preparing the manufactured home application and by



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failing to confirm the validity of the building permit. They contend that Pacific Northwest Title's conduct affected the public interest because it maintains a website that lists closing as one of the services offered. They also contend that Pacific Northwest Title's conduct caused them injury in that they would have discovered the lack of a building permit for the double wide and the unpermitted septic system.

To state a prima facie claim under the CPA, 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; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Summary judgment is proper where a plaintiff fails to prove all five elements. *Michael*, 165 Wn.2d at 602.

Pacific Northwest Title contends that the acts complained of here did not occur in trade or commerce. We agree. "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RCW 19.86.020. "'Trade' and 'commerce' shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). The CPA attempts "to bring within its reaches every person who conducts unfair or deceptive acts or practices in any trade or commerce." *Short*, 103

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Wn.2d at 61 (emphasis omitted). “[L]earned professions are not exempt from application of the Consumer Protection Act.” *Quimby v. Fine*, 45 Wn. App. 175, 180, 724 P.2d 403 (1986).

“The term ‘trade’ as used by the Consumer Protection Act includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided.” *Ramos*, 141 Wn. App. at 20. The question then is whether the claim involves entrepreneurial aspects of the practice or mere negligence claims, which are exempt from the CPA. *Short*, 103 Wn.2d at 61. “Claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act.” *Ramos*, 141 Wn. App. at 20. In a legal practice, or the practice of an LPO, entrepreneurial aspects include for example “how the price of legal services is determined, billed, and collected and the way a firm obtains, retains, and dismisses clients.” *Short*, 103 Wn.2d at 61.

Here, the buyers contend that “the LPO did not engage in the unauthorized practice of law”<sup>1</sup> and professional negligence claims are specifically exempted from the CPA. *Short*, 103 Wn.2d at 61, 66. We need not consider the additional elements; their CPA claim fails.

*Attorney Fees*

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<sup>1</sup> Appellant’s Br. at 19.

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The buyers request attorney fees and costs as the prevailing party under the CPA and RCW 19.86.090. Pacific Northwest Title requests fees under RAP 18.1, 18.7, and 18.9, alleging that Mr. Gonzales's and Ms. Kassap's appeal is so devoid of merit there was no possibility of reversal.

Mr. Gonzales and Ms. Kassap are not entitled to fees as they are not prevailing parties. However, their claims were not frivolous. “[A]n appeal that is affirmed simply because the arguments are rejected is not frivolous.” *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983) (quoting *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980)).

Ultimately, there is no showing on the record before us that the title company supplied the wrong permit number. There is only an allegation in the plaintiffs' complaint. CP at 5. Moreover, again on this record, the title company agreed to eliminate title to the double wide manufactured home on the property and it did so. We then affirm the court's summary dismissal of the suit.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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WE CONCUR:

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Brown, J.

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Siddoway, A.C.J.