**IN THE SUPREME COURT**
**OF THE STATE OF MONTANA**
DA 20-0257

TONY C. PHIPPS and MINDY L. PHIPPS,

Plaintiffs/Appellants.

v.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY & SECURITY TITLE AND ABSTRACT COMPANY,

Defendants/Appellees.

# APPELLEES' ANSWERING BRIEF

On Appeal from the Sixteenth Judicial District
Garfield County, Montana
Case No. DV-19-8
Honorable Michael B. Hayworth

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## I. STATEMENT OF THE ISSUES

1. Did the District Court properly grant summary judgment to the Defendants, Old Republic National Title Insurance Company ("OR") and Security Abstract and Title Company ("ST") (collectively "OR/ST"), on the Plaintiffs' claims of ordinary and professional negligence on the grounds that OR/ST did not owe them any legal duty in issuing a preliminary title commitment?
2. Even if there is such a duty, does the scope of that duty require the title insurer to offer specific terms of coverage that a buyer would accept?
3. Should OR/ST be granted summary judgment on the Plaintiffs' claim for negligent misrepresentation?

## II. STATEMENT OF THE CASE

This case first arises out of an aborted sale of ranch property and subsequent litigation in Garfield County, Montana between the Plaintiffs, Tony and Mindy Phipps (the "Phipps"), as the sellers, and Theodore and Elizabeth Wright (the "Wrights"), as the buyers. The Wrights terminated that transaction after the Phipps were unable to provide title insurance that the Wrights would accept. The Phipps refused to return the Wrights' earnest money causing them to file suit. After judgment was entered against the Phipps, they in turn filed suit against OR/ST in this matter alleging three claims: (1) ordinary negligence; (2) professional negligence; and (3) negligent misrepresentation. (Dkt. 1).

The basis for the Phipps' claims in this litigation was OR/ST's unwillingness to unconditionally insure the Wrights legal access to the property, which in turn was one of the reasons for the Wrights terminating the sale. The Phipps allege that OR/ST failed to conduct a diligent search of the public records and, had they conducted such a search, should have offered to unconditionally insure legal access for the Wrights. OR/ST responded that, under Montana law, a title commitment is merely a statement of the terms of insurance being offered by the insurer and is not a representation as to the condition of title. Moreover, OR/ST had no duty to offer insurance with any specific terms based on its search. (Dkt. 5).

Early in the case, in a Joint Motion, the Parties informed the Court that:

> A threshold legal issue in these claims is whether title insurers, like the Defendants, owe sellers of real property, like the Phipps, any legal duty, and if so the scope of that duty, in issuing a preliminary commitment under the Montana Title Insurance Act, specifically Montana Code Annotated § 33-25-111, and the Montana Supreme Court's rulings in *Malinak v. Safeco Title Ins. Co.*, 203 Mont. 69, 76, 661 P.2d 12, 16 (1983) and *Harpole v. Powell County Title Co*., 2013 MT 257.

(Dkt. 11). Pursuant to that Joint Motion, the District Court stayed the litigation to allow briefing on these dispositive issues. (Dkt. 12). OR/ST then filed their Motion for Summary Judgment arguing that they did not owe any duty to the seller of the property when issuing a preliminary title commitment, and that even if there were a duty, based upon the specific allegations of the Phipps Complaint, OR/ST

did not have a duty to offer specific terms (i.e. unconditionally insuring legal access) which the Wrights would accept. Additionally, OR/ST argued they were entitled to summary judgment on the Phipps' negligent misrepresentation claim because the preliminary title commitment was not a representation as to title and the Phipps failed to come forward with any other actionable representations. (Dkt. 17).

On April 23, 2020, the District Court issued its Order on Threshold Legal Issue. (Dkt. 31). The District Court found that the Montana Legislature's enactment of the Montana Title Insurance Act ("MTIA") had plainly abrogated *Malinak*, the pre-MTIA case upon which the Phipps' common law claims are based. (*Id.* at 7). Regardless, even if *Malinak* remained good law, it was distinguishable on these facts. (*Id.* at 8). Thus, it granted OR/ST's Motion for Summary Judgment. The Phipps timely appealed.

## III. STATEMENT OF FACTS

In March 2017, the Phipps entered into a standard buy-sell agreement with the Wrights for their purchase of the Phipps' ranch property known as the "South Unit". (Dkt. 1, ¶6; Dkt. 18, Ex. A (the "Buy-Sell")). The South Unit is physically accessible via Ingomar Road, which runs north/south between MT200 and U.S.12, then by taking Gregg Road east. Despite having physical access, there was some question whether legal access had been established. When the Phipps originally

purchased the South Unit (through two transactions in 2008 and 2016), the title insurance policies covering their purchase each contained exceptions for established legal access based on the lack of a public record establishing Ingomar and Gregg Roads as public roads. (Dkt. 18 ("Decl. Gundlach"), Ex. B (Policy No. 087474, #9 & 10); Ex. C. (Policy No. 851204, #II.1)). As one policy specifically noted:

> Access to and from the lands described in Exhibit "A" herein appear to be gained from the Gas/Fuel Tax Road identified as "Gregg Rd." Sufficient documentation evidencing a public right to use the said road is unable to be located at this time.

(*Id.* Ex. B at 5).

The Buy-Sell with the Wrights obligated the Phipps to provide title policy insuring the buyer and contained the standard contingencies for the Wrights' "receipt and approval (to Buyer's satisfaction) of a preliminary title commitment." (*Id.* Ex. A at 3). The Phipps ordered a title commitment from ST on March 21, 2017. (Dkt. 21, Ex. 3, Dep. Gundlach 53:7-11 ("Dep. Gundlach")). Mitch Gundlach, ST's title examiner, researched and examined title of the South Unit by examining any prior title policies for tract indexes and exceptions (*see* Decl. Gundlach Exs. B & C), drawing a map of the property, and searching the public records recorded with the Garfield County Clerk and Recorder, such as the county miscellaneous book, the deed book, and the mortgage book. (Dep. Gundlach 53:12-23, 121:1-12). Mr. Gundlach did not search any road books for Garfield

County, as the documents contained therein are not part of a standard title search. The road book is not recorded or indexed by the Clerk and Recorder, meaning a title searcher would have to search page-by-page through hundreds of pages in the hope of finding some mention of the subject property, which is not feasible. (*Id.* at 173:6-19).

One week after receiving the order, OR/ST issued Commitment for Title Insurance No. 26696, listing the Wrights as the named insureds. (Decl. Gundlach Ex. D ("Preliminary Commitment")). The Preliminary Commitment offered to insure the Wrights' title subject to certain exceptions, and expressly stated that it is "a contract to issue one or more title insurance policies and is not an abstract of title or a report of the condition of title." (*Id.* at 2, ¶4). The Preliminary Commitment also expressly stated that OR/ST did not search documents "not recorded and indexed as a conveyance of record" in the county Clerk and Recorder's Office. (*Id.* at 5, ¶9). Based on Gundlach's search of the prior title policies (i.e. the policies previously issued to the Phipps) on the same property and the recorded documents, the Preliminary Commitment listed several exclusions to coverage, including Exception #20: "No right of access to and from all of the Land herein." (*Id.* at 7, ¶20). This was the same exception found in the Phipps' own policies.

The Wrights indicated that the exceptions to coverage in the Preliminary Commitment were unacceptable. The Wrights then had the option to either accept the terms of coverage being offered, terminate the Buy-Sell with the Phipps, or negotiate further. (*See* Order on Motions, DV-2017-3, at 2 (Mar. 13, 2019) ("Wright Order")).[1] The Wrights elected to negotiate further, countering with an "Inspection Notice" that offered to close on the transaction if the Phipps provided an updated title commitment that removed many of the exceptions to coverage, specifically Exception #20, by May 10, 2017. (*Id.* at 3). The Phipps accepted the Wright's counteroffer in the Inspection Notice and "continued with efforts to satisfy the conditions" set by the Wrights, namely, to see if OR/ST would remove Exception #20 on legal access. (*Id.* at 3-7).

At the same time OR/ST was evaluating its willingness to offer coverage for legal access, the Garfield County Commissioners were in the process of adopting resolutions declaring Ingomar and Gregg Roads as public roads. (Decl. Gundlach, ¶5). On May 5, 2017, Mr. Gundlach emailed OR's underwriter, Branden Allen, explaining the coverage issue and the efforts of the County Commissioners:

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[1] A copy of the Wright Order, which the District Court itself took judicial notice of in its Order on Threshold Legal Issue (Dkt. 31 at 2), is attached in the Appendix. OR/ST asks that the Court also take judicial notice of this Order. *Holtz v. Babcock*, 143 Mont. 341, 373, 390 P.2d 801, 802 (1964) ("An appellate court will take judicial notice of any matter of which the court of original jurisdiction may take notice").

> The issue on our part is that the roads (Ingomar Road and Gregg Road) that provide access to the property from Highway 200 are "Gas/Fuel Tax Roads" and are presumably maintained by the County, but we are unable to find any recorded documentation such as a County Road Resolution which evidences the public/county right to said roads.
>
> The attorney for the Seller wanted us to run the following scenario by you to see if OR/ST will remove [Exception #20]:
>
> They will obtain a formal letter from the Garfield County Commissioners which states that the County is in the process of designating the roads as county roads, and will defend the roads (Ingomar Road and Gregg Road) as open public roads[.]

(Dkt. 21, Ex. 2 at 4-5). Allen responded that, while he understood the unfortunate timing, a proposed resolution "does not get us to the point that access does in fact exist." (*Id.*)[2] However, OR was willing to "lessen" the exception to state "Access, if any, is by way of Ingomar Road and Gregg Road, subject to any terms, conditions, and provisions of said roads." (*Id.*)

That same day, the Phipps emailed Gundlach two photos of a single document from 1912, purporting to establish a north-south "Road A-290." (Decl. Gundlach ¶6, Ex. E ("1912 Document")). Gundlach mapped Road A-290 and found that, while roughly parallel, it did not exactly match the location of Ingomar Road, and in any event did not describe any portion of Gregg Road, both of which

[2] The fact that the Commissioners were still in the process of designating the road supported OR/ST's position that there was no evidence of a public road.

are necessary for legal access to the South Unit. (*Id.* ¶7). Gundlach relayed his findings to Allen, stating that the 1912 Document might establish access for Ingomar Road only, but that the buyers would still need a private easement (which they did not have) to establish legal access to the South Unit. (Dkt. 21, Ex. 2 at 3-4). Because the 1912 Document for Road A-290 still did not establish legal access all the way to the South Unit and there was no private easement going the rest of the way, OR was not willing to unconditionally insure legal access. On May 10, 2017, an updated preliminary title commitment was issued which, among other changes, removed Exception #20 and replaced it with Exception #23—stating the conditional "Access, if any" exception suggested by Allen. (Decl. Gundlach, Ex. F; Wright Order at 8).

The Wrights were still dissatisfied with the revised offer of title insurance for several reasons, but principally because Exception #23 still did not unconditionally insure legal access to the South Unit. (Wright Order at 7-8). Thus, the Wrights subsequently terminated the Buy-Sell and demanded return of their $150,000 in earnest money. When the Phipps refused, the Wrights were forced to initiate *Wrights v. Phipps* (Cause No. DV 2017-3) just a few days later on May 19, 2017. (*Id.* at 2). Ultimately, the District Court granted summary judgment to the Wrights, ruling that the Phipps had accepted the counteroffer by the Wrights to provide title insurance that unconditionally insured legal access and

when that insurance was not provided, the Wrights were contractually justified in terminating the transaction. The Phipps then breached the contract by wrongfully refusing to return the Wrights' earnest money. (*Id.* at 11).

Ironically, the transaction with the Wrights likely could have been salvaged if the relationship had not quickly soured when the Phipps unjustifiably refused to release the earnest money. On June 5, 2017, just three weeks after the Wrights terminated the buy-sell, the Garfield County Commissioners formally adopted resolutions declaring Ingomar and Gregg Roads to be County Roads, thus definitively establishing legal access. (*Id.* at 26). Indeed, on June 15, 2017, OR/ST issued a new title commitment with no access exceptions, but by then it was too late to salvage the transaction. (*Id.* at 8-9 n.14).

On April 18, 2018, almost one year after the transaction had terminated and the Wrights had commenced litigation to recover their earnest money counsel for the Phipps sent Gundlach an email, with the subject line "County Road Records," with two attached documents attached. One was the 1912 Document already discussed for Road A-290 which, while closely approximating Ingomar Road, still did not establish an easterly path to the South Unit.

However, the other document was from a Dawson[3] (not Garfield) County road book dated 1914 describing a "Road A-504". (Decl. Gundlach, Ex. G). The 1914 Document, like the 1912 Document, is not indexed or recorded with the Clerk and Recorder. (*Id.*) This was the first time Gundlach or OR/ST ever saw the 1914 Document, and the email does not indicate (and Gundlach does not know) where these documents were located, who located them, or what effort was taken to locate them. (*Id.* ¶10). However, OR/ST acknowledge that, unlike the 1912 Document for Road A-290, the 1914 Document for Road A-504 does describe an access all the way to the South Unit.[4]

## IV. STATEMENT OF STANDARD OF REVIEW

"This Court reviews an order granting summary judgment de novo, using the same Rule 56, M.R.Civ.P., criteria applied by the district court." *Safeco Ins. Co. of Am. v. Liss*, 2000 MT 380, ¶21, 303 Mont. 519, 16 P.3d 399. Summary

[3] Garfield County was not established until February 7, 1919. At the time of the 1914 Document, all the land within Garfield County was still part of Dawson County.

[4] In their brief, the Phipps imply that Gundlach had access to both the 1912 and 1914 Documents prior to the Wrights terminating the transaction and from those documents he could "create[] a map establishing that a road provided access to the Phipps' Property" (Brief at 4). That is incorrect; at that time, Gundlach only had the 1912 Document for Road A-290 (Dep. Gundlach 156:22-157:23), and he was not provided the 1914 Document for Road A-504 until April of 2018, long after the transaction had fallen apart. (Decl. Gundlach ¶10).

judgment is proper when the moving party can demonstrate that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Richardson v. Corvallis Pub. Sch. Dist. No. 1*, 286 Mont. 309, 311, 950 P.2d 748, 750 (1997) (quoting *Wiley v. City of Glendive*, 272 Mont. 213, 216, 900 P.2d 310, 312 (1995)). If the moving party can show that there is no genuine issue of material fact as to any essential element of the non-moving party's claim, summary judgment is proper. *Id*. As its review is *de novo*, this Court may affirm a district court's grant of summary judgment on any grounds in the record. *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶36, 337 Mont. 1, 155 P.3d 1247.

While summary judgment is generally not appropriate in negligence cases, "when reasonable minds cannot differ, questions of fact can be determined as a matter of law." *Wiley*, 272 Mont. at 216, 900 P.2d at 312 (citing *Brohman v. State*, 230 Mont, 198, 202, 749 P.2d 67, 70 (1988)); *see also Harpole*, ¶¶25-26 (affirming summary judgment on negligence claims based on the facts). Moreover, because negligence arises only where there is a breach of a legal duty and the existence of a legal duty is a question of law, summary judgment may be appropriate on that basis. *Yager v. Deane*, 258 Mont. 453, 456, 853 P.2d 1214, 1216 (1993); *see also Hatch v. State Dep't of Highways*, 269 Mont. 188, 195, 887 P.2d 729, 733 (1994) (the existence of a duty is the first element of a negligence claim and, without a duty, there is no claim). "The primary policy and general purpose underlying

summary judgment is to encourage judicial economy through the prompt elimination of questions not deserving resolution by trial." *Gwynn v. Cummins*, 2006 MT 239, ¶ 12, 333 Mont. 522, 144 P.3d 82.

## V. SUMMARY OF ARGUMENT

The District Court did not err in granting summary judgment to OR/ST. The Phipps claims of ordinary and professional negligence are based on common law established in 1983 in *Malinak v. Safeco Title Ins. Co.* However, that common law was abrogated by statute just two years later with the enactment of the MTIA. While it is true that the legislative history for the MTIA does not expressly mention *Malinak* by name, by necessary implication, no other conclusion can be reached. The MTIA, which was expressly adopted to change title insurance as it then existed, fundamentally altered the very basis for the common law in *Malinak*. Other jurisdictions, some of which provided the very authority for the holding in *Malinak*, have faced this same issue with similar statutes and concluded that no common law duty arises in the issuance of a preliminary title commitment.

As it found there was no common law duty, the District Court did not address whether the Phipps' allegations fell within the scope of any duty. As summary judgment can be affirmed on any basis in the record, it is appropriate to address this argument on appeal. The Phipps' claims necessarily assume that a title insurer owes a duty to a seller to diligently search public records and, as a part

of that duty, must then offer specific terms of insurance based on that search (*i.e.* unconditional legal access). However, even assuming there is a common law duty owed to sellers to diligently search public records, there is no subsequent duty that would require an insurer to offer any specific terms. Instead, under current Montana law, a title insurer has the freedom of contract to assess risks on its own and offer terms of insurance that it feels comfortable offering. There is no statutory or common law duty to offer any specific terms.

Finally, OR/ST was entitled to summary judgment on the negligent misrepresentation claim. The Phipps have not identified any misrepresentation of fact that they were unaware was false and which they detrimentally relied upon. As the title commitment is not, by statute, a representation as to the condition of title, it cannot serve as a basis for the claim. The series of internal emails between OR and ST – which basically just discuss the contents of the title commitment – cannot serve as a basis either. These emails were not directed to the Phipps and were not given to them until after the sale transaction was terminated by the Wrights.

# VI. ARGUMENT

## A. THE DISTRICT COURT CORRECTLY GRANTED OR/ST SUMMARY JUDGMENT ON THE PHIPPS' ORDINARY AND PROFESSIONAL NEGLIGENCE CLAIMS.

### 1. SUMMARY OF THE COMMON LAW UNDER *MALINAK*

In 1983, this Court decided *Malinak v. Safeco Title Ins. Co.* In that case, the title insurer issued a preliminary commitment containing exceptions for third-party timber reservations, but subsequently deleted them in a date-down endorsement. After that initial sale fell through, the seller of the property, Malinak sold the property to another buyer, warranting title without exception in reliance on the elimination of the timber reservations in the endorsement to the title commitment. Later, when the timber reservations turned out to be valid and enforceable, Malinak sued the insurer for his damages incurred defending his warranty of title. Since Malinak was not an insured under the title policy, he did not have a contractual claim for coverage. Instead, Malinak claimed "that he relied on the correctness of the title commitment as amended by the date-down endorsement in warranting all timber rights," and alleged that the insurer had been negligent in conducting its search and removing the exceptions. *See Malinak* 203 Mont. at 71-73, 661 P.2d at 13-14.

Citing to cases from other jurisdictions, the *Malinak* Court conflated a preliminary title report with an abstract of title: "When a title insurer presents a

buyer with . . . a preliminary title report . . . **the insurer serves as an abstractor of title** and must list all matters of public record regarding the subject property in its preliminary report." *Id.* at 75, 661 P.2d at 15 (quoting *Jarchow v. Transamerica Title Ins.*, 48 Cal.App.3d 917, 938 (Cal.Ct.App. 1975)) (emphasis added). Because an abstract requires that all matters of public record must be listed in the commitment, this Court held that a title insurer could be liable under the common law for negligence in searching the records.

> We find a duty on the part of the title insurer when it issues a title commitment which later forms the basis for a title insurance policy, particularly where the seller relies on the title commitment, to base its title commitment and report upon a reasonably diligent title search of the public records.

*Id.* at 76, 66 P.2d at 16.

In his dissent, Chief Justice Haswell rejected the notion that a title insurer had any such a duty, or that Malinak had a right to rely on the commitment as a representation of title. *Id*. at 77-78, 661 P.2d at 16 (Haswell, J., dissenting). The Dissent focused on purpose of a title commitment, which was not to represent the status of title (*i.e.* an abstract), but to determine insurability of title. By missing this distinction, he argued that the majority had created a duty not contemplated by the terms of a title commitment itself. *Id.*

### 2. THE ADOPTION OF THE MTIA IN 1985 ABROGATED THE RULING IN *MALINAK.*

The very next session of the Legislature in 1985 saw the enactment of the MTIA, Montana Code Annotated §33-25-104 *et seq*. In contrast with the holding in *Malinak*, the MTIA – which was modeled after the Uniform Title Insurance Act ("UTIA") – distinguished between a preliminary commitment and an abstract of title. The MTIA defines an abstract as "a written representation, provided pursuant to a contract and expected to be relied upon" by a third party that lists "all recorded conveyances, instruments, or documents which, under the laws of this state, impart constructive notice regarding the chain of title to real property described in the abstract." Mont. Code Ann. § 33-25-105(1). A preliminary report or commitment, on the other hand, is merely "an offer to issue a title insurance policy subject to any exceptions stated in the report[.]" Mont. Code Ann. § 33-25-105(7). To further avoid any confusion or overlap, the MTIA expressly clarifies the distinction:

> A preliminary report is not an abstract of title. The rights, duties, and liabilities applicable to the preparation and issuance of an abstract of title are not applicable to the issuance of a preliminary report. A preliminary report does not constitute a representation as to the condition of title to real property, but constitutes a statement of the terms and conditions upon which the issuer is willing to issue its title insurance policy.

Mont. Code Ann. § 33-25-111(2). It is OR/ST's position, with which the District Court agreed, that the adoption of the MTIA eliminated the common law duty recognized in *Malinak*, which is the principal basis for the Phipps' claims.

The Phipps have accurately noted that there is no legislative history expressly stating that the MTIA was intended specifically overturn *Malinak.* However, express legislative history is not required, and no other conclusion can reasonably be reached. A statute in derogation of the common law is to be liberally construed (Mont. Code Ann. §1-2-103) and will abrogate common law claims "to the extent the statute expressly or *by necessary implication declares*." *Sunburst School District No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 51, 338 Mont. 259, 165 P.3d 1079 (emphasis added); *see also Meech v. Hillhaven W.*, 238 Mont. 21, 31, 776 P.2d 488, 494 (1989) (no one has a vested right to a rule of common law and the legislature, under its plenary power, may alter common law causes of action).

In *Sunburst*, this Court concluded that the adoption of CECRA did not preempt or abrogate the common law for trespass for two reasons. First, there was no provision in CECRA that expressly preempted common law damages for trespass. *Id.*, ¶53. Second, the Court held that there was no implied preemption because the statutory and regulatory framework for CECRA was not in conflict with the common law, particularly the recovery of restoration damages. *Id.*, ¶59. Moreover, while not part of the Court's rationale in *Sunburst*, there was nothing about the timing of the Legislature's enactment of CECRA in 1989 that would have led to any implication that it was necessarily in response to the recovery of

restoration damages, which had been available for years if not decades before in Montana. *Bos v. Dolajak*, 167 Mont 1, 534 P.2d 1258, *cited in Sunburst* ¶29.

In contrast here, the abrogation of *Malinak* by the MTIA is by necessary implication for three reasons. First, the basis for the holding in *Malinak* – that there is no distinction between an abstract and a title commitment – is in direct conflict with the MTIA that enacts that distinction. Second, other jurisdictions that have adopted a similar version of the UTIA have also concluded that it abrogates prior common law similar to *Malinak*. Third, while not express, the general purpose and timing of the enactment of the MTIA in the very next legislative session implies that it was in response to and for the purpose of overturning.

**a. THE JURISPRUDENTIAL BASIS FOR *MALINAK* WAS EXPRESSLY ELIMINATED BY THE MTIA.**

The very basis for the holding in *Malinak* was the common law at the time, borrowed from California and other states, that did not make a distinction between a title commitment and an abstract of title. *See Malinak*, 203 Mont. at 75, 661 P.2d at 15 (citing cases). However, the MTIA made an express statutory distinction between a title commitment and an abstract of title and clarified that a commitment is just a statement of the terms of coverage that the insurer was willing to offer, but was not a representation as to title. Mont. Code Ann. § 33-25-111(2). Indeed, the statutory language in the MTIA echoed Chief Justice Haswell's reasoning in his dissent in *Malinak*: the sole purpose of a title search by a title insurer before

issuing a commitment is to determine its own risk in insuring title and the coverage it is willing to offer; it is not to make a representation as to the status of title that can be relied upon. Instead, that is the purpose of an abstract of title. The underlying basis for the continued viability of the common law in *Malinak* is incompatible with the express statutory language from the MTIA.

The Phipps' Complaint highlights this incompatibility, as all their negligence claims stem from allegations that OR/ST allegedly made "inaccurate" representation that access did not exist. They allege that OR/ST Preliminary Commitment "did not accurately reflect the insurability of title and the condition of the public record." (Dkt. 1, ¶24). They allege at least eight different times that the Preliminary Commitment was in "error" or "incorrect." (*Id*. ¶¶14-32). However, under the express language of the MTIA, the Preliminary Commitment does not describe limitations in access to the South Unit, as that would be an abstract of title. OR/ST did not issue an abstract. Instead, they provided a Preliminary Commitment, which merely stated the terms upon which they were willing to offer insurance.

**b. OTHER JURISDICTIONS THAT HAVE ADOPTED THE UTIA HAVE HELD THAT IT ABROGATED PRIOR COMMON LAW SIMILAR TO *MALINAK*.**

In *Haker v. Southwestern R.R.*, 176 Mont. 364, 371-72, 578 P.2d 724, 728 (1978), the Court was faced with the question of whether the enactment of the

Montana State Aeronautical Regulatory Act was intended by the Legislature to change common law liabilities for pilot negligence. In answering that question, the Court turned to the cases interpreting the same question under federal law, which was the model for the Montana statute. A similar analysis of how other jurisdictions have addressed this issue is appropriate here.

In *Malinak*, the Court cited to three cases from other jurisdictions for its holding that title insurers have a common law duty to examine and report title in issuing a title commitment: *Jarchow v. Transamerica Title Ins.*, 48 Cal.App.3d 917 (Cal.Ct.App. 1975); *Chun v. Park*, 462 P.2d 905 (Hawaii 1970); and *Transamerica Title Ins. Co. v. Ramsey*, 507 P.2d 492 (Alaska 1973). *Malinak v. Safeco Title Ins. Co.*, 203 Mont. at 75-76, 661 P.2d at 16. Alaska and Hawaii have never adopted a statute (similar to the MTIA) that distinguishes between a preliminary commitment and an abstract of title, so those cases presumably remain good law in those jurisdictions.

However, California followed the same path as Montana three years earlier in adopting a version of the UTIA in 1982. Cal. Ins. Code. § 12340.10 defines an abstract of title as a "written representation, provided pursuant to a contract … intended to be relied upon by the person who has contracted for the receipt … listing all recorded conveyances…." In contrast, Cal. Ins. Code. §12340.11 defines preliminary reports or commitments as "offers to issue a title policy subject to the

stated exceptions." Like the MTIA, the statute makes clear that commitments are "not abstracts of title" and that the rights and duties of an abstract do not apply to a commitment. Subsequent cases have recognized that *Jarchow* and similar cases have been abrogated by this statutory enactment, specifically the distinction adopted in *Southland Title Corp. v. Superior Court*, 231 Cal. App. 3d 530, 536 n.4 (Cal. App. 1991), where the Court noted:

> Indeed, we believe it to be obvious that the enactment of sections 12340.10 and 12340.11 was a direct legislative reaction to judicial decisions such as *Jarchow*[], and to the inability of the title insurance industry to avoid abstractor liability by express contractual agreement with the consumers of preliminary title reports.

S*ee also Herbert A. Crocker & Co. v. Transamerica Title Ins. Co.*, 27 Cal. App. 4th 1722, 1727 n.6 (1994) ("The law is now clear that a preliminary report is not an abstract of title, and therefore does not carry rights, duties, or responsibilities associated with the preparation and issuance of such a document"); *Siegel v. Fid. Nat. Title Ins. Co.*, 46 Cal. App. 4th 1181, 1193 (1996) (the UTIA "leave[s] no room for the existence of a duty of care based on the title company's search of records and issuance of a preliminary report and title insurance policy").

While not cited in *Malinak*, courts in both Arizona and Washington have also reached the same conclusion after those states adopted a version of the UTIA similar to the MTIA. In *Centennial Dev. Grp., Ltd. Liab. Co. v. Lawyer's Title Ins. Corp.*, the Arizona Court noted that, prior to 1992 "an insurer could be liable in

Arizona for issuing a title commitment that negligently failed to disclose an encumbrance of record." 310 P.3d 23, 25-26 (Ariz. Ct. App. 2013) (citing to *Moore v. Title Ins. Co. of Minn.*, 714 P.2d 1303 (Ariz. Ct. App. 1985).[5] However, enactment of A.R.S. § 20-1562[6] "changed that rule by effectively barring a common-law claim against an insurer whose title commitment fails to identify a cloud on title." *Id.*

The evolution of the law in Washington is a little different, but the conclusion reached is the same. In *Barstad v. Stewart Title Guar. Co.*, 39 P.3d 984, 987-88 (Wash. 2002), the Washington Supreme Court noted that it had for years intentionally avoided the question of "whether title insurance companies possess a general duty to search and disclose potential title defects when issuing preliminary commitments…." [7] However, after the Washington legislature passed its version of the UTIA in 1997, there was no further avoiding the issue.

> [T]he Legislature amended the definition section of chapter 48.29 RCW, which sets forth the general duties of title insurers, clarifying the distinctions between a title policy, an abstract of title, and a preliminary report, binder or commitment. In distinguishing between

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[5] *Moore*, like *Malinak*, also relied on the California Court's opinion in *Jarchow* for its holding. *Moore*, 714 P.2d at 1306.

[6] A.R.S. §§ 20-1562 is identical to Cal. Ins. Code §§ 12340.10, 12340.11 in its distinctive definitions of an abstract of title and a title commitment.

[7] One of the instances identified in *Barstad* where the question was avoided was *Shotwell v. Transamerica Title Ins. Co.*, 588 P.2d 208, 211 (Wash. 1978), where the Court held that "a 'duty' might arise…." Of note, *Shotwell* is also cited by this Court in *Malinak*, 203 Mont. at 77, 661 P.2d at 16.

> a preliminary commitment and an abstract of title, the Legislature also clarified some of the responsibilities associated with each form. The insureds ask this court to decide that a preliminary commitment serves essentially the same purpose as an abstract of title. Such a conclusion would be contrary to the clear language of RCW 48.29.010.

*Id.*

Even those jurisdictions that have not adopted a version of the UTIA, but nevertheless make the distinction the statute does between an abstract and a preliminary commitment, hold that a title insurer owes no common law duty when issuing the commitment. In fact, two of those jurisdictions even rejected the holding in *Malinak* based upon that very distinction. *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 729 (Utah Ct. App. 1990) (rejecting *Malinak* as contrary "to the 'better reasoned approach' which views preliminary title reports and title insurance commitments as 'no more than a statement of the terms and conditions upon which the insurer is willing to issue its title policy'"); *Wormsbacher v. Phillip R. Seaver Title Co.*, 772 N.W.2d 827 (Mich. Ct. App. 2009) (rejecting *Malinak* because "Michigan distinguishes between title insurers and abstractors"). So, regardless of whether the distinction is made by statute or judicial decision, the underlying basis for the holding in *Malinak* falls away. Now that Montana too makes that distinction by the adoption of the MTIA, *Malinak* can no longer be good law.

The Phipps attempt to side-step this evolution of the law in other jurisdictions by attempting to distinguish *Jarchow* from *Malinak*, claiming:

> The Court cited *Jarchow* in *Malinak* to establish the distinction between an abstractor of title and a preliminary report. *Malinak*, 203 Mont. at 75, 661 P.2d at 15.

(Phipps' Br. at 14). However, the opposite is what occurred: this Court cited *Jarchow* for **no** distinction between an abstract of title and a preliminary report:

> The function of a title insurance commitment was not lost on the California appellate court in *Jarchow* [citation omitted], where it said:
>
> > "When a title insurer presents a buyer with both a preliminary title report and a policy of title insurance, two distinct responsibilities are assumed. **In rendering its first service, the insurer serves as an abstractor of title and must list all matters of public record regarding the subject property in its preliminary report …**

*Malinak*, 203 Mont. at 75, 661 P.2d at 15. However, with the adoption of the MTIA and similar statutes in California, Washington, and Arizona, that distinction was now codified in statute. Other courts in those jurisdictions faced with this issue have concluded that the common law was necessarily changed by statute. This Court should reach the same conclusion.

### c. THE TIMING OF THE ADOPTION OF THE MTIA NECESSARILY IMPLIES IT WAS IN RESPONSE TO *MALINAK.*

It is significant that *Malinak* was issued in 1983 and the MTIA was adopted in the next Legislative session. The timing and the purpose of the statute cannot be ignored in any analysis. While *Malinak* is admittedly not expressly identified by

name, the Legislature's stated purpose in enacting the MTIA, was to "*change the laws on title insurance*" in order to "draw[] distinctions between title insurance policies and abstracts of title and amend[] existing laws." Minutes, Business and Labor Committee, HB338 at 3 (Jan. 31, 1985).

In the past, where the Court has issued a ruling or interpreted a statute and time passes without any amendment in response from the Legislature, it has interpreted such inaction as Legislative acceptance of the judiciary's pronouncement. *See e.g. State v. Kirkbride*, 2008 MT 178, ¶21, 343 Mont. 409, 185 P.3d 340 ("The passage of time [since 1988] and the actions, or more appropriately inactions, of Montana's legislature [to amend the statute] provide a final reason to hold partial parole restrictions lawful").

This case presents the corollary to that rule. The Court, borrowing from other jurisdictions, established the common law in Montana in 1983 with *Malinak*. The next session, the Legislature enacted a statute – whose express purpose was to "change the laws on title insurance" – and codified the distinction between an abstract and a commitment that was missing in *Malinak*. The only possible implication is that the intent with the MTIA was to abrogate the common law established by *Malinak*.

### 3. THE 2013 DECISION IN *HARPOLE* v. POWELL COUNTY TITLE INSURANCE DOES NOT REVIVE *MALINAK*

For twenty-eight years after its passage, neither the MTIA nor *Malinak* featured prominently in any published decisions from the Montana Supreme Court.[8] That changed in 2013 when this Court issued its decision in *Harpole v. Powell County Title Co.*, 2013 MT 257, 371 Mont. 343, 309 P.3d 34, a case with similar facts to the facts here. Harpole had ordered a title commitment in anticipation of a sale of property in Powell County. While the title company searched documents recorded with the Powell County Clerk and Recorder, it could not find any record that the existing road that provided access to the property had been formally designated as a county road. The title company also spoke with the Powell County Attorney who opined that it was not an official county road. As a result, the preliminary commitment contained an exception for "lack of right of access" and, due to the exception, Harpole lost the sale.

Subsequently, Harpole set out to conduct his own investigation which took him to four different cities and involved hundreds of hours over three months. He eventually located a 1903 map that indicated a "County Road No. 9" as a public

[8] The MTIA received a brief mention in *Yellowstone II Dev. Group, Inc. v. First Am. Title Ins. Co.* 2001 MT 41, ¶53 n.3, 304 Mont. 223, 20 P.3d 755, where the Court noted that, under § 33-25-111, "the condition of title cannot necessarily be gleaned either from a preliminary report or a title insurance policy, and any 'exceptions' found therein." While it did not reference *Malinak*, it is notable that the conclusion reached in this footnote is incompatible with the holding in *Malinak* that is based on a title report accurately stating the condition of title for reliance by the parties.

highway. Based upon the description on the map, the County Attorney concluded that County Road No. 9 and the road leading to the property were one and the same. While Harpole was not able to salvage the original sale, he did find another buyer, but at a discount. Harpole then sued the title company for negligence and negligent misrepresentation to recover the difference. After the defendant title company was granted summary judgment, Harpole appealed. The Court framed Harpole's claims as being based on: (1) the title company's "failure to locate and review the 1903 Road Record;" and (2) the title company's oral conversations with Harpole regarding the legal status of Harpole Road.

In the context of the negligence claim, the Montana Supreme Court noted that "Harpole relies on *Malinak*" and then goes on to state the holding of *Malinak* without addressing the intervening adoption of the MTIA and whether it had any impact on the continuing viability of the decision. *Harpole*, ¶18. The Court then went on to affirm summary judgment for the title company, finding that the 1903 map was not a "public record" and, in any event, the effort that went into Harpole locating the document exceeded the "reasonably diligent" search standard adopted in *Malinak*. *Harpole*, ¶¶25-26.

Because neither party raised the issue, a fair reading of the Court's opinion in *Malinak* is that it simply presumed *Malinak* was still valid law and just applied it to the facts of the case. *See Harpole*, ¶18 ("Harpole relies on Malinak … which

states …"), ¶26 ("Having determined that Foster's conduct satisfied the *Malinak* standard, we conclude Foster did not breach a duty to Harpole ….").[9] That was the reading correctly given to it by the District Court:

> The [*Harpole*] Court's Opinion states that the *Malinak* duty was "noted by all parties," and the Court determined that the title company's employee satisfied the "*Malinak* standard." There is no discussion of the argument relied on here—that *Malinak* has been abrogated by the enactment of the MTIA, specifically Section 33-25-111(2), MCA.

(Dkt. 31 at 8). *Harpole* has not been cited since for the proposition that it somehow saves *Malinak*, despite the intervening adoption of the MTIA in 1985.

Nevertheless, the Phipps argue that *Harpole* does just that: revives *Malinak*. This argument is without legal merit. As pointed out previously, the Legislature has the plenary power to alter the common law previously established by the Court. *Meech*, 238 Mont. at 31, 776 P.2d at 494. If the Legislature changes the common law by statute – which it did here with the enactment of the MTIA – the Court does not have the authority to change it back absent a determination that the statute was unconstitutional in the first place. As a matter of separation of powers, *Harpole* cannot accomplish what the Phipps want it to, namely to undue the effect of the passage of the MTIA on the common law it relies upon.

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[9] The Court did address the MTIA in the context of Harpole's negligent misrepresentation claim, noting that the district court found that the written preliminary title commitment could not form the basis for the claim based upon § 33-25-111(2), Mont. Code Ann. *Harpole*, ¶27. However, because Harpole did not appeal that ruling, it was not addressed further.

The District Court correctly granted OR/ST summary judgment on the grounds that, due to the enactment of the MTIA, no common law duty arose regarding the Preliminary Commitment issued to the Wrights.

## B. EVEN IF THERE IS A COMMON LAW DUTY, THE SCOPE OF THAT DUTY DOES NOT REQUIRE OR/ST TO OFFER TO UNCONDITIONALLY INSURE ACCESS.

The District Court's ruled that, since the MTIA abrogated *Malinak*, no common law duty arises that would support the negligence claims being asserted. (Dkt. 31 at 7). The Phipps argue that this ruling was in error but would like to cut the analysis short at that stage in the hopes to prolong their claims on remand. However, the Joint Motion presented by the Parties to the District Court asked for a ruling not only whether a common law existed, but if so, what was the *scope* of that duty. (Dkt. 11). Because the District Court concluded that there was no common law duty, it never had to reach the question of scope. Because a ruling on summary judgment can be affirmed on any basis found within the record (*Jones*, ¶36), it is necessary and appropriate to address that issue here.

The factual allegations of the complaint, presumed to be true, frame the scope of any duty. *See e.g. Bassett v. Lamantia*, 2018 MT 119, ¶9, 391 Mont. 309, 417 P.3d 299 (framing legal question as to the scope of any legal duty based on specific allegations). The gravamen of the Phipps' claims – the act that allegedly caused them to incur damage – is not that OR/ST did not locate a 1914 Document

for Road A-504 (a document their own counsel apparently took a year to uncover). It is the allegation that OR/ST did not offer to unconditionally insure legal access to the South Unit, which was the basis for the Wrights to terminate the transaction. Dkt. 1, ¶16 ("Wrights terminated their purchase of the Phipps South Unit because of the erroneous limitations on insurability of title set forth in Title Commitment No. 26696") & ¶19 ("Following Wrights' termination of the transaction, Plaintiffs incurred losses in excess of $1.5 million")). Importantly, the Wrights were not able to terminate the purchase because of disclosure or non-disclosure by OR/ST of the 1914 Document. Instead, they were able to terminate the purchase because – among other reasons[10] – OR/ST were unwilling to offer to insure access unconditionally. So, for the purposes of this case, the question is whether the scope of any legal duty imposed upon a title insurer includes offering specific terms of coverage to the buyer, which in this case would be to unconditionally insure legal access to the South Unit.[11]

[10] As the District Court noted, the exception for legal access was only one of the multiple reasons for why the Wrights were able to terminate the transaction and, even if it had been removed, it would not have resulted in compelling the Wrights to close on the sale. (Dkt. 31 at 9).

[11] The District Court understood the basis for the Phipps' claims, but actually saw this as a basis to distinguish *Malinak* "to any extent [it] remains good law." (Dkt. 31 at 8). In *Malinak*, the seller relied on the commitment to issue his own warranty of title in his deed. Here, the Phipps did not.

At its core, an insurance policy is just an indemnity contract. Mont. Code Ann. § 33-1-201(5)(a); *Meadow Brook, LLP v. First Am. Title Ins. Co.*, 2014 MT 190, ¶14, 375 Mont. 509, 329 P.3d 608. The preliminary commitment is merely the offer of the contractual terms by the insurer. Mont. Code Ann. § 33-25-105(7). Parties to a contract are "free to mutually agree to terms governing their private conduct as long as those terms do not conflict with public laws." *Arrowhead Sch. Dist. No. 75 v. Klyap*, 2003 MT 294, ¶20, 318 Mont. 103, 79 P.3d 250. As a general principal, one who is offering a contract is under no legal duty to offer terms that the other party finds acceptable. If the terms being offered are acceptable, then a contract may arise with the parties' mutual consent. Mont. Code Ann. § 28-2-301. Imposing a common law duty mandating specific terms would infringe upon that freedom of contract.

The fact that this case involves insurance does not result in a different analysis. Absent a statutory mandate that a title insurer unconditionally insure a legal right of access, OR/ST were free to define their offer to include or exclude whatever coverages they were willing to provide. *Allen v. United Servs. Auto. Ass'n*, 907 F.3d 1230, 1239 n.5 (10th Cir. 2018) (citing cases) (noting that, "[i]n the absence of statutory inhibition," an insurer has the freedom of contract to offer any terms and conditions it sees fit); *Levine v. Blue Shield of California*, 117 Cal. Rptr. 3d 262, 271 (Cal. App. 4th 2010) ("We also agree that a person's initial

decision to obtain insurance and an insurer's decision to offer coverage generally should be governed by traditional standards of freedom to contract").

To be sure, there are examples where an insurer has a statutory duty to offer specific terms of insurance or specific policies. [12] However, no such requirement is found in the MTIA. The District Court noted that, Montana Code Annotated §33-25-214(1) does require that any title policy be issued only after a reasonable search and examination in accordance with sound underwriting practices; however, the remedy for issuance of a policy in violation of that section is that the insurer is estopped to deny the validity of the policy as to the insured. (Dkt. 31 at 9) (citing Mont. Code Ann. §33-25-214(4)). The District Court correctly concluded that this provision does not "impose a duty with respect to the offer of title insurance." *Id.* [13]

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[12] An obvious example would be the Affordable Care Act, where a health insurer must offer terms that do not exclude pre-existing conditions. *See* 45 C.F.R. §147.108.

[13] The only mention of a preliminary commitment in §33-25-214 is subsection (3), which prohibits an insurer from issuing a commitment "unless all outstanding enforceable recorded liens or other interests against the property title to be insured are shown." Legal access is not a lien or interest against property. An "interest against the property title" is defined as "those interests created by documents the purpose of which is to encumber title," like a lien. ARM 6.6.2201(1)(a); *see also* Mont. Code Ann. § 70-20-305 (defining "encumbrance" as "taxes, assessments, and all liens upon real property"). While a recorded easement across burdened property would be considered an encumbrance, a document creating a ***right of access*** to property would not, since it does not encumber title. A lack of access to

The Phipps argue in their Brief that, by providing the estoppel remedy in section -214(4), the Legislature did not "eliminate the duty to conduct a reasonable search and examination of title in the event the insurer does not issue a policy …." (Phipps' Br. at 6). However, the Phipps' argument is misplaced for two reasons. First, OR/ST does not contend that §33-25-214 eliminated the common law duty articulated in *Malinak*. Instead, that common law duty was eliminated by the statutory definitions of abstract and preliminary commitment and the express distinction made in §33-25-211. The Court cannot interpret section -214 in isolation and ignore the impact of the distinction made in -211. *U.S. West, Inc. v. Dep't. of Rev*., 2008 MT 125, ¶ 16 , 343 Mont. 1, 183 P.3d 16 (interpretation should be consistent with the statute as a whole).

Second, this argument ignores that the Wrights terminated their purchase, not because of any failure by OR/ST to conduct a reasonable search, but rather because OR/ST would not offer to unconditionally insure a right of access to the South Unit. Because a preliminary title commitment is statutorily only a statement

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property is not even considered a "defect" in title. 11 Couch on Insurance § 159:59 (3d ed. Dec. 2007) ("The ability to access a parcel of real estate can obviously affect the marketability of the property in terms of how much a buyer would pay for it, but is not technically a 'defect' in the title to the property"); *see also Fid. Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC*, 830 F.3d 1209, 1218 (10th Cir. 2016); *BJD Props. V. Stewart Title Guar. Co.*, 380 F.Supp.3d 560, 568-69 (W.D.La. 2019). Subsection (3) is not implicated in this litigation.

of the terms and conditions of coverage being offered, it does not matter whether OR/ST should or should not have found and disclosed the 1914 Document on the Preliminary Commitment. Even if the 1914 Document pertaining to Road A-504 had been located in time to issue the Preliminary Commitment, there was no requirement in the MTIA that OR/ST offer to unconditionally insure the Wrights right of access based upon that document. Absent a statute that imposes a duty on OR/ST to offer specific coverage, insurers have the freedom of contract to offer terms of coverage for the risks they individually are willing to assume. Stated another way, *even assuming* the OR/ST had located the 1914 Document, they still have the freedom of contract to decide not to offer to unconditionally assume the risk that it provided legal access.

The Phipps' tacitly acknowledge the disconnect between their allegations of negligent conduct and the ultimate decision by OR/ST not to unconditionally insure legal access. In their Brief, the Phipps argue that, had OR/ST searched the unrecorded and unindexed documents in a road book, they would have located "evidence for accessibility [that] would have given a greater comfort level to the underwriters." (Phipps' Br. at 5). While this argument is based on a considerable amount of assumptions, even a "greater comfort level" does not ultimately translate to a legal duty to offer specific terms of coverage. Even if OR/ST had the 1914 Document in hand at the time of issuance of the Preliminary Commitment,

they still have the freedom of contract to decide not to offer to assume that risk. Indeed, this is precisely the decision OR/ST made regarding both the 1912 Document (which did not reach the South Unit) and the planned resolutions from the County Commissioners that had not yet been adopted.

Even assuming OR/ST had searched road books and located the 1914 Document, the Phipps cannot claim that OR/ST was required to insure access, only that OR/ST should have been more comfortable in its willingness to do so. The Phipps seek to regulate an insurer's comfortability and would propose an entirely unworkable system whereby the law would identify some predetermined level of comfortability which would then trigger the duty to offer specific terms as set by the seller. Taking the Phipps' position to its logical endpoint, they are attempting to define what risks a title insurer has to assume. While it is debatable whether such a system of insurance can be created, it is not the system of title insurance in Montana currently under the MTIA and is not within the scope of any possible duty to search public records.

## C. OR/ST IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW ON THE PHIPP'S NEGLIGENT MISREPRESENTATION CLAIM.

Although OR/ST also moved for summary judgment on the Phipps' negligent misrepresentation claim (*See* Dkt. 17 at 19), the District Court did not

specifically address the claim in its Order. (Dkt. 31).[14] However, based on the MTIA and the clear record available in this case, there is no genuine issue of material fact that the Phipps' negligent misrepresentation claim fails as a matter of law.

To establish a claim of negligent misrepresentation, the Phipps must establish the following elements:

> a) representations were made to the Phipps relating to a past or existing material fact;
>
> b) the representations were untrue;
>
> c) the representations were made without any reasonable ground for believing it to be true;
>
> d) the representations were made with the intent to induce the Phipps to rely on them;
>
> e) that the Phipps must have been unaware of the falsity of the representation and justified in relying upon it; and
>
> f) the Phipps sustained damage by their reliance.

*Harpole* ¶28 (quoting *Osterman v. Sears*, 2003 MT 327, ¶32, 318 Mont. 342, 80 P.3d 435).

[14] In its Order, the District Court did raise the question of whether the duty in a misrepresentation claim is also the same duty in a negligence claim, so that elimination of that duty in one would necessarily just eliminate it for both. (Dkt. 31 at 8, n.11).

In their Complaint, the only two "representations" of fact the Phipps allege were made by OR/ST were that: (1) legal "access to the Phipps South Unit was questionable," – a statement of opinion,[15] not fact – and (2) "title would not be insured with respect to access," – a true statement given that OR/ST was not willing to unconditionally insure access. (Dkt. 1, ¶42). Most significantly, the Phipps could not have relied on the representation that "access was questionable" as their Complaint admits they "were aware" it was "false." (Dkt. 1, ¶46). All other arguments aside, neither of these representations would establish the elements of a negligent misrepresentation claim.

Moreover, there is no dispute that, to the extent that these alleged representations were contained within the Preliminary Commitment, OR/ST is entitled to judgment as a matter of law. Because a preliminary title commitment is only an offer of terms and not a representation as to the state of title, that document itself cannot serve as a basis for a negligent misrepresentation claim. *See* Mont. Code Ann. §§ 33-25-105(7), -111(2). The Phipps agree that there can be no negligent misrepresentation with respect to the any "representation" in the Preliminary Commitment, as it is the one issue *Harpole* did address. "Tacitly, the

[15] The fact that the Garfield County Commissioners were contemporaneously working on passing resolutions to make Ingomar and Gregg public roads only underscores the reasonableness of OR/ST's opinion that legal access at that time was "questionable."

parties and the [district court] agreed that § 33-25-111(2) establishes that the statements in a preliminary title commitment cannot form the basis of negligent misrepresentation as to the status of title." (Phipps' Brief at 16; *see Harpole* ¶ 27).

Instead, the Phipps turn their focus to alleged misrepresentations in "subsequent documents." (Dkt. 1, ¶ 42). While OR/ST agrees that a negligent misrepresentation claim can be based on documents other than the preliminary commitment, the Phipps have not produced specific "subsequent documents" that they allegedly relied upon to their detriment. For purposes of summary judgment, the Phipps may not rely solely on the pleadings; they must come forward with actual evidence that raises a question of material fact on the elements of their claim. *Safeco*, ¶¶ 22-23.

The only "subsequent documents" the Phipps have identified are a series of internal emails between Gundlach and OR/ST's underwriter, Branden Allen. (Dkt. 21, Ex. 2). However, these documents cannot establish a genuine issue of material fact. First, none of these emails are directed—or were even sent—to the Phipps. Also, the Phipps could not have relied on statements within these internal emails because they were produced by ST in discovery in *Wrights v. Phipps* (Cause No. DV 2017-3), well-after the Wrights' termination of the Buy-Sell on May 10, 2017. (*See* Bates Stamps, Dkt. 21, Ex. 2). Finally, the only "representations" in these emails are Gundlach and Allen discussing what terms and conditions of coverage

OR/ST is willing to offer in the Preliminary Commitment—the very document that cannot serve as a basis for a negligent misrepresentation claim. Thus, the Phipps could not have relied on these emails, which were not made as representations to them and were solely related to the terms and conditions upon which OR/ST was willing to offer insurance.

OR/ST is entitled to summary judgment on the Phipps' negligent misrepresentation claim as well.

## VII. CONCLUSION

The District Court did not err in granting summary judgment to OR/ST. By necessary implication, the MTIA abrogated the common law established by *Malinak*. A title insurer no longer has the duties of an abstractor in issuing a preliminary title commitment. Furthermore, even if such a duty exists, OR/ST is not required to offer any specific terms of insurance based on the documents it locates. Finally, as there can be no negligent misrepresentation in the title commitment, and the Phipps cannot show any other misrepresentation in any other document that they relied upon, OR/ST should be granted summary judgment as to the Phipps' negligent misrepresentation claim as well.

DATED this 2nd day of October 2020.

By: */s/ Charles E. Hansberry*
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## VIII. CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word is 9,816 words, excluding the Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

DATED this 2nd day of October, 2020.

By: */s/ Charles E. Hansberry*
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## IX. CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing document with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies upon each attorney of record, and each party not represented by an attorney in the above referenced action, as follows:

DATED this 2nd day of October, 2020.

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I, Charles E. Hansberry, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-02-2020:

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