

FILED

DEC 14 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 305465

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

THELMA, KARL, LORI and KARIN KLOSTER,

Appellants/Cross-Respondents,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY and
AMERITITLE, INC.,

Respondents/Cross-Appellant.

REPLY BRIEF OF CROSS-APPELLANT
FIRST AMERICAN TITLE INSURANCE COMPANY

STOEL RIVES LLP

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I. INTRODUCTION

Cross-Appellant First American Title Insurance Company (“First American”) submits its reply brief in support of its cross-appeal. In its cross-appeal, First American urges that the trial court erred in finding an ambiguity with regard to the partial plat map appended to the policy, in awarding attorneys’ fees and costs to the Klosters based upon the trial court’s erroneous finding of coverage, and in allocating to First American \$9,000 in damages based upon a cost to cure tort measure that the jury allocated to the Klosters 100 percent. The errors in finding coverage and in allocating tort damages are independently dispositive, such that a reversal of the trial court on either prevents the Klosters from establishing a claim under their title policy.

In response to First American’s cross-appeal, the Klosters have side-stepped the merits to focus on prior trial court orders that had been revised and superseded by later, more specific rulings of the trial court. The Klosters never showed, and Judge E. Thompson Reynolds never ruled, that there was an ambiguity that led to coverage of the Klosters’ specific claim. Partial rulings eventually superseded are not enough. Indeed, the record shows that the piecemeal analysis the Klosters offered of their title policy was ultimately rejected by Judge Brian Altman in favor of First American’s approach. The Klosters’ look at prior rulings is unavailing.

Moreover, the Klosters have not engaged First American's claimed error on the trial court's allocation of \$9,000 to First American based upon a cost to cure tort measure of damages. The Klosters have not questioned First American's analysis that there is no basis for the trial court to adopt the jury's \$9,000 cost to cure but ignore the 100 percent allocation of fault to the Klosters, and conclude the \$9,000 was an actual loss that should be the responsibility of First American.

**II. THE TRIAL COURT ADOPTED FIRST AMERICAN'S
INTERPRETATION OF THE KLOSTERS' TITLE POLICY BUT
FOUND AMBIGUITY ONLY WITH REGARD TO THE PARTIAL
PLAT MAP APPENDED TO THE POLICY.**

In their response to First American's cross-appeal, the Klosters look to Judge Reynolds' early ruling on policy ambiguity related to access coverage. Unaccountably, the Klosters argue that somehow Judge Reynolds' ruling that access coverage was "ambiguous" is helpful to their cause when the ruling in no way specifies how that means the Klosters' claim was covered and, in any event, the ruling was eventually revised and superseded by more specific findings. (Klosters' Response at pp. 1-2.)

Looking toward trial, the parties made a series of motions requesting the trial court to revisit a number of issues raised by the parties on prior motions. First American, AmeriTitle and Pacific Rim sought clarification and revision of prior rulings. For First American and AmeriTitle, these issues included (1) coverage (CP 2253-2256

(Appendix A); 2911-2913 (Appendix F)), (2) the Klosters' legal and physical access to their property (CP 2253-2256 (Appendix A); 2760-2764 (Appendix C)), (3) whether AmeriTitle acted as an insurer on issuance of the Klosters' First American title policy (CP 2253-2256 (Appendix A); 2760-2764 (Appendix C)), and (4) damages (CP 2345-2347 (Appendix B); 2760-2764 (Appendix C)). In its subsequent rulings, the court revised, specified and clarified rulings on each of these issues in preparation for trial.

A. An Early Ruling on Access Coverage Ambiguity Is of No Account in Determining the Trial Court's Ultimate Ruling on the Klosters' Claim for Coverage Under Their Title Policy.

One of the early controversies was the nature of access insured under the Klosters' First American title policy. First American argued that under Insuring Clause 4, only legal access was insured. (CP 1336-1356.) The Klosters, on the other hand, argued that physical access also was insured and that they did not have physical access to their lot. Thus, the Klosters argued that they were entitled to coverage for physical access under their First American title policy. (CP 1429-1437.)

By order entered May 18, 2010, Judge Reynolds denied summary judgment on this issue, but ruled that there was an ambiguity under the Klosters' First American title policy with regard to "access coverage." (CP 1446-1447.) Judge Reynolds did not make any factual findings with regard to the issue.

It bears reminding that just because a provision of an insurance contract is ambiguous does not mean that the particular claim is covered, even if that ambiguity is interpreted in the insured's favor. A positive interpretation on one issue does not necessarily mean the insured can establish a covered claim. See Heringlake v. State Farm Fire & Cas. Co., 74 Wn. App. 179, 872 P.2d 539 (1994) (while term "being driven by" was ambiguous and construed in favor of coverage, the court also determined that the accident did not "arise out of" the use of the vehicle so coverage was denied). In other words, an insured must show (1) that there is an ambiguity to be construed in the insured's favor and (2) how that ambiguity leads to coverage of the specific claim.

Judge Reynolds never ruled that there was access coverage based upon elements of the policy he identified. Indeed, in his September 1, 2009 ruling on the Klosters' motion in limine regarding coverage, he expressly refused to find coverage for the access easement and ruled that First American could contest whether the access easement was insured:

The Court orders that the motion in limine of Plaintiffs the KLOSTERS regarding whether the access easement at issue herein is insured under the title policy, be, and the same hereby is, denied;

The Court further orders that Defendants FIRST AMERICAN TITLE INSURANCE COMPANY and AMERI-TITLE, INC., may

contest whether the access easement is insured.

(CP 1304-1305.)

In any event, his partial rulings were revised and superseded.

B. First American Subsequently Obtained Revision and Specification of the Issues on Coverage of the Klosters' Claim Under Their Title Policy.

Subsequently, First American moved to have both the type of access coverage and more generally the issue of coverage of the Klosters' claim under their title policy revisited by the trial court. (CP 2253-2256 (Appendix A).) First American moved, in part, for an order that there was no coverage for the purported easement over the north 30 feet of Tract 2, WS-146, or in the alternative, to make specific findings with regard to the Klosters' claim, such as that regarding physical and legal access. (*Id.*)

In ruling on First American's Motion To Revise Interlocutory Issues on Summary Judgment, Judge Brian Altman began to revise and clarify the trial court's position with regard to access under the title policy. Judge Altman ruled:

1. First American's and AmeriTitle's motion to revise is granted in part and denied in part as follows:
 - a. As to coverage of the Klosters' claim under the Klosters' First American owner's policy, the Court finds:

- (i) The Klosters have physical and legal access from their Lot 1 to a public road via the southern 30' of Lot 2 and the eastern 30' of Lots 5, 6 and 7 of Pacific Rim Estates;
- (ii) The northern 30 feet across Parcel 2, WS-146 is not included in the description of land in Schedule A of the Klosters' First American Owner's Policy;
- (iii) All specific easements in Pacific Rim Estates and WS-146 are excluded from coverage under the Klosters' First American title policy in Schedule B, Section Two; and
- (iv) The Court otherwise denies First American's and AmeriTitle's motion to revise regarding coverage.

(CP 2760-2764 (Appendix C) Order on Defendants First American's and AmeriTitle's Motion to Revise and Joinder on Pacific Rim's Motion for Summary Judgment As To Specific Items of Damages at p. 3.)¹

In denying the Klosters' motion for reconsideration, the court reaffirmed its revised rulings on access:

Insuring clause 4 does not guarantee that

¹ Judge Reynolds retired effective August 1, 2010. Judge Brian Altman was appointed as his successor and presided over the present case thereafter.

“legal access” is tantamount to a “public road.” Legal access is provided by the 30-foot easement across Lot 2, which is more than sufficient for a driveway, according to the evidence submitted in this case - including the testimony of Klosters’ expert, Tennyson Engineering. Plaintiffs produce neither new evidence nor new argument in their motion to reconsider on this issue. As a matter of law, Klosters have legal access.

Likewise, the evidence submitted in this case thus far - including the video and photographic evidence referenced by defendant First American - demonstrates unequivocally that the Klosters have physical access to their property. Plaintiffs produce neither new evidence nor new argument in their motion to reconsider. As a matter of law, Klosters have physical access.

(CP 4608-4611 (Appendix E) Ruling on Plaintiffs’ Motion for Reconsideration at p. 2.)

The court further affirmed that Schedule A under the Klosters’ title policy does not describe an easement of any sort:

Furthermore, the narrow ruling of the court is that “the northern 30 feet . . . is not included in the description of land in Schedule A.” This comports with the observation that there are no easements described in the Pacific Rim Estate plat legal description - the land insured under Schedule A does not describe any easement of record.

(Id.)

Accordingly, the court revised the prior ruling on policy ambiguity with regard to access coverage by finding that the Klosters had both legal and physical access, so there could be no claim on their title policy on that basis. And the court went further to address the scope of Schedule A to exclude any easement in the description of the insured land, and Schedule B to exclude all specific easements.

C. Ultimately, the Trial Court Adopted First American's Interpretation of the Klosters' Title Policy, but Identified a New Ambiguity Related to the Partial Plat Map That the Court Ruled Led to Coverage.

The trial court's rulings had accumulated to the point of possibly adopting First American's interpretation of the Klosters' title policy. First American's interpretation of the Klosters' title policy included the following propositions, some of which had already been approved by the trial court:

1. The title policy's insuring clauses extend coverage for specific types of losses, Schedule A of the policy describes the interest in land affirmatively insured, and Schedule B exceptions exclude certain interests from coverage.

2. Insuring Clause 4 provides coverage against loss or damage by reason of a lack of a right of access to and from the land. Owners are thus insured against loss resulting from the lack of a right to access their

land from a public road. Courts and commentators are virtually unanimous that Insuring Clause 4 addresses only legal access.

3. Insuring Clause 4 is only invoked in the event the land lacks legal access to a public road. Insuring Clause 4 never insures any specific easement.

4. The Klosters have legal access to their land across the southern 30 feet of Kingsford-Smith Lot 2 and the eastern 30 feet of Lots 5, 6, and 7 of Pacific Rim Estates. As even the Klosters' expert, Tennyson Engineering, agreed, a 30-foot-wide driveway is more than adequate under the Klickitat County Code (Tennyson having designed a 20-foot-wide driveway as the Klosters' testifying expert).

5. Schedule A includes the description of the land insured by the policy and does not include any property beyond the bounds of the area described or referred to in Schedule A, nor does it include any right in abutting streets or roads.

6. Schedule A does not describe any specific easement, even though it refers to the Pacific Rim Estates plat. The purported easement over the northern 30 feet of the Rickey parcel, Tract 2, short plat WS-146, is outside the Pacific Rim Estates plat.

7. Schedule B, Section Two, of the Klosters' First American title policy excludes all specific easements in Pacific Rim Estates and short plat WS-146. While legal access is insured under Insuring Clause 4, there is no coverage for any specific easement.

The trial court had already ruled that: (1) the Klosters had both physical and legal access, (2) the claimed easement was not described in Schedule A, the description of land insured, and (3) Schedule B, Section Two, excluded from coverage all specific easements.

By contrast, the Klosters never presented a comprehensive theory on interpretation of their First American title policy. Rather, the Klosters made fragmented arguments focusing on discrete terms. They never, however, put all of the terms together as a coherent interpretation.

In light of the trial court's revised rulings, First American moved again for an order finding that the First American title policy issued to the Klosters was not ambiguous and must be enforced in accordance with its terms. (CP 2782-2790.)

In an attempt to strike the ultimate issue on coverage between the parties and prompt the court to adopt a comprehensive interpretation, First American characterized the Klosters' policy interpretation summarized as follows:

1. The Klosters' First American title policy covers matters of public record.
2. Insuring Clause 4 insures both legal and physical access to and from the Klosters' Lot 1, Pacific Rim Estates, even though physical access is not a matter of public record and the policy never references physical access.

3. The Section 1(d) definition of “land” does not limit or modify access insured under the policy such that First American’s obligation to insure legal and physical access is virtually unbounded to include even purported easements outside Pacific Rim Estates, even though the policy definition of “land” does not include any rights in abutting streets or roads.
4. Schedule A of the Klosters’ title policy refers to the Pacific Rim Estates plat. The northern 30 feet of the Rickey parcel, Tract 2, short plat WS-146, is shown on the map that includes both the Pacific Rim Estates plat and short plat WS-146. The northern 30 feet of the Rickey parcel, Tract 2, short plat WS-146, is part of Pacific Rim Estates plat, even though under Washington law the plats are legally distinct and Pacific Rim Estates cannot encumber WS-146.
5. The Schedule B, Section Two, easement exclusions render access coverage under the Klosters’ title policy illusory if no specific easements are covered. Thus, the Schedule B exclusions must be ignored and cannot reasonably be interpreted in relation to Insuring Clause 4 and Schedule A.
6. Thus, the average person would reasonably conclude that the Klosters’ title policy for Lot 1, Pacific Rim Estates, covers legal and physical access outside the plat across the northern 30 feet of the Rickey parcel, Tract 2, in adjoining

short plat WS-146, despite the fact that the Klosters have legal and physical access across the southern 30 feet of Kingsford-Smith Lot 2, within Pacific Rim Estates, to a public road.

(CP 2789-2790 (Appendix D) First American's Motion for Pretrial Ruling on Title Policy Ambiguity.)

First American argued that the Klosters' interpretation of their title policy failed to coherently take into account its terms, while urging that First American's interpretation did so.

In its ruling on First American's motion, the trial court made its choice and expressly adopted First American's comprehensive interpretation of its title policy as it related to the Klosters' claim with one exception:

The court agrees with First American's analysis paragraphs 1-7, on pages 6 and 7 of its brief in support of the motion. **[CP 2787-2788 set out above.]** However, an ambiguity is created, when viewing the contract as a whole, by virtue of the unfortunate plat map appended to the policy.

(CP 2912 (Appendix F) Court's Pretrial Ruling on Title Policy Ambiguity at p. 2 (emphasis added).)

Accordingly, the court had narrowed its holding on ambiguity to only the partial plat map appended to the Klosters' title policy while

otherwise adopting First American's interpretation. Moreover, the court's concern with the partial plat map was new and not a source of ambiguity urged by the Klosters. Indeed, as the Klosters state in their responsive brief:

It is not surprising that Karl Kloster did not rely on a map attached to the policy. Instead, he relied on the Pacific Rim Estates plat map given to him by Adrian Palmer ("Palmer") of Pacific Rim (RP 988) and also on Palmer's assurance that the access easement existed on the adjoining property. RP 994.

(Klosters' Response at p. 12.)

It was on this basis that the trial court instructed the jury that it had found coverage under the title policy for the Klosters' claim such that the only issue related to First American for the jury was damages.

By the time of trial, the only finding that prevented the trial court from adopting First American's interpretation and affirming First American's denial of the Klosters' claim under their title policy was that the ambiguity, the court held, was created by the partial plat map appended to the title policy. The trial court agreed there was no coverage under Insuring Clause 4 on the Klosters' claim to the northern 30 feet of the Rickey parcel, Tract 2, WS-146 because the Klosters had legal access. Schedule A did not include the 30-foot strip as part of the property insured, and in fact did not describe any specific easement. In any event,

as the trial court also found, all easements in Pacific Rim Estates and Short Plat WS-146 were excluded from coverage.

Beyond this, the Klosters do not engage First American's cross-appeal on the merits regarding the trial court's identification of an ambiguity related to the partial plat map. The purported ambiguity the Klosters briefly attempt to develop in their response was not adopted by the trial court. (Kloster Response at pp. 9-10 (arguing that some combination between the Pacific Rim Estates plat as a matter of public record and Schedule B, Section One, created an ambiguity of some sort never adopted by the trial court).)

Indeed, after trial the Klosters submitted proposed findings of fact and conclusions of law to the trial court providing that the Klosters' title was "defective" and that therefore three further coverages under First American's title policy were invoked. In several findings of fact, the Klosters referred to coverage under Insuring Clause 2 and Insuring Clause 4 from their First American title policy. The court never identified these clauses as a source of coverage and the Klosters' make no citation to the record otherwise. Moreover, the court never found Schedule B exceptions to be ambiguous, and in fact, as shown above, found Schedule B, Section Two, to exclude all specific easements. All of this was pointed out on First American's objections to the Klosters' proposed findings and conclusions. (CP 4401-4406.) The Klosters acknowledge the trial court's

rejection of those findings:

The Klosters' proposed findings of fact and conclusions of law which were based on the trial court's ruling that the Klosters's (sic) title was defective and invoked the further three coverages of First American's title policy (CP 4373-4394, 4437-4442) were objected to by First American (RP 1347) and its objections were upheld by the trial court. RP 1348.

(Klosters' Response at p. 13.)

So, the Klosters' look at prior rulings is unavailing. They take no issue with First American's analysis that the trial court erred in finding an ambiguity related to the sketch map appended to the Klosters' title policy. They concede the Klosters did not rely on such an ambiguity. On this basis alone, First American's cross-appeal should be granted and the trial court reversed with the Klosters' coverage claim dismissed with prejudice.

III. THE KLOSTERS DO NOT DISPUTE THAT THE TRIAL COURT ERRED IN ALLOCATING \$9,000 FOR THE COST TO CURE AGAINST FIRST AMERICAN, CONTRARY TO THE SPECIFIC TERMS OF THE TITLE POLICY.

In their response to First American's cross-appeal, the Klosters have not responded to First American's appeal of the trial court's allocation of \$9,000 for the cost to cure against First American contrary to the specific terms of the title policy. First American's appeal of the trial court's determination of coverage and its appeal of the trial court's

allocation of damages are independently dispositive, such that if the trial court is reversed on either issue, the Klosters have failed to establish a claim under their title policy, rendering all other issues moot.

The Klosters attempt to raise an issue with the court's use of the term "defective title" in its ruling on attorneys' fees following trial. (Klosters' Response at pp. 5-6.) The Klosters previously had attempted to gain from the trial court's use of the word "defect" in referring to their title, but to no avail. In denying the Klosters' motion for summary judgment, the court took pains to clarify its usage:

The plaintiffs want the court to announce that, as a matter of law, the non-recorded easement is a "defect" on their title. But because the failed easement is not affirmatively insured under Schedule A, and Schedule A does not describe any specific easement, the court does not grant the motion to formalize the issue with a finding that the non-recorded easement is a defect. The court's previous usage of the word defect in describing the non-recorded easement was intended to be a general description, as in, "problematic, faulty, deficient, not all it's cracked up to be" – not a legal finding. Motion denied.

(CP 3275-3281 (Appendix G) Court's Ruling: Various Pretrial Motions; Pretrial Order entered October 10, 2011.)

In any event, the trial court erred in allocating the \$9,000 cost to cure to First American. The Klosters do not appear to dispute this. In

other words, the Klosters do not dispute that the cost to cure was a tort measure of damages submitted to the jury in addition to the contract measure on the difference in value. The jury allocated \$0 damages for the difference in value measure, but allocated \$9,000 for the cost to cure, a tort measure not prescribed under the Klosters' title policy. Because there was no loss related to diminution in value under the jury's verdict, under the policy there was no obligation to indemnify. As the court in Polygon Northwest Co. stated:

Washington law does not, in fact, force insurers to pay for losses that they have not contracted to insure. Rather, the contours of an insurer's coverage obligations are defined by the specific language of the insurance contract interacting with the type of loss suffered by the insured.

Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co., 143 Wn. App. 753, 775, 189 P.3d 777 (2008).

Moreover, the Klosters do not dispute that the trial court further failed to take into account the fact that on the cost to cure tort measure, the jury allocated 100 percent fault to the Klosters. (CP 3714-3716 (Appendix H) Jury Verdict Form at Question 6.) There is no basis to adopt the jury's \$9,000 cost to cure but ignore the 100 percent allocation of fault to the Klosters, and to characterize the \$9,000 as an "actual loss" that should be the responsibility of First American. This ignores the jury's verdict and

the express terms of the Klosters' title policy requiring an indemnable loss based upon diminution in value. The trial court erred in allocating tort damages to First American under a contract despite the jury's verdict that the Klosters were 100 percent responsible for the loss.

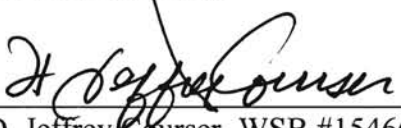
IV. CONCLUSION

On First American's cross-appeal, the trial court erred in finding coverage based upon a purported ambiguity in the Klosters' First American title policy, in awarding the Klosters' attorney's fees and costs under Olympic Steamship, and in allocating \$9,000 in damages to First American based upon a cost to cure that the jury allocated 100 percent to the Klosters and that does not represent a loss under the terms of the title policy. The Klosters' judgment against First American should be reversed and the Klosters' coverage claim against First American dismissed with prejudice.

The trial court otherwise should be affirmed on all issues raised by the Klosters on appeal.

Dated: December 11, 2012.

STOEL RIVES LLP



D. Jeffrey Courser, WSB #15466
Of Attorneys for Respondents/Cross-Appellant

APPENDICES

- Appendix A First American's and AmeriTitle's Motion to Revise Interlocutory Issues on Summary Judgment, or in the Alternative, Under CR 56(d) to Ascertain Material Facts and Conclusions of Law filed December 17, 2010 (CP 2253-2256)
- Appendix B First American's and AmeriTitle's Joinder on Pacific Rim's Motion for Summary Judgment as to Specific Items of Damages filed December 23, 2010 (CP 2345-2347)
- Appendix C Order on Defendants First American's and AmeriTitle's Motion to Revise and Joinder on Pacific Rim's Motion for Summary Judgment as to Specific Items of Damages filed April 19, 2011 (CP 2760-2764)
- Appendix D First American's Motion for Pretrial Ruling on Title Policy Ambiguity filed June 13, 2011 (CP 2782-2790 (Virginia Law & Business Review article omitted))
- Appendix E Ruling on Plaintiff's Motion for Reconsideration filed July 29, 2011 (CP 4608-4611)
- Appendix F Court's Pretrial Ruling on Title Policy Ambiguity filed August 1, 2011 (CP 2911-2913)
- Appendix G Court's Ruling: Various Pretrial Motions; Pretrial Order filed October 10, 2011 (CP 3275-3281)
- Appendix H Jury Verdict Form filed November 3, 2011 (CP 3714-3716)

APPENDIX A

**First American's and AmeriTitle's
Motion to Revise Interlocutory Issues on
Summary Judgment, or in the
Alternative, Under CR 56(d) to Ascertain
Material Facts and Conclusions of Law**

(December 17, 2010) (CP 2253-2256)

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Saundra Olson, Clerk
KLICKITAT COUNTY

SUPERIOR COURT OF WASHINGTON
KLICKITAT COUNTY

THELMA KLOSTER, KARL
KLOSTER, LORI KLOSTER AND
KARIN KLOSTER,

Plaintiffs,

v.

SCHENECTADY ROBERTS;
PACIFIC RIM BROKERS, INC., a
corporation; AMERITITLE, INC., a
corporation; MICHAEL MOORE;
FIRST AMERICAN TITLE
INSURANCE COMPANY, a
corporation; and DOES ONE through
FIFTY, inclusive,

Defendants.

No. 05-2-00108-4

**FIRST AMERICAN'S AND AMERITITLE'S
MOTION TO REVISE INTERLOCUTORY
ISSUES ON SUMMARY JUDGMENT, OR IN
THE ALTERNATIVE, UNDER CR 56(d) TO
ASCERTAIN MATERIAL FACTS AND
CONCLUSIONS OF LAW**

First American Title Insurance Company ("First American") and AmeriTitle, Inc.

("AmeriTitle") move the court to (1) revise certain interlocutory issues on summary judgment or, in the alternative, (2) ascertain those material facts that exist without substantial controversy and to make conclusions of law on the record created by the parties' several motions for summary judgment. In particular, First American and AmeriTitle request that the court find and declare:

1. Under the Klosters' First American owners policy, there is no coverage for the purported easement over the north 30' of the Parcel 2, WS-146, or in the alternative:

**FIRST AMERICAN'S AND AMERITITLE'S MOTION TO REVISE INTERLOCUTORY ISSUES ON
SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, UNDER CR 56(d) TO ASCERTAIN MATERIAL
FACTS AND CONCLUSIONS OF LAW- 1**

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0-000002253

1 1. Under the Klosters' First American owners policy, there is no coverage for the
2 purported easement over the north 30' of the Parcel 2, WS-146, or in the alternative:

- 3
- 4 (a) The Klosters have physical access from their Lot 1 to a public road via the
southern 30' of Lot 2 and the eastern 30' of Lots 5, 6 and 7 of Pacific Rim
Estates;
- 5
- 6 (b) The Klosters have legal access from their Lot 1 to a public road via the
southern 30' of Lot 2 and the eastern 30' of Lots 5, 6 and 7 of Pacific Rim
Estates;
- 7
- 8 (c) The northern 30 feet across Parcel 2, WS-146 is not included in the
description of land in Schedule A of the Klosters' First American Owner's
Policy;
- 9
- 10 (d) All specific easements in Pacific Rim Estates and WS-146 are excluded
from coverage under the Klosters' First American title policy in Schedule
B, Section Two.
- 11

12 2. AmeriTitle is not an insurer and not subject to the Unfair Claims Settlement
13 Practices Act, or in the alternative, at all relevant times:

- 14
- 15 (a) The Washington Insurance Commissioner issued a license to First
American as a title insurer in the State of Washington;
- 16
- 17 (b) The Washington Insurance Commissioner did not issue a license to
AmeriTitle as a title insurer in the State of Washington;
- 18
- 19 (c) The Washington Insurance Commissioner issued an agent's license to
AmeriTitle as a title agent in the State of Washington;
- 20
- 21 (d) First American and AmeriTitle entered into an Agency Contract dated
April 25, 2002 wherein First American appointed AmeriTitle as its agent
authorized issued title policies on behalf of First American and to collect
premiums;
- 22
- 23 (e) The Washington Insurance Commissioner issued an appointment
certificate authorizing AmeriTitle to represent First American as title
agent in the State of Washington;
- 24
- 25 (f) AmeriTitle issued First American's Policy of Title Insurance (Policy No.
H300745) to the Klosters and collected a premium of \$295.
- 26
- 27 (g) AmeriTitle was not a party to the Klosters' First American title policy.

**FIRST AMERICAN'S AND AMERITITLE'S MOTION TO REVISE INTERLOCUTORY ISSUES ON
SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, UNDER CR 56(d) TO ASCERTAIN MATERIAL
FACTS AND CONCLUSIONS OF LAW - 2**

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1 (h) AmeriTitle never made an offer to the Klosters to indemnify or defend
2 them on any matter related to the Klosters' Lot 1, Pacific Rim Estates.

3 First American's and AmeriTitle's motion is based upon the records and files herein, CR
4 56, the declarations of D. Jeffrey Courser in support of this motion, and the memorandum of law
5 filed herewith. The Courser declaration provides limited new material available to the parties.
6 The material not previously filed includes video footage taken by the Klosters' neighbors the
7 Rickeys. First American and AmeriTitle will offer to show this video footage during the hearing
8 on this motion.

9 Additionally, First American and AmeriTitle offer bench copies of declarations and
10 affidavits previously filed on summary judgment. These sworn statements provide additional
11 evidence in the record previously referred to by the parties on summary judgment. Only bench
12 copies are provided for the convenience of the court.

13 DATED: December 16, 2010. STOEL RIVES LLP

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15 
16 _____
17 D. Jeffrey Courser, WSB No. 15466
18 Attorneys for Defendant First American Title
19 Insurance Company and AmeriTitle, Inc.

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**FIRST AMERICAN'S AND AMERITITLE'S MOTION TO REVISE INTERLOCUTORY ISSUES ON
SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, UNDER CR 56(d) TO ASCERTAIN MATERIAL
FACTS AND CONCLUSIONS OF LAW - 3**

70443685.1 0090147-00090

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Telephone (360) 699-3910

0-000002255

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing **FIRST AMERICAN'S AND AMERITITLE'S MOTION TO**
3 **REVISE INTERLOCUTORY ISSUES ON SUMMARY JUDGMENT, OR IN THE ALTERNATIVE,**
4 **UNDER CR 56(d) TO ASCERTAIN MATERIAL FACTS AND CONCLUSIONS OF LAW** on the
5 following named person(s) on the date indicated below by

- 6 mailing with postage prepaid
7 hand delivery
8 facsimile transmission
9 overnight delivery

10 to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s)
11 at his or her last-known address(es) indicated below.

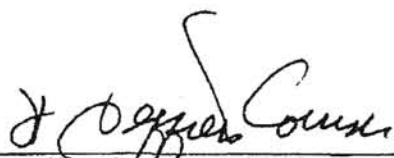
12 Lance Stewart Stryker
13 40 Palos Verde
14 White Salmon WA 98672-8941

15 Attorney for Plaintiffs Thelma, Karl, Lori and Karin Kloster

16 Jeffrey P. Downer
17 Eric L. Lewis
18 Lee Smart, P.S., Inc.
19 701 Pike Street, Suite 1800
20 Seattle WA 98101-3929

21 Attorneys for Defendants Schenectady Roberts and Pacific Rim Brokers, Inc.

22 DATED: December 16, 2010.

23 
24 _____
25 D. Jeffrey Courser, WSB No. 15466
26 Of Attorneys for Defendants First American Title
Insurance Company and AmeriTitle, Inc.

CERTIFICATE OF SERVICE - 1

APPENDIX B

**First American's and AmeriTitle's
Joinder on Pacific Rim's Motion
for Summary Judgment as to
Specific Items of Damages**

(December 23, 2010) (CP 2345-2347)

FILED
DEC 23 2010
Saundra Olson, Clerk
Klickitat County

SUPERIOR COURT OF WASHINGTON
Klickitat County

THELMA KLOSTER, KARL
KLOSTER, LORI KLOSTER AND
KARIN KLOSTER,

Plaintiffs,

v.

SCHENECTADY ROBERTS;
PACIFIC RIM BROKERS, INC., a
corporation; AMERITITLE, INC., a
corporation; MICHAEL MOORE;
FIRST AMERICAN TITLE
INSURANCE COMPANY, a
corporation; and DOES ONE through
FIFTY, inclusive,

Defendants.

No. 05-2-00108-4

**FIRST AMERICAN'S AND AMERITITLE'S
JOINDER ON PACIFIC RIM'S MOTION
FOR SUMMARY JUDGMENT AS TO
SPECIFIC ITEMS OF DAMAGES**

First American Title Company ("First American") and AmeriTitle, Inc. ("AmeriTitle") join in defendant Pacific Rim Brokers, Inc.'s ("Pacific Rim") motion for summary judgment as to specific items of damages dated December 21, 2010. First American and AmeriTitle previously had joined in Pacific Rim's motion for partial summary judgment limiting the plaintiffs Klosters' damages because First American and AmeriTitle are similarly situated to Pacific Rim such that the analysis of damages equally applies. Accordingly, First American and AmeriTitle adopt, without restating, Pacific Rim's damage analysis addressing the Klosters'

**FIRST AMERICAN'S AND AMERITITLE'S JOINDER ON PACIFIC RIM'S MOTION
FOR SUMMARY JUDGMENT AS TO SPECIFIC ITEMS OF DAMAGES - 1**

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0-000002345

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing **FIRST AMERICAN'S AND AMERITITLE'S**
3 **JOINER ON PACIFIC RIM'S MOTION FOR SUMMARY JUDGMENT AS TO**
4 **SPECIFIC ITEMS OF DAMAGES** on the following named person(s) on the date indicated
5 below by

- 6 mailing with postage prepaid
7 hand delivery
8 facsimile transmission
9 overnight delivery
10 email

11 to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s)
12 at his or her last-known address(es) indicated below.

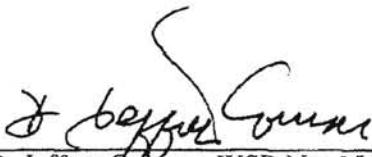
13 Lance Stewart Stryker
14 40 Palos Verde
15 White Salmon WA 98672-8941

16 Attorney for Plaintiffs Thelma, Karl, Lori and Karin Kloster

17 Jeffrey P. Downer
18 Eric L. Lewis
19 Lee Smart, P.S., Inc.
20 701 Pike Street, Suite 1800
21 Seattle WA 98101-3929

22 Attorneys for Defendants Schenectady Roberts and Pacific Rim Brokers, Inc.

23 DATED: December 22, 2010.

24 
25 _____
26 D. Jeffrey Courser, WSB No. 15466
Of Attorneys for Defendants First American Title
Insurance Company and AmeriTitle, Inc.

CERTIFICATE OF SERVICE - 1

APPENDIX C

**Order on Defendants First American's
and AmeriTitle's Motion to Revise
and Joinder on Pacific Rim's
Motion for Summary Judgment
as to Specific Items of Damages**

(April 19, 2011) (CP 2760-2764)

FILED
APR 19 2011
Saundra Olson, Clerk
KLICKITAT COUNTY

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SUPERIOR COURT OF WASHINGTON
KLICKITAT COUNTY

THELMA KLOSTER, KARL KLOSTER,
LORI KLOSTER, and KARIN KLOSTER,,

Plaintiffs,

v.

SCHENECTADY ROBERTS; PACIFIC
RIM BROKERS, INC., a corporation;
AMERITITLE, INC., a corporation;
MICHAEL MOORE; FIRST AMERICAN
TITLE INSURANCE COMPANY, a
corporation; and DOES ONE through
FIFTY INCLUSIVE,

Defendants.

No. 05-2-00108-4

**ORDER ON DEFENDANTS FIRST
AMERICAN'S AND AMERITITLE'S
MOTION TO REVISE AND JOINDER
ON PACIFIC RIM'S MOTION FOR
SUMMARY JUDGMENT AS TO
SPECIFIC ITEMS OF DAMAGES**

This matter having come regularly before the Court upon defendants First American Title Insurance Company's ("First American") and AmeriTitle, Inc.'s ("AmeriTitle") motions to revise and joinder on Pacific Rim's motion for summary judgment as to specific items of damages, and the Court having heard argument of counsel and having reviewed the records and files herein, including:

1. First American's and AmeriTitle's Motion to Revise Interlocutory Issues on Summary Judgment, or in the Alternative, Under CR 56(d) to Ascertain Material Facts and Conclusions of Law.
2. First American's and AmeriTitle's Memorandum of Law in Support of Their Motion to Revise Interlocutory Issues on Summary Judgment, or in the Alternative, Under CR 56(d) to Ascertain Material Facts and Conclusions of Law.

**ORDER ON DEFENDANTS FIRST AMERICAN'S AND AMERITITLE'S MOTION TO REVISE
AND JOINDER ON PACIFIC RIM'S MOTION FOR SUMMARY JUDGMENT AS TO SPECIFIC
ITEMS OF DAMAGES - 1**

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Telephone (360) 699-3900

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- 1 3. Declaration of Jeffrey Courser in Support of First American's and AmeriTitle's
2 Motion to Revise Interlocutory Issues on Summary Judgment, or in the
Alternative, Under CR 56(d) to Ascertain Material Facts and Conclusions of Law.
- 3 4. Defendant Pacific Rim Brokers, Inc.'s Motion for Summary Judgment as to
4 Specific Items of Damages.
- 5 5. Memorandum in Support of Defendant Pacific Rim Brokers, Inc.'s Motion for
6 Summary Judgment as to Specific Items of Damages.
- 7 6. Declaration of Eric L. Lewis in Support of Defendant Pacific Rim Brokers, Inc.'s
8 Motion for Summary Judgment as to Specific Items of Damages.
- 9 7. First American's and AmeriTitle's Joinder on Pacific Rim's Motion for Summary
10 Judgment as to Specific Items of Damages.
- 11 8. Memo of Points and Authorities in Opposition to Pacific Rim's Motion for
12 Summary Judgment on Specific Damage Items of the Klosters.
- 13 9. Memo of Points and Authorities in Opposition to First American's and
14 AmeriTitle's Joinder in Damages Summary Judgment Motion.
- 15 10. Declaration of Lance Stryker in Opposition to Motion for Summary Judgment on
16 the Klosters' Damages.
- 17 11. Memo of Points and Authorities in Opposition to First American's Motion to
18 Review/Reverse Summary Judgment and/or Summary Adjudication Rulings.
- 19 12. Declaration of Lance Stryker in Opposition to First American's Motion to Revise.
- 20 13. Pacific Rim's Response to First American's and AmeriTitle's Motion to Revise
21 Interlocutory Issues.
- 22 14. Supplemental Declaration of D. Jeffrey Courser in Support of First American's
23 and AmeriTitle's Motion to Revise.
- 24 15. First American's and AmeriTitle's Reply to Pacific Rim in Support of Motion to
25 Revise.
- 26 16. First American's and AmeriTitle's Reply to the Klosters in Support of Motion to
Revise.
17. Reply Memorandum in Support of Pacific Rim Brokers, Inc.'s Motion for
Summary Judgment as to Specific Items of Damages.
18. Stryker letter to Judge Altman providing American Best Food, Inc. v. Alea
London, Ltd., 168 Wn.2d 398 (2010) and Holden v. Farmers Ins. Co. of
Washington, 169 Wn.2d 750 (2010).

ORDER ON DEFENDANTS FIRST AMERICAN'S AND AMERITITLE'S MOTION TO
REVISE AND JOINDER ON PACIFIC RIM'S MOTION FOR SUMMARY JUDGMENT AS
TO SPECIFIC ITEMS OF DAMAGES - 2

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1 Now therefore,

2 IT IS HEREBY ORDERED as follows:

3 1. First American's and AmeriTitle's motion to revise is granted in part and denied
4 in part as follows:

5 a. As to coverage of the Klosters' claim under the Klosters' First American
6 owner's policy, the Court finds:

- 7 (i) The Klosters have physical and legal access from their Lot 1 to a
8 public road via the southern 30' of Lot 2 and the eastern 30' of
9 Lots 5, 6 and 7 of Pacific Rim Estates;
- 10 (ii) The northern 30 feet across Parcel 2, WS-146 is not included in the
11 description of land in Schedule A of the Klosters' First American
12 Owner's Policy;
- 13 (iii) All specific easements in Pacific Rim Estates and WS-146 are
14 excluded from coverage under the Klosters' First American title
15 policy in Schedule B, Section Two; and
- 16 (iv) The Court otherwise denies First American's and AmeriTitle's
17 motion to revise regarding coverage.

18 b. As to AmeriTitle's status on issuance of the First American owner's
19 policy to the Klosters, the Court finds:

- 20 (i) The Washington Insurance Commissioner issued a license to First
21 American as a title insurer in the State of Washington;
- 22 (ii) The Washington Insurance Commissioner did not issue a license to
23 AmeriTitle as a title insurer in the State of Washington;
- 24 (iii) The Washington Insurance Commissioner issued an agent's license
25 to AmeriTitle as a title agent in the State of Washington;
- 26 (iv) First American and AmeriTitle entered into an Agency Contract
dated April 25, 2002 wherein First American appointed AmeriTitle
as its agent authorized to issue title policies on behalf of First
American and to collect premiums;
- (v) The Washington Insurance Commissioner issued an appointment
certificate authorizing AmeriTitle to represent First American as a
title agent in the State of Washington;
- (vi) AmeriTitle issued First American's Policy of Title Insurance
(Policy No. H300745) to the Klosters and collected a premium of
\$295;

ORDER ON DEFENDANTS FIRST AMERICAN'S AND AMERITITLE'S MOTION TO
REVISE AND JOINDER ON PACIFIC RIM'S MOTION FOR SUMMARY JUDGMENT AS
TO SPECIFIC ITEMS OF DAMAGES - 3

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- (vii) AmeriTitle was not a party to the Klosters' First American title policy;
- (viii) AmeriTitle never made an offer to the Klosters to indemnify or defend them on any matter related to the Klosters' Lot 1, Pacific Rim Estates;
- (ix) Accordingly, AmeriTitle, at the time of issuance of the First American title policy, was not an insurer but a licensed title agent and had a contract with First American under which it provided services to its agent. The contract for services was between First American and the Klosters, not between AmeriTitle and the Klosters; and
- (x) The motion to revise is granted to the extent the Klosters may not assert a claim against AmeriTitle as an insurer and all claims on that basis against AmeriTitle are dismissed with prejudice, including the Klosters' third cause of action for breach of insurance contract and breach of duty to defend and indemnify, fourth cause of action for bad faith insurance claim practices and bad faith breach of duty to defend and indemnify, and fifth cause of action under the Consumer Protection Act, chapter 19.86 RCW based on bad faith insurance claim practices and bad faith denial of insurance claim.

2. On First American's and AmeriTitle's joinder on Pacific Rim's Motion for Summary Judgment as to Specific Items of Damages on the Klosters' first cause of action for negligent misrepresentation and/or concealment and second cause of action for intentional misrepresentation and/or concealment, the Court grants the joinder motion and dismisses with prejudice the following items the Klosters claimed as damages against First American and AmeriTitle:

- a. Purchase price of the property: \$39,530.91.
- b. Cost of acquisition of the property: \$1,911.70.
- c. Ongoing cost of ownership of the property.
- d. Time and expense of property location: \$2,500.
- e. Loss of interest on funds to purchase property.
- f. Loss of business opportunity in property purchase: \$40,000 on land purchase/sale, and \$120,000 on building construction development/sale.

provided that plaintiffs may present evidence as to measure of damages

ORDER ON DEFENDANTS FIRST AMERICAN'S AND AMERITITLE'S MOTION TO REVISE AND JOINDER ON PACIFIC RIM'S MOTION FOR SUMMARY JUDGMENT AS TO SPECIFIC ITEMS OF DAMAGES - 4

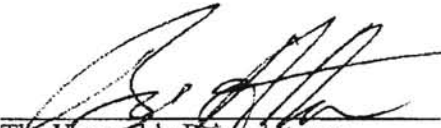
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Telephone (360) 699-5900


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- 1 g. Loss of time and expense in attempts to develop property: \$3,250 for 50
2 hours of skidder use, \$2,500 for labor for 100 hours of land clearing and
3 preparation.
- 4 h. Being defrauded into purchase of property: \$25,000 per person.
- 5 3. First American's and AmeriTitle's joinder motion, however, is denied, subject to
6 proof at trial with regard to the Klosters' claimed cost of cure, unusable water
7 connection, and easement survey.
- 8 4. The court reserves its ruling on loss of consortium.
- 9 5. The court reserves its rulings on specific items of damages against First American
10 related to the Klosters' bad faith insurance claim and Consumer Protection Act
11 claim, Chapter 19.86 RCW.
- 12 6. Any prevailing party in this action that has a basis for claiming reasonable
13 attorneys' fees and costs may request such an award after trial.

14 Dated: April 19, 2011

15 
16 The Honorable Brian Altman
17 Superior Court Judge

18 PRESENTED BY:

19 
20 D. Jeffrey Courser, WSB No. 15466
21 Of Attorneys for First American Title Insurance
22 Company and AmeriTitle, Inc.

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ORDER ON DEFENDANTS FIRST AMERICAN'S AND AMERITITLE'S MOTION TO
REVISE AND JOINDER ON PACIFIC RIM'S MOTION FOR SUMMARY JUDGMENT AS
TO SPECIFIC ITEMS OF DAMAGES - 5

70592752.1 0090147-00090

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APPENDIX D

First American's Motion for Pretrial Ruling on Title Policy Ambiguity

(Virginia Law & Business Review article omitted)

(June 13, 2011) (CP 2782-2790)

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FILED
JUN 13 2011
Saundra Olson, Clerk
KLICKITAT COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KLICKITAT COUNTY

THELMA KLOSTER, KARL KLOSTER,
LORI KLOSTER, and KARIN KLOSTER,

Plaintiffs,

v.

SCHENECTADY ROBERTS; PACIFIC
RIM BROKERS, INC., a corporation;
AMERITITLE, INC., a corporation;
MICHAEL MOORE; FIRST AMERICAN
TITLE INSURANCE COMPANY, a
corporation; and DOES ONE through
FIFTY inclusive,

Defendants.

No. 05-2-00108-4

**FIRST AMERICAN'S MOTION FOR
PRETRIAL RULING ON TITLE
POLICY AMBIGUITY**

MOTION

First American Title Insurance Company ("First American") moves the court for a pretrial order finding that the First American title policy issued to the Klosters is not ambiguous and must be enforced in accordance with its terms. As a preliminary matter, the court must determine the substance of what the Klosters may argue to the jury with regard to coverage under their First American title policy, and this motion presents the parties' purported alternative interpretations of the First American title policy to allow the court to make such pretrial determination. First American makes this motion pursuant to the records and files herein, ER 104 regarding preliminary questions, and the memorandum of law provided below.

**FIRST AMERICAN'S MOTION FOR PRETRIAL RULING ON TITLE POLICY
AMBIGUITY - 1**

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1 MEMORANDUM OF LAW

2 I. ARGUMENT

3 The Klosters have the burden of establishing (1) that their First American title policy is
4 ambiguous because it is reasonably interpreted in alternative ways considering the policy as a
5 whole, and (2) that the Klosters' interpretation is reasonable in a way that leads to coverage.
6 Nat'l Clothing Co. v. Hartford Cas. Ins. Co., 135 Wn. App. 578, 582, 145 P.3d 394 (2006)
7 (insured must show loss falls within scope of policy coverage). If the Klosters' interpretation is
8 not reasonable because it is incoherent, ignores policy provisions, and the like, then the Klosters
9 should not be allowed to argue any theory on coverage, and their claim under the policy should
10 be denied.

11 As specified below, First American has moved for a pretrial order finding that the First
12 American title policy is not ambiguous and should be enforced according to its terms. In
13 interpreting the Klosters' First American title policy, there are no issues of fact that must be
14 submitted to the jury, and the Klosters' claim for coverage should be denied as a matter of law.

15 On these questions, the Klosters' First American title policy must be interpreted. In
16 doing so, the court must determine the allocation of functions between the court and the jury.
17 Because the First American title policy is interpreted as any policy of insurance, the court should
18 be mindful that any interpretation should promote consistent and predictable meanings for the
19 insurer and the insured.

20 A. **General Standards for Interpretation of a Title Insurance Policy Under Washington**
21 **Law.**

22 Title insurance policies are interpreted and constructed like any insurance policy.
23 Interpretation of insurance policies is a question of law. Heringlake v. State Farm Fire & Cas.
24 Co., 74 Wn. App. 179, 185, 872 P.2d 539 (1994); Hess v. N. Pac. Ins. Co., 122 Wn.2d 180, 186,
25 859 P.2d 586 (1993). The policy should be given a fair, reasonable, and sensible construction.
26 Roller v. Stonewall Ins. Co., 115 Wn.2d 679, 682, 801 P.2d 207 (1990). The entire policy must

FIRST AMERICAN'S MOTION FOR PRETRIAL RULING ON TITLE POLICY
AMBIGUITY - 2

1 be construed together, so as to give force and effect to each clause. Transcon. Ins. Co. v. Wash.
2 Pub. Utils. Dist. Util. Sys., 111 Wn.2d 452, 456, 760 P.2d 337 (1988).

3 If policy language is clear and unambiguous, the court may not modify the contract or
4 create an ambiguity by interpretation. Morgan v. Prudential Ins. Co. of Am., 86 Wn.2d 432, 435,
5 545 P.2d 1193 (1976); Am. Star Ins. Co. v. Grice, 121 Wn.2d 869, 874, 854 P.2d 622 (1993). A
6 clause in a policy is ambiguous when, on its face, it is fairly susceptible to two different
7 interpretations, both of which are reasonable. Baehmer v. Viking Ins. Co. of Wis., 65 Wn. App.
8 301, 304, 827 P.2d 1113 (1992) (citing Greer v. Nw. Nat'l Ins. Co., 109 Wn.2d 191, 198, 743
9 P.2d 1244 (1987)).

10 Policy provisions are not necessarily inconsistent or ambiguous merely because the scope
11 of coverage must be determined by the examination of several provisions. Doyle v. State Farm
12 Ins. Co., 61 Wn. App. 640, 644, 811 P.2d 968 (1991). Undefined terms should be given their
13 plain, ordinary, and popular meaning. Boeing Airplane Co. v. Firemen's Fund Ind. Co., 44
14 Wn.2d 488, 268 P.2d 654 (1954). When the language of the policy is susceptible to more than
15 one reasonable meaning, it is the duty of the court to search out the intent of the parties by
16 viewing the contract as a whole and considering all of the circumstances surrounding the
17 transaction. 44 Wn.2d at 496.

18 The policy should be interpreted as it would be understood by an average person. N.H.
19 Indem. Co. v. Budget Rent-A-Car Sys., Inc., 148 Wn.2d 929, 933, 64 P.3d 1239 (2003).
20 Nonetheless, such reading must not be arbitrary or unreasonable. See Spratt v. Crusader Ins.
21 Co., 109 Wn. App. 944, 951, 37 P.3d 1269 (2002) (insurer's interpretation of "each common
22 cause" limitation was the only reasonable interpretation, so insurer was entitled to summary
23 judgment); Ross v. State Farm Mutual Auto. Ins. Co., 132 Wn.2d 507, 522, 940 P.2d 252 (1997)
24 (UIM coverage did not apply, even given liberal reading of coverage).

25 Finally, as with any contract, the parties are presumed to have made their agreement with
26 reference to existing statutes, and laws affecting the subject matter of the contract will be

**FIRST AMERICAN'S MOTION FOR PRETRIAL RULING ON TITLE POLICY
AMBIGUITY - 3**

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1 incorporated into and become part of the contract. See Wagner v. Wagner, 95 Wn.2d 94, 98, 621
2 P.2d 1279 (1980) (it is the general rule that parties are presumed to contract with reference to
3 existing statutes, and the statute that affects the subject matter of a contract is incorporated into
4 and becomes part thereof); Watkins v. Sellers (In re Estates of Clise), 64 Wn.2d 310, 391 P.2d
5 547 (1964), cited in Wagner, 95 Wn.2d at 98. Policy interpretations that distort or violate
6 Washington law should be avoided.

7 **B. The Court Should Determine That the First American Title Policy Issued to the**
8 **Klostors Is Unambiguous and Must Be Enforced in Accordance with Its Terms.**

9 **1. Under Washington Law, Insurance Policy Interpretation Is a Question of**
10 **Law for the Court.**

11 The Klostors contend there is an interpretation of their First American title policy that
12 gives them coverage for access over the northern 30 feet of the Rickey parcel, Tract 2, WS-146.
13 First American has repeatedly indicated what it believes is the proper interpretation of the title
14 policy it issued to the Klostors and that its interpretation affords the Klostors no coverage for the
15 purported easement. The Klostors have asserted in various ways that the title policy is
16 ambiguous and should be interpreted in favor of coverage. Accordingly, the Klostors' First
17 American title policy must be interpreted on the issues of whether it is ambiguous and, if so,
18 whether this affords the Klostors coverage under the policy.

19 Broadly speaking, interpretation of contracts focuses on ascertaining the intent of the
20 parties and, when a contract is ambiguous, can be considered a question of fact for the jury. This
21 is particularly true when certain facts must be determined to ascertain the meaning of the terms
22 in the parties' agreement. On the other hand, when the contract is unambiguous, interpretation is
23 a question of law for the court.

24 These distinctions can vary, however, depending upon the type of contract under
25 consideration. For example, a contract whose terms have been negotiated may involve
26 consideration of extrinsic evidence, what the parties said to each other, and their subsequent
conduct in relation to their agreement. On the other hand, a contract such as an insurance policy

FIRST AMERICAN'S MOTION FOR PRETRIAL RULING ON TITLE POLICY
AMBIGUITY - 4

1 almost never involves negotiation, is drafted to be issued in identical form to thousands of
2 persons, and may not even be read by the insured. An attempt to focus on the “intent of the
3 parties” is not helpful. Cf. Spratt, 109 Wn. App. at 949 (usually the terms of insurance policies
4 are not negotiated, and, if not, extrinsic evidence is not admissible to interpret specific terms).

5 Because the terms of insurance policies are relatively consistent, case law becomes
6 especially important in considering the meaning of policy terms. Generally, judges interpret
7 insurance policies with reference to case law to promote consistent and predictable meanings for
8 the insurer and the insured. Accordingly, most courts do not submit insurance policies to juries
9 for interpretation, except with regard to predicate facts or historical events relating to the claim.
10 For an insightful discussion of contract interpretation and allocation between judge and jury, see
11 Randall H. Warner, All Mixed Up About Contract: When Is Contract Interpretation a Legal
12 Question and When Is It a Fact Question?, 5 Va. Law & Bus. Rev. 81 (2010) (a copy of the
13 article is attached hereto for the court’s convenience).

14 **2. The Klosters Have the Burden to Establish That the First American Title**
15 **Policy Is Ambiguous and to Offer a Reasonable Interpretation of the Title**
16 **Policy That Would Lead to Coverage of Their Claim.**

17 Determining whether coverage exists under an insurance policy is a two-step process.
18 First, the insured must show the loss is within the scope of the policy’s coverage. If such a
19 showing is established, the insurer nevertheless can avoid liability by showing the loss is
20 excluded by specific policy language. See Nat’l Clothing Co., 135 Wn. App. at 582 (citing
21 Overton v. Consol. Ins. Co., 145 Wn.2d 417, 431-32, 38 P.3d 322 (2002)).

22 First American urges as a pretrial matter that the court require the Klosters to articulate
23 their comprehensive interpretation of the First American title policy that leads to a reasonable
24 conclusion that there is coverage for the purported easement over the northern 30 feet of the
25 Rickey parcel, Tract 2, WS-146. As set out below, First American will restate in summary form
26 those key points under its interpretation of the title policy it issued to the Klosters, leading to the
conclusion that there is no coverage. Additionally, First American will identify those aspects of

FIRST AMERICAN’S MOTION FOR PRETRIAL RULING ON TITLE POLICY
AMBIGUITY - 5

1 the Klosters' anticipated interpretation that are erroneous. Ultimately, the Klosters cannot offer a
2 reasonable and coherent interpretation of the title policy that leads to coverage.

3 If they cannot, then the title policy is not ambiguous and should be enforced unless the
4 court determines that there are facts that the jury first must determine. First American has
5 consistently asserted that there are none and that the policy should be enforced as a matter of
6 law.

7 In summary, as a threshold pretrial matter, the court must determine whether First
8 American and the Klosters have both offered alternative reasonable and coherent interpretations
9 of the title policy. Relevant case law should be consulted because the contract at hand is an
10 insurance policy that was not negotiated but has been interpreted by other courts and should be
11 interpreted consistently to the extent reasonably possible. Asking the jury to do this would be
12 improper.

13 (a) **First American's Interpretation of Its Title Policy Is Reasonable and**
14 **Coherent Considering the Policy as a Whole.**

15 First American's comprehensive interpretation of its title policy issued to the Klosters is
16 as follows:

- 17
- 18 1. The title policy's insuring clauses extend coverage for specific types of losses,
19 Schedule A of the policy describes the interest in land affirmatively insured, and
20 Schedule B exceptions exclude certain interests from coverage.
 - 21 2. Insuring Clause 4 provides coverage against loss or damage by reason of lack of a
22 right of access to and from the land. Owners are thus insured against loss
23 resulting from the lack of a right to access their land from a public road. Courts
24 and commentators are virtually unanimous that Insuring Clause 4 addresses only
25 legal access.
26

**FIRST AMERICAN'S MOTION FOR PRETRIAL RULING ON TITLE POLICY
AMBIGUITY - 6**

70727191.3 0090147-00090

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0-000002787

- 1 3. Insuring Clause 4 is only invoked in the event the land lacks legal access to a
2 public road. Insuring Clause 4 never insures any specific easement.

- 3 4. The Klosters have legal access to their land across the southern 30 feet of
4 Kingsford-Smith Lot 2 and the eastern 30 feet of Lots 5, 6, and 7 of Pacific Rim
5 Estates. As even the Klosters' expert, Tennyson Engineering, agrees, a 30-foot-
6 wide driveway is more than adequate under the Klickitat County Code (Tennyson
7 having designed a 20-foot-wide driveway as the Klosters' testifying expert).

- 8 5. Schedule A includes the description of the land insured by the policy and does not
9 include any property beyond the bounds of the area described or referred to in
10 Schedule A, nor does it include any right in abutting streets or roads.

- 11 6. Schedule A does not describe any specific easement, even though it refers to the
12 Pacific Rim Estates plat. The purported easement over the northern 30 feet of the
13 Rickey parcel, Tract 2, short plat WS-146, is outside the Pacific Rim Estates plat.

- 14 7. Schedule B, Section Two, of the Klosters' First American title policy excludes all
15 specific easements in Pacific Rim Estates and short plat WS-146. While legal
16 access is insured under Insuring Clause 4, there is no coverage for any specific
17 easement.

- 18 8. Thus, interpreting the Klosters' First American title policy under Insuring Clause
19 4, Schedule A, and the Schedule B exemptions clearly shows that the Klosters'
20 claim to the northern 30 feet of the Rickey parcel, Tract 2, short plat WS-146, is
21 not covered under their policy.

22 **(b) The Klosters Are Unable to Articulate a Reasonable and Coherent**
23 **Interpretation of Their First American Title Policy That Leads to**
24 **Coverage of Their Claim.**

24 The Klosters have never alleged a comprehensive theory on interpretation of their First
25 American title policy. Rather, the Klosters have made fragmented arguments focusing on
26 discrete terms. They have never, however, put all of the terms together as a coherent

**FIRST AMERICAN'S MOTION FOR PRETRIAL RULING ON TITLE POLICY
 AMBIGUITY - 7**

1 interpretation. Indeed, the Klosters are unable to do so because they cannot account for all of the
2 policy elements interpreted as a whole. The closest the Klosters have come is their
3 Memorandum of Points and Authorities in Opposition to First American's Motion to Revise
4 Summary Judgment dated January 7, 2011. As best we can determine, the Klosters' policy
5 interpretation may be summarized as follows:

- 6
7 1. The Klosters' First American title policy covers matters of public record.
- 8
9 2. Insuring Clause 4 insures both legal and physical access to and from the Klosters'
10 Lot 1, Pacific Rim Estates, even though physical access is not a matter of public
11 record and the policy never references physical access.
- 12
13 3. The Section 1(d) definition of "land" does not limit or modify access insured
14 under the policy such that First American's obligation to insure legal and physical
15 access is virtually unbounded to include even purported easements outside Pacific
16 Rim Estates, even though the policy definition of "land" does not include any
17 rights in abutting streets or roads.
- 18
19 4. Schedule A of the Klosters' title policy refers to the Pacific Rim Estates plat. The
20 northern 30 feet of the Rickey parcel, Tract 2, short plat WS-146, is shown on the
21 map that includes both the Pacific Rim Estates plat and short plat WS-146. The
22 northern 30 feet of the Rickey parcel, Tract 2, short plat WS-146, is part of Pacific
23 Rim Estates plat, even though under Washington law the plats are legally distinct
24 and Pacific Rim Estates cannot encumber WS-146.
- 25
26 5. The Schedule B, Section Two, easement exclusions render access coverage under
the Klosters' title policy illusory if no specific easements are covered. Thus, the
Schedule B exclusions must be ignored and cannot reasonably be interpreted in
relation to Insuring Clause 4 and Schedule A.

**FIRST AMERICAN'S MOTION FOR PRETRIAL RULING ON TITLE POLICY
AMBIGUITY - 8**

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0-000002789

1 6. Thus, the average person would reasonably conclude that the Klosters' title policy
2 for Lot 1, Pacific Rim Estates, covers legal and physical access outside the plat
3 across the northern 30 feet of the Rickey parcel, Tract 2, in adjoining short plat
4 WS-146, despite the fact that the Klosters have legal and physical access across
5 the southern 30 feet of Kingsford-Smith Lot 2, within Pacific Rim Estates, to a
6 public road.

7 It is readily apparent that the Klosters' interpretation of their title policy fails to
8 coherently take into account its terms. Most importantly, there is no reasonable justification to
9 conclude that the policy terms allow for coverage of a purported easement entirely outside
10 Pacific Rim Estates' plat. It is extraordinary and beyond any reasonable expectation that the title
11 policy covering a lot within a plat would include any right, title, or interest involving land
12 outside not only the lot but also the plat that determines the lot's legality.

13 Moreover, the Klosters have never suggested an interpretation of Insuring Clause 4 and
14 Schedule A that does not ignore the exclusion of all specific easements under Schedule B,
15 Section Two. This alone is fatal to the Klosters' assertion of coverage.

16 II. CONCLUSION

17 Based upon the foregoing, First American requests that its motion be granted, finding that
18 the First American title policy issued to the Klosters is unambiguous and must be enforced in
19 accordance with its terms. Accordingly, the Klosters' First American title policy does not cover
20 a purported easement across the northern 30 feet of the Rickey parcel, Tract 2, in adjoining short
21 plat WS-146.

22 DATED: June 10, 2011

23 STOEL RIVES LLP
D. Jeffrey Courser

24 D. Jeffrey Courser, WSB No. 15466
25 Of Attorneys for Defendants First American
26 Title Insurance Company and AmeriTitle,
Inc.

**FIRST AMERICAN'S MOTION FOR PRETRIAL RULING ON TITLE POLICY
AMBIGUITY - 9**

FILED
JUL 29 2011
Sandra Olson, Clerk
KLICKITAT COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KLICKITAT

Thelma, Karl, Lori Kloster,)
Plaintiffs,)
vs.)
Schenectady Roberts, et al,)
Defendants.)

No. 05-2-00108-4
Ruling on Plaintiffs'
Motion for Reconsideration

Plaintiffs move the court under CR 59 for reconsideration of the court's April 19, 2011 order determining that 1) "[t]he Klosters have physical and legal access from their Lot 1 to a public road via the southern 30' of Lot 2 and the eastern 30' of Lots 5, 6, and 7 of Pacific Rim Estates," and 2) "[t]he northern 30 feet across Parcel 2, WS-146 is not included in the description of land in Schedule A of the Klosters' First American Owner's policy."

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0-000004608

Ruling:

Access Issue.

Once again the plaintiffs argue that because the Klickitat County Code specifies a 60 foot right-of-way minimum for public roads, that the plaintiffs do not have "legal" access under insuring clause 4 across the southern 30 feet of Kingsford-Smith Lot 2. They also reassert the claim that the question of whether they have "physical access" should be left for the jury.

Insuring clause 4 does not guarantee that "legal access" is tantamount to a "public road." Legal access is provided by the 30-foot easement across Lot 2, which is more than sufficient for a driveway, according to the evidence submitted in this case—including the testimony of Klosters' expert, Tennyson Engineering. Plaintiffs produce neither new evidence nor new argument in their motion to reconsider on this issue. As a matter of law, Klosters have legal access.

Likewise, the evidence submitted in this case thus far—including the video and photographic evidence referenced by defendant First American—demonstrates unequivocally that the Klosters have physical access to their property. Plaintiffs produce neither new evidence nor new argument in their motion to reconsider. As a matter of law, Klosters have physical access.

Coverage Issue.

Plaintiffs also move the court to reconsider this April 19, 2011 ruling:


The northern 30 feet across Parcel 2, WS-146 is not included in the *description of land* in Schedule A of the Klosters' First American Owner's policy. (Emphasis added.)

Plaintiffs renew their argument that, based on *Santos v. Sinclair*, 76 Wn.App. 320 (1994), because the "missing easement" does appear on the face of the surveyed and certified plat, the title policy "incorporates by reference" all aspects of the property and insurance coverage adheres.

However, *Santos* stands for the proposition that where a title insurance policy “clearly and unequivocally incorporates by reference” a legal description which includes a disputed easement, then coverage may follow, even if the easement or road is not specifically described. In the case at bar, this is not the case. Plaintiffs’ contention that the “according to the plat thereof” language provides the predicate reference is a bridge too far.

Furthermore, the narrow ruling of the court is that “the northern 30 feet...is not included in the description of land in Schedule A.” This comports with the observation that there are no easements described in the Pacific Rim Estate plat legal description—the land insured under Schedule A does not describe any easement of record.

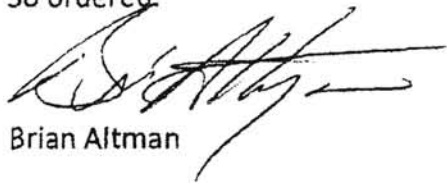
For the foregoing reasons, the plaintiffs’ motions on reconsideration are denied.



Brian Altman, Superior Court Judge

Accordingly, finding the policy ambiguous as to access coverage as a whole, the court rules as a pretrial matter that First American is precluded from arguing coverage to the jury.

So ordered.



Brian Altman

APPENDIX F

Court's Pretrial Ruling on Title Policy Ambiguity

(August 1, 2011) (CP 2911-2913)

FILED
AUG 01 2011
Samantha Olson, Clerk
KLICKITAT COUNTY

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KLICKITAT**

Thelma, Karl, Lori Kloster,)
Plaintiffs,)
vs.)
Schenectady Roberts, et al,)
Defendants.)

No. 05-2-00108-4
Court's Pretrial Ruling
on Title Policy Ambiguity

First American Title Insurance Company ("First American") moves the court for a pretrial order finding that the First American title policy issued to the Klosters is not ambiguous and must be enforced in accordance with its terms. Because the court reaffirms its prior rulings that the Title Policy is ambiguous when viewed in its entirety, the court denies First American's motion.

The court agrees with First American's analysis paragraphs 1-7, on pages 6 and 7 of its brief in support of the motion. However an ambiguity is created, when viewing the contract as a whole, by virtue of the unfortunate plat map appended to the policy.

Schedule A of the Klosters' title policy refers to the Pacific Rim Estate plat. The northern 30 feet of the Rickey parcel, Tract 2, short plat WS-146, is shown on the map that includes both the Pacific Rim Estates plat and short plat WS-146. The northern 30 feet of the Rickey parcel, Tract 2, short plat WS-146, is not part of Pacific Rim Estates plat. The plats are legally distinct and Pacific Rim Estates cannot encumber WS-146.

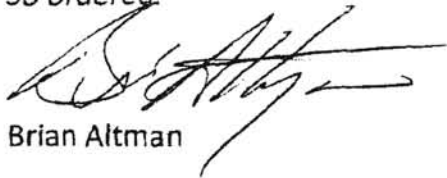
However, when the entire policy is interpreted as it would be understood by an average person, a question is created as to coverage when each constituent part of the policy is parallelized.

An average person could reasonably conclude that the title policy for Lot 1, Pacific Rim Estates, covers access outside the plat across the northern 30 feet of the Rickey parcel, Tract 2, in adjoining short plat WS-146, because it both references the mistaken easement by attachment and guarantees coverage to "access." In other words, it is the inclusion of the inaccurate plat in the policy along with otherwise unambiguous language which creates the ambiguity. And it is First American's policy.

The court also agrees with First American that generally insurance policy interpretation is a question of law for the court. Moreover, as noted in the treatise provided by First American, "[w]hen an insurance policy provision is deemed ambiguous, courts resolve the ambiguity themselves, frequently by invoking the rule that construes insurance policy provisions against the insurer." *Randall H. Warner, All Mixed up about Contract: When is Contract Interpretation a Legal Question and When Is It a Fact Question?*, 5 Va. Law & Bus. Rev. 81, 111 (2010).

Accordingly, finding the policy ambiguous as to access coverage as a whole, the court rules as a pretrial matter that First American is precluded from arguing coverage to the jury.

So ordered.



Brian Altman

APPENDIX G

**Court's Ruling: Various
Pretrial Motions; Pretrial Order**

(October 10, 2011) (CP 3275-3281)

FILED
OCT 10 2011
Saundra Olson, Clerk
KLICKITAT COUNTY

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KLICKITAT**

Thelma, Karl, Lori Kloster,)	No. 05-2-00108-4
Plaintiffs,)	Court's Ruling:
vs.)	Various Pretrial Motions;
Schenectady Roberts, et al,)	Pretrial Order
Defendants.)	

After oral argument, the court rules on the following issues and motions:

1. First American's motion for clarification on Title Policy Ambiguity;
2. Plaintiff Klosters' motion for partial summary judgment for failure to defend, bad faith, and breach of unfair claims settlement practices against defendant First American;

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0-000003275

3. Plaintiff Klosters' motion for partial summary judgment that the non-recorded access easement is a defect on plaintiffs' title;
4. Defendant Pacific Rim's motion for summary judgment of dismissal; and
5. First American's motion in limine on plaintiffs' Bad Faith and CPA claims; and First American's cross-motion for summary judgment on the same issues.

First American's motion for clarification on Title Policy Ambiguity

First American is troubled by the court's August 1, 2011 ruling on Title Policy Ambiguity, and seeks clarification. First American argues that, if the court is going to place legal emphasis on the fact of the plat map being attached and made a part of the title policy, then the disclaimer language should also be read into the policy. If that is done, the argument suggests, no reasonable insured could consider the attached partial map as part of the title policy when the disclaimer language expressly states that it is not.

In determining whether the First American policy is ambiguous, the court is bound by the broad policy language in Shotwell and other Washington cases. Where policy provisions are reasonably capable of two constructions, the construction of the policy most favorable to the insured must be employed, interpreting the language of the contract as it would be understood by the average person purchasing insurance.

Notwithstanding the disclaimer language contained in the plat map attached to the insurance policy, the average person purchasing insurance would not reasonably glean that the additional access easement was not within the definition of access contained elsewhere in the policy. Again, it is the court's understanding that the very broad language of Washington State cases require

this result; and First American has always argued that the issue of coverage is for the court.

Plaintiff Klosters' motion for partial summary judgment for failure to defend, bad faith, and breach of unfair claims settlement practices against defendant First American

The plaintiffs bring partial summary judgment motions addressing claims for failure to defend, bad faith, and unfair settlement practices.

Assuming coverage, the plaintiffs argue that First American's decision to deny coverage to the plaintiffs and to grant coverage and to defend the Rickeys' title policy was capricious, illegal, and was in bad faith.

First American counters inter alia that no duty to defend arises unless the insured is sued, and no obligation to file suit arises if a claim for indemnity is made. In this case, because the Klosters were never sued by any third party, even if there is coverage, they were entitled to indemnity only. Because First American's duty to defend never arose, the plaintiffs' allegation based upon it must fail.

A duty to defend may be triggered if there is coverage, and a third party asserts a lawful right which effectively evicts the plaintiff under color of an insurance policy. In most cases, the third parties' assertion of a superior right is demonstrated in a lawsuit; however, the court can find no cases which make that an implacable rule. Indeed, the principle appears to be that the duty to settle is intimately bound up with the duty to defend and to indemnify—that those continuing duties revolve around the particular facts of a particular case.

Of course, a bad faith claim is analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by that breach. Whether an insurer acted in bad faith by failing to defend is a question of fact.

In a summary judgment context, there is a question of fact for the jury as to whether First American acted in bad faith refusing to defend. Plaintiff's motion is denied.

Plaintiff's motion for partial summary judgment on Unfair Claims Settlement Practices and Ignorance and Good Faith Investigation

The plaintiffs argue First American violated the Unfair Claims Settlement Practices Act (and consequently the CPA) and failed to complete the investigation of the claim within the period prescribed by law.

The court finds that the issues of failure to complete the investigation, refusal to investigate, ignorance of the law, are inextricably bound with a dense set of factual inquires—who said what to whom and when was it said; what records were or were not produced—and are thus for the jury. Therefore, the plaintiffs' motion for partial summary judgment on these issues fails.

Plaintiff Klosters' motion for partial summary judgment that the non-recorded access easement is a defect on plaintiffs' title

The plaintiffs want the court to announce that, as a matter of law, the non-recorded easement is a "defect" on their title. But because the failed easement is not affirmatively insured under Schedule A, and Schedule A does not describe any specific easement, the court does not grant the motion to formalize the issue with a finding that the non-recorded easement is a defect. The court's previous usage of the word defect in describing the non-recorded easement was intended to be a

general description, as in, “problematic, faulty, deficient, not all it’s cracked up to be”—not a legal finding. Motion denied.

Defendant Pacific Rim’s motion for summary judgment of dismissal

Defendant Pacific Rim Brokers moves the court for summary judgment of dismissal on three separate, independent, grounds. First, that upon the court’s ruling that policy ambiguity precludes First American from arguing coverage to the jury, since the Klosters cannot recover the same damages twice, as a matter of law Pacific Rim cannot be liable, ie., “did not cause the Klosters any damages beyond those that the First American policy all ready will pay.” Second, Pacific Rim had no legal duty to disclose the correct status of the access easement that is the subject of this action. And finally, Pacific Rim Brokers made no affirmative false statement on which the Klosters can base their claims.

First American Covers all remaining Claims:

Pacific Rim Brokers withdrew this motion for the purposes of summary judgment.

No duty to Disclose:

Pacific Rim Brokers argues that since the true condition of the problematic easement was apparent or readily ascertainable, it had no duty to disclose it to the plaintiffs. The defendant further urges that the plaintiffs have failed to respond, and thus as a matter of law it is entitled to summary judgment.

The court agrees with Pacific Rim’s analysis of the court’s December 6, 2010, ruling on summary judgment. In that ruling the court held that Pacific Rim’s motion as to intentional torts was defeated by facts which raised the issue of

First American's motion in limine on plaintiffs' Bad Faith and CPA claims; and
First American's cross-motion for summary judgment on the same issues

The court agrees with First American that it is a close coverage question under the facts of this case, but that, in a summary judgment context, disputed facts exist regarding an adequate and timely investigation. Based on the evidence thus far adduced, there are disputed facts surrounding the adequacy and timeliness of Mr. Moore's response to the Klosters. The test is whether First American's conduct was reasonable. That is for the jury. Motion denied.

Court's Pretrial Order for Pretrial Hearing on October 20, 2011, at 1:00 p.m.

There is currently calendared a pretrial hearing for Thursday, October 20, at one o'clock, in anticipation of a jury trial currently set for October 31st.

Counsel should come prepared to do all remaining work to prepare this case for trial, understanding that we will begin picking a jury at 9:30 a.m. on the morning of trial. Please bring a proposed pre-trial order along the lines of Mr. Courser's "Defendant's Proposed Pre-Trial Order" submitted a year ago. The court and counsel will work through all remaining issues, motions in limine and the like, during the ½ day allotted for the pre-trial hearing. The jury trial is set for a maximum of five days.

So ordered.



Brian Altman

APPENDIX H

Jury Verdict Form

(November 3, 2011) (CP 3714-3716)

SUPERIOR COURT OF WASHINGTON IN AND FOR
Klickitat County

FILED

NOV 03 2011

Sandra Olson, Clerk
Klickitat County

THELMA, KARL, LORI, and)
KAREN KLOSTER,)
)
Plaintiffs,)
)
Vs.)
)
PACIFIC RIM BROKERS, INC.,)
a corporation; and FIRST)
AMERICAN TITLE INSURANCE)
COMPANY, a corporation.)

No. 05-2-00108-4

**JURY VERDICT
FORM**

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Do you find by clear, cogent, and convincing evidence that there was any difference between the price the Klosters paid for the property and its actual market value? If yes, state the dollar amount.

ANSWER: YES NO

ANSWER: \$ _____

INSTRUCTION: Circle "Yes" or "No." If you answered "Yes," fill in the dollar amount. Answer Question 2.

QUESTION 2: Do you find by clear, cogent, and convincing evidence that there was any cost of cure? If yes, state the dollar amount.

ANSWER: YES NO

ANSWER: \$ 9,000

INSTRUCTION: Circle "Yes," or "No." If you answered "Yes," fill in the dollar amount. Answer Question 3.

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0-000003714

QUESTION 3: Do you find by clear, cogent, and convincing evidence the Klosters suffered any other damages as a natural consequence of the defective easement? If so, please state the amount. (Note: Any dollar amount that you state in answer the Question 3 may not exceed the alleged cost of the water connection in the amount of \$1,300.00, and the alleged cost of the easement survey in the amount of \$287.50).

ANSWER: YES NO

ANSWER: \$ _____

INSTRUCTION: Circle "Yes," or "No." If you answered "Yes," fill in the dollar amount. Answer Question 4.

QUESTION 4: Do you find by clear, cogent, and convincing evidence that Pacific Rim Brokers, Inc., committed the following cause of action concerning the validity of the disputed easement running along the northern 30 feet of WS-146?

Negligent Misrepresentation: ANSWER: YES NO

INSTRUCTION: Circle "Yes," or "No." Answer Question 5.

QUESTION 5: Do you find by a preponderance of the evidence that the Klosters' conduct constituted failure to minimize their loss?

ANSWER: YES NO

INSTRUCTION: Circle "Yes," or "No." Answer Question 6.

QUESTION 6: As to each party as to which you answered "Yes" to any part of Questions 4 or 5, set forth those parties' percentage shares of fault. The total percentage shares of fault must equal 100%.

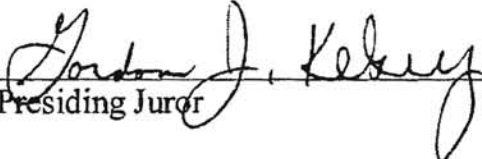
Klosters: 100 %

Pacific Rim Brokers, Inc.: ∅ %

TOTAL: 100%

INSTRUCTION: sign and return this verdict.

Dated this 4th day of November, 2011.


Presiding Juror

0-000003716

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANT** on the following named person(s) on the date indicated below by

- mailing with postage prepaid
- hand delivery
- facsimile transmission
- overnight delivery

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at his or her last-known address(es) indicated below.

Lance Stewart Stryker
40 Palos Verde
White Salmon WA 98672-8941

Attorney for Plaintiffs Thelma, Karl,
Lori and Karin Kloster

Jeffrey P. Downer
Christine Slattery
Lee Smart, P.S., Inc.
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Seattle WA 98101-3929

Attorneys for Defendant Pacific Rim
Brokers, Inc.

L. Eugene Hanson, Jr.
Hanson Law Office
111 N. Grant Street
Goldendale WA 98620

Attorney for Defendant Alvin
Fred Heany, Jr.

I also hereby certify that I caused the original to be filed with the appellate court clerk, by mailing the same via postage-paid first class U.S.

Mail to the following:

Washington State Court of Appeals
Division III
500 N. Cedar Street
Spokane WA 99201
Attention: Court Clerk

DATED: December 11, 2012



D. Jeffrey Courser, WSB No. 15466
Of Attorneys for Defendants First
American Title Insurance Company
and AmeriTitle, Inc