Supreme Court No. 90385-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THELMA, KARL, LORI, and KARIN KLOSTER,

Petitioners,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY; AMERITITLE, INC.; PACIFIC RIM BROKERS, INC.; and SCHENECTADY ROBERTS,

Respondents.

FIRST AMERICAN TITLE INSURANCE COMPANY'S AND AMERITITLE, INC.'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals Unpublished Opinion conflicts with no decisions of this court, the Court of Appeals, or, for that matter, other jurisdictions, which have ruled upon the numerous issues raised by petitioners the Klosters in their Petition for Review. RAP 13.4(b)(1), (2), (4).

In their Petition for Review, the Klosters appear to adopt the Court of Appeals' description of the material facts in the case. Klosters' Petition pp. 4-6 (tracking the Court of Appeals' fact description without exception). As the Klosters correctly state, after pretrial motions, the trial court dismissed many of the Klosters' claims and the Court of Appeals affirmed those dismissals.

The Court of Appeals also held that the trial court erred in concluding that the title policy was ambiguous and therefore covered a "defect" in the title caused by the Klosters' inability to use the unrecorded easement on Tract 2. The judgment against First American was reversed. Unpublished Opinion at 42. The Klosters' petition does not seek review of the Court of Appeals' reversal on title policy ambiguity regarding the sketch map. Rather, the Klosters pursue review of other issues, but are unable to establish any basis for review. Their petition should be denied.

II. WHY THE KLOSTERS' PETITION FOR REVIEW SHOULD BE DENIED

The Klosters' Petition for Review identifies several issues addressed in the Court of Appeals' Unpublished Opinion. With limited exception, the Klosters assert error and then invoke RAP 13.4, arguing that the Court of Appeals' rulings raise matters of substantial public interest. In fact, the Court of Appeals committed no error, as its decision was consistent with the standards of review applied under Washington law without conflict of any decision of the Washington Supreme Court or any other Washington Court of Appeals. Where there is no error, there is no issue of substantial public interest that should be determined by the Supreme Court.

A. The Court of Appeals Affirmed the Klosters Had Both Legal and Physical Access to Their Property.

In their petition, the Klosters assert the Court of Appeals erred in not considering an early decision by Judge E. Thompson Reynolds that access coverage under the Klosters' title policy was "undefined" and thus somehow ambiguous. Klosters' Petition pp. 6-7. As explained below, the Klosters' reliance on Judge Reynolds' early decision is unavailing and does not give rise to an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(4).

1. ALTA Insuring Clauses Provide Standard Coverage.

ALTA owner's policies contain "insuring clauses" on the front (or "jacket") of the policy. The standard insuring clauses state:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:
>
> 1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
>
> 2. Any defect in or lien or encumbrance on the title;
>
> 3. Unmarketability of the title;
>
> 4. Lack of a right of access to and from the land.
>
> The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.

Trial Ex. 95 (Klosters' First American Title Policy).

Insuring clause 4 provides coverage against loss or damage by reason of "[l]ack of a right of access to and from the land." Typically, owners are thus insured against loss or damage resulting from the lack of a right to access their land from a public road. By its terms, an ALTA

policy insures against lack of a "right" to access, not lack of physical or practical access. See Magna Enters., Inc. v. Fid. Nat'l Title Ins. Co., 104 Cal. App. 4th 122, 127 Cal. Rptr. 2d 681, 683-84 (2002) (title policy insures against lack of right to access, not lack of physical or practical access; any other interpretation would be strained and unnatural under policy language insuring against lack of right to access); Krause v. Title & Trust Co. of Fla., 390 So. 2d 805 (Fla. Dist. Ct. App. 1980) (title policy insures legal access as shown by record, and current owner had no claim under his policy even though the only way to access his land was not passable by ordinary passenger vehicles without substantial amount of clay or rock fill); Gates v. Chi. Title Ins. Co., 813 S.W.2d 10, 11-12 (Mo. Ct. App. 1991) (insured owner had right of access, even though it was via rough and nearly impassable route, and thus made no case under his title insurance policy).

Accordingly, the Klosters' title policy insured the Klosters' legal access to their property under Insuring Clause 4. As explained below, the Klosters had legal and physical access to their property to a public road across neighboring land to their west. In the Court of Appeals, however, the Klosters claim that Insuring Clause 4 somehow failed to define access, rendering the clause ambiguous. So, they argued, Insuring Clause 4 should be interpreted to also grant coverage of their claim for alternate access over land to the south of the Klosters' parcel.

2. The Klosters Had Legal and Physical Access to Their Property.

The Klosters never disputed they had access to a public road via the south 30 feet of Lot 2 and the east 30 feet of Lots 5, 6, and 7 of Pacific Rim Estates. As the Court of Appeals recognized, the Klosters gained, upon their purchase, both legal and physical access to the land, regardless of the absence of an easement across a neighboring parcel to the south. Unpublished Opinion at 39. Given the Klosters' enjoyment of the 30-foot easement allowing access to their

property, "their claim does not fulfill the policy inclusory language." Id. Insuring Clause 4 under the Klosters' First American title policy was satisfied.

3. Nonetheless, the Klosters Erroneously Rely upon an Early Trial Court Ruling That Access Coverage Under Their Title Policy Was Somehow Ambiguous, Giving Rise to Coverage of Their Claim.

The Klosters rely upon an early ruling by Judge Reynolds that access coverage under their title policy was somehow ambiguous. Klosters' Petition pp. 6-7. Judge Reynolds' ruling, however, in no way specified how the Klosters' claim to alternative access was therefore covered, and this is left unexplained in the Klosters' Petition for Review. Moreover, Judge Reynolds expressly refused in his earlier ruling to find coverage for the alternative access easement, allowing that First American could contest at trial whether the access easement was insured (CP 1304-1305 (First American may contest whether the alternative access easement is insured)). So, Judge Reynolds' ruling could not, on its terms, be applied to grant coverage to the Klosters' access over the northern 30 feet of Tract 2 owned by the Klosters' neighbors to the south.

In any event, the ruling was eventually revised and superseded by more specific findings in later rulings by Judge Robert Altman. By the time of trial, Judge Reynolds' partial ruling was no longer the law of the case, as Judge Altman had identified another sole source of ambiguity in the Klosters' First American title policy.

Accordingly, the Klosters' reliance on an earlier finding of title ambiguity leading to coverage that the Court of Appeals should have considered is erroneous and fails to satisfy any basis for review under RAP 13.4.

B. Access Coverage Under the Klosters' Title Policy Was Not Illusory.

The Klosters assert that the Court of Appeals erred in its analysis of the First American policy's exclusion of coverage for specific easements. Id. pp. 8-9. In its Unpublished Opinion,

the Court of Appeals correctly identified Schedule B as excluding from coverage specific easements, including the unrecorded easement on the northern 30 feet of Tract 2 the Klosters had claimed was covered under their policy. Unpublished Opinion at 39-40. This included any easements purportedly shown on the partial sketch map appended to the Klosters' title policy. Indeed, as the Court of Appeals recognized, the Klosters' own testimony acknowledged (1) the title policy exclusions, including for the alternative access they sought, and (2) that the sketch map appended to the policy contained a disclaimer stating that the map was provided as a courtesy and did not constitute a part of the title policy. Id. at 40.

In their petition, the Klosters appear to argue that, in some way, access coverage, because it must be construed in accordance with the understanding of the average person, must be for all access easements regardless of the Schedule B exclusions because access coverage under the policy is "undefined, ambiguous and illusory." Klosters' Petition pp. 8-9. Still, the Klosters refuse to explain how access coverage is "undefined" and how it is ambiguous as applied by Judge Altman and the Court of Appeals, thereby rendered "illusory." The Klosters fail to establish any basis for review under RAP 13.4 in their failure to explain.

C. There Is No Evidence That AmeriTitle Undertook Any Duty to the Klosters Beyond Issuing a Preliminary Commitment for Title Insurance.

In their petition, the Klosters cite no evidence that AmeriTitle agreed with the Klosters to undertake any duty beyond issuing a preliminary commitment for title insurance. As the Klosters concede, a preliminary commitment for title insurance is an offer to insure and not a representation of the condition of title. Barstad v. Stewart Title Guar. Co., 145 Wn.2d 528, 536, 39 P.3d 984 (2002). As the Court of Appeals affirmed, because the preliminary commitment AmeriTitle issued was not an abstract of title, AmeriTitle had no duty to inform the Klosters that one of the easements on the attached short plat map had not been recorded. Moreover, the preliminary commitment specifically excluded from coverage any easement shown on the short

plat map. Unpublished Opinion at 31. There is no basis to impute any duty of AmeriTitle to the Klosters with regard to the unrecorded easement.

Once again, the Klosters erroneously assert error in the Court of Appeals as the basis for review under RAP 13.4. There is no substantial public interest in review of the Court of Appeals' correct decision that is consistent with Washington law.

D. First American's Agent, AmeriTitle, Was Not a Co-Insurer as a Matter of Law.

The trial court ruled that the Klosters could not assert a claim against AmeriTitle as an insurer, and therefore all claims on that basis were dismissed, including claims for breach of contract, breach of the duty to defend and indemnify, bad faith, and violations of the Consumer Protection Act ("CPA"). The Court of Appeals affirmed. Id. at 30.

In their Petition for Review, the Klosters make the same argument that failed below. The Klosters contend that because First American and AmeriTitle entered into an agency agreement requiring AmeriTitle to indemnify First American for the first $3,500 of loss on any policy of title insurance issued, AmeriTitle somehow becomes an insurer owing a duty to indemnify the Klosters. Klosters' Petition pp. 13-15. The Klosters rely upon both the Washington Insurance Code and its attendant regulations.

The Klosters' failed argument is frivolous. There is no evidence that AmeriTitle made any representation to the Klosters agreeing to indemnify them for any loss related to the title policy AmeriTitle issued on behalf of First American. AmeriTitle was First American's duly appointed agent and issued a preliminary commitment and a title policy on behalf of First American in accordance with the scope of its authority. AmeriTitle's business arrangement with First American was of no benefit to the Klosters. First American remained solely liable to the Klosters for any covered loss.

E. The Klosters' Title Policy Claim Was Handled Promptly and Properly Denied.

In their Petition for Review, the Klosters claim that technical violations of the Unfair Claims Settlement Practices Act are actionable, even in the absence of any demonstrated harm to the insured. Id. p. 16. In arguing the Court of Appeals departed from Washington law, the Klosters rely upon Rizzuti v. Basin Travel Service of Othello, Inc., 125 Wn. App. 602, 105 P.3d 1012 (2005).

The Klosters' reliance is unfounded. Rizzuti does not hold that a first party insured need not establish with specific evidence that they were harmed by the insurer's bad faith acts. In fact, Rizzuti held just the opposite, consistent with Washington law that, as an element of every bad faith or CPA action, a first party insured must establish it was harmed by the insurer's bad faith acts. Rizzuti, 125 Wn. App. at 620-21; Coventry Assocs. v. Am. States Ins. Co., 136 Wn.2d 269, 276, 961 P.2d 933 (1998) (to maintain a cause of action based on insurer's bad faith or CPA violation, the insured must establish it was harmed).

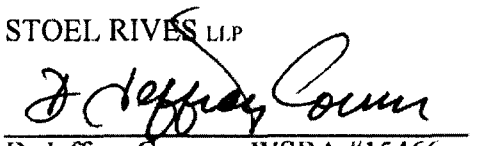
As the Court of Appeals affirmed, the Klosters failed to present any evidence of any delay in First American's investigation, or any other action First American took that harmed the Klosters, notwithstanding denial of their title policy claim. Unpublished Opinion at 36.

III. CONCLUSION

This court should deny the Klosters' Petition for Review.

DATED: June 18, 2014.

STOEL RIVES LLP



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **ANSWER TO PETITION FOR REVIEW** on the following named person(s) on the date indicated below by

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

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Attached please find the following for filing:

Case Name:	Kloster v. First American Title Insurance Company, et al.
Supreme Court Case Number:	90385-9
Name of Document to File:	First American Title Insurance Company's and AmeriTitle, Inc.'s Answer to Petition for Review.

Copies will also be served on opposing counsel via mail pursuant to the certificate of service. Thank you.

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