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No. 75097-6-I

IN THE COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

EDWARD AND MAYA ELEAZER, Husband and Wife,

Appellants/Plaintiffs,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign insurer doing business in Washington; THE TALON GROUP, a domestic Washington corporate entity or partnership, d/b/a Talon Group Escrow and/or Talon Title,

Respondents/Defendants.

REPLY BRIEF OF APPELLANTS

FRIEDMAN | RUBIN®
James A. Hertz, WSBA No. 3062
Henry G. Jones, WSBA No. 45684
1126 Highland Avenue
Bremerton, Washington 98337
Telephone: (360) 782-4300

Sean J. Gamble, WSBA No. 41733
51 University Street, Suite 201
Seattle, WA 98101
Telephone: (206) 501-4446

Attorneys for the Appellants

TABLE OF CONTENTS

INTRODUCTION 1

I. It is a question of fact how much harm the 1993 Recorded Documents caused to the Eleazers 2

II. It is a question of fact whether Respondents' conduct violated the duty of good faith and fair dealing and whether Respondents violated IFCA 6

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 11

Coventry Associates v. American States Ins. Co., 136 Wn.2d 269, 961 P.3d 933 (1998) 7

Fireman's Fund Ins. Co. v. Alaskan Pride P'ship, 106 F.3d 1465 (9th Cir. 1997) 7

Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 94 P.3d 945 (2004) 5

Markman v. Westview Instruments, Inc., 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996) 11

Smith v. Safeco Ins. Co., 150 Wn.2d 478, 78 P3.d 1274 (2003) 7

Van Noy v. State Farm Mut. Auto Ins. Co., 142 Wn.2d 784, 16 P.3d 574 (2001) 7

Waldridge v. American Hoechst Corp., 24 F.3d 918, (7th Cir.1994) 11

Zilisch v. State Farm Mut. Auto. Ins. Co., 196 Ariz. 234, 995 P.2d 276, (2000). 7

Other Authorities

10 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure: Civil § 2712, at 574-78) 11

INTRODUCTION

Respondents' brief demonstrates how they cannot escape from the reality that the 1993 recorded documents—for which there is insurance coverage—continue to encumber the Eleazers' title to their home. This was true in 2007, it remains true in 2016, and will remain true indefinitely. First American admitted this when it accepted coverage in February of 2012. CP 926 (middle ¶), CP 345. Rather than address this critical issue, however, Respondents argue that the Form 34 "agreement to agree" to an easement must relieve the Respondents of any responsibility pertaining to the undisclosed 1993 recorded documents. Summary judgment based on arguments made in the light most favorable to the *moving* party is improper. The trial court erred. It remains a question of fact for just how much the Eleazers are harmed financially by the undisclosed 1993 recorded documents—regardless of the Form 34. This question of fact can only be resolved by a jury.

Regardless of whether a claim is covered, insurers such as First American are still obligated to investigate the claim and not engage in bad faith conduct that violates IFCA. It is undisputed that, for sixteen months, First American did not investigate or assist its insureds. And it is undisputed that First American never defended them or paid

damages. At a minimum, it is a question of fact whether First American violated Washington insurance law all the while it denied coverage, accepted coverage, and then denied coverage. A trial court cannot disregard an insurer's breach of the insurance policy and violations of insurance regulations in order to grant summary judgment to the insurer.

The trial court erred when it viewed the evidence in the light most favorable to the Respondents, and then weighed that evidence to reach its ruling. That is error. The trial court's decision must be reversed.

I. It is a question of fact how much harm the 1993 Recorded Documents caused to the Eleazers.

The Eleazers' property is diminished in value as a consequence of the 1993 recorded documents. This is a covered claim. The Eleazers contend that the 1993 recorded documents have caused them to incur significant losses because the Health District relies on those documents to restrict the locations on the Eleazers' property where they can install a septic system to serve their home. The 1993 recorded documents will likewise restrict any future owners in the same manner, thus negatively impacting the value of the property. The 1993 recorded documents

have also been relied upon by others to make claims adverse to the Eleazers. The Eleazers submitted a claim on their title insurance because the purpose of buying this type of insurance is to safeguard against unknown encumbrances that can negatively impact a homeowner's real estate investment. First American recognized this when it belatedly accepted coverage in February of 2012. CP 926 (middle ¶), CP 345. The Eleazers also incurred legal fees as a result of the 1993 recorded documents, which constitute contract damages under the policy.

Respondents contend that the 2007 Form 34 "agreement to agree" relieves First American of any obligation to cover the Eleazers' contract claim arising from the 1993 recorded documents—which still restrict the locations on the Eleazers' property where they can install a septic system to serve their home. The Respondents further contend that because of the Form 34 "agreement to agree," the Eleazers do not have any diminution in value. But these contentions are undercut by First American's own property appraiser, who found diminution-in-value (DIV) damages caused in part by the 1993 recorded documents. Another problem with the contentions is that they assume the Bush House, Nordstrom, and the Eleazers can come to an agreement on an

easement curing the 1993 recorded documents. But no future easement will undue the past harm caused by the 1993 recorded documents, for which First American provided the insurance.

As it stands now, Ms. Nordstrom has rejected the Eleazers' good faith easement offer. In the future, she may accept it, counteroffer (which she has not done), or seek rescission (which includes a host of problems, not the least of which the Eleazers lose the family home that they renovated). None of these outcomes cures the detrimental effect of the 1993 recorded documents. Respondents' DIV report found $125,000 in property diminution-in-value losses. CP 363. The Respondents' DIV report contemplated a reevaluation "depending on the outcome of the appeal." CP 363. No such reevaluation ever occurred, leaving a DIV somewhere between $1 and $125,000, but far from the zero dollars in damage that the trial court assumed. Respondents must not be allowed to shirk their contractual liability based on conclusory arguments that there is no DIV. A new DIV should be conducted consistent with Respondents' May 21, 2013 letter seeking a DIV based on the 1993 recorded documents.

The Form 34 was "an agreement to do something which requires a further meeting of the minds of the parties and without which it

would not be complete."[1] The Eleazers in 2007 could have negotiated an easement or walked away from the deal. All Form 34 indicates is a willingness to negotiate further. While potentially useful in the 2007 negotiations, "[a]greements to agree are unenforceable in Washington."[2] Ultimately, "for a contract to form, the parties must objectively manifest their mutual assent" and "the terms assented to must be sufficiently definite."[3] In 2007, the Eleazers were negotiating from a position of power, deciding whether to buy or not to buy the property from an eager seller. The Eleazers did not know that there were any restrictions on their ability to install a septic system to serve their home. If the Eleazers knew about the 1993 recorded documents, they could have incorporated that information into their decision making process.

The Form 34 does not mean that the Eleazers somehow knew about the 1993 recorded documents or that the restrictions are removed. The Form 34 does not cure the 1993 restrictions. The Form 34 "agreement to agree" does not mean that the Eleazers caused the 1993 restrictions that the insurance claim arises from. Knowledge is power,

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[1] *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 175, 94 P.3d 945 (2004).
[2] *Id.* at 176.
[3] *Keystone*, 152 Wn.2d at 177-78.

and Respondents' failure to find and disclose the 1993 documents meant reduced power causing reduced property value; no prospective buyer will want to purchase the Eleazers' property at full value in light of the 1993 recorded documents. When the Eleazers purchased the property, Respondents insured the title against any encumbrances the Respondents collectively failed to find and disclose. This is the purpose of title insurance and anything less than full coverage renders the protection illusory.

The extent to which the Eleazers' property is diminished in value as a consequence of the 1993 recorded documents is a question of fact. The trial court erred when it decided this key question of fact in favor of the Respondents by weighing the evidence and finding that there is no diminished value arising from the 1993 recorded documents.[4]

II. It is a question of fact whether Respondents' conduct violated the duty of good faith and fair dealing and whether Respondents violated IFCA.

Whether First American acted unreasonably while it denied the Eleazers' claim in 2011, belatedly accepted the claim in 2012, and then later belatedly denied the claim in 2013, is a heavily disputed question

[4] There are several questions of fact as outlined in the Eleazers' opening brief needing resolution, but the DIV is a key issue that drives the insurance contract claim.

of fact that can only be resolved by a jury.[5] It is such a question of fact, that under Washington law an insured may sue an insurer for the bad faith investigation of a claim regardless of whether the insurer ultimately correctly determined there was no coverage.[6] This is because the standard of conduct is whether First American acted reasonably at the time based upon the available information.[7] First American's conduct is examined prior to when each denial occurred; not whether later developments can vindicate First American's decision.[8]

Was it reasonable for First American to deny the claim in 2011 without conducting any actual claim investigation? CP 907. Unsurprisingly, Respondents contend that it was reasonable even though in 2011 First American:

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[5] *See Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P3.d 1274 (2003) (citing *Van Noy v. State Farm Mut. Auto Ins. Co.*, 142 Wn.2d 784, 796, 16 P.3d 574 (2001)).

[6] *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.3d 933 (1998).

[7] *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 237-38, ¶ 21-22, 995 P.2d 276, 279-80 (2000). (The reasonableness of an insurer's actions in handling a claim must be evaluated as of the time of those actions based on what it knew when it acted).

[8] *Fireman's Fund Ins. Co. v. Alaskan Pride P'ship*, 106 F.3d 1465, 1470 (9th Cir. 1997) ("The bad faith claim required the jury to determine whether Insurer's denial of coverage was unreasonable when it occurred, not whether later developments could have vindicated the Insurer's decision.") (applying Washington law) (citations omitted).

- Failed to accept or deny liability within 30 days, violating WAC 284-30-370.
- Failed to explain why it needed additional time to investigate, violating WAC 284-30-380.
- Failed to interview its insured to ask any questions it felt was pertinent to the claim investigation, violating WAC 284-30-330(4).
- Failed to make any inquiries to the Health District to ask about the 1993 recorded documents and how they impact the Eleazers' use of their own land, violating WAC 284-30-330(4).
- Failed to hire an appraiser to determine if the 1993 recorded documents have the detrimental effect of restricting the locations on the Eleazers' property where they can install a septic system to serve their home, violating WAC 284-30-330(4).

These are just a few of the facts that a jury needs to evaluate while determining whether First American's conduct in 2011 violated IFCA under Washington law.

Was it reasonable for First American to belatedly accept partial liability in 2012—while still denying coverage under other policy provision—**and then do nothing for 16 months?** *Compare* CP 921 *with* CP 343 (First American accepted partial liability in February 2012 then failed to order an appraisal until May 2013). Unsurprisingly, Respondents contend that it was reasonable even though in 2012 First American:

- Failed to timely respond to the Eleazers' request for the abstracts of title to the encumbered property, violating WAC 284-30-330(2). CP 335.

- Failed to timely respond to the Eleazers' request to verify whether First American will reimburse them for attorney fees under paragraph 4.a(5) of the title insurance policy, violating WAC 284-30-330(2) and (13). CP 338.
- Failed to assist its insured in clearing the title to their property, violating WAC 284-30-330(12).
- Failed to investigate or evaluate the claim, violating WAC 284-30-330(4).
- Failed to pay any benefits under the title insurance policy, violating WAC 284-30-330(12).
- Admitted that it dropped the ball by not communicating for several months, violating WAC 284-30-330(2). CP 341.

These are just a few of the additional facts that a jury needs to evaluate while determining whether First American's conduct in 2012 violated IFCA under Washington law.

Was it reasonable for First American to belatedly deny coverage in 2013? CP 764. Unsurprisingly, Respondents contend that it was reasonable even though in 2013 First American:

- Misrepresented that the Eleazers created the risk and withheld information, violating WAC 284-30-330(1).
- Mispresented that the Eleazers failed to cooperate, violating WAC 284-30-330(1).
- Failed to conduct a reasonable investigation, violating WAC 284-30-330(4).
- Compelled the Eleazers to initiate litigation, violating WAC 284-30-330(7).

First American did not ask its agent Talon or the Eleazers about whether an easement was discussed in 2007. The Eleazers never

claimed that they didn't know about the OSS on the property and First American never investigated this issue. The insurance company has the obligation to conduct the investigation, not the other way around. An insured is not obligated to speculate about what information the insurance company wants. First American cannot bury its head ostrich-like in the sand and pretend that it had no access to the facts at or around the time the Eleazers submitted their claim or that no duty to investigate was triggered. As such, the unreasonableness of First American's investigation in 2011 is evidenced by its 2013 denial. Moreover, the parties were adversarial once First American denied the claim in 2011. Having breached the contract in 2011, First American cannot later claim that the Eleazers violated the contract by not somehow cooperating during all the adversarial communications in 2012 and 2013.

These are all issues that a jury needs to evaluate while determining whether First American's conduct in 2013 violated IFCA under Washington law. A trial court cannot find on summary judgment that an insurer acts reasonably when the insurer violates insurance regulations. The fact finder is best suited to weigh issues of credibility

and questions of fact.[9] "Because summary judgment is not a paper trial, the district court's role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe. The court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial."[10] The trial court erred dismissing the IFCA claims.

CONCLUSION

For the reasons outlined in their opening brief and for the ones highlighted above, the Eleazers ask that this Court reverse the trial court's summary judgment ruling. Questions of fact exist as to the degree to which the 1993 recorded documents damage the value of the property and have the detrimental effect of restricting the locations where they can install a septic system to serve their home. Questions of fact exist regarding the extent to which First American's conduct has been unreasonable and in violation of IFCA while it denied the claim in 2011, belatedly accepted the claim in 2012, and then later belatedly

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[9] *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996).

[10] *See Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir.1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); 10 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure: Civil § 2712, at 574-78).

denied the claim in 2013, during which time First American never defended or paid covered damages.

Dated: September 26, 2016

Respectfully submitted,

Sean J. Gamble
Attorney for Appellants Edward and Maya Eleazer
Washington State Bar Association No. 41733

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2016, the foregoing document was served by emailing a true and correct copy to:

Thomas F. Peterson: tpeterson@sociuslaw.com

Linda McKenzie: lmckenzie@sociuslaw.com

in accordance with the Stipulation re Service by Email signed by the parties.

Nori Skretta