

64738-5

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No. 64738-5-I

IN THE COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON

DANIEL HERR,

APPELLANT,

v.

ESMAEIL FORGHANI AND JOY FORGHANI,  
HIS WIFE, AND ADDITIONAL PARTIES,  
PACIFIC NORTHWEST TITLE INSURANCE COMPANY  
AND DEPOSITORS INSURANCE COMPANY,

RESPONDENTS.

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APPELLANT'S OPENING BRIEF

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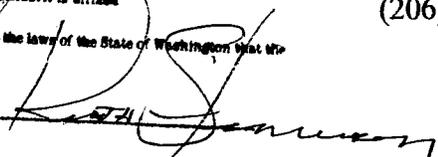
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*On this day I deposited in the office of the United States of America a properly stamped and addressed envelope directed to the receiver of record for plaintiff defendant, containing a true copy of the document to which this affidavit is affixed*

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

4-5-10



## Table of Contents

	<u>Page</u>
I. Introduction.....	7
II. Assignments of Error.....	7
A. <u>Errors in Findings of Fact</u> .....	7
No. 1.....	6
No. 2.....	7
No. 3.....	7
No. 4.....	8
No. 5.....	8
B. <u>Errors in Conclusions of Law</u> .....	9
No. 1.....	8
No. 2.....	9
No. 3.....	9
No. 4.....	9
C. <u>Errors in Judgment</u> .....	10
No. 1.....	10
No. 2.....	10
III. Issues Pertaining to Assignment of Error	
A. <u>Forghani</u>	
No. 1.....	10
No. 2.....	10
No. 3.....	11
No. 4.....	11
No. 5.....	11
No. 6.....	11
No. 7.....	11

	<u>Page</u>
B. Pacific Northwest Title Insurance Co.....	12
C. Depositors Insurance Company.....	13
D. Attorney’s Fees and Costs.....	13
IV. <u>Statement of the Case</u> .....	14
V. <u>Argument</u> .....	16
A. The Trial Court Abused Its Discretion In Refusing To Enjoin The Adult Family Home, Changing A Residential Access Easement Road To Daily Commercial Use.....	16
B. Rezoning Under RCW 70.128.175 (2) Amounts To A Constitutional Taking Of Private Property.....	19
C. Spot Zoning Is Invalid When It Summarily Permits Adult Family Homes To Invade Residential Neighborhoods.....	22
D. Summary Dismissal Of Herr’s Tender Of Defense To Pacific Northwest Title Of The Forghani Counterclaim And Action For Damages Should Be Vacated.....	24
E. Summary Dismissal Of Herr’s Tender Of Defense Of Forghani’s Counterclaim And Action For Damages Should Be Vacated As To Depositors Insurance Company.....	29
F. Both Insurance Carriers Have Wrongfully Refused To Defend The Counterclaim And Should Pay Attorney’s Fees and Costs.....	34
VI. <u>Conclusions</u> .....	35

Table of Authorities

<u>Table of Cases</u>	<u>Page</u>
<u>Anderson v. City of Seattle</u> , 64 W2d 198, 390 P2d 994.....21 (1964)	
<u>Berhard v. Reischman</u> , 33 WA 569, 578, 658 P2d 2 (1992).....25	
<u>Cunningham v. Town of Tieton</u> , 60 W2d 434, 374 P2d 375 (1962).....30	
<u>Denny’s v. Security Union Title Ins.</u> , 71 WA 194 at 211.....25, 26	
<u>General Cas. Co. v. Gauger</u> , 13 WA 928, 931, 538 P2d 563 (1975).....31	
<u>Hagemann v. Worth</u> , 56 WA 85, 782 P2d 1072(1989) .....17	
<u>Hauser v. Arness</u> , 44 W2d 358, 267 P2d 691(1954).....21	
<u>Hebb v. Severson</u> , 32 W2d 159, 201 P2d 156 (1948).....26	
<u>In re Parentage of C.A.M.A.</u> , 154 W2d 52, 57-58, 109 P2d 405 (2005).....21	
<u>In the Matter of the Pet. of the City of Seattle v. First National Bank</u> , 81 W2d 652, 656, 504 P2d 292 (1972).....23	
<u>Labberton v. Gen. Cas. Co.</u> , 53 W2d 180, 187, 332 P2d 250 (1958).....31	
<u>Lowe v. Dauble L. Props Inc.</u> , 105 WA 888, 894, 201 P2d 787 (2001).....17	
<u>Mains Farm Owners Assn. v. Worthington</u> , 121 W2d 810, 854 P2d 1072 (1993).....17, 22	

	<u>Page</u>
<u>Muench v. Oxley</u> , 90 W2d 637, 645, 584 P2d 939 (1978).....	25
<u>Olympic S.S. Co. v. Centennial Ins. Co.</u> , 77 W2d 850, 855 467 P2d 847 (1970).....	28
<u>Pierce v. King Cy.</u> , 62 W2d 334, 382 P2d 628 (1963).....	21
<u>Presbytery of Seattle v. King Cty.</u> , 114 W2d 320, 329(1990).....	20
<u>Prosser Commission Co. v. Guaranty Ins. Co.</u> , 41 WA 425, 700 P2d, 188 (1985).....	25
<u>Prudential Ins. v. Lawrence</u> , 45 WA 111, 115, 724 P2d 418 (1986).....	30, 34
<u>Rupert v. Gunther</u> , 31 WA 27, 29, 640 P2d 36 (1982).....	16
<u>State Farm Ins. v. Emerson</u> , 102 W2d 477 687 P2d 139 (1984).....	24
<u>Sunnyside Valley Irrigation Dist. v. Dickie</u> , 111 WA 209 (2002).....	18
<u>Synder v. Haynes</u> , 152 WA 774, 217 P2d 787 (2009).....	18
<u>Waite v. Aetna Cas. &amp; Surety Co.</u> , 77 W2d 850, 855 467 P2d 847 (1970).....	34

Statutes

RCW 70.128.175(2).....	19, 22, 27
RCW 40.04.030.....	27
RCW 64.04.175.....	17

Miscel.

Marketable Title Encroachments, Annot 47 AL R2d 331.....	26
Washington State Constitution, Sec. 12 & 16.....	19
Constitution of the United States, Fifth and Fourteenth Amendments.....	20

## I. Introduction

The Herr family believed they were purchasing their home in a residential neighborhood in 2004. But within two years, Mr. Forghani purchased a duplex to the back of their home and started operating a commercial adult home and using the 20 foot residential access road easement to the two properties as a commercial easement.

This appeal is from the denial of an injunction and damages for the abuse, overburdening, and change of use of the 23 year old road easement.

## II. Assignments of Error

A. The trial Court erred in making and entering the following Findings of Fact:

### No. 1 Findings of Fact #1

Forghani purchased (plans for converting one of their units into an adult home) and received the blessings of both state licensing authorities and

the county building and fire departments.

No. 2 Findings of Fact #5

As to be expected, the Defendant's Happy Heart adult family home is a relatively quiet neighbor. In the daytime there are occasional visits by Metro Access vans, doctors, pharmacy vehicles. The Court was saddened to hear that visits by family members of the residents are exceedingly rare. Based upon the testimony, however, the Court cannot find this volume to be greater than would be expected were still two fairly active families occupying the duplex unit.

No. 3 Findings of Fact #6

Other than kids being kids and strangers being, well, strange, the Plaintiff may have a complaint directed at either the Defendant's decision to operate an adult home or the authorities decision to allow them to do so. None of those, however, is an issue in this case.

No. 4 Findings of Fact #7

From the photographs in evidence, including an aerial photograph, the trees would appear to stand on the property of the adjoining apartment building and not that of the Plaintiff.

No. 5 Findings of Fact #8

It is easy to imagine worse neighbors.

B. The Court erred in making and entering the following Conclusions of Law:

No. 1 Conclusion of Law #2

Under the terms of the short plat as well as the laws and ordinances of the state and county, the

Defendants are making lawful use of their property.

The Plaintiff misplaces reliance on the case

of Mains Farm owners Ass'n v. Worthington

121 W2d 810, 854 P2d 1072 (1993), a case

restricting use of the subject property to “single family” residential purposes only.

No. 2 Conclusion of Law #3

The Defendants have express authority to utilize their easement over “Tract X” for purposes of ingress and egress. That is what they are doing.

No. 3 Conclusion of Law #4

The evidence presented does not support a conclusion that the Defendants have altered or expanded the easement or overburdened the servient estate.

No 4 Conclusions of Law #5

The Plaintiff has failed to make a sufficient showing to support his request for either a permanent injunction or damages.

C. The trial Court erred in making and entering the following Judgment:

No. 1 Plaintiff’s Petition for a Permanent

Injunction and Damages is dismissed with  
prejudice and without costs

No. 2 Defendant's Esmacil Forghani and Joy  
Forghani are awarded judgment against the  
Plaintiffs Daniel Herr and Li Ma individually  
and in their marital community in the amount  
of \$200 and for attorney's fees of \$121 for legal  
costs.

III. Issues Pertaining to Assignments of Error

A. Forghani

No. 1. Is the continuing operation of an adult  
home a commercial business for profit?

No. 2 Did the trial Court abuse its discretion  
in refusing to issue an injunction prohibiting the  
change of a residential access easement to a  
commercial use?

No. 3. Did the trial Court commit reversible error by refusing to award diminution of the fair market value of Herr's property resulting from the operation of the commercial adult home?

No. 4. Is RCW 70.128.175(2), permitting adult family homes in residential neighborhoods, a "taking" of the value of Herr's property without compensation by a private person?

No. 5 Does RCW 70.128.175(2) violate the due process and equal protection clauses of the federal and state constitutions?

No. 6 Is RCW 70.128.175(2) nothing more than illegal" spot zoning" and void?

No. 7 Does the evidence support the Findings and Conclusions of Law?

B. Pacific Northwest Title Insurance Co

No. 1 Should the trial Court have ordered Pacific Northwest to defend the Counterclaim of Forghani against Herr based upon its coverage?

C. Depositors Insurance Company

No. 1 Should the trial Court ordered Depositors to defend the Counterclaim of Forghani against Herr based upon its coverage?

D. Attorney's Fees & Costs

No. 1 Should attorney's fees and costs be awarded Herr against both Pacific Northwest and Depositors for refusing to defend?

#### IV. Statement of the Case

In 2002 the Herr family purchased a home in Seattle in what they believed to be a residential neighborhood. It was Mrs. Herr's first home in America (she is Chinese) with her teenage daughter and husband. RP 10-20. She later went to Highline Community College, received a nursing degree and went to work as an oncology nurse in a hospital in Everett, Washington. RP 10-8; RP 11-24.

Herr's home was located on Lot 1 with two duplexes located on Lot 2 to the rear. Both lots were serviced by an access easement created as "Tract X" for ingress, egress, and utilities in 1981. The easement road is 20 feet x 200 feet and was created by a short plat.

Mr. Forghani purchased Lot 2 from the duplex owners in 2004. He converted one into an adult family home (for the care of persons in need of round-the-clock room and board) within a few months of purchase and had a fire lane erected for emergency vehicles, the length of the 200 foot easement. Suddenly, the long established residential easement road was filled daily with a variety of commercial traffic in the form of: RP 26-25; RP 40-16.

1. Visitors and their vehicles. RP 71-1; RP 90-15
2. Metro Buses. RP 70-22; 88-9; 87-16; 89-20;94-4
3. Deliveries of all kinds. RP 71-8; 83-13; 92-4
4. Parking by various visitors. RP 64-9
5. Water Trucks. RP 83-13; RP 92-2
6. Physicians & therapists. RP 91-1
7. Social workers. RP 91-9
8. UPS delivery trucks. RP 83-17
9. Access buses. RP 88-9
10. Persons looking for the adult home. RP 71-9
11. Children using the fire lane to play( believing it to be a public road). RP 72-5
12. Fire Lanes for emergency vehicles and fire signs.

The Herrs brought this action to enjoin the *commercial use* of the road easement and for damages for the diminution in the fair market value of their property. Forghani responded by filing a Counterclaim to make the commercial use and the operation of the adult family home, permanent. CP 1, CP 13.

Herr then joined, as additional parties, his title insurance company, Pacific Northwest Title Company, and his homeowner's insurance company, Depositors Insurance Company. Herr's tender of the defense of the Counterclaim was refused by both companies. CR 8; CR 43; CR 57. The carriers's Motion for Summary Judgment of Dismissal was granted; Herr's Motion for Summary Judgment against his carriers was denied. A later trial between Herr and Forghani resulted in the dismissal of Herr's case for injunction and/or damages. The result permits the *commercial use* of the easement by the adult family home. CR 44; CR 46 & 47; CR 52; CR 61; CR 14, CR 63.

At the trial of this case, Herr testified that the fair market value of his property had fallen \$60,000 as a result of the adult family home's presence. RP 74-16-25; RP 75-1-3. The testimony was uncontested but ignored by the trial court.

## V. Argument

### A. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ENJOIN THE ADULT FAMILY HOME CHANGING A RESIDENTIAL ACCESS EASEMENT ROAD TO DAILY COMMERCIAL USE

It is conceded that a trial Court has broad authority and power to shape injunctive relief under the particular facts of a case. Rupert v. Gunter, 31 WA 27, 29, 640 P2d 36 (1982). But the discretion is abused when the discretion is exercised for untenable reasons. In this case, the Court's basic reason for denial of an injunction rested on the "*lawful*" *blessings* of state and county licensing authorities authorizing an adult family home's commercial use of a road easement. CP 91; Findings of Fact #1: This is an untenable reason. RCW 64.04.175. (Easements cannot be altered without consent.)

A commercial adult home is a business for profit. Mains Farm Owner's Assn. v. Worthington, 121 W2d 810, 854 P2d 1072 (1993). Hagemann v. Worth, 56 WA 85, 782 P2d 1072 (1982). The access road easement to Herr and Forghani's properties was *used as a residential road easement for 23 years* when Forghani purchased the two duplexes on Lot 2 in 2004. Forghani was a dominant estate owner and Herr, a servient owner. There was no commercial use of the two family duplexes on Lot 2 during that time.

In this state, a dominant estate owner may not change the use of a road easement without the approval of a servient owner.

Lowe v. Double L. Props, Inc., 105 W 888, 894, 2p P2d 787

(2001). This was an action by a servient owner to enjoin a dominant owner (of a working cattle ranch) to remove three gates that had been added to an access road and used by the servient owner. The trial Court found that the additional gates intimidated the servient owner and ordered their removal. The decision was affirmed on appeal:

... the dominant estate holder may increase an existing intended or imposed use, but may not compel a change in use on the servient estate holder.

In Synder v. Haynes, 152 WA 774, 217 P2d 87 (2009), a change of use by the owner of a road easement was enjoined because it extended the easement to additional parcels of property adjacent to the road. The injunction prohibiting the change of use was affirmed on appeal.

In Sunnyside Valley Irrigation Dist. v. Dickie, 111 WA 209 (2002), an injunction was granted to an irrigation district prohibiting the interference with a maintenance right of way and permitting the district to enlarge an existing lateral allowing the

maintenance to be performed. Orchard trees and sprinklers within 20 feet of the lateral were ordered removed also because they interfered with the easement and caused irreparable harm.

In this case, the adult family home immediately changed the long residential use to a *daily commercial one*. The traffic to the adult home was spread over a myriad of different users as outlined above in the Statement of the Case. The trial Court's conclusion that the daily volume over the road easement was no greater than the use by two duplex families is not tenable nor borne-out by the testimony of the parties. This change cannot be lawfully authorized by the state and/or county by the issuance of an adult family home license without a hearing and against our statutory and case law.

**B. REZONING UNDER RCW 70.128.175 (2) AMOUNTS TO A CONSTITUTIONAL TAKING OF PRIVATE PROPERTY**

The trial Court in denying Herr an injunction against the commercial use of the road easement relied upon RCW 70.128.175(2); CP 86, p. 8, 1.8; Conclusions of Law 2, 3, 4 & 5. This statute cannot constitutionally deprive Herr of the enjoyment

and use of his home by authorizing a rezone for only family homes in residential neighborhoods.

Private property shall not be taken by a private person for private use. Washington State Constitution, Section 16. Herr has a fundamental right to own, enjoy, sell and even exclude others from his property. This fundamental property right is protected by substantive and procedural due process and equal protection of the laws. Constitution of the United States, Fifth and Fourteenth Amendments. Presbytery of Seattle v. King Cy., 114 W2d 320, 329-30, 78 P2d 907, cert. den., 498 U.S. 911 (1990). The test is to determine whether RCW 70.128.175(2) is to safeguard public interest in health, safety, the environment or fiscal integrity of an area. Another test is to determine whether the rezone destroys one or more of the fundamental attributes of property ownership. Is the statute reasonable? Has the police power exceeded its Constitutional limits?

This statute is not aimed at the protection of dysfunctional persons in need of a place to live and board with accompanying care. The law is centered on creating “spot zoning” for commercial adult family homes in residential neighborhoods throughout the state. The rezoning has no nexus or connection

with the care of these persons. It only provides additional areas for them to place their homes outside of commercial and/or industrial zones. Therefore, the rezone is not designed to assist in the care of the health, safety and day-to-day living of persons in need of such care. It creates, on the other hand, daily problems for residential neighbors related to parking, visiting vehicles, noise, buses, emergency vehicles, fire lanes and fire signs,( which are not necessary for residential homes), as well as delivery vehicles, social workers, physicians, persons seeking to find the home, and the like. Hauser v. Arness, 44 W2d 358, 267 P2d 691 (the ordinance must have a substantial relationship to public health, safety, morals or general welfare).

This Court views spot zoning regulations that impact fundamental property rights in the prism of *strict scrutiny*. In re Parentage of C.A.M.A., 154 W2d 52, 57-58, 109 P3d 405 (2005). The regulation must have a compelling state interest and be narrowly tailored as a reason for the legislation. “Spot zoning” is an attempt to wrench a single piece of property from its environment and give it a new rating which disturbs the tenor of the neighborhood and which is not related to a general comprehensive plan for the community as a whole. Pierce v. King

County, 62 W2d 324, 382 P2d 628. It is invalid. Anderson v. City of Seattle, 64 W2d 198, 390 P2d 994. RCW 70.128.175(2) does not conform to the general purpose and comprehensive plan of the City of Seattle, let alone the statute's broad authority placing adult homes in residential neighborhoods anywhere in this state.

Adult commercial homes next to residential homes impact the welfare of the whole community. They have no connection with the care of dysfunctional persons. Commercial homes are more appropriate in commercial or industrial settings. RCW 70.128.175(2) is an invalid, non-comprehensive attempt to "spot zone" in this state and a "taking" of Herr's home by a private person.

**C. SPOT ZONING IS INVALID WHEN IT SUMMARILY PERMITS ADULT FAMILY HOMES TO INVADE RESIDENTIAL NEIGHBORHOODS**

RCW 70.128.175(2) provides in part:

**Adult Family Homes. Definitions...**

**(2) An adult family home shall be considered a residential use of property for *zoning*...purposes. Adult family homes shall be a permitted use in all areas zoned for *residential* or commercial purposes, including areas zoned**

for single family dwellings.

Mains Farm Homeowners at 823 limited the effect of this statute so that it did not trump a private use or covenant restriction. The Court held that the scope and purpose of the act was limited to zoning rights but did not show a legislative intent to declare a general public policy to over-ride a contractual property right.

Spot zoning, however, in the present case, does exactly that. If Herr has a fundamental right to own and enjoy his property, it should encompass being free of commercial adult family homes placed next door to him and the commercial use of a 23 year-old easement access road. The rezone statute in this case was apparently accomplished without a rezone hearing of any kind. Nor was there any notice to Herr or hearing on the application of Forghani for a license to operate the facility under the rezone statute.

Herr's right to use his property free of commercial businesses is at issue. In the Matter of the Pet. of the City of Seattle v. First National Bank, 81 W2d 652, 656, 504 P2d (1972):

Property in a thing consists not

merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.

The rezone under the above circumstances is invalid and void and destroys Herr's basic fundamental property rights.

**D. SUMMARY DISMISSAL OF HERR'S  
TENDER OF DEFENSE TO PACIFIC NORTHWEST  
TITLE OF THE FORGHANI COUNTERCLAIM AND  
ACTION FOR DAMAGES SHOULD BE VACATED**

Forghani's Counterclaim sought to make operation of his adult family home a commercial use of the road easement permanent. It also asked for dismissal of Herr's complaint for an injunction. CP 13. Herr's tender of the defense of the Counterclaim to Pacific Title was rejected. A motion for summary judgment of dismissal by Pacific Title of Herr's Amended Complaint was granted. Herr's motion for summary judgment

against Pacific Title was denied. CR 44; CR 61; CR 63. Both orders were error.

A duty to defend arises when actions allege facts, which if proved, would be within the coverage of the carrier. State Farm Ins. v. Emerson, 102 W2d 477, 687 P2d 139 (1984).

Exclusionary clauses in a policy are strictly construed against the insurer and for the insured. Prosser Commission Co. v. Guaranty Ins. Co., 41 WA 425, 700 P2d 1188 (1985).

Under Extended Coverage provisions by policy endorsements, a policy does away with previous exceptions and exclusions for an additional premium. Denny's v. Security Union Title Co., 71 WA 194 (Court found the policy ambiguous with regard to off-record title defects and permitted extrinsic evidence of the parties intent because of endorsement excluding Schedule B exclusions). Standard B exceptions are for matters which are not disclosed by documents or public records. Extended coverage, *such as in Herr's title policy*, requires off-record investigation by the title company. See Muensch v. Oxley, 90 W2d 637, 645 584 P2d 939 (1978), and Bernhard v. Reiscliman, 33 WA 569, 578, 658 P2d 2 (1992).

Herr's title policy provides (CP 44; CP 57)

Subject to the exclusions from coverage, The exceptions from coverage contained in Schedule B... Pacific Northwest ...insures...against loss or damage ...by reason of (3) unmarketability of the title...

Unmarketability means not readily saleable or free from reasonable doubt and such as a reasonably informed and intelligent purchaser, exercising ordinary business prudence, would be willing to accept. Hebb v. Severson, 32 W2d 159, 201 P2d 156 (1948).

Encroachments from or onto Herr's property may render it unmarketable. Opinions may differ in the variations in encroachments destroying marketability. Marketable Title – Encroachments, Annot., 47 A L R2d 331, 349, (1956).

It is submitted, that the statute permitting rezoning of residential neighborhoods for commercial adult family homes, together with its encroachment potential onto residential property is the type of encroachment of public record. Pacific Northwest Title covenants in its agreement that it insures against unmarketable title.

Summary judgment in favor of Pacific Northwest Title was improper. Unmarketability itself is a question of material fact to

be determined by trial. Denny's v. Security Union Title Ins., 71 WA 194 at 211.

The next step in this analysis is whether, as contended by Northwest Title, the policy contains exclusions and/or exceptions which would destroy coverage. Herr submits there are none.

Herr paid for and received an endorsement which extends his coverage and does away with the effect of Schedule B exceptions. The Endorsement provides:

2. The Company hereby insures the insured owner against loss or damage which...shall be sustained by reason of: ...(b) the... interference with the use (of the residence) for ordinary residential purposes as a result of a final Court Order or Judgment based upon the existence at the date of the policy of: (2) any violation of enforceable covenants, conditions or restrictions.

As of the date of Herr's policy on August 2, 2002, RCW 70.128.175(2) was in full force and effect. it became effective July 1, 1989. Mains, at 823. This statute was of public record on the date of Herr's policy. Public records embrace legislative statutes and Supreme Court and Appellate Court cases. RCW 40.04.030.

Mains was decided in July of 1993, nine years prior to Herr's policy. That case held that adult family homes were commercial business for profit and allowed in what would be all residential zones of this state. Pacific Northwest Title had public notice of this statute and its zoning effect. It was not excepted or excluded.

Lastly, Herr's policy provides for other exclusions removing coverage from all items that relate to laws or government regulations, including zoning laws, restricting or regulating use of land. However, these exclusion are removed because yet another *exception* to the governmental police power exists when Northwest Title *has notice of the exercise of such police power recorded in the public records* at the date of its policy.

Summary Judgment of Dismissal to Pacific Northwest Title was error and should be vacated in light of the policy coverage . Herr's denial of his motion for summary judgment was, in light of the foregoing analysis, reversible error. Where a carrier wrongfully denies coverage, an award of attorney's fees and costs can be awarded if the insured must engage in a legal action. Olympic S.S. Co. v. Centennial Ins. Co., 117 237 53 811 P2d 673 (1991).

E. SUMMARY DISMISSAL OF HERR'S  
TENDER OF DEFENSE OF FORGHANI'S  
COUNTERCLAIM AND ACTION FOR  
DAMAGES SHOULD BE VACATED AS TO  
DEPOSITORS INSURANCE COMPANY

Herr tendered the defense of the Forghani Counterclaim to his homeowners insurance company – Depositors Insurance Company. He also asked for damages for his loss of market value, attorney's fees and costs. The trial Court granted Depositor's motion for summary judgment of dismissal for defense of the Counterclaim and action by Herr for damages. Likewise, Herr's Motion for Summary Judgment was denied.

Depositor's policy provides (CP 73; CP 56):

1. We insure against the risk of direct physical loss to property described in coverage A (Herr's Residence).

Under definitions the policy provides:

Property Damage. Under Section 2 property damage means physical injury to, destruction of, or *loss of use of tangible property.*

Depositors contention has been that there is no coverage for what has happened to Herr because there has been no physical damage to the property, the argument being that diminution of market value because of a commercial adult family home moving in and its commercial use of an existing road easement is not physical.

This analysis is faulty. Our Courts have held that *physical damage is not necessary* when you have real property damaged in value by *loss of use of tangible property*. Prudential Ins. v. Lawrence, 45 WA 111, 115, 724 P2d 418 (1986); Cunningham v. Town of Tieton, 60 W2d 434, 374 P2d 375 (1962).

In Lawrence, a property owner claimed his view was blocked by a neighbor and sued for diminution of his property value. The view-blocking neighbor tendered the defense of the action to his insurance carrier. The carrier refused the defense on the ground that there was no coverage for physical injury or destruction of the property. The trial Court found that the damage caused by blockage of view was covered and qualified under the policy as property damage. The appellate Court agreed. Property

damage does not require physical damage under coverage for loss of use of tangible property.

Cunningham involved offensive odors from a sewage lagoon adjacent to Plaintiff's property. It was a reverse eminent domain constitutional taking of the property. The "taking" was a nuisance. The appellate court found that comfortable enjoyment of one's property is both a mental quietness and physical comfort. Tangible damage comes within the meaning of comfortable enjoyment.

Labberton v. General Cas. Co., 53 W2d 180, 187, 332 P2d 250 (1958) concerned itself with whether a general liability policy covered a warranty of fitness that a fertilizer applying machine was fit for the purpose of fertilizing a farmer's fields. The insurer argued that there was no "damage" because the injury to property was not within the meaning of the insuring clause. The Court disagreed. The term "property" is a broad general term and includes not only the physical property itself but the use and enjoyment of the physical property.

It is not limited to tangible or intangible property, but is an all encompassing word.

The Court affirmed the trial Court's award under the policy of damage sustained by breach of the warranty of fitness.

Accord: General Ins. Co. v. Gauger, 13 WA 928, 31, 538 P2d 563 (1975). Action for declaratory judgment by the insurer to determine whether damages paid to a customer for crop loss from defective seeds was covered under a liability policy in which the insurer agreed to pay all damages its insured was obligated to pay for liability imposed by law. "Damages" under the policy included damages for loss of use of property resulting from "property damage." Property damage was defined as "injury to or destruction of tangible property." The insurer argued that injury to "tangible property" was not covered. The Court rejected the contention and found that the policy does not require "tangible damage to tangible property." Losses from defective wheat seeds were losses to tangible property and covered by the policy.

Loss or diminution of property value from an adult family home's presence in a residential neighborhood is covered by Depositor's policy as a "loss of use of tangible property."

Finally, Depositors contends that its policy exclusions deny any coverage. Under Section I, Coverage A – Dwellings, the policy provides:

1. We insure against risk of direct physical loss to property described in Coverage A & B.

None of the exclusions under Section I apply in this case. In Section I – Exclusions, the insurer provides:

B. We do not insure for loss of property described in Coverages A & B caused by any of the following. However, any ensuing loss to property described in Coverages A & B not precluded in Section I Exclusions in A above is covered.

There are no exclusions “following” that apply to this case. It would appear, however, that this section clears from uncertainty all damage to “tangible property” regarding coverage and covers Herr’s loss.

The Summary Judgment of dismissal for Depositors was not proper. This Court should order vacation of that judgment and order Herr’s Motion for Summary Judgment be entered.

F. BOTH INSURANCE CARRIERS HAVE  
WRONGFULLY REFUSED TO DEFEND THE  
COUNTERCLAIM AND SHOULD PAY ATTORNEY'S  
FEES AND COSTS

If this Court vacates the summary judgments of dismissal of Herr's Complaint against both Pacific Northwest Title and/or Depositors Insurance Company, both carriers have wrongfully refused to defend are required to pay Herr's reasonable attorney's fees and costs in defense of the Counterclaim. Waite v. Aeutna Cas. & Surety Co., 77 W2d 850, 855, 467 P2d 847 (1970); Lawrence, supra at 287.

The rule is that where an insurer wrongfully refuses to defend, it will be required to pay the judgment or settlement to the extent of its policy limits and also to reimburse the insured for his costs reasonably incurred in the defense of the action (citing Lawrence v. Northwest Cas. Co.).

VI. Conclusions

1. This case should be reversed and remanded for instructions to issue an injunction against further commercial use of the road easement by the adult home;

2. In the alternative, damages should be awarded to Herr, by instructions to the trial Court, for an award of \$60,000 and reasonable attorney's fees and costs.

3. Reverse the orders of dismissal as to Herr's insurance carriers and order the entry of Herr's Motion for Summary Judgment against both carriers with attorney's fees and costs in the trial Court and in this Court.

DATED this 31<sup>st</sup> day of March, 2010.

Respectfully submitted.

  
Robert H. Stevenson, WBA 519 Attorney for Daniel Herr