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CASE NO: 37129-4-II

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COURT OF APPEALS, DIVISION II OF THE STATE OF  
WASHINGTON

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GREGG JORDSHAUGEN and PATRICIA JORDSHAUGEN,

Appellants,

v.

FIRST AMERICAN TITLE ET AL,

Respondents.

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**REPLY BRIEF OF APPELLANTS**

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## **I. Restatement of the Case**

Some of the facts contained in the brief of Respondent warrant further explanation and some are inaccurate.

### **1. The Jordshaugens Were Misinformed about the Location of the Boundary.**

Respondent's brief suggests that the Jordshaugens in seeking to quiet title were seeking to claim land that they did not believe they purchased. The Jordshaugens correctly understood themselves to be purchasing the garage in front of their townhouse until they were incorrectly informed by their real estate agent that the boundary did not include the garage. RP 17. When they purchased the property their understanding about the location of the boundary was incorrect, as is generally true in encroachment cases. No one would purchase property with knowledge of a significant encroachment. Encroachments are assumed to be on the property of the property of the neighbor.

### **2. First American Admits that it Neither Accepted Nor Denied the Jordshaugens' Claim.**

Jordshaugens gave notice of their claim to First American by letter dated October 6, 2004. Ex 138. The Browns, who were using the garage, also made a claim to First American. The

Browns received a denial of their claim in clear and unequivocal language by letter dated September 21, 2004. Ex 136. John Dahl stated in his reply to their claim:

This issue was known to the buyers and seller at the time the transaction closed. Enclosed please find an indemnity from buyer and seller holding First American harmless from any action which might result from failure to complete the boundary line adjustment. First American will look to all parties to the indemnity for defense of any litigation or reimbursement of any costs and/or fees arising out of the matter.

Based on the foregoing your clients' claim is denied. . . .

The response to the Jordshaugens' claim was starkly and intentionally different from the denial of the Brown's claim. *Compare Ex 136 and Ex 140*. (Mr. Dahl treated the letter from the Jordshaugens' lawyer as notice of a claim. RP 176.) Mr. Dahl, admitted in testimony that his letter to the Jordshaugens neither accepted nor denied the Jordshaugens' claim. RP 189. His letter is also remarkable for failing to disclose any facts known to First American regarding the matter and failing to mention that First American was indemnified by the Browns and Port Ludlow Associates, L.L.C. in the event of litigation.

Mr. Dahl said nothing in his letter to the Jordshaugens about their claim. *See Ex 140*. He only said that there was no

litigation, so there was no duty to defend at that time. The letter says that the tender may “ripen.” Respondent’s brief quotes language from Mr. Dahl’s response to the Jordshaugens’ claim and asserts somehow that there is a clear denial of the claim, even when Mr. Dahl testified that this letter did not deny the claim.

Mr. Dahl acknowledged in testimony that he asked the Jordshaugens’ lawyer to resubmit the claim after the issues were joined in a lawsuit. RP 183. As the letter indicates, the tender could “ripen” if there were litigation.

**3. First American Admits that it Did Not Reply to the Tender of Defense.**

The Jordshaugens, acting on Mr. Dahl’s advise filed a quiet title action and tendered the defense of the claims by the Browns and Port Ludlow Associates, L.L.C. denying that the Jordshaugens had good title. Mr. Dahl admitted that he did not respond to the tender of defense after the lawsuit was filed and the Jordshaugens quiet title claim was opposed. RP 187.

After the Jordshaugens brought the quiet title action they discovered that First American had withheld information from them. The Jordshaugens had not been told that First American was supposed to inform them before closing of the problem with title.

First American had withheld from both the Browns and the Jordshaugens the fact that the garage encroached entirely or almost entirely on TH 17. The “Statement of Awareness” signed by the Browns on the day of closing made vague reference to possibly needing to make boundary adjustments after closing but the facts were never explained to the Browns. *See Ex 90.*

## **II. Argument**

### **1. The Argument that there was no Claim is Unclear Since the Jordshaugens Lost a Significant Portion of Their Lot.**

The Respondent’s first argument is that there was no claim against the title of their insured. The meaning of this is a little unclear. As discussed, the Jordshaugens made a claim to First American. What Respondent is alleging is, not that there was no claim, but that the Jordshaugens’ claim was not covered by the policy. This completely ignores the position of the Jordshaugens, that First Americans’ failure to deny or accept the claim and its disregard of the tender of defense, estop it from denying coverage.

Nonetheless without any legal authority whatsoever First American asserts by fiat that there was no coverage. First American lists the four insuring clauses: First American insured that title to TH 17 had vested in the Jordshaugens; that there was

no defect in title; that title was not unmarketable; and that there was access to the property. Only the last insuring clause is irrelevant.

It is important to remember the First American did not deny coverage, let alone give any reason for denying coverage. If it had denied coverage, the denial would be defective for failure to state the reason for the denial. *See* WAC 284-30-330(1).

Whether the Jordshaugens had vested title to TH 17 was the subject of the quiet title action. First American has never explained how the vesting clause did not cover this lawsuit about the vesting of the Jordshaugens' title. As to insuring against a defect of title, the sellers, Port Ludlow Associates, L.L.C. claimed that there was a defect in title because First American had breached its agreement to inform the Jordshaugens of the encroachment at closing. It claimed that this defect warranted the court to change the legal description. This too was the subject of the lawsuit.

Marketable title is defined in *Couch on Insurance 3d* as follows:

Marketable title has been defined in various ways, including a title that may be freely made a subject of resale;

a title free from reasonable doubt both as to matters of law and fact; a title free of liens or encumbrances and dependent on its validity on no doubtful questions of law or fact; and a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and ready to perform his or her contract, would, in the exercise of that prudence which business persons ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.

II *Lee R. Russ and Thomas F. Segala, Couch on Insurance 3d*, 159-17 (3d ed. 2005).

It is inconceivable that the Jordshaugens' title met this standard. Their front yard was claimed by their neighbor. Washington adopted above-quoted rule and a substantial permanent encroachment is deemed to render title unmarketable. *See e.g. Brown v. Herman*, 75 Wn.2d 816, 824, 454 P.2d 212 (1969).

For these reasons the Jordshaugens believe their loss to be covered, but the burden is on the insurer to first deny the claim and then explain the basis for the denial. None of this was done by First American.

First American's argument that there was no coverage does not even address its failure to respond to the tender of defense. The duty to defend is based on the potential for liability under the policy. The scope of the duty to defend exceeds the scope of

liability under the policy. *Viking Ins. Co. v. Hill* 57 Wn. App. 341, 346, 787 P.2d 1385 (Div. 3, 1990). The pleadings are to be construed liberally and ambiguities resolved in favor of coverage. *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wash.2d 751, 760, 58 P.3d 276 (2002). If coverage is unclear from the pleadings, the insurer has a duty to investigate the underlying facts to determine if there is any basis whatsoever for liability under the policy. If doubt remains it must defend or file a declaratory judgment action. *Id.* at 761. In this lawsuit, First American did neither; it did not defend and it did not seek declaratory relief with respect to coverage.

Mr. Dahl admitted in his testimony and in his written reply to the Jordshaugens' claim that there might be coverage in the event of litigation. RP 178 and 183. This is sufficient to mandate defending the insured, particularly if no basis for denying the tender is articulated.

Respondent in this section of the brief next claims that there was no harm suffered by the Jordshaugens. This appears to be an argument that the Jordshaugens were not covered by the policy because the policy covers "loss" and the Jordshaugens did

not suffer a “loss.” Respondent’s brief seems to say that the Jordshaugens suffered no harm because they had been told that the garage was not on their lot before they purchased the property and they acted accordingly. The argument goes that they really suffered no loss because they believed the real estate agent who misdescribed their boundary.

This of course begs the point of title insurance. One never purchases property believing that there is a substantial encroachment, but surveys sometimes reveal encroachments. When they are found the law does not say that your title is not what your deed says but what your real estate agent told you before closing. The title insurance company insured the deed not the vague statements of the real estate agent. The errant words of a real estate agent do not excuse the title company from its contractual obligation. There is no legal authority for this defense, nor is it even discussed in the cases because the proposition is so outlandish.

Respondent claims that the Jordshaugens suffered no loss, but the size of the lot they purchased was considerably reduced by the Court’s decision. The Jordshaugens have been paying taxes on

a bigger lot. Based on the assessment of the land, Mr. Jordshaugen determined that the value of the land taken from his lot and joined to TH 16 was between \$52,465 and \$64,216. RP 115. He did not factor in the value of the garage on the land. Certainly the insured suffers a loss if the insured is divested of a portion of the insured estate.

**2. Consumer Protection.**

To prevail on their consumer protection claim, the Jordshaugens must meet the five prong test of *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.* 105 Wn.2d 778, 784-85, 719 P.2d 533 (1986). Respondent correctly lists the five elements.

First American's violation of WAC 284-30-330(1), (2), (5) and (13), discussed in Appellant's brief, satisfy the first element of the test, that First American committed "an unfair act or practice." *Industrial Indemnity Co. of Northwest, Inc. v. Kallevig*, 114 Wn. 2d 907, 922-23, 592 P.2d 920 (1990). *See also* RCW 48.30.010.

The second element of the test, that the act or practice occur in trade or commerce, is satisfied whenever the lawsuit

involves an insurance policy. *Salois v. Mutual of Omaha Ins. Co.* 90 Wn. 2d 355, 463, 581 P.2d 1349 (1978).

The third element, that the action impacts public policy was deemed satisfied when an insurer performs an inadequate investigation. *Industrial Indemnity Co. of Northwest, Inc. v. Kallevig*, 114 Wn. 2d 907, 922-23, 592 P.2d 920 (1990). This element is discussed in *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.* 105 Wn.2d at 790-91, where the court said that factors to be considered include (1) whether the action occurred in the course of business, (2) whether the defendant advertised, (3) whether the plaintiff's business was solicited, suggesting that others might be solicited as well, and (4) did the parties have unequal bargaining power. The answer to each of these elements in the instant case is affirmative. *Hangman Ridge, supra*, on substantially similar facts found a violation of the Consumer Protection Act.

The last two elements involve damage and proximate cause. The Jordshaugens damages include the value of the lost land, the attorneys' fees award that was entered against them and their attorneys' fees, including attorneys' fees on appeal. If First

American had investigated and just given them the value of their claim, as they should have, none of these expenses would have been incurred.

### **III. Conclusion.**

In failing to accept or deny the Jordshaugens claim and in entirely disregarding their tender of defense, First American violated the most fundamental duties to its insured. First American's failure to inform the Jordshaugens of its position on coverage and on the tender of defense is consistent with its decision to not inform them of the encroachment. After the closing, First American decided not to tell either the Jordshaugens or the Browns of the encroachment. From the Jordshaugens' perspective, First American has never acted like it owed them any duty of disclosure or explanation. It has never behaved as if it owed them a fiduciary duty or a quasi fiduciary duty.

DATED this 30<sup>th</sup> day of June 2008.

RAND L. KOLER & ASSOCIATES, P.S.



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**CERTIFICATE OF SERVICE**

I certify that on June 30, 2008, I caused a true and correct copy of the Reply Brief of Appellants to be served on the following in the manner indicated below:

<b>Via:</b>	<b>To:</b>
<input type="checkbox"/> Legal Messenger	<u>Counsel for Respondents:</u>
<input checked="" type="checkbox"/> Facsimile	James K. Sells, WSBA # 6040
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Signed and dated this 30<sup>th</sup> day of June 2008.

RAND L. KOLER & ASSOCIATES, P.S.



Marison Hund, Legal Assistant

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