

FILED

DEC 20 2011

COURT OF APPEALS NO. 300200
Consolidated with No. 300218
SPOKANE COUNTY CASE NO. 10-2-00911-1

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

JANICE COURCHAINE, a single person and
EVA VOSS, a single person,

Plaintiffs/Respondents,

v.

COMMONWEALTH LAND TITLE INSURANCE COMPANY;
SPOKANE COUNTY TITLE; and FIDELITY NATIONAL TITLE
INSURANCE GROUP,

Defendants/Appellants.

COMMONWEALTH AND FIDELITY'S
JOINT OPENING BRIEF

MATTHEW CLEVERLEY, WSBA #32055
Fidelity National Law Group
A Division of Fidelity National Title Group, Inc.
1200 6th Ave., Suite 620
Seattle, WA 98101
206-223-4525 x103

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I. INTRODUCTION

Janice Courchaine and Eva Voss (collectively “Courchaine”) purchased a parcel of property in Spokane County, Washington. The legal description of the property was based on the recorded Plat Map to describe the Property. The recorded plat map showed that there was power line easement for Bonneville Power that encumbered the eastern half of the Property. The seller’s property disclosure statement indicated that the Property was subject to a “power company easement.” Courchaine did not examine the Plat Map or inquire about the “power company easement” disclosure before purchasing the Property. Courchaine was unaware of the Bonneville Power easement when she purchased the Property.

Courchaine purchased an owner’s title insurance policy (the “Policy”) from Commonwealth Land Title Company (“Commonwealth”). The Policy insured the land subject to the disclosures on the Plat Map and also excluded coverage for restrictions disclosed on the face of the Plat Map.

After purchasing the Property and discovering the easement, Courchaine made a claim under her Policy for damages due to the easement. The claims handler for Commonwealth initially accepted the claim. Another claims handler Commonwealth later reviewed the claim

and determined that the claim was not covered by the Policy because the easement was shown on the Plat Map. The Policy does not provide coverage for matters that are shown on the Plat Map or otherwise excepted from coverage.

Courchaine sued Commonwealth and Fidelity for two causes of action: breach of contract and violation of the Consumer Protection Act. A 3-day bench trial was held in March 2011. The trial court found that Commonwealth had breached its contract and violated the Consumer Protection Act by failing to disclose and except the easement from the Policy.

The trial court's decision was not that the Policy covered the particular claim and that Commonwealth incorrectly denied the claim. In fact, the trial court did not even consider the terms of the Policy or make any findings as to whether the claim was covered by the Policy. Rather, the trial court concluded that Commonwealth had a *duty to disclose* the easement in the preliminary title commitment, and that the *failure* to disclose and/or except the easement was a *breach of duty* and a violation of Washington's Consumer Protection Act.

The trial court's decision is erroneous. The trial court's decision should be reversed and the case dismissed.

II. ASSIGNMENTS OF ERROR

A. The trial court erred when it ignored Washington statutes and concluded that Commonwealth breached its contract by failing to except the Bonneville Power easement from the Policy.

B. The trial court erred when it found that Commonwealth had a duty to except from its Policy an easement that was already shown on the recorded Plat Map.

C. The trial court erred when it concluded that Commonwealth violated the Consumer Protection Act by failing to exclude the Bonneville Power easement from the Policy.

D. The trial court erred in when it concluded that Fidelity violated the Consumer Protection Act and is liable to Courchaine because the finding is unsupported by substantive evidence or case law.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. The record shows that when Courchaine purchased the Property that she did not look at the Plat Map that created her property. Had she looked at the Plat Map, she would have seen the Bonneville Power easement as well as the other restrictions on the Property.

B. The record shows that Commonwealth issued Courchaine a preliminary title commitment and later issued the Policy of title insurance. The commitment and Policy both identified the insured Property as it was defined in the recorded Plat Map. The commitment and Policy also excluded coverage for restrictions contained on the face of the Plat Map. Does Courchaine's failure to review the Plat Map to see what she was purchasing create an obligation for Commonwealth to do for Courchaine what she didn't do for herself?

C. Commonwealth is an issuer of title insurance. Washington statutes define what a preliminary title commitment is, and Washington case law clearly holds that there is no duty of disclosure in preliminary title commitments. When the trial court ignored the statutes and case law and found that Commonwealth had a duty to disclose the Bonneville Power easement, did it err in the application of the law?

D. The trial court did not make findings of facts to support its conclusions that Commonwealth had breached its contract and violated the Consumer Protection Act. Did it err in doing so?

E. Fidelity and Commonwealth are two separate entities. There was no evidence submitted at trial to support any claims of corporate disregard.

Did the trial court err when it found Fidelity liable for acts done by Commonwealth?

IV. STATEMENT OF THE CASE

Many of the facts in this case are undisputed. On September 13, 2008, Courchaine entered into a Purchase and Sale Agreement for the real property commonly known as 13119 E Cataldo Ave, Spokane Washington (the "Property"). Tr Ex 3. The Property has the following legal description:

Lot 11, Block 1, Guthrie's Valley View 4th Addition, as per plat recorded in Volume 3 of Plats, page 62, records of Spokane County, Situate in the County of Spokane, State of Washington.

On or about September 13, 2008, the sellers of the Property provided Courchaine with a Seller Disclosure Statement of Improved Property which had a handwritten disclosure of a "power company easement." Tr. Ex. 4.

The Plat Map that created the lot that Courchaine was purchasing was recorded on September 16, 1954. Tr. Ex. 104. The Plat Map shows various details regarding the Property, including an easement along the east half of the Property for the Bonneville Power Company transmission lines.

Courchaine never obtained or looked at a copy of the Plat Map before purchasing the Property. RP 51- 52.

As part of her purchase of the Property, Courchaine obtained a Preliminary Commitment for Title Insurance from Commonwealth. Tr. Ex. 5. However, Courchaine never personally reviewed the commitment. RP 57-58. Neither Courchaine nor her real estate agent asked the seller of the Property for clarification of the “power company easement.” Had they done so, the selling real estate agent would have made sure they understood its location. RP 146-151.

After purchasing the Property, Courchaine attempted to get a building permit to convert the home on the Property into a duplex. At that time, she discovered that the Bonneville Power line easement would prohibit building in the configuration that she wanted. RP 24-25. However, Courchaine did not look at any other options of re-configuring the building plans that would have fit within the buildable area of the Property and allowed her to complete construction. RP 95-96.

After learning about the Bonneville Power easement, Courchaine submitted a title insurance claim to Commonwealth. Tr. Ex. 13. The claim was submitted on or about November 4, 2008 – less than three weeks after her purchase of the Property. The final title insurance policy

had not yet been issued, but when it was issued, the effective date of the Policy was October 17, 2008 – the date of recording the deed. Tr. Ex 17. The issuance of the final Policy was delayed because the claim was submitted before the Policy was issued. However, the final Policy was consistent with the terms of the preliminary commitment.

Commonwealth acknowledged receipt of the title insurance claim, and Kennard Goodman was assigned to review the claim. Goodman initially accepted the claim on behalf of Commonwealth. Tr. Ex. 15. As part of various business changes, Goodman was fired by Commonwealth and his cases reassigned. On March 24, 2009, Lisa Lieck, a new claims adjuster, contacted Courchaine and advised her that Fidelity National Title Group was handling the claim process. On April 27, 2009, Commonwealth advised Courchaine in a detailed analysis that the claim was not covered by the Policy. Tr. Ex. 18.

The trial court issued its Findings of Fact after trial. CP 162-183. Prior to entry of the Findings and Conclusions, Commonwealth submitted an objection explaining why the court's factual findings were inconsistent with the evidence and why the trial court's findings and conclusions were misstatements of law. CP 141-161. The trial court did not make any significant changes to its findings or conclusions.

V. ARGUMENT

A. Standards of Review

Whether a statute applies to a factual situation is a question of law and fully reviewable upon appeal. *Keyes v. Bollinger*, 31 Wash.App. 286, 640 P.2d 1077 (1982). The Appeals Court is bound by findings of fact which are supported by substantial evidence. *Beeson v. ARCO*, 88 Wash.2d 499, 563 P.2d 822 (1977). No finding as to a material fact constitutes a negative finding, *McCutcheon v. Brownfield*, 2 Wash.App. 348, 467 P.2d 868 (1970), unless there is undisputed evidence which an appellate court can hold compels a contrary finding. *LaHue v. Keystone Investment Co.*, 6 Wash.App. 765, 496 P.2d 343 (1972). An appellate court may also independently review evidence consisting of written documents. *Wilson v. Howard*, 5 Wash.App. 169, 486 P.2d 1172 (1971).

The trial court's findings of fact and conclusions of law are reviewable by this court *de novo*. Many of the facts are undisputed and are document-based. However, the trial court's findings that are not supported by substantial evidence are fully reviewable. This court may also independently review the documentary evidence and the application of law to the facts.

B. The creation of an easement by recording it on the Plat Map means it is an integral part of the legal description. Easements dedicated on the Plat Map have the same effect as if they were written in text and separately recorded

The Plat Map is the official record that creates a plat. R.C.W. 58.17.020. Tr. Ex. 104. When an owner of property has a plat map approved and recorded, that plat becomes the official record for the property. The owner of the property may include on the dedication and the plat map easements or other matters that affect the property. R.C.W. 58.17.217. Those become part of the official plat map and part of the legal description of the property. R.C.W. 58.17.290. Reference to the plat map creating the lot, by definition, includes restrictions and other matters that are recorded on the plat.

Commonwealth's preliminary title commitment offered to insure against losses pursuant to the terms of the Policy. One of the exceptions of coverage was for matters that were shown on the Plat Map. Matters, including easements, shown on the Plat Map are not covered by the Policy. Tr. Ex. 5 and 17.

When Courchaine purchased the Property, she never examined the Plat Map, so she had no idea what matters or restrictions on the Plat Map might affect her ability to use the Property. RP at 51. She didn't even

review the preliminary title commitment. RP at 57. She bought the property without proper investigation as to whether it was suitable for her purposes.

C. The trial court's first Conclusion of Law is erroneous. The trial court erred when it ignored Washington statutes and case law and concluded that Commonwealth breached its contract by failing to except the Bonneville Power easement from the Policy. That is a misunderstanding of the function of title insurance.

This case is illustrative of what title insurance is not. Title insurance is not an abstract of title or a representation of the condition of title. It is simply an indemnity contract offered to an insured party. R.C.W. 48.29.010(3)(c). The trial court misunderstood what title insurance is, and what it is for. The trial court believed that title insurance required Commonwealth to disclose all matters affecting title. RP at 178. In her oral findings, the trial court indicated that she didn't understand why the buyer of property had any duty to investigate the property since it was Commonwealth's duty to investigate. RP at 178. This is an incorrect application of law.

The trial court's Conclusion of Law #1 states:

The Commitment was a contract for title services between the Plaintiffs and the Defendants. The Defendants were required by that contract to except all matters of the public record that touched and concerned the Cataldo property as of the date of that

commitment. The Commitment failed to disclose the seventy five (75') foot easement. Therefore, Commonwealth breached the contract with the Plaintiffs. The Plaintiffs' damages based upon breach of contract are \$23,500.00.

RP at 167. Each section of this conclusion can be examined and the court's errors are identified:

"The commitment was a contract for title services between the Plaintiffs and the Defendants." This is an incorrect statement of the law. A preliminary title commitment is simply a statement of conditions upon which a title insurer will issue a policy. It wasn't a contract at all.

(c) "Preliminary report," "commitment," or "binder" means reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions in the reports, the conditions and stipulations of the report and the issued policy, and other matters as may be incorporated by reference. The reports are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. The report is not a representation as to the condition of the title to real property, but is a statement of terms and conditions upon which the issuer is willing to issue its title policy, if the offer is accepted.

R.C.W. § 48.29.010(3)(c).

The trial court incorrectly found that the preliminary commitment was, in essence, an abstract of title that was required to disclose the status of title and all matters affecting title.

“The Defendants were required by that contract to except all matters of the public record that touched and concerned the Cataldo property as of the date of that commitment.” This is another incorrect statement of title insurance law. The title insurer is not required to except or disclose matters in a policy. The commitment is not an abstract of title. In fact, the insurer is not required to except anything from a title insurance policy. Exceptions to coverage in the commitment and in the title policy benefit the *insurer*, not the insured.

“[A] preliminary commitment is a statement submitted to the potential insured establishing the terms and conditions upon which the title insurer is willing to issue a policy.” *Barstad v. Stewart Title Guar. Co. Inc.*, 145 Wash.2d 528, 536, 39 P.3d 984 (2002) (citing RCW 48.29.0100(3)(c)). “Significantly, the Legislature clearly established that a preliminary commitment is *not* a representation of the condition of title, but a ‘statement of terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted.’ ” *Id.* (quoting RCW 48.29.010(3)(c)). As such, these preliminary reports “are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report.” *Barstad*, 145 Wash.2d at 540, 39 P.3d 984. The purpose of the investigation before the preliminary commitment is to help the title insurance company set the scope of the policy. *Id.* at 540, 39 P.3d 984 (“title insurance companies conduct the necessary research to determine the scope of the policy that they will offer to the potential insured”). As such, the Supreme Court in *Barstad* held there was no general disclosure duty in preliminary commitments from title insurance companies. *Id.* at 544, 39 P.3d 984. In other words, the purpose of First American's investigation was to determine the scope of the title policy it would issue to DRC; as a matter of law, First American owed no duty of disclosure to DRC, and the trial court did not err in dismissing on this ground.

Dave Robbins Const., LLC v. First Am. Title Co., 158 Wash. App. 895, 249 P.3d 625 (Wash. Ct. App. 2010).

“The Commitment failed to disclose the seventy five (75’) foot easement. Therefore, Commonwealth breached the contract with the Plaintiffs.” As noted above, as a matter of insurance law, the preliminary commitment is not required to disclose *any* matter regarding the title. Inspections of the property and the conditions of title are the responsibility of the buyer. The title insurer assumes risks based on its own choice of what it excepts or does not except from coverage. Courchaine purchased real property whose legal description referred specifically to the recorded Plat Map. Matters on the Plat Map are not covered by the Policy. Courchaine never bothered to look at the Plat Map for the property even though she planned to build on it. That’s like buying a car to use as a taxi without making sure it has back seats.

Contrary to the trial court’s findings, it was not Commonwealth’s responsibility to inspect the Property or the Plat Map for Courchaine. Commonwealth simply offered to insure that there were no matters affecting the title to the Property other than those shown on the Plat Map or otherwise excepted from the coverage in the Policy. Courchaine was responsible for making sure the Property met her expectations. It is

unfortunate that she did not look at the Plat Map or even inquire about the seller's disclosures of the "power company easement" listed on the property disclosure report. But ultimately, it was Courchaine's own failure to ensure that the Property was suitable for her intentions that cause of her inability to build where she wanted to. Commonwealth is not responsible for that.

In sum, the trial court's first conclusion of law is incorrect. The trial court's assessment of damages in the amount of \$23,500 was based on an incorrect application of law.

D. The trial court's second conclusion of law is erroneous. It is not a violation of Washington's Consumer Protection Act to fail to except a matter from coverage in a title insurance policy.

The trial court's Conclusion of Law #2 states:

"Defendant Commonwealth violated the Consumer Protection Act of the State of Washington, by unfair or deceptive acts or practices, namely failing to include and except in the title insurance policy the easement filed of record in September of 1945, under recording number 666726A (Exhibit 12)."

This Conclusion is an incorrect statement of the law. The trial court is confusing a preliminary title commitment with an abstract of title. They are not the same. Commonwealth was not required to disclose or

except the easement from coverage from the preliminary commitment or the Policy.

(c) “Preliminary report,” “commitment,” or “binder” means reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions in the reports, the conditions and stipulations of the report and the issued policy, and other matters as may be incorporated by reference. The reports are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. The report is not a representation as to the condition of the title to real property, but is a statement of terms and conditions upon which the issuer is willing to issue its title policy, if the offer is accepted.

R.C.W. § 48.29.010(3)(c).

The trial court’s Conclusion illustrates a misunderstanding of title insurance law. A tile insurance policy that discloses matters affecting title means that they are excepted *from* coverage. Exceptions benefit the *insurer* not the insured.

Therefore, a conclusion of law that the preliminary commitment is a contract is contrary to statutes. As industry practice suggests, title insurance companies conduct the necessary research to determine the scope of the policy that they will offer to the potential insured. Deskbook, *supra*, § 39.8, at 39-12 (“This search is for the benefit of the title insurer, not the insured.”). Furthermore, this court has recognized that to require the title insurance companies to disclose this information may constitute a significant change in the law. *Johnson*, 103 Wash.2d at 413, 693 P.2d 697.

Barstad v. Stewart Title Guar. Co., Inc., 145 Wash. 2d 528, 540, 39 P.3d 984, 991 (2002).

In addition, a Consumer Protection Act violation may not be found unless the Court specifically finds the insurer's actions are "frivolous and unfounded," or "thoroughly lack reasonable justification:"

Common-law bad faith exists when an insurer's actions in handling a claim are "frivolous and unfounded." *Insurance Co. of Pa. v. Highlands Ins. Co.*, 801 P.2d 284, 286 (Wash. Ct. App. 1990). No bad faith exists as a matter of law when the insurer acts with "reasonable justification." *Gingrich v. Unigard Security Ins. Co.*, 788 P.2d 1096, 1101 (Wash. Ct. App. 1990). Similarly, the Washington Consumer Protection Act imposes liability when the insurer's actions "thoroughly lacked reasonable justification." *Starczewski v. Unigard Ins. Group*, 810 P.2d 58, 62 (Wash. Ct. App. 1991).

McGreevy v. Oregon Mut. Ins. Co., 46 F.3d 1142 (9th Cir. 1995).

Commonwealth sent Courchaine a detailed explanation of why the Bonneville Power easement was not covered under the Policy. Tr. Ex 18. The Bonneville Power easement was shown on the Plat Map. It was never a matter that was covered by the Policy because the Policy did not insure against matters shown on the Plat Map. Therefore, Commonwealth had reasonable justification for denying the claim. Although Commonwealth initially accepted the claim, Commonwealth was well within its rights to review and revise its coverage determination.

In addition, even if the court had found that the claim was covered by the Policy, in order to make a determination of bad faith, the Court must make a finding of fact that Commonwealth did not make a “good faith mistake.” If Commonwealth was mistaken in its position, then there is no bad faith.

Claims of bad faith are not easy to establish and an insured bringing such a claim has a heavy burden to meet. *Id.*; *see also*, e.g., *Overton*, 145 Wash.2d at 433, 38 P.3d 322 (an insurer alleging bad faith arising from a breach of contract must show that the breach was “unreasonable, frivolous, or unfounded”). However, the insurer's duty to act in good faith is “fairly broad” and may be breached by conduct short of intentional bad faith or fraud, **but not by a good faith mistake**. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wash.App. 323, 329, 2 P.3d 1029 (2000).

Leslie v. Fid. Nat. Title Ins. Co., C08-5252BHS, 2008 WL 5000275 (W.D. Wash. Nov. 21, 2008) (emphasis added).

The trial court did not make any factual findings that Commonwealth’s coverage reconsideration was not a good faith mistake.

There was also insufficient evidence to support the trial court’s conclusion that Commonwealth violated the Consumer Protection Act.

To prove a violation of the CPA, the claimant must show: (1) an unfair or deceptive act; (2) the act occurred in the conduct of trade or commerce; (3) the act has an impact on the public interest; (4) injury to the claimant; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 790, 719 P.2d 531 (1986).⁴ The question of whether a particular action gives rise to a CPA violation is a question of law. *Seattle Pump Co., Inc.*

v. Traders and General Ins. Co., 93 Wash.App. 743, 752, 970 P.2d 361 (1999).

To prove an unfair or deceptive act under the first element of a CPA action, the plaintiff need not show that the act in question was intended to deceive, but only that the act had the capacity to deceive a substantial portion of the public. *Hangman Ridge*, 105 Wash.App. at 785, 20 P.3d 1062. While the CPA does not define the term “deceptive,” Washington courts have held that “implicit in that term is ‘understanding that the actor *misrepresented* something of material importance.’ ” *Stephens v. Omni Ins. Co.*, 138 Wash.App. 151, 166, 159 P.3d 10 (2007) (quoting *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wash.App. 722, 730, 959 P.2d 1158 (1998)) (emphasis in original).

A plaintiff may satisfy the first element by proving either a per se or a non-per se deceptive or unfair trade practice. “A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated.” *Hangman Ridge*, 105 Wash.2d at 786, 719 P.2d 531. The Legislature and the Insurance Commissioner have identified specific acts that are per se unfair or deceptive. *See, e.g.*, RCW 48.30.010-.340 (“Unfair Practices and Frauds”) and WAC 284-30-800 (“Unfair Practices Applicable to Title Insurers and Their Agents”). If a plaintiff cannot prove that an act is per se unfair or deceptive, he or she may still independently demonstrate that the practice is unfair or deceptive by showing that the practice has the capacity to deceive a substantial portion of the public. *Hangman Ridge*, 105 Wash.2d at 785, 719 P.2d 531.

Leslie v. Fid. Nat. Title Ins. Co., C08-5252BHS, 2008 WL 5000275 (W.D. Wash. Nov. 21, 2008).

Courchaine’s claims and the evidence did not meet the *Hangman Ridge* and *Leslie* standards. As a matter of law, the preliminary title

commitment was not required to disclose the easement. Therefore, there was no statutory violation. There was also no evidence that any practices were unfair or deceptive or had the capacity to deceive a substantial portion of the public.

E. The Court's Third Conclusion of Law is Erroneous and unsupported by the evidence. There is no substantive evidence that would support a conclusion that Fidelity is liable to Plaintiff or that any of Fidelity's actions violate the Consumer protection Act.

The Court's Conclusion of Law #3 states:

Defendant Fidelity failed to pay the Plaintiffs' claim when said failure to except the BPA easement was brought to Fidelity's attention. Further, both Defendants misled the Plaintiffs into believing that they were two separate legal entities acting independent of one another. Said conduct occurred in the issuance of the final title insurance policy and in the ordinary course of business. Said conduct impacts the public interest, as well as the interest of the Plaintiffs. Said failure to except from coverage the omitted easement and pay the claim caused injury to the Plaintiffs. The Plaintiffs' injury is related to and the proximate result of the unfair and/or deceptive acts of the Defendants, and proximately resulted from the Defendants' conduct. Pursuant to RCW 19.86.090 Plaintiffs should be awarded civil penalties of \$10,000.00 from each of the Defendants. Additionally, Plaintiffs should be awarded their attorney fees pursuant to RCW 19.86.090.

This Conclusion is confusing and convoluted, to say the least. The trial court did not explain the basis upon which it found that Fidelity was liable for the insurance Policy issued by Commonwealth. Why was

Fidelity (as opposed to Commonwealth) obligated to pay Plaintiff's claim? Nor is it clear how the trial court determined that Fidelity had done anything that violated the Consumer Protection Act.

As has been analyzed in the previous sections, the trial court also incorrectly applied the law. The trial court's conclusion of damages is for failure to except coverage for a matter. The law is clear that this isn't the case. However, even if we broadly reinterpret this finding to say that Commonwealth failed to pay a claim for a non-excepted matter, the court ignored the fact that the terms of the Policy itself do not insure against matters that are disclosed on the Plat Map.

Even more confusing is how the trial court came to the apparent conclusion that Fidelity and Commonwealth are the same entity.

1. FNTG has No Direct Liability to Plaintiff.

There is no evidence that Courchaine had any direct contract with Fidelity. Courchaine's contract and contact was with Commonwealth. Commonwealth issued the Policy and denied the claim. The court's findings that Fidelity somehow controlled Commonwealth or forced it to deny the claim are made on unsubstantiated speculation.

2. The trial court did not base the findings and conclusions against Fidelity substantial facts. There was no evidence produced that the corporations are not separate entities.

Commonwealth is a subsidiary of Chicago Title Insurance Company, which is a subsidiary of Chicago Title and Trust Company, which is a subsidiary of Fidelity National Title Group, Inc. RP at 63-64. However, there was no evidence presented at trial that the Commonwealth and Fidelity acted in such a way to meet the standards of corporate disregard under Washington law. While Commonwealth and Fidelity have aligned interests, there is no question that they are separately incorporated companies.

A parent corporation is not liable for the acts of its subsidiaries. "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998). This general principle is only violated in "exceptional cases." *Culinary Workers & Bartenders Union v. Gateway Cafe, Inc.*, 91 Wash. 2d 353, 366, 588 P.2d 1334 (1979). "To pierce the corporate veil and find a parent corporation liable, the party seeking relief must show that there is an overt intention by the corporation to disregard

the corporate entity in order to avoid a duty owed to the party seeking to invoke the doctrine." *Minton v. Ralston Purina Co.*, 146 Wash. 2d 385, 397, 47 P.3d 556 (2002). "The alter ego theory . . . is applied when the corporate entity has been disregarded by the principals themselves so that there is such a unity of ownership and interest that the separateness of the corporation has ceased to exist." *Grayson v. Nordic Construction Co., Inc.*, 92 Wash. 2d 548, 552, 599 P.2d 1271 (1979). On the other hand, "[w]hen the shareholders of a corporation . . . conscientiously keep the affairs of the corporation separate from their personal affairs, and no fraud or manifest injustice is perpetrated upon third persons who deal with the corporation, the corporation's separate entity should be respected." *Id.*¹

There is no evidence in the record to support the conclusion that Commonwealth and Fidelity's operations were such that the corporations had ceased to exist independent of each other or that the corporate structure was intended to avoid a duty of the other corporation.

3. There was no evidence to support a Corporate Disregard/Veil Piercing Theory.

¹ See Generally, *Campagnolo S.R.L. v. Full Speed Ahead, Inc.*, 2010 U.S. Dist. LEXIS 49707 (W.D. Wash. May 20, 2010).

Under Washington law, a plaintiff seeking to pierce the corporate veil must show (1) that the corporate form was intentionally used to violate or evade a duty, and (2) disregard of the corporate form is necessary to prevent unjustified loss to the injured party. *Meisel v. M&N Modern Hydraulic Press Co.*, 97 Wash. 2d 403, 410, 645 P.2d 689 (1982). The first element requires an abuse of the corporate form, which typically involves "fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit and creditor's detriment." *Id.* (quoting *Truckweld Equipment Co. v. Olson*, 26 Wn. App. 638, 645, 618 P.2d 1017 (1980)). The second element requires that the wrongful corporate activities cause the harm suffered by the party seeking relief. *Id.* "The absence of an adequate remedy alone does not establish corporate misconduct. The purpose of a corporation is to limit liability." *Id.* At 411.

Federal veil-piercing law in the Ninth Circuit is similar. First, the court must find (1) that there is "such a unity of interest and ownership between the corporation and the shareholder that the two no longer exist as separate entities," and (2) that failure to disregard the corporate form would result in fraud or injustice. *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1111 (9th Cir. 1979); see also *Igen Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 309 n.5 (4th Cir. 2003) (noting that under Delaware law "to pierce the corporate veil based on an

agency or 'alter ego' theory, "the corporation must be a sham and exist for no other purpose than as a vehicle for fraud"). The court should consider the degree to which the separate identity of the parent and subsidiary were maintained, the degree of injustice visited on the litigants by recognizing separate entities, and fraudulent intent. *Id.* That a creditor may be unsatisfied is not an injustice warranting piercing the corporate veil. *United States v. Standard Beauty Supply Stores, Inc.*, 561 F.2d 774, 777 (9th Cir. 1977).

There is no evidence in this case that support a veil-piercing theory. There is no evidence to dispute that Fidelity and Commonwealth were other than separate entities. There is no evidence of disregard of corporate formalities. There is no evidence of undercapitalization or any other commingling that would support any corporate disregard arguments. There is simply no evidence to support this theory.

4. There is No evidence to support Liability against Fidelity Under an Agency Theory

To hold a parent liable on an agency theory requires that the parent exercise total control over the subsidiary, well beyond the normal control exercised by parents over subsidiaries. See *Igen*, 335 F.3d at 309 n.5 ("[M]ere control and even total ownership of one corporation by another is

not sufficient to warrant the disregard of a separate corporate entity") (internal quotation omitted). Courts look to see if the parent exercises "complete domination" over the subsidiary or whether the subsidiary is a shell corporation, *Japan Petroleum v. Ashland Oil, Inc.*, 456 F. Supp. 831, 845 (D. Del. 1978), or whether "the parent specifically directs the actions of its subsidiary, using its ownership interest to command rather than merely cajole," *Esmark, Inc. v. Nat'l Labor Relations Bd.*, 887 F.2d 739, 757 (7th Cir. 1989). A parent has no liability on an agency theory where it does not "direct[] and authorize[] the manner in which the subsidiary conduct[s] its business." *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 289, 864 N.E.2d 227, 309 Ill. Dec. 361 (2007) (emphasis in original) (considering veil-piercing law of numerous jurisdictions). Whether the parent and subsidiary respected corporate formalities is relevant to the question of whether the parent so dominated the subsidiary that the subsidiary is a mere agent of the parent. See *Esmark*, 887 F.2d at 758-59.

There is no evidence in the record to support any Agency theory in this case.

5. There is No Liability Even if though Commonwealth's claims were handled by FNTG

Plaintiff's final argument is that because FNTG's claim center handled the claim, Fidelity is somehow liable. Again, Washington law does not support that claim. In *J.I. Case Credit Corp. v. Stark*, 64 Wash. 2d 470, 475, 392 P.2d 215 (1964), the Supreme Court of Washington held that the corporate veil should not be pierced even where the facts indicated: (1) one corporation was a wholly owned subsidiary of the other; (2) the secretary-treasurer of one was the president of the other; (3) all employees of the subsidiary were paid by the parent; (4) both companies had the same address, credit managers, lawyers, nonresident agents and auditors; and (5) the subsidiary was in business only to handle retail financing for the parent.

6. There are no findings that support the conclusion that Fidelity or Commonwealth acted in bad faith or violated the Consumer Protection Act.

If Commonwealth acted reasonably in its denial of Plaintiff's claim, then there is no "bad faith," even if Commonwealth's position is determined to be incorrect. In order to find "bad faith" in Commonwealth's handling of Plaintiff's claim, the court must find specific facts that Commonwealth's actions are "frivolous and unfounded." The Court must also find the facts that Commonwealth's actions "thoroughly lacked reasonable justification."

Common-law bad faith exists when an insurer's actions in handling a claim are "frivolous and unfounded." *Insurance Co. of Pa. v. Highlands Ins. Co.*, 801 P.2d 284, 286 (Wash. Ct. App. 1990). No bad faith exists as a matter of law when the insurer acts with "reasonable justification." *Gingrich v. Unigard Security Ins. Co.*, 788 P.2d 1096, 1101 (Wash. Ct. App. 1990). Similarly, the Washington Consumer Protection Act imposes liability when the insurer's actions "thoroughly lacked reasonable justification." *Starczewski v. Unigard Ins. Group*, 810 P.2d 58, 62 (Wash. Ct. App. 1991).

McGreevy v. Oregon Mut. Ins. Co., 46 F.3d 1142 (9th Cir. 1995).

Commonwealth issued Plaintiff an extensive letter that explained the factual and legal reasons for its denial of the claim. Tr. Ex. 18. The four-page letter sets forth Commonwealth's position. The trial court did not address the denial letter or find that the reasons for the denial were "frivolous and unfounded" or that they "thoroughly lacked reasonable justification." Thus, there was no basis to support the conclusion that Commonwealth acted in "bad faith" under Washington law, even if the court determines that Commonwealth's position was incorrect.

Likewise, in the instant case, the ultimate failure of [the Insurer's] theory does not establish the lack of reasonable justification. See *Insurance Co. of Pa.*, 801 P.2d at 286 (finding that it is not bad faith for insurer to take position that later turns out to be wrong). The district court properly determined that, because [the Insurer] had a very strong argument that its liability should be zero, [the Insurer] was justified in refusing to stipulate to damages.

McGreevy v. Oregon Mut. Ins. Co., 46 F.3d 1142 (9th Cir. 1995).

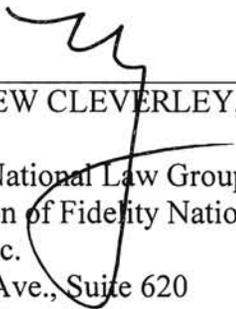
VI. THE COURT'S ATTORNEY FEES AWARD MUST BE REVERSED.

The trial court awarded attorney based upon R.C.W 19.86.090 – the Consumer Protection Act. That award is erroneous and must be reversed because there was no violation of the CPA by either Commonwealth or Fidelity.

VII. CONCLUSION

Throughout the case, the trial court made the erroneous assumption that a preliminary title insurance commitment and an abstract of title are the same thing. They aren't. The trial court's treatment of the title insurance policy as something other than an indemnity contract was erroneous. The trial court's decision should be reversed and an order for dismissal entered.

Dated: December 19, 2011



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CERTIFICATE OF SERVICE

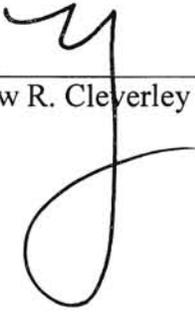
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing document on the following individual in the manner indicated:

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Dated: December 19, 2011



Matthew R. Cleverley