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No. _____

Washington Court of Appeals, Division Three

SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III
Cause No. 23384-7-III

MIKE G. VAN DINTER AND SHERYL ANN VAN DINTER,
husband and wife,

Appellants,

v.

JOSEPH M. ORR AND LORI L. ORR, husband and wife, each
individually and the martial community; FIRST AMERICAN
TITLE COMPANY OF SPOKANE, a Washington corporation;
FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign
corporation; FIRST AMERICAN CORPORATION,
a foreign corporation,

Respondents.

PETITION FOR REVIEW

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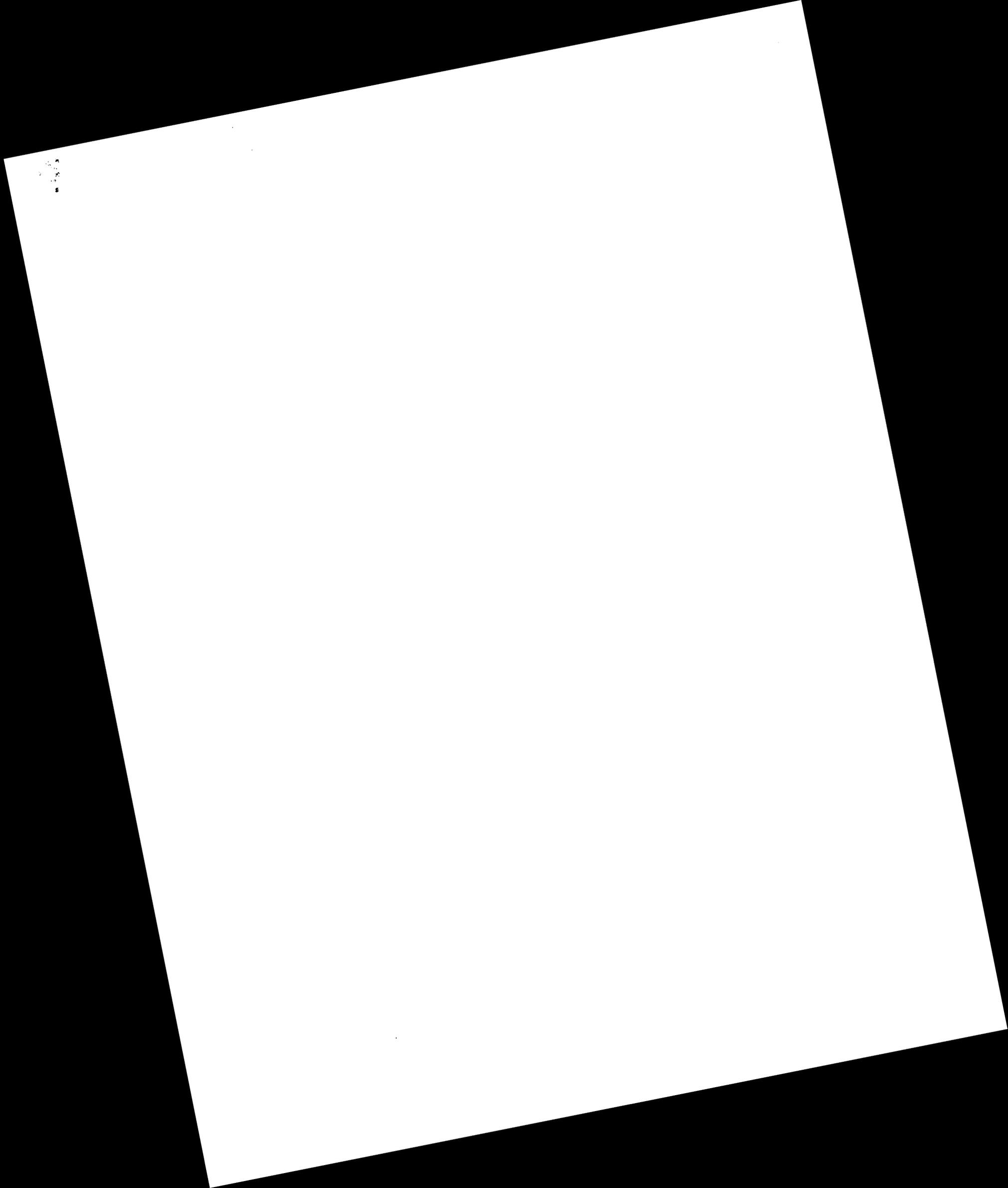


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I. IDENTITY OF PETITIONER

Appellants Mike G. Van Dinter and Sheryl Ann Van Dinter ("Van Dinters"), ask the Supreme Court to accept review of the decision designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

The Van Dinters seek review of a portion of the Court of Appeals decision filed July 28, 2005 in Mike G. Van Dinter, et ux. v. Joseph M. Orr, et ux., et al., Appellate Cause No. 23384-7-III. A copy of the Decision is attached hereto as **Appendix A**.

III. ASSIGNMENTS OF ERROR

1. Did the trial court and Court of Appeals err by finding that the undisclosed Capital Facilities Rate ("CFR") at issue did not constitute an "encumbrance?"
2. Did the Court of Appeals err when it held that the diminution in value caused by the undisclosed CFR did not constitute "damages?"
3. Did the trial court and Court of Appeals err by denying the Van Dinters' Cross-Motion for Summary Judgment and by granting Orrs' Motion for Summary Judgment for breach of statutory warranty deed?
4. Did the trial court and Court of Appeals err by denying the Van Dinters' Motion for Summary Judgment on its breach of contract action in granting First American's Motion for Summary Judgment?

IV. STATEMENT OF THE CASE

A. Undisputed Facts Relevant For Review.

The relevant facts in this case are undisputed. Prior to January 22, 2003, Joseph and Lori Orr ("Orrs") owned the property located at 8700 East Sprague Avenue, Spokane, Washington ("Property"). (C.P. 119-20). On November 16, 1999, the Spokane County Board of County Commissioners adopted an ordinance that called for the construction of sewer and street improvements benefiting the Property. (C.P. 90). In order to pay for the improvements, the ordinance also set a Capital Facility Rate ("CFR") to be assessed against each benefited parcel. (C.P. 90). In 2001, the sewer construction and street improvements benefiting the Property were completed. (C.P. 23-24; 86; and 141). The Orrs began attempts to sell the Property. In doing so, the Property was advertised as having all utilities including sewer. (C.P. 141).

Based on the representations by the Orrs and their agents, Mike Van Dinter and Sheryl Ann Van Dinter ("Van Dinters") purchased the Property on approximately January 23, 2003. (C.P. 22-23). In order to complete the transaction, the Orrs provided the

Van Dinters a statutory warranty deed. (C.P. 23; C.P. 122). The statutory warranty deed, by law, warranted against all known and unknown encumbrances. (C.P. 9-11). The Orrs did not indicate, at any time, to the Van Dinters or their agents that any amounts were due and owing on the Property for the sewer construction or that the Property was encumbered in any way. (C.P. 23, 120).

In order to purchase the Property, the Van Dinters obtained financing from AmericanWest Bank. (C.P. 23). In turn, AmericanWest Bank obtained title insurance from First American Title Company of Spokane through First American Title Insurance Company and First American Corporation (collectively "First American"). (C.P. 23). The policy obtained by AmericanWest Bank insured against any encumbrances on the title of the property, against liens, or against assessments for street improvements. Id.

After the sale of the Property, it was discovered that in 1999 Spokane County had assessed the CFR against the Property for the sewer improvements which was perfected in 2001 when the construction was completed. (C.P. 23). Subsequent to the purchase, Spokane County sought payment of this encumbrance from the Van

Dinters. (C.P. 23). AmericanWest Bank filed a formal notice of claim with First American because of the encumbrance. (C.P. 96). First American denied this claim. AmericanWest assigned its claims against First American under the title insurance policy to the Van Dinters in order to protect its interest. (C.P. 40–41).

B. Procedural History.

As a result of the Orrs and First American's refusal to honor their commitments, the Van Dinters commenced this suit to obtain payment of the encumbrance. (C.P. 3-11). The Van Dinters sought relief against the Orrs for breach of their statutory warranty deed and negligent misrepresentation of material facts in connection with the sale. (C.P. 3–11). The Van Dinters also sought relief against First American for breach of the title insurance policy. (C.P. 3–11). After First American and the Orrs answered, the Van Dinters moved for summary judgment against First American. (C.P. 64–66; C.P. 54–63). In turn, First American cross-moved for summary judgment. (C.P. 67–80). On July 26, 2004, the Orrs moved for summary judgment on the Van Dinters' causes of action for breach of statutory warranty deed and negligent misrepresentation. (C.P.

107–118). The Van Dinters then moved for summary judgment against the Orrs on their cause of action for breach of statutory warranty deed. (C.P. 156–163). On August 20, 2004, the trial court heard argument on these motions. (C.P. 194). The trial court granted the Orrs' motion for summary judgment and First American's cross-motion for summary judgment. Both the Van Dinters' motions for summary judgment were denied. (C.P. 200–211). Appeal was then initiated. (C.P. 212–226).

On July 28, 2005, the Court of Appeals correctly held that genuine issues of material fact exist with regard to Van Dinters cause of action for negligent misrepresentation. However, the Court of Appeals ignored Washington law by holding that an undisclosed CFR does not constitute an encumbrance. This decision affects every purchase of property in the State of Washington and those individuals who rely upon title insurance to assure that the value of their property will not be diminished by the undisclosed rights of another. In reaching its decision, the Court of Appeals ignored long standing Washington Law on an issue that is one of substantial public interest. Thus, the issue should be determined by this Court.

V. ARGUMENT IN SUPPORT OF
ACCEPTANCE OF REVIEW

A. Review of Van Dinters' Petition Should be Granted.

1. The Court of Appeals Decision Conflicts With Decisions Of The Supreme Court And Prior Court of Appeals Decisions.

As set forth below, the Court of Appeals decision directly conflicts with both decisions of this Court and other Court of Appeals decisions. First, the decision conflicts with the well established definition of encumbrance. Merlin v. Rodine, 32 Wn.2d 757, 760, 203 P.2d 683 (1949); Robinson v. Khan, 89 Wn. App. 418, 421, 948 P.2d 1347 (1998). Despite recognizing that the County had a right or interest in the subject property (Spokane County Code 8.03.9040), the Court of Appeals reached the incongruent conclusion that the CFR is not a “right or interest” in the property. Indeed, this is contrary to a decision of this Court that holds exactly the opposite. See Green v. Tidball, 26 Wash. 338, 343, 67 P. 84 (1901).

Second, the Court of Appeals’ holding that AmericanWest Bank did not suffer damages because there was no “loss of priority” is in direct conflict with the holding of Miebach v. Safeco Title Ins., 49 Wn. App. 451, 453, 743 P.2d 845 (1987). The Miebach Court

held that damage for diminution in value or any other damages are recoverable for a breach of a title insurance policy. Miebach, 49 Wn. App. at 453. Yet, the Court of Appeals' decision purports to limit recoverable damages under a breach of title policy to damages suffered by "loss of priority."

2. Decision Of The Court of Appeals Decision Involves An Issue of Substantial Public Interest That Should Be Determined By The Supreme Court.

The decision of the Court of Appeals involves two issues of substantial public policy. First, the decision uproots the policy behind full disclosure and protection in real estate transactions. In this case, the Van Dinters did everything possible under Washington law to protect themselves. They required the Orrs to provide a statutory warranty deed that warranted against all known and unknown encumbrances and purchased title insurance. The bank also purchased title insurance. Yet, decisions below have the Van Dinters shouldering the risk and burden of the undisclosed CFR. Thus, it is impossible for a prospective buyer of real property to protect themselves from an undisclosed CFR. As a result, this Court

should accept review to clarify that under Washington law buyers are entitled to protection for undisclosed CFRs.

Second, this Court should accept review to provide guidance to title insurers with regard to the scope and extent of coverage for CFRs under the industry-wide standard language "encumbrance." Such guidance will create a bright line rule with regards to one of the municipal financing options available, the CFR. This will allow the title insurers to either specifically exclude CFRs from coverage or make it clear that title insurance assures against losses caused by undisclosed CFRs.

B. The Spokane County CFR Constituted An Encumbrance Against The Property.

On January 22, 2003, the Orrs provided the Van Dinters with a "statutory warranty deed". (C.P. 29). Under Washington law, the "statutory warranty deed" includes certain covenants.

Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his heirs and assigns, with covenants on the part of the grantor: (1) That at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all

encumbrances; and (3) that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same, and such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at full length in such deed.

RCW 64.04.030 (2005) (emphasis added).

It is well established that such a deed warrants "*against known as well as unknown defects and encumbrances . . .*" Fagan v. Watters, 115 Wash. 454, 457, 197 P. 635 (1921)(emphasis added).

An encumbrance is "*any right to or interest in land which may subsist in third persons, to the diminution of value of the estate of the tenant . . .*" Cowiche Basin P'ship v. Mayer, 40 Wn. App. 223, 228, 698 P.2d 567 (1985); see also Green, 26 Wash. at 343. Thus, in determining whether property is "encumbered" the determinative question is whether the right diminishes the value of the land. Id. In other words, is the land worth less because of the CFR?

Here, Spokane County created an obligation and its right against the Property in 1999. (C.P. 90). This Court held many years ago that this creates an encumbrance at the time the property is benefited.

Within these definitions [of the term "incumbrance"] there can be little doubt that the right of the city to levy an assessment upon these lands to pay the proportionate costs of the improvement made in the street was an incumbrance on the land at the time the deed in question was executed. The work had then been performed and accepted by the city. It was performed in pursuance of a resolution and ordinance of the city declaring that a just proportion of the cost of the improvement should be charged upon this land. The benefit conferred upon the land which gave rise to the right to make the levy, and without which no right to levy could arise, had then been conferred. True, all of the steps necessary to perfect the charge had not then been taken, and the amount thereof, as it depended on various considerations, was undetermined, and the city might or might not thereafter enforce the right. In this sense the right may be said to have been inchoate; but it was, nevertheless, a right which the city could enforce against the will and consent of the owner, and in spite of any objection he might make. As such it was a burden on the land depreciative of its value, which did not conflict with his right to convey the land and fee, and hence an incumbrance.

Green, 26 Wash. at 343-344 (emphasis added).

The real test is found in the answer to the question, when were the benefits conferred? . . . The liability of the property to assessment is not created by the placing of the assessment roll in the hands of the city treasurer, but from the fact that a benefit is conferred on the property by the improvement; and the time when the obligation therefore would naturally arise is when the benefit is conferred, - the completion of the improvement. It would seem, then, as between grantor and grantee, in the absence of express legislation to

the contrary, such a charge, if perfected, should be held to be an incumbrance from that time, and such, we think, is the general rule.

Green, 26 Wash. at 344-45 (emphasis added).

Similarly, in this case, the right was created by the County's ordinance in 1999. (C.P. 90). The benefit was conferred to the property when the construction was completed in 2001. (C.P. 23-24). At that time, the County maintained the right to enforce the charge. (C.P. 90). Whether the County chose to delay enforcing its right or sending a bill to the Orrs is immaterial. See Green, 26 Wash. at 343-344 ("*[I]t was nevertheless, a right which the City could enforce against the will and consent of the owner*"). Thus, as a matter of law, the Property was encumbered in 2001 when construction was completed.

It is further urged that no damages arise until some right is asserted under the restrictive clause, and that the evidence does not show that any right has been claimed. . . . The contention that the respondent's right of action did not accrue until there was an assertion of right under the clause is not tenable.

Williams v. Hewitt, 57 Wash. 62, 63-64, 106 P. 496 (1910).

Consequently, the Orrs, as a matter of law, breached their statutory warranty deed. The Orrs warranted that the Property was

free from all known and unknown encumbrances. (C.P. 122). Under Washington law, the CFR was an encumbrance regardless of whether the County chose to exercise its rights. Williams, 57 Wash. at 63-64. The bottom line is that the CFR was a right or interest in land which subsisted in the County and diminished the value of the Property at the time the deed was executed in 2003. See Green, 26 Wash. at 343-344. The Orrs did not and cannot offer any legal authority to the contrary. By selling the Property subject to the CFR to the Van Dinters, the Orrs breached the statutory warranty deed causing damages to the Van Dinters.

Therefore, the Van Dinters are entitled to judgment against the Orrs as a matter of law. Thus, the trial court erred when it denied the Van Dinters' Cross-Motion for Summary Judgment on this issue. The Court of Appeals erred when it affirmed the trial court's decision. For the same reasons that the Van Dinters are entitled to Summary Judgment against the Orrs, it was in error for the trial court to grant Summary Judgment dismissing the Van Dinters Breach of Statutory Warranty Deed Action. Further it was in error for the Court of Appeals to affirm that decision.

C. **First American Breached The AmericanWest Policy.**

An insurance policy is a contract. Panorama Village Condo Owners Assoc. Bd. v. Allstate Ins. Co., 144 Wn.2d 130, 137, 26 P.3d 910 (2001). “*The interpretation of insurance policies is a question of law.*” PUD No. 1 v. Int'l Ins. Co., 124 Wn.2d 789, 797, 881 P.2d 1020 (1994). Courts will not disregard language used by the parties in a contract. Better Fin. Solutions v. Transtech, 112 Wn. App. 697, 711, 51 P.3d 108 (2002), rev. denied, 149 Wn.2d 1010 (2003). They will construe the contract so as to give effect to all of its provisions as opposed to rendering one or more provisions meaningless or ineffective. Id.

If any ambiguities in the policy exist, those ambiguities shall be construed against the insurer. Weyerhaeuser Co. v. Aetna Cas. & Surety Co., 123 Wn.2d 891, 897, 874 P.2d 142 (1994). Failure to pay a covered claim constitutes a breach of the insurance policy and the insured is entitled to judgment. Simms v. Allstate Ins. Co., 27 Wn. App. 872, 879, 621 P.2d 155 (1980).

1. **First American is liable because the CFR is an encumbrance.**

The policy of title insurance sold to AmericanWest Bank provides:

[First American], insures, as of Date of Policy shown in Schedule A , against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:...

2. *Any defect in or lien or encumbrance on the title;...*
6. *The priority of any lien or encumbrance over the lien of the insured mortgage; . . .*
7. *Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material: (a) arising from an improvement or work related to the land which is contracted for or commenced prior to date of policy;...*
8. *Any assessments for street improvements under construction completed at date of policy which now have gained or hereafter may gain priority over the insured mortgage;...*

[First American] will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

(C.P. 30)(emphasis added).

First American insured AmericanWest Bank against any encumbrance against the Property. (C.P. 30) As discussed in detail above, the CFR at issue is an encumbrance which diminished the

value of the property. Green, 26 Wash. at 343-344. Thus, AmericanWest Bank suffered a loss by reason of the encumbrance on the title. First American's failure to pay this loss is a breach of contract. See Simms, 27 Wn. App. at 879.

AmericanWest Bank purchased the title insurance to protect it against any encumbrance against the Property. (C.P. 31). That is exactly what happened in this case. Hence, the Van Dinters, through the rights assigned from AmericanWest Bank, are entitled to judgment against First American as a matter of law. (C.P. 40). Therefore, the trial court erred by denying the Van Dinters' Motion for Summary Judgment and granting First American's Cross-Motion for Summary Judgment. Furthermore, the Court of Appeals erred by affirming the trial court's decision on this issue.

2. First American is liable because the CFR is a lien that has priority over the Bank's mortgage.

The plain language of the title insurance policy provides that First American will pay any loss or damage suffered by AmericanWest Bank if there exists a lien or encumbrance that has priority over its mortgage. (C.P. 30).

RCW 36.94.150 in the pertinent part states:

All counties operating a system of sewage and/or water shall have a lien for delinquent connection charges and charges for the availability of sewage and/or water service,... [t]he lien shall be for all charges, interest, and penalties and shall attach to the premises to which the services were unavailable. The lien shall be superior to all other liens and encumbrances, except general taxes and local and special assessments of the county.

RCW 36.94.150 (2005)(emphasis added).

Here, the CFR is a charge for the availability of sewer and/or water service creating a lien which takes priority over any interest of AmericanWest Bank. (C.P. 23). See RCW 36.94.150 (2005). Consequently, by statute, the CFR has priority over any lien except general taxes and local and special assessments of the County. See RCW 36.94.150 (2005).

AmericanWest Bank requested that First American pay under the policy because Spokane County has priority over AmericanWest Bank's mortgage. (C.P. 43-44). However, First American refused to do so. This failure also constitutes a breach of contract for which the Van Dinters, through AmericanWest Bank's rights, are entitled to judgment as a matter of law. See Simms, 27 Wn. App. at 879. Thus, the trial court erred when it denied the Van Dinters' Motion

for Summary Judgment and granted First American's Cross-Motion for Summary Judgment. Furthermore, the Court of Appeals erred by affirming the trial court's decision on this issue.

3. First American is also liable because the CFR is an assessment for street improvements.

The contract of insurance issued by First American also provides insurance for assessments for street improvements completed at the date of policy which may gain priority over AmericanWest Bank's mortgage and/or a statutory lien arising from an improvement or work related to the land which is commenced prior to the date of the policy. (C.P. 30).

Under Washington law, water or sewer pipeline is a street improvement. Hargreaves v. Mukilteo Water Distr., 37 Wn.2d 522, 528, 224 P.2d 1061 (1950). A sewer pipeline is also an improvement and/or work related to the land. See RCW 60.04.021 (2005). Spokane County constructed a sewer and refurbished the road in front of 8700 East Sprague Avenue, Spokane, Washington. (C.P. 23). The cost of these street improvements was assessed against the property purchased by the Van Dinters. (C.P. 23). These street improvements were commenced and completed prior to

January 24, 2003. (C.P. 23-24). The CFR has or will have priority over AmericanWest Bank's mortgage. RCW 36.94.150 (2005).

The term "assessments" is not defined in the policy. (C.P. 30-39). However, undefined terms are to be given their plain, ordinary, and popular meanings. Queen City Farms v. Central Nat'l Ins. Co., 126 Wn.2d 50, 65, 882 P.2d 703 (1994). Assessment has been defined as "*the process of ascertaining and adjusting the shares respectively to be contributed by several persons toward a common beneficial object according to the benefit received.*" Black's Law Dictionary, Fifth Edition, p. 106.

Under the plain meaning of "*assessment*," the CFR is an assessment for the sewer installation because it represents the amounts owed by each property owner attributable to "*the costs of acquiring, constructing and installing the system of sewerage.*" (C.P. 84). Thus, the CFR is an assessment for street improvements which "*may gain priority over the insured mortgage.*" (C.P. 30); RCW 36.94.150 (2005).

Consequently, under the policy terms, First American is required to pay for this assessment. Because First American has

failed to pay, the Van Dinters, through the rights acquired from AmericanWest Bank, were entitled to summary judgment.

VI. VAN DINTERS' RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

An insured is entitled to attorney fees incurred as a result of the insurance company's wrongful refusal to pay a covered claim. Olympic Steamship Co., Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991). Moreover, the insurance policy provided that First American would pay attorney fees as a result of defending the title. (C.P. 45). Here, the Van Dinters were forced to bring suit against First American with regard to First American's obligations. First American failed to pay a covered claim. Thus, under Olympic Steamship and the insurance policy the Van Dinters request this Court grant their motion for attorney fees at both the trial court level, at the Court of Appeals and on review in this Court. This motion is made pursuant to RAP 18.1(b).

VII. CONCLUSION

Pursuant to the foregoing, the Van Dinters respectfully request that their Petition for Review be granted.

DATED this 29th day of August, 2005.

DUNN & BLACK, P.S.

A handwritten signature in black ink, appearing to read "N. Kovarik" followed by a stylized flourish or second signature.

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MIKE G. VAN DINTER and SHERYL ANN)
VAN DINTER, husband and wife,)

Appellants,)

v.)

JOSEPH M. ORR and LORI L. ORR,)
husband and wife, each individually and)
the marital community; FIRST)
AMERICAN TITLE COMPANY OF)
SPOKANE, a Washington corporation;)
FIRST AMERICAN TITLE INSURANCE)
COMPANY, a foreign corporation;)
FIRST AMERICAN CORPORATION, a)
foreign corporation,)

Respondents.)

No. 23384-7-III

Division Three
Panel Two

UNPUBLISHED OPINION

KATO, C.J.—The Van Dinters bought property from the Orrs. After the sale, Spokane County sent the Van Dinters a bill for sewer construction. Believing the property already had sewer, they sued the Orrs for breach of statutory warranty deed and negligent misrepresentation. They also sued First American Title Company for breach of the title insurance policy. The court

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granted summary judgment dismissal of all claims. We affirm in part and reverse in part.

Joseph and Lori Orr owned vacant property located at 8700 East Sprague Avenue in Spokane, Washington. On November 16, 1999, the Spokane County Commissioners adopted an ordinance calling for sewer construction and other street improvements that would benefit property. In order to pay for the improvements, the County set a Capital Facilities Rate (CFR) to be assessed against each benefited parcel. The project was completed in 2001.

The Orrs later listed the property for sale, indicating the property had sewer. On January 23, 2003, Mike and Sheryl Ann Van Dinter bought the property. The Orrs gave the Van Dinters a statutory warranty deed. At no time did the Orrs indicate any amount was owed for the costs of sewer construction.

In order to buy the property, the Van Dinters got a loan from AmericanWest Bank, which obtained title insurance for the property from First American Title Company. This policy insured against any encumbrances on the property. The Van Dinters also had a title insurance policy with First American.

In 2003, Spokane County sent the Van Dinters a letter indicating a CFR existed for sewer construction. The County sought payment from them.

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The Van Dinters and AmericanWest filed a claim with First American because of this encumbrance. The claim was denied. AmericanWest then assigned its claim against First American to the Van Dinters.

The Van Dinters sued the Orrs for breach of statutory warranty deed and negligent misrepresentation and sued First American for breach of the title insurance policy. All parties moved for summary judgment. The court granted summary judgment to the Orrs and First American. The Van Dinters appeal.

In reviewing an order of summary judgment, we engage in the same inquiry as the trial court and consider the evidence and all reasonable inferences from it in favor of the nonmoving party. *Bishop v. Jefferson Title Co.*, 107 Wn. App. 833, 840-41, 28 P.3d 802 (2001), *review denied*, 145 Wn.2d 1025 (2002). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 841. The Orrs sold the property to the Van Dinters and gave them a statutory warranty deed, which covenants against both known and unknown title defects. *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 162, 951 P.2d 817, *review denied*, 136 Wn.2d 1015 (1998). A grantor conveying land by a statutory warranty deed makes several covenants against title defects, but the only covenant at issue here is the promise that the title was free of encumbrances. *Id.*

The Van Dinters argue the CFR was an encumbrance on the property and thus should have been disclosed. An encumbrance is “any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant.” *Robinson v. Khan*, 89 Wn. App. 418, 421, 948 P.2d 1347 (1998) (quoting *Merlin v. Rodine*, 32 Wn.2d 757, 760, 203 P.2d 683 (1949)).

In 1999, Spokane County adopted a Sewer Construction Program using a CFR to fund this project. According to the Spokane County Code, a CFR is “that portion of the monthly sewer charges for property within an individual sewer project that is attributable to the costs of acquiring, constructing and installing the system of sewerage.” Spokane County Code 8.03.1135. The County gets a lien on the property for any delinquent amounts due. Spokane County Code 8.03.9040. The County indicates “the CFR charge is not an assessment and will not show up in a title search.” Clerk’s Papers at 94.

Nothing in the record suggests the CFR grants any right to or interest in the property to the County. Furthermore, nothing suggests the sewer diminished the property’s value. The Van Dinters argue the purchase price included the sewer’s value and they now have to pay again for that same value. Although they may have paid too much for the property, they show no decrease in the land’s value. The CFR is thus not an encumbrance. The Orrs did not breach the

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statutory warranty deed. The court properly granted summary judgment on this claim.

The Van Dinters also pleaded negligent misrepresentation. In analyzing a negligent misrepresentation claim, we ask if (1) the defendant made a negligent misrepresentation; (2) a party relied on the misrepresentation causing the party harm; and (3) the party was justified in relying on the misrepresentation. See *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002); *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998).

The Van Dinters assert the Orrs negligently misrepresented in advertisements that the property was connected to sewer. But the property did have sewer. There was no misrepresentation.

The Orrs may, however, have negligently misrepresented the existence of the CFR by not disclosing it. Washington has adopted *Restatement (Second) of Torts* § 551 (1977), which permits a claim for negligent misrepresentation if the plaintiff establishes a duty to disclose or to provide accurate information.

Richland Sch. Dist. v. Mabton Sch. Dist., 111 Wn. App. 377, 385, 45 P.3d 580 (2002), *review denied*, 148 Wn.2d 1002 (2003). Liability can exist for failure to disclose. *Id.*

The Orrs did not tell the Van Dinters the sewer was recently constructed. Whether the Van Dinters knew of the CFR's existence is a question of fact. The

information on the Spokane County Web site indicates a seller should disclose a CFR to a buyer. As to the first element, a question of fact exists.

As to the second element, the Van Dinters claim they relied on the fact the property was connected to sewer in making their purchasing decision. This assertion also raises a question of fact.

As to the third element, whether a party justifiably relied upon a misrepresentation is also an issue of fact. *Alejandre v. Bull*, 123 Wn. App. 611, 625-26, 98 P.3d 844 (2004), *review granted*, (Wash. June 1, 2005, No. 762741). When the evidence is viewed in a light most favorable to the Van Dinters, questions of fact exist that must be resolved by a trial. The court erred by summarily dismissing this claim.

The Van Dinters further contest the court's order granting summary judgment in favor of First American. They sued First American, claiming it breached the title insurance policy. We construe title insurance policies by applying the general rules applicable to all contracts. *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 941 (1994). Any ambiguities are construed against the insurer in favor of coverage. The policy must be interpreted as an average person seeking insurance would. *Shotwell v. Transamerica Title Ins. Co.*, 91 Wn.2d 161, 167, 588 P.2d 208 (1978). An ambiguity exists if language in the

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policy lends itself to more than one reasonable interpretation. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997).

On the assigned claim, the Van Dinters assert that First American breached the title insurance policy issued to AmericanWest because it insured against loss or damage for any defect in or lien or encumbrance on the title. But First American contends there are no damages and a breach of contract claim thus cannot be sustained. Damages are an essential element of a breach of contract claim. See, e.g., *NW Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712-13, 899 P.2d 6 (1995). There is no showing AmericanWest suffered a loss of its priority on the title. There are no damages, which is fatal to the claim for breach of contract.

The Van Dinters further argue First American breached the title insurance policy issued to them because the CFR is an encumbrance. They did not plead breach of the insurance contract in their complaint. This argument is raised for the first time on appeal. We need not consider it. RAP 2.5(a). Moreover, the CFR is not an encumbrance. The court properly granted First American's motion for summary judgment.

The Van Dinters seek attorney fees against First American. But they did not prevail on this claim and are therefore not entitled to an award of fees.

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Claiming the Van Dinters' action was frivolous, the Orrs and First American also request attorney fees. An appeal is frivolous if it is so totally devoid of merit there is no reasonable possibility of reversal. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 109-10, 74 P.3d 692 (2003). But the appeal is clearly not so devoid of merit that an award of fees is proper.

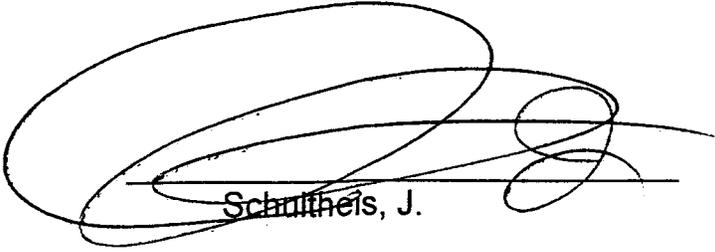
The summary dismissal of the negligent misrepresentation claim against the Orrs is reversed. The judgment of the trial court is affirmed in all other respects.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

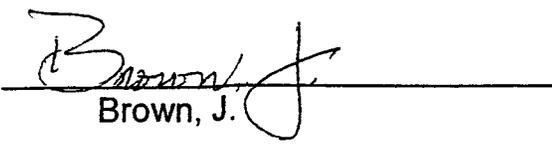


Kato, C.J.

WE CONCUR:



Schulteis, J.



Brown, J.

RCW 64.04.030

Warranty deed -- Form and effect.

Warranty deeds for the conveyance of land may be substantially in the following form, without express covenants:

The grantor (here insert the name or names and place or residence) for and in consideration of (here insert consideration) in hand paid, conveys and warrants to (here insert the grantee's name or names) the following described real estate (here insert description), situated in the county of, state of Washington. Dated this day of, 19. . .

Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his heirs and assigns, with covenants on the part of the grantor: (1) That at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all encumbrances; and (3) that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same, and such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at full length in such deed.

[1929 c 33 § 9; RRS § 10552. Prior: 1886 p 177 § 3.]

APPENDIX B

RCW 36.94.150

Lien for delinquent charges.

All counties operating a system of sewerage and/or water shall have a lien for delinquent connection charges and charges for the availability of sewerage and/or water service, together with interest fixed by resolution at eight percent per annum from the date due until paid. Penalties of not more than ten percent of the amount due may be imposed in case of failure to pay the charges at times fixed by resolution. The lien shall be for all charges, interest, and penalties and shall attach to the premises to which the services were available. The lien shall be superior to all other liens and encumbrances, except general taxes and local and special assessments of the county.

The county department established in RCW 36.94.120 shall certify periodically the delinquencies to the auditor of the county at which time the lien shall attach.

Upon the expiration of sixty days after the attachment of the lien, the county may bring suit in foreclosure by civil action in the superior court of the county where the property is located. Costs associated with the foreclosure of the lien, including but not limited to advertising, title report, and personnel costs, shall be added to the lien upon filing of the foreclosure action. In addition to the costs and disbursements provided by statute, the court may allow the county a reasonable attorney's fee. The lien shall be foreclosed in the same manner as the foreclosure of real property tax liens.

[1997 c 393 § 9; 1975 1st ex.s. c 188 § 3; 1967 c 72 § 15.]

APPENDIX C

RCW 60.04.021

Lien authorized.

Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

[1991 c 281 § 2.]

APPENDIX D

